CITATION: 1688782 Ontario Inc. v. Maple Leaf Foods Inc., 2016 ONSC 4233
COURT FILE NO.: 60680CP
DATE: 2016/10/31

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
1688782 Ontario Inc. Plaintiff	Kevin L. Ross and Rebecca Case, for the plaintiff
– and –	
Maple Leaf Foods Inc. and Maple Leaf Consumer Foods Inc. Defendants	Elizabeth Bowker, for the defendants
	HEARD: April 26, 2016, Written Submissions : August 2, 2016

LEITCH J.

CERTIFICATION MOTION

[1] The plaintiff seeks an order certifying this action as a class proceeding pursuant to s. 5(1) of the *Class Proceedings Act*, 1992, S.O. 1992 c. 6 (the *"CPA"*).

[2] The plaintiff is a franchisee of Mr. Submarine Limited ("Mr. Sub").

[3] Mr. Sub franchisees are obliged to offer for sale only those ready to eat meats ("RTE meats") approved by Mr. Sub. The defendants are the exclusive supplier of 14 RTE meats that are core menu items for the franchisees of Mr. Sub.

[4] In August 2008, certain RTE meats supplied by the defendants were found to contain listeria which caused an outbreak of listeriosis in Canada. Ultimately, as a result of this outbreak, 22 people died and 57 people became seriously ill.

[5] On August 17, 2008, the defendants announced a recall of certain RTE meats.

[6] The plaintiff alleges that it and other members of the proposed class, the owners and operators of Mr. Sub franchises, suffered losses as a result of the negligence of the defendants. The plaintiff says that, at its heart, its case is one of product liability.

[7] The plaintiff alleges that the defendants are liable for economic losses caused by the breach of their duty to manufacture and provide a product fit for human consumption, which includes a duty to warn when the product that is not inherently dangerous becomes dangerous, and caused by their negligent misrepresentation of the fitness of their product.

The certification criteria

[8] Certification of an action as a class proceeding is mandatory where the following criteria listed in s. 5(1) of the *CPA* are met:

(a) the pleadings disclose a cause of action;
(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff;
(c) the claims of the class members raise common issues;
(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
(e) there is a representative plaintiff who,
 (i) would fairly and adequately represent the interests of the class,
 (ii) has produced 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, and
 (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[9] In *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477 ("*Microsoft*"), the court referenced its earlier decision in *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158 and reiterated that the class representative must show some

basis in fact for each of the certification requirements set out in class proceedings legislation, other than the requirement that the pleadings disclose a cause of action.

[10] The court observed at para. 101 that the standard of proof does not require evidence on a balance of probabilities. It also does not involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action; rather, it focusses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding.

The s. 5(1)(a) requirement – the disclosure of a cause of action in the pleadings

[11] As reiterated in *Microsoft,* the plaintiff satisfies this criterion unless it is plain and obvious and beyond doubt that the plaintiff's claim cannot succeed.

[12] There is a very low threshold to prove the existence of a cause of action (see *Airia Brands Inc. v. Air Canada*, 2015 ONSC 5352 at para. 63 citing *Williams v. Canon Canada Inc.*, 2011 ONSC 6575, 2011 OJ No. 5049 at para. 176 affirmed 2012 ONSC 3692, 2012 O.J. No. 3120 (Div. Ct.) for a summary of the principles applicable to the cause of action requirement).

[13] Defendants may have strong arguments that they owed no duties to the plaintiff but unless it is plain and obvious that a plaintiff's claim will fail, a plaintiff will meet the cause of action requirement on a certification motion.

[14] In addressing this criteria, no evidence is considered. The court addresses only a question of law in determining whether the pleadings disclose a cause of action.

[15] The plaintiff's pleadings were summarized at para. 21 of its factum as follows:

(a) that the defendants owed a duty of care to the Class to manufacture and provide RTE meats that were fit for human consumption; [paras. 13-18]

(b) that the defendants represented that the RTE meats were fit for human consumption; [paras. 11 and 12(j)]

(c) that the Class relied on the defendants to produce and supply RTE meats free of bacterial contamination and fit for human consumption; [paras. 11 and 12(j)]

(d) that the defendants breached the standard of care and their duty of care to the plaintiff and the Class; [para. 30]

(e) that the defendants' representations that the RTE meats were safe for human consumption were untrue and negligently made; [para. 31]

(f) that the defendants failed to warn that their sanitation methods were inadequate to eliminate or control the risk of listeria contamination in the RTE meats; [para. 32] and

(g) that the Class suffered damages as a result [para. 33].

[16] It is important to add that the alleged damages include disposal and destruction of RTE meats, clean-up and mitigation costs, loss of past and future sales, loss of past and future profits, loss of goodwill, loss of the capital value of their franchises and businesses, and special damages for the cost of disposal, destruction and replacement of the defendants' damaged, contaminated and dangerous products.

[17] According to the plaintiff, the issues to be determined in relation to the s. 5(1)(a) criteria are:

(a) whether a duty of care has been properly plead such that it is plain and obvious that there is a properly plead cause of action; and

(b) whether the economic losses plead by the plaintiff are recoverable at law such that it is plain and obvious that there is a properly plead cause of action.

[18] The plaintiff's position is that the defendants' relationship with the plaintiff falls within a recognized duty of care, the duty to supply goods fit for human consumption which includes a duty to warn, and its claim falls under recognized categories for which

economic losses are compensable: the negligent supply of shoddy (dangerous) goods and negligent misrepresentation.

[19] The defendants submit that the plaintiff's statement of issues is incomplete. They say that it is plain and obvious and beyond doubt that no duty of care can be owed due to lack of foreseeability or proximity or due to policy considerations and therefore no cause of action in negligence or negligent misrepresentation can be made out.

[20] In their submission that the plaintiff cannot satisfy the cause of action criterion, the defendants raise a number of arguments which I will summarize as follows:

1. that the essence of the plaintiff's allegation is that the defendants breached a duty of continuous supply;

2. that the relationship between the plaintiff and the defendants is not of a type which has already been judicially recognized as giving rise to a duty of care creating liability for economic losses and therefore a full-scale *Anns* analysis, as reaffirmed and clarified by the Supreme Court of Canada in *Cooper* v. *Hobart*, 2001 SCC 79, is required;

3. that the first prong of the *Anns* test (which addresses the question whether the harm that occurred was the reasonably foreseeable consequence of a defendant's act) cannot be met because there is insufficient proximity between the plaintiff and the defendants and the plaintiff's alleged harm was not a reasonably foreseeable consequence of the defendants' conduct;

4. that even if the first prong of the *Anns* test is satisfied and a *prima facie* duty of care exists, the second prong, which considers the policy implications of imposing that duty of care, leads to the conclusion that the defendants should not be found liable to the plaintiff.

[21] I will begin by addressing the first issue raised by the defendants which raises the question of what duties the plaintiff has alleged it is owed by the defendants.

[22] The defendants' position is that the allegations of harm claimed by the plaintiff are in relation to products that were not supplied to the plaintiff and thus it is the failure to supply RTE meats that has led to the alleged harm, which includes loss of revenue, loss of goodwill, harm to reputation and the costs of disposal of the recalled RTE meats, all of which are in the realm of economic losses.

[23] The defendants acknowledge that the plaintiff does not explicitly refer to a duty of continuous supply but they argue that is the essence of the allegations in the Statement of Claim.

[24] To address this argument, the allegations of negligence in the Statement of Claim must be considered. These allegations were summarized in para. 37 of the plaintiff's factum. As set out, the plaintiff has alleged the defendants were negligent in:

(i) failing to safely and properly manufacture RTE meats so that they were safe for human consumption;

(ii) representing that the RTE meats were safe for human consumption;

(iii) failing to implement a safety plan and a listeria control policy at its plant;

(iv) maintaining inadequate and unsanitary facilities and equipment;

(v) having inadequate processes, such as no post-process pasteurization or use of secondary listeria growth inhibitors;

(vi) inadequately testing RTE meats;

(vii) failing to take adequate steps to eradicate listeria once it had been detected; and

(viii) failing to warn of the presence of listeria once detected.

[25] Considering the foregoing allegations, I cannot accept the defendants' assertion that the plaintiff is alleging a breach of a duty of continuous supply. I agree with the plaintiff that

this assertion ignores the allegations in the statement of claim. I agree with the plaintiff that the allegations of negligence in relation to the issue of the defendants' supply of RTE meats are much broader than breach of a duty of continuous supply.

[26] I turn next to the issue of whether it is plain and obvious that the relationship between the plaintiff and the defendants is not of a type which has already been recognized as giving rise to a duty of care.

[27] The plaintiff alleges that the defendants owed a duty to manufacture and provide a product fit for human consumption and the defendants were negligent in supplying a shoddy or dangerous product. The plaintiff submits that the fact the RTE meats are not inherently dangerous is of no consequence because there should be no distinction between a dangerous good and one that becomes dangerous as a result of negligence. In addition, the plaintiff further submits that this duty includes a duty to warn when a product which is not inherently dangerous becomes dangerous.

[28] Further, the plaintiff asserts that its claim for economic losses falls within a recognized category of cases for which economic losses are compensable as set out in *Canadian National Railway Co* v. *Norsk Pacific Steamship Co.*, [1992] 1 SCR 1021 which has been accepted for decades (see also for example *Martel Building Ltd. v. Canada,* 2000 S.C.C. 60 at para. 38). It submits that two of those categories apply in this case - negligent misrepresentation and negligent supply of shoddy (dangerous) goods.

[29] The plaintiff relies on *Plas-Tex Canada Ltd.* v. *Dow Chemical of Canada Ltd.*, 2004 ABCA 309 and *376599 Alberta Inc.* v. *Tanshaw Products Inc.*, 2005 ABQB 300 for the proposition that a duty is owed by a manufacturer to an intermediary who sells a product to an ultimate consumer. Put simply, the plaintiff says that these cases make clear that a manufacturer must supply a product fit for consumption. A breach of this duty renders the manufacturer liable to the intermediary selling to a consumer for the economic losses sustained by the intermediary.

[30] In *Plas-Tex*, the defendant sold one plaintiff defective resin, knowing that the resin was defective and that it would be used to manufacture pipes that would be installed by other

plaintiffs to carry natural gas. The defective resin made the pipes dangerous because it cracked, allowing natural gas to escape. As a result, the plaintiffs suffered financial hardship eventually going bankrupt. The trial judge's finding that the defendant was liable under contract and in tort based on its failure to warn the plaintiffs was upheld by the Court of Appeal.

[31] In dismissing the appeal, the court first considered the relationship of the parties and whether the harm that occurred was reasonably foreseeable as a consequence of the defendant's acts. It found that the defendant knew the resin was defective, and knew it was going to be sold to plaintiffs who were going to use it to build pipes that would be buried in the ground to carry natural gas. The court also found that each of the plaintiffs were parties closely and directly affected by defendant's acts. In addition, the court found that there were no policy considerations to challenge the findings of foreseeability and proximity.

[32] The court then turned to the second part of the *Anns* test, which applied because a new set of circumstances was being considered, and addressed residual policy issues, such as whether another remedy at law existed and whether establishing a duty of care in these circumstances would give rise to unlimited liability to an unlimited class. The court concluded that allowing a duty of care would not give rise to unlimited liability for the defendant. The circumstances were such that the case was the last in a long line of litigation, and the defendant had already been held accountable for its actions in all other instances. Therefore, the court concluded that the defendant did not face the risk of indeterminate damage claims. Additionally, the court noted that from a policy perspective, the facts supported a finding that the defendant owed a duty of care since it sold a defective product that it knew could be dangerous to consumers.

[33] The court found that there was a duty, independent of contractual obligation, to take reasonable care not to manufacture and distribute a product that is dangerous. Therefore, the plaintiffs, who had not contracted with the defendant, could still pursue a negligence claim for breach of duty.

[34] The plaintiff also relies on *Tanshaw*, where the plaintiff, a nightclub owner, brought an action against the defendants for providing toxic foam to the plaintiff's event causing the plaintiff to suffer significant economic losses. The court found there was a duty owed by the defendants, who distributed and produced the foam, to the users of their product to ensure that their product is suitable and fit for its purpose and the defendants were liable for the economic losses suffered by the plaintiff.

[35] In addition, the plaintiff relies on *Country Style Food Services Inc. v. 1304271 Ontario Ltd.*, 2005 CanLII 23214, [2005] O.J. No. 2730 where the court found a landlord owed a duty of care to a franchisee even though the lease had only been entered into by the franchisor. A site plan of the property was attached to the lease. Thereafter the landlord redesigned the mall without prior notice to either the franchisor or its sublessee, the franchisee. The franchisee alleged that the design changes affected its business and claimed against the landlord for misrepresentation.

[36] The court observed that the landlord knew about the redesign at the time negotiations for the lease were underway; knew that the leased premises were to be sublet by the franchisor to a franchisee; and knew that the original site plan was an attachment to the sublease. The Court of Appeal upheld the trial judge's conclusion that given the circumstances, the landlord possessed a special and unique knowledge of the proposed redesign, a special relationship of proximity existed between the landlord and the franchisee, and the landlord owed a duty of care to the franchisee to provide it with an accurate site plan and ought to have disclosed the intended redesign details to the franchisor or franchisee.

[37] The plaintiff's position is that the class, as the intermediary providing tainted RTE meats to consumers, may recover its economic losses from the source of the tainted meat – the defendants. It emphasizes that here, as was found in *Country Style*, there is no privity of contract and there ought to be a remedy in negligence.

[38] The plaintiff submits that the duty to provide a fit product includes a duty to warn when the product becomes dangerous as a consequence of the manufacturer's negligence. The statement of claim alleges that the defendants were aware of problems in their processing

plant and despite that knowledge, regulatory authorities, Mr. Sub, Mr. Sub franchisees and the public were not advised. It is plead that the defendants knew that if the contaminated product went into the chain of commerce the class members would be harmed. The plaintiff has alleged that the defendants had a duty to warn, which arose before the recall, because they were aware they had a problem in their plant which exposed the plaintiff and the proposed class to the risk of contamination but they did not tell anyone.

[39] On this motion, the defendants accept that a manufacturer owes a duty of care to an intermediary but note that the cases relied upon by the plaintiff involve the actual supply of shoddy or dangerous goods. According to the defendants, it is critical that in *Tanshaw* the club used the foam and its patrons were injured and similarly in *Plas-Tex* the product was actually supplied and incorporated into the plaintiff's products. The defendants emphasize that in contrast, in this case the harm complained of is the non-supply of the goods and there has been no case where a manufacturer has been liable for such a failure. The defendants assert that in order to analogize these circumstances to the circumstances before the courts in the cases relied on by the plaintiff, the defendants would have had to supply the product to the consumer who was harmed.

[40] In my view, the defendants' position leads to a situation where an intermediary, such as the plaintiff, could only sue in tort if its customer was harmed. That should not be a necessary prerequisite to a finding that a manufacturer has a duty to an intermediary to take reasonable care not to distribute a product that is dangerous to the consumer of that product. The harm in issue here is the risk of danger (that is illness or death) that could occur from consumption of the product. That risk of danger led to the recall of the RTE meats and the resulting alleged losses.

[41] In relation to the related duty to warn when a manufacturer is aware that its product has become dangerous, while the defendants acknowledge a manufacturer has a duty to warn consumers of dangers inherent in the use of its product (see *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634), it asserts the plaintiff was not a consumer, the RTE meats were not

inherently dangerous and imposing a duty to warn would have little, if any, impact on the harm suffered by the plaintiff and the class it represents.

[42] However, I note that in *Rivtow Marine Ltd.* v. *Washington Iron Works*, [1973] 6 W.W.R. 692 the court found a duty to warn even though the product in issue (a crane designed and manufactured by one defendant and distributed by the other defendant) was not dangerous in and of itself, rather it was a defect that made it dangerous. In that case the court found the manufacturer had a duty to warn after a crane, virtually identical to the one installed on plaintiff's ship, collapsed and killed its operator. Both defendants were aware of defects in the plaintiff's crane and in the crane that had collapsed. The court concluded that the plaintiff was so closely and directly affected by the faulty design of the crane that the defendants ought to reasonably have contemplated that the defect could harm it. The defendants owed the plaintiff a clear duty to warn of necessary repairs as soon as they became aware of the defects.

[43] In my view it is not plain and obvious that these circumstances are not analogous to those before the court in *Rivtow.* On the other hand, I note also that these circumstances are distinct from those in *Sauer v. Canada (Attorney General),* 2007 ONCA 454 where the Court of Appeal upheld the dismissal of the plaintiff's claim for breach of duty to warn on the basis that the plaintiff was not a purchaser nor a user of the defendant's product and therefore, a warning would not have had an impact on the plaintiff's conduct. As the plaintiff suggests, early warnings could have avoided the listeriosis outbreak and the harm suffered by the plaintiff and the class it represents. The recall might not have been necessary and alternate suppliers could have been accessed while the defendants investigated and remediated the issue at their plant.

[44] Furthermore, I agree with the position advanced by the plaintiff that the duty to warn is arguably heightened where a product which is normally safe becomes dangerous.

[45] Lastly, based on the allegations which are more particularly outlined below, I am not satisfied that it is plain and obvious that there is no special relationship between the plaintiff and the defendants so as to conclude that there is no viable cause of action in negligent misrepresentation.

[46] I am satisfied that it is not plain and obvious that the plaintiff's claims do not fall within a recognized category for which economic loses are compensable.

[47] However, considering the significance of this motion, the importance of the cause of action criterion and the focus in argument on the application of the *Anns* test, I will address the further arguments of the defendants that it is plain and obvious that the foreseeability and proximity requirements of the *Anns* test cannot be met.

[48] In relation to this issue, the term or label "proximity" connotes that the circumstances of the relationship between a plaintiff and a defendant are such that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting its affairs (see *Cooper v. Hobart* 2001 S.C.C. 79 at para. 33 and *Martel Building Ltd. v. Canada*, 2000 S.C.C. 60 at para. 49 citing *Hercules Management Ltd. v. Ernst and Young*, [1997] 2 S.C.R. 165 at para. 24).

[49] In addition, I note that, as stated by the court in *Cooper* at para. 34, "defining the relationship may involve looking at expectations, representations, reliance and the property or other interests involved … factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant".

[50] I note also that as instructed in *Knight* v. *Imperial Tobacco Canada Ltd.*, 2011 SCC 42, in applying the first part of the *Anns* test, proximity and foreseeability are heightened concerns in claims for economic loss arising from negligent misrepresentation and are established if there was a "special relationship" between the parties. This special relationship is established where (1) a defendant ought reasonably to foresee that the plaintiff will rely on his or her representation; and (2) reliance by the plaintiff would be reasonable in the circumstances.

[51] The defendants assert that the proximity and foreseeability requirements of the *Anns* test cannot be met in these circumstances because the relationship between the defendants

and the plaintiff is not sufficiently close and direct. At best, the defendants were aware there were franchisees who would be buying their products.

[52] The defendants note there is no contract between the plaintiff and the defendants and the expectation question can be informed by that fact.

[53] The defendants also argue that the plaintiff's economic losses are not reasonably foreseeable given that the defendants continued to supply 12 core menu items without interruption and that the plaintiff could have exercised its right to replace the recalled products from an alternative supplier.

[54] In addition, the defendants query how a reaction of customers, reasonable or not, is foreseeable. In other words, how is it foreseeable in law how the media will report and how the public will react? The defendants assert that such reactions are imaginable only.

[55] Further, the defendants query how it is reasonably foreseeable that customers would not return to the Mr. Sub franchise after the RTE meats were recalled and how is it foreseeable that a withdrawal of two out of fourteen RTE Meat products will result in a loss of profit and goodwill.

[56] On the other hand, the plaintiff argues that the harm the outbreak and resulting recall caused – the drastic decline in sales and loss of profit and goodwill – was a reasonably foreseeable consequence of the defendants' negligence in supplying RTE meats which were unsafe for human consumption. In other words, it argues that it can establish the requisite foreseeability of harm and proximity between the parties.

[57] In relation to foreseeability, the plaintiff has plead the following as summarized in para. 30 of its factum:

> With respect to reasonable foreseeability it is plead that:
>
> (a) Maple Leaf is a large producer of RTE Meats that are distributed across Canada [para. 4];
>
> (b) Maple Leaf entered into a contract with Mr. Sub as a result of which, to their knowledge, it was the exclusive supplier to the Class of RTE meat products [para. 8-10, 12(a), 12(b)];

(c) Maple Leaf became the sole source of all meat products distributed to the Class for sale in their restaurants. The RTE Meats were subject to strict specifications and control with respect to ingredients, taste, shape, size, colour, and weight. The intention and result of the strict specifications was the creation of a RTE Meat product line unique to the Mr. Sub franchise [paras. 8 - 9];

(d) Listeria is well known, and was known to Maple Leaf, to have serious consequences for human health including death [para. 19];

(e) Maple Leaf knew that listeria is able to thrive in a refrigerated environment [para. 20];

(f) Maple Leaf also knew that the presence of listeria in RTE Meats at the time these left Maple Leaf's processing facilities would multiply and grow to dangerous levels by the time the RTE Meats reached the Class and their customers [para. 20];

(g) Any RTE Meats contaminated, or potentially contaminated, with listeria are dangerous and unfit for human consumption, and would therefore have to be disposed of or destroyed to prevent Mr. Sub's customers from becoming ill [para.12(f), 19];

(h) In the months leading up to the Maple Leaf listeriosis outbreak, Maple Leaf received repeated and consistent reports confirming the persistent presence of listeria in the Bartor Plant and in their RTE Meats [para. 27];

(i) Maple Leaf knew that this presence of listeria represented a serious threat to the public and did not report this to CFIA inspectors, Mr. Sub, the Class or the public at any time prior to the Maple Leaf listeriosis outbreak [para. 29];

(j) In August 2008, certain of Maple Leaf's RTE meat products were recalled due to suspected contamination with listeria and the expanded list of recalled meat products included RTE Meats sold exclusively at Mr. Sub restaurants [para. 25];

(k) Any RTE Meats distributed to the Class contaminated with listeria would be dangerous goods not safe for human consumption and the Class would be required to dispose of or destroy those RTE Meats to prevent their customers from becoming ill [para. 12(f)];

(l) If Maple Leaf could not distribute RTE meats to the Class, the Class would not be able to procure RTE meats from any other supplier [para. 12(g)];

(m) The RTE meats were an integral and essential part of the Class members' businesses without which their businesses could not operate. Any sudden failure on the part of Maple Leaf to supply RTE meats to the Class would result in immediate loss of revenue and goodwill for the Class members [para.12(c), 12(d), 12(g)];

(n) The quality and safety of the RTE meats was essential to the maintenance of the Class members' goodwill and reputation in the community and to the Mr. Sub brand upon which the Class depended [para. 12(e)]; and

(o) The Class was in a close, unique and exclusive relationship with Maple Leaf. If a widespread outbreak of bacterial contamination occurred which included the RTE meats, the Class would become publicly identified as retailers of Maple Leaf's meat products and would suffer a loss of revenue, profit, and goodwill as a result.

[58] In relation to proximity, the plaintiff has plead the following in its Statement of Claim, as summarized in para. 32 of its factum:

> With respect to proximity … it is plead that:
>
> (a) Maple Leaf was in a contractual relationship with Mr. Sub; [para. 8]
>
> (b) Maple Leaf knew that the Class had to use Maple Leaf RTE Meats exclusively; [paras. 8 - 10, 12(a) and (b)]
>
> (c) Maple Leaf represented that the RTE Meats were safe for human consumption; [para. 11]
>
> (d) The plaintiff and the Class reasonably expected and relied on Maple Leaf to produce and supply RTE Meats that were safe for human consumption; [paras. 11, 12(j)] and,
>
> (e) Maple Leaf knew that the Class could or would be harmed by the Maple Leaf listeriosis outbreak, as set out in their Statement of Defence: [paras. 22-23, 26-27]
>
> (i) Maple Leaf notified Mr. Sub in advance of the public notice of recall about the recall of the RTE Meats;

(ii) Maple Leaf assisted Mr. Sub in its communications with the Class about the recall; and

(iii) Maple Leaf made arrangements to have a distributor pick up the contaminated RTE Meat products from the Class.

[59] In their arguments that the cause of action criterion cannot be met, the defendants emphasized their position that this action seeks to recover lost sales relating to a disruption in the supply of RTE meats. As earlier noted, this argument mischaracterizes the allegations in the Statement of Claim.

[60] Similarly, the defendants' argument that they may have had a general awareness of the existence of franchisees, which is not the basis for any relationship of proximity or foreseeability, ignores the allegations in the Statement of Claim.

[61] Considering the allegations in the Statement of Claim and accepting them as proven for the purposes of analyzing the cause of action criterion, I agree with the conclusion with respect to foreseeability proposed by the plaintiff in para. 31 of its factum as follows:

> It is therefore foreseeable that when Maple Leaf produced and placed into the chain of distribution contaminated RTE Meats knowing that the Class would receive and sell these to the public (i) the customers of the Class would be in danger from eating the meat; (ii) once the danger was known, the Class would have to dispose or destroy the contaminated product to prevent harm to their customers; (iii) the Class would lose customers to competitors because customers would be afraid of the danger of listeria; and (iv) the Class could not replace the meat products because of the exclusivity provisions in the contract between Maple Leaf and Mr. Sub. [paras. 14-15.] In addition, it was foreseeable that negligence on the part of Maple Leaf would result in a recall of the potentially contaminated RTE Meats distributed to the Class and that such recall would be widely publicized and result in a loss of sales, profit and goodwill for the Class. [paras. 14-15.]

[62] In relation to the proximity requirement, I do not agree with the defendants that the plaintiff, as an intermediary between the defendants and ultimate consumer, is too far removed from the defendants and it is plain and obvious they are not in a proximate relationship.

[63] In *Norsk*, which was followed in *Cooper* and applied in *Martel,* a tugboat owned by the defendant struck and damaged a bridge owned by Public Works Canada. The plaintiff in *Norsk* had a contractual right to use the bridge and while the bridge was closed for maintenance, it had to reroute its trains and as a result, incurred additional operating costs. It sought damages to recover these costs from the defendant for its negligence in damaging the bridge.

[64] The court concluded at paras. 49 - 52 that pure economic loss is *prima facie* recoverable where, in addition to negligence and foreseeability, there is "sufficient proximity between the negligent act and the loss". In order for liability to be imposed on an alleged tortfeasor, there must be a sufficiently close relationship between the parties. The court stated that a comprehensive view of proximity requires that the court review all of the factors connecting the negligent act to the loss; including the relationship between the parties, physical proximity, circumstantial proximity, and causal or assumed indicators of closeness.

[65] In *Norsk,* the court found that the relationship between the plaintiff and the bridge was sufficient enough to satisfy the proximity element. The plaintiff's property was in close proximity to the bridge, the property could not be enjoyed without the bridge, and the plaintiff supplied materials to the bridge, inspected the bridge and provided consulting services for the bridge.

[66] The court stated at para. 71 that the close relationship between plaintiff and the owner of the bridge could be classified as a "joint or common venture" and when a relationship can be classified as a joint or common venture with the owner of damaged property, a party can recover its economic loss even though it did not own the damaged property. The court confirmed that this would not open the floodgates to unlimited liability, an important finding discussed further below.

[67] The allegations of proximity set out above address the factors that *Norsk* suggested are relevant to the proximity requirement.

[68] Further support for a finding that it is not plain and obvious that the *Anns* test cannot be met, is found in *Arora* v. *Whirlpool Canada LP*, 2013 ONCA 657 where *Norsk* was considered. In *Arora,* a plaintiff sought to certify a class action claim for negligence to recover pure economic loss caused by the defendant's negligent design of a non-dangerous consumer product (washing machines). Although the court ultimately found that the pleadings did not disclose a cause of action for policy reasons, the court found, relying on *Norsk*, that the circumstances fell within the established category of negligent supply of shoddy goods or structures, giving rise to a *prima facie* duty of care.

[69] I note also that in *Sauer,* the plaintiff, a cattle farmer in Ontario, commenced a proposed class action against the defendant for negligent manufacturing in making the animal feed that allegedly infected an Alberta cow with mad cow disease and breached a duty to warn that the feed might be contaminated. Although, the plaintiff did not purchase or use the defendant's product and had no connection to the infected cow other than he was also a cattle farmer and his business suffered as a result of the cow getting infected, the motion judge did not strike out the claim of negligent manufacturing because it was not "plain and obvious" that the claim would fail for want of proximity. The appeal was dismissed on the basis that the consequences of contaminated feed of a single cow is shared by all commercial cattle farmers, and in this way all commercial cattle farmers are linked to the defendant as victims of the feed contamination. It was not plain and obvious that plaintiff's claim would fail in this regard.

[70] Considering the allegations in the statement of claim set out above, I cannot find that it is plain and obvious that the court will not find the defendants owed a duty of care to the plaintiff and the class it represents. The plaintiff is within a known and readily identifiable category of persons. The defendants supplied to the plaintiff, an entity it had a close and direct relationship with as an exclusive supplier, a defective product dangerous to public health, knowing that the product would be offered for sale to consumers who could be injured from consuming the product thereby causing economic losses to the plaintiff.

[71] There are no policy concerns which arise when considering the first prong of the *Anns* test.

[72] Having reached these conclusions, I turn to the next argument of the defendants - that it is plain and obvious that the defendants cannot be found liable to the plaintiff for policy reasons. The defendants assert that even if a *prima facie* duty of care is found there are policy reasons to reject it. They argue that there are many reasons why a manufacturer cannot supply a product such as financial reversal and other operational problems and finding a duty of supply would lead to all kinds of difficulties and liability to an indeterminable class. Therefore, public policy concerns regarding indeterminate liability should negate any duty of care.

[73] The defendants also argue that they voluntarily recalled, out of an abundance of caution, product that may or may not have been contaminated. As they put it in para. 88 of their factum, imposing a duty in these circumstances "would be tantamount to punishing" them "for acting in complete good faith and taking every precaution possible to ensure that any potentially contaminated product was recalled". Again, they say that public policy considerations weigh against finding a duty of care.

[74] I note that in *Norsk*, the Supreme Court of Canada made clear that the proximity requirement avoids the potential for imposing unlimited liability on a tortfeasor.

[75] Further, the conclusions in *Hercules*, where the Supreme Court of Canada highlighted the problem of indeterminate liability in the context of a claim for economic loss, resolve the policy concerns raised by the defendants. In *Hercules*, shareholders, who were provided with annual audit reports, brought an action against the auditors for negligently preparing the reports. The court found that a *prima facie* duty of care arose since it was reasonably foreseeable that shareholders would rely on the audit reports. However, the court determined that a duty of care could not be imposed based on policy considerations taken into account in the second part of the *Anns* test, especially in the case of auditors where a number of different people may rely on an auditor's report unknown to the auditor in question. As the court made clear in *Hercules,* a relationship of sufficient proximity in a negligent misrepresentation case must be one where the plaintiff has relied on the

defendant's words. This relationship of reliance is evident when the defendant ought to reasonably foresee that the plaintiff will rely on his or her representations and reliance on the part of the plaintiff is reasonable in the circumstances.

[76] It is significant that in *Hercules*, the court noted that in instances where the auditor is aware of the identity of the plaintiff, and where the document is used for the specific purpose for which it was made, the scope of liability is sufficiently narrowed.

[77] It is also significant that these circumstances are different from those before the court in *Martel, Knight* and *Arora*. In *Martel*, the court found that the although the circumstances satisfied the first prong of the *Anns* test, to impose a duty of care upon negotiations would have deleterious effects; therefore, on policy grounds, the court concluded that no duty of care could arise in claims stemming from the conducting of negotiations. In *Knight*, the court concluded that because the statements alleged to be negligent misstatements were protected expressions of government policy, recognizing a duty of care by the government in these circumstances would expose the government to indeterminate liability. In *Arora*, the court ultimately concluded that recognizing a cause of action in negligence for diminution in value for a defective, non-dangerous consumer product would overburden the court; and the plaintiff's claim was better dealt with as a claim in contract rather than tort since the issue related to product quality and determining whether the consumer received value for their money.

[78] I agree with the plaintiff that it is not plain and obvious that it is unimportant to recognize and enforce a duty of care in these circumstances to heighten accountability and it can be argued there are policy reasons to recognize this duty, particularly when the defendants were so closely connected to the plaintiff who was in the defendants' sphere of knowledge. This is consistent with the conclusions in *Plas-Tex* and *Tanshaw* where it was observed that policy considerations weigh in favour of a duty considering the danger to the public.

[79] I also agree with the plaintiff that there are arguments that indeterminate liability is not a concern here regarding the circumstances of proximity set out above. The defendants knew the identity of all of the Mr. Sub franchises and considering the actions of the

defendants, as the plaintiff puts it in para. 43 of its factum, they "had them in their contemplation as these events unfolded".

[80] In *Sauer*, the court rejected the defendant's argument that the plaintiff's claim imposed unlimited liability to an unlimited class since the statement of claim quantified the size of the class and the quantum of loss of each class member. Here too, the size of the class is known.

[81] The defendants referenced the decision of the British Columbia Court of Appeal in *M. Hasegawa & Co. v. Pepsi Bottling Group (Canada), Co.*, 2002 BCCA 324 for the proposition that economic losses resulting from the purchase of a defective product were not recoverable from the supplier. Based on that decision, they assert that only if a defect is dangerous will economic losses be recoverable.

[82] In relation to that argument I agree with the plaintiff that it is significant that in *Hasegawa* the product in issue was found to be safe. Furthermore, the Court of Appeal confirmed in *Arora* that the law is still undecided on whether or not recovery should be allowed in cases of pure economic loss where goods are shoddy but not dangerous noting that in *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85, the Supreme Court of Canada explicitly refrained from ruling on that point in order to leave it open for future consideration. In *Winnipeg Condominium*, the court found the general contractor of a building liable for negligence to a subsequent purchaser of the building for the reasonable costs of putting the building into a non-dangerous state as the contractor owed a duty to occupants to take reasonable care to ensure that the building did not contain defects that posed foreseeable real and substantial danger to their health and safety.

[83] More importantly, although the court in *Arora* stated that it is not settled that a party who supplies a non-dangerous product is responsible for the economic losses caused by that product, it is not plain and obvious that a court could not find that the RTE meats were dangerous goods and the recall was for safety reasons.

[84] One further observation should be made. As the plaintiff has outlined, the nature of the economic losses claimed by the plaintiff are supported in the jurisprudence (see *Rivtow* where the loss of profits was recovered; *Winnipeg Condominium* where the cost of repair was recovered and lost profits were not claimed; and *Plas-Tex* and *Tanshaw* where both the cost of repair and lost profits were recovered).

[85] For these reasons, I find that the plaintiff has satisfied the cause of action criterion for certification.

The evidentiary record presented on the certification motion relevant to the remaining certification criteria

[86] The plaintiff's motion record contains an affidavit of Mr. George Mitropoulos sworn December 10, 2014. He is the president of the plaintiff. His father, Mr. Nick Mitropoulos operated a Mr. Sub franchise since January 1990. Mr. George Mitropoulos worked in this business. Their franchise was renewed for a further five-year term on February 1, 2006 and this franchise renewal agreement was assigned to the plaintiff which continued to operate a Mr. Sub in Mississauga, Ontario with an exclusive defined territory.

[87] Mr. George Mitropoulos deposed that the plaintiff's franchise agreement with Mr. Sub was a standard form which Mr. Sub required from all of its franchisees.

[88] Pursuant to its contractual obligations with Mr. Sub, the plaintiff was obliged to purchase all products from either Mr. Sub or sources or suppliers designated in writing by Mr. Sub. The term "products" was defined in the franchise agreement to mean all food, beverages, merchandise and any other items approved by Mr. Sub for sale.

[89] Mr. Sub franchisees who wished to purchase products from sources or suppliers other than those approved or designated in writing by Mr. Sub were obliged to request Mr. Sub's approval of such other source, supplier, product or service. Mr. Sub had thirty days to consider such a request but had the absolute right to disapprove of any such other source, supplier, product or service.

[90] Mr. Sub specified that the defendants, through a distributor called Summit Food Services Distributor, was to provide all RTE meats for the plaintiff's franchise and for all other Mr. Sub franchisees. In particular, the plaintiff was obliged to purchase corned beef, roast beef and turkey from the defendants.

[91] The listeriosis outbreak which occurred in August 2008 had its source in RTE meats manufactured by the defendants in its facility in Toronto, Ontario.

[92] On August 17, 2008, the Canadian Food Inspection Agency issued a Health Hazard Alert warning the public not to serve or consume roast beef and corned beef manufactured by the defendants.

[93] On August 18, 2008, Mr. Nick Mitropoulos was informed of the listeriosis outbreak by Mr. Sub and that it would likely be necessary to remove product from its restaurant.

[94] On August 19, 2008, the defendants announced a recall of RTE Meats.

[95] On August 19, 2008, a health inspector attended the plaintiff's business premises and removed all inventory of RTE meats identified in the recall which depleted the plaintiff's inventory of corned beef, roast beef and turkey. As the defendants point out, the turkey product was not an Affected Product – a product subject to recall. Also, as Mr. George Mitropoulos confirmed when cross examined on his affidavit, the total product the plaintiff had on hand, which was subject to recall was two boxes of roast beef and four boxes of corned beef, with a total combined value of $240.96.

[96] As Mr. George Mitropoulos set out in his affidavit at para. 13, based on media publicity on a national basis the public was made aware "that among the products affected were RTE meats sold exclusively at Mr. Sub stores". In other words, according to national media coverage, Mr. Sub was identified as selling the recalled tainted RTE meats and people had become ill and had died as a result of ingesting the contaminated RTE meats.

[97] The Canadian Food Inspection Agency issued further alerts later on August 25, 2008 providing a link to affected products which included Mr. Sub products.

[98] As Mr. Mitropoulos deposed at para. 15 of his affidavit, "Mr. Sub was unique among submarine sandwich restaurants for being identified as a purveyor of Maple Leaf deli meat products".

[99] He went on to say that Mr. Sub's significant competitors were not so identified in the public domain and he believed that the recall provided his competitors "with a significant competitive advantage over Mr. Sub restaurants to the significant detriment of Mr. Sub franchisees". He believed that "sales at our competitors' stores rose and they were able to capture a portion of our market share, while our sales declined and our market share eroded".

[100] Mr. Mitropoulos further outlined in his affidavit that the plaintiff's sales declined as did its profits following the outbreak and its sales and profits never returned to the levels that were sustained prior to the outbreak. His affidavit included gross sales data for periods of time before and after the announcement of the listeria outbreak.

[101] Ultimately, Mr. Mitropoulos concluded at para. 21 of his affidavit as follows:

> I verily believe that this drastic drop in sales was entirely attributable to the Maple Leaf listeria outbreak, the loss of customer confidence in Mr. Sub restaurant's as a result of the outbreak, and the consequent loss of market share. This loss of consumer confidence and market share continued, and our gross sales never rebounded to the same consistent levels that had been achieved prior to the outbreak. As a result, the business no longer achieved sales and profits which justified our continued time commitment in working in the business, and we therefore closed the business in November, 2010.

[102] As the defendants highlighted, the plaintiff believes it lost business after the recall because, as Mr. Mitropoulos indicated on his cross examination, customers simply didn't come into the store at all because of the listeriosis outbreak; and/or customers that did come in would ask whether that store carried the defendants' products and then leave.

[103] The plaintiff's motion record included what was referred to as the Weatherill report. This report published in July 2009 resulted from the findings of Ms. Sheila Weatherill who

was appointed by the Government of Canada to conduct an independent investigation of the listeriosis outbreak. It was noted therein that the defendants had convened a panel of international food safety experts which found that the most probable cause of the listeriosis outbreak was contamination of meat slicing equipment; the defendants had admitted that as early as the summer and fall of 2007 its environmental testing program had shown positive listeria environmental test results; the data was not being analyzed to detect trends over time because the original source of the bacteria was not recognized and treating the underlying cause of the contamination was not addressed until after the outbreak; and had they made use of the trend analysis contained in the environmental testing program the problem could have been detected much sooner.

[104] As the plaintiff points out, the Weatherill report makes clear that a voluntary recall of a product does not indicate that the product is not contaminated; a mandatory recall ordered by the government is exceptional and arises when a company is unwilling or unable to recall its contaminated product or when a company cannot be found; and, the vast majority of companies voluntarily recall their product.

[105] The plaintiff's motion record also included an affidavit of Dr. James L Marsden sworn December 12, 2014. Dr. Marsden is a Professor of Food Safety and Security in the Department of Animal Science and Industry at Kansas State University in Kansas, USA. He has been retained by the plaintiff as an expert in the field of food processing, food safety and government regulations governing food safety and has authored a report dated December 12, 2014 in which he opined that the defendants failed to implement preventative measures and control strategies for listeria consistent with the standard of care that existed in the processed meat industry in 2008. It was also his opinion that the reason for the listeriosis outbreak was the inadequate design of the defendants' food safety system and their plan for the control of listeria.

[106] The responding motion record of the defendants contained an affidavit of Mr. Jeff Peterson, the National Account Manager of the defendants. He deposed that the defendants had a partnership agreement with Mr. Sub pursuant to which Mr. Sub agreed to honour the exclusive supplier status of the defendants for 14 core menu RTE meats;

the defendants would sell RTE meats to various distributors; and the distributors would sell and deliver the RTE meats to the Mr. Sub franchisees. Mr. Peterson was cross examined on his affidavit during which he indicated that Mr. Sub was one of the defendants' bigger national accounts.

[107] Mr. Peterson acknowledged on his cross examination that the defendants dealt directly with the Mr. Sub franchisees with regard to credits, that there was a dedicated toll free line available to the franchisees which permitted them to communicate directly with the defendants, that the defendants had a complete listing of the franchisees with contact information, that the franchisees could contact the defendants directly if they had an issue with a product and the defendants commonly provided information to Mr. Sub knowing it would then provide it to its franchisees.

[108] In his affidavit, Mr. Peterson outlined the background of the recall of the affected RTE meats and the resulting actions by the defendants. This included, what he described as, gratuitous assistance to Mr. Sub and its franchisees – a call to Mr. Sub's chief executive officer, assistance in preparing communications to Mr. Sub's franchisees, the establishment of a quality assurance hotline for food service providers including Mr. Sub franchisees, giving advice to franchisees who called him directly when government inspectors were in their restaurants, and retaining the distributors to attend at each Mr. Sub location to retrieve the Affected Products at the defendants' expense and crediting the distributors for the Affected Products so that the Mr. Sub franchisees would not have to pay for them. On his cross examination, Mr. Peterson indicated that once the Affected Products were identified, Mr. Sub and its franchisees immediately came to mind because of the national scale of the account and he initiated communication with Mr. Sub to ensure the franchisees stopped selling the Affected Products.

[109] Mr. Peterson also set out that in early September 2008, when it became clear that the defendants' plant would not reopen soon, he spoke with Mr. Sub's chief executive officer and ultimately encouraged him to source alternative suppliers despite the exclusivity terms of their partnership agreement.

[110] The defendants point out that, as Mr. Mitropoulos acknowledged on his cross examination, the plaintiff was aware that it had the right under its franchise agreement to seek permission from Mr. Sub to sell products from alternate suppliers, but it did not exercise that option. However, the plaintiff emphasizes that if this "right" was to mitigate or avoid all losses to the class, each franchisee would have had to undertake this process which would take time in addition to the thirty-day period provided for in the franchise agreement and any steps to access an alternative source was "a very sensitive matter". Furthermore, the plaintiff points to evidence that the defendants consistently reassured its customers that operations would be resumed imminently.

[111] The defendants point out that Mr. Mitropoulos confirmed on cross examination that the plaintiff received all supplies other than the two Affected Products and six to eight weeks after the recall it had a new source of roast beef and corned beef and thereafter the plaintiff had available all of the products it had prior to the recall. The plaintiff emphasizes that the defendants knew that for six to eight weeks the franchisees had no roast beef or corned beef to sell.

[112] The defendants' plant reopened in October 2008. Thereafter, the defendants paid compensation to Mr. Sub to cover, among other things, the inconvenience caused by the recall. Later, Mr. Sub and the defendants entered into a Supply and Settlement Agreement dated September 28, 2010 pursuant to which the defendants agreed to reduce the price of every product sold to Mr. Sub. This 2010 agreement relieves Mr. Sub from the exclusive supply arrangement if the defendants cannot supply product on a timely basis or if a health or safety issue arises in relation to their products.

The s. 5(1)(b) Requirement – An identifiable class of two or more persons that would be represented by the representative plaintiff

[113] The plaintiff proposes the following class definition:

> All persons, whether natural or corporate, who, on August 17, 2008 were franchisees of the restaurant franchise operating in Canada of which Mr. Submarine Limited was the franchisor.

[114] The defendants agreed that this proposed class definition satisfies the s. 5(1)(b) criterion.

[115] This proposed class definition satisfies the requirements described by Chief Justice McLachlin in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 at para. 38 that the class be defined clearly at the outset of the litigation; the proposed definition states objective criteria by which members of the class can be identified; the proposed definition bears a rational relationship to the common issues asserted by all class members; it does not depend on the outcome of the litigation; any particular person's claim to membership in the class is determinable by stated, objective criteria and it is not "unnecessarily broad".

[116] The identity of franchisees of Mr. Sub as of August 17, 2008 is readily ascertainable. The materials filed on the certification motion reveal that counsel for the plaintiff has been in contact with many franchisees and they are interested in participating in a class action.

[117] I am satisfied that the s. 5(1)(b) criterion is met.

The s. 5(1)(c) Requirement – The claims of the class members raise common issues

[118] The plaintiff proposes seven common issues:

(a) Did the defendants produce, process, sell and distribute ready to eat meat products ("RTE Meats") containing the bacterium *Listeria monocytogenes*, rendering the RTE Meats dangerous and unfit for human consumption?

(b) Did the defendants:

(i) owe a duty of care to the Class in relation to the production, processing, sale and distribution of the RTE Meats?

(ii) owe a duty of care with respect to any representations made that the RTE Meats were fit for human consumption and posed no risk of harm?

(iii)owe a duty to warn in relation to any positive tests regarding the presence of *listeria monocytogenes* in their Bartor Road Plant and RTE Meats?

(c) If so, what standard of care was owed to the Class by the defendants?

(d) Did the defendants breach the standard of care? If so, when and how?

(e) If so, did the breach of the standard of care by the defendants cause losses to the Class?

(f) Are the defendants liable to pay damages to the Class?

(g) Should the defendants pay prejudgment and post judgment interest to the Class? If so, who should pay prejudgment and post judgment interest, and at what rate?

[119] In *Microsoft* the court instructed that to establish commonality, evidence that the acts alleged actually occurred is not required; rather, the factual evidence required at the certification stage goes only to establishing whether these questions are common to all class members.

[120] The defendants agree that the proposed common issues (a), (b), (c), (d), (f), and (g) satisfy the commonality criterion.

[121] With respect to the proposed common issue (e), the defendants note that the plaintiff has acknowledged that damages cannot be a common issue because as set out in para. 145 and 146 of the plaintiff's factum; "the main individual issue that will exist for each Class Member will be entitlement to and assessment of individual damages" and "the individual issues that remain after the determination of the common issues could be addressed through a process designed by this Court via the powers granted under s.25 of the *CPA*". That is, as the plaintiff clarifies in its reply factum at para. 40, common issue (f) relates to "the legal obligation of the defendants to pay damages and does not speak to quantum on a general or individual basis".

[122] The defendants' position is that the question whether the breach of the standard of care by the defendants caused losses to the class cannot be answered on a class basis. Put at its simplest, the position of the defendants is that the causation issue cannot be done on a class basis and it must be done on an individual basis.

[123] However, I am satisfied that whether a breach of the standard of care caused losses to the class is an appropriate common issue and there is some basis in fact for the court to determine this general causation question. That is, there is evidence that the defendants caused losses to the class: the evidence of Mr. Mitropoulos that the outbreak caused a decline in the plaintiff's sales and other consequences; the evidence respecting media coverage of the outbreak and recall and the connection to the Mr. Sub franchisees available from Mr. Marsden's and Mr. Smith's affidavit; the evidence of Mr. Peterson that as a result of the recall the franchisees were not supplied roast beef and corned beef by the defendants; the evidence that Mr. Sub brought an action seeking reimbursement of loss of royalty payments based on a reduced volume of sales from the class; and that Mr. Sub received compensation from the defendants.

[124] I agree with the plaintiff that it has presented evidence demonstrating some basis in fact that there is a workable method for determining loss and causation and the comparative analysis set out in Mr. Mitropoulos' affidavit can be undertaken for each class member during an individual issues stage as well as on a class wide basis given the records maintained by Mr. Sub and the defendants.

[125] I am satisfied that this claim raises the common issues proposed by the plaintiff and turn to the remaining certification criteria.

The s. 5(1)(d) Requirement – The preferability of a class proceeding to resolve the common issues

[126] The defendants have admitted that this proposed class action satisfies the preferability criterion.

[127] *Fisher v. IG Investment Management Ltd.*, 2013 SCC 69, [2013] 3 S.C.R. 949 provides direction that the preferability analysis is to be "conducted through the lens of the three

principal goals of class actions" – access to justice, behaviour modification and judicial economy.

[128] As Mr. Mitropoulos stated in para. 22 of his affidavit, the plaintiff "simply cannot afford to prosecute an individual action against the defendants" and he believes based on his communications with other franchisees (particularly in the Greater Toronto Area), that many of them would similarly be unable to pursue individual litigation. In addition, as he set out at para. 24 of his affidavit, "current Mr. Sub franchisees who may have a claim for the losses they suffered as a result of the listeria outbreak would be very hesitant to commence legal proceedings on their own, out of fear of prejudicing that business relationship".

[129] This proposed class proceeding is consistent with the goals of the *CPA*. It offers access to justice, there will be judicial economy by avoiding duplication of fact finding and legal analysis and behaviour modification will be achieved.

The s. 5(e) Requirement – The representative plaintiff fairly and adequately represents the interests of the class; has a workable plan for the advancement of the class proceeding and does not, on the common issues, have an interest in conflict with the interest of other class members

[130] The defendants agree that this certification criterion is met.

[131] I note that the plaintiff has a real interest in the dispute and will provide fair representation to the class.

[132] The motion materials outline the education and qualifications of Mr. Mitropoulos, the president of the proposed representative plaintiff, which has, as the plaintiff's counsel notes, "demonstrated that it is willing to vigorously and capably prosecute the interests of the class".

[133] Mr. Mitropoulos in his affidavit stated his commitment to do everything necessary to ensure that the plaintiff properly fulfills its role as representative plaintiff. He has outlined the steps that have been undertaken to date and the further work that he is

prepared to undertake which reflects his understanding of the process of this proceeding if it is certified as a class action.

[134] He has also confirmed his understanding of his responsibilities to act as a representative plaintiff in the best interests of the class.

[135] The defendants agreed that the plaintiff has produced a plan that sets out a workable method to advance the proceeding on behalf of the class and for notifying class members of the proceeding.

[136] I agree with the observations made by counsel in relation to this criterion and am satisfied that the s. 5(1)(e) requirement is met.

Conclusion

[137] For these reasons, an order will go certifying the action as a class proceeding.

"Justice Lynne C. Leitch"

Justice Lynne C. Leitch

Released: October 31, 2016

CITATION: 1688752 Ontario Inc. v. Maple Leaf Foods Inc., 2016 ONSC 4233
COURT FILE NO.: 60680CP
DATE: 2016/10/31

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

1688782 Ontario Inc.

Plaintiff

– and –

Maple Leaf Foods Inc. and Maple Leaf Consumer Foods Inc.

Defendants

REASONS FOR JUDGMENT

Leitch J.

Released: October 31, 2016