COURT OF APPEAL FOR ONTARIO

CITATION: David v. Loblaw Companies Limited, 2025 ONCA 830
DATE: 20251203
DOCKET: COA-24-CV-1333 & COA-24-CV-1355

Hourigan, Zarnett and Sossin JJ.A.

BETWEEN

Marcy David, Brenda Brooks and Andrew Balodis

Plaintiffs (Appellants)

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
(Appellant*/Respondent**)

Proceeding under the *Class Proceedings Act, 1992*

Reidar Mogerman, K.C., Jay Strosberg, and Scott Robinson, for the appellants Marcy David, Brenda Brooks, and Andrew Balodis (COA-24-CV-1333)

J. Thomas Curry and Andrew Locatelli, for the appellant (COA-24-CV-1355)/respondent (COA-24-CV-1333) Canada Bread Company, Limited

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

Heard: September 15, 2025

On appeal from the order of Justice Edward M. Morgan of the Superior Court of Justice dated October 25, 2024, with reasons reported at 2024 ONSC 5818.

Zarnett J.A.:

I. OVERVIEW

[1] In 2021, the appellants Marcy David, Brenda Brooks, and Andrew Balodis (the "representative plaintiffs") sought certification of a proposed class proceeding that alleged a decades long conspiracy to fix the price of Packaged Bread[1] in Canada. They obtained an order dated December 31, 2021 (the "Certification Order") granting certification of the claims in the action against some defendants. But the Certification Order refused certification of the claims in the action against other defendants, including the respondent Maple Leaf Foods Inc. ("Maple Leaf"), on the basis that the pleading of the representative plaintiffs did not disclose a cause of action against them. The representative plaintiffs did not appeal that aspect of the Certification Order.

[2] In 2023, the representative plaintiffs presented an amended pleading which, in their view, corrected its deficiencies against Maple Leaf and moved to amend the Certification Order to essentially reverse its treatment of Maple Leaf by reclassifying it as a defendant against whom the certified class action would proceed. The motion was supported by Maple Leaf's former subsidiary, the appellant Canada Bread Company, Limited ("Canada Bread"), against whom the

[1] As it would ultimately be defined in the Certification Order, Packaged Bread is "industrially-produced bread products and bread alternatives", including bagged bread, buns, rolls, bagels, naan bread, English muffins, wraps, pita and tortillas for resale.

action was already certified. The motion judge dismissed the motion. Both the representative plaintiffs and Canada Bread appeal that dismissal.

[3] The principal issue in these appeals is the effect of the provision in the Certification Order refusing to grant certification against Maple Leaf on the "no cause of action" ground, namely that the pleading did not disclose a cause of action against Maple Leaf.

[4] For the reasons that follow, I conclude that a decision to refuse certification against a defendant on the no cause of action ground gives rise to *res judicata* and has preclusive effect. In the absence of a successful appeal of that decision it is not open to a representative plaintiff to later seek to amend the pleading and the Certification Order so as to resurrect the class proceeding against that defendant. Although in narrow circumstances a court may exercise a discretion not to apply *res judicata*, this is not such a case.

[5] I agree with the conclusion of the motion judge and would therefore dismiss the appeals.

II. BACKGROUND

1. The Nature of the Action

[6] The representative plaintiffs' motion for certification of their action as a class proceeding was heard in 2021. According to the pleading operative at the time the

certification motion was heard,[2] the "Nature of the Action" was a claim that the 13 entities that were named as defendants had, between November 2001 and the present, "conspired, agreed or arranged amongst themselves to set the wholesale and retail price of Packaged Bread sold in Canada by controlling output, price and other aspects of [its] manufacture, production, or supply…". That conduct was alleged to have caused loss or damage to the proposed class – purchasers of Packaged Bread during that period. The defendants were major retailers or producers of Packaged Bread and, in five instances, corporate parents of retailer or producer defendants.

[7] One of the defendants named was Canada Bread, a producer of Packaged Bread. The pleadings alleged that Maple Leaf was Canada Bread's corporate parent until 2014 when Maple Leaf sold its shares in Canada Bread to Grupo Bimbo, S.A.B. De C.V. ("Grupo Bimbo"), which was also named as a defendant.

2. The Cause of Action Requirement

[8] Section 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*CPA*"), sets out a number of requirements that must be met before a court will grant certification of an action as a class proceeding. One of the requirements is that the pleading "discloses a cause of action": s. 5(1)(a) of the *CPA*.

[2] The Amended Amended Third Fresh As Amended Statement of Claim.

3. The Certification Order

[9] The Certification Order provided that the action was "certified as a class proceeding pursuant to s. 5 of the CPA" with respect to certain claims[3] against nine defendants, one of whom was Canada Bread.[4] Certification was refused, with one exception,[5] for the claims against defendants who were parent corporations of other defendants, including Maple Leaf and Grupo Bimbo. Paragraph 5 of the Certification Order states:

> **THIS COURT ORDERS** 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.

[10] In his reasons for the Certification Order,[6] the certification judge explained that the pleading against these four parent corporations simply lumped them in with their subsidiaries who actually produced or retailed bread and who were alleged to have actually taken the steps that constituted the conspiracy. The pleadings did not make particularized allegations that these parent corporations did anything to participate in the alleged conspiracy and did not plead facts that

[3] The Certified Claims were those under s. 45 of the *Competition Act*, R.S.C., 1985, c. C-34, for the tort of civil conspiracy and for unjust enrichment in respect of alleged overcharges on the sale of Packaged Bread.
[4] The Certified Defendants were Loblaw Companies Limited, George Weston Limited, Weston Foods (Canada) Inc., Weston Bakeries Limited, Canada Bread, Metro Inc., Sobeys Inc., Wal-Mart Canada Corp., and Giant Tiger Stores Limited.
[5] The exception was the defendant George Weston Limited.
[6] *David v. Loblaw*, 2021 ONSC 7331, 160 O.R. (3d) 33.

would allow the court to ignore their separate legal personalities vis-à-vis their subsidiaries.

[11] Specifically with respect to the respondent Maple Leaf, the certification judge rejected the argument that the activities of one individual, Mr. Lam, put Maple Leaf in a different category than the other parent corporations against whom certification was refused. He stated:

> 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. I[n] 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 … that he was also there on behalf of Maple Leaf, does not constitute a material fact in support of a lawsuit against Maple Leaf.
>
> 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.

[12] The no cause of action conclusion reached by the certification judge regarding Maple Leaf and the other parent corporations referred to in paragraph 5

of the Certification Order was in contrast to the conclusion he reached regarding the defendant George Weston Limited ("George Weston"), the parent corporation of the defendants Weston Foods (Canada) Inc. and Weston Bakeries Limited. With respect to George Weston, the certification judge found that the statement of claim alleged that it "directly participated in the conspiracy and that its affiliates implemented a directive initiated by it for the purpose of giving effect to the conspiracy". He concluded that "as an alleged direct participant in the conspiracy" George Weston was in a separate category from the other parent corporations named as defendants and that the claims against George Weston passed the cause of action requirement in s. 5(1)(a) of the *CPA*.

[13] An appeal was taken with respect to some aspects of the Certification Order. However, there was no appeal taken from the refusal to certify the action against Maple Leaf.

4. The Motion to Amend the Certification Order and Maple Leaf's Motion to Strike

[14] In 2023, the representative plaintiffs, supported by Canada Bread, launched a motion to amend the Certification Order to remove Maple Leaf from paragraph 5 of the Certification Order (i.e., from the list of defendants against whom the action was not certified) and to add Maple Leaf to the Certified Defendants, that is, the defendants against whom the action was certified.

[15] The representative plaintiffs supported the motion to amend with an amended pleading.[7] The amended pleading continued essentially the same description of the Nature of the Action as had been contained in the pleading as it stood when the certification motion was decided. The representative plaintiffs argued that the amended pleading disclosed a cause of action against Maple Leaf, because it now contained particulars of actual conduct by Maple Leaf.

[16] The representative plaintiffs also supported the motion with evidence which they described as “new information”. Some of it was derived from proceedings relating to a 2023 guilty plea by Canada Bread to charges under the *Competition Act*, R.S.C., 1985, c. C-34, such as an Agreed Statement of Facts (“ASF”) between Canada Bread and His Majesty the King, a Second Information to Obtain and matters referenced therein. Their evidence also included what were said to be a series of emails showing persons from Canada Bread and Maple Leaf communicating with other defendants involved in the claim.

[17] Maple Leaf opposed the motion and moved to strike the amended pleading as against it and to exclude some of the evidence relied on by the representative plaintiffs.

[7] At the time of the motion the amended pleading was the Fifth Fresh As Amended Statement of Claim.

5. The Motion Judge's Decision

[18] The motion judge, who was the same judge who made the Certification Order, dismissed the representative plaintiffs' requests and granted those of Maple Leaf.

[19] Following *Obodo v. Trans Union of Canada, Inc.*, 2022 ONCA 814, 164 O.R. (3d) 520, leave to appeal refused, [2023] S.C.C.A. No. 12, the motion judge considered that the decision to refuse certification against Maple Leaf finally decided the question of whether the representative plaintiffs could proceed against Maple Leaf. In his view neither the pleading amendment provisions of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, nor the provisions of s. 8(3) of the *CPA* (that permit amendments to certification orders) or s. 12 of the *CPA* (that permits the court to make orders respecting the conduct of a class proceeding) allowed for the revisiting of a matter that had been finally decided and had not been successfully appealed.

[20] The motion judge noted that relitigation of matters already decided based on new evidence was permitted only when a strict standard was met. He adopted, as that standard, the test for re-opening a trial to hear new evidence set out in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983, which he interpreted to require evidence that would probably have changed the result if initially presented and that could not have been obtained before the initial hearing. He concluded that the evidence put forward by the

representative plaintiffs, for various reasons, did not meet the test. For instance, the ASF and the court's finding of guilt were not evidence against Maple Leaf, other evidence was not particularly new or fresh having been previously available to the representative plaintiffs, and the emails were unattested to and thus unsworn hearsay. He excluded some of the evidence as inadmissible.

III. ANALYSIS

[21] In pursuing their appeals, the representative plaintiffs and Canada Bread have different interests. The representative plaintiffs seek to reverse the treatment of Maple Leaf in the Certification Order, reclassifying it as a defendant against whom the action is certified, so as to pursue recovery from it on behalf of the class. Canada Bread, on the other hand, seeks to preserve a right to claim over Maple Leaf. The desire of Canada Bread to claim over is not an independent basis to make Maple Leaf a defendant to the action. Accordingly, Canada Bread's arguments are analyzed from the same standpoint as those of the representative plaintiffs, namely, whether they show a reversible error in the motion judge's decision to deny the representative plaintiffs' motion to amend and to grant the relief sought by Maple Leaf.

1. The Grounds of Appeal

[22] The appellants raise what are essentially three interrelated grounds of appeal.

[23] First, the appellants argue that the motion judge should not have struck their amended pleading against Maple Leaf. Pleadings, they say, remained open, and amendable as of right against Maple Leaf as the claims against it were never dismissed, pleadings had not closed, and the Certification Order did not foreclose pleading amendments. They argue that the claim as it pertained to Maple Leaf was simply found to lack sufficient particulars at the time of the Certification Order, and the amended pleading now supplies the necessary particulars, making allegations of direct participation by Maple Leaf in the conspiracy in the same manner as was found sufficient to disclose a cause of action against George Weston.

[24] Second, the appellants submit that it follows from the amended pleading now disclosing a cause of action against Maple Leaf that the Certification Order should be amended to remove the reference to it in paragraph 5 of the Certification Order and to add it to the list of Certified Defendants against whom the Certified Claims will proceed. They point out that the lack of a particularized cause of action was the only bar to certification against Maple Leaf at the time of certification, and is now overcome. The appellants submit that the remedial aim of the *CPA* supports a broad reading of the powers in ss. 8(3) and 12, encompassing the right to amend the Certification Order in these circumstances. They argue that the motion judge took too narrow an approach to his jurisdiction under these provisions.

[25] Third, the appellants submit that the motion judge also erred in applying the "*Sagaz* test" to determine whether the relief they sought should be granted – an

error that led him to view the evidence that the representative plaintiffs submitted through the wrong lens. The point of the new evidence was not, they say, to prove by admissible evidence that Maple Leaf participated in the alleged conspiracy – in other words, that there was merit to the proposed claim in the amended pleading. According to the appellants, the evidence was proffered to show that the amended allegations were responsibly made and to explain their timing.

2. Discussion

a. Paragraph 5 of the Certification Order Has Preclusive Effect

[26] At the heart of the resolution of the appeals is the effect of paragraph 5 of the Certification Order which I reproduce again for ease of reference:

> **THIS COURT ORDERS** 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.

[27] Bound up in the appellants' arguments is the proposition that paragraph 5 of the Certification Order was not "final" in the sense that it did not "finally" dispose of the claim against Maple Leaf. Rather, on the appellants' interpretation, the determination that the pleadings disclosed no cause of action against Maple Leaf was transitory – in effect unless and until the representative plaintiffs amended their pleadings, something the appellants say they maintained the right to do. Equally, according to the appellants, the determination that the causes of action

alleged against Maple Leaf shall not be certified was also subject to revision in changed circumstances such as an amended pleading.

[28] I do not accept the appellants' proposition. Paragraph 5 of the Certification Order is a final determination of the rights of the representative plaintiffs to proceed against Maple Leaf on any claim that it is liable for the conspiracy to fix the price of Packaged Bread in Canada referred to in their action. Paragraph 5 of the Certification Order gives rise to *res judicata*, barring any further proceedings between the parties or their privies for the same subject matter.

[29] This conclusion follows directly from *Obodo*, this court's leading decision on the effect of a refusal to certify a claim because the pleadings did not disclose a cause of action. At issue in *Obodo* was whether such an order could be appealed directly to the Court of Appeal, which (at the time) would be the case only if the order was final. In concluding that it was final in this sense, *Obodo* determined that, unless successfully appealed, such an order meant the claim against the defendant could not go forward in any forum. At paragraph 16, Doherty J.A. stated:

> I agree with Trans Union that the order under appeal is for some purposes properly characterized as an order certifying a proceeding as a class proceeding. To the extent that the *Class Proceedings Act, 1992* governs rights of appeal, the appeal from the order certifying the proceeding as a class proceeding goes to the Divisional Court with leave. However, the 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. [Emphasis added.]

[30] The appellants contend that *Obodo* is distinguishable because the problem with the pleading in that case went beyond an absence of particularized allegations. According to the appellants, the fatal flaw in the *Obodo* pleading was so pronounced as to be incurable, while here it was the absence of particularized allegations. I do not accept that distinction. The effect of an order that refuses to certify a claim because the pleading fails to disclose a cause of action is the same, irrespective of the flaw in the pleading that gave rise to that order being made. One does not go behind the order and consider how close to asserting a cause of action the unsuccessful plaintiff came.

[31] The appellants do not otherwise challenge the proposition that, following *Obodo*, paragraph 5 of the Certification Order was final for the purpose of appeal. They resist the implications of that conclusion, both as to what the order decided and the order's effect on further attempts to litigate the same issue, but in my view the implications are irresistible.

[32] An order is final for the purpose of appeal when it "determine[s] the real matter in dispute between the parties—the very subject matter of the litigation—or any substantive right to relief of a plaintiff or substantive right of a

defendant": *Drywall Acoustic Lathing Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc.*, 2020 ONCA 375, at para. 16. That is what paragraph 5 of the Certification Order did. It determined the subject matter in dispute between the representative plaintiffs and Maple Leaf by determining that the representative plaintiffs had not asserted a cause of action, in other words, they had no substantive right to relief against Maple Leaf arising out of the conspiracy to fix prices for Packaged Bread that is the subject of their action.

[33] As for the effect on further attempts to litigate the same or a similar issue, an order that is final for the purposes of an appeal has preclusive effect. It "gives rise to a plea of *res judicata* in subsequent proceedings on the same issue or issues": *V.K. Mason Construction Ltd. v. Canadian General Insurance Group Limited* (1998), 42 O.R. (3d) 618 (C.A.), at para. 19. The doctrine of *res judicata*[8] prevents the relitigation of previously adjudicated matters, where the basis of the cause of action was argued or could have been argued in a prior action, the same parties were involved, and the underlying decision is final: *The Catalyst Capital Group Inc. v. VimpelCom Ltd.*, 2019 ONCA 354, 145 O.R. (3d) 759, at paras. 50-51, leave to appeal refused, [2019] S.C.C.A. No. 284. Applying these principles, a determination on a certification motion that a pleading failed to disclose a cause of action has been held to give rise to *res judicata* barring a subsequent attempt to

[8] *Res judicata* embraces both cause of action estoppel and issue estoppel: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 23. It is unnecessary to distinguish between them in this case.

amend the pleading: *Turner v. York University*, 2011 ONSC 6151, at paras. 6, 60-65.

[34] The requirements for the application of *res judicata* to the representative plaintiffs' motion to amend are present here.

[35] First, whether better particularized or not, the amended pleading asserts, in the relevant sense, the same claim as was rejected by the Certification Order, namely, a claim to substantive relief from Maple Leaf arising from the same alleged conspiracy. The amendment sought to the Certification Order reinforces that conclusion, as it seeks to reverse the effect of paragraph 5 and to place Maple Leaf in the category of a Certified Defendant facing Certified Claims, the very outcome that was rejected by the Certification Order itself.

[36] Second, the parties are the same. Indeed, the conspiracy alleged in the amended pleading, is among the same parties, about the same subject matter, harming the same persons, as was alleged in the prior version of the pleading that was held not to disclose any right to substantive relief against Maple Leaf.

[37] Third, as noted above, paragraph 5 of the Certification Order is final.

[38] Paragraph 5 of the Certification Order therefore stands as a bar to the representative plaintiffs' attempt to relitigate the claim that Maple Leaf is liable for the conspiracy referred to in their action to fix the price of Packaged Bread during

the time period in question, by amending their pleadings or by amending the Certification Order.

b. The Preclusive Effect of the Certification Order Cannot be Avoided

i. The Rules of Civil Procedure do Not Permit Amendment of the Pleading in These Circumstances

[39] The preclusive effect of paragraph 5 of the Certification Order cannot be avoided by asserting that there was a right to amend the pleading under r. 26.02 of the *Rules of Civil Procedure*, as the representative plaintiffs contend. The right to amend "without leave, before the close of pleadings" in r. 26.02 presupposes a situation in which a defendant is obligated to deliver a defence, since pleadings close when a reply to every defence has been delivered or the time for reply to a delivered defence has expired, and every defendant in default of delivering a defence has been noted in default: r. 25.05. Maple Leaf had no obligation to deliver a defence once it was determined that the statement of claim did not disclose a cause of action against it, a determination that meant that the representative plaintiffs were not able to pursue the action against Maple Leaf in any forum: *Obodo*, at para. 16.

[40] In my view, it is not germane that the Certification Order did not formally dismiss the action against Maple Leaf. Given the effect of paragraph 5 of the Certification Order, as explained in *Obodo*, formal dismissal would have added

nothing. I therefore reject the appellants' submissions that the Certification Order either implicitly preserved a right to amend, or did not foreclose it.

ii. The *CPA* Does Not Provide a Right to Amend in These Circumstances

[41] Sections 8 and 12 of the *CPA* are also not of assistance to the appellants. Section 8(3) of the *CPA* provides that "[t]he court, on the motion of a party or class member, may amend an order certifying a proceeding as a class proceeding." Section 12 of the *CPA* provides that:

> [t]he 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.

[42] Without gainsaying the flexibility of those provisions in other situations, they must always be interpreted in light of their text, context, and purpose, the touchstones of any statutory interpretation: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at para. 118.

[43] Here, the relevant context and purpose is that "[t]he *CPA* is a comprehensive procedural statute to provide for and regulate the conduct of class proceedings in Ontario. It neither modifies nor creates substantive rights" (emphasis added): *Hislop v. Canada (Attorney General)*, 2009 ONCA 354, 95 O.R. (3d) 81, at para. 57, leave to appeal refused, [2009] S.C.C.A. No. 264, citing

Hollick v. Toronto (City), 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 14; *Bisaillon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666, at para. 17; *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 (S.C.), at para. 50; and *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at paras. 27-29; see also *Drywall Acoustic*, at para. 21.

[44] Maple Leaf's right to rely on the doctrine of *res judicata* is a substantive right. It cannot be modified, let alone taken away, by interpreting these sections of the *CPA* in a manner that would allow for the relitigation of matters that have been finally decided. Put another way, interpreting ss. 8(3) and 12 of the *CPA* in a way that permits relitigation in the face of the doctrine of *res judicata* would create a new substantive right for class action plaintiffs, contrary to the context and purpose of the statute read as a whole.

iii. The Motion Judge Did Not Err in Refusing to Exercise the Discretion Not to Give Preclusive Effect to Paragraph 5 of the Certification Order

[45] There exists a discretion not to apply *res judicata* in a particular case. The discretion exists because there are circumstances in which "the bar against relitigation, either through the doctrine of *res judicata* or that of abuse of process, would create unfairness": *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 53. However, where the order that gives rise to *res*

judicata was made in court proceedings as opposed to an administrative hearing, the discretion is "very limited": *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, at para. 62, citing *G.M. (Canada) v. Naken*, [1983] 1 S.C.R. 72, at p. 101.

[46] The appellants various arguments to the effect that the motion judge wrongly prioritized finality over the need for flexibility in a class action are properly characterized as raising a concern about whether the motion judge erred in his approach to the discretion not to apply *res judicata*. In my view the appellants have not shown a reversible error in the motion judge's failure to exercise his discretion not to give paragraph 5 of the Certification Order preclusive effect.

[47] The appellants argue that the motion judge should not have used the *Sagaz* test to guide the exercise of his discretion. In *Sagaz,* the court was considering a request to re-open a trial for further evidence after reasons for judgment had been released, but before the formal judgment had been entered. The two-prong *Sagaz* test, focusing on whether the further evidence was discoverable before the trial through the exercise of reasonable diligence and on whether that evidence would probably have changed the result, was particularly geared to that situation. The appellants say this test is inapt where the provision of the Certification Order sought to be revisited (paragraph 5) is an issue to be decided on the basis of the pleadings which are assumed to be true, rather than evidence.

[48] Maple Leaf points out that the *Sagaz* test has been applied in the certification motion context. In *Risorto v. State Farm Mutual Automobile Insurance Co.* (2009), 72 C.C.L.I. (4th) 60 (Ont. Div. Ct.), the Divisional Court applied the test to the question of whether a denial of certification based on the insufficiency of evidence about commonality and the suitability of the representative plaintiff could be re-opened for further evidence on those certification criteria before the formal order was issued. In *Risorto*, at para. 34, Gray J., stated that the two-prong test applies to both trials and motions where the question is whether the matter should be re-opened for the calling of new evidence.[9]

[49] It may have been preferable if the motion judge had articulated the test as whether there were grounds for him to exercise his very limited discretion not to apply *res judicata* arising from the Certification Order, rather than proceeding directly to the *Sagaz* test. Nevertheless, in my view the motion judge's reference to the *Sagaz* test did not lead to an unreasonable exercise of that discretion, or to any error in principle that would justify setting aside his decision.

[50] First, the cautious approach in *Sagaz* and *Risorto* to reopening a matter that has already been heard is animated by principles that are relevant to whether the court should exercise the very limited discretion not to apply *res judicata* arising from a court order. The *Sagaz* test is a product of balancing the interests of finality

[9] *Risorto* is not completely responsive to the appellants' point, as the certification criteria there in issue were evidentiary questions, whereas whether the pleading discloses a cause of action is not.

and fairness: *Sagaz*, at para. 60. It reflects the "strong interest in finality, which should only be departed from in exceptional circumstances": *Risorto*, at para. 35.

[51] *Res judicata* is the court's ultimate expression of the primacy of finality. As Binnie J. stated in *Danyluk*, at para. 18: "The law rightly seeks a finality to litigation … A litigant, to use the vernacular, is only entitled to one bite at the cherry." Finality interests are thus given even greater weight after (as opposed to before, which was the case in *Sagaz* and *Risorto*) the formal order has been issued and the avenue for reconsideration of a decision is available by appeal. In *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848, at p. 860, the Supreme Court stated:

> [t]he general rule [is] that a final decision of a court cannot be reopened … [t]he basis for [that rule] was that the power to rehear was transferred by the *Judicature Acts* to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:
>
> 1. where there had been a slip in drawing it up, and,
>
> 2. where there was an error in expressing the manifest intention of the court.

[52] In other words, the motion judge did not err by taking an approach, which he viewed as reflected in *Sagaz* and other cases, that finality was important and not to be lightly undone, rather than adopting the appellants' contention that

certification should be viewed as a “fluid and flexible process” that could be periodically revisited.

[53] Second, although *Sagaz* and *Risorto* deal with the reopening of evidentiary issues, the appellants overemphasize the distinction from this case. It was only on the initial certification motion that the representative plaintiffs were entitled to have the question of whether they had a cause of action against Maple Leaf assessed on the allegations in their pleading, assumed to be true. Once that question was finally decided against them, making the issue *res judicata*, they were not entitled to simply present an amended pleading and obtain a different result about certification against Maple Leaf. If they were, there would be no meaning to the principle noted above, endorsed by the Supreme Court, that where the order that gives rise to *res judicata* was made in court proceedings as opposed to an administrative hearing, the discretion not to apply *res judicata* is “very limited”: *Danyluk*, at para. 62, citing *Naken*, at p. 101.

[54] Here, the appellants proffered evidence, and the question was whether the evidence was capable of bringing the representative plaintiffs within that very limited discretion. The motion judge was entitled to scrutinize that evidence. He found that what was proffered did not consist of admissible evidence that was new or suggestive of an arguably meritorious claim on any standard. Although the appellants claim that this holds them to too high a standard, the alternative they submit is unpersuasive.

[55] On the appellants' own characterization of their evidence in this court, it shows nothing more than the development of the "legal landscape" and that the more particularized allegations in the amended pleading are responsibly made (as opposed to being true, or revealing on any evidentiary standard, an arguably meritorious case). That kind of evidence falls far short of demonstrating the kind of fundamental unfairness that would justify the exercise of the very limited discretion to permit relitigation of a matter finally decided in a court proceeding.

IV. CONCLUSION

[56] I would dismiss the appeals.

[57] In September of 2024, Canada Bread filed an amended statement of defence which included a crossclaim against Maple Leaf.[10] Although the crossclaim was not addressed in either the order appealed from or the reasons for it, in oral argument Canada Bread asked us to preserve the crossclaim regardless of the disposition of the appeals.

[58] I would decline to make any order regarding the crossclaim and refer any issue concerning it, or any other procedure by which Canada Bread may seek to claim over against Maple Leaf, to the Superior Court, to be dealt with consistently

[10] A crossclaim is available only against a co-defendant: r. 28.01 of the *Rules of Civil Procedure*. A claim over by a defendant against someone who is not a party to the action is to be asserted by third-party claim: r. 29.01 of the *Rules of Civil Procedure*.

with these reasons. In doing so I make no determination as to whether Canada Bread does or does not have grounds for a claim over.

[59] If the parties are unable to agree on the costs of the appeals they may make written submissions, not exceeding 2 pages each, by no later than 10 days following the release of these reasons.

December 3, 2025 “C.W.H”

“B. Zarnett J.A”

“I agree. C.W. Hourigan J.A.”

“I agree. Sossin J.A.”