CITATION: David v. Loblaw; Breckon v. Loblaw, 2018 ONSC 1298
COURT FILE NOs.: CV-17-586063-00CP
and CV-17-00005494-00CP
DATE: 20180301

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	*David Wingfield and Jay Strosberg*, for the
Marcy David	)	Plaintiff, Marcy David
Plaintiff	)	
	)	*David Sterns, Charles Wright, and Linda*
– and –	)	*Visser*, for the Plaintiff, Irene Breckon
	)	
	)	*James Orr and Kyle Taylor*, for the Plaintiff
Canada Bread Company, Limited, Orupo	)	in *Balodis v George Weston Limited*, Fed Ct
Bimbo, S.A.B. De C.V., George Weston	)	File No. T-2117-17
Limited, Loblaw Companies Limited,	)	
Weston Foods (Canada) Inc., Empire	)	
Company Limited, Sobeys Inc., Metro Inc.,	)	
Wal-Mart Canada Corp., Wal-Mart Stores,	)	
Inc. and Giant Tiger Stores Limited	)	*Davit Akman and Denes Rothschild*, for
	)	Canada Bread Company, Limited, Grupo
Defendants	)	Bimbo, S.A.B. De C.V., George Weston
	)	Limited, Loblaw Companies Limited,
AND BETWEEN:	)	Weston Foods (Canada) Inc., Empire
	)	Company Limited
Irene Breckon	)	*Eliot Kolers*, for Sobeys Inc.
Plaintiff	)	*Kristine Spence*, for Wal-Mart Canada Corp.
	)	*Michael Brown and Eric Lefebvre*, for Metro
– and –	)	Inc.
	)	*Adam Fanaki and Derek Ricci*, for Giant
Loblaw Companies Limited, George Weston	)	Tiger Stores Limited
Limited, Weston Foods (Canada),	)	
Incorporated, Weston Bakeries Ltd., Canada	)	
Bread Company, Limited, Wal-Mart Canada	)	
Corporation, Sobeys Incorporation, Metro	)	
Incorporated, Giant Tiger Stores Limited	)	
	)	
Defendants	)	

HEARD: February 9, 2018

CARRIAGE MOTION

E.M. MORGAN, J.:

[1] This carriage motion pits against each other two very experienced counsel groups for the putative class: the consortium led by Strosberg Sasso Sutts LLP ("Strosberg" or the "Strosberg Consortium") and the team of Sotos LLP and Siskinds LLP ("Sotos" or the "Sotos Team").

[2] The underlying case entails claims of price fixing and conspiracy brought by consumers against sellers of packaged bread across the country. It involves putative class actions commenced in at least 5 provinces as well as the Federal Court. Strosberg and Sotos have each commenced actions in Ontario (respectively, the "David Action" and the "Breckon Action"). This motion is brought simultaneously in both of those actions, asking the court to make an order under section 12 of the *Class Proceedings Act, 1992*, SO 1992, c. 6 ("*CPA*") to ensure a fair and expeditious procedure for the conduct of the litigation.

[3] The stakes are significant for each counsel group. Generally speaking, there should not be multiple class actions in respect of the same putative class asserting what are for the most part the same causes of action. Although carriage motions arise as a choice between competing counsel, a determination of carriage will effectively determine which action will proceed: *Vitapharm Canada Ltd. v F. Hoffman-Laroche Ltd.*, [2000] OJ No 4594 (SCJ).

I. The carriage test

[4] As my colleague Perell, J. pointed out in *Kowalyshyn v Valeant Pharmaceuticals International, Inc.*, 2016 ONSC 3819, at para 139, "Although the determination of a carriage motion will decide which counsel will represent the plaintiff, the task of the court is not to choose between different counsel according to their relative resources and expertise." Certainly in a case such as this one, where some of the most highly qualified class action counsel in the country are competing for carriage, the point of the exercise is to take the measure not of the lawyers or law firms themselves, but the cases they have prepared – i.e. to engage in a "qualitative analysis of all of the factors" in the competing actions and the advantages of the steps taken in each: *Locking v Armtec Infrastructure*, 2013 ONSC 331, at para 27 (Div Ct).

[5] In *Mancinelli v Barrick Gold Corporation*, 2016 ONCA 571, at para 13, Chief Justice Strathy confirmed the threefold criteria for determination of a carriage motion: "(a) the policy objectives of the *CPA*, namely, access to justice, judicial economy for the parties and the administration of justice, and behaviour modification; (b) the best interests of all putative class members; and, at the same time, (c) fairness to defendants." Of these, it is the best interests of the class that is dominant, *Mignacca v Merck Frosst Canada Ltd.* (2009), 95 OR (3d) 269, at paras 8, 26 (Div Ct), since the carriage motion will result in the class being assigned representation by one set of counsel over another.

[6] In analysing the above criteria, the courts have developed an expanding list of factors to consider. I hasten to add that this list is not exhaustive, and that what is of central importance in one case may be of only peripheral importance, or not important at all, in another: *Barrick Gold*, *supra*, at para 17. In any case, at latest count the tally was up to 16, as set out in *Valeant Pharmaceuticals*, *supra*, at para 143:

The factors tend to overlap and interconnect. The sixteen factors for the immediate case are:

(1) The Quality of the Proposed Representative Plaintiffs
(2) Funding
(3) Fee and Consortium Agreements
(4) The Quality of Proposed Class Counsel
(5) Disqualifying Conflicts of Interest
(6) Preparation and Readiness of the Action
(7) Relative Priority of Commencement of the Action
(8) Case Theory
(9) Scope of Causes of Action
(10) Selection of Defendants
(11) Correlation of Plaintiffs and Defendants
(12) Class Definition
(13) Class Period
(14) Prospect of Success: (Leave and) Certification
(15) Prospect of Success against the Defendants
(16) Interrelationship of Class Actions in More than one Jurisdiction

[7] In the present case, the number of truly important factors is relatively limited. The funding, quality of representative plaintiffs, fees, quality of counsel, selection of defendants, correlation of plaintiffs and defendants, class definition, class period, and several other factors are very similar (or have only minor differences) when Strosberg and the David Action are held up against Sotos and the Beckon Action. For the most part, I therefore see these as neutral factors for the sake of the analysis here.

II. The central factors

[8] The preparation and readiness of the action, the interrelationship of the Ontario actions to those in other jurisdictions, to a limited extent the differences in the causes of action pleaded, and the potential for any disqualifying conflicts of interest are matters that require consideration here. In analyzing the carriage question, it should be kept in mind that the selection of class counsel is likely to go a far way toward determining the efficiency and manageability of the action.

a) Preparation and readiness

[9] Counsel for Strosberg submits that by any measure, his group is at a far more advanced state of preparedness than Sotos. Counsel for Sotos submits that while his group is no more advanced than Strosberg, they have taken a more prudent and responsible course in preparing the case. It is the Strosberg view that they have advanced the cause of the class measurably in the time since the price fixing conspiracy first hit the press in October 2017; it is the Sotos view that the two firms are roughly equal to date but that Sotos is in a strong position to proceed ahead.

[10] It is fair to say that both firms have issued pleadings, both have arranged for a case management judge, and both have obtained documents pertinent to the price fixing allegation from the federal Competition Bureau. Both firms concede that Strosberg was earlier off the mark in

pursuing the case. Strosberg sees itself as more energetic and effective as class counsel; Sotos sees Strosberg's early lead as a sign of a rash flight into the unknown.

[11] Both law firms have acknowledged that they saw the Competition Bureau's press release in late October 2017 indicating that it was conducting an industry-wide investigation in respect of possible price fixing by large retailers of packaged bread. Strosberg went into action and issued a Notice of Action setting out the essence of the present claim on November 7, 2017. It retained investigators and experts, and secured evidence from people who are knowledgeable about the Competition Bureau's investigation. In the Notice of Action, Strosberg alleged vertical and horizontal price fixing among the Defendants.

[12] It is true, of course, that "[t]he relative priority of the commencement of the action is typically a trivial factor": *Valeant Pharmaceuticals*, *supra*, at para 192. It can become meaningful, however, depending upon the context. For example, Perell J. indicated in *Valeant Pharmaceuticals* that being first to commence an action may be meaningful in a negative way if it appears that class counsel has issued a *pro forma* Notice of Action in an effort to simply stake a claim for a piece of the action. By the same logic, being first to file can be meaningful in a positive way if a law firm does so in order to promptly identify the wrongdoing of the defendants and to gain some ground for the class in framing the issues up front.

[13] Sotos took a more cautious approach than Strosberg. Mr. Sterns states that his firm wanted to wait and see how the evidence came out before making far reaching allegations. It is Sotos' view that by waiting before jumping into the litigation arena, they avoided the potential for serious embarrassment and serious costs for the plaintiff. Sotos has interviewed the Ontario organization of independent grocers, who happen to be Sotos clients, to get their input. However, they have not yet identified or retained any experts.

[14] On December 19, 2017, Loblaw issued its own press release disclosing that it had participated fully in the Bureau's investigation and conceding that it had indeed engaged in price fixing. Fortunately for Strosberg – and, in terms of its position on this motion, unfortunately for Sotos – the fast, upfront judgment of Strosberg that the case was one of vertical and horizontal price fixing turned out to be correct.

[15] Sotos, as indicated, was more sober in its exercise of judgment and in waiting to verify the evidentiary base of its allegations before issuing any claim. In many contexts that approach would be prudent and commendable, but not here. Rash and impetuous as Sotos wants to portray the Strosberg approach, it is, as they say, hard to argue with success. Sotos is now compelled to argue that their competitor could have looked bad even if they now look good. It turns out that Strosberg did the class a great service by alerting them early on that the major retailers had engaged in the type of anti-competitive behaviour which Loblaw eventually conceded in its press release.

[16] Strosberg finalized and issued its Statement of Claim on December 20, 2017. Sotos also issued a Statement of Claim shortly thereafter. Both firms have a retainer agreement with their client. Mr. Sterns complains that the Strosberg retainer agreement is dated December 20, 2017 – the date of the Statement of Claim – and not November 7, 2017 – the date of the Notice of Action. He points out that the Sotos retainer agreement is dated the same date as its Statement of Claim, which was its originating document for its action. Mr. Sterns goes on to observe that in *Agnew-*

Americano v Equifax Canada Co, [2018] OJ No 361, at para 60, Glustein J. criticized the practice of commencing an action without a written retainer agreement.

[17] Under the circumstances, I see this argument as raising more of a quibble than anything. While the Strosberg retainer agreement is indeed dated more than a month after the issuance of the Notice of Action, it expressly states that it is "effective as of November 7, 2017". In other words, the agreement itself was in place on November 7th, but the written version did not get signed by all parties until December 20th. I am hesitant to allow others to look beyond the face of this solicitor-client agreement. The Court of Appeal has advised that only in "exceptional circumstances" should one party in litigation be able to question the authority and related discussions flowing between another party and their solicitors: *Attis v Ontario*, 2011 ONCA 675, at para 16.

[18] What is important is that the Plaintiff, Marcy David, was already named as Plaintiff on November 7th, indicating that she was prepared at that date to go on record as putative class representative. I would, of course, be far more concerned had a different plaintiff's name appeared on the Notice of Action than on the Statement of Claim, as that might be a red flag for the kind of exceptional circumstances that the Court of Appeal had in mind – i.e. that the David Action was commenced without a client that was fully prepared to take on the class action. Since that is not the case, and Ms. David was obviously on board with Strosberg all along, the fact that the written agreement is signed on December 20th but effective as of November 7th satisfies me that the law firm was properly instructed and retained when it commenced the David Action.

[19] In the same December 19, 2017 press release, Loblaw announced its gift card program which was designed as a public relations measure to win back any customer confidence that had eroded as a result of the announcement of the Bureau's investigation. Strosberg made arrangements with the court for a motion to be heard challenging the gift card program, and brought that motion in early January 2018.

[20] Again, Sotos took a more cautious approach. It did have representatives attend at the gift card motion for the purpose of maintaining a watching brief. Counsel from Sotos indicated at the hearing of the motion that they concurred with counsel from Stosberg, who shouldered the effort in its entirety.

[21] It is Strosberg's view that although I upheld the gift card program and found there to be nothing improper about Loblaw's approach to its customers, the result of the motion was of benefit to the class. They specifically stress the fact that in my endorsement I reserved to a future time the question of the enforceability of the release that accompanies the gift card: *David v Loblaw*, 2018 ONSC 198, at paras 23-24. Messrs Wingfield and Strosberg submit that in calling this to the court's attention they have taken a significant step in preserving the right of the class to challenge the release in the event of an eventual settlement or at trial.

[22] Sotos dismisses this argument, and submits that it is little more than marketing spin. Mr. Sterns takes particular issue with the Strosberg statement to the press on January 9, 2018 – the same date as my endorsement – to the effect that the ruling (and, parenthetically, Strosberg's advocacy), "sided with millions of Canadian consumers". It is Sotos' position, which has been echoed in argument by counsel for Loblaw, that the Strosberg statement is, if not misleading, at

the very least flamboyant and exaggerated. It intimates that the January 9, 2018 ruling represents a victory for consumers that the Strosberg firm obtained on their behalf by bringing the motion.

[23] It seems to me the objection is more one of style and taste than one of substance. The Strosberg public relations effort attempts to underscore and highlight in bold the fact that the viability of the release has been held in abeyance. Loblaw's customers would have to read my endorsement, or have it explained to them, in order to know that. It is perhaps the case that other counsel would phrase the matter more delicately; and, indeed, Mr. Sterns has pointed me to his own firm's website in which the January 9th ruling is announced in far more fastidious legalese.

[24] The point of the Strosberg statement, however, was not to impress a court but to attract the attention of the average Loblaw customer. That customer is presumed to have heard about a 'free' gift card without having focused on the release that goes with it. Strosberg, together with a public relations firm that they retained, assessed that a more audacious approach was called for in explaining the situation to consumers more interested in groceries than legalities. The criticism of the Strosberg press statement, reminiscent of popular portrayals of class action lawyering, is a critique of the 'classiness' of the public relations and class awareness campaign that ignores its effectiveness: see *Better Call Saul*, Season 2, Episode 4.

[25] The motion in respect of the gift card was a major undertaking at the very outset of the action, and it did advance the position of the class, or at this stage putative class. It put the David Action ahead of the Breckon Action in terms of moving the claim forward, and is one more sign of Strosberg being out front in the effort to advance the case for the class.

[26] As a final matter, on January 31, 2018 the Competition Bureau released new documents from its investigation that shed additional light on the price fixing and conspiracy allegations leveled against the Defendants. Strosbereg has amended its Statement of Claim in order to reflect this new information. Sotos has not amended its Statement of Claim, but has indicated that it intends to do so in the future. This, of course, is similar to Sotos' response to Strosberg indicating that it has hired an expert who is already working on the complicated task of assessing damages. Sotos has indicated that it has not yet retained an expert, but that it intends to do so in the future.

[27] In my view, this is indicative of the relative state of preparedness of the two firms competing for carriage of this case. Both firms have the experience to know what needs to be done to advance the case for the class. Strosberg appears to be taking each step as it comes up, while Sotos appears to be contemplating taking each step at some future point.

b) Interrelationship of actions across jurisdictions

[28] The Strosberg Consortium is composed of 4 law firms who in total have filed actions in 6 Canadian jurisdictions. There is a Consortium Agreement among them which divides up their responsibilities and gives each a defined amount of input into strategy and settlement prospects. The Consortium Agreement provides for all of the other jurisdictions except for Quebec agreeing to stay their actions in favor of certifying the David Action as a national class action. With respect to the Quebec action, the Consortium Agreement sets out a coordination mechanism for working with the rest of the Strosberg Consortium.

[29] The Sotos Team consists of 2 law firms whose only action is the Breckon Action. It has no agreement with any firms who have commenced actions in another jurisdiction cross Canada. Mr. Sterns indicated at the hearing that if the Sotos Team is awarded carriage of this case, it will enter negotiations with those other firms and attempt to strike an agreement with them.

[30] What the Sotos Team has given, and the Strosberg Consortium has refused to give, is an undertaking to the Defendants that it will not pursue similar cases against these Defendants in any other jurisdiction but Ontario. The Defendants contend that this undertaking represents a means of containing the multijurisdictional nature of the litigation, and they commend Sotos for having agreed to this initiative. They are of the view that the refusal of the members of the Strosberg Consortium to provide a similar undertaking should count against them in the carriage contest. Needless to say, the Sotos Team concurs with the Defendants in this regard.

[31] The idea of this type of undertaking was endorsed by Chief Justice Strathy in *Barrick Gold*, *supra*, at para 73, as being a mechanism that ensures fairness to the Defendants. In that case, which entailed allegations of misrepresentations in public filings by a publicly traded company, the two law firms contending for carriage had between them started the only actions in Canada. Unlike in the present situation, there were no parallel actions in other jurisdictions to deal with. Under those circumstances, Strathy CJO, at para 74, described the undertaking to refrain from commencing actions in other provinces as "an innovative and practical solution to the problem of overlapping or duplicative class actions."

[32] When it comes to evaluating practical solutions, context is everything. The record here indicates that there are more than the two counsel groups before me bringing claims against the same group of Defendants. Although Strosberg and Sotos are the only ones with actions on behalf of the putative class in Ontario, the Merchant Law Group ("Merchant") has commenced parallel actions in several provinces in western Canada. Merchant is not a member of either the Strosberg Consortium or the Sotos Team.

[33] I gather that the Merchant actions are framed regionally and do not aspire to become national class actions. They have been characterized as predatory in the sense that they are designed to extract a piece of the national action ultimately carried by others.

[34] The existence of actions by unrelated counsel in other jurisdictions is, of course, a burden to the Defendants as it requires them to duplicate the steps they take in defending their position. At the same time, the parallel actions are a nuisance to counsel for the Plaintiff in a national class action in that they compete for class members and may thus restrict overall recovery. Nevertheless, the parallel actions in western Canada exist and the Merchant claims cannot be ignored.

[35] As already indicated, the only action commenced by the Sotos Team is the Breckon Action in Ontario. The Strosberg firm commenced the David Action in Ontario, and members of the Strosberg Consortium have commenced actions in Quebec, three western provinces, and the Federal Court. As Strosberg explains it, the actions in Quebec, Manitoba, and the Federal Court were all commenced independently by the respective counsel in each of those jurisdictions, and were then brought into the Strosberg Consortium one at a time as the Consortium Agreement was negotiated across the country. In other words, Strosberg did not commence the parallel actions

strategically with a view to simply "staking a claim", as Perell J. has described the practice: *Valeant Pharmaceuticals*, *supra*, at para 92.

[36] Strosberg did commence two of the western Canada actions – the Alberta and British Columbia actions – in a specific effort to occupy the field in those jurisdictions. The idea was to have a stake in those jurisdictions where Merchant was likely to file so that the actions there could be coordinated with the proposed national class action in Ontario. In my view, there is nothing wrong or overly aggressive in that approach; indeed, Perell J. has pointed out that, "...it is acceptable that there be actions brought by the same counsel in Ontario and British Columbia (and by other counsel in Quebec) and the court's case management jurisdiction could be exercised to make appropriate directions to avoid unnecessary duplication and to ensure that the actions proceed efficiently": *Ibid.*, at para 267.

[37] The Strosberg approach to the multijurisdictional problem is to accomplish in advance what the Sotos Team says that it will eventually do if it is awarded carriage. That is, in forming the Strosberg Consortium it has negotiated with counsel for the other existing actions. Mr. Sterns has likewise indicated that the counsel in other jurisdictions will "get a call" if the Sotos Team has carriage, as they will be anxious to negotiate a coordinated strategy.

[38] In the meantime, the undertaking requested by the Defendants and given by Sotos has prevented Sotos from being proactive in other jurisdictions. Accordingly, the Sotos Team has been hamstrung in a way that the Strosberg Consortium has not been. While the undertaking may be an innovative, practical solution in some contexts, it is an impediment to a solution in others.

[39] An undertaking such as that given in *Barrick Gold*, where all of the law firms involved in the matter give the same undertaking, is potentially helpful as it puts a halt to the competition arising out of filings in multiple jurisdictions. By contrast, in the present situation, where Merchant is not part of the conversation and will not be bound by any of the undertakings requested by the Defendants, the undertaking only serves to augment the problem of multijurisdictional filings. The firm that gives this kind of undertaking cannot compete with Merchant in other provinces, whereas the firm that does not give the undertaking can compete and help ensure the uniformity of actions across the country.

[40] It is curious to me that the Defendants prefer the Sotos Team, with their undertaking but otherwise passive approach to the other jurisdictions, to the Strosberg Consortium, with their proactive efforts to head off a multiplicity of actions in other jurisdictions. Counsel for the non-Loblaw related Defendants submits that the Defendants want to encourage the undertaking as a mechanism that should in an optimal world be given by all class counsel in every case. They state that they are as concerned about the development of the law in this field as they are about this particular case.

[41] I take Defendants' counsel at their word, but the embrace of a mechanism that is unlikely to aid their clients here is an unusual approach. A more cynical person might think that the Defendants simply prefer the more passive of the two competing class counsel groups over the more proactive group.

[42] I am convinced that the problem of multijurisdictional filings is more likely to be handled efficiently by the Strosberg Consortium. They already bring in counsel from most of the parallel actions across Canada, and have started actions in the western provinces where the Merchant cases constitute a competitive presence.

[43] The Sotos Team, by contrast, is only Ontario-based and has taken a wait-and-see position with respect to the rest of the country. The Strosberg approach seems to me to be not only in the best interest of the potential national class, but – much as they don't want to admit it – fairer to the Defendants as well.

c) The umbrella purchasers' claim

[44] Sotos has included in the Breckon Action the claims of so-called "umbrella purchasers" of packaged bread – i.e. purchasers who did not purchase directly or indirectly from the [Defendants] but rather who purchased indirectly from upstream non-defendants" and who allegedly incurred higher prices than otherwise due to the market effects of the Defendants' price fixing: *Shah v LG Chem, Ltd.*, 2015 ONSC 2586, at para 17 (Div Ct). Strosberg has not included umbrella purchaser claims in its David Action. Each says the other's strategic choice in this regard is a problem for its leadership of the class action.

[45] The case law is mixed as to whether umbrella purchasers have a cause of action against allegedly conspiring Defendants under the *Competition Act* or otherwise. Courts in the United States have gone both ways, with some federal circuit courts rejecting any cause of action for umbrella purchasers, see *Mid-west Paper Products Co. v Continental Group, Inc.*, 596 F.2d 573 (3rd Cir. 1979); *Re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 691 F.2d 1335 (9th Cir. 1982), and some federal circuits accepting that they do have a cause of action: see *Re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979), cert. denied 449 U.S. 905 (1980); and *Re Arizona Dairy Products Litigation*, 627 F. Supp. 233 (Dist. Ct. Ariz. 1985).

[46] In Canada, the British Columbia Supreme Court has said that umbrella purchasers have a claim and can be included in the class, *Godfrey v Sony Corporation*, 2017 BCCA 302, at para 247, while the Ontario Divisional Court has said that they do not have a claim and should be excluded: *Shah*, *supra*, at para 53. Both sets of counsel concede that the Ontario Court of Appeal has yet to rule on the subject, and it is considered to still be in a state of flux.

[47] Mr. Wingfield, on behalf of the Strosberg Consortium, submits that the fact that the Breckon Action includes umbrella purchasers is a problematic distraction that will threaten to derail that case when it is inevitably challenged by the Defendants. Mr. Wright, on behalf of the Sotos Team, submits that the fact that the David Action does not include umbrella purchasers is problematic and will cause a distracting obstacle when class counsel inevitably try to add them to the class later.

[48] Both of these arguments are potentially correct, depending on how the law develops in this area. If umbrella purchasers are eventually confirmed by the Ontario Court of Appeal as having a valid claim, Sotos will have guessed right; and if umbrella purchasers are eventually confirmed as

excluded from any claim by the Ontario Court of Appeal, Strosberg will have guessed right. At the moment, however, it seems to be anybody's guess as to which direction the law will take.

[49] Indeed, these alternative directions are so evenly weighted that it is difficult to see one approach being today preferable to the other. Each has its up side and down side. An approach which includes the umbrella purchaser claims can be said to be a better or worse strategy than one that excludes them. Although the debate is a legally interesting one, the choice does not represent an important factor in assessing the carriage issue. Each set of counsel here has made a decision informed by the law; it is neither side's fault that the law could in the future go either way.

[50] Accordingly, I regard the inclusion or exclusion of umbrella purchasers in the class as a neutral factor. It does not favour either Strosberg or Sotos.

d) Allegations of conflict

[51] Mr. Akman, on behalf of Loblaw and its related Defendants raises two distinct issues of conflict of interest, both levelled at the Strosberg Consortium.

[52] The first of the allegations is that a member of Mr. Orr's law firm, who are counsel to the plaintiff in the Federal Court action, represented a former employee of Loblaw's. Mr. Akman apparently wrote to Mr. Orr about this and indicated that it was improper for the firm to continue to act in this matter without some resolution of this alleged conflict of interest.

[53] Mr. Orr advised the court that in response he wrote a strongly worded letter explaining the situation, and has filed an affidavit repeating this explanation for the court's benefit. Mr. Orr explains that a member of his firm had 1.4 hours of docketed time with respect to a meeting with a former employee of Loblaw who sought advice on a matter unrelated to the packaged bread price fixing claim. Mr. Orr submits that this is not a conflict as the matter was not connected to any issues contained in the present class action. He points out that in any case the former employee was, like the plaintiff in the Federal Court action that Mr. Orr's firm represents, adverse to Loblaw.

[54] I agree with Mr. Orr that this allegation is a tempest in a teapot. There is nothing wrong with a law firm representing two different people who are adversaries of the same party in unrelated matters. Indeed, when I heard the explanation I was somewhat surprised that the allegation of conflict was even made. Mr. Akman then advised that in his letter, Mr. Orr had indicated that the law firm had arranged it so that the lawyer in question would in any case have nothing to do with the class action file, and that this assurance satisfied Mr. Akman's concerns.

[55] I was pleased to hear that the concerns expressed about a firm involved in this case have been addressed to the satisfaction of the party that raised them. However, learning that the matter had been addressed and resolved before anyone got to court made me even more surprised that the matter had been raised before me at all. I frankly do not understand what it was meant to accomplish.

[56] The second allegation of conflict was pursued with more vigour by Mr. Akman. He states that for a number of years Mr. Wingfield held the position of executive director of the Competition Bureau Legal Services, and that he was in that position at the time that the Competition Bureau

investigated the merger of Loblaw with Shoppers Drug Mart. Mr. Akman submits that although the Loblaw-Shoppers transaction was unrelated to the present price fixing issue, that investigation by the Bureau must have contained a great deal of financial information about Loblaw. As Loblaw's counsel, he contends that this inside knowledge created a conflict of interest not just for Mr. Wingfield but for the entire Strosberg Consortium.

[57] Mr. Wingfield indicated in response that he had written to Mr. Akman denying the suggestion of any conflict, and that he was surprised that the matter was still being raised. He explained that his position at the Competition Bureau was an administrative one, not a legal supervisory one, and that he had nothing whatsoever to do with the Loblaw-Shoppers file. Indeed, he indicated that his own previous law firm, Weir and Foulds, had acted for Shoppers and so he made a point of staying away from the file.

[58] More to the point, Mr. Wingfield noted that an administrative position in a public sector department or institution is not equivalent to a partner in a law firm. That is, the administrator is not liable for the acts of the other staff in the department, and is not deemed to have the knowledge of the other staff the way one partner of a firm is deemed to be liable for and have knowledge of what the other partners are working on. This point about public sector management was acknowledged by the Supreme Court of Canada in *Wewaykum Indian Band v Canada*, [2003] 2 SCR 259. The Court confirmed, at para 79, that Justice Binnie's "past status as Associate Deputy Minister [of Justice] is by itself insufficient to justify his disqualification" from cases of which he had no personal knowledge but that were worked on by the Department of Justice during his term in that office.

[59] Given this state of the law as it applies to public sector positions, Mr. Wingfield's explanation of his former position with the Competition Bureau should have sufficed to put this allegation to rest. There is no substance to the conflict of interest complaint.

III. Disposition

[60] Carriage of the class action in Ontario is hereby awarded to the Strosberg Consortium.

[61] The Breckon Action is stayed. No other class action may be commenced in Ontario against the Defendants, or any other entities, in respect of the facts pleaded in the David Action without leave of the court.

[62] By agreement of the parties, there is no award of costs.

E.M. Morgan, J.

Released: March 1, 2018

CITATION: David v. Loblaw; Breckon v. Loblaw, 2018 ONSC 1298
COURT FILE NOs.: CV-17-586063-00CP and CV-17-00005494-00CP
DATE: 20180301

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Marcy David

Plaintiff

– and –

Canada Bread Company, Limited, Orupo Bimbo, S.A.B. De C.V., George Weston Limited, Loblaw Companies Limited, Weston Foods (Canada) Inc., Empire Company Limited, Sobeys Inc., Metro Inc., Wal-Mart Canada Corp., Wal-Mart Stores, Inc. and Giant Tiger Stores Limited

Defendants

AND BETWEEN:

Irene Breckon

Plaintiff

– and –

Loblaw Companies Limited, George Weston Limited, Weston Foods (Canada), Incorporated, Weston Bakeries Ltd., Canada Bread Company, Limited, Wal-Mart Canada Corporation, Sobeys Incorporation, Metro Incorporated, Giant Tiger Stores Limited

Defendants

REASONS FOR DECISION – CARRIAGE MOTION

E.M. Morgan, J.

Released: March 1, 2018