Bill 161: Sweeping changes to Ontario's Class Proceedings Act take effect October 1

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On December 9, 2019, Ontario's Attorney General introduced Bill 161 in the Legislative Assembly, proposing sweeping changes to the *Class Proceedings Act, 1992*. See our previous article for more information. Bill 161 received Royal Assent on July 8, 2020 and will come into force October 1, 2020.

This article reports on the final version of Bill 161 and highlights the reforms of greatest interest to stakeholders. The debates in the Legislature highlighted the Ontario government's twin goals of ensuring class actions move promptly through the judicial system and adding rigour to the test for certification. The government explained that it used the Law Commission of Ontario's 2019 report as a basis for its amendments (see our commentary on that report). The government also expressed concern that too many cases were taking too long to be decided, getting certified and then sitting and using resources that could be deployed elsewhere in the justice system. The following is a summary of the new legislation:

Multi-jurisdictional class proceedings

The definition of a "multi-jurisdictional class proceeding" has been added to the Act and is defined as a proceeding:

- Brought on behalf of a class of persons that includes residents from two or more provinces or territories of Canada; and
- Certified as a class proceeding under this Act or under the law of another Canadian jurisdiction, as the case may be.

Other definitions have been added to clarify the meaning of "proceedings," "representative party" and "success in a class proceeding."

The originally drafted Bill would have required the party commencing a class action to register it on the day it started. The legislation in its final form retains the registration requirement, but no longer mandates that it occur on the day the class action begins. Instead, plaintiffs must provide evidence to the court that they have registered the action when they move for certification. Where multiple actions are filed, notice to each plaintiff in the other actions of the proposed certification motion will now be required, including

notice to plaintiffs in multi-jurisdictional class proceedings commenced in another province and involving the "same or similar subject matter" and some or all of the same class members. Claims will involve the "same or similar subject matter" if they involve the same or similar causes of action and defendants. Any person given the required notice will be entitled to make submissions at the certification motion. These changes enact into law existing practice directions calling for registration of proposed class actions, such as the Canadian Bar Association's implementation of the National Class Action Database, as well as the multi-jurisdictional notification requirements contained in the recently-adopted Class Action Judicial Protocols (2018).

Early resolution of issues:

Section 4.1 of Bill 161 addresses an issue that has been somewhat uncertain since the enactment of the *Class Proceedings Act, 1992*. Courts have been reluctant to allow pre-certification motions and have generally taken the view that the certification motion should be the first one addressed in a proposed class proceeding. Section 4.1 now permits pre-certification motions 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, unless the court orders that the two motions be heard together.

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. While the Ontario government intended to address this recommendation, it went much further than the Law Commission to expressly require the court to consider the following "minimum" guideposts when deciding whether a class proceeding is preferable:

- 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
- Whether questions of fact or law common to the class members predominate over any questions affecting only individual class members.

This change to the certification test led to significant debate within the Legislature and criticism from the plaintiff's bar when introduced in earlier drafts of the Bill. Nonetheless, the revised test remained in the final Bill.

As part of the "preferability" inquiry, the court must also consider the existence of other class proceedings – including litigation in other Canadian jurisdictions involving similar subject matter and some or all of the same class members. 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. The court must also consider all relevant factors, including:

- The alleged basis of liability in each of the proceedings and the different laws applicable in each jurisdiction;

- The stage reached in each of the other actions;
- A review of the plan of proceeding in each action;
- Matters akin to considerations of *forum conveniens*;
- The location of evidence and witnesses; and
- The ability to enforce judgments in each of the jurisdictions.

The court will have the power to stay a proceeding or impose other terms, as it considers appropriate. In effect, under the Bill 161 amendments to the Act, preferability will become a more holistic inquiry, focusing both on whether the particular class proceeding is preferable to other means of remedying the alleged misconduct and if Ontario is the preferred venue for a multi-jurisdictional proceeding. If a court refuses to certify a class proceeding, the court must now also consider whether notice of the refusal should be given and whether that notice should include:

- An account of the conduct of the proceeding;
- A statement of the result of the proceeding;
- Any other prescribed information; and
- Any other information the court considers appropriate.

The court may also permit a proceeding to continue as one or more proceedings between different parties and may:

- Order the addition, deletion or substitution of parties;
- Order the amendment of the pleadings or notice of application; and
- Make any further order it considers appropriate.

Furthermore, the court has wide powers to make any order it considers appropriate, respecting the conduct of a proceeding to ensure its fair and expeditious determination.

Carriage motions

The amendments to the Act will require representative plaintiffs to bring any carriage motions no later than 60 days after the first class proceeding started. The motion will be heard as soon as practicable. The current legislation (unlike the original draft) no longer requires the carriage motion to be heard by a different judge than the judge case managing the class action. The criteria that the court must consider are set out in Bill 161, which also provides that the decision respecting carriage 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 amendments will also require counsel to bear the costs of the carriage motion themselves and not attempt to recoup any portion of those costs from the class or the defendant. Once 60 days have passed from the time a motion respecting carriage could be brought or a proceeding was commenced, the legislation will automatically bar starting the same or similar proceedings without leave of the court.

Notice and costs of notice

Bill 161 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

state the specific items to be addressed in “plain language,” which go well beyond the current norm for disclosure, 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. The overarching requirement is that the court make notice orders to ensure the best notice that is practicable in the circumstances.

The change in provisions regarding who pays for the cost of notice of certification of a class proceeding remains unchanged from the original draft of the legislation. The 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, unless the defendant consents to their payment in whole or in part at an earlier time. For greater certainty, the 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, absent the defendant’s consent.

When a proceeding includes a subrogated claim, the Bill further requires the person who commenced the proceeding serve the originating process on the person or entity specified in regulations in respect of the subrogated claim within 21 days. Before any settlement is approved that includes a subrogated claim, the person or entity with the claim must be given a reasonable opportunity to consider the proposed settlement or release of the subrogated claim and must give approval of the proposed settlement or release of the subrogated claim in writing.

Settlements, distribution of awards and assessment of fees for class counsel

Bill 161 enacts significant changes to the approval of settlements, the distribution of awards and the approval of fees paid to class counsel. It spells out specific criteria for the court to consider in approving a proposed resolution of a class proceeding. These criteria will require plaintiffs to file evidence on the settlement approval motion sufficient to satisfy the court that the settlement is fair, reasonable and in the best interests of the class. The amendments specifically recognize the ability of the court to approve *cy-près* payments as part of a class action settlement.

The amendments also require the person or entity who administers the distribution of an award, whether by settlement or judgment, to file a detailed report with the court providing their best information in relation to a number of specified criteria. This information will include the amount of the award, the number of class members, the notice given to class members, the “take-up rate” of an award by class members and the number of opt-outs from the class proceeding, as well as the high and low mark for compensation to individual class members. The report will require disclosure of the administrative costs of the distribution, the lawyers’ fees and disbursements and the payment, if any, to the Class Proceedings Fund. Once satisfied, the court will be required to make an order approving the report and appending the report to the order, thereby making the report part of the public record.

Bill 161 also codifies that 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, Bill 161 implements 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 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:

- The total number of class members;
- Information about notice distribution;
- The take-up rate from class members of the benefits under the settlement;
- Objectors to the settlement;
- A breakdown of amounts paid to class members; and
- 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.

Harmonization of appeal rights and clarification of the suspension of limitation periods

The legislation as approved by the government will eliminate appeals to the Divisional Court and allow appeals by any party directly to the Court of Appeal from an order certifying, refusing to certify or decertifying a class proceeding. Significantly, defendants will no longer need leave in order to appeal from certification. This follows one of the key recommendations of the Law Commission. A further defendant-friendly change, intended to improve predictability on appeals, is a section that specifies that plaintiffs seeking to amend the notice of certification motion, pleadings or notice of application on an appeal, may only do so with leave of the court in exceptional or unforeseen circumstances, neither of which is defined.

The 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 legislation addresses this gap. For a defendant, the limitation period within which to bring claims for contribution or indemnity is suspended from the start 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.

The changes also provide clarity as to when a limitation period resumes running as against class members and now affirms that once a certification motion is dismissed, or a cause of action or a member is removed from the proceeding, the limitation period will resume running.

Third-Party funding agreements

The changes to the Act bring clarity to the ability to make use of third-party funding agreements and 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.

In order to address concerns of the plaintiffs’ bar, the funding agreement can be redacted to remove information that may reasonably be considered to confer a tactical advantage on the defendant. Criteria are set out for the court to consider when deciding whether to approve the funding agreement, and the amendments specifically recognize that the confidentiality requirements and deemed undertaking rule applicable to the parties also apply to the proposed third party funder.

Other provisions require the court to 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. It also permits direct recovery from the funder for any costs awarded against the representative plaintiff, as well as the entitlement of the defendant to move for security for costs.

Summary

As noted by the government during the review of the Act, the changes build on 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 changes is to make class actions more fair, transparent and efficient for people and businesses in Ontario. The amendments to the Act brought about by Bill 161 will apply to cases commenced on or after Oct. 1, 2020.

Reach out to any of the contacts listed below if you have questions about how Bill 161 may affect you or your organization.

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