

Ontario introduces significant changes to class actions

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On December 9, 2019, the Ontario government introduced [amendments](#) [PDF] to Ontario class action legislation that will make it easier for courts and defendants to address unmeritorious cases earlier — by explicitly encouraging early motions to strike and to determine dispositive legal issues. The amendments will also make cases that are certified more manageable, by requiring common issues to predominate (similar to the approach in the United States).

Background

[Bill 161](#) [PDF] puts forward the first significant overhaul of the Ontario *Class Proceedings Act* since its inception. It follows the comprehensive review of class actions by the Law Commission of Ontario, released in July 2019 (which we reported on [here](#)). The Ministry of the Attorney General's description of the changes to the *Class Proceedings Act* can be found [here](#).

Significant changes to certification test and pre-certification motions

A significant proposed change is to the test for certification. The amendment provides that a class proceeding will only meet the certification requirement of being the "preferable procedure" if, at a minimum (i) a class proceeding is "superior to all reasonably available means of determining" class members' entitlement, including case management of individual claims, and administrative proceedings, and (ii) common factual and legal issues must predominate over questions affecting only individual class members.

The requirement of predominance of the common issues over individual issues will align the certification test much more closely to the one generally applied in the United States. It is not the current test in Ontario. These changes to the test may create a new hurdle for plaintiffs seeking certification.

Another significant amendment is the proposed new section 4.1, which mandates the Courts to hear dispositive motions and motions which may narrow the issues to be determined *in advance* of or in conjunction with certification. Currently, courts have discretion as to the timing of such motions, and have frequently deferred such motions with the express hope of avoiding delay of certification motions.

Practical consequences

These changes will permit defendants and courts to address unmeritorious claims earlier and in a more cost-effective manner. Long term, the practical result may be that plaintiffs will pursue proposed class actions in jurisdictions perceived as more plaintiff-friendly, where they have the option.

Other changes

The amendments would also make other significant changes to address multi-jurisdictional cases and other matters including:

- **Notice to other Canadian class plaintiffs:** An Ontario plaintiff must notify the representative plaintiff in any other similar case in Canada.
- **Registration:** An Ontario plaintiff must simultaneously register the proposed class proceeding.
- **Carriage motions:** The amendments set out detailed rules for the conduct of carriage motions, where competing plaintiffs' counsel bring overlapping class proceedings in Ontario. Among other things, the carriage motion must be brought within 60 days of the commencement of the first of the proceedings and the decision of the court is final and not subject to appeal.
- **Determining best venue for overlapping claims:** Parties may seek an order staying an Ontario class proceeding where the Court determines that it is preferable for some or all of the claims to be resolved in a similar class proceeding commenced in another Canadian jurisdiction. Additionally, the Court may refuse to certify a proposed multi-jurisdictional class proceeding if it determines it is preferable for it to proceed in in another jurisdiction.
- **Notices to the class:** A number of provisions regarding notices to the class are proposed to be amended. Of interest to defendants, the costs of any notice of certification may only be awarded to the representative plaintiff in the event that the class proceeding is ultimately successful. Additionally, any notices to the class are to be in both French and English, unless the court orders otherwise (regardless of whether the class includes Québec residents).
- **Settlement:** The proposed amendments detail the evidentiary and other requirements when seeking court approval of a settlement of a class proceeding.
- **Appeals:** Both defendants and plaintiffs may now appeal certification orders directly to the Court of Appeal. (This change eliminates an intermediary appellate court level that currently applies to certification decisions as well as the requirement that defendants seek leave to appeal.) 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.