

# **COMMON CAUSE: EMPLOYMENT-RELATED CLASS ACTIONS IN CANADA**

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## **1. Introduction:**

Over the last decade, class action suits in the employment context have become increasingly common in the United States, growing in both frequency and the quantum of settlement value and verdicts. In Canada, by contrast, their use has been more sporadic and, until recently, typically of more modest scope.<sup>1</sup> However, there is reason to believe that the combination of employment legislation in this country that is equal to or surpasses the level of protection granted to employees in the United States, and class action legislation in some provinces that is showing signs of being more robust than comparable American statutes, is creating fertile ground for employment class actions in Canada.

The class action is perfectly suited to the employment context. Employees have long recognized the value of acting collectively in order to equalize the power imbalance between employer and individual employee. This principle is one of the fundamental ideas underlying the formation of unions and the development of labour law. Similarly, by banding together in a class action, non-unionized employees are finding new ways to force their employers to comply with employment law standards and respect their rights in the workplace. Whereas individual litigation was once foreclosed to many employees as too costly, class actions allow employees to pursue their rights in court in a financially viable way. Suddenly, instead of being faced with a few relatively modest claims, employers are now facing potential liability for multimillion dollar class actions.

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<sup>1</sup> Thomas Brady, "Status of Employment Class Actions in Canada," (June 2007) International Labor and Employment Law Committee Newsletter, see online:  
<[http://www.abanet.org/labor/intlcomm/newsletter/2007/june\\_ca.shtml](http://www.abanet.org/labor/intlcomm/newsletter/2007/june_ca.shtml)>.

This paper will provide an overview of employment class actions in Canada.<sup>2</sup> Given the relatively brief history of employment class actions in this country, this jurisprudence can sometimes point in conflicting directions. As well, it reveals that there still remain a number of challenges to using class actions in the employment law context. However, it also suggests that the class action may become an increasingly important tool for enforcing the rights of non-unionized employees.

## **2. Overview of Employment Class Actions**

There are four main categories of employment class actions in Canada: claims arising out of breach of employment standards violations; claims from mass termination; retirement benefits cases; and employment discrimination cases.<sup>3</sup> As discussed below, attempts to certify these types of cases as class actions have met with varying degrees of success.

In order for a claim to proceed as a class action, it must be certified by a judge who is persuaded that the criteria for a certification have been met. These criteria, set out in statute in the common law provinces that have legislated in this regard, are:

- (a) the pleadings or the notice of application discloses a cause of action;
- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
- (c) the claims or defences of the class members raise common issues;
- (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
- (e) there is a representative plaintiff or defendant who,
  - (i) would fairly and adequately represent the interests of the class,

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<sup>2</sup> Class actions against employers began initially with cases involving pension surpluses. However, given that pension plan class actions have developed into their own specialized field, they will not be discussed in this paper.

<sup>3</sup> John Jaffey, "Class Actions have given employees and equal voice." (July 12, 2002) *Lawyers Weekly* 17.

- (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
- (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.<sup>4</sup>

**(a) *Employment Standards Cases***

Increasingly, non-unionized employees are turning to class actions as a means of enforcing their statutory rights under employment standards legislation. Given that most employment standards statutes contain their own enforcement mechanisms, one of the key questions arising at the certification stage is whether or not the class action is the preferable procedure for resolving the common issues.

Cases from Ontario have resulted in conflicting answers to this question. In an early Ontario case *Halabi v. Becker Milk Co.*,<sup>5</sup> the plaintiff brought a motion for certification of the action, claiming the recovery of wages under the *Employment Standards Act*.<sup>6</sup> In very brief reasons, Justice Southey dismissed the motion for certification. In his view, because the Act provided a quick and cost-effective procedure for “dealing with the complaints of employees under the Act” and provided for the “appointment of persons to represent groups,” proceedings under the Act were “clearly preferable to the proposed class action.”<sup>7</sup>

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<sup>4</sup> Section 5(1) of the *Ontario Class Proceedings Act, 1992*, S.O. 1992, c. 6 [Ontario CPA]. See also s. 5 of the *Alberta Class Proceedings Act*, S.A. 2003, c. C-16.6, s. 4 of the *British Columbia Class Proceedings Act*, R.S.B.C. 1996, c. 50 [BC CPA], s. 4 of the *Manitoba Class Proceedings Act*, C.C.S.M. c. C130, s. 6 of the *New Brunswick Class Proceedings Act*, C-C5.15, s. 5 of the *Newfoundland Class Actions Act*, SNL 2001, c. C-18.1, s. 6 of the *Saskatchewan Class Actions Act*, S.S. 2001 c. C-12.01, as well as Rule 334.16 of the *Federal Court Rules*, SOR 98/106.

<sup>5</sup> [1998] O.J. No. 2662, (1998), 39 O.R. (3d) 153 (Gen Div) [*Halabi*].

<sup>6</sup> R.S.O. 1990, c. E. 14.

<sup>7</sup> *Halabi*, *supra*, note 5 at 154.

A different conclusion to the same issue was reached in *Wicke v. Canadian Occidental Petroleum Ltd.*<sup>8</sup> In that case, the representative plaintiff brought a motion for certification of a class action, claiming lost overtime wages, damages for breach of contract and exemplary damages. The class in question was composed of approximately seventy former employees, whom the plaintiff claimed had all been made to work 12-hour rotating shifts contrary to s. 17 of the Ontario *Employment Standards Act*. In response, the defendant brought a motion to strike the statement of claim, arguing that, since the plaintiff had filed an individual complaint with the Employment Standards Branch of the Ministry of Labour for overtime wage losses, which had been rejected, he was barred from proceeding with the present action. Noting that no hearing was held by the Ministry in this case, Justice Jenkins found that the “steps taken by the Ministry in the *Wicke* claim fall far short of a litigation of his claim on the merits”<sup>9</sup> and ordered certification of the action.

Another example of a class action in which a statutory right was sought is *Rathwell v. Hershey Canada Inc.*<sup>10</sup> In this case, the representative plaintiff claimed that the employer had reduced its premiums under the *Employment Insurance Act*,<sup>11</sup> but had failed to provide the employees with the benefit of this reduction, contrary to the act. As in *Wicke*, the defendant brought a motion to strike the statement of claim as disclosing no reasonable cause of action, arguing that the Court did not have the jurisdiction to hear the action. Justice Manton refused to dismiss this case, ruling that the plaintiffs were not estopped since the parties to this action were

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<sup>8</sup> [1998] O.J. No. 2818, (1998) 40 O.R. (3d) 731 (Gen Div) [*Wicke*].

<sup>9</sup> *Ibid* at 735.

<sup>10</sup> [1999] O.J. No. 5725 (Sup Ct).

<sup>11</sup> S.C. 1996, c. 23 [EIA].

not the same as the parties who communicated with Human Resources and Development Canada.<sup>12</sup> This decision was upheld by the Ontario Court of Appeal.<sup>13</sup>

Another employment standards class action is *Kumar v. Sharp Business Forms Inc.*,<sup>14</sup> a case involving a motion for certification under the Ontario CPA. The representative plaintiff claimed damages for breach of contract on behalf of 50 former and present employees, alleging that the defendant had failed to provide minimum overtime pay, public holiday pay and vacation pay, contrary to the Ontario *Employment Standards Act*. In granting the motion for certification, Cumming J. specifically rejected the reasoning in *Halabi, supra*, noting that in s. 64.3 of the Act, the legislature expressly provided for “a civil action being available as an alternative to the administrative procedure of the ESA” and that under the ESA, “there is no provision for a consolidation of complaints by employees in respect of the determination of claims by an employment standards officer.” Accordingly, he held that a class action was the preferable procedure.<sup>15</sup>

More recently in Ontario, three large-scale national class actions, *Fresco v. Canadian Imperial Bank of Commerce*,<sup>16</sup> *Fulawka v. Bank of Nova Scotia*,<sup>17</sup> and *McCracken v. Canadian National Railway*,<sup>18</sup> have been launched.<sup>19</sup> These actions are based on claims for unpaid overtime under the federal *Canada Labour Code*.<sup>20</sup> As with the provincial employment statutes, the federal statute contains its own enforcement mechanism and as a result, the issue of

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<sup>12</sup> *Ibid.* at para. 5.

<sup>13</sup> *Rathwell v. Hershey Canada Inc.*, [2001] O.J. No. 3730 (CA).

<sup>14</sup> [2001] O.J. No. 1729 (Sup Ct) [*Kumar*].

<sup>15</sup> *Ibid.* at paras. 40-44.

<sup>16</sup> [2009] O.J. No. 2531 (Sup Ct) [*Fresco*].

<sup>17</sup> [2010] O.J. No. 716 (Sup Ct) [*Fulawka*].

<sup>18</sup> [2010] O.J. No. 3466 (Sup Ct) [*McCracken*].

<sup>19</sup> The author is co-lead counsel in each of these cases.

<sup>20</sup> R.S., 1985, c. L-2 [CLC].

preferable procedure is being addressed in the context of these cases. The three cases have met with different results.

In *Fresco*, Lax J. denied certification on the basis that the plaintiff had not established that there were common issues that would materially advance the litigation. In brief, she held, upon weighing the evidence, that the claims advanced by the plaintiff were inherently individual in nature and therefore not amenable to common proof. However, but for her finding with respect to common issues, she would have found that a class action was a preferable procedure to the administrative complaints process<sup>21</sup>. *Fresco* was appealed to the Divisional Court and the appeal was dismissed in a split 2-1 decision.<sup>22</sup> The majority upheld Lax J.'s determination on lack of commonality. In a strong dissent, Sachs J. would have allowed the appeal on the basis of significant errors of principle and palpable and overriding errors of fact. In particular, she found that Lax J. improperly recast the plaintiff's case of systemic breaches as individual in nature and erred in determining that there was no evidence in support of the plaintiff's systemic claims. At the time of writing, the Ontario Court of Appeal had granted the plaintiff leave to appeal this decision.

*Fulawka* was decided by Strathy J. in February 2010. In contrast to *Fresco*, Strathy J. found that there was evidence in support of the plaintiff's claims of systemic failings on the part of the defendant and that, as a result, there were issues capable of common proof and of significantly advancing the litigation. He distinguished *Fresco* on the basis that Justice Lax found no evidence of systemic breaches by CIBC in the record before her, but that he found

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<sup>21</sup> *Fresco*, *supra*, note 16

<sup>22</sup> *Fresco v. Canadian Imperial Bank of Commerce*, [2010] O.J. No. 3762 (Sup Ct – Div Ct)



evidence of systemic breaches by Bank of Nova Scotia in the case before him. Like Lax J., he was of the opinion that a class proceeding was a preferable procedure.<sup>23</sup>

Justice Strathy also rejected a collateral motion by the defendant to permanently stay the action on the basis that the Court had no jurisdiction to entertain claims based upon overtime benefits contained within the *Canada Labour Code*. Although he agreed with the defendant that the Court could not *directly* enforce the statutory entitlements, he found, nonetheless, that statutory terms could be implied into the contracts of employment of individual class members and could otherwise inform the duties that the defendant owed to its employees. Indeed, he found the issue of whether the statutory terms are implied into the contracts of employment of class members is a common issue. The defendant obtained leave to appeal Strathy J.'s decision<sup>24</sup> and the appeal was argued in December 2010. The decision is under reserve.

*McCracken* was argued and decided in the summer of 2010. *McCracken* differed from *Fresco* and *Fulawka* insofar as the issues centred around whether class members were properly classified as “management” and thus disentitled to overtime. Although Perell J. was not persuaded that classification could be determined commonly on behalf of the 1500 CN first line supervisors who made up the class (notwithstanding that this is precisely what the defendant itself had done in determining that they were all management) he was nonetheless of the opinion that the minimum criteria for management could be determined commonly and that an efficient process could be employed to determine which of the 1500 were or were not managers. He found that this would significantly advance the litigation. Justice Perell was also of the view (like Lax

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<sup>23</sup> *Fulawka*, *supra*, note 17.

<sup>24</sup> *Fulawka v. Bank of Nova Scotia*, [2010] O.J. No. 2107 (Sup Ct – Div Ct)

J. and Strathy J.) that a class proceeding would be a preferable procedure. As a result, he certified the action.<sup>25</sup>

As in *Fulawka*, defendant's counsel<sup>26</sup> protested that the Court had no jurisdiction to entertain the plaintiff's claims based on the *Canada Labour Code* and sought to permanently stay the action on this basis. Justice Perell rejected this argument but on a different basis than Strathy J. did in *Fulawka*. Justice Perell found that the minimum overtime statutory provisions were incorporated into class members' contracts of employment by force of law and that the common issue based upon this question should be determined in the plaintiff's favour. The Court did allow portions of the defendant's motion relating to striking a negligence claim and a claim based on holiday pay.

Both the plaintiff and defendant have rights of appeal directly to the Ontario Court of Appeal, which they are exercising. The appeal of these issues, as well as other issues upon which the Divisional Court has granted leave to appeal, are expected to be heard by the Court of Appeal sometime in 2011.

Class actions involving claims for breaches of employment standards legislation have also appeared in British Columbia. In *Macaraeg v. E Care Contact Centres Ltd.*,<sup>27</sup> the plaintiff had earlier brought a proceeding pursuant to the BC CPA<sup>28</sup> on behalf of a class of employees, in which she claimed unpaid overtime wages, in contravention of the *Employment Standards Act*.<sup>29</sup> Prior to the claim being certified as a class, the defendant brought an application, seeking rulings on whether the minimum overtime pay requirements of the ESA were implied terms of the

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<sup>25</sup> *McCracken*, *supra*, note 18.

<sup>26</sup> The defendant in *McCracken* was represented by the same defence team as the defendant in *Fulawka*.

<sup>27</sup> [2006] B.C.J. No. 3211 (SC) [*Macaraeg*].

<sup>28</sup> BC CPA, *supra*, note 4.

<sup>29</sup> R.S.B.C. 1996, c. 113 [B.C. ESA]

plaintiff's contract of employment and whether the plaintiff was entitled to bring a civil action to enforce her statutory right to overtime pay. Justice Wedge of the British Columbia Supreme Court found that that the minimum overtime pay requirements found in the statute were indeed implied terms<sup>30</sup> and that the provisions of the ESA did not grant "exclusive jurisdiction to the Director of Employment Standards to decide claims for benefits conferred by the ESA."<sup>31</sup>

However, the British Columbia Court of Appeal reversed the decision (interestingly, the Director of Employment Standards intervened in the case and supported the position of the employer).<sup>32</sup> The Court of Appeal disagreed with the chambers judge's interpretation of *Machtinger v. HOJ Industries Ltd.*,<sup>33</sup> holding that this case did not stand for the proposition that statutory employment standards form implied terms of employment contracts.<sup>34</sup> Furthermore, the Court disagreed with the approach taken by the Ontario Court of Appeal in *Stewart v. Park Manor Motors Ltd.*,<sup>35</sup> holding that as a general rule, rights conferred by statute are to be enforced in the statutory regime.<sup>36</sup> The Court found that the intent of the legislature was for the *ESA* to be enforced exclusively by the administrative tribunal.

Citing *Beaulne v. Kaverit Steel & Crane ULC*,<sup>37</sup> the British Columbia Court of Appeal left open the situation where an employer has actually promised the employee to pay overtime.<sup>38</sup> The Court suggested that where the employer has promised to pay overtime and this promise

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<sup>30</sup> *Macaraeg*, *supra* note 20 at para. 63.

<sup>31</sup> *Ibid.*, at para. 115.

<sup>32</sup> *Macaraeg v. E Care Contact Centers Ltd.*, [2008] B.C.J. No. 765 at para 2 [*Macaraeg CA*], leave to appeal refused [2008] S.C.C.A. No. 293.

<sup>33</sup> [1992] S.C.J. No. 41, [1992] 1 S.C.R. 986

<sup>34</sup> *Macaraeg CA*, *supra*, note 32 at para 39.

<sup>35</sup> [1967] O.J. No. 1117, [1968] 1 O.R. 234 (C.A.)

<sup>36</sup> *Macaraeg CA*, *supra*, note 32 at para 45.

<sup>37</sup> *Beaulne v. Kaverit Steel & Crane ULC*, [2002] A.J. No. 1066, 325 A.R. 237 (Alta QB)..

<sup>38</sup> *Macaraeg CA*, *supra*, note 32 at para. 51-53.

forms part of the employment contract, an employee may sue for breach of contract without relying on the "implied term" argument. In such cases, it would appear that the employee may enforce this promise as a term of the contract in a civil action, including through class proceedings. Following *E Care*, employees may in the future wish to emphasize a contractual basis for overtime payment, such as oral statements or promises, or written documents or employment manuals, in addition to making arguments based on employment standards legislation.

It is unclear how well the *E Care* decision will translate to other jurisdictions. The Supreme Court of Canada refused leave to appeal. In Ontario (and in contrast to British Columbia) the employment standards legislation specifically contemplates civil actions brought under the Act, commenting first that the Act does not affect any civil remedies the employee might have, and second that where an employee commences a civil proceeding "under this Act", the Director is entitled to notice of the proceeding.<sup>39</sup> This would seem to imply that the Ontario ESA grants employees rights that are enforceable in a civil action as part of a contract of employment. It is also not clear whether *E Care* will have any application in the federal jurisdiction. The defendant in *Fresco* did not argue that the court lacked jurisdiction to hear overtime cases. By contrast, the defendants in *Fulawka* and *McCracken* did make this argument. In both cases, the Court appeared to accept the reasoning in *E Care* but distinguished it from the cases at bar. As set out above, in *Fulawka*, Strathy J. found that statutory terms could be implied into the class members' contracts of employment. In *McCracken*, Perell J. found that

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<sup>39</sup> *Employment Standards Act, 2000*, S.O. 2000, c. 41, s. 8 [Ontario ESA].

the intent of Parliament as expressed by the *Canada Labour Code* was for employees to be able to enforce their statutory rights in court.

Justice Perrell also certified and approved a settlement agreement in *Corless v. KPMG LLP*,<sup>40</sup> a case in which it was alleged that a national accounting firm failed to compensate employees for the hours they had worked, contrary to employment standards legislation. In response to the claim, KPMG instituted a voluntary Overtime Redress Plan (“ORP”).<sup>41</sup> The parties eventually reached a settlement agreement, a component of which was that the ORP would be incorporated into the class proceedings as the mechanism to resolve the employees' (both past and present) claims.<sup>42</sup>

In approving the ORP as the basis for the settlement, Perrell J. noted the following factors as influential: the proposed settlement did not compromise the claim; the claims administrator was independent of KPMG; the employees if unsatisfied could proceed to mediation and binding arbitration; there was no cap on KPMG's liability; the administration of the ORP was similar to a court ordered class action claims administration program; and KPMG offered to reimburse employees for independent legal advice.<sup>43</sup> The Court noted that compliance with the certification criteria is less strictly required when the court is asked to approve a settlement,<sup>44</sup> but, in any event, commented:

It is desirable to employ the mechanism of a class proceeding to resolve the claims of the KPMG employees. There are over 11,000 potential class members in Canada. Individual litigation would be repetitive and expensive for the parties and would place an undue and unnecessary burden on the judicial system.<sup>45</sup>

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<sup>40</sup> [2008] O.J. No. 3092 (SC) [*Corless*].

<sup>41</sup> *Ibid.*, at para. 12.

<sup>42</sup> *Ibid.*, at para. 13.

<sup>43</sup> *Ibid.*, at para. 20.

<sup>44</sup> *Ibid.*, at para. 30.

<sup>45</sup> *Ibid.*, at para. 33.

In short, courts are increasingly (but not always) willing to find that class actions are to be preferred over statutory enforcement mechanisms when it comes to resolving claims based on breaches of employment standards legislation involving a large number of employees. The courts' conclusion in this regard accords with common sense and experience, particularly given the "greater demand for government services and [the fact that] budget cutbacks have slowed tribunals"<sup>46</sup> and limited the ability of federal and provincial employment standards branches to effectively enforce workers' rights. For example, in British Columbia, provincial government budget cuts in 2002-2003 resulted in staff at the Employment Standards Branch being reduced by a third and the number of branches being reduced by almost one half.<sup>47</sup> Other enforcement agencies have experienced similar strains on their resources. In his report on Part III of the *CLC*, *Fairness at Work, Federal Labour Standards for the 21<sup>st</sup> Century*,<sup>48</sup> Professor Harry Arthurs noted that there are insufficient resources in the Labour Program of Human Resource and Social Development Canada to adequately enforce the *CLC*. For example, in 2005-2006, only 120 full-time equivalent field staff were responsible for enforcing the labour standards of 840,000 workers employed by 12,000 different enterprises.<sup>49</sup>

Although the use of a class action as a tool for enforcing statutory employment standards has opened up possibilities for protecting the rights of workers, it has proven less effective for vulnerable employees who work for subcontractors in vertically-integrated industries, such as the

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<sup>46</sup> Jonathon Dye, "Short-Circuiting the Employee Class Action" (2000) 8 Can. Labour & Employment L.J. 355 at 369.

<sup>47</sup> Leo McGrady, "Class actions can be effective in enforcing rights in employment law," (March 3, 2006) 25:40 Lawyer's Weekly (QL).

<sup>48</sup> Harry Arthurs, *Fairness at Work: Federal Labour Standards for the 21<sup>st</sup> Century* (Gatineau, QC: Human Resources and Skills Development Canada, 2006).

<sup>49</sup> *Ibid.*, at 212.

garment industry. The limitation of the class action in this type of industry is demonstrated by *Lian v. J. Crew Group Inc.*<sup>50</sup> The representative plaintiff in this case was employed to sew and assemble piecework clothing. Her direct employer manufactured clothing as part of a chain of subcontractors supplying retailers. The plaintiff alleged that, contrary to the Ontario ESA, her employer failed to pay the minimum wage, overtime pay and vacation pay. She also alleged that the other defendant retailers were jointly and severally liable under s. 12 of the ESA. The defendants, other than the direct employer who did not file a statement of defence, moved for summary judgment, arguing that the related employer provision in s. 12 did not apply.

In granting the defendants' motion for summary judgment, Cumming J. held that the defendants were not "associated or related" to the direct employer within the meaning of s. 12 of the ESA since the "fact that there is a known chain of supply and pyramid of businesses within the overall garment industry, such that it can be said there is a vertically integrated industry, is in itself of no adverse legal consequences to the retailer."<sup>51</sup> Although he acknowledged that "[i]t might be argued that as a matter of sound and progressive public policy, measures should be taken to achieve greater compliance of ESA standards within the vertically integrated garment industry,"<sup>52</sup> these were problems to be addressed by legislators.

Employment standards provide protection for some of the most basic workers' rights, including entitlements to a minimum wage, vacation pay and overtime pay. The use of the class action as an enforcement tool may give rise to new possibilities for non-unionized employees, who may have relatively low-value claims, to litigate in an economically feasible way. Much

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<sup>50</sup> [2001] O.J. No. 1708, 54 O.R. (3d) 239.

<sup>51</sup> *Ibid.*, at para. 71.

<sup>52</sup> *Ibid.*, at para. 72.

will depend, however, on the outcome of the *Fresco* appeal (and further appeals). If the Ontario Court of Appeal agrees with Lax J. that the class members' claims are fundamentally individual in nature then it will be difficult for similar cases to be certified in the future. If, however, the Court of Appeal accepts the plaintiff's position that class members' losses arise from common, systemic causes, and accepts the approach of Justice Strathy in *Fulawka*, than more overtime cases are likely to come forward and be certified.

**(b) Termination Cases**

Employment class actions involving claims of wrongful dismissal and entitlements to reasonable notice periods are another area that has seen an increasing amount of activity. Typically, the members of the class in these cases have worked for different lengths of time and may be entitled to different notice periods if the class extends across multiple provinces. This poses potential challenges regarding how damages for the individual claims should be assessed in a cost effective way. However, the fact that some of the issues in a class action may require individual assessment after the common issues are determined is not, in and of itself, a bar to certification.<sup>53</sup>

The courts in Ontario have approved wrongful dismissal actions for certification on numerous occasions. One of the largest of these actions to date has been *Webb v. K-Mart Canada Ltd.*,<sup>54</sup> a national class action certified in 1999. This case arose out of the purchase of K-mart by HBC and the merger of the K-mart chain with the Zellers and Bay chains, resulting in the closing of approximately 31 stores across the country and the termination of thousands of employees. Although these employees received enough notice and termination pay to satisfy statutory

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<sup>53</sup>See for example s. 7 of the Ontario CPA, *supra* note 4.

<sup>54</sup>[1999] O.J. No. 2268, 45 O.R. (3d) 389 (Ont. Sup Ct).



requirements, the representative plaintiff argued that they were entitled to more and that their termination was a common issue “sufficient to ground a class action for common law damages for wrongful dismissal.” In response to concerns regarding the quantification of individual claims, the plaintiff proposed a “mini-hearing mediation and determination process, under court supervision.”<sup>55</sup> In response, the defendant argued that the case was not appropriate for a class action, since the individual contracts of employment required individual consideration.

Justice Brockenshire disagreed. He held that the issues of whether the class members’ contracts of employment required the defendant to provide reasonable notice if dismissed without cause, and whether the class members were in fact dismissed without cause, were common, even if issues of quantum and mitigation were personal to each member.<sup>56</sup> As well, regarding the proposed process for determination of the individual claims, he noted:

[T]eams of experienced mediators and referees, using expedited and simplified procedures in informal settings, should be able to quickly and fairly arrive at satisfactory awards that would exhibit some uniformity for claimants in similar circumstances across the country.

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In short, I conclude that using the *Class Proceedings Act*, and in particular a reference type of adjudication of individual claims is the preferable course...and is likely to be simple and expeditious, less expensive than normal litigation, and not prejudicial to anyone.<sup>57</sup>

Accordingly, he granted the motion for certification.

Unfortunately, the determination of the individual claims in this case did not proceed as smoothly as Justice Brockenshire had hoped. By 2004, only 24 claims had been heard regarding the determination of the individual issues of quantum of damages and mitigation efforts, and in

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<sup>55</sup> *Ibid.*, at 392.

<sup>56</sup> *Ibid.*, at 398-399.

<sup>57</sup> *Ibid.*, at 400-401.

only 15 of these cases had the referees found that some additional notice was required. As well, in a number of these cases, the costs consequences to the employee were such that they ended up having to pay costs greater than the amount of the actual award. As a result, the defendant brought a motion to decertify.<sup>58</sup>

Although acknowledging the delays and intervening problems, Brockenshire J. rejected the motion to decertify, holding that the “original reasons for finding a class action to be the best procedure still apply”<sup>59</sup> and that judicial economy had been achieved since the trial courts had been saved the burden of approximately 1000 trials.

For several years, *Webb v. K-Mart* has been held up as an example, by employer defendants, of how an employment class action cannot be managed effectively given the numerous individual issues inherent in each person’s employment relationship. However, there are numerous other examples of class actions for wrongful dismissal in both Ontario and B.C. that have been certified and adequately managed. In *Smith v. Krones Machinery Co.*,<sup>60</sup> the plaintiff brought a motion to certify a class proceeding and approve a settlement in a case involving a claim for damages for the wrongful dismissal of two groups of employees. Justice Canning, of the Ontario Superior Court of Justice, certified the action and approved the settlement, finding that the common issues between the parties were “whether it was a term of class members’ employment that reasonable notice be provided upon termination without just cause; and whether the class members were dismissed without just cause.”<sup>61</sup> In this case, the issue of the individual employee claims for damages was addressed through the settlement

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<sup>58</sup> *Webb v. 3584747 Canada Inc.*, [2005] O.J. No. 449 (Ont. S.C.J.) (Aff’d *Webb v. 3584747 Canada Inc.*, [2005] O.J. No. 3306 (Ont Div Ct)).

<sup>59</sup> *Ibid.*, at para. 27.

<sup>60</sup> [1999] O.J. No. 5113 (Sup Ct).

<sup>61</sup> *Ibid.*, at para. 3.

agreement, which included a detailed three-stage process to resolve individual claims in an expeditious and cost-effective manner.

*Downey v. Mitel Networks Corp.*<sup>62</sup> is another Ontario case involving a motion for certification of a wrongful dismissal class action. The proposed class in this case included 96 former employees of the defendant who received a notice of termination between April and October of 2003. The representative plaintiff alleged that she and the other affected employees “were not given reasonable notice of termination, their salaries were reduced while they worked at Mitel and Mitel reduced its contributions towards the employees pension plan.”<sup>63</sup> Although not all the issues with respect to the employees were common issues, Justice Manton certified the class, noting that the fact that some of the issues would require individual assessments was not a bar to certification.

A similar approach to the problem of individual issues in the certification of class actions for wrongful dismissal has also been adopted by the courts in B.C. *Gregg v. Freightliner Ltd.*<sup>64</sup> involved an application to certify a claim for wrongful dismissal as a class action against the defendant employer. In 2001, the representative plaintiff’s employer merged with the defendant Freightliner. Approximately a year later, the plaintiff and almost all the other non-unionized employees received notice that their employment was being terminated. The defendant contested certification, sounding the familiar refrain that the individual issues were too numerous to permit certification. Justice Bennett, although acknowledging that there were individual

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<sup>62</sup> [2004] O.J. No. 5981 (Sup Ct.) [*Downey*].

<sup>63</sup> *Ibid.*, at para. 7.

<sup>64</sup> [2003] B.C.J. No. 345 (SC).

claims to be assessed following the determination of the common issues, nonetheless found that this fact should not necessarily result in the court refusing to certify the claim. She noted:

Freightliner is rightly concerned about this becoming litigation "out of control" once the common issues are determined. The court then has to look at individual claims, some of which may be small and some not. However, those matters may be resolved by careful planning and management and is not a reason to refuse certification in this case.<sup>65</sup>

Not all motions for certification of an action for wrongful dismissal as a class action have been as successful. In *Aston v. Casino Windsor*<sup>66</sup> the action was started by a supervisor employed by Casino Windsor whose employment, along with that of a group of 18 other supervisors, was terminated as a result of an economic downturn. Patterson J. dismissed this motion for certification, holding that there was a lack of common issues to be decided. Key questions such as the validity of each employment contract, whether the employer fairly considered the individual employment record in selecting who was to be terminated, and mitigation, were all individual issues requiring individual assessments. In Patterson J.'s view, given the relatively small number of putative class members, these claims could be more expeditiously dealt with "by use of the case management procedure."<sup>67</sup>

This decision in *Aston* has recently been relied upon by the Quebec Superior Court in *Lachance c. Cleyn & Tinker Inc.*<sup>68</sup> This case involved claims by the former employees of a textile company regarding reimbursements for wage rollbacks and compensation in lieu of reasonable notice. The employer was forced to close as a result of economic difficulties, and accordingly provided its employees with lay-off notices. A certain number of employees were

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<sup>65</sup> *Ibid.*, at paras. 82, 85.

<sup>66</sup> [2005] O.J. No. 2879 [*Aston*].

<sup>67</sup> *Ibid.*, at paras. 18-19.

<sup>68</sup> [2006] J.Q. no. 5974 [*Lachance*].

offered additional compensation based on seniority. These offers included a written undertaking not to reveal the content of the offer and a written renunciation of claims against the employer. The court refused to certify the class, noting that, as in *Aston*, the individual claims of each member of the class regarding the appropriate notice period would need to be considered separately. As well, the court distinguished this case from *Downey* on the basis that *Downey* had required a consideration of a uniform termination policy, and all the employees who had signed a release had been excluded from the class.<sup>69</sup>

As demonstrated by the courts' refusal to certify the class actions in *Aston* and *Lachance* and by the difficulties regarding the determination of the individual claims in *Webb*, class actions for wrongful dismissal face a number of challenges regarding how to deal with individual issues. However, the courts' continued willingness to certify these claims demonstrates that often the advantages of determining the common issues by way of a class actions will outweigh the challenges of dealing with the individual issues of class members.

Moreover, these cases must now be read in light of recent decisions of the Ontario Court of Appeal endorsing the use of statistical sampling and aggregate damages awards as a means of dealing with cases in which it would be unduly difficult, or impossible, to conduct individual damage assessments and allow such cases to proceed to certifications. The decisions of *Markson v. MBNA Canada Bank*<sup>70</sup> and *Cassano v. Toronto-Dominion Bank*<sup>71</sup> specifically rely on sections 23 and 24 of the Ontario CPA which, respectively, provide for the use of statistical sampling and aggregate damages. In these cases, the Court has stated that a plaintiff need only show "potential

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<sup>69</sup> *Ibid.*, at paras. 50-51.

<sup>70</sup> [2007] O.J. No. 1684, 85 O.R. (3d) 321 (CA), leave to appeal refused [2007] S.C.C.A. No. 346 [*Markson*].

<sup>71</sup> [2007] O.J. No. 4406, 87 O.R. (3d) 401 (CA), leave to appeal refused [2008] S.C.C.A. No. 15. [*Cassano*].

liability” on a class-wide basis in order to engage these provisions. Moreover, both decisions acknowledge that there is a kind of rough justice inherent in these provisions (and in similar provisions in most other class action legislation in Canada) but that they are nonetheless consistent with, and can further, the principal purpose of class proceedings -- that is to provide access to justice to persons who otherwise face substantial barriers to bringing forward meritorious claims.

In *Fulawka*, Strathy J. followed *Markson* and *Cassano* and held that it was reasonably likely that an aggregate assessment could be employed in that case, having regard to the fact that the plaintiff’s claim was based on alleged systemic wrongs affecting the class as a whole. Accordingly, he certified a common issue based upon whether an aggregate assessment could be ordered.<sup>72</sup> By contrast, Perell J. in *McCracken* was of the view that *Markson* and *Cassano* were distinguishable from the case before him and the plaintiff had not yet shown whether there was a potential for liability to be established on a class-wide basis.<sup>73</sup> Each case turns on its own facts and it remains to be seen what principles appellate courts set out with respect to the applicability of aggregate damages in employment class actions.

**(c) Benefits Cases**

Another group of employment class actions are cases involving claims by employees or former employees for health and other benefits. Typically, employee benefit entitlements flow from a single policy and, therefore, do not result in as many individual issues. However, these cases frequently involve claims by retirees who were unionized during their period of employment. As a result they raise the problem of whether a court can take jurisdiction or

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<sup>72</sup> *Fulawka*, *supra* note 17 at paras. 148-151.

<sup>73</sup> *McCracken*, *supra* note 18 at paras. 414-420.

whether an arbitrator (under labour legislation) has sole jurisdiction. Some pension statutes also provide for the resolution of certain types of disputes through arbitration.<sup>74</sup> As will be discussed below, although early cases approved certification for disputes involving pensions and other employment benefits, the potential for class actions in this area of the law may be restricted, following the Supreme Court's decision in *Bisaillon*.

An example of an early case is *Ormrod v. Etobicoke (Hydro-Electric Commission)*.<sup>75</sup> In 1988, Etobicoke Hydro began paying 50% of the cost of the premiums under its Retiree Health and Dental Benefits Plan (the "Plan"). Later, in 1996, it phased out the premium-sharing arrangement and made retirees responsible for 100 per cent of the premiums. The representative plaintiff sought certification on behalf of retired former employees of the employer, claiming compensation for 50% of the premiums under the Plan. The plaintiffs alleged that the payment of the premiums by the employer was a term of their employment contract that vested upon retirement.

In granting certification, Winkler J., as he was then, rejected the defendant's argument that the pleadings did not disclose a cause of action<sup>76</sup> In his view, this was the "quintessential class action" since the plaintiff's case rested entirely on representations made by the employer regarding the premium-sharing arrangement."<sup>77</sup> In conclusion, he noted that "[t]his is a case where the advantages of a class proceeding are so apparent as to be uncontrovertible."<sup>78</sup>

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<sup>74</sup> See for instance, *Pension Benefits Standards Act*, [RSBC 1996] c. 352, s. 62.

<sup>75</sup> [2001] O.J. No. 754, 53 O.R. (3d) 285 (Sup Ct) [*Ormrod*].

<sup>76</sup> *Ibid.*, at para. 32.

<sup>77</sup> *Ibid.*, at para. 34.

<sup>78</sup> *Ibid.*, at para. 37.

Another employment benefits class action from Ontario is *Kranjcec v. Ontario*.<sup>79</sup> In this case, the Ontario government had unilaterally reduced or eliminated certain dental, supplemental health and hospital benefits for its retired employees. The representative plaintiff, on behalf of approximately 51,000 other retirees of the Ontario Civil Service, sought a declaration that any reduction in benefits was a violation of the retirees' equality rights under s. 15 of the *Canadian Charter of Rights and Freedoms*, or in the alternative, damages for breach of contract and breach of fiduciary duty. The defendants argued that the pleadings failed to disclose a cause of action since the class members were all represented by OPSEU while employed, and that therefore, because of the existence of a collective agreement, there could not have been a valid contract to provide benefits between the Crown and the class members. Following *Ormrod*, Cullity J. rejected this argument and held that it was not "plain and obvious" that the claim for breach of contract could not succeed.<sup>80</sup> As well, he found that the pleadings regarding the s. 15 violation and the breach of fiduciary duty disclosed causes of action. He further found there to be a number of common issues, although noted that the individual issue of the assessment of damages might potentially give rise to some difficulty.<sup>81</sup> Finding that all the statutory requirements were met, Cullity J. certified the action as a class proceeding.

In the end, Cullity J.'s concerns regarding the assessment of individual damages proved not to be an issue since the parties reached a settlement.<sup>82</sup> Under the terms of the settlement, the Crown provided an amount of \$20 million to be distributed among the class member equally per capita after payment of counsel fees and disbursements, which resulted in an estimated payment

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<sup>79</sup> [2004] O.J. No. 19 (Sup Ct.) [*Kranjcec*].

<sup>80</sup> *Ibid.*, at para. 23.

<sup>81</sup> *Ibid.*, at para. 62.

<sup>82</sup> *Kranjcec v. Ontario*, [2006] O.J. No. 3671 (Sup Ct.).



of approximately \$350 for each class member. As well, the settlement agreement provided that class members would be entitled to all new benefits negotiated by OPSEU during collective bargaining in 2005, including the provision of a drug card. By settling the manner in this way, counsel avoided the problem of the individual assessment of damages.

Class actions relating to pensions and employment benefits pose certain potential jurisdictional problems, given the overlap between class proceedings and traditional methods of labour law dispute resolution available to unionized employees. In *Kranjec*, this jurisdictional conflict did not present an insurmountable barrier to certification. However, the Supreme Court's 2006 decision *Bisaillon v. Concordia University*,<sup>83</sup> has arguably altered the landscape.

In *Bisaillon*, a unionized employee tried to bring a class action against his employer, a large university with multiple unions as well as many non-unionized employees, in order to contest a number of decisions made with respect to the administration and use of the pension fund. The measures complained of by the representative plaintiff had been authorized by one of the unions.<sup>84</sup> The other eight affected unions had unsuccessfully negotiated with Concordia and had not filed grievances, instead supporting the class action.<sup>85</sup>

Justice LeBel held that the class action in this case was incompatible with the exclusive jurisdiction of grievance arbitrators and the representative function of unions.<sup>86</sup> The collective agreements each referred in some way to the pension plans, and this was enough to give the arbitrator exclusive jurisdiction.<sup>87</sup> The collective agreement may apply to the dispute either

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<sup>83</sup> [2006] S.C.J. No. 19, [2006] 1 S.C.R. 666 [*Bisaillon*].

<sup>84</sup> *Ibid.*, at para. 9.

<sup>85</sup> *Ibid.*, at para. 9.

<sup>86</sup> *Ibid.*, at para. 2.

<sup>87</sup> *Ibid.*, at para. 3.

explicitly or implicitly, and this is to be interpreted broadly.<sup>88</sup> Justice LeBel noted that an arbitrator's jurisdiction depends on both subject matter jurisdiction and personal jurisdiction over the parties to the dispute.<sup>89</sup> Following *Weber*, the question is "whether the dispute, in its essential character, arises from the interpretation, application, administration or violation of the collective agreement."<sup>90</sup> Justice LeBel commented,

In short, the class action procedure cannot have the effect of conferring jurisdiction on the Superior Court over a group of cases that would otherwise fall within the subject-matter jurisdiction of another court or tribunal. Except as provided for by law, this procedure does not alter the jurisdiction of courts and tribunals.<sup>91</sup>

The Court in *Bisaillon* refrained from expressing an opinion on the applicability of the holding to non-unionized employees:

In the instant case, this Court did not have to rule on the validity of a civil suit undertaken by the non-unionized employees to assert their own rights, be it by means of a declaratory action, an action in nullity or a class action. The question whether a class action limited to non-unionized employees lies was not before this Court, so I will refrain from expressing an opinion on the subject.<sup>92</sup>

However, given the Court's strong reliance on principles of labour law applicable only to unionized employees, it is difficult to see how the holding in *Bisaillon* could be applied to non-unionized employees who do not benefit from the special procedures crafted by the legislature for unionized employees. In the absence of a similar jurisdictional conflict (such as the conflict in *BC Rail*, discussed below), there is no reason that the holding in *Bisaillon* should prevent a class action on behalf of non-unionized employees.

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<sup>88</sup> *Ibid.*, at paras. 32-33.

<sup>89</sup> *Ibid.*, at para. 29.

<sup>90</sup> *Ibid.*, cited at para. 30.

<sup>91</sup> *Ibid.*, at para. 22.

<sup>92</sup> *Ibid.*, at para. 63.

*Bisaillon* has since been applied in the British Columbia Court of Appeal in the case of *Ruddell v. BC Rail Ltd.*<sup>93</sup> This case dealt with the conflict between arbitration and class proceedings in the context of a surplus dispute in the BC Rail Pension Plan.<sup>94</sup> The relevant pension legislation required pension plans to provide for a method of dispute resolution, and the BC Rail Pension Plan had established a dispute resolution process through commercial arbitration. Pursuant to the *Commercial Arbitration Act*, the court was required to stay an application brought in respect of a matter to be submitted to arbitration.<sup>95</sup> While finding that the issue in *BC Rail* was not really one of jurisdiction, the Court held that *Bisaillon* was instructive in that it authorized some amount of procedural difficulties in favour of arbitration when required by the legislative scheme.<sup>96</sup> The Court also took note of the arbitrator's ability to craft responses to complex situations faced by large groups of people, "it is within an arbitrator's mandate, in my view, to recognize an arbitration advanced by an individual on a point of principle, as is here the case, and fashion a response applicable to others who are in the same position."<sup>97</sup> The Court summarized,

Factoring into the discussion... the specific statutory instruction that disputes as to surplus and contribution holidays in pension plans may be referred to arbitration and that, once referral is made, the dispute must be arbitrated, and considering the potentially broad application of an arbitration decision, the preference for class proceeding falls away.<sup>98</sup>

The British Columbia Court of Appeal also considered the impact of *Bisaillon* in *Bennett v. British Columbia*, a class action involving claims by retirees of the B.C. civil service to certain

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<sup>93</sup> [2007] B.C.J. No. 918, 282 D.L.R. (4th) 664 (CA) leave to appeal refused [2007] S.C.C.A. No. 354.

<sup>94</sup> *Ibid.*, at para. 1.

<sup>95</sup> *Ibid.*, at para. 2.

<sup>96</sup> *Ibid.*, at para. 40.

<sup>97</sup> *Ibid.*, at para. 39.

<sup>98</sup> *Ibid.*, at para 41.

health benefits.<sup>99</sup> In this case, the representative plaintiff alleged that as a term of his employment with the government of B.C., he received the benefit of Medical Services Plan payments and Extended Health Plan benefits without premiums for these benefits being charged to the employees and that these benefits vested upon retirement. In 2002, the Province began charging retirees premiums for Medical Services Plan and Extended Health Plan benefits.

The Court of Appeal noted that this case was distinguishable from *Bisaillon* since “the Benefits have never been mentioned in, or the subject of, any collective agreement between the Province and its unions.”<sup>100</sup> In fact, provincial statutes in force at the time prevented these benefits from ever being contained in the collective agreements. Accordingly, the Court of Appeal held that the essential character of the dispute did not arise from the interpretation, application, administration or violation of a collective agreement, and that the Chambers judges was preferable in this case.<sup>101</sup>

In sum, although early cases gave hope that pension and benefit disputes were generally certifiable, given the Supreme Court’s holding in *Bisaillon*, the potential for class actions in pension and benefits disputes is quickly narrowing to circumstances in which there is no other potential conflicting jurisdiction. The Court’s task in certification is arguably no longer one of assessing “preferable procedure” but rather one of ensuring that there are no other potential alternative procedures. Class actions should, however, continue to be available in cases where the benefits were not mentioned in a collective agreement, and there is no other provision for arbitration under statute or otherwise.

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<sup>99</sup> [2007] B.C.J. No. 4, 277 D.L.R. (4<sup>th</sup>) 440 (CA).

<sup>100</sup> *Ibid.*, at para. 42.

<sup>101</sup> *Ibid.*, at paras. 42-49. It should be noted however that, although this class action was successfully certified, it was ultimately dismissed by the BC Supreme Court, which found that the plaintiffs had failed to establish a contractual entitlement to the post-retirement group benefits. See *Bennett v. British Columbia*, [2009] B.C.J. No. 1955.

**(d) Employment Discrimination Cases**

A final category of employment class actions is employment discrimination cases. In the United States, many of these cases have met with a high degree of success at the certification stage. Perhaps the best-known of them is *Dukes v. Wal-Mart Stores, Inc.*,<sup>102</sup> a multi-billion dollar class action for gender discrimination involving approximately 1.5 million female employees employed at 3,400 stores in the United States.<sup>103</sup> This case is currently on appeal to the Supreme Court of the United States and is scheduled to be heard in March 2011.<sup>104</sup>

Employment discrimination cases have seen little success in Canada. An obvious hurdle is the fact that, as was held by the Supreme Court of Canada in *The Board of Governors of Seneca College of Applied Arts and Technology v. Bhaduria*,<sup>105</sup> there is no tort of discrimination. Recently, in *Honda v. Keays*<sup>106</sup> the Supreme Court was asked to reconsider its ruling in *Bhaduria* but declined to do so.

As explained by the Ontario Court of Appeal in *Taylor v. Bank of Nova Scotia*,<sup>107</sup> “[d]iscrimination claims do not give rise to a civil cause of action, but must be addressed by the Human Rights Commission.” Accordingly, cases involving claims of discrimination are typically heard by specialized human rights tribunals charged with the responsibility of enforcing human rights legislation. Since both individuals and groups of individuals are entitled to bring

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<sup>102</sup> 2004 U.S. Dist LEXIS 11 297 (Lexis), 222 F.R.D. 137, affirmed 474 F.3d 1214 and 603 F.3d 571.

<sup>103</sup> Raewyn Brewer, ““The Wal-Mart Way”: *Dukes v. Wal-Mart Stores, Inc.*, Social Change and the Canadian Legal Landscape” (2007) 12 Appeal 10 at 10.

<sup>104</sup> Supreme Court Docket, see online: <<http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-277.htm>>.

<sup>105</sup> [1981] S.C.J. No. 76, [1981] 2 S.C.R. 181.

<sup>106</sup> [2008] S.C.J. No. 40, [2008] 2 S.C.R. 362.

<sup>107</sup> [2005] O.J. No. 838 at para. 1.

complaints regarding discriminatory practices,<sup>108</sup> some of these cases have similarities to large-scale employment discrimination class actions in the United States. For example, in *Public Service Alliance of Canada v. Treasury Board*,<sup>109</sup> the Canadian Human Rights Tribunal ruled in favour of female employees in a pay equity complaint affecting tens of thousands of federal civil servants. This complaint ultimately settled for billions of dollars.

However, amendments to the Ontario *Human Rights Code*<sup>110</sup> may have broadened the opportunity for class actions concerning discrimination. Since 2008, a party may seek damages and other restitutionary remedies from a court for infringement of human rights provided that he or she is not solely bringing an action on that basis.<sup>111</sup> In other words, someone who is terminated and bringing a wrongful dismissal action may also bring a human rights claim in court. While this amendment would not provide a basis for a free-standing class action alleging discrimination, it would appear to allow a group of employees, who otherwise have a cause of action (including, for example, wrongful dismissal) to allege common discriminatory practices.

Although precluded from bringing civil actions for discrimination, employees have framed discrimination-related claims as claims for breach of statute or equitable claims for unjust enrichment. For example, in *Gehman v. Salvation Army Grace General Hospital*,<sup>112</sup> the representative plaintiff claimed that she and other members of the class were entitled to pay equity payments pursuant to the *Pay Equity Act*. The plaintiff in this case was formerly employed as a nursing supervisor by the defendant hospital. This class action was unsuccessful however, because the court held that the class action portion of her statement of claim should be struck out

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<sup>108</sup> See for example *Canadian Human Rights Act*, R.S., 1985, c. H-6, s. 40.

<sup>109</sup> T.D. 2/96 (CHRT).

<sup>110</sup> R.S.O. 1990, c. H.19

<sup>111</sup> *Ibid*, s. 46.1 and 46.2

<sup>112</sup> [1997] M.J. No. 333 (Man. QB).

given that there was uncontested evidence that the plaintiff was not entitled to pay equity since she was in a class of employees which did not receive pay equity payments.

*Franklin v. University of Toronto*<sup>113</sup> is another example of a class action involving systemic salary discrimination. In this case, the four representative plaintiffs claimed that they had received less money than their male colleagues for the same or similar work and that, as a result, the defendant was unjustly enriched. They proposed the use of statistical evidence to prove the common issue of systemic salary discrimination. Justice Gans noted that pay equity provisions had been incorporated into the ESA and that employees had the right to bring a civil action for breaches of the statute. In his opinion, claims for unjust enrichment based upon the alleged breach of the ESA should be permitted to stand. However, he refused to certify the action as a class proceeding, noting that “the determination of the University’s liability and the applicability of the defence of laches can only be assessed on a case-by-case basis”<sup>114</sup> and that “the assessment of damages for each plaintiff will have to be established on an individual basis.”<sup>115</sup> As a result of the numerous individual issues, Gans J. found that any potential judicial economy that would have resulted from certifying the case as a class action would be lost, notwithstanding that certification of the action would have facilitated the plaintiffs’ access to justice.

However, in light of Ontario Court of Appeal’s recent decisions in *Markson* and *Cassano*,<sup>116</sup> *Franklin* may no longer be good law. Arguably, if this case had been heard today it would have been certified on the basis that, similar to *Cassano*, it was an appropriate case “to

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<sup>113</sup> [2001] O.J. No. 4321, 56 O.R. (3d) 698 (Sup Ct) [*Franklin*].

<sup>114</sup> *Ibid.* at para. 54.

<sup>115</sup> *Ibid.* at para. 56.

<sup>116</sup> *Supra*, notes 70 and 71.

conduct an aggregate assessment of monetary relief under s. 24 of the CPA.”<sup>117</sup> As noted, the plaintiffs in *Franklin* had statistical evidence of systemic salary discrimination, which could have been helpful in an aggregate assessment of damages.

Another emerging area of class actions are actions based on breaches of the *Charter*. Initially, courts were very resistant to certifying this type of class action. In *Auton (Guardian of) v. British Columbia (Minister of Health)*, the B.C. Supreme Court refused to certify a class action that alleged that the Government’s failure to provide a specific form of Autism Treatment was a violation of the plaintiffs’ equality rights under s. 15 of the *Charter*. In the Court’s view “the plaintiffs’ claim for a declaration relating to their s. 15 rights under the *Charter* will be more efficiently, economically, and quickly dealt with as a single claim than in a class proceeding” since “if the rights of a group are infringed, all member of that group are entitled to relief.”<sup>118</sup>

Recently, in *Hislop v. Canada*, the courts have shown an increasing willingness to certify class actions involving *Charter* breaches. *Hislop* is notable both for the fact that it is a *Charter* class action and because it is one of the few class actions to have actually proceeded to trial. At issue in *Hislop* was whether the *Canada Pension Plan*,<sup>119</sup> as amended by the *Modernization of Benefits and Obligations Act*,<sup>120</sup> contravened s. 15(1) of the *Charter* by failing to give a fully retroactive pension to all same-sex survivors whose partners died after April 17, 1985, the date that s. 15 of the *Charter* came into force. As well, the representative plaintiff alleged a breach of fiduciary duty and unjust enrichment. The specific statutory provisions at issue were s. 44(1.1) and s. 72(2) of the CPP, which provided that the contributing same-sex partner must have died

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<sup>117</sup> *Markson*, *supra* note 70 at para. 5.

<sup>118</sup> [1999] B.C.J. No. 718, 12 Admin. L.R. (3d) 261 at para. 50 (SC).

<sup>119</sup> R.S.C. 1985, c. C-8 [CPP].

<sup>120</sup> S.C. 2000, c. 12 [MOBA].



on or after January 1, 1998 and that pensions will only begin to be paid to same-sex surviving partners from July 2000 onward. Also at issue were two general provisions of the CPP that applied to all claimants: s. 60(2), which provided that the estate of any surviving partner may only receive a maximum of twelve months' pension and must apply for it within twelve months of the death of the surviving partner, and s. 72(1), which limited the payment of any pension arrears to the twelve months prior to the application regardless of when it is made following the death of the contributing partner.

This action was certified as a national class action and was successful at trial. Justice Macdonald of the Ontario Superior Court held that ss. 44(1.1) and 72(2) of the CPP infringed s. 15 and was not justified under s. 1 of the *Charter*. As well, she granted the same-sex survivors a constitutional exemption from the two general sections, effectively entitling class members to survivors' pensions dating back to April 17, 1985. Finally, she dismissed the plaintiffs' claims for symbolic damages of \$20,000 for each class member under s. 24(1) of the *Charter*, and their claims for damages for breach of fiduciary duty and unjust enrichment.<sup>121</sup> The Court of Appeal for Ontario affirmed the finding that ss. 44(1.1) and 72(2) were unconstitutional, but held that the general sections, ss. 60(2) and 72(1), did not infringe s. 15 and that same-sex survivor benefits should be subject to the 12-month cap.<sup>122</sup> This decision was upheld at the Supreme Court, with the majority finding that, when a court is developing new law within the broad confines of the Constitution, it may be appropriate to limit the retroactive effect of its judgment.<sup>123</sup> As a result,

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<sup>121</sup> *Hislop v. Canada (Attorney General)* [2003] O.J. No. 5212, 234 D.L.R. (4<sup>th</sup>) 465.

<sup>122</sup> *Hislop v. Canada (Attorney General)* [2004] O.J. No. 4815, 73 O.R. (3d) 641.

<sup>123</sup> *Hislop v. Canada (Attorney General)*, [2007] S.C.J. No. 10, [2007] 1 S.C.R. 429.

the members of the *Hislop* class were not entitled to retroactive payments beyond the 12-month cap.

Given the courts' reluctance to award damages under s. 24(1) of the *Charter*, as demonstrated by *Hislop*, and the fact that an individual litigant can obtain a declaration of invalidity under s. 52(1) of the *Constitution* for the benefit of an entire group whose rights have been infringed, the value of making *Charter* claims by way of a class action is limited. As well, since the *Charter* only applies to government actors, the impact of these type of class actions upon the employment law context may be somewhat muted. However, it is possible that we may see this type of class action in the future with respect to government employees or employment-related legislation.

### **3. Conclusion: The Challenges and Advantages of Employment Class Actions**

The increasing prevalence of the class action in the employment context is a relatively recent legal development in Canada. As demonstrated by this overview of the jurisprudence, there remain a number of burdens that plaintiffs must overcome to successfully certify and litigate these cases. These challenges include the burden of showing that class actions raise common issues (such as in *Fresco*), are a preferable procedure to statutory enforcement mechanisms, (such as in *Halabi*), the burden of individual assessments to determine damages, (such as in *Webb*), and questions around the court's jurisdiction in cases involving unionized workplaces (such as in *Bisaillon*) or where a statute provides for the arbitration of disputes (such as in *BC Rail*).

On the other hand, the potential benefits of class actions to employees are many. Suddenly, employees, for whom it would have been prohibitive to pursue a small value claim

individually, now have a cost-effective way to seek to enforce their rights. Indeed, as the Supreme Court recently noted in *Bisaillon*,

The class action has a social dimension. Its purpose is to facilitate access to justice for citizens who share common problems and would otherwise have little incentive to apply to the courts on an individual basis to assert their rights.<sup>124</sup>

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<sup>124</sup> *Bisaillon*, *supra* note 83 at para 16.

## ABSTRACT

The increasing prevalence of the class action in the employment context is a relatively recent legal development in Canada. However, in many ways, the class action is perfectly suited to the employment context. Employees have long recognized the value of acting collectively in order to equalize the power imbalance between employer and individual employee, a principle underlying the formation of unions. Similarly, by banding together in a class action, non-unionized employees are finding new ways to force their employers to comply with employment law standards and respect their rights in the workplace.

This paper provides an overview of employment class actions in Canada, including three large-scale national class actions, *Freso v. Canadian Imperial Bank of Commerce*, *Fulawka v. Bank of Nova Scotia*, and *McCracken v. Canadian National Railway*, which are based on claims for unpaid overtime under the federal *Canada Labour Code*. It discusses the four main categories of employment class actions in Canada: claims arising out of breach of employment standards violations; claims from mass termination; retirement benefits cases; and employment discrimination cases. This jurisprudence reveals significant challenges to using class actions in the employment law context., including the burden of showing that class actions raise common issues and are a preferable procedure to statutory enforcement mechanisms, the problem of individual assessments to determine damages, and questions around the court's jurisdiction in cases involving unionized workplaces or where a statute provides for the arbitration of disputes. On the other hand, the potential benefits of class actions to employees are many. Employees, for whom it would have been prohibitive to pursue a small value claim individually, now have a

cost-effective way to seek to enforce their rights. As a result, the class action may become an increasingly important tool for enforcing the rights of non-unionized employees.

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