Common Ground? Class Action Updates

Ontario Court Considers New Preferable Procedure Test

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One of the important parts of the test for certification of a proposed class proceeding is that a class proceeding would be the preferable procedure for the resolution of the common issues. In Banman v. Ontario, the Ontario Superior Court of Justice (Court) provided the first detailed interpretation and application of the revised preferable procedure analysis under the amended *Class Proceedings Act, 1992* (*CPA*). More than three years since the amendments took effect on October 1, 2020, the Court has confirmed that the recalibrated preferable procedure analysis is a more rigorous challenge for plaintiffs to meet.

Background

The proposed class action concerned the psychiatric treatment of patients detained in the psychosocial treatment unit of St. Thomas Psychiatric Hospital in Ontario. The plaintiffs alleged that between 1976 to 1992, they underwent treatment that was "experimental, untested, reckless, negligent, ineffective, harmful, unethical, and cloaked from disclosure to the patients."

The plaintiffs alleged breach of fiduciary duty, negligence, vicarious liability, breach of non-delegable duty and breaches of the *Canadian Charter of Rights and Freedoms* (*Charter*).

The Court certified the action as a class proceeding against the Ontario government but dismissed the action as against the Attorney General on the basis that it was not a proper party. The Court held that the plaintiffs satisfied the cause of action criterion for some of their claims, except with respect to certain breach of *Charter* claims, and also held that certain claimed common issues regarding causation and damages could not be certified.

The Preferable Procedure Test

As part of its analysis, the Court reviewed the new preferable procedure test in the *CPA* (section 5(1.10)). The new test was added in 2020 and imposed a stricter test for the preferable procedure criteria under the certification requirements.

The amended preferable procedure section of the *CPA* states that a class action will **only** be considered the preferable procedure for the resolution of common issues if, at a minimum:

1. It is superior to all reasonably available means of determining the entitlement of the class members to relief or addressing the impugned conduct of the defendant, including, as applicable, a quasi-judicial or administrative proceeding, the case management of individual claims in a civil proceeding, or any remedial scheme or program outside of a proceeding; and,
2. The questions of fact or law common to the class members predominate over any questions affecting only individual class members.

The Court stated that it was arguable that the "prerequisites of: (a) predominance of common issues over individual issues, and (b) superiority of all reasonably available alternative resolution procedures" were already factors in the preferability analysis under the previous statutory provision. The Court noted, however, that the legislative debates and the addition of "the only if, at a minimum" statutory wording "reveals that the purpose of the amendment was to raise the threshold, heighten the barrier, or make more rigorous the challenge of satisfying the preferable procedure criterion" (at para. 317).

The Court continued that the amendments to the preferable procedure test require a more rigorous analysis to determine:

- whether the design of the class action is manageable as a class action
- whether there are reasonable alternatives
- whether the common issues predominate over the individual issues
- whether the proposed class action is superior to the alternatives

The Court stated that this analysis is accomplished by “comparing the advantages and disadvantages of the alternatives to the proposed class action through the lens of judicial economy, behaviour management, and access to justice” (at para. 320).

The Court further clarified that the common issues, taken as a whole, must predominate over the individual issues for a class action to be the preferable procedure. This is to ensure that the common issues taken together advance the objective of judicial economy and sufficiently advance the claims to achieve access to justice (i.e., put the claimants in better economic and practical position).

The Court concluded that the proposed class action at issue before the Court was the preferable procedure and superior because:

1. A class action automatically assembles the class members who may benefit by a common issues trial and will have an opportunity to opt into individual issues trials if they have economically viable claims.
2. A class action secures the class members with legal representation they might not otherwise obtain.
3. Class counsel may be unwilling to take on the risks of a joinder action and so a class action is the only viable route to access to justice for those with economically viable claims.
4. A class action achieves economies of scale for the whole group, and allows those with economically viable individual claims to pursue them later depending on the outcome of the common issues trial.
5. A class action is the most favourable procedure for the defendant (in this case, the Government of Ontario) because a class action ending in individual issues trials accommodates all of the claims of the class members (the patients) that wish to pursue them and if the class action settles, it will benefit the defendant (the Government of Ontario) by discharging it from liability for all of the class members (the patients), even those who would not have proceeded to individual issues trials (at para. 357).

Key Takeaways

- While each class action must be analyzed having regard to its own unique circumstances, *Banman* sets out the analysis to determine whether the preferable procedure criterion is satisfied in a proposed class action.
- If an alternative route to a class proceeding is more expeditious or efficient to address fault, or better fosters access to justice, there is an argument available to defendants that the class proceeding should not be certified. A superior alternative scheme may include an administrative or tribunal proceeding, statutory liability, government action, an individual court action, or joinder.
- To satisfy the predominance requirement, common issues *taken together* must predominate over the individual issues; if they do not, then a class action is not productive and is inferior to the alternatives of proceeding to individual issues trial.
- The rigorous analysis set out by the Court for this part of the certification analysis, along with the other criteria, reinforce the importance of strategic thinking and planning, together with counsel, in defending a certification motion.