

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

SWINTON, HENNESSY and KARAKATSANIS JJ.

B E T W E E N:

2038724 ONTARIO LTD and 2036250
ONTARIO INC.

Plaintiffs/Appellants

- and -

QUIZNO'S CANADA RESTAURANT
CORPORATION, QUIZ-CAN LLC, THE
QUIZNO'S MASTER LLC, GORDON
FOOD SERVICE INC, and GFS CANADA
COMPANY INC.

Defendants (Respondents)

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)
) *Allan D.J. Dick, David Sterns, Sam Hall*, for
) the Appellants 2038724 Ontario Ltd and
) 2036250 Ontario Inc.
)
)
)
) *Geoffrey Shaw, Timothy Pinos, Eunice*
) *Machado*, for the Respondents Quizno's
) Canada Restaurant Corporation, Quiz-Can
) LLC, The Quizno's Master LLC
)
) *Katherine Kay, Mark Walli*, for the
) Respondents Gordon Food Service, Inc., and
) GFS Canada Company Inc.
)
) **HEARD at Toronto:** November 19, 20, 21,
) 2008

REASONS FOR JUDGMENT

HENNESSY and KARAKATSANIS JJ.:

[1] This is an appeal from the Order of Justice P.M. Perell of March 4, 2008, in which he dismissed the appellants' motion to certify this action as a class proceeding on behalf of the Canadian franchisees of the Quiznos Restaurant Chain. The appellants are two Quiznos franchisees based in Ontario.

[2] The appellants ask this court to set aside the Order refusing to certify the action as a class proceeding and to certify the action on the common issues set out in their Notice of Motion, effective March 4, 2008.

[3] The key issues in this appeal are whether the motions judged erred in principle in determining that there were no common issues and in finding a class action was not the preferable proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (CPA).

BACKGROUND

[4] Quiznos is a franchise chain of sandwich style restaurants with approximately 427 franchises in Canada. The appellants commenced an action in May 2006 and proposed to bring the action as representative plaintiffs in a class proceeding on behalf of “all persons, including firms and corporations, carrying on business in Canada under a Quiznos Franchise Agreement on or after May 12, 2006.”

[5] Quiznos Canada enters into standardized franchise agreements with franchisees in Canada. Quiz-Can provides management services to Quiznos Canada. Quiznos Master, who owns the trademark and trade name Quiznos, is a third party beneficiary under those agreements. Collectively, these respondents are referred to as the Quiznos respondents.

[6] The Quiznos respondents generate revenues from franchisees from initial franchise fees, royalties, and the supply of products. They control what is sold by franchisees to customers, how it is sold, and the maximum prices they may charge. The franchisees must follow uniform business practices, including purchasing their goods and supplies from sources designated by the Quiznos respondents.

[7] Under s. 13.4 (Quality Control) of the standardized franchise agreement between Quiznos Canada and all franchisees, franchisees must purchase from sources designated by Quiznos Canada.

[8] In 2003, the Quiznos companies appointed affiliate company Canada Food Distribution (CFD) to negotiate contracts with suppliers and retain a food distributor for the restaurant chain as its agent. (The motions judge granted leave to add CFD as a defendant to the proceedings and the appellants do not seek to disturb that provision in the order.) CFD negotiated a distribution agreement with GFS-Canada as the food distributor to Quiznos franchises in Canada. GFS-Canada was designated as the supply source for Canadian franchisees under s. 13.4 of the franchise agreement. GFS-Canada and its related Canadian corporations, along with one independently owned Newfoundland corporation, operate distribution centres located in five different regions throughout the country. Franchisees purchase their supplies directly from these companies from an Order Guideline issued monthly for each region.

[9] GFS-Canada supplies products from its own inventory and those that have been purchased or sourced by CFD to which CFD has added a mark-up or sourcing fees. Those mark-ups and sourcing fees added by CFD are included by GFS-Canada in the price of the products to the franchisees. GFS adds its own mark up and invoices the franchisees directly with the maximum price determined by CFD. The monthly Order Guidelines are reviewed and approved by CFD. It is the CFD mark-ups and sourcing fees that are at issue in this litigation, as the appellants claim they are excessive.

[10] Around 2004, Canadian franchisees of Quiznos began to believe that they were being overcharged by the Quiznos respondents for supplies. By forming an independent association known as “Denver Subs”, some of the franchisees sought information and action by the Quiznos respondents and by the GFS respondents to redress their concerns about the cost of

supplies. At the time of the commencement of the main action, more than half of the Canadian Quiznos franchises had joined this association. The appellants maintain that the respondents thwarted the franchisees' attempts to redress overcharging and tried to intimidate them with aggressive and retaliatory conduct.

[11] The appellants assert that over 40% of Quiznos franchises in Canada are operating at a loss and that overcharging on supplies is the single greatest problem affecting the franchises.

[12] The appellants claim that the Quiznos 'mark-ups' and 'sourcing fees' constitute a breach of their contract; a breach of the price maintenance prohibition contained in s. 61 of the *Competition Act*, R.S.C. 1985, c. 19; and a breach of a duty of fair dealing under franchise legislation in Ontario (*Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c. 3) and Alberta (*Franchises Act*, S.A. 1995, c. F-17). The appellants also claim that the Quiznos respondents, together with GFS-Canada and its parent Gordon Food Services (the GFS respondents), have committed the tort of civil conspiracy because GFS-Canada has contractually bound itself to sell goods at prices fixed and maintained by the Quiznos respondents contrary to s. 61 of the *Competition Act*. They allege that CFD, with the agreement of the GFS respondents, "extracted" over \$12.3 million in revenue from the franchisees' purchases in 2006.

[13] The appellants argue that the only way for franchisees to obtain justice is by way of a class proceeding, as no individual franchisee has the time, money, managerial resources, and fortitude to bring an action independently.

The causes of action

[14] The appellants claim general and punitive damages and an injunction arising from three causes of action:

- (a) breach of price maintenance provisions of the *Competition Act*;
- (b) breach of contract and breach of duty of fair dealing under franchise legislation in Ontario; and
- (c) conspiracy amongst the defendants to fix prices.

[15] The statutory claim is pursuant to s. 36(1) of the *Competition Act* for loss or damages and the full costs of investigation suffered as a result of the Quiznos respondents' conduct in breach of the prohibition against price maintenance in s. 61 of that Act. Section 61(1)(a) reads in part:

- (1) No person who is engaged in the business of producing or supplying a product... shall, directly or indirectly...
 - (a) by agreement, threat, promise or any like means, attempt to influence upward, or to discourage the reduction of, the price at

which any other person engaged in business in Canada supplies or offers to supply or advertises a product within Canada....

[16] The civil conspiracy claim is the only claim against the GFS respondents.

[17] The appellants seek \$50 million in damages, plus punitive damages. The damages claimed against the Quiznos respondents is the amount of the overcharging by CFD through the CFD 'mark-ups' and 'sourcing fees' added to the product prices, together with the investigation costs under s. 36 of the *Competition Act*. Counsel advised that the damages claimed against the GFS respondents relate to that portion of GFS' fixed mark-up that is based upon the overcharging by CFD.

[18] The appellants also seek an injunction against the Quiznos respondents to stop the price maintenance.

[19] The pleading of civil conspiracy was upheld by Hoy J. on a pre-certification motion, from which leave to appeal was denied. The other causes of action were upheld by Perell J. as part of the certification test on this motion.

The proceedings

[20] The certification requirements are set out in s. 5(1) of the CPA, which provides that a court shall certify a proceeding as a class proceeding if:

- (a) the pleadings disclose a cause of action;
- (b) there is an identifiable class;
- (c) the claims or defences of the class members raise common issues of fact or law;
- (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
- (e) there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

[21] There is no dispute between the parties that ss. 5(1)(a) and (b) of the CPA are satisfied. The motions judge found, however, that the appellants had not shown common issues under clause (c). He found that a class proceeding would not be the preferable procedure under clause (d).

[22] The motions judge found under clause (e) that although the representative plaintiffs would adequately represent the interests of the class, he was not satisfied with the proposed litigation plan and would have conditionally certified the action subject to the appellants delivering a better plan (para. 146).

[23] The motions judge dismissed the certification motion, added CFD as a party defendant and denied the respondents' motions to stay the proceedings.

STANDARD OF REVIEW

[24] On appeal, a court will interfere only if the motions judge made a palpable and overriding error of fact or erred in principle. Errors of law are reviewable on a correctness standard. The standard of review of matters of mixed fact and law lies along a spectrum. These matters are subject to the “palpable and overriding error” standard unless it is clear that the motions judge made some extricable error in law or principle which can be reviewed on a standard of correctness: *Housen v. Nikolaisen* (2002), 211 D.L.R. (4th) 577 (S.C.C.) at paras. 8, 10, 36-37, [2002] S.C.J. No. 31.

[25] The judges’ decisions on motions for class certification are entitled to considerable deference: *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (C.A.) at 677, leave to appeal to the S.C.C. refused, [1999] S.C.C.A. No. 476 [*Anderson*].

[26] In *Cassano v. The Toronto Dominion Bank*, 87 O.R. (3d) 401 (C.A.), leave to appeal to the S.C.C. refused, [2008] S.C.C.A. No. 15 [*Cassano*], Chief Justice Winkler, writing for the majority, confirmed the substantial deference to which class action judges are entitled and stated at para. 23:

The intervention of this court should be limited to matters of general principle.... However, legal errors by the motion judge on matters central to a proper application of s. 5 of the CPA displace the deference usually owed to the certification motion decision....

[27] Such deference does not depend upon the personal experience of the judge (see *Olar v. Laurentian University* (2004), 6 C.P.C. (6th) 276 (Div. Ct.) at para. 5).

[28] As stated by the Ontario Court of Appeal in *Pearson v. Inco Ltd.* (2005), 261 D.L.R. (4th) 629 (C.A.); leave to appeal to the S.C.C. denied, [2006] S.C.C.A. No. 1 at para. 43 [*Pearson*], the decision of the motions judge on a certification motion with respect to the preferable procedure requirement is entitled to “special deference because it involves weighing and balancing a number of factors.”

THE COMMON ISSUES REQUIREMENT CPA s. 5(1) (c)

Legal principles

[29] 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.

[30] The proper approach to the common issues requirement is to analyze whether there are any issues necessary to the resolution of each class member’s claim which are substantial ingredients of that claim. The underlying question is whether allowing the suit to proceed will avoid duplication of fact finding or legal analysis: *Hollick v. Toronto (City)* (2001), 205 D.L.R. (4th) 19 (S.C.C.) at paras. 18 and 39 [*Hollick*].

[31] The common issues requirement is a “low bar”. Common issues need not determine liability. They may make up a very limited aspect of the liability. They need only be issues of fact or law which will move the litigation forward and avoid duplication. Many individual issues, including damages, may remain to be decided after the resolution of a common issues trial: *Hollick, supra* at paras. 16, 18, 25; *Carom v. Bre-X Minerals Ltd.*, 51 O.R. (3d) 236 (C.A.), leave to appeal denied, [2000] S.C.C.A. No. 660 at paras. 40-41; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at para. 52, leave to appeal to the S.C.C. refused, [2005] S.C.C.A. No. 50 [*Cloud*].

[32] In *Cloud*, Goudge J.A. underscored the importance of recognizing that certain issues could meet the common issues threshold, notwithstanding the fact that other significant individual issues may remain outstanding. He stated at para. 53:

In other words, an issue can constitute a substantial ingredient of the claims and satisfy s. 5(1) (c) even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution. In such a case the task posed by s. 5(1) (c) is to test whether there are aspects of the case that meet the commonality requirement rather than to elucidate the various individual issues which may remain after the common trial.

And at para 65, (citing the Supreme Court in *Rumley v. British Columbia*, [2001] 2 S.C.R. 184): “. . . the comparative extent of individual issues is not a consideration in the commonality inquiry although it is obviously a factor in the preferability assessment.”

[33] Nonetheless, the Court performs a gatekeeper function and cannot rely upon allegations alone. A plaintiff must adduce “some basis in fact” to show that issues are common: *Hollick, supra* at para. 25.

The plaintiff’s formulation of common issues in the certification motion

[34] The appellants proposed the following common issues in their Notice of Motion (as set out in para. 98 of the motions judge’s reasons):

- (a) Have the Quiznos Defendants, or any of them, engaged in conduct contrary to Section 61(1) of the *Competition Act*?
- (b) Have the Defendants, or any of them, engaged in conduct that amounts to civil conspiracy?
- (c) (Issue deferred)
- (d) Have the Quiznos Defendants, or any of them, engaged in conduct which constitutes a breach of their contractual obligations to the Class Members?
- (e) Have the Class Members suffered loss or damage as a result of any of the conduct referred to in issues a, b, c, or d? If so, what is the appropriate measure or amount of such loss or damages?
- (f) Should the Court award an aggregate assessment of monetary relief on behalf of some or all class members? If so, what is the

- amount of the aggregate assessment and how should the class members share in the award?
- (g) Should the defendants pay punitive, exemplary or aggravated damages to the Class Members? Should such damages be assessed in the aggregate? If so, what is the amount of such damages including pre- and post- judgment interest thereon?
 - (h) Are the Class Members entitled to recover from the Quiznos Defendants the full costs of their investigations and the full costs of this proceeding, including contingent legal fees on a complete indemnity basis, under section 36(1) of the *Competition Act*?

[35] The appellants also proposed: “(c) Have the Quiznos Defendants, or any of them, breached their duty of fair dealing under s. 3 of the *Arthur Wishart Act* (Franchise Disclosure) and s. 7 of the *Franchises Act*?” However, the motions judge deferred consideration of that common issue based upon inadequate notice to the respondents.

The findings of the motions judge on common issues

[36] The motions judge found there were no common issues. His finding was primarily based on the problems he identified with the determination and assessment of loss or damages. He focused on loss as a key issue both as a constituent element of liability with respect to the alleged violations of the *Competition Act* and conspiracy, and as proof of damages for all claims. The motions judge rejected the appellants’ expert’s opinion that a valid methodology existed to determine and assess loss on a class wide and aggregate basis. He found that the determination and assessment of loss could only be done on an individual basis and therefore was unsuitable as a common issue. He concluded that because the appellant franchisees had not shown that damages could be established on a class wide basis they had failed to identify any common issues.

[37] Although the motions judge stated (at para. 104) that “there is a great deal that is in common to the 427 class members,” he went on to observe that “this is a very serious problem for the certification of the franchisees’ action as a class proceeding – assuming that they all have been wronged by their franchisor, their suffering is individual and damages are a constituent element of the franchisee’s central claims.”

[38] It was on this basis that the motions judge concluded that there was no basis in fact to establish loss either as a component of liability or as quantum of damages on an aggregate or class wide basis. He ended his inquiry into the common issues when he found that the individual issues would overwhelm the common issues. He concluded at para. 115:

I conclude that it was not shown by the plaintiffs that damages or the impact of the alleged maintenance, if any, suffered by the franchisees can be proven in the aggregate or on a class wide basis. This conclusion removes proposed common issue (f) as a common issue and has the effect of an avalanche that buries the proposed common issues with an absence of commonality and a proliferation of individual issues. Thus, for instance,

proposed common issues (a) and (b) above (namely: (a) Have the Quiznos Defendants, or any of them, engaged in conduct contrary to section 61 (1) of the *Competition Act*? and (b) Have the Defendants, or any of them, engaged in conduct that amounts to civil conspiracy?) depend upon showing: individual instances of price maintenance; individual instances of suffering loss in the ‘but for’ world in order to measure the impact of losses; and individual claims of damages for the tort of conspiracy. Similarly, proposed common issues, (d) [breach of contract], and (e) [have the franchisees suffered loss?] are individual not common issues. Proposed common issues (g) [punitive damages] and (h) [full compensation for costs under the *Competition Act*] have commonality but, standing alone, they would not sufficiently advance the litigation to qualify as common issues.

Position of the appellants

[39] The appellants submit that the motions judge erred in focussing on damages and failing to consider whether there were other common issues. They submit that he erred in finding there was no basis in fact to establish loss on a class wide basis and that in any event some of the claims do not have damages as a constituent element, such as breach of contract. They further submit that the motions judge failed to consider that a finding of an ongoing breach of s. 61 or an ongoing breach of contract or duty of fairness would prevent future loss which could be cured by a permanent injunction, and would provide a universal remedy not requiring individualized assessment of damages.

[40] The appellants submit that the motions judge misapprehended and misused the evidence of their expert, which evidence was tendered as opinion evidence to show that there was accepted methodology to prove damages on a class wide basis. They further submit that he engaged in a weighing of evidentiary issues at the certification stage. They submit that the evidentiary record provided some basis in fact to prove the fact of loss on a class wide basis and that s. 24 was available to prove aggregate damages at a common issues trial.

Position of the respondents

[41] The respondents submit that the existence of loss is a critical component of liability both under s. 36 of the *Competition Act* and the tort of conspiracy and that the motions judge correctly found that the appellants were unable to show “some basis in fact” to support a determination that “loss or damage” could be established or measured on a class wide basis.

[42] Further, the respondents submit that in order for the existence of harm to be a common issue, the appellants would need to demonstrate that there was a methodology which could prove on a class wide basis that the franchisees could have obtained the same products delivered to their door for less from alternate suppliers. The respondents relied on their expert opinion that the proposed methodology could not establish loss on a class wide basis because actual prices paid vary over regions on a monthly (and sometimes weekly) basis. With respect to ‘but for’ prices, there are a large number of variables in the supply matrix that affect pricing including location, employee theft and waste, and similar products

may not be available in the market. Neither the actual nor ‘but for’ prices are or would be common to the proposed class members, but instead would need to be proven through detailed, complex and time-consuming individual inquiries.

[43] The respondents further submit that the appellants’ expert’s proposed methodology is speculative, unreliable and is only with respect to franchisees within a given region.

Analysis

[44] Failure to analyze and articulate what parts of the claim could be said to be common is an error of law. The analysis of the proposed common issues requires the identification and assessment of common issues. Only then can one compare the relative importance of these issues in the context of the entire claim and among other things provide a sound basis for appellate review: *Cloud, supra* at para. 54.

[45] After finding that the individual inquiry to establish loss or damages “has the effect of an avalanche that buries the proposed common issues with an absence of commonality and a proliferation of individual issues” the motions judge did not go on to consider the other proposed or possible common issues. In our view, whether one of the proposed common issues is overwhelmed or buried by the individual issues is part of the analysis for the preferable procedure criterion, but is not necessarily determinative of the common issues requirement. The remaining proposed common issues ought to have been analysed.

[46] Pursuant to s. 6 of the CPA, inability to prove damages on a class wide basis is not a bar to certification. Failure to establish *all* elements of liability, including proof of loss as a constituent element of liability under s. 36 of the *Competition Act* or for civil conspiracy, is not the end of the inquiry. Numerous certifications have been upheld by the Ontario Court of Appeal, notwithstanding that damages or causation were not a common issue even where loss was a constituent element of liability. See for example: *Anderson, supra* at para. 32; *Cloud, supra* at paras. 68, 60-62; *Pearson, supra*; *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995), 25 O.R. (3d) 331 (S.C.J); leave to appeal denied, [1995] O.J. No. 3069 (Div. Ct.); *Axiom Plastics Inc. v. E.I. DuPont Canada Co.* (2007), 87 O.R. (3d) 352 (S.C.J.), leave to appeal denied, 90 O.R. (3d) 782 (Div.Ct.) [*Axiom*].

[47] We are satisfied that the motions judge erred in principle by focusing on proof of damages and failing to consider and identify other common issues. Even if the motions judge made no reversible error with respect to his assessment that the expert evidence provided no basis in fact to prove damages on a class wide basis, he erred in failing to consider whether there was some other basis in fact to find that breach of s. 61 of the *Competition Act*, breach of contract, and the existence of loss on a class wide basis were common issues.

[48] The essence of this claim is systemic in nature. In order to succeed in each of the *Competition Act* and conspiracy claims, the franchisees must prove that the conduct of the franchisor in adding mark-ups or sourcing fees as part of the sourcing of products is for the purpose of inflating or “maintaining” the prices to all franchisees.

[49] While loss or damage, if any, may vary from region to region and from month to month, the conduct that could give rise to liability is systemic. Every franchisee is subject to the same contract, pricing structure and distribution system. The appellants allege that the overcharging scheme effected through the ‘mark-ups’ and ‘sourcing fees’ as part of the pricing of products pursuant to the distribution agreement has permitted the franchisor to enrich itself by “overcharging” the franchisees as a captive class.

[50] For the reasons that follow, we are satisfied that there is some basis in fact to support the proposed common issues. In addition, the following factual and legal issues are common and would advance the claim of each member. A resolution of these issues would avoid duplication of fact finding or legal analysis:

- the factual and legal relationship between the franchisor and franchisees,
- the legal duties required under the franchise agreement;
- the factual and legal relationship between the respondents,
- the distribution and pricing scheme;
- the nature and extent of the mark-up and sourcing fees to CFD;
- the services provided by the respondents in relation to the supply of products;
- the systemic basis for the added mark-ups and sourcing fees to the price of the products, and whether they were commercially reasonable;
- industry standards and practices relating to the supply of products; and
- Investigation of any threats by the franchisors relating to price maintenance.

The proposed common issues:

Proposed common issue (a): Breach of s. 61(1) of the CA

[51] The motions judge’s analysis of this proposed common element focused primarily on the difficulties entailed in satisfying the proof of loss element of a cause of action under s. 36 of the *Competition Act*. However, the plaintiffs proposed that the question of whether there was a breach of s. 61 was the appropriate common issue. The analysis involved in determining a breach of s. 61 may be approached in a number of ways, and involves consideration of several elements, only one of which is the existence of provable individual loss.

[52] In our view, the motions judge erred in principle in holding that proving a s. 61(1) breach depends upon proof of individual instances of loss or price maintenance, in applying a

'bottom-up' model of proof when considering proof of loss, and in consequently finding that the question of whether the respondents had breached s. 61(1) was not a common issue (para. 115).

[53] Price maintenance under s. 61(1) of the CA occurs when a supplier of products purports to set a fixed minimum price at which another supplier in a vertical distribution chain may sell a product. Price maintenance may also occur horizontally, for example between competitors who agree to impose resale prices on vendors of their product. A supplier does not illegally 'maintain' prices if it requires its purchasers to agree not to sell product at prices greater than a specified amount. Such an agreement is permissible as long as the purchaser remains entirely free to charge lower prices at its discretion. Price maintenance is a criminal offence and therefore intent must be proved. The courts have held that a specific intent to restrict or maintain prices is not required to violate the price maintenance provision; it suffices that the supplier intentionally engaged in proscribed behaviour which had the effect or would have the effect of maintaining prices (See: *Fundamentals of Canadian Competition Law*, Canadian Bar Association, James B. Musgrove, ed. (Toronto, Thomson Carswell, 2007) at 61-68).

[54] Loss or damage is not a constituent element to establish a breach of s. 61 of the *Competition Act*. Price maintenance occurs where there is an attempt to influence prices upwards, thereby *exposing* purchasers to loss.

[55] According to the language of s. 61(1), the offence has three constituent elements:

- (1) a person engaged in the business of producing or supplying a product;
- (2) who, directly or indirectly, attempts to influence upward or discourages the reduction of the price at which another person supplies or offers to supply a product within Canada;
- (3) by agreement, threat, promise or any like means.

[56] In order to prove a breach of s. 61(1), therefore, the appellants must prove these three elements. They must establish that (1) Quiznos; (2) directly or indirectly attempted to influence upward or discourage the reduction of the price at which GFS supplied or offered to supply products to the franchisees; (3) by agreement, threat, promise or any like means.

[57] In this case, the appellants claim that the Quiznos respondents have breached s. 61(1) by over-charging them as captive purchasers. The statement of claim alleges that the attempt to maintain prices resulted in overcharging. It asserts that:

- (a) By paying the prices fixed by Quiznos and its co-conspirators, the appellants were deprived of the benefits of the prices that would otherwise be available.
- (b) The class members paid prices that were significantly above the prices they would have paid absent the conspiracy.
- (c) Quiznos used threats and retaliation to prevent franchisees from obtaining lower prices or even finding out what lower prices were available in the market.

[58] Pursuant to the distribution agreement, GFS-Canada maintains an inventory of Quiznos specified products for distribution to franchisees. Under the distribution agreement and the arrangements between GFS-Canada and CFD, a Quiznos related company, product for distribution to the franchisees is obtained in four ways:

- (1) CFD purchases the product, marks up the price, and sells it to GFS-Canada;
- (2) CFD contracts with a supplier to sell a product to GFS-Canada, who pays the supplier its price and a “sourcing fee” to CFD;
- (3) GFS-Canada sells its own brands; and
- (4) GFS-Canada acquires the product from a supplier.

[59] Only the CFD mark-ups and sourcing fees and thus only the products obtained in the first two ways are at issue in this litigation. Products obtained in the first way already include CFD’s mark-up in the price and GFS-Canada adds its own fixed mark-up. For products obtained in the second way, GFS-Canada pays CFD the sourcing fee, adds it to the price, and then adds its own fixed mark-up. GFS-Canada distributes the product to the franchisees with a maximum price determined by CFD. GFS-Canada may charge lower prices than the maximum, and invoices the franchisees directly.

[60] The Quiznos restaurant chain has had between 163 and 256 products specified for use in the preparation and sale of the franchisee’s menu items, although the appellants advised the Court in oral submissions that they intend to focus on 10 products that comprise 70% of the value of products purchased. Approximately 50% of the products are based on Quiznos unique specifications, and franchisees are told how to prepare the menu items sold in the restaurants.

[61] A list of products and the prices that GFS-Canada charges franchisees in each region are set out in monthly Order Guidelines, approved by CFD which vary from region to region. Pursuant to the Distribution Agreement, GFS-Canada calculates the prices in the Guidelines by assembling supplier price information for each product from each supplier for each distribution centre in a region. It then adds any sourcing fees payable to CFD and its own fixed mark-up fee.

[62] In letters to the franchisees, GFS-Canada advised that it had no control over their cost of goods. GFS-Canada stated: “The contractual arrangement between GFS and Quiznos Sub would preclude M&S Food Service from entering into discussions with you on pricing schedule that have been negotiated.” (Compendium, Vol. 2, Tab 7, pp. 295,297.)

[63] The motions judge concluded that proof of breach of s. 61 “depend[s] upon showing: individual instances of price maintenance; individual instances of suffering loss in the ‘but for’ world in order to measure the impact of losses” (para. 115). Such a position suggests it is necessary to *measure* or *quantify* the loss for the purposes of establishing a breach of s.61.

[64] However, loss need not be quantified to establish breach of s. 61. The focus of s. 61 is on the conduct of the respondents, not upon the efficiency of the appellants as purchasers. *The complaint of the franchisees relates to the mark-up and sourcing fees as opposed to the*

base price of the products of the suppliers. By focusing on individual product prices that the appellants would be able to obtain in an alternate buying scenario, rather than the conduct of the respondents and the franchisor mark-up and sourcing fees component of the product prices in the existing franchising system, the motions judge relied upon a ‘bottom up’ model of proof.

[65] A ‘top down’ approach was preferred by the court in *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2000] O.J. No. 4594 (S.C.) at paras. 35-39, 43-45 and 57. In reviewing different approaches for assessing damages in business-to-business price-fixing conspiracy, Cumming J. preferred an approach based upon the difference between the conspiracy prices and the prices that would have been charged for similar products absent (or “but-for”) the alleged conspiracy. Such an inquiry was an objective one that did not depend on the lost profit or the expense items of individual class members. He noted that in some instances of sufficient “uniformity” amongst the class, collective class recovery may be calculated from the defendant’s business records or computer systems. Cumming J. preferred this ‘top down’ approach to the individualized approach to damages based upon the theory that the loss on the part of purchasers is not the increase in price but rather the increase in cost to them which they are unable to pass on. Similarly, in *1176560 Ontario Limited v. The Great Atlantic & Pacific Co. of Canada Limited*, [2003] O.J. No. 5703 (Master S.C.J.) at paras. 27 and 32 the Court found that franchisees’ profit was not relevant to a claim by franchisees against their franchisor for withheld supplier rebates and allowances.

[66] Furthermore, breach of s. 61 of the *Competition Act* has been found to be a common issue under s. 5 of the CPA in a number of cases notwithstanding the fact that loss or damages could not be proved on a class wide basis: *Price v. Panasonic Canada Inc.* (2002), 22 C.P.C. (5th) 379 (Ont. S.C.J.); *Harmegnies c. Toyota Canada Inc.*, [2008] J.Q. No.1446 (Que. C.A.), leave to appeal to the S.C.C. refused, [2008] S.C.C.A. No. 173 [*Harmegnies*]; *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal to the S.C.C. refused, [2003] S.C.C.A. No. 106 [*Chadha*].

[67] We agree with the appellants’ submission that a ‘top down’ approach focusing on the arrangement between the franchisor, the distributor and the suppliers, and the nature and amounts of the sourcing fees and mark-ups, may allow the court to determine *whether the mark-ups and sourcing fees resulted in maintaining prices contrary to s. 61(1)*. This may ultimately allow the court to determine whether s. 61(1) was breached without the need to establish what each individual franchisee, acting alone, would pay for each product from an alternate supplier.

[68] Whether or not evidence is available of prices before and after the distribution agreement or comparable industry practices need not be shown at the certification stage. The requirement that there be some basis in fact to support the common issues does not require the plaintiffs to indicate the evidence to be advanced at the certification stage, nor does it determine the admissibility of evidence.

[69] As well, the Quiznos respondents take the position that the mark-up charged by CFD is consideration for the services rendered including: establishing the confidential specifications, negotiating with suppliers, inventory management, establishment of the brand

and goodwill and demand for the product. This factual issue is part of the common issue between the respondents and each member of the proposed class.

[70] If the court is satisfied that the Quiznos respondents imposed sourcing fees and mark-ups by way of the distribution agreement in an attempt to influence upwards the prices paid by the appellant franchisees, and that the pricing scheme resulted in a breach of s. 61(1), a substantial ingredient of liability under s. 36 of the *Competition Act* can be proven on a class wide basis. This will advance the claim of each member of the class, and avoids the duplication of the legal analysis involved in determining this question. Alternatively, a finding that the distribution agreement did not amount to price maintenance will resolve the litigation relating to both the *Competition Act* and the civil conspiracy claim.

[71] We are satisfied that the record provides some basis in fact to the claim that CFD “mark-ups” and “sourcing fees” included in the price of products have resulted in influencing upwards the prices the franchisees must pay, given that the franchisees were direct purchasers required by contract to buy products from the specified distributor, under a pricing scheme in the distribution agreement that permitted the franchisor to add to the price of products.

[72] The franchisees have spent considerable time and effort over a number of years to put the defendants on notice that they are overcharging and engaging in ‘price maintenance’. There is evidence that some of their efforts were thwarted with threats and intimidation:

- the franchisees formed an organization for the purpose of addressing the issue of overcharging;
- they retained experts who attempted to determine alternate prices;
- those persons who attempted to research alternate prices were threatened with litigation by the franchisor;
- 40% of the franchisees are operating at a loss;
- the franchisor recognized that food costs were the over-riding issue;
- the franchisors did not disclose the distribution agreement until litigation was underway;
- CFD had revenues of \$12.3 million dollars in 2006, with no head office and perhaps only one employee;
- the franchisees were contractually obligated to buy products from GFS at the prices specified in Order Guidelines approved by the franchisor company; and
- GFS stated that it had no control over the cost of goods.

[73] In *Hollick, supra*, the plaintiff proposed to pursue its claim of nuisance for pollution on behalf of a proposed class persons residing within a defined geographical area. The Supreme Court of Canada found that there was some basis in fact for both an identifiable class and the common issues requirements. The S.C.C. considered the large number of complaints by residents of the area as some basis in fact to satisfy the commonality requirement: *Hollick* at para. 26.

[74] The requirement that there be an evidentiary foundation – or some basis in fact - to support the certification criteria does not include a preliminary merits test and should not involve an assessment of the merits. It is not an onerous requirement. The plaintiffs are not required to indicate the evidence upon which they will prove these issues. The certification stage focuses on the form of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action: *Hollick* at paras. 16, 25.

[75] In our view, the complaints of the franchisees and the contractual and factual context outlined above in paragraphs 4-13, provide some basis in fact to establish that breach of s. 61 of the *Competition Act* is a common issue. Whether there has been a breach of the *Competition Act* is a significant component of each class member's claim against the Quiznos respondents and would advance each member's claim. We conclude that whether the Quiznos respondents have breached s. 61(1) of the *Competition Act* is a common issue.

Proposed common issue (b): Conspiracy

[76] The conspiracy claim is the only cause of action against the GFS respondents. The appellants do not allege that GFS breached s. 61 of the *Competition Act*. They allege a civil conspiracy between GFS-Canada and Quiznos based on the distribution agreement to sell goods at prices that result in the Quiznos respondents' breach s. 61.

[77] The amended statement of claim states:

By entering into the Price Maintenance Agreements, and acting in furtherance of such agreements, each of the defendants entered into unlawful and tortious conspiracies to use unlawful means directed at the Class Members, knowing fully that their agreements and actions would cause injury to the Class Members, which injury has in fact resulted to the Class Members.

[78] Civil conspiracy requires an agreement to pursue an unlawful object, or to pursue a lawful object by unlawful means. Although only the Quiznos respondents can be in breach of s. 61 of the *Competition Act*, the appellants claim that the GFS respondents employed unlawful means to pursue an otherwise lawful object in that they aided and abetted and counselled the Quiznos respondents in maintaining prices in contravention of s. 61 of the *Competition Act*, contrary to s. 21 of the *Criminal Code*.

[79] The appellants must prove:

1. that the respondents entered into an agreement (to permit the Quiznos respondents to enhance, fix and maintain prices to be paid by the class members contrary to s. 61 of the *Competition Act*);
2. that the GFS respondents' conduct (aiding and abetting price maintenance by the Quiznos respondents) is unlawful;
3. that the respondents acted in furtherance of the agreement;
4. that the respondents should have known that the conspiracy would likely cause serious harm to the class members by forcing them to pay inflated prices for the goods; and
5. that the conspiracy has caused damage to the class members.

[80] The motions judge found that because proof of loss is a constituent element of liability for civil conspiracy, there was no basis in fact to establish whether the respondents engaged in civil conspiracy as a proposed common issue.

[81] Given our conclusion that the fact of loss on a class wide basis is a common issue, we are satisfied that whether the respondents engaged in a civil conspiracy is a common issue. However, even in the absence of proof of the fact of loss, the first four constituent elements of conspiracy are common issues that would advance each franchisee's claim and avoid duplication of fact finding and legal analysis.

Proposed common issue (d): Breach of Contract

[82] We are further satisfied that the claim against the Quiznos respondents for breach of contract is also a common issue.

[83] In discussing the importance of damages in this case, the motions judge stated (at para. 105):

The quantum of damages for breach of contract of each franchisee is individual. ... In some instances, damages are a substantive element of a cause of action. ... In other instances, the proof of damages is the reason d'être [sic] for the franchisee's claim. Thus, while damages are strictly speaking not a constituent element for a breach of contract claim because if a breach is proven, the court may award nominal damages, practically speaking, the franchises are not litigating for the prize of nominal damages for a breach of contract. Rather, they advance a \$50 million claim.

[84] The breach of contract claim does not require proof of harm or damages. However, having found that damages could not be proved on a class wide basis, and that damages, breach of s. 61 of the *Competition Act* and conspiracy were not common issues, the motions judge similarly concluded that the proposed common issue of breach of contract was an individual as opposed to a common issue (para. 115). In our view, he erred in principle in concluding that breach of contract was a not a common issue because substantial damages could not be proven on a class wide basis.

[85] The amended statement of claim pleads that Quiznos has a common law duty (in addition to its statutory duties) to exercise powers to designate suppliers and distributors under s. 13.4 of the franchise agreement for the stated purpose of “quality control” in good faith, in the best interests of the class members and in a commercially reasonable manner. This duty prevents Quiznos from exercising such powers and discretion in a self-preferential manner over the interests of the franchisees.

[86] The amended statement of claim asserts that the Quiznos respondents have breached their contractual obligations by failing to assist franchisees in obtaining and maintaining commercially reasonable prices for supplies; failing to ensure that the designated manufacturers, suppliers and distributors are charging fair and commercially reasonable prices to the class members; failing to remove the exclusive or sole designation of manufacturers, suppliers and distributors that charge excessive prices for supplies; and using contractual powers and the promise of exclusivity to maximize the amount of remittances paid, all without regard to the interests of, and to the prejudice of class members.

[87] Subsection 9(1)(c) of the franchise agreement requires Quiznos to provide “advice regarding the standards and specifications for the equipment, supplies, and materials used in, and the menu items offered for sale by, the Restaurant and advice regarding selecting suppliers for and purchasing such items.” Subsections 10.1(a) and (c) require assistance in the nature of “consultation...regarding the continued operations and management of a restaurant and advice regarding Restaurant services, product quality control, menu items.”

[88] Subsection 13(4) provides under the heading “Quality Control”:

Franchisee is prohibited from offering or selling any services or products from or through the Restaurant that have not been previously authorized by QCC. However, if Franchisee proposes to offer, conduct or utilize any services, products, materials, forms, items or supplies for use in connection with or sale through the Restaurant that are not approved by QCC, Franchisee shall first notify QCC in writing requesting approval. QCC may, at its sole discretion, elect to withhold such approval; however, in order to make such determination, QCC may require submission of specifications, information, or samples of such services, product, materials, forms, items or supplies. QCC will advise Franchisee within a reasonable time whether such products, supplies or services meet the specification of QCC.

[89] The appellants plead that the sections in the franchise agreement requiring the franchisor to assist the franchisee in the operation of the restaurant *inform* the franchisor’s duties in designating the source of products under the provision relating to quality control.

[90] In any event, the effect of the breach of contract complaint, as pleaded, is that the Quiznos respondents are alleged to have breached certain sections of the franchise agreements by failing to ensure that its franchisees are obtaining “commercially reasonable prices” for supplies. This is similar to the allegations contained in the overcharging or price

maintenance claim under the *Competition Act* in that it appears to require the same evidence and or types of proof.

[91] The determination of the following issues on a class wide basis would significantly advance this claim and avoid duplication of legal analysis and fact finding:

- the meaning of the contract provisions;
- the existence and nature of any common law duty of fairness; and
- Whether the Quiznos respondents have breached the contract provisions in failing to provide specifications.

[92] Furthermore, for the reasons discussed above, whether the Quiznos respondents breached the contract by charging commercially unreasonable mark-ups or sourcing fees, thereby using the provision relating to quality control to the detriment of the franchisees, may be established on a class wide basis by examining the respondents' conduct and the services they provided relating to the provision of the products, and through evidence – if available – of industry standards. These are factual issues that are common to all class members and go to the heart of the appellants' claim: that the Quiznos respondents exploited them as captive purchasers by over-charging for the products that they were required to buy.

[93] Based on the foregoing, we find that a significant number of factual and legal issues, integral to the breach of contract claim, are common issues. These represent substantial ingredients of the breach of contract claim that could advance the claim of each class member and will avoid duplication of fact-finding or legal analysis.

Proposed common issues (e) and (f): Loss or damages on a class wide basis or aggregate damages

(e) The fact of loss on a class wide basis

[94] Given that the appellant's expert was asked to assume that there were damages as a consequence of the price maintenance, it would not have been appropriate to accept the evidence of the expert to provide some basis in fact of that very issue. In *Chadha, supra*, the expert evidence was rejected in part for assuming the very fact that his opinion was tendered to substantiate – that loss was passed through to the indirect purchaser.

[95] In our view, however, the motions judge erred in principle in failing to consider whether, quite apart from the expert opinion evidence, there was some basis in fact in the record that the fact of loss, if not the quantum of loss, could be a common issue with respect to liability under the *Competition Act* and for civil conspiracy. In our view the circumstances outlined above in paragraphs 4-13, provide some basis in fact that the fact of loss is a common issue. The relationship between the franchisor, the distributor and each class member was the same; the class members purchased the same products, at the same prices within each region, pursuant to the same franchise contracts and distribution agreement. The class members did not have separate individual relationships with the respondents. Although there will be a differential impact on the class members depending on the specific products

each ordered, if the plaintiffs ultimately prove overcharging, the fact of loss or damage must be common to all.

[96] In *Axiom* at para. 137, Hoy J. was satisfied on basic economic principles that in the case of persons required by their customers to buy products there would be, as a result of that requirement, some basis in fact that each such person suffered some loss as a result of the alleged vertical price fixing conspiracy contrary to s.61(1) of the *Competition Act*.

(f) Aggregate damages

[97] The plaintiff's expert, Dr. Baziliauskas, proposed using a 'but for' approach, described at paragraph 65 above, to establish what the prices would have been absent the pricing conspiracy, rather than individualized inquiries. The measure of aggregate damages would be the difference between the 'but for' prices, which are extrapolated from industry data of comparables and actual prices determined from historical data quantifying the prices paid by the Quiznos franchisees. Dr. Baziliauskas' opinion was that because of the collective nature of franchisee purchasing and the prevalence of collective purchasing in the franchise systems the prices which the franchisee would pay in the theoretical 'but for' world would likely be common, because the franchisees would combine their purchasing power. Consequently, the 'but for' prices would likely be common as well. Dr. Baziliauskas proposed three possible methodologies to measure a class wide impact of price maintenance:

- 1) Benchmark prices or prices for substantially similar products paid by a comparator restaurant chain where there is no price maintenance agreement;
- 2) A servicing fee analysis or the difference between the sourcing and mark-ups charged and the fees charged by Quiznos and other similar franchisors in similar circumstances where there is no price maintenance; and
- 3) A before and after comparison of prices charged to Quiznos franchisees.

[98] The Quiznos respondents challenged both the assumptions in the 'actual' and 'but for' prices. They criticized Dr. Baziliauskas' focus on prices in the buyer's guide as the basis for the 'actual' prices, and his disregard of factors such as rebates, credit terms, waste, employee theft and sharing to establish the cost of products to the franchisees. The respondents submit that Dr. Baziliauskas' opinion is based upon the faulty assumption that actual prices are common prices to begin with and that absent the price maintenance, the franchisees would continue to purchase as a collective.

[99] The respondents' expert Dr. Ware was of a fundamentally different view from the appellants' expert. He indicated that it would be difficult to find a sufficiently similar comparator group to make the methodology feasible and that it would be difficult to determine to what extent any difference in servicing fees charged by comparable franchisors was attributable to other factors. His opinion was that there is no basis to assume that the alleged price maintenance has had a common impact on franchisees across Canada. In his opinion, the impact, if any, would have to be analyzed on an individual franchise and product by product basis over the relevant time period.

[100] The motions judge compared the two opinions, accepted the criticisms made by the respondents' expert and ultimately rejected the expert evidence of Dr. Baziliauskas as speculative and based upon assumptions. He found that the expert did not show that a comparator franchise group could be identified, nor how to isolate the extent to which any differences could be attributed to unrelated factors. Further, he found that Dr. Baziliauskas did not show that there was, or could be, a time before price maintenance began. He concluded (at para. 113-114):

In my opinion, these omissions make his three methodologies conceptually unsound and not feasible to measure a class wide impact of price maintenance.

The onus of showing that there is some basis in fact for an issue being common falls on the Plaintiffs and, in my opinion, Dr. Baziliauskas' opinion is not persuasive. A weakness in his opinion, not entirely of his own making, is that his opinion is based on so many assumptions that it becomes speculative and unreliable. Thus, Dr. Baziliauskas assumed or was asked to assume, among other things, that: (a) there was price maintenance by Quiznos; (b) there was damages [sic] as a consequence of the price maintenance; (c) in the 'but for' world, the franchisees had the capital resource to form a buying group; (d) in the 'but for' world, the franchisees could lawfully form a buying group; (e) in the 'but for' world all the necessary goods would be available to the buyers' group; (f) there were candidate franchisors to provide benchmark comparator groups for a 'but for' analysis; and (g) there were comparator distributor networks whose mark-ups may be appropriate for use as benchmarks.

[101] The court was faced with conflicting expert opinions by highly specialized economists. The experts disagreed on the validity of a methodology for assessing loss amongst franchisees. They based their opinions on different economic principles and assumptions.

[102] It is neither necessary nor desirable to engage in a weighing of this conflicting evidence on a certification motion. The plaintiffs on a certification motion will meet the test of providing some basis in fact for the issue of determination of loss to the extent that they present a proposed methodology by a qualified person whose assumptions stand up to the lay reader. Where the assumptions are debated by experts, these questions are best resolved at a common issues trial. A motions judge is entitled to review the evidentiary foundation to determine whether there is some basis in fact to find that proof of aggregate damages on a class wide basis is a common issue. While that might require some review of the evidence, the assessment should not relate to the merits of the claim or the resolution of conflicting expert reports.

[103] The appellants' expert's qualifications were not challenged and the opinion was based upon the record and economic principles. Opinion evidence is always based upon some factual assumptions. Dr. Baziliauskas' opinion was inevitably based on his review of the record and upon assumptions, research, and economic principles.

[104] It is setting the bar too high to require that evidence be led to support the factual foundation of the proposed methodology. We are satisfied that the appellant did provide a basis in fact to find that that aggregate damages was a common issue.

[105] In any event, the material filed on the certification motion was sufficient to find a basis in fact to support the appellants' expert's assumptions. The Quiznos respondents themselves used a comparative analysis of actual prices in attempting to demonstrate that their pricing was fair. The respondents' affidavit presented price comparisons from other specific franchise groups to comment on the fairness of their price as a percentage of revenue. (Compendium Vol. 2 Tab 7, pp. 336-37; Exhibit Book Vol. 3, tab F p. 681); they failed to provide the basis for the comparative pricing data they relied upon despite a court order (Exhibit Book Vol. 5 pp.1261-1262, 1264); and they had previously prevented experts retained by the franchisee group Denver Subs from obtaining such information. Thus the assumption that comparables exist, as identified by the motions judge in (f) and (g) above, had some basis in fact. A "top down" approach, indeed the franchise system, is premised upon a collective buying group as assumed in (c), (d) and (e) above. Furthermore, a before and after date, based upon the date of the distribution agreement is obvious in the factual foundation in this motion. The appellants should not be defeated for not providing the information which is held by the franchisors and which would be available to them on discovery if this matter were certified.

[106] The motions judge also rejected the Dr. Baziliauskas' opinion evidence because it was based upon assumptions and speculation to the extent it made his opinion unsound. However, opinion evidence is always based upon some factual assumptions. Yet, Dr. Baziliauskas' expertise was not challenged and his opinion was inevitably based on his review of the record and upon assumptions, research, economic principles. Similarly, Dr. Baziliauskas was required to assume proof of (a) price maintenance, and (b) the fact that there were damages as a consequence of the price maintenance, as he was being called upon to give his opinion as to the availability of methodology to prove class wide aggregate damages if liability was otherwise proven. For the purpose of an opinion on the availability of a methodology, the assumption of damage or loss is not fatal.

[107] In each of *Chadha*, *Price*, and *Harmegnies*, *supra*, and in *Pro-Sys Consultants v. Infineon Technologies AG*, 2008 BCSC 575 [*Pro-Sys*], the courts considered and found that there was insufficient reliable evidence to provide some basis in fact for the proposed common issue regarding loss or damages on a class wide basis in price fixing cases. In our view, these cases are distinguishable.

[108] In *Chadha*, homeowners sought relief for alleged price fixing against the manufacturer of pigment used in the manufacture of bricks that were used in their homes. The class members were therefore indirect purchasers, many of whom had purchased from sellers three or four steps removed in the purchase chain from the pricing conspiracy. The court found that there was no evidence to show a basis in fact that a loss caused by the conspiracy to inflate prices was passed through or traceable to the end consumers on a class wide basis. The expert evidence assumed that the higher costs of product would have been passed on to end-users and the assumption was the very issue that the court had to be satisfied was provable by some method on a class wide basis before the common issue could

be certified as such (para. 30). The Court of Appeal's decision that loss could not be proven on the basis of the net gain realized by the defendants as a result of their allegedly unlawful agreement is rooted in the "pass-through problem" to the indirect purchasers, the ultimate home owners.

[109] In *Pro-Sys*, a motion for certification of a claim for price-fixing brought by indirect (as well as direct) purchasers was dismissed. The court found that where the context of the alleged price-fixing involves pass through, it must be persuaded that there is a viable and workable methodology that is capable of relating harm to class members (para. 139).

[110] *Price* involved a proposed consumer class action in which the purported class consisted of approximately 20 million end purchasers of various products from over 1400 authorized dealers over a 19-year period. While Shaughnessy J. found that whether there was a breach of s. 61 of the *Competition Act* was a common issue, he was not satisfied that damages could be proved on a class wide basis. The court found that proof of loss or damage was complicated in sales of electronics because of the need to determine whether the product was a 'named product' distributed through an authorized dealer, rather than a product on the substantial 'grey market', and the need to determine whether the 'actual price' included extras such as complimentary equipment or rebates, warranties, service plans or installation. The plaintiff proposed that loss be estimated largely based upon reports in the media that British consumers were paying 15-20% more because of price collusion. The court held that both the real price and the 'but for' prices would require proof on an individual basis and the court did not find the tendered evidence sufficient to provide a basis in fact for loss on the part of all class members.

[111] *Harmegnies* is a decision based on the class proceedings provision in the Quebec *Code of Civil Procedure*, s. 36. This provision, unlike the Ontario class proceedings legislation, requires that the motions judge be satisfied that the facts seem to justify the conclusions sought. The Quebec Superior Court stated that the issue was whether there was *prima facie* proof of the facts giving rise to liability under s. 36, including proof that loss on a class wide basis has been established (para. 20). The Quebec Court of Appeal itself has emphasized the difference in the tests for certification found in the Quebec class proceedings provision vis-à-vis Ontario's CPA.

[112] *Steele v. Toyota Canada Inc.*, 2008 BCSC 1063 is a companion case to *Harmegnies* brought in British Columbia claiming price-fixing and civil conspiracy against Toyota and its dealers in B.C. As was the case in *Price*, media reports were offered in support of proof of loss. Expert evidence suggested that the prices in Ontario, where the price program was not implemented appeared in fact to be higher than those in B.C. The court held that proof of loss would require the consideration of a myriad of factors specific to each individual class member.

[113] These cases are distinguishable from the case before us. In *Chadha* and *Pro-Sys* the courts found that evidence of methodology to permit determination of loss on a class wide basis was necessary to show loss had been "passed through" to indirect purchasers. In *Price*, there were potentially indirect purchasers, no commonality of the actual price of the product

and as in *Steele*, the plaintiffs relied only upon media reports for the basis in fact of loss for the entire class. *Harmegnies* applied the Quebec standard of the factual foundation required.

[114] Conversely, the judgment of Hoy J. in *Axiom, supra*, is instructive. Hoy J. distinguished *Chadha* and *Price* and certified a claim of price maintenance and conspiracy under the *Competition Act* and of common law conspiracy on behalf of approximately 200 companies engaged in the manufacture of plastic components for automotive applications. It was alleged that the distributors were required to sell the defendant DuPont's resin to the plaintiff companies at not less than a listed price unless DuPont agreed. The issue of whether s. 61(1) of the *Competition Act* was breached was certified as a common issue only with respect to purchasers who were required to buy DuPont resin by their customers in the automotive industry. Hoy J. found that loss, as a component of liability, was a common issue on a class basis for direct purchasers who were required to buy DuPont resins, notwithstanding the absence of expert evidence on whether the alleged unlawful conduct would have impacted on that class through higher prices. Hoy J. relied upon basic economic principles to find that in the case of persons required to buy DuPont resins, there would be, as a result of that requirement, some basis in fact that each such direct purchaser suffered some loss as a result of the alleged vertical, price-fixing conspiracy (para. 137). She accepted that the expert had provided some methodology (including a benchmark and before and after approach) that had the potential to establish damages or restitutionary payments on an aggregate basis as a common issue, notwithstanding the defendants' expert's opinion that individualized inquires would be required to establish the 'but for' prices (paras. 146-150). She refused, however, to find that loss, as a component of liability, was a common issue with respect to a broader class of customers who were not obligated to purchase the products from DuPont and were free to purchase from competitors.

[115] Based on the foregoing, we are satisfied that the motions judge erred in weighing the merits of the expert evidence; and that his rejection of the evidence of the methodology tendered by the appellant's expert was not supportable on the evidence and the circumstances of this case. For the above reasons, we conclude there was some basis in fact for finding that loss or damages could be proven on an aggregate basis as a common issue.

The availability of s. 24 of the CPA

[116] We are also satisfied that the motions judge erred in finding that s. 24 of the CPA would not be available to prove aggregated damages in a common issues trial.

[117] Subsection 24(1) reads:

- (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,
 - (a) monetary relief is claimed on behalf of some or all class members;
 - (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and

(c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

[118] Section 24 of the CPA is procedural in nature, and cannot aid in proving an element of liability. The Court of Appeal in *Chadha* found that “s. 24 is applicable only once liability has been established and provides a method to assess the quantum of damages on a global basis, but not the fact of damage” (para. 49).

[119] The motions judge in this case relied upon the fact that s. 24 was not available because liability could otherwise be proven on a common basis; however, he failed to consider that liability for breach of contract could be established without proof of loss.

[120] In *Markson v. MBNA Canada Bank*, (2007) 85 O.R. (3d) 321 at para. 44 [*Markson*], Rosenberg J.A. found that at the certification stage the plaintiff need only establish that there is a reasonable likelihood that the preconditions in s. 24(1) of the CPA would be satisfied and an aggregate assessment made if the plaintiffs are otherwise successful at a trial for common issues.

[121] In *Markson*, a credit card holder proposed to certify a class action alleging that the rate of interest charged on card advances could exceed the criminal interest rate. Because the actual rate of interest depended upon the circumstances surrounding the individual advances and the nature of the record keeping, and complex individual calculations would be required to determine if the interest rate was exceeded, the motions judge found that the individual card holders whose interest rate exceeded the lawful rate could not be identified. As a result, he did not certify any common issues.

[122] Rosenberg J.A. held (at para. 49) that in circumstance where the plaintiff could establish that the defendant violated the *Criminal Code* and or breached its contract with its customers, it would have established potential liability on a class wide basis. Each member of the class would be entitled to declaratory and injunctive relief and the only matter remaining would be the application of the decision on the common issues to the specific account activity of each class member to determine that class member’s entitlement of monetary relief. He held that s. 23 can be used to calculate the global damages figure and s. 24 can be used to find a way to distribute the aggregate sum to class members, as “it would be impractical or inefficient to identify the class member entitled to share in the award.”

[123] In this case, the appellants seek declaratory relief. We have found that liability for breach of the *Competition Act* and liability for breach of contract are common issues. Given our conclusions, s. 23 and 24 of the CPA may be available at the common issues trial to determine damages on an aggregate basis.

THE PREFERABLE PROCEDURE CRITERION: Subsection 5(1)(d) of the CPA

The legal principles

[124] In determining whether to certify a proceeding, the motions judge must also be satisfied under s. 5 (1)(d) of the CPA that: “ a class proceeding would be the preferable procedure for the resolution of the common issues.”

[125] The principles governing the preferable procedure requirement articulated in *Hollick*, *supra* were summarized by the Ontario Court of Appeal in *Markson* (at para. 69):

(1) The preferability inquiry should be conducted through the lens of the three principal advantages of a class proceeding: judicial economy, access to justice and behaviour modification.

(2) “Preferable” is to be construed broadly and is meant to capture the two ideas of whether the class proceeding would be a fair, efficient and manageable method of advancing the claim and whether a class proceeding would be preferable to other procedures such as joinder, test cases, consolidation and any other means of resolving the dispute.

(3) The preferability determination must be made by looking at the common issues in context, meaning, the importance of the common issues must be taken into account in relation to the claims as a whole.

[126] The Court of Appeal’s decision in *Cassano*, *supra* at para. 63, emphasizes that individual issues are “an essential element” of many class proceedings, and their resolution “crucial” to the advancement of the goal of access to justice.

[127] The motions judge should also consider whether the individual issues can be streamlined by the discretion given to the case management judge under the CPA to streamline the process and consider whether a simplified process may be available under s. 25 to deal with individual issues. In *Sauer v. Canada (Attorney General)*, [2008] O.J. No. 3419 (Sup.Ct.) at para. 64, Lax J. commented:

In my view, the direction from the Ontario Court of Appeal since *Cloud* and in particular in the recent cases of *Markson* and *Cassano*, is that the court should strive to find ways to use the powerful tools of the CPA to meet the preferability requirement.

[128] *Hollick* directs that the CPA must be construed generously (para. 14). In 2006, in *Pearson*, the Court of Appeal also recognized a shift in the legal landscape since *Cloud* (para. 44).

[129] The case of *1176560 Ontario Limited v. The Great Atlantic & Pacific Co. of Canada Limited* (S.C.J.), affirmed (Div. Ct.) involved a claim by 66 Food Basics franchisees against their franchisor, A&P, for withheld supplier rebates and allowances. The court

commented specifically on the vulnerability of franchisees generally and the barrier to justice which this presents (para. 41):

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:

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.

The motions judge's findings

[130] In discussing the common issue criterion, the motions judge found at para. 116:

I ... conclude that a common issue has not been made out in this case, and I also conclude that even if it were possible to isolate some discrete element or elements of the causes of action as a common issue or issues that would advance the litigation, in the case at bar those common issues would be substantially overmatched by the individual issue of the members of the class. This last conclusion is material to the discussion of preferable procedure that follows.

[131] The motions judge considered the preferability criterion in the event that he was wrong that there were no common issues. He considered as well the deferred common issue of the duty of fairness under the Ontario and Alberta Acts for that purpose.

[132] The motions judge correctly referred to the applicable legal principles and concluded (at para. 130):

In my opinion, the case at bar is an example of those cases where the quality and quantity of the individual issues overwhelms any common issues and the extent and quality of the individual issues stand in the way of satisfying the preferable procedure criterion of the prerequisites for certification. I therefore conclude that this criterion is not satisfied for the case at bar.

The position of the parties on preferability

[133] The appellants submit that while the motions judge referred to the legal principles, he did not consider the common issues, the underlying goals of the CPA, the evidence of aggressive intimidation by the Quiznos respondents, the expense of litigating the many motions brought by them, or the costs, duplication, delay and inefficiency that would result

from over 400 individual trials. The appellants submit that no reasonable alternative to class actions exist for franchise actions involving price fixing.

[134] The respondents submit the motions judge applied the correct principles, properly weighed the common issues in light of the whole claim and found that a class proceeding is not the preferable procedure because of the individualized nature of the claims. The respondents further submit that there are additional reasons to deny certification based upon the limitation of liability and the exclusive jurisdiction clauses in the franchise agreement. The Quiznos respondents argue that the motion judge erred in finding the limitation of liability clause void for public policy because there was no evidence of fraud, duress or unconscionability and the certification motion should have been denied on the basis of this clause alone. Furthermore, the franchisees are bound by an agreement naming British Columbia as the governing jurisdiction and law. Such clauses are enforceable unless there is strong cause to override the contract, and no such cause was found.

Analysis

[135] The motions judge's assessment of the preferability criterion focussed on the fact that the individual issues overwhelmed the common issues. This may lead to the inference that there is no judicial economy in pursuing the class action, however, a review of all of the objectives of the CPA must be part of the analysis.

[136] Although a motions judge is entitled to considerable deference, especially in relation to the balancing required in a determination of whether a class proceeding is the preferable procedure, we are satisfied that the motions judge erred in principle by concluding his assessment with his finding that the individual issues in this case overwhelm any common issues. Moreover, he erred in failing to consider the objectives of the CPA.

[137] We have found that even if loss could *not* be proved on class wide basis, the breach of s. 61(1) of the CPA and the breach of contract, would in our view, be common issues that would have significantly advanced the claim.

[138] In this case, every purchaser is known and identifiable, and is a direct purchaser from an alleged conspirator. Furthermore, they are bound by contract to purchase from the respondents. There are no issues of self-identification of class members and no issue of whether the loss was passed through to indirect purchasers as was the case in *Chadha, Price and Pro-Sys, supra*. In *Chadha*, the Court of Appeal specifically refers to the size of the class as a consideration in determining that the action would be unmanageable (para. 56). In *Price*, the purported class consisted of approximately 20 million end users who had purchased from over 1400 authorized dealers in addition to unauthorized gray market distributors over a 19 year period.

[139] *909787 Ontario Ltd. v. Bulk Barn Foods Ltd.*, [2000] O.J. No. 3649, is a pre-*Hollick* decision of this court which overturned the certification of an action by franchisees against their franchisor. Unlike this case, the Bulk Barn franchise agreement stipulated that the franchisee purchasers would receive prices on supplies which were competitive as compared to each franchisee's local market. The agreement also required the franchisee to notify the

franchisor of any item with an uncompetitive price, to allow the franchisor to investigate and redress the overcharge. As the court found in *Bulk Barn*, when the franchisor was notified of overcharging on selected items, it responded by reducing its prices on those items. Leave to appeal from the decision was granted by the Court of Appeal, although the case settled before the appeal was argued.

[140] Whether a class action would be fair, efficient and manageable, and preferable to any alternative to resolving the claim, is to be assessed in the context of the entire action in the light of the objectives of the Act. This requires a practical cost-benefit approach, which takes account of the impact of a class proceeding on class members, the defendant and the court in terms of access to justice, judicial economy and behaviour modification.

[141] In this case, with respect to the Quiznos respondents, declaratory relief in relation to breach of the *Competition Act*, liability for breach of contract and, if permitted, breach of the statutory duty of fairness where applicable, would be common issues. Given the systemic nature of the claims, these common issues are central components of the entire litigation even if loss and damages remained as individual issues. In our view, there is no question that resolution of these common issues would substantially advance the litigation against the Quiznos respondents in the context of the overall action. In addition to the legal issues, there are extensive factual commonalities among the class members. Avoidance of duplication of fact finding and legal analysis would result in judicial economy. This is particularly so given our finding that all the proposed issues are common issues, and only the individual assessment of damages may remain as individual issues.

[142] Furthermore, ss. 23 and 24 may be available to determine the class wide or aggregate damages and an efficient distribution of those damages. As well, s. 25 would be available to fashion more streamlined processes relating to proof of damages. Even if proof of loss remained an individual issue, these sections would have been available for the breach of contract claim against the Quiznos respondents.

[143] Access to justice and behaviour modification are both also relevant considerations in this case. The appellants submit that they could not afford to pursue these claims individually and would otherwise be denied access to justice. Furthermore, the motions judge noted (para. 40) “that efforts by franchisees, individually or collectively, to obtain information and a useful response to their concerns about overpricing only led to a heightened concern and considerable acrimony. The Plaintiffs accuse the Quiznos Defendants of stonewalling, of thwarting the attempts to redress overcharging, and they accuse the Quiznos Defendants of aggressive, divisive, harsh and retaliatory conduct to intimidate the franchisees.” The record establishes that the Quiznos respondents stopped the appellants’ experts from gathering information about alternative costs of products and took steps to counter the efforts of Denver Subs to address their concerns about over-charging. This is a relevant consideration both with respect to the goals of access to justice and behaviour modification. The fact that there exists a mechanism to enforce the *Competition Act* is a factor but not a complete answer to the need for behaviour modification. Finally, the declaratory relief, if successful would provide relief to class members indefinitely.

[144] In the *A&P* case the franchisees' requests for information were rejected by A&P and A&P took steps to intimidate class members into abandoning their efforts. In discussing the goals of behavioural correction, Winkler J. (as he then was) referred to evidence that the franchisor has consistently failed to produce proper records to the franchisees despite repeated requests and its obligations to do so in accordance with its duty of utmost good faith as franchisor (para. 58). The court commented specifically on the vulnerability of franchisees generally and the barrier to justice which this presents:

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:

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.

[145] While the consideration of behaviour modification does not apply as forcefully to the GFS respondents, in light of the fact that there are no allegations of intimidation or stonewalling against GFS, the other objectives of the CPA still favour certification in this case. Furthermore, given the common issues as found, liability of the GFS respondents and perhaps damages may be assessed at a common issues trial. A class proceeding would therefore be an efficient and manageable process, would meet the goal of access to justice and judicial economy with respect to the GFS respondents as well.

[146] Given GFS' limited role in this litigation we are sympathetic to the GFS respondents' view that it is not fair to involve them in the class proceedings. "A certification motion is intended to screen claims... at least in part to protect the defendant from being unjustifiably embroiled in complex and costly litigation": *Robertson v. Thomson Corp.* (1999), 43 O.R. (3d) 389 (Gen.Div.) at para 4. However, the relatively minor involvement of the GFS respondents creates the same unfairness that would result in any trial where one defendant has a much less significant role than the other defendants. The CPA provides numerous tools to the case management judge to manage the process to address some of this concern.

[147] Individual trials were proposed as the alternative to a class action in this case. Given the circumstances of this case, no other means of resolving this dispute appears preferable and none was proposed. We agree with Justice Cumming J. in *Ford v. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (S.C.J.) at paras. 40-42, that there were no reasonable alternatives to a class proceeding over alleged price fixing by the defendants:

These class actions are the preferable procedure because they present a fair and manageable process. Moreover, for class members there are no "alternative avenues

of redress apart from individual actions.” Further, “individual actions would be less practical and less efficient than a class proceeding.” Thus, certification would increase access to justice...

...In the absence of these class actions, it is unlikely that the majority of claims would be advanced at all...

Any notion of judicial economy would be destroyed if each class member was required to proceed individually against the Defendants and to prove the existence and impact of the identical conspiracy to fix prices...

[148] In our view, a class proceeding would be fair, efficient and manageable, and preferable to any alternative to resolving this claim because of the significance of the common issues in the context of the entire claim. Moreover, a class proceeding would best advance the goals of judicial economy, access to justice and behaviour modification. We are satisfied in all the circumstances that the motions judge failed to consider all the relevant considerations, erred in principle and that a class proceeding against the respondents is the preferable procedure.

Additional submissions by the Respondents

[149] The respondents moved for a stay of proceedings based on a claim that the appellant had contracted out of class proceedings and that most of the franchisees had contractually agreed that British Columbia was the exclusive jurisdiction for any actions. The respondents did not appeal from this decision and we do not review the merits of that decision.

CONCLUSION

[150] The appeal is allowed and the decision refusing to certify the class action is set aside.

[151] While the appellant seeks an order for certification, it would not be appropriate for this Court to make such an order. The motions judge indicated that if he had otherwise decided that this action should be certified as a class proceeding, he would have conditionally certified the action subject to the Plaintiffs delivering a better litigation plan (para. 146). Therefore, the appropriate remedy in this appeal is to conditionally certify the action and refer the issue of certification back to him, so that the appellants can provide a revised litigation plan.

[152] Subject to approval of a revised litigation plan, the following common issues for a class proceeding are to be certified against the Quiznos respondents:

- (a) Have the Quiznos Defendants, or any of them, engaged in conduct contrary to Section 61(1) of the *Competition Act*?
- (b) Have the Defendants, or any of them, engaged in conduct that amounts to civil conspiracy?
- (d) Have the Quiznos Defendants, or any of them, engaged in conduct which constitutes a breach of their contractual obligations to the Class Members?

- (e) Have the Class Members suffered loss or damage as a result of any of the conduct referred to in issues a, b, c, or d? If so, what is the appropriate measure or amount of such loss or damages?
- (f) Should the Court award an aggregate assessment of monetary relief on behalf of some or all class members? If so, what is the amount of the aggregate assessment and how should the class members share in the award?
- (g) Should the defendants pay punitive, exemplary or aggravated damages to the Class Members? Should such damages be assessed in the aggregate? If so, what is the amount of such damages including pre- and post- judgment interest thereon?
- (h) Are the Class Members entitled to recover from the Quiznos Defendants the full costs of their investigations and the full costs of this proceeding, including contingent legal fees on a complete indemnity basis, under section 36(1) of the *Competition Act*?

[153] Pursuant to the motions judge's direction, consideration is deferred of proposed common issue (c): Have the Quiznos Defendants, or any of them, breached their duty of fair dealing under s. 3 of the *Arthur Wishart Act* (Franchise Disclosure) and s. 7 of the *Franchises Act*?

COSTS

[154] If the parties cannot agree on costs, the appellants may make written submissions on costs within 15 days; the respondents may respond within a further 15 days; reply, if any, within 7 days. Written submissions should not exceed five typed pages, plus supporting documentation.

HENNESSY J.

KARAKATSANIS J.

SWINTON J. (Dissenting):

Overview

[155] I agree with the majority that a motions judge hearing a certification motion must ask whether there are any common issues, and then determine whether they are a substantial part of each class member's claims. In my view, that is what the motions judge did here,

although his reasons might have been more detailed in order to illustrate his reasoning process more clearly.

[156] However, even if he erred in the way in which he approached the common issues as the majority finds, I see no basis to interfere with his conclusion that a class proceeding is not the preferable procedure. He applied the correct legal principles, made no palpable and overriding errors of fact, and exercised his discretion based on the pleadings and evidence before him. Therefore, I would dismiss the appeal.

Background

[157] At the heart of this litigation is the franchisees' claim that Quizno's, through a distribution scheme, was able to impose excessive markups and sourcing fees, resulting in prices that were inflated and unfair. Given the description of the distribution agreement with GFS, it is apparent that the appellants' complaints are directed at two types of products – those purchased from suppliers by Quizno's and sold to GFS with a markup, and those purchased by GFS from suppliers at a price arranged by Quizno's and for which GFS may be required to pay a sourcing fee to Quizno's.

[158] While counsel for the appellants suggested in oral argument that the case would focus on ten products, this was not set out in the evidence, nor does it appear to have been argued before the motions judge. Indeed, during cross-examination, the appellants' expert rejected the suggestion that the claim would be based on a consideration of ten products.

[159] The franchisees have alleged that Quizno's conduct was a form of price maintenance contrary to s. 61 of the *Competition Act*, R.S.C. 1985, c. C.-34 (the "CA") and a breach of contract. As well, the conduct formed the basis of a claim of civil conspiracy involving the GFS defendants, who are alleged to have aided, abetted and counselled the contravention of s. 61 of the CA.

[160] Section 61 of the CA makes it illegal for a supplier to attempt, by agreement, promise or like means, to influence upwards or to discourage the reduction of the price at which any other person supplies a product in Canada. In this case, the allegation is that Quizno's, through its agreement with GFS as distributor, did influence upwards the prices at which the franchisees purchased their products, because of the markups and sourcing fees imposed by Quizno's. As a result of the alleged price maintenance, the appellants plead, in paragraph 44 of the Statement of Claim, prices charged for supplies "have been significantly above market prices for comparable Supplies". At paragraph 46, they plead that "[b]ut for the price maintenance scheme, the prices of the Supplies sold by the GFS companies to the Class members would have been, and would be, substantially lower."

[161] In order for the appellants to obtain relief in the civil courts for a breach of s. 61, they must, pursuant to s. 36(1) of the CA, prove that they have suffered loss or damage as a result of that misconduct.

[162] The allegation in contract rests on various sections of the franchise agreement. Paragraph 9.1(c) requires Quizno's to provide "advice regarding the ... supplies, and

materials used in, and the menu items offered for sale by, the Restaurant and advice regarding selecting suppliers for and purchasing such items”. Paragraphs 10.1(a) and (c) require Quizno’s to provide assistance in the nature of “consultation ... regarding the continued operation and management of a Restaurant and advice regarding Restaurant services, product quality control [and] menu items” and “information and programs regarding menu items and ... the Restaurant business”. While section 13.4 gives Quizno’s the exclusive right to dictate the supplies to be used and the suppliers and distributors of supplies, the appellants argue that the obligations of advice and assistance with respect to purchasing supplies require Quizno’s to exercise its powers under section 13.4 in the best interests of the franchisees.

[163] The appellants also argue that there is a common law duty to exercise such powers fairly, in good faith and in a commercially reasonable manner.

[164] The appellants argue that Quizno’s has breached the franchise agreement and the obligation of good faith by failing to assist franchisees in obtaining commercially reasonable prices for supplies and by using its contractual powers to maximize the amount of remittances it obtains.

[165] The allegation of civil conspiracy requires the appellants to prove that the defendants, Quizno’s and GFS, had an agreement to maintain prices, that they engaged in unlawful conduct directed at the appellants, and that they caused actual damage to the appellants. Proof of damages is an essential element of liability for the tort (*Canada Cement Lafarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 at 471-72).

The Common Issues Criterion

[166] The motions judge commenced his discussion of the common issues criterion with a correct summary of the applicable legal principles derived from the leading cases (Reasons, paras. 99-102).

[167] My colleagues are of the view that there are many common issues of fact and law. I agree that some common issues could be identified. Where I part ways, and more importantly, where the motions judge parted ways, is in assessing whether they constitute a “substantial ingredient” of each class member’s claim, to use the words from *Hollick v. Toronto (City)* (2001), 205 D.L.R. (4th) 19 (S.C.C.) at para. 18.

[168] The motions judge began his analysis of the common issues by asking whether damages as a result of the price maintenance and the conspiracy could be proved on a class wide basis. That was a reasonable place to begin his analysis, as actual damage is an essential element of the two principal causes of action: price maintenance giving rise to civil liability under the CA and civil conspiracy.

[169] For damages to be a common issue, the appellants had to show there was a basis in fact showing damages or loss from the alleged price maintenance or conspiracy was class wide. This required them to show they had a methodology to prove, on a class wide basis,

that the actual prices for supplies paid by franchisees, as a group, exceeded the price they would have paid for those products in the absence of the alleged price maintenance and conspiracy (the “but for” prices).

[170] Ultimately, the motions judge concluded that “it was not shown by the Plaintiffs that damages or the impact of the alleged price maintenance, if any, suffered by the franchisees can be proven in the aggregate or on a class-wide basis” (Reasons, para. 115). That conclusion is supported by the evidence before him on the certification motion.

[171] While the appellants assert in their factum that class members purchased products at common prices fixed by Quizno’s and set out monthly in order guides, the evidence before the motions judge showed that actual prices would not be common to the proposed class members, even within a region. GFS distributes products through five different affiliated companies using eight different distribution centres. Prices listed for the same products vary from distribution centre to distribution centre for a number of reasons. For example, the cost of acquiring the products may vary between GFS companies and between distribution centres operated by the same company.

[172] As well, the list prices shown on the order guides may vary from distribution centre to distribution centre, because the distribution agreement permits different GFS companies to charge different markups on products sold to Quizno’s stores. List prices may also vary because Quizno’s may or may not apply a sourcing fee to a particular product. The sourcing fee can be different for different GFS companies for the same product in any given month (Greenwood affidavit, para. 47).

[173] The respondents also pointed to the facts that the actual prices to franchisees would be affected by rebates from the Greenline program and different credit arrangements with GFS, among other factors.

[174] Even more significantly, the motions judge concluded that the appellants had failed to show there was an evidentiary basis to prove “but for” prices that would be class wide. The appellants put forth an expert opinion from economist Dr. Andy Bazilauskas. On the instructions of counsel, he had assumed that there had been price maintenance, and he gave an opinion with respect to methodologies that might be used to calculate damages on a class wide basis. It was his opinion that one could employ a methodology “that would estimate but-for prices that would be common to all franchisees, at least within a given territory.” He assumed that actual prices would be common across franchisees within a given territory.

[175] Dr. Bazilauskas suggested three ways to determine “but for” prices: one could use “benchmark prices” – that is prices paid for substantially similar products purchased by a comparator coalition of buyers, where there is no price maintenance agreement between the franchisor and distributor. Second, one could use a “servicing fee” analysis, which would compare the sourcing fees and markups charged by Quizno’s to those charged by other similar franchisors where there is no price maintenance. The expert was asked by counsel to assume that there were other distribution networks whose markups might be appropriate for comparison (see para. 39 of his affidavit). Third, one could use a “before and after”

approach, comparing prices charged to the franchisees before and after the price maintenance occurred.

[176] The motions judge found that the opinion was speculative and unreliable and did not show that any of the three proposed “but for” methods was a workable method of determining harm on a class wide basis in this case. He identified fundamental flaws in the opinion: for example, the expert did not show that a comparator franchisor could be identified for benchmark or servicing fee analysis, nor could he explain how to prove that another group of franchisees was paying for products free of price maintenance, nor could he determine there was a time before price maintenance occurred. This led him to conclude that the three methodologies were “conceptually unsound and not feasible to measure a class-wide impact of price maintenance” (Reasons, para. 113).

[177] The appellants submit that the motions judge weighed the evidence on this point, which was improper on a motion for certification. Instead, he was required to determine if there was some basis in fact to determine whether damages were a common issue.

[178] In my view, the motions judge did not engage in a preliminary determination of the merits, nor was he improperly weighing the evidence of the appellant’s expert against the evidence of the respondent’s expert, Dr. Ware. Rather, he considered the opinion of the appellant’s expert in light of the criticisms made by Dr. Ware and found the Bazilauskas opinion so speculative that it provided no workable method to determine harm from the alleged misconduct on a class wide basis.

[179] I see no error in his treatment of the evidence. It is consistent with what the Ontario Court of Appeal did in *Chadha v. Bayer* (2002), 223 D.L.R. (4th) 158 at para. 40. There, the Court rejected expert evidence from an economist respecting damages as a common issue, where the expert had not “consulted industry records or other data” or done an analysis to “substantiate” the opinion rendered.

[180] The Court of Appeal’s decision in *Pearson v. Inco* (2005), 261 D.L.R. (4th) 629 (Ont. C.A.) is also distinguishable from the present case. In that case, the Court rejected a challenge to expert evidence tendered by the plaintiffs on a certification motion that addressed the issue of harm to their property values allegedly caused by the defendant’s nickel refining. The Court held that unlike in *Chadha*, the plaintiffs’ expert evidence showed a link between certain disclosures of information about nickel contamination and a negative impact on property values in Port Colborne as compared with other comparable communities in the Niagara Region in the relevant time, showing that “the only relevant event during the time was the disclosures about nickel contamination” (at para. 76).

[181] In the present appeal, the majority concludes that the motions judge erred in finding that there was no common issue with respect to loss because he ignored lay evidence of loss on a class wide basis, including the organization of the franchisees’ association, the complaints about high food prices, the failure rate among franchisees, and Quizno’s efforts to prevent the franchisees from obtaining pricing information.

[182] The motions judge evidently did not find this evidence sufficient to show a basis in fact that damages for price maintenance and conspiracy could be proved on a class wide basis. That is a conclusion that he could reasonably make on this evidence. As stated by Cullity J. in *Risorto v. State Farm Mutual Automobile Insurance Co.* (2007), 38 C.P.C. (6th) 373 (Ont. S.C.J.):

Although the evidential burden at this stage of the proceeding is not heavy, there must be sufficient evidence to demonstrate that the issue exists and should be set down for trial. (at para. 47)

[183] The lay evidence here shows dissatisfaction with the prices of supplies and a concern for lack of profitability. It demonstrates a perception that there was “overcharging”. It does not provide a basis in fact to show that there was loss or damage from price maintenance contrary to the CA that was suffered on a class wide basis.

[184] The motions judge made no error in his treatment of ss. 23 and 24 of the CPA. He correctly found that s. 23 “does not render otherwise inadmissible statistical evidence admissible for other purposes, such as determining liability” (Reasons at para. 120). Section 23 does not permit a defendant’s liability to be based on statistical probabilities or percentages. It cannot be used to alter the constituent elements of any cause of action. In this case, actual damage is a component of liability for both the CA and the conspiracy claims.

[185] Nor did the motions judge err in finding s. 24 of the CPA to be of no assistance. It provides a method for the “assessment of monetary relief” in order to establish the amount of the defendant’s monetary liability – but only when there are no other questions of fact or law remaining. It is a provision for assessing the quantum of damages on a global or aggregate basis, but not the fact of damage (*Chadha, supra* at para. 49). Again, it cannot assist the appellants with respect to any of its claims. As I explain further below, even the determination that there is a breach of contract requires some individual determinations with respect to what are commercially reasonable prices.

[186] This is not a case like *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.), where the Court held that s.24(1) can be used where “potential liability can be established on a class-wide basis” (at para. 48). Here, the motions judge found that the appellants had not shown that potential liability could be proved on a class wide basis (Reasons, para. 121). Therefore, s. 24(1) was not available to assist them in showing that there was a common issue.

[187] In conclusion, therefore, the motions judge made no error in law or fact by concluding that damages or loss was not a common issue.

[188] The majority concludes that the motions judge erred in law by failing to analyze the parts of the claims that could be said to be common. With respect, he did not stop his analysis with the damages issue, as the appellants suggest. Rather, he went back to look at the other proposed common issues at paragraphs 115 and 116 of his Reasons, albeit he did so

in a fairly summary manner. He found that the failure to show damages as a common issue had “the effect of an avalanche that buries the proposed common issues with an absence of commonality and a proliferation of individual issues”.

[189] Earlier in his Reasons, he had correctly observed that damages were a constituent element of both the *Competition Act* and conspiracy claims. He found that proof of a breach of s. 61 of the CA, as well as proof of civil conspiracy, would require the appellants to show “individual instances of price maintenance; individual instances of suffering loss in the ‘but for’ world in order to measure the impact of losses; and individual claims of damages for the tort of conspiracy” (Reasons at para. 115).

[190] The majority concludes that he erred in principle in failing to find breach of s. 61(1) of the CA to be a common issue, and that he erred in principle in applying a “bottom up” model of proof.

[191] I accept that there is a common issue with respect to s. 61 – namely, whether there was an agreement with respect to pricing. However, it is undisputed that there was a distribution agreement with GFS.

[192] The majority concludes that breach of s. 61 is a common issue, requiring the appellants to establish that Quizno’s directly or indirectly attempted to influence upward or to discourage the reduction of the price at which GFS supplied or offered to supply products to the franchisees by agreement, threat, promise or like means. I disagree with this conclusion. It is not sufficient for purposes of this action that the appellants prove an *attempt* by Quizno’s to maintain prices, as would be the case for a criminal offence. They have pleaded that there was actual price maintenance that caused them to pay higher prices, and thus they suffered damages. Proof of an attempt would not advance this litigation.

[193] The important issue in this case is whether the agreement with GFS resulted in increased prices of supplies to franchisees, as purchasers from GFS, in a manner contrary to the CA. The appellants have pleaded that the class members paid prices significantly above what they would have paid without the conspiracy or had they been able to purchase in the market. That would require them to show that they paid above market prices for particular products at various points in time. The motions judge found that there was no basis in the evidence to show that could be done on a class wide basis. He was entitled to reach that conclusion on the evidence before him.

[194] The majority takes the view that it would not be necessary to focus on the prices paid by individuals; rather, one could take a “top down” approach, looking to whether the markups and sourcing fees were excessive when compared to those in other franchises free of price maintenance. With all due respect, the majority is reweighing the evidence and coming to its own findings based on the evidence. That is not the role of this Court on appeal.

[195] In any event, the problem with the majority’s assertion is, as identified by the motions judge, the lack of a basis in fact to show that the markups and sourcing fees are excessive when compared to other franchises, so as to permit a class wide assessment of damages. The appellants’ expert had no knowledge of comparable franchises and pricing for

purpose of comparators. He had no method of showing that any differences in Quizno's markups and sourcing fees, as compared to another franchise, was attributable to the alleged price maintenance agreement.

[196] The respondents provided evidence to show that the food costs of Quizno's franchisees, as a percentage of revenue, were not out of line with competitors such as Mr. Sub and Tim Horton's. I disagree with the majority that this evidence provides a basis in fact for the appellants to show that the markups and sourcing fees constituted price maintenance. The appellants' own expert stated that this evidence, set out in the Fisher affidavit, is not useful for estimating "but for" prices for the franchisees (Bazilauskas affidavit, paragraph 44).

[197] Thus, even if the agreement between GFS and Quizno's could be said to be a common issue, there is no basis in fact to show that proof of misconduct resulting in a violation of s. 61 is a common issue.

[198] The case of *Vitapharm Canada Ltd. v. F. Hoffman-Laroche Ltd.*, [2000] O.J. No. 4594 (S.C.J.) relied on by the majority does not assist the appellants. In that case, a top down approach was adopted for assessing damages for price fixing, but in the context of a motion to approve a settlement of a class proceeding. The parties had resolved the fact of harm and the quantum of damages, thus removing what would have been a key issue for determination in a contested proceeding.

[199] It is true that in two cases involving alleged price fixing by Toyota, the breach of s. 61 was found to be a common issue (*Harmegnies c. Toyota Canada Inc.*, [2008] J.Q. No. 1446 (C.A.); *Steele v. Toyota Canada Inc.*, 2008 BCSC 1063). Both those cases dealt with a situation where Toyota was alleged to have prevented its dealers from lowering the retail price to buyers through negotiations.

[200] In *Chadha v. Bayer, supra*, the Court of Appeal stated that the agreement to fix prices for iron pigment and the impact of the agreement on the price of the product were common issues.

[201] Similarly, in *Axiom Plastics Inc. v. E.I. DuPont Canada Co.* (2007), 87 O.R. (3d) 352 (S.C.J.), certain elements of an alleged price maintenance scheme were held to be a common issue. Those aspects of the s. 61 claim held to be a common issue dealt with an alleged agreement to fix the price of resins to a group of purchasers who were required to buy their product from Dupont. There was evidence before the motions judge to show a basis in fact for proof of harm on a class wide basis. However, for a number of other potential class members, certification was refused, because of the lack of common issues.

[202] In contrast, in this case, there are hundreds of products that have been sold with prices varying over time. The appellants will have to prove that the markups and sourcing fees are a form of price maintenance, rather than a return to Quizno's for services such as the sourcing of supplies, the negotiation of prices, and the development of the product and goodwill. They have not demonstrated that this can be done on a class wide basis.

[203] Therefore, even if there is a common issue with respect to an agreement within the requirements of s. 61, that is not an issue that will significantly advance the litigation. Damages are a necessary component of liability under the CA, and the appellants did not satisfy the motions judge that damages could be proved on a class wide basis. Therefore, he did not err in concluding that the determination of the proposed common issue respecting s. 61 of the CA would not substantially advance this litigation.

[204] The appellants submitted that the issue whether the defendants engaged in conduct that constituted a civil conspiracy was a common issue. While the appellants might have framed the issue more narrowly in terms of elements of the tort, they did not do so. They have phrased this proposed common issue in terms of a cause of action.

[205] The motions judge was correct when he stated that damages are a constituent element of the claim based on conspiracy, and each franchisee would have to prove damages “both as a matter of liability and also as a matter of quantum of their own damages” (*Canada Cement Lafarge Ltd.*, *supra* at p. 471). Given that the appellants had not demonstrated that actual damage from the alleged conspiracy could be proven on a class wide basis, the motions judge made no error in concluding that conspiracy was not a common issue.

[206] Nor did he err in finding that the breach of contract issue was not a common issue. I accept that elements of that claim include common questions of law and fact - for example, whether the contract is to be interpreted as including an obligation on Quizno’s to ensure that the prices for supplies are commercially reasonable.

[207] However, even if this issue were to be determined on a common basis, it would not move the litigation forward in a significant way without some method of proving breach on a class wide basis. Proof of reasonable prices will require, once again, an examination of the price of many goods over time and in different regions and some method to compare the prices charged with some comparable pricing. The appellants have failed to show that there is a workable method to do this on a class wide basis. Therefore, while proof that there is such a term of the contract, the appellants have not shown that they have a basis in fact to prove breach of contract on a class wide basis.

[208] In sum, while there may be elements of the claims of breach of the CA, conspiracy and breach of contract that are common to class members, they are not a substantial part of the litigation, as the motions judge found. Therefore, I would not give effect to this ground of appeal.

The Preferable Procedure Criterion

[209] Even if the majority is correct, and there are some common issues that would advance the litigation, in my view, the motions judge did not err in concluding that a class proceeding was not the preferable procedure. His determination of this issue is entitled to considerable deference.

[210] Once again, the motions judge set out the correct legal principles in his reasons. A motions judge must determine whether a class proceeding would be a fair, efficient and

manageable method of resolving the common issues, and it is preferable to any alternative method. In determining whether a class proceeding is the preferable procedure, a judge is to consider the common issues in the context of the entire litigation (*Hollick, supra* at para. 30).

[211] As instructed by *Hollick*, the motions judge considered the importance of the common issues in relation to the claims as a whole. He concluded that any common issues would be overwhelmed by the individual issues, stating (Reasons, at para. 130):

... the case at bar is an example of those cases where the quality and quantity of the individual issues overwhelm any common issues and the extent and quality of the individual issues stand in the way of satisfying the preferable procedure criterion of the prerequisites for certification.

[212] Given that conclusion, he did not go further to examine other elements of the preferable procedure analysis in depth. In my view, he committed no legal error.

[213] The appellants failed to show how damages could be determined on a class wide basis. Therefore, in order to prove liability under the *Competition Act* or in conspiracy or breach of contract, they would have to prove damages on an individual basis. To prove damages, they would have to prove that individual franchisees paid more for products than they would have had to pay but for the pricing scheme adopted by Quizno's. This would require complex and time consuming individual inquiries.

[214] There is no question that a class proceeding would serve certain purposes of the CPA. It would provide access to justice for franchisees, who are, without doubt, a vulnerable group, as stated by Winkler J. in *1176560 Ontario Ltd. v. The Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.J.), aff'd (2003), 70 O.R. (3d) 182 (Div. Ct.).

[215] However, just because the franchisees are a vulnerable group does not mean every class action brought by them should be certified. Each certification motion must turn on its own facts and not on the type of plaintiff (*Hollick, supra*, at para. 37).

[216] I note that the claims in *A & P* were much more suited to a class proceeding than the present claims. There, the franchisees alleged breach of a contractual provision requiring the franchisor to pass on rebates from suppliers to the franchisees and to disclose the amounts of rebates to the franchisees. The case was not characterized by the large number of individual issues that one sees in this case.

[217] I agree with the majority that certification of a class action could contribute to behaviour modification with respect to the Quizno's defendants. If they are maintaining prices in a way that offends the *Competition Act* or breaches their contract, as alleged, a class action would be an important method to deter such conduct in the future. However, this factor is not determinative. There is a public interest in preventing price maintenance and, therefore, if the alleged conduct does breach the CA, the Competition Bureau can provide an oversight role to deter the conduct.

[218] Moreover, I have difficulty in seeing how the goal of behaviour modification is fulfilled with respect to GFS. The allegations of wrongdoing and excessive profit taking are addressed to Quizno's as franchisor. GFS appears to be, at most, the vehicle by which Quizno's prices are passed on through the distribution agreement, but there are no particulars pleaded of excessive price taking by GFS. Rather, pursuant to the distribution agreement, it appears to have a limited and well-defined sales, distribution and logistics function for the Canadian operations of Quizno's. Unfortunately for GFS, it has been caught up in a franchisor-franchisee dispute.

[219] Even if there are considerations of access to justice and behaviour modification favouring certification, that does not mean the motions judge erred in refusing certification. The real work in this case is on the damages side, as the motions judge concluded. Therefore, there would be little in the way of judicial economy if this motion were certified, as individual trials would be required for both liability and damages. Even the breach of contract claim does not move this case ahead significantly, because "commercially reasonable prices" will vary at least across regions, if not among purchasers within those regions, depending on their location.

[220] A class proceeding must be a fair, manageable and efficient proceeding, considering the interests of both plaintiffs and defendants. It is true that there are a number of cases in which a class proceeding has been certified where the common issues still require significant individual issues to be adjudicated. These cases turn on their particular facts and claims.

[221] At the end of the day, a determination of preferable procedure is an exercise of judicial discretion. Considerable deference is owed to the motions judge's determination of this issue. The decision here was consistent with a number of other decisions that have refused to certify proceedings alleging price maintenance, price fixing and conspiracy because damages can not be proven on a class wide basis (*Hermegnies, supra; Steele, supra; Price v. Panasonic* (2002), 22 C.P.C. (5th) 379 (Ont. S.C.J.); *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2008 CarswellBC 943 (S.C.)).

[222] The motions judge was careful to acknowledge that there was no bar to certifying a proceeding where price fixing was alleged and referred to the *Axiom* case, *supra*. He correctly stated that each case must turn on the allegations and record before the certification judge.

[223] I see no error of principle in his conclusion that a class proceeding was not a just, manageable and efficient method to resolve these claims, given the individualized inquiries necessary to establish liability as well as damages. His conclusion was justified on the record and pleadings before him.

[224] For these reasons, I would dismiss the appeal.

Swinton J.

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ONTARIO

**SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

**SWINTON, HENNESSY and
KARAKATSANIS JJ.**

B E T W E E N:

2038724 ONTARIO LTD and 2036250 ONTARIO
INC.

Plaintiffs/Appellants

- and -

QUIZNO'S CANADA RESTAURANT
CORPORATION, QUIZ-CAN LLC, THE
QUIZNO'S MASTER LLC, GORDON FOOD
SERVICE INC. and GFS CANADA COMPANY
INC.

Defendants/Respondent

REASONS FOR JUDGMENT

**HENNESSY and KARAKATSANIS JJ.
SWINTON J. dissenting**

Released: April 27, 2009