

# Class actions to face more scrutiny in Ontario before they can move ahead



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Class action lawsuits in Ontario, like the ones filed against long-term care homes, will have to meet a higher standard before they're certified — the first step before they can be litigated.

A recent decision, *Banman v. Ontario*, provided lawyers and judges with a reference point for the new standard, which was enacted by the provincial government in 2020.

The decision, which certified the class action, was a comfort for a lawyer representing the plaintiffs, who said it confirms that the changes won't prevent cases with merit from moving forward.

Before class action suits can proceed, a judge has to certify that they meet certain criteria.

One of those is called the "preferable procedure" test, which means a class action must be the best way to resolve the dispute. In 2020, the Ford government added that the issues in the class action that apply to everyone must also "predominate," or be stronger than, issues that only affect some members.

The Banman case was a good test for that change. The suit dealt with patients of the former St. Thomas Psychiatric Hospital, who alleged they were subject to various cruel and unusual treatments between 1976 and 1992, including tying patients to mattresses and other "torturous punishment."

Provincial government lawyers argued that individual issues predominated and a class action wasn't necessary. Superior Court Justice Paul Perell disagreed, finding that though each individual's experience was different, a class action would be the only realistic way many of them could access justice.

Golnaz Nayerahmadi of Rochon Genova, who represented the Banman plaintiffs, said the ruling confirms that predominance must be "assessed qualitatively rather than quantitatively," she said. "It's not a tallying exercise of how many individual issues exist."

Some plaintiff lawyers were concerned that institutional abuse cases, like residential school survivors, could be more difficult to certify under the new regulations, Nayerahmadi said. They're certainly stricter, and might cause lawyers to take a harder look at their cases before proposing them, she said.

"But I think the decision does serve as a comforting reminder that the class action regime in Ontario will likely continue to function in light of the objectives and the underlying purpose for which it was set up" — namely, access to justice, she said.

Nayerahmadi also represents plaintiffs in class action motions against long-term care home operators for their handling of the COVID-19 pandemic. She and her colleagues will argue for those cases to be certified starting Jan. 15.

Observers will keep a close eye on those cases to see how they're affected by the Ford government's [legislation to shield organizations](#) against COVID-related lawsuits.

Lindsay Lorimer, a class action defence lawyer with McMillan LLP, agreed that plaintiff lawyers will likely have to put in some extra work to make sure their cases meet the higher standards. But the opportunity for people to band together to access justice remains.

"The only issue is that there's more scrutiny as it relates to whether the action should move forward," she said.

Along with the certification changes, the Ford government has introduced other class action amendments to address court backlogs. Courts must now dismiss cases that haven't meaningfully moved forward after a year.

Sometimes, "entrepreneurial" firms would start a class action and leave it there to try to get as many plaintiffs as possible, Lorimer said.

"And they would just sort of be parked there for a very long time, and there was no mechanism by which the court could address the delay," she said. "So the legislature fixed that."

Nayerahmadi agreed that the rule against delaying cases was a good change.

These types of class actions "concern the most important rights that people have, particularly when they involve the government," she said. "And it's important to continue to have a regime set up that can achieve accountability and access to justice."