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PRACTICE

CLASS PROCEEDINGS

Appeal from Federal Court order (2023 FC 397, [2022] 2 F.C.R. D-17) granting respondents' motion, amending certification order by reinstating Family Class to class definition — Certification Judge granted order certifying class proceeding against Royal Canadian Mounted Police (RCMP) in *Greenwood v. Canada*, 2020 FC 119 (*Greenwood FC*) — Respondents later filed notice of motion to vary *Greenwood FC* certification order on basis that class definition erroneous — Certification Judge granted respondents' motion to vary certification order — Amendments inadvertently removed Family Class from certification order — Court in *Canada v. Greenwood*, 2021 FCA 186, [2021] 4 F.C.R. 635 (*Greenwood FCA*) found that Certification Judge had erred in defining Class, in certifying one of common questions — Set aside amended *Greenwood FC* certification order, remitted it to Federal Court to be revised in accordance with Court's judgment — Appellant indicated not consenting to having Family Class reinstated into class definition — Certification Judge stated *Federal Courts Rules*, SOR/98-106, r. 334.19 conferred necessary power to amend certification order — Ruled that circumstances did not preclude her from amending certification order to include Family Class — Also ruled that *functus officio* doctrine only applying to final decisions, that certification orders not constituting final finding on merits of case — Whether Certification Judge erred in her application of r. 334.19 — Had respondents moved to vary certification order to restore Family Class *before* Court's decision in *Greenwood FCA*, it would have been open to Certification Judge to reinstate Family Class on basis of her findings, analysis with respect to initial certification motion — However, respondents' motion to reinstate Family Class brought *after* Court issued its judgment in *Greenwood FCA* — In *Greenwood FCA*, Court partially reversed *Greenwood FC*, finding that Certification Judge had erred in her application of "some basis in fact" requirement with regard to evidence on record — In restoring Family Class as part of class definition, Certification Judge overlooked Court's ruling in *Greenwood FCA* — Certification Judge erred in relying on *Greenwood FCA* to conclude that Court had somehow endorsed her analysis with respect to Family Class — To the contrary, reasoning in *Greenwood FCA* required Certification Judge to perform an analysis, reconsider whether Family Class met criteria for certification in light of guidance provided by Court — *Greenwood FCA* provided basis for Certification Judge to exercise her discretion, reconsider Family Class in ruling on respondents' motion to vary — Not open to Certification Judge to simply reinstate her initial findings after having been overturned by Court — Reinstatement of Family Class in certification order, absent "some basis in fact" analysis conducted consistently with guidance set forth by *Greenwood FCA*, amounting to error of law — Whether Certification Judge erred in her application of doctrines of issue estoppel, *functus officio* — Certification Judge conflated whether issue at hand was finally resolved with whether entirety of claim was finally determined — In context of class proceedings, number of decisions confirming that issue estoppel applying to class certification motions with understanding that judges retaining discretion not to apply it when they are of view it would lead to an injustice — While certification orders do not dispose of entire proceeding, they may yield final rulings on issues going to merits of case, such as class definitions, common questions — Accordingly, certification orders issued in context of class proceedings may be subject to issue estoppel — Follows that doctrine of *functus officio* can accordingly be applied to certification orders — Order set aside, question of Family Class remitted to Certification Judge — Appeal

allowed.

CANADA V. GREENWOOD (A-96-23, 2024 FCA 22, Boivin J.A., reasons for judgment dated January 30, 2024, 15 pp.)