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Is the Bar for Class Action Certification Now Higher in Ontario? Two Judges Say â€œYes, but Probably Not Muchâ€•

In 2020, following a series of recommendations released by the Law Commission of Ontario, the Ontario legislature passed substantial amendments to the *Class Proceedings Act*. Many of those amendments were drawn straight from the Law Commission's report and were generally supported by most stakeholders.

However, the amendments contained one new provision that was not recommended by the Law Commission and which drew significant controversy. A new subsection 5(1.1) of the Act imposed a new hurdle as part of the preferable procedure requirement for certification of a case as a class action. That subsection provided as follows:

> 5(1.1) In the case of a motion under section 2, a class proceeding is the preferable procedure for the resolution of common issues under clause (1) (d) only if, at a minimum,
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> (a) 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
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> (b) the questions of fact or law common to the class members predominate over any questions affecting only individual class members.

Part of the controversy pertaining to those amendments pertained to the magnitude of the change which they would usher in: namely, whether those amendments would have a material impact on the likelihood of cases being certified. Certainly, at least some plaintiffs' counsel were of the view that they had a significant impact: anecdotally, many defence counsel have observed that plaintiff's counsel have

commenced a greater number of class actions in British Columbia relative to Ontario in recent years, likely as a response to legislative amendments in Ontario. Despite those concerns, however, it remained unclear as to what impact subsection 5(1.1) would have.

It has taken some time for Ontario courts to give an answer to that question. Given the transitional provisions applicable to the amendments, subsection 5(1.1) only applied to cases filed from late 2020 onward. That transitional provision, coupled with the shift in cases to British Columbia – and likely a disproportionate shift in cases that would be most impacted by subsection 5(1.1) – has meant that it has taken several years for Ontario courts to render a decision on contested certification motions impacted by these amendments.

However, by late 2023, Ontario courts have started to weigh in. A pair of decisions released in the last few months appears to suggest that while subsection 5(1.1) is intended to change the standard for certification, the practical impact of those changes may be relatively modest. Indeed, a reasonable takeaway from those early cases interpreting subsection 5(1.1) is that rather than representing a fundamental change to the certification standard, the new provisions of the Act are more of a legislative reminder directing Courts to apply the existing preferrable procedure requirement in a robust manner.

The first of the two cases is a decision of Justice Perell in *Banman v Ontario.* This was a proposed class action brought against the Government of Ontario relating to the psychiatric treatment of patients who were detained in the forensic psychiatric unit of the St. Thomas Physchiatric Hospital. The claim asserted that patients were improperly treated, including by inappropriate confinements, restraints, humiliation at group therapy, and cruel punishments. The plaintiffs advanced various claims under common law and the *Charter*.

In a lengthy certification decision, Justice Perell certified the action as a class proceeding. With respect to the new preferable procedure criteria, Justice Perell suggested that the amendments represented a raising of the bar for certification rather than introducing fundamentally new requirements:

> Although it is arguable that its 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 that developed in the original statute, the emphasis placed by “the only if, at a minimum language” and the debates in the Legislature 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. The factors of predominance of common issues over individual issues and superiority over the alternatives are signals that the proposed class action must be superlative to the alternatives in order to satisfy the preferable procedure criterion.

He then went on to note that "The addition of s. 5(1.1) to the *Class Proceedings Act, 1992* imposes a stricter test for preferability than the test that governed since 1994 when the Act came into force. The only ponderable is how much stricter is the new test associated with the preferable procedure criterion."

Justice Perell then outlined a framework for considering the preferable procedure requirement in light of subsection 5(1.1):

> …the recent amendments to the *Class Proceedings Act, 1991* require that the preferable procedure analysis be more rigorous and involve determining: (a) whether the design of the class action is manageable as a class action; (b) whether there are reasonable alternatives; (c) whether the common issues predominate over the individual issues; and (d) whether the proposed class action is superior (better) to the alternatives.

Justice Perell then concluded his discussion of subsection 5(1.1) that this new test contained a "subtle but significant element":

> The subtle point is that it is the common issues - taken together - that must predominate over the individual issues. Each discrete common issue has already satisfied the common issues criterion of advancing the plaintiff's claim. The football game metaphor used in the case law is that the common issue must just move the yardsticks down the playing field. That metaphor is not apt for the preferable procedure analysis and should not conflate the strict preferable procedure analysis where the common issues taken as a whole must predominate. The factor that the common issues taken as a whole must predominate is a test of anticipated productivity and a type of inferiority test. If the common issues do not predominate then a class action is not productive and is inferior (not superior) to the alternative of proceeding immediately to individual issues trials.

On its face, Justice Perell's analysis indicates that the new subsection 5(1.1) requires a shift in emphasis, rather than a fundamental shift in analytical approach. It suggests a need for a more rigorous application of the preferable procedure requirement, without a sea change in the approach.

Yet beyond the analytical framework that Justice Perell articulates, a key indicator that the test has not fundamentally changed is the outcome of that case. Institutional negligence and abuse cases were among the type of cases that subsection 5(1.1) could have impacted, given the almost invariable need for significant assessments of individual class members' circumstances in such cases. The fact that Justice Perell ultimately decided to certify *Banman* as a class proceeding shows that while subsection 5(1.1) may have raised the bar, it has not created an impossibly high standard for certification.

The second recent decision addressing subsection 5(1.1) is Justice Akbarali's decision in *Grozelle v Corby Spirit and Wine Limited.* In that case, the plaintiffs alleged that improper storage practices at a whisky warehouse owned by the defendant had led to mold damage to nearby properties. Justice Akbarali dismissed the plaintiffs' certification motion on numerous grounds.

With respect to the preferable procedure requirement, Justice Akbarali referred to and adopted Justice Perell's approach in *Banman*:

> [80] The import of these amendments was considered recently by Perell J. in *Banman v. Ontario*, 2023 ONSC 6187, at paras. 317-322. He concluded that the addition of s. 5(1.1) to the CPA imposes a stricter test for preferability than the test that governed since 1994 when the CPA came into force. The preferable procedure analysis is now more rigorous and involve determining, through the lens of judicial economy, behaviour modification, and access to justice:
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> a. whether the design of the class action is manageable as a class action;
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> b. whether there are reasonable alternatives;
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> c. whether the common issues predominate over the individual issues;
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> d. whether the proposed class action is superior (better) to the alternatives.
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> [81] In his reasons, at para. 321, Perell J. noted that the fact that a class action may involve both a common

> issues phase and an individual issues phase is not an obstacle to certification,
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> > but the court must consider the contributions of both the common issues phase and the individual issues phase in the preferable procedure analysis. The purpose of determining whether the common issues predominate over the individual issues is to ensure that the common issues – taken together – advance the objective of judicial economy and sufficiently advance the claims of the class members to achieve access to justice. A class action will not be preferable if, at the end of the day, claimants remain faced with the same economic and practical hurdles that they faced at the outset of the proposed class action.
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> [82] I agree with Perell J.'s view of the impact of the recent amendments.

On the facts of this particular case, Justice Akbarali ultimately held that the common issues would not predominate over the individual issues. Justice Akbarali noted as follows:

> [85] Given the plethora of individual issues that arise in this case, I find that the common issues, to the extent any could be fashioned, would not predominate over the individual issues. The individual issues would, first, be more significant in quantity.
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> [86] More importantly, the individual issues would be equally or more significant in terms of the nature of proof required to deal with them. In this case, the evidence in the record indicates that there has been variance in ethanol emissions in the geographic area near the warehouses on the occasions it has been measured. It also indicates that whisky mold growth can be contributed to by factors including humidity, of particular potential relevance here due to the proximity of the properties near the warehouses to two bodies of water. The individual issues would require individual plaintiffs or class members to each adduce expert evidence specific to their particular property, along with fact evidence supporting their damages, and potentially all the elements of a claim in negligent misrepresentation.

While Justice Akbarali adopted Justice Perell's approach to subsection 5(1.1) and declined to certify the action as a class proceeding, the outcome again does not suggest a dramatic change in the approach. Importantly, Justice Akbarali declined

to certify the case on numerous grounds, and the failure to meet the new preferable procedure requirement was one of many grounds for declining certification. Moreover, even as it pertains to the preferable procedure requirement, the reasoning that Justice Akbarali employed was very much the same type of reasoning that courts had employed from time to time before the amendments to decline certification.

Ultimately, both *Banman* and *Grozelle* provide helpful guidance on the proper interpretation of additional preferable procedure requirements in subsection 5(1.1). And although it remains early days in the interpretation of this provision, perhaps the best way to view the amendments at this point in time is to consider them as legislative reminders of the need for a robust preferrable procedure requirement. The point of the preferrable procedural requirement has always been to analyze whether, despite the presence of common issues, a class action is the appropriate vehicle for the case to move forward. Even before the amendments, Courts regularly dismissed certification motions on the basis that the individual issues would overwhelm whatever limited common issues there were. The decisions in *Banman* and *Grozelle* appear to be a reminder that Courts should continue to apply these principles and not simply wave through the preferrable procedure requirement without any analysis. If that is how the provisions continue to be interpreted, the amendments will provide a welcome clarification to the law that will require Courts to exercise a robust gatekeeping function, without dramatically increasing the threshold that plaintiffs face in seeking to get a class action certified.