Federal Court of Appeal | Cour d'appel fédérale

Date: 20240130

Docket: A-96-23

Citation: 2024 FCA 22

CORAM: **BOIVIN J.A.**
GLEASON J.A.
LEBLANC J.A.

BETWEEN:

HIS MAJESTY THE KING

Appellant

and

GEOFFREY GREENWOOD and TODD GRAY

Respondents

Heard at Toronto, Ontario, on November 7, 2023.

Judgment delivered at Ottawa, Ontario, on January 30, 2024.

REASONS FOR JUDGMENT BY: BOIVIN J.A.

CONCURRED IN BY: GLEASON J.A.
LEBLANC J.A.

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REASONS FOR JUDGMENT

BOIVIN J.A.

I. Introduction

[1] This appeal, which arises from a unique set of circumstances, involves the class definition in the context of class proceedings.

[2] More particularly, at issue in this appeal is whether it was open to the Judge of the Federal Court (the certification judge) to reinstate the Family Class as part of the class definition originally certified after its inadvertent removal from the certification order.

[3] For the reasons that follow, the appeal should be allowed.

II. Procedural History

[4] Four years ago, on January 23, 2020, in *Greenwood v. Canada*, 2020 FC 119 (*Greenwood* FC), the certification judge granted an order certifying a class proceeding against the Royal Canadian Mounted Police (RCMP). The Class included two groups—the Class and the Family Class—and was defined as follows:

> All persons who reside in Canada who were or are Regular Members, Special Constables Members, Reservists, Supernumerary Special Constables, Civilian Members, and Public Service Employees under s. 10 of the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10, Volunteers, Auxiliary Constables, Non-Profit Employees, Temporary Civilian Employees, Casual Employees, Term Employees, Cadets, Pre-Cadets, Students, Contract Employees, Municipal Employees, and others who work or worked with the RCMP (the "Class"); and
>
> All individuals who are entitled to assert a claim pursuant to the *Family Law Act*, RSO 1990 c F.3, and equivalent or comparable legislation in other provinces and territories (the "Family Class")

[5] A week later, on January 31, 2020, the respondents filed notice of a motion to vary the *Greenwood* FC certification order on the basis that the class definition was erroneous. Specifically, the certification judge had mistakenly included the initially proposed class definition, notwithstanding the fact that the respondents had previously filed a revised class definition.

[6] Nearly simultaneously, on February 3, 2020, the appellant filed a notice of appeal in this Court against the order granting the certification in *Greenwood* FC.

[7] On April 21, 2020, the certification judge granted the respondents' motion to vary the certification order. In so doing, the certification judge amended the class definition (April 2020 Order, unreported):

> The definition of the Class shall be:
>
> All persons who reside in Canada who worked with or for the RCMP being all current or former:
>
> - RCMP Members: including all Regular Members, Civilian Members, Special Constables, Special Constable Members, Supernumerary Special Constables, Reservists, and Recruits;
>
> - Public Service Employees ("PSEs") who are not able to grieve under s. 208 of the *Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22, s. 2 ("*FPSLRA*"): including all indeterminate, term. And casual PSEs; and
>
> - Others who work within RCMP workplaces: including but not limited to; temporary civilian employees, community constables, auxiliary constables, cadets, pre-cadets, students, independent and subcontractor employees (including Commissionaires, custodial worker, guards/matrons, individuals employed through temporary agencies, and interns – e.g. Youth Internship Program), other government employees (including municipal, regional or similar levels of government employees and seconded officers and employees, including Interchange Canada participants) who are not entitled to grieve under s. 208 of the *FPSLRA*, volunteers, and non-profit organization employees; individuals working or attending courses on RCMP premises; and any other individuals who worked with or for the RCMP and who have a Human Resources management Information Services ("*HRMIS*") identification.

[8] However, the above amendments inadvertently removed the Family Class from the certification order. The parties did not notice the omission at this point.

[9] On September 21, 2021, this Court issued its decision regarding the appeal of the amended *Greenwood* FC certification order. This Court found that the certification judge had erred in defining the Class and in certifying one of the common questions (*Canada v. Greenwood*, 2021 FCA 186, [2021] 4 FCR 635 (*Greenwood* FCA) (leave to appeal to SCC refused, 39885 (March 17, 2022)). This Court accordingly ordered that the class definition be curtailed to only include RCMP Members and Reservists. This Court thus set aside the amended *Greenwood* FC certification order and remitted it to the Federal Court to be revised in accordance with this Court's judgment.

[10] Subsequently, on July 8, 2022, the respondents wrote to the Federal Court to raise the question of the inadvertent omission of the Family Class from the April 2020 Order:

> In [their January 29, 2020 Motion to Vary], the Plaintiffs inadvertently used the Primary Class Definition as a standalone Revised Class Definition, instead of consolidating it with the FLA Class that was separately referenced in a later part of the Memorandum of Law.
>
> This had the unintended effect of removing the FLA Class from the certified class definition, despite the fact that it was advanced (and responded to) at certification, and was certified by this Court in both its reasons and order.

[11] On September 20, 2022, the certification judge made the amendments to the certification order as required by this Court's judgment in *Greenwood* FCA (2022 FC 1317). She did so on the understanding that the respondents would soon thereafter bring a motion to vary addressing the issue of the exclusion of the Family Class in the April 2020 Order.

[12] In the interim, the appellant indicated that it did not consent to having the Family Class reinstated into the class definition.

[13] On February 24, 2023, the certification judge heard the respondents' motion to vary regarding the question of the omission of the Family Class from the class definition.

[14] On March 22, 2023, the certification judge granted the respondents' motion and amended the certification order by reinstating the Family Class to the class definition (*Greenwood v. Canada*, 2023 FC 397). This is the Order under challenge in the current appeal. It will be referred to as the Order under Appeal.

III. The Order under Appeal

[15] In rendering the Order under Appeal, the certification judge acknowledged that the respondents' counsel was not solely responsible for the inadvertent omission of the Family Class. She noted that the Court itself had failed to flag the omission and that the appellant had not raised it either (Order under Appeal at paras 4–5).

[16] The certification judge then proceeded to address the appellant's arguments against re-certification for the purposes of reinstating the Family Class. The appellant's arguments were put forward on the following grounds: (1) the doctrine of issue estoppel, (2) the doctrine of *functus officio*, (3) the lack of "some basis in fact," and (4) the unworkability of the Family Class definition. Prior to addressing the grounds as raised by the appellant, the certification judge stated that, in her view, Rule 334.19 of the *Federal Courts Rules*, SOR/98-106 (the *Rules*) conferred the necessary power to amend the certification order.

[17] The certification judge then turned to the appellant's arguments. Firstly, in connection with issue estoppel, the certification judge ruled that the circumstances did not preclude her from amending the certification order to include the Family Class. Specifically, she found that the issue at hand had not been finally determined by either the *Greenwood* FCA decision or her own Order of April 2020. In the words of the certification judge (1) the "FCA decision does not directly address the Family Class claim" and (2) "motions at the class certification stage are essentially procedural motions and do not involve decisions on the merits" (Order under Appeal at paras 17, 19).

[18] Regarding the application of the doctrine of *functus officio*, the certification judge ruled that the doctrine only applies to final decisions and that certification orders do not constitute "a final finding on the merits of a case" (Order under Appeal at para. 24). She added that should the doctrine apply, there exists an exception to its application "where there is a slip-up or error in expressing a court's manifested intention or statutory power to revisit an order" (*ibid*. at para. 25).

[19] With respect to the appellant's argument that there was a lack of "some basis in fact" to support the existence of the Family Class, the certification judge ruled that there had been no change in circumstances since the original certification order that would allow her to revisit the evidence (Order under Appeal at paras 29–35). She further noted that she did not consider this Court's decision in *Greenwood* FCA as invalidating her Family Class findings and analysis (*ibid*. at para. 33).

[20] Finally, the certification judge addressed the appellant's argument regarding the workability of the Family Class definition by finding that "the Family Class is a derivative class… It is therefore inaccurate to say the Family Class is unidentifiable" (Order under Appeal at para. 37).

[21] As a result, the certification judge reinstated the Family Class as part of the class definition.

IV. Standard of Review

[22] The standards of review applicable to an appeal from a decision of the Federal Court are those set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235: palpable and overriding error for questions of fact, and correctness for questions of law. For questions of mixed fact and law, correctness will apply to any extricable question of law, otherwise the standard of palpable and overriding error will apply.

V. Issues

[23] This appeal raises the following issues:

A. Did the certification judge err in her application of Rule 334.19?
B. Did the certification judge err in her application of the doctrines of issue estoppel and *functus officio*?

VI. Analysis

A. *Did the certification judge err in her application of Rule 334.19?*

[24] In the Order under Appeal, the certification judge ruled at the outset of her analysis that the wording of Rule 334.19 "provides the Court with the necessary jurisdiction and discretion to consider this Motion" (Order under Appeal at para. 13).

[25] Rule 334.19 provides that:

Amendment and decertification	**Modification ou retrait de l'ordonnance**
334.19 A judge may, on motion, amend an order certifying a proceeding as a class proceeding or, if the conditions for certification are no longer satisfied with respect to the proceeding, decertify it.	**334.19** Le juge peut, sur requête, modifier l'ordonnance d'autorisation ou, si les conditions d'autorisation ne sont plus respectées, retirer l'autorisation

[26] As such, the certification judge relied on Rule 334.19 to conclude that it was not necessary to consider whether the proposed Family Class met the requirements for certification since she had already done so in *Greenwood* FC.

[27] It is a given that had the respondents moved to vary the certification order to restore the Family Class *before* this Court's decision in *Greenwood* FCA, it would have been open to the certification judge to reinstate the Family Class on the basis of her findings and analysis with respect to the initial certification motion.

[28] However, the situation before the certification judge was different. Indeed, the respondents' motion to reinstate the Family Class was brought *after* this Court issued its judgment in *Greenwood* FCA.

[29] In *Greenwood* FCA, this Court partially reversed *Greenwood* FC, finding that the certification judge had erred in her application of the "some basis in fact" requirement with regard to the evidence on record (*Greenwood* FCA at paras 128–39, 165–75). This Court indicated as follows in this regard (*ibid*. at paras 167, 169):

> [A] motion judge must be satisfied that there is some basis in fact for the final four criteria for certification. If there was no evidence before a motion judge that is capable of supporting a determination that there is some basis in fact for these criteria, the certification order will be tainted by palpable and overriding error and may be set aside.
>
> …
>
> While the "some basis in fact" requirement establishes a lesser standard than the balance of probabilities, a plaintiff is nonetheless required to set out a factual underpinning to support the existence of claims on behalf of class members…

[30] In restoring the Family Class as part of the class definition, the certification judge overlooked this Court's ruling in *Greenwood* FCA.

[31] Indeed, the class definition considered in *Greenwood* FCA was the definition that formed part of the April 2020 Order, which is the Order that did not include the Family Class. The Family Class issue was not before our Court in *Greenwood* FCA, as the certification judge acknowledged herself (Order under Appeal at para. 17). Although our Court in *Greenwood* FCA did refer to the Family Class at paragraphs 5 and 14, it merely did so in reference to the respondents' statement of claim. As such, it cannot be alleged that our Court considered the issue

of whether there was “some basis in fact” for the certification of the Family Class as part of the class definition. The certification judge accordingly erred in relying on those paragraphs from *Greenwood* FCA to conclude that our Court has somehow endorsed her analysis with respect to the Family Class (Order under Appeal at para. 34). To the contrary, the reasoning in *Greenwood* FCA required the certification judge to perform an analysis and reconsider whether the Family Class met the criteria for certification in light of the guidance provided by our Court.

[32] The decision in *Greenwood* FCA provided the basis for the certification judge to exercise her discretion and reconsider the Family Class in ruling on the respondents’ motion to vary. Specifically, given the circumstances, she had the obligation to revisit the Family Class with a view to determine whether there was “some basis in fact” in the evidentiary record to support its inclusion as part of the class definition. It was not open to the certification judge to simply reinstate her initial findings after having been overturned by this Court. The reinstatement of the Family Class in the certification order, absent a “some basis in fact” analysis conducted consistently with the guidance set forth by this Court in *Greenwood* FCA, amounts to an error of law.

[33] The certification judge’s error in her application of Rule 334.19 is sufficient to dispose of this appeal. The doctrines of estoppel and *functus officio* are not determinative of this appeal and the appellant conceded that, “in the circumstances of this case, it would be open to the Court to depart from a strict application of those doctrines” (Memorandum of fact and law of the Appellant at para. 62).

[34] However, the certification judge suggested that, as a matter of principle, issue estoppel and *functus officio* never apply to procedural motions like certification motions. In my view, this was a further error that our Court is required to address.

B. *Did the certification judge err in her application of the doctrine of issue estoppel and functus officio?*

(1) Issue estoppel

[35] Issue estoppel is a common law doctrine that provides that once a judicial proceeding finally decides an issue, neither party can re-litigate that issue. The doctrine rests on the finality principle. As aptly summarized by the Ontario Court of Appeal in *Smith Estate v National Money Mart Company*, 2008 ONCA 746, 303 DLR (4th) 175 at para. 33: "[o]nce a point has been decided, the winning litigant is entitled to rely on the result, to be assured of peace and to be able to plan the future on the basis of the court's decision." The doctrine also exists to preserve scare judicial resources and prevent parties from exposure to additional legal costs, as well as to reduce the risk of undue litigation (*Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19, [2013] 2 S.C.R. 125 at para. 28).

[36] It is well established that issue estoppel emerges in the presence of three preconditions (*Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 at para. 25 (*Danyluk*)):

(1) the same question has been decided;

(2) the judicial decision which is said to create the estoppel was final; and,

(3) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[37] Furthermore, even if all the preconditions are established, a judge will retain a broad discretion to refuse to apply the doctrine of issue estoppel if its application were to create an injustice (*Danyluk* at para. 33):

> The first step is to determine whether the moving party … has established the preconditions to the operation of issue estoppel … If successful, the court must still determine whether, as a matter of discretion, issue estoppel *ought* to be applied … [emphasis in original]

[38] In the present case, and I agree with the appellant on this point, the certification judge conflated whether the issue at hand was finally resolved with whether the entirety of the claim was finally determined. She did so in a cursory manner, without reference to the relevant case law.

[39] Indeed, there are decisions stating that the doctrine of issue estoppel applies to interlocutory orders (*Hawley v. North Shore Mercantile Corp.*, 2009 ONCA 679, 99 O.R. (3d) 142 at para. 26, leave to appeal to SCC refused, 33440 (April 22 2010), citing *Fidelitas Shipping Co. v. V/O Exportchieb*, [1965] 2 All E.R. 4 at 10 (CA UK); see also *R. v. Duhamel*, 1981 ABCA 295 at para. 14, aff'd [1984] 2 S.C.R. 555). More particularly, in the context of class proceedings, a number of decisions confirm that issue estoppel applies to class certification motions with the understanding that judges retain discretion not to apply it when they are of the view it would lead to an injustice (see *Risorto v. State Farm Mutual Automobile Insurance Co.*, [2009] O.J. No. 820, 72 C.C.L.I. (4th) 60 at para. 49; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2014 BCSC 1280, 376 D.L.R. (4th) 302 at paras 28–30, 60, 78 (*Pro-Sys*); *Turner v. York University*, 2011 ONSC 6151, 209 A.C.W.S. (3d) 228 at paras 63–65; *Corless v. Bell*

Mobility Inc., 2023 ONSC 6227 at paras 51–58 (*Corless*); *Fanshawe College of Applied Arts and Technology v. LG Philips LCD Co.*, 2016 ONSC 3958, 270 A.C.W.S. (3d) 23 at paras 43–53).

[40] While certification orders do not dispose of the entire proceeding, they may yield final rulings on issues going to the merits of the case, such as class definitions and common questions. As it was put by our Court in *Apotex Inc. v. Merck & Co. (C.A.)*, 2002 FCA 210, [2003] 1 F.C. 242 at para. 27:

> The decision which is said to give rise to the estoppel need not be a decision which determines the entire subject-matter of the litigation. The test for issue estoppel is a substantive issue test where the decision affects substantive rights of the parties with respect to a matter bearing on the merits of the cause of action.

[41] Accordingly, certification orders issued in the context of class proceedings may be subject to issue estoppel. Although Rule 334.19 contemplates the possibility of amending a certification order, it does not displace the doctrine of issue estoppel that exists to prevent re-litigation. Both the rule and the doctrine have to be taken into account and the judge's discretion has to be exercised consequently and appropriately (*Pro-Sys* at para. 28). Any other approach would undermine judicial economy (which the doctrine of issue estoppel fundamentally seeks to protect) by allowing litigants to repeatedly and endlessly re-open certification orders.

[42] That being said, there are circumstances where the doctrine of issue estoppel can be set aside, namely in the event of an appeal, a material change in circumstances, or new evidence (Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 5th ed. (Toronto: LexisNexis, 2021) at 328).

[43] In the present case, prior to *Greenwood* FCA, it would have been open to the respondents to move to vary the certification order to reinstate the Family Class, as the certification judge remained bound by her previous Family Class findings. However, from the moment this Court issued its judgment in *Greenwood* FCA and partially reversed the certification judge, issue estoppel ceased to apply by virtue of the appeal exception. As of that moment, and for reasons that differ from those of the certification judge, the Family Class was no longer barred by issue estoppel as the analysis grounding its inclusion in the class definition was no longer valid.

(2) *Functus officio*

[44] Simply put, the *functus officio* doctrine provides that once a matter is finally ruled upon, the judge has discharged its office and cannot re-open the matter. Indeed, to do so would impede on "orderly appellate procedure" (*Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33, 461 D.L.R. (4th) 635 at para. 34).

[45] In the Order under Appeal, the certification judge found that the doctrine of *functus officio* could not apply, as certification orders do not involve final findings on the merits of the case. This conclusion stems from the certification judge's same misunderstanding regarding the meaning of "final" in the context of the doctrine of issue estoppel. As explained in these reasons, certification orders can be considered final orders for the purpose of class proceedings, and it follows that the doctrine of *functus officio* can accordingly be applied to certification orders.

VII. Proposed disposition

[46] I would allow the appeal, set aside the Order of the Federal Court (2023 FC 397) and remit the question of the Family Class to the certification judge. The certification judge should provide an analysis and revisit the “some basis in fact” requirement for the certification of the Family Class. In the event that the certification judge determines that the Family Class should be certified, she should also thoroughly examine the workability of its definition.

[47] In accordance with Rule 334.39, I would make no order as to costs.

"Richard Boivin"
J.A.

“I agree.
Mary J.L. Gleason J.A.”

“I agree.
René LeBlanc J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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