LITIGATION - CANADA

CLASS ACTION LAW IN ONTARIO CANADA - A NEW PLAYBOOK 20 YEARS IN THE MAKING

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On this the twentieth anniversary of the *Class Proceedings Act, 1992* two recent Ontario Court decisions may significantly change Class Action litigation in Ontario and by implication across Canada. The decisions remind us that the law is fluid and procedural conventions are subject to change. The first decision clarifies when a Statement of Defence must be delivered. The second deals with limitation periods. Both cases are likely to increase pre-certification motions practice as the class action playbook continues to be revised.

Has the End of the Pleadings Convention Arrived?

The Court in *Pennyfeather v. Timminco Limited* 2011 ONSC 4257 S.C.J. ("*Pennyfeather*") challenges the convention of excusing defendants from delivering a Statement of Defence until after certification. Prior to *Pennyfeather*, parties and the Courts routinely postponed closing pleadings (including not requiring a Statement of Defence) until after certification of a Class Action on the basis that "in the preponderance of cases the statement of defence will not be required for the certification motion."[1] A principled reason for this procedural flexibility was that the Statement of Defence may need to be completely reformulated after the certification motion is heard. The procedural flexibility permits the parties to focus on the threshold concern of certification. Indeed, the courts often grant certification on a subset of the allegations set out in the Statement of Claim, so requiring a defendant to deliver a defence to issues that were not certified was seen as a waste of resources.

With the release of *Pennyfeather*, this convention is under significant pressure and may become a thing of the past.

As background, the Defendants in *Pennyfeather* brought a motion seeking answers to their Demands for Particulars (a request for further information required to properly respond to a pleading). Class Counsel argued that the Defendants' motion for particulars was premature citing the above convention.

Despite the convention, Justice Paul Perell of the Ontario Superior Court of Justice ordered that much of the requested information be provided to the Defendants. But in exchange, and as a term of his order, the Defendants were required to deliver a Statement of Defence before the certification motion. Having upended a recognized convention Justice Perell offered the following explanation in obiter:

> **"it is time to revisit the convention that defendants do not deliver a Statement of Defence before the certification motion. ...**
>
> **My experience as a case management judge in class proceedings reveals to me that as a general rule, it would be preferable that pleadings be closed before the action moves to a certification motion."** [2]

Justice Perell also clarified that the basis of the convention is not found in legislation. Indeed, neither the *Ontario Rules of Civil Procedure* nor the *Class Proceedings Act, 1992* excuse defendants in a class proceeding from delivering a Statement of Defence until after certification. Justice Perell went on to state that in his view, requiring the delivery of a Statement of Defence will call out the defendants to make their challenges to the Statement of Claim prior to the certification motion.

Challenges to the Statement of Claim are often lumped into the first prong of the class action certification test. Justice Perell suggests that a better approach may be to deal with challenges to the pleadings prior to the certification motion in separate procedural motions,[3] in so doing he arguably opened the door for more robust motions practice prior to the certification motion itself.

As *Pennyfeather* is a lower court decision of a single judge, albeit a very experienced and well regarded judge, it is persuasive but not binding on other lower courts. Thus although it is open to speculate that the convention has been torn out of the class action playbook, it will be some time before we know if the numerous virtues Justice Perell expresses in *Pennyfeather* will result in the bench and bar embracing a new playbook or bucking it.[4]

Apparent Support from the Court of Appeal

Arguably, the Ontario Court of Appeal's recent unanimous decision in *Sharma v. Timminco* 2012 ONCA 107 ("*Timminco*") does more than clarify when the limitation period in secondary market misrepresentation class actions is stayed. Being on the heels of *Pennyfeather*, the decision in *Timminco* albeit on an unrelated issue can be read as the Court of Appeal supporting Justice Perell's obiter in Pennyfeather.

As background, the *Ontario Securities Act* ("*OSA*") creates a statutory cause of action for purchasers of public company shares in the secondary markets (the stock markets) to seek compensation on the basis that the company's misrepresentations resulted in the shares being over-valued at the time of the purchase. However the *OSA* also sets out two statutory hurdles to commence such an action: First, leave of the court (permission) is required. Second, a statutory three year limitation period is established. [5]

In *Timminco*, as was common practice in numerous secondary market misrepresentation class actions, the Statement of Claim states the Plaintiffs intend to bring an *OSA* leave motion and if granted to amend the Statement of Claim to include a claim under Section 138 of the *OSA*. Historically this approach was used to postpone the leave motion until after certification, thereby avoiding an unnecessary motion if certification was not achieved. As certification can be a long and hard fought battle, Class Counsel (and the parties) traditionally rely on the broad statutory suspension of the limitation period set out in Section 28(1) of the *Class Proceedings Act* ("*CPA*") for this purpose.

However, the Court of Appeal for Ontario in *Timminco* interpreted the language in the *CPA* and the *OSA* otherwise, stating that it cannot be that the limitation period is automatically suspended "on the mere mention of that cause of action" in a Class Action Statement of Claim. The Appeal Court reasoned:

> "Section 138.14 [of the OSA] was clearly designed to ensure that secondary market claims be proceeded with dispatch. That requires the necessary leave motion to be brought expeditiously. **To suspend that limitation period with no guarantee that the s. 138.8 cause of action, including the prerequisite leave motion, will be proceeded with expeditiously is inconsistent with that purpose**." [6]

and concluded:

> "[F]or a s. 138.3 cause of action to be asserted in a class proceeding, so as to trigger the suspension provision in s. 28(1) of the *CPA*, leave must be granted." [7]

Thus individuals contemplating secondary market misrepresentation class proceedings are wise to take steps to protect against the three year *OSA* limitation period lapsing and corporate directors and officers may feel more comfort in the strength expired of limitation periods.

What are the Consequences of *Pennyfeather* and *Timminco*?

These recent decisions remind us that the class action playbook continues to develop and adapt. The days of launching a class action and ignoring all else until after the certification motion and the incumbent pressure to settle on the eve of such a motion may be coming to an end. In exchange, we can expect more robust motions practice to enter the arena with the effect of reducing the enormity of certification motions as the sands of class proceedings flow into a new era, on this the twentieth anniversary of the *Class Proceedings Act, 1992*.

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[1] *Mangan v. Inco Ltd.* 1996 CanLII 8202 (ON SC) at para 14.
[2] *Pennyfeather* at paras 9 and 10. Bold added.
[3] The five part test for certification is enumerated in Section 5(1) of the *Class Proceedings Act, 1992*.
[4] A list of benefits are set out in *Pennyfeather* at paras 84 to 92. As to how the bench and bar are responding to the decision, *Pennyfeather* has been referenced in no less than four reported decisions, although all three Ontario decisions were written by Justice Perell himself. *Axiom Plastics Inc. v. E.O. DuPont Canada Company*, 2011 ONSC 4510; *Johnston v. Sheila Morrison Schools*, 2011 ONSC 6843; *Mayotte v. Ontario*, 2011 ONSC 4550 ; *Penwell v. Harwood* 2011 CarswellNS 827 S.C.
[5] See Sections 138.3, 138.8 and 138.14.
[6] *Timminco* at paras 25 and 26. Bold added.
[7] *Timminco* at para 28.

FOR MORE INFORMATION, PLEASE CONTACT:

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