CITATION: Green v. The Hospital for Sick Children, 2019 ONSC 5696
COURT FILE NO.: CV-15-543259-00CP
DATE: 20191002

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
REBECCA GREEN Plaintiff	*Kirk Baert* for the Plaintiff
– and –	
THE HOSPITAL FOR SICK CHILDREN, GIDEON KOREN and JOEY GARERI Defendants	*Kate A. Crawford, Logan Crowell, Naveen Hassan,* and *Barry Glaspell* for the Defendants The Hospital for Sick Children and Joey Gareri *Darryl A. Cruz* and *Erica J. Baron* for the Defendant Gideon Koren
Proceeding under the *Class Proceedings Act, 1992*	**HEARD**: September 16, 2019

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] This motion raises three important new questions for which answers are required about the operation of the *Class Proceedings Act, 1992*[1].

[2] The first question is: When, if at all, does the running of limitation periods recommence after a motion to certify an action as a class proceeding has been dismissed?

[3] The second question is: After a motion to certify an action as a class proceeding has been dismissed, what is the court's jurisdiction under s. 7 of the *Class Proceedings Act, 1992* to join co-plaintiffs in a continued action against the defendants?

[4] The third question, which is related to the first, is: Is the test for joinder of parties under s. 7 of the *Class Proceedings Act, 1992* the same or different from the test for joinder under the *Rules*

[1] S.O. 1992, c. 6.

of Civil Procedure?

[5] In the immediate case, the Plaintiff, Rebecca Green, was unsuccessful in having her action against the Defendants, The Hospital for Sick Children, Dr. Gideon Koren and Joey Gareri, certified under the *Class Proceedings Act, 1992*. With the addition of up to approximately 200 co-plaintiffs, Ms. Green now brings a motion pursuant to s. 7 of the *Act* to continue her action against the Defendants.

[6] The proposed co-plaintiffs were putative class members in the proposed class action that had not been certified. The proposed co-plaintiffs had in the past contacted Koskie Minsky LLP, Ms. Green's lawyer of record and putative Class Counsel because of their interest in her ultimately thwarted class action. Ms. Green instructed Koskie Minsky LLP to join these co-plaintiffs to her action so that they all can achieve access to justice now that a class proceeding is unavailable.

[7] The Defendants do not oppose Ms. Green continuing her own action, but they object to her joinder of up to 200 co-plaintiffs. The Defendants have many grounds of objection, including the objection that there is no evidence that the proposed co-plaintiffs have themselves retained Koskie Minsky LLP, and, indeed, there is evidence that some of the proposed co-plaintiffs have already retained other lawyers to pursue claims against the Hospital, Dr. Koren and Mr. Gareri.

[8] Further, the Defendants object that there is no evidence that would support joinder of the co-plaintiffs in accordance with Rule 5 of the *Rules of Civil Procedure,* and, rather the evidence from the certification motion indicates that the joinder of co-plaintiffs should not be allowed. Ms. Green's position is that the test for joinder under s. 7 of the *Class Proceedings Act, 1992* is more liberal and lower than the standard used for joinder under rule 5.02 (1) of the *Rules of Civil Procedure.*

[9] Further still, the Defendants object that it may be that even if the causes of action of the co-plaintiffs could be joined with Ms. Green's cause of action, many of the individual claimants would have statute-barred claims because the limitation periods have resumed running with the dismissal of the motion for certification.

[10] Ms. Green's response to the last objection is that s.28 of the *Class Proceedings Act, 1992* has permanently suspended the running limitation periods, and, therefore, there is no substance to the Defendants' objection, to which the Defendants reply that Ms. Green has misinterpreted s.28 of the *Act*.

[11] In summary, the Defendants submitted that because of their various objections, I should allow Ms. Green's individual action to proceed, but I should otherwise dismiss her motion. In particular, the Defendants submitted that I ought not answer the questions about the interpretation of s. 28 of the *Class Proceedings Act, 1992* or about the court's jurisdiction to join of co-plaintiffs to a continuing action. The Defendants submit that these questions can and should be addressed on a case-by-case basis should any of the proposed co-plaintiffs properly retain Koskie Minsky LLP or other law firms and should the Class Member seek to bring actions against the Defendants.

[12] As I shall explain below, while in several respects Ms. Green and Koskie Minskie LLP have mishandled the motion under s. 7 of the *Class Proceedings Act, 1992*, their intentions were commendable. I shall, therefore, answer all of the questions about the operation of the *Act*.

[13] In answer to the first question, after a motion for certification is dismissed, limitation periods remain suspended until the defendant moves to have the class action dismissed without an adjudication on the merits, which the defendant may do after the certification motion is dismissed

or by cross-motion on the original certification motion. Applying this answer to the circumstances of the immediate case, the limitation periods of the co-plaintiffs' claims applicable to the causes of action asserted in Ms. Green's proposed class proceedings remain suspended.

[14] I will have more to say below about a defendant's motion for a non-adjudicative dismissal, but I foreshadow to say that the court on such motion has the jurisdiction to determine when the limitation period will resume; *i.e.*, the court has the same jurisdiction available to it on a defendant's motion to dismiss as it would have if the plaintiff had applied to discontinue the class proceeding.

[15] In answer to the second question, after a motion to certify an action as a class proceeding has been dismissed, the plaintiff may apply under s. 7 of the *Class Proceedings Act, 1992* to join co-plaintiffs to a continued action against the defendants. In answer to the third question, the test for joinder is the test for joinder under the *Rules of Civil Procedure*.

[16] Applying these three answers to the circumstances of the immediate case, Ms. Green's motion under s. 7 of the *Class Proceedings Act, 1992* should be dismissed because there are insufficient material facts pleaded to determine whether the test for joinder has been satisfied. The motion should be dismissed without prejudice to her reapplying for an order under s. 7 of the *Act* on proper material.

[17] In the result, for the reasons that follow, I answer the question about the resumption of limitation periods and I grant Ms. Green's motion to continue her action, but I dismiss her motion to join the co-plaintiffs without prejudice to a motion under the *Rules of Civil Procedure* for the joinder of the co-plaintiffs. I make no order as to costs.

B. Factual Background

[18] Between 2005 and 2015, the Hospital for Sick Children operated the Motherisk Drug Testing Laboratory ("MDTL"). During this time, the laboratory tested the hair of 18,463 individuals to screen for the presence of drugs and alcohol. Some of the test results were used by physicians treating patients. Some of the test results were used as evidence in criminal proceedings. Some of the test results were used as evidence in matrimonial disputes to determine custody and access rights. And some of the test results were used as evidence in child protection proceedings under the *Child and Family Services Act*[2] that could result in the loss of the tested individual's parental rights.

[19] One of the individuals tested was Rebecca Green, whose newborn son had been apprehended by the Toronto Children's Aid Society in the summer of 2009. After the apprehension of her baby, Ms. Green agreed to hair testing to regain access and custody. Her test results, however, were positive, and her son remained in foster care between 2009 and 2011, approximately two years, until Ms. Green's test scores reported negative for drug and alcohol use.

[20] Meanwhile in matters not involving Ms. Green, three years later, in October 2014, in *R. v. Broomfield*,[3] Ms. Broomfield was charged with several offences arising from the allegation that she had administered a noxious substance to her two-year-old son. At trial, Crown counsel adduced expert evidence about long-term cocaine ingestion from a pharmacologist/toxicologist and a

[2] R.S.O. 1990, c. C.11.
[3] 2014 ONCA 725.

technician from the Motherisk Program. Ms. Broomfield was convicted, and she appealed. On the appeal, new evidence was admitted that revealed that there was controversy among the experts about the use of the testing methods at Motherisk. The Court of Appeal set aside the conviction on one of Ms. Broomfield's charges. The Court of Appeal's decision sparked an uproar and a scandal for the Hospital.

[21] In Ontario, 28 regular actions were commenced against the defendants. Five of those claims are joinder claims comprised of approximately 400 plaintiffs. Nine of the actions join a Children's Aid Society and the Province of Ontario. There is also a joinder action in Nova Scotia. The 28Ontario actions are currently being case managed by Justice Darla Wilson.

[22] In addition to the individual actions, in January 2016, Yvonne Marchand commenced a proposed class action. She alleged that all the laboratory's 18,463 tests were unreliable and that she and others suffered harm as a result of the reliance that courts and others placed on the test results. Ms. Marchand sued the Hospital, Dr. Gideon Koren, the founder of the Motherisk Program, and Joey Gareri, one of the managers of the laboratory, for the systemic negligence of releasing unreliable test results.

[23] In June 2016 in Ms. Marchand's proposed class action, the Hospital, Mr. Gareri and Dr. Koren delivered Statements of Defence.

[24] On November 16, 2016, an Amended Statement of Claim was issued with Ms. Green substituted for Ms. Marchand as the proposed Representative Plaintiff. Ms. Marchand subsequently commenced an individual action, and her action is one of the actions being case managed by Justice Wilson.

[25] In December 2016, the Hospital, Dr. Koren, and Mr. Gareri filed Amended Statements of Defence.

[26] Ms. Green moved for certification of her proposed class action, and on November 1, 2017, I dismissed the certification motion.[4]

[27] On November 26, 2018, the Divisional Court dismissed Ms. Green's appeal.[5]

[28] On March 15, 2019, the Court of Appeal denied leave to appeal from the decision of the Divisional Court. The time for appealing to the Supreme Court of Canada has elapsed.

[29] Relying on sections 7 and 12 of the *Class Proceedings Act, 1992*, Ms. Green now brings a motion for the following relief: (a) an order continuing the proceeding for approximately 200 individual plaintiffs under sections 7 and 12 of the *Class Proceedings Act, 1992*; (b) an order tolling limitation periods for approximately 200 individual plaintiffs pursuant to s. 28 of the *Class Proceedings Act, 1992*; and (c) leave to file an Amended Statement of Claim.

[30] The proposed Amended Statement of Claim in its style of cause lists the proposed co-plaintiffs. It, however, provides no material facts and no particulars about their individual claims. During oral argument, Ms. Green's counsel explained that the individual material facts would be added later after it was determined that the co-plaintiffs could proceed in a joinder action.

[31] Further, the proposed amended claim seeks to remove the particulars of Ms. Green's claim. The only material facts pleaded as to the idiosyncratic circumstances of Ms. Green and of the co-

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[4] *R.G. v. The Hospital for Sick Children*, 2017 ONSC 6545.
[5] *R.G. v. The Hospital for Sick Children*, 2018 ONSC 7058 (Div. Ct.).

plaintiffs is paragraph 9 of the Amended Statement of Claim, which states:

> 9. The plaintiffs are individuals who had false-positive test results from a hair-strand drug or alcohol tests [sic] administered by the Motherisk Drug Testing Laboratory between January 2005 and April 2015 and suffered harm as a result of the false positive test results as well as individuals who bring their claims pursuant to section 61 of the *Family Law Act*, RSO 1990, C F3 and/or the equivalent legislation in other provinces.

[32] The proposed Amended Statement of Claim pleads:

a. The MDTL at Toronto's Hospital for Sick Children held itself out as a leading authority in the field of hair testing for drugs and alcohol abuse.

b. Between January 2005 and April 2015, MDTL tested 24,000 hair samples for drug and alcohol use for child protection purposes. The samples represent hair from more than 16,000 different individuals, approximately 54 percent of which tested positive.

c. Neither the hair test results nor the opinions delivered by MDTL were adequate or reliable.

d. The hair strand drug and alcohol tests used by MDTL were inadequate and unreliable for use in child protection and criminal proceedings or for any use whatsoever. At no time did MDTL adhere to the internationally accepted forensics standards which it was required to follow. SickKids did not provide adequate oversight over MDTL.

e. As a result of these failures, the use of hair testing evidence in child protection and criminal proceedings systemically impaired the fairness of those proceedings.

f. The defendants owed those people who tested positive common law duties, which were breached by, amongst other things, failing to properly and effectively supervise the hospital and the laboratory to ensure that the hair strand tests were reliable and appropriate for their intended purpose, namely to provide forensic evidence in child protection and criminal proceedings.

g. The loss of a child, or the deprivation of liberty, on account of a false-positive test, in addition to the anxiety, depression, insult to character and mental anguish to which these people have been subjected, has grossly violated their rights and fundamentally altered the paths of their lives.

[33] At least 24 of the Proposed Plaintiffs on this motion are already plaintiffs in one of the other actions, including some of the five joinder actions. Counsel for the Defendants wrote Ms. Green's counsel after the Notice of Motion was served requesting confirmation that counsel represented the Proposed co-plaintiffs. Ms. Green's counsel refused to provide and confirmation.

[34] On May 22, 2019 at a case conference I scheduled Ms. Green's s.7 motion. The case conference was scheduled to address whether Ms. Green's proceeding could be continued pursuant to sections 7 and 12 of the *Class Proceedings Act, 1992* and about the application of limitation periods in light of s. 28 of the *Act*.

[35] At the case conference, I directed that affidavit evidence would not be required for the

motion. While I did not mention it in my endorsement, I anticipated that Ms. Green would deliver a proposed amended statement of claim that would provide particulars of her own claim and also the particulars of the claims of each of the co-plaintiffs to be joined. My anticipation was based on *Joanisse v. Barker*,[6] a s. 7 motion case, discussed below, with which I was familiar. I also assumed that the proposed co-plaintiffs would have formally retained Koskie MinskyLLP.

[36] My unexpressed anticipations were disappointed when Ms. Green delivered a notice of motion which sought leave to amend the statement of claim to include 200 individual claimants but did not plead the material facts of their discrete claims.

[37] As already noted above, instead of providing a particularized statement of claim, the draft statement of claim revised the style of cause to add claimants, including John Doe and Jane Doe co-plaintiffs, but the pleading provided no particulars of any of the co-plaintiffs claims and the particulars of Ms. Green's claim were also removed. The draft statement of claim was essentially a statement of claim for a class proceeding without a class definition but with a style of cause that listed class members. Much like a class action, the notion of motion also included a "litigation plan for a multi-plaintiff proceeding".

[38] After Ms. Green delivered her notice of motion, the Defendants requested a second case management conference to revisit the issue of whether evidence should be proffered for the s. 7 motion. The conference proceeded on September 9, 2019, and the Defendants submitted that the court could not decide the s. 7 motion in without evidence to support the joinder. I confirmed that evidence was not required on the motion. It was my view that the Defendants could make their argument about what was required for a s. 7 motion at the hearing of the motion.

[39] That is precisely what occurred and Ms. Green's motion was argued on September 16, 2019.

[40] At the hearing of the s.7 motion, Ms. Green's counsel explained that the motion had been brought in the manner it had been brought because until there were answers to the questions about the ambit of s. 7 of the *Class Proceedings Act, 1992* and about the resumption of limitation periods, there seemed to be no other way to proceed to protect the rights of those former putative class members who had contacted Koskie Minsky LLP about the proposed class action.

[41] Ms. Green's counsel explained with the uncertainty about section 7 and about the running of limitation periods that there was a-what-comes-first problem about how to particularize the co-plaintiffs' causes of action. He suggested that once the uncertainties were resolved, the particulars of the co-plaintiffs' discrete claims could be addressed.

[42] In any event, at the hearing of the motion, the question about the operation of s. 28 of the *Class Proceedings Act, 1992* was a legal issue being a matter of interpreting the statute, and for the purposes of Ms. Green's motion did not require any factual underpinning other that the dates of the commencement of the proposed class action and the dates for the decision about certification and the subsequent appeals of that decision.

[43] I have set out the Defendants' arguments in the introduction to these Reasons for Decision.

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[6] [2006] O.J. No. 5902 (S.C.J.).

C. Legal Background

[44] For present purposes, the relevant portions of the *Class Proceedings Act, 1992* are sections 7, 10, 11, 12, 28, and 29 which state:

> *Refusal to certify: proceeding may continue in altered form*
>
> 7. Where the court refuses to certify a proceeding as a class proceeding, the court may permit the proceeding to continue as one or more proceedings between different parties and, for the purpose, the court may,
>
> (a) order the addition, deletion or substitution of parties;
>
> (b) order the amendment of the pleadings or notice of application; and
>
> (c) make any further order that it considers appropriate.
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> [...]
>
> *Where it appears conditions for certification not satisfied*
>
> 10. (1) On the motion of a party or class member, where it appears to the court that the conditions mentioned in subsections 5 (1) and (2) are not satisfied with respect to a class proceeding, the court may amend the certification order, may decertify the proceeding or may make any other order it considers appropriate.
>
> *Proceeding may continue in altered form*
>
> (2) Where the court makes a decertification order under subsection (1), the court may permit the proceeding to continue as one or more proceedings between different parties.
>
> *Powers of court*
>
> (3) For the purposes of subsections (1) and (2), the court has the powers set out in clauses 7 (a) to (c).
>
> *Stages of class proceedings*
>
> 11. (1) Subject to section 12, in a class proceeding,
>
> (a) common issues for a class shall be determined together;
>
> (b) common issues for a subclass shall be determined together; and
>
> (c) individual issues that require the participation of individual class members shall be determined individually in accordance with sections 24 and 25.
>
> *Separate judgments*
>
> (2) The court may give judgment in respect of the common issues and separate judgments in respect of any other issue.
>
> *Court may determine conduct of proceeding*
>
> 12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair

and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

[...]

Limitations

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.

Idem

(2) Where there is a right of appeal in respect of an event described in clauses (1) (a) to (f), the limitation period resumes running as soon as the time for appeal has expired without an appeal being commenced or as soon as any appeal has been finally disposed of.

[...]

Discontinuance, abandonment and settlement

29. (1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.

Settlement without court approval not binding

(2) A settlement of a class proceeding is not binding unless approved by the court.

Effect of settlement

(3) A settlement of a class proceeding that is approved by the court binds all class members.

Notice: dismissal, discontinuance, abandonment or settlement

(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

(a) an account of the conduct of the proceeding;

(b) a statement of the result of the proceeding; and

(c) a description of any plan for distributing settlement funds.

[...]

[45] For present purposes, the relevant rules from the *Rules of Civil Procedure*[7] are Rules 5.01 to 5.05 which state:

JOINDER OF CLAIMS

5.01 (1) A plaintiff or applicant may in the same proceeding join any claims the plaintiff or applicant has against an opposite party.

(2) A plaintiff or applicant may sue in different capacities and a defendant or respondent may be sued in different capacities in the same proceeding.

(3) Where there is more than one defendant or respondent, it is not necessary for each to have an interest in all the relief claimed or in each claim included in the proceeding.

JOINDER OF PARTIES

Multiple Plaintiffs or Applicants

5.02 (1) Two or more persons who are represented by the same lawyer of record may join as plaintiffs or applicants in the same proceeding where,

(a) they assert, whether jointly, severally or in the alternative, any claims to relief arising out of the same transaction or occurrence, or series of transactions or occurrences;

(b) a common question of law or fact may arise in the proceeding; or

(c) it appears that their joining in the same proceeding may promote the convenient administration of justice.

Multiple Defendants or Respondents

(2) Two or more persons may be joined as defendants or respondents where,

(a) there are asserted against them, whether jointly, severally or in the alternative, any claims to relief arising out of the same transaction or occurrence, or series of transactions or occurrences;

(b) a common question of law or fact may arise in the proceeding;

(c) there is doubt as to the person or persons from whom the plaintiff or applicant is entitled to relief;

(d) damage or loss has been caused to the same plaintiff or applicant by more than one person, whether or not there is any factual connection between the several claims apart from the involvement of the plaintiff or applicant, and there is doubt as to the person or persons from whom the plaintiff or applicant is entitled to relief or the respective amounts for which

[7] R.R.O. 1990, Reg. 194.

each may be liable; or

(e) it appears that their being joined in the same proceeding may promote the convenient administration of justice.

JOINDER OF NECESSARY PARTIES

General Rule

5.03 (1) Every person whose presence is necessary to enable the court to adjudicate effectively and completely on the issues in a proceeding shall be joined as a party to the proceeding.

Claim by Person Jointly Entitled

(2) A plaintiff or applicant who claims relief to which any other person is jointly entitled with the plaintiff or applicant shall join, as a party to the proceeding, each person so entitled.

Claim by Assignee of Chose in Action

(3) In a proceeding by the assignee of a debt or other chose in action, the assignor shall be joined as a party unless,

(a) the assignment is absolute and not by way of charge only; and

(b) notice in writing has been given to the person liable in respect of the debt or chose in action that it has been assigned to the assignee.

Power of Court to Add Parties

(4) The court may order that any person who ought to have been joined as a party or whose presence as a party is necessary to enable the court to adjudicate effectively and completely on the issues in the proceeding shall be added as a party.

Party Added as Defendant or Respondent

(5) A person who is required to be joined as a party under subrule (1), (2) or (3) and who does not consent to be joined as a plaintiff or applicant shall be made a defendant or respondent.

Relief Against Joinder of Party

(6) The court may by order relieve against the requirement of joinder under this rule.

MISJOINDER, NON-JOINDER AND PARTIES INCORRECTLY NAMED

Proceeding not to be Defeated

5.04 (1) No proceeding shall be defeated by reason of the misjoinder or non-joinder of any party and the court may, in a proceeding, determine the issues in dispute so far as they affect the rights of the parties to the proceeding and pronounce judgment without prejudice to the rights of all persons who are not parties.

Adding, Deleting or Substituting Parties

(2) At any stage of a proceeding the court may by order add, delete or substitute a

party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

Adding Plaintiff or Applicant

(3) No person shall be added as a plaintiff or applicant unless the person's consent is filed.

RELIEF AGAINST JOINDER

5.05 Where it appears that the joinder of multiple claims or parties in the same proceeding may unduly complicate or delay the hearing or cause undue prejudice to a party, the court may,

(a) order separate hearings;

(b) require one or more of the claims to be asserted, if at all, in another proceeding;

(c) order that a party be compensated by costs for having to attend, or be relieved from attending, any part of a hearing in which the party has no interest;

(d) stay the proceeding against a defendant or respondent, pending the hearing of the proceeding against another defendant or respondent, on condition that the party against whom the proceeding is stayed is bound by the findings made at the hearing against the other defendant or respondent; or

make such other order as is just.

D. Analysis and Discussion

1. The Operation of s. 28 of the *Class Proceedings Act, 1992*

[46] In her notice of motion, Ms. Green asked that the limitation periods of the co-plaintiffs be tolled because of s. 28 of the *Class Proceedings Act, 1992*. This request was neither proper nor possible on a motion under s. 7 of the *Act* because the court has no jurisdiction to eliminate limitation periods, but the actual request, as advanced at the oral argument of the motion, was just for an order interpreting the operation of s. 28, so that Koskie Minsky LLP could advise the co-plaintiffs of whether their claims might be statute-barred. That the court can do.

[47] The text of s. 28 of the *Class Proceedings Act, 1992* is set out above. There is no dispute between the parties that s. 28 was activated in the immediate case to suspend the running of any limitation period applicable to a cause of action asserted in the proposed class action brought by Ms. Green. The disputed question to be determined is when does the limitation period resume running in circumstances where a certification motion is dismissed.

[48] As I explained in *Coulson v. Citigroup Global Markets Canada Inc.*,[8] the purpose of s. 28 of the *Class Proceedings Act, 1992* is to suspend the running of limitation periods until the putative

[8] 2010 ONSC 1596, aff'd 2012 ONCA 108.

class members know whether they have the alternative of a class action as a means to achieve access to justice. I stated at paragraph 49:

> 49. The purpose of s.28 of the *Class Proceedings Act, 1992* is to protect class members from the operation of limitation periods until it has been determined whether class members may obtain access to justice through membership in a class proceeding as an alternative to obtaining access to justice by pursuing individual actions. In the absence of s.28, class members would have to commence a multitude of individual actions and then, if a class action was certified, the class members who have the choice of opting out or of abandoning or having their individual actions stayed. The operation of s.28 makes it unnecessary for class members to commence multitudes of individual claims by protecting them from the operation of limitation periods until it is determined whether they actually have the option of membership in a class proceeding that mentions their claim.

[49] The Supreme Court of Canada came to the same conclusion about the purpose of s. 28 of the *Class Proceedings Act, 1992* in *Canadian Imperial Bank of Commerce v. Green*,[9] where the Court stated at paragraph 60:

> 60. The purpose of s. 28 CPA is to protect potential class members from the winding down of a limitation period until the feasibility of the class action is determined, thereby negating the need for each class member to commence an individual action in order to preserve his or her rights: *Coulson v. Citigroup Global Markets Canada Inc.*, 2010 ONSC 1596 (CanLII), 92 C.P.C. (6th) 301, at para. 49, quoted with approval by the Court of Appeal, 2012 ONCA 108 (CanLII), 288 O.A.C. 355, at para. 11. Once the umbrella of the right exists and is established by a potential class representative in asserting a cause of action, class members are entitled to take shelter under it as long as the right remains actively engaged. The provision is squarely aimed at judicial economy and access to the courts, encouraging the former while preserving the latter. Once certification is denied and appeals exhausted, the right to seek justice through a class proceeding is no longer actively engaged.

[50] Section 28 specifies when the limitation period recommences running, and Ms. Green's argument is that as a matter of straightforward statutory interpretation, the circumstances of a dismissal of a certification motion is not one of the listed circumstances specified in s. 28 (1) and, therefore, the running of the limitation periods of the causes of action asserted in her proposed class action has not resumed.

[51] The Defendants' counterargument is that as a matter of statutory interpretation, Ms. Green's interpretation is an absurd interpretation, because it would mean that in any class action in which certification is refused, the putative class member's claims, which once had a limitation period, are stripped of the limitation period; *i.e.,* their claims can never be statute-barred. The Defendants submitted that section 28 should be interpreted so that in the case at bar, the limitation period resumed running when the time to seek leave to appeal to the Supreme Court elapsed, which is to say on May 14, 2019.

[52] Ms. Green's response to this counterargument is there is no indefinite suspension of the

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[9] 2015 SCC 60 at para. 60.

limitation period and that the limitation period would begin to run if her s. 7 motion was dismissed or if the Defendants successfully brought a motion to have the class action dismissed without a determination on the merits.

[53] Ms. Green's argument is set out in paragraphs 13 and 14 of her factum as follows:

> 13. Section 28(1)(d) of the CPA makes it clear that limitation periods remain suspended until "the class proceeding is dismissed without an adjudication on its merits". Koren suggests that section 28(1)(d) of the CPA has been triggered because: "There was no adjudication of the case on its merits". This approach willfully ignores one half of the equation in section 28(1)(d) of the CPA, which requires that the "proceeding is dismissed". A motion was dismissed. This proceeding has not been dismissed. This motion to continue is not an apparition or a legal fiction. The motion to continue simply could not exist if the proceeding had already been dismissed. Likewise, section 28(1)(d) of the CPA simply cannot be triggered until and unless the proceeding is dismissed.
>
> 14. Koren suggests that the plaintiff's interpretation leads to an "indefinite suspension" of limitation periods. If this concern were real, it would pose a difficult issue. However, the plaintiff accepts that the limitation periods may recommence if she is unsuccessful on the section 7 motion. If this Court declines to continue the proceeding, then it will also be open to the court to dismiss the proceeding without an adjudication on its merits, thereby clearly triggering section 28(1)(d) of the CPA. Moreover, the defendants could, at any time, bring a motion to dismiss the action. If that motion were successful, it would clearly trigger section 28(1)(d) of the CPA.

[54] I agree with Ms. Green's argument that the limitation period remains suspended until one of the enumerated circumstances set out in s. 28 of the *Class Proceedings Act, 1992* occurs. I agree that in the immediate case, there is no circumstance under s. 28 that have been activated and, therefore, the limitation period for the proposed co-plaintiffs' claims remains suspended.

[55] In the immediate case, I agree that the Defendants may bring a motion to have the action dismissed without a determination on the merits and that if this motion may trigger a resumption of the running of limitation periods. I, however, disagree with Ms. Green's argument that the limitation period for the putative co-plaintiffs would recommence should her s. 7 motion be dismissed. In my opinion, the s. 7 motion is separate and apart from a motion to have an action under the *Class Proceedings Act, 1992* dismissed without an adjudication. The relief of a dismissal without an adjudication requires a motion - by a defendant - to have the action dismissed, not a motion by the plaintiff to have the action continued.

[56] The defendant can bring its motion for a dismissal as a cross-motion to the original certification motion or at any time after the certification motion. The defendant's motion could, however, be a cross-motion to a motion by the plaintiff under s. 7 of the *Class Proceedings Act, 1992.*

[57] In my opinion, in circumstances where a motion to certify an action as a class proceeding is dismissed and none of the other enumerated circumstances under s. 28 applies, a motion by the defendant is required in order to deactivate the suspension of the running of limitation periods. Until such a motion is brought, not having been formally dismissed, the proposed class action is still active albeit it has not been certified. This conclusion is a consequence of the plain meaning

of section 28 of the *Class Proceedings Act, 1992* read in the context of the whole *Act* and most particularly in the context of s. 29 of the *Act.*

[58] This conclusion may come as a surprise to the class action bar because up to and including the case at bar, defendants have usually not found it necessary to address whether or not the limitation period has resumed because putative class members rarely advance actions if a certification motion is dismissed. The issue of whether the unadvanced claims are statute-barred is academic. Further, the absence of a flurry of individual actions may be explained, in part, by the circumstance that putative class members may not even be aware that there was a proposed class action. There is no provision in the *Act* that requires publication of a dismissal of a certification motion, and so the putative class members may not know that they can no longer rely on a class action as the means to access justice.

[59] In practical effect, however, the dismissal of the certification motion is akin to a discontinuance of a proceeding commenced under the *Class Proceedings Act,* but pursuant to s. 29 of the Act, a proceeding cannot be discontinued without the approval of the court on such terms as the court considers appropriate.

[60] The case law about s. 29 reveals that before approving an abandonment or discontinuance of a proceeding commenced under the *Act*, a court will consider what prejudice, if any, the putative class members might suffer by a discontinuance of the action.[10] Where there is a discontinuance, the terms of the court approval may include requiring the plaintiff to give notice to the putative class members that they can no longer rely on a possible class proceeding as the means to obtain access to justice and that they may need to bring individual actions. The terms of the order may provide an operative date for the discontinuance to come into effect in order to allow the putative class members to obtain legal advice and to commence an action if so advised.

[61] In my opinion, analyzing s.28 of the *Class Proceedings Act* along with s. 29 of the *Act* reveals that a similar approach to that used when a proposed class action is discontinued is available when a proposed class action fails to be certified. If a putative class member's cause of action is expressly mentioned in the statement of claim of a proposed class action, then that cause of action is suspended until the suspension is lifted by certain events, including a determination that dismisses the asserted cause of action without a determination of its merits.

[62] In my opinion, should a defendant bring a motion to have the class proceeding dismissed without an adjudication on the merits, the motion would be akin to a discontinuance of the action, which also entails a termination of the proceeding without an adjudication on the merits. However, until the court rules on the terms of the discontinuance or dismissal without an adjudication on the merits, the suspension of the limitation period continues.

[63] This interpretation of the operation of the *Class Proceedings Act, 1992* is fair to both plaintiffs and defendants. In the normal course, the putative class members are given notice if the certification motion succeeds, and the above approach would give them notice when the

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[10] *Castrillo v. Workplace Safety and Insurance Board*, 2018 ONSC 4421; *Frank v. Farlie, Turner & Co., LLC*, 2011 ONSC 7137; *Hudson v. Dr. Richard Austin*, 2010 ONSC 2789; *Campbell v. Canada (Attorney General)*, [2009] F.C.J. No. 50 (T.D.); *Durling v. Sunrise Propane Energy Group Inc.*, [2009] O.J. No. 5969 (S.C.J.) at paras. 14-29; *Sollen v. Pfizer*, [2008] O.J. No. 4787 (C.A.), aff'g [2008] O.J. No. 866 (S.C.J.); *Coleman v. Bayer Inc.*, [2004] O.J. No. 1974 (S.C.J.) at paras. 30-39 and [2004] O.J. No. 2775 (S.C.J.); *Logan v. Canada (Minister of Health)*, [2003] O.J. No. 418 (S.C.J.), aff'd (2004), 71 O.R. (3d) 451 (C.A.).

certification motion fails. For the putative class members, who have been waiting to learn whether they have the option of a class proceeding rather than commencing their own action, they will be given notice of the outcome of the certification motion, and then they may act as they may be advised.

[64] The above approach is fair to the defendant who has a mechanism to trigger the resumption of the running of limitation periods. *Logan v. Canada*[11] stands for the proposition that s. 28 of the *Class Proceedings Act, 1992* should be interpreted in a manner that promotes judicial economy and access to justice. In the *Logan* case, Justice Feldman in the Court of Appeal stated:[12] " [T]he 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".

[65] In *Ragoonanan et al. v. Imperial Tobacco Canada Limited,*[13] Justice Horkins concluded that denial of certification is not an event that causes the limitation period to recommence running and she rejected the defendant's argument that this interpretation would mean that where certification of a proposed class action is refused, the limitation period would never resume running. She rejected the defendant's argument, in part, because in her view it would render s. 7 of the *Class Proceedings Act* useless; she stated at paragraphs 27-29:

> 27. The defendant's position that a denial of certification triggers s. 28(d), in effect, would render s. 7 useless. If the proceeding is dismissed, then there would be nothing to "continue" under s. 7. It is illogical to force an interpretation on s.28(d) that would render s. 7 meaningless.
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> 28. The defendant also argues that if s. 28(d) is not triggered when certification is denied, it will be exposed to a limitation period that has no end in sight. I disagree. If certification is denied and the plaintiff fails to move under s. 7, the defendant can seek a discontinuance of the proceeding under s. 29 of the *Class Proceedings Act*.
>
> 29. Further, if the defendant (as in this case) does not move to discontinue under s. 29, and after a period of delay the plaintiff moves under s. 7 to continue the proceeding, s. 7 gives the court the power to make "any order that it considers appropriate". It is conceivable that where there is excessive delay in the plaintiff moving under s. 7, this might mitigate against allowing a proceeding to be continued.

[66] Although I would not myself describe a defendant's motion under s. 29 of the *Class Proceedings Act, 1992* for a dismissal without an adjudication on the merits as a defendant's motion for a discontinuance of the proceeding under s. 29 of the *Class Proceedings Act, 1992*, I agree with Justice Horkins analysis that the dismissal of a certification motion is not a triggering event under s. 28 of the *Class Proceedings Act, 1992* and that a formal motion under s. 29 of the Act is required.

[67] In the immediate case, the current status is that the running of limitation periods remains suspended until the Defendants bring a motion for a dismissal without a determination on the merits. The Defendants are at liberty to bring a motion for a dismissal without an adjudication of

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[11] [2003] O.J. No. 418 (S.C.J.), aff'd (2004), 71 O.R. (3d) 451 (C.A.).
[12] (2004), 71 O.R. (3d) 451 at para. 22 (C.A.).
[13] 2011 ONSC 6187.

the merits. Should such a motion be brought, the court will have an opportunity to consider what are the terms of the order dismissing the action without an adjudication of its merits.

2. The Motion to Continue under s. 7 of the *Class Proceedings Act, 1992*

[68] The next two questions to address are: (a) After a motion to certify an action as a class proceeding has been dismissed, what is the court's jurisdiction under s. 7 of the *Class Proceedings Act, 1992* to join co-plaintiffs in a continued action against the defendants?; and (b) Is the test for joinder of parties under s. 7 of the *Class Proceedings Act, 1992* the same or a different test from the test for joinder under the *Rules of Civil Procedure*?

[69] The analysis and discussion of these two questions can be brief.

[70] The answer to the two interrelated questions is that pursuant to s. 7 of the *Class Proceedings Act, 1992,* after a motion to certify an action as a class proceeding has been dismissed, the court may order the joinder of parties to a continuing action pursuant to the *Rules of Civil Procedure*.

[71] This answer entails that the tests and the developed case law about joinder of parties and causes of action under the *Rules of Civil Procedure* is to be applied when a motion is brought under s. 7 of the *Class Proceedings Act, 1992* not some newly developed test under the various provisions of the *Class Proceedings Act, 1992*. While the evidence filed for the certification motion and the outcome of the certification motion may be relevant to the application of the tests and the case law about the joinder of parties and causes of action under the *Rules of Civil Procedure*, s. 7 of the *Class Proceedings Act, 1992* does not require nor create a different standard for joinder of parties in the continuing action.

[72] It may be observed that pursuant to s. 7 of the *Class Proceedings Act, 1992*, the proposed class action may be continued as a proceeding, but the continued proceeding would not be a proceeding governed by the *Class Proceedings Act, 1992.* The continued proceeding is governed by the *Rules of Civil Procedure,* and the continued proceeding is different from a proceeding under the *Class Proceedings Act, 1992.*

[73] A proceeding under the *Class Proceedings Act, 1992* is a bifurcated proceeding that differs procedurally from a typical action under the *Rules of Civil Procedure*. By way of illustrations:

a. A proceeding under the *Class Proceedings Act, 1992* involves the stages of a certification motion, a common issues trial, and then individual issues trials. In contrast, a continued proceeding is a normal action that is not bifurcated; it simply proceeds in accordance with the *Rules of Civil Procedure*.

b. A proceeding under the *Class Proceedings Act, 1992* is automatically case managed. In contrast, a proceeding under the *Rules of Civil Procedure* is typically not case managed and case management must be requested in accordance with the *Rules of Civil Procedure*.

c. In a proceeding under the *Class Proceedings Act, 1992*, after certification, the class members have a right to opt-out. In contrast, parties to a normal action have no right to opt-out.

d. In a proceeding under the *Class Proceedings Act, 1992,* for the bifurcated common issues trial, the Class Members are not examined for discovery except with leave

of the court. In contrast, the parties to an action under the *Rules of Civil Procedure* continued by s. 7 are not insulated from examinations for discovery and their causes of action are not bifurcated into common and individual issues trials.

e. In a proceeding under the *Class Proceedings Act, 1992* the court may give judgment in respect of the common issues and separate judgments in respect of any other issues. In contrast, there is no separation of judgments in a proceeding under the *Rules of Civil Procedure*.

[74] In short, s. 7 of the *Class Proceedings Act, 1992,* is not a mechanism to create a class action by another name, and a motion under s. 7 just transitions a proposed class action into a proceeding governed by the *Rules of Civil Procedure*. It follows that the legal tests to be applied about joinder in an action continued under s. 7 of the *Class Proceedings Act, 1992* are the tests already developed under the *Rules of Civil Procedure.*

[75] That the tests and the cases under the *Rules of Civil Procedure* about the joinder of parties apply to the joinder of parties under s. 7 of the *Class Proceedings Act, 1992* was the conclusion of Justice Cullity in *Joanisse v. Barker*,[14] where the plaintiff sought to add 32 putative class members as co-plaintiffs following the dismissal of a motion to certify a class proceeding. Speaking about s. 7, Justice Cullity stated that he should apply the requirements of joinder found in Rule 5 of the Rules *of Civil Procedure*:

> ...an appropriate exercise of the discretion to permit the proceedings to continue under the ordinary procedure must be compatible with the rules and principles that govern such procedure. In particular...where the plaintiffs are to be added, this should be consistent with the provisions of rules 5.02(1), 5.04(2) and 26.01 and the jurisprudence that bears on their interpretation.

[76] Applying these answers to the circumstances of the immediate case, apart from Ms. Green's own action, her motion under s. 7 of the *Class Proceedings Act, 1992* should be dismissed because there are insufficient material facts pleaded to determine whether the test for joinder under the *Rules of Civil Procedure* has been satisfied. However, the motion should be dismissed without prejudice to Ms. Green reapplying for an order under s. 7 of the *Act* for the joinder of co-plaintiffs on proper material.

[77] Without a proper pleading of the material facts, it is not possible to say whether the proposed co-plaintiffs' claims arise out of the same transaction or occurrence. Without a proper pleading of the material facts, it is not possible to say whether a joinder of the proposed co-plaintiffs' claim would promote the convenient administration of justice.

[78] If Ms. Green does not reapply for an order under s. 7 of the *Class Proceedings Act, 1992*, she should deliver an amended Statement of Claim that pleads the material facts of her claim in the pleading. If she reapplies to join co-plaintiffs, the amended pleading should contain the material facts of the co-plaintiffs' discrete claims.

[79] The Defendants asked that any orders be made without prejudice to their rights to bring a summary judgment motion. The Defendants rights in this regard, however, go without saying. It also goes without saying that any co-plaintiffs must have properly retained the lawyer of record.

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[14] [2006] O.J. No. 5902 (S.C.J.).

E. Conclusion

[80] In the result, for the above reasons, I grant Ms. Green's motion to continue her action, but I dismiss her motion to join the co-plaintiffs. The dismissal of the balance of the motion is without prejudice to another motion under the *Rules of Civil Procedure* for the joinder of the co-plaintiffs.

[81] It is appropriate that each party be responsible for their own costs of this motion and, therefore, I make no order as to costs.

Perell, J.

Released: October 2, 2019

Rebecca Green Plaintiff	and	The Hospital For Sick Children, et al Defendants	Court File No.: CV-15-54325900CP

October 2, 2019

Order to go in accordance with Reasons for Decision released today

Perell, J.

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding under the *Class Proceedings Act, 1992*

Proceeding commenced at TORONTO

NOTICE OF MOTION
(Motion for Continuation of Proceeding Returnable September 16 and 17, 2019)

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