Raising the Bar: Ontario’s Amended Class Actions Regime Heightens Certification Threshold and Provides New Opportunities for Early Dismissal of Claims

Jeremy Martin
December 4, 2020

On October 1, 2020, Ontario adopted a slate of amendments to its class actions regime aimed at eliminating inefficiency and tightening up certification standards. Through these amendments, Ontario has untied a defendant’s hands at the outset of a class action. This move comes just as other Canadian jurisdictions have released important decisions minimizing a defendant’s ability to avoid a full class action certification or authorization hearing, regardless of the merits of any preliminary objections.

Smarter, Faster, Stronger: Amendments to Ontario’s Class Actions Regime

The recent amendments to the Class Proceedings Act, 1992, introduced through Bill 161 (the Smarter and Stronger Justice Act, 2020) were proclaimed in force on October 1, 2020. The amendments introduce new “predominance” and “superiority” requirements within the test for certification. Those requirements, drawn from the class action certification requirements in Rule 23 of the U.S. Federal Rules of Procedure, essentially direct the court to find that a class action is not a preferable procedure to advance the claims of the class unless (a) the common issues predominate over individual ones and (b) a class action would be a superior means of advancing those claims over any available alternative.¹

There are a number of factors softening those new requirements. Among other things, they are still assessed on the low “some basis in fact” standard (i.e., the plaintiff only has to show some reason to believe that the common issues may predominate over individual ones, rather than having to prove that they will); the statute is still to be interpreted broadly and remedially with a view to improving access to justice, judicial economy and behavior modification;² and the Attorney General stated in Hansard that the amendments are not intended to cut down on meritorious claims.³ Still, these requirements are more stringent than those in British Columbia, for example, where predominance and superiority are also part of the certification test, but are only considerations rather than requirements.⁴

Still, the Legislature has spoken and directed certification judges to be more mindful of certifying cases with a range of individual issues and – critically for manufacturers – where ameliorative action like a recall, replacement or repair has already been taken.
Those new standards are paired with an under-the-radar game-changer for defendants: the new Section 4.1, which allows a defendant to bring a motion prior to certification (or, at the judge’s discretion, together with certification) if that motion would “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.”

Hear Me Out: New Opportunities for Pre-Certification Resolution

These changes taken together hold some promise for manufacturers facing the common situation of a class action on the back end of a product recall. Ontario courts are already warming to the argument that a class action is not a preferable procedure for addressing claims when the defendant has already mitigated the potential harm to the class. The new amendments allow defendants to avoid the extraordinary time and expense of establishing that there is no evidence of compensable harm at certification. Now there is an avenue for a defendant to raise that argument at a preliminary stage, before committing to the serious risk, publicity, expense and effort of challenging certification.

That framework is a clear turn at a fork in the road that has recently seen the British Columbia and Quebec courts headed the other way. In BC, a landmark sequencing decision in British Columbia v Apotex Inc. ruled that all defendants with preliminary motions in the opioid class action would have to raise their arguments alongside and/or after certification. This ruling covered motions objecting to the constitutionality of the British Columbia statute authorizing the province to bring an action on behalf of a class of other provincial governments, as well as jurisdictional questions about how the British Columbia Supreme Court has any jurisdiction simpliciter to hear a case about, for example, the actions of a pharmacy that operates only within Quebec. All parties with those preliminary questions as to how they could even properly be before the Court have nonetheless been directed to incur the expense of defending the certification motion before their objections will be heard.

At the same time, the Supreme Court of Canada allowed an appeal in Desjardins Financial Services Firm Inc. v Asselin, and split 5-4 on whether the authorization (i.e., certification) stage of a Quebec class action is intended simply to filter out frivolous claims and nothing more; or if an authorization judge is to go further to weed out non-frivolous claims with substantive defects that do not satisfy the conditions for authorization. The majority concluded that the former is the correct state of the law. For defendants, that means that any substantive objection even to the form of a Quebec class proceeding is best left until a later stage in the action.

It appears, then, that Ontario is taking a conscious step away from the trend elsewhere in Canada of pushing defendants into low-threshold certification/authorization hearings over their objections and will be providing them instead with an opportunity to be heard early if the proposed proceeding is demonstrably flawed.
As any defendant that has been named in a hopeless class action will attest, it can be endlessly frustrating to spend money and productive time preparing a full defence to certification just to demonstrate that there is one key question class counsel simply cannot answer, or a crucial fact they cannot explain away. These new changes may go a long way to promoting judicial economy and preventing waste by permitting those narrow issues to be heard before both parties have marshaled their forces for the full battle.

At the same time, we anticipate courts will be cautious in the application of these new requirements as there is obvious potential for abuse in the bringing such preliminary motions before plaintiffs have the benefit of discovery. Case conferences may take on new importance as opportunities for defence counsel to persuade a judge that these early motions should not be put off to be heard alongside certification.

At least as of October 1, 2020, the Ontario government has signalled movement in the direction of hearing defendants out early. This is welcome news for manufacturers, who have been watching the jurisprudence pull in the opposite direction for quite some time, even as judges have sometimes reflected on whether or not that approach might disincentivize good faith efforts at minimizing harm. At the moment, there is renewed hope that serious and early investments in socially responsible corporate behaviour will be considered in a timely and meaningful way as an alternative to a class proceeding.

1 See the new Section 5(1.1) for the full wording of the superiority requirement, which also may or may not require a judge to consider whether or not the alternative procedure will adequately address the impugned conduct of the defendant, even if it may satisfy the plaintiffs’ claims.

2 Dutton v Western Canadian Shopping Centres, 2001 SCC 46, <http://canlii.ca/t/520c>.


4 Class Proceedings Act, R.S.B.C. 1996, c. 50, s. 4(2).

5 See for example: Maginnis v FCA Canada, 2020 ONSC 5462, <http://canlii.ca/t/j9pll>, and our summary on this case.


8 See, for example: Blair v Toronto Community Housing Corporation, 2011 ONSC 4395, <http://canlii.ca/t/fmd6z>, paras. 67-71.

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