



this court on the basis that the order appealed from is a final order as it finally determines: (1) that the claims of the two new representative plaintiffs are tenable at law and not statute-barred; (2) that a claim under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (“*CPA*”) is not an individual action until certified, but is an intended class proceeding until certified or until it becomes an individual proceeding upon court order if the action is not certified; and (3) the limitation period for all class members is suspended under s. 28 of the *CPA* from the commencement of the proceeding and not from certification. The appellant disputes these determinations.

## **FACTS**

[2] The class action is brought against the federal government on behalf of persons implanted with temporomandibular joint implants (“TMJ implants”) in respect of alleged regulatory negligence for wrongful approval and ongoing failure to warn with respect to these devices. The action was commenced in 1999.

[3] The original representative plaintiff, Judith Logan, had also commenced an individual action against the government for some of the same claims in 1995. As a result of a ruling by the case management judge in the class proceeding on another motion, Ms. Logan determined that she would have to elect to remain as plaintiff in one action or the other. The motion to withdraw as representative plaintiff was brought to carry out her decision to proceed with her individual action.

[4] The appellant opposed the motion on procedural grounds that could have significant substantive effects. The appellant took the position that prior to certification the action is an individual action and therefore the representative plaintiff cannot withdraw but must discontinue the action and the new representative plaintiffs must commence a new action. The appellant’s concern was two-fold: (1) that the new plaintiffs were not members of the original class because they had TMJ implants from different manufacturers than Ms. Logan and therefore the class was being increased by the substitution to the prejudice of the appellant; and (2) that the suspension or tolling of the limitation period under s. 28 of the *CPA* for all class members does not occur until the class is certified, so that by substituting new representative plaintiffs *nunc pro tunc*, the limitation period was also being potentially extended to the prejudice of the appellant.

## **FINDINGS OF THE MOTION JUDGE**

[5] The motion judge, who is the case management judge for the class proceeding, addressed each of the issues raised by the appellant. First, he found that the two proposed

substitute representative plaintiffs, Kevan Drady and Kathryn Anne Taylor, were members of the putative class in the action as constituted. Judith Logan had been implanted with a Proplast TMJ implant in March 1984. The proposed plaintiff, Kevan Drady was implanted with a Silastic implant in September 1981 and this device was removed in September 1999 and replaced with a Christensen TMJ device. The proposed plaintiff, Kathryn Anne Taylor was implanted with a Vitek Proplast implant in April 1988.

[6] The motion judge found that although Ms. Logan had been implanted with only one manufacture of TMJ device, the pleading included the entire class of persons who had been implanted with any manufacture of TMJ device, because of the nature of the claim against the appellant for regulatory failures in respect of all TMJ devices. Consequently, the proposed substituted plaintiffs were already part of the class and therefore their substitution did not expand the class to the prejudice of the appellant.

[7] Second, the motion judge rejected the submission that a proposed class action is only an individual action until it has been certified. He referred to Rule 12 of the *Rules of Civil Procedure*, which requires that the style of cause must state that the proceeding has been commenced under the *CPA*, that the *CPA* applies from that time forward and triggers the case management functions of the class proceedings judge. That role at the pre-certification stage would be meaningless if the proceeding was merely an individual action at that stage. Furthermore, s. 7 of the *CPA* provides that where a proceeding is not certified, the court may permit it to continue “as one or more proceedings between different parties.” That section would not be necessary if the action were already an individual proceeding.

[8] Third, the motion judge rejected the appellant’s submission that the claims of the proposed new plaintiffs must be rejected as statute barred. He treated the motion for substitution on the same basis as a motion to strike a claim as disclosing no cause of action, applying the principle in *Hunt v. Carey*, [1990] 2 S.C.R. 959. He concluded that the substituted plaintiffs’ claims should be allowed at this stage as long as it could not be demonstrated that they were clearly untenable for some reason. The appellant submitted that the proposed plaintiffs’ implants occurred in 1981 and 1988 respectively and no issues relating to discoverability are alleged. Therefore on their face, any claim arising from those actions must be barred either under the *Limitations Act*, R.S.O. 1990, c. L. 15 (six years) or under the *Public Authorities Protection Act*, R.S.O. 1990, c. P. 38 (six months).

[9] In addition to the claim of negligence, the pleading asserts claims of continuing breach of fiduciary duty and breach of *Charter* rights. The motion judge referred to the concession by the Attorney General that it is unclear whether such claims can be brought against the appellant, but that it is not possible to say “at this stage of the proceeding” that they are not tenable at law.

[10] The motion judge rejected the submission that those claims were barred by the six-month limitation in s. 7 of the *Public Authorities Protection Act*, on the basis that it is arguable that that legislation does not apply to equitable claims sounding in breach of fiduciary duty, and in any event, the claims in this action are of a continuing breach, so that the limitation period would not have passed. In any event, there is case law that holds that s. 7 does not bar *Charter* claims: *Prete v. Ontario (A.G.)* (1993), 16 O.R. (3d) 161 (C.A.), leave to appeal refused, [1994] S.C.C.A. No. 46; *Yule v. Mamakwa* (1998), 81 O.T.C. 278 (C.A.).

[11] Fourth, the motion judge rejected the appellant’s argument regarding the effect of s. 28 of the *CPA* which provides:

28. (1) Subject to subsection (2), any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the class proceeding and resumes running against the class member when,

- (a) the member opts out of the class proceeding;
- (b) an amendment that has the effect of excluding the member from the class is made to the certification order;
- (c) a decertification order is made under section 10;
- (d) the class proceeding is dismissed without an adjudication on the merits;
- (e) the class proceeding is abandoned or discontinued with the approval of the court; or
- (f) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise.

[12] The appellant argued that the words "on the commencement of the class proceeding," mean on certification of the class proceeding, and until that time, any applicable limitation period runs against the putative class members. Therefore by making the substitution of plaintiffs apply *nunc pro tunc*, the order effectively extended the applicable limitation period for the class. The motion judge rejected the appellant's interpretation of "commencement of the proceeding", concluding that the commencement of the proceeding is to be distinguished from the certification. He referred to s. 29(1), which states that both a commenced and a certified proceeding under the *CPA* may be discontinued or abandoned only with the approval of the court, and pointed out that it would be redundant to refer to both events if they were synonymous under the *CPA*. As a result, the effect of s. 28(1) is to suspend the running of the limitation period for all class members at the date Ms. Logan commenced the action, so that the substitution of representative plaintiffs *nunc pro tunc* back to that date, did not extend the rights of the class members.

[13] Finally, the motion judge held, effectively exercising his discretion as the supervisory judge case managing the class action proceeding under ss. 12 and 14 of the *CPA*, that it was not necessary or desirable for the proposed substitute plaintiffs to be required to commence a fresh action, and the most appropriate disposition of the motion was for the new plaintiffs to be substituted.

## **ISSUES ON THE APPEAL**

[14] The appellant's position is that the order made by the motion judge finally disposed of two issues in the action in a manner that is prejudicial to the interests of the appellant. The respondent's position is that the order of Winkler J. is interlocutory as it does not finally dispose of these issues. The two issues are:

- (1) the substitution of the plaintiffs deprived the appellant of a limitation defence; and
- (2) the substitution expanded the class.

## **ANALYSIS**

### **Issue 1: The Limitation Issue**

[15] The appellant has several prongs to its argument on this issue. The first is that Ms. Logan's claim itself was statute barred when it was commenced, so that on that basis alone there can be no substitution of plaintiffs because the original action was untenable. The respondent points out in response that no motion was brought to strike out the Logan claim on that basis. In any event, the motion judge did not deal with that argument and I can only assume it was because the argument was not put in that way. In any event,

however, it is clear from the disposition made by the motion judge that because the claim is that the breaches by the appellant are continuing, the action was not, on its face, barred by the passing of a limitation period.

[16] The second argument is that, on their face, the actions of the substituted plaintiffs in respect of the negligence claims are out of time, and there is no reliance on an extension because of discoverability issues. This argument was addressed by the motion judge. The claim includes not only negligence but ongoing breach of fiduciary duty and *Charter* breaches. The claim also alleges that the appellant's breaches, including negligence, are continuing. Therefore, it is not clear that any of the claims are untenable.

[17] The second answer to this argument is that the appellant has not yet delivered a statement of defence in this proceeding. The effect of the order of the motion judge is that on their face, the causes of action, including the negligence claim, do not appear to necessarily be statute barred. However, the order does not preclude the appellant, if so advised, from pleading that any one of the claims is barred by the passage of time. That pleading can then be one of the issues for trial or possibly for another motion.

[18] The appellant's third argument is that by substituting the new plaintiffs *nunc pro tunc*, the motion judge extended the limitation period so that if it transpires that the new plaintiffs' claims were statute barred in February 2003, when they were added as parties, but not in December 1999, when the original claim was commenced, the appellant will have been prejudiced.

[19] The complete answer to this argument is in s. 28(1) of the *CPA*. I agree with the motion judge that the correct interpretation of that section is that from the date when the proceeding is commenced and not from the date of certification of the proceeding, the running of the limitation period as against each class member is suspended until the occurrence of any of the events listed in the subsections of s. 28(1). As a result, in this case, the tolling date for the suspension limitation period is December 1999 for all members of the class, regardless of who is the representative plaintiff or plaintiffs.

[20] The appellant argues that each class member must commence an individual action in order to protect that member's limitation status and that s. 28(1) only suspends the limitation period for all class members from the date the class action is certified. The appellant's argument is based on the observation that the first three subsections of s. 28(1) list events that can only occur in a certified action. The appellant says that although the last three subsections list acts that can occur before or after certification, the term

“class action” can only have one meaning and that must be a certified action. The appellant also says that s. 28(1) does not provide as one of the events that causes the limitation period to recommence running, the denial of certification. Consequently, if the motion judge is correct and the suspension occurs before certification, the limitation period will be suspended indefinitely after certification is denied, an untenable result.

[21] In my view, the appellant’s argument is flawed. First, as the motion judge pointed out, s. 29(1) clearly refers both to a proceeding commenced under the *CPA*, and to a certified class proceeding as two different forms of proceeding, not as synonyms. This is consistent with the plain meaning of the term “commencement of the proceeding”, which normally refers to the filing of the action or application. If there is any doubt about the ordinary meaning of “commencement” in the context of litigation proceedings, guidance can be obtained by reference to the Rules of Civil Procedure, which apply to class proceedings (s. 35 of the *CPA*). In rule 1.03, action is defined as a proceeding “commenced” by a statement of claim or one of five other originating documents. In other words, it is the originating document that commences a legal proceeding. There would have to be specific language or context in the wording of s. 28(1) that required the court to interpret the word “commencement” to mean “certification” in that section.

[22] Second, it is true that denial of the certification motion is not listed as a specific event causing the limitation period to recommence against all class members. However, in each case where that occurs, the intended class proceeding may be continued as an individual action or actions between designated parties. To the extent that the action is not continued, its disposition will likely fall into one of the subsections of s. 28(1), thereby causing the limitation period to recommence against those not included within the individual actions. In my view, the fact that the limitation period does not recommence automatically on denial of certification fits within the scheme of the *CPA* and should operate fairly and efficiently as each situation arises; it is not a reason to give the language of s. 28(1) a strained meaning.

[23] Finally, as part of the argument that the appellant will suffer prejudice by the substitution of plaintiffs because the limitation period will be extended, the appellant submits, as it did to the motion judge, that an action under the *CPA* is only an individual action until certified and not a class action, so that if Ms. Logan’s individual action is discontinued, the new plaintiffs are obliged to commence a new action. For the reasons given by the motion judge, I reject this argument. I quote from the reasons of the motion judge at para. 13:

An intended class proceeding is brought by a proposed representative plaintiff pursuant to the *CPA* on behalf of a

putative class of plaintiffs. In other words, it is a claim brought pursuant to the procedural mechanism of the *CPA* on behalf of people similarly situated claiming relief in respect of a common wrong. It originates from the time of the issuance of the claim or notice of action. It is not an individual action that metamorphosises to a class proceeding when certified. Rather, the proceeding changes from an intended class proceeding, which was commenced as such, to a “certified” class proceeding which will then be conducted accordingly with respect to its continuation.

This is the same conclusion reached by the Divisional Court in *Boulanger v. Johnson and Johnson Corp.* (2003), 64 O.R. (3d) 208.

[24] I conclude on this issue that the motion judge was correct in finding that the appellant would suffer no prejudice by the substitution of plaintiffs in respect of the limitation period, first because of the operation of s. 28(1) of the *CPA*, and second, because the appellant may plead any limitation defence in its statement of defence. The motion judge was also correct in his conclusion that he was not obliged by the structure of the *CPA* and the class proceeding procedure to order that Ms. Logan must discontinue the original action and to then require the substituted plaintiffs to commence a new action.

## **Issue 2: The Expanded Class**

[25] The appellant submits that the motion judge erred by holding that the substituted plaintiffs were members of the putative class in the Logan class action when their respective TMJ devices were made by different manufacturers. The appellant also submits that by making the decision regarding the scope of the class on the substitution motion, the motion judge pre-empted a decision that he will be required to make on the certification motion in accordance with s. 8(1)(a) of the *CPA*, which requires the court to “describe the class.”

[26] In my view, the motion judge made no error on this issue. The motion judge had the discretion under rule 5.04(2) of the *Rules of Civil Procedure* and under s. 12 of the *CPA* to substitute representative plaintiffs in accordance with the requirements of those statutory provisions. In order to determine whether it was appropriate to substitute the original plaintiff with the new proposed plaintiffs, the motion judge was required to address the potential prejudice concerns raised by the appellant and mandated by rule

5.04(2). He therefore was required to determine, based on the statement of claim, whether the new plaintiffs were already members of the putative class. The motion judge concluded that the class represented in the Logan proceeding included recipients of TMJ devices of all manufacturers because the action was not against the individual manufacturers but against the appellant as regulator of the devices. Paragraphs 1.2, 11, 12, 13, 14, 15, and 16 of the Amended Statement of Claim dated December 13, 1999 (the Logan statement of claim) make it clear that the action relates to TMJ devices of all manufacturers.

[27] In my view, the appellant has shown no basis on which to interfere with the motion judge's exercise of discretion on that issue. The motion judge has not predetermined the scope or definition of the class for class certification purposes, where further material may be before the court.

[28] I see no basis on which this court ought to interfere with the motion judge's exercise of his discretion to allow the new plaintiffs to be substituted for Ms. Logan in this action.

## **CONCLUSION**

[29] At the opening of the appeal, the respondent took the position that the order of the motion judge was an interlocutory order and that the appeal route was to the Divisional Court, not to the Court of Appeal. As I have indicated, the appellant's position was that the order was a final order because by substituting the new plaintiffs, it finally determined the issues of expansion of both the limitation period and of the class against the appellant and to its prejudice. After hearing brief argument on the issue, the panel decided that because the procedural nature of the order appeared to turn on the merits of the issues, it could not determine the procedural issue without hearing the merits of the appeal.

[30] It was necessary to fully consider the arguments and to decide the substantive issues raised on the appeal. Having done so, I have concluded that the substitution of the representative plaintiffs does not have the effect of expanding the limitation period or precluding the limitation issue to be raised by the appellant in its defence, nor does it finally determine the scope of the class, which must be done on the certification motion. However, the interpretation of the meaning of s. 28(1) of the *CPA* and of its effect on the substitution of representative plaintiffs by suspending the running of the limitation period from December, 1999, has been finally determined and is part of the reason why the

substitution of the representative plaintiffs does not extend the limitation period in this case. The order is final to that extent, unlike in the case of *Young v. Janssen-Ortho Inc.* (2003), 169 O.A.C. 158, where the substitution of representative plaintiffs did not finally dispose of any right of the defendant and was merely procedural.

[31] I would therefore dismiss the appeal. The respondent shall have its costs of the appeal fixed at \$10,000 including disbursements and G.S.T.

Signed: “K. Feldman J.A.”

“I agree E.E. Gillese J.A.”

“I agree Robert P. Armstrong J.A.”

RELEASED: “KNF” JUNE 29, 2004