DICKINSON WRIGHT LLP

Canada's Tim Hortons Case: Lessons Learned About Franchisors' Rights, Class Action Certification and Rules of Expert Testimony

Edward (Ned) Levitt and Bruce S. Schaeffer*

On February 24, 2012, Mr. Justice G.R. Strathy of the Ontario Superior Court of Justice issued a 163 page judgment in a motion by Fairview Donut Inc. and Brule Foods Ltd. to certify a class action under the Ontario Class Proceedings Act, 1992 against The TDL Group Corp. and Tim Hortons Inc ("**Fairview**").[1] Please note that the plaintiffs filed an appeal of this decision on March 23rd, 2012.[2]

The case is very important because it: 1) re-enforces the rights of franchisors with respect to governing their own systems; 2) addresses the limitations of using class action litigation in fact-specific franchise disputes; 3) shows how not to pick a target franchisor for litigation alleging mismanagement and misrepresentation; and 4) explains the law with respect to expert testimony in Ontario (in the franchise context).

To say that the franchisor, Tim Hortons, won a decisive victory would be an understatement. However this case, if it is sustained on appeal, will have repercussions for franchising for years to come. It establishes a number of bench marks for franchisors, slows the momentum of the class action strategy by franchisees against their franchisors, and clarifies the rules on summary judgment motions in franchise cases. It is predicted that this seminal case will be extensively studied, cited and argued about in many of the franchise cases that will come after it, as it stands for much more than defeating an attempt of the Tim Hortons franchisees to bring a class action against their franchisor.

1) Factual Background

The Tim Hortons franchise operation is an iconic Canadian success story, the equivalent of McDonald's in the U.S. The first Tim Hortons store was opened in May, 1964 by Tim Horton, a famous National Hockey League defenseman and in 1967, Horton entered into partnership with Ron Joyce; together they opened thirty-seven restaurants over the next seven years. By 2008, the company was the fourth largest publicly traded quick-service restaurant ("QSR") chain in North America and by the end of 2009, there were approximately 3,000 stores in Canada, owned by just under 1,000 franchisees.

At the heart of this case were two Tim Hortons initiatives that were imposed upon franchisees, the always fresh changeover (the "**AFC**") and the lunch menu. The AFC was an initiative whereby Tim Hortons franchisees would cease baking many of their products in-store from scratch, and instead purchase par-baked goods from a central

[1] *Fairview Donut Inc. and Brule Foods Ltd v. The TDL Group Corp. and Tim Hortons Inc,* 2012 ONSC 1252.
[2] http://www.adairmorse.com/sharedItems/documents/latest_news/Notice%20of%20Appeal%20final.pdf

bakery. The plaintiffs argued that the cost of goods for their baked products rose significantly due to this initiative, robbing them of potentially higher profit margins, and entitling them to damages.

The Tim Hortons lunch menu was originally introduced in 1986,[3] providing various meal options that were designed to supplement Tim Hortons core coffee and baked good offerings. The plaintiffs complained that the lunch menu items carried significantly lower profit margins than the other products on the menu, and that this was diverting valuable resources away from products that had the potential to earn the plaintiffs more profit.

The plaintiffs argued that these initiatives: 1) represented a breach of their franchise agreements; 2) unjustly enriched Tim Hortons; 3) contravened the *Competition Act*;[4] 4) were in breach of the duty of good faith and fair dealing enshrined in Section 3 of the *Arthur Wishart Act (Franchise Disclosure), 2000*;[5] and 5) were misrepresented in order to procure approval for the AFC.

At the risk of oversimplifying the decision, Tim Hortons succeeded with this extraordinary remedy of dismissal on summary judgment because the language of their franchise agreements allowed them wide discretion in how they charged their franchisees for inventory, they created a business model that worked well financially for most of their franchisees, their modifications to the system over time were based on sound business principles and they received input from franchisees and considered that input in their business decisions for change.

2) Class Action

Background

This decision started out as a motion for certification as a class action. However, the class action certification was never decided, as Tim Hortons brought a counter motion for summary judgement dismissing the entire action, which succeeded on all issues.

Franchise disclosure legislation in Canada has made class action lawsuits much more prevalent in the franchise context, for the past 10 or so years. The obligations placed on franchisors by legislation, combined with the fact that there are large groups of franchisees operating under very similar (if not nearly identical) contracts, creates a breeding ground for class action lawsuits.

The course of class litigation in a franchise context has experienced an evolution of sorts in the past 15 years. Early cases were hard fought at the certification stage and settlement ensued fairly soon after a certification motion succeeded. Perhaps this was

[3] *Ibid* at para. 11.
.

[4] RSC 1985, c C-34.
[5] SO 2000, c 3 at s. 3.

because of the defendant franchisor's fear of adverse publicity, a potentially expensive adverse judgement or a combination of both. Plaintiff franchisees (or perhaps more their lawyers, who took these cases on contingency) became emboldened and we witnessed a surge of such cases, especially in the last few years. Adding to the frenzy to bring such actions were the various judicial pronouncements that a class action proceeding was an appropriate vehicle to resolve issues in a franchise system. The early class action cases also helped iron out a number of potential impediments for plaintiff franchisees, such as the issue of needing common issues and the combination of various sub-classes in one action.

Of considerable interest is the fact that, to date, there has never been a trial in a franchise class action lawsuit, only motions for certification, so the lawsuit could continue on behalf of the class of franchisees. It was expected that the days of easy "shakedown" settlements following certification were over and that franchisee lawyers could expect a long, arduous and expensive trial process after certification. No one, however, was prepared for or expected that a franchisor could close the entire process down so completely and so early through a motion for summary judgement, as Tim Hortons has done, although in TA&K Enterprises Inc. v. Suncor Energy Products Inc.[6] the franchisor was successful in defeating a class action law suit with a summary judgment, but on very narrow technical grounds dealing with statutory interpretation.

Class Action Decision in *Fairview*

As noted above, the class certification motion was not decided in *Fairview*, as further evidence was required to make a determination and the dismissal of the action on a motion for summary judgment made ruling on class certification moot for the time being. However, the Court still devoted a significant portion of its decision to discussing the certification motion and ruling on discrete portions of the motion.

The decision in *Fairview* briefly reviewed the process for certifying a class under Section 5 of the *Class Proceedings Act, 1992 ("**CPA**").*[7] Under that section, a group of franchisees would need to prove that they have a cause of action that could be litigated by a representative plaintiff, and that the claims or defences of the class members raise common issues. They would also have to show that the representative plaintiff will fairly represent the class, has a workable plan that would advance the proceeding on behalf of the class, and does not have an interest in conflict with other class members on the common class issues. Section 5 of the *CPA* also specifies that a class proceeding must be the preferable procedure for the resolution of the common class issues. Only when all of these requirements are satisfied can a class be certified. Once the class is certified, the representative plaintiff can litigate the matter on behalf of the entire class, eliminating duplication of fact finding, judicial legal analysis, and the potential for conflicting judgments while reducing costs for all of the litigants involved.

Two classes of plaintiffs were proposed, being franchisees who 1) wanted to litigate claims regarding to the AFC; and 2) wanted to litigate claims relating to the lunch menu.

[6] T&K Enterprises Inc. v. Suncor Energy Products Inc. 2011 ON CA 613
[7] SO 1992, c 6 at s. 5.

Obviously, many franchisees would have been members of both classes. The Court felt that issues of timing and potential ambiguity plagued the class definitions proposed by the plaintiffs, and as such did not rule on their appropriateness, but rather invited additional submissions on the matter in the event that the motion for certification continued after an appeal of the summary judgment motion.

The Court began its assessment of the "common issues" requirement under Section 5 of the *CPA* by providing a provisional definition of the common issues as follows:

> Having regard to the contractual rights and responsibilities of both parties, was it an express or implied term of the franchise agreements or a requirement of the duty of good faith at common law or under the *Arthur Wishart Act* that Tim Hortons [*sic*]would supply ingredients to its franchisees at lower prices that they could obtain for the same ingredients in the marketplace? If so, did Tim Hortons breach that term or requirement? If so, how?[8]

Justice Strathy noted that many revisions were made regarding the plaintiff's submissions regarding the issues common to the class members. He reviewed the submissions of both parties and was not satisfied that the wording of the issues was appropriate. Accordingly, he called on the parties to jointly draft a set of agreed common issues.

Justice Strathy noted that many of the common issues proposed by the plaintiffs improperly assumed facts, such as the assertion that the prices charged by Tim Hortons for baked goods pursuant to the AFC were "commercially unreasonable".[9] Another concern arose regarding whether it was appropriate to adjudicate whether certain terms were implied in the franchise agreements (for example, whether Tim Hortons was required to supply product at a commercially reasonable price) in a class proceeding. The Court held that it would not be proper to make such findings when such terms could not be implied without reference to the intentions of the parties.[10]

Following a number of other findings, Justice Strathy ultimately ruled that the plaintiffs had a cause of action common to the members of an identifiable class (with such issues to be re-worded by the parties) and that a class proceeding was the preferable course of action. However, because the proposed representative plaintiff had refused to answer questions regarding whether he had a third-party funding agreement with another party to finance the litigation, he declined to rule on whether the representative plaintiff was appropriate. A decision on whether the representative plaintiff was appropriate was adjourned pending the representative plaintiff's answers to questions regarding the funding of the litigation.

3) Plaintiffs Picked a Bad Target

[8] *Ibid* at para. 238.
[9] *Ibid* at para. 248.
[10] *Ibid* at paras. 289 and 291.

Whether on the highway or deep in an urban center, Tim Hortons outlets are as ubiquitous as ATMs and gas stations. As a kind of informal Canadian institution and benchmark, Tim Hortons fosters national and brand loyalty among its customers. The effects of being a dominant market leader are far-reaching, as the general public, who effectively created and continually affirm such market positioning, develop trust in their favourite companies. It may have been a mistake to attack a market Goliath's system of operations and business judgment, as the sense of trust discussed above can deflect a great deal of criticism.

The proposed representative plaintiffs in this action were two prominent Tim Hortons franchisees. It probably did not help their case that these two franchisees were former long time employees of Tim Hortons, occupying high level positions within the organization.[11] On top of this, both representative franchisees executed renewals of the agreements under which this suit was brought after the imposition of the lunch menu and the AFC.[12]

The fact that the representative plaintiffs had so much knowledge regarding the operation of the Tim Hortons franchise system, both as it stood at the time of the decision and how it was operated in the past, begs the question as to why they would agree and continue to operate franchises under the conditions in question, only to subsequently challenge them.

Justice Strathy may have been influenced by the national profile of Tim Hortons in deciding to unwaveringly defer to its executives' business judgment. He continually praised Tim Hortons' management and marketing strategies, highlighting menu changes, advertising campaigns and the plethora of resources available to its decision makers. Justice Strathy pointed to the strength of the Tim Hortons franchise system, noting that there was a 3,000 person waiting list to become a franchisee.[13] Tim Hortons franchisees' profit margins were also quite high for a quick service restaurant, falling somewhere between 10% and 16%.

Tim Hortons produced affidavits from 12 current franchisees containing sparkling endorsements of the Tim Hortons franchise and business models,[14] to which Justice Strathy referred frequently, despite the fact that these franchisees were denied intervener status earlier in the proceedings.[15]

While it cannot be said with any level of assurance that Tim Hortons' place in the Canadian national psyche caused bias to seep into Justice Strathy's judgment, it certainly goes without saying that the facts evidencing Tim Hortons' monolithic market position were used to justify giving significant deference to the business decisions of its managers (perhaps rightfully so, in relation to consideration of the resources that went into formulating the lunch menu and the AFC).

---

[11] *Ibid* at paras. 33 and 42.
[12] *Ibid* at paras. 37 and 42.
[13] *Ibid* at para. 24.
[14] *Ibid* at paras. 50, 130, 132, 138, 260, and 311.
[15] *Ibid* at para. 48.

4) Statements With a Potential Impact on Future Franchising Cases

There is a lot more stated in the decision of Mr. Justice Strathy than just how well Tim Hortons wrote its franchise agreements or how it conducted itself that will have far reaching impact on future franchise cases. As noted above, it is important to remember that the statements referred to below were made in the context of the particular facts of this case. Where franchise agreements are structured and worded differently, different conclusions might be reached. Despite the fact-specific nature of this decision, the agreements in question represent best practices, and are an example of the protection that can be afforded to a vigilant franchisor.

It is important to note that the core of the plaintiff franchisees' claims was the fact, as stated by Mr. Justice Strathy, that:

> "Their real complaint is not that they don't make a reasonable profit as Tim Hortons franchisees – but rather that they don't make more profit."[16]

Had this been a franchise system with a lot of failing franchisees or franchisees earning little profit, the result could have been very different. In this case, though, Justice Strathy used the robust performance of Tim Hortons to examine a franchisor's rights to dictate the elements and execution of a successful franchise system.

Most of Justice Strathy's pertinent statements addressed the ability of franchisors and franchisees to exercise discretion with respect to the way a franchise is to be run.

The judgment was highly supportive of a franchisor's right to dictate the specifications which a franchisee must satisfy where such specifications, in concert with the business model of the franchise system, provide franchisees with the ability to earn a reasonable profit. Justice Strathy noted that:

> "If the franchisor reasonably believes that an economically-priced lunch selection is a good way of attracting customers in off-peak hours, helps to cross-sell other profitable products, and builds customer loyalty, then, subject to the terms of its contracts with its franchisees, it is entitled to price the ingredients as it sees fit, having regard to the franchisee's operations as a whole, and the return on investment they receive."[17]

The decision builds upon this statement, ruling that not only is the franchisor entitled to structure franchise specifications as it sees fit, but that:

> "In order to keep the system healthy and competitive, the franchisor must be permitted to introduce new products, new methods of production or sale, and new techniques or systems during the life of a franchise agreement. The franchisees have an expectation that this will be done for the benefit of both the franchisor and the franchisee. It would not be

[16] *Ibid* at para. 41.
[17] *Ibid* at para. 155.

> commercially reasonable to require that the franchisor can only implement system-wide changes over the life of a particular franchise agreement if the proposed change is demonstrated to be an improvement that benefits that particular franchisee. Nor would it be commercially reasonable to require the franchisor to demonstrate that every such change will be a financial benefit for every franchisee." [18]

These two statements speak for themselves as to the deference which a franchisor can earn by properly structuring its franchise agreements. Essentially, the court was willing to defer to Tim Hortons on any decision where it was able to show that significant thought and energy went into a particular decision, and was designed to foster the continued health of the overall franchise system. If there was any doubt as to the meaning of these statements the court put such doubts to rest when it noted that:

> "Tim Hortons, as franchisor, is entitled to tell the franchisees what to buy and where to buy it, and what to sell and how to sell it. It is entitled to make a profit on what the franchisees are required to buy and it is entitled to determine the amount of its profit."[19]

This statement can be seen as a confirmation that a franchisor has the right, subject to the terms of its franchise agreements, to determine and limit the profit making capabilities of its franchisees.

This statement is important because it essentially gives franchisors an avenue by which they can change the profit-sharing structure of a franchise agreement. While it would seem trite to note that a franchisor would not be able to alter, for example, the amount of the monthly royalty payments, this judgment effectively opens the door for successful franchisors to effect such an alteration by increasing prices on products that are required to be purchased by the franchisee from the franchisor (assuming that the decision was well thought out and can be couched as an initiative that would benefit the franchise system generally).

Despite these conclusions, which give considerable power to franchisors, the Court went out of its way to point out that:

> "There are contractual and statutory limits to what Tim Hortons can do. It must abide by the terms of its contracts. It must deal fairly with its franchisees and act in good faith and in accordance with reasonable commercial standards in the performance and enforcement of its contract. It cannot deprive the franchisees of the benefits of the contract or undermine the very foundation of the contract."[20]

Tim Hortons avoided the imposition of these limits on a franchisor's power through a combination of appropriate planning and good faith. According to this judgment, it is

[18] *Ibid* at para. 427.
[19] *Ibid* at para. 672.
[20] *Ibid* at para. 673.

clearly open to a franchisor to alter the profit sharing element of the franchisor-franchisee relationship, where it is within the limits noted above and the agreements contain sufficient flexibility.

Regarding a franchisee's discretion to operate its business as it sees fit, this decision unequivocally states that "Franchisees are not entitled to pick and choose between menu offerings and to sell only the most profitable ones."[21] Accordingly, one can anticipate that franchisees will be expected to operate their businesses in accordance with the specifications and plans of the franchisor where such franchise is operating at a reasonable profit margin, even where such specifications and plans have a negative effect on a franchisee's bottom line.

4) Expert Evidence in Ontario and the U.S.

As a general rule of evidence in both the U.S. and Canada, only prescient witnesses, *i.e.* those who were first-hand observers of the facts with their senses, are allowed to give testimony. Expert testimony is an exception to this rule; therefore, its use is limited by case law and statute.
In *Tim Hortons* the defendants made a motion to strike plaintiffs' expert testimony claiming large portions of the expert's report were unnecessary; that the opinion was advocacy dressed up as opinion; that the expert provided legal conclusions; that the expert engaged in fact-finding rather than proceeding from assumptions provided by his client or counsel; that the expert expressed opinions not based on underlying proven facts; and that the expert opined on financial and accounting issues that were beyond his expertise.[22] The judge basically agreed with the defendants' contentions[23] but refused to strike the expert's report. These very same contentions would be grounds for a *Daubert* motion in U.S. Courts to exclude the expert.

In *Tim Hortons,* Mr. Justice Strathy repeatedly cited one of his own decisions in a prior case with respect to the "principles applicable to expert evidence generally and on a certification motion in particular"[24]. In his prior decision[25], the judge specifically cited as the foremost authority in Canada, "the *Mohan* criteria, derived from the test established by the Supreme Court of Canada in *R. v. Mohan*, 1994 CanLII 80 (SCC), [1994] 2 S.C.R. 9, [1994] S.C.J. No. 36 which requires that expert evidence satisfy the following criteria: (1) relevance; (2) necessity in assisting the trier of fact; (3) the absence of any exclusionary rule; and (4) a properly qualified expert."[26] In substance that is almost exactly the same as the rule in U.S. courts used to challenge the admissibility of expert testimony.

---

[21] *Ibid* at para. 136.
[22] *Tim Hortons* at para 151
[23] *Tim Hortons* at para 152
[24] *Tim Hortons* at para 150
[25] *Williams v. Canon Canada, Inc.*, 2011 ONSC 6571, [2011] O.J. No. 5049 (S.C.J.)
[26] *Ibid* para 64

In *Daubert v. Merrell Dow Pharmaceuticals*,[27] the United States Supreme Court determined that expert testimony, to be admissible, must meet the two-part test of the Federal Rules of Evidence Rule 702: (a) it must be reliable—based on recognized knowledge, and (b) it must be relevant—of assistance to the trier of fact. Prior to *Daubert*, the "general acceptance" standard of *Frye v. United States*[28] was the rule. Since *Daubert*, in determining whether expert testimony and any report prepared by the expert may be admitted, federal courts engage in a three-part inquiry of whether (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue. The shorthand is: (1) qualifications, (2) reliability, and (3) helpfulness.
The Canadian and U.S. jurisprudence on this point are in close agreement. As Justice Binnie noted with respect to this overlap in *R. v. J.-L.J.*, 2000 SCC 51 (CanLII), [2000] 2 S.C.R. 600, [2000] S.C.J. No. 52, at para. 33:

> *Mohan* reject[ed] the "general acceptance" test formulated in the United States in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), and mov[ed] in parallel with its replacement, the "reliable foundation" test more recently laid down by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). While *Daubert* must be read in light of the specific text of the Federal Rules of Evidence, which differs from our own procedures, the U.S. Supreme Court did list a number of factors that could be helpful in evaluating the soundness of novel science (at pp. 593-94):
> (1) whether the theory or technique can be and has been tested…
> (2) whether the theory or technique has been subjected to peer review and publication …
> (3) the known or potential rate of error or the existence of standards; and
> (4) whether the theory or technique has been generally accepted.

Mr. Justice Strathy cited this with approval in *Tim Hortons* saying: "The application of these factors will assist the court in the exercise of its 'gatekeeper' role of determining whether the evidence is reliable and deserving of any weight."[29]
Daubert, which was one of three cases that form the law of expert testimony in the U.S., directed trial courts to consider at least the four factors (cited above) when making the threshold determination of whether or not to admit expert testimony. The second case

[27] 509 U.S. 579, 113 S.Ct. 2786 (1993).
[28] 54 App.D.C. 46, 293 F. 1013 (1923).
[29] at paragraph 76.

in the *Daubert* trilogy, *General Electric Co. v. Joiner*[30] stands for two propositions: (1) that the "gatekeeper" function allows the court itself to investigate the expert's reasoning process as well as the expert's general methodology, and (2) that the standard of review of such a trial court's decision was only to be for "abuse of discretion." And in the third case of the trilogy, *Kumho Tire v. Carmichael*[31], the U.S. Supreme Court rejected the argument that *Daubert* only applied to "scientific" testimony, holding that the *Daubert* test applies to all expert witnesses.

It is worth noting that both the *Mohan* criteria in Canada and the *Daubert* rules in the U.S. describe the court's function with respect to the admissibility of expert witnesses as that of a "gatekeeper". Mr. Justice Strathy's recitation in *Williams v. Canon* is worth quoting:

> [68] While much of the recent discussion of expert evidence has taken place in the context of criminal cases, the principles apply equally to civil proceedings. The court has an important gate-keeping role with respect to the admissibility of evidence and it is not appropriate or fair to shirk that responsibility by saying "let it in, and the objections will go to weight rather than admissibility." This approach was expressly rejected by Binnie J. in *R. v. J. (J.L.)*, 2000 SCC 51 (CanLII), [2000] 2 S.C.R. 600, [2000] S.C.J. No. 52 at p. 613.
>
> [69] I will begin with first principles. Expert evidence is only admissible where the trier of fact would be unable to draw conclusions from proven facts, because the subject matter is not within the ordinary experience of a lay person and requires the opinion of someone with specialized knowledge. In *R. v. A.K.* 1999 CanLII 3793 (ON CA), (1999), 45 O.R. (3d) 641, [1999] O.J. No. 3280 (C.A.), the Court of Appeal described this aspect of the opinion rule as follows, at para. 71:
>
> > The opinion rule is a general rule of exclusion. Witnesses testify as to facts. As a general rule, they are not allowed to give any opinion about those facts. Opinion evidence is generally inadmissible. Opinion evidence is generally excluded because it is a fundamental principle of our system of justice that it is up to the trier of fact to draw inferences from the evidence and to form his or her opinions on the issues in the case. Hence, as will be discussed below, it is only when the trier of fact is unable to form his or her own conclusions without help that an exception to the opinion rule may be made and expert opinion evidence admitted. It is the expert's precise function to provide the trier of fact with a ready-made inference from the facts which the judge and jury, due to the nature of the facts, are unable to formulate

[30] 522 U.S. 136 (1997)
[31] 526 U.S. 137, 119 S.Ct. 1167 (1999)

> themselves: *R. v. Abbey* 1982 CanLII 25 (SCC), (1982), 68 C.C.C. (2d) 394 at 409.

[70] The Court of Appeal continued, summarizing the rule at para. 75, as follows:

> In a nutshell, the opinion rule can be stated as follows: Opinion evidence is generally inadmissible unless it meets all four [of the *Mohan*] criteria set out above. A consideration of the first two criteria, relevance and necessity requires a balancing of the probative value of the proposed evidence against its potential prejudicial effect. The Supreme Court in *Mohan* identifies a number of factors that should be considered in this balancing process. The proposed evidence will only be admissible if its probative value exceeds its prejudicial effect. The third criterion involves a consideration of other applicable rules of evidence. Even if the proposed evidence is sufficiently probative to warrant admission, it may be subject to some other exclusionary rule and further inquiry may be required. Finally, the last criterion requires that expert opinion evidence be adduced solely through a properly qualified expert.

Another point made in the *Tim Hortons* case was that expert evidence, even in a Certification Motion, must still meet the *Mohan* criteria. Again quoting Justice Strathy's prior opinion in *Williams v. Canon*:

> [65] While the evidentiary burden on a certification motion is the low, "basis in fact" test, that burden must be discharged by admissible evidence. The evidence tendered on a certification motion must meet the usual criteria for admissibility: *Schick v. Boehringer Ingelheim (Canada) Ltd.*, 2011 ONSC 63 (CanLII), [2011] O.J. No. 17, 2011 ONSC 63 at para. 13; *Ernewein v. General Motors of Canada Ltd.* 2005 BCCA 540 (CanLII), (2005), 260 D.L.R. (4th) 488, 2005 BCCA 540 at para. 31, leave to appeal to SCC dismissed, [2005] S.C.C.A. No. 545.

Finally, the *Tim Hortons* decision affirmed another aspect of the law of expert testimony, i.e. that novel arguments put forward by a proffered expert must meet special – generally more stringent - criteria.[32] For example, Justice Strathy applied this

---

[32] See e.g. *Williams v. Canon:*

[74] Particular caution needs to be exercised where the proposed expert seeks to advance a novel scientific theory or a novel technique. The risk is obvious – the very novelty of the theory or method makes it untested and potentially unreliable. In *Mohan*, Sopinka J. observed, at para. 28:

> [...] expert evidence which advances a novel scientific theory or technique is subjected to special scrutiny to determine whether it meets a basic threshold of reliability and whether it is essential in

additional analysis to Plaintiff's expert's argument that every item sold in a QSR franchise must be a profit center - a proposition the court rejected.

Conclusion

On the evidentiary issues, the case represents a good primer on the admissibility of expert evidence which was attacked but not excluded in the case. On the class action issues, however, the complete dismissal was quite a surprise and for this case to be controlling precedent for other class actions, of course, similar facts will have to be present. In *Tim Hortons* there were some extenuating circumstances allowing for the summary judgment motion to be brought and there are whispers in the judgment of Mr. Strathy that an iconic Canadian franchisor gets the benefit of the doubt, but it is conjectured that we will see more of such procedures brought, or at least attempted, in the future. But a word to the wise: pick a better target.

* **Edward (Ned) Levitt** is a partner at Dickinson Wright LLP, Toronto, Canada. He has served as General Counsel to Canadian Franchise Association and was instrumental in the creation of Ontario's franchise legislation as a member of the Ontario Franchise Sector Working Team. Among his many publications is the leading text, **Canadian Franchise Legislation**. Mr. Levitt is recognized by his peers, The Best Lawyers in Canada, and the International Who's Who of Business Lawyers as one of Canada's leading franchise law practitioners. Mr. Levitt was the recipient of the Canadian Franchise Association's 1993 and 2007 Special Recognition Award, 2005 Franchise Support Services Recognition Award and a Lifetime Achievement Award in 2010.
Bruce S. Schaeffer is an attorney in private practice in New York City. He holds a Juris Doctor, a Master of Laws (in Taxation) and is also the founder and president of Franchise Valuations, Ltd (www.franchisevaluations.com), which provides valuations and expert testimony in damages disputes. A nationally recognized expert, he has over 30 years' experience dealing with tax, valuation, damages and expert testimony issues with respect to franchises. He is co-author of the CCH treatise, *Franchise Regulation and Damages* and is the author of the BNA Tax Management Portfolio on the Tax Aspects of Franchising

12520078.1

---

the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert. The closer the evidence approaches an opinion on an ultimate issue, the stricter the application of this principle.