KOSKIE MINSKY

JUSTICE MATTERS

Class Actions

A Summary of Class Action Decisions

Good for Aggregate Damages

The Ontario Court of Appeal recently upheld certification in *Good v. Toronto (Police Services Board)*, **2016 ONCA 250** (*Good*). *Good* is a class action concerning mass detentions during the G20 Summit and protests which occurred in Toronto.

The Court of Appeal made two important holdings regarding aggregate damages. The first was to reaffirm that the decision as to whether aggregate damages are available, is a decision for the trial judge. The second was to articulate what may flow from the provision of s. 24(1) which allows a court to determine the "...aggregate **or a part** of a defendant's liability". The Court of Appeal held that:

"...this appears to be a case where the common issues judge may well determine that at least part of TPS' liability can reasonably be determined without proof by individual class members. As the Divisional Court highlighted, **s. 24(1)** asks whether the aggregate or a part of the defendant's liability can reasonably be determined without proof by class members. And, as the Divisional Court observed, it would be open to a common issues judge to determine that there was a base amount of damages that any member of the class (or subclass) was entitled to as compensation for breach of his or her rights."[emphasis in original]

The above statement by the Court of Appeal affirms that aggregate damages under s. 24(1) are not an all or nothing affair. Awarding a minimum, base or average amount of damages is in line with awards of damages upheld by the Supreme Court of Canada in *St. Lawrence Cement Inc. v. Barrette*, **2008 SCC 64**, and *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand* **[1996] 3 S.C.R. 211**. The holding in *Good* flows from the plain wording of section 24(1) and ensures that if a plaintiff can establish a common wrong there can be a common remedy.

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Court of Appeal Affirms Certification in G20 Class Action

On April 6, 2016, the Ontario Court of Appeal released its decision in ***Good v. Toronto (Police Services Board)*, 2016 ONCA 250**, where it upheld the Divisional Court's certification of a class action stemming from the G20 summit held in Toronto in June 2010.

According to an independent review, during the G20, police encircled or "boxed-in" groups at multiple locations. At three of the locations, the individuals detained were arrested and taken to a central Detention Centre specially constructed for the G20 summit. The conditions at the Detention Centre were poor and significant delays, overcrowding, and a breakdown in prisoner care occurred. In total, approximately 1,000 people were arrested or detained, including the representative plaintiff. The class action asserts multiple claims, including *Charter* breaches.

The Court of Appeal's decision is important for (1) its treatment of aggregate damages in class actions; (2) its reinforcing of the practice of *de novo* certification hearings on appeal; and (3) its treatment of costs under s. 31 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

(1) In respect of aggregate damages, the Court of Appeal rightfully affirmed that a minimum, base level of damages may be possible for each class member, stating:

> Further, this appears to be a case where the common issues judge may well determine that at least part of TPS' liability can reasonably be determined without proof by individual class members. As the Divisional Court highlighted, s. 24(1) asks whether the aggregate or a part of the defendant's liability can reasonably be determined without proof by class members. And, as the Divisional Court observed, it would be open to a common issues judge to determine that there was a base amount of damages that any member of the class (or subclass) was entitled to as compensation for breach of his or her rights. It wrote, at para. 73, that "[i]t does not require an individual assessment of each person's situation to determine that, if anyone is unlawfully detained in breach of their rights at common law or under s. 9 of the Charter, a minimum award of damages in a certain amount is justified."

(2) In respect of *de novo* certification on appeal, the proposed class action on appeal was significantly narrower than that considered by the motion judge. But the Court of Appeal kept in line with its precedent in affirming this practice. It echoed its recent decision in ***Keatley Surveying Ltd. v. Teranet Inc.*, 2015 ONCA 248**, to the effect that "there must be some latitude on appeal for consideration of issues not raised at first instance provided that the other party is afforded procedural fairness". This acknowledges the reality that certification is "a fluid, flexible procedural process" and that class proceedings evolve as they work their way through certification and case management. This sort of procedural flexibility is unique to class

actions and is necessary to realize the goals of class actions: access to justice, judicial economy, and behaviour modification.

(3) In respect of costs under s. 31, the Court of Appeal awarded the plaintiff more costs from the courts below out of respect for the goals of class actions and out of fear for the chill that could transpire should costs awards overshadow cases with a clear public interest. In effect, it held that s. 31, which allows a court to consider whether "the class proceeding was a test case, raised a novel point of law or involved a matter of public interest" when deciding costs, should only be used to protect plaintiffs from potentially larger costs awards – not defendants.

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