

## Pre-Certification Discovery in Class Action Proceedings - *Kaplan v. Casino Rama Services Inc.*

Cheyenne Arnold-Cunningham, J.D. Candidate,  
University of Windsor<sup>1</sup>

On June 6, 2018, the Ontario Superior Court of Justice released its decision in *Kaplan v. Casino Rama Services Inc.*, 2018 ONSC 3545, relating to pre-certification documentary production for the purpose of class action certification.

In *Kaplan*, the plaintiffs had brought a class action against the owners and operators of Casino Rama following a cyberattack on the Casino Rama computer system. Confidential information relating to vendors, employees, and customers was stolen and subsequently uploaded onto the internet. Following the attacks, Casino Rama notified approximately 200,000 individuals of the data breach.

The defendants filed an affidavit making reference to a third-party cybersecurity company retained by the defendants to conduct an investigation. The affiant indicated that the investigation located parts of the computer system that could not have been accessed by the hacker. As such, many of the individuals notified of the attack would not have been affected. The plaintiffs brought a motion for an order requiring the defendants to produce the investigative reports and documents from the cybersecurity company.

Glustein J. granted the motion in part. The production was limited to only those parts of the documents relating to the certification motion—namely, the information relating to the size and scope of the prospective class.<sup>2</sup>

### *The Road to Kaplan*

Section 12 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (“CPA”) confers wide-ranging power on the court to control the process of a class proceeding. Under this section, judges may order pre-certification production of documents where the information is relevant to one of the issues on the motion of certification listed at s. 5 of the CPA.

In *Dine v. Biomet Inc.*, 2015 ONSC 1911, Belobaba J. noted the uneven jurisprudence surrounding motions for pre-certification documentary production and set out to formulate a clear rule: a court may order documentary discovery in a potential class action, though the order may be restricted to what is necessary to inform the certification process.<sup>3</sup> The onus

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<sup>1</sup> At the time she wrote this article, the author was a summer student at the Ontario Ministry of the Attorney General, Crown Law Office - Civil.

<sup>2</sup> *Kaplan v. Casino Rama Services Inc.*, 2018 ONSC 3545 at para 49 [“*Kaplan*”].

<sup>3</sup> *Dine v. Biomet Inc.*, 2015 ONSC 1911 at para. 8 [“*Dine*”].

is placed on the party seeking production to explain relevancy.<sup>4</sup>

Building on *Dine*, Perell J. in *Batten v. Boehringer Ingelheim (Canada) Inc.*, 2015 ONSC 7821, stressed that to require, in every case, the party seeking production to explain why documents are required could result in the “consequence of encouraging defendants to deliver expert evidence on the motion for production of additional medical records”.<sup>5</sup> This would exacerbate the problem of certification motions diverging into issues related to the merits of the action.<sup>6</sup> Perell J. noted that, in some actions, it may be quite clear what level of disclosure is required based solely upon the pleadings and affidavit evidence.<sup>7</sup> If the relevance is obvious, then pre-certification production ought to be ordered without placing excessive onus requirements upon the parties.<sup>8</sup>

The reasoning from *Batten* was applied in *J.K. v. Ontario*, 2016 ONSC 8040, where the Defendant sought an order for the pre-certification production of youth justice records. The court found that, in light of the pleadings, it was “patently obvious that the requested [documents were] relevant to the certification criterion, most particularly, to the common issues and preferable procedure criteria”.<sup>9</sup> As such, the plaintiff was ordered to produce the requested records.

Ontario courts have continued to apply and expand on the well-established rules relating to issues of pre-certification discovery. For further reading on the subject matter, see *Daniells v. McLellan*, 2016 ONSC 5958, where Ellies J. weighed principles of proportionality and found that the requested production was disproportionate to the needs of the certification hearing.<sup>10</sup> See also *Parker v. Pfizer Canada Inc.*, 2012 ONSC 1652 and *Papassay v. R.*, 2016 ONSC 7014 where the courts discussed the scope of cross-examination prior to class action certification.<sup>11</sup>

### ***The Current Legal Framework***

The rules established in the jurisprudence coupled with the inherent discretion of the court to control pre-certification discovery under s. 12 of the *CPA* has provided the courts with what is needed to ensure relevance and fairness.<sup>12</sup> It would appear that the relevant principles are as follows:

- The court may order documentary discovery in a potential class action that is restricted to what is necessary to inform the certification process.<sup>13</sup>

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<sup>4</sup> *Ibid*, at para. 9.

<sup>5</sup> *Batten v. Boehringer Ingelheim (Canada) Inc.*, 2015 ONSC 7821 at para. 26 [“*Batten*”].

<sup>6</sup> *Ibid*.

<sup>7</sup> *Ibid*, at para. 30.

<sup>8</sup> *Ibid*, at paras. 30-31.

<sup>9</sup> *J.K. v. Ontario*, 2016 ONSC 8040 at paras. 26-28.

<sup>10</sup> *Ibid* at para. 43.

<sup>11</sup> *Supra*, *Parker* at para. 23; *Supra*, *Papassay* at paras. 21-22.

<sup>12</sup> *Supra*, *Dine* at para. 14.

<sup>13</sup> *Ibid*, at para. 9; *Supra*, *Roveredo* at para. 8; *Parker v. Pfizer Canada Inc.*, 2012 ONSC 1652 at para. 23.

- The onus is on the party seeking pre-certification production to explain why the records are relevant to the issues on certification. It is not enough for the party to simply assert that the documents “may be relevant”. The party must explain how the documents are relevant to certification.<sup>14</sup>
- Class actions are not monolithic. A case-by-case analysis is required to determine the extent to which a party seeking production must explain the relevancy of the requested documents.<sup>15</sup>
- Pre-certification production will be ordered when the relevance of those documents is obvious from the case being certified.<sup>16</sup>
- The scope of cross-examination is restricted to issues on certification and matters raised in an affidavit. If a matter is raised, or put in issue by the affiant in their affidavit, the opposite party is entitled to cross-examine on the matter even if it is irrelevant to the motion before the Court.<sup>17</sup>
- Motions for pre-certification discovery are subject to the proportionality principle embedded within Rule 29. 2 of the *Rules of Civil Procedure*.<sup>18</sup> Production must be proportionate to the needs of the certification motion.<sup>19</sup> Determining the scope of disclosure also requires a degree of balancing so as to be fair to both parties.<sup>20</sup>
- The path employed by Ontario courts in ordering pre-certification production of documents is focused and limited.<sup>21</sup>

### ***The Kaplan Decision***

Glustein J. built his order on established law and principles of proportionality, finding that the plaintiffs required access to information contained in the requested documents in order to adequately test the defendant’s affidavit evidence.<sup>22</sup> The decision in *Kaplan* serves as guidance to parties in class actions by requiring defendants to produce all documents relevant to both the certification motion and matters raised in their affidavit. In particular, when the information relates to the size and scope of a prospective class.

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<sup>14</sup> *Supra*, *Dine* at para. 9.

<sup>15</sup> *Supra*, *Batten* paras. 30-31.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Supra*, *Parker* at para. 23.

<sup>18</sup> *Supra*, *Daniells* at para. 38.

<sup>19</sup> *Supra*, *Kaplan* at para. 44; See also *Cirillo v. Ontario*, 2018 ONSC 4359.

<sup>20</sup> *Ibid.*, at paras. 28-29; *Supra*, *Roveredo* at paras. 9-10.

<sup>21</sup> *Supra*, *Dine*, at para. 8; *Supra*, *Kaplan* at para. 34.

<sup>22</sup> *Supra*, *Kaplan* at para. 47.