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CLASS ACTIONS MAY NOW BE EASIER TO DEFEAT IN ONTARIO

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An Ontario Court has provided the first detailed interpretation and application of the revised preferability analysis under the amended Class Proceedings Act ("**CPA**"). More than three years since the amendments took effect on October 1, 2020, *Banman v Ontario*[1] has confirmed that the recalibrated preferable procedure analysis is a more rigorous challenge for plaintiffs to pass with a heightened threshold.

Banman is an important case for certification and could result in courts refusing to certify class proceedings going forward on the basis that a class action is not the preferable method to resolve a dispute. Although the updated preferability analysis found in section 5(1.1) is arguably just a codification of previously existing case law, the heavier burden on plaintiffs in class actions is now confirmed.

In the end, the class action in *Banman* was certified on a limited basis as against the Government of Ontario, nonetheless, the decision is instructive of the certification test going forward.

Facts

This is a case about institutional abuse. The proposed class action concerned the psychiatric treatment of patients detained in the forensic psychiatric unit of St. Thomas Psychiatric Hospital in Ontario, which was similar to a prior case argued by the same class counsel, *Barker v Barker*.[2]

While in the psychiatric unit, patients alleged that between 1976 and 1992 they underwent an experimental psychosocial treatment which was untested, reckless, negligent, ineffective, harmful, unethical, and cloaked from disclosure to the patients. The Plaintiffs submitted that a class proceeding was the preferable method to resolve the dispute, and succeeded in having the class proceeding certified. However, it was not certified as against the Attorney General of Ontario, and common issues related to damages and causation were not certified.

Preferability Analysis – The Court Makes Clear It Is a Strict, Rigorous Analysis

Though the Plaintiffs ultimately passed the preferability procedure criterion, Justice Perell provided guidance on what is expected of plaintiffs to pass the recalibrated preferability analysis under the CPA.

As always has been the case, to satisfy the preferable procedure criterion, the proceeding must (a) be a fair,

efficient, and manageable method of advancing the claim, and (b) be preferable to any other reasonably available means of resolving the complaint.[3] The test is to be measured through the lens of the three goals of class proceedings: judicial economy, behavior modification, and access to justice.[4] However, after the amendments to the CPA, the addition of section 5(1.1) adds two variables to the preferable procedure analysis. It states that a class proceeding is preferable only if, at a minimum, the class proceeding is both (a) superior to all alternative resolution procedures, and (b) has its common issues predominate over individual issues.

Justice Perell indicated 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.[5] Accordingly, the proposed class action "must" be superlative to the alternatives to satisfy the preferable procedure criterion, and it is now a "stricter" test.[6]

Further, the common issues "must" also predominate as a whole over individual issues.[7] The purpose is to ensure that the common issues, taken together, advance judicial economy and the claims sufficiently to achieve access to justice.[8] The decision of *Lewis v Uber Canada Inc. et al*,[9] also decided under the amended CPA, provides further guidance on this point. The Court in *Uber* held that common issues will not predominate when they will necessarily break down into individual issues, and that common issues should not only be common when cast at the most general level.[10] With that said, Justice Perell opined while characterizing these amendments that a class action will not be preferable if at the end of the day, claimants would face the same economic and practical hurdles they faced at the outset of the proposed class proceeding.[11]

While *Banman* is the first detailed interpretation of the recalibrated test under the amended CPA, in the manufacturing space, the decision of *Coles v FCA Canada Inc.*[12] may provide further insight regarding where a court will find that a class action is not preferable. In his decision in *Coles*, Justice Perell noted that the case was commenced prior to the amendments to the CPA, so the recalibrated preferability analysis did not apply. However, Justice Perell commented that even if *Coles* was governed by the amended CPA, he would reach the same conclusion, signaling aspects of the predominance and superiority requirements.[13] On the facts, Justice Perell ruled that an automotive recall program was superior to a class proceeding, as it more efficiently remedied the damages sustained by proposed class members. Justice Perell's comments foreshadow the analysis in *Uber*, where a statutory scheme and administrative process did not demand the "complex steps of a class proceeding" to address alleged damages, the Court held that proceeding through the scheme was the preferable procedure.[14]

With the *Banman* and *Uber* decisions together with the commentary in *Coles*, there is a growing line of authority supporting the defeat of certification motions where there have already been efficient and timely methods to redress alleged damages, or there is one that could be utilized by proposed class members – like a well-planned and structured recall to address a product defect or way to recoup any loss. These authorities

indicate that courts will thoroughly consider creative and administrative methods of redress that expeditiously address the concerns of consumers.

Court's Application of the Predominance and Superiority Requirements

a. Predominance

Justice Perell focused on access to justice as being the crucial lens through which to conduct the analysis. The Court looked at the broad monetary range of the patients' claims and noted how several class members had nominal claims which could not justify the costs of individual litigation. Despite a number of class members still having significant claims that would be worthy of pursuing even through individual litigation, Justice Perell held that the benefit to class members who had nominal claims was sufficient for the common issues to predominate over the individual ones, as these individuals would be given a route to access to justice they would otherwise not have.[15] This suggests that if the claims of all proposed class members are monetarily significant, such that the costs of individual litigation are not prohibitive, a different conclusion may be reached.

b. Superiority

After finding that the common issues did predominate, the Court looked to whether the class action was superior over alternatives.

The Plaintiffs argued that alternatives such as joinder would be prohibitively expensive compared to a class proceeding. It would also force vulnerable, marginalized, and now elderly class members to proceed individually and go through lengthy protracted discoveries, all for the prospect of damages to be relatively low. Thus, it was argued that alternatives would not be economically feasible as compared to a class proceeding.

In support of the argument that the class action was preferable, class counsel relied on their experience in *Barker* where the court refused to certify a similar institutional abuse class action. Class counsel detailed the lengthy delays, costs, inefficiencies, and procedural and accessibility related hurdles it genuinely faced to prosecute the joinder in *Barker*. Despite noting several counterarguments to the *Barker* circumstances, the Court saw merit in the *Barker* argument, and accepted it. Further, the Court looked at the efficiencies of a class action from the perspective of the Defendants, stating the Defendants would maximally economize their defence in a class proceeding. This also led to Justice Perell concluding that a class proceeding was preferable.[16]

Conclusion and Takeaways

The decision in *Banman* is the first detailed interpretation and application of the amended CPA's revised

preferability analysis, which now contains a predominance and superiority requirement. It confirms that the preferability analysis is stricter, and the barrier to pass the test is now heightened for plaintiffs.

Along with other changes to the CPA, this decision may further cause plaintiffs to look to other jurisdictions in which to commence their class action – a trend we have already seen in recent years.

A trend appears to be emerging in Ontario which indicates that the preferable procedure criterion will be a more difficult hurdle for plaintiffs to satisfy if there are reasonable alternatives to a class proceeding. If an alternative is more expeditious to address fault or better fosters access to justice (considering how class actions typically take years to reach a conclusion), there is an argument to be made that the impugned 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, joinder, or as in Coles, a recall.[17] This list is not closed.

[1] 2023 ONSC 6187 [*Banman*].
[2] 2020 ONSC 3746, 2021 ONSC 158 and 2022 ONCA 567 [*Barker*].
[3] *Banman* at para 314-315.
[4] *Banman* at paras 314-315.
[5] *Banman* at para 317.
[6] *Banman* at paras 317-318.
[7] *Banman* at para 322.
[8] *Banman* at para 321.
[9] 2023 ONSC 6190 [*Uber*].
[10] *Uber* at para 92.
[11] *Banman* at para 31.
[12] 2022 ONSC 5575 [*Coles*].
[13] *Coles* at paras 155-156, 163. See paras 157-170.
[14] *Uber* at para 91.
[15] *Banman* at para 337-341.
[16] *Banman* at paras 345-356.
[17] See *Broutzas v Rouge Valley Health System*, 2018 ONSC 6315; *Maginnis and Magnaye v FCA Canada Inc. et al*, 2020 ONSC 5462; *Singer v Schering-Plough Canada Inc.*, 2010 ONSC 42; *Hoy v Expedia Group Inc.*, 2022 ONSC 6650; see generally *Curtis v Medcan Health Management Inc.*, 2021 ONSC 4584.

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A Cautionary Note

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