

FOCUS ON INSURANCE LAW

Court rejects 'certify now, worry later' approach

Factual assumptions cannot form the basis of commonality to support certification of an action as a class proceeding, according to the Ontario Superior Court.

In *Nadolny v. Peel (Region)*, [2009] O.J. No. 4006, which involved a claim for health insurance benefit premiums, Justice Michael Quigley dismissed the plaintiff's motion for certification. *Nadolny* emphasizes that any party seeking to have an action certified must prove that the case meets the *Class Proceedings Act* s. 5(1) criteria through hard evidence, not speculative assertions.

The plaintiff's action stemmed from a decision made by the Region of Peel to adjust health insurance benefit premiums payable by retired, non-unionized employees who received early retirement health benefits. The critical issue in the underlying litigation is whether the region had the right to adjust insurance premium payments to maintain equal cost sharing between the region and its retired employees.

Nadolny believed that there was no legal entitlement to adjust the premiums payable by retired employees. She brought



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the action on her own behalf, based on breach of an implied term of the contract for health insurance benefits, breach of fiduciary duty and negligent misrepresentation. She sought to represent all other early retirees in a class proceeding.

In rejecting Nadolny's bid for

certification, Justice Quigley found that the plaintiff failed to put forward evidence supporting her position that there were issues common to a class that would satisfy s. 5(1) of the *Class Proceedings Act*. Instead, Nadolny asked the court to make a series of factual assumptions “in order to create a necessary foundation of commonality for this class action to be certified and to circumvent the necessity for individual inquiries to be made into the circumstances of each of the early retirees.” Such an approach is contrary to the intent of the Act.

In denying certification, Justice Quigley followed an emerging line of cases that establish that a party seeking to prove certification must put forward evidence that there is a “real and subsisting group of persons” interested in having their action tried as a class proceeding. In this case, there was no evidence that anyone other than Nadolny wished to pursue a claim against the region.

To the contrary, the region filed evidence that supported a finding that she was the only one. The judge found that there would be no judicial economy in “invoking complex class action

machinery in a case involving a single known plaintiff, particularly one who presents the court with such a modest claim.”

As well as confirming the need for cogent evidence supporting a bid for certification, this decision underscores the importance of developing a class action roadmap from the outset of the litigation. Counsel seeking to have an action certified must ensure that the facts and allegations pleaded in the statement of claim are capable of supporting the action being tried as a class proceeding.

In *Nadolny*, the statement of claim alleged a breach of an implied contractual term, something the courts have repeatedly found cannot be proven on a class-wide basis owing to the individual nature of the steps involved in determining whether a term ought to be implied. Nadolny's statement of claim also put all of the communications between each retiree and the region in issue, something which could not be addressed without individual inquiries. Both of these factors were cited by Justice Quigley as weighing against certification.

Justice Quigley stepped into the shoes of the trial judge, not

to consider the merits of the action, but to envision how a common issues trial would unfold if the action was certified. In doing so, he recognized the unfairness that would result to the region if Nadolny's evidence was extrapolated across the class without a proper factual foundation. The decision rejects the “certify now, worry later” approach to certification.

A party seeking to have an action move forward as a class proceeding must prove all elements of the s. 5(1) certification test through proper evidence filed in support of the motion. *Nadolny* emphasizes the important “gatekeeper” role that the judge hearing the motion has — to decide this procedural motion based on the evidence actually before him or her, and not permit a party to “transcend the threshold of commonality” by calling upon the court to make unfounded assumptions. ■

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