

# Dufault v. Toronto Dominion Bank first decision to consider recent CPA amendments

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## Background

On Oct. 1, 2020, amendments to the Class Proceedings Act, 1992 (CPA) came into force. As discussed [in our article from July 2020](#), these amendments include changes to the sequencing of motions prior to certification. Section 4.1 of the CPA states:

If, before the hearing of the motion for certification, a motion is made under the rules of court that may dispose of the proceeding in whole or in part, or narrow the issues to be determined or the evidence to be adduced in the proceeding, that motion shall be heard and disposed of before the motion for certification, unless the court orders that the two motions be heard together.

Dufault v. Toronto Dominion Bank (Dufault) is the first decision to consider section 4.1 of the CPA.

## Decision

In this decision, the court granted the defendant bank's request to have its motion for summary judgment heard prior to the plaintiff's motion for certification. The court held that section 4.1 "preserves a sensible measure of judicial discretion and gives the judge the last word", while also "shifts the presumptions about who has to show what." In the court's view, this means defendants now have a "presumptive right to have certain motions heard and decided before the plaintiff's motion for certification". However, plaintiffs can "displace this presumption by persuading the court that there is nonetheless an overarching and good reason for the two motions to be heard together".

The court in Dufault interpreted section 4.1 as a "strong legislative signal that early motions by the defendants that can indeed narrow or dispose of a case before certification should be presumptively heard before certification".

In Dufault, the defendant bank sought to have a motion for summary judgment heard prior to certification. The plaintiff's proposed class action alleged that the defendant bank unlawfully earned millions of dollars by charging multiple Non-Sufficient Funds

fees on a single rejected payment or bounced cheque. The defendant bank argued the claims of the proposed class have no merit and that the parties and court will save significant time and resources by avoiding unnecessary litigation if the motion for summary judgment is heard prior to certification.

The court identified the following two “good reasons” for denying a defendant’s request for a pre-certification summary judgment motion under section 4.1:

- (i) the defendant’s motion would not raise any genuinely arguable issues that can narrow or dispose of all or part of the litigation and appears to be a delay tactic; or
- (ii) the defendant’s motion would raise genuinely arguable issues that can narrow or dispose of all or part of the litigation but the existing or proposed dates for the certification motion and the summary judgment motion are sufficiently close that it makes sense to hear the two motions together.

The court was satisfied that the defendant’s motion for summary judgment raised arguable issues that narrow or dispose of all or part of the litigation and was not merely a delay tactic. In addition, the certification record had not yet been filed and had the certification motion had not been scheduled.

## Key takeaways

Given the court’s decision in *Dufault*, it is likely section 4.1 will encourage defendants in proposed class proceedings to bring more pre-certification motions that can narrow or dispose of a class proceeding pending against them. Defendants should consider whether the pre-certification motion, though only applicable to the named representative plaintiff, would serve to dispose of the basis for bringing further claims. If the motion disposes of an issue, which otherwise would give rise to a class action, it would potentially be a good reason to bring the motion prior to certification. However, if the issue would only bind the representative plaintiff, it may be more beneficial to bring a dispositive motion post-certification and obtain an order, binding the entire class. One concern for defendants arising from *Dufault* is that plaintiffs may rush to file the certification record or schedule certification motions prematurely in order to shift the judicial balancing required under section 4.1 in their favour. For more information on the case decision and the amendments to the CPA, contact your BLG lawyer or any of the key contacts listed below.

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