AIRD BERLIS

Three Legislative Changes Impacting Class Actions

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In early July 2020, the Ontario Legislature passed the *Smarter and Stronger Justice Act, 2019* (Bill 161), which includes several changes to Ontario's *Class Proceedings Act*, *1992.* One of those changes is to the class certification test in Ontario, requiring that issues common to class members must predominate over any individual issues that will be left to be determined.

When these modifications come into effect, they will join two other legislative changes over the last 18 months that impact class action lawsuits:

1. amendments to British Columbia's *Class Proceedings Act* in late 2018, which will take on greater significance considering the new amendment to the certification test in Ontario, and
2. the passage of the C*rown Liability and Proceedings Act*, *2019*, S.O. 2019 ("*CLPA*"), which came into effect in July 2019. The *CLPA* precludes proceedings against the province of Ontario respecting a "policy matter" defined to include "the manner in which a program, project or other initiative is carried out."

Depending on how these amendments are interpreted by the courts, they may make it more difficult to bring a class action in Ontario and, in the case of actions against non-government actors, favour British Columbia as the main forum for class action litigation going forward.

Amendments to Ontario's Class Proceedings Act

Bill 161 includes dozens of amendments to Ontario's class action legislation. These amendments will not have retroactive effect, but will apply to proceedings commenced after the amendments come into force. Some of the key amendments provide for and include:

1. **Mandatory dismissalfor delay** – any proposed class proceeding will be automatically dismissed for delay unless, by the first anniversary of the day on which the proceeding was commenced, the representative plaintiff has filed a "final and complete" certification motion record. A dismissal can only be avoided otherwise if the parties have agreed in writing, and filed with the court, a timetable for service of the representative plaintiff's motion record for certification or for completion of one or more other steps required to advance the proceeding; or the court has ordered that the proceeding not be dismissed and established such a timetable. Prior to this amendment, lawyers for the representative plaintiff had no deadline in practice to complete their certification record, which, in some instances, allowed for additional time to obtain evidence to support their certification motion, especially in circumstances where there might be ongoing government investigations or cross-border proceedings.
2. **Support for pre-certification motions to strike and for summary judgment** – judges must hear and dispose of any motion filed before the certification motion that may dispose of the proceeding in whole or in part, or narrow the issues to be determined or the evidence to be adduced in the proceeding, unless the court orders that the two motions be heard together. This amendment changes what had been the operating premise that the certification motion should be the first motion that is heard, subject to persuading the court otherwise. The court must now hear potentially dispositive motions before or concurrent with certification opening the door to more motions for summary judgment to dismiss an action or strike out certain claims earlier in the process.
3. **Consideration of other provincial proceedings** – the amendments include various provisions that call upon the court to consider whether it would be preferable for some or all of the issues raised to be

resolved in a proceeding commenced in another province instead of in the proposed Ontario proceeding. Among other things, a defendant can move before the certification hearing to have the Ontario proceeding stayed on the grounds that it is preferable to have the claims addressed in another provincial proceeding.

4. **Leave no longer required to appeal certification** – appeals from decisions certifying a class action no longer require leave to appeal from the Divisional Court. All certification decisions will now be heard by the Court of Appeal as of right. Other than in exceptional and unforeseen circumstances, the cause of action and proposed common issues cannot be amended on an appeal from an order dismissing certification, thereby eliminating the ability to reframe the case.

Other amendments go to such matters as registration of a proposed class action, carriage motions, notice, subrogated claims, approval of third-party funding agreements, fees, settlement approval, cy-près distributions and claims administration.

However, the amendment with the greatest potential impact to class actions in Ontario is the modification to the test by which the courts in Ontario determine which cases will become class actions. In deciding whether to certify a proceeding as a class action, Ontario courts have always had to determine whether a class proceeding would be the "preferable procedure" for the resolution of common issues. The Supreme Court of Canada has interpreted this requirement as requiring a court to compare the class action against other methods of resolving the claim through the lens of the three principal goals of class actions: behaviour modification, judicial economy and access to justice.[1] Prior case law rejected any requirement that the common issues predominate over issues requiring individual consideration, which is a requirement under the United States' federal rule governing certification of class actions. Bill 161 now adds as a requirement in considering the preferable procedure requirement language comparable to that under United States Federal Rule 23(b)(3).

Ontario judges going forward must adhere to the following direction under what will become section 5(1.1) of Ontario's *Class Proceedings Act*:

[A] class proceeding is the preferable procedure for the resolution of common issues under clause (1) (d) 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, 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.

This represents a significant change in the law. Our courts have previously noted, in cases like the residential school cases, that the fact that there may remain numerous issues requiring individual determination should not preclude the certification of a class proceeding that resolves a common issue that constitutes a substantial ingredient to a claim even if it makes up a very limited aspect of the liability question.[2] In so doing, the court applies a qualitative and not simply a quantitative consideration of the common issue relative to the remaining individual issues. It remains to be seen if Ontario courts will continue to take such a view in applying a predominance test pursuant to this amendment. If the courts simply apply a quantitative approach, certain cases that previously would have been certified may no longer meet the certification test.

British Columbia Amendments Supportive of National Classes

British Columbia's amendment to its *Class Proceedings Act* eliminated the requirement that out of province class members take positive steps to join ("opt in") a B.C. class action. Now, both residents and non-residents will be automatically considered members of the class unless they voluntarily opt out. This amendment is likely to make British Columbia an even more appealing jurisdiction for class action plaintiffs by facilitating national classes. Depending on how Ontario courts interpret the predominance test, British Columbia may become a preferred forum over Ontario now that national classes can more readily be

pursued coupled with the absence of any predominance requirement and a no-costs regime in British Columbia.

The B.C. courts will have some discretion in whether to permit a national class to be certified. The court must still consider whether it would be preferable for some or all of the issues to be resolved in existing proceedings elsewhere in Canada based on guidance set out in the legislation. Also, the proposed representative plaintiff in B.C. must provide notice of the certification application to the representative plaintiffs involved in existing or proposed multi-jurisdictional class proceedings elsewhere in Canada involving the same or similar subject matter. Those representative plaintiffs who receive notice are then able to make submissions at the certification hearing in B.C. as to why it may not be appropriate to include some or all of the proposed class. In making these decisions, judges may consider a variety of multijurisdictional factors, including degree of overlap of the classes, degree of disruption that certification would cause to other proceedings, the possibility of offending judicial comity, disruption to existing solicitor client relationships, and the effect on the economic viability of the action.[3]

Ontario Limits Class Actions Against the Crown

Governments commonly find themselves defendants to class action lawsuits. Last July, the *Crown Liability and Proceedings Act, 2019* came into effect in Ontario with retroactive application. Subsection 11(4) of the Act provides that, "No cause of action arises against the Crown or an officer, employee or agent of the Crown in respect of any negligence or failure to take reasonable care in the making of a decision in good faith respecting a policy matter, or any negligence in a purported failure to make a decision respecting a policy matter." "Policy matters" are defined to also include "the manner in which a program, project or other initiative is carried out." This has raised concerns about how the *CLPA* will be interpreted relative to negligence-based claims (individual and class action) against the Ontario government.

In *Leroux v. Ontario, 2020 ONSC 1994*, a case about allegations of negligence in operating social assistance programs for disabled persons, Justice Belobaba found it was not plain and obvious, for purposes of the certification test, that the new provisions of the *CLPA* applied to bar claims arising from operational negligence not involving any decision. However, the effect of *Leroux* is simply to defer to a later date an actual determination of whether operational negligence is subject to immunity under the *CLPA.* In *Francis v. Ontario, 2020 ONSC 1644*, a summary judgment motion in a certified class proceeding brought by prison inmates concerning administrative segregation, the Court was required to make a definitive interpretation of the intended scope of the *CLPA.* Justice Perell interpreted the Act narrowly, finding that it merely codified the pre-existing limitation on Crown immunity leaving intact liability for operational decisions.[4] Justice Perell relied on the legislative history of statutes of this nature, which were intended to curb Crown immunity, the statements of the Attorney General when the legislation was passed that the Act was not intended to change the existing law, and the principle that legislation intending to change rather than codify the existing common law must do so expressly. Most recently, at the end of June, in *Cirillo v. Ontario, 2020 ONSC 3983*, the scope of the *CLPA* was again raised for consideration. Unfortunately, Justice Morgan left it to another day to determine whether the *CLPA* has simply codified the pre-existing law, as suggested by Justice Perell, or potentially broadened the scope of immunity to include operational negligence. In *Cirillo*, the proposed class action concerned the issue of timely bail hearings.[5] Justice Morgan found the claim raised government decisions and acts that were based on social, economic and political considerations and squarely fit within the scope of immunity under the *CLPA* as government policy. However, it is worth noting that the Crown in *Cirillo* expressed the view that the new provisions merely codify and more clearly define the difference between what it described as a "discretionary/policy decision for which the Crown is immune, and a non-policy decision for which it can be sued."[6] These initial cases suggest that some of the concerns about the impact of the *CLPA* may not materialize, although it is too early to make any definitive conclusions.

Conclusion

After over twenty-five years with no changes to legislation governing class proceedings in Ontario, Bill 161, and by implication the *Crown Liability and Proceedings Act, 2019*,have opened new interpretation issues that may take several years to settle. During this period, these legislative changes will likely give rise to new challenges to certification of certain types of class actions in Ontario and may make other provinces, such as British Columbia, which has amended its legislation to increase access to that province's courts for non-residents, a more attractive forum for class action suits.

[1] *AIC Limited v. Fisher, 2013 SCC 69, [2013] 3 SCR 949*

[2] *Cloud v. Canada (Attorney General), 73 OR (3d) 401 (Ont. C.A.)*

[3] *Wilson v. DePuy International Ltd., 2019 BCCA 440*

[4] At para 507.

[5] At para 24.

[6] At para 13.

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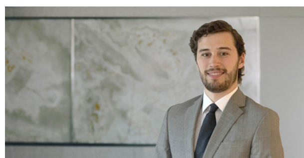

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