

There is no foundation in the Class Proceedings Act, 1992 for conditional certifications

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In *Knisley v Canada (Attorney General)*, 2025 ONCA 185, the Court of Appeal was asked to consider whether a motions judge hearing a certification motion can conditionally certify a class proceeding where neither the parties nor the court at the hearing can provide a workable class definition capable of satisfying s. 5(1)(b) of the *Class Proceedings Act, 1992* (CPA).

The *Knisley* class action was brought on behalf of veterans who suffered damages arising from the alleged failures of Canada, through Veterans Affairs Canada, to properly administer their disability program and make timely payment of the disability pension and pain and suffering compensation. At the certification motion, the motions judge conditionally certified the action as a class proceeding, subject to the class definition being amended "to the satisfaction of the parties and the court". No direction was given by the motions judge as to how the class definition could be amended to achieve that "satisfaction" nor did the motions judge address what might happen if the parties, or the court, could not reach that "satisfaction".

The Attorney General of Canada appealed to the Court of Appeal which allowed the appeal and the matter was remitted back to the motions judge for a further hearing.¹

In its decision, the Court of Appeal clarified Justice McLachlin's comment in *Hollick v. Toronto (City)*, 2001 SCC 68, that: "*Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended.*" The Court clarified that *Hollick* did not stand for the proposition that a class action could be certified without an identifiable class being established. Rather, the Supreme Court was offering the view that in circumstances where the **proposed** class definition was not acceptable, the certification judge could either dismiss the motion or effectively amend the class definition to make it acceptable. The representative plaintiff could then accept the definition as amended or abandon the class proceeding. Neither option supported conditional certification. Allowing certification on condition that the definition of the class be amended still required the Court to identify an acceptable class definition.

The Court of Appeal articulated three primary reasons for its interpretation of *Hollick*:

1. There was nothing in the CPA that contemplated conditional certification. The language in section 5(1) established five criteria that must be met, and then the court *shall* certify the class proceeding. If any of those criteria were not required, the legislature would have made that clear.
2. The class definition has a direct impact on the analysis of other criteria for certification, including the proposed common issues, preferable procedure and the appropriateness of the representative plaintiff.
3. Conditional certification creates certain procedural issues. For example, what was the consequence if the parties couldn't agree on a class definition? Does the certification lapse or does the motion judge have to decertify the proceeding under section 10 of the CPA? Further, what was the appeal route from a conditional certification, since it presented like an interlocutory order would it only be appealed to the Divisional Court?

The Court of Appeal emphasized that the determination of an identifiable class was a crucial aspect of the certification process, establishing whose rights were going to be determined and, consequently, who had the right to opt out.

Key takeaways

There is no discretion on the part of a motion judge to conditionally certify a class action. If neither the plaintiff's proposed class definition nor the Court's consideration of another class definition can comply with the CPA, then the motion must be dismissed. The decision does not displace s. 5(4) of the CPA which allows the court to adjourn the certification motion to permit the parties to amend materials, pleadings or provide further evidence.

The decision emphasizes that close attention should be paid to unworkable class definitions proposed by representative plaintiffs in defending class proceedings.

Footnote

¹ Under the amendments to the CPA, for actions commenced after Oct. 1, 2020, appeals are now made directly to the Court of Appeal, see section 30.

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