

COURT OF APPEAL FOR ONTARIO

CITATION: Aizic v. Natcan Trust Company, 2025 ONCA 719

DATE: 20251022

DOCKET: COA-24-CV-1324 & COA-24-CV-1357

Zarnett, Sossin and Pomerance JJ.A.

DOCKET: COA-24-CV-1324

BETWEEN

Angie Aizic

Plaintiff (Respondent)

and

Natcan Trust Company and National Bank Investments Inc.

Defendants (Appellants)

Proceeding under the *Class Proceedings Act, 1992*

DOCKET: COA-24-CV-1357

AND BETWEEN

Vanessa Yeats

Plaintiff (Respondent)

and

BMO Investments Inc.

Defendant (Appellant)

Proceeding under the *Class Proceedings Act, 1992*

Ian C. Matthews and Adrian Pel, for the appellant BMO Investments Inc.

Brookelyn Kirkham and Emily Young, for the appellants Natcan Trust Company and National Bank Investments Inc.

Paul Guy, Serge Kalloghlian and Garth Myers, for the respondents

Heard: September 18, 2025

On appeal from the orders of Justice Jasmine T. Akbarali of the Superior Court of Justice dated November 5, 2024, with reasons reported at 2024 ONSC 6143.

**Sossin J.A.:**

**A. OVERVIEW**

[1] This appeal raises the important question of how to interpret a court order. At issue are two class action certification orders, which both contain a provision stating that no other proceeding relating to the subject matter of the certified class action may be commenced without leave. The motion judge interpreted this provision as requiring only those who were part of these certified class actions to seek leave to commence another action, meaning it did not bar the proposed class actions commenced by the respondents on behalf of a different class, none of whom were class members in the certified class actions. The appellants argue the provision should have been interpreted as requiring the respondents to seek leave because the subject matter of their new proposed class actions is related to the subject matter of the certified class actions and thus subject to the leave requirement in the certification orders.

[2] For the reasons that follow, I would dismiss the appeal. In short, the motion judge applied the proper framework for the interpretation of court orders. Her reasons are consistent with the correct interpretation of the certification orders, which is that the leave requirement only applies to proceedings commenced by the parties at whom the certification orders are aimed – i.e., the representative plaintiffs, the class members and the defendants.

## **B. BACKGROUND**

### **1. The 2018 actions**

[3] In 2018, several class actions (the “2018 actions”) were commenced against the trustees and managers of various mutual funds. These actions allege that the managers wrongfully paid trailing commissions to discount brokers through whom class members acquired their investments in the funds, in breach of the managers’ trust and fiduciary duties. These mutual funds are open-ended investment trusts where investors purchase “units”. The trustees/managers charge a fee for managing the funds and pay a portion of this management fee to the dealers through which investors acquired their units, including discount brokers. These payments are called trailing commissions. Discount brokers provide “order-execution only” services and are legally prohibited from providing unit holders with investment advice. The plaintiffs in the 2018 actions held their units through discount brokers and allege that because discount brokers do not provide advice,

they were improperly compensated via trailing commissions. This, in turn, reduced the value of the plaintiffs' investments.

[4] The appellants in this case, BMO Investments Inc. and National Bank Investments Inc./NatCan Trust Company (the "National Bank appellants") were among the mutual fund managers/trustees against whom the 2018 plaintiffs brought their class actions. They manage BMO and National Bank mutual funds, respectively. The action against BMO Investments Inc. is referred to as the Gilani action, while the action against the National Bank appellants is referred to as the Pozgaj action.

## **2. The 2020 actions**

[5] Another series of class actions were commenced in 2020, naming discount brokers, rather than mutual fund managers, as defendants, which also sought damages for wrongfully paid trailing commissions. These are referred to as the Frayce and Michaud actions.

[6] The Frayce action was subsequently denied certification by Belobaba J. in 2023 on the basis that the payment of trailing commissions to discount brokers was not illegal, as alleged in that action: *Frayce v. BMO Investor Line Inc. et al*, 2023 ONSC 16. An appeal of this decision was dismissed by the Divisional Court and leave to appeal the Divisional Court's decision was refused by this court: 2024 ONSC 533 (Div. Ct.), 169 O.R. (3d) 768, leave to appeal to Ont. C.A. refused,

COA-24-OM-0042 (September 6, 2024). The plaintiffs in the Michaud action never applied for certification.

**3. The certification of the 2018 actions and the leave provisions**

[7] The Gilani action against BMO Investments Inc. was certified by Glustein J. on May 18, 2021, following a contested certification motion: *Gilani v. BMO Investments Inc.*, 2021 ONSC 3589. On August 5, 2022, Belobaba J. certified the Pozgaj action against the National Bank appellants on consent.

[8] Each certification order contained a stay provision (exempting the 2020 actions) and a leave provision which is the subject of this appeal.

[9] The Gilani action certification order included, in part, the following:

THIS COURT ORDERS that any other proceeding relating to the subject matter of this action is hereby stayed, except for ... [the 2020 actions]

THIS COURT ORDERS that no other proceeding relating to the subject matter of this action may be commenced without leave of the Court, excluding any proceeding that may be commenced by the Bank of Montreal, its subsidiaries and/or affiliates.

[10] The Pozgaj action certification order included, in part, the following:

THIS COURT ORDERS that any other class proceeding in Ontario relating to the subject matter of this action is hereby stayed, except for ... [the 2020 actions]

THIS COURT ORDERS that no other class proceeding relating to the subject matter of this action may be commenced in Ontario without leave of the Court.

[11] As noted, the Gilani action certification order exempts BMO, its affiliates, and subsidiaries from the operation of the leave requirement. The Pozgaj action certification order contains no such term regarding the National Bank appellants.

#### **4. The 2022 class actions**

[12] The 2022 class actions were launched against BMO Investments Inc. and the National Bank appellants by Vanessa Yeats (the “Yeats Action”) and Angie Aizic (the “Aizic Action”), respectively. Collectively, I refer to these actions as the 2022 actions. The 2022 actions were commenced after the commencement of the 2020 actions and after the 2018 actions against the appellants were certified.

[13] The claims in the 2022 actions overlapped to some degree with the claims commenced in the 2018 actions, in that they were commenced against the sued defendants (i.e., the appellants) and allege that the payment of trailing commissions to discount brokers is a breach of duty.

[14] The material difference between the 2018 actions and the 2022 actions is that the plaintiff class in the 2018 actions are unitholders who held BMO and National Bank mutual funds through discount brokers, while the representative plaintiff and the proposed plaintiff class in each of the 2022 actions were other unitholders of BMO and National Bank mutual funds (i.e., those who did not hold

those funds through discount brokers). The theory of liability in the 2022 actions was that the payment of trailing commissions to discount brokers increased the costs to all unit holders, and thus reduced the value of the 2022 class members' investments.

[15] Each of the 2022 actions was commenced without the representative plaintiffs seeking, or obtaining, leave to do so under the certification orders.

**5. The request to dismiss the 2022 actions because they were commenced without leave**

[16] The 2018 actions were case managed by the motion judge for a number of years. In 2023, class counsel in the 2018 actions sought a temporary stay of the 2022 actions, partially on the basis that there was substantial overlap between the proceedings. The appellants took no position on the stay motion. The motion judge stayed the 2022 actions pending the outcome of the common issues trial in the 2018 actions.

[17] The appellants, together with other defendants in the actions, obtained a partial lifting of the temporary stay so as to enable them to bring motions for summary judgment against the plaintiffs in the 2022 actions. In these motions, the appellants argued that the 2022 actions related to the subject matter of the 2018 actions, and as such, leave was required to commence those actions. Since leave was not obtained, the appellants argued that the 2022 actions were nullities or an abuse of process and must be dismissed. The appellants also sought to dismiss

the 2022 actions on the basis that the limitation period had expired. The motions for summary judgment on the limitation period issue were adjourned by the motion judge, leaving her to focus on the leave provisions.

### **C. DECISION BELOW**

[18] The motions for summary judgment based on the leave requirement were dismissed. The motion judge held that leave was not required for the commencement of the 2022 actions. In light of this finding, she concluded that it was not necessary to consider whether the actions were nullities or an abuse of process.

[19] To determine whether the 2022 actions against the appellants required leave, the motion judge considered the proper interpretation of the certification orders in the 2018 actions. The motion judge instructed herself that the orders were to be interpreted purposively, in their context, and in light of the statutory scheme of the *Class Proceedings Act* (“CPA”).<sup>1</sup> The motion judge stated that, to proceed as a class action, a proceeding must be certified, and that there cannot be two or more certified class actions in the same jurisdiction representing the same class in relation to the same claim. She reasoned that a certification order thus defines the parameters of the class action that will proceed. Some certification orders include

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<sup>1</sup> *Class Proceedings Act*, 1992, S.O. 1992, c. 6.

a provision requiring leave to bring a proceeding relating to the subject matter of the action, but this term is not required.

[20] In the motion judge's view, leave was not required for the 2022 actions because the plaintiffs in those actions, and the classes they proposed to represent, were not members of the classes in either of the 2018 actions. The reasons underlying the certification orders at issue did not identify or discuss a need for non-class members to seek leave to commence an action arising out of the same factual matrix. There was no reason in the statutory scheme, or the language, or context of the orders, to conclude that the leave provision was meant to extend to a non-class member.

#### **D. ISSUES**

[21] According to the appellants, the motion judge made several legal errors in her decision interpreting the certification orders, including:

1. Failing to properly apply the principles of interpretation applicable to court orders.
2. Permitting her consideration of the orders' context and their purpose to overwhelm the actual wording of the leave requirement. In the appellants' submission, this was the motion judge's core error.
3. Misconstruing the purpose of the leave requirement.

4. Conflating the analysis of whether leave was required to commence the 2022 actions with the substantive question of whether leave should be granted, if sought.
5. Misconstruing the relevant context, including the statutory context, and the certification order in the Pozgaj Action, in interpreting the leave requirement.

[22] While these are framed as distinct errors, they all relate to the question of whether the motion judge properly interpreted and applied the leave provision in the certification orders. Accordingly, I will deal with the various alleged errors in the context of the motion judge's overall interpretation and application of the orders below.

## **E. ANALYSIS**

### **1. Standard of review**

[23] The standard of review for the interpretation of a court order is correctness: *Fontaine v. Canada (Attorney General)*, 2020 ONCA 688, at para. 29, leave to appeal refused [2022] S.C.A.A. No. 161.

### **2. The principles of interpreting court orders**

[24] As this court stated in *Chippewas of Saugeen First Nation v. South Bruce Peninsula (Town)*, 2024 ONCA 884, 502 D.L.R. (4th) 261, leave to appeal refused [2025] S.C.C.A. No. 40:

A court considering the interpretation of a court order must consider ‘the language of the order in the context of the pleadings, the proceedings in the action that led to the order, the circumstances surrounding the making of the order, and the reasons given for making the order, if any’: at para. 168. [Citations omitted.]

[25] Thus, the interpretation of a court order is “much like the interpretation of a statute” in the sense that it is an exercise of attending to the order’s text, context, and purpose: *Fontaine*, at para. 29; *Auer v. Auer*, 2024 SCC 36, 497 D.L.R. (4th) 381, at para. 64.

[26] The Court of Appeal for Saskatchewan set out a helpful approach to the interpretation of court orders in *Koroluk v. KPMG Inc.*, 2022 SKCA 57, [2022] 11 W.W.R. 423, at para. 43, in which the court was asked to interpret a liquidation plan approved by court order:

However, the interpretation of a court order, or for that matter a document approved by a court order or which a court order directs be implemented, involves more than simply reading its words in isolation. Like other law-making instruments, court orders are to be interpreted wholistically and purposively. The interpretation of specific provisions must take into account other parts of the order. A court interpreting an order should consider the authority to render it, since it should be assumed that a court would not grant an order it had no power to make. Finally, consideration must also be given to the broader context in which the order was made, including the pleadings and litigation events leading to the order. *Warde v Slatter Holdings Ltd.*, 2016 BCCA 63, 394 DLR (4th) 513 [*Warde*] and *Onion Lake* provide two recent examples of the application of these principles.

[27] In the present case, the motion judge stated that the parties agreed on the principles of interpretation for a court order. The motion judge instructed herself to consider the text, context and purpose of the order, based on: (i) the express language of the order; (ii) the purpose of the terms of the order; (iii) the authority to make the order, including the statutory context and procedural rules; (iv) the broader context within which the order was granted; and (v) resolving apparent inconsistencies between different terms by reaching an interpretation that can reasonably give meaning to each of the terms in question, citing *Kuang v. Young*, 2023 ONSC 2429, at para. 7, cited with approval in *Chippewas*, at para. 168.

[28] I agree that these are applicable principles. I would add that in interpreting an order, a reviewing court must apply “accepted principles of statutory and contractual interpretation to ascertain the intent of the ordering judge”: *Kuang*, at para. 9. As the Supreme Court of Canada has recently made clear, this means using the text as the anchor of the interpretive exercise: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Directrice de la protection de la jeunesse du CISSS A*, 2024 SCC 43, 498 D.L.R. (4th) 316, at para. 24. However, it does not mean focusing on sometimes ambiguous text to the exclusion of context and purpose.

[29] Further, where a holistic consideration of text, context, and purpose nevertheless yields ambiguity, court orders, like statutes, should be interpreted in a manner that preserves a party’s right to sue: *Berardinelli v. Ontario Housing*

*Corp*, [1979] 1 S.C.R. 275, at p. 280; *Garland v. Consumers' Gas Co.* (2001), 57 O.R. (3d) 127 (C.A.), at paras. 46-47, reversed on other grounds but affirming the principle 2004 SCC 25, [2004] 1 S.C.R. 629, at paras. 67-69.

### **3. The principles applied**

#### **a. The issuing judges' reasons**

[30] The first question to consider in applying the interpretive principles to the leave requirement in the certification orders is whether the judges issuing the orders provided an explanation for its inclusion: *Chippewas*, at para. 172. Glustein J., who issued the Gilani certification order, did not provide any explanation for the leave provision in his certification reasons. Belobaba J. certified the Pozgaj action on consent and accordingly did not provide reasons at all.

[31] Therefore, I proceed to consider the text, surrounding context and purpose of the orders to determine their intent.

#### **b. The text**

[32] The appellants' argument in this regard is clear and straightforward. In their submission, the text of the leave requirement in the orders plainly encompasses the 2022 actions. The language at issue is as follows: "THIS COURT ORDERS that no other proceeding relating to the subject matter of this action may be commenced without leave of the Court" (emphasis added). The appellants contend that the absence of limiting language gives rise to a plain meaning that

encompasses the 2022 actions in the leave requirement. They submit that the 2022 actions, like the 2018 actions, bring claims relating to the subject matter of trailing commissions paid to discount brokers.

[33] The respondents reject the characterization of the 2022 actions as relating to the subject matter of the 2018 actions, on the basis that the phrase “relating to the subject-matter of this action” is specific to the class in the 2018 actions, and the alleged duties owed by the defendants to that class. In other words, it is not possible to characterize what the orders apply to without also determining who they apply to. According to the respondents, the phrase “relating to the subject-matter of this action” is ambiguous and needs to be read in light of the context of the certification orders, and informed by the principle that ambiguous terms of an order should be interpreted narrowly to preserve a party’s access to justice: *Berardinelli*, at p. 280; *Garland*, at paras. 46-47.

[34] The motion judge rejected the appellants’ arguments, concluding that the statutory context of the orders makes clear that they apply only to class members. According to the motion judge, “there is no reason in the statutory scheme, or the language or context of the orders, to conclude that the leave provision was meant to extend to a non-class member.” She further explained:

BMO and National Bank argue that a plain reading of the order[s], when coupled with my repeated description in various endorsements of the 2022 actions and the 2018

actions as involving the same subject matter, means that leave must be required.

This argument is superficially attractive, but on closer examination, reveals itself to be simplistic. The words “relating to the same subject matter” in the orders have to be interpreted in their context, and in the context of the statutory scheme. The applicability of the leave requirement is not a matching game, to see whether the orders use the same phrase that I have used in my endorsements to express an idea. In any event, in my endorsements, I describe the “same subject matter” of all of the 2018 and 2022 actions: the alleged wrongful payment of trailing commissions to discount brokers. If that phrase were enough to call bingo, the plaintiff would be correct that any action brought by anyone against anyone relating to the payment of trailing commissions to a discount broker would be captured. Plainly, that is an absurd interpretation of the orders: at paras. 48-49.

[35] The appellants assert that by inserting a limitation to class members only, the motion judge erred. She mistakenly focused on who the orders applied to, and determined it was the class being certified, rather than what the orders applied to, which was any proceeding raising related subject matter.

[36] I would reject this characterization. Rather, the motion judge, appropriately in my view, concluded that the phrase “relating to the subject matter of this action” had to be interpreted with the statutory and class action context in mind.

[37] The text of the leave requirement, divorced from context, is of little assistance in discerning its meaning. Without examining the context surrounding the orders, it is unclear if the subject matter of the “dispute” can be severed from

the parties in dispute. Thus, while the text is the anchor of this interpretive exercise, on its own, it does not point to any particular interpretation of the leave requirement.

[38] Accordingly, like the motion judge, I proceed to consider the context in which the orders were made.

**c. The context**

[39] The appellants argue that the motion judge erred in her contextual analysis, which they characterize as unduly narrow, by not engaging with the pleadings or the broader litigation context.

[40] The appellants characterize the orders as part of the certification judges' broad case management discretion under s. 12 of the *CPA*, which provides that:

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.

In support of this argument, the appellants rely on *Amyotrophic Lateral Sclerosis Society of Essex v. Windsor (City)*, 2015 ONCA 572, 387 D.L.R. (4th), at para. 68, where this court held that s. 12 of the *CPA*, together with r. 1.04 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, permit class action judges to make orders with procedural terms that will promote access to justice and judicial economy as well as ensure the “just, most expeditious and least expensive determination” of

the proceeding on its merits. The appellants submit that the motion judge failed to consider this context in her interpretation of the leave requirement.

[41] According to the respondents, by contrast, the motion judge appropriately grappled with the relevant contextual dynamics informing the leave requirement, especially the *CPA*, which is focused on governing “the class” within class actions. This statutory context, they argue, lends support to the view that the phrase “relating to the subject matter of this action” was a way of capturing actions by the class that was certified in the 2018 actions.

[42] The appellants also point to the language of the leave requirement in the Gilani action, which includes not just the reference to the “subject matter” of the Gilani action but also a includes a specific exemption for BMO itself. Recall that this order reads:

THIS COURT ORDERS that no other proceeding relating to the subject matter of this action may be commenced without leave of the Court, excluding any proceeding that may be commenced by the Bank of Montreal, its subsidiaries and/or affiliates. [Emphasis added.]

[43] The appellants submit that this exception would have been unnecessary if the leave requirement in the Gilani order was limited to class members only, as BMO already would fall outside of its scope. The respondents concede there is no easy answer as to why this exception was necessary if, as they argue, the motion judge correctly limited the leave requirement to class members.

[44] The motion judge does not address the exemption, though she does set out the general context for leave requirements in certification orders. She explains that leave requirements are not mandated by the *CPA*, nor does the model certification order include such a term. For the motion judge, the statutory and litigation contexts of the leave requirement were necessary to consider but not sufficient in order to interpret the orders properly. I agree. A consideration of the purpose of the leave requirement within that context is necessary as well.

**d. The purpose**

[45] With respect to the purpose of the leave requirement, the appellants provide two rationales: first that the leave requirement facilitates the orderly case management of complex class actions such as these; and second, that the leave requirement permits “front-end” issues to be raised prior to a class action going forward. The example cited by appellants’ counsel of a “front-end” issue was that of limitation defences.

[46] The motion judge rejected this submission. She observed that where a new plaintiff attempts to sue a defendant based on a factual matrix related to the class action involving the orders at issue, those defendants would have the opportunity to raise their concerns with the case management judge.

[47] I see no error in this reasoning. Indeed, this is exactly the process that occurred in this case, leading to the temporary stay of the 2022 actions, pending further steps in the 2018 actions against BMO and the National Bank appellants.

[48] Further, there is no reason to think that the appellants would not bring “front-end” issues to the fore as part of that case-management process. Again, that is precisely what occurred in this case. The motions for summary judgment in the 2022 actions brought by the appellants, based on the limitation period, were adjourned. In reaching that decision, the motion judge considered the 2023 motion to temporarily stay the 2022 actions brought by the plaintiffs of the 2018 actions.<sup>2</sup>

[49] Thus, interpreting the leave requirement as facilitating proactive case management would render it redundant, given that these case management powers are already available under s. 106 of the *Courts of Justice Act*, ss. 12-13 of the *CPA*, and r. 6.01(1) of the *Rules of Civil Procedure*, and the appellants already availed themselves of these powers. Like statutes, provisions in orders should be interpreted in a manner that gives them meaning: *R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346, at para. 16; *Kuang*, at para. 7.

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<sup>2</sup> *Ciardullo v. 1832 Asset Management L.P., et al.*, 2023 ONSC 4466. The temporary stay was granted, but the reasons contemplated that the appellants could seek to lift the stay to bring a summary judgment motion based on the limitation period. The appellants’ subsequent request to do so was granted. The stay was lifted to address issues unique to the 2022 actions. However, before the summary judgment motions were scheduled to be heard, counsel for the 2018 plaintiffs raised concerns that the 2022 summary judgment motions were not unique to the 2022 actions, but that they would require findings that would impact the 2018 actions. The motion judge stated that the import of findings on such a motion would have a practical impact on the issues that the 2018 plaintiffs were litigating. Accordingly, the summary judgment motions on the limitations issue were adjourned.

[50] The motion judge's consideration of the orders' purpose was appropriately rooted in the statutory context in which they were made, and in particular s. 8 of the *CPA*, which specifies the mandatory requirements for certification orders. She concluded that the purpose of a certification order is to define the class for the purposes of a class action under s. 8 of the *CPA*, including a description of the class, the name of the representative plaintiff, the claims or defences asserted by the class, the relief sought, the common issues, and the method by which class members may opt out. Indeed, s. 8 operationalizes the result of a successful fulfillment of the test for certification in s. 5 of the *CPA*, which is oriented around the class and the claims it seeks to assert against the defendants. In light of this statutory context, the motion judge accepted that the stay and leave provisions in the orders were intended to ensure that only one action on behalf of the class may proceed against the defendants arising from the same factual matrix. On that reading, the orders provided that no other proceeding could be advanced by the class without leave. She concludes, at para. 47, that "[t]here is no reason in the statutory scheme or the language or context of the orders, to conclude that the leave provision was meant to extend to a non-class member."

[51] I see no error in the motion judge's conclusion. It is one thing to read an order as applying to the parties to the motion in which it is sought (here the representative plaintiffs and the defendants in the 2018 actions), as well as to persons on whose behalf the motion is brought (here, the class members in the

2018 actions) who are expected to receive notice that the order has been obtained. It is quite another to advance an interpretation that the order binds the world, imposing a barrier on anyone seeking to bring an action where trailing commissions to discount brokers is at issue even if they had no notice that a leave requirement would be sought in a certification order in a proceeding in which they were neither a party nor a proposed class member, and even though they would not necessarily be expected to receive notice that a leave requirement had been imposed, since notice of certification of a class proceeding is not required to be given to non-class members.

[52] The motion judge correctly pointed out that the purpose of the leave requirement is to support the purpose of certification, which is to delineate the parameters of the single class action that may proceed in a jurisdiction with respect to particular class members, defendants, and claims. Her reasons on this point paid careful attention to the statutory scheme under which the orders were made. This interpretation is also supported by the pleadings in the 2018 actions, in which the plaintiffs assert a theory of liability that is particularized to the defendants' conduct vis-à-vis the class members in those actions, not anyone else. Additionally, this "single class action" purpose explains why the 2020 actions needed to be carved out from the orders' stay provisions. This is because they related to the same class members and alleged wrongful conduct as the

2018 actions, which are two core parameters on which certification was granted for the 2018 actions.

[53] I do not view the clause in the Gilani certification order that excludes proceedings brought by the defendant, BMO, and its subsidiaries and affiliates, from the leave requirement as supporting the broad interpretation advanced by the appellants or undermining the conclusion reached by the motion judge. The exemption may have been necessary, since the order may have been taken to apply to anyone who was a party to the 2018 actions. It may have been included out of an abundance of caution.

[54] While the motion judge's focus was on which persons who wanted to sue the appellants were caught by the leave requirement, as that was the issue before her, the logic of her reasoning is not inconsistent with the leave requirement also applying to the named parties, including the defendants in the 2018 actions. The existence of a carve out for BMO and its subsidiaries does not imply that the order otherwise applies to persons who were never parties to the 2018 actions nor members of the classes bound by and entitled to the benefits of their resolution.

[55] On the correct interpretive approach, class members in the 2018 actions who opt out of the 2018 actions and seek to bring their own proceedings against the 2018 defendants for the same alleged wrongdoing would be subject to the leave requirement. This aligns with the purpose of the leave requirement as set

out by the motion judge, which is to govern the parties to the certification orders and the class represented in each. While those who opt out cease at that point to be class members, they were originally parties and therefore would be subject to the leave requirement. Of course, this does not assist the appellants.

[56] I do not view the leave requirement as being subject to any interpretive difficulty that is not resolved by resort to the context and purpose of the certification orders. But even if it was ambiguous, as the leave requirement may restrict access to the courts, it should be interpreted narrowly, not in the expansive fashion proposed by the appellants: *Berardinelli*, at p. 280; *Garland*, at paras. 46-47.

[57] For these reasons, I conclude that the motion judge did not err in rejecting the appellants' proposed broad interpretation of the leave requirements in the certification orders of the 2018 actions, or in determining that the leave requirements did not extend to the 2022 actions.

[58] As I would not disturb the motion judge's finding that the leave requirement in the certification orders do not apply to the 2022 actions, it is not necessary to consider whether a breach of that requirement would justify dismissing the actions.

#### **F. DISPOSITION**

[59] Accordingly, I would dismiss the appeal.

[60] The respondents are entitled to their costs, in the agreed upon all-inclusive amount of \$25,000.

Released: October 22, 2025 "B.Z."

"L. Sossin J.A."  
"I agree. B. Zarnett J.A."  
"I agree. R. Pomerance J.A."