Ontario Announces Significant Proposed Changes to the Class Proceedings Act, 1992

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On December 9, Ontario's Attorney General introduced Bill 161 in the Legislative Assembly. Announced as the *Smarter and Stronger Justice Act, 2019*, the government has proposed sweeping legislative amendments to numerous statutes, which it says will provide "better, more affordable justice for families and consumers." Included in the Bill are proposed changes to the *Class Proceedings Act, 1992* (the Act). The review of class actions in Ontario follows the release of the Law Commission of Ontario's Final Report on class action reform in mid-2019, a development that we have previously commented on here. The Law Commission proposed far-reaching reforms to the Act, and a number of these recommendations have found their way into the proposed amendments.

This bulletin highlights a number of the proposed class action reforms in Bill 161. Amongst the proposed amendments are measures intended to achieve an earlier resolution of class actions, addressing the long-standing issue of multi-jurisdictional class actions, encouraging the use of preliminary motions, eliminating the intermediate appeal to the Divisional Court, addressing one aspect of the certification test and levelling the playing field between plaintiffs and defendants. The following is a summary of some of the more interesting and important proposed changes.

Multi-Jurisdictional Class Proceedings

In addition to adding a definition to the Act for a "multi-jurisdictional class proceeding," the proposed amendments require registration of all class action claims on the day they are commenced. When moving for certification, plaintiffs must provide evidence to the court that they have registered the action. Where multiple actions are filed, notice to each plaintiff in the other actions of the proposed certification motion would be required, including notice to plaintiffs in multi-jurisdictional class proceedings commenced in another province and which involve the same or similar subject matter and some or all of the same class members. Any person given such notice will be entitled to make submissions at the certification motion. These proposed changes are incremental, and build on existing practice-direction-based requirements for registration of proposed class actions in the Canadian Bar Association's National Class Action Database, as well as the multi-jurisdictional notification requirements in the recently-adopted Class Action Judicial Protocols (2018).

Dismissal for Delay

As recommended by the Law Commission, the proposed legislation provides for a motion to dismiss a class action for delay unless, on the first anniversary of the action:

1. the representative plaintiff has filed a "final and complete" motion record for certification;
2. the parties have agreed to a timetable for service of the motion record and the completion of one or more steps required to advance the proceeding;
3. a court order is made to not dismiss the action and a timetable for the action has been established; or
4. any other steps, occurrences or circumstances prescribed by regulations have taken place.

The proposed legislation does not define what constitutes a "final and complete" motion record and the government has not published any proposed regulations concerning other steps, occurrences or circumstances, as noted above. The apparent motivation underlying the proposed amendments is to move the action quickly towards a certification motion, and to avoid class proceedings languishing for years prior to that motion. In addition, where an action is dismissed for delay, the counsel for the representative plaintiff shall be ordered to give notice of the dismissal on the counsel's website, by direct contact with class members who have previously contacted class counsel or through any other steps that the court may specify.

The Certification Test

In its report, the Law Commission recommended an amendment to the certification test to place greater emphasis on the preferable procedure criterion. The proposed legislation will now expressly require the court to consider the following "minimum" guideposts when deciding whether a class proceeding is preferable:

a. whether a class action is "superior" to all "reasonably available means" of determining the entitlement of the class members to relief or addressing the impugned conduct of the defendant, including quasi-judicial or administrative proceedings, as well as any other "remedial scheme or program outside of a proceeding"; and
b. whether questions of fact or law common to the class members **predominate** over any questions affecting only individual class members (emphasis added). Predominance is a significant change to the Act, which previously did not include any predominance requirement among its certification criteria.

The court must also consider the existence of other class proceedings – including in other Canadian jurisdictions – as part of its preferability assessment. Courts undertaking this inquiry will be guided by a set of articulated objectives, including: ensuring that the interests of all parties in each jurisdiction are given due consideration, serving the ends of justice, avoiding inconsistent verdicts and promoting judicial economy. In addition, the court must consider all relevant factors, including:

1. the alleged basis of liability in each of the proceedings and the different laws applicable in each jurisdiction;

2. the stage reached in each of the other actions;
3. a review of the plan of proceeding in each action;
4. matters akin to considerations of *forum conveniens*; and
5. the ability to enforce in each of the jurisdictions.

The court will be entitled to stay a proceeding or impose other terms as it considers appropriate. In effect, under the proposed amendments to the Act preferability will become a much more holistic inquiry, focused not only on whether the particular class proceeding is preferable to other means of remedying the alleged misconduct, but also whether Ontario is the preferable venue for a multi-jurisdictional proceeding.

Notice and Costs of Notice

Bill 161 proposes sweeping changes to the form of notice of certification and who is required to pay for the costs of notice. The provisions respecting notice codify the court's requirement to consider alternative forms of notice to be given to the class. The notice provisions also articulate the specific items to be addressed in "plain language" in the notice, which go well beyond the current norm for disclosure in such notices, including a new requirement to disclose fee agreements between the representative plaintiff and class counsel, as well as disclosure of any third-party funding arrangements.

Of some significance is the proposed change to the notice provisions of the Act regarding who pays for the cost of notice of certification of a class proceeding. While it has become common for the defendant to pay the costs of providing notice of certification to class members, or to share the costs with class counsel, the proposed amendments will allow for an award of the payment of costs of notice to a representative plaintiff only in the event of success in the class proceeding. For greater certainty, the proposed legislation specifically provides that no order for payment of costs of notice shall require payment by the defendant at any earlier time in the proceeding.

Carriage Motions

The proposed amendments will require a carriage motion be made no later than 60 days after the day on which the first class proceeding was commenced, and heard as soon as practicable. The carriage motion "shall" be heard by a different judge than the judge case managing the class action, unless the parties to the carriage motion agree otherwise The criteria to be considered by the court are set out in the proposed legislation and the decision respecting certification will be final and not subject to appeal. Once the carriage decision is made, the court may stay the other proceeding and bar commencement of any other competing action. The proposed amendments will also require counsel to bear the costs of the carriage motion themselves and not attempt to recoup any portion from the class or the defendant.

Third-Party Funding Agreements

The proposed changes to the Act will bring clarity to the ability to make use of third-party funding agreements and will preclude use of such agreements unless approved by

the court. Court approval must be sought “as soon as practicable” after the third party funding agreement is reached. The funding agreement must be provided to the court and the defendant, and the defendant will now have the right to make submissions at the hearing of the motion to approve the funding agreement. Criteria are set out for the court to consider in its determination of the approval of the funding agreement, and the amendments specifically recognize the confidentiality requirements and deemed undertaking rule applicable to the parties also apply to the proposed third party funder. Other provisions include a requirement that the court consider whether the proposed representative has obtained independent legal advice about the funding agreement – strongly suggesting that it will become standard practice for such independent advice to be sought – and permits direct recovery from the funder for any costs awarded against the representative plaintiff.

Appeals and Limitation Periods

In an effort to speed up the appeal process, the proposed legislation eliminates the requirement to appeal to the Divisional Court from orders certifying, decertifying, or refusing to certify a class proceeding, and allows a direct right of appeal to the Court of Appeal from such orders for both plaintiffs and defendants. This was one of the key recommendations of the defence bar and was addressed by the Law Commission in its report.

The proposed legislation also addresses the suspension of limitation periods for both plaintiffs and defendants. The Law Commission report did not address the issue of a defendant’s limitation period being suspended in relation to any claims for contribution or indemnity it may have, although this was a submission made by some stakeholders. The proposed changes will provide some clarity as to when a limitation period resumes running as against the class member and now clarifies that once a certification motion is dismissed, the limitation period resumes running. For a defendant, the limitation period within which to bring claims for contribution or indemnity is suspended from the commencement of the proposed class proceeding, and resumes running once the court makes a decision on the certification motion or any appeal from such decision is finally disposed of.

Settlements and Assessment of Fees for Class Counsel

Bill 161 provides significant changes to approval of settlements and fees paid to class counsel. Specific criteria are spelled out for the court to consider in approving a proposed resolution of a class proceeding. These criteria will necessitate the filing of evidence on the settlement approval motion sufficient to satisfy the court that the elements of the settlement are fair, reasonable and in the best interests of the class. The amendments specifically recognize the ability of the court to award *cy-près* payments as part of a class action settlement. Bill 161 also sets out the criteria which the court must consider in determining whether the fees proposed to be paid to class counsel are fair and reasonable. These considerations include the results achieved for class members, the degree of risk assumed by counsel, the proportionality of the fees to the monetary award of settlement funds and any prescribed matter or other criteria the court considers relevant.

In the case of a court award of aggregate monetary relief following a common issues trial, the bill addresses a recommendation made by the Law Commission for post-distribution reporting of the funds. The report must include information on a number of items, not the least of which is the number of class members who have received a distribution (the take-up rate), as well as a breakdown of the amount of monetary relief provided to class members and the administrative costs of the award made by the court. Once approved, the report of the administration of a settlement will be appended to the order approving the report.

In the case of a settlement approved by the court, the proposed amendments will also require that, at the conclusion of the distribution of the settlement funds, the administrator must file a report with the court addressing a number of issues, including:

1. the total number of class members;
2. information about notice distribution;
3. the take-up rate from class members of the benefits under the settlement;
4. objectors to the settlement;
5. a breakdown of amounts paid to class members,; and
6. the administrative costs and lawyers fees incurred, as well as amounts paid to the class proceedings fund or under any approved third party funding agreement.

Summary

As noted in the press release issued by the provincial government, the proposed changes are said to build off the comprehensive review of class actions by the Law Commission in July 2019 and the Ministry of the Attorney General's own review and consultations. The stated intention of the proposed changes is to make class actions more fair, transparent and efficient for people and businesses in Ontario. If implemented, many of the proposed amendments will achieve the fairness proposed by the Ontario government. Whether the bill remains in its present form is uncertain, but what is clear is that the legislature does intend to make far-reaching amendments to Ontario's *Class Proceedings Act, 1992*. The timing for final implementation will be determined as Bill 161 progresses through the Legislative Assembly and the proposed changes to the Act are ultimately proclaimed in force by the Lieutenant Governor.

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