

First Things First: Ontario Courts Acknowledge the Usefulness of Preliminary Motions Under the Province's New Class Proceedings Regime

Jessica L. Lewis, Sukhreet Nagra

November 29, 2022

In *Davis v. Desjardins Financial Services Firm Inc.*,¹ the Ontario Superior Court of Justice reaffirmed the Court's departure from the prior view that there is no presumptive right for a class proceeding defendant to bring a pre-certification motion. In *Davis*, Justice Shaw interpreted s.4.1 of Ontario's amended *Class Proceedings Act*, 1992 (CPA) and held that (a) there is a presumptive right to hear and dispose of certain preliminary motions prior to the certification motion, and (b) that this provision is subject to the Court's discretion as to whether there is an overarching and good reason for preliminary and certification motions to be heard together. Further, the Court held that a pre-certification motion could be made out with only a Notice of Motion within the meaning of s.4.1 of the CPA by making considerations into the context and timing of the motion.

Background

The main issue in *Davis* was the sequencing of motions of the defendant's proposed summary judgement motion and the plaintiff's filed certification motion. Section 4.1 of the amended CPA (which came into effect on October 1, 2020) governs the sequencing of motions and states that a preliminary motion shall be heard and disposed of prior to the motion for certification unless the court orders they be heard together. More specifically, the hearing of preliminary motions is encouraged prior to a motion of certification, "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." Prior to this amendment, the sequence of motions was governed by s.12 of the CPA, which gave the Court discretion to ensure a fair and expeditious determination of a class proceeding with the help of factors set out in the *Canon* test.² This often meant that ostensibly preliminary motions were heard at the same time as the certification motion and thus defendants who brought motions to dispose of the claim were compelled to respond to certification due to their preliminary concerns not being resolved in time.

The Decision

The plaintiff argued that since the defendant had not filed the summary judgment motion, the sequence

Cassels

should be governed by s.12 of the CPA, not s.4.1. The plaintiff further asserted that should s.4.1 apply, the motions should be heard together. The defendants submitted that although their summary judgment hadn't been filed, the plaintiff had been made aware of the intention to bring the motion, and, consequently, s.4.1 applied.

The Court reviewed earlier precedent regarding the CPA amendments in *Dufault v. Toronto Dominion Bank*.³ Justice Shaw follow *Dufault* and applied s.4.1 of the CPA. The only assessment required was whether the summary judgment motion could dispose of or narrow the issues. Consequently, the Court held that the summary judgement motion is to be heard first, as, regardless of the outcome of that motion, the judgement would assist in either narrowing the issues, providing some guidance, or promoting settlement.

Moreover, the Court recognized the narrow preservation of judicial discretion in s.4.1 of the CPA by stating that had the plaintiff's certification motion date been set, it would have been good reason to exercise the Court's discretion that the motions proceed at the same time. However, since the plaintiff had not set a date and was aware the defendant would be bringing a summary judgment motion, discretion was not appropriate in the circumstances.

Looking Forward

Davis highlights the amendments to s.4.1 of the CPA were created with the legislative intent to address unacceptable delays and to ensure that meritorious class actions move expeditiously through the judicial system. Governing motion sequence through the use of s.4.1 of the CPA incentivizes plaintiffs to be prompt in their filings and records as these actions could be considered a good reason for the Court to use their discretion and hear the motions together. Similarly, if the defendants are expeditious and file a preliminary motion prior to a plaintiff setting a date for certification, their motion will be prioritized. This pressure on the parties to be timely allows for weak or problematic claims to be dealt with earlier in the process.

There is a potential issue that emerges from the reasoning in *Davis*, namely that a summary judgement only binds the proposed class representative and not the proposed class, as stated in *Davis*. This occurs because the proposed class are considered non-parties to the proceeding until certification. Thus, the proposed class could bring back an identical form with a different proposed class representative before another judge. Practically speaking, however, this would be unlikely in the context of a similar fact scenario given a reasoned finding on the merits of the case and the significant cost of re-litigating the facts underlying a complex class proceeding.

¹ 2022 ONSC 2016 (*Davis*).

² See *Canon v. Funds for Canadian Foundation*, 2010 ONSC 146.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.