

Court File No. 2426/19CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE

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TUESDAY, THE 1st

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JUSTICE H.A. RADY

)

DAY OF OCTOBER, 2024

B E T W E E N:

1758939 ONTARIO LTD.

Plaintiff

- and -

**WESTON BAKERIES LIMITED, WESTON FOODS (CANADA) INC., and
GEORGE WESTON LIMITED**

Defendants

Proceeding under the *Class Proceedings Act*, 1992

ORDER

THIS MOTION, made by the Plaintiff for an order certifying the within action was heard February 27 and 28th, 2024 at the courthouse 80 Dundas St, London, ON N6A 6K1.

ON READING the materials filed by the parties, including the Motion Record of the Plaintiff, including the Affidavit of Kara-Lee Bagness Jess, sworn June 28, 2022 and the Affidavit of Brandon Schaufele, sworn June 28, 2022, the Responding Motion Record of the Defendants, including the Affidavit of Martin Daryl Hanstead, sworn December 30, 2022, the Reply Record of the Plaintiff, including the Affidavit of Rick McCraig, sworn January 27, 2023, and the Affidavit

of Brendan Schaufele, sworn January 31, 2023, the respective facts of the parties, and on hearing the submissions of counsel,

1. **THIS COURT ORDERS** that the action herein is certified as a class proceeding pursuant to the *Class Proceedings Act*, 1992, SO 1992, c 6;

2. **THIS COURT ORDERS** that 1758939 Ontario Ltd. is hereby appointed as the Representative Plaintiff on behalf of the Class;

3. **THIS COURT ORDERS** that the Class is defined as:

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

4. **THIS COURT ORDERS** that the certified common issues are as follows:

Breach of the Arthur Wishart Act and Provincial Franchise Legislation

(1) Does the *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c. 3 and the regulations thereto (the “*AWA*”) and provincial franchise legislation in Alberta, British Columbia, Manitoba, New Brunswick, and Prince Edward Island (as described in **Schedule “A”** hereto) apply to the distributors’ agreements of the Class Members?

- i. If so, are the distributors’ agreements a “franchise agreement” within the meaning of section 1 of the *AWA* and parallel provisions of provincial franchise legislation?
- ii. If so, are the Class Members a “franchisee” within the meaning of section 1 of the *AWA* and parallel provisions of provincial franchise legislation?
- iii. If so, is the Defendant, Weston Bakeries Limited, a “franchisor” within the meaning of section 1 of the *AWA* and parallel provisions of provincial franchise legislation?
- iv. If so, are the Defendants, Weston Foods (Canada) Inc. and George Weston Limited, “franchisor’s associates” of Weston Bakeries

Limited within the meaning of section 1 of the *AWA* and parallel provisions of provincial franchise legislation?

- (2) Did the Defendants, or any one of them, breach the duty of fair dealing under section 3 of the *AWA* and the parallel provisions of provincial franchise legislation?
- (3) Did the Defendants, or any one of them, breach the disclosure requirements under section 5 and section 7 of the *AWA* and parallel provisions of provincial franchise legislation?

Breach of Common Law Duty of Honest Performance

- (4) Does the common law duty of honest performance apply to distributor's agreements between the Defendants and Class Members located in provinces without provincial franchise legislation and/or across all provinces as applicable?
 - i. If so, did the Defendants, or any one of them, breach the common law duty of honest performance to the Plaintiff and Class Members?

Breach of Contract

- (5) Did the Defendants, or any one of them, engage in conduct which constitutes a breach of their contractual obligations to Class Members?

Damages

- (6) If one or more of the "Breach of the *AWA* and Provincial Franchise Legislation" common issues are answered affirmatively, are the Plaintiff and Class Members entitled to damages under sections 3(2) and/or 7(1) of the *AWA* and parallel provisions of provincial franchise legislation?
 - i. If so, can the amount of damages payable by the Defendants be determined on an aggregate basis and in what amounts?
 - ii. If so, are the Defendants jointly and severally liable for any and all damages awarded, pursuant to section 8 of the *AWA* and parallel provisions of provincial franchise legislation?
- (7) If one or more of the "Breach of Common Law Duty of Honest Performance" and "Breach of Contract" common issues are answered affirmatively, are the Plaintiff and Class Members each entitled to damages?
 - i. If so, are the Defendants jointly and severally liable for any and all damages awarded?

(8) If one or more of the above common issues are answered affirmatively, can the amount of damages payable by the Defendants be determined on an aggregate basis?

i. If so, in what amount?

(9) Should exemplary, punitive, and/or aggravated damages be awarded against the Defendants? If so, in what amount?

5. **THIS COURT ORDERS** that the Litigation Plan attached hereto as **Schedule "B"** is hereby approved.

6. **THIS COURT ORDERS** that, pursuant to the Litigation Plan attached hereto as **Schedule "B"**, McKenzie Lake Lawyers LLP and Klein Lawyers LLP are hereby appointed as Class Counsel.

7. **THIS COURT ORDERS** that the form, manner and costs of notice and the time and manner of opting out shall be determined by further order of the Court.

8. **THIS COURT ORDERS** that the Defendants shall pay to the Plaintiff the costs of this motion, fixed at \$260,000, inclusive of fees, disbursements and taxes.

(Signature of judge, officer or registrar)

SCHEDULE “A”

Provincial Franchise Legislation

Alberta – *Franchises Act*, RSA 2000, c. F-23, sections 1, 4, 7, 9, and 12.

British Columbia – *Franchises Act*, SBC 2015, c. 35, sections 1, 3, 5, 7, and 10.

Manitoba – *The Franchises Act*, CCSM c. F156, sections 1, 3, 5, 7, and 8.

New Brunswick – *Franchises Act*, RSNB 2014, c. 111, sections 1, 3, 5, 7, and 9.

Price Edward Island – *Franchises Act*, RSPEI 1988, c. F-14.1, sections 1, 3, 5, 7, and 9.

Parallel Provisions

Provincial Legislation	Duty of Fair Dealing	Disclosure Obligations	Damages
Ontario, <i>Arthur Wishart Act (Franchise Disclosure)</i> , 2000	Section 3	Section 5	Section 7, 8
Alberta, <i>Franchises Act</i>	Section 7	Section 4	Section 9, 12
BC, <i>Franchises Act</i>	Section 3	Section 5	Section 7, 10
Manitoba, <i>The Franchises Act</i>	Section 3	Section 5	Section 7, 8
New Brunswick, <i>Franchises Act</i>	Section 3	Section 5	Section 7, 9
PEI, <i>Franchises Act</i>	Section 3	Section 5	Section 7, 9

SCHEDULE “B”

WESTON DISTRIBUTORS LITIGATION PLAN

Section 5(1)(e)(ii) of the CPA requires the plaintiff to produce "a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding." The plaintiff proposes the following plan, subject to amendments suggested by the Defendants and ordered by the Court.

CLASS COUNSEL AND THEIR TEAM

1. Class Counsel is McKenzie Lake Lawyers LLP and Klein Lawyers LLP (collectively “**Class Counsel**”). Class Counsel have been class counsel in many class proceedings. Class Counsel possesses the requisite knowledge, skill, experience, personnel, and financial resources to prosecute this class action on behalf of all persons who suffered damages as a result of their distributorship with the Defendant, Weston Bakeries Limited, in Canada.

THE DEFINITION OF THE CLASS

2. The “**Class**” and “**Class Members**” are defined as: All persons resident in Canada who entered into a distribution agreement with the Defendant, Weston Bakeries Limited, during the period between January 1, 2001 and the date of certification.

REPORTING TO AND COMMUNICATING WITH THE CLASS MEMBERS

3. Current information on the status of this class action is posted on www.mckenzielake.com (the “**Website**”). The Website will be updated regularly.

Applicable Court decisions and Notices will be posted on the Website.

4. The Website allows Class Members to request to be notified of any Court approved notices and allows Class Members to submit inquiries to Class Counsel and receive a response.

LITIGATION SCHEDULE

5. The Plaintiff will ask Justice Rady to set a litigation schedule for:
 - a. the completion of pleadings;
 - b. motion(s) for judgment;
 - c. the documentary production and delivery of affidavits of documents by the parties;
 - d. examinations for discovery;
 - e. delivery of expert reports; and
 - f. the trial of the common issues, if necessary.
6. The Plaintiff may ask that the litigation schedule be amended, from time to time, as required.

DOCUMENT EXCHANGE AND MANAGEMENT

7. The Plaintiff proposes that the parties will meet to discuss and finalize a discovery plan within 60 days of certification.
8. Documents will be produced to Class Counsel through the normal production processes such as Defendants' affidavit of documents, cross-examination, and examination for discovery.

9. Class Counsel will handle the documents produced by the Defendants and use data management systems to organize, code, and manage these documents. For example, Class Counsel will establish and maintain a secure, password-protected website.
10. The Plaintiff will produce all relevant documents in its possession or under its control.

DOCUMENTS PRODUCED FROM NON-PARTIES

11. The Plaintiff may seek orders for production of relevant documents in the possession or under the control of non-parties and/or affiliated parties.

PLAINTIFF'S EXPERTS

12. The Plaintiff has retained an expert to opine on a methodology for calculating damages.
The Plaintiff may retain other experts as necessary throughout the litigation.

NOTICE OF CERTIFICATION OF THIS ACTION AS A CLASS PROCEEDING AND THE OPT-OUT PROCEDURE

13. If the action is certified as a class proceeding, the Court will be asked to:
 - a. settle the form of the notice (the “**Notice of Certification**”);
 - b. set an opt-out date;
 - c. determine the method by which the Notice of Certification will be given to Class Members; and
 - d. order the Defendants to disclose to Class Counsel the names and contact information of Class Members in the possession of the Defendants.
14. The Plaintiff proposes that the Notice of Certification be disseminated by (the “**Notice Plan**”):

- a. the Notice of Certification will be sent directly to each Class Member by way of email and/or direct mail where email is unavailable;
 - b. the Notice of Certification will be posted by Class Counsel, in English and French, on the Website; and
 - c. the Notice of Certification will be clearly and prominently posted by the Defendants, in English and French, on their respective websites.
15. The Plaintiff will ask the Court to order the Defendants to pay the costs of the Notice Plan.
16. The Plaintiff proposes the following opt-out procedure:
- a. the Court will approve the form and content of an opt-out form (the “**Opt-Out Form**”);
 - b. a person may opt out of the action by sending an Opt-Out Form before the opt-out date to a person designated by the Court;
 - c. no person shall be permitted to opt-out a minor or a person who is mentally incapable without leave of the Court after notice to the Children’s Lawyer and/or the Public Guardian and Trustee, as appropriate; and
 - d. no Class Member may opt out of the action after the expiration of the opt-out date.

EXAMINATIONS FOR DISCOVERY

17. The Plaintiff intends to examine for discovery at least one representative of each of the Defendants and will seek leave to extend the discovery period beyond 7 hours.
18. The Plaintiff may ask the Court for an order allowing them to examine multiple representatives of the Defendants, if necessary.

AGGREGATE DAMAGES

19. Section 24(1) of the *Class Proceedings Act* allows the Court to award aggregate damages to the Class if certain criteria are established.
20. The Plaintiff plans to deal with aggregate damages by way of a motion at the common issues trial.

ALTERNATIVE DISPUTE RESOLUTION

21. At a date as agreed by the parties or as set by the Court, the parties are to participate in mediation or other dispute resolution mechanism.

THE TRIAL OF THE COMMON ISSUES

22. The Plaintiff will ask the Court to hold a trial of the common issues six (6) months after the completion of examinations for discovery, undertakings, and any motions for refusals.
23. The findings of fact and conclusions on the common issues may permit the judge at the common issues trial to give directions, pursuant to s. 25(3) of the *CPA*, to deal with any remaining individual issues.

THE PROCESS AFTER THE COMMON ISSUES TRIAL

24. If the Plaintiff is successful at the common issues trial or after a motion for judgment, the Court will be asked under s. 25 of the *Class Proceedings Act* to:
 - a. settle the form and content of a notice of resolution of the common issues (the “**Notice of Resolution**”);

- b. order that the Notice of Resolution be distributed substantially in accordance with the Notice Plan, except that the Notice of Resolution shall not be emailed to any person who validly opted out of this class action; and
- c. set a deadline by which each Claimant must file a claim to establish eligibility as a Class Member (“**Claims’ Bar Date**”).

APPOINTMENT OF AN ADMINISTRATOR AND REFEREE(S) AND THEIR COSTS

- 25. The Plaintiff will ask the Court to appoint an Administrator and Referee(s), fix their compensation and order the Defendants to pay the cost of this Administration.

THE CLAIM FORM AND DECISIONS ON ELIGIBILITY

- 26. The Claim Form shall be approved by the Court.
- 27. Each Claimant must deliver a completed Claim Form by the Claims’ Bar Date.
- 28. The Administrator must decide in writing whether or not a Claimant is a Class Member and send the decision to the Claimant and, if appropriate, to the Defendants and Class Counsel.

REVIEW OF ADMINISTRATOR’S ELIGIBILITY DECISION BY THE REFEREE(S)

- 29. Within a period approved by the Court, the Claimant and, if appropriate, the Defendants, may appeal the Administrator’s decision on eligibility to the Referee.
- 30. The eligibility review will be dealt with as a paper record review unless a Referee orders otherwise.
- 31. The review of the Administrator’s eligibility decision shall proceed in such manner as the Referee directs.

32. The Referee's decision on eligibility shall be final.

**THE DISTRIBUTION PROCESS ON THE ASSUMPTION THAT THE JUDGE
AWARDS AGGREGATE DAMAGES TO THE CLASS**

33. As soon as practicable after all eligibility reviews are completed, the Administrator shall by motion on notice to Class Counsel and the Defendants, if necessary, report to the Court the proposed distribution of the aggregate damages for each of the eligible Class Members.

34. No distribution to eligible Class Members shall be made until authorized by the Court. The Administrator may make an interim distribution if authorized by the Court.

35. Each eligible Class Member shall sign such documents as the Administrator may require, in accordance with a protocol approved by the Court, as a condition precedent to receiving any money from the Administrator.

36. In the event that the Defendants do not pay the judgment(s) in full, the Court will be asked to give further directions to ensure that there are no priorities among eligible Class Members.

**THE PROCESS ON THE ASSUMPTION THAT ALL INDIVIDUAL DAMAGE ISSUES
ARE NOT RESOLVED AT THE COMMON ISSUES TRIAL**

37. After determining the common issues, the trial judge will be asked to give directions to resolve any remaining individual issues. The Plaintiff will ask the trial Judge to order test cases to be heard by a Referee(s).

38. The Plaintiff will ask the Court to order the following procedure:

- a. delivery of pleadings, affidavits of documents, and examinations for discovery;

- b. the Referee has the power to award prejudgment interest and costs of the hearings; and
 - c. the Referee has the power to make any order to allow the fair determination of the hearings.
39. Following any hearing, the Referee shall prepare a written report setting out his or her reasons for the decision. The Referee will send the report by mail or fax or email to the Defendants, the Administrator, Class Counsel, and shall file the report with the Court. The Referee's report shall be deemed to be confirmed upon the expiration of 15 days after it is filed with the Court unless a Defendant or Class Counsel serve a notice of motion to oppose confirmation of the report within that 15 day period as required by rule 54.09(1)(b).
40. If there is no overall settlement or judgment with the Defendants and each claim must be proven and assessed, then the Defendants should be required to pay to Class Counsel or the Administrator the amount of each judgment immediately after each report becomes final. The money shall be held in trust and invested as the Court directs.

CLASS COUNSEL FEES

41. The Court will be asked to fix the amount of Class Counsel fees, disbursements, and applicable taxes and authorize payment as a fixed charge on the recovery.

CY-PRÈS DISTRIBUTION

42. If there is any residue from the amounts recovered in this action, the Court will be asked to distribute this residue cy-près to a recipient approved by the Court.

FINAL REPORT

43. After the Administrator makes its final distribution, the Administrator shall make its final report to the Court, in such manner as the Court directs, and the Court may then discharge the Administrator.

REVIEW OF THE LITIGATION PLAN

44. This plan will be reconsidered before, during, and after the common issues trial and may be revised by Court order.

1758939 ONTARIO LTD.
Plaintiff

-and-

Court File No. 2426/19-CP
WESTON BAKERIES LIMITED et al.
Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
LONDON

ORDER

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