

**FEDERAL COURT OF APPEAL
CLASS PROCEEDING**

B E T W E E N :

HIS MAJESTY THE KING

FEDERAL COURT OF APPEAL COUR D'APPEL FÉDÉRALE	
F I L E D	03-APR-2023
TORONTO, ON	1

Appellant
(Defendant)

- and -

GEOFFREY GREENWOOD and TODD GRAY

Respondents
(Plaintiffs)

NOTICE OF APPEAL

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears on the following page.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at the Federal Court of Appeal in Toronto.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341 prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor, or where the appellant is self-represented, on the appellant, **WITHIN 10 DAYS** after being served with this notice of appeal.

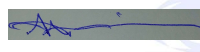
IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341 prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

(Date): April 3, 2023

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APPEAL

THE APPELLANT, HIS MAJESTY THE KING, APPEALS to the Federal Court of Appeal from the Judgment of the Honourable Justice McDonald (the “Motion Judge”) dated March 22, 2023 (the “Order”), in which she granted the Respondents’ motion to amend the certification order to add a secondary class consisting of “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”).

THE APPELLANT ASKS that this Honourable Court:

1. Allow the appeal and set aside the Order;
2. Give the judgment that the Federal Court should have made, namely:
 - (a) Dismiss the motion to amend the certification order; or
 - (b) Set aside the order and remit it to the Federal Court with directions to revise the definition of the Family Class so that it permits members of the Family Class to self-identify as such; and
3. Grant such further and other relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS OF APPEAL are as follows:

4. The Motion Judge erred in law and made palpable and overriding errors of mixed fact and law in arriving at her decision to certify the Family Class.
5. The Motion Judge erred in law in failing to undertake the necessary analysis on a motion to amend a certification order pursuant to Rule 334.19. In particular, the Motion Judge erred by:
 - (a) Finding that the doctrines of issue estoppel and *functus officio* apply only to decisions on the merits, and not to interlocutory decisions such as certification orders;
 - (b) Finding that the Federal Court of Appeal did not overturn her finding, expressed in paragraph 58 of her initial certification decision dated

January 23, 2020, that the plaintiffs had met the “identifiable class” criterion in Rule 334.16 in respect of the class definition proposed at that time;

- (c) Failing to undertake an analysis of whether the plaintiffs met the threshold of showing “some basis in fact” for the certification of the Family Class; and
 - (d) Treating the Federal Court of Appeal’s decision in *Greenwood* only as part of the procedural history of this class action, and failing to accept – or even refer to – that decision as a relevant authority that she was bound to consider and apply on the plaintiffs’ motion to amend the certification order.
6. Had the Motion Judge applied the proper legal test under Rule 334.19 and considered the plaintiffs’ evidence in light of the relevant case law – including cases like *Greenwood FCA* that have been decided since her initial certification decision – she would have had to dismiss the plaintiffs’ motion to amend the certification order. The plaintiffs’ evidence – consisting of hearsay and double hearsay – does not provide a factual underpinning to support the existence of claims on behalf of class members under the relevant provincial or territorial legislation, and was not sufficient to meet the “some basis in fact” threshold for the identifiable class criterion for certification.
7. Finally, and regardless of the foregoing errors, the Motion Judge erred in law in finding that the Family Class consists only of derivative claims, and a palpable and overriding error in finding that the Family Class was adequately defined. The class definition is impermissibly vague insofar as it fails to identify:
- (a) the provincial and territorial legislation that would qualify as “equivalent or comparable” to Ontario’s *Family Law Act*; and

- (b) in each province and territory, the kinds of
 - (i) relationships to primary class members and
 - (ii) injuries by primary class members

that would mean that a person could be “entitled to assert a claim” under the applicable legislation.

As a result of these deficiencies, potential members of the Family Class will not be able to self-identify as class members. Instead, they would need to obtain legal advice to determine whether they are likely included, leaving class members and the Defendant without the required degree of certainty regarding who is and is not bound by the outcome of the class action.

8. *Federal Courts Act*, RSC 1985, c F-7, Section 27.
9. *Federal Courts Rules*, SOR/98-106, Rules 334.16-334.19, 392, 397.
10. Provincial and territorial legislation, including *Fatal Accidents Act*, RSA 2000, c. F-8; *Survival of Actions Act*, RSA 2000, c. S-27; *Tortfeasors Act*, RSA 2000 c T-6; *Family Compensation Act*, RSBC 1996, c. 126; *The Fatal Accidents Act*, CCSM, c. F50; *Fatal Accidents Act*, RSNB 2012, c. 104; *Survival of Actions Act*, RSNB 2011, c. 227; *Fatal Accidents Act*, RSNL 1990, c. F6; *Survival of Actions Act*, RSNL 1990, c. S-32; *Fatal Accidents Act*, RSNWT 1988, c.F-3; *Fatal Injuries Act*, RSNS 1989, c. 163; *Survival of Actions Act*, RSNS 1989, c. 453; *Fatal Accidents Act*, RSNWT (Nu) 1988, c.F-3; *Family Law Act*, RSO 1990, c. F.3; *Fatal Accidents Act*, RSPEI 1988, c. F-5; *Survival of Actions Act*, RSPEI 1988, c. S-11; *Fatal Accidents Act*, RSS 1978, c. F-11; *The Survival of Actions Act*, SS 1990-91, c. S-66.1; *Fatal Accidents Act*, RSY 2002, c. 86; *Survival of Actions Act*, RSY 2002, c. 212.

11. Such further grounds as counsel may advise and this Honourable Court may permit.

April 3, 2023

**Venney,
Marilyn**

Digitally signed by Venney, Marilyn
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