Common Ground? Class Action Updates

Ontario Court of Appeal Clarifies Transition Provision in *Class Proceedings Act, 1992*

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Ontario's class proceedings legislation was amended in 2020 and the Ontario courts have recently addressed the question of "transition" for cases begun under the "old" version of the legislation.

In *Martin v. Wright Medical Technology Canada Ltd.*, the Ontario Court of Appeal confirmed that there is a "bright line" between actions started under the *Class Proceedings Act, 1992* (*Act*) before it was amended in 2020, and those actions started under the *Act* after the 2020 amendments. The distinction is significant, among other things, because the "preferable procedure" portion of the certification test was "stiffened" under the amended *Act*.

The transition provisions of the amended *Act* are found in section 39, which specifies that the old *Act* applies to actions commenced prior to October 1, 2020, and the amended *Act* applies to actions started after that date. Actions started under the old *Act* are subject to mandatory dismissal for delay under section 29.1 of the amended *Act* unless the test under that section is met to avoid dismissal.

The *Martin* decision involved two class actions (in which Rowland and Martin, respectively, were the named proposed representative plaintiffs) which had been commenced under the old *Act*. The Rowland action had failed to meet the requirements to avoid mandatory dismissal under s. 29.1 of the amended *Act*. As stated by the Court, it is "common ground that a new and substantively similar action asserting the causes of action in the Rowland action could be started under the amended *Act* after such a dismissal." The Martin action had met the requirements under section 29.1 and as a result the action could continue under the old *Act*.

Class counsel in both cases wanted the Rowland action to proceed, but under the more plaintiff-friendly certification provisions of the old *Act.* The matter proceeded before a motion judge. He added the Rowland action to the Martin action, then ordered the combined action to proceed under the amended *Act*. The decision to proceed under the amended *Act* was appealed.

The Court of Appeal reviewed the text of the amended *Act*, the legislative history leading up to the 2020 amendments, and the relevant jurisprudence.

It agreed with the observation in *David v. Loblaw Companies Ltd.* that the "legislature drew a bright line between class action proceedings commenced before the 2020 amendments came into effect, and class action proceedings commenced after that date" and "the language of s. 39(1) could not be clearer."

The Court of Appeal concluded that since the Rowland action was granted leave to be discontinued, it could be re-filed—but under the amended *Act*. The Court also found that the Martin action is to be governed by, and would therefore continue under, the old *Act* "alongside a re-constituted or re-filed Rowland action to be commenced under the amended *Act*, to be tried separately or together."

Further, the Court stated that "whether the differences in the criteria will make any difference in the certification decision for each is unknown and will depend on the facts as they unfold." The Court rejected the argument of the respondents (i.e., the defendants) that "different certification tests would be 'entirely unmanageable and unworkable' owing to the application of different criteria and different appeal routes."

Finally, the Court addressed an additional issue raised and found that a new defendant could be added to the reconstituted Rowland action and that the viability of any limitations defence would be decided in the future.

Key Takeaway

The key takeaway here is the Court's confirmation of a "bright line" approach to the transition provisions of the *Act*. The decision confirms that the old *Act* continues to apply to class actions commenced before October 1, 2020 and that the new *Act*, with the stricter certification test and mandatory dismissal for delay, applies to actions commenced after the 2020 amendments.