CITATION: 1688782 Ontario Inc. v. Maple Leaf Foods Inc., 2016 ONSC 3368
COURT FILE NO.: 60680CP
DATE: 2016/11/18

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
1688782 Ontario Inc.	)	
	)	Kevin L. Ross and Rebecca Case, for the
Plaintiff	)	Plaintiff
	)	
– and –	)	
	)	Elizabeth Bowker, for the Defendants
Maple Leaf Foods Inc. and Maple Leaf Consumer Foods Inc.	)	
	)	
Defendants	)	
	)	
	)	
	)	**HEARD:** April 28, 2016

LEITCH J.

SUMMARY JUDGMENT MOTION

[1] The defendants bring a motion pursuant to Rule 20 seeking (a) summary judgment dismissing the plaintiff's claim on the basis that the defendants owed no duty of care to the plaintiff; and (b) summary judgment declaring that the defendants did not owe a duty to warn the plaintiff, or, in the alternative, that the defendants did not breach any duty to warn.

[2] Alternatively, the defendants seek an order dismissing the plaintiff's claims for damages arising out of economic losses, namely alleged loss of past and future sales, past and future profits, loss of capital value of the plaintiff's franchises and business, and loss of goodwill. The defendants assert that the plaintiff cannot recover damages for non-supply and for reputational damage and the only recoverable losses are a claim for clean-up and destruction of product, which the plaintiff has not incurred.

[3] Succinctly set out in para. 8 of their factum, the defendants' position is that there is "no genuine issue requiring a trial with respect to whether a duty of care or duty to warn was owed by Maple Leaf. The plaintiff's negligence claim for pure economic losses for a non-dangerous consumer product is untenable and this action ought to be dismissed in its entirety".

[4] In relation to a duty to warn, the defendants made clear in argument that their position was that the recall was a full answer to the duty to warn.

[5] In its responding materials, the plaintiff submits that the defendants' summary judgment motion should be dismissed because there are genuine issues for trial: whether the defendants owed the plaintiff a duty of care in negligence, whether the defendants had a duty to warn of the presence of listeria in their plant, and whether the plaintiff's claims for pure economic loss are recoverable. However, in its factum the plaintiff also requests an order for summary judgement in its favour on any or all of the issues raised in the defendants' motion.

[6] In clarifying during argument the relief it seeks, the plaintiff referenced common issue (b) which is the following:

> (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?

[7] The other common issues are:

> (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?

(c) If [the defendants owed a duty of care], 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?

[8] None of the common issues (a), (c) – (g) were addressed on this summary judgment motion.

[9] The issues on this summary judgment motion were confined to the question of whether the defendants owed a duty of care to the plaintiff, or any other Mr. Sub franchisee, as made clear in each party's position on the motion, which I will set out below.

[10] The parties agree that the question of whether the defendants owe the plaintiff a duty of care can be determined on the evidence presented on this summary judgment motion.

The allegations in the Statement of Claim

[11] The plaintiff's pleadings were summarized at para. 21 of its certification 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]

[12] 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' damages, contaminated and dangerous products.

The evidentiary record on this summary judgment motion

[13] I note that each party adopted and incorporated in their factums, filed on the summary judgment motion, their recitation of facts from their certification factums. Similarly, I will not repeat all of the evidence I referenced in my reasons relating to the decision to certify the action as a class proceeding.

[14] The defendants acknowledge that it was known to them that pursuant to the plaintiff's franchise agreement, the plaintiff was obliged to purchase its RTE meats from the defendants. The defendants emphasize that they were under no obligation to supply such product. In other words, the defendants consider it significant that that there was no guaranteed supply of the RTE meat products.

[15] However, I observe that as outlined in the reasons on certification, the plaintiff has not pled a duty to supply. What I find significant is that the franchisor, Mr. Sub, agreed it would not purchase RTE meat products from any supplier other than the defendants and the defendants knew that the plaintiff and all of the other Mr. Sub franchisees were prohibited from doing so.

[16] With respect to the purchase and supply of RTE meats, the plaintiff and other franchisees were obliged to order through the distributor. As set out in paras. 19 and 20 of the defendants' factum:

> As explained by the plaintiff, to obtain the RTE meats;
>
> a) it called its distributor Summit to place an order every one to two weeks;
>
> b) the amount of product ordered was up to the plaintiff;
>
> c) the distributor Summit would deliver the product and render an invoice to the plaintiff; and
>
> d) the plaintiff would pay Summit directly.
>
> As also admitted by the plaintiff:
>
> a) it never placed an order with Maple Leaf directly;
>
> b) it never placed an order with Mr. Sub directly;
>
> c) Maple Leaf never delivered directly to it;
>
> d) it never received an invoice from Maple Leaf;
>
> e) it never paid Maple Leaf; and
>
> f) prior to the recall, it had not received any direct correspondence from Maple Leaf.

[17] Notwithstanding these arrangements the plaintiff, and all other Mr. Sub franchisees, had access to a hot line directly to the defendants' place of business.

[18] The defendants emphasize that foods containing low levels of listeria are considered to pose very little risk. According to Mr. Peterson, the defendants' National Accounts Manager, risk mitigation in 2008 was achieved through surveillance and sanitation programs. When a concern involving listeria arose in August 2008, the defendants say that they moved quickly. Two of the plaintiff's 14 core menu items, roast beef and corned beef (the "Affected Products") were recalled on a voluntary basis.

[19] Prior to the recall being publicly announced, the defendants provided what they described as gratuitous assistance to Mr. Sub and its franchisees. Specifically, Mr. Peterson contacted Mr. Sub's chief executive officer to assist Mr. Sub in preparing communications to its franchisees to advise them of the recall. The franchisees were instructed to immediately cease use of the Affected Products and to dispose of them in accordance with specified instructions. They were also advised that the distributor would be contacting them to return unopened packages for full credit or replacement. The defendants also set up a quality assurance hotline for the Mr. Sub franchisees.

[20] The distributor did attend at each Mr. Sub location to retrieve the Affected Products. The defendants credited the distributor, reflecting their intention that the Mr. Sub franchisees would not have to pay for any of the Affected Products. However, the plaintiff did not receive any credit although it never raised this issue with its distributor or Mr. Sub.

[21] On August 19, 2008, a health inspector attended the plaintiff's business premises and removed all inventory of RTE meats identified in the recall as well as all turkey inventory. This removal depleted the plaintiff's inventory of corned beef, roast beef and turkey. As the defendants point out, the turkey product was not one of the Affected Products. 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.

[22] The defendants' summary judgment motion record contained detailed information with respect to the number of boxes picked up at various locations of Mr. Sub franchises and the invoice submitted by its distributor relating to the cost for that pick up.

[23] The defendants note that they released Mr. Sub from the exclusivity purchase obligation in early September 2008 and an alternate supplier was selected in mid-September 2008.

[24] Further, the defendants note that the franchisor, Mr. Sub sued the defendants. This dispute was resolved by the defendants paying $250,000 to the franchisor in 2010. The defendants and Mr. Sub entered into a new contract on September 28, 2010 for the supply of product at reduced prices that the defendants assert provides a direct benefit to the franchisees if the reduced prices flowed through to them. Mr. Peterson deposed in his affidavit, sworn in

support of the summary judgment motion, that it was his belief (although no basis for his belief was set out) that the Mr. Sub franchisees, including the plaintiff, directly received the entire and significant benefit of these price reductions for all products.

[25] The plaintiff believes it lost business after the recall because customers simply did not come into its restaurant at all as a consequence of the listeriosis outbreak; and/or customers that did come in would ask whether they carried the defendants' products and would then leave after hearing the plaintiff served such products.

[26] As outlined below, the plaintiff's position is that the potential to seek permission to use an alternate supplier and the ultimate release from the exclusive purchase obligation did not avoid their losses.

The approach to a Rule 20 motion

[27] The factums of both parties outline the guidance from the Supreme Court of Canada in *Hryniak v. Mauldin,* 2014 SCC 7 and need not be repeated here. Neither party takes issue with the fact that summary judgment is appropriate in relation to the issues described above.

The defendants' position on this summary judgment motion

[28] The defendants' position is that it owed no duty of care to the plaintiff and they cannot be liable for economic losses in any event. The defendants assert that the plaintiff essentially alleges that it was owed a duty of care to continually provide a supply of RTE meats, which the defendants deny. The defendants also assert that the plaintiff's allegation that they had a duty to warn the plaintiff of the potential for contamination of the RTE meats is similarly not tenable.

[29] The defendants contend that there is no tort law duty to "not mess up" the plaintiff's brand and to maintain a pure public image. They say tort law does not require the defendants to respond to this alleged harm and no duty of care should be recognized in these circumstances

[30] The defendants suggest that most of the facts the plaintiff relies on, as summarized in paras. 10 and 11of its factum set out below, are actions between the defendants and the franchisor or the franchisor and the franchisee, or are actions which occurred after the recall and as a result they assert that these actions cannot shed any light on the relationship between the plaintiff and the defendants prior to the recall.

[31] Lastly, they say that the plaintiff's claims for economic loss should be dismissed because even if a duty of care was owed, no claim can be made for economic loss related to defective products unless the products are inherently dangerous, which RTE meats are not.

[32] The defendants argue that even if a duty of care is owed, the only viable claims are for clean-up and destruction of product. The defendants note that they have already paid for the cost of the product thrown away; they arranged for distributors to give credit for unopened and/or partially used cases and they arranged for the pickup of unusable product. As a result, the defendants say that having already paid for the destruction and/or disposal of unusable product, the only remaining claim relates to cleanup costs which are *de minimis* and fall into the category that ought not to be the subject of a claim according to *Arora* v. *Whirlpool Canada LP*, 2013 ONCA 657, summarized in my certification reasons.

The plaintiff's position on this summary judgment motion

[33] 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 that 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 the defendants owed the plaintiff a duty to warn when a product, which is not inherently dangerous, becomes dangerous.

[34] 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 SCC 60

at para. 38). It submits that two of those categories apply in this case - negligent misrepresentation and negligent supply of shoddy (dangerous) goods.

[35] According to the plaintiff, these circumstances are as close and proximate as one entity can have with another without a contractual relationship.

[36] The plaintiff's point to paras. 10 and 11 of its factum on the summary judgment motion which sets out the following:

> This close proximate relationship, while not expressly admitted by the defendants, is reflected in their statements in their factum for summary judgment:
>
> (a) Maple Leaf was the exclusive supplier to Mr. Sub of 14 core menu items and Mr. Sub could not purchase these 14 core menu items from anyone other than Maple Leaf.
>
> (b) Maple Leaf personally called the principal of Mr. Sub to alert him of the pending recall,
>
> (c) Maple Leaf assisted in preparing communications to the class to advise them of the recall
>
> (d) Maple Leaf advised the distributors about the pending recall on or about August 19, 2008 and,
>
> (e) Maple Leaf directed and paid for the distributors to attend at each Mr. Sub franchise to retrieve the Affected products.
>
> The defendants then argue that the lack of contractual dealings between Maple Leaf and the class, for example that the franchisees never directly placed orders with, received RTE meats from or paid Maple Leaf, negate proximity. But in doing so they ignore the direct dealings between the parties that did occur including:
>
> (a) Mr. Nick Mitropoulos advised that if he had any issues with Maple Leaf product he would call Mr. Sub head office and a Maple Leaf representative would come by to discuss the issues
>
> (b) Mr. Nick Mitropoulos recalls visits to the Mitropoulos Mr. Sub franchise from Maple Leaf representatives that were not in response to a call to Mr. Sub head office.

(c) If a class member had an issue with respect to Maple Leaf's product, it was understood that they could contact Maple Leaf directly and did not have to go through Mr. Sub or a distributor.

(d) Maple Leaf dealt directly with the class regarding credits.

(e) Maple Leaf had a dedicated toll free call line for the class to communicate with it directly.

[37] As the plaintiff succinctly put it in argument on this motion, the plaintiff bases its claim on the fact that the defendants put damaged product into the marketplace and the plaintiff has been "tagged" as being a place where dangerous products might have been sold prior to those products being recalled.

The issue of the duty of continuous supply

[38] The defendants emphasize that there was no obligation on them to maintain a supply for the franchisor and the plaintiff could not expect that the defendants would maintain a supply for its business. Therefore, it was not reasonable for the plaintiff to rely on the defendants to supply something that could be taken out of the market at any time for any reason.

[39] However, as I concluded on the certification motion, the plaintiff has not alleged harm arising from the non-supply of product. There is no duty of continuous supply alleged. Rather, as I have set out above, the plaintiff alleges that the defendants owed a duty to manufacture and provide a product fit for human consumption, the defendants were negligent in supplying a shoddy or dangerous product and misrepresenting the quality of the product.

Do the defendants owe the plaintiff a duty of care?

[40] I conclude that the defendants owe the plaintiff and the class it represents a duty to supply a product fit for human consumption – in other words, a product that has not become dangerous as a result of the defendants' negligence. This conclusion is consistent with the reasoning and findings in *Plas-Tex Canada Ltd.* v. *Dow Chemical of Canada Ltd.*, 2004 ABCA 309; *376599 Alberta Inc.* v. *Tanshaw Products Inc.*, 2005 ABQB 300; *Country*

Style Food Services Inc. v. 1304271 Ontario Ltd., 2005 CanLII 23214 (ON CA), 200 OAC 172, which were summarized in my certification reasons.

[41] This conclusion is appropriate considering the fact that I find the circumstances of the relationship between the plaintiff and the defendants are such that the defendants 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 SCC 79 at para. 33 and *Martel Building Ltd. v. Canada*, 2000 SCC 60 at para. 49 citing *Hercules Management Ltd. v. Ernst and Young*, [1997] 2 S.C.R. 165 at para. 24).

[42] As the plaintiff emphasizes, the defendants knew the name, address and contact information of all franchisees. The defendants submit that such knowledge cannot satisfy the proximity requirement of tort law. However, in addition to that knowledge there are the facts that the defendants were the exclusive supplier of RTE meats; there were direct dealings and communications between the defendants and the Mr. Sub franchises as described above; the defendants alerted the franchisor to the recall and assisted in communications to the franchisees; there was communication addressed to both the franchisor and the franchisees when the recall occurred; the defendants directed and paid the distributors to retrieve the Affected Products from the franchisees; and as Mr. Peterson acknowledged on his cross examination in response to questions 346 -349, he was aware that the RTE products were an integral and essential part of the business of the franchisees without which their business could not operate. The quality and safety of the RTE meats were essential to the maintenance of the franchisee's good will and reputation in the community and if the RTE meats were contaminated they were potentially dangerous to consumers.

[43] I also find that the plaintiff's alleged harm is a reasonably foreseeable consequence of the defendants' conduct.

[44] The defendants submit that it is not reasonably foreseeable that businesses could fail because two of 14 products were not available for six to eight weeks, particularly when the franchisees could seek an alternate supplier and had the opportunity to do so. As Mr. Peterson indicated, when it became clear in early September 2008 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. Further, as the defendants point out, 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.

[45] 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 require additional time over and above the thirty-day period provided for in the franchise agreement. The plaintiff points out that 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.

[46] The defendants also submit that the assertion that customers would leave the restaurant without purchasing any product and would not return to the plaintiff's business after learning that it sold the defendants' products is not reasonable. The defendants note that unusual or extreme reactions to events caused by negligence are imaginable but not foreseeable (see *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27).

[47] However, as the plaintiff emphasizes, there were three products removed from its restaurant, two of which were recalled because they were unsafe, and for 6 to 8 weeks the defendants could not reliably put other products in place. As the plaintiff points out, the defendants knew that for six to eight weeks the franchisees had no roast beef or corned beef to sell.

[48] I agree with the plaintiff's submission that it was reasonable, appropriate, and foreseeable for consumers to avoid buying food from a restaurant where there had been a food recall arising from problems in the plant of its meat supplier which were not "resolved" for a relatively significant period of time.

[49] In relation to the defendants alleged representations that the RTE meats were fit for human consumption and posed no risk of harm, I find there was a "special relationship" between the plaintiff and the defendants of the nature described in *Knight* v. *Imperial Tobacco*

Canada Ltd., 2011 SCC 42 because the defendants ought reasonably to have foreseen that the plaintiff would rely on their representations and its reliance was reasonable in the circumstances.

[50] The plaintiff is within a known and readily identifiable category of persons. The defendants supplied the plaintiff, an entity it had a close and direct relationship with as its 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. There are no policy concerns arising from imposing a duty of care on the defendants in favour of the plaintiff and the class it represents. Rather, policy considerations weigh in favour of imposing a duty in these circumstances to heighten accountability. I disagree with the defendants that indeterminate liability is a concern here considering my findings in relation to the proximity requirement.

[51] 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.

[52] 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. 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.

[53] More importantly, although the court in *Arora* stated that it is not settled law that a party who supplies a non-dangerous product is responsible for economic losses, I am satisfied that the contaminated RTE meats, to use of the words of the court in *Winnipeg Condominium,* posed foreseeable real and substantial danger to consumer's health and safety and the recall was for safety reasons. Therefore, economic losses are recoverable.

[54] With respect to damages, I agree with the plaintiff that it is not required to have sustained all of the damages claimed on behalf of the class (see *Boulanger v. Johnson & Johnson Corp.*, 64 O.R. (3d) 208 (Div. Ct.)). The fact that plaintiff does not have a claim for the cost of disposal and destruction of the Affected Products and for clean-up does not entitle the defendants to an order striking these claims which the plaintiff makes on behalf of the class it represents.

[55] The defendants' motion for summary judgment is therefore dismissed. I find that the plaintiff is entitled to an order which resolves common issues (b)(i) and (ii) in its favour.

[56] However, I reach a different conclusion respecting the issue of whether the defendants owed the plaintiff a duty to warn of the presence of listeria in their plant. In *Sauer v. Canada (Attorney General),* 2007 ONCA 454 at para. 53 the court referenced *Economic Negligence*: *The Recovery of Pure Economic Loss*, 4th ed. (Toronto: Thomson Canada, 2000) at 190, where Professor Feldthusen described this rationale:

> A manufacturer's duty to warn of known dangers associated with its products is premised on safety concerns. The premise of the duty ought to control its ambit. Thus, the duty should extend to those persons who are in a position to respond to the warning, and hence to reduce the safety risk. [Footnote omitted.]

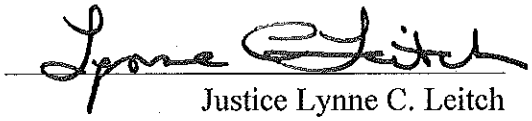
[57] It is unclear what a response to a warning to the plaintiff would have required to reduce the safety risk. It is also unclear when a safety risk was created prior to the recall. If destruction of the product was the appropriate response to a warning, the alleged damages are not foreseeable in relation to a duty to warn.

[58] I agree with the defendants that imposing a duty to warn would have little, if any, impact on the harm suffered by the plaintiff and the class it represents. In large part, the alleged

damages are a consequence of the public announcement of the recall and resulting publicity. In national media coverage Mr. Sub was identified as selling the recalled tainted RTE meats and it was reported that people had become ill and had died as a result of ingesting the contaminated RTE meats. In the alerts issued by the Canadian Food Inspection Agency a link to affected products included Mr. Sub products. 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". As a result, his competitors, who were not so identified, were advantaged to the detriment of Mr. Sub franchisees.

[59] I conclude that the defendants are entitled to an order that they owed no duty to warn the plaintiff of the presence of *listeria monocytogenes* in the plant. However, the evidence relevant to the alleged duty to warn – for example the presence of *listeria monocytogenes* in the plant and RTE meats – will be relevant to the issue of whether the defendants were negligent in the supply of the RTE meats.

[60] Orders may be issued according to these reasons. If there are any issues that would benefit from a case conference I invite counsel to schedule a conference as soon as possible.



Justice Lynne C. Leitch

Released: November 18, 2016

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1688782 Ontario Inc.

Plaintiff

– and –

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Defendants

REASONS FOR JUDGMENT

Leitch J.

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