SHERRARD KUZZ LLP
Employment & Labour Lawyers

MULTI-JURISDICTION CLASS PROCEEDINGS

THE NEW FRONTIER IN EMPLOYMENT LAW

WHILE EMPLOYMENT-RELATED class proceedings remain a relatively new phenomenon in Canada, in the United States "wage-and-hour" class actions pose a significant financial risk to employers. In 2019 alone, the top ten 10 wage-and-hour class actions south of the border cost employers nearly US**$500 million**.[1]

In Canada, each province has its own employment standards legislation. As a result, cross-Canada class proceedings have historically been limited to federally regulated employers governed by the Canada Labour Code.[2] Recently, two Canadian courts (one in Ontario and another in Alberta) signalled that this may no longer be the case, as they considered when a multi-jurisdictional class proceeding may be appropriate under provincial employment standards legislation. This suggests that the financial risk to employers associated with class action proceedings in Canada may increase substantially in the near future.

Class actions – in a nutshell

A class proceeding is a civil action in which one or more plaintiffs sues a defendant or a group of defendants on behalf of a larger group of people for the same type of loss. Instead of starting separate lawsuits, a *representative plaintiff* can pursue the claim on behalf of the class, and the costs of litigation are shared by class members. Class action proceedings must be certified by a court before they will be permitted to continue.

Each province has its own criteria for certification. However, generally the following criteria must be met:

1. The pleadings must disclose a cause of action.
2. There must be an identifiable class of two or more persons.
3. The claims raised by the class members must raise common issues.
4. A class proceeding must be the preferable procedure consistent with a fair and efficient resolution of the common issues.
5. The representative plaintiff must represent the interests of the class without a conflict of interest.

Vacation and holiday pay claims

In *Cunningham v. RBC Dominion Securities*,[3] the Ontario Superior Court certified a proposed class action against RBC Dominion Securities ("RBC") for failure to pay vacation and holiday pay on commission payments to its investment advisors, associates, and assistants, contrary to provincial and territorial employment standards laws across Canada (collectively the "ESA").[4]

Cunningham, the representative plaintiff appointed by the court to represent a class of "several thousand potential class members," headed a team of associates and assistants paid, in part, by commission. Three years after Cunningham retired, she noticed none of her pay stubs referenced vacation pay or public holiday pay. Under the ESA, an employer is required to pay vacation pay and holiday pay on all "wages," which is generally defined to include commission payments.

RBC argued that while it may not have accurately recorded vacation and holiday pay on the pay stubs, it had nonetheless complied with its ESA obligations as evidenced by the fact commission continued to be paid to the employees while they were on vacation or off work for the public holiday. RBC requested that the claim be dismissed at the certification stage. The court disagreed and certified the proceeding.

Significantly, the court relied on earlier case law that supported the position that a class proceeding is the *preferred* method to adjudicate ESA-related claims for a variety of reasons including access to justice and behavioural modification of large employers. The court stated:

> This makes sense. **Access to justice is best achieved via a class proceeding in an ESA** case because claims may be relatively small, especially those of the partially-commissioned Associates and Assistants. And even where the claims are larger, as in the case of the IAs, they may not be pursued for fear of reprisa**l. Judicial economy is best achieved when the core liability issues can be litigated and decided, as here, in one proceeding.** Behavioural modification **— encouraging large financial entities to comply with ESA requirements that were obviously enacted to protect their employees** — is a self-evident social benefit and will likely be achieved on the evidence herein. And, in any event, there is no suggestion from the defendant that some other from of proceeding would be preferable.[5] **[emphasis added]**

Employee misclassification claims

Class proceedings have also been certified to advance the claims of independent contractors who allege they are, in fact, employees and thus entitled to various employment standards-related benefits.[6]

However, a recent decision from Alberta suggests that, unlike a claim for vacation and holiday pay, a misclassification claim may not always be appropriate as a class proceeding.

In *Virani v. Uber Portier Canada Inc.*,[7] the Alberta Court of King's Bench rejected a certification application filed by a representative plaintiff who sought to represent class members in Alberta, Saskatchewan, Manitoba, Nova Scotia, New Brunswick, Newfoundland and Labrador, British Columbia, and Quebec. The court refused to certify the class proceeding on a multi-jurisdictional basis, granting certification in Alberta only.

In rejecting a multi-jurisdiction certification, the court noted that there were a variety of factors and different relationships between the individual class members and the defendant, each of which had to be considered when assessing damages, including the degree of control exercised by the defendant, the economic dependency of each individual, and whether the trappings of entrepreneurship were present such as providing one's own tools, the

opportunity for profit, and the assumption of financial risk. These diverse factors, together with the different legislative regimes across the country, made a cross-Canada misclassification claim impractical to manage:

> Differences in employment standards legislation could likely be accommodated in a multi-jurisdictional class action when that is the principal variable… But it becomes an analytical quagmire when the dimensions of individual differences and time are layered into the equation. The combined effect would be a class action that is inherently unmanageable or requires an [sic] inordinate resources from the courts and litigants to complete. [8]

British Columbia has its own agenda

The British Columbia Court of Appeal has routinely held that the director of employment standards holds exclusive jurisdiction over employment standards disputes in British Columbia.[9] This raises the question of whether a multi-jurisdictional employment standards class proceeding could ever include employees in British Columbia. This was not addressed by the court in either *Cunningham* or *Virani*, as neither were ultimately certified for a class that included employees in British Columbia.

Takeaways for employers

We anticipate that class proceedings will be increasingly used in Canada to advance ESA-related claims on behalf of groups of employees. Particularly, large employers with operations in multiple Canadian jurisdictions are likely to see this type of litigation strategy used more frequently.

To minimize risk of this occurring, employers should consider the following best practices:

- Ensure vacation and public holiday pay are properly calculated and paid on all "wages" including commission and, in many cases, bonus payments.
- Provide employees with clear information on how and when ESA-related payments are calculated and paid.
- Periodically **self-audit** pay practices to ensure they comply with minimum ESA requirements.
- With the assistance of employment law counsel, regularly evaluate every independent or dependent contractor relationship to ensure they are defensible as against an employee misclassification claim.

[1] Smith, Allen. "Top 10 wage and hour class actions cost nearly $500m" (January 28, 2020).
[2] See *Fresco v. Canadian Imperial Bank of Commerce*, 2020 ONSC 4288, aff'd on appeal *Fresco v. Canadian Imperial Bank of Commerce*, 2022 ONCA 115.
[3] 2022 ONSC 5862 ("*Cunningham*").
[4] The proposed class action did not include BC or Alberta as investment advisors in those jurisdictions are exempt from the vacation and public holiday provisions of their respective employment standards legislation.
[5] Supra, note 2, at para 45.
[6] See *Heller v. Uber Technologies Inc.*, 2021 ONSC 5518.
[7] 2023 ABKB 240 ("*Virani*").
[8] Ibid at para 89.
[9] See *Macaraeg v. E Care Contact Centers Ltd.*, 2008 BCCA 182.

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