Court File No. CV-17-586063-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

MARCY DAVID, BRENDA BROOKS and ANDREW BALODIS

Plaintiffs

- 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

Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF MAPLE LEAF FOODS INC.
(Responding to Second Certification Motion and in Support of Motions to Strike and to Exclude Evidence)

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PART I - OVERVIEW

1. Maple Leaf Foods Inc. ("**MLF**") delivers these consolidated submissions to address the three motions before the Court, namely: (i) the Plaintiffs' motion (with the support of Canada Bread Company, Limited ("**Canada Bread**")) to revisit and reverse this Court's prior certification ruling dated December 31, 2021 that refused to certify this action against MLF (the "**Second Certification Motion**"); (ii) MLF's motion to strike the Plaintiffs' latest amended claim; and (iii) MLF's motion to exclude certain exhibits as inadmissible hearsay evidence.

2. The Plaintiffs' motion is an outright attempt to relitigate this Court's final order that refused to certify this action against MLF on the basis of evidence that was previously excluded by the Court as well as hearsay evidence that is inadmissible. The Plaintiffs have adduced no "new" admissible evidence that could meet the test for reopening the record after this Court has already issued a final order. Moreover, the Plaintiffs' motion is barred by the preclusive doctrines of *res judicata*, issue estoppel, collateral attack and abuse of process, which are designed to prevent precisely these types of repeated kicks at the proverbial certification can, ensure finality in litigation, and advance the goal of judicial economy. MLF respectfully submits that this Court should dismiss the Plaintiffs' motion and grant MLF's motions.

3. This action has a lengthy history. It was commenced in 2017, and the original certification motion was brought in 2018 (the "**Original Certification Motion**"). The Plaintiffs delivered extensive materials in support of their position on the Original Certification Motion, including the Informations to Obtain ("**ITOs**") that referred to MLF and the alleged role of a former senior officer of Canada Bread. The parties argued the Original Certification Motion over five days in October 2021. During that Motion, the Plaintiffs sought to introduce a number of the **same documents** that are the subject of this motion, and the Court ruled that these documents were inadmissible. In its final ruling, this Court held that the Plaintiffs had failed to assert any viable

cause of action against MLF under Section 5(1)(a) of the *Class Proceedings Act, 1992* ("***CPA***") under their various theories in light of the foundational principles of corporate separateness. At the time, Canada Bread and its parent, Grupo Bimbo S.A.B. de C.V. ("**Grupo Bimbo**") advanced and succeeded on the same arguments of corporate separateness in their efforts to resist certification. Canada Bread and Grupo Bimbo now seek to do an about face on the very argument they advanced successfully in this Court during the Original Certification Motion, and that they benefitted from.

4. The Plaintiffs never appealed the Court's determination in favour of MLF. In this motion, after years of pursuing separate appeals relating to the class definition, the Plaintiffs now seek to circumvent the statutory appeal process and ask this Court to "amend" its Certification Order through its case management powers and **reverse** its prior ruling in favour of MLF. The primary evidence they purport to rely upon in doing so is the very same evidence the Court specifically ruled was inadmissible for being too late as part of the Original Certification Motion. The balance of the supposedly "new" evidence – the Canada Bread Agreed Statement of Facts ("**ASF**"), and other hearsay documents – are not new in substance and are inadmissible.

5. The Plaintiffs' motion should be dismissed as a belated attempt to relitigate the final ruling of this Court that there is no viable cause of action against MLF. MLF makes a number of core submissions. First, the Plaintiffs' Second Certification Motion is foreclosed by the statutory scheme of the *CPA*. This Court has no jurisdiction under Sections 8(3) or 12 of the *CPA* to reverse a prior and final certification ruling given express statutory language that provides that any challenge to an order "refusing to certify a proceeding" must be pursued by means of an appeal under Section 30 of the *CPA*. The Plaintiffs made the deliberate strategic choice to forego any appeal in respect of the Court's decision against MLF and should be held to the consequences associated with that choice.

6. Second, the Plaintiffs' Second Certification Motion is precluded by the doctrines of *res judicata*, abuse of process, collateral attack and the principles against re-litigation. Our Courts have held repeatedly that these principles apply with equal force to a ruling on class certification. In this case, this Court has already ruled that the Plaintiffs have not asserted any viable cause of action against MLF. Notwithstanding the final and binding decision of the Court in that regard, the Plaintiffs have asserted **the same identical causes of action** against MLF under the *Competition Act*, for the tort of common law conspiracy, for unjust enrichment and for constructive trust in their proposed amended Claim. The Plaintiffs also assert the same identical arguments the Court has already rejected relating to MLF's alleged domination and control over Canada Bread, the role of a former senior officer of Canada Bread and the original ITOs. This Court has already found that these arguments were foreclosed by the principles of corporate separateness.

7. Third, in this motion, the Plaintiffs are seeking to rely on the same historical evidence from certain ITOs and MLF's corporate disclosures that this Court specifically ruled were inadmissible during the Original Certification Motion. The Plaintiffs never sought leave to appeal that decision, and there have been no new ITOs since this Court's ruling in December 2021.

8. Fourth, the Plaintiffs cannot meet the test in *Sagaz* to adduce new evidence at this late stage. The Courts have held that that test applies where the Court has issued a decision but no final order has been entered. In this case the Court's final order was issued and entered more than two years ago, on June 10, 2022. In any event, the Plaintiffs cannot meet the high threshold set out in *Sagaz* that: (i) the proposed evidence would probably have changed the result the Court has already arrived at; and (ii) the proposed evidence could not have been discovered by the exercise of reasonable diligence. In particular:

(a) **The ITOs and the Annual Reports**. A substantial part of the "new" evidence that the Plaintiffs invoke on this motion (*i.e.*, the ITOs and MLF's corporate disclosures)

was actually discovered by the Plaintiffs during the Original Certification Motion but excluded by the Court in its evidentiary ruling;

(b) **The ASF**. Canada Bread's statements in its ASF do not constitute "new" admissible evidence. The ASF was filed for the purposes of a joint sentencing recommendation pursuant to leniency arrangements Canada Bread negotiated as early as November, 2017 but that have never been disclosed. The sentencing court did not make any factual findings in respect of the ASF. The ASF is inadmissible against MLF, both because MLF did not make any admission in it, and because it does not meet a threshold level of reliability with respect to MLF. The Supreme Court of Canada has held that statements by a co-accused, made in the context of negotiating a more lenient sentence, are motivated by self-interest and "inherently unreliable."[1] Moreover, Canada Bread's statements in the ASF were made unilaterally by it in a different proceeding, have not been verified or corroborated by any witness of the Plaintiffs or Canada Bread, and are now being proffered in this proceeding for the truth of their contents. This is at best unfair and impermissible. MLF has had no opportunity to test the accuracy or reliability of any of these statements, either for the purposes of this motion or otherwise. The ASF is unreliable hearsay and has no evidentiary value on this motion. In any event, the supposedly "new" facts in the ASF are not new, and instead are the same core underlying facts that were relied upon by the Plaintiffs during the Original Certification Motion; and

(c) **The Challenged Exhibits**. The documents the Plaintiffs have obtained from Canada Bread and purport to rely upon in support of their Second Certification

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[1] *R. v. Youvarajah,* 2013 SCC 41 at paras 58-62 [*Youvarajah*].

> Motion (the "**Challenged Exhibits**") do not constitute "new" admissible evidence. A certification motion must be decided on the basis of properly admissible evidence. But the Plaintiffs have not adduced any evidence from any affiant who has personal knowledge of these records (all of which date back to the period from 2007 to 2010), or who can attest to the source, selection, authenticity or content of any of these documents. The Plaintiffs have also failed to disclose the terms of their cooperation agreement with Canada Bread that led to the production of these exhibits, in violation of their obligations under *Handley Estate*.[2] The Plaintiffs have further failed to offer any explanation or timeline of their purported diligence in seeking to obtain these records in the period prior to November, 2023. In short, this Court has no factual foundation to assess whether these records could have been obtained by the Plaintiffs through cooperation or the cross-examination of Canada Bread's two senior sales representatives in 2021.

In any event, on their face, none of these documents have any bearing on this Court's ruling that there is no viable cause of action against MLF under Section 5(1)(a) of the *CPA*.

9. The Plaintiffs' Second Certification Motion breaches the most basic principles of fairness and finality, and the Court should not permit Canada Bread to make submissions in support of it or give those submissions any weight. Canada Bread opposed certification during the Original Certification Motion and advanced the same arguments of corporate separateness in respect of its parent, Grupo Bimbo. Although Canada Bread was in possession of its historical records at the time of the Original Certification Motion, it did not volunteer any of these documents or assert any crossclaim against MLF. Although Canada Bread has provided no explanation for the change in

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[2] *Handley Estate v. DTE Industries Limited*, 2018 ONCA 324 [*Handley Estate*].

its position to this Court, the Court can draw its own inferences. In short, after entering into an improvident plea with the Competition Bureau in 2023 arising from ill-considered and undisclosed leniency arrangements entered into with the Competition Bureau years before, as well as an undisclosed cooperation agreement entered into with the Plaintiffs for their own corporate purposes, Canada Bread and Grupo Bimbo are now seeking to encourage and support the Plaintiffs in their effort to revisit the exclusion of MLF as a certified defendant. They apparently seek to misuse these proceedings to lever up their position in a potential future dispute with MLF relating to Grupo Bimbo's acquisition of the shares of Canada Bread in 2014. This is unfair, improper and impermissible. This Court should not countenance the reversal of Canada Bread's and Grupo Bimbo's position for collateral purposes, particularly when Grupo Bimbo continues to rely on this Court's Certification Order as a final ruling in its favour.

PART II - SUMMARY OF FACTS

A. MLF

10. MLF is one of Canada's leading producers of meats and poultry products. As this Court found in the Original Certification Motion, "[MLF] does not produce or sell packaged bread (or any other bread)".[3]

11. As was fully in evidence during the Original Certification Motion, MLF was the majority shareholder of Canada Bread from the start of the proposed class period until Canada Bread was acquired by Grupo Bimbo in May 2014. During this period, Canada Bread was a publicly traded company that manufactured packaged bread.

12. On May 23, 2014, Grupo Bimbo acquired the shares of Canada Bread pursuant to a statutory plan of arrangement (the "**Share Transaction**"). Following the completion of the Share

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[3] Reasons for Decision of Justice Morgan dated December 31, 2021 ("**Certification Decision**") at para 55, Motion Record of the Plaintiffs' dated August 4, 2023 ("**MR**") Vol 1, Tab D p. 69.

Transaction, MLF had no further interest in Canada Bread, and no interest in any company involved in the sale of packaged bread in Canada.

B. The Plaintiffs' Claim

13. The Plaintiffs commenced this action on November 7, 2017, alleging a sprawling price-fixing conspiracy involving more than a dozen producers and retailers of packaged bread and their respective parent companies over a period of some 14 years.

14. In the lead up to the Original Certification Motion in 2021, the Plaintiffs issued a Third Fresh as Amended Statement of Claim (the "**Third Claim**"). With respect to MLF, the Plaintiffs alleged that at all material times "Canada Bread participated in the Conspiracy under the direction of [MLF]", and that "MLF was aware of and participated in the Conspiracy". The Plaintiffs further alleged that until the sale of Canada Bread to Grupo Bimbo, MLF exercised complete "domination and control" over the affairs and activities of Canada Bread, and that MLF used Canada Bread as a shield for the improper purpose of participating in the alleged conspiracy. Alternatively, the Plaintiffs asserted that Canada Bread acted as the authorized agent of MLF in all respects, including its participation in the alleged conspiracy.[4] The Court rejected these theories, which the Plaintiffs seek to relitigate in pursuing this Second Certification Motion against MLF.

C. The Court's Ruling at the Original Certification Motion

15. The Original Certification Motion was argued on the basis of the Third Claim before Justice Morgan of the Ontario Superior Court of Justice over five days between October 25 and 29, 2021, which was more than seven years after Grupo Bimbo acquired Canada Bread, and four years after the Competition Bureau executed warrants against many of the Defendants.

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[4] Third Claim, at paras 14-16, Exhibit A to Affidavit of Khrystal Mittoo-Thomas sworn February 16, 2024 ("**MT Affidavit"**), Responding Motion Record of the Defendant MLF dated February 16, 2024 ("**RMR**"), Tab 2-A pp. 19-20.

16. The Plaintiffs made the strategic decision to pursue class certification without the support of any cooperating party, and were required to put their best foot forward on the Original Certification Motion. To that end, the Plaintiffs delivered a voluminous Certification Record and Supplemental Certification Record totaling approximately 3,500 pages. Amongst other things, the Plaintiffs relied on the Information to Obtain of Simon Bessette dated October 26, 2017 (the "**Original ITO**"), which contained allegations relating to the supposed conduct of Mr. Richard Lan. Mr. Lan was formerly cross-appointed as an officer of both Canada Bread and MLF. That fact was clearly disclosed in multiple places within the Plaintiffs' Certification Record. Plaintiffs' counsel also referred repeatedly to Mr. Lan's alleged connections to MLF during oral arguments.[5]

17. On the fourth day of the certification hearing, after MLF had completed its responding submissions, the Plaintiffs sought to adduce additional evidence in support of their argument that the action should be certified against MLF (the "**Additional Materials**"). The Plaintiffs had previously made the tactical choice to include none of these Additional Materials in their Certification Record, even though they were publicly available and predated the motion by months and even years. The Additional Materials included:

(a) An excerpt from MLF's Annual Report for the Year Ended December 31, 2020. In that Annual Report, MLF confirmed that it had been named in a "class action against packaged bread manufacturers and retailers and an ongoing investigation by the Competition Bureau into the Canadian bread industry, including alleged price fixing and related securities disclosure issues". MLF further disclosed that it

[5] Reply Factum of the Plaintiffs dated October 5, 2021, at para 23, Exhibit I to MT Affidavit, RMR, Tab 2-I pp. 205-206. See also Transcript from Original Certification Motion, dated October 25, 2021, pp. 8.8-9.14, including the submission of Plaintiffs' counsel that "So, we have the original round of warrants and now we have a warrant against -- a search warrant against Maple Leaf Foods and we have the evidence that Richard Lan was involved in every discussion where there was a price increase in every circumstance according to the person providing information to the government."

was "a named defendant in the class action and is a subject in the investigation";[6] and

(b) The Information to Obtain of Simon Bessette, dated May 13, 2019 (the "**Second ITO**"). The Second ITO contained additional allegations not previously made in the Original ITO, including that at least one senior executive at MLF, specifically Michael McCain, had knowledge of the alleged anti-competitive conduct that was the subject of the Commissioner's inquiry.[7] The Second ITO also reproduced an email seized from Canada Bread dated March 22, 2007, describing a meeting between Mr. McCain and Paul del Duca of Metro Inc.[8] The Plaintiffs now purport to rely on this email as a key piece of "new evidence", even though : (i) the email is entirely innocuous and legally benign, given that Metro was a customer of Canada Bread rather than a competitor of either Canada Bread or MLF; and (ii) was available to the Plaintiffs prior to the Original Certification Motion.[9]

18. Justice Morgan excluded the Additional Materials from the record of the Original Certification Motion and issued the following endorsement (the "**Endorsement**"):

> In *Carter v. Ford Motors*, Justice Perrell said that a certification proceeding must be done on admissible evidence. I, of course, agree with that, but having said that I am not a formalist when it comes to evidence on a motion. The fact that the evidence is unsworn does not faze me. These two new documents could easily have been attached to a law clerk's affidavit making them sworn and proper in form but, of course, that propriety in form would have added nothing to the substance.
>
> It is the substance here that really concerns me and I think that Justice Perrell, again, stated the concern in *Johnson v. North American Palladium*. There he pointed out that the rule against case splitting restricts reply evidence. It does not entitle the plaintiff to submit new evidence on reply. As Justice Perrell put it, that would be

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6 Exhibit 13 to Affidavit of Pujan Modi sworn August 4, 2023 ("**Modi Affidavit**") at p. 23, MR Vol 2, Tab F-13 p. 816.

7 Exhibit 7 to Modi Affidavit at para 4.15, MR Vol 1, Tab F-7 pp. 246-247.

8 Exhibit 7 to Modi Affidavit at para 4.56, MR Vol 1, Tab F-7 pp. 259-260.

9 Plaintiffs' Moving Factum (Certification Against Maple Leaf Foods Inc.) dated July 12, 2024 ("**Plaintiffs' Factum"**) at paras 34-37.

intrinsically unfair since the responding defendant has already completed their evidence and submissions. New evidence on reply would only be admissible if the matter has been raised for the first time during the defendant's response.

Here we have new documentation provided by the plaintiff on the last day of a week-long certification motion, or what I think is the last day of a week-long certification motion. The documentation refers to the defendant Maple Leaf Foods. Mr. Naudie on behalf of Maple Leaf Foods gave his response already. I cannot remember now if it was yesterday or two days ago, but I did hear his response in full.

Mr. Naudie's point was that Maple Leaf Foods was a subject of a search warrant executed by the Competition Bureau because it was a repository of documents. **He also pointed out to me that an executive of Maple Leaf Foods at the relevant time was also an executive of Canada Bread and that that individual is implicated in the alleged conspiracy. That Maple Leaf Foods at the relevant time was a majority shareholder of Canada Bread.**

Those submissions that came from Mr. Naudie completely tracked the evidence that was in the record. He quite carefully took me to each point in the evidentiary record that he was making including and, I guess, especially the search warrant that was executed by the Competition Bureau. I see no indication that it was misleading in any way. Like I said, if this were a written essay there would have been a footnote on every sentence.

To the extent that the sworn information of Simon Bissett that the plaintiff is now asking to submit, to the extent that that sworn information might suggest something different, that is the information I gather on which the search warrant was issued, or was premised, to the extent that that might suggest something different my concern is that that will likely be a matter of interpretation and debate and there is no time for counsel for Maple Leaf Foods to prepare a proper sur-reply. For all I know, they may have yet some other document, where there may be out there yet some other document that helps interpret this new document and then we would be in a continuing spiral of new evidence.

This case is three years old. There are some 24 lawyers, I've counted them here on screen for this week-long certification motion. **The record is already voluminous. In my view, these documents are too late and as I view them[,] they do not address a new issue**. This is an issue that was foreseen, could have been more thoroughly foreseen in fact. In fact, it was actually foreseen and was the subject of Maple Leaf Foods' submission a couple days ago**.** So, I am not going to allow them to be adduced in evidence at this point. Okay.[10]

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[10] Exhibit M to MT Affidavit at pp. 170-173, RMR, Tab 2-M pp. 279-282 (emphasis added).

19. Justice Morgan released his reasons for decision on December 31, 2021 (the "**Certification Decision**"),[11] dismissing the putative class action against the parents (including MLF), and certifying common issues against the other Defendants concerning liability under the *Competition Act*, common law conspiracy, unjust enrichment, and constructive trust.[12]

20. With respect to MLF and the other parents,[13] Justice Morgan concluded as follows:

(a) The Third Claim provided no basis for disregarding the separate corporate personalities of the parents and the companies of which they are shareholders;[14]

(b) There was no basis to treat MLF as "unique among the Parents", and in fact there was "nothing to support…the Plaintiffs' attempt to distinguish it from the other Parents";[15]

(c) MLF was a publicly traded company that did not produce or sell packaged bread;[16]

(d) The Third Claim did not set out any basis to disregard the principle of corporate separateness as between Canada Bread and MLF. Moreover, the Plaintiffs did not allege – and could not plausibly have alleged – that Canada Bread, a publicly traded company pre-dating the alleged conspiracy, the shares of which were never completely owned by MLF, was incorporated for an improper purpose or as a mere shell;[17] and

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11 *David v. Loblaw*, 2021 ONSC 7331.
12 Certification Decision at paras 27-29, MR Vol 1, Tab D pp. 64-65.
13 Specifically, MLF, Grupo Bimbo, Wal-Mart Stores, Inc., and Empire Company Limited. Justice Morgan certified these causes of action against George Weston as a corporate parent, since it was a different position from the other parent companies given its admission of direct participation in a price-fixing conspiracy.
14 Certification Decision at para 37, MR Vol 1, Tab D p. 66.
15 Certification Decision at para 56, MR Vol 1, Tab D p. 69.
16 Certification Decision at para 55, MR Vol 1, Tab D p. 69.
17 Certification Decision at paras 51-57, MR Vol 1, Tab D pp. 68-69.

(e) The Original ITO was nothing more than a bald allegation and was not evidence. In any event, the Original ITO expressly referenced Mr. Lan in his capacity as an officer of Canada Bread rather than in his capacity as officer of MLF. Accordingly, to the extent that Mr. Lan's "participation was significant at all", it was "significant to Canada Bread's participation".[18]

21. Justice Morgan concluded: "[T]here is nothing to support any cause of action against Maple Leaf."[19]

D. The Positions of Canada Bread and Grupo Bimbo During the Original Certification Motion

22. During the Original Certification Motion, Canada Bread and Grupo Bimbo filed evidence and made their own written and oral submissions. Canada Bread filed affidavits from two senior sales people who had each worked at Canada Bread for the entire class period.[20] Neither of these affiants volunteered any emails or other documents from Canada Bread's files that might have supported claims against MLF. Nor did they provide any evidence to implicate MLF in any alleged conspiracy whatsoever.

23. In their submissions, Canada Bread and Grupo Bimbo jointly opposed certification against any of the Defendants, including MLF. Canada Bread challenged the Plaintiffs' evidence on the basis that they had failed to meet the usual standards of admissibility on a certification motion.[21] Grupo Bimbo adopted the submissions of the other parents that the proposed claim should not be

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18 Certification Decision at paras 51-57, MR Vol 1, Tab D pp. 68-69.
19 Certification Decision at para 56, MR Vol 1, Tab D p. 69.
20 See the Affidavit of Dennis McPhail, sworn August 12, 2020, and the Affidavit of Randy Baltzer, sworn August 12, 2020, Motion Record of Canada Bread and Grupo Bimbo, dated September 10, 2021, Tabs 1 and 2 pp. 1 and 16.
21 Factum of Canada Bread dated September 10, 2021 at para 24.

certified against any of the parents, including MLF. In doing so, Grupo Bimbo relied on the same arguments in respect of corporate separateness.[22]

E. The Court's Certification Order

24. The Court issued its certification order on June 10, 2022 (the "**Certification Order**"). Under Paragraph 5 of the Certification Order, Justice Morgan held and directed that "the causes of action alleged against Walmart Inc. (formerly known as Wal-Mart Stores, Inc.), Empire Company Limited, Grupo Bimbo, S.A.B de C.V, and Maple Leaf Foods Inc. do not meet the requirements for certification set out in section 5(1)(a) of the *CPA*, and shall not be certified".[23]

F. No Appeals by the Plaintiffs, Canada Bread or Grupo Bimbo Relating to the Court's Rulings in Respect of MLF

25. The Plaintiffs did not appeal the Certification Order in relation to MLF. Nor did the Plaintiffs seek leave to appeal Justice Morgan's decision to exclude the Additional Materials. Canada Bread and Grupo Bimbo similarly did not seek to appeal Justice Morgan's rulings in respect of MLF, or his Honour's decision to exclude the Additional Materials.

G. The Separate Appeals of the Plaintiffs and Canada Bread

26. Although they pursued no appeal as against or involving MLF, the Plaintiffs did pursue a separate, limited appeal in respect of confined aspects of the Certification Order. In particular, the Plaintiffs sought to appeal the Court's ruling in respect of class definition. On February 26, 2024, the Divisional Court dismissed the Plaintiffs' appeal.[24] The Plaintiffs are currently seeking leave to appeal from that decision to the Court of Appeal. MLF relied upon the final nature of the Court's Certification Order in declining to participate in any of these appeals.

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22 Factum of Grupo Bimbo dated September 10, 2021 at para 10.
23 Certification Order of Justice Morgan dated December 31, 2021 ("**Certification Order**") at para 5, MR Vol 1, Tab C p. 38.
24 *David v. Loblaw Companies Limited,* 2024 ONSC 1157.

27. In 2022, Canada Bread also pursued its own proposed appeal from the Certification Order. MLF did not participate in Canada Bread's motion for leave to appeal. In seeking leave to appeal, Canada Bread did not seek to challenge any of the Court's findings in respect of MLF. On March 14, 2023, the Divisional Court denied Canada Bread's motion for leave to appeal. No further steps were taken by Canada Bread to challenge or appeal the Certification Order.[25]

H. The Plaintiffs' Motion to Amend the Certification Order

28. In August 2023, approximately 17 months after the Court issued its Certification Order, and well after the expiry of all appeal deadlines, the Plaintiffs now seek to relitigate the same issues through this Second Certification Motion. In particular, the Plaintiffs have brought a motion to amend Paragraph 5 of the Certification Order "to certify this action as a class proceeding against … MLF". In the alternative, the Plaintiffs have sought: (i) an order granting leave to issue a new statement of claim against MLF (the "**Second Action**"); and (ii) an order to consolidate the Second Action with the existing action.

29. In their Second Certification Motion, the Plaintiffs do not seek to revisit the Court's identical findings that there is no cause of action against Grupo Bimbo as a corporate parent under the principles of corporate separateness.

30. In support of their Second Certification Motion, the Plaintiffs have delivered a proposed Fourth Fresh as Amended Statement of Claim, dated August 4, 2023 (the "**Fourth Claim**"), and the affidavit of Pujan Modi sworn August 4, 2023 (the "**Modi Affidavit**"). The proposed statement of claim in the Second Action is materially identical to the Fourth Claim.

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[25] *David v. Sobeys Inc.,* 2023 ONSC 1585.

31. In the Fourth Claim, the Plaintiffs make additional factual allegations about MLF that were not made in their Third Claim. However, in the Fourth Claim, the Plaintiffs assert **the same identical underlying causes of action** against MLF that were contained in the Third Claim at the time the Original Certification Motion was argued in October, 2021.[26]

32. In their Fourth Claim, the Plaintiffs have included specific references to the Second ITO that Justice Morgan expressly excluded from evidence at the Original Certification Motion.[27]

33. The Notice of Motion filed by the Plaintiffs in respect of their Second Certification Motion references supposedly "new information", namely documents attached to the Modi Affidavit. This alleged "new information" consists of:

(a) The ASF of Canada Bread under Section 655 of the *Criminal Code* between His Majesty the King and Canada Bread, dated June 20, 2023, arising from Canada Bread's guilty plea in respect of conduct contrary to the *Competition Act*;[28] and

(b) The Additional Materials that were **previously excluded** from the evidentiary record by Justice Morgan during the Original Certification Motion (*i.e.*, the Second ITO[29] and MLF's 2020 annual report, along with preceding and subsequent annual reports for the years 2015-2021).[30]

34. The "new information" relied on by the Plaintiffs for this motion is either: (i) information that was available to the Plaintiffs during the Original Certification Motion; or (ii) inadmissible "evidence" from a sentencing submission relating to Canada Bread's guilty plea.

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26 Plaintiffs' Factum at para 70.

27 Fourth Fresh as Amended Statement of Claim dated August 4, 2023 ("**Fourth Claim**") at para 69, MR Vol 1, Tab E p. 104. See also Fifth Fresh as Amended Statement of Claim dated February 21, 2024 ("**Fifth Claim"**) at para 69, Supplementary Motion Record of the Plaintiffs dated February 22, 2024 ("**SMR**"), Tab 2 p. 31.

28 Exhibit 2 to Modi Affidavit, MR Vol 1, Tab F-2 pp. 163-175.

29 Exhibit 7 to Modi Affidavit, MR Vol 1, Tab F-7 pp. 230-297.

30 Exhibits 9-15 to Modi Affidavit, MR Vol 1, Tab F-9 p. 394 to MR Vol 2, Tab F-15 p. 979.

35. Canada Bread's guilty plea was entered pursuant to leniency arrangements and admissions that Canada Bread had entered into with the Competition Bureau commencing **as early as November 2017**, some **four years** before the Original Certification Motion was argued.[31] Notably, Canada Bread's guilty plea and ASF are flatly inconsistent with central allegations made by the Plaintiffs in every iteration of their Claim. MLF was not a party to the ASF and had no input into its content or wording. As described in further detail in Section III-B-(iii)-2 below, the ASF is wholly unreliable, and has no evidentiary value on this motion as against MLF.

I. The Exchange of Materials for the Second Certification Motion

36. Following delivery of the Plaintiffs' Second Certification Motion, the parties agreed on a timetable for the delivery of materials that was endorsed by the Court.[32] Under that timetable, MLF was required to deliver its responding evidence by February 17, 2024, and the Plaintiffs were required to deliver their reply evidence by March 1, 2024.

37. MLF responded to the Second Certification Motion on February 16, 2024. MLF opposed the Second Certification Motion and also brought its own parallel motion to be heard simultaneously, seeking to strike or stay all claims related to MLF in the Fourth Claim on the basis of *res judicata*, issue estoppel and abuse of process (the "**Motion to Strike**").

38. On February 22, 2024, some six months after delivering the Second Certification Motion – and after MLF had served its responding evidence and Motion to Strike – the Plaintiffs delivered a purported Fifth Fresh as Amended Statement of Claim (the "**Fifth Claim**"), dated February 21, 2024, along with a supplemental affidavit of Pujan Modi, sworn February 20, 2024 (the "**Supplemental Modi Affidavit**").

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31 Exhibit 2 to Modi Affidavit at para 28, MR Vol 1, Tab F-2 p. 170.
32 Motion Record of MLF Re Striking Portions of Supplemental Modi Affidavit dated April 8, 2024, Tab 2 p. 19.

39. The Fifth Claim, like the Fourth Claim, asserts the same identical causes of action against MLF that were asserted in the Third Claim and considered and rejected by Justice Morgan in issuing his Certification Decision and Order.[33]

40. The main difference between the Fourth and Fifth Claims is the Fifth Claim's reference to certain additional hearsay documents that were included in the Supplemental Modi Affidavit (as defined above, the "**Challenged Exhibits**").

J. The Supplemental Modi Affidavit and the Hearsay Documents

41. Mr. Modi is a lawyer with Orr Taylor LLP, one of the lawyers representing the Plaintiffs. In the Supplemental Modi Affidavit, Mr. Modi attaches a letter from Mr. Curry, counsel to Canada Bread, dated November 16, 2023 (three months before the deadline for the delivery by MLF of its evidence), and an email from Mr. Curry dated January 14, 2024 (one month before the deadline for MLF's evidence). The letter and email were addressed to Mr. Mogerman, who acts as counsel for the Plaintiffs. In the letter and email, Mr. Curry stated that he was delivering certain documents Canada Bread had produced in a parallel class action in Quebec[34] (*i.e.,* a class action in which MLF is not a party). The underlying documents date from 2007 to 2010. Canada Bread has been in possession of all of these documents for well over a decade. Based on the produced correspondence, the Plaintiffs had some form of cooperation agreement with Canada Bread in 2023 or earlier and were in possession of all of these documents by no later than January 14, 2024. Nevertheless, the Plaintiffs made the deliberate strategic choice to conceal these documents from MLF until after MLF had delivered its responding materials.

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33 Plaintiffs' Factum at para 70.

34 Exhibit A to Supplemental Affidavit of Pujan Modi dated February 20, 2024 ("**Supplemental Modi Affidavit**"), SMR, Tab 3-A p. 61; Exhibit Q to Supplemental Modi Affidavit, SMR, Tab 3-Q p. 158.

42. Mr. Modi has no personal knowledge of any of the Challenged Exhibits and was not included in the exchanges between Mr. Curry and Mr. Mogerman. Indeed, Mr. Modi does not even attest to the authenticity of any of these documents. Nor could he reasonably have done so. Mr. Curry has declined to file an affidavit. Mr. Mogerman has similarly declined to do so. Perhaps most significantly, Canada Bread has filed no affidavit or other evidence from any businessperson who can attest to the source, selection or authenticity of any of these records, let alone addresses their contents or meaning.

43. Moreover, it is clear that since at least November 16, 2023, the Plaintiffs and Canada Bread have been cooperating for purposes of this Second Certification Motion. However, in breach of their obligations under the *Handley Estate* rule,[35] the Plaintiffs have never disclosed the existence or terms of their cooperation agreement with Canada Bread, with the result that MLF has been deprived of the opportunity to explore the timeline of their cooperation, the discoverability of these records or the potential monetary or other motives of the Plaintiffs or Canada Bread in producing the Challenged Exhibits.

44. As part of this motion, the Plaintiffs are tendering the Challenged Exhibits for the truth of their contents – namely that they offer some basis in fact in respect of an alleged conspiracy that involved not only Canada Bread but also its shareholder, MLF.

45. Accordingly, on April 9, 2024, MLF brought a motion to strike the Challenged Exhibits from the evidentiary record at this Second Certification Motion as inadmissible hearsay (the "**Hearsay Motion**"). At a case conference dated May 1, 2024, Justice Morgan directed that the Hearsay Motion would proceed concurrently with the Second Certification Motion and Motion to Strike.

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[35] *Handley Estate*, *supra* note 2.

K. The Changed Position of Canada Bread and Grupo Bimbo

46. As noted above, during the Original Certification Motion in 2021, Canada Bread and Grupo Bimbo opposed certification as against **all** of the Defendants and argued against parental liability on grounds of corporate separateness. However, at some point in 2023, Canada Bread reversed its position and now supports the Plaintiffs' Second Certification Motion as against MLF.

47. Moreover, Canada Bread has also recently advised that some seven years after this proceeding was commenced, it now intends to assert a crossclaim against MLF in this action. Grupo Bimbo previously threatened to assert a claim against MLF arising from its acquisition of Canada Bread in 2014, outside of the context of this proceeding. That claim was (and remains) tolled by agreement of the parties.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

A. Statement of Issues

48. It is MLF's position that:

(a) **The Second Certification Motion should be dismissed because of the doctrines of *res judicata*, issue estoppel, collateral attack and/or abuse of process**

This motion is an abusive attempt to relitigate the Original Certification Decision and to mount a collateral attack on the Certification Order. The Certification Order is a final Order of the Superior Court. The Plaintiffs took no steps whatsoever to appeal from that Order in respect of MLF. Having chosen not to pursue an appeal as against MLF, the Plaintiffs cannot now do an end run around the statutory appeal provisions of the *CPA* by seeking an "amendment" to the Certification Order, years after all applicable appeal and limitation periods have expired.

(b) **The Plaintiffs cannot satisfy the strict test for the admission of new evidence (the "*Sagaz* test") in their belated efforts to certify this case against MLF**

The *Sagaz* test applies where a plaintiff seeks to adduce new evidence after the Court has issued a decision, but before the issuance of a final order. In this instance, the Court issued its final order in respect of MLF in 2022. In any case, the principal allegedly "new", non-hearsay evidence that is supposedly admissible on this motion is not, in fact, new. It is in substance the very same evidence that Justice Morgan refused to admit on the Original Certification Motion. Neither that evidence nor any other evidence the Plaintiffs seek to rely upon in support of their Second Certification Motion would have "probably have changed the result" of the Original Certification Motion. Moreover, the bulk of that evidence could have been discovered (and in fact was discovered) by the Plaintiffs through the exercise of reasonable diligence. The Plaintiffs' belated attempt to rely on this evidence is abusive and effectively a collateral attack on Justice Morgan's well-founded decision to exclude this evidence from the Original Certification Motion. Although the ASF and Canada Bread's plea may be admissible as against Canada Bread, they are **not** admissible as against MLF. As the Supreme Court of Canada held in *R. v. Youvarajah*, statements of that nature are inherently unreliable and constitute inadmissible hearsay against a third party. The Challenged Exhibits are plainly hearsay and raise all of the reliability and fairness concerns traditionally associated with hearsay evidence. They are also improper reply and must be excluded.

B. Responding Submissions of MLF on the Second Certification Motion

(i) The Plaintiffs' Motion Seeks to Set Aside a Final Order and is Foreclosed by the CPA and the CJA

49. To begin, the Plaintiffs' motion is foreclosed by the statutory scheme to the *CPA*. The *CPA* provides for limited rights of appeal from a ruling on class certification.[36] Under Section 30 of the *CPA*, the Plaintiffs had a right to appeal the Court's "order refusing to certify a proceeding" to the Divisional Court. The Plaintiffs could also have sought leave to appeal to the Divisional Court from the Court's decision excluding the Additional Materials. The Plaintiffs may also have had a direct right of appeal to the Court of Appeal in respect of the Court's rulings under Section 5(1)(a), since the Court has held that an order striking out a claim as disclosing no reasonable cause of action is a **final order** that can be appealed under Section 6(1)(b) of the *Courts of Justice Act*.[37]

50. The Plaintiffs chose not to pursue **any** of these avenues of appeal from the Court's rulings in respect of MLF. As stated above, all potentially applicable appeal periods have expired, and the Certification Order is now final in respect of MLF. MLF has relied on that finality since 2021 and has not participated in any of the subsequent appeals or proceedings regarding other aspects of the Certification Order.

51. The Plaintiffs argue that the certification process is *sui generis*, and that certification is a "fluid, flexible procedural process".[38] They claim that "certification orders … are not final judgments" – rather "they are interlocutory orders that may be amended at any time as the case proceeds".[39]

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[36] The parties are in agreement that any appeal rights that existed are governed by the version of the *CPA* that existed at the time the claim was issued. See the Court of Appeal's ruling in the separate appeals relating to the Certification Order at *David v. Loblaw Companies Limited*, 2022 ONCA 833 at paras 14-16.

[37] See, *e.g.*, *Cavanaugh v. Grenville Christian College*, 2013 ONCA 139 at paras. 1, 13, 17, 32-33 [*Cavanaugh*].

[38] Plaintiffs' Factum at para 64.

[39] Plaintiffs' Factum at para 55.

52. With respect, the Plaintiffs are completely wrong in law. The Court of Appeal has specifically held that a finding by a certification judge that a plaintiff has failed to plead a viable cause of action under Section 5(1)(a) is indeed a final order.[40] The *CPA* provides express rights of appeal from or in respect of certification orders. In this very case, the Plaintiffs invoked these rights to challenge the Court's ruling regarding the class definition – *i.e.*, a procedural issue. The Plaintiffs continue to invoke these rights in respect of their pending application for leave to appeal to the Court of Appeal. Similarly, Canada Bread invoked these rights in respect of its proposed appeal from class certification.

53. The Court has jurisdiction under Section 12 of the *CPA* to issue orders in respect of "the conduct of a class proceeding". This Court's power under Section 12 concerns case management, and is invoked to deal with routine matters relating to timetables, production, discovery, carriage, funding agreements and class notices. The Court also has jurisdiction under Section 8(3) of the *CPA* to amend a certification order involving a certified defendant in a certified proceeding, such as to deal with changes to the identity of representative plaintiffs or refinements to class definitions.

54. However, MLF is not aware of a single authority where this Court has invoked its powers under these provisions to **revisit and reverse** a final order that **refused** to certify a proceeding against a defendant under Section 5 of the *CPA*. MLF is similarly not aware of any precedent where this Court has invoked these powers to revisit and reverse a finding that there is no viable cause of action under Section 5(1)(a) of the *CPA*. Given the express and specific language in Section 30 that refers to appeals from "an order refusing to certify a proceeding", the general

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[40] *Cavanaugh, supra* note 37 at paras 13 and 17; *LBP Holdings Ltd. v. Hycroft Gold Corp. et al.,* 2018 ONSC 1794 at para 37; *Obodo v. Trans Union of Canada, Inc.,* 2022 ONCA 814 at paras 17-20, leave to appeal to SCC ref'd 2023 CanLII 62026; *Lilleyman v. Bumble Bee Foods LLC*, 2024 ONCA 606 at paras 5, 38-42.

language under Sections 12 and 8(3) of the *CPA* cannot extend to issuing an order to amend and **reverse** a final order "refusing to certify a proceeding" in the absence of an appeal.

55. The Plaintiffs' contrary argument would effectively undermine or even negate the appeal process provided for under the *CPA*, disrupt the orderly management of class proceedings in this Province and eviscerate the important goal of finality in class proceedings. It would impair, rather than advance, the underlying goals of judicial economy and access to justice. If the Plaintiffs' unprecedented theory is accepted, it would be open to virtually every plaintiff in every class action involving multiple parties to revisit the denial of certification through a future "amendment" of the certification order on the basis of repackaged old facts – in this case, old facts that were specifically excluded as evidence on the Original Certification Motion.

(ii) The Plaintiffs' Motion is Barred by the Doctrines of Res Judicata, Issue Estoppel, and Collateral Attack, and is an Abuse of the Court's Processes

56. The Plaintiffs' Second Certification Motion is also barred by the doctrines of *res judicata*, issue estoppel and collateral attack, and is an abuse of process. Under these interrelated doctrines, a party is precluded from re-litigating a claim or issue that has been determined by the Court in a final order.[41] The fundamental principle that these doctrines enshrine is the goal of finality in litigation.[42] At their core, these doctrines work together to prevent unfairness through "abuse of the decision-making process".[43] Our Courts have held repeatedly that these doctrines apply to the outcomes of interlocutory or procedural motions within an action, including certification motions under the *CPA*.

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41 *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) v. Celestica Inc.,* 2016 ONSC 3235 at para 37 [*Celestica*].

42 As succinctly and correctly held by Justice Farley over twenty years ago: "[Y]ou must not put new wine in old bottles; even more so, you must not in a legal sense attempt to put the same old wine in the same old bottles". *Shaw v. BCE Inc*. (2003), 42 B.L.R. (3d) 107 (ONSC) at para 8. Affirmed by the Court of Appeal (2004), 49 B.L.R. (3d) 1 (ONCA), but on different grounds.

43 *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52 at para 34 [*Figliola*].

57. The Plaintiffs argue that these doctrines carry less force in the context of a ruling on class certification. There is no merit to that contention. Indeed, the Divisional Court rejected this identical argument fifteen years ago in *Risorto v. State Farm Mutual Automobile Insurance Co*. ("***Risorto***"). In *Risorto*, the Court held that the principle of finality is just as compelling in certification proceedings as it is in any other context, and that certification is **not** sufficiently unique to warrant a different approach.[44]

58. This is entirely logical and sensible, given that certification is the "critical step in a class proceeding", and that the parties to class actions "understand well the significance of an order granting or refusing certification".[45] In this case, the Original Certification Motion was argued over an entire week, a longer period than many trials, on the basis of a voluminous record.

59. Given the importance of finality, our Courts have held that litigants are not to be allowed successive "bites at the cherry" in respect of class certification.[46] Numerous Courts throughout Canada have held that second and successive attempts at certification are foreclosed under the doctrines of *res judicata*, issue estoppel and/or abuse of process.[47] The Plaintiffs' attempt to dismiss these numerous precedents as "starkly differ[ing]" is unavailing.[48] In fact, these authorities are directly applicable and dispositive of this motion.

60. In *Turner v. York University* ("***Turner***"), for instance, Justice Horkins refused to permit the plaintiff to amend his claim following an initial unsuccessful attempt at certification. Similar

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44 *Risorto v. State Farm Mutual Automobile Insurance Co*, [2009] O.J. No. 820 (Div. Ct.) at paras 37 and 41 [*Risorto*].

45 *Turner v. York University*, 2011 ONSC 6151 at paras 63-64 [*Turner*]; *Risorto*, *supra* note 44 at para 40.

46 *Samos Investments Inc v. Pattison,* 2004 BCSC 484 at paras 57-60 [*Samos*] (the Court adopted this vernacular, but multiple "bites at the apple" may be the more accurate phrase).

47 See, for example: *Heller v. Uber Technologies Inc*., 2023 ONSC 1942, in which Justice Perell refused to allow class counsel to amend the claim to add a common issue that had been decided against the class twice previously; *Samos*, in which class counsel proposed three successive class definitions; *MacKinnon v. National Money Mart Co*., 2006 BCCA 148, in which the Court held that "judicial economy is enhanced by discouraging repeated applications for certification" and that "Access to justice is furthered by ensuring that the courts are not clogged with repeated applications in the same litigation"; and *Bear v. Merck Frosst Canada & Co*., 2011 SKCA 152.

48 Plaintiffs' Factum at para 97.

to this motion, the plaintiff in *Turner* continued to allege the exact same causes of action,[49] but sought to address the criticisms of the Court through strategic amendments. Justice Horkins concluded that the plaintiff's amendments were barred by issue estoppel and *res judicata*, applying the tripartite test requiring: (i) that the same question has been decided; (ii) that the judicial decision creating the estoppel was final; and (iii) that the parties be the same.[50]

61. The same analysis applies here. The question of certification against MLF under Section 5 of the *CPA* has been finally determined, and the Plaintiffs' attempt to relitigate this question is barred by issue estoppel and *res judicata*. More particularly:

(a) First, Justice Morgan has already determined that it was plain and obvious that the Third Claim did not disclose a viable cause of action against MLF under Section 5(1)(a), and that, in fact, "important portions" of the claims against MLF "**could not possibly be supported by any material facts**".[51] The Plaintiffs nonetheless continue to allege **the identical causes of action** that have already been found not to be viable as a matter of law, conceding in their factum that the "amendments in the Fourth and Fifth Claims did not result in a fundamental change to the nature of the action certified, nor did they plead any new causes of action".[52]

(b) Second, the Certification Order is final as **it concerns MLF**. *Turner* demonstrates that even where a plaintiff is actively appealing a certification order, it is still considered final for *res judicata* purposes once issued, as such order "leaves nothing to be judicially determined or ascertained thereafter, in order to render it

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49 *Turner*, *supra* note 45 at paras 37 and 65.
50 Originally from *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248 (SCC) at p. 254.
51 Certification Decision at para 57, MR Vol 1, Tab D p. 69 (emphasis added).
52 Plaintiffs' Factum at para 70.

effective and capable of execution".[53] And in contrast to *Turner*, there has been no appeal of the Certification Order as it concerns MLF.

(c) Third, the parties are the same.

62. Justice Perell similarly relied on these doctrines as well as the doctrine of abuse of process to foreclose a plaintiff's attempt at re-litigation of certification in *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) v. Celestica Inc.* ("***Celestica***").

63. The doctrine of abuse of process engages the inherent power of the Court to prevent the misuse of its procedure in a way that would be manifestly unfair to any party to the litigation, or that would otherwise bring the administration of justice into disrepute. Abuse of process is a flexible doctrine, unencumbered by the specific requirements of other doctrines.[54] It is broader than the doctrines of *res judicata* and issue estoppel, although in this case, all three doctrines are applicable.

64. In *Celestica*, the plaintiffs sought to rely on a purported change in circumstances to alter the original outcome at certification. More particularly, after subsequent events established that their statutory misrepresentation claim was out of time, the plaintiffs applied to Justice Perell to vary his original decision and certify the common law misrepresentation claim he had originally rejected on preferable procedure grounds. Justice Perell refused to schedule another certification hearing, remarking that there had already been a determination that the common law misrepresentation claim did not satisfy the test for certification, and accordingly:

> [A]nother certification motion should be barred as *res judicata* - technically an issue estoppel - or as an abuse of process… If I was wrong in deciding that standing alone the common law misrepresentation did not satisfy the preferable procedure

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[53] *Turner*, *supra* note 45 at para 65, citing *Newmarch Mechanical Constructors Ltd. v. Hyundai Auto Canada Inc.* (1994), 18 O.R. (3d) 766 (ONSC).

[54] *Celestica, supra* note 41 at para 37; *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (ONCA) at paras 55-56, Goudge JA, dissenting, aff'd [2002] 3 S.C.R. 307 (SCC).

> test, **the route was to appeal my decision not re-litigation of whether the common law claim standing alone is certifiable**.[55]

65. The same reasoning applies in this case, where the Plaintiffs likewise attempt to rely upon a purported change in circumstances – the so-called "change in heart and change of story" of Canada Bread.[56] Justice Morgan already dismissed as fatally flawed each cause of action asserted against MLF. If the Plaintiffs considered that Justice Morgan had erred in reaching that conclusion, including in deciding to exclude the Second ITO and the 2015 Annual Report during the Original Certification Motion, the proper route was to appeal that decision, not to launch a collateral attack on that decision years later by re-litigating the exact same legal theories, on the basis of evidence that was previously excluded.[57]

66. At its core, this motion represents nothing more than an attempt by the Plaintiffs to relitigate their claims with the benefit of hindsight based on the Original Certification Decision, notwithstanding that the Plaintiffs have still not put forward anything – not a single shred of admissible evidence, or even a compelling argument – that could properly support piercing the corporate veil between two public companies, namely Canada Bread and MLF.[58] It manifestly remains the case that the Plaintiffs cannot plausibly allege that Canada Bread, a sizeable, operating and independent public company, was incorporated for an improper purpose or as a mere shell.

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55 *Celestica*, *supra* note 41 at paras 5 and 44 (emphasis added).
56 To utilize the term from *671122 Ontario Ltd. v. Sagaz Industries Canada Inc*. (2000), 46 O.R. (3d) 760 (ONCA) at para 33 [*Sagaz ONCA*].
57 *Figliola, supra* note 43.
58 See, for example, *Yaiguaje v. Chevron Corporation*, 2018 ONCA 472, at para 66, leave to appeal to SCC ref'd 2019 CanLII 25908.

(iii) The Plaintiffs Have Not Met the Sagaz Test for Admission of Fresh Evidence Post-Certification

(1) The *Sagaz* Test

67. The Plaintiffs' attempt to re-open the Certification Order on the basis of purported new evidence is barred since they have not purported to meet, and cannot meet, the "*Sagaz* test".

68. In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc*., the Supreme Court set out the test that a plaintiff must meet to adduce new evidence after a Court has rendered a decision, but before a final order has been issued. In *Risorto*, the Divisional Court applied the "*Sagaz* test" to the plaintiffs' attempt to revisit a denial of class certification.[59] In that case, the plaintiffs were unsuccessful at certification, did not appeal, and instead waited a year before applying to the motion judge to re-open certification by tendering new evidence. Similar to *Sagaz*, the plaintiffs in *Risorto* brought their motion before the Court had issued a final order.[60]

69. In that case, similar to this motion, the plaintiffs invoked the "procedural" nature of certification and the Court's ability to issue orders under Section 12 of the *CPA*.[61] At first instance, the motion judge applied a lenient standard of "whether there is an arguable case that new evidence might justify certification".[62] However, on appeal, the Divisional Court reversed that ruling and held that the proper test is the stricter two-part test set out in *Sagaz.* Under the *Sagaz* test, the party seeking to revisit a ruling by the Court on the basis of new evidence must demonstrate on a balance of probabilities that: (i) the proposed evidence would probably have changed the original result; and (ii) the proposed evidence could not have been discovered through reasonable diligence.[63]

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59 *Risorto, supra* note 44 at para 9 (the motion to re-open the record was brought "… before a formal order had been taken out …").

60 *671122 Ontario Ltd. v. Sagaz Industries Canada Inc*, 2001 SCC 59, at para 59 [*Sagaz SCC*] (the motion to re-open the record was brought "… before the formal judgment was entered …").

61 Plaintiffs' Factum at paras 50, 53-55.

62 *Risorto, supra* note 44 at para 11.

63 *Sagaz SCC*, *supra* note 60 at paras 20, 59-65.

70. Writing for a unanimous Divisional Court, Justice Gray explained the rationale for applying this stringent test to attempts to reopen the outcome of a certification motion:

> An orderly system of litigation requires that each party put his or her best foot forward. It contemplates that judgment will be rendered after each party has done so. Litigation by instalments is not to be encouraged. There is a strong interest in finality, which should only be departed from in exceptional circumstances. Parties make strategic decisions in the course of litigation, and except in narrow circumstances they must be held to those decisions.
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> …
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> There is no doubt that the motions judge is correct that motions for certification of class proceedings are to be approached differently than motions brought in the course of ordinary litigation. Motions judges in class proceedings are intended to exercise a considerable degree of flexibility in order that the purposes of the Act can be achieved. However, in my view, **once the evidence has been presented to the Court, the motion has been fully argued, and the Court has rendered its judgment, the principles articulated by the Supreme Court of Canada in *Sagaz*, concerning the reopening of proceedings to allow the reception of further evidence, apply with equal force to certification motions. Indeed, in some ways they apply with even more force.**
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> …
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> Parties involved in this sort of litigation understand well the significance of an order granting or refusing certification. Both parties will usually devote substantial amounts of time and resources on the motion. Typically, the magnitude of costs requested, and often awarded, vastly exceeds anything awarded on an ordinary interlocutory motion. Indeed, it is difficult to conceive of an interlocutory proceeding in which the parties would better understand the need to put their best foot forward. In my view, **the interests in preventing litigation by instalments; requiring parties to put their best foot forward; and finality; are just as compelling in certification proceedings as they are in any other proceedings.**[64]

71. Justice Gray also expressly rejected the plaintiffs' argument that a potential order under Section 12 – or any other provisions of the *CPA* – mandated a different outcome.[65]

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64 *Risorto, supra* note 44 at paras 35, 39 and 41 (emphasis added).

65 In addressing the Court's case management powers under Section 12, Justice Gray held that "While this provision is an express recognition of the broad flexibility conferred on certification judges, it cannot be construed, in my view, so as to override the long-standing and well-understood principles that apply once the Court has rendered its judgment and it is sought to reopen the proceedings and tender new evidence." *Risorto*, *supra* note 44 at para 45.

72. In this case, the Plaintiffs face a much higher burden than in *Sagaz* and *Risorto* given that **their Second Certification Motion has been brought years after the final order of the Court rejecting certification as against MLF was issued and entered**. There is no basis to suggest that a different (and lower) test should apply in the period **after** a final order has been issued and entered.

73. It is notable that the Divisional Court's ruling in *Risorto* was issued prior to the development of existing law that applies the doctrines of *res judicata*/issue estoppel/abuse of process to certification hearings. The Divisional Court did not reject the application of these principles but opted to leave that question for another day.[66] As set out above, more recent authorities hold that these doctrines apply directly to the outcome of certification hearings, particularly once the Court has issued a final order.

74. The *Sagaz* test is intended to be – and is – a very demanding test to satisfy given the compelling interest in finality in judicial proceedings.[67] Indeed, as the Divisional Court held in *Risorto*, once certification has been argued and determined in a class proceeding, the principles articulated in *Sagaz* "in some ways … apply **with even more force**".[68]

75. For the purposes of these submissions, MLF will first address the application of the *Sagaz* test on the basis of the purported "new evidence" attached to the Modi Affidavit (*i.e.*, the Additional Materials and the ASF). MLF will then address the application of the *Sagaz* test to the Challenged Exhibits, in the event that this Court finds that they are not inadmissible hearsay. In short, the Plaintiffs cannot satisfy the *Sagaz* test in respect of either set of "new evidence".

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66 *Risorto, supra* note 44 at paras 49-50.

67 As Justice Major held, the trial (or motion) judge must "exercise his discretion to reopen the trial "sparingly and with the greatest care" so that "fraud and abuse of the Court's processes" do not result". *Sagaz SCC*, *supra* note 60 at para 61.

68 *Risorto, supra* note 44 at para 39 (emphasis added).

(2) Purported "New Evidence" in the Modi Affidavit does not Satisfy the First Step of the *Sagaz* Test

76. The first requirement of the *Sagaz* test is that the proposed evidence would probably have changed the result from the Original Certification Motion. Given the unique facts of this case, it is clear that the Additional Materials attached to the Modi Affidavit **could not** probably have changed the result. First, the Court's core ruling in respect of MLF concerned the principles of corporate separateness and Section 5(1)(a) of the *CPA* – and the Court does not consider evidence under Section 5(1)(a). Second, the Plaintiffs possessed the Second ITO and the 2020 MLF Annual Report and attempted to tender these specific documents at the Original Certification Motion – and the Court refused to admit these documents. By definition, these documents could not have changed the result at Original Certification, since they were available to the Plaintiffs at that time.

77. The Plaintiffs also rely on the ASF as "new evidence". Statements made by Canada Bread in the ASF are not "evidence" in this proceeding as against MLF, and instead constitute untested statements made by Canada Bread in the context of undisclosed leniency arrangements entered into years before. For the reasons described below, statements made by Canada Bread in the ASF are not admissible **as against MLF**. Even if they were admissible, however, the statements made in the ASF would not probably have changed the result.

78. First and foremost, the Supreme Court of Canada has recognized that an agreed statement of facts entered into by another person is "inherently unreliable" – especially where the person who has agreed to the facts is thereby implicating an alleged accomplice and seeking a more lenient sentence. As held emphatically by Justice Karakatsanis in *R. v. Youvarajah*:

> Criminal law is generally and rightfully suspicious of allegations made by a person against an accomplice. It has long been recognized that evidence of one accomplice against another may be motivated by self-interest and that it is dangerous to rely on such evidence absent other evidence which tends to confirm it. **The fact that such statements are contained in an ASF does not provide any reassurance of**

> **reliability. Indeed, statements by a co-accused or accomplice are recognized as inherently unreliable**.[69]

79. In this case, the ASF is so unreliable that even if it was comprised entirely of new facts (which it is not), it still could not satisfy the standard of "probably have changed the result". The context of the ASF is Canada Bread admitting to **its own** wrongdoing in an effort to fulfill its obligations under undisclosed leniency arrangements it entered into years before. It clearly does not constitute an admission **by MLF**.

80. Notably, Canada Bread's guilty plea and ASF are flatly inconsistent with central allegations made by the Plaintiffs in every iteration of their Claim. In this regard, Canada Bread **did not** admit that it had participated in a sprawling, industry-wide conspiracy to fix the price of packaged bread over a period of 14 years, as alleged by the Plaintiffs. Rather, Canada Bread admitted to "entering into arrangements with Weston ... to increase wholesale Fresh Commercial Bread prices to Grocery Retailers on four occasions, resulting in **two price increases**, one implemented in October 2007 and the other implemented in March 2011."[70] The ASF clarifies in paragraphs 19 and 22 (without explanation) that the supposed agreed-upon price increases of October, 2007 and March, 2011 were only partially implemented by Canada Bread.[71]

81. MLF was not a party to the ASF and had no input into its content or wording. It has no evidentiary value as against MLF. Rather, the ASF is simply an agreement between Canada Bread and the Public Prosecution Service of Canada, pursuant to undisclosed leniency arrangements Canada Bread negotiated with the Competition Bureau in 2017, to stipulate certain facts for the purposes of sentencing. The ASF has never been subject to judicial approval, and none of the asserted facts in the ASF have been tested or proven in Court. To the extent that Canada Bread

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69 *Youvarajah, supra* note 1 at paras 58-62 (emphasis added); followed in *R. v. Bidesi*, 2015 BCSC 126 at paras 103-106.

70 Exhibit 2 to Modi Affidavit at para 6, MR Vol 1, Tab F-4 p. 165.

71 Exhibit 2 to Modi Affidavit at paras 19 and 22, MR Vol 1, Tab F-4 pp. 167-168.

made negotiated statements in its ASF regarding historical events, those statements were made outside Court. No witness of Canada Bread has attested to the truth or accuracy of any of those statements, either for the purpose of the guilty plea, for the purposes of this motion, or at all. In short, in addition to other significant reliability concerns associated with the contents of the ASF, all of the statements in the ASF constitute hearsay statements for the purposes of this motion.

82. Moreover, Canada Bread made the untested statements in question at a time when it was wholly owned and controlled by Grupo Bimbo, in the shadow of a claim Grupo Bimbo has threatened to assert against MLF arising from Grupo Bimbo's acquisition of Canada Bread in 2014. That threatened claim was not disclosed in the ASF. It was obviously in Grupo Bimbo's interest to attempt to point the finger at MLF in an effort to lever up its threatened claim against MLF, just as it attempts to do by instructing Canada Bread to insert itself into the Plaintiffs' Second Certification Motion.

83. Furthermore, as the Supreme Court of Canada held in *Sagaz,* where the purported "new evidence" is a change in story from a co-defendant, in contradiction of its prior evidence (to use the words of the Court, the evidence of a "recanting liar"), that evidence is not presumptively credible, and for that reason alone would not probably have changed the result.[72]

84. Canada Bread is in the same position in this case. As a recanting party, nothing it has to say now is credible as against MLF, or capable of probably changing the result arrived at by the Court in its Original Certification Decision. Further, Canada Bread does not even have the courage of its own belated convictions. While it supports the Plaintiffs' Second Certification Motion on the basis of the ASF, Canada Bread has declined to produce an affidavit that substantiates any of

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[72] As the Court held: "Landow [the witness who changed his story] is akin to a 'recanting liar' because he failed to tell his 'truth' when he had the opportunity to do so on discovery and again when he declined to testify at trial … Evidence which is not presumptively credible may fail to probably change the result under the first branch of the test … This is how the trial judge dealt with the affidavit evidence, and in my view he was correct in so doing." *Sagaz SCC, supra* note 60 at para 64.

the statements made by it in the ASF. As a result MLF has had no opportunity to explore the accuracy or reliability of those statements. Simply put, statements made by Canada Bread in the ASF have no assurance of reliability, and do not constitute "new admissible evidence".

85. Second and in any event, allegations made in the ASF are largely duplicative of information that was known by the Plaintiffs at the time of the Original Certification Motion. For example, Canada Bread identifies four supposed new pieces of information in the ASF at paragraph 11 of its Factum. None of these are, in fact, "new" evidence:

(a) **That the Bureau obtained a search warrant against MLF, and that the warrant contained allegations concerning MLF**. The search warrant referenced by Canada Bread was obtained on the basis of the Second ITO, which predates the Original Certification Motion by several years, and which Justice Morgan specifically excluded during the Original Certification Motion. This obviously cannot be new information that would probably have changed the result;

(b) **That Canada Bread was controlled by MLF from 2001 to 2014, and that its Chief Executive Officer was a senior officer of MLF at all relevant times**. These are not new facts. The Plaintiffs pleaded at the outset of the action that Canada Bread was controlled by MLF. MLF's majority interest in Canada Bread and the cross-appointment of Mr. Lan were disclosed in public securities filings of MLF contained in the Plaintiffs' Certification Record, and specifically referenced in the Certification Decision;

(c) **That the four instances of unlawful price fixing to which Canada Bread pled guilty were carried out by a senior officer of Canada Bread who was simultaneously a senior officer of MLF**. The guilty plea of Canada Bread is

admittedly new. However, allegations concerning the senior officer – *i.e.*, Mr. Lan – were made by the Plaintiffs during the Original Certification Motion and addressed by Justice Morgan in rejecting certification as against MLF; and

(d) **That between 2001 and 2014, Canada Bread did not have an independent legal and compliance department responsible for its commercial and market practices.** Intercompany arrangements between Canada Bread and MLF were public in nature and known at the time of the Original Certification Motion. Canada Bread disclosed these arrangements in its public filings, which were included by the Plaintiffs in their Certification Record. Those filings disclosed, among other things, that MLF provided "legal" services to Canada Bread.[73] If Plaintiffs' counsel chose not to emphasize this constellation of facts in argument at the time of the Original Certification Motion, they were no less known. Parties are bound by the tactical decisions of their counsel.

86. Given that they are almost entirely duplicative of information that was previously known or available, untested statements made by Canada Bread in the ASF, including statements made for the ulterior purpose of levering up potential claims of Grupo Bimbo against MLF, cannot meet the onerous standard of "probably have changed the result". Further, even if one accepts the ASF as containing "new facts" (which it does not), none of these facts suggests a different conclusion

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[73] The Plaintiffs included Canada Bread's Annual Financial Statements for 2011-2013, plus their Interim Financial Statements for Q1 2014 in the Original Certification Record. Those documents all uniformly disclose that services provided to Canada Bread by MLF under the terms of the Management Services Agreement which included "treasury and cash management, taxation, internal audit, accounting, external financial report, investor relations, public relations, corporate secretarial, **legal**, insurance, human resources and computer systems support." (emphasis added). See Exhibit 57 to Strosberg Affidavit, MR Vol 7, Tab H-57 p. 3329; Exhibit 58 to Strosberg Affidavit, MR Vol 7, Tab H-58 p. 3367; Exhibit 59 to Strosberg Affidavit, MR Vol 7, Tab H-59 p. 3407; Exhibit 61 to Strosberg Affidavit, MR Vol 7, Tab H-61 p. 3539.

on the fundamental question of whether Canada Bread was incorporated for an improper purpose or was a mere shell.

(3) Purported "New Evidence" in the Modi Affidavit does not Satisfy the Second Step of the *Sagaz* Test

87. Furthermore, even if none of this were true, the Additional Materials and ASF attached to the Modi Affidavit also cannot satisfy the second step of the *Sagaz* test concerning the requirement of discovery through the exercise of reasonable diligence.

88. Our Courts have held that the reasonable diligence requirement must be rigorously enforced. Otherwise, there is a real danger that the principle of finality will be undermined, proceedings will become protracted, and parties will seek to bolster their cases after hearings have been concluded. The reasonable diligence requirement is therefore described as "the bulwark to protect the court's process from abuse".[74]

89. It is plain and obvious that the Plaintiffs cannot satisfy this requirement. Justice Morgan concluded in his Endorsement that the Additional Materials concerned an issue that was "foreseen" and had been delivered "too late". In addition, the Plaintiffs included in their Certification Record the MLF Annual Reports during the period from 2002 to 2014, but none of its Reports for subsequent years. The Plaintiffs have never explained why they did not include the subsequent Annual Reports of MLF. As filings by a public company, the subsequent Annual Reports of MLF were clearly available at the time of the Original Certification Motion if the Plaintiffs had engaged a modicum of diligence.

90. In a formal sense, statements made by Canada Bread in the ASF did not exist at the time of the Original Certification Motion, as Canada Bread had not yet pled guilty. However, this is

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[74] *Effigi Inc. v. CG Operations (H/O) Ltd*. (2007), 157 A.C.W.S. (3d) 87 (ONSC).

irrelevant to the application of the reasonable diligence prong of the *Sagaz* test.[75] As noted above, the alleged "new" facts about MLF that are referred to in the ASF – such as its performance of legal and compliance functions to Canada Bread – had been disclosed publicly, and were included within the Plaintiffs' Certification Record.

C. MLF Submissions relating to the Challenged Exhibits

91. In their efforts to meet the *Sagaz* test, the Plaintiffs also rely on the Challenged Exhibits.

(i) Facts related to Challenged Exhibits

92. As set out above, on February 21 and 22, 2024, in place of delivering proper reply evidence in accordance with the Court approved timetable for this motion, the Plaintiffs instead delivered the Supplemental Modi Affidavit that attached the Challenged Exhibits as well as the Fifth Claim. The Plaintiffs appear to have been in possession of virtually all of the Challenged Exhibits since at least as early as November 16, 2023, but made the tactical choice to withhold their production until **after** MLF had delivered its responding evidence on February 16, 2024. The Plaintiffs have offered no explanation for this delay. But on their face, there is no sense in which the Supplemental Modi Affidavit and Challenged Exhibits could be considered proper "reply" to MLF's record, which consisted solely of an affidavit from a law clerk that attached Court filings and transcripts from the Original Certification Motion.

93. As noted above, Mr. Modi is a lawyer with the Plaintiffs' law firm. He attached to his affidavit a letter and email from Mr. Curry, counsel for Canada Bread, which delivered a number of documents to Mr. Mogerman. Mr. Modi was not copied on any of this correspondence.

94. Mr. Modi does not claim to have personal knowledge of any of these records. Mr. Curry has not delivered an affidavit. Although Mr. Curry refers in his letter and email to documents from

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[75] See, for example, *Risorto, supra* note 44 at para 55.

a Quebec proceeding (the *Govan* case), he does not act as counsel in that proceeding and no Quebec lawyer has delivered an affidavit. Most importantly, no one from Canada Bread has delivered an affidavit, and these records date between 2007-2010. There is no one with personal knowledge from Canada Bread who can attest (or is willing to attest) as to the source, collection, selection, authenticity or content of any of these records.

95. In broad strokes, the Challenged Exhibits comprise fifteen documents, including fourteen emails or email chains and their attachments apparently dated from January 11, 2007 to March 2, 2010, as well as one additional undated document that appears to be a collection of hand-written notes, typed notes, emails and a chart. Five of these emails include attachments, themselves ranging in length from 1 page to 40 pages.

96. To the extent that the identity of the authors of the Challenged Exhibits can be ascertained from the face of the documents, not one of these authors has provided evidence or been made available for cross-examination. No Canada Bread witness has been made available on this motion, even if only to explain or contextualize its "voluntary production", the obvious curation of the Challenged Exhibits, or Canada Bread's motivation in making them available.

97. The Challenged Exhibits are quintessential inadmissible hearsay. In the alternative, even if they are deemed admissible, the Challenged Exhibits cannot satisfy the *Sagaz* test, are inherently unreliable and should be afforded no weight. They do not assist the Plaintiffs in meeting their burden on the Second Certification Motion.

(ii) The Challenged Exhibits are Inadmissible Hearsay

98. The Court has a critical evidentiary gate-keeping role at certification. The Plaintiffs face a burden of proof in establishing the certification requirements, and our Courts have repeatedly held

that they must meet that burden based only on admissible evidence.[76] MLF submits that the Plaintiffs must scrupulously meet the requirements of admissibility when they are seeking to tender evidence to reverse a final order of this Court in respect of certification.

99. The rule against hearsay provides that out of Court written or oral statements of third parties are presumptively inadmissible if such statements are tendered as proof of the truth of their contents. The modern focus of the rule is centered on the difficulty of testing the reliability of assertions made by absent declarants.[77] Rule 25.11 provides the Court with the necessary mechanism to strike improper hearsay evidence from an affidavit proffered in support of certification. The Court also has the inherent jurisdiction to control its own processes, including to avoid abuse and ensure fairness.

100. The Challenged Exhibits are unquestionably hearsay, and for that reason alone are presumptively inadmissible. They are out of Court statements (predominantly emails and their attachments) by absent third parties made between 14-17 years ago, and are relied upon by the Plaintiffs for their truth on a contentious matter. The fact that the Plaintiffs rely on the Challenged Exhibits for the truth of their contents is obvious from the Plaintiffs' own admissions in their Factum. Based on their own submissions to this Court, the Plaintiffs rely on the Challenged Exhibits to "substantiate the plaintiffs' assertions in this action, and Canada Bread's assertions in its guilty plea, that MLF was an active participant in the conspiracy with direct involvement in setting bread prices, and it directed Canada Bread's involvement in the conspiracy".[78]

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[76] *Price v. Smith & Wesson Corp.*, 2021 ONSC 8471 at para 58; *Holder v. Wray*, 2018 ONSC 6133 at para 40; *Williams v. Canon Canada Inc.*, 2011 ONSC 6571 at para 94; *Gutierrez v. The Watchtower Bible and Tract Society of Canada,* 2023 ONSC 650 at paras 16-17 [*Gutierrez*]; *Harris v. Bayerische Motoren Werke Aktiengesellschaft*, 2019 ONSC 5967 at para 37 [*Harris*].

[77] *R. v. Khelawon*, 2006 SCC 57.

[78] Plaintiffs' Factum at para 29.

101. With respect, the Challenged Exhibits do no such thing. Indeed, they are too unreliable to substantiate anything. This is the very concern the hearsay rule guards against, and rightfully so given the lack of opportunity for cross-examination.

102. Rule 39.01(4) allows for the admission of hearsay evidence for limited purposes on a certification motion. In all cases, hearsay concerning contentious matters about which there is serious dispute between the parties should be struck from the offending affidavit or disregarded by the Court.[79] Further, Rule 39.01(4) does not allow for the use of multiple-level hearsay, which the Challenged Exhibits are replete with.[80] The Supplemental Modi Affidavit in any event does not conform to Rule 39.01(4), as it contains no statement with respect to Mr. Modi's information and belief. This material defect is noteworthy, though unsurprising. Mr. Modi could not possibly have information or belief in the veracity of the Challenged Exhibits, given their wholesale "voluntary production", based on unknown criteria, by counsel for Canada Bread. In fact, the Supplemental Modi Affidavit does not even attest to the authenticity of the Challenged Exhibits.

103. It is no answer to argue that the standard at certification is only "some basis in fact". The Courts have repeatedly held that hearsay documents cannot create some basis in fact for certification.[81]

104. For example, in the proposed class proceeding in *Harris v. Bayerische Motoren Werke Aktiengesellschaft* ("***Harris***"), the plaintiffs sought to tender hearsay evidence in the form of complaints that had been levied with a foreign motor vehicle safety regulator. Exactly as in this

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79 *Labine v. Webster*, 2019 ONSC 4023 at para 20.

80 *Harris, supra* note 76 at paras 41-42.

81 *Harris, supra* note 76 at para 46; *Gutierrez*, *supra* note 76 at para 16; *O'Brien v Bard Canada Inc.*, 2015 ONSC 2470, at paras 99-109. See also *Weremy v. The Government of Manitoba*, 2021 MBCA 34, at para 40: "Despite the low evidentiary standard for certification, the normal evidentiary rules apply during certification hearings (see *Ernewein v General Motors of Canada Ltd* 2005 BCCA 540 at para 31; and *Dow Chemical Company v Ring, Sr* 2010 NLCA 20 at para 21." See also Warren K Winkler et al, *The Law of Class Actions in Canada* (Toronto: Canada Law Book, 2014) at p. 32: "For evidence to be admissible, it must be relevant. If the evidence is inadmissible hearsay, then it cannot be used to establish some basis in fact."

motion, the plaintiffs in *Harris* sought to adduce this hearsay evidence by attaching it to an affidavit of one of their lawyers.[82] The plaintiffs in *Harris* argued that they did not rely on the truth of the complaints *per se*, but rather on the mere fact of complaints having been made as creating some basis in fact for the proposed common issues.[83] In striking the proposed evidence, Justice Perell confirmed that hearsay remains inadmissible and unreliable, even when used for the limited purpose of demonstrating the existence of "some basis in fact".[84]

105. The Plaintiffs also seek to rely on the purportedly unique context of an alleged price fixing conspiracy, citing *Mancinelli v. Royal Bank of Canada* ("***Mancinelli***").[85] However, the inadmissibility of hearsay evidence is equally applicable in this context. In *Airia Brands Inc. v. Air Canada*,[86] at the certification motion for an alleged price-fixing conspiracy, the plaintiffs sought to adduce hearsay emails, arguing that they were not being relied upon for their truth but rather only to establish that the statements in question had been made. Justice Leitch struck the hearsay emails, remarking: "The plaintiffs seek to have the e-mail attachments themselves stand as evidence that there were communications or discussions amongst the parties named in the e-mails about prices and fuel surcharges. With such a use, hearsay dangers are engaged."[87] The same is equally true with respect to the Challenged Exhibits.

106. For these reasons, the Court should exercise its authority under Rule 25.11 as well as its inherent jurisdiction and strike out or otherwise exclude the Challenged Exhibits to the Supplemental Modi Affidavit as improper and inadmissible on the Second Certification Motion.

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82 *Harris, supra* note 76 at para 30.
83 *Harris, supra* note 76 at para 43.
84 *Harris, supra* note 76 at para 46.
85 *Mancinelli v. Royal Bank of Canada*, 2020 ONSC 1646.
86 *Airia Brands Inc. v. Air Canada*, 2011 ONSC 4003 [*Airia Brands*].
87 *Airia Brands*, *supra* note 86 at paras 10-25.

(iii) Further, the Plaintiffs Attempt to Rely on this Evidence Abuses this Court's Process

107. The Plaintiffs' misuse of the Challenged Exhibits is aggravated by the Plaintiffs' outright failure to comply with their disclosure obligations under the Court of Appeal's ruling in *Handley Estate*.

108. Under the *Handley Estate* rule, the Plaintiffs were under an immediate obligation to disclose to MLF and the Court "any agreement between or amongst parties to a lawsuit that has the effect of changing the adversarial position of the parties set out in their pleadings into a co-operative one."[88] The Court of Appeal held that the rule applies to bilateral agreements with one defendant and is not limited to formal settlement agreements. In particular, the rule in *Handley Estate* applies to any agreement with a co-defendant that changes "the dynamics of the litigation" or changes the "adversarial orientation" of the defendants.[89] Based on the limited evidence before this Court, the Plaintiffs reached some form of agreement with Canada Bread by no later than November 2023, pursuant to which Canada Bread became a cooperating party with the Plaintiffs and produced documents voluntarily to the Plaintiffs for the purpose of attempting to incriminate one or more defendants and advance the Plaintiffs pending Second Certification Motion. But the Plaintiffs failed to disclose that agreement to MLF, and instead actively concealed the existence of any such agreement until **after** MLF had delivered its responding materials.

109. To this day, the Plaintiffs have not disclosed the terms of their agreement with Canada Bread that resulted in Canada Bread's production of the Challenged Exhibits. As a result of this obvious breach by the Plaintiffs of their disclosure obligations, MLF has been deprived of its right or ability to explore the potential monetary or other motives of the Plaintiffs or Canada Bread in producing the Challenged Exhibits, or what arrangements led to the selective production by

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88 *Handley Estate, supra* note 2 at para 39.
89 *Ibid*.

Canada Bread of documents that purportedly implicate MLF. In *Handley Estate*, the Court of Appeal held that the appropriate remedy for such a breach is a stay of proceedings against the prejudiced defendant.

110. In MLF's submission, the appropriate remedy in this instance should be a refusal to consider the Challenged Exhibits, and a dismissal of the Plaintiffs' motion. Alternatively, MLF submits the Plaintiffs' action as against MLF should be stayed, as well as the crossclaim that Canada Bread now intends to assert against MLF pursuant to those arrangements.

(iv) In the Alternative, even if Admissible, the Challenged Exhibits fail the Sagaz Test and do not Assist the Plaintiffs in Meeting their Burden for Certification

111. In the alternative, if the Court finds somehow that the Challenged Exhibits are admissible, the Plaintiffs cannot meet their burden for re-opening the record to adduce these Challenged Exhibits under the *Sagaz* test.

112. First, the Challenged Exhibits would not probably have changed the result of the Original Certification Motion. The Court's ruling was based on principles of corporate separateness, and evidence is not admissible under Section 5(1)(a) of the *CPA*. In addition, the Challenged Exhibits are simply too unreliable to have probably changed the result, as they exhibit all the reliability concerns associated with hearsay documents and should be afforded no weight. In particular:

(a) They are replete with multiple-level hearsay;

(b) Their meaning is not self-evident. No explanation concerning their content has been provided by any affiant, and the absence of cross-examinations renders it impossible to inquire into the perception, memory, narration or sincerity of declarants (to the extent the identity of the declarant of the statements in question is even known);

(c) They include unidentified handwritten notes and attachments of unknown origin prepared by unknown authors for unidentified purposes;

(d) The only information about the provenance of the Challenged Exhibits is the hearsay assertion of Mr. Curry that they were previously produced by Canada Bread in the *Govan* litigation. Assuming this to be true, there is no connection between the **production** of documents in one litigation and their **admissibility** in another. The mere fact of production in one action certainly cannot establish some basis in fact for allegations made in another;[90] and

(e) They were obviously carefully curated by counsel for Canada Bread based on unknown criteria for an undisclosed but clearly ulterior purpose. Given the lack of evidence from any current or former executive of Canada Bread, there is no information on how they were selected from what was certainly a far broader Canada Bread production in *Govan*. Nor has any evidence been provided concerning other documents in the possession, custody or control of Canada Bread that may place the Challenged Exhibits in their proper context.

113. Second, the Plaintiffs have adduced no evidence to meet their burden to establish that these Challenged Exhibits could not reasonably have been discovered prior to or during the Original Certification Motion. In particular:

(a) During the Original Certification Motion, in contrast to other Defendants, Canada Bread filed two affidavits from senior sales representatives who had been at the company for decades and who were directly involved in its pricing decisions. The Plaintiffs had a full right to cross-examine these individuals and seek disclosure of

[90] Factum of Canada Bread Company Limited (Maple Leaf Certification Motion) dated July 12, 2023 at para 34.

these records, but they have provided no explanation why they elected to forgo this right;

(b) The Plaintiffs are currently working with the plaintiffs in the *Govan* action in Quebec as part of a national consortium. The *Govan* action was certified in 2019, and the case management judge in that action adopted a discovery protocol in May 2021 that directed Canada Bread to deliver the "totality" of its productions to the Plaintiffs by September 2021 – *i.e.*, before the Original Certification Motion.[91] The Plaintiffs have provided no explanation as to whether they had access or why they did not seek access to Canada Bread's productions at the Original Certification Motion, or seek to adjourn the Original Certification Motion until they could access or review these productions;

(c) The Plaintiffs have provided no disclosure of the existence or timing of their cooperation agreement with Canada Bread, or any explanation as to whether they could have reached an earlier agreement or whether it would have been preferable to delay their Original Certification Motion to accommodate a cooperation agreement with one or more of the parties;

(d) For its part, Canada Bread attempts to argue that the *Sagaz* test is met, but has provided no explanation or disclosure concerning its leniency arrangements, the timing of its plea agreement or its discussions with the Plaintiffs or their counsel – and why it took seven years to reach a cooperation agreement with the Plaintiffs. If

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[91] *Govan c. Loblaw Companies Limited*, 2021 QCCS 2060 at para 113 (court direction dated May 20, 2021 ordering all defendants including Canada Bread to deliver complete productions to the Plaintiffs by August 30, 2021 "sous toutes peines que de droit" (*i.e.*, subject to all penalties at law)) and *Govan c. Loblaw Companies Limited*, 2021 QCCS 3638 at para 3 (acknowledging initial productions by the defendants including Canada Bread but directing production of the "totalité des documents prescrits" (*i.e.*, the totality of the required documents) by September 30, 2021).

Canada Bread deliberately chose to conceal these documents at the time of the Original Certification Motion, it cannot now rely on its own actions to argue that these documents were not "discoverable" at the time.

114. In short, the Plaintiffs have provided no disclosure of their prior efforts to obtain these Challenged Exhibits from Canada Bread, or the substance and timeline of their discussions with Canada Bread. The Plaintiffs and Canada Bread are jointly asking this Court to set aside a final order issued in 2021, but have declined to produce any evidence that would permit this Court to assess whether these Challenged Exhibits "were not reasonably discoverable" until 2023.

115. Third, on their face, the Challenged Exhibits are entirely benign and do not evidence any conspiratorial agreement between competitors. Nor do they somehow establish or even support MLF's participation in such an agreement:

(a) To the extent the Challenged Exhibits concern individuals who were cross-appointed to positions at MLF and Canada Bread – a fact that in and of itself was known and addressed during the Original Certification Motion – there is no evidence that any cross-appointee was acting in any MLF capacity, or that any of the Challenged Exhibits concern MLF rather than Canada Bread. The Plaintiffs' argument to the contrary simply ignores governing principles of corporate separateness, as they already unsuccessfully attempted at the Original Certification Motion;

(b) Many of the Challenged Exhibits are duplicative of statements made in the Second ITO, which the Plaintiffs had in their possession at the time the Original Certification Motion was argued several years ago, in October 2021. For example, the Plaintiffs specifically highlight Exhibit E in their factum. This is an email

originally sent on March 22, 2007 describing a meeting between "Michael" and Paul del Duca of Metro.[92] This is the **exact same email** reproduced in the Second ITO that Justice Morgan expressly excluded during the Original Certification Motion, and therefore definitionally cannot have changed the result at Original Certification;[93]

(c) Further, to the extent the meeting described in Exhibit E occurred, it was not a communication between competitors, but rather a perfectly lawful and entirely benign discussion between a supplier (Canada Bread) and its customer (Metro) (*i.e.*, a vertical relationship). **Indeed, none of the Challenged Exhibits constitutes a communication between Canada Bread and one of its competitors, namely Weston Bakeries/Weston Foods**;

(d) The Plaintiffs also focus on Exhibits C and F. Exhibit C attaches a Canada Bread spreadsheet, and shows correspondence between Mr. McLean, the President of the packaged bread division of Canada Bread, and Mr. Lan, the CEO of Canada Bread. Also on this email is Mr. McCain, likewise a Canada Bread cross-appointee. Again, Exhibit C refers to the relationship between Canada Bread and its customer (Loblaws) and **is not** a communication between Canada Bread and its competitor (Weston Bakeries/Foods). It is nothing more than self-serving conjecture on the part of Plaintiffs' counsel to claim that this email reflects the existence of a conspiracy, rather than an entirely normal course interaction between Canada Bread and its customer, Loblaws. The same is true with respect to Exhibit F; and

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92 Plaintiffs' Factum at paras 34-35.
93 Exhibit 7 to Modi Affidavit at para 4.56, MR Vol 1, Tab F-7 p. 259.

(e) Moreover, contrary to the Plaintiffs' assertions, the Challenged Exhibits in no way demonstrate that MLF was an active participant in a conspiracy, and/or that it directed Canada Bread's involvement in a conspiracy.[94] The Plaintiffs still have not put forward any properly admissible evidence that could possibly justify piercing the corporate veil between MLF and Canada Bread.

116. Because Canada Bread is now wholly owned and controlled by Grupo Bimbo, and would no doubt like to embroil MLF in this proceeding, it is highly probable that in selecting documents to "voluntarily produce", Canada Bread would have included any "smoking guns" in their possession. Notwithstanding the Plaintiffs wholesale and abusive disregard of the hearsay principle, however, the Challenged Exhibits are nothing of the sort.

(v) Canada Bread's Improper Efforts to Interject Itself into this Motion

117. Canada Bread seeks to make submissions supporting the Plaintiffs' Second Certification Motion, in particular on the hearsay issue. It does so notwithstanding that it did not have sufficient courage in its convictions to put forward even a single affiant to speak to the Challenged Exhibits. Its self-serving attempt to interfere on this motion is wholly inappropriate.

118. First, Canada Bread should not be granted standing to make submissions to this Court. Although it is a party to the action, it has no direct stake in the outcome of this motion, and the question of certification in respect of MLF is solely a matter between the Plaintiffs, MLF, the Court and the class members. Our Courts routinely deny standing to parties in class proceedings to make submissions in respect of matters that do not properly concern them. Canada Bread's presence and submissions on this motion are not necessary for the Court to effectively adjudicate the issue before it. Rather, Canada Bread's efforts to interject itself to support the Plaintiffs are

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[94] Plaintiffs' Factum at para 29.

transparently intended to gain leverage for Grupo Bimbo in its threatened claim against MLF, which Grupo Bimbo apparently intends to pursue outside the context of this class proceeding. It is entirely inappropriate and an abusive misuse of the Court's processes for Canada Bread to attempt to intervene on this motion to further its parent's ulterior objectives.

119. Moreover, even if Canada Bread technically has standing under Rule 37.07(1), respectfully it has nothing of value to add. Canada Bread has no credibility on this motion in light of: (i) the inconsistent positions that it, and Grupo Bimbo, previously took during the Original Certification Motion, (ii) its failure to put any affiant forward, and (iii) Grupo Bimbo's obvious self-interest in attempting to misuse these proceedings in an effort to leverage its potential corporate claims against MLF.

D. All of the Claims in the Fourth (or Fifth) Claim as Against MLF Should Be Struck

120. For all of the foregoing reasons, the Plaintiffs' Fourth (or Fifth) Claim against MLF should be struck. Given that the Plaintiffs served their Fifth Claim after MLF served its Motion to Strike, the Court should treat it as a nullity for purposes of this motion. The parties' rights are crystalized at the time the motion is served, and it is not open to a plaintiff to amend a claim pursuant to Rule 26.02(a) when the sustainability of the pleading is being challenged by a defendant.[95]

121. In any event, however, even if this Court has regard to the Fifth Claim, it should be struck against MLF for the same reasons that the Fourth Claim should be struck.[96]

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[95] *Bruce v. John Northway & Son Ltd.*, [1962] O.W.N. 150, per Senior Master Marriot: "[A]fter service of a notice of motion, as a general rule, any act done by any party affected by the application which affects the rights of the parties on the pending motion will be ignored by the Court." See also *Brightman Capital Ventures Inc. v. J.P. Haynes & Associates Inc*. (2001), 8 C.P.C. (5th) 318 (Div. Ct.) at para 5; *Philippine/Filipino Centre Toronto v. Datol*, 2010 ONSC 956 (Div. Ct.) at paras 34-39.

[96] In particular and without limitation, MLF submits that the following paragraphs of the Fifth Claim should be struck: references to MLF in the style of cause and in the definitions of "Canada Bread" and "Parents" in paragraphs 1(c) and 122, paragraphs 12-20, 69-72 (in part, only those references to MLF), 78-84, 87-92, 97, 102, 108, 112 (in part, only those references to MLF), 120 (in part, only those references to MLF), 122 (in part, only those references to MLF), 129, 136.

E. In the Alternative, Claims of Knowing Receipt and Knowing Assistance Should be Struck

122. In the alternative, even if this Court finds that the action should be certified against MLF, the claims of knowing receipt and knowing assistance must be struck. This would be the only outcome at all consistent with the Original Certification Motion, where the Court refused to certify these claims against all of the parents (including George Weston), on the basis they were not viable at law, given among other reasons that they were based on a constructive trust that, by definition, did not exist at the time of the alleged knowing assistance/receipt. As Justice Morgan held:

> The entire pleading in this respect is a matter of speculation and, frankly, imagination. **The material facts that support the damages claims simply do not fit the knowing receipt or knowing assistance paradigms**. Belobaba J. described a similarly mispleaded claim in *Stenzler v. TD Asset Management Inc*., 2020 ONSC 111, at para 24: "The knowing assistance and knowing receipt claims are square pegs that are being forced unsuccessfully into a round hole. Both are plainly and obviously doomed to fail".[97]

F. Leave To Bring the Second Action Should Be Denied

123. For all the above reasons, the Plaintiffs should not be granted leave to initiate the Second Action, nor to consolidate it with the existing Action. The Plaintiffs did not mention this alternative remedy in their factum and it is not clear if they continue to pursue it. In any event, the Court should not grant it. If the Court concludes that the Fourth (and/or Fifth) Claims are barred by the doctrine of *res judicata,* issue estoppel, collateral attack and/or abuse of process, the mere act of bringing another action in an effort to circumvent that conclusion would be a blatant abuse of process.

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[97] Certification Decision at para. 49, MR Vol 1, Tab D p. 68 (emphasis added).

PART IV - ORDER REQUESTED

124. MLF respectfully requests that an Order be issued:

(a) Dismissing the Plaintiffs' Second Certification Motion that seeks to reverse this Court's prior ruling and certify this action against MLF;

(b) Granting MLF's motion that excludes the Challenged Exhibits as inadmissible hearsay;

(c) Granting MLF's motion that strikes out without leave to amend under Rule 21.01(1)(b) all of the claims in the Fourth (or Fifth) Claim as against MLF, or alternatively permanently staying or dismissing the Action as against MLF under Rule 21.01(3)(d), or in the further alternative, striking without leave to amend those same parts of the Fourth (or Fifth) Claim under Rules 25.11(b) and (c);

(d) In the further alternative, striking the claims of knowing assistance and knowing receipt;

(e) Granting to MLF its costs of the Second Certification Motion, Motion to Strike, and Hearsay Motion; and

(f) Such further and other grounds as counsel may advise and this Honourable Court may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of August, 2024.

Christopher Naudie/ Adam Hirsh/ Graeme Rotrand

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *671122 Ontario Ltd. v. Sagaz Industries Canada Inc*. (2000), 46 O.R. (3d) 760 (ONCA).
2. *671122 Ontario Ltd. v. Sagaz Industries Canada Inc*, 2001 SCC 59.
3. *Airia Brands Inc. v. Air Canada*, 2011 ONSC 4003.
4. *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248 (SCC).
5. *Bear v. Merck Frosst Canada & Co*., 2011 SKCA 152.
6. *Brightman Capital Ventures Inc. v. J.P. Haynes & Associates Inc*. (2001), 8 C.P.C. (5th) 318 (Div. Ct.)
7. *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52.
8. *Bruce v. John Northway & Son Ltd.*, [1962] O.W.N. 150.
9. *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (ONCA).
10. *Canam Enterprises Inc. v. Coles,* [2002] 3 S.C.R. 307 (SCC).
11. *Cavanaugh v. Grenville Christian College*, 2013 ONCA 139.
12. *David v. Loblaw*, 2021 ONSC 7331.
13. *David v. Loblaw Companies Limited*, 2022 ONCA 833.
14. *David v. Loblaw Companies Limited,* 2024 ONSC 1157.
15. *David v. Sobeys Inc.,* 2023 ONSC 1799.
16. *David v. Sobeys Inc.,* 2023 ONSC 1585.
17. *Effigi Inc. v. CG Operations (H/O) Ltd*. (2007), 157 A.C.W.S. (3d) 87 (ONSC).
18. *Govan c. Loblaw Companies Limited*, 2021 QCCS 2060.
19. *Govan c. Loblaw Companies Limited,* 2021 QCCS 3638.
20. *Gutierrez v. The Watchtower Bible and Tract Society of Canada,* 2023 ONSC 650.
21. *Handley Estate v. DTE Industries Limited*, 2018 ONCA 324
22. *Harris v. Bayerische Motoren Werke Aktiengesellschaft*, 2019 ONSC 5967.
23. *Heller v. Uber Technologies Inc*., 2023 ONSC 1942.

24. *Holder v. Wray*, 2018 ONSC 6133.

25. *Labine v. Webster*, 2019 ONSC 4023.

26. *LBP Holdings Ltd. v. Hycroft Gold Corp. et al.,* 2018 ONSC 1794.

27. *Lilleyman v. Bumble Bee Foods LLC*, 2024 ONCA 606.

28. *MacKinnon v. National Money Mart Co*., 2006 BCCA 148.

29. *Mancinelli v. Royal Bank of Canada*, 2020 ONSC 1646.

30. *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) v. Celestica Inc.,* 2016 ONSC 3235.

31. *Newmarch Mechanical Constructors Ltd. v. Hyundai Auto Canada Inc*. (1994), 18 O.R. (3d) 766 (ONSC).

32. *Obodo v. Trans Union of Canada, Inc.,* 2022 ONCA 814, leave to appeal to SCC ref'd 2023 CanLII 62026.

33. *O'Brien v Bard Canada Inc*., 2015 ONSC 2470.

34. *Philippine/Filipino Centre Toronto v. Datol*, 2010 ONSC 956 (Div. Ct.)

35. *Price v. Smith & Wesson Corp*., 2021 ONSC 8471.

36. *Risorto v. State Farm Mutual Automobile Insurance Co*, [2009] O.J. No. 820 (Div. Ct.).

37. *R. v. Bidesi*, 2015 BCSC 126.

38. *R. v. Khelawon*, 2006 SCC 57.

39. *R. v. Youvarajah,* 2013 SCC 41.

40. *Samos Investments Inc v. Pattison,* 2004 BCSC 484.

41. *Shaw v. BCE Inc*. (2003), 42 B.L.R. (3d) 107 (ONSC), aff'd (2004), 49 B.L.R. (3d) 1 (ONCA).

42. *Turner v. York University*, 2011 ONSC 6151.

43. *Weremy v. The Government of Manitoba*, 2021 MBCA 34.

44. *Williams v. Canon Canada Inc*., 2011 ONSC 6571.

45. *Yaiguaje v. Chevron Corporation*, 2018 ONCA 472, leave to appeal to SCC ref'd 2019 CanLII 25908.

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Class Proceedings Act, 1992, S.O. 1992, c. 6

Amendment of certification order

8(3) The court, on the motion of a party or class member, may amend an order certifying a proceeding as a class proceeding. 1992, c. 6, s. 8 (3); 2020, c. 11, Sched. 4, s. 11 (2).

Court may determine conduct of proceeding

12 The court, on its own initiative or on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a proceeding under this Act to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate. 2020, c. 11, Sched. 4, s. 14.

Appeals
Appeals: certification

30 (1) A party may appeal to the Court of Appeal from an order,

(a) certifying or refusing to certify a proceeding as a class proceeding; or

(b) decertifying a proceeding. 2020, c. 11, Sched. 4, s. 27 (1).

No amendments of materials on appeal

(2) The appellant may not materially amend the notice of certification motion, pleadings or notice of application on an appeal of an order refusing to certify a proceeding as a class proceeding, except with leave of the court in exceptional or unforeseen circumstances. 2020, c. 11, Sched. 4, s. 27 (1).

Appeals: judgments on common issues and aggregate awards

(3) A party may appeal to the Court of Appeal from a judgment on common issues and from an order under section 24, other than an order that determines individual claims made by class members. 1992, c. 6, s. 30 (3).

Appeals by class members on behalf of the class

(4) If a representative party does not appeal as permitted by subsection (1), or if a representative party abandons an appeal, any class member may make a motion to the court for leave to act as the representative party for the purposes of an appeal under that subsection. 2020, c. 11, Sched. 4, s. 27 (2).

Idem

(5) If a representative party does not appeal as permitted by subsection (3), or if a representative party abandons an appeal under subsection (3), any class member may make a motion to the Court of Appeal for leave to act as the representative party for the purposes of subsection (3). 1992, c. 6, s. 30 (5).

Appeals: individual awards

(6) A class member may appeal to the Divisional Court from an order under section 24 or 25 determining an individual claim made by the member and awarding the member an amount that is equal to or greater than the monetary jurisdiction of the Small Claims Court. 1992, c. 6, s. 30 (6); 2020, c. 11, Sched. 4, s. 27 (3).

Idem

(7) A representative plaintiff may appeal to the Divisional Court from an order under section 24 determining an individual claim made by a class member and awarding the member an amount that is equal to or greater than the monetary jurisdiction of the Small Claims Court. 1992, c. 6, s. 30 (7); 2020, c. 11, Sched. 4, s. 27 (3).

Idem

(8) A defendant may appeal to the Divisional Court from an order under section 25 determining an individual claim made by a class member and awarding the member an amount that is equal to or greater than the monetary jurisdiction of the Small Claims Court. 1992, c. 6, s. 30 (8); 2020, c. 11, Sched. 4, s. 27 (3).

Idem

(9) With leave of the Superior Court of Justice as provided in the rules of court, a class member may appeal to the Divisional Court from an order under section 24 or 25,

(a) determining an individual claim made by the member and awarding the member an amount that is less than the monetary jurisdiction of the Small Claims Court; or

(b) dismissing an individual claim made by the member for monetary relief. 1992, c. 6, s. 30 (9); 2006, c. 19, Sched. C, s. 1 (1); 2020, c. 11, Sched. 4, s. 27 (4).

Idem

(10) With leave of the Superior Court of Justice as provided in the rules of court, a representative plaintiff may appeal to the Divisional Court from an order under section 24,

(a) determining an individual claim made by a class member and awarding the member an amount that is less than the monetary jurisdiction of the Small Claims Court; or

(b) dismissing an individual claim made by a class member for monetary relief. 1992, c. 6, s. 30 (10); 2006, c. 19, Sched. C, s. 1 (1); 2020, c. 11, Sched. 4, s. 27 (4).

Idem

(11) With leave of the Superior Court of Justice as provided in the rules of court, a defendant may appeal to the Divisional Court from an order under section 25,

(a) determining an individual claim made by a class member and awarding the member an amount that is less than the monetary jurisdiction of the Small Claims Court; or

(b) dismissing an individual claim made by a class member for monetary relief. 1992, c. 6, s. 30 (11); 2006, c. 19, Sched. C, s. 1 (1); 2020, c. 11, Sched. 4, s. 27 (4).

Courts of Justice Act, R.S.O. 1990, c. C.43

Court of Appeal jurisdiction

6 (1) An appeal lies to the Court of Appeal from,

(a) an order of the Divisional Court, on a question that is not a question of fact alone, with leave of the Court of Appeal as provided in the rules of court;

(b) a final order of a judge of the Superior Court of Justice, except,

(i) an order referred to in clause 19 (1) (a) or (a.1), or

(ii) an order from which an appeal lies to the Divisional Court under another Act;

(c) a certificate of assessment of costs issued in a proceeding in the Court of Appeal, on an issue in respect of which an objection was served under the rules of court;

(d) an order made under section 137.1. R.S.O. 1990, c. C.43, s. 6 (1); 1994, c. 12, s. 1; 1996, c. 25, s. 9 (17); 2015, c. 23, s. 1; 2020, c. 25, Sched. 2, s. 1 (1).

MARCY DAVID ET AL. Plaintiffs	and	**LOBLAW COMPANIES LIMITED ET AL.** Defendants	Court File No: CV-17-586063-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

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