

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) Elizabeth Bowker, for the defendants
Consumer Foods Inc.)
)
Defendants)
)
)
)
) HEARD: April 26, 2016

LEITCH J.

SECTION 2(3)(b) LEAVE MOTION

[1] The plaintiff seeks leave of the court to bring its motion for certification of the action as a class proceeding and for its appointment as representative plaintiff pursuant to s. 2(3)(b) of the *Class Proceedings Act*, 1992, S.O. 1992 c. 6 (the "CPA").

The Applicable Provision of the CPA

[2] Section 2(3) of the CPA provides that a certification motion shall be made,

(a) within 90 days after the later of,

(i) the date on which the last statement of defence, notice of intent to defend or notice of appearance is delivered, and

(ii) the date on which the time prescribed by the rules of court for delivery of the last statement of defence, notice of intent to defend or notice of appearance expires without its being delivered; or

(b) subsequently with leave of the court.

The Date of Delivery of the Relevant Pleadings

- [3] This proposed class proceeding was commenced in December 2008. The statement of claim was issued December 30, 2008.
- [4] The defendants served a notice of intent to defend dated April 1, 2009.
- [5] The statement of claim was substantially amended on December 4, 2014 and served on the defendants on December 5, 2014.
- [6] The plaintiff's motion for certification was served on December 18, 2014.
- [7] The defendants delivered their statement of defence and a motion for summary judgment on August 28, 2015.

Background Information

- [8] Mr. Scott Smith, one of the lawyers representing the plaintiff, swore an affidavit in support of this motion setting out the various activities undertaken in relation to this proposed class proceeding since it began. He deposed in para. 6 that "class counsel determined that it was in the best interests of the class to conduct a detailed investigation to assemble the evidentiary basis for liability prior to proceeding with certification". His affidavit describes the activities of class counsel in that regard.
- [9] The plaintiff retained an expert, Professor James Marsden in October 2011. His report, dated December 12, 2014, is part of the certification record, which as previously set out, was delivered in December 2014.
- [10] The defendants emphasize that there were exchanges of correspondence with plaintiff's counsel up to January 2011. Thereafter defendants' counsel did not hear further from plaintiff's counsel until the amended statement of claim and materials for the certification motion were served in December 2014. Prior to that time, defendants' counsel had closed its file. In November 2012, defendants' counsel rendered what they referred to as a "final account" to the defendants.
- [11] Plaintiff's counsel sought the appointment of a case management judge on December 16, 2014. I was assigned as the case management judge on December 23, 2014.
- [12] Counsel advise that they intended to request a case conference in April 2015. However, because they agreed on a timetable in relation to the certification motion and the defendants' anticipated motion for summary judgment, the initial case conference was scheduled for September 23, 2015 with the agreement of counsel.
- [13] On September 23, 2015, a timetable order was signed in respect of the certification motion and summary judgment motion which included dates agreed upon by counsel for the hearing of the certification and summary judgment motions.

- [14] A second case conference was held March 30, 2016 at which time the order of hearing of the certification and summary judgment motions was discussed and finalized.

Analysis and Decision

- [15] This motion arose as a result of the defendants raising in their factum filed April 4, 2016 in response to the certification motion that the plaintiff had not sought leave to bring its motion for certification pursuant to s. 2(3)(b) of the *CPA*. The defendants argued in their factum that leave should not be granted.
- [16] Counsel for the defendants candidly acknowledged during her submissions on this motion that it was not until the defendants' responding factum was finalized that s. 2(3)(b) was considered. Nevertheless, the defendants submit that the "clock" calculating the time within which the certification motion must have been brought started to run in April 2009. The defendants emphasize on this motion that they "heard nothing" for almost four years from the plaintiff.
- [17] I am satisfied that the plaintiff should be granted leave to bring its certification motion for a number of reasons.
- [18] I begin by noting that the "90 day rule" under s. 2(3)(a) is rarely followed and leave has infrequently been explicitly sought from the court. The plaintiff directed me to three decisions - *Lalani v. Reeves*, 2016 ONSC 424, *Pardhan and Bank of Montreal*, 2012 ONSC 2229, leave to appeal to Divisional Court dismissed, 2013 ONSC 355 and *Kherani v. Bank of Montreal*, 2012 ONSC 2230, leave to appeal to Divisional Court dismissed, 2013 ONSC 355. As noted in para. 11 in the *Pardhan* case;

... courts have noted that the 90 day limit is more frequently honoured in the breach than in the observance. It is an unfortunate reality that certification motions generally do not proceed until long after the statement of claim is issued. Rarely does a defendant take the position, as in this case, that the plaintiff must obtain leave to bring the certification motion. It is usually agreed that the motion can proceed.
[Footnotes omitted.]

- [19] A consideration of the issue of prejudice weighs in favour of the plaintiff. I note that the commencement of a limitation period automatically tolled in favour of all class members under s. 28 of the *CPA*.
- [20] Further, although the defendants assert that there is prejudice by virtue of the delay because some employees of the defendants are no longer in their employ, I agree with the plaintiff's submission that there is no evidence of actual prejudice to the defendants for the reasons outlined in paras. 18 and 19 of its factum as follows:

18 ... The defendants were advised in January 2011 to preserve all relevant documents. Under cross-examination the defendants admitted that many documents have been saved. They also admitted that their statement that their ability to respond to the allegations has

been hampered only refers to an inability to find purchase orders from distributors and to seek clarification from some distributors who no longer exist. It was explicitly stated “That’s about as far as that goes”.

19. As set out above, multiple investigations were commenced into the Maple Leaf listeriosis outbreak shortly after its discovery by multiple parties including the defendants, who convened an expert panel, the CFIA [Canadian Food Inspection Agency] and a government appointed independent investigator, Ms. Sheila Weatherill. The Weatherill Report, published in July 2009, was the product of a comprehensive investigation and included:

- (a) examination of thousands of pages of research findings;
- (b) over 100 interview and fact-finding meetings with individuals from all sectors; and
- (c) extensive expert advice. [Footnotes omitted.]

[21] Importantly, I find that the requisite leave of the court is implied by the timetable order made by the court with the consent of the parties setting out the dates by which documents were to be filed and the hearing date for the certification and summary judgment motions. If the plaintiff’s right to bring the certification motion was to be challenged, it should have been challenged before the timetable order was agreed to.

[22] It is also important to note that the timetable ordered by the court has not been wilfully disregarded. There has been nothing akin to any abuse of process. It would be unjust to the plaintiff for this action to be dismissed for delay in these circumstances. It would be unfair for the defendants at this stage and in these circumstances to deny the plaintiff adjudication on the merits of its claim.

[23] One of the purposes for the appointment of a case management judge is to ensure proper adherence to process. It was not until the very end of 2014 that any party requested the assignment of a case management judge. Therefore, at the earliest, this matter could have been subject to the supervision of the court in early 2015. However, throughout 2015, the court endorsed the timetable agreed upon by counsel both of whom were diligently moving toward a certification hearing scheduled with the consent of all counsel.

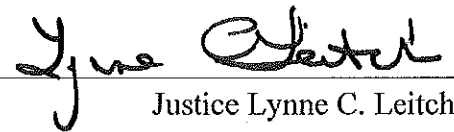
[24] It is also significant that the defendants served and filed their statement of defence in late August 2015 after the motion for certification was served. The statement of defence was obviously filed beyond “the date on which the time prescribed by the rules of court for delivery of the last statement of defence ... expires”. Presumably this late delivery was expressly or implicitly consented to by the plaintiff. In such circumstances, the plaintiff should not be procedurally foreclosed from pursuing its certification motion on the date agreed to by counsel shortly thereafter.

[25] The permitted late filing of the statement of defence is consistent with the purpose of requiring a plaintiff to delay its certification motion. In *Boulanger v. Johnson & Johnson*

Corp., 64 O.R. (3d) 208, [2003] O.J. No. 1374 (Div. Ct.) 64 O.R. (3d) 208 (SC), the court commented at para. 31 that the *CPA* “controls when the plaintiff may move for certification” and observed at para. 32 that:

The *CPA* therefore permits a representative plaintiff to institute a proceeding and to advance claims on behalf of members of a class without either prior or concurrent judicial approval. By postponing the time for a certification motion, the *CPA* postpones judicial scrutiny of the representative plaintiff and of his or her claims. The reason why the *CPA* postpones the time for a certification motion is apparent from the provisions of ss. 2(3). It is to afford defendants a reasonable opportunity to respond to the representative plaintiff's claims and allegations. It is noteworthy that pursuant to ss. 2(3), the court does not have discretion to order that a certification motion be heard earlier. The court may only delay the certification motion, pursuant to ss. 2(3)(b).

- [26] Finally, I note that pursuant to s. 29(1) of the *CPA* a proceeding commenced under the *CPA* and a proceeding certified as a class proceeding under the *CPA* may only be abandoned or discontinued with the approval of the court on such terms as the court considers appropriate. Further pursuant to s. 29(4) if a proceeding is dismissed for delay or if the court approves an abandonment, the court must consider whether notice should be given. The plaintiff clearly has no intention of abandoning this proceeding. The defendants have not moved for dismissal for delay.
- [27] For these reasons the plaintiff is granted leave to proceed with its motion for certification.


Justice Lynne C. Leitch

CITATION: 1688752 Ontario Inc. v. Maple Leaf Foods Inc., 2016 ONSC 3368

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