

Litigation plans matter: Players' appeal denied in Ontario junior hockey league class action

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In [Carcillo v. Ontario Major Junior Hockey League](#), the Court of Appeal for Ontario upheld the motion judge's decision refusing certification of a proposed class action alleging systemic abuse of young players in major junior hockey leagues. The Court of Appeal held that the proposed class action was of "an unprecedented scale and complexity" and that the lack of a workable litigation plan meant that the motion judge was justified in finding that the action was unmanageable.

Key takeaways

- A litigation plan acts as a vital "check" on preferability, and an unworkable plan that cannot be remedied will render the action unmanageable, particularly in large-scale and complex proposed class actions.
- A motion judge's decision on whether a class action is manageable is entitled to "special deference" and appellate courts cannot interfere merely because they would have weighed factors differently.
- Plaintiffs cannot recast a case on appeal, as this deprives the appellate court of the motion judge's expertise and factual findings, and is unfair to defendants who might have responded differently on the certification motion.

Background

Three former hockey players initiated a proposed class action, alleging that over a period of 50 years, young players in major junior hockey leagues endured systemic abuse, including physical and sexual assaults, harassment, and hazing. They sought leave to commence a class proceeding against four major junior hockey leagues and the 60 teams that they represent, on behalf of thousands of players.

The motion judge acknowledged the importance of ensuring access to justice for victims, but ultimately refused to certify the proposed class action, finding that it was **unmanageable**. The motion judge also noted that plaintiffs' counsel had failed to provide a workable litigation plan, meaning that the action was not a viable means of achieving access to justice.

The plaintiffs appealed the motion judge's decision, claiming that he erred in finding that the proposed class action (1) failed to disclose a cause of action, (2) did not raise common issues that could be decided on a class-wide basis, and (3) was not the preferable procedure for resolving the claims.

Decision of the Court of Appeal

The Court of Appeal dismissed the appeal, finding that the proposed class action was “of an unprecedented scale and complexity, far greater than that of other systemic negligence class actions previously recognized.”

The Court of Appeal recognized that a motion judge's determination of whether a class action is manageable is a discretionary judgment that attracts “special deference” on appeal. Since plaintiffs' counsel had failed to present a litigation plan that could meet the challenges raised by the scale and complexity of the proposed class action, the Court of Appeal held that the motion judge was justified in finding the action unmanageable. This conclusion was sufficient to dispose of the appeal, since preferability is a key element of the test for certification.

To address the concerns of manageability, the appellants proposed dropping the majority of the defendants, leaving only three leagues as defendants. The Court of Appeal held that the appellants could not fundamentally recast their case on appeal, since they did not suggest a narrower class action as an alternative at the certification stage. The Court of Appeal emphasized that fundamental changes on appeal are **impermissible because they deprive appellate courts of the motion judge's expertise and factual findings**, and prejudice defendants who may have adopted different litigation strategies had the claim been framed differently.

The Court of Appeal took issue with some of the motion judge's reasoning, including holding that he applied an unduly strict standard when assessing the cause of action and common issues criteria, and found that the appellants had a viable cause of action for systemic negligence. The Court of Appeal also noted that the motion judge had failed to consider how class actions can help overcome barriers to seeking justice, but ultimately held that this factor could not overcome the manageability concerns in this case.

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