

Litigation

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Court of Appeal Ruling Endorses Aggregate Damages Awards in Class Proceedings and Provides Guidance to *Consumer Protection Act* Misrepresentation Claims

The Ontario Court of Appeal (the “**Court**”) may have made it easier for consumers to bring class actions based on misrepresentations made by companies. In its latest decision in the ongoing class action litigation in *Ramdath v. George Brown College of Applied Arts and Technology*, the Court clarified the causation requirement for unfair practice claims (including misrepresentation) under the *Consumer Protection Act, 2002* (Ontario) (the “**Act**”) and confirmed the court’s authority to award aggregate damages awards where individual damages cannot be assessed. This case marks the first award of aggregate damages in Ontario, and may have important implications for Canadian companies defending class proceedings in Canada. A similar approach may be taken in other Canadian provinces having comparable consumer protection statutes.

Background

The plaintiffs/appellants were students enrolled in a post-graduate program in International Business Management at George Brown College (“**GBC**”) in 2007-2008. The course calendar contained a misleading statement that, as part of the program, graduates would have “the opportunity to complete three industry designations/certifications.” The industry designations in fact required additional work experience and expense. Three cohorts of students (those beginning the course in September 2007, January 2008 and September 2008) launched a class action alleging, among other claims,

that GBC engaged in an unfair practice contrary to Section 14(1) of the *Act*. Section 14(1) states that “it is an unfair practice for a person to make a false, misleading or deceptive representation.” The lower court found GBC’s statement breached this provision. The Court of Appeal upheld that finding in an earlier decision.

The trial judge also awarded aggregate damages under Section 24(1) of the *Class Proceedings Act, 1992* (Ontario), but removed the September 2008 cohort from the certified class because those students had an opportunity to withdraw from enrollment after learning of the misstatement in the course calendar.

Court of Appeal Decision

In a unanimous decision, the Court of Appeal reversed the trial judge’s decision to remove the September 2008 cohort from the class, and upheld the award of aggregate damages.

Causation: no reliance or knowledge required under the Act

The Court reaffirmed its previous decisions that, unlike a common law claim for misrepresentation, a claim under the *Act* does not require reliance on the misrepresentation. The Court further held that the *Act* does not even require the plaintiff to have *knowledge* of an unfair practice. Thus, given that the September 2008 cohort had enrolled in the program and paid some tuition before the calendar was corrected, they were subject to the unfair practice and entitled to a statutory remedy. Because the statutory claim had already crystallized, the Court found that any correction of the misstatement after the enrollment agreements were entered into had no bearing on the claim, even though the students of the September 2008 cohort were still within the withdrawal period.

Goodmans^{LLP} Update

Aggregate damages available and desirable

The Court upheld the trial judge's finding that this was an appropriate case for an award of aggregate damages, and endorsed the trial judge's approach to aggregate liability under Section 24(1) of the *Class Proceedings Act, 1992*. The Court held that the availability of aggregate damages depends on a consideration of:

1. whether the non-individualized evidence is sufficiently reliable;
2. whether use of the evidence will result in unfairness or injustice to the defendant, such as overstatement of its liability; and
3. whether the denial of an aggregate approach will result in a "wrong eluding an effective remedy" and a denial of access to justice.

The Court noted that although aggregate damages may result in over- or under-compensation of individual claimants, this will be reasonable provided the defendant's total liability is not overstated. Further, the Court noted that the same degree of accuracy required of damages calculations in an ordinary action is not required in class actions. The Court found that the availability of aggregate damages in appropriate cases is critical in making the class action an effective instrument to provide access to justice.

Finally, the Court rejected what it considered to be GBC's back-door attempt to reintroduce a reliance requirement into a claim under the *Act* by arguing that causation, for damages purposes, required a causal link between the unfair practice and the damages. No causal link between the unfair practice and the damages is required: it is enough that damages flowed from entering into the agreement or while an unfair practice was occurring.

Key Points for Companies Doing Business in Canada

The Ontario Court of Appeal's decision in *Ramdath* regarding aggregate damages may affect certification contests in class proceedings, and may inspire more claims under the *Act*. Companies facing potential class proceedings should assess the risk that aggregate damages will be considered appropriate and the effect that may have on certification of class proceedings. In addition, companies doing business in Canada should review and ensure that the internal controls they have implemented for ensuring the accuracy of statements made to consumers are functioning properly.

If you have any questions about compliance, please contact our Litigation Department.