KOSKIE MINSKY

JUSTICE MATTERS

Class Actions

A Summary of Class Action Decisions

Court Proposes "Individual Issues Litigation Plan"

On November 16, 2015, Justice Perell released his decision in ***Lundy v. VIA Rail Canada Inc.*, 2015 ONSC 7063**. As indicated at the outset of the decision, "[t]his mini-sized class action is a test centre for underdeveloped but very important aspects of class action procedure under the *Class Proceedings Act, 1992*". A novel aspect of class action litigation, the underlying motion concerned an "Individual Issues Motion" pursuant to s. 25 "to settle a litigation plan for the final stage of a class action." As Justice Perell made clear:

> "[O]ne would be wrong in undervaluing the importance of the litigation plan for the final stage of a class action. The design of the individual issues phase has a substantial impact on achieving the goals of the class action regime of access to justice, behaviour modification, and judicial economy. The matter of designing the individual issues phase of a class proceeding is actually a matter of substantial importance."

The case concerns the class member passengers' claims for damages on account of a train derailment in 2012. In prior proceedings, the defendant admitted liability and judgment on certain common issues was entered. Once the litigation plan for the remaining individual issues is agreed upon, the Court will allow offers to settle to be made. However, the parties disagreed about the litigation plan for the individual issues phase and called on the Court to resolve the dispute.

Justice Perell ultimately rejected both the plaintiffs' and the defendant's litigation plans and proposed his own, which he *directed* the parties to consider and attempt to agree upon, failing which the court will then resolve the dispute at a case conference.

Justice Perell proposed a three level process on the facts of this case:

1. **Claims under $50,000:** a paper-based claim to be decided by a judge of the Superior Court of Justice with no appeal from the decision.

2. **Claims between $50,000-$100,000:** the procedure would be akin to a summary judgment procedure, with the normal appeal rights.
3. **Claims over $100,000:** the normal *Rules of Civil Procedure* would apply, discoveries would be conducted, and a mini-trial would be held.

Justice Perell stressed that the individual issues litigation plan should be akin to a settlement distribution process and should utilize the full powers of s. 25 in creating summary procedures. He also rejected the plaintiffs' suggestion of a test case for mental distress claims: in his view, if there is a physical injury, mental distress damages are available; but if no physical injury, then a recognized psychiatric illness is required.

As common issues trials are becoming more frequent in Canada, so too will become the resolution of individual issues. This case represents a court's rare take on the reasonableness of procedures to address these issues. It demonstrates the special, often summary, procedural considerations taken in class actions – clearly depending on the quantum at issue – so as to promote judicial economy, access to justice, and behavior modification. It will certainly serve as a kind of 'guidepost' for future individual issue resolution, especially in cases involving physical injuries.

Koskie Minsky LLP was involved in the hearing of the motion on behalf of the plaintiffs.

Court of Appeal Weighs in on Benefits of Case Management

In the Court of Appeal for Ontario's latest pronouncement on the test for certification, Chief Justice Strathy re-iterated Ontario's liberal approach to certification and focused on the benefits associated with attentive case management as class proceedings wind their way through this province's courts.

Amyotrophic Lateral Sclerosis Society of Essex v. Windsor (City), 2015 ONCA 572 was a proposed class action alleging that lottery licensing and administration fees collected by the municipalities are direct taxes and therefore *ultra vires* because the revenues far exceed the costs of administration. Although there were many issues on appeal, Chief Justice Strathy focused on the unique feature of case management of class proceedings that render this vehicle appropriate to resolve group claims:

> [67] [. . .] In my view, the significant features of class proceedings – the ability to case manage groups of claims raising common issues and the ability to make binding determinations of those issues – make a class proceeding appropriate to resolve these claims. With active and strategic case management, and a resolve by the parties to focus on the fair and efficient resolution of the issues, both liability and limitation period issues could be resolved relatively expeditiously.

Section 12 of the *Class Proceedings Act, 1992* empowers the case management judge to make appropriate orders to ensure the fair and expeditious determination of the proceeding. Case management judges are entitled to seek and impose creative solutions to the efficient determination of the issues. For example, Chief Justice Strathy identified the following:

- The case management judge is entitled to give directions as to when certain steps should be accomplished and as to what motions may be brought, and when.
- The case management judge may prohibit motions from being brought before certain steps have been accomplished and may make orders as to the sequencing of motions.
- The case management judge is also entitled to determine the order in which some issues are addressed.
- He or she is entitled, but not required, to determine whether some issues are amenable to summary judgment and to schedule the proceedings accordingly.

The benefit of case management is that it may render proceedings which may otherwise be unmanageable efficient and it permits the parties to fairly and effectively resolve issues in the context of the proceeding. Ultimately, the availability of case management weighed heavily in favour of certification in the preferability analysis.

It is no surprise that Chief Justice Strathy identified case management as an important component of the preferability analysis, since he was a judge on Ontario's class proceeding list for many years. As class proceeding jurisprudence matures in Ontario, one hopes that judicial familiarity with the intricacies of the regime – for example, case management – will inform judicial analysis at this province's highest court.

Court Denies Summary Judgment in "Private Issuers" Class Action

On June 29, 2015, Justice Perell released his decision in ***Mayotte v Ontario*, 2015 ONSC 4196**, denying what in effect were cross motions for summary judgment in this certified class action. There were "numerous genuine, novel, and profound issues for trial, and it [was] not in the interests of justice to determine this matter summarily for either side."

The action is seeking damages of $75 million for breach of contract and unjust enrichment on behalf of current and former members of the "Private Issuers Network", which signed contracts with the Province of Ontario over a given period to issue driver's licences and register vehicles. They allege their compensation by Ontario has for years been inadequate, unfair, unreasonable, and not comparable to that paid to Private Issuers in other provinces with similar systems.

In denying the summary judgment motions, Justice Perell made several noteworthy comments on the contemporary application of summary judgment, some of which can be particularly instructive to class proceedings. He reaffirmed that even post-*Hryniak*, summary judgment is not always the correct course of action:

In *Hryniak v. Mauldin*, 2014 SCC 7, although the Supreme Court of Canada commanded a very robust summary judgment procedure, it did not foreclose lower courts from simply dismissing the summary judgment motion and ordering that the action be tried in the normal course. Indeed, where there are genuine issues for trial and the lower court concludes that employing the enhanced forensic tools of the summary judgment procedure would not lead to a fair and just determination of the merits, the court should not decide the matter summarily[.]

The common issues trial in this action is scheduled to begin in September 2015, which clearly factored into Justice Perell's analysis in denying the motions, stating "[t]he parties are ready for an imminent trial, and, in my view, it would not be in the interests of justice to decide this class action summarily."

Justice Perell also shed light on what the motion judge owes to the various stakeholders in a motion for summary judgment before such a motion should be granted:

The point is not that the court cannot decide the dispute between the parties summarily and come to a fair and just result. The point is that the court cannot give the winner the vindication it seeks from access to justice, the loser the solace of having had its day in court, and the appellate court the evidentiary record it will need to determine the correctness of the decision by a summary determination of the dispute between the parties. And, because the court cannot deliver all of justice, the appearance of justice, and the catharsis of justice by a summary determination, therefore, the court ought to dismiss the competing requests for a summary judgment.

Koskie Minsky LLP was involved in the hearing of the motion on behalf of the Plaintiff.

Federal Court Certifies Day Student Class Action

On June 3, one day after the release of the Executive Summary from the Truth and Reconciliation Commission of Canada, the Federal Court certified a class action concerning day students of Indian Residential Schools [*Chief Shane Gottfreidson et al. v. HMQ*, **2015 FC 706**]. The *Indian Residential Schools Settlement Agreement*[IRSSA] did not cover students of Residential Schools who did not stay overnight, although they could make an application to the Independent Assessment Process. Day students were members of the class in ***Cloud***, which was certified prior to IRSSA. As a result, day students are now seeking compensation for the harm they endured along with their peers who resided at Residential Schools.

The proposed class consisted of all day students from 140 schools covered by IRSSA (the "survivors"), descendants of the survivors and certain bands. The proposed class period was from 1920 until 1997. The plaintiffs explicitly sought compensation only from Her Majesty in Right of Canada [Canada], excluding what could have been hundreds of religious orders as third parties. The rationale behind this selection was to create a manageable case, as the Court noted "The members of the 'survivor' class hope to have this matter resolved before they are all dead."

Canada opposed certification on the basis that the claim for cultural loss and loss of language could not succeed and that the plaintiffs would be unable to prove a common policy in respect of Residential Schools. The Court held that it was not plain and obvious the plaintiffs would not succeed on these issues. The Court considered the issue of a potential time bar as the most "troubling" issue, although ultimately it was held to not be plain and obvious the claims would be barred. In considering the application of a potential time bar to the claims made, the Court considered the fluid nature of the *sui generis* relationship between Canada and its Aboriginal peoples concluding that "The last chapter is far from being written."

On the issue of class definition, the plaintiffs sought to include in the descendant class the children of survivors going back 5 generations, including unborn descendants. The Court refused to certify the breadth of the descendant class sought, limiting the descendant class to the first generation.

This case and other ongoing litigation continues to highlight that Canada's past practices with respect to Residential Schools is far from resolved.

To learn more about Koskie Minsky's Class Action law practice, please visit our website at kmlaw.ca

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This edition of Class Action News was produced and edited by the Class Action Department at Koskie Minsky LLP