

PRODUCT LIABILITY

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*In an effort to toughen-up what has become a notoriously low bar for certification in one of Canada's busiest class action jurisdictions, Ontario's Attorney General has tabled [Bill 161, the Smarter and Stronger Justice Act, 2019](#) ("**Bill 161**"). Bill 161 seeks to overhaul various regulations of Ontario's justice system and includes significant amendments to Ontario's Class Proceedings Act, 1992, which has not been substantially updated in over 25 years. These reforms will be of interest to anyone who is advising clients with class actions exposure in Canada.*

Pending Overhaul of the Class Proceedings Landscape in Canada's Most Populous Province

ABOUT THE AUTHORS



Cheryl Woodin is an experienced litigator with a broad background who specializes in the defence of class and other multi-party actions in a variety of industries. Her practice includes managing and coordinating Canadian litigation in the context of multi-jurisdictional proceedings as well as advising clients on litigation risk mitigation in regulated environments. She has both jury and non-jury trial experience and has appeared at all levels of court in Canada. She has defended clients across a broad variety of industries in claims involving consumer products, automotive parts, drug and medical devices, securities, labelling and billing practices, and environmental contamination. She has also acted for and against public authorities in the context of litigation related to limits of statutory powers and the development of novel tort claims. Cheryl is co-head of our Class Actions practice group. She can be reached at woodinc@bennettjones.com.



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ABOUT THE COMMITTEE

The Product Liability Committee serves all members who defend manufacturers, product sellers and product designers. Committee members publish newsletters and *Journal* articles and present educational seminars for the IADC membership at large and mini-seminars for the committee membership. Opportunities for networking and business referral are plentiful. With one listserv message post, members can obtain information on experts from the entire Committee membership. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



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The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

The Introduction of a Predominance Requirement in Canada

Many of the proposed amendments will increase procedural efficiency and streamline class actions (there is no mandatory case management for class proceedings in Ontario). But by far the most significant proposal is the introduction of a “predominance” requirement to the test for class certification in Ontario.

According to the proposed amendments, a class action will only satisfy the preferable procedure requirement at certification if, *at a minimum*:

1. proceeding as a class action is considered the superior means to all reasonably available options of determining the entitlement of the class members to relief, or addressing the disputed conduct of the defendant; and
2. the questions of fact or law common to the class members predominate over questions affecting only individual class members, mimicking the language of the predominance section of the United States’ Federal Rule 23(b)(3).

Although the predominance requirement will be a familiar element to U.S. class counsel, it has never formed a part of the Canadian regime. In *Bendall v McGhan Medical Corp*—the first case to be certified on a contested basis in Canada—Justice Montgomery specifically recognized that the predominance issue is not a factor to be

considered under the Ontario certification test. Historically, the lack of a predominance requirement is likely what has made Ontario (consistent with other provinces) a friendly jurisdiction for class actions that typically involve many individual issues, such as product liability and personal injury cases, while in the U.S., such cases rarely achieve certification. As an example, common questions about whether a duty exists, the standard of care, and its breach have been sufficient to establish the preferability of a class proceeding in Ontario, even if causation and damages are inherently individual elements.

The new predominance requirement is likely to limit the availability of class actions in Ontario writ large. The judicial interpretation of these proposed amendments will determine their impact not only within Ontario, but also in the broader context of the national coordination of class actions that, at least for now, will have significantly different procedural thresholds for certification.

What is Next?

While the U.S. benefits from a multi-district litigation system, managing class actions across multiple provinces continues to be a live issue in Canada. A heightened test for certification in Ontario will undermine national coordination and initiatives (like the *Canadian Judicial Protocol for the Management of Multijurisdictional Class Actions*) by causing situations in which a class proceeding can be certified in one province, but not in Ontario. While a toughening of the class certification test is welcomed by defendants, litigants in the

short term should be prepared for uncertainty, a rise in interprovincial litigation while the issue of national coordination of class action proceedings is addressed, and, possibly, a retreat to a multiplicity of provincial contests over class certification.

Bill 161 survived hefty debate at second reading and was carried on division (64 ayes: 40 nays) to the Standing Committee on Justice Policy in early March. Counsel and companies with class actions exposure in Canada should keep a close watch as Bill 161 makes its way through the Ontario Legislature.

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