

Goodmans^{LLP} Update

Ontario Government Proposes Significant Changes to the *Class Proceedings Act*

The Ontario government this week introduced the *Smarter and Stronger Justice Act, 2019* (“Act”). In addition to other broad changes, the Act, which has not yet become law, contains significant amendments to the *Class Proceedings Act, 1992*. Some of the more significant changes which could affect class proceedings are outlined below.

Registration of Class Proceedings

Any person who commences a class proceeding will be required to register it that same day in accordance with regulations to be later made under the Act. Proof of registration will also be required in one of the affidavits filed in the motion for certification. It is anticipated that the registration requirements will likely involve registering the class action with the Class Action Database of the Canadian Bar Association.

Mandatory Hearing of Certain Motions

Motions brought that would (a) dispose of the proceeding in whole or in part; or (b) narrow the issues to be determined or the evidence to be adduced in the proceeding, will have to be heard and disposed of before the certification motion, absent a court order that the motions be heard together. Presently, such pre-certification motions are generally discouraged by the courts.

Heightened Requirements to Establish a Class Action is the Preferable Procedure

To satisfy the existing certification test, a representative plaintiff must, among other things, demonstrate that a class proceeding is the preferable procedure to resolve common issues among the class members. Under the amended regime, representative plaintiffs will be required to show that a class proceeding 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. This includes any quasi-judicial or administrative proceeding, case management or any other remedial scheme or program outside of a class proceeding, which might better resolve the matter. In addition, it must be demonstrated that questions of fact or law common to the class members predominate over any questions affecting only individual class members. This change may, in part, be directed at incentivizing defendants to offer alternative compensation to prospective plaintiffs before a class action is commenced or certified.

Multi-jurisdictional Class Proceedings

Ontario courts will be required to consider class proceedings commenced in other jurisdictions to determine whether it would be preferable for some or all of the claims raised in a proposed Ontario class proceeding to be resolved in the other jurisdiction rather than under the Ontario regime. The court may also certify a multi-jurisdictional proceeding where Ontario is the appropriate venue for the proceeding.

Authors



Daniel Cohen
dcohen@goodmans.ca
416.597.5494



Kirby Cohen
kcohen@goodmans.ca
416.849.6912

Carriage Motions

Where two or more proceedings involve the same or similar subject matter, the court may, on motion of a representative plaintiff in one of those proceedings, order that one or more of the proceedings be stayed. Any such carriage motion must be made within 60 days of the day on which the first proceeding was commenced and be heard as soon as practicable. Where a stay is granted, the court must also bar the commencement of any other proceeding involving the same or similar subject matter and some or all of the same class members, without leave of the court. Carriage motion decisions will be final and not subject to appeal. Solicitors for the representative plaintiffs who are parties to the carriage motion will bear the costs of the motion and cannot attempt to recoup any portion of the costs from the class or any class member or from the defendant. Class proceedings which would involve the same or similar subject matter and some or all of the same class members as an existing proceeding, cannot be commenced without leave of the court if more than 60 days have passed since the existing proceeding was commenced.

Notice for Class Members

There are various changes to notice requirements under the Act, including that notices be written in a plain language manner and in both official languages, unless the court orders otherwise.

Settlements

Settlements may only be approved if they are fair and reasonable and in the best interests of class members. There will be specific evidentiary requirements in settlement approval motions, including evidence of the risks of continued litigation, the range of possible recoveries and the method used for valuation of the settlement.

Limitation Period

Additional circumstances have been added under which the applicable limitation period resumes running against a class member following the commencement of a proceeding. This includes circumstances in which the court refuses to certify the proceeding as a class proceeding. The limitation period for contribution and indemnity claims by a defendant is also suspended in favour of the defendant on commencement of a class proceeding and resumes running as soon as the time for appeal of the court's decision to certify or refuse to certify the proceeding has expired, or any such appeal has been finally disposed of.

Mandatory Dismissal for Delay

Proceedings commenced under the Act must be dismissed for delay, on motion, after one year unless the representative plaintiff has filed a final and complete motion record for certification and certain other criteria have been met.

Appeals

Orders both certifying and refusing to certify a proceeding as a class proceeding may be appealed to the Court of Appeal.

Third-Party Funding Agreements

Any third party funding agreement will be subject to the court's approval obtained on motion by the representative plaintiff as soon as practicable once the agreement is entered into. Third party funding agreements not approved by the court will be of no force or effect. The Act includes various factors for the court to consider in approving third party funding agreements, including that the agreement must be fair and reasonable and will not diminish the rights of the representative plaintiff. Proposed funding agreements will need to be provided to the court in full, and to the defendants, and only information which may reasonably be considered to confer a tactical advantage upon the defendant can be redacted.

Implications

Once enacted, the foregoing changes can be expected to have significant implications for all parties involved in class proceedings in Ontario. It is not clear at this time when the amendments could become law, but will likely not be before mid-2020 at the earliest.

Should you wish to discuss the foregoing or class actions more generally, please contact the authors or any member of our [Class Action Group](#).