# Re-Starting Limitation Periods After Defeating Class Certification

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On October 2, 2019, the Ontario Superior Court of Justice released its latest decision in the litigation surrounding the Motherisk Drug Testing Laboratory (MDTL). This decision answers questions relating to restarting suspended limitation periods and continuing individual or joinder actions after class certification is defeated under the *Class Proceedings Act, 1992* (the Act).

As previously reported, the underlying case was a proposed class action about MDTL's hair tests, used to test for presence of drugs and/or alcohol in an individual's hair. The hair test results were used for multiple purposes including in clinical settings, child protection case management and proceedings, and criminal proceedings. In her proposed class action, plaintiff R.G. alleged the defendants (the hospital, as well as MDTL's director and manager) were negligent in operating the lab, producing unreliable test results causing class members harm. The alleged harm included loss of custody, impaired ability to participate in family affairs, and pain and suffering.

Justice Perell refused to certify R.G.'s action as a class proceeding, a decision the Divisional Court affirmed in November 2018. The Court of Appeal for Ontario denied leave to appeal in March 2019. The plaintiff did not seek leave to appeal to the Supreme Court of Canada.

## Limitation Periods Under Section 28 of the Act

Justice Perell's recent decision focuses on when limitation periods resume running after a class certification motion is dismissed. This issue engages ss. 28(1) of the Act. As interpreted over the years by Ontario courts, s. 28 provides that any limitation period associated with claims pleaded in a proposed class action is suspended in favour of putative class members upon commencement of the proposed class proceeding. Subsection 28(1) enumerates six circumstances in which limitation periods resume running against class members. Extraordinarily, denial of class certification is not one of the enumerated circumstances.

In a precedent-setting ruling, Justice Perell found that limitation periods remain suspended under the *Act* despite the denial of class certification. According to Perell J., one of the six enumerated circumstances of ss. 28(1) must occur before limitations

automatically start running again. Since dismissal of certification is not expressly listed, limitations remained suspended.

Applying these principles to the case before him, Justice Perell found that “limitation periods remain suspended until the defendant moves to have the class action dismissed without an adjudication on the merits”. The decision specifies that a defendant’s motion to dismiss a class action could be made either by cross-motion on the original certification motion or after the certification motion is dismissed.

As noted by Justice Perell, this ruling will be news to the class action bar. The generally held view has been that limitations resume running upon class certification being defeated, subject to exhaustion of appeal rights. Placing an onus on defendants to restart the limitations clock by way of a cross-motion is new Ontario law – subject to any potential appeal from this novel decision. The

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