WARNING

Prohibitions under the *Child, Youth and Family Services Act*, 2017, S.O. 2017, c.14, Sched. 1 apply to this decision:

Prohibition re identifying child

87(8) No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding, or the child's parent or foster parent or a member of the child's family.

Prohibition re identifying person charged

87(9) The court may make an order prohibiting the publication of information that has the effect of identifying a person charged with an offence under this Part.

Transcript

87(10) No person except a party or a party's lawyer shall be given a copy of a transcript of the hearing, unless the court orders otherwise.

…

Offences re publication

142 (3) A person who contravenes subsection 87 (8) or 134 (11) (publication of identifying information) or an order prohibiting publication made under clause 87 (7) (c) or subsection 87 (9), and a director, officer or employee of a corporation who authorizes, permits or concurs in such a contravention by the corporation, is guilty of an offence and on conviction is liable to a fine of not more than $10,000 or to imprisonment for a term of not more than three years, or to both.

COURT OF APPEAL FOR ONTARIO

CITATION: R.G. v. The Hospital for Sick Children, 2020 ONCA 414
DATE: 20200625
DOCKET: C67619 and C67659

Juriansz, Lauwers and Huscroft JJ.A.

BETWEEN

R.G.

Plaintiff (Respondent)

and

The Hospital for Sick Children, Gideon Koren
and Joey Gareri

Defendants (Appellants)

Naveen Hassan, Logan Crowell, Kate Crawford and Barry Glaspell, for the appellants The Hospital for Sick Children and Joey Gareri

Jessica Laham, Darryl Cruz, Gabrielle Schachter, Erica Baron and Jessica Firestone, for appellant Gideon Koren

Kirk M. Baert, Adam Tanel and Celeste Poltak, for the respondent R.G.

Heard: May 21, 2020 by video conference

On appeal from the order of Justice Paul M. Perell of the Superior Court of Justice, dated October 2, 2019, with reasons reported at 2019 ONSC 5696.

By the Court:

OVERVIEW

[1] Following denial of certification of the respondent's proposed class action, the respondent brought a motion for an order continuing her proceeding for approximately 200 individual plaintiffs, including unnamed individuals; tolling the limitation periods for those plaintiffs; and granting leave to file an amended statement of claim. The motion judge declared that the limitation period of all former putative class members remained suspended pursuant to s. 28(1) of the *Class Proceedings Act 1992*, S.O. 1992, c. 6 (*CPA*), but granted only the respondent representative plaintiff's motion to continue her individual action under s. 7 of the *CPA*. Her motion in respect of the co-plaintiffs was dismissed without prejudice to her right to reapply to join co-plaintiffs on proper material.

[2] The appellants do not contest the continuation of the respondent's individual action under s. 7. They argue that the motion judge erred in interpreting s. 28(1) and erred, further, in answering a hypothetical question concerning the operation of the limitation period for the proposed co-plaintiffs.

[3] We dismiss the appeal, for the reasons that follow.

[4] We are mindful of the consequence of this decision. It means, as a practical matter, that following the denial of certification of a class proceeding, the limitation period remains suspended for an indefinite time period. In our view, suspension for an indefinite time period is not necessary to promote the purpose of the *CPA*

and undermines the purpose of the *Limitations Act, 2002*, S.O. 2002, c. 24. Be that as it may, it is not a problem that this court can address. It is a matter for the Legislature to address, should it choose to do so.

BACKGROUND

[5] The facts in this matter are not in dispute and may be set out briefly.

[6] The respondent was the representative plaintiff in a proposed class action alleging that the appellants were negligent in operating the Motherisk Drug Testing Laboratory, which screened hair samples for the presence of drugs and alcohol and delivered false positive results. Test results were used for various purposes, including the treatment of patients, criminal proceedings, and family law disputes. The respondent's motion for certification of the class action was dismissed: *R.G. v. The Hospital for Sick Children*, 2017 ONSC 6545. Her appeal to the Divisional Court was dismissed: *R.G. v. The Hospital for Sick Children*, 2018 ONSC 7058, and this court denied leave to appeal. Leave to appeal to the Supreme Court was not sought and the time for seeking leave has now elapsed.

The motion

[7] The respondent brought a motion for an order: 1) declaring that the putative class members' limitation periods continued to be suspended; 2) permitting her to continue the proceeding as a multi-plaintiff action pursuant to s. 7 of the *CPA*; and 3) granting leave to file an amended statement of claim to join approximately 200

individual claimants to her claim. Numerous proposed co-plaintiffs on the motion were already included in other actions that were ongoing, and counsel for the respondent refused to confirm that he represented the proposed co-plaintiffs, despite the request that he do so.

The legislation

[8] Section 7 of the *CPA* governs the continuation of proceedings following a refusal to certify a proceeding as a class proceeding:

> 7 Where the court refuses to certify a proceeding as a class proceeding, the court may permit the proceeding to continue as one or more proceedings between different parties and, for the purpose, the court may,
>
> (a) order the addition, deletion or substitution of parties;
>
> (b) order the amendment of the pleadings or notice of application; and
>
> (c) make any further order that it considers appropriate.

[9] Section 28 of the *CPA* governs the suspension and resumption of limitation periods concerning causes of action asserted in class proceedings. It provides as follows:

> 28 (1) Subject to subsection (2), any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the class proceeding and resumes running against the class member when,
>
> (a) the member opts out of the class proceeding;
>
> (b) an amendment that has the effect of excluding the member from the class is made to the certification order;

> (c) a decertification order is made under section 10;
>
> (d) the class proceeding is dismissed without an adjudication on the merits;
>
> (e) the class proceeding is abandoned or discontinued with the approval of the court; or
>
> (f) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise.
>
> (2) Where there is a right of appeal in respect of an event described in clauses (1) (a) to (f), the limitation period resumes running as soon as the time for appeal has expired without an appeal being commenced or as soon as any appeal has been finally disposed of.

The motion judge's decision

[10] The only question concerning the operation of s. 28(1) was: When does the limitation period resume running once a certification motion is dismissed? The motion judge noted the purpose of s. 28 – the protection of class members from the operation of limitation periods until the availability of class action proceedings was determined, citing his decision in *Coulson v. Citigroup Global Markets Canada Inc.*, 2010 ONSC 1596, aff'd 2012 ONCA 108, 288 O.A.C. 355, which was referred to with approval by the Supreme Court of Canada in *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60, [2015] 3 S.C.R. 801, at para. 60.

[11] The motion judge accepted the respondent's argument that the limitation period remained suspended until one of the circumstances enumerated in s. 28(1) occurs. In other words, s. 28(1) sets out an exhaustive list of the circumstances that restart a limitation period. Denial of certification is not one of the enumerated

circumstances; therefore, the limitation period remains suspended following a denial of certification.

[12] The motion judge cited this court's decision in *Logan v. Canada* (2004), 71 O.R. (3d) 451, in which Feldman J.A., speaking for the court, stated at para. 22:

> [T]he fact that the limitation period does not recommence automatically on denial of certification fits within the scheme of the *CPA* and should operate fairly and efficiently as each situation arises; it is not a reason to give the language of s. 28(1) a strained meaning.

[13] The motion judge cited *Ragoonanan v. Imperial Tobacco Canada Ltd.*, 2011 ONSC 6187, 107 O.R. (3d) 587, in support of the argument that denial of certification is not a triggering event under s. 28 and that a motion under s. 29 is required, though he disagreed that a defendant's motion under s. 29 was a motion for discontinuance, describing it instead as a motion for dismissal without a determination on the merits.

[14] The motion judge said, at para. 57, that if a motion to certify a class proceeding is dismissed and none of the circumstances enumerated in s. 28(1) apply, in order to deactivate the suspension of the running of limitation periods the defendant must bring a motion. He explained:

> Until such a motion is brought, not having been formally dismissed, the proposed class action is still active albeit that it has not been certified. This conclusion is a consequence of the plain meaning of section 28 of the *Class Proceedings Act, 1992* read in the context of the

> whole *Act* and most particularly in the context of s. 29 of the *Act*.

[15] The motion judge considered that dismissal of a certification motion is akin to a discontinuance of a proceeding under the *CPA*. Thus, the defendant could bring a motion to have the class proceeding dismissed without an adjudication on the merits, a motion that would be akin to discontinuance of the action. Suspension of the limitation period would continue until the court rules on the terms of the discontinuance or dismissal.

[16] The motion judge found that following the dismissal of a motion to certify, a motion under s. 7 of the *CPA* transitions a proposed class action into a proceeding governed by the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and the court may order the joinder of parties to a continuing action pursuant to those rules: *Joanisse v. Barker*, [2006] O.J. No. 5902 (S.C.). Applying this approach, the motion judge found that, apart from the respondent's action, her motion under s. 7 should be dismissed because there were insufficient facts pleaded to determine whether the test for joinder was satisfied. He dismissed the motion without prejudice to the respondent's right to reapply to join co-plaintiffs on proper material.

DISCUSSION

[17] The amended statement of claim contains no material facts relating to the proposed co-plaintiffs, and counsel for the respondent refused to confirm that he

was retained by any such plaintiffs. This meant there was no proposed plaintiff before the court who had an interest in the s. 28 question being decided.

[18] The appellants submit the motion judge was wrong to decide a hypothetical question. Even so, they now urge that it is appropriate for this court to determine the question on appeal. We agree.

[19] The appellants argue that the motion judge's interpretation of s. 28 results in the indefinite suspension of the limitation period following the denial of certification, a result they describe as absurd. They urge a purposive interpretation of the *CPA*, rather than a focus on the grammatical and ordinary sense of s. 28, and proffer alternative interpretations. They argue that, following the refusal to certify, either all of the provisions in the *CPA*, or s. 28 in particular, no longer apply because no cause of action is being asserted in a class proceeding. As a result, the circumstances under s. 28(1) that reactivate the limitation period are irrelevant. In the alternative, they argue that the denial of certification could be interpreted as a dismissal of the class proceeding without adjudication on the merits, as contemplated by s. 28(1)(d), and that the limitation period would resume as a result.

[20] The respondent counters that s. 28 of the *CPA* constitutes a complete code governing the resumption of limitation periods for class members and the denial of certification is not one of the listed circumstances. The plain meaning of the

provision supports the motion judge's interpretation: the proceeding or action must be dismissed in order for the suspension to end. The court should not use a purposive interpretation to rewrite the section to include language that the Legislature could have included, but did not. Moreover, the respondent notes that there is a significant body of case law that supports its interpretation, emphasizing this court's decision in *Logan*, which was followed in *Joanisse* and *Ragoonanan*.

[21] It is well established that the purpose of s. 28 is to protect putative class members from limitation periods that would otherwise interfere with their ability to pursue a class action. As the Supreme Court of Canada explained in *Green*, at para. 60:

> The purpose of s. 28 *CPA* is to protect potential class members from the winding down of a limitation period until the feasibility of the class action is determined, thereby negating the need for each class member to commence an individual action in order to preserve his or her rights: *Coulson v. Citigroup Global Markets Canada Inc.*, 2010 ONSC 1596, 92 C.P.C. (6th) 301, at para. 49, quoted with approval by the Court of Appeal, 2012 ONCA 108, 288 O.A.C. 355, at para. 11. Once the umbrella of the right exists and is established by a potential class representative in asserting a cause of action, class members are entitled to take shelter under it as long as the right remains actively engaged. The provision is squarely aimed at judicial economy and access to the courts, encouraging the former while preserving the latter.

[22] In our view, s. 28(1) establishes an exhaustive list of circumstances that govern the commencement and suspension of limitation periods in the context of

class action proceedings. The provision means what it says: limitation periods are suspended when the respondent asserts a cause of action in a class proceeding and resume only when one of the specific circumstances in paragraphs (a)-(f) of s. 28(1) occurs. The denial of certification is not one of those circumstances. As a result, the suspension of the limitation period remains in place following the denial of certification. This understanding of s. 28(1) was confirmed by this court in *Logan* and has been applied in the trial division. There is no basis to change it now.

[23] Accordingly, the appeal must be dismissed.

[24] We accept that this result is not ideal. It means that the *Limitations Act* has been suspended indefinitely in respect of individual claimants even though the rationale for continuing to toll limitation periods no longer applies once certification has been denied. In particular, the limitation periods remain tolled for strangers to the action, whom counsel for the respondent now seeks to join to the respondent's action.

[25] But this problem is by no means new and it does not result from our decision in this case. Instead, it is the consequence of the clear wording of s. 28(1), which cannot be overcome by the purposive interpretation urged by the appellants. It is a consequence that has been clear at least since this court's decision in *Logan* in 2004.

[26] As the motion judge observed, individual actions have rarely been pursued if a certification motion was dismissed; as a practical matter, the failure to achieve certification usually brings actions to an end, rendering questions about whether individual actions are statute barred irrelevant. This is that rare case in which the question is not irrelevant.

[27] The motion judge asserted that the appellants can bring the suspension of the limitation period to an end by bringing a motion to have the class proceeding dismissed without an adjudication on the merits. He considered that such a motion would provide fair notice to putative class members that the certification motion had failed.

[28] We agree that notice to potential plaintiffs is important, but without more, a motion by the appellants to have the class proceeding dismissed would not be sufficient to provide that notice. The motion judge would have to make an order that notice be given to potential plaintiffs. We note that the motion judge could have made an order requiring notice to potential plaintiffs at the same time that he refused certification.

[29] Be that as it may, we see no basis for the motion proposed by the motion judge.

[30] A motion to dismiss the proceedings contemplates that a class action has begun, but the denial of certification means that no class action ever came into

being. Thus, no action could be dismissed, nor could an action be discontinued, and in any event discontinuance contemplates a motion brought by the plaintiffs in an action, not the defendant. Nor is it clear what the appellants would be required to establish on such a motion. A denial of certification is, in our view, akin to the decertification of a class action, but while the latter causes the limitation period to resume running, the former does not. That is a feature of s. 28(1).

[31] We note that the Legislature is considering a bill that would amend s. 28(1) to add the refusal to certify a class proceeding as a circumstance that causes the limitation period to resume running. That bill is irrelevant to our decision in this case. Speculation as to what may or may not happen in the legislative process does not factor into the statutory interpretation process.

CONCLUSION

[32] The appeal is dismissed.

[33] Subsequent to the hearing of this matter, the parties informed the court that they have agreed on costs and that no order is required.

Released: June 25, 2020 (“R.G.J.”)

“R.G. Juriansz J.A.”
“P. Lauwers J.A.”
“Grant Huscroft J.A.”