CITATION: David v. Loblaw, 2024 ONSC 5818
COURT FILE NO.: CV-27-586063-00CP
DATE: 20241025

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 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

BEFORE: Justice E.M. Morgan

COUNSEL: *Jay Strosberg, Reidar Mogerman, K.C., and Scott Robinson,* for the Plaintiffs

Christopher Naudie, Adam Hirsh, and Graeme Rotrand, for the Defendant, Maple Leaf Foods Inc.

Tom Curry, Eli Lederman, and Andrew Locatelli, for the Defendants, Canada Bread Company, Limited and Grupo Bimbo, S.A.B. de C.V.

Eliot Kolers, for the Defendants, Empire Company Limited and Sobeys Inc.

Andrew McCoomb, for the Defendant, Metro Inc.

Sarah Whitmore, for the Defendants, Loblaw Companies Limited, George Weston Limited, Weston Foods (Canada) Inc., and Weston Bakeries Limited

Sarah Cormack, for the Defendants, Wal-Mart Canada Corp. and Wal-Mart Stores, Inc.

Maura O'Sullivan, for the Defendant, Giant Tiger Stores Limited

HEARD: September 19, 2024

MOTION TO REVISE CERTIFICATION

I. The motion and cross-motions

[1] This set of reasons combines several motions, heard together, into one, namely:

(a) the Plaintiffs' motion, with the support of the Defendant, Canada Bread Company, Limited ("Canada Bread"), to reconsider my certification ruling dated December 31, 2021 that certified this action against certain Defendants but dismissed the motion to certify the action against, *inter alia*, the Defendant, Maple Leaf Foods Inc. ("MLF"), and to now certify the action as against MLF;

(b) a motion by MLF brought in response to the above motion to exclude certain exhibits in the Plaintiff's record; and

(c) a motion by MLF to strike the Plaintiffs' latest amended claim(s).

[2] Although there have been appeals of my certification judgment with respect to other Defendants, my dismissal of the certification motion as against MLF was never appealed: *David v. Loblaw*, 2021 ONSC 7331 (SCJ) ("*David Certification*"); *David v. Loblaw*, 2024 ONSC 1157 (Div Ct); *David v. Loblaw*, 2022 ONCA 833. Counsel for the Plaintiffs state that, armed with new information based on new evidence, the time is right for reconsidering certification as it pertains to MLF. They submit that a failure to do so will deny the class access to justice and other worthy goals that the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*CPA*") is meant to embody: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 SCR 534, at paras 27-29.

[3] Counsel for MLF put forward a starkly different view. They characterize the Order denying certification as against MLF as final and, absent an appeal, unassailable, "leav[ing] nothing to be judicially determined or ascertained thereafter, in order to render it effective and capable of execution, and is absolute, complete, and certain…": *Newmarch Mechanical Constructors Ltd. v. Hyundai Auto Canada Inc*., (1994), 18 OR (3d) 766, at 769 (Gen Div), quoting Spencer Bower and Alexander Turner, *The Doctrine of Res Judicata*, 2nd ed. (London: Butterworths, 1969).

[4] The first question raised by this motion, therefore, is whether there is authority under the *CPA*, or in the court's inherent jurisdiction, to re-visit the motion against MLF in the way that the Plaintiffs propose. The parties have differing views on the court's authority to reconsider a certification motion already disposed of once.

[5] The Plaintiffs submit that the court has broad discretion to amend a decision that it made in error or that was based on facts or law that had not yet come to light. Insofar as the dismissal of certification against MLF was based on the Plaintiff's failure to show a viable cause of action

under section 5(1)(a) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*CPA*"), the Plaintiffs characterize that holding as akin to a pleadings motion under Rule 21 of the *Rules of Civil Procedure*. And since MLF has not yet issued a Statement of Defense, it is the Plaintiff's view that they can amend their own pleading by adding newfound material facts and then once again seek certification against MLF.

[6] The Plaintiffs also state that there is new evidence which justifies re-visiting the question of certification against MLF. It is the Plaintiffs' position that new documentation, including emails and other communications supplied by Canada Bread, together with a guilty plea by Canada Bread and other documents flowing from related criminal proceedings, provide grounds for setting aside the Order in respect of MLS and reconsidering certification of the action as against it.

[7] MLF responds that the court has a mandate to ensure judicial economy, and that a certification motion is a once-and-for-all procedure that cannot be repeated at the Plaintiffs' behest. Equating the dismissal of certification to a summary judgment ruling under Rule 20 or a verdict at trial, MLF submits that moving parties must put their best foot forward the first time around in seeking certification. In MLF's view, the mandate of the case management judge under the circumstances is to ensure that there is finality to the ruling and to forestall repetitive litigation.

[8] MLF also contends that the evidence relied on by the Plaintiffs may be new in form but not in substance, and that in any case it is neither reliable nor admissible. Further, it is MLF's position that there was found to be no viable cause of action against it in the original certification motion, and, given the nature of the supposedly new evidence, there remains no viable cause of action against it now.

II. Flexibility vs. finality

[9] Counsel for the Plaintiffs, together with counsel for Canada Bread, submit that class action litigation generally, and certification in particular, is a fluid, flexible and interlocutory process. They point to the fact that section 8(3) of the *CPA* allows certification orders to be amended at the motion of any party, and that section 12 allows the court to "make any order it considers appropriate respecting the conduct of a proceeding under this Act…"

[10] They likewise stress that Rules 26.01 and 26.02 of the *Rules of Civil Procedure* establish a liberal regime for amending pleadings. Moreover, Plaintiffs' and Canada Bread's counsel observe that where pleadings are still open but a claim is deficient in particulars, a fresh Statement of Claim can be issued: *AGF Canadian Equity Fund v. Transamerica Commercial Finance Corp.*, 1993 CanLII 8682 (Gen Div*).* It is their view that since the pleadings are still at a stage where they can be amended as of right, and since the case management and inherent powers of the court combine to create flexibility in the aim of justice, the ruling with respect to section 5(1)(a) of the *CPA* can be revisited whenever there is new evidence and/or an amended pleading to consider.

[11] I agree that the *CPA* creates a generally flexible litigation environment, allowing the case management judge considerable leeway in fashioning workable procedures. Specifically with respect to amending a pleading and reconsidering certification, I can see why one might view the combined provisions of the *CPA* and the *Rules* the way the Plaintiffs do – i.e. as fostering a liberal and malleable approach to all orders and motions. Unfortunately for the Plaintiffs (and for Canada Bread, who supports them here), that is not how successive courts, including the appellate courts, have seen the *CPA* or the *Rules* when it comes to revisiting an already decided matter.

[12] In *Danyluk v. Ainsworth Technologies Inc. et. al.*, [2001] 2 SCR 4, at para. 18, the Supreme Court of Canada observed that, "The law rightly seeks a finality to litigation… A litigant, to use the vernacular, is only entitled to one bite at the cherry." The Court of Appeal has added that the principle of finality applies to all judicial decisions, not just to trial judgments or other decisions on the merits: *Marche D'Alimentation Denis Theriault Ltee.v. Giant Tiger Stores Ltd.* (2007), 87 OR 660, at para. 38 (CA). As a matter of judicial principle and public policy, "the state has an interest that there should be an end to litigation and secondly, that no individual should be sued twice for the same cause": *Newmarch*, at 768, quoting John Sopinka and Sidney Lederman, *The Law of Evidence in Civil Cases* (Toronto: Butterworths, 1974), at 365.

[13] The Divisional Court has also confirmed that the fundamental principle of finality "is a compelling consideration in judicial proceedings" – including certification motions – "so as to avoid duplicative litigation, potential inconsistent results, undue costs and inconclusive proceedings": *Risorto v. State Farm Mutual Automobile Insurance Co.*, 2008 CanLII 21234, at para. 26 (Div Ct). Courts have therefore spoken of re-litigation of a motion or trial in terms of "*res judicata* estoppel", contending that "[t]o hold otherwise would allow unsuccessful litigants to bring the same matter before the court for re-hearing" without it being "demonstrated [on appeal]…to be clearly wrong": *Newmarch*, at 769.

[14] In short, the discretion that I have as case management judge to flexibly manage the process under section 12 of the *CPA* permits me to ensure the "fair and expeditious determination of the proceeding": *Amyotrophic Lateral Sclerosis Society of Essex v. Windsor (City)*, 2015 ONCA 57, at para. 68. But it does not override other sections of the *CPA* or other fundamental aspects of judicial process. The flexibility that it attributes to the case management judge is to be exercised with a view to implementing "procedural terms that will promote access to justice *and* judicial economy" [emphasis added]: *Ibid*. The *CPA* simply does not provide an open platform for parties to try certification and then try again.

[15] Moreover, the Court of Appeal has been explicit that a finding of no cause of action under section 5(1)(a) of the *CPA* is not an interim order that can be revisited as the action progresses. As Justice Doherty explained in *Obodo v. Trans Union of Canada, Inc.*, 2022 ONCA 814, at para. 16:

> [T]he motion judge's [certification] order does more than identify the claims that can and cannot go forward as part of a class action. By holding that the intrusion upon seclusion claim did not disclose a cause of action against Trans Union, the

> motion judge effectively determined that the claim could not go forward. The order was a final order. Mr. Obodo cannot pursue the intrusion upon seclusion claim against Trans Union in any forum, absent a successful appeal.

[16] In keeping with the finality of final orders, the courts have consistently refused to revisit certification rulings that have not been successfully appealed. In *Turner v. York University*, 2011 ONSC 6151, the plaintiff presented a sequence of events similar to the one at issue here – having been found in a certification motion to have no cause of action, he amended the statement of claim and returned to court for another round. Justice Horkins held, at para. 6, that "the plaintiff seeks to reargue that which has been decided. *Res judicata* is a bar to this motion."

[17] Similar reasoning was expressed in *Trustees of the Millwright Regional Council of Ontario Pension Trust Fund v. Celestica Inc.*, 2016 ONSC 3235 – a case that was characterized, at para. 1, as a "hyper-litigated proceeding". Again, the plaintiff, having failed in a certification motion to satisfy the section 5(1)(a) requirement with respect to its misrepresentation claim, revised its pleading and returned for another attempt at certification. Justice Perell stated, at para. 5, that, "There has been a determination that a stand-alone common law misrepresentation claim does not satisfy the test for certification as a class proceeding. Thus, another certification motion should be barred as *res judicata* - technically an issue estoppel - or as an abuse of process. In the circumstances of the case at bar, it has already been determined that a stand-alone common law misrepresentation claim should not be certified."

[18] More recently, in *Heller v. Uber Technologies Inc.*, 2023 ONSC 1942, the court considered whether adding a new cause of action could allow a plaintiff to re-visit the enforceability of an arbitration clause that, on a previous iteration of the pleading, had been upheld and unsuccessfully appealed by the plaintiff. Justice Perell dismissed the motion, reasoning, at para. 49, that "there is no doubt that there has been re-litigation of the issue of the enforcement of Uber's arbitration clause… I agree with Uber that the current motion, which is re-litigation, should be dismissed as an abuse of process."

[19] Certification is not, as Plaintiff's and Canada Bread's lawyers have argued, a fluid and flexible process. It cannot be changed, or periodically revisited, as an ordinary part of the case management powers attributed to the court in section 12 of the *CPA*. It can be amended under section 8 of the *CPA* in the event of a clerical error or accidental slip or omission, much as any order can potentially be amended, set aside, or varied under Rule 59.06. But if it is to be re-litigated on the merits as a result of new information based on new evidence, that evidence must meet the strict standard applied to any attempt to re-litigate a final order.

[20] The applicable test was set out by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983. The court must determine whether "the new evidence, if presented at trial [or at first instance], would probably have changed the result… Second, [whether the] evidence could have been obtained before trial [or first instance]": *Ibid*., at para. 62. Where certification has been denied as against a defendant under section 5(1)(a) due to a

lack of cause of action, the Court of Appeal has expressly said that the order is a final one. It cannot be brought back and reconsidered by simply issuing an amended pleading.

[21] In order to determine whether the *Sagaz* test has been met with respect to the claim against MLF, the timeline and significance of the new information and evidence relied on by the Plaintiffs must be reviewed. In doing so, it is to be kept in mind that re-opening litigation in the face of a final order is to be done "sparingly and with the greatest care" and only in "exceptional circumstances": *Holterman v. Fish*, 2017 ONCA 769, at para. 17. As the Federal Court of Appeal has observed, "If expectations of finality…are not enforced strictly and…can be easily reversed, there will be no economy": *Philipos v. Canada (Attorney General)*, 2016 FCA 79, at para. 17.

[22] In other words, the new evidence must have been both undiscoverable and transformative; "the test 'includes considerations of finality, the apparent cogency of the evidence, delay, fairness and prejudice'": *Holterman* , at para. 18, quoting *Mehedi v. 2057161 Ontario Inc.*, 2015 ONCA 670, at para. 20. Revisiting a final order is always a "significant and considered measure which should not be lightly undone": *Neis v. Yancey*, 1999 ABCA 272, at para. 25.

III. The timeline of the claim against MLF

[23] A brief chronology of the relevant portions of action was introduced in *David Certification*, at paras. 10-11, 55, as follows:

> [10] In 2015, the federal Competition Bureau commenced an investigation into a price fixing conspiracy involving packaged bread that had begun over a decade previously – in or about November 200…
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> [11] In December 2017, roughly two months after the Competition Bureau's conspiracy investigation came to the public's attention, Loblaw [i.e. Loblaw Companies Limited, or "Loblaw"] and George Weston [i.e. Loblaw parent company, George Weston Limited, or "George Weston"] issued a press release in which they admitted they had participated in this conspiracy…
>
> [55] Maple Leaf is a publicly traded company that does not produce or sell packaged bread (or any other bread). For a portion of the class period – until 2014 when it sold its interest to Grupo Bimbo – it was majority shareholder of what was then another publicly traded company, Canada Bread…

[24] The Competition Bureau's investigation into the alleged conspiracy commenced with an Information to Obtain dated October 26, 2017 ("First ITO"). The First ITO contained, *inter alia*, allegations relating to the conduct of Richard Lan, who had been cross-appointed as an officer of both Canada Bread and MLF.

[25] A year and a half later, on May 13, 2019, the Competition Bureau issued a follow-up Information to Obtain ("Second ITO"). The Second ITO contained, *inter alia*, an allegation that

the CEO of MLF, Michael McCain, had knowledge of the matters under investigation. The Second ITO reproduced an email seized from Canada Bread dated March 22, 2007, describing a meeting between Mr. McCain and Paul del Duca of the Defendant, Metro Inc., in which the pricing of bread – i.e. purportedly the anti-competitive conduct under investigation – was discussed.

[26] The certification motion was heard by me a year and a half after that – from October 25th to 29th, 2021. In my reasons for decision, I noted that the Competition Bureau had by then fully disclosed the "[d]ocuments collected during the Competition Bureau's investigation and unsealed by the court, including investigators' affidavits and search warrants": *David Certification*, at para. 12.

[27] Toward the end of the lengthy certification hearing, Plaintiffs' counsel moved to admit into evidence certain materials that had been made publicly available by the Competition Bureau but that had not up until then found their way into the court record. This additional material included excerpts from MLF's Annual Report of December 2020 – i.e. from the previous year – stating that it had been named in the within class action and was the subject of a parallel price fixing investigation by the Competition Bureau. It also included the Second ITO with the email correspondence referenced therein. Up until that time – through all of the extensive production, multiple affidavits, lengthy cross-examinations, etc. leading up to the certification hearing – it was only the First ITO that had been included in the Plaintiffs' record.

[28] MLF opposed the mid-hearing introduction of this evidence. It was their view that the evidence added little in substance to what was already in the record, and that it would be unfair to consider material to which MLF had not been given a chance to respond. More pointedly, however, it was MLF's view that it was too late in the certification process – the last day of the hearing – to adduce material that was available to the Plaintiffs many months before the hearing and that could have been included in the motion record all along. At the time, Canada Bread and its new majority shareholder, Grupo Bimbo, supported MLF in opposing the introduction of this evidence.

[29] I denied the Plaintiffs' motion to introduce these materials into the evidentiary record. In an oral endorsement, at *David v. Loblaw*, October 28, 2021, transcript of proceedings, at p. 170, I stated:

> 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.
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> 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

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.

[30] In the result of the certification motion, I granted certification as against the retailers and producers of bread, including Canada Bread, but denied certification against the parent companies of those alleged co-conspirators, with the exception of George Weston. In my reasons for decision, I found that while the Plaintiffs had included viable causes of action against the retailers and producers in what was then the Third Fresh As Amended Statement of Claim, they had no viable cause of action against the parent companies other than George Weston.

[31] In so doing, I also observed that MLF was in a class all its own in terms of the parent-subsidiary analysis. The allegation against MLF was that, despite its being a shareholder of a bread company and not itself a retailer or producer of packaged bread, it was a full participant in the price fixing conspiracy. That said, my ultimate conclusion was that, as with the other parent/shareholder Defendants, there was viable no cause of action against MLF and the motion to certify against MLF therefore failed the section 5(1)(a) hurdle: *David Certification*, at paras. 51-57:

> [51] Before concluding the discussion of the claim against the Parents, I will briefly comment on what Plaintiff's counsel characterize as the unique position of Maple Leaf. It is the Plaintiffs' view that, unique among the Parents, Maple Leaf was more than just a passive, behind-the-scenes participant in the conspiracy or receiver of its proceeds. This allegation is based on statements contained in the Information To Obtain ("ITO") submitted by the Competition Bureau in support of a search warrant that the Bureau executed on a number of the Defendants during the course of its own investigation. The ITO stated that Richard Lam, who at the time was Chief Operating Officer of Maple Leaf, was a participant in the price fixing discussions with other Defendants.
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> [52] In evaluating this submission, it should be kept in mind that an ITO does not contain evidence. It is composed of unsubstantiated statements that reflect an investigator's concerns. The Supreme Court of Canada has described a search warrant as "an investigative tool for answering those questions": "What happened? Who did it*?" CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, 1999 CanLII 680 (SCC), [1999] 1 SCR 743, at para. 21. The ITO on which a warrant is based poses those questions; it does not answer them. The warrant, and the information on which it was obtained, remains unchallenged until trial: *Re Zevallos and The Queen* (1987), 37 CCC (3d) 79 (Ont CA). At this stage, statements in an ITO are nothing more than bald allegations such as may be found in a pleading. They do not provide material facts on which anyone can rely.
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> [53] What is interesting in the circumstances is that the ITO, which is identified by Plaintiffs' counsel as the source of their allegations against Maple Leaf, does not actually mention Maple Leaf. It mentions Mr. Lam, but in a different capacity – i.e. his capacity at the time as an officer of Canada Bread. Much as the ITO and search warrant contains allegations rather than evidence and must be treated as such, this one does not even allege that Mr. Lam acted on behalf of Maple Leaf. If

> his participation was significant at all, the ITO identifies it as being significant to Canada Bread's participation, not to Maple Leaf's.
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> [54] Unlike the Plaintiffs in the parallel Quebec and British Columbia actions where Maple Leaf is not named as a Defendant, the Plaintiffs here have seized on the fortuitous presence of Mr. Lam's name in the ITO. They have used this hook to include a corporate party, Maple Leaf, that even the Bureau's investigators who created the ITO do not suspect was part of any price fixing conspiracy.
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> [55] Maple Leaf is a publicly traded company that does not produce or sell packaged bread (or any other bread). For a portion of the class period – until 2014 when it sold its interest to Grupo Bimbo – it was majority shareholder of what was then another publicly traded company, Canada Bread. It their pleading, the Plaintiffs have not set out any basis to disregard the principle of corporate separateness and they have not adduced any real basis in fact to assert their conspiracy allegation against Maple Leaf. Mr. Lam's supposed presence in some discussions on behalf of Canada Bread, with absolutely no allegation in the ITO that he was also there on behalf of Maple Leaf, does not constitute a material fact in support of a lawsuit against Maple Leaf.
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> [56] Moreover, the Plaintiffs do not allege and could not plausibly allege that Canada Bread – a publicly traded company pre-dating the alleged conspiracy, the shares of which were never completely owned by Maple Leaf – was incorporated for an improper purpose or as a mere shell. There is nothing to support any cause of action against Maple Leaf despite the Plaintiffs' attempt to distinguish it from the other Parents.
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> [57] The causes of action against the Parents do not meet the requirements for certification set out in section 5(1)(a) of the *CPA*…

[32] As indicated at the outset of these reasons, the conclusion with respect to MLF has not been appealed.

[33] Roughly a year and a half later, in August 2023, the Plaintiffs issued their Notice of Motion seeking to re-visit the prospect of certifying the claim against MLF. Alternatively, the Notice seeks leave to issue a new statement of claim against MLF and to consolidate it with the present claim. In support of their motion, the Plaintiffs delivered a proposed Fourth Fresh as Amended Statement of Claim, dated August 4, 2023.

[34] The Notice of Motion filed by the Plaintiffs makes reference to certain "new information" that will support the amended claim. The cause of action pleaded in the Fourth Fresh As Amended Statement of Claim is the same as that pleaded against MLF in the Third Fresh As Amended Statement of Claim (on the basis of which certification was denied), but the material facts pleaded in support are further embellished with the new information.

[35] The new information includes an Agreed Statement of Facts ("ASF") submitted to the criminal court in support of a guilty plea by Canada Bread in respect of charges brought against it under section 655 of the *Criminal Code*. The package of new information also includes the Second ITO and matters referenced therein, and MLF's published annual reports for the years 2015-2021.

[36] As MLF's counsel point out, the new information relied on in the Plaintiffs' Notice of Motion and particularized in the Fourth Fresh As Amended Statement of Claim is not new. As discussed above, the Second ITO was available two years before the certification hearing but was a late afterthought by the Plaintiffs that they unsuccessfully tried to introduce during the hearing. The published annual reports issued by MLF dating back to 2015 – i.e. 6 years before the certification hearing – were also all previously available to the Plaintiffs and are hardly what one can call "new information".

[37] As for Canada Bread's ASF, that is a document that cannot be taken as evidence of any kind except as evidence of the plea bargain struck by Canada Bread with the Crown and of Canada Bread's own guilt. It can potentially be used to counter Canada Bread's denial that it participated in the price fixing conspiracy – a position which it appears to be maintaining in this action despite its guilty plea in the criminal prosecution – but is useful for little else. It does not constitute evidence against a third party: *Intact Insurance Co. v. Federated Insurance Co. of Canada* (2017), 134 OR (3d) 241, at para. 34 (CA).

[38] The ASF was created in the context of a case in which MLF was not a party, and under circumstances in which MLF had no input. Canada Bread's accusation of a third party as a co-conspirator is precisely the kind of "new information" that the Supreme Court of Canada has warned against accepting because it is "inherently unreliable": *R. v. Youvarajah,* [2013] 2 SCR 720, at para. 62.

[39] Following service of the Plaintiffs' Motion Record, the parties agreed to a timetable for the delivery of materials. That timetable was approved by me as case management judge. In accordance with that timetable, MLF was to deliver its responding record by February 17, 2024, and the Plaintiffs were to deliver their reply record by March 1, 2024. MLF delivered its responding materials in a timely fashion on February 16, 2024.

[40] In its response, MLF both opposed the Plaintiffs' motion and brought a motion of its own to strike the claims related to MLF in the Fourth Amended Statement of Claim. It is MLF's view that those claims are barred by the principles of *res judicata,* issue estoppel and abuse of process as having already been decided against the Plaintiffs in the original certification decision.

[41] On February 22, 2024 – i.e. one week after receiving MLF's responding materials – the Plaintiffs served a Fifth Fresh As Amended Statement of Claim dated February 21, 2024. This new pleading contained new particulars, but again asserted the identical causes of action against MLF that were asserted in both the Third and the Fourth Fresh As Amended Statements of Claim. It was

accompanied by a supplemental affidavit sworn February 20, 2024 by an associate at one of the Plaintiffs' law firms, appending new evidence in support of the claim.

[42] This evidence consists of a series of emails that were in Canada Bread's files dating from 2007 to 2010. Those emails showed persons from Canada Bread and MLF corresponding with other Defendants involved in the within claim. The emails had previously been produced to the plaintiffs in parallel Quebec litigation, but those plaintiffs were not able to share them with the Plaintiffs in Ontario due to Quebec's confidentiality legislation and its implied undertaking rule: SQ 2001, c. 73; *Lac d'Amiante du Quebec v. 2858-0702*, 2001 SCC 51. They were, however, eventually provided to the Plaintiffs by Canada Bread itself, through its counsel. Since MLF is not a party to the Quebec action, the Plaintiffs' supplementary motion record of February 22, 2024 was the first time it was made aware of the Canada Bread emails.

[43] The first exhibit in the affidavit of the lawyer appending the Canada Bread emails is the initial letter from Canada Bread's counsel to Plaintiffs' counsel enclosing these email productions. That letter is dated November 16, 2023 – i.e. three months before the MLF response to the Plaintiff's motion was due. The Plaintiffs appear to have held onto this material during those months, setting MLF to work on its response to the older "new" material and the Fourth amended pleading; and then, once MLF had responded, the Plaintiffs suddenly issued a Fifth amended pleading based on the further material and then produced the further material as "new".

[44] In a repeat of the late production of the Second ITO which had forestalled MLF's response to the "new" information at the original certification hearing, the Plaintiffs waited until a week after MLF's response to serve this additional material and to issue yet another Fresh As Amended Statement of Claim. There is no explanation for this delay. One can speculate, however, that it was only when the Plaintiffs saw MLF's response to their Fourth pleading that the Plaintiffs realize that they needed a Fifth one with at least some new particulars to back it up. MLF, for its part, has now supplemented its responding materials with a cross-motion to disallow the further new evidence and to strike the Fifth Fresh As Amended Statement of Claim.

[45] In its cross-motion, MLF submits that the newly produced emails and notes are hearsay produced by a law firm rather than by the author of any of them, and that the authenticity of these records therefor has not been established. The Plaintiffs have tendered the new records for the truth of their contents – i.e. as some basis in fact for MLF's active participation in a price fixing conspiracy. It is MLF's view that as hearsay evidence, the late produced emails and records are inadmissible for that purpose.

[46] MLF characterizes the evidence forwarded by Canada Bread to the Plaintiffs as unreliable documentation from a party that has taken different positions at different stages of this litigation that are diametrically opposed to each other. It is MLF's view that Canada Bread's sudden turn from Plaintiffs' adversary to Plaintiffs' ally means that Canada Bread cannot be trusted and its productions cannot be trusted in the absence of careful adherence to the law of evidence.

[47] MLF also argues that the Plaintiffs, by receiving this evidence in November 2023 but holding it back until after MLF's response, have acted contrary to the rule in *Handley Estate v. DTE Industries Limited*, 2018 ONCA 324. That rule requires "immediate disclosure…[of] 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": *Ibid*., at para. 39. The correspondence from Canada Bread's counsel to Plaintiffs' counsel indicates that the newfound cooperative relationship between the Plaintiffs and Canada Bread started months earlier than had previously been revealed to MLF. From MLF's perspective, those months formed a crucial part of the run-up to the present motion.

[48] As counsel for MLF sates in their factum, the Plaintiffs have never disclosed the timing or the terms of Canada Bread's cooperation with them. In fact, the Plaintiffs never revealed this cooperation with an adverse party until it was too late for MLF to explore the discoverability of the email records. MLF has likewise not been able to investigate or cross-examine on whether any consideration or promise of reciprocal cooperation was received by Canada Bred in exchange for entering this pact with the Plaintiffs. MLF is therefore skeptical about the authenticity and/or the meaning of the documents in question.

[49] At the hearing, MLF's counsel's frustration with the timeline of events involved in reaching this motion was palpable. In their view, this is the second time that MLF has had to respond to the identical claims by the Plaintiffs. In addition, it is the second time that they have been confronted with late-produced evidence that was long available to the Plaintiffs but is being put forward as "new" just after MLF has finished responding.

IV. The new evidence and new pleadings

[50] It is evident from the chronology described above that the Plaintiffs have been, and are now again, out of sync with an established litigation timeline in presenting evidence and in seeking to revise their motion and pleading. The lateness of these moves might in itself disqualify the newly sought relief from consideration; along with that, MLF submits that the substance of what the Plaintiffs have produced is also problematic. A review of the Canada Bread emails and the latest proposed pleading reveals that none of the new evidence is particularly new, and that the Fifth Fresh As Amended Statement of Claim is not particularly fresh.

[51] The staleness of this material is apparent as soon as one realizes that the narrative they are meant to support is essentially a regurgitation of the cross-directorships of Richard Lam. Given his dual position on the boards of MLF and Canada Bread for a period of time, his participation in pricing discussions and email exchanges can potentially be seen as impugning either of those organizations.

[52] That said, it is Canada Bread, and not MLF as shareholder during the relevant time, that actually produces and prices packaged bread. Since Canada Bread has now confessed in the criminal proceedings to having participated in a price fixing conspiracy, my earlier conclusion in *David Certification*, at para. 53, that Mr. Lam's participation was on behalf of Canada Bread and not MLF, is underscored.

[53] I say this notwithstanding that Canada Bread made efforts in its ASF and guilty plea to deflect some responsibility for its actions to MLF, as set out in the sentencing judgment: see *R. v. Canada Bread Co.*, 2023 ONSC 3790. Plaintiffs' counsel specifically emphasize the criminal court's recitation that, "Prior to Grupo Bimbo's acquisition [or a majority interest in Canada Bread] in 2014 and at the time of the offences, Canada Bread did not have an independent legal and compliance department responsible for its commercial and market practices; Canada Bread's legal and compliance functions had been directed by senior management of Maple Leaf": *Ibid.*, at para. 4(27).

[54] As counsel for MLF point out, that reference in the sentencing judgment is a quote from Canada Bread's ASF rather than an independent finding of fact against MLF – a finding which the criminal court could not make as against a non-party to the case before it. Perhaps more important for present purposes is that the information that it recites is not new. Canada Bread's previous public reporting had disclosed that MLF's legal department handled legal and regulatory compliance matters for Canada Bread; for example, this fact can be found in Canada Bread's 2011 financial statement, which already formed part of the original certification record.

[55] I will also add that, in any case, to say that MLF's legal department handled legal matters for Canada Bread is to say very little. A legal department gives advice, generally covered by privilege, based on the information provided to it: *Alfred Crompton Amusement Machines Ltd. v. Customs and Excise Commissioners (No. 2)*, [1972] EWCA Civ J0217-2 (CA).

[56] One can no more impugn MLF's legal department acting as Canada Bread's legal advisor than one can impugn Canada Bread's law firm for giving it legal advice; and that includes legal advice given to their client's affiliated corporations: *Mutual Life Insurance Co. v. A.G. Canada*, [1984] CTC 155 (ON HC). Legal advisors, whether external or in-house, are not by virtue of giving legal advice considered complicit in a party's non-compliance. Moreover, the record contains no indication of what MLS' legal department advised or on what information any such advice was founded.

[57] Counsel for the Plaintiffs further argue that not only was Mr. Lam involved in these discussions, but a number of the emails indicate that the CEO of MLF, Michael McCain, was also personally involved in pricing discussions with representatives of other alleged co-conspirators. One such email, already disclosed by the Competition Bureau in the Second ITO, describes Mr. McCain as having had a conversation with Paul Del Duca, an executive with Metro Inc. Another email describes Mr. McCain meeting with Galon Weston Jr., an executive with Loblaw. Both emails indicate that pricing was a dominant part of the conversation.

[58] Plaintiffs' counsel considers this revelation to be a newly discovered smoking gun, placing MLF's CEO, and therefore MLF itself, at the core of the price fixing conspiracy. They submit that the CEO can be considered the "single directing corporate mind…such that the theory of alter ego applies and any tortious conduct on the part of any of the named Defendants [here, MLF] may be imputed to that directing mind": *Wilson v. Servier Canada Inc.*, 2002 CanLII 19190, at para. 16 (SCJ).

[59] Counsel for MLF, on the other hand, says that these emails are both inconclusive and constitute hearsay, and are inadmissible on both accounts. They point out that the emails are submitted by the Plaintiffs as exhibits to the affidavit of one of their lawyers, who only identifies the source of the emails as having been sent to him by one of Canada Bread's lawyers. That is, of course, one or two steps removed from an actual source of the purported evidence. And while I would not stand on formalities and do not doubt that counsel received these documents in the way that they describe, I have no way of assessing the authenticity of the emails. The lawyers simply forward documents supplied by Canada Bread, but do not depose as their authenticity. The emails are in every sense hearsay.

[60] Counsel for the Plaintiffs submit that under Rule 39.01(4), hearsay is admissible on a motion. They also point out that in previous cases email correspondence has been introduced to show some basis in fact for a price fixing conspiracy: see *Airia Brands Inc. v. Air Canada*, 2011 ONSC 4003. The upshot of that, of course, is that the Plaintiffs, with Canada Bread, seek to use the emails not just to show that there was correspondence between the parties, but to prove the truth of the emails' contents.

[61] I acknowledge that hearsay may be admissible and that emails have been used elsewhere to demonstrate conspiracy. But at the very least, and for good reason, courts require that someone depose as to their the belief that the information sought to be introduced is true, and for the person who deposes to its truth be available for cross-examination: *Ibid.*, at para. 17. That is a glaring omission from the evidence as it has been introduced here. There is no one from Canada Bread or any other party on record who, under oath, has identified the emails as authentic or who has explained what the emails actually mean. As discussed below, they are far from the self-explanatory and do not necessarily contain the incriminating meaning ascribed to them by the Plaintiffs.

[62] Suffice it to say that the appearance of the Canada Bread emails late in the day, unattested to in any way, raises serious admissibility concerns. In a certification proceeding, as with other important steps in the litigation process, the court must take seriously its gatekeeping function when it comes to unsworn hearsay records such as these emails: *Harris v. BMW*, 2019 ONSC 5967, at para 37.

[63] The price fixing conspiracy, as described by the Competition Bureau and in *David Certification*, at para. 12, is a horizontal one operating on two levels: bread producers fixing prices as between themselves, and retailers fixing prices as between themselves. The result of such

horizontal cooperation is that competition is eliminated, and prices are inflated, at the wholesale level and again at the retail level:

> Documents collected during the Competition Bureau's investigation and unsealed by the court, including investigators' affidavits and search warrants, show that Weston Bakeries together with the Defendant, Canada Bread Company ("Canada Bread"), as producers, and Loblaw together with the Defendants, Metro Inc. ("Metro"), Sobeys Inc. ("Sobeys"), Wal-Mart Canada Corp. ("Wal-Mart Canada"), and Giant Tiger Stores Limited ("Giant Tiger"), as retailers, are suspected by the Bureau of having participated in an industry-wide conspiracy to increase the price of wholesale and retail packaged bread.

[64] A horizontal agreement to fix prices is not, however, what is evidenced in the Canada Bread emails. Rather, what those records relate is Canada Bread, a producer/wholesaler of packaged bread, speaking with Metro and Loblaw, two supermarket retail chains. Even if an executive of MLF as owner of Canada Bread is speaking on the bread producer's behalf, what each of the records shows is a producer/wholesaler talking price with its customer, a retailer. That is hardly an improper or shocking business practice.

[65] If, for example, Weston Bakers were discussing its pricing with Canada Bread, it would be a badge of a price fixing conspiracy; two wholesalers – direct competitors – should not be negotiating prices with each other. But for a wholesaler to discuss its prices with a retailer, or a producer with a supermarket customer, is ordinary business. The players in the Canada Bread email drama are not horizontal; they are positioned vertically down the supply chain.

[66] On its face, at least – and without a Canada Bread deponent the face of the documents is all there is to go on – there is nothing conspiratorial or anti-competitive about these communications. They show two businesses, one of which sells products to the other, discussing price. That is not a conspiracy; it is the legitimate way that business is conducted. An email showing a seller and a buyer, in effect, negotiating a price for the goods being sold and bought, is about as *un*-shocking a piece of evidence as one could find in the commercial world.

[67] The smoking gun, therefore, turns out to be a harmless replica. As far as one can tell in the motion materials produced by the Plaintiffs, the Canada Bread emails do not meet the *Sagaz* test for new evidence. They could have been, and were, discovered by the Plaintiffs earlier (and by Canada Bread years earlier). But they were held back in the Ontario proceedings first by Canada Bread and then by the Plaintiffs. Moreover, regardless of when the impugned emails would be produced, they were never going to change the result of the motion and would not have led to certification of the claim against MLF.

[68] No one from Canada Bread, in whose files the emails supposedly were found, has gone on record to verify the emails' authenticity or to explain their content and meaning. Without more,

the emails appear at highest to be repetitive of what had been produced at the original certification motion, and more likely they are completely innocuous and represent no wrongdoing at all.

[69] I would therefore not allow the Canada Bread emails produced by the Plaintiffs in their Supplementary Motion Record of February 22, 2024 to be included in the evidence on the present motion. Likewise, I would not permit the Plaintiffs to amend their pleading in the form of the Fifth Fresh As Amended Statement of Claim. The records, and the pleading insofar as it makes new allegations and contains new particulars against MLF, were introduced too late and amount to no substantive change.

[70] Turning to the Fourth Fresh As Amended Statement of Claim and the evidence put forward to support it, I would likewise not allow the evidence into the record. I would also strike the pleading insofar as it is directed at MLF.

[71] Again, much of the supposedly new evidence and information on which this revised pleading is based – e.g. the Second ITO and previously published Canada Bread financial reports – is not new. While it was not held back this time around, it is essentially a repeat of the evidence that was submitted late in the hearing of the original certification motion. In other words, it was discoverable and could have been made part of the record years ago.

[72] The balance of the purportedly new information and new evidence related to the Fourth Fresh As Amended Statement of Claim is not evidence, or information, that can be used against MLF. It is from an ASF between Canada Bread and the Crown, and a sentencing judgment based on the ASF, but not on any objective source or independent fact-finding by the court. The ASF, and the court's finding of guilt, binds Canada Bread and the Crown, but says nothing reliable about any third party and is not evidence against MLF.

[73] In all, neither the Fourth nor the Fifth Fresh As Amended Statements of Claim are valid pleadings. They contain claims against MLF that have already been determined not to be sustainable claims, and seek to revive them without adding anything substantively new.

[74] Moreover, the new particulars sought to reinforce these claims are based on inadmissible evidence. The Plaintiffs have not met the test for reconsidering a motion already decided by the court.

V. Disposition

[75] The Plaintiffs' motion to amend or reconsider certification of the action as against MLF is dismissed.

[76] MLF's motion to exclude from the record the Canada Bread email correspondence, the ASF, the Second ITO, the Canada Bread reports, and other records sought to be admitted into evidence by the Plaintiff is granted; all such materials are inadmissible.

[77] The Fourth Fresh As Amended Statement of Claim and the Fifth Fresh As Amended Statement of Claim are struck insofar as they relate to claims against MLF.

VI. Costs

[78] The parties may make written submissions on costs. I would ask counsel for MLF to provide me with brief submissions, sent directly to my assistant, within two weeks of today. I would ask counsel for the Plaintiffs and counsel for Canada Bread to provide me with equally brief submissions, also by email to my assistant, within two weeks thereafter.

Date: October 25, 2024 **Morgan J.**