

CITATION: Fairview Donut Inc. v. The TDL Group Corp., 2010 ONSC 5979
COURT FILE NO.: CV-08-00356806-CP00
DATE: 20101028

ONTARIO SUPERIOR COURT OF JUSTICE

RE: Fairview Donut Inc. and Brulé Foods Ltd., Plaintiffs/ Moving Parties
The TDL Group Corp. and Tim Hortons Inc., Defendants/ Respondents

BEFORE: G.R. Strathy J.

COUNSEL: Jerome Morse & Lori Stoltz, for the Plaintiffs/Moving Parties
Peter F.C. Howard, Katherine L. Kay & Danielle K. Royal, for the
Defendants/Respondents

DATE HEARD: By written submissions

DIRECTION

(Scheduling of Defendants' Motion to Strike Fisher Affidavit)

[1] The defendants have brought a motion to strike the affidavit of Douglas Fisher (the "Fisher Affidavit"), an expert witness for the plaintiffs. The plaintiffs ask for directions concerning the scheduling of that motion. They ask that the motion be heard at the same time as the motion for certification and the defendants' summary judgment motion (the "Motions"), both of which are scheduled to be heard commencing April 11, 2011. The defendants ask that the motion be heard in advance of that date, namely on November 29, 2010, a date that has been tentatively reserved for that purpose.

[2] Each party has filed a carefully prepared, well-researched and persuasive memorandum in support of its position. It cannot be said that the position taken by either party is unreasonable or without merit. There are pros and cons to each. My responsibility is to weigh and balance these arguments, to consider what is fair to the parties, what advances the just, most expeditious and least expensive resolution of this litigation, and what promotes the goals of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

[3] The statement of claim was served in June, 2008. By the time the Motions are heard in April, 2011, the action will be almost three years old. The certification motion, and the action,

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are being vigorously contested by the defendants. I have granted the defendants' request that the Motions be heard at the same time.¹

[4] The Fisher Affidavit is massive. It runs to 187 pages, consists of 618 paragraphs and has 16 exhibits contained in six volumes. It is intended to provide evidence in support of the certification motion and also to be a comprehensive response to the summary judgment motion and to the expert evidence advanced by the defendants on that motion.

[5] The defendants seek to strike the Fisher Affidavit, which they say violates every conceivable rule with respect to proper expert testimony. They say it contains:

- (a) impermissible findings of fact;
- (b) evidence where no expertise is required to assist the trier of fact;
- (c) improper advocacy and argument under the guise of expert opinion;
- (d) opinions that are not relevant to the issues;
- (e) opinions that are not based on legally admissible evidence; and
- (f) opinions for which Mr. Fisher lacks expertise.

[6] Although the defendants seek to strike the entire affidavit, they have identified numerous paragraphs that they say contain one or more of these defects.

[7] The defendants say that they should not be put to the effort and expense of preparing a response to this affidavit, or preparing for cross-examination, where the affidavit "most likely will be excluded". They argue that determining the admissibility of the affidavit prior to the hearing will ensure that the record on the Motions contains only admissible evidence. They also say that it will give the plaintiffs a chance to submit further, admissible evidence on those motions. They say that dealing with the issue in advance of certification will promote the efficiency and fairness of certification process. Leaving an inadmissible affidavit in the record would be unfair and prejudicial, they submit.

[8] The plaintiffs say that the admissibility of the Fisher Affidavit is best determined in the context of a full evidentiary record at the Motions. They submit that hearing the defendants' motion in advance will delay the matter, waste judicial resources and lead to inefficiency.

[9] Although it might be advantageous to a party to know whether its record needs shoring up prior to the hearing, the plaintiffs are prepared to run the risk that some or all of the affidavit will be found irrelevant, unreliable or inadmissible.

[10] The parties acknowledge that I have discretion under s. 12 of the *C.P.A.* to give directions on the scheduling of motions such as this. They refer to *Berkovits v. Canon Canada Inc.* [2010] O.J. No. 3013 (S.C.J.) and some of the authorities discussed there, concerning the principles and

¹ See *Fairview Donut Inc. v. The TDL Group Corp.*, 2010 ONSC 2845, [2010] O.J. 2094.

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factors that should inform the exercise of the court's discretion. There are authorities, which in the interests of brevity I do not propose to recite, on either side of the issue, all of which turn on their particular facts.

[11] I accept, of course, the proposition that the court has an important "gatekeeper" role in ensuring that inadmissible expert evidence is screened out. The defendants point to the observations of Justice Binnie in *R. v. J. (J.-L.)*, [2000] 2 S.C.R. 600 at para. 28:

In the course of *Mohan* [*R. v. Mohan*, [1994] 2 S.C.R. 9] and other judgments, the Court has emphasized that the trial judge should take seriously the role of "gatekeeper". The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility.

[12] There is, however, no requirement that this "gatekeeper" function be performed in advance of the hearing and it is, of course, frequently performed in the course of both civil and criminal trials.

[13] In the circumstances of this particular case, I have concluded that the interests of justice, and particularly fairness, economy and judicial efficiency, are best served by dealing with the admissibility of the Fisher Affidavit on the hearing of the Motions. I consider the following to be of particular importance:

(a) if the motion is heard at this time, and resolved against the plaintiffs, there is a high probability that the plaintiff will, as the defendants suggest, seek to cooper up any deficiencies by filing further affidavit evidence and this will likely result in delays and probably a further motion: see *Andersen v. St. Jude Medical Inc.*, 2002 [2002] O.J. No. 4478, 29 C.P.C. (5th) 234 at paras. 12-13 (S.C.J.);

(b) the plaintiffs have indicated that they understand the risks of their course of action and they are prepared to live or dic with the Fisher Affidavit in its current form, whatever its infirmities may ultimately be found to be;

(c) the relative infirmities, if any, of the Fisher Affidavit, and the significance of those infirmities, if any, are likely to be brought into focus on the hearing of the Motions, as opposed to dealing with them in the abstract in advance – some alleged infirmities may prove to be purely irrelevant side issues – others may be highly relevant and may demand a determination;

(d) dealing with the admissibility of the Fisher Affidavit at the same time as the Motions will promote judicial efficiency;

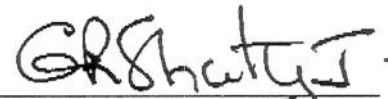
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(e) dealing with the issue on the hearing of the Motions will permit both issues to move forward together, in the event there are appeals as there may well be – this will promote efficiency at the appellate level; and

(f) this action has not progressed expeditiously to a certification hearing (which has been re-scheduled twice) and there have already been several interlocutory motions – I do not assign blame to either party, but I am concerned that hearing this motion in advance of the Motions will further delay the proceeding, will escalate the costs incurred by the parties and will consume, rather than conserve, judicial resources.

[14] The defendants will not be prejudiced if the issue is deferred to the Motions. Any additional (and ultimately unnecessary) expense incurred in responding to the Fisher Affidavit can be addressed by costs, if appropriate. Leaving the entire affidavit in the record will not cause prejudice. A motion judge, like a trial judge, is capable of differentiating between admissible and inadmissible evidence and ignoring the latter.

[15] For these reasons, the motion to strike the Fisher Affidavit will be adjourned, to be heard at the same time as the Motions. Costs of this motion will be reserved to the hearing of the Motions.


G.R. Strathy J.

DATE: October 28, 2010