

Federal Court



Cour fédérale

Date: 20230322

Docket: T-1201-18

Citation: 2023 FC 397

Ottawa, Ontario, March 22, 2023

PRESENT: Madam Justice McDonald

CLASS PROCEEDING

BETWEEN:

GEOFFREY GREENWOOD and TODD GRAY

Plaintiffs

and

HIS MAJESTY THE KING

Defendant

ORDER AND REASONS

[1] On this Motion, the Plaintiffs request the class definition in the Certification Order be amended to restore the Family Class, as it was initially certified in *Greenwood v Canada*, 2020 FC 119 [Certification Decision]. According to the Plaintiffs, the Family Class was inadvertently left out of the class definition when a revised Certification Order was issued on April 21, 2020 (unreported) [Revised Certification Order].

I. Background

[2] Some background is necessary. On January 23, 2020, following a contested certification hearing, I issued the Certification Decision, certifying this action as a class proceeding. The certified class definition included the following:

All individuals who are entitled to assert a claim pursuant to the *Family Law Act*, RSO 1990 c F.3, and equivalent or comparable legislation in other provinces and territories (the “Family Class”).

[3] On April 21, 2020, at the request of the parties, I issued an Order amending the class definition. The amendment was not in relation to the Family Class and was not intended to amend or delete the Family Class. However, this Order resulted in the Family Class being omitted from the class definition.

[4] Class counsel acknowledges that this omission happened through inadvertence on their part. However, I am not certain the omission lies fully with class counsel. When the Court was asked to amend the class definition, even on a consent basis, it should have noted the change in the class definition. I would further note that counsel for the Defendant does not appear to have brought this change or omission in the class definition to the attention of class counsel or the Court. Finally, I note there were no amendments to the Statement of Claim and paragraph 18 includes the Family Class.

[5] I accept that the omission of the Family Class from the class definition in the Revised Certification Order in April 2020 was not the intention of class counsel.

[6] In the meantime, in February 2020, the Defendant appealed the Certification Decision.

[7] In its decision, *Canada v Greenwood*, 2021 FCA 186, the Federal Court of Appeal [FCA] upheld the certification of the class proceeding, but determined the class definition was overly broad and struck one of the certified questions. The class definition considered by the FCA was the revised class definition as contained in the April 2020 Revised Certification Order. As such, the FCA did not directly consider the Family Class in its assessment of the class definition.

[8] The Defendant sought leave to appeal the FCA decision to the Supreme Court of Canada [SCC], but leave was dismissed (see *Her Majesty the Queen v Geoffrey Greenwood, et al*, 2022 CanLII 19060 (SCC)). Following the dismissal of the SCC leave application, the class counsel discovered that the Family Class had inadvertently been omitted from the class definition in the April 2020 Revised Certification Order. Class counsel immediately took steps to advise the Defendant and the Court of this omission.

[9] The Defendant did not consent to having the Family Class added back into the class definition. As class counsel did not want to delay the claim any further, the parties agreed to an Order in September 2022 (that did not include the Family Class in the class definition), so that the Notice of Certification could be distributed (*Greenwood v Canada*, 2022 FC 1317). The Court agreed to this Order on the understanding that the Plaintiffs would bring the present Motion.

[10] On this Motion, the Plaintiffs seek an Order restoring the Family Class to the class definition. The Defendant objects to the relief sought.

II. Analysis

[11] Rule 334.19 of the *Federal Courts Rules*, SOR/98-106 [*Rules*], provides the following:

A judge may, on motion, amend an order certifying a proceeding as a class proceeding or, if the conditions for certification are no longer satisfied with respect to the proceeding, decertify it.

[12] The Defendant argues that notwithstanding Rule 334.19, this Court lacks jurisdiction to amend the Certification Order in this case. It argues that issue estoppel and the doctrine of *functus officio* apply to this Motion. Alternatively, it argues there is a lack of “direct” evidence to establish “some basis in fact” to support the inclusion of the Family Class in the class definition. Finally, it submits that the Family Class is unworkable because the multiplicity of potentially applicable provincial legislative regimes makes it impossible to define who would be included in the Family Class definition.

[13] I will address these issues below. However, as a general principle, I will start by stating that I am satisfied that Rule 334.19 provides the Court with the necessary jurisdiction and discretion to consider this Motion.

A. *Does Estoppel Apply?*

[14] The Defendant argues the Revised Certification Order issued in April 2020 constitutes a final order and since this was the Order considered by the FCA, the Plaintiffs are now estopped from re-litigating the class definition.

[15] In support, the Defendant relies on *Tippett v Canada*, 2021 FC 1338 [*Tippett*] where the Court refused to amend a certification order. The request in *Tippett* was dismissed as it was based upon new evidence that arose during examinations for discovery and the expanded class definition had never previously been before the Court. Further, the new evidence did not support the expansion of the class definition. The circumstances in *Tippett* are very different from this case.

[16] The preconditions for issue estoppel are addressed in *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at paragraph 25, as follows:

- (1) that the same question has been decided;
- (2) that the judicial decision which is said to create the estoppel is final; and,
- (3) that the parties to the judicial decision [...] were the same persons as the parties to the proceedings in which the estoppel is raised...

[17] The issue of the inclusion of the Family Class in the class definition has arguably been decided, given that the Family Class was included in the class definition in the Certification Decision. The FCA decision does not directly address the Family Class claim, although reference is made to it in paragraphs 5 and 14. However, I acknowledge that the Certification Order before the FCA was the April 2020 Revised Certification Order, from which the Family Class was inadvertently omitted from the class definition.

[18] The Defendant says the Court is estopped from addressing this Motion on the grounds that the matter has been determined. For the following reasons, I disagree with this proposition.

[19] First, motions at the class certification stage are essentially procedural motions and do not involve decisions on the merits. There have been no judicial findings on the merits of the Plaintiffs' claims in this class proceeding.

[20] Further, the April 2020 Revised Certification Order does not address the Family Class in any manner. The Family Class was not therefore judicially determined in that Order.

[21] Accordingly, I do not accept that the inadvertent "omission" of the Family Class from the class definition prevents the Court from revisiting the April 2020 Revised Certification Order.

B. *Is the Court Functus?*

[22] Related to the arguments on issue estoppel, the Defendant also argues the Court should not consider this Motion on the grounds the Court is *functus officio*.

[23] The doctrine of *functus officio* "indicates that a final decision of a court that is susceptible to appeal cannot, as a general rule, be reconsidered by the court that rendered that decision," as summarized in *Canadian Broadcasting Corp v Manitoba*, 2021 SCC 33 at paragraph 33

[*Canadian Broadcasting Corp*].

[24] The *functus officio* doctrine presupposes that the Court has made a final finding on the merits of a case. By contrast, here by certifying this matter as a class proceeding, this Court has simply made a finding that there is a sufficient basis for this matter to go forward as a class

proceeding. There have been no findings on the merits or on the common issues of the class proceeding.

[25] Further, the SCC has recognized exceptions to the doctrine of *functus officio* where there is a slip-up or error in expressing a court's manifested intention or statutory power to revisit an order (*Canadian Broadcasting Corp* at para 33).

[26] In the context of certification orders in class proceedings, courts have found that the concept of *functus officio* does not limit their statutory powers to amend a certification order (*Sharbern Holdings Inc v Vancouver Airport Centre Ltd et al*, 2005 BCSC 681 at paras 17–18 and *Nova Scotia (Attorney General) v Murray*, 2017 NSCA 29 at paras 22–23). Although these cases address provincial class action statutes, the applicable *Rules* provide the Court with similar control over class proceedings.

[27] Finally, I note the Defendant has not been able to point to any legal authority to support its argument that this Court does not have ongoing authority to amend the Certification Order.

[28] The Defendant's argument that the Court is *functus officio* on this matter is untenable.

C. *Is there "Some Basis in Fact" for the Family Class?*

[29] The Defendant raises the alternative argument that there was, at the time of the certification of this proceeding, and there continues to be, a lack of evidence to support a finding that there was some basis in fact to certify the Family Class.

[30] Further the Defendant argues the Court should only consider this Motion if there are “exceptional circumstances” that allow it to grant the relief sought by the Plaintiffs. Counsel was unable to point the Court to any legal authority to support their position on the “exceptional circumstance” test, in light of Rule 334.19.

[31] In any event, the Defendant argues that while the rules of evidence are relaxed on a certification motion, it is not an evidentiary free-for-all, relying on *Johnson v Ontario*, 2016 ONSC 5314 at paragraph 54 [*Johnson*]. The Defendant submits the hearsay statements in Mr. Gray and Mr. Greenwood’s Affidavits are insufficient to meet the required evidentiary burden to certify a Family Class in this class proceeding. The Defendant also argues the reports relied upon by the Plaintiffs can only serve to supplement the necessary direct evidence and cannot replace it to support the requirement that there be “some basis in fact” for the inclusion of the Family Class.

[32] The court in *Johnson* found that the evidence sought to be excluded by the defendant Ontario was not wholly inadmissible on the certification motion. The contested evidence simply provided additional support for the plaintiff’s assertions and, therefore, assisted in meeting the onus of the “some basis in fact” requirement (at paras 65–67). I do not read *Johnson* as supporting the Defendant’s position in this case.

[33] On this issue, in the Certification Decision, I found that, while potentially covering a large group of individuals, the Plaintiffs met the requirements of Rule 334.16(1)(b) and satisfied the “identifiable class” requirement of the certification criteria by establishing “some basis in

fact” (Certification Decision at para 58). I do not read the FCA decision as overturning my findings on this issue.

[34] I further note that paragraphs 5 and 14 of the FCA decision do refer to the Family Class claims.

[35] Although the Defendant seeks to re-argue this issue, there has been no change in circumstances since the Certification Decision was issued. Therefore, I need not revisit the issue.

D. *Is the Family Class Definition Workable?*

[36] The final argument raised by the Defendant is that the Family Class definition is unworkable because it would be impossible to determine who is included given the multiplicity and differences in the provincial legislation that might apply.

[37] To be clear, the Family Class is a derivative class, which means that any claims from that class arise through a primary class member who can otherwise make a claim themselves. It is therefore inaccurate to say the Family Class is unidentifiable. The interests of the Family Class are aligned with the primary class. In *Healey v Lakeridge Health Corporation*, 2006 CanLII 36247, the Ontario Superior Court of Justice found that claimants within a family class “fall within a special category” because they are derivative of claims by other class members (at para 88).

[38] I disagree with the Defendant's submissions on this point. As determined at the time of certification, the Family Class is an identifiable class.

III. Conclusion

[39] For the above reasons, it is appropriate to add the Family Class to the class definition. I therefore grant the Plaintiffs' Motion.

ORDER IN T-1201-18

THIS COURT ORDERS that:

1. This Motion is granted.
2. The Certification Order is hereby amended to replace the definition of the Class in paragraph 2 of the Order as follows:

All current or former RCMP Members (ie. Regular, Civilian, and Special Constable Members) and Reservists who worked for the RCMP between January 1, 1995 and the date a collective agreement becomes or became applicable to a bargaining unit to which they belong (“Primary Class”).

and

All individuals who are entitled to assert a claim pursuant to the *Family Law Act*, RSO 1990, c F.3, and equivalent or comparable legislation in other provinces and territories (“Family Class”).

This Class Proceeding excludes claims that are covered under *Merlo v Her Majesty the Queen*, Federal Court File No. T-1685-16, *Ross et al v Her Majesty the Queen*, Federal Court File No. T-370-17, and *Gaétan Delisle et al c Sa Majesté le roi*, Quebec Superior Court No. 500-06-000820-163. [Emphasis added.]

3. There will be no costs on this Motion.

“Ann Marie McDonald”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1201-18

STYLE OF CAUSE: GEOFFREY GREENWOOD and TODD GRAY v HIS MAJESTY THE KING

PLACE OF HEARING: TORONTO

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ORDER AND REASONS: MCDONALD J.

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