STAY TUNED: ONTARIO PROPOSES SWEEPING CHANGES TO *CLASS PROCEEDINGS ACT*

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On December 9, 2019, the Ontario government announced material changes to Ontario's *Class Proceedings Act* (*CPA*).

The proposed changes were introduced as part of an omnibus bill, Bill 161, the *Smarter and Stronger Justice Act, 2019*. The Ontario Ministry of the Attorney General indicated that the *Smarter and Stronger Justice Act* is intended to "simplify a complex and outdated justice system" and, among other objectives, to "modernize and improve… how class actions are handled."[1]

Bill 161 was just introduced for First Reading and will make its way through the legislative process over the next several months. Bill 161 is not expected to become law until sometime in the second half of 2020 at the earliest. We will provide updates on the status of the bill and its proposed amendments to the *CPA* as it progresses through the legislature.

Key Takeaways

While Bill 161 is at an early stage and its full impact remains to be seen, the amendments to the *CPA* could materially change the class action landscape in Ontario and across Canada. Several of the proposed changes are likely to be welcomed by parties, class members and courts that have been burdened with lengthy, costly and unworkable proceedings. Some amendments may signal the government's willingness to take more direct steps to address concerns with fairness, access to justice, and recognized problems with the current class action practice in Ontario. As drafted, the majority of the changes would apply only to proceedings commenced **after** the amendments come into force. However, a new mandatory dismissal for delay provision could have implications for existing cases.

The amendments may permit earlier and more effective resolution of unworkable and unmeritorious claims in Ontario. Some Ontario claimants may try to instead pursue such claims in jurisdictions that have not yet adopted similar reforms. If so, the courts may face early challenges in managing these proceedings that may test whether existing tools are effective to address forum shopping attempts by Ontario residents seeking to avoid the impact of the changes in Ontario's legislation.

Background

To some, changes to Ontario's class action legislation are overdue. The proposed amendments in Bill 161 represent the first substantive overhaul of the *CPA* since it was enacted in 1993.

In 1990, Ontario's then draft class action legislation was presented to the legislature 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."[2] However, almost three decades of class actions experience since then have revealed numerous challenges. The volume and complexity of class actions have materially increased. Class proceedings are more frequently associated with high cost, delay, difficulties in dealing with unmeritorious or unworkable claims, and the ever-present problem of overlapping and conflicting class proceedings in multiple jurisdictions. There is also the practical reality that few class actions proceed to trial, so that once any class action is certified it is likely to be settled, rather than determined on the merits.

In 2017, the Law Commission of Ontario (LCO) announced a project to survey the experience with class actions in Ontario and to provide an independent and practical analysis of class actions from the perspective of the primary objectives of class proceedings. In July 2019, the LCO released its Final Report, "Class Actions: Objectives, Experiences and Reforms".[3] The Final Report made 47 recommendations to reform the *CPA* and related policies. The 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 have been 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.

Bill 161 *CPA* Amendments – Summary of Important Features

The amendments included in Bill 161 appear to be a response, in part, to some recognized problems with the existing class actions regime. Some of the proposed amendments reflect concepts similar to recommendations contained in the LCO's Final Report. Other proposed amendments to the *CPA*, however, reflect changes rejected or not included in the LCO's final recommendations. Some of the key differences in approach may indicate the government's intention to try to respond more directly to problematic issues in class proceedings.

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

New CPA Mandate for the Early Resolution of Issues

Motions seeking early resolution of issues on the merits have frequently been deferred by courts until later stages of the litigation. Under proposed new section 4.1 a motion that may be dispositive of the proceeding (in whole or part), or narrow the issues to be determined or evidence adduced, would have to be heard before or at certification. Section 4.1 signals an intention to have these matters dealt with promptly and at an early stage.

New Mandatory Dismissal for Delay

It is not uncommon for proposed class actions to be filed and then lie dormant for years. New section 29.1 provides that the court **shall**, on motion, dismiss certain proceedings for delay unless requisite steps have been taken within a one-year period. 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 proposed amendments provide that a proposed class proceeding will meet the threshold requirement of being the preferable procedure for resolution of common issues **only if, at a minimum**, (i) it 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** (ii) the questions of fact or law common to the class members predominate over any questions affecting only individual class members.

With respect to (ii), a "predominance" certification requirement has frequently been raised as a potential means of responding to the problems posed by unworkable and impractical class proceedings. Some form of consideration of the "predominance" of common issues is a feature of the class action legislation in other Canadian jurisdictions (such as in British Columbia and Alberta); however, the minimum superiority and predominance requirements reflected in the amendments are closer to certain class certification requirements under the *Federal Rules of Civil Procedure* in the United States.[4]

The imposition of minimum superiority and predominance requirements may be a useful step toward giving the certification motion an effective gatekeeping function. If the *CPA* amendments reflect the Ontario government's interest in mirroring certain features of the U.S. approach to class certification that have proven useful in dealing with the proliferation of unmeritorious or unworkable claims, now may be the time to also consider further amendments to the test for certification that incorporate and reflect the government's clear intent (e.g. as revealed in section 4.1) to advance early resolution of issues prior to or at certification. For example, a further amendment may include a requirement that the facts alleged not be consistent with purely lawful conduct.

Mandatory Consideration of Multi-jurisdictional Class proceedings

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.

For example, the amendments include a requirement to register proposed class proceedings and to provide notice of the certification motion to the representative plaintiff in other similar proposed or certified class actions in other Canadian jurisdictions. The amendments would also require the court to take into consideration other class proceedings or proposed class proceedings outside of Ontario. The court would be required to determine whether it would be preferable for some or all common issues or claims to be resolved in that other jurisdiction. In making its determination, the legislation requires the court to be guided by certain objectives described in the amendments and to consider all relevant factors, including those listed in the legislation. The court may refuse to certify a multi-jurisdictional class action if it is preferable that the matter proceed in another jurisdiction. New section 5.1 provides that the court may make any order it considers appropriate on a motion to certify a multi-jurisdictional class proceeding (including refusing to certify the proceeding if the court determines it should proceed in another jurisdiction and refusing to certify the proceeding in respect of class members the court determines may be included in another proposed or certified class proceeding).

Any party or class member would be permitted to make a pre-certification motion for a determination as to whether it is preferable that certain claims or certain common issues be resolved in the other jurisdiction. The court may stay an Ontario proceeding where it is preferable that some or all of the claims be resolved in a similar class proceeding in another Canadian jurisdiction.

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. Some jurisdictions have incorporated amendments that expressly consider proceedings in other jurisdictions,[5] and some courts have adopted practice directions to incorporate recommendations of "best practices" for the management of class proceedings commenced in two or more Canadian jurisdictions.[6] In practice, however, management of this problem has remained largely reliant on voluntary cooperation by parties and courts across cases and jurisdictions. The fact that changes are necessary is well-recognized. Whether the proposed changes will be effective in helping to manage this problem remains to be seen.

Appeals

The amendments contain a number of changes relevant to appeals. For example, the appeal routes would be changed so **both** defendants and plaintiffs may appeal certification (including refusal to certify and decertifying a proceeding) orders directly to the Court of Appeal. The changes also significantly restrict a plaintiff's ability to materially amend its certification material to improve its changes on appeal of an order

refusing to certify a class proceeding.

Other Changes

In addition to the changes noted above, the amendments contain a wide range of changes relating to class action procedure and resolution. Additional examples of these changes are briefly noted below.

- **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.
- **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 contains 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.

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). In light of the fact that many existing cases have not proceeded beyond the mere filing of the claim, however, it remains to be seen whether and to

what extent the amendments (and the legislative intent expressed in the amendments) will influence existing class proceedings going forward.

Input on the Proposed Legislation

We will provide an update once the bill is open for public comment. We encourage stakeholders to participate in this process, or to share their comments with a member of McMillan's class action group.

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[1] Online: Building a Stronger Justice System to Grow Safer Communities[ps2id id='1' target='/]
[2] Online: Hansard Issue: I071_90[ps2id id='2' target='/]
[3] Law Commission of Ontario, Class Actions: Objectives, Experiences and Reforms: Final Report[ps2id id='3' target='/]
[4] Fed. R. Civ. P. 23(b)(3).[ps2id id='4' target='/]
[5] For example, British Columbia, Alberta and Saskatchewan.[ps2id id='5' target='/]
[6] In 2018, the Canadian Bar Association approved a resolution "Canadian Judicial Protocol for the Management of Multijurisdictional Class Actions and the Provision of Class Action Notice" (the "**2018 Judicial Protocol**") in relation to the management of multijurisdictional class proceedings. The 2018 Judicial Protocol was endorsed by the Canadian Judicial Counsel and courts in a number of jurisdictions (***e.g***. Ontario, British Columbia, Alberta) have adopted practice directions to incorporate the 2018 Judicial Protocol.[ps2id id='6' target='/]

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.