Common Ground? Class Action Updates

Two Recent Class Action Decisions of Note for Employers

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In this latest edition of *Common Ground? Class Action Updates*, we discuss two recent decisions of interest to employers. The first is a certification order relating to a systemic claim of negligence within a workplace. The second considers a plausible methodology to measure compensable loss.

Federal Court Certifies Class Action Brought by Current and Former Members of the RCMP

By: Hicks Morley

In Greenwood v. His Majesty the King, the Federal Court recently issued a certification order for a class proceeding relating to a claim of systemic negligence within the RCMP.

Specifically, Justice McDonald of the Federal Court certified a class action brought as a result of alleged failure by the RCMP to take reasonable measures in the operation or management of the RCMP to provide a workplace free from systemic bullying, intimidation and harassment.

Among other things, the claim seeks to hold the government of Canada (Canada) vicariously liable for the actions of the RCMP's agents, employees and servants.

The proceeding was initially certified as a class action in January 2020, following a contested certification motion. The class was broadly defined and included current and former RCMP members as well as other individuals including cadets, municipal employees and volunteers.

Canada subsequently appealed the decision, arguing that the Federal Court erred in its findings that there is a reasonable cause of action in negligence related to workplace harassment, in presuming that different requirements apply to a claim framed as "systemic negligence" and in finding that the alleged class-wide duty of care was sustainable at law.

The Federal Court of Appeal upheld the Federal Court's decision, but focused on the fact that the workplace harassment claims involved members who were statutorily appointed and did not have contracts of employment.

The Federal Court of Appeal narrowed the class definition to include only RCMP members (i.e. regular members, special constable members and civilian members) and reservists. The class was also temporally limited to the time period between January 1, 1995 and the date, for each category of class member, that a collective agreement becomes or became applicable to a bargaining unit to which they belong.

In March 2022, Canada was denied leave to appeal this decision by the Supreme Court of Canada.

This case is significant for employers as a reminder that they may find "systemic" claims (whether they be in relation to negligence or otherwise) being asserted as proposed class proceedings.

Divisional Court Considers Low Threshold to Establish Plausible Methodology for

Measuring Compensable Loss

By: Justin Choy

The Ontario Divisional Court recently addressed the threshold required to establish a plausible methodology for measuring compensable loss on a class-wide basis. For the purpose of certification, plaintiffs are not required to quantify the actual loss suffered.

In *MacKinnon v. Volkswagen Group Canada Inc*., the Divisional Court overturned the decision of a motion judge to deny certification of a proposed class action brought against Volkswagen, Audi and a number of subsidiaries resulting from their use of an unlawful device designed to subvert emissions regulations. In 2021, the defendants had settled a class action which sought recovery for the drop in value of Volkswagen and Audi vehicles resulting from the public disclosure of the "defeat device" issue. The proposed class in this action consisted of claimants who were not included in the previous settlements. Specifically, the proposed class included Volkswagen and Audi owners and lessees who sold their diesel-engine vehicles *prior* to the revelation in September 2015 that the vehicles contained the unlawful defeat device.

The motion for certification was denied on the basis that there was no plausible methodology to calculate the damages claimed; namely, the premium paid for the clean diesel or low emission feature of the vehicle that was never received. The representative plaintiff's experts provided several proposed methodologies for measuring the loss. The motion judge took issue with the inability of the methodologies to isolate the monetary value of the clean diesel premium from other types of loss suffered by owners and lessees, such as reductions in the resale value of the vehicles. Absent a plausible methodology to measure the isolated value of the clean diesel premium, the motion judge dismissed the motion for certification.

On appeal, the Divisional Court held that the methodology proposed by the plaintiff's experts for measuring compensable loss on a class-wide basis was plausible, and therefore allowed the appeal.

The Court clarified the threshold in establishing plausible methodology: "The issue is merely whether the experts present a plausible – indeed, even a barely plausible – methodology; not whether it will ultimately work. It is by now well established that 'a certification motion is not the time for finely calibrated assessments of the expert opinions.'"

In light of this threshold, the Court held that the motion judge erred by requiring evidence that the methodology proposed by the plaintiff's expert could actually do what it purported to—provide a measure of loss. It found that there was a plausible methodology for measuring compensable loss on a class-wide basis. Accordingly, the appeal was allowed, and the matter was remitted to a new judge of the Superior Court of Justice to determine the balance of the certification issues. The issue addressed in this case is important for employers defending class proceedings because it serves as a reminder not to over-estimate the threshold (legal, factual and strategic) presented by the requirement for a "plausible" methodology to measure compensable loss.

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