Ontario Court of Appeal confirms when new Class Proceedings Act applies

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On Oct. 1, 2020, significant amendments to the *Class Proceedings Act, 1992* (CPA), came into force. On Jan. 2, 2024, in *Martin v. Wright Medical Technology Canada Ltd.*, 2024 ONCA 1, the Ontario Court of Appeal considered which version of the CPA applied in the context of a consolidation of two proposed class proceedings, where one pre-dated and one post-dated the October 2020 amendments.

The Court determined that an existing action under the old Act cannot be combined with another action to get the benefit of the amended Act. Further, the broad procedural powers of a class action judge granted by section 12 cannot override the clear language of other provisions in the Act.

Legal background

On Oct. 1, 2020, the *Smarter and Stronger Justice Act, 2019* (Bill 161), came into force. Bill 161 made numerous amendments to Ontario's *Class Proceedings Act, 1992*, including mandatory dismissal for delay (s. 29.1) and strengthening the Act's "preferable procedure" test (s. 5(1.1)). For a class action to be certified, it now needs to be "superior to all reasonably available means" of resolving the dispute. Further, the issues common to all class members must "predominate" over any individual issues of the class members. For more information, please see BLG's previous article on Bill 161.

Since the passage of Bill 161, class counsel and defence counsel have struggled to agree on how to handle actions which predate the Oct. 1, 2020 coming-into-force date, but which must be re-issued after that date for procedural reasons. Class counsel often attempt to keep these actions under the old *Class Proceedings Act, 1992*, while defence counsel seek the protection of the stricter preferable procedure test under the amended Act.

Procedural background

In *Martin v. Wright Medical Technology Canada Ltd.*, two different representative plaintiffs – Ms. Martin and Ms. Rowland – commenced class actions alleging negligent manufacturing of two different prosthetic hip implants. Both actions were liable to be

dismissed for delay under section 29.1 of the Act by Oct. 1, 2021, the one-year anniversary of Bill 161's passage. Ultimately, only the Rowland action was exposed to mandatory dismissal for delay under s. 29.1.

To address the issue, the plaintiffs sought to combine the two actions in some fashion and make use of the amended CPA.

The Court of Appeal's decision

Ultimately, the Court of Appeal clarified that the correct option was to leave the Martin action to continue under the old Act, discontinue the Rowland action, and re-commence the Rowland action under the amended Act, presumably with a new representative plaintiff. The two actions could then be tried separately or together.

The Court of Appeal referred to section 39 of the Act, a transitional provision which specifies that the old Act continues to apply to cases started before Oct. 1, 2020, with the addition of the new dismissal for delay provisions under s. 29.1, which also apply to actions started under the old Act. The amended Act applies to cases started after that date:

> **39** (1) Except as otherwise provided by this section, the Act, as it read immediately before [the amendments] came into force [on Oct. 1, 2020], continues to apply with respect to,
> (a) a proceeding commenced under section 2 before that day; …

Given the clear language of section 39, the motion judge erred in purporting to use section 12 to fill a legislative gap that did not exist, giving himself the discretion to consolidate the two actions under the amended Act. The Court of Appeal referenced their earlier decision in *David v. Loblaw Companies Ltd.*, 2022 ONCA 833 at para 16, in which they observed: "The language of s. 39(1) could not be clearer. The Legislature drew a bright line between class action proceedings commenced before the 2020 amendments came into effect, and class action proceedings commenced after that date."

Further, the Court of Appeal rejected the defendants' argument that managing two different certification tests under the old Act and amended Act would be unworkable. They quoted the unreported decision of *Robertson v. Ontario* (Jan. 21, 2022), CV-20-648597-CP (Ont. S.C.), at para. (vi): "There will be occasions, perhaps even here, where the certification judge will need to consider and apply the differently-worded certification requirements for different claims in the same proceeding. I have every confidence that class action judges, myself included, will be able to do so and explain their analyses in a reasonably straight-forward fashion."

Key takeaway

The *Martin* decision confirms that class proceedings commenced before Oct. 1, 2020, fall under the old Act, and those commenced after Oct. 1, 2020, fall under the amended Act, including its stricter preferable procedure test for certification.

Should you have further questions about this important decision, please reach out to your BLG lawyer, one of the key contacts below, or any lawyer in our experienced Class Actions Group.

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