FOURTH SESSION - TWENTY-SEVENTH LEGISLATURE

of the

Legislative Assembly of Saskatchewan

DEBATES and PROCEEDINGS

(HANSARD) Published under the authority of The Honourable Dan D'Autremont Speaker

N.S. VOL. 57 NO. 13A MONDAY, NOVEMBER 17, 2014, 13:30

Bill No. 147 – *The Class Actions Amendment Act, 2014*

Mr. Forbes: Thank you, Mr. Speaker. It is a pleasure to enter into this debate on Bill No. 147, *An Act to amend The Class Actions Act*. And it's a short Act. It's only one page, two pages if you count in a bilingual, but they're of the same . . . Very interesting debate that we could have about class actions.

And I have to just recognize my colleague from Nutana who gave a very good speech on this, talking about the history of class actions or group litigation that she had presented in the House a few days ago. Because it really was quite interesting what the history is of class action lawsuits through time, since the early 1100s I understand, where this was the kind of thing that was often done because it was a way to deal with justice quickly because we know . . . And there's that saying justice delayed is justice denied, and quite often there is a commonality between affronts to justice in our society. And there's no need to take a long time and there's no need to have individuals bring forward complaints where actually it's a group that you could do things quite effectively, quite efficiently.

So it is an interesting history that we have about class actions and that type of thing, and how it was sort of lost in the 1700s, and the impact of the American Revolution and the War of Independence, and how the whole move to individualism and how that lost the role of group justice. And so I think it's something that we should all be cognizant of, that this is a common and a pretty effective way to have justice served, and that we don't dismiss this kind of thing frivolously or out of hand, that we look at how can we make sure that we can have justice provided quickly and effectively to as many people as possible without making things so complicated. Because we know, and we've seen this and we see this in litigation, where things are drawn out for years and years and years. And we think this is an important discussion to have.

But I will want to discuss the specifics because I think it is interesting because even though it's just one page . . . And I will compare this to the section that it is repealing and talk about some of the differences between the two. And I'm no lawyer, but this is sort of

where the common sense comes into it. So why are you taking out one section and putting in another section and what were the reasons for that?

And I would want to at the same time reflect on the minister's speech. And as we have talked about that there always is an interesting range of how effective or how enlightening the minister's speeches are when it comes to second readings. Some can be quite articulate and answer a lot of questions that we may have, and it's right there. And others leave a lot of questions unanswered.

And in this case I think that that is the case, that we will have lots of questions for committee, for the minister, around what does this really mean for an effective justice system here in Saskatchewan because, after all, that's what we want to strive for, that as I say, you know, if there's a case of justice delayed, that it's justice denied if people aren't aware that in fact that they may have a complaint, but they're grumbling or muttering to themselves at home not realizing that there's actually a court case out there, that in fact it can be dealt with.

And we see that arising more and more when it comes to environmental issues, whether it's flooding, that kind of thing, where really it's a group of people, a common class as they would say, a class of people who have the same concerns, who are affronted in the same way. Or consumerism, whether you've bought a car or you've bought some razors. I know some of us aren't buying as many razors as we should these days.

But, Mr. Speaker, all those kind of things, whether consumerism, environmentalism, and especially when we have issues around, you know, particularly in our society where both those issues are taking more and more prominence over in our day-to-day life, particularly in the issues of climate change, the impact that's having. That may be unknown, but the fact of the matter is that somebody should have been held to a higher standard, or if there was impact, a company did not fulfill its contractual obligations, then we need to have action.

And I think about that particularly when it comes to consumer products, whether it's cars that we buy, trucks we buy, or homes that we buy, all of those things. And we're seeing an onslaught of newer and newer products that may be untested or should have been tested or more fully tested, those kind of issues. And whether it's safety issues, that's all very, very important.

So there's a lot of issues here, Mr. Speaker, but I do want to take a minute to talk about essentially . . . And I will read the Act because it is so short, but it really talks about:

> **Section 40 of *The Class Actions Act* is repealed and the following substituted:**
>
> **"Costs**
>
> **40**(1) The court or the Court of Appeal may award costs that the court or Court of Appeal considers appropriate with respect to any application, action, or appeal pursuant to this Act.
>
> (2) In determining whether a costs award should be made pursuant to

> subsection (1), the Court of Appeal may take into account one or more of the following:
>
> > (a) the public interest;
> >
> > (b) whether the action involved a novel point of law;
> >
> > (c) whether the action was a test case;
> >
> > (d) access to justice for members of the public using class action proceedings;
> >
> > (e) any other factor that the court or the Court of Appeal considers appropriate.

And then:

> (3) Class members, other than persons appointed as representative plaintiff for the class, are not liable for costs except with respect to the determination of the class member's individual claim.
>
> (4) This section applies to proceedings commenced . . . [or] costs incurred before . . . or after this section comes into force.

And essentially that's it. There's a coming-into-force clause. This Act comes into force on assent.

So I'll start it with subsection (4). "This section applies to proceedings commenced and costs incurred before, on or after this section comes into force." So essentially this is a retroactive bill, and we're not sure how far back it goes. What is the impact of this on class action lawsuits and litigation that's gone before? Is it 10 years prior, or what is the limitation to this? I don't believe the minister was clear on that and we'll have, in a few minutes, an opportunity to review what he had said about that. But it just seems to be an odd, odd situation and strange that you would have a piece of legislation coming forward from Justice that has a retroactivity to it that is not addressed.

Is there a certain lawsuit that has brought this forward, makes this necessary? That there is . . . That it is retroactive? And if that was the case, the minister didn't reference that in his remarks and we are very curious about that. What was the impetus for this clause?

Now I am not a lawyer, as I've said, but this is our job here to say, hey, this doesn't make a lot of common sense here because you're really opening up a lot of issues that can go back quite a ways. Because it says, ". . . commenced and costs incurred before, on or after this section comes into force." And as we know, class actions can be very, very expensive. This is not an individual lawsuit where you sort of have . . . the numbers are known. Because obviously when you have class action lawsuits they can be quite large in settlements, in the impact, and costs can be quite large. So we are very, very curious about that.

And then that:

> (3) Class members, other than a person appointed as representative plaintiff for the class, are not liable for the costs except with respect to the determination of the class member's individual claim.

So it sounds like the class members are not liable for costs other than the person who has been appointed as the representative plaintiff. So we're not sure how that process will work. It sounds like others are not responsible for the costs. I have questions. Is that fair? Is that the process that we have seen in other situations? How does that all work out? We understand it could be complicated, because how can you identify all members of the class? Especially if this is a case where it's a voluntary thing to come forward and say, I'm part of that group. I'm part of that group that bought that car. I'm part of that group that has that environmental impact. I'm part of that group where justice was denied.

And you know, we can go through different kinds of lawsuits that have been fought for or litigation or actions that have been brought forward, and, as my colleague from Nutana talked about, some of these are very, very major. So we have some questions about that.

So I want to then talk about some of these (a) to (d) — the public interest. And when I look at this I'm not sure, you know, what is the definition of public interest? Clearly, you know, it says:

> In determining whether a costs award should be made pursuant to subsection (1), the court or the Court of Appeal may take into account one or more of the following:
>
> (a) the public interest.

So I'm not sure if there's a definition out there of what the public interest means, and that would be one of our questions. What is the intention? The Minister of Justice does not go into detail on that term. I think it's a good term. I mean I think that we're always very interested in making sure, you know, when we think of issues, particularly when we think of residential schools, the civil rights movement that happened in the States, some of those issues that have a broader impact in our society. Clearly if class actions can have an impact and can serve to help us understand those much better, then I would think that it's a good idea that the court or the Court of Appeal take that into account.

So that's a good, a good piece of legislation. But again, as I'm saying, the weakness lies in, what is the definition of public interest? You know, we know we have that kind of definition when it comes to, for example, municipalities and how they act, their planning. There is a public interest and it's articulated whether it's environmental interest, whether it's a cultural interest, whether it's, you know, those kind of things. It's articulated what the public interest is. I'm not sure if that speaks to this, or what do they really mean by public interest?

The other one that I thought was of interest . . . I mean there's a few here, but whether the action involved a novel point of law. So what is a novel point of law? I'm not sure. I

don't know what the definition of novel in this case of it than what we would look up in a dictionary and . . . unusual, or when we think that's a novel comment. We know what it means, the noun, but not when it's used as an adjective. Novel point of law. So what does that mean? And so clearly, are there examples of what a novel point of law is? And it would have been very helpful for the minister to be more clear about what kind of things in Saskatchewan are we talking about.

And there's lots of cases that we could be making use of the courts. But you know, this is always a big debate in the House is how much are we giving up to the court to decide, when really it's up to us to decide. We've seen, since the constitution, the Supreme Court of Canada become very active in their decisions in terms of helping us decide what is the meaning, what are the implications of the constitution? Are those considered novel points of law?

And again as a lawyer, or non-lawyer I mean, that a lawyer may have much more knowledge in this area, and maybe it's a common term that they use and it's one that goes without saying what a novel point of law is. But as someone who's not practising law, what does that mean? And when I'm reading this Act, what will I take that to mean? Maybe I think a novel point of law is one thing, but it should be clear in the definitions whether that novel point of law is something that's used to extend the law. Is it one that's used to clarify a point of law? Or is it . . . You know, when I think of novel I think of something unusual or creative. When I think, that's a novel approach to solving this problem, I think of it being more creative than anything else.

The other point that I would say, Mr. Speaker . . .

The Speaker: The House now stands recessed to 7 p.m. this evening.

Mr. Forbes: All right, here we go. We're getting revved up.

Thank you, Mr. Speaker. And I just want to welcome all of the people back, especially those who are tuning in who were at work this afternoon, who are watching this evening. It's adjourned debates and we're resuming debate on Bill 147, *An Act to amend The Class Actions Act.*

And this is a very interesting piece of legislation. I started just prior to 5 o'clock. I just had a few minutes in before 5 o'clock talking about this. And so I have been taking a look at the Internet, looking for novel points of law. I really couldn't find any novel points of law, so I don't know what the lawyers are looking for with that.

But I do want to take a minute and talk about this piece of legislation, and I do want to review just for a minute for those people who are just tuning in and for the folks up in the gallery as well. I know we have visitors in the gallery from the reception earlier; I want to welcome them as well to their House, their legislature.

It's an important piece of legislation that we have before us when it reflects on class actions. My colleague from Saskatoon Nutana gave a very learned, very thorough discussion about the history of class actions and how they were the norm starting in our

British history of law back in the 1100s, 1200s when they were trying to figure out a way to have an effective, efficient way of delivering justice because we all know that justice delayed is justice denied. And if you have that kind of circumstance then that can lead to civil unrest, when we know that there's common groups of people out there who are facing injustice and they look for redress from, at that time in England it would have been from the king or his representative. Because of this situation where there would be poor transportation, poor roads, poor communication, they had to make sure decisions were quick, effective and affected as many people as possible so they didn't have to keep repeating the same type of decisions over and over and over again.

This was the way to do it, was group law. And it was an interesting process I was not familiar with because of course we are more used to thinking about individual or independent law, individual law. And of course, interestingly, that came about through, whether it would be the industrial revolution in Britain; the rise of much more of the middle class, but independent individuals who wanted not to be grouped with others; the War of Independence in the States; and all of that kind of thing where maybe law became a little bit more sophisticated, and this kind of fell into not as much use as it had in the past.

So here we are taking a look at class actions. And I think it's a good discussion and we will have lots of questions for the minister. And I will take a minute in a few minutes to review his notes because, as I was saying, this Act only really talks about repealing section 40 of the old class actions Act and which, where we're really talking about costs and how the court or the Court of Appeal will decide on cost. And it talks about four benchmarks: public interest, whether the action involved a novel point of view, whether the action was a test case, and whether access to justice for members of the public using class action proceedings . . . [inaudible] . . . and they needed a way to have access, and then the catch-all clause, any other factor.

Interestingly it does talk about, the section applies to proceedings commenced and costs incurred before, on, or after the section comes into force. And so that is sort of the retroactive aspect. And we asked about why and we will want to know why is that in there and are there any limitations, because at this point, it doesn't look like there's limitations and that could be quite costly. What are the consequences of having no limitations on legislation like that? So we have a lot of questions about that.

But I just want to take a minute to review what the minister had said and because it's always very instructive to take a minute to review what he had said. And sometimes ministers can be quite thorough in their second reading speeches and sometimes not. And sometimes when they're not, we have some real questions. And what they say or don't say leaves a lot of room for us to have questions about this.

And so of course he talks about and he stood on November 5th to introduce *The Class Actions Amendment Act*. And he talks about how it's going to serve ". . . several important functions in our justice system . . . for more efficient use of court resources by consolidating similar matters." And that's true and that goes back hundreds of years. "Defendants can also benefit from class actions by defending multiple claims through a

single set." So it works for both sides, whether you are making a claim or you are defending against a claim, and then you can be dealt with quickly.

Now he talks about when it was first introduced: "This was done out of concern that the threat of large cost awards could deter legitimate claimants from participating in class action matters." It talks about how "Alberta and Nova Scotia class action legislation has demonstrated that a more balanced approach can be taken . . ." and how that's important. It talks about balance and ". . . provides courts authority to award cost and class actions and appropriate circumstances."

And talks about the factors ". . . whether to award costs: the public interest, whether the action involves a novel point of law . . . [or that] the action is a test case, [and for sure allowing] access to justice for members of public using class action proceedings . . ."

So he reviews those but doesn't really illuminate or gives any more definition to what is the public interest, doesn't really talk about what kind of actions are we talking . . . that might involve a novel point of law here in Saskatchewan, and whether the action is a test case. It would have been interesting if he had some examples because, as we know, in Saskatchewan we've had many instances of people coming together and demanding more justice. And we can just think of the residential schools as an example of people banding together and demanding justice. And that's one example, but I think it would have been interesting to hear more from the minister on that.

As well, Mr. Speaker, he talks about that the amendments ". . . will restore the discretion to the courts to control their own processes . . . while still addressing the unique access-to-justice concerns that arise with class action litigation." So that was the extent of his comments. He doesn't really add more to it. He doesn't talk about who they consulted with and what were their concerns, doesn't give any sort of grounding in what's happening out there in Saskatchewan, what would cause these amendments to come forward.

Now is this part of a national plan? He references Alberta and Nova Scotia but doesn't say it's part of the federal-territorial-provincial tables on law that might be driving this so things are uniform across Canada. If that's the case, that would be helpful to know and then we might see some of those documents. So we don't know, and there's lots of questions that we'll have about this.

But I want to take a minute, I did talk about why this is a one-page Act. It's pretty straightforward, repealing section 40. But in the old Act on page 20 is section 40, and I'll talk about what is being changed that I think has some, causes further questions, for example when . . . It's structured pretty much the same with 40(1) or section 1 and section 2. I'm not seeing, but I'm a non-lawyer, so maybe there are significant differences, but I'm not seeing a big thing. But one thing I'm noticing here that "A court mentioned . . ." And this is the old Act, in section 40(2):

> A court mentioned in subsection (1) may award costs to a party respecting an application for certification or respecting all or any part of a class action or an

appeal from a class action if the court considers that:

> (a) there has been vexatious, frivolous or abusive conduct on the part of . . . [the] party;
>
> (b) an improper or unnecessary application or other step has been made or taken for the purpose of delay or increasing costs or for any other improper purpose; or
>
> (c) there are exceptional circumstances that make it unjust to deprive the successful party of costs.

So there are those three sub-parts, but they're not anything like these five that are in the new one. So the old one talks about vexatious, frivolous, or abusive conduct. That's not mentioned in the new legislation, so it will be lost. And I don't know whether that's a gain or a loss, if that's negative or a positive. So I would be interested to hear from the minister about why the turnaround here, going from a negative to a positive. This one seems to be much more supportive of the claimant who's making a case or the class action when they talk about public interest or novel point of law or a test case. That's the new stuff, but the old stuff was saying that they take into account "vexatious, frivolous or abusive conduct." So why, why the change about it? I'm not sure.

Or:

> (b) an improper or unnecessary application or other step has been made or taken for the purpose of delay or increasing costs or for any other improper purpose.

So those are the two. And then (c) is sort of the catch-all clause, there are:

> exceptional circumstances that make it unjust to deprive the successful party of costs.

So it's a significant change. It's, you know, a bit of a 180 I think, in the sense of here we're seeing the new Act as positive. And I agree with that, I think that seems reasonable, but it's taking out some of the other stuff and I'm not sure why.

So we have a lot of questions here, Mr. Speaker, about why the change? What caused it? Who were the groups that were consulted? What was the case law behind this that caused them not to worry anymore and to drop the issue of frivolous or vexatious claims? Maybe there's a reason for that and now they're moving towards more of a concern about the public interest and the novel point of law and the idea of a test case. I think those things are important. And access to justice of course is very, very important.

But there's questions because none of these things are defined. We don't have the public interest defined, and we don't have the novel point of law defined. We are pretty familiar what a test case is. We see that often at the Supreme Court and what that means because it's establishing or clarifying points of law. So we have some real questions about that. And as I said, that this will be an interesting one to understand more fully because, as we

see and as I mentioned, in terms of our new world, in terms of issues — whether it be environmental issues, consumer issues whether you're buying a new car, a new house, that type of thing — these are huge, huge issues.

And if this is going to help the delivery of justice, which is very important and that's what the minister has said, we're for that. But will it have unintended consequences because, for example, that section that talks about:

> . . . applies to proceedings commenced and costs incurred before, on or after this section comes into force".

So a lot of questions, Mr. Speaker, on this piece of legislation. And I know that many of my colleagues will want to speak more fully on this because of the impact it has. We've had one of our colleagues give quite a good, thorough history of what it means in terms of class actions in the British law system. So I think this will be one that we'll be paying a lot of attention to.

So, Mr. Speaker, I know that many other people will want to get into this debate and will want to have their thoughts recorded. But with that, Mr. Speaker, I would like to now move adjournment of Bill No. 147, *An Act to amend The Class Actions Act*. Thank you very much, Mr. Speaker.