CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL
No: 500-06-000849-170

No.

(CLASS ACTION)
COURT OF APPEAL
(CIVIL DIVISION)

STÉPHANE DURAND, businessman, domiciled and residing at 3205 Port-au-Persil, in the City and District of Laval, Province of Quebec, H7E 4R1,

APPELLANT/Plaintiff

v.

SUBWAY FRANCHISE SYSTEMS OF CANADA, LTD., a legal person, incorporated according to the *Canada Business Corporations Act*, having its head office at 11210- 107th Avenue, main floor, **c/o Monarch Registry**, in the City of Edmonton, province of Alberta, T5H 0Y1,

-and-

DOCTOR'S ASSOCIATES INC., a legal person, incorporated according to the *Florida Corporation Business Act*, having its head office at 700 S. Royal Poinciana Boulevard, Suite 500, in the City of Miami Springs, State of Florida, 33166, United States of America,

RESPONDENTS/Defendants

NOTICE OF APPEAL
(Art. 352 & ssq. C.c.p.)
Appellant
March 5, 2019

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1. The appellant appeals from a judgment of the Superior court, rendered on February 19, 2019, by the Honourable François P. Duprat, sitting in and for the District of Montreal, which dismissed Appellant's application for authorization to institute a class action;

2. The date of the notice of judgment is February 25, 2019;

3. The duration of the trial was one (1) day;

4. The appellant files with this notice of appeal a copy of the first instance judgment in **Schedule 1**;

5. No value is applicable to the subject matter of the dispute as its was rendered on the application for authorization to institute a class action;

6. This file is not confidential;

7. The trial judge erred in his judgment for the following reasons:

I- <u>Errors of law:</u>

a) The trial judge erred in law by:

- Deciding for absence of nextus;
- Deciding that the allegations of the application for autorisation to exercise a class action concerning the merits of the case were inaccurate when no debate on the merits was engaged;
- Deciding a question related to the mertis of the case at the autorisation stage without a thorough contradictory debate which will have to take place at the mertis of the lawsuit;
- Setting aside the appellant's argument to the effect that the respondents were the conceptors behind the sandwich recepes as well as the directing

minds that vigorously required their franchisees to use the specific products provided to them;

- Setting aside the appellant's argument to the effect that the respondents were the ones that manufactured and/or requested specific chicken products from suppliers which were subsequently delivered to Subway franchisees through distributors from distribution centers designated by the respondents;

- Disregarding appellant's argument that the respondents, which controlled strictly their franchisees though their franchise and sub-franchise agreements, allowed and directed the franchisees to give the class members the clear impression that the patties in the sandwiches purchased by members of the class were made of pure chicken;

- Dismissing the argument that granting the right to use the trademark Subway and requiring franchisees to use the trademark Subway on their products falls within the definition of manufacturer as defined in section 1(g) of the *Consumer Protection Act*;

- Refusing to apply section 52(1) of the *Compeition Act* which prohibits the promotion, directly or indirectly, of any business interest by making a representation that is false or misleading;

- Dismissing the general impression criterion of section 218 of the *Consumer Protection Act* and instead requiring the appellant to point out the specific evidence of a statement by the respondents that Subway chicken patties were made of pure chicken;

- Requiring from the appellant, contrary to section 253 of the *Consumer Protection Act*, an allegation as to the consequence of the respondents' misrepresentations and not taking into consideration that a consumer is presumed to have disagreed with the contract in case of a prohibited practice by the manufacturer;

- Stating that, even if he had authorized the class action, he would have excluded Chicken and Bacon Ranch sandwiches;

- Stating that, even if he had authorized the class action, he would have excluded the claims prior to February 24, 2014, even though the class members were not aware of the untruthfulness of respondents' representations;

b) The appellant intends to demonstrate that;

- There is a nexus between the herein parties;

- At the authorization stage, the Court should have limited itself to the analysis of authorization criteria without making any decision on the merits of the case;

- The syllogism that respondents are liable because of their recepes is defendable;

- The syllogism that respondents are liable because they asked and required their franchisees to use products not in conformity with their representations is defendable;

- The appellant's syllogism is defendable when he takes the position that assigning the use of a trademark to franchisees falls within the definition section 1(g) of the *Consumer Protection Act* and makes the respondents manufacurers;

- The appellant's syllogism is defendant when he takes the position that section 52(1) of the *Compeition Act* is applicable to the case at hand and makes respondents liable towards members of the class;

- The general impression left to class members as consumers can be inferred from name of the Subway sandwiches, their images and their brief description given online and in stores;

- Section 253 of the *Consumer Protection Act* applies to the case at hand and all members of the class are presumed to have disagreed with the contract in case of a prohibited practice by the manufacturer;

- All chicken sandwich consumers should be part of the class;

- Prescription issues should be dealt with at the merits of the case, not at the authorization stage;

c) This error of law is overriding because:

- The first instance judge erred mainly by dismissing the application for autorization to institute a class action based on absence of nexus. By establishing the existence of a nexus, appellant therefore ascertains the validity of his position;

- By showing the respondents' roll in preparing the recepes, their requirement from the franchisees to use products not conform with their representations and assignment of the rights to use the name Subway in the manner indicated in section 1(g) of the *Consumer Protection Act*, the appellant establishes that respondents are manufacturers and liable towards each member of the class;

II- <u>Palpable and overriding errors in findings of fact:</u>

a) The trial judge committed a palpable error by:

- Accepting only the statement of respondents' representative, Ms. Chiara O'Hara-Goncalves, to the effect that the respondents were not manufacturers as defined in the *Consumer Potection Act*; while ignoring the appelant's allegations to the effect that respondents manufactured, imported

and distributed to their network of franchisees the so-called chicken products which were subsequently delivered to Subway franchisees for use in the Subway sandwiches and eventually consumption by members of the class;

- Deciding that the allegations of the application for autorisation to exercise a class action concerning the distribution centers designated by the respondents and the merits of the case were inaccurate;

- Omitting to consider the appellant's allegations and argument to the effect that the respondents are the franchisors of the Subway franchise network and that, as a consequence, they are the ones allowing the use of the Subway trademark on goods and sandwiches sold by their franchisees;

- Ignoring that the franchise and sub-franchise agreements signed by the respondents allow the transfer of the usus of the trademark to franchisees;

- Overlooking the fact that granting the right to use the trademark Subway and requiring franchisees to use the trademark Subway on their products falls within the definition of manufacturer as defined in section 1(g) of the *Consumer Protection Act*;

- Setting aside the appellant's argument to the effect that the respondents are the ones that manufactured and/or requested specific chicken products from suppliers which are subsequently delivered to Subway franchisees through distributors at designated distribution centers;

- Disregarding appellant's argument that the respondents knew the exact content of their chicken and still marketed their franchisee's sandwiches as chicken sandwiches, giving the general impression that the patties were pure chicken;

- Dismissing the appellant's allegations to the effect that general impression that the Subway product names and their images give is that they contain pure chicken patties;

- Dismissing the appellant's allegations as to the DNA content of the Subway chicken patties while accepting the denials made by the respondents as to the DNA content of their chicken patties;

b) The appellant intends to demonstrate that:

- Respondents manufactured, imported and distributed to their network of franchisees the so-called chicken products which were subsequently delivered to Subway franchisees for use in Subway chicken sandwiches and eventually consumption by members of the class;

- The respondents are the franchisors of the Subway franchise network and that, as such, they are the ones allowing the use of the Subway trademark on goods and sandwiches sold by franchisees;

- The franchise and sub-franchise agreements signed by the respondents allow the transfer of the usus of the trademark to franchisees;

c) This factual error is overriding because the first instance judge's decision is based on lack of nexus and absence of sufficient allegations which the allegations and evidence mentioned above completes;

Conclusions

8. The appellant will ask the Court of Appeal to :

I. **ALLOW** the appeal;

II. **SET ASIDE** the first instance judgment;

III. **MAINTAIN** and **GRANT** the present application;

IV. **AUTHORIZE** the institution of a class action in restitution or *SUBSIDIARILY* in reduction of the purchase price and punitive damages;

V. **ATTRIBUTE** to applicant the status of designated representative for purposes of exercising the class action recourse on behalf of the following Group, namely:

"All natural persons who have purchased in 2014, 2015, 2016 and/or 2017 a sandwich containing chicken from a Subway restaurant in the Province of Quebec";

VI. **IDENTIFY** the following principal questions of fact and law to be dealt with collectively:

- Did defendants accurately describe the content of their Subway chicken sandwiches to the members of the class?
- Did defendants misinform, mislead or deceive the members of the class in their description of their Subway chicken sandwich?
- Are defendants at fault towards applicant and other members of the class and did they misrepresent the specifications of their Subway chicken sandwiches?
- Did defendants fail in their duties and obligations under contract, consumer protection law, civil law as well as statutory law respecting sale of food products to the proposed class members?
- Were the products sold to applicant and other members of the class affected by any hidden defect?
- Are members of the class, including applicant, entitled to restitution or reduction of the purchase price of the Subway chicken sandwich?
- Are defendants liable towards applicant and other members of the class for punitive damages?
- Are defendants jointly and severally (solidarily) liable towards applicant and the members of the class?

VII. **IDENTIFY** the conclusions sought with relation to such questions as follows:

GRANT applicant's action;

CONDEMN defendants jointly and severally (solidarily) to restore (restitute) all members of the class, including applicants, the full purchase price paid for the chicken sandwiches purchased or *SUBSIDIARILY* **REDUCE** the purchase price and **CONDEMN** defendants jointly and severally (solidarily) to reimburse to applicant a sum equivalent to same;

CONDEMN defendants jointly and severally (solidarily) to pay to applicant and members of the class punitive damages of ONE HUNDRED FORTY-TWO DOLLARS AND THIRTY-ONE CENTS ($142.31);

THE WHOLE with costs, including the costs for all experts, expertise, exhibits and publication notices;

VIII. **DECLARE** that any member who has not requested his/her exclusion from the class be bound by any judgement to be rendered on the class action, in accordance with the law;

IX. **FIX** the delay for exclusion at sixty (60) days from the date of notice to the members of the class; and

X. **ORDER** that a notice to the members of the class be published on the date to be determined by this honourable Court in the following manner and form attached hereto:

A notice published in the following newspaper:

- La Presse;
- The Montreal Gazette

XI. **THAT** the present court record be referred to the Chief Justice so that he may fix the district in which the class action is to be brought and the judge before whom it will be heard.

XII. **THAT** in the event that the class action is to be brought in another district, the clerk of this Court be ordered, upon receiving the decision of the Chief Justice, to transmit the present record to the clerk of the district designated.

XIII. **THE WHOLE** with costs to follow suit, save in case of contestation;

XIV. **CONDEMN** the respondents to pay the appellant legal costs both in first instance and on appeal.

This notice of appeal has been notified to [name of the respondent, intervenors or impleaded parties], to [name of the lawyer who represented the respondent in first instance] and to the Office of the [Court of First Instance], District of [name of the district in first instance].

Montréal, le 5 mars 2019

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No.: 500-06-000849-170
No.:

COURT OF APPEAL OF QUEBEC
DISTRICT OF MONTREAL

STÉPHANE DURAND,

APPELLANT - Plaintiff

v.

SUBWAY FRANCHISE SYSTEMS OF CANADA, LTD.,
-and-
DOCTOR'S ASSOCIATES INC,

RESPONDENT - Respondents

NOTICE OF APPEAL,
LIST OF SCHEDULES AND SCHEDULE 1

Appellant
March 5, 2019

ORIGINAL

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Our file: 1702JN3519 AN-1795

Within 10 days after notification, the respondent, the intervenors and the impleaded parties must file a representation statement giving the name and contact information of the lawyer representing them or, if they are not represented, a statement indicating as much. If an application for leave to appeal is attached to the notice of appeal, the intervenors and the impleaded parties are only required to file such a statement within 10 days after the judgment granting leave or after the date the judge takes note of the filing of the notice of appeal. (Article 358, para. 2 C.C.P.).

The parties shall notify their proceedings (including briefs and memoranda) to the appellant and to the other parties who have filed a representation statement by counsel (or a non-representation statement). (Article 25, para. 1 of the Civil Practice Regulation)

If a party fails to file a representation statement by counsel (or non-representation statement), it shall be precluded from filing any other pleading in the file. The appeal shall be conducted in the absence of such party. The Clerk is not obliged to notify any notice to such party. If the statement is filed after the expiry of the time limit, the Clerk may accept the filing subject to conditions that the Clerk may determine.
(Article 30 of the Civil Practice Regulation)