

Court File No.: 60680 CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

1688782 ONTARIO INC.

Plaintiff

- and -

MAPLE LEAF FOODS INC. and MAPLE LEAF CONSUMER FOODS INC.

Defendants

Proceeding under the *Class Proceedings Act*, 1992

STATEMENT OF DEFENCE

1. The Defendants, Maple Leaf Foods Inc. and Maple Leaf Consumer Foods Inc., (collectively, "Maple Leaf") admit the allegations contained in paragraphs 4 (first two sentences only), 5, 8, 19, 20, 25 (first and third sentences only) and 36 of the Amended Statement of Claim.

2. The Defendants have no or insufficient knowledge to plead to the allegations contained in paragraphs 2, 3, 6, 7 and 9 of the Amended Statement of Claim.

3. Save as explicitly admitted herein, the Defendants deny the balance of the allegations contained in the Amended Statement of Claim, and put the plaintiff to the strict proof thereof.

The Defendants

4. Maple Leaf Foods Inc. ("MLF") is a corporation with its headquarters in the Province of Ontario, carrying on business in the manufacture and processing of food products.

5. Maple Leaf Consumer Foods Inc. ("MLCF") was at the material time a corporation with its headquarters in the Province of Ontario, and was a wholly owned

subsidiary of MLF. At the material time MLCF carried on business as a manufacturer of meat products as part of the Meat Product Group of MLF and its product lines included packaged meats. On January 1, 2010, MLCF was amalgamated into its parent company, MLF.

6. At the material time, MLCF operated the Bartor Road Plant in Toronto, Ontario. The Bartor Road Plant was a federally registered plant and was approved for export to the United States. The Bartor Road Plant produced Ready-To-Eat sliced meats, bologna and deli meats for national distribution to retail and food services operations ("RTE Meats"). Among other employees, it had ten food safety and quality assurance staff.

Maple Leaf's relationship with Mr. Sub Franchisor

7. At the time of the recall in August 2008, the purchase and sale of RTE Meats from Maple Leaf to Mr. Sub Limited ("Mr. Sub") was governed by the terms of the contract between MLF and Mr. Sub dated December 12, 2005 ("the Partnership Agreement"). The terms of this Partnership Agreement included:

- (a) The contract was in effect from January 1, 2006 until December 31, 2008;
- (b) Mr. Sub agreed to honour the exclusive supplier status of MLF for fourteen Core Menu items (RTE Meats) for the 3 year period;
- (c) The Core Menu items included Corned Beef and Roast Beef; and
- (d) The Core Menu items were to be supplied exclusively by MLF.

8. Of Mr. Sub's Core Menu items, the two types of RTE Meats sold to Mr. Sub which were eventually affected by the August 2008 recall ("the Affected Products") were:

- (a) SKU 02356 Mr. Sub Seasoned Beef, sold in 12x500 gram packages; and
- (b) SKU 44938, Main Street Deli Corned Beef, sold in 6x500 gram packages.

9. The Partnership Agreement did not contain any obligation for Maple Leaf to supply to Mr. Sub, nor did it contain any obligation to maintain a continuous supply of any RTE Meats to Mr. Sub.

10. At no time did Maple Leaf have a relationship, contractual or otherwise, with the plaintiff in the within action nor with any other Mr. Sub franchisees. Maple Leaf dealt solely with Mr. Sub as franchisor and as the party with whom it had a contractual relationship.

11. At no time did Maple Leaf enter into any arrangements directly with the plaintiff or with any of the Mr. Sub franchisees for the sale of RTE Meats.

Sale and Distribution of Ready to Eat Meats

12. Pursuant to the Partnership Agreement with Mr. Sub, Maple Leaf sold its RTE Meats to various distributors, including Bruce Edmeades, a division of Summit Cambridge Distribution / Summit Food Distribution Inc. ("Summit"), and in Western Canada, either GFS, including its division Bridge Brand Food Service, or Sysco (collectively, the "Distributors"). The Distributors issued purchase orders to Maple Leaf for the RTE Meats and Maple Leaf then invoiced the Distributors for the products.

13. The Distributors in turn sold and delivered the RTE Meats to the Mr. Sub franchisees. Maple Leaf has no knowledge of the terms of such shipments, including prices or how and when such products were delivered to the franchisees.

The Recall

14. *Listeria* is a bacterium that can be found in soil, water and foods. While there are six (6) species of *Listeria*, *Listeria Monocytogenes* is the only one that causes human illness. Approximately 1 to 10% of all Ready-to-Eat foods contain *Listeria Monocytogenes*. Given that *Listeria* is everywhere, elimination is not possible and therefore risk mitigation needs to be achieved through surveillance and sanitation programs.

15. Maple Leaf adhered to best practices of the food industry in 2008 in monitoring *Listeria* using regular swabbing and sampling within the plant environment.

16. Maple Leaf was first made aware on August 7, 2008 that a local public health authority in Ontario had launched an investigation into a sliced meat product. On August 8th, the Canadian Food Inspection Agency ("CFIA") asked Maple Leaf if three products could be traced and to investigate whether they were still in inventory. On August 12th, the CFIA informed Maple Leaf that an investigation had been launched into these products produced at the Bartor Road Plant.

17. On August 13th, Maple Leaf notified customers in writing of the need to place three products on hold and not to ship or sell them. At this point, there was no reason to believe that the two Affected Products sold to Mr. Sub might be contaminated, as they were not any of the three products being investigated.

18. On August 16th at 10:00 p.m., the CFIA notified Maple Leaf that tests for *Listeria* on one of the three products had returned positive. Maple Leaf immediately set its recall protocol in motion. On August 17th at 3:30 a.m. Maple Leaf issued a news release to all media in Canada with notice of the recall and product information. It worked diligently to contact all of its food service customers.

19. On August 19th, the CFIA advised Maple Leaf that two more tests on products produced at different times on the same lines at the Bartor Road Plant had come back positive. Maple Leaf voluntarily expanded the scope of the recall to include all products manufactured on Lines 8 and 9 at the Bartor Road Plant from the earliest affected production date of June 2nd and then shut down the Bartor Road Plant altogether.

20. On the evening of August 23rd, the CFIA and Public Health concluded that the strain of *Listeria* bacteria which was linked to the illness and deaths of several consumers matched the *Listeria* strain identified in some Maple Leaf products. As a further precautionary measure, Maple Leaf voluntarily expanded its product recall to include all production from Bartor Road dating back to January 2008.

21. On August 24th, the CFIA and Maple Leaf simultaneously posted the recalled list of products and codes. Originally 220 products were posted but the list was ultimately revised down to 191 products as duplicates were removed.

Maple Leaf's Gratuitous Assistance to Mr. Sub and its Franchisees

22. Prior to the formal recall of the Affected Products, on or about August 19, 2008, Maple Leaf called the principal of Mr. Sub (Jack Levinson) to advise that the recall was imminent. Mr. Levinson confirmed that Mr. Sub would develop a plan to retrieve the Affected Products from the Mr. Sub franchise locations.

23. To further assist Mr. Sub, Maple Leaf assisted it in preparing communications to the franchisees to advise them about the recall. The franchisees were notified of the recall of the Affected Products by August 20, 2008.

24. On or about August 25, 2008, Maple Leaf confirmed again to Mr. Sub and its franchisees the SKU numbers of the two Affected Products.

25. To assist the food service providers, including Mr. Sub franchisees, Maple Leaf voluntarily hosted a quality assurance hotline to enable them to call if they had questions about the recall.

26. Maple Leaf communicated with Mr. Sub and the Distributors and instructed them to arrange for the retrieval and ultimate return of the Affected Products.

27. At Maple Leaf's direction, and at Maple Leaf's sole expense, the Distributors attended at each Mr. Sub franchisee location to retrieve the Affected Products.

28. Only a minimal amount of Affected Products were present in any given franchise at the time of the recall. In particular, Corned Beef was not a popular item and franchisees had very few Corned Beef products on hand.

29. Food services providers, including the Mr. Sub franchisees, were issued credits for any returned cases of Affected Products. Credits for the value of a full case were given irrespective of whether the cases were closed, opened or partially used.

Replacement/Alternate Supply

30. In early September 2008 it became clear that the Bartor Road Plant was not going to reopen soon.

31. Maple Leaf accordingly encouraged Mr. Sub to source alternate suppliers for the Affected Products, and provided it with the names of various competitors of Maple Leaf that could supply the Affected Products. Maple Leaf authorized Mr. Sub to source alternative suppliers, despite the exclusivity terms of the Partnership Agreement.

32. By mid-September, Mr. Sub had selected its own alternate supplier, a manufacturer in Quebec, to supply the Affected Products.

33. In October 2008, RTE products were being produced from the Bartor Road Plant again, and Maple Leaf was once again able to supply the Affected Products to Mr. Sub.

Compensation to Mr. Sub

34. In or around October 2008, Maple Leaf offered to Mr. Sub:

- (a) a one-time payment of \$250,000.00 to cover the inconvenience caused to Mr. Sub by the recall;
- (b) That pricing on all Mr. Sub approved products would be decreased by seven cents per kilogram effective November 1st, 2008, which was anticipated to provide the franchisees with projected annual savings of \$140,000.00; and
- (c) To provide one case of Roast Beef and one case of Corned Beef free of charge on behalf of each Mr. Sub franchisee.

35. Maple Leaf paid the \$250,000.00 to Mr. Sub, and, following negotiations, agreed to reduce the pricing on Mr. Sub approved products by 16 cents per kilogram, which resulted in significant savings to the plaintiff and Mr. Sub franchisees.

No Duty of Care Owed to Franchisees

36. The Defendants deny that they owed any duty of care to the plaintiff or to the Mr. Sub franchisees.

37. There was no relationship of proximity between the Defendants and the plaintiff or any of the franchisees. At all times, Maple Leaf dealt solely with Mr. Sub and with the Distributors. The franchisees dealt solely with Mr. Sub and any issues as between Mr. Sub and its franchisees were resolved without the involvement of the Defendants.

38. The Defendants deny that the plaintiff was uniquely vulnerable to any acts or omissions on their part and deny that they were in a relationship of proximity with the plaintiff. Alternatively if it was uniquely vulnerable, it was as a result of the terms of its franchise agreement with Mr. Sub.

No duty of continuous supply

39. These Defendants had no obligation to continuously supply the plaintiff and/or the Mr. Sub franchisees with RTE Meats. As such, any losses caused to these franchisees by the temporary lack of supply of certain RTE Meats are not the responsibility of these Defendants.

40. Furthermore, the Franchise Agreement between Mr. Sub and the plaintiff does not create any obligation on the part of Mr. Sub itself to supply RTE Meats to the Mr. Sub franchisees. Rather, the Franchise Agreement expressly permitted the franchisees to purchase products other than those approved by Mr. Sub, with the permission of Mr. Sub.

41. Since the franchisees could have no reasonable expectation that they would have had a continuous supply of RTE Meats from Mr. Sub itself, they could not have had any reasonable expectation that these Defendants, with whom they did not have any contractual relationship, would continuously supply them either.

42. Maple Leaf denies that the scope of any duty it owed extended to maintaining a continuous supply of meats.

No negligence

43. These Defendants deny the allegations of negligence made against them in the Amended Statement of Claim, and in particular deny the allegations at paragraph 30.

44. *Listeria* is ubiquitous and a certain amount of ready-to-eat foods contain *Listeria Monocytogenes*. Complete elimination is therefore not possible.

45. At all times, Maple Leaf used best practices accepted by the industry and by the CFIA to monitor *Listeria* using regular swabbing and sampling within the Bartor Road Plant environment.

46. At all times, the Bartor Road Plant met the requirements to export to the United States

47. At all times, until early August 2008, the Bartor Road Plant met the requirements of the CFIA which regularly inspected the Bartor Road Plant.

48. Maple Leaf carried out all appropriate cleaning and disassembly procedures, including those protocols recommended by the manufacturer of the meat slicers and other equipment used at the Plant.

49. Maple Leaf met industry standards with respect to cleaning and decontamination of the equipment and facilities at the Bartor Road Plant.

50. Maple Leaf had in place appropriate hazard analysis critical control points policies and food safety plans, as well as *Listeria* control policies in keeping with the standards of the time.

51. Maple Leaf kept the Bartor Road Plant in an appropriate state of repair and took all reasonable precautions to prevent *Listeria Monocytogenes* bacteria from entering the facility.

52. Maple Leaf took all steps to maintain a sanitary condition of the Bartor Road Plant suitable for the production, processing and packaging of RTE Meats.

53. Maple Leaf denies that post-process high pressure pasteurization after packaging RTE Meats was required under industry standards at the time and further denies that post-process thermal pasteurization was required by industry-standard, or indeed by the CFIA.

54. Secondary Listeria growth inhibitors were not required by industry standards or by the CFIA.

55. Maple Leaf had thorough and adequate testing procedures to detect foodborne illnesses and the CFIA had reviewed and approved same.

56. There was no obligation to use different production methods for products intended for consumption by high risk vulnerable groups.

57. Maple Leaf at all times complied with Health Canada guidelines, industry standards, and government regulations.

58. Once notified of the issues, Maple Leaf voluntarily recalled its products in a timely manner, warned consumers of the recalled products and the public at large regarding the recalls.

No damages for economic loss

59. The Defendants state that the economic losses claimed by the plaintiff were never sustained and are not recoverable in law. The alleged loss of sales, profits and goodwill are economic losses for which these Defendants are not liable.

60. The Defendants deny that 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 were sustained or are in any way recoverable.

61. RTE Meats are not dangerous in and of themselves and do not present a real and substantial danger to consumers or to the plaintiff.

62. The Defendants deny that they had a duty to warn consumers of the dangers or a potential for contamination of the RTE Meats. In the first place, it is well known to the food service industry, including the plaintiff, that the potential for Listeria exists in all RTE Meats. Secondly, as soon as Maple Leaf learned of the potential for contamination of the meat, it advised Mr. Sub as well as the plaintiff and the Mr. Sub franchisees.

63. An alternate source of supply was available to the plaintiff and the franchisees within 6 to 8 weeks of the recall. Further, Mr. Sub advised the plaintiff and the franchisees that they could find alternate suppliers themselves. To the extent that the plaintiff failed to mitigate its losses, these Defendants are not responsible.

64. The Defendants state that any costs relating to the removal, disposal and destruction of the Affected Products have already been covered by Maple Leaf and that there were in fact no such direct costs to the plaintiff or the franchisees.

65. The value of such benefits and price reductions exceeds any losses suffered by the plaintiff as a result of the recall.

66. Further, Maple Leaf has already given a gratuitous and voluntary benefit to the plaintiff and other franchisees by providing free boxes of products. The value of such products exceeds any time and inconvenience caused to the plaintiff as a result of the recall.

67. If the plaintiff has suffered the damages as alleged, this is due to the plaintiff's failure to mitigate and it is responsible for its own losses. In particular, the plaintiff failed to:

- (a) Coordinate with Mr. Sub for an alternate source of supply;
- (b) Advertise to its customers that it carried a number of other products that were not affected by the recall in any way;
- (c) Obtain its own alternate source of supply;

- (d) Exercise appropriate public relations to attract customers to its store following the removal of the Affected Products; and
- (e) Take reasonable steps to protect its own economic interests.

68. The damages claimed are exaggerated and the Defendants put the plaintiff to the strict proof thereof.

69. The Defendants deny that the within action is amenable to certification.

70. The Defendants request that the action be dismissed, with costs.

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Proceeding commenced at London

STATEMENT OF DEFENCE

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