Class Actions and an Increasingly Litigious Ontario

Erin Crochetière
September 2020

On October 1, 2020, significant changes to the *Class Proceedings Act* will come into force. These changes will meaningfully alter the landscape of class actions in Ontario.

Many of the changes to the *Act* appear to aim to promote efficiency for the benefit of both defendants and plaintiffs. For example, the amendments allow for a motion to be brought prior to, or in conjunction with, a certification motion to consider early resolution of the issues in dispute.

The new scheme also grants the Court powers to manage multi-jurisdictional proceedings as well as broad jurisdiction to manage the conduct of a class proceeding to ensure "its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate."[1]

However, some amendments appear to create additional barriers for plaintiffs which did not exist under the former scheme.

Most controversially, the requirements for certification are now more stringent and require that the plaintiff demonstrate that questions of fact or law common to the class members *predominate* over the individual issues.[2] Under the former scheme, the plaintiff was required to merely demonstrate that class proceedings were the preferable procedure for the resolution of common issues.

In addition, section 29.1 of the amended *Act* provides for a mandatory dismissal of a proceeding unless, by the first anniversary of the day on which the proceeding was commenced, a) the plaintiff has filed a complete motion record in the motion for certification, b) the parties have agreed to a timetable, c) the Court has ordered that the

[1] *Class Proceedings Act*, 2020, R.S.O. c. 11, Sched. 4, s. 12.
[2] *Ibid* s. 5 (1.1).

proceeding not be dismissed and has established a timetable, or d) any other steps as specified under the regulations have taken place.

The *Act* also requires that plaintiffs obtain Court approval for any third party funding agreements.[3]

These amendments appear to promote efficiency and provide mechanisms for the disposal of unmeritorious claims at an earlier stage in proceedings. However, the amendments may also limit the amount of class actions which are certified in Ontario.

Critics of the changes to the *Act* to the scheme also cite the intersection between the changes to the *Class Proceedings Act* and the expansion of tort immunity under the *Crown Liability and Proceedings Act*, arguing that the result may be a broad immunity from liability for large, government controlled corporations, while plaintiff classes with legitimate claims will be left without recourse.

However, some view these changes as necessary to ensure the survival of the class actions scheme and the broader civil litigation system. Arguments made in this regard cite the growing number of class actions commenced in Ontario and the vast public resources consumed in the course of these often drawn-out and protracted proceedings.

Indeed, in the United States over the last decade or so, the jurisprudence demonstrates a reluctance on the part of the Courts to certify class actions. Legislation has also been enacted to curtail the use of class actions as well as grant federal courts greater powers to manage class action proceedings.[4]

One might ask: why this is necessary? Why must legislators in Ontario act to restrict or limit class proceedings?

Anecdotally, one reason might be that Ontarians are catching up with their neighbours to the south in terms of litigiousness. On the one hand, this might be characterized as a good thing; more people are aware of their rights and are able to make the necessary financial arrangements to enforce them.

Conversely, one might argue that the present system, together with the popularity of adverse costs insurance and third party funding agreements, encourages the pursuit of unmeritorious claims. Moreover, it is debateable whether the resources consumed by

[3] *Ibid* s. 33.1.

[4] See for example: *Comcast Corp v Behrend,* 133 S Ct 1426 (2013*), Epic Systems Corp v Lewis, 138 S Ct 1612 (2018)* and the *Class Action Fairness Act of 2005*.

these lawsuits are outweighed by the end-of-day awards to the individuals who seek to enforce their rights.

On the face of the amendments, it is difficult to argue with the changes to the *Class Proceedings Act*, which appear to be aimed to promote efficiency and which should, in theory, benefit all parties involved in these proceedings.

Whether this efficiency will come at a high cost for prospective plaintiff classes remains to be seen.

The broader changes to the landscape of civil litigation in Ontario as a result of these amendments (whatever they may be) will also be interesting to witness in the coming years.