

CITATION: *Fairview Donut Inc. v. The TDL Group Corp.*, 2011 ONSC 247
COURT FILE NO.: CV-08-00356806-CP00
DATE: 20110113

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

BEFORE: **G.R. Strathy J.**

COUNSEL: *Lori Stoltz*, for the Plaintiffs/Moving Parties

L. Theall, for the Affiant Franchisees/Respondents

Bevan Brooksbank, for the Defendants

DATE HEARD: January 6, 2011

ENDORSEMENT

(Motion for Production from Affiant Franchisees)

[1] The plaintiffs move for production of documents from eleven franchisees of the Tim Hortons chain who have sworn affidavits filed by the defendants (“Tim Hortons”) in support of their motion for summary judgment and as part of their record in response to the plaintiff’s motion for certification of this proceeding as a class action. I will refer to these respondents as the “Affiant Franchisees”. For the background of this proceeding, I refer to my previous endorsements: *Fairview Donut Inc. v. TDL Group Corp.* (2010), 100 O.R. (3d) 510, 2010 ONSC 789 and *Fairview Donut Inc. v. TDL Group Corp.*, 2010 ONSC 2845, [2010] O.J. No. 2094.

[2] As a result of the diligence and cooperation of counsel for the plaintiff and counsel for the Affiant Franchisees, most of the production issues were resolved prior to the hearing of the motion. Certain additional concessions were made during submissions, which further reduced the matters in dispute. At the end of submissions, I advised counsel of the disposition I intended to make concerning the remaining issues and suggested that they prepare an order reflecting their agreement, their additional concessions and my intended disposition. They have done so, and all outstanding issues were resolved at a case conference on January 10, 2011.

[3] The one particularly contentious issue on the motion concerned the production of documents by one of the franchisees, Mr. Cardella. The documents at issue are described as “throw sheets”. At the conclusion of counsel’s submissions I indicated that I proposed to grant

Page: 2

the motion with respect to Mr. Cardella's throw sheets, with reasons to follow. These are my reasons.

[4] One of the important issues in this action is the effect of Tim Hortons' conversion from the old-fashioned "bake from scratch" method, employing professional bakers in each store, to a par baking system called "Always Fresh", where baked goods were prepared at a central facility, frozen and shipped to the retail stores where they were baked in a convection oven. The plaintiff says that this system, although touted by Tim Hortons as a cost-saving, really had the effect of increasing franchisees' expenses.

[5] Mr. Cardella is one of the Affiant Franchisees. Among other things, he deposes that after the conversion to "Always Fresh" the wasted baking in one of his stores was reduced. He refers specifically to his store #1469 and says that by comparing the month of August 2001 (before the conversion) to August 2003 (after the conversion) the amount of waste or "throws" was cut in half. "Throws" refers to donuts or other baked goods that have to be discarded at the end of the day because more product was baked than was sold. Tim Hortons' case will likely be that there were fewer "throws" after the conversion because baking was simpler and more efficient because it could be tailored to demand.

[6] The plaintiff has served a notice of examination on Mr. Cardella. It requests that he produce his records concerning throws for the period of 2002 to 2009. It is acknowledged that Mr. Cardella has such records, which document the discarding of wasted product. The records for 2002 and 2003 are available in hard copy, but are said to be contained, along with other documents, in over a hundred banker's boxes that are stored in an attic, presumably of his store or his home. The records from 2004 onwards are available electronically on his computer system called "Clearview", a system that can be accessed through the internet. The electronic records could be made available to the plaintiffs' counsel, on a restricted basis, over the internet. The parties have agreed to a protocol for access to the Clearview records in the case of other documents.

[7] It is acknowledged that I have jurisdiction to grant the order sought. Mr. Theall submits that my jurisdiction lies under Rule 30.10 of the *Rules of Civil Procedure*, R.R.O. 1990, reg. 194, which governs production of documents from a non-party. That rule provides that the court may order production of a document from a non-party if satisfied that a document is relevant to a material issue in the action and it would be unfair to require the moving party to proceed to trial without having discovery of the document.

[8] In my view, I also have jurisdiction under the combined operation of Rule 34.10 (dealing with production of documents on examination) and section 12 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6. The latter permits the court to make "any order it considers appropriate regarding the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate." I do not believe that the concluding words limit the court's jurisdiction to making orders only in relation to parties. It seems to me that where an affiant whose cross-examination is pending has made it clear that he/she does not intend to produce a requested document, the court must be able to order the production of that document at the request of the other party. Doing so promotes the

“just, most expeditious and least expensive determination” of the proceeding (rule 1.04) and, what amounts to the same thing, its “fair and expeditious determination”.

[9] Counsel for the plaintiff refers to *Toronto-Dominion Bank v. Ndem*, 2010 ONSC 2818, [2010] O.J. No. 2268, a decision of Pollak J. That case is distinguishable because it appears that the affiant had attended a cross-examination, refused to produce a document and was subsequently ordered by the Master to produce the document in advance of the next examination. It was argued that the Master had no jurisdiction to order production of the document prior to the examination and that the only jurisdiction was to order that it be produced at the examination. In affirming the Master’s decision, Pollak J. noted that counsel needed time to review the document prior to the continued examination and the matter was also time-sensitive.

[10] Both parties refer to the decision of Perell J. in the recent case of *Tetefsky v. General Motors Corp.* 2010 ONSC 1675, [2010] O.J. No. 1117. In that case, Perell J. summarized the law with respect to motions under Rule 30.10 at paras. 41 and 42 as follows:

The case law associated with rule 30.10 establishes that the disclosure and production of a document from a non-party is a matter of fairness and necessity. The court determines whether it would be unfair to require the moving party to proceed to trial without a document in the possession of a non-party. Although production can be ordered from a non-party, it is not routinely sought and the threshold for granting it is high: *Olendzki v. W.A. Baker Trucking Ltd.* (2006), 27 C.P.C. (6th) 338 (Ont. S.C.J.). An order under rule 30.10 should not be made as a matter of course and should only be made in exceptional circumstances: *Morse Shoe (Canada) Ltd. v. Zellers Inc.*, [1997] O.J. No. 1524 (C.A.) at para. 19.

In making the determination of whether to order production from a non-party, the court may consider the following factors: (1) the importance of the document to the issues in the litigation; (2) whether production at the discovery stage as opposed to production at trial is necessary to avoid unfairness to the moving party; (3) whether the examination of the opposing party with respect to the issues to which the documents are relevant would be adequate to obtain the information in the document; (4) the availability of the document or its information from another source that is accessible to the moving party; (5) the relationship of the non-party from whom production is sought to the litigation and the parties to the litigation; and (6) the position of the non-party with respect to production: *Ontario (Attorney General) v. Ballard Estate* (1995), 26 O.R. (3d) 39 (C.A.); *Morse Shoe (Canada) Ltd. v. Zellers Inc.*, [1997] O.J. No. 1524 (C.A.).

[11] Applying the factors set out in rule 30.10 and identified by Perell J., I conclude:

(a) The “throw sheets” are plainly relevant – the affidavit filed by Mr. O’Rourke, one of Tim Hortons’ directors, acknowledges that such

Page: 4

records are relevant. Mr. Cardella's own affidavit indicates that they are relevant to the effect of the "Always Fresh" conversion. The documents are also important to enable the plaintiffs to make out their case that the conversion did not reduce costs. They are also important to challenge Mr. Cardella's credibility.

(b) The plaintiffs are facing a summary judgment motion. It would be unfair to require them to proceed to that motion without production well in advance and without the opportunity to confront Mr. Cardella with the evidence on his examination.

(c) The documents are prepared on a daily basis. It will be necessary to prepare summaries in order to make any meaningful use of them. Tim Hortons does not have the information.

(d) No one other than Mr. Cardella has the information.

(e) Mr. Cardella is a Tim Hortons franchisee. He has voluntarily sworn an affidavit in support of Tim Hortons' position. He had no obligation to do so and gives evidence as a volunteer. Although not a party, he is a willing witness and, apparently, a witness who is not supportive of the proposed class action.

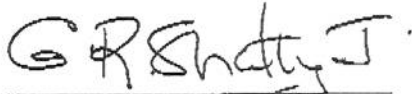
(f) Mr. Cardella opposes production. His affidavit in opposition indicates that he had throw data available since January 2004 in Clearview format. This information can be provided electronically without difficulty or inconvenience. He swears that he has throw data for the years prior to 2004, (which his counsel indicates is limited to 2002 and 2003), and he says that the records are "voluminous". He does not, however, identify any particular hardship in their production which, at worse, appears to be a matter of manual labour and some sorting.

[12] Considering all these factors, it is appropriate to require production of hard copies of the 2002 and 2003 throw sheets and production through Clearview of the post-2003 data. It would be a waste of the parties' time and resources to require that Mr. Cardella attend an examination, refuse to produce the documents and then re-attend if he is ordered to produce the documents when it is clear that he would not produce the documents without a court order.

[13] In the course of settling the terms of the order, an issue also arose concerning the extent of production required of Mr. G. Oliver, another Affiant Franchisee. It was agreed that Mr. Oliver would produce summary information from his own business records concerning the throws for three of his stores. The plaintiff wanted to have access to selected underlying throw sheets for the purpose of verifying the summary information. I indicated that I would consider that request, after the cross-examination of Mr. Oliver, if the plaintiff can establish any reason to believe that the summary information is unreliable. On the face of it, there seems no reason to question the reliability of the summary information, which is a contemporaneous business record, prepared in the ordinary course of business long before this action was launched. If the

Page: 5

plaintiff can establish that there is some doubt, and the issue cannot be resolved in a practical and sensible way, written submissions can be made to me.



G.R. Strathy J.

DATE: January 13, 2011