

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE) TUESDAY, THE 9th DAY
JUSTICE MORGAN) OF NOVEMBER, 2021

B E T W E E N:

SURENDRARAJ NAVARATNARAJAH

Plaintiff

– and –

FSB GROUP LTD., FSB INSURANCE LTD. AND FSB COMMERCIAL LTD.

Defendants

Proceeding under the Class Proceedings Act, 1992

ORDER

THIS MOTION made by the Plaintiff for an order certifying this action pursuant to s. 5 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, (“**CPA**”) was heard on July 22, 2021 at Toronto, Ontario.

ON READING the motion record and factum filed by the Plaintiff, as well as the responding factum and motion record of the Defendants, and the reply factum and affidavit of the Plaintiff, and on hearing submissions of counsel:

1. **THIS COURT ORDERS** that this action is certified as a class proceeding, pursuant to s. 5 of the CPA, as against FSB Insurance Ltd. and FSB Commercial Ltd. (the “**Class Defendants**”).
2. **THIS COURT ORDERS** that the Class is defined as:

All persons engaged in services as producers on behalf of FSB INSURANCE LTD. and FSB COMMERCIAL LTD. since August 2004 who were classified as independent contractors.

3. **THIS COURT ORDERS** that the action is dismissed on consent, and without costs, as against the Defendant FSB Group Ltd.
4. **THIS COURT ORDERS** that Surendraraj Navaratnarajah is appointed as the representative plaintiff for the Class and Monkhouse Law is hereby appointed as lawyers for the Class (“**Class Counsel**”).
5. **THIS COURT ORDERS** that the issues outlined in **Schedule “A”**, attached hereto, are certified as common issues.
6. **THIS COURT ORDERS** that the Notice of Certification attached hereto as **Schedule “B”** is approved.
7. **THIS COURT ORDERS** that the methods of distribution of the Notice of Certification shall be as per the consented to litigation plan attached hereto as **Schedule “C”**:

- 1) **Internet**

The Notice and Certification Order shall be published on a web page maintained by Class Counsel in respect of this proposed class proceeding.

- 2) **Direct mail and email**

The Class Defendants will provide Class Counsel with the names and last known addresses and contact information (including personal email addresses, where available) for all class members. Class Counsel will then send the Notice via email to class members at the e-mail addresses provided.

If the email notifications are returned as undeliverable or if personal email addresses are not available, Class Counsel shall deliver the Notice by direct mail to the last known address for each class member.

8. **THIS COURT ORDERS** that the Notice of Opting Out attached hereto as **Schedule “D”** is approved.
9. **THIS COURT ORDERS** that the costs of this motion are to be \$144,000.00 inclusive of HST and disbursements, payable to Plaintiff’s counsel, as consented to by the parties.
10. **THIS COURT ORDERS** that distribution of the Notice of Certification and Certification Order, the deadline for returning the Notice of Opting Out, and payment of the costs of this motion shall all be stayed pending the outcome of the Class Defendants’ motion for leave to appeal and any subsequent appeals.

A handwritten signature in blue ink, appearing to read 'E. Morgan', is centered on the page. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

THE HONOURABLE JUSTICE MORGAN

SCHEDULE “A”

Common Issues:

- 1) Did the actual circumstances of the relationship between the Defendants and the class members constitute an employer/employee relationship, such that class members were in fact employees of the Defendants and not "independent contractors"?
- 2) If the answer to (1) is "yes", are the Defendants liable to the class for employee benefits pursuant to the *Employment Standards Act* (including minimum wage, unpaid vacation pay and public holiday pay, premium pay and overtime)
- 3) If the answer to (1) is "yes", are the Defendants liable, and must reimburse the class members, for any Canada Pension Plan or Employment Insurance Act contributions which they may have paid or are owed resulting from the failure of the Defendants to pay statutory contributions.
- 4) If the answer to (1) is "yes", what are the terms (express or implied or otherwise) of the class members' contracts of employment with the Defendants regarding:
 - (a) Regular and overtime hours of work;
 - (b) Recording of the hours worked by the class members;
 - (c) Payment of hours worked by class members;
 - (d) Termination and severance pay;
 - (e) Lieu time as purported compensation for overtime hours worked.
- 5) Whether the Defendants breached any of the contractual terms and if so, how. Without limiting the generality of the forgoing, whether the class members are owed damages from the Defendants for:
 - (a) Unpaid overtime;
 - (b) Compensation below minimum wage;

- (c) Termination and severance pay;
 - (d) Vacation pay; and,
 - (e) Public holiday pay and premium pay.
- 6) Whether the Defendants have a duty (in contract or in statute) to prevent class members from working, or a duty to not permit or encourage class members to work, overtime hours for which they were not properly compensated or for which the Defendants would not pay.
- (a) If such a duty exists, whether the Defendants breached that duty.
- 7) Whether the Defendants have a duty (in contract or in statute) to accurately record and maintain a record of all hours worked by class members to ensure that class members were appropriately compensated for same.
- (a) If such a duty exists, whether the Defendants breached that duty.
- 8) Whether the Defendants have a duty (in contract or in statute) to implement and maintain an effective and reasonable system or procedure which ensured that the duties in Common Issues 6) and 7) were satisfied for all class members.
- (a) If such a duty exists, whether the Defendants breached that duty.
- 9) If liability is established, are aggregate damages available?
- 10) If the answer to Common Issue (9) is yes:
- (a) What is the most efficient method to assess those aggregate damages? Without limiting the generality of the foregoing, can aggregate damages be assessed in whole or in part on the basis of statistical evidence, including statistical evidence based on random sampling?
 - (b) What is the quantum of aggregate damages owed to class members or any part thereof?

- (c) What is appropriate method or procedure for distributing the aggregate damages award to class members?
- 11) Whether the position of the Defendants relative to the class members was one of fiduciaries such that the Defendants had a fiduciary duty to the class members.
- (a) If such a duty exists, whether the Defendants breached that duty.
 - (b) Whether any profits made through a breach ought to be disgorged.

SCHEDULE “B”

NOTICE OF CERTIFICATION AS A CLASS ACTION

*To: All producers engaged by FSB Insurance Ltd. and FSB Commercial Ltd.
(together, the “Company”)*

THIS NOTICE MAY AFFECT YOUR RIGHTS. PLEASE READ CAREFULLY.

The Nature of the Action

On June 4, 2020, Surendraraj Navaratnarajah commenced an action in the Ontario Superior Court of Justice against the Company.

This action was brought on behalf of a proposed class of persons comprised of all Ontario current and former producers of the Company since 2004.

The action claims that the Company’s producers are employees of the Company and not independent contractors. The action also claims that the Company breached its statutory duties to the class by failing to appropriately provide them with minimum wage, overtime pay, vacation pay and public holiday, premium pay, severance pay and termination pay. The Company disputes these claims

By order dated [INSERT DATE], The Honourable Justice Morgan certified the action as a class proceeding against the Company and appointed Surendraraj Navaratnarajah as representative plaintiff for the class.

Participation in the Class Action

If you were a producer of the Company and fall within the class definition, you are automatically included as a member of the class unless you opt out. All members of the class will be bound by the judgment of the Court, or any settlement reached by the parties and approved by the Court. Among other things, members of the class may be found to be employees of the Company and not independent contractors.

At this juncture, the Court has not taken a position as to the likelihood of recovery for the

representative plaintiff or the Class, or with respect to the merits of the claims or defences asserted by either side.

Fees and Disbursements

You do not need to pay any legal fees out of your own pocket. A retainer agreement has been entered into between the representative plaintiff and Class Counsel with respect to legal fees. The agreement provides that the law firm has been retained on a contingency fee basis, whereby it will only be paid its fees in the event of a successful result in the litigation or a Court approved settlement. The fees payable to the lawyers for the class will be paid out of any judgment and will not be paid directly by class members. Any fee paid to lawyers for the class is subject to the Court’s approval.

You will not be responsible for the Company’s legal costs if the class action is unsuccessful.

Opt Out

If you wish to exclude yourself from this class proceeding (“opt out”), you must complete and return the “Opt Out” form by no later than [INSERT DATE 120 DAYS AFTER THE OUTCOME OF THE CLASS DEFENDANTS’ MOTION FOR LEAVE TO APPEAL AND ANY SUBSEQUENT APPEALS]. The Opt Out form may be downloaded at: <https://www.monkouselaw.com/fsb-class-action/>. If you would like to opt out, you can also e-mail, fax, or send a letter to Class Counsel that clearly states your intention to opt-out.

If you choose to opt out within the above noted deadline you will not recover any monies in the event the representative plaintiff is successful in this action and you will not be bound by any court decision in these proceedings. If you do not choose to opt out by the prescribed deadline you will be bound by any judgment ultimately obtained in these proceedings, whether favourable or not, or any settlement if approved by the court. You may wish to obtain independent legal advice with respect to this matter.

Contact Information

If you have any questions or concerns about the matters in this Notice or the status of the this Class Action, please visit:

<https://www.monkouselaw.com/fsb-class-action/>

You may contact Class Counsel in a number of ways.

By email at the following address:

Fsb.classaction@monkouselaw.com

By mail at the following address:

220 Bay Street, Suite 900
Toronto, Ontario
M5J 2W4

Or by fax or telephone:

Phone: (416) 907-9249

Fax: (888) 501-723

SCHEDULE “C”

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

SURENDRARAJ NAVARATNARAJAH

Plaintiff

– and –

FSB INSURANCE LTD. AND FSB COMMERCIAL LTD.

Defendants

Proceeding under the *Class Proceedings Act, 1992*

LITIGATION PLAN

Pursuant to s. 5(1)(e)(ii) of the *Class Proceedings Act, 1992* (“CPA”), the Plaintiff proposes that this Litigation Plan be followed with respect to these proceedings, subject to the Court’s approval:

STAGE 1: PRE-CERTIFICATION INQUIRIES

1. The Plaintiff proposes the following class definition:

All persons engaged in services as producers on behalf of FSB INSURANCE LTD. and FSB COMMERCIAL LTD. since August 2004 who were classified as independent contractors.

Communicating with the Class

2. Monkhouse Law has experience communicating with class members in employment class proceedings. In combination with the required court ordered notices, class counsel has established a website page and an email address to facilitate communication with class members.

3. Monkhouse Law has taken the initiative of creating a website page that offers details and updates on the progress of the litigation. The website page is: <https://www.monkouselaw.com/fsb-class-action/>

4. Potential class members can locate the website page through an internet search or through links established on Monkhouse Law's website. Through this website page, class members who may become aware of this action are kept apprised the progress the litigation. Email contacts are also available on the website to allow interested parties to contact Monkhouse Law with inquiries.

5. The Plaintiff and Monkhouse Law shall not use the Defendants' trademarks in their communications with class members, or for any other purpose.

STAGE 2: NOTICE OF CERTIFICATION AND OPT OUT

6. Following certification of this action as a class proceeding, notice of certification will be delivered pursuant to s. 17 of the *CPA*, in a form and manner approved by this Court.

Draft Notice

7. A draft of Notice of Certification ("Draft Notice") is attached hereto as Schedule "B" and is subject to the Court's approval. Upon certification of this proceeding and court approval of the Draft Notice, the Notice of Certification ("Approved Notice") will be disseminated in accordance with this Litigation Plan and the direction of this Court.

8. The Draft Notice provides the website page address established for this class action <https://www.monkouselaw.com/fsb-class-action/> a contact email address, and Monkhouse Law's mailing address and phone number to allow for newly identified class members to make any inquiries regarding the class action.

Notice Program

9. Subject to and following the final determination of any appeal(s) of the certification decision, the Approved Notice will be distributed by Monkhouse Law :

- a. Using the records of FSB, the Approved Notice shall be sent by regular mail to the last known address of class members;
- b. Using the records of FSB, the Approved Notice shall be sent by e-mail to the last known personal e-mail address of class members;
- c. E-mail or mail the Approved Notice to any person who may request it;
- d. Post the Approved Notice on the FSB class action webpage already created by Monkhouse Law <https://www.monkouselaw.com/fsb-class-action/>;

10. In addition to responding to individual inquiries, Monkhouse Law will continue to update the class action webpage following certification. The phone numbers and e-mail address for inquiries provided on the website will continue to operate until the class action is finally resolved.

Opt-out

11. The Plaintiff submits that the Court should agree to set an opt-out deadline of 120 days after the Approved Notice is disseminated by regular mail, electronic mail, and publication as described in paragraph 9 above.

12. The Approved Notice outlines the significance of opting out and explains that those members of the class who choose to opt out within stipulated deadline will not recover any monies in this action. Further, the Approved Notice makes clear that affected persons who do not opt out will be considered class members and will be bound by the Court's judgment or the terms of any settlement, including with respect to employment or contractor status.

13. "Opt Out" forms (a draft of which is attached as Schedule "D"), to be approved by the Court, will be made available by Monkhouse Law and will be posted on the class action webpage (<https://www.monkouselaw.com/fsb-class-action/>)

14. Class members who wish to opt out of the class action as certified must complete and return the Opt Out form to Monkhouse Law by no later than 120 days after dissemination of the Approved Notice. The Opt Out form can be returned by email, fax or mail. Alternatively, class members who wish to opt out of the class action as certified can notify Monkhouse Law in writing by no later than 120 days after dissemination of the Approved Notice.

15. Monkhouse Law will serve an affidavit listing the opt-outs within 30 days of the opt-out deadline.

STAGE 3: PLEADINGS AND DOCUMENTARY DISCOVERY

16. The Defendants to deliver their Statement of Defence no later than 60 days following the date on which any appeal(s) of the certification order have been finally determined and any resulting appeal periods have expired. The Plaintiff will have 30 days following service of the Statement of Defence to serve a Reply, if any.

17. Within 90 days following the delivery of the Statement of Defence, each side shall furnish on the other side all documents arguably relevant to the matter in the form of an affidavit of documents. This unless otherwise agreed shall initially be provided in PDF format numbered starting with number 1. Either party shall have the right to request originals of electronic documents (including metadata) or to review originals of any physical document.

18. The parties will use best efforts to conduct a mediation at a date convenient to the parties.

STAGE 4: EXAMINATION FOR DISCOVERY

19. Examinations for discovery will commence after the exchange of affidavits of documents. Examinations are to be completed within 120 days of the exchange of documents.

20. Subject to refusals and undertakings, the Plaintiff anticipates that the examinations for discovery of Defendants' representative, Paul Brown, will take approximately 5 to 7 days, which would occur over the course of three to four months, subject to the parties' availability.

STAGE 5: EXCHANGE OF EXPERT OPINIONS

21. The exchange of expert reports, if necessary, shall be governed by the timetable agreed to between the parties and ordered by the Court.

STAGE 6: COMMON ISSUE TRIAL

22. The trial of the certified common issues will take place on a timeline agreed to by the parties or as ordered by the Court and shall be set after the conclusion of discoveries and all preliminary motions.

23. A full list of the witnesses the parties intend to call will be provided in accordance with a trial management timetable agreed to between the parties.

24. If the common issues pertaining to liability are resolved to the Plaintiff's benefit, the Plaintiff will request that the Court make an order under s. 24 of the *CPA* awarding the amount of aggregate damages determined by the Court to class members and ask that a common determination of class members' hours per day and days per week be made.

STAGE 7: NOTICE OF RESOLUTION AND DISTRIBUTION

25. After the common issues are determined, the process for the distribution of any aggregate damages is determined (see Stage 8 below), and the process for determinations of any individual issues has been approved, if necessary (see Stage 9 below), the Plaintiff will request that the Court approve the form and content of a notice program giving class members notice of the resolution of the common issues, notice of any aggregate or punitive award of damages, and the method for distributing such damages, and/or the method determination of any individual issues ("Notice of Resolution").

26. The Notice of Resolution will require eligible class members to file their claim on an approved claim form ("Claim Form") by a fixed date with the agreed upon Class Action Administrator. This form will allow the class members to establish their membership in the class and could be checked against the relevant records of FSB.

27. The Notice of Resolution and Claim Form will be disseminated in the same manner as the Approved Notice set out above in paragraph 9.

STAGE 8: DISTRIBUTION OF AGGREGATE DAMAGES

Aggregate Damages

28. The Plaintiff proposes that an aggregate damages award shall be placed in a fund for the class members and claims shall be administered by a mutually agreed upon administrator approved by the Court (“Class Action Administrator”).

29. The Plaintiff understands that the total number of class members, their names and contact information, their length of active service with the Defendants and the amounts paid by the Defendants to class members in commissions, is all information that is readily accessible and ascertainable by the Defendants.

30. Using that information, along with the information from the Canada Revenue Agency (related to CPP contributions made by class members), the aggregate damages awarded (be it for all heads of damages or some – which includes minimum wage, overtime, vacation pay, public holiday and premium pay, and CPP and EI contribution reimbursement) can be distributed to the class members based on their specific entitlements based on the length of service with the Defendants and common determinations of hours worked per day/week.

STAGE 9: INDIVIDUAL ISSUES DETERMINATIONS – IF NECESSARY

31. If the Court does not order an award under s. 24 of the *CPA* and/or determines that individual issue determinations are necessary, then the Plaintiff will attempt to come to an agreement with the Defendants to reach a mutually acceptable method for determining individual issues (which may include liability and damages).

32. Alternatively, the Plaintiff will request that the common issues judge approve a procedure to resolve individual issues pursuant to s. 25 of the *CPA*. The approved procedure will be disseminated to the class in the Notice of Resolution.

33. Once final individual issue determinations, including liability and damages, are completed, individual damage awards would then be distributed to the class members.

FUNDING

34. The Plaintiff’s legal fees are to be paid on a contingency basis based on success on the common issues, as provided for in the *CPA*, and are subject to the Court’s approval.

35. Monkhouse Law will continue to provide the funding of all disbursements necessary to properly prosecute this action to successful completion.

SETTLEMENT

36. Monkhouse Law will conduct settlement negotiations with the Defendants' counsel from time to time, as circumstances dictate. The Plaintiff is prepared to enter mediation processes or discussions during the litigation as the Defendants may agree or counsel recommend.

REVIEW OF THE LITIGATION PLAN

37. Notwithstanding the foregoing, this Litigation Plan will be subject to regular review by the parties and their counsel and may be revised and/or modified at any time during the litigation process as required, under the continuing case management authority of this Court.

SCHEDULE “D”

NOTICE OF OPTING OUT

**TO: Monkhouse Law
220 Bay Street, Suite 900
Toronto, Ontario
M5J 2W4**

RE: FSB Class Action

I do not want to participate in the class action styled as *Surendraraj Navaratnarajah v. FSB Insurance Ltd. and FSB Commercial Ltd.*

I understand that this class action involves claims that producers are employees of the FSB Insurance Ltd. and FSB Commercial Ltd. (the “Defendants”) and seeks to provide producers with minimum employment standards as employees of the Defendants.

I understand that by opting out, I will not be eligible for the payment of any amounts awarded or paid in the class action and the Defendants will continue to classify me as an independent contractor.

I certify that the Defendants have not put pressure on me to opt out of this Class Action.

Dated: _____

Signature

Witness

Print Name

Address

City, Province, Postal Code

Telephone

Email

**Copy of government issued ID.
This Notice must be delivered by email, fax or mail on or before _____, 202_.**