

Raising the Bar

Key Changes to Ontario's Class Proceedings Regime Now in Effect

Date: October 9, 2020

For the first time in nearly three decades, significant changes have been made to Ontario's class proceedings regime. The amendments to the *Class Proceedings Act, 1992 (Act)* came into effect on October 1, 2020 and are significant in terms of their substance and scope, modifying many key provisions of the existing Act and adding nearly a dozen more.

Some of the key reforms are described below.

A Stricter Certification Test

Perhaps the most significant amendment is the introduction of a stricter certification test, which is the five-step test used by courts to determine which cases will be certified to proceed as class proceedings.

One of these five criteria is whether a class proceeding is the "preferable procedure" under s. 5(1)(d) of the Act. That criterion is now amended to include new requirements for "predominance" and "superiority". Specifically, Ontario courts are directed to find that a class proceeding is the "preferable procedure" only if, at a minimum:

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

The new language adopts the rules for class proceedings certification from the U.S. Federal Rules of Civil Procedure almost verbatim. This more onerous test may make it more difficult for plaintiffs to certify and pursue class proceedings.

Encouraging Early Resolution

The amendments to the Act also encourage early resolution of some class proceedings.

Previously, the presumptive rule in Ontario has been that the certification motion would be the first substantive motion to be heard in a class proceeding. Now, Ontario courts are required to hear summary judgment motions and motions to narrow the issues before or simultaneous with the

certification motion.

This offers defendants an opportunity to narrow issues or dispose with the proceeding entirely prior to a costly fight over certification.

Facilitating Dismissal for Delay

Defendants also now have the ability to bring a motion to dismiss a dormant class proceeding, a change designed to expedite the class proceedings process. If a plaintiff does not file a “final and complete” certification motion record, does not file a timetable, or has not completed certain other procedural steps within a year of commencing the proceeding, the court will be required to dismiss the proceeding for delay.

Limiting Multi-Jurisdictional Class Proceedings

The reforms reflect the reality that multi-jurisdictional class proceedings (i.e., those brought on behalf of residents of two or more provinces or territories) have become increasingly common. Ontario courts are now required to consider whether to refuse to certify a class proceeding on the basis that it would be preferable for all, or some, of the class members’ claims to be resolved in a multi-jurisdictional proceeding commenced outside of Ontario. An Ontario proceeding may be stayed on this basis. To facilitate this process, Ontario plaintiffs are also now required to register class proceedings and to advise counsel advancing parallel proceedings in other provinces. If applicable, these amendments offer a potential avenue for defendants resisting Ontario certification.

Approving Class Settlements

Stricter requirements for court approval of class proceedings settlements have also been introduced. To receive court approval, settlements must be fair, reasonable and in the best interests of class members. In seeking settlement approval, class counsel will be required to make “full and frank disclosure” of prescribed factors to assist the court in assessing the fairness of the proposed settlement. The court may hold back class counsel’s fees until it is satisfied with the distribution of the monetary award or settlement funds.

Introduction of Parallel Appeal Rights

Historically, parties have had asymmetrical appeal rights under the Act. While a plaintiff who was unsuccessful on the certification motion had a direct right of appeal to the Ontario Court of Appeal, a unsuccessful defendant was required to pursue an intermediate appeal to the Divisional Court. With the new amendments now in effect, all parties are provided with the same right to directly appeal certification orders to the Court of Appeal. This balances appeal rights between parties and



ensures that a defendant can pursue an appeal more expeditiously.

Many of these changes have the potential to be beneficial to companies defending against class proceedings.

We look forward to keeping you informed of further developments as these amendments are interpreted and applied by the Ontario courts. Please contact any member of our [Litigation Group](#) should required further information.