

Appendix R

Amendments to Ontario Class Proceedings Act

In July 2020, the Ontario Government enacted major changes to the *Class Proceedings Act, 1992* (the Act) as part of *The Smarter and Stronger Justice Act, 2020*. This legislation represents the first major amendment to the Act since it was enacted in 1992.

The amendments to the Act have not yet been proclaimed in force and will apply, once proclaimed, only to new proceedings and will not apply retroactively to existing proceedings.

Certification Test

A 2019 report of the Law Commission of Ontario estimated that 73% of all class proceedings are eventually certified in whole or in part. Certainly, it has been CLLAS's experience that most matters are certified such that we have concentrated our efforts on negotiating the best possible certified issues rather than spending resources fighting certification. Amendments to the Act may make certification challenges more viable.

From CLLAS's perspective perhaps the most significant amendment to the Act is the addition of requirements of "superiority" and "predominance" to the "preferable procedure" element of the certification test.

Historically, the Ontario courts have accepted that a class proceeding is the preferable procedure for achieving the public policy objectives of class proceedings (i.e., judicial economy, behaviour modification and access to justice) where the resolution of the common issues would materially advance the proceedings as a whole, even if these common issues do not predominate over individual issues (i.e., not all issues are common to all members of the class).

The amendments to the Act now mean that, to meet the preferable procedure element of the certification test, the plaintiff will have to establish, at a minimum, that:

- 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, including, as applicable, a quasi-judicial or administrative proceeding, the case management of individual claims in a civil proceeding, or any remedial scheme or program outside of a proceeding; and
- b) the questions of fact or law common to the class members predominate over any questions affecting only individual class members.

The superior and predominance requirements in the amended Act are similar to provisions found in the class actions certification test in the United States under the *United States Federal Rules of Civil Procedure*. It is possible that the amendment to the certification test will filter out some proposed class actions, which may meet the existing certification test because they may have one or a few common issues, but which really are not suited for treatment as class actions, practically or efficiently, due to the highly individualized nature of their claims. Indeed, we have had some CLLAS class proceedings where such seemingly intrinsic issues of reliance and causation have been left for individual trials following the trial of common issues.

Pre-Certification Motions

Under the current process, dismissal motions are typically heard together with certification motions or following certification.

Under the amended Act, motions to dispose of the proceeding, or which narrow the issues or evidence on certification are to be heard and decided prior to the certification motion, unless the court orders that the two motions be heard together. This amendment could encourage the use of pre-certification motions to dispose more expeditiously of unmeritorious claims, or to narrow the issues before the hearing of the certification motion.

Appeals from Certification Orders

Under the current Act, only plaintiffs have an automatic right to appeal a dismissal of a certification order to the Divisional Court, whereas defendants, who wish to appeal an order certifying a class action, must apply for leave to appeal the certification order. Under the amended Act, both defendants and plaintiffs may now appeal certification orders directly to the Court of Appeal as of right. Additionally, the plaintiff is not permitted to materially amend the notice of certification motion or pleadings on appeal except with leave of the court in exceptional circumstances.

Tolling of Defendant Claims

Limitation periods applicable to potential claims for contribution and indemnity by defendants are automatically tolled from the date of the commencement of the action until the deadline for appealing the certification order has expired or the appeal has been finally disposed of.

Mandatory Dismissal for Delay

The amended Act now provides that the court, on a motion, will dismiss any action where the plaintiff has not filed a final motion for certification or the parties have not agreed to a timetable for certification within one year of the action being commenced.

Speedy Disposition of Carriage Disputes

Where more than one action involving the same or similar issues and some of the same class members are commenced in Ontario, a carriage motion must be made within 60 days of the day on which the first action was commenced and heard as soon as practicable. The court's decision on a carriage motion will be final and not subject to appeal.

Coordination of multi-jurisdictional class actions

Where a class proceeding involving the same or similar matters, and some or all of the class members, is commenced in a Canadian jurisdiction other than Ontario, the court will be required to determine whether it would be preferable for some or all of the claims or common issues of the class members be resolved in the proceeding commenced in the jurisdiction outside of Ontario. This could reduce the cost of duplicative class proceedings in multiple provinces.

Notices to the class

The amended Act changes a number of provisions regarding notices to the class. Significantly, the costs of notice to the class are to be borne by the representative plaintiff. The costs of any notice of certification may only be awarded to the representative plaintiff if the class proceeding is ultimately successful.

Third Party Funding

Under the amended Act, third party funding arrangements will be subject to court approval and must be disclosed to defendants. The court will only approve a funding arrangement if it is satisfied that the agreement is fair and reasonable, and that the funder is financially able to satisfy an adverse costs award in the proceeding. Defendants will be able to recover a costs award made against the representative plaintiff directly from the third-party funder, to the extent of the indemnity provided under the approved funding agreement.

Third-party funding arrangements will have to be included in the notice of certification to class members. The court will have the ability to order that third-party funder not resident in Ontario to provide security for costs to the defendants.

Stricter requirements for settlement approval

Plaintiffs seeking court approval will be required to make full disclosure of all material facts and file an affidavit detailing the method used for valuing the settlement and the plan for allocating and distributing settlement funds. Evidence demonstrating that the settlement is fair, reasonable, and in the best interests of class members will be required. A court will not approve a settlement unless those with subrogated claims have had a chance to consider the settlement and have approved it in writing.