

- [1] This is a motion for leave to appeal from the order of Lax J. dated May 5, 2009, certifying the action against Her Majesty the Queen in Right of Ontario ("Ontario") as a class action.
- [2] In these reasons, I dismiss the motion for leave to appeal.

OVERVIEW

- [3] The class action relates to an outbreak of Legionnaires' disease at a long-term care facility in Toronto in September and October, 2005. The City of Toronto ("Toronto") owned and operated the facility. The outbreak was investigated by Toronto Public Health with Ontario's assistance through its Central Public Health Laboratory of the Ontario Ministry of Health and Long Term Care.
- [4] The outbreak had tragic results. Lax J. noted in the first paragraph of her April 15, 2010 reasons, reported as *Glover v. Toronto (City)* [2009] O.J. No. 1523, 70 C.P.C. (6th) 303:

The cause of the outbreak was ultimately determined to be *Legionella pneumophila* which was found in the cooling tower located on the roof at Seven Oaks. A total of 135 were infected: 70 residents, 21 visitors, 39 staff and 5 members of the community who lived or worked near Seven Oaks. Twenty-three residents died. The Legionnaires' outbreak was the first time since SARS in 2003 that Ontario faced the threat of an illness that could not be easily or quickly identified. For the first 10 days, the cause of the outbreak was unknown.

- [5] Ontario's inclusion as a defendant in the class action certification is based on the plaintiffs' claim that Ontario was negligent in initially using the wrong test on urine samples, thereby failing to identify the cause of the outbreak in a timely manner, with the result that class members did not receive timely appropriate treatment for Legionnaire's disease.

THE ISSUES RAISED BY ONTARIO, THE MOVING PARTY

- [6] Ontario does not contest Lax J.'s decision to certify the class action, but submits that Ontario should not have been included as a defendant.

THE TEST FOR THE GRANTING OF LEAVE

- [7] The order of Lax J. was interlocutory. Leave to appeal an interlocutory order may be granted under Rule 62.02(4) of the *Rules of Civil Procedure* if:
- i. There is a conflicting decision by another judge or court in Ontario, or elsewhere on the matter involved in the proposed appeal, and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or
 - ii. There appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.

DEFERENCE

[8] Courts should be reluctant to grant leave to appeal class action certification orders because deference is owed to judges who have developed expertise in this “very sophisticated area of practice”, and “intervention should be restricted to matters of general principle”: See, e.g. *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 at p. 677 (C.A.). See also: *Carom v. Bre-X Minerals Ltd.* (2000) 51 O.R. (3d) 236 (C.A.); *Peter v. Medtronic Inc.* [2007] O.J. No. 4828 (S.C.J.); leave to appeal refused [2008] O.J. No. 1916 (Div. Ct.); *Guidant Corp. v. Lefrancois* [2009] O.J. No. 36 (Div. Ct.); *Hickey-Button v. The Loyalist College of Applied Arts & Technology* [2006] O.J. No. 2393, 267 D.L.R. (4th) 601, 211 O.A.C. 301, per Doherty J. A. at para. 5.

THE TEST FOR CERTIFICATION

[9] The requirements for certification are contained in S. 5 of the *Class Proceedings Act, 1992*, S.O. 1992, C.6 (“CPA”). The s. 5 factors that are relevant to this motion for leave to appeal are set out below:

- a) The pleadings or the notice of application disclose a cause of action;
- b) There is an identifiable class of two or more persons that would be represented by the representative plaintiff;
- c) The claims or defences of the class members raise common issues;
- d) A class proceeding would be the preferable procedure for the resolution of the common issues.

GROUND FOR THE MOTION FOR LEAVE TO APPEAL

[10] Ontario seeks leave on three broad bases:

- (a) there are conflicting decisions, and it is desirable that leave to appeal be granted;
- (b) there is good reason to doubt the correctness of the conclusions that:
 - i. Inclusion of Ontario as a defendant in the action is the preferable procedure;
 - ii. The claim of negligence against Ontario has been sufficiently pleaded; and
- (c) the appeal raises issues of such importance that leave to appeal should be granted.

DISCUSSION

[11] I will briefly discuss each of these issues in turn.

- (a) Conflicting Decisions and the Desirability that Leave to Appeal be Granted—Rule 62.02(4)(a)

[12] Ontario argues that Lax J.’s decision holding that the plaintiffs had met the threshold evidentiary requirement for inclusion of Ontario in the class action certification is in conflict

with the decision in *Hollick v. Toronto* [2001] 3 S.C.R. 158 and *Taub v. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379 (Gen. Div.), upheld [1999] O.J. No. 5737 (C.A.), and cited with approval in *Hollick, supra*, at paras. 24 and 25.

[13] I disagree. The differences noted by Ontario are fact driven and do not establish any conflict with either *Hollick* or *Taub*. Indeed, Lax J. clearly focussed on and applied the principles in *Hollick*, which she cited several times in her reasons dated April 15, 2009 which formed the foundation for her decision to certify this class action: see *Glover v. Toronto (City)*, above, at 2366 paras. 18, 42, 43 & 70.

[14] Ontario has not established the conflicting decisions criterion, nor that it is desirable that leave to appeal be granted. The motion fails under Rule 62.02(4)(a).

(b) Good Reason to Doubt the Correctness of the Conclusions—[first criterion of Rule 62.02(4)(b)]

(i) Inclusion of Ontario in the Action is not the Preferable Procedure

[15] While not attacking Lax's J.'s certification of the proceeding as a class action, Ontario argues that the motion judge erred by failing to distinguish between the claim against Toronto and the claim against Ontario; and by ignoring Ontario's evidence that even if the plaintiffs were to succeed against it on a common issues trial, there was no evidence that any of the representative plaintiffs or class members had suffered any damages as a result of Ontario's alleged negligence. Ontario submits that its inclusion as a defendant in these circumstances would frustrate, rather than enhance, the goals of judicial economy and access to justice.

[16] I disagree. In paragraphs 68-76 of her April 15 decision, Lax J. carefully considered the "preferable procedure" criteria and the case law under s. 5(1)(d) of the CPA. She recognized that with respect to the claim against Ontario, the policy objective of behaviour modification was "not a driving feature", because procedural modifications were made after the Legionnaires' disease outbreak. She nevertheless concluded with respect to Ontario, that a class proceeding "will meet the other objectives of the CPA". She completed her discussion of preferable procedure by stating that "a class proceeding is a fair, efficient and manageable method of advancing the claim and is the preferable procedure to resolve the claims of class members". Her conclusion is entitled to deference and I would not interfere with it.

ii. Claim of Negligence against Ontario has not been sufficiently pleaded;

[17] The thrust of Ontario's submission is that the plaintiffs' claims of negligence on the part of Ontario are inadequate with respect to duty of care, standard of care, and proximate cause. With respect, I see no merit in this submission. The motion judge dealt with these issues extensively in her clear, cogent, and practical reasons. There is no good reason to doubt the correctness of her conclusions.

(c) The Appeal Raises Issues of Such Importance that Leave to Appeal Should be Granted—[second criterion of Rule 62.02(4)(b)]

[18] Ontario submits that leave to appeal should be granted because otherwise, as submitted in para. 65 of its factum, the test for certification “is rendered so minimal as to be effectively meaningless”; that the common issues trial “even if successful”, will benefit no one; and Ontario will be left to spend significant public funds defending a futile action against it.

[19] Given my conclusion on the first criterion in Rule 62.02(4)(b), it is not strictly necessary to comment on the second criterion. However, in the event that I am wrong, I will express my opinion on the second criterion.

[20] In my opinion, the decision to certify this case as a class action proceeding against Toronto and Ontario does not represent a lowering of the threshold for certification, much less render it meaningless.

[21] This action is about an outbreak of Legionnaires’ disease in which 135 people were infected and 23 people died. Ontario helped with the testing and allegedly was negligent in doing so. The motion judge exercised her authority under the CPA sparingly and wisely. Her conclusions are entitled to deference.

[22] CONCLUSION

[23] This case is an example of the type of careful balancing of competing interests and judgment calls required of judges dealing with class action certification motions. Lax J.’s conclusions are reasonable and entitled to deference. The motion for leave to appeal is dismissed.

[24] The plaintiffs are entitled to their costs on a partial indemnity basis. I urge the parties to attempt to agree on costs. If they are unable to do so, they may make brief written submissions. The plaintiffs’ submissions shall be filed with the Registrar within 20 days, and Ontario shall have ten days to reply.



McCombs J.

GERALD CLAYTON
GLOVER, et al.

and

CITY OF TORONTO and HER MAJESTY THE
QUEEN IN RIGHT OF ONTARIO

Plaintiffs

Defendants

P.007

416 327 5549

DIV COURT

APR-22-2010 12:13

TOTAL P.007

Nov. 23/09.

On consent, adjourned to

File 19/10.



April 22/10

The motion by Her Majesty the Queen in Right of Ontario for leave to appeal is dismissed. The parties are urged to agree on costs. If they are unable to do so, they may provide brief written submissions to the Registrar of the Divisional Court in accordance with the direction contained in the signed endorsement attached hereto.



ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

SUPPLEMENTARY MOTION RECORD OF
HER MAJESTY THE QUEEN IN RIGHT
OF ONTARIO
(Motion for Leave to Appeal returnable
November 26, 2009)

MINISTRY OF THE ATTORNEY GENERAL
Crown Law Office - Civil
72 Bay Street, 8th Floor
Toronto, Ontario M5G 2K1

Kin Twohig
LSJC # 179860
Tel: (416) 326-4098

Lise Favreau
LSJC #37800S
Tel: (416) 325-7078

Kristin Smith
LSJC #55678C
Tel: (416) 326-4026
Fax: (416) 326-4181

Counsel for Her Majesty the Queen in Right of
Ontario