COURT OF APPEAL FOR ONTARIO

CITATION: Knisley v. Canada (Attorney General), 2025 ONCA 185
DATE: 20250311
DOCKET: COA-24-CV-0797

2025 ONCA 185 (CanLII)

Nordheimer, Madsen and Pomerance JJ.A.

BETWEEN

Andrew Knisley

Plaintiff (Respondent)

and

Attorney General of Canada

Defendant (Appellant)

Kathryn Hucal and Monisha Ambwani, for the appellant

Darryl Singer, Ronald D. Davis, Mathura Santhirasegaram, Shir Ziskind and Shannon Reid, for the respondent

Heard: February 12, 2025

On appeal from the order of Justice Phillip Sutherland of the Superior Court of Justice, dated June 20, 2024, with reasons reported at 2024 ONSC 3528.

Nordheimer J.A.:

[1] The Attorney General of Canada ("Canada") appeals from the order of the motion judge that certified this action as a class proceeding "subject to the class definition being amended to the satisfaction of the parties and the court". For the reasons that follow, due to a procedural error made by the motion judge that is

central to the certification process, I would allow the appeal and remit the matter for a further hearing.

[2] It is not necessary, for the purposes of these reasons, to go into lengthy detail regarding the underlying claim. Some level of detail is, however, necessary to provide context. In limiting my description of the background, I do not mean to diminish the seriousness of the allegations made or the impact that they have had on many veterans. I also do not mean to minimize what appears to be the deplorable conduct to which these veterans have been subjected by Canada arising from the manner in which it has administered an assistance program designed to help them.

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A. BACKGROUND

[3] The respondent is a veteran of the Canadian Armed Forces ("CAF"). He joined the infantry in 2007 and was deployed to Afghanistan that same year. On January 19, 2009, he was injured by an improvised explosive device while on patrol. This resulted in the amputation of his entire right leg at the hip, a traumatic brain injury, hearing loss, a scrotal injury, renal failure, and ulnar nerve damage.

[4] The respondent says that Canada incentivizes veterans to join the military by offering them entitlement to a variety of benefits and programs, including statutory Disability Benefits and Disability Awards (collectively the "Benefits") under the *Veterans Well-being Act*, S.C. 2005, c. 21, s. 2.1 (the "*VWA*").

[5] The purpose of the *VWA* is set out in s. 2.1, which reads:

> The purpose of this Act is to recognize and fulfil the obligation of the people and Government of Canada to show just and due appreciation to members and veterans for their service to Canada. This obligation includes providing services, assistance and compensation to members and veterans who have been injured or have died as a result of military service and extends to their spouses or common-law partners or survivors and orphans. This Act shall be liberally interpreted so that the recognized obligation may be fulfilled.

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[6] Veterans Affairs Canada ("VAC") is the government department responsible for, among other things, the administration of legislation relating to the care, treatment, and re-establishment in civilian life of veterans, as well as their survivors and dependants. VAC fulfils this mandate by delivering various programs and services that provide compensation for hardships arising from disabilities and lost economic opportunities and that recognize the achievements and sacrifices of Canadians during periods of war and conflict.

[7] More specifically, VAC provides compensation and recognition for the effects of a service-related disability through Disability Benefits. There are two types of Disability Benefits:

a) Disability Pension: a multi-purpose benefit available under the *Pension Act* that provides compensation for the economic and non-economic impacts of

a service related disability to eligible CAF members and veterans and their families.[1]

b) Pain and Suffering Compensation (formerly the Disability Award): a benefit paid in recognition of the non-economic effects of a service-related disability to eligible current CAF members and veterans under the *VWA*.

[8] From March 2009 to October 15, 2015, the respondent applied for Benefits from Canada, through VAC. The respondent claims that VAC's administration of his applications was marked by errors and delays that caused him significant psychological harm and aggravated his physical injuries. For example, VAC wrongly assessed his leg amputation as being a "high-above knee amputation", which resulted in a disability rating of 68%. This was incorrect as his disability assessment should have been closer to 100%. As a result of VAC's incorrect assessment, Andrew was awarded a disability benefit for an injury substantially less serious than the one he sustained. He was finally assessed at 89% many months later.

[9] The respondent also claims that, without his knowledge, VAC wrongfully withdrew his application for hearing loss despite his eardrum having been completely ruptured as a result of the improvised explosive device, and extensive

[1] This benefit is also available to members and former members of the RCMP, pursuant to the *Royal Canadian Mounted Police Superannuation Act*, R.S.C. 1985, c. R-11 and the *Royal Canadian Mounted Police Pension Continuation Act,* R.S.C. 1970, c. R-10.

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medical documentation he produced to support the injury. VAC also wrongfully withdrew his application for renal failure, and the injury to his right arm without any explanation. The respondent has had other issues with respect to the way that he has been treated by VAC.

[10] Since his release from service in 2017, Andrew has been unemployed and unable to return to work. He has been diagnosed with Post-Traumatic Stress Disorder and Specific Trauma and Stressor Related Disorder and has been suffering from suicidal ideation resulting directly from the failures of VAC and the CAF.

[11] There are no legislated timeframes governing the speed at which VAC must provide a service or adjudicate an application. Nevertheless, VAC has developed Service Standards, representing target turnaround times for making decisions on, among other benefits and services, applications for Disability Benefits. Service Standards represent the target “turnaround time” for an application in a specified percentage of cases. The current Service Standard for Disability Benefits is for 80% of decisions to be made within 16 weeks for first applications and reassessments, and 12 weeks for departmental reviews.

[12] The motion judge found that VAC has not, at any time, attained this 80% target. He noted that in 2019–2020, 24% of the applications were processed within

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the 16-week target; in 2020–2021, that number rose to 39% and in 2021–2022, the number rose further to 46%.[2]

[13] The respondent claims that Canada's failure, through VAC, to adhere to these standards leaves veterans unable to move forward with their lives, their recovery, and their employment. The respondent also claims that VAC denies veterans information about the status of their Benefits, allowing veterans to languish for indeterminate periods, unable to know when their applications may be adjudicated.

[14] The respondent claims, as a result of these failures, that veterans have suffered damages arising from the failure of Canada, through VAC, to provide timely administration of the benefits to which the veterans are entitled. The respondent claims that this has led to ongoing physical, psychological, emotional and mental harm, and other related damages.

[15] The respondent seeks to advance this proceeding as a class action on behalf of himself and other veterans who have suffered these damages arising from the failures of Canada, through VAC, to properly administer the disability program and make timely payment of the Benefits.

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[2] Delays in dealing with applications for benefits has been the subject of critical comment both by the Office of the Veterans Ombudsman (Office of the Veteran's Ombudsman, *Meeting Expectations: Timely and Transparent Decisions for Canada's Ill and Injured Veterans*, (Ottawa, 2018)) and by the Auditor General of Canada (Office of the Auditor General of Canada, *Report 2—Processing Disability Benefits for Veterans*, (Ottawa, 2022)).

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B. THE MOTION JUDGE'S DECISION

[16] In terms of the requirements for certification under s. 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, the motion judge began by determining if the fresh as amended statement of claim disclosed a cause of action. The motion judge found that, of the five causes of action asserted, only one – the claim in negligence – constituted a valid cause of action. He rejected the claims based on a breach of the *Charter of Rights and Freedoms*, fiduciary duty, contract, and negligent misrepresentation. Canada appeals only from the determination that the claim in negligence is a valid one.

[17] In terms of whether there is an identifiable class, the motion judge found that the class as defined did not satisfy that requirement. He noted that an earlier class definition had been problematic because the time period in the definition was too broad. The motion judge found that the current definition suffered from different problems.

[18] Having reached that conclusion, the motion judge said, at para. 91, that he had two alternatives. He identified those alternatives as (i) disallowing the certification motion or (ii) allowing the certification "on the condition that the definition be amended to properly define the class". He chose the latter alternative.

[19] With respect to the third, fourth and fifth requirements, the motion judge found that there were common issues; that a class proceeding would be the

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preferable procedure; and that the respondent was a proper representative plaintiff. Canada also appeals from the motion judge's conclusions on common issues and preferable procedure.

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C. ANALYSIS

(1) Conditional certification

[20] I begin with this issue because, as I shall explain, it has implications for other requirements in s. 5(1), namely, common issues and preferable procedure.

[21] As I have mentioned, the motion judge was not satisfied with the class definition as it was presented to him. The definition proposed by the respondents was as follows: "All veterans that are in Case Management as of May 21, 2024, and any future veterans from May 21, 2024, that are placed in Case Management who have applied for and/or are receiving Disability Benefits."

[22] In rejecting this class definition, the motion judge said simply, at para. 90: "The new proposed definition limits the claim to Class Members that are presently in Case Management. However, this presents a further problem of omitting veterans that may be within the breadth of the cause of action but are excluded due to the definition."

[23] On this point, the evidence before the motion judge was that veterans move in and out of case management at different times. As well, there are veterans in case management that are not receiving disability benefits and there are veterans

who are not in Case Management who are receiving disability benefits. Canada submitted, and the motion judge agreed, that the proposed class definition was unworkable.

[24] Notwithstanding that conclusion, the motion judge certified the action as a class proceeding. He made the certification order subject to the class definition being amended "to the satisfaction of the parties and the court". The motion judge did not give any direction as to how the class definition could be amended to achieve that satisfaction nor did he address what might happen if the parties, or the court, could not reach that satisfaction.

[25] In reaching this conclusion, the motion judge relied on two decisions: *Hollick v. Toronto (City),* 2001 SCC 68, [2001] 3 S.C.R. 158, and *Hoy v. Expedia* Group Inc., 2022 ONSC 6650, aff'd 2024 ONSC 1462, 171 O.R. (3d) 114. In my view, the decision in *Hollick*, properly read, does not support the certification route that the motion judge took.

[26] The reliance on *Hollick* turns on one sentence in the reasons. At para. 21, McLachlin C.J. said: "Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended:" (references omitted).

[27] In my view, McLachlin C.J. was not saying, in that sentence, that a class action could be certified with no identifiable class being established. Rather, she

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was offering the view that, in a circumstance where the proposed class definition was not acceptable, the motion judge could simply dismiss the certification motion, or the motion judge could amend the class definition to make it acceptable. The representative plaintiff could then accept the class definition as amended or abandon the class proceeding.

[28] I reach this conclusion for three principal reasons. First, there is nothing in the *Class Proceedings Act, 1992* that contemplates "conditional" certification. To the contrary, s. 5(1) establishes five criteria that need to be met. If those criteria are met, then the court "shall" certify the class proceeding. The section does not contemplate some requirements being met and others not being met. If the Legislature had intended that result, they could have easily said so.

[29] Second, the class definition has a direct impact on the analysis whether there are common issues and whether a class proceeding is the preferable procedure. Indeed, it also impacts on whether the proposed representative plaintiff is appropriate, although it does not appear that that issue would arise in this case.

[30] Third, certain procedural issues arise from such a conditional certification. For example, what happens if the parties cannot agree on a class definition or on one that the court finds acceptable? If it transpires that there is not a workable class definition, what then happens to the conditional certification? Does the

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certification simply lapse or does the motion judge have to decertify the proceeding under s. 10

[31] I should add, on the procedural issues, that it is not clear what the appeal route is from a conditional certification. Section 30 of the *Class Proceedings Act, 1992*, reads:

> A party may appeal to the Court of Appeal from an order,
>
> (a) certifying or refusing to certify a proceeding as a class proceeding; or
>
> (b) decertifying a proceeding.

[32] A conditional certification is not a final determination. Arguably, the presence of a condition of the type here renders the order granted an interlocutory order that would ordinarily be appealable only to the Divisional Court with leave: *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 19(1)(b). While I do not suggest that this issue removes this court's jurisdiction, it does help to identify the problems with this creature called a conditional certification.

[33] The determination of an identifiable class is a crucial aspect of the certification process. It establishes whose rights are going to be determined in the proceeding and, consequently, it determines who has the right to opt out of that determination. It is not acceptable to purport to certify a proceeding as a class action with that critical aspect undetermined. I would add, on that point, that almost

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a year has passed since the motion judge's order and there is still no identifiable class.

[34] I am reinforced in my view of this matter by the two decisions to which McLachlin C.J. made reference in the sentence that is relied on. One is *Webb v. K-Mart Canada Ltd.* (1999), 45 O.R. (3d) 389 (S.C.), where the motion judge did exactly what I say McLachlin C.J. was contemplating, that is, in certifying the proceeding as a class action, the motion judge amended the class definition to make it acceptable. The other is *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (S.C.) where the motion judge took the other alternative. He dismissed the motion to certify based, in part, on his finding that the class definition was "over-inclusive".

[35] Put simply, in neither instance do the cases, to which McLachlin C.J. referred in *Hollick* on this issue, involve a conditional certification.

[36] In terms of the motion judge's reliance on *Hoy* as authority for his conditional certification, the motion judge in *Hoy* did not actually decide whether there was an identifiable class because of other obstacles that arose regarding certification. To the degree that he discussed the problems he saw with the class definition as proposed, the motion judge said that "subject to amendments to the Class Period", the identifiable class criterion could be satisfied: at para. 28. Thus, the motion judge did in that case, what I say McLachlin C.J. was referring to in *Hollick*, and

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what the motion judge did in *Webb*, which was make an express amendment to the class definition to make it acceptable. I would add that, in discussing the class definition, the motion judge in *Hoy* referred to the direct relationship that can exist between the identifiable class and the common issues.

[37] On this point, the respondent relies on the decision in *Brown v. Canada (Attorney General)* 2013 ONCA 18, 114 OR (3d) 355. That decision does not hold that it is appropriate to conditionally certify a class proceeding. It simply records the fact that one of the parties in that case allowed that it might be proper to do so. To the degree that it is relevant to the point here, the decision does hold that it was not appropriate to conditionally certify a class action absent a viable cause of action.

[38] The respondent refers to five other cases, two of which do not actually address this issue. In two other decisions of the British Columbia Supreme Court, where the issue was discussed, both decisions went to the British Columbia Court of Appeal and in neither case did the Court of Appeal address this issue. The one other Ontario decision to which the respondent refers is *Griffin v. Dell Canada Inc*. (2009), 72 C.P.C. (6th) 158 (Ont. S.C.), aff'd 2010 ONCA 29, 98 O.R. (3d) 481. However, in that case, the motion judge gave specific directions on the amendments that had to be made to the class definition: at para. 70. Again, it was not conditionally certified.

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[39] I will mention one other case. In *Lockhart v. Canada (Attorney General),* 2024 ONSC 6573, Healey J. commented directly on the approach taken by the motion judge in this case and said, at para. 220: “With respect, this approach appears to be at odds with the duty of the motions judge to certify only if all of the preconditions for certification have been met.”

[40] There is no foundation in the *Class Proceedings Act, 1992,* for a conditional certification. The statute refers to certification, to refusal of certification, and to decertifying a class proceeding, but it does not refer to conditional certification. Nor is there any reference to the concept of a conditional certification in s. 8, which sets out the mandatory contents of a certification order.

[41] Finally on this issue, it is not appropriate to conditionally certify a class proceeding. To do so, not only gives rise to the procedural problems that I have discussed above, but it has a direct impact on three of the other stipulated requirements. Indeed, it is difficult to see how a proper determination could be made regarding the existence of common issues and the preferability of the class proceeding without knowing who compromises the class.

[42] In my view, the order of the motion judge conditionally certifying this action as a class proceeding must be set aside.

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(2) Cause of action

[43] I turn now to a separate issue raised by Canada, that is, whether the cause of action in negligence can be properly asserted in this case. I can address that issue since its determination does not depend on the other requirements of s. 5(1), including the identification of the appropriate class.

[44] Canada submits that the motion judge erred in finding that the statement of claim disclosed a reasonable cause of action in negligence. Canada says that the statement of claim fails to reveal sufficient facts to establish the required proximity to give rise to a duty of care. Canada refers to the asserted duty of care as “novel”.

[45] Accepting that characterization of the duty of care, the respondent must satisfy the *Anns/Cooper* test. That test has two stages.[3] The first stage in turn involves two components: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of the test, that tort liability should not be recognized? In the second stage, residual policy considerations fall to be considered. These are concerned with the effect of recognizing a duty of care on other legal obligations, the legal system, and society more generally.

[3] See the discussion in *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, at paras. 30–39.

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[46] The motion judge said, at para. 62 of his reasons:

> VAC is the sole actor as the operational administrator and decision maker of the program and provides individual advice and instructions to veterans on how their respective applications are processed. Veterans are fully reliant on the statutory system created solely for their benefit, which is operated and processed by VAC, who is solely and fully responsible for the training, education and hiring of appropriately trained staff to process the applications of veterans efficiently and effectively, along with providing management, advice and information to individual Class Members. The Claim pleads that the Class Members relied on the information and advice provided.

[47] I agree with the motion judge that the relationship between VAC and our veterans establishes a sufficient proximity that harm to veterans arising from the misadministration of the services designed for them was reasonably foreseeable. VAC had to know that, if they failed in their obligations to properly administer the benefits system that Canada had created, harm would be occasioned to our veterans.

[48] Canada, in its submissions, continually referenced VAC as a “regulator”. It is not. It is the administrator of a statutory plan. References to cases where proximity has been found not to exist between regulators and the regulated are inapplicable to this case.

[49] In considering the first stage of the Anns/Cooper test, I am also mindful of the observations made in *R. v. Imperial Tobacco Canada Ltd.,* 2011 SCC 42, [2011] 3 S.C.R. 45. In that decision, McLachlin C.J. said that determining, at the

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preliminary stage of an action, that sufficient proximity could not be made out was a determination that should be reached with great care. Rather, she said that the approach to that determination must be generous and "err on the side of permitting a novel but arguable claim to proceed to trial": at para. 21. McLachlin C.J. continued in that vein later in her reasons where she said, in words particularly apt to this case, at para. 47:

> On the other, where the asserted basis for proximity is grounded in specific conduct and interactions, ruling a claim out at the proximity stage may be difficult. So long as there is a reasonable prospect that the asserted interactions could, if true, result in a finding of sufficient proximity, and the statute does not exclude that possibility, the matter must be allowed to proceed to trial, subject to any policy considerations that may negate the *prima facie* duty of care at the second stage of the analysis.

[50] In terms of the second stage of the test, I do not see any residual policy considerations that would argue against a finding of proximity. Indeed, to the contrary, this seems to be precisely the type of case where policy considerations would favour a finding of proximity. If a government (federal, provincial or municipal) chooses to establish a benefit system directed at a specific group of individuals, who may be enticed by that system to agree to join a government mandated operation, whether it be the CAF (as in this case) or the Royal Canadian Mounted Police or other similar entities, then policy considerations would appear

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to favour the conclusion that the government will administer that system in the best interests of those to whom it applies, and be held accountable if it does not.

[51] Lastly, Canada also complains that the fresh as amended statement of claim does not disclose material facts in support of such a duty of care, even if one could be legally found to exist. I disagree. I repeat the well-known principle that a pleading, in these circumstances, must be read generously.[4]

[52] The fresh as amended statement of claim sets out that the respondent and the class members were injured by virtue of their military service and that they relied on timely payment of their benefits for food, shelter, medications, and other necessities of life. The pleading goes on to set out the respondent's experiences with the program as I have referred to above. It pleads the vulnerable state of the respondent and other class members and the harm that results from any failure to properly pay the Benefits.

[53] This is not the type of "bald" pleading that would warrant, in a different context, an order striking it out. Read generously, it adequately pleads sufficient material facts to get over the low threshold of establishing a basis for the cause of action pleaded in negligence.

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[4] See, for example, *Taylor v. Canada (Attorney General),* 2012 ONCA 479, 111 O.R. (3d) 161, at para. 120.

D. CONCLUSION

[54] I would allow the appeal on the first issue. I would set aside the certification order granted by the motion judge and remit the matter to him for reconsideration and determination of whether the requirements in s. 5(1)(b), namely an identifiable class, are made out. If an identifiable class is found, then the motion judge must go on to consider whether the class definition has any impact on his earlier conclusions regarding common issues and preferable procedure. Canada is entitled to the costs of the appeal fixed in the agreed amount of $30,000, inclusive of disbursements and HST.

Released: March 11, 2025 “I.N.”

“I.V.B. Nordheimer J.A.”
“I agree. L. Madsen J.A.”
“I agree. R. Pomerance J.A.”

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