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ARTICLE

# Wrinkles in Judicial Class Actions Management Recent Decisions from the Federal Court of Appeal

*In reasons released November 9, 2018 and December 13, 2018, the Federal Court of Appeal and Court of Appeal for Ontario have offered further guidance on the limits for class members and supervising judiciary to interfere with the approval and management of class actions.*

*Frame v Riddle*– Class Members Seek Leave to Exercise the Right of Appeal in Federal Court

In *Frame v Riddle*, the Federal Court of Appeal considered a motion by various class members who sought to appeal the approval of class counsel fees in the amount of $37.5M. As detailed in our prior article, the approval of a settlement for the "Sixties Scoop" was thrown into question after the decision of the Ontario Superior Court in a parallel action ruled that counsel fees were not "anywhere close to reasonable". Justice Belobaba of the Ontario Superior Court suggested he would only have approved a fee of $12.5M for class counsel before the Federal Court.

After Justice Belobaba's decision, all counsel agreed that each court would only approve the fees of the counsel before it. In an Order granted August 2, 2018, the Federal Court approved fees payable to class counsel before it in the full amount of $37.5M (rather than the $12.5M suggested). Of significance, the defendant had previously advised that any difference between the amount allocated for fees and the amount awarded would fund a "Sixties Scoop Foundation".

Certain class members then attempted to appeal the Order approving fees in what appears to be the first motion for leave to exercise the right of appeal under Rule 334.31(2) of the *Federal Courts Rules*. The Federal Court of Appeal held that the principles outlined by the Court of Appeal for Ontario in *Dabbs v Sun Life Assurance Co of Canada* and *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation* were of assistance in determining how the rule should be exercised, and held that "to obtain leave to exercise the appeal right of a representative plaintiff, a class member must show that he or she will fairly and adequately represent the class on an appeal and that the appeal is itself in the best interest of the class".

Further, the Court of Appeal noted that in circumstances where applicants seek to step into the shoes of representative plaintiffs, a Court should expect evidence to be submitted which speaks to, among other things:

1. the applicants' interest;
2. their understanding of the position they seek to advance;
3. their role in the proceeding and;
4. their competence to instruct counsel.

The Court was concerned that, absent this evidence, applicants may be nothing but an "empty vessel" controlled by a lawyer. As the applicants in this case did not file any affidavits in their own name, but had only submitted the affidavit of a legal assistant with five documentary exhibits, the Court determined that the evidence was "inadequate in the extreme" and dismissed the motion.

*Fontaine v Canada*– Limits on Judiciary Charged with Supervision of Class Actions

In *Fontaine v Canada (Attorney General)*, the Court of Appeal for Ontario considered the limits on judiciary charged with supervising the administration of class actions. In *Fontaine*, a judge had been tasked with supervising the administration of a settlement which resolved a series of class actions across Canada relating to residential schools. A series of orders by the provincial courts hearing the parallel cases established a process that permitted a "party, counsel or other entity with standing" to file with the supervising courts a Request for Direction relating to the implementation of the settlement.

In this appeal, the Court of Appeal considered two directions made by a judge responsible for supervising the administration of the settlement for Eastern Canada (the "Eastern Administrative Judge"), made on the judge's own motion and without notice to any party.

In the first direction, the Eastern Administrative Judge prohibited the Chief Adjudicator for claims assessment from participating in certain ongoing appeals before the Supreme Court of Canada and the British Columbia Court of Appeal. Without any evidence, the Eastern Administrative Judge found the Chief Adjudicator had been "insubordinate" and acted "in defiance" of supervising courts and directed that the Chief Adjudicator withdraw from the appeals and remove their facta from the appellate courts. The Chief Adjudicator proceeded to appeal the direction.

Before the appeal of the first direction could be heard, the Eastern Administrative Judge issued a second direction which purported to rescind the first direction and provide a different manner for the Chief Adjudicator's issues to be dealt with. A further notice of appeal was filed for the second direction.

Ultimately, the Court of Appeal determined that when a judge is tasked with a supervisory role and then exercises a judiciary function, a duty of procedural fairness and natural justice is owed. The court held that the power to supervise must be exercised in a manner that confirms to the principles of natural justice and respects the right to procedural fairness.

The Court of Appeal further held that the Chief Adjudicator's rights to procedural fairness were not respected as there was no opportunity to participate in the Eastern Administrative Judge's fact-finding process, no warning that the Chief Adjudicator's actions were being impugned, and no opportunity to make submissions. The Court of Appeal was further concerned that the second direction purported to affect the first direction under appeal, and held that the second direction offended the principle of*functus officio*(that a lower court, having rendered a decision, may not interfere with the jurisdiction of an appellate court reviewing that previous decision).

The Court of Appeal ordered that both of the Eastern Administrative Judge's directions be set aside, and offered the opportunity for any of the parties to bring a Request for Direction on any of the issues considered by the directions. The Court further ordered that the Eastern Administrative Judge be prohibited from engaging in any such Request for Direction.

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