

# MATERIAL CHANGES TO ONTARIO'S CLASS PROCEEDINGS ACT – WHAT YOU NEED TO KNOW

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On October 1, 2020, key changes to Ontario's class action legislation came into force. The *Smarter and Stronger Justice Act, 2020* (Bill 161) received royal assent on July 8, 2020. The changes are part of the first material update to Ontario's *Class Proceedings Act (CPA)* since the CPA's introduction almost thirty years ago and are intended to effect material changes to Ontario's class action landscape.

## **KEY TAKEAWAYS**

The CPA amendments implement sweeping changes to existing class action practice in Ontario. Among the more commented-upon changes are material changes to the minimum test for certification, which now include a minimum requirement the court be satisfied that (i) issues common to the claims predominate over individual issues; and (ii) the proposed 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.

With a few notable exceptions (for example, a new mandatory dismissal for delay provision that may impact some current claims), the majority of the changes apply only to proceedings commenced **after** the amendments come into force.

It is possible, however, that the amendments will have more immediate effect on class action practice in Ontario. The stated aim of the changes appear focused on addressing concerns with fairness, access to justice, and recognized problems with the current class action practice in Ontario. The amendments, and the legislative intent supporting the amendments, should also support the powers of the court and the ability of parties to more efficiently address unworkable and unmeritorious claims in Ontario.

The introduction of class action reform in Ontario may have unintended spillover effect, with some claimants changing tack and instead seeking to pursue less meritorious or unwieldy proceedings in jurisdictions that have not yet adopted similar reforms. In the short-term, however, it is reasonable to expect heightened scrutiny of matters before the court.

## **BACKGROUND**

Approximately 30 years ago, draft Ontario class action legislation was presented as “a more efficient and streamlined method for the court to deal with complex litigation affecting the interests of hundreds or even thousands of persons.”<sup>[1]</sup> Since that time, however, criticism has mounted regarding familiar and undesirable features of the Ontario class actions landscape: high cost, delay, difficulties in efficiently dealing with unmeritorious or unworkable claims, and overlapping and conflicting class proceedings in multiple jurisdictions.

In 2017, the Law Commission of Ontario (“LCO”) announced a project to survey the experience with class actions in Ontario. The LCO received input and submissions from a number of groups, with a significant number of submissions describing a need to update and reform the test for certification of (or court leave to proceed with) a class action in Ontario. In 2019, the LCO released its Final Report, “Class Actions: Objectives, Experiences and Reforms”.<sup>[2]</sup> The LCO’s Final Report made 47 recommendations to reform the CPA and related policies. The LCO recommendations addressed a wide range of issues, including class action certification, settlement approval and distribution, class counsel fees, and costs. The LCO expressly acknowledged, however, that many of its recommendations would be controversial.

Both within and outside the scope of the LCO project, questions were raised as to whether Ontario’s current class actions regime reflects modern legislative objectives and goals, and whether legislative amendments were needed to address the volume, complexity and implications of present-day class proceedings.

When the proposed amendments to the CPA were introduced, the Ontario Ministry of the Attorney General indicated that the Smarter and *Stronger Justice Act* aimed to “modernize and improve... how class actions are handled”<sup>[3]</sup> (see our bulletin on Bill 161’s introduction here). This overhaul of Ontario’s class action system elicited significant debate and a number of submissions seeking to support or oppose the amendments. Some commentators applauded the changes as long overdue and necessary reforms to a system that had become unwieldy and unworkable. Others expressed opposition and various concerns, including a concern that the changes as drafted would make it more difficult for cases to be granted leave to proceed as class actions in Ontario. McMillan has a substantial class action defence practice, and a number of McMillan class action lawyers were actively engaged in submissions for reform. Following review and debate, the legislation passed with few changes from the original language of Bill 161.

## **WHAT IS CHANGING?**

Examples of key amendments and features of Bill 161 are briefly discussed below.

### **New CPA Mandate for the Early Resolution of Issues**

Generally, courts have deferred preliminary merits motions until later stages of class proceedings, to be heard

either with or after the certification motion. Section 4.1 now requires that a motion disposing of a proceeding in whole or in part, or to narrow the issues or evidence for the proceeding, will be heard before or at certification.

Time will tell whether this provision will result in a significant change. Courts may continue to set preliminary motions to be heard with the certification motion, rather than before. However, section 4.1 signals an intention to deal with these matters at an early stage, and the trend may shift to earlier resolution of these motions.

### **New Mandatory Dismissal for Delay**

Section 29.1 provides that a on a motion to dismiss for delay, the court must grant the dismissal unless within the year since the proceeding commenced the plaintiff filed a certification record, a timetable has been filed with the court, the court has ordered a timetable or other steps specified in regulations have occurred.

Mandatory dismissal for delay will also apply, with necessary modifications, to certain existing cases, requiring certain steps to be taken within a one year period after the amendments come into force to avoid dismissal for delay.

### **Changes to the Certification Test**

The court will certify a class action if five criteria are met: i) the pleadings disclose a cause of action; ii) there is an identifiable class; iii) there are common issues; (iv) a class proceeding is the preferable procedure to resolve the common issues; and (v) there is an adequate representative plaintiff.

The amendments include additional requirements in assessing criteria (iv), whether the class proceeding is the preferable procedure. Plaintiffs must show that at a minimum a class action:

- (a) 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; **and**
- (b) the questions of fact or law common to the class members predominate over any questions affecting only individual class members.

### **Mandatory Consideration of Multi-jurisdictional Class proceedings**

The problem of conflicting and overlapping class actions in Ontario and across Canada has been a feature of the Canadian class action landscape for many years. The amendments include changes relating to the identification and management of class proceedings that include claimants from two or more provinces or territories in Canada. The amendments require registration of class proceedings, notice of certification to other similar class actions in Canada. Further, the amendments require the court to consider whether it would be

preferable for some or all common issues or claims to be resolved in another jurisdiction with a class proceeding.

### Appeals

The amendments contain a number of changes relevant to appeals. Previously, plaintiffs had automatic appeal rights to the Divisional Court, while defendants were required to seek leave. Now both defendants and plaintiffs may appeal certification (including refusal to certify and decertifying a proceeding) orders directly to the Court of Appeal. The changes to appeal rights also significantly restrict a plaintiff's ability to materially amend its certification material to improve its chances on appeal of an order refusing to certify a class proceeding.

### Other Changes

The amendments contain a wide range of changes relating to class action procedure and resolution, including these additional changes:

- **Class Action Carriage.** The amendments set out detailed rules for motions where competing plaintiffs' counsel bring overlapping class proceedings, also referred to as "carriage motions". If more than 60 days have passed since an action was commenced under the CPA, leave of the court will be necessary to commence another proposed class action involving similar subject matter and some or all of the same class members.
- **Notices.** The amendments include several changes regarding notice. For example, the amendments include more detailed provisions regarding when, how and to whom notices will be provided, as well as notice content requirements. A new provision expressly confirms that certification notice costs must be paid by the representative plaintiff, who may be reimbursed by the defendant only if the plaintiff succeeds in the class proceeding or the defendant consents to payment.
- **Settlements.** The amendments contain new and detailed provisions to address evidentiary and other requirements for settlement approval, as well as more detailed provisions relating to settlement procedure and related requirements.
- **Distribution of Settlements and Awards.** There are new and detailed provisions to address the distribution of awards and settlement funds, including on a cy-près basis. The changes include new detailed reporting requirements for administrators in relation to the distribution of awards and settlement funds.
- **Subrogated Claims.** The amendments contain requirements that apply if a proceeding does or may include a subrogated claim.
- **Counsel Fee and Disbursement Approvals.** A number of changes relate to the requirements and

procedures relating to the approval of counsel fees and disbursements.

- **Third Party Funding.** The amendments introduce specific provisions addressing third party funding arrangements, which arrangements are subject to court approval.
- **Limitation Periods.** The CPA suspended limitation periods in class proceedings. The amendments expand the events that trigger the resumption of limitation periods. The amendments also clarify that the limitation period for a defendant's claim for contribution and indemnity is suspended until the time to appeal a certification decision has expired without an appeal or the appeal has been finally disposed of.

### **Transition Periods**

The amendments include proposed transition provisions that would see the majority of the amendments apply only to proceedings commenced after the legislation comes into force (subject to some exceptions, including the mandatory dismissal for delay provision noted above).

### **CONCLUSION**

The changes to the CPA are significant and extensive. The extent to which the amendments will modify Ontario class action practice going forward, however, remains to be seen.

Class actions have become associated with high cost, delay and complexity. The amendments are intended to expressly change the test for certification and should make it easier to identify unworkable proceedings at an earlier stage. The provisions requiring hearing of dispositive motions before or at certification should similarly support the efforts of parties and courts to pursue summary resolution at an early stage.

In the short-term, we expect a flurry of matters advancing to certification as there are cases which have not proceeded beyond the mere filing of a claim notwithstanding the passage of several years. In cases which have progressed slowly to-date plaintiffs will be required to file certification records or set timetables for certification to avoid a dismissal for delay.

It is difficult to predict the full impact of the legislative changes and whether the amendments will be sufficient to achieve the necessary reforms to Ontario's class action regime. What is easier to predict is heightened scrutiny of class action practice and jurisprudence as the CPA changes take effect.

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[1] Online: [here](#).

[2] Online: [here](#).

[3] Online: [here](#).

### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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