CITATION: Gilani v. BMO Investments Inc., 2024 ONSC 3674
COURT FILE NO.: CV-18-00611748-00CP
DATE: 20240626

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Naheed Gilani

AND:

BMO Investments Inc.

BEFORE: J.T. Akbarali J.

COUNSEL: *Anthony O'Brien and Michael G. Robb*, for the plaintiff

Ian Matthews and Adrian Pel, for the defendant

HEARD: June 24, 2024

Proceeding under the *Class Proceedings Act, 1992*

ENDORSEMENT

Overview

[1] This class action was certified by order of Glustein J. dated May 18, 2021. The plaintiff moves to amend the class definition to extend the end date of the class period from May 18, 2021 to May 31, 2022. The defendant resists the order on the basis that doing so would admit claimants whose claims are clearly statute barred to the class.

Background

[2] The claim was commenced by way of Notice of Action in December 2018. The claim alleges that the defendant improperly paid trailing commissions to discount brokers on behalf of discount broker unitholders of BMO mutual funds for services and advice that were never provided to the unitholders.

[3] The Notice of Action defines the class and class members as:

> collectively, all persons, wherever they may reside or be domiciled, who held or hold, at any time prior to the conclusion of the trial of the common issues in this proceeding, units of a BMO Mutual Fund through a Discount Broker, except for the Excluded Persons.

[4] On May 18, 2021, Glustein J. issued his reasons certifying this class proceeding. There was a live issue in that motion with respect to the end date of the class definition under s. 5(1)(b) of the *Class Proceedings Act, 1992,* S.O. 1992, c. 6 ("*CPA*"). The plaintiff argued that because trailing commissions continued to be paid to discount brokers, that class membership ought to be closed at the notice date, to ensure that effective notice could be given, and opt-out rights exercised. The defendant argued that the proposed class definition was problematic because it included people who did not meet the attributes for class membership on the date of a potential certification order: *Gilani v. BMO Investments Inc.*, 2021 ONSC 3589 ("*Gilani certification*"), at paras. 320-322.

[5] In his decision, Glustein J. noted that, despite courts having approved class definitions with class periods that ended on notice, there was no case directly addressing whether the end date of the class definition should be on certification or on notice.

[6] He had regard to Perell J.'s decision in *Berg v. Canadian Hockey League*, 2017 ONSC 2608, where the plaintiff proposed an open-ended rolling end date for the class until the last notice of certification was issued. Perell J. found that a rolling period would not be appropriate unless there was "certainty that the predicament of the new class members is common with those Class Members at the time of certification": *Berg,* at para. 120. In the result, Perell J. ordered the end of the class period to be the date of the certification order without prejudice to the definition being amended from time to time by a new motion to certify which, if granted, would be followed by a notice program.

[7] Glustein J. noted that he had adopted a similar approach in *Granger,* at paras. 102-106.

[8] Glustein J. found that this case posed the same fundamental problem as existed in *Berg* and *Granger*, in that there has been no adjudication to determine the circumstances of those proposed class members who purchased units of a BMO mutual fund through a discount broker after certification but before notice, and the evidentiary record may have changed. Glustein J. concluded that it was not appropriate to include prospective class members when there is no evidence before the court on membership past the certification date. He found that if an impugned practice continues after certification, the plaintiff can return with a new motion to certify which, if granted, would be followed by a notice program: *Gilani certification* at paras. 335-338.

[9] The defendant continued to pay trailing commissions to discount brokers until May 31, 2022. On June 1, 2022, a regulatory ban on the payment of trailing commissions to discount brokers came into effect.

[10] The plaintiff now moves to expand the class definition to include those people who acquired units in a BMO mutual fund through a discount broker after certification up to May 31, 2022, when the impugned conduct ceased, and seeks approval for a notice program. According to the plaintiff, he is doing what Glustein J. envisioned at the original certification motion.

[11] The defendant argues that the plaintiff moves too late, and the proposed new class members are out of time.

Issues

[12] This motion raises three issues:

a. Does s. 28 of the *CPA* operate so as to suspend the limitation periods of the claims of the proposed new class members?

b. If not, are the proposed new class members' claims statute-barred such that certifying them is not appropriate, or alternatively, should the question of the operation of the limitation period be left to the individual issues phase of the proceeding?

c. Can the prospectus misrepresentation claim be certified in respect of the proposed new class members?

Amending the Class Period

[13] Under s. 8(3) of the *CPA*, on the motion of a party or class member, the court may amend an order certifying a proceeding as a class proceeding.

[14] In *Fanshawe v. LG Phillips*, 2017 ONSC 2763, at paras. 17 and 21, Leitch J. found that pursuant to s. 8(3) of the *CPA*, a judge hearing a motion to amend a certification order is not obliged to do so. Rather, it is a discretionary decision whether to amend the order.

Are the proposed new class members' claims tolled by virtue of s. 28 of the *CPA*?

[15] Section 28 of the *CPA* has been amended since this action was commenced. The parties agree that the operative version for purposes of this motion is the pre-amended version. It 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,
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> (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;
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> (c) a decertification order is made under section 10;
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> (d) the class proceeding is dismissed without an adjudication on the merits;
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> (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.

[16] Thus, under the pre-amended provision, once a limitation period is tolled by s. 28, it only resumes running when one of the six events identified in the section occur.

[17] The question that the defendant puts in issue is who gets the benefit of the statutory tolling of the limitation period? More specifically, who is a "class member" contemplated by s. 28? Whose claims are tolled?

[18] On the defendant's argument, up until certification, a class member is a putative class member, which it defines as someone who meets all the criteria for membership in the class proposed in the pleading. After certification, a class member is someone who meets the criteria for membership in the certified class.

[19] The plaintiff argues that the defendant's proposed approach to s. 28 would result in confusion, and upend a well-understood tolling mechanism that is designed to protect the interests of class members. He argues that acceding to the defendant's view of s. 28 would not promote access to justice, behaviour modification, or judicial economy.

[20] There is no authority directly on point. Neither party has been able to locate a case where the court has pronounced on the impact of s. 28 on claims of potential class members that accrue after certification.

[21] In considering the scope of s. 28, the ordinary principles of statutory interpretation apply, that is, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the legislature: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2006] 1 S.C.R. 715, at para. 26.

[22] The *CPA* is remedial legislation, and must be interpreted in light of the three goals of class proceedings: access to justice, behaviour modification, and judicial economy.

[23] I begin my analysis with a review of the existing law with respect to s. 28.

[24] Understanding the operation of s. 28 of the *CPA* begins with the decision of the Court of Appeal in *Logan v. Canada (Minister of Health)*, 2004 CanLII 184, 71 O.R. (3d) 451 (C.A.). There, the Court of Appeal held that the tolling provision in s. 28 begins on the commencement of the action, not on its certification as a class proceeding.

[25] In *Wright v. United Parcel Service Canada Ltd.*, 2011 ONSC 5044, Horkins J. was asked to consider the end date for the class in that case. Although not a case dealing with the operation of s. 28, Horkins J. had regard to the provision as an aid to assist her in dealing with the question of the class period end date.

[26] In *Wright*, the defendant argued that the end date for the class period had to be the date the proceeding was commenced. It argued that restricting the class definition in this way is consistent with the well-established common law position that an action cannot be commenced for future wrongs, and an action initiated before the cause of action has accrued is a nullity. In contrast, the plaintiff argued that the end date should be the date of the certification decision.

[27] In acceding to the plaintiff's position, Horkins J. noted that the purpose of the class definition, described in *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div), at para. 10, is to identify persons with a potential claim, define who will be bound by the result, and describe who is entitled to notice. She found that if a class definition must end on the date the action was commenced, obvious mischief would result, in that additional class actions dealing with the same wrongs would have to be commenced to protect those whose losses accrue after the statement of claim is issued. She found that the defence position ignored the goals of a class action: access to justice, behaviour modification and judicial economy: at paras. 178-179.

[28] In considering the defence argument that s. 28 cannot suspend limitation periods that have not yet started to run, Horkins J. held, at paras. 194-196:

> In my view, this interpretation of s. 28 fails to recognize that the suspension is in favour of the class member. In other words, s. 28 protects all of the putative class members that accumulate after the claim is issued. During the four years it took for this statement of claim to reach certification, the putative class members grew in number. There is a limitation period running against each additional putative class members. Putative class members do not become class members until a certification order is granted. Clearly, the intent of s. 28 is to suspend the running of each limitation period for all of the putative class members.
>
> The defence interpretation of s. 28 would encourage multiple class actions for the same conduct and would cause unnecessary confusion. Consider the confusion that the [defendant's] approach will create for new class actions in the future: it will be impossible, in most cases, to protect against the expiration of the limitation period without starting multiple class proceedings. Assume a proposed class action is issued on June 1, 2011 and the defendant's alleged conduct continues beyond this date, the first class action will not protect those allegedly wronged by the defendant's conduct after June 1, 2011. If a second class action is issued on July 31, 2011, it will protect those claims that accumulated after June 1, 2011, but not after July 31, 2011. Yet another class proceeding will be necessary to protect claims after July 31, 2011. If, as in this case, it takes four years to get to certification, multiple class proceedings are likely to result. Absent perfect coordination in commencing multiple actions to protect all putative class members, there is a real risk that there will be a gap. Valid claims will be left without the protection of an action. [emphasis in original]

[29] In my view, Horkins J. aptly illustrated why s. 28 must toll limitation periods for putative class members whose claims arise, at least up to the time of the certification of the class. Adopting a contrary approach to s. 28 would only limit access to justice, increase complexity, and tax judicial resources unnecessarily.

[30] A few years later, the Supreme Court of Canada considered the purpose of s. 28 of the *CPA* in *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60, at para. 60. It held:

> 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… 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. [cites omitted]

[31] In the passage quoted above from *Green*, the Court relied on the decision of Perell J. in *Coulson v. Citigroup Global Markets Canada Inc.*, 2010 ONSC 1596, 92 C.P.C. (6th) 301, at para. 49, where he described the purpose of s. 28 as follows:

> 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.

[32] Perell J. also held that, while s. 28 is a necessary protection, it is "sufficient to give it an interpretation that minimally interferes with the public policies associated with limitation periods": *Coulson*, at para. 103.

[33] The Court of Appeal again had cause to consider s. 28 in *R.G. v. The Hospital for Sick Children*, 2020 ONCA 414, although there in the context of the resumption of the limitation period. The Court of Appeal there agreed with the motion judge who, citing *Logan*, found that a suspended limitation period remained suspended until one of the circumstances enumerated in s. 28(1) occurs, that is to say, s. 28(1) sets out an exhaustive list of the circumstances that restart a limitation period. Denial of certification is not an enumerated circumstance. Thus, the Court of Appeal agreed that the limitation period remains suspended following a denial of certification: at para. 22.

[34] The Court of Appeal noted that the result was "not ideal", because under the operation of s. 28 (as it then stood) the limitation period was suspended indefinitely even though the rationale for continuing to toll limitation periods no longer applies once certification has been denied. However, the court found that the problem was the result of the clear wording of s. 28(1): *R.G.*, at para. 24.

[35] As it happens, the legislature was alive to the issue as well. At the time of the *R.G.* decision, it was considering a bill to amend s. 28(1), which has now been passed. The new version of s.

28(1) is similar, but adds three additional events to the list of those that will cause the limitation period to run again:

> **28** (1) Any limitation period applicable to a cause of action asserted in a proceeding under this Act is suspended in favour of a class member on the commencement of the proceeding and, subject to subsection (2), resumes running against the class member when,
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> (a) the court refuses to certify the proceeding as a class proceeding;
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> (b) the court makes an order that the cause of action shall not be asserted in the proceeding;
>
> (c) the court makes an order that has the effect of excluding the member from the proceeding;
>
> (d) the member opts out of the class proceeding;
>
> (e) an amendment that has the effect of excluding the member from the class is made to the certification order;
>
> (f) a decertification order is made under section 10;
>
> (g) the proceeding is dismissed without an adjudication on the merits, including for delay under section 29.1 or otherwise;
>
> (h) the proceeding is abandoned or discontinued with the approval of the court; or
>
> (i) the proceeding is settled with the approval of the court, unless the settlement provides otherwise.

[36] Denial of certification is now an enumerated event that will cease tolling the limitation period under s. 28. Also of some relevance in this case is 28(1)(c), which provides that an order that has the effect of excluding a member from the proceeding will also recommence the running of the limitation period.

[37] According to the plaintiff, the addition of s. 28(1)(c) is an indication that the pre-amendment version of s. 28 did not cease tolling the limitation period of putative class members who were excluded from the proceeding by reason of Glustein J.'s decision in this case (that is, those proposed new class members who became discount broker unitholders of BMO mutual funds, and whose cause of action accrued, after the certification order was issued).

[38] The defendant takes a somewhat different view. It argues that s. 28(1)(c) speaks to someone who held membership as a putative class member but who was excluded by the certified class definition. For example, if the proposed class definition had included people who purchased units in 2007, but the certified class period began with purchasers who purchased units in 2008, the 2007 purchasers would be captured under s. 28(1)(c). Prior to the amendment, presumably such a person would still have their limitation period tolled indefinitely on being excluded from the class at certification.

[39] The preceding review of the law and the positions of the parties brings me to the nub of the issue. The dispute between the parties is not whether the proposed new class members' limitation periods continued to be tolled after the date of certification. It is whether the proposed new class members were ever putative class members whose limitation periods were tolled at all.

[40] I conclude that they were not putative class members because they never fulfilled all the criteria in the proposed class definition to be putative class members. At the time the claim was commenced, up to the time of certification, the proposed new class members were strangers to the action. They did not hold units in BMO mutual funds. They could not, at any time up to certification, have been identified as putative class members based on the criteria in the class definition.

[41] Post-certification, once they began holding units the BMO mutual funds, they could have been identified as putative class members under the definition proposed in the Notice of Action. But that was no longer the operable definition. The certification of the action had changed the landscape. And they did not meet the criteria for inclusion in the certified class.

[42] In *Heward v. Eli Lilly & Company*, 2007 CanLII 2651, (ON SC) at para. 11, aff'd 2008 CanLII 32303 (ON SCDC), Cullity J. discussed the task of defining a class appropriately. After noting that a class definition often changes between the initiating process and the certification motion, he observed that the class definition will remain uncertain until, after a successful certification motion, the definition is included in the order of the court. He held that "[i]t is that definition, and not any different definition, or description, in the pleadings, that will be applicable as the proceedings continue."

[43] In other words, certification of a putative class proceeding is a milestone. Although a certification order is procedural, and can be amended, certification is a significant step in the development of a class proceeding. The certification order defines the class, the class period, the causes of action, the common issues, and the representative plaintiff. It provides a significant amount of information to people who may or may not be in the defined class to enable them to decide what, if any, next steps they need, or want, to take.

[44] I observe that both *Coulson* and *Green* place emphasis on the protection of class members' claims up to the point of certification, that is, to the point where the "feasibility of the class action [has been] determined" (*Green*), or the point where it is "determined whether [the putative class members] actually have the option of membership in a class proceeding" (*Coulson*). Logically, the language used can only refer to certification.

[45] This focus on the protection of claims up to certification reflects the fact that on certification, a person knows whether they have membership in the class, and thus whether the class proceeding will protect their rights. They are in a position to take steps to preserve their individual rights, if necessary. There is thus no unfairness to the proposed new class members because at the time they purchased their units in the BMO mutual funds, they had the information they needed to protect their rights.

[46] This interpretation of s. 28 interferes minimally with public policy around limitation periods.

[47] Nor am I concerned that adopting this approach to s. 28 will cause the problem Horkins J. so aptly described in *Wright*, of the need to issue multiple class actions. Once a class action is commenced, s. 28 operates to toll claims that accrue along the journey to certification. Once certification is reached, the claimants with accrued claims know where they stand, and have the information to enable them to decide what to do: commence an individual action, opt-out of a class proceeding, or do nothing and remain in a certified class.

[48] The remedy to deal with people whose rights accrue after certification is that which was identified in *Berg*, *Granger*, and this case: a motion can be brought to amend the class definition to include after-arising claims. But the motion should be brought within the limitation period applicable to those claims.

[49] If there is no change in circumstances that would place those claimants with after-arising claims in a different position than those in the certified class, chances are high that a motion to amend the class period to encompass after-arising claims will go on consent if brought within the limitation period.

[50] There is no reason to think that multiple action will be required, or that the necessary motion(s) to amend the class definition will be onerous, absent a true change in circumstances, in which case the new claimants ought either to prosecute a separate claim, or at the very least, whether their claims can be tried in common with the claims of the existing class ought to be tested.

[51] I thus conclude that s. 28 does not operate to toll the limitation period of any person whose claim has not accrued by the time of certification, and who does not fall within the certified class.

Should the class definition be amended even though s. 28 does not toll the claims of the proposed new class members?

[52] The defendant argues that if s. 28 does not operate to toll the limitation periods of the proposed new class members, their claims are statute-barred because:

a. The motion to amend the class definition was heard more than two years after the impugned conduct ceased;

b. All of the claims have a two-year limitation period which runs from the date of discovery: *Limitations Act, 2002*, S.O. 2002, c. 24, Sch B., s. 4.

c. Section 5(2) of the *Limitations Act, 2002* establishes a statutory presumption that the claims were discovered on the day the act or omission on which the claim is based took place, unless the contrary is proved.

d. There is no basis in fact in the evidence before me to conclude that the proposed new class members discovered their claims after the date on which the act or omission on which the claim is based took place.

e. The evidence indicates that the claim was certified before the proposed new class members' claims arose, and a notice program was undertaken which would have brought the class action, and therefore the nature of the claim, to the attention of the proposed new claimants, because it was directed at investors generally.

[53] The defendant relies on *Fantl v. Transamerica Life Canada*, 2013 ONSC 2298, at para. 168, where Perell J. held that courts will exclude persons from class membership when it is clear that their claims are statute-barred. However, where the application of the limitation period is unclear and depends upon a factual inquiry about when the class members knew or ought to have known about the facts constituting his or her cause of action, the limitations issues should not be resolved on the motion for certification.

[54] Among the issues in *Fantl* was the question of an ultimate limitation period under various insurance statutes across the country, in respect of which discoverability played no role in the analysis.

[55] On the record before me, there is no evidence about discoverability from any proposed new class members at all. This is not surprising, however. The plaintiff first learned of the defence theory on this motion after he had delivered his evidence.

[56] The plaintiff points out that the defendant has twice before attempted to address its limitation period defence with respect to members of the certified class. First, it sought to bring a summary judgment motion on the limitations period issue to be heard with the certification motion, but Glustein J. did not permit it. Second, the defendant sought to add a common issue regarding discoverability to the class proceeding. Glustein J. declined to do so, concluding that discoverability was an individual issue.

[57] The criticism that the plaintiff has not provided evidence to establish some basis in fact for the discoverability issues for the proposed new class members does not speak to the common issues, because there is no discoverability common issue.

[58] Moreover, the lack of evidence to establish some basis in fact for the discoverability issues related to the proposed new class members does not speak to the cause of action requirement in s. 5(1)(a), because that is evaluated without regard to evidence: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, at para. 99.

[59] The argument must be that there is no basis in fact to establish that the class is not overbroad by including proposed new members whose claims are statute-barred.

[60] The plaintiff notes that where discoverability is alleged, the predominant approach is that limitations period issues ought not to be addressed at certification. For example, in *Stenzler v. TD Asset Management Inc.*, 2020 ONSC 111, at para. 31, Belobaba J. held, in a claim raising similar

issues to this one, that the question of whether the claim was statute-barred was best left to the next stage of the proceeding. Among the reasons he cited were (i) the Court of Appeal's conclusion in *Pearson v. Inco Ltd.*, [2005] O.J. No. 4918 (C.A.) that individual limitation defences do not negate a finding that the case is suitable for certification, and (ii) discoverability is often an individual issue that will require individual adjudication after the common issues phase of the proceeding. He concluded, "[h]ence the prevailing wisdom that 'the limitations issue should not be resolved on a pleadings motion or on a motion for certification'", citing Winkler, Perell, Kalajdzic and Warner, *The Law of Class Actions in Canada*, (2014), at 294.

[61] The defendant raised limitation period issues in its statement of defence. In reply, the plaintiff pleads that the disclosure documents relating to the defendant's funds are "ambiguous, inconsistent, imprecise, subject to various interpretations and lack important information, such that they would result in a class member discovering a claim".

[62] Glustein J. has found that the limitations period issue as pleaded raises individual issues that must be addressed after the common issue phase of the trial.

[63] The proposed new class members may be in a different position that the class members captured by the original certified class definition. By purchasing after the litigation was commenced, and after the notice program took place, it may be harder for some or all of them to establish a discoverability defence to the assertion of the limitation period.

[64] But in my view, given the pleading of the complexity of the documents, which the plaintiff argues applies equally to the proposed new class members, I am satisfied that the question of the limitation period defences for them also ought to be dealt with as an individual issue. The record before me establishes some basis in fact for a discoverability argument, if it is necessary to do so.

[65] The proposed class definition meets the criteria set out in *Bywater*.

[66] As a result, I grant the plaintiff's motion to amend the class definition, without prejudice to the defendant's right to assert a limitation period defence against the proposed new class members.

[67] I also approve the notice and notice plan subject to one required change. There is a statement in the long form notice: "If you require assistance in the French language, please contact Class Counsel using the contact details above and we will direct your inquiry to an appropriate person." This statement should also appear on the notice in French.

The Prospectus Misrepresentation Claim

[68] The defendant argues that the proposed new class members cannot have a claim under s. 130 of the *Ontario Securities Act*, R.S.O. 1990, c. S.5.

[69] The plaintiff clarifies that the proposed new class members do not seek to advance a prospectus misrepresentation claim against the defendant. He seeks to advance the other certified

causes of action on their behalf, including breach of trust, breach of fiduciary duty, breach of contract, s. 23.1 of the *Trustee Act*, and unjust enrichment.

[70] The plaintiff proposes a pleading amendment to clarify which rights of action are asserted on behalf of which class members. I agree this is an appropriate approach.

Costs

[71] The final matter that remains to be addressed is costs.

[72] The three main purposes of modern costs rules are to indemnify successful litigants for the costs of litigation, to encourage settlement, and to discourage and sanction inappropriate behaviour by litigants: see *Fong v. Chan* (1999), 46 O.R. (3d) 330, at para. 22.

[73] Subject to the provisions of an act or the rules of this court, costs are in the discretion of the court, pursuant to s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. The court exercises its discretion considering the factors enumerated in r. 57.01 of the *Rules of Civil Procedure*, including the principle of indemnity, the reasonable expectations of the unsuccessful party, and the complexity and importance of the issues. Overall, costs must be fair and reasonable: see *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (Ont. C.A.), at para. 38. A costs award should reflect what the court views as a fair and reasonable contribution by the unsuccessful party to the successful party rather than any exact measure of the actual costs to the successful litigant: see *Zesta Engineering Ltd. v. Cloutier* (2002), 21 C.C.E.L. (3d) 161 (Ont. C.A.), at para. 4.

[74] In my view, success on this motion is divided. The plaintiff has succeeded in obtaining an order amending the class definition, but the defendant was successful in obtaining a finding that the proposed new class members' claims are not tolled by virtue of s. 28 of the *CPA*.

[75] In the circumstances, I conclude is appropriate that each party bear their own costs of the motion.

J.T. Akbarali J.

Date: June 26, 2024