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Class Actions – Court Departs From Established Practice and Requires Defendants to Deliver Statement of Defence Before Certification

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Established practice upended?

In Ontario for many years the practice has been that defendants need not deliver a statement of defence until after the action has been certified as a class proceeding. The principal rationale for the practice has been that the common issues are not typically known until after certification and so if defendants were required to deliver a defence early on, they may well need to revise it after the certification outcome was known. This practice had its origin in one of the early class action cases in Ontario decided by Justice Winkler. That decision has been consistently followed and applied across Canada until now. In the 2011 case of *Pennyfeather v Timminco* (July, 2011) the Ontario Superior Court of Justice not only departed from this practice but also arguably cast doubt on its wisdom.

In addition, the Court went against the long line of cases which hold that the certification motion ought to be the first motion heard. Justice Perell questioned the wisdom of this practice and suggested that, in fact, it might be better if motions challenging the pleadings be heard in advance of certification so that the enormous costs of the certification motion could potentially be avoided. Whether the Court of Appeal will support this view remains to be seen.

The case

Pennyfeather was a securities case with allegations of negligence and negligent misrepresentation against Timminco and some of its officers and directors (the allegations were mainly that the defendants issued or authorized the issuance of public statements containing material misrepresentations which affected the price of the company's shares).

Under the *Ontario Securities Act*, a plaintiff first requires permission ("leave") from the court before it can assert this type of claim (known as a secondary market claim). Under the rules of procedure, any defendant is able to ask the court to order "particulars" of the allegations being made against it in the statement of claim if it believes that additional detail is necessary in order to answer those allegations. This became the context out of which the issue under consideration arose.

Some of the defendants in *Pennyfeather* applied for particulars and did so on the somewhat novel basis that they were necessary in order for them to be able to respond to *certification*. While the statement of claim did seem to be deficient in important ways, the plaintiff predictably argued in response that particulars would be premature because they are required only for the purpose of answering allegations in a claim (ie filing a statement of defence) and since the matter was not yet at that stage, the plaintiff should not be ordered to provide them. Thus the conundrum.

A new look at some old issues

The court's decision had a Solomonic tinge to it: most of the requested particulars were to be provided but in exchange the defendants were to deliver their statements of defence - and all this prior to certification. But it is the court's rationale for the ruling that is the more interesting part: it *rejected* the plaintiff's contention (based of course on the long list of cases before it that had routinely accepted the proposition) that the certification motion (which determines what causes of action and common issues proceed to trial) will determine the content of the statement of defence. Breaking with the past, the court said the precise opposite: that all causes of action in the statement of claim have the potential to go to trial whether they get certified as raising common issues or not, which is of course quite true. And so if this is the case, there is really no absolute reason for waiting until after certification before requiring delivery of the statement of defence.

The court went further in yet another departure from established practice. It held that any preliminary challenges to the statement of claim should be heard prior to certification, the rationale being that such motions could potentially save the parties from incurring the "enormous costs of a comprehensive certification motion". This also is a change of some significance for while defendants have been arguing for years that preliminary motions challenging the statement of claim should be heard in advance of certification, the courts have consistently held (with a few exceptions) that certification should be the first order of business.

Pennyfeather recognized that there are some obvious advantages to the early delivery of a defence and the hearing of pre-certification motions challenging the pleadings. If a particular claim is fatally flawed from the start, for example, this should be sorted out at the earliest possible opportunity.

Implications

At least in Timminco, the ruling undoubtedly helped narrow the issues for certification: it potentially eliminated the first question on the test for certification which is whether the claim discloses a cause of action. And so to that extent, it represented a solution for that case consistent with the purposes of the Act. Some will question whether it provides enough of a basis for departing from a practice that had taken root across jurisdictions for good reason. Others still will argue that the ruling really cannot be taken out of the context of the request for particulars that brought the issue about.

Leaving that aside, one clear effect from the ruling and even a possible game changer could be this: requiring the delivery of a statement of defence prior to certification will definitely lead to more motions challenging the merits of the claim (or perhaps even the merits of the defence) all of which would be heard prior to certification (through motions to strike, motions for summary judgment, etc.) thus delaying, likely significantly, the certification hearing itself. Not only will these preliminary motions be heard in advance of certification, but any appeals from those decisions will also have to be heard in advance of certification.

Whether this is a positive development in class action practice or not (and whether the Court of Appeal accepts this change in approach) will take some time to become clear. But for parties on either side of this kind of litigation, delaying the answer to the central question of whether the action can proceed as class action cannot really be a welcome development except perhaps to the extent that claims lacking in merit could get tossed out at an early stage.

While there has been no word as yet on an appeal we expect and think the case merits a look-see by the court of appeal. ■