ONSC provides guidance on the analysis of superiority and predominance provisions in the Class Proceedings Act

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In the recent class action certification decision of *Banman v. Ontario*, 2023 ONSC 6187, the Ontario Superior Court of Justice provided guidance for the first time on the analysis required for the superiority and predominance provisions under section 5(1.1) of the *Class Proceedings Act, 1992*.

The issue of superiority and predominance arose in the context of a claim advanced on behalf of 429 former patients of a psychiatric hospital that was likely to require a significant number of individual issues trials.

Stricter preferable procedure test

In 2020, section 5(1.1) was added to the *Class Proceedings Act* to impose a stricter test for the preferable procedure criterion under the certification requirement. It provides that a class action is the preferable procedure for the resolution of common issues only if, at a minimum, (1) it is superior to all reasonably available means of determining the entitlement of the class members' claims; and (2) the questions or fact or law common to the class members predominate over any questions affecting only individual class members.

Superiority and predominance analysis

The Court in *Banman* stated that the superiority and predominance provisions require more rigorous analysis to determine:

- whether the design of the class action is manageable as a class action;
- whether there are reasonable alternatives (*i.e.*, individual actions, joinder, consolidation, text cases, quasi-judicial or administrative proceeding, or remedial scheme or program outside of a proceeding);
- whether the common issues predominate over the individual issues; and
- whether the proposed class action is superior to the alternatives.

This analysis is performed 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.

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).

Decision

This proposed systemic negligence and institutional abuse or malfeasance class action arises from the psychiatric treatment of 429 patients who were detained in the forensic psychiatric unit of the St. Thomas Psychiatric Hospital between 1976 and 1992. Despite finding that causation and damages questions could not satisfy the common issues criterion, and will require individual issues trials, certification was granted.

In applying the superiority and predominance analysis as outlined above, the Court concluded that the proposed class action satisfies the preferable procedure criterion and noted the following:

- The design of the proposed class action – a systemic institutional abuse or malfeasance class action with a common issues trial followed by individual issues trial to determine causation and damages – was manageable.
- There were alternatives to the proposed class action (i.e., individual issues trial, a single joinder action, and several joinder actions).
- While not all of the 429 patients would benefit from a common issues trial, there were many that would benefit if the plaintiffs were successful at the common issues trial. For these patients a class proceeding was the only viable means to achieve access to justice. As such, the common issues predominated over the individual issues.
- A class action was preferable procedure and superior because:
    - it automatically assembled the class members who may benefit by a common issues trial;
    - it secured them with legal representation that they may not otherwise obtain;
    - it may be the only viable route to access to justice for those with economically viable claims;
    - it achieved economies of scale for the class members and allowed those with economically viable claims to pursue them later depending on the outcome of the common issues trial; and
    - it was the most favourable procedure for the defendant as it would deal with all of the claims of the class members.

Comments

This is the first decision since the addition of section 5(1.1) of the *Class Proceedings Act* to provide interpretation of the stricter “superiority and predominance” test for the preferable procedure criterion for certification. 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.

For more information on *Banman* and the *Class Proceedings Act,* please reach out to one of the key contacts listed below.

By

Sunny Kim, Glenn Zakaib, John Hunter

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BLG Offices

Calgary
Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3
T 403.232.9500
F 403.266.1395

Ottawa
World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9
T 613.237.5160
F 613.230.8842

Vancouver
1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2
T 604.687.5744
F 604.687.1415

Montréal
1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4
T 514.954.2555
F 514.879.9015

Toronto
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3
T 416.367.6000
F 416.367.6749

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