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Bill 161: Much Needed Modernization for Class Actions in Ontario

On December 9, 2019, the Attorney General of Ontario introduced Bill 161, the *Smarter and Stronger Justice Act, 2019* . The new bill is omnibus legislation that proposes broad reforms to the legal system in Ontario. While the draft legislation will keep commentators busy for weeks or months, I focus here on one set of proposed reforms: those to the class actions regime in Ontario.

Bill 161 adopts a number of recommendations that had been made in the Law Commission of Ontario's July 2019 Final Report on Class Actions. I and others at the firm have commented on the changes proposed in the LCO's report here and here.

In this blog post, I will divide what Bill 161 contains and does not contain from a class actions perspective into three buckets:

- The recommendations from the LCO's report that were adopted;
- The recommendations from the LCO's report that weren't adopted; and
- The provisions of Bill 161 that pertain to class actions but that weren't recommended in the LCO's report.

The first two sets are likely to be (relatively) uncontroversial. The third has already attracted significant scrutiny.

The Recommendations from the LCO's Report that were Adopted

Fortunately, Bill 161 adopts most of the LCO's recommendations in its final report. Some of the key changes that were recommended by the LCO and contained within the Bill include the following:

- **Automatic Dismissals for Delay** – Bill 161 provides that a proposed class proceeding would be dismissed within a year of the Statement of Claim being filed unless the plaintiff has filed their certification motion, the parties have agreed to a timetable for filing of the certification motion, or the court has ordered that the proceeding not

be dismissed and establishing a timetable.

- **Reform to Carriage Motions** – The Bill provides that carriage motions have to be brought within 60 days within the issuance of the first action. The Bills sets out an explicit test for how carriage motions are to be adjudicated. It also provides that such decisions are final and cannot be appealed. Finally, the Bill also provides that carriage motions are not to be recouped by class counsel.
- **Provisions to Deal with Multi-Jurisdictional Actions** – Multi-jurisdictional class actions are a significant phenomenon across Canada, and it is now commonplace for there to be several proposed class actions dealing with the same subject matter commenced in different provinces. The LCO recommended, and Bill 161 includes, provisions designed to coordinate such multi-jurisdictional class actions to try and avoid duplication and ensure they proceed in the proper forum.
- **Encouraging Preliminary Motions** – Bill 161 specifically affirms that courts should support pre-certification motions that could dispose of the action, narrow the issues to be determined or evidence to be filed at certification.
- **Strengthening the Settlement Approval Process** – Bill 161 contains an explicit provision that proposed settlements must be scrutinized as to whether they are fair, reasonable, and in the best interests of the class. Bill 161 also sets out explicit requirements as to the evidence that must be filed on a settlement approval motion.
- **Improving Appeal Routes** – The proposed legislation eliminates appeals to Divisional Court from certification decisions. It instead provides that any decision on a certification motion may be appealed directly to the Court of Appeal, without any requirement for leave to be granted.
- ***Cy-Près* Orders** – Bill 161 includes a provision to specifically allow for *cy-près* orders where it is not practical or possible to compensate class members directly.
- **Notice** – Bill 161 includes a provision requiring that notices be drafted in plain language.

Overall, these recommendations are sensible, and most are unlikely to attract too much criticism.

The Recommendations from the LCO's Report that were not Adopted

There were a handful of recommendations the LCO made that were not included in Bill 161. The principal ones among these are the following:

- **Costs** – The LCO had recommended that the *Class Proceedings Act* be amended to provide for no costs at certification and ancillary motions. Bill 161 contains no modification to costs on certification motions.
- **Case management conferences** – The LCO had recommended a provision be added to the Act that the first case management conference must be held within 60 days of the last defendant being served with the claim. No such requirement was introduced in Bill 161.
- **Revisions to the structure of the Class Proceedings Fund** – The LCO recommended amending the *Law Society Act* to allow the Class Proceedings Fund to partially fund legal fees in appropriate circumstances. These amendments are not contained in Bill 161.

The lack of any changes to costs rules is perhaps the most significant element that was recommended by the LCO and was not in Bill 161. There are arguments both for and against changes to the costs regime. However, in light of the development of a reasonably robust market for third-party funding, the possibility of adverse costs orders being made on certification are unlikely to dissuade many meritorious claims from being brought.

New Provisions in Bill 161

There were some provisions included in Bill 161 that were not recommended in the LCO's report. The most contentious of these are almost certain to be new requirements that a plaintiff must show to establish that a class action is the preferable procedure, such that it can be certified. In particular, Bill 161 proposes to introduce a new s 5(1.1) to the *Class Proceedings Act* that would provide as follows:

> 5 (1.1) In the case of a motion under section 2, a class proceeding is the preferable procedure for the resolution of common issues under clause (1) (d) only if, at a minimum,
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> (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
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> (b) the questions of fact or law common to the class members predominate over any questions affecting only individual class members.

While the LCO's final report recommended that "courts interpret the existing elements of s. 5(1)(d) of the certification test more rigorously", Bill 161 goes well beyond what the authors of the LCO's final report likely intended.

Jasminka Kalajdzic, a law professor at the University of Windsor and one of the Principal Researchers of the LCO's final report, has eloquently and candidly set out her views on the problems with those proposed provisions in her blog post here. Her views are well worth considering.

There is no doubt that, as Professor Kalajdzic identifies, the intention of this new provision is to create a more stringent bar for certification. The question is whether this makes sense. There will undoubtedly be a difference in opinion on this that in large measure tracks the interests that different stakeholders have in the class actions system.

The newly proposed s 5(1.1)(a) would require a Court hearing a certification motion to not just determine whether a class proceeding is the preferable procedure for resolving the common issues, but also whether 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". Professor Kalajdzic notes the subtle change here as being focused on what the preferable procedure is for "resolving the class members' claims entirely". This change has much to recommend it. A class proceeding is a powerful tool for ensuring access to justice, but only if it results in a practical outcome for the parties. The resolution of a common issue, by itself, provides little access to justice, if individual trials will be necessary and the costs of individual trials would be prohibitive. Consequently, a more sensible process in determining the preferable procedure would be to weigh: 1) the entire class action process, including any individual trials that are likely to be necessary after the resolution of the common issues; and 2) any alternative means of remedying the alleged wrong. That allows for a more holistic, apples-to-apples comparison of which procedure is actually the most likely to result in access to justice for all parties.

As a practical matter, even with this new burden, a class action

will still in many cases likely be the preferable procedure for determining class members' entitlement to relief. In the absence of a meaningful applicable alternative dispute resolution mechanism that can adjudicate matters on a common basis, class actions will often remain the best available forum for resolving common disputes. But at least the new section 5(1.1)(a) calls for a more fair comparison to be done.

The newly proposed s 5(1.1)(b) introduces a predominance requirement drawn from US Federal Rule 23. The intention of this rule is to preclude certification of cases where individual issues overwhelm any certified common issues. This requirement has long been an element of US class actions law.

Undoubtedly this new requirement will have some effect in raising the bar for certification. Two points are worth noting in this regard. First, related to the point made above regarding s 5(1.1)(a), there is arguably relatively little value in a case being certified as a class action if individual issues do in fact predominate. If any certified common issues really do pale in comparison to any individual issues, then it is important to ask what the point of obtaining certification even is. Second, it remains to be seen the extent to which 5(1.1)(b) will in fact raise the bar all that much. After all, it is already a requirement for certification that any proposed common issues constitute a "substantial ingredient" of class members' claims. Moreover, unlike in class certification in the US, the standard that must be met in Canada with respect to each of the elements of certification is the lower "some basis in fact" standard.

Consequently, while the new section 5(1.1) no doubt raises the bar for certification of claims, there are good reasons to believe that it will be a sensible and incremental change. Indeed, the changes reflected in section 5(1.1) are much more modest than other proposed reforms that have been articulated by some stakeholders, such as introducing a preliminary merits test or raising the standard on certification to a balance of probabilities standard.

Conclusion

Overall, Bill 161 contains the vast majority of changes proposed by the Law Commission of Ontario. These proposed reforms, if enacted into law, will represent a sensible modernization of Ontario's class proceedings regime that is largely based on the sound expert input that went into the LCO's report.