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Submission to Law Commission of Ontario[1]

Consultation Process regarding Class Actions

Regarding the certification test in section 5 of the CPA

Current state of play:

The certification test is in fact not being applied as it is written. This is manifested in the following principal ways (there are others):

1. the "some basis in fact" test, which appears nowhere in the statutory language;

2. the refusal to engage in a proper consideration of the expert evidence, on the basis that "now is not the time to resolve the battle of the experts";

3. the certification as a common issue of whether a given issue – typically, the question of fact of harm – is in fact a common issue (which, even in the current class action world, is an impressive display of legal gymnastics);

4. the constant reliance on the objectives of class proceedings legislation as a justification for failing to grapple with frailties in the plaintiff's certification evidence (i.e., to not certify would mean that the objectives of the CPA are not met).

Justification (or not) for proposing changes:

As an editorial comment, I note that (a) the Supreme Court of Canada has, in effect, dictated this kind of approach; (b) depending on one's perspective, this may seem perfectly acceptable; and (c) I just think we should not be pretending that we are applying a statutory test – the test as written is not what is being applied by the courts.

I offer two reasons (there are more) to "encourage" the courts do what the legislatures told them to do (i.e., apply the actual statutory test):

1. Class actions are very high stakes litigation. It makes no sense to apply some of the lowest legal standards to some of the highest stakes litigation (even appreciating that certification is only a preliminary motion). Courts accept frail evidence or "trust me" submissions in class actions that would never fly in (for example) business-to-business litigation. Think of certification as an injunction motion, where really hard decisions get made all the time, and courts do not say "it's too hard to decide this preliminary issue now". The only time that a court considers whether the certification test is met is on the actual certification motion, and the idea that a trial judge may come to a different view later on a bigger record is no more an acceptable answer than to grant or deny an injunction on the basis that the trial judge may come to a more informed decision later. Yes, the trial judge might, but this is a preliminary motion with a legal test, and it is for the courts to decide preliminary motions on proper standards.

[1] These are personal submissions which are not to be attributed to my law firm or any client.

2. Access to justice is not a concept unique to class actions; all kinds of citizens and cases "deserve" access to justice. It is somewhat startling that we allow class actions to move forward past certification on a frail record because to do otherwise would be to deny access to justice, yet we do not consider the toll that certified class actions with a myriad of problems take on a severely resource-constrained legal system, which also has huge access to justice implications (I didn't read anywhere in the SCC decision in *Jordan* a reference to criminal delays being acceptable because access to justice in the form of class actions is being achieved). A larger slice of the resource-constrained "justice pie" means a narrower slice for criminal and family cases (as obvious but not the only examples) – yet no one ever talks about that. As a society we make all kinds of choices, but we don't often step back and question them – this is one area where we should. I make these points not to advocate for the abolition of class actions: they are here to stay and they can be good for class members and good societally. My point is that there is an insufficient cost-benefit (including who benefits, which is principally lawyers on both sides) analysis being performed at a macro level.

Possible "solutions":

I offer relatively modest proposals for addressing this issue:

1. add words like "on a balance of probabilities" into the introductory language of section 5 (to apply at least to (b) through (e));

2. whether or not you do #1, tweak the (a) part of the test to refer not to the pleading but to create a "genuine issue for trial" test with respect to the claims asserted. It should be noted that in a competition law context, this would probably not change the outcome as to this part of the test, in that regulatory proceedings in other jurisdictions (typically under a different legal framework) are referred to and would likely (being realistic) be enough to meet such a threshold;

3. add a new subsection that precludes certifying as a common issue whether something is a common issue;

4. add a new subsection that specifies that expert (and other) evidence regarding the issue of whether the plaintiff's proposed methodology is workable under the certification test is to be considered by the court in the usual way on the certification motion and not left to the trial judge (who will of course not be considering the certification test);

5. repeal section 5 and replace it with the three objectives of the CPA. At least that would be intellectually honest and would save a ton of resources.

A word on creating a new merits/leave test:

In short, to create a new full-blown leave test (as in securities legislation) will probably just lead to a greater expenditure of resources by the parties and the courts for little change in outcomes. Where a proposed class action is untenable on the merits, summary judgment – in advance of or at the same time as certification – is probably enough of a tool. But any card-carrying member of the class action defence bar should probably not be saying that.