

COURT OF APPEAL FOR ONTARIO

CITATION: David v. Loblaw Companies Limited, 2022 ONCA 833

DATE: 20221130

DOCKET: M53684, M53678 & M53664 (C70893)

Doherty, Feldman and Trotter JJ.A.

BETWEEN

Marcy David, Brenda Brooks and Andrew Balodis

Plaintiffs (Appellants/Responding Parties)

and

Loblaw Companies Limited, George Weston Limited, Weston Foods (Canada) Inc., Weston Bakeries Limited, Canada Bread Company, Limited, Grupo Bimbo, S.A.B. de C.V., Maple Leaf Foods Inc., Empire Company Limited, Sobeys Inc., Metro Inc., Wal-Mart Canada Corp., Wal-Mart Stores, Inc. and Giant Tiger Stores Limited

Defendants (Respondents/Moving Parties)

Randall Hofley and Natalie Cammarasana, for the respondent (C70893) / moving party (M53684) Canada Bread Company, Limited

Sandra Forbes, for the respondent (C70893) / moving party (M53678) Wal-Mart Canada Corp.

Chantelle Cseh, for the respondent (C70893) / moving party (M53678) Giant Tiger Stores Limited

Sinziana R. Hennig, for the respondent (C70893) / moving party (M53678) Sobeys Inc.

Andrew McCoomb and Ted Brook, for the respondent (C70893) / moving party (M53678) Metro Inc.

Markus Kremer and Joshua Abaki, for the respondents (C70893) / moving parties (M53664) Loblaw Companies Limited, George Weston Limited, Weston Foods (Canada) Inc. and Weston Bakeries Limited

James C. Orr, Kyle R. Taylor and Jonathan H.W. Careen, for the appellants (C70893) / responding parties (M53684, M53678 & M53664)

Heard: November 15, 2022

On appeal from the order of Justice Edward M. Morgan of the Superior Court of Justice, dated December 31, 2021, with reasons reported at 2021 ONSC 7331, 160 O.R. (3d) 33 and 2022 ONSC 3486.

Doherty J.A.:

[1] The moving parties bring these motions to quash the responding parties' appeal of the underlying certification order, on the basis that this court has no jurisdiction to hear the appeal.

[2] The plaintiffs moved under s. 2(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA") for an order under s. 5 of the CPA certifying a class proceeding against various producers and retailers of manufactured packaged bread. The plaintiffs alleged a widespread price fixing conspiracy, involving the manufacturers and retailers of packaged bread. The motion judge certified the proceedings against most of the named defendants. The certification order set down several common issues in respect of the various causes of action put forward. In certifying the proceeding, the motion judge defined the class at para. 3 of the order:

All persons residing in Canada ... other than Excluded Persons, who during the Class Period purchased Packaged Bread, either directly or indirectly, that was sold by a Defendant retailer.

[3] The motion judge's definition of the class for the purposes of the class proceeding is the exclusive focus of the proposed appeal brought by the plaintiffs. They contend that the class definition in the order is both inconsistent with the detailed reasons given by the motion judge about six months before the order was issued, and wrong in law on the evidence adduced by the plaintiffs on the certification motion.

[4] These motions are concerned exclusively with the jurisdiction of this court to hear the appeal. The merits of the appeal are not relevant.¹

[5] These motions raise two questions. First, do the appeal provisions in the *CPA* govern this appeal and, second, if the *CPA* does apply, do the current or former appeal provisions in the *CPA* apply?

I. DOES THE *CPA* APPLY?

[6] The plaintiffs submit that the challenged order, while made in the context of a certification motion, effectively determines the claims brought by the plaintiffs excluded from the class. The plaintiffs submit that the order amounts to a final

¹ The defendants argued that the merits of the appeal were relevant in that the plaintiffs were out of time to bring their appeal and needed an extension of time. The merits of an appeal are relevant to whether an extension should be granted. I do not agree that the plaintiffs are out of time. The terms of the order, and in particular the definition of the class identified in the order, were subject to dispute among the parties. The terms were not fully known to the parties until the order was issued in June 2022. In those circumstances, the plaintiffs' time to appeal began to toll when the order was issued: *Gefen v. Gaertner*, 2021 ONCA 631, at para. 10. The appeal is not out of time.

order dismissing the claims brought by those plaintiffs and is appealable to this court under s. 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (“CJA”).

[7] Alternatively, the plaintiffs submit that if the appeal provisions in the *CPA* control this appeal, the current provisions in the *CPA* apply. Under s. 30(1)(a) of the current provisions in the *CPA*, an appeal lies to this court from an order certifying or refusing to certify a proceeding as a class proceeding.

[8] The defendants submit that the order under appeal is an order certifying the proceeding as a class proceeding and is subject to the appeal provisions in the *CPA*. The defendants further argue that under the transitional provision in s. 39(1) of the *CPA*, the appeal provisions of the *CPA* in force before the 2020 amendments apply to this appeal. Under those provisions, an appeal from a certification order lies to the Divisional Court with leave of a Superior Court judge. The defendants ask this court to quash this appeal.

[9] The proper characterization of the order under appeal is central to the determination of the proper appellate forum. In making that characterization, the court is concerned with the substance of the order and its effect on the proceedings. As explained in *Cavanaugh v. Grenville Christian College*, 2013 ONCA 139, 360 D.L.R. (4th) 670, an order made on a certification motion, which effectively brings a claim to an end, is not properly characterized as an order granting or refusing certification, but is correctly viewed as an order bringing the

proceeding, or at least a claim in the proceeding, to an end. The order is a final order, properly appealable under s. 6(1)(b) of the *CJA*.

[10] Paragraph 3 of the certification order defines the class for the purpose of the certification proceeding. Nothing in the order, expressly or by implication, decides the ultimate merits of any claim in respect of any of the plaintiffs.

[11] The motion judge defined the class to reflect his understanding of the nature and scope of the allegations advanced by the plaintiffs. He read the claim as requiring that persons harmed by the conspiracy include only persons who had acquired packaged, manufactured bread that had passed through both a defendant producer and a defendant retailer.

[12] Nothing in the motion judge's language suggests that any part of any claim by any potential plaintiff was dismissed by the motion judge. Indeed, counsel for Canada Bread, in response to questions from the court, expressly indicated that it was not, and would not, be Canada Bread's position that any persons excluded from the class, as defined by the motion judge, would be barred by *res judicata*, or abuse of process, from raising their claims in a proceeding in which the nature and scope of the conspiracy was described so as to include the plaintiffs excluded by the motion judge.

[13] The order is not a final order bringing a plaintiff's claim to an end. It is a procedural order, describing the constitution of the class for the purposes of the

class proceeding certified by the motion judge. The appeal provisions in the *CPA* govern.

II. WHICH APPEAL PROVISIONS IN THE *CPA* APPLY?

[14] The relevant part of the transitional provision in s. 39(1)(a) of the *CPA* reads:

39 (1) Except as otherwise provided by this section, this Act, as it read immediately before section 35 of Schedule 4 to the *Smarter and Stronger Justice Act, 2020* came into force, continues to apply with respect to,

(a) a proceeding commenced under section 2 before that day;

[15] The “proceeding commenced under section 2”, referred to in s. 39(1)(a), is the proceeding in the Superior Court brought on behalf of the members of the class. That proceeding was commenced by Notice of Action issued on November 7, 2017. The appeal, like the certification motion itself, is a step in the proceeding that was commenced in November 2017.

[16] The plaintiffs referred to s. 52 of the *Legislation Act, 2006*, S.O. 2006, c. 21, Sched. F in support of the submission that s. 39(1) has no application to appeals. With respect, s. 52 in the *Legislation Act, 2006* is not helpful. When interpreting statutes, the reader begins with the language of the statute: *Legislation Act, 2006*, s. 47. If the language is clear, there is no need to go outside of that language to interpret the provision. The language of s. 39(1) could not be clearer. The Legislature drew a bright line between class action proceedings commenced before the 2020 amendments came into effect, and class action proceedings

commenced after that date. That bright line applies “except as otherwise provided by this section”. Nothing in the language of s. 39(1) suggests that the section does not apply to the provisions in the *CPA* governing rights of appeal. The appeal provisions as they existed before the 2020 amendments to the *CPA* apply to this appeal. The former s. 30(2) of the *CPA* applies. The appeal from the certification order lies to the Divisional Court with leave from a Superior Court judge.

[17] The appeal to this court is quashed.

[18] As agreed between the parties, costs are payable to the moving parties in the amount of \$7,500 plus HST, inclusive of disbursements.

Released: “November 30, 2022 DD”

“Doherty J.A.”
“I agree. K. Feldman J.A.”
“I agree G.T. Trotter J.A.”