Cassels

Good News and Bad News for Defendants as Ontario Proposes Tightening and Streamlining Class Actions

Jeremy Martin

December 13, 2019

Ontario's Attorney General released proposed amendments to the *Class Proceedings Act, 1992* (CPA) this week that represent the first comprehensive revision to Ontario's class actions regime since its inception.

The proposed amendments adopt a full roster of broadly welcomed changes aimed at curbing abuses, redundancies, and inefficiencies plaguing the class actions regime, as well as more controversial changes that would significantly tighten the requirements on plaintiffs to demonstrate that a class action is a preferable and superior procedure by which to seek compensation for class members.

Background

The move to amend the CPA comes after the release of the Law Commission of Ontario's (LCO's) report on class proceedings ("Class Actions: Objectives, Experiences and Reforms") on July 17, 2019. That report followed from 24 months of extensive consultations with stakeholders across Ontario's justice system and made more than 40 recommendations for improvement to the class actions regime.

Many of the LCO's recommendations are integrated, entirely or in modified form, into the proposed amendments to the CPA. In other respects, the amendments go beyond the recommendations of the LCO to tighten up the requirements upon plaintiffs seeking to certify a class action in Ontario.

In addition to reviewing the LCO report, the Attorney General's office also initiated robust listening sessions and consultations with stakeholders in the process of preparing its amendments.

The Class Actions Group at Cassels has been, and continues to be, deeply involved in that process of consultation and amendment:

- Tim Pinos, Lara Jackson, Derek Ronde and Jeremy Martin made submissions to the LCO on behalf of their clients generally;
- Derek Ronde and Jeremy Martin spearheaded an *ad hoc* Defence Bar group comprised of representatives from most Bay Street class action defence firms that made further submissions to the LCO, many of which were adopted by the new legislation; and
- Jeremy Martin contributed to and edited the Ontario Bar Association's submissions to the LCO; and

sat on both the LCO's debriefing small group and the Attorney General's select roundtable in advance of the amendments being tabled.

This week's amendments come as part of the omnibus *Smarter and Stronger Justice Act, 2019* (Bill 161), which sets out an ambitious agenda for procedural and institutional law reform across Ontario's justice system. The Bill could be going to Second Reading and then to committee for debate as early as mid-January, 2020.

Key Proposals

The most notable changes proposed in Bill 161 are as follows:

Predominance and Superiority Come to Canada (Section 5): The most significant changes proposed in Bill 161 are the introduction of predominance and superiority requirements at certification, presumably in the vein of the U.S. Federal Rule 23(b)(1)(3).

Those criteria require that, in order to certify their claim as a class action, plaintiffs must establish that:

- Issues common to the class predominate over issues affecting only individual class members ("predominance"); and that
- Carrying on the claim as a class action is a superior procedure to all other reasonably available means of seeking relief (e.g., ADR, recalls, etc.) ("superiority").

There has been a strong reaction to this proposal by the plaintiff's bar, as predominance and superiority are leading grounds for denial of certification in American class proceedings. If interpreted in the same way they have been federally in the United States, these criteria could potentially make certain claims – such as product liability, mass tort, institutional abuse, harassment and discrimination claims – more difficult to certify in Ontario.

It is unclear, however, how these proposed restrictions will be interpreted by a judiciary that has guidance from the Supreme Court of Canada requiring that class actions statutes be interpreted purposively with a view to promoting access to justice, judicial economy and behaviour modification, and that the certification criteria be assessed on a relaxed "some basis in fact" standard rather than the balance of probabilities.

While these amendments will tighten certification requirements on proposed representative plaintiffs, it is too early to conclude that, if enacted, they will necessarily import American-style hurdles to the certification of cases involving significant ranges of personal injury or individual damages. Predominance, for example, is already a consideration in the British Columbia and Alberta statutes (though not a *requirement*), and British Columbia continues to be widely regarded as the most plaintiff-friendly common law jurisdiction for class

actions in Canada.

The Egg Comes First (Section 4.1): An ongoing debate in Canadian class actions has centered around the “chicken or the egg” question as to whether or not preliminary motions may be brought in advance of certification, or if certification is a mandatory first procedural step. The inability to assert merits at a pre-certification stage has been an ongoing concern for defendants, who have often been required to go through the reputational cost, monetary expense and settlement pressure of certification before having any opportunity to remove improper parties or to demonstrate that a class action demonstrably has no actual merit.
Bill 161 proposes a new Section 4.1 in the CPA that would explicitly authorize motions that may narrow or dispose of issues in a proceeding to be brought in advance of certification, opening a new lane of fire in early class action defence.

Faster Carriage Motions (Section 13): When more than one class action firm seeks to represent the class in respect of the same subject-matter, Ontario courts convene a hearing to decide which firm will have carriage of the matter as class counsel.

Appeals from these “carriage motions” are expensive and time-consuming for the class and their counsel, and can greatly delay a defendant’s crisis response as no one is available to speak for the putative class when a defendant seeks to offer interim relief or to mitigate damages.

Ontario proposes by these amendments to require carriage to be decided within sixty (60) days of the first claim being brought; to minimize the factors to be considered in the court’s decision; to bar any future related claims, and to eliminate appeals from carriage decisions. These changes will mean that large-scale class actions in Ontario will generally commence earlier, to the benefit of all parties involved. (This reform, and particularly the elimination of appeals, met with significant bipartisan support during the consultation process.)

Stagnant Class Actions Are Coming Off the Books (Section 29.1): One of the most persistent headaches for class action defendants is the preponderance of class actions in which they are named that never seem to go anywhere. They are often required to take a significant reserve and report their contingent liabilities to shareholders for years as they continually weigh the costs of moving to dismiss the claim for delay against “letting a sleeping dog lie.”

Bill 161 proposes to automatically dismiss class actions within one (1) year unless certification materials have been filed by the plaintiffs, or a timetable has been agreed to or fixed by the Court.

Limitations Periods Clarified (Section 28): A related concern for frequent class action defendants is the tolling provision of the CPA, which prevents limitations periods from expiring once a class action begins, without clear provisions for when that tolling period is intended to resume.

Bill 161 sets out numerous conditions that, taken together, effectively allow the limitations clock to continue to run against class members as soon as they are no longer actively involved in the class action.

Symmetrical Appeal Rights from Certification Motions (Section 30): Due to the idiosyncrasies of Ontario civil procedure and the existence of our interim appellate court, the Divisional Court, the law in Ontario developed such that plaintiffs could appeal failed certification as of right to the Court of Appeal, whereas defendants failing to defeat a certification motion had to seek leave to appeal to the Divisional Court, and *then* appeal to the Court of Appeal if unsuccessful at the interim level.

Defendants have therefore been forced to weigh additional years, hundreds of thousands of dollars in costs and the uncertainty of leave compared to plaintiffs when considering whether or not to appeal certification decisions that do not go their way. Bill 161 proposes to correct that asymmetry, as it provides for all certification appeals to go directly to the Court of Appeal.

Bill 161 also proposes to prevent parties from materially amending their court materials on the path to an appeal, eliminating the possibility of a plaintiff losing at certification, amending to accommodate a judge's concerns, and then "winning" the appeal with the fresh materials.
Just as with the new certification criteria, this change appears to suggest that defeating a certification motion is tantamount to winning the case since plaintiffs would be unable to amend identified flaws in their materials – but in practice this may simply mean that motion judges may be more likely to certify conditionally upon amendments, rather than denying certification outright – in which case this amendment could actually be a net loss for defendants due to the costs awards associated with successful certification motions.

Transparency Requirements (Sections 27, 32 and 33): Bill 161 also deals extensively with making the settlement approval process in class actions more transparent to judges and class members, including new provisions permitting the court to hold back class counsel fees until it is satisfied with the progress of settlement distribution.

The amendments also require reporting from claims administrators and provides for court supervision of third-party funding arrangements, as well as setting guidelines for appropriate *cy-près* distributions when payments to certain class members are not feasible.

National Class Accommodations (Sections 3 and 5.1): The proposed amendments also provisions similar to those already adopted in Western provinces with a vision towards streamlining and restricting provincial proceedings in order to facilitate national class actions in line with the widely respected recommendations and protocols of the Uniform Law Conference of Canada and the Canadian Bar Association.

Details, details: Ontario has also proposed multiple technical amendments that may seem minor in character but may have broader (and potentially unforeseen) ramifications over time.

These include expanding the power of judges to make whatever orders they see fit to manage the class action *on their own motion*, rather than requiring a motion from the parties (Section 12), which may have drastic effects on interlocutory case strategy and the interpretation of other provisions (such as the motion scheduling in Section 4.1); and defining a “proceeding” as including an *uncertified* proceeding (Section 1(2)), which may have unintended effects on class action lawyers’ professional ethics rules and settlement options prior to certification.

Next Steps

We anticipate that these amendments will be hotly debated at the Bar and in the Ontario Legislature before they take effect, and may undergo further amendment in committee.
