Best Interests of the Class: No Role for Self-Represented Representative Plaintiffs

October 04, 2019

The recent decision of Justice Fothergill of the Federal Court in *Rooke v Canada (Health)* confirms that self-represented individuals cannot act in a representative capacity in class actions.

Mr. Rooke, a self-represented litigant, sought to have an action for unpaid dental expenses certified as a class proceeding, with himself as the representative plaintiff. His previous attempt to file a statement of claim with respect to the proposed class proceeding had been rejected. After he learned that he could not bring a motion for certification without an underlying proceeding, his second statement of claim (which did not identify the action as a proposed class proceeding) was accepted.

Mr. Rooke then proceeded to file a motion to certify his action as a class proceeding. The assigned case management judge, Prothonotary Tabib, determined that the motion should not be accepted for filing because it did not comply with Rule 121 of the *Federal Court Rules*, which requires that parties acting in a representative capacity be represented by counsel:

Unless the Court in special circumstances orders otherwise, a party who is under a legal disability or who acts or seeks to act in a representative capacity, including a representative proceeding, shall be represented by a solicitor.

On appeal, the Federal Court upheld the decision. Justice Fothergill found that the plain language of the rule was clear, as was the rationale. When an individual acts on her own behalf without legal counsel, it is only her own rights and interests that are implicated. However, the rights and interests of others are at risk when an individual proposes to act in a representative capacity without the benefit of counsel, particularly in a situation where the self-represented litigant likely has neither the resources nor the insurance to do so.

While Mr. Rooke took the position that a lawyer is only required following the certification of the action, the Court disagreed. Citing Justice Winkler (as he then was) for the proposition that a class proceeding is not "…an individual action that metamorphosises to a class proceeding when certified," the Court was clear that the rights of putative class members could be prejudiced from the initiation of an action

onwards in the absence of legal representation, including in respect of matters such as the framing of common issues and any applicable limitation period considerations.

The Court's focus on protecting the rights and interests of putative class members recognizes the inherent limits on the capacity of self-represented individuals to represent others, and highlights the importance of a putative class proceeding being advanced in the best interests of the class.

By

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