

CLASS ACTIONS

Objectives, Experiences and Reforms

FINAL REPORT • JULY 2019



LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

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LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

ABOUT THE LAW COMMISSION OF ONTARIO

The Law Commission of Ontario (LCO) was created by an Agreement between the Law Foundation of Ontario, the Ontario Ministry of the Attorney General, Osgoode Hall Law School, the Law Society of Ontario and the Law Deans of Ontario. The LCO is located at Osgoode Hall Law School at York University.

The LCO's mandate is to promote law reform, advance access to justice, and stimulate public debate. The LCO fulfills this mandate through rigorous, evidence-based research; contemporary public policy techniques; and a commitment to public engagement. LCO reports provide independent, principled, and practical recommendations to contemporary legal policy issues. More information about the LCO is available at www.lco-cdo.org.

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The opinions or points of view expressed in our research, findings and recommendations do not necessarily represent the views of our funders, the Law Foundation of Ontario, Osgoode Hall Law School, and the Law Society of Ontario, or of our supporters, the Law Deans of Ontario, or of York University.

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Chapter One

INTRODUCTION

A. Introduction

1. The Class Actions Project

This is the final report of the Law Commission of Ontario's (LCO) class action project.

The LCO initiated this project to consider Ontario's experience with class actions since the enactment of the *Class Proceedings Act, 1992* (CPA or the Act).¹ During this period, class actions have grown significantly in volume, complexity and impact in Ontario and across Canada. Class actions have systemic implications for access to justice, court procedures and efficiency, and government and corporate liability. Class actions have had major financial, policy and even cultural implications across the country.

The project's mandate was to research class actions in Ontario and to conduct an independent, evidence-based and practical analysis of class actions from the perspective of their three objectives: access to justice, judicial economy, and behaviour modification.

The LCO's report concludes an intensive 24-month process in which the LCO consulted with stakeholders across Ontario's justice system. Our consultations and analysis have led us to make more than 40 recommendations to reform the *Class Proceedings Act, 1992* and related policies. These recommendations address a broad cross-section of issues, including the process for initiating a class action, certification, settlement approval and distribution, counsel fees, costs and reporting on class actions. We believe our recommendations represent a necessary and important update to a significant piece of legislation that is now almost 30 years old. In many areas, we have concluded that the existing statutory provisions and/or judicial interpretations of those provisions are sound and should not be changed.

Many of our recommendations will be controversial. This is not surprising. Class action discussions are often polarized and appear to be influenced by stakeholder interests and perspectives. This project is unique in that the LCO is independent of those interests and committed to an impartial, public interest analysis of class action issues.

The starting point for our work is the *Class Proceedings Act, 1992*, a ground-breaking piece of legislation that transformed the practice of mass litigation in Ontario. The Act followed a comprehensive and thoughtful law reform process that included a 1982 report from the Ontario Law Reform Commission (*OLRC Report*) and a 1990 report from the Ontario government's Advisory Committee on Class Action Reform (*MAG Advisory Committee Report*).²

The Act established a legal framework for class actions that remains in place in Ontario. Several important and far-reaching choices underpin the Act and the countless judicial decisions that have followed it. Stability is not the same as unanimity, however, and many of the issues first identified in the OLRC's 1982 report continue to be controversial.

The LCO project is the first comprehensive, independent review of the CPA since the legislation was introduced.

2. The Law Commission of Ontario

The LCO is Ontario's leading law reform agency. The LCO has a mandate to promote law reform, advance access to justice and stimulate public debate. The LCO fulfills this mandate through rigorous, evidence-based research; contemporary public policy techniques; and a commitment to public engagement. LCO reports provide independent, principled and practical recommendations to contemporary legal policy issues.

A Board of Governors, representing a broad cross-section of leaders within Ontario's justice community, guides the LCO's work. Financial support is provided by the Law Foundation of Ontario, the Law Society of Ontario, Osgoode Hall Law School and York University. The LCO is located at Osgoode Hall Law School in Toronto.

More information about the LCO is available at www.lco-cdo.org.

3. Why Are Class Actions Important?

Class actions have an outsized impact on litigants, the justice system, and public policy.

Former Supreme Court of Canada Justice Frank Iacobucci has written:

Class proceedings can level the playing field for plaintiffs by spreading the ever-increasing costs of litigation across a larger group and resolving multiple claims by way of single procedure. Further, class actions can provide defendants with a fair and efficient dispute resolution tool because of the certainty associated with collective claims resolution and the opt-out process. Although class actions may save defendants out-of-pocket legal fees, they may also result in liability for claims that, rightly or wrongly, would never have been pursued by individuals.³

One can appreciate the breadth and impact of class actions simply by surveying the range of cases in recent years. Notable class actions in Ontario since the CPA was passed have addressed:

- Consumer protection issues such as payday loans and criminal interest rates;
- Environmental accidents, such as the Walkerton tragedy, soil contamination and explosions;
- Federal and provincial inmates held in solitary confinement;
- Institutional abuse in residential schools and health care facilities;
- Labour and employment issues concerning pensions, gender discrimination, misclassification and unpaid overtime;
- Mass personal injury involving blood, blood products and *C. difficile* infections;
- Privacy breaches concerning credit cards and data security;
- Products liability, including implanted medical devices and food product recalls; and
- Securities issues.

Class action lawsuits can often involve thousands – if not hundreds of thousands – of potential litigants and millions – if not billions – of dollars in compensation. They can have a significant impact on the general public, corporate or government behaviour and reputations, public policy and the justice system. It is fair to describe class actions as one of the most high-profile and far-reaching legal procedures in the Canadian justice system.

B. Law Reform and the *Class Proceedings Act*

The LCO's law reform analysis of class actions is organized around three important questions and assumptions:

- **Are Class Actions in Ontario Fulfilling Their Three-Part Promise to Improve Access to Justice, Foster Judicial Efficiency, and Promote Behaviour Modification?**

The three objectives of class actions – access to justice, judicial economy and behaviour modification – were originally set out by the OLRC in its 1982 Report.⁴ These objectives are not included in the CPA, but courts have interpreted the Act consistent with these objectives, most notably in the Supreme Court of Canada cases of *Fischer*⁵ and *Hollick*.⁶

The LCO and virtually everyone the Commission consulted acknowledge these objectives and assumes they are still valid. The more difficult issue is how to *balance* competing objectives and whether reforms are necessary to *fulfill* the objectives more successfully. These are controversial and far-reaching issues touching on fundamental legal and policy questions regarding class action certification, costs, settlements and process.

In 1982, the OLRC highlighted the importance, when choosing a procedural model for class actions, of considering the extent to which the scheme

*will operate to ensure (1) that actions are actually commenced in situations where mass wrongs deserve redress, (2) that the interests of absent class members are protected, and (3) that class actions that should not be allowed to proceed are effectively weeded out.*⁷

This project considers to what extent the three objectives are being met.

• **Does the CPA Reflect Contemporary Class Actions Issues and Practice?**

The CPA has proven very resilient. Nevertheless, the drafters of the legislation could not have foreseen the growth in complexity and scale of class actions. As a result, this report considers whether the Act needs reforms to address contemporary issues such as delay, legal costs, carriage battles, multijurisdictional class actions, third party funding and settlements that often total hundreds of millions of dollars.

The LCO also addresses contemporary practice from a less obvious, more optimistic, perspective: How can or should the CPA promote and sustain the best practices and lessons that have been learned over the years?

• **Does the CPA Reflect Contemporary Priorities in Ontario's Justice System and Public Administration?**

Questions regarding access to justice, delay, legal costs, judicial efficiency and proportionality have been a significant concern of stakeholders and policy-makers in the Canadian justice system for many years. These issues appear to have reached a tipping point in *R v. Jordan*, a 2016 decision of the Supreme Court of Canada that considered delay in the Canadian criminal justice system.⁸ The *Jordan* court established new rules to alleviate the “culture of delay” in criminal proceedings in Canada. In so doing, *Jordan* has become a catalyst for justice system reform across the country.

Class actions are a major part of the administration of civil justice in Ontario. Class actions are lengthy and consume significant private and public resources. Many of the priorities typically identified for civil justice reform have analogues in class action law and practice. As a result, the LCO considers whether or how the CPA should be updated to reflect larger, strategic priorities for civil justice reform generally.

To take one example, the justice system is generally perceived as lagging other public services in the dissemination, gathering, sharing and analysis of information and data.⁹ Policy-makers and stakeholders from across Canada's justice system agree upon the need for increased transparency regarding justice system outcomes and empirical data. For example, the Canadian Bar Association has emphasized:

*Data serve a range of purposes, from informing the public about the justice system and grounding the day to day decision making of justice system participants, to supporting policy making processes and change processes. Metrics enhance people's choices, enable comparisons and learning, increase transparency and create incentives for improving access to justice.*¹⁰

The LCO believes empirical data is an important priority for class actions law and policy. As a result, this report devotes considerable attention to the reforms we believe are necessary to improve data collection and support evidence-based policy-making in class actions.

C. LCO Approach, Engagement and Research

As mentioned above, class action discussions are controversial and often influenced by stakeholder interests and perspectives. This project is unique in that the LCO is independent of those interests and committed to an impartial, public interest analysis of class actions issues.

The LCO's research and consultation program was extensive, participatory and evidence-based.

The LCO team engaged in public consultations with a cross-section of class action stakeholders, including plaintiff and defendant litigators, judges, class members, NGO representatives, government policy makers, court administrators, academics, claims administrators and others. The LCO consulted with individuals and organizations in Ontario, Québec, British Columbia, Alberta, the United States and Australia. The LCO is confident that this project undertook the most extensive consultation on class actions in Canada.

In addition to stakeholder consultations, the LCO completed an extensive program of legal and public policy research regarding class actions, the administration of civil justice and public administration generally.

Finally, this report is informed by empirical research where possible to do so. Unfortunately, researchers and policy-makers have comparatively little empirical research regarding key class actions issues such as the number and nature of class actions initiated in Ontario; the outcomes of class actions; the distribution of settlement funds to class members; and the length, cost or complexity of class actions. The LCO initiated a significant empirical research program to address these gaps, which was only partially successful.

D. Summary of Findings and Recommendations

The LCO has made a conscious decision to prioritize issues that appear to have a systemic impact on class action litigants, practice, and outcomes. The project also prioritized issues based upon the concerns identified through our consultations, the principal researchers' and Reference Group's experience and judgement, and the LCO's analysis of whether an issue was appropriately considered a law reform issue. This report does not consider substantive amendments to statutes beyond the *CPA*.

The report addresses a broad cross-section of issues, including the process for initiating a class action, certification, settlement approval and distribution, counsel fees, costs, and monitoring/reporting on class actions. Our recommendations include both substantive and technical amendments to the *CPA*, significant reforms to class action practice management, the adoption and promotion of consistent best practices in key areas, and major new reporting obligations. In many areas, we have concluded that the existing statutory provisions and/or judicial interpretations of those provisions are sound and should not be changed.

Some of our recommendations will be controversial. Importantly, the LCO's goal was not consensus. It was, rather, to identify principled, practical, and forward-looking recommendations that best achieve the objectives of class actions and other priorities we have identified. From a strictly partisan perspective, the LCO believes stakeholders will see both potential benefits *and* major new responsibilities in our recommendations.

Our recommendations are summarized below. Chapters 2 to 12 in this report address issues in detail. **Appendix A** is a complete list of our recommendations.

Chapter Two: Class Actions, An Empirical Profile

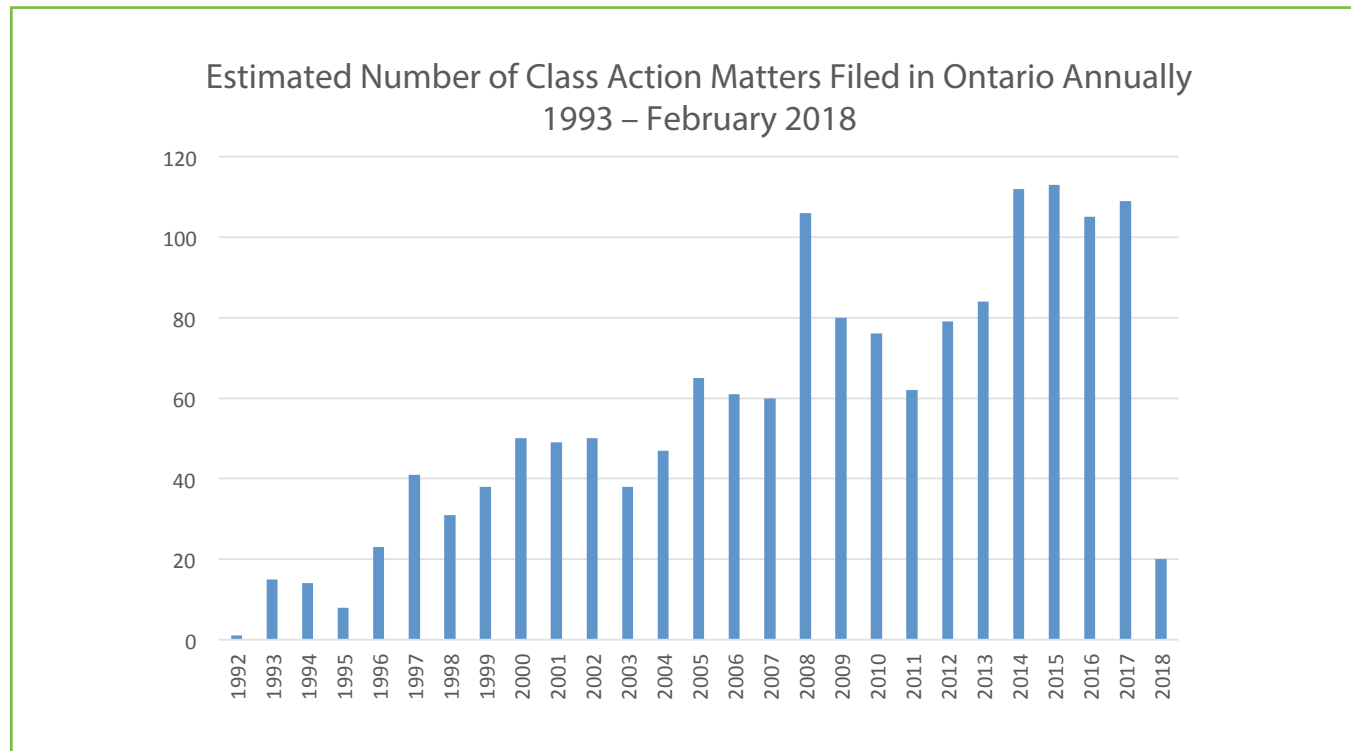
The LCO created a comprehensive list of class action matters filed in Ontario since the enactment of the *Class Proceedings Act* in 1993. This was not an easy endeavor – prior to this project, there was no institution in Ontario that was accurately keeping track of all class action matters. The LCO encountered many difficulties throughout this research and there are many empirical questions left unanswered.

The objective of this effort was to provide a basic empirical foundation for our analysis of class actions in Ontario. This work was only partially successful. Below we summarize our empirical estimates on several key metrics.

Number and Growth of Class Actions In Ontario

The LCO estimates that there were approximately 1,500 class actions initiated in Ontario between 1993 and February 2018. This estimate is based on several important assumptions.¹¹

The chart below sets out the LCO's estimate of class action proceedings filed per year. The number of class action matters filed in recent years has clearly increased, averaging more than 100 class actions per year for the last several years.



The Type of Class Actions Initiated in Ontario

These cases covered a wide range of issues and matters, including the *Competition Act*, consumer protection, Crown liability, employment and pension-related matters, environmental issues, franchise issues, insurance, mass torts, privacy, professional negligence and product liability.¹²

Certification Approval Rate

The LCO estimates that approximately 73% of contested certification motions are eventually granted, in whole or in part.¹³

Chapter Three – Managing Class Actions

Many of the usual obstacles to access to a judicial determination in a reasonably timely manner are compounded in the class action setting. Virtually everyone consulted by the LCO cited delay as a significant issue in class action litigation.

The LCO agrees there is a pressing need to establish clear and enforceable rules and benchmarks early in the class action litigation process. As a result, the LCO is recommending several targeted but significant reforms that will establish reasonable expectations – and firm consequences – for parties to advance their actions in a timely manner. The need for active and assertive case management is a recurring theme throughout this report. The LCO encourages recent initiatives in Ontario, such as the Class Action Bench-Bar Liaison Committee, to improve case management in Ontario.

LCO recommendations in this area include:

- Amending s. 2(3) of the *Act* to establish a deadline of one year within which the certification motion is to be scheduled and plaintiffs' motion material filed;
- Introducing an automatic dismissal and costs provision for cases that are not advanced by plaintiff firms in a timely or appropriate manner;
- Amending s. 12 of the *Act* to give courts more expansive authority to manage cases;
- Implementing measures to improve case management of class actions, including a provision requiring a case management conference early and the development of a comprehensive class action Practice Direction or dedicated Rule of Civil Procedure.

Chapter Four – Carriage

There is a strong belief within the class action community that the system for determining carriage in Ontario is inefficient and unpredictable. The LCO agrees. The LCO has concluded the *CPA* needs dedicated new provisions to better manage and focus carriage hearings in Ontario. The objective of these provisions is to promote high-quality representation for class members, improve judicial economy, and increase predictability and finality in carriage decisions.

LCO recommendations in this area include:

- Amending the *Act* to establish a dedicated process and timetable for determining carriage, including new, simpler criteria for courts to use when deciding between competing firms that emphasize the quality of client representation, the experience of counsel, and the resources and funding of counsel;
- Amending the *Act* to add provisions that ensure carriage orders are final; and,
- Amending the *Act* to add new rules respecting the costs of carriage motions.

Chapter Five – Multijurisdictional Class Actions

Multijurisdictional class actions raise extraordinary challenges for Ontario's justice system. Stakeholders agreed these actions create barriers to access to justice, generate inefficiencies, increase costs and add considerable delays in class action proceedings. Stakeholders also consistently advised the LCO that the *CPA* does not provide sufficient guidance to Ontario courts considering overlapping class actions.

The LCO agrees with these observations. The number and complexity of multijurisdictional class actions has grown to an extent that could not have been foreseen by the original drafters of the *CPA*. New provisions are needed to organize multijurisdictional class actions more effectively and to promote harmonization between provinces. The LCO supports the recent adoption of the CBA Protocol on Multijurisdictional Actions as a Practice Direction in Ontario.

LCO recommendations in this area include:

- Amending the *CPA* to add provisions consistent with the Uniform Law Conference of Canada's *Uniform Class Proceedings Act (Amendment) 2006*, and to harmonize with Alberta, BC and Saskatchewan multijurisdictional class action legislation;
- Encouraging Federal, Provincial and Territorial (FPT) Ministers of Justice to work together to develop a national protocol or set of rules for the recognition of provincial certification decisions and multijurisdictional classes; and,
- Encouraging courts across Canada to develop consistent training regarding the management of multijurisdictional class actions.

Chapter Six – Certification

Certification is the most controversial and partisan class action issue.

The LCO evaluates certification against the three class action objectives and in the context of the entire class action regime, including costs, fees, delay and multijurisdictional actions.

As noted above, the LCO estimates that approximately 73% of contested certification motions are eventually granted, in whole or in part. From one perspective, the certification approval rate proves that the certification process favours plaintiffs and that reforms are necessary. From another perspective, the certification approval rate proves the current test is working appropriately.

The LCO agrees that the certification rate in Ontario appears high. Statistics alone, however, cannot answer the question of whether the certification test should be reformed. There is no simple or accepted statistical benchmark of what constitutes an appropriate certification rate. As a result, the LCO's analysis addresses further questions regarding the nature and extent of frivolous class action litigation in Ontario, questions of procedure and fairness, alternatives to the current certification test, and other issues.

The LCO has concluded that the certification regime in Ontario does not warrant major reforms to the statutory or evidential tests. The LCO believes that the most significant proposed reforms (adopting a preliminary merits test, amending the “some basis in fact” evidential burden) would introduce procedural and practical concerns that would subvert the objectives of access to justice and judicial economy.

The LCO acknowledges that defendants have many legitimate concerns about class proceedings including dormant cases “copycat” claims, late-filing claims, overly-broad actions, and actions with scant evidence. The LCO believes these concerns can be best addressed through means other than a preliminary merits test or other statutory amendments.

LCO recommendations in this area include:

- Encouraging courts to interpret elements of the s.5 certification test more rigorously;
- Adopting a dedicated class action Practice Direction that includes detailed provisions and best practices for certification motions; and
- Encouraging courts to support/endorse pre-certification summary judgment motions or motions to strike if such a motion will dispose of the action, or narrow issues to be determined or evidence to be filed at certification.

Chapter Seven – Settlement Approval

Settlement approval is a key moment in class action litigation. Courts have repeatedly stated that settlements demand careful judicial scrutiny before they are approved.

Experience, consultations and research suggest judicial scrutiny of settlements is mixed. The LCO is aware of many instances where courts took considerable time and effort to evaluate a proposed settlement. That said, it is also true that settlements have been approved that raise serious questions about the adequacy of, and barriers to claiming, compensation.

In light of this analysis, the LCO believes there is a significant need to improve the settlement approval process. The LCO believes a combination of statutory reforms, best practices, transparency and empirical analysis will improve the consistency and quality of judicial decision-making in this difficult task.

In the short-term, the effect of these reforms will be to improve the quality of judicial scrutiny in individual cases. In the long term, these reforms will create higher expectations and responsibilities for counsel proposing settlements, promote evidence-based best practices, improve settlement outcomes for class members, and establish the empirical record necessary to evaluate class actions more thoughtfully.

LCO recommendations in this area include:

- Amending the *Act* to establish dedicated new provisions governing settlement approvals, including specifying that proposed settlements be “fair, reasonable, and in the best interests of the class” and setting higher evidential standards for parties seeking approval of settlements, including affidavit evidence respecting the settlement approval criteria, the risks of litigation, the range of possible recoveries, and the method of valuation of the settlement;
- Amending the *Act* to require parties to make full and frank disclosure of all material facts;
- Amending the *Act* to give courts the discretion to appoint an *amicus curiae*; and,
- Requiring that notice be given to statutory agencies if class members are likely to be represented by such agencies.

Chapter Eight – Settlement Distribution

In *Fischer*, the Supreme Court of Canada recognized that class actions must provide substantive outcomes to the members.¹⁴ Those substantive outcomes are dependent upon distribution processes, the costs of distribution, and the transparency and monitoring of distributions, whether following a settlement or a judgment on the merits.

Lack of compensation to class members is one of the most common and trenchant criticisms of class actions. Many people believe that access to justice in class actions is hindered by *de minimis* claims in which minimal compensation is paid to class members. The LCO’s consultations and research presents a more complex and promising picture of class action outcomes than these views suggest.

The LCO believes that class member’s interests can and should be more consistently and sufficiently protected. This is not an easy task. With appropriate reforms, however, it is possible to significantly improve the transparency, monitoring and measurement of settlements through initiatives such as mandatory and consistent outcome reports. Other reforms in settlement distribution should address notices, claims administrators and *cy prè*s distributions.

LCO recommendations in this area include:

- Adopting a dedicated Practice Direction that includes detailed requirements and best practices for proposed settlement distributions;
- Amending the *Act* to establish dedicated new provisions governing settlement distributions, including:
 - Adding plain language requirements and requiring the court to order the best notice reasonably practicable;
 - Adding provisions governing claims administrators;
 - Adding provisions governing *cy prè*s distributions; and
 - Requiring detailed final outcome reports.

Chapter Nine – Fee Approval

A frequent criticism of class actions is that plaintiff counsel often appear to earn millions in counsel fees while individual class members receive comparatively little compensation for their damages. This view is too simple. The disparity between lawyers’ remuneration and individual class members’ recovery is an inevitable and structural feature of class action litigation: plaintiff lawyers are paid to represent a large group of people, each of whom contributes to their fees. Moreover, contingency fees are designed to ensure plaintiff lawyers are remunerated appropriately for assuming the financial risk of taking on a big case that may be unsuccessful.

Public cynicism about plaintiff counsel fees can overshadow the fact that courts in Ontario (and throughout Canada) must approve fees. Plaintiff counsel fees are directly related to access to justice: If fees are set too low, counsel may not pursue claims in the future, a result that could decrease access to justice. However, if plaintiff counsel receive some of the benefit that should have gone to class members, this will decrease access to justice.

The LCO believes that counsel fees should attract greater judicial scrutiny. This scrutiny is essential because fee arrangements, like settlement approvals, are presented to the court in an adversarial void. Heightened scrutiny is also essential because counsel fees and class member compensation are often a zero-sum equation. The objective in fee determinations should be to ensure that class counsel are appropriately compensated and “incentivized” to take on class proceedings but not overcompensated to the detriment of class members.

The LCO recommends that the main factors to be considered in awarding counsel fees should be the results achieved for the class and the risks undertaken by counsel. The interpretation of these factors must be clarified, however, to include a more realistic analysis of risks and results.

Finally, courts should be given statutory authority to evaluate and adjust fees in appropriate circumstances.

LCO recommendations in this area include:

- Amending the *Act* to add provisions that provide greater clarity to courts when considering counsel fees, including provisions
 - Specifying that counsel fees must be fair and reasonable and approved by the court, regardless of the method of calculation or the source of the payment;
 - Specifying that the court consider the results achieved for the class and the degree of responsibility/risk assumed by class counsel when considering whether a proposed fee is fair and reasonable;
- Amending the *Act* to give courts the authority to appoint an *amicus curiae* to assist the court considering fee approvals;
- Amending the *Act* to give courts the discretion to adjust counsel fees to ensure counsel fees bear an appropriate relationship to results achieved; and
- Amending the *Act* to give courts the authority to hold back a small percentage of counsel fees pending the final outcome of the case.

Chapter Ten – Costs

Ontario maintains the usual two-way costs rule in class actions, as it does for other civil litigation. The issue of costs is a divisive topic where opinions fall largely on partisan lines. Plaintiff stakeholders favour the no-cost approach of BC, Manitoba, Newfoundland and the Federal Court; defence stakeholders are strongly in favour of the two-way cost rule. There was no dispute among stakeholders, however, that cost orders have risen over the past several years. The magnitude of these cost orders is an access to justice problem. Additional consequences of two-way costs in class actions are: indemnities and the associated cost to the class; trading appeal rights to avoid paying costs; deterring public interest litigation; and keeping the market for class counsel very narrow.

On balance the LCO believes a modified no-costs system is the best solution. Under this scheme there would be no-cost awards for certification motions and all proceedings ancillary to certification including motions for productions, motion to amend a certification order, and appeals from certification. All other proceedings would have two-way costs applied including motions to strike, jurisdiction disputes, summary judgment motions, motions to de-certify, and trials.

LCO recommendations in this area include:

- Amending the *Act* to introduce a modified no-costs regime for certification and ancillary motions;
- Amending the *Act* to permit third party funding of class actions under prescribed circumstances; and,
- Amending the *Act* to give the Class Proceedings Fund greater authority to determine appropriate funding arrangements in individual cases.

Chapter Eleven – Behaviour Modification

The LCO does not believe that every class action needs to achieve behaviour modification for the objective to be valid. Class action-related behaviour modification appears to occur in some proceedings; it does not occur in others. In many proceedings, it is difficult, if not impossible, to isolate the deterrent effect of class action proceedings compared to other factors, such as regulatory proceedings, corporate reputational interests or legal proceedings initiated outside of Canada.

As in many other areas of class action law and policy, it is difficult to assess or promote behaviour modification in the absence of consistent reporting on, and understanding of, class action outcomes. Improved reporting would allow litigators, clients, courts, policy-makers and the public to systematically assess the efficacy of class actions as a vehicle for corporate/institutional deterrence and behaviour modification. Finally, *cy près* awards can be an important tool to promote behaviour modification, provided they are structured and reported appropriately.

LCO recommendations in this area include:

- Requiring that mandatory class action outcome reports include information about behaviour modification outcomes, including changes in corporate or government practices and behaviour that may be attributable to a class action.

Chapter Twelve – Appeals

Ontario's appeal routes from certification orders are unique in that the Divisional Court and the Ontario Court of Appeal have divided appellate jurisdiction. No other province or the Federal Court have an intermediate court for certification appeals. Moreover, Ontario is the only common law province with asymmetrical certification appeal rights as between plaintiffs and defendants.

Two levels of appeal add time and expense without offering finality. Further, there is no principled reason to maintain asymmetry between the parties for these appeals as certification is fundamentally important to both parties. Finally, the development of case law on emerging issues in class actions is facilitated by equal access to appellate review.

LCO recommendations in this area include:

- Amending s. 30 of the *CPA* to provide both parties with a right of appeal to the Ontario Court of Appeal from certification orders.

E. Project Organization

1. Terms of Reference

The project's Terms of Reference sets out the project's objectives and the general issues that were considered. The terms of reference read, in part, as follows:

The purpose of the project is to research whether class actions are fulfilling their three-part promise to improve access to justice, foster judicial efficiency, and promote behaviour modification.

The project will be independent, consultative, balanced, practically oriented, and guided by public interest values....

The project acknowledges its scope is potentially broad, with many complex and controversial issues. Time and resources for the project will be limited. As a result, the project will prioritize and organize its work to focus on systemic issues that affect class actions generally. The project will consider whether Ontario's existing Class Proceedings Act needs to be amended to govern contemporary class action proceedings. The project will also strive to establish an independent, evidence-based record of class actions in Ontario.

The project's complete terms of reference are attached as **Appendix B**.

2. Issues Considered

The project's Consultation Paper identified the general areas of inquiry for this project, including questions regarding:

- Delay
- Settlements and class actions outcomes
- Costs
- Counsel fees
- Certification
- Behaviour modification
- Perspectives of class members
- Multijurisdictional class actions
- Carriage
- Appeals
- Empirical data collection

The complete Consultation paper is available on the LCO's website.¹⁵ The list of questions included in the Consultation Paper is attached as **Appendix C**.

3. Staffing, Support and Funding

The class actions project was led by the LCO with the support of a distinguished group of academics, justice system leaders and class action practitioners.

The project's Principal Researchers were:

- Professor Jasminka Kalajdzic, Faculty of Law, University of Windsor; and,
- Professor Catherine Piché, Faculty of Law, Université de Montréal.

The LCO established an expert Reference Group to assist the project's work. The Reference Group included:

- The Honourable Stephen T. Goudge, LCO Board of Governors Liaison;
- Marie Audren, Partner, Audren Rolland LLP;
- Tim Buckley, Global Resolutions Inc. (formerly of Borden Ladner Gervais LLP);
- Michael A. Eizenga, Partner, Bennett Jones LLP;
- Professor Trevor C. W. Farrow, Osgoode Hall Law School;
- André Lespérance, Partner, Trudel, Johnston and Lespérance;
- Celeste Poltak, Partner, Koskie Minsky LLP; and
- Linda Rothstein, Partner, Paliare Roland Rosenberg Rothstein.

Funding for the project was provided by the LCO. The project was also supported by the Faculty of Law, University of Windsor and the Faculty of Law at the Université de Montréal. Additional project funding was provided by the Ontario Ministry of the Attorney General and the Government of Canada through its Justice Partnership and Innovation Program.

4. Project Consultations

The project had two consultation phases.

Phase One ran from November 2017 to January 2018. During this phase, the LCO's principal researchers, Professors Catherine Piché and Jasminka Kalajdzic, and LCO staff interviewed sixty class actions stakeholders, including a broad cross section of plaintiff and defendant litigators, judges, class administrators, class members, community organizations and insurers. This phase used a purposive key informant approach to help the LCO identify issues. More information about the LCO's Phase One consultations is included in the project Consultation Paper.

Phase Two ran from March to May 2019. This phase included a comprehensive Consultation Paper, public submissions, and additional meetings with stakeholders. During this period, the LCO conducted an additional 75 interviews, received more than 30 public submissions, and made presentations at several public and private events, conferences, and meetings. The public submissions are posted on the LCO's class actions project website.¹⁶

A list of persons and organizations consulted during this project is included in **Appendix E**.

5. Acknowledgements

Many people and organizations were involved in the research and writing of this report.

Most notably, the LCO wants to extend its thanks to Professors Jasminka Kalajdzic and Catherine Piché, the LCO's Principal Researchers, and to the members of our project Reference Group.

The LCO would also like to thank the Faculty of Law, University of Windsor, the Faculty of Law at the Université de Montréal and the Class Actions Lab for their support of this project. Important financial and in-kind support was also provided by the Ontario Ministry of the Attorney General and the Government of Canada through its Justice Partnership and Innovation Program.

Finally, the LCO would like to thank the numerous counsel, firms, judges, academics, class members, governments, and NGOs that contributed to this project.

6. Next Steps and How to Get Involved

The LCO believes that successful law reform depends on broad and accessible consultations with individuals, communities, and organizations across Ontario. As a result, the LCO is seeking comments and advice on this report. There are many ways to get involved. Ontarians can:

- Learn about the project and sign up for project updates on our project website;
<https://www.lco-cdo.org/en/our-current-projects/class-actions/>
- Contact us to ask about the project; or,
- Provide written submissions or comments on the final report.

The LCO can be contacted at:

Law Commission of Ontario
Osgoode Hall Law School
York University
2032 Ignat Kaneff Building
4700 Keele Street Toronto
ON M3J 1P3

Telephone: (416) 650-8406
Email: lawcommission@lco-cdo.org
Web page: www.lco-cdo.org
Twitter @LCO_CDO

Chapter Two

CLASS ACTIONS, AN EMPIRICAL PROFILE

A. Introduction

Empirical data about class actions is difficult to collect in most class action jurisdictions, including Ontario. Among others, Professor Catherine Piché has confirmed that:

There is a dearth of data on judicial activity in Canada in all sectors of litigation, including class actions. In fact, apart from the limited and rather informal data gathered by the provinces' superior court class action judges, the court registries, bar association registers, and informal (often more impressionistic) numbers circulating within the class action bar and among judges, no one can reliably draw any conclusions as to class action activity in Canada. Consequently, we do not know if our class action system is truly effective, fair and efficient. We are therefore unable to determine how the law should move forward, evolve and be reformed. Often, law reforms are based on inaccurate data. The absence of a documented monitoring system of implemented reforms makes for an imprecise, opaque civil justice system. The class actions sector is no exception.¹⁷

Over the years, there have been many efforts to collect and publicize data on class action issues. Notable examples of empirical studies in Ontario and Canada include:

- An analysis of the incidence of trials in class actions;¹⁸
- An analysis of take up rates;¹⁹
- An examination of class counsel fees;²⁰
- Class actions “activity” reports prepared law firms;²¹
- Reports on specific areas of law, including securities class actions;²²
- Class actions reports prepared by law firms and trade associations;²³
- Reports prepared by class actions funders;²⁴ and,
- Academic studies.²⁵

These reports are helpful, and the individuals, firms and organizations supporting this work should be commended. Unfortunately, these efforts are not enough. For example, despite more than 25 years of class action proceedings, policy-makers still have very little empirical research regarding the outcomes of class action litigation in Ontario, especially regarding the distribution of settlement funds to class members. Nor is there empirical research regarding the length, cost or complexity of class action matters in this province.²⁶

The need for more data has important consequences for thoughtful discussions and law reform about class actions. The lack of empirical data means that policy-makers and stakeholders discussing class action issues very often rely on anecdotes or personal experience rather than statistics or data. Personal experience, while obviously important, is not a substitute for data.

The lack of empirical data about class actions may distort or undermine policy debates about class actions. Absent data, how can policy-makers assess whether class actions are fulfilling their compensatory objectives? Absent data, how can we assess whether class actions are successful in distributing funds to class members? Absent data, how can we evaluate or judge class actions transaction costs relative to class actions “outcomes?” The answers to these questions go to the heart of important class actions policy questions.²⁷

This is not to say that class action data or information does not exist. On the contrary, it often *does* exist but is in hands of counsel, claim administrators, or is otherwise effectively “buried” in paper-based court files. The difficulty is that this information is often not available publicly, consistently, or economically.

Ontario is by no means unique in its lack of class action data. The LCO’s informal survey of several Canadian jurisdictions reveals similar challenges in British Columbia, Alberta, and Saskatchewan. The situation in Québec is unique and will be discussed in Chapter 8. Perhaps unsurprisingly, there appears to be more class action-related empirical research in the United States. There too, however, important information gaps persist.²⁸

B. LCO Empirical Database Project

The LCO is attempting to fill the data vacuum by developing a class actions database. Our goal was to create a comprehensive list of all class action matters filed in Ontario since the enactment of the *Class Proceedings Act* in 1993.

The objective of this effort was to provide a basic empirical foundation for our analysis of class actions in Ontario. This work was partially successful. The LCO encountered many difficulties throughout this research and there are many empirical questions left unanswered.

The LCO compiled data from three sources: data from the Ministry of the Attorney General; case law databases such as CanLII, Quicklaw and Westlaw; and informal records provided to the LCO by law firms and others. None of these sources represent a complete, definitive record of class actions proceedings in Ontario. Our methodology and the challenges we faced are described in **Appendix D**.

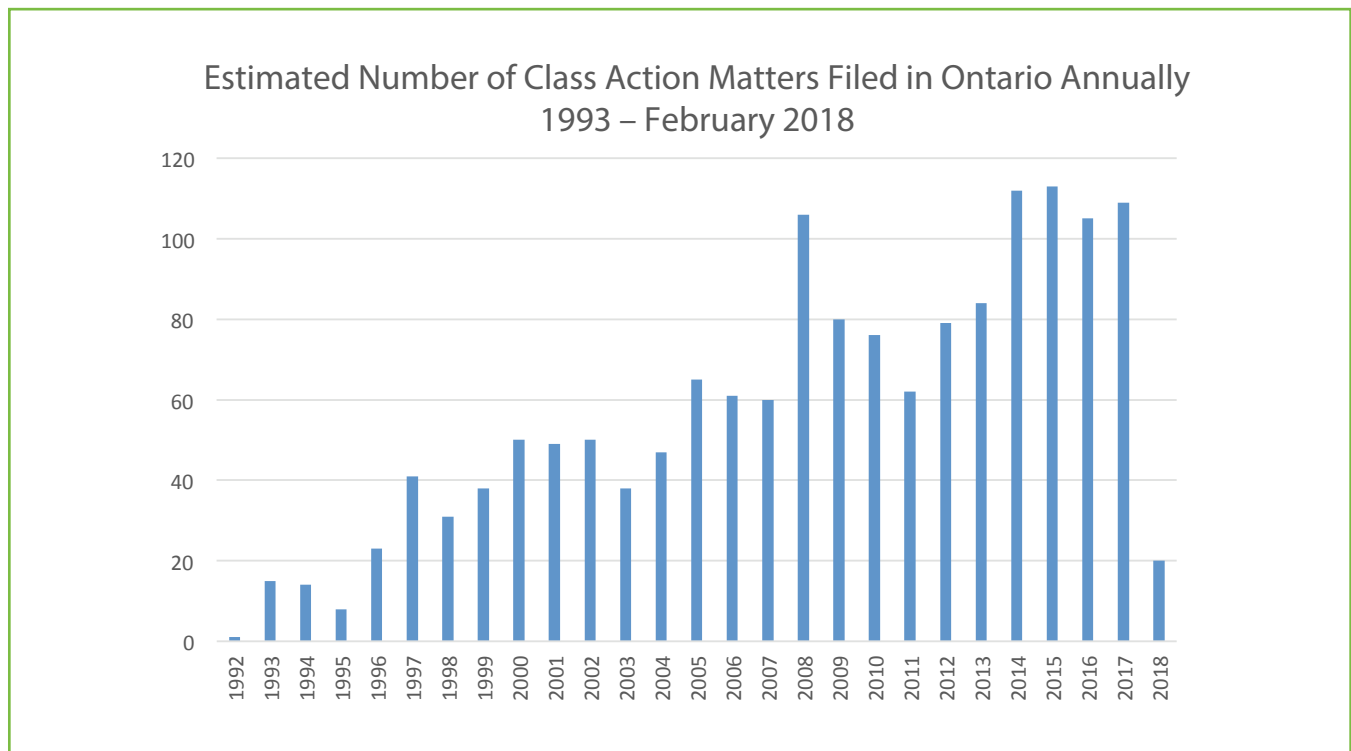
C. Summary of Findings

Below we summarize our empirical findings on key metrics: The number of class actions in Ontario; the types of class actions filed in Ontario; and the certification approval rate.

1. Number and Growth of Class Actions in Ontario

The LCO estimates that there have been approximately 1,500 class actions initiated in Ontario between 1993 and February 2018. This estimate is based on several important assumptions that qualify our findings.²⁹

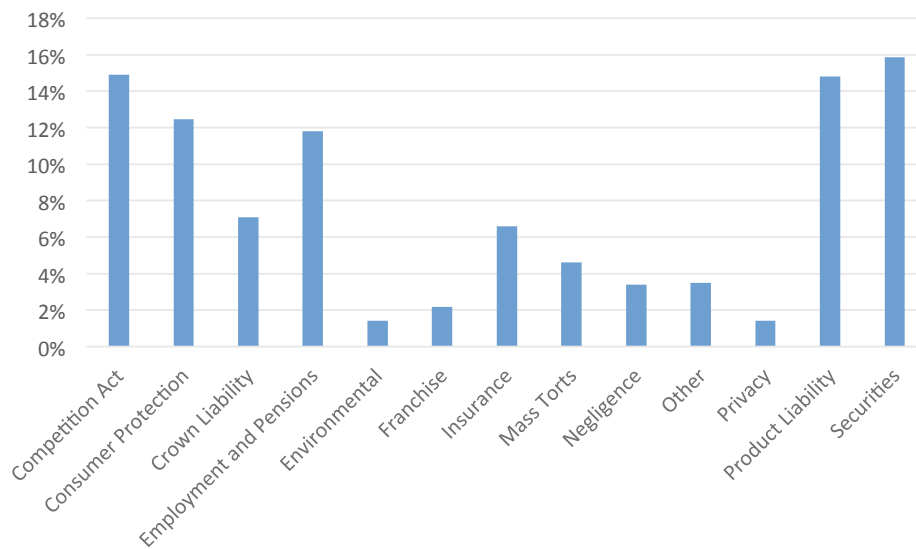
The chart below sets out the LCO's estimate of class action proceedings motions filed per year. The number of class action matters filed in recent years has clearly increased, averaging more than 100 class actions per year for the last several years.



2. Types of Class Actions in Ontario

The LCO reviewed MAG databases, published decisions, and other materials in order to estimate the types of class actions filed in Ontario since 1993. Not surprisingly, the LCO discovered that class actions in Ontario cover a wide range of legal issues, including the *Competition Act*, consumer protection, Crown liability, employment and pension-related matters, environmental issues, franchise issues, insurance, mass torts, privacy, professional negligence and product liability.³⁰ The most frequent types of cases are *Securities Act* litigation (16%), followed by *Competition Act* matters (15%) and product liability cases (15%).

Estimated Types of Class Actions Filed in Ontario
1993 - 2018



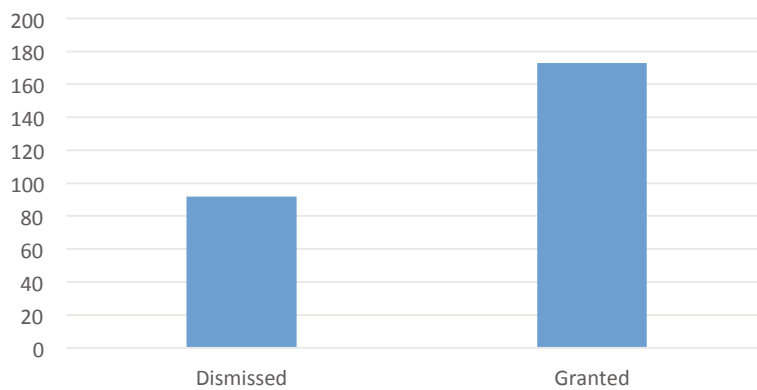
3. Certification

In light of the many debates about the test for certification and calls for its reform, the LCO thought it important to understand just how frequently proceedings are certified. To calculate the rate of certification, the LCO had to rely solely on published decisions.³¹ The LCO researched three legal search engines for published decisions citing the *Class Proceedings Act* to identify and categorize decisions involving certification motions. In the end, the LCO found 423 published decisions between both contested and consent certification motions.

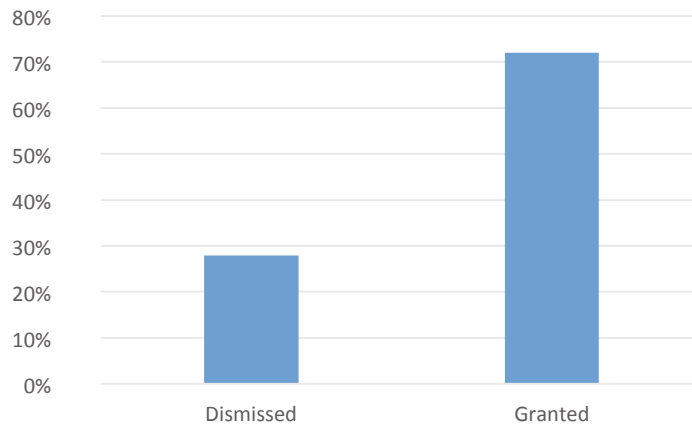
Taking into account appeals of certification decisions, approximately 73% of contested certification motions are successful, in whole or in part.

Note that a certification decision may involve more than one court file or more than one class action matter. The LCO discovered that while most certification decisions dealt only with one court file, some involved multiple actions being litigated in one certification motion.

Number and Result of Certification Motions
Not Including Appeals
1993 - 2018

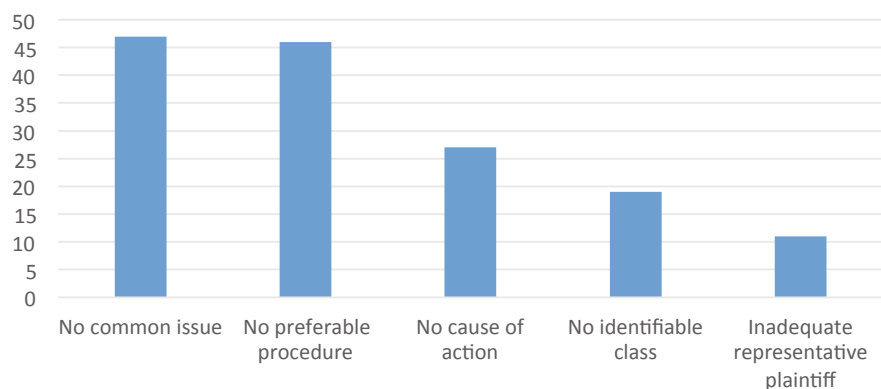


Percentage of Contested Certification Motions
Granted Including Appeals
1993-2018



The following chart shows the number of times each statutory ground for dismissal – cause of action, identifiable class, common issues, preferable procedure, and the existence of a representative plaintiff or defendant – was cited by courts when dismissing a certification motion. The top two grounds cited was lack of common issues, and failure to show that a class action is the preferable procedure.

Reasons Cited as Grounds for Dismissal of
Certification Motions
1993 - 2018



Chapter Three

MANAGING CLASS ACTIONS

A. Introduction

Many of the usual obstacles to access to a judicial determination in a reasonably timely manner are compounded in the class action setting.

Virtually everyone consulted cited delay as a significant issue in class action litigation. Delay can harm class members due to loss of evidence or because the class may dissipate. Delay can also harm defendants, who may suffer financial and/or reputation harm during this period.

While some informants stated that delay in class actions was inevitable, most expressed concern at the length of time class actions – no matter the category or degree of complexity – required to be resolved. Plaintiff and defence counsel were equally critical of so-called dormant class actions. Counsel also uniformly supported more directive and consequential case management that was less conciliatory to lawyers' schedules. Judges generally agreed with these comments.

The LCO agrees there is a pressing need to establish clear and enforceable rules and benchmarks early in the class action litigation process. As a result, the LCO is recommending several targeted but significant reforms that will establish reasonable expectations – and firm consequences – for parties to advance their actions in a timely manner. These reforms should include:

- Amending s. 2(3) of the Act to establish a one-year deadline within which the certification motion must be scheduled and plaintiffs' motion material filed;
- Introducing an automatic dismissal and costs provision for cases that are not advanced by plaintiff firms in a timely or appropriate manner;
- Improving case management of class actions, including
 - A statutory provision requiring a case management conference early in the proceeding;
 - Amending the Act to give courts more expansive authority to manage cases; and,
 - Adoption of a comprehensive Practice Direction specifically addressing case management of class action proceedings.

The LCO believes these reforms are complementary and mutually reinforcing. They are designed to encourage parties to advance their actions, to reduce dormant class actions, to improve judicial economy and to give courts more tools to manage class actions effectively. These recommendations are consistent with the public submissions and interviews from a broad cross-section of stakeholders.³²

B. The CPA

Delay issues are usually resolved through judicial case management and scheduling directions rather than by formal motion procedures in Ontario class proceedings. The CPA provides for only one set deadline within the procedure. Leave to bring a certification motion pursuant to section 2 of the CPA must be brought:

*ninety days after the later of, (i) the date on which the last statement of defence, notice of intent to defend or notice of appearance is delivered, and (ii) the date on which the time prescribed by the rules of court for delivery of the last statement of defence, notice of intent to defend or a notice of appearance expires without its being delivered.*³³

A motion for leave to bring a certification motion outside the time limits may be brought, as per section 2 of the *CPA*, but without specific statutory direction. Courts must balance the plaintiff's interest to proceed with the case on its merits and the defendant's entitlement to a fair and efficient trial.³⁴

In general, courts in Ontario do not take a rigid approach to the application of timelines that would penalize parties for technical non-compliance or frustrate the fundamental goal of resolving disputes on their merits.³⁵ Nonetheless, a class proceeding may be dismissed for delay as specifically contemplated by section 29(4) of the *CPA*. Specifically, the section provides as follows:

In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether a notice should be given under section 19 and whether any notice should include:

- (a) an account of the conduct of the proceedings;*
- (b) a statement of the result of the proceeding; and*
- (c) a description of any plan distributing settlement funds.*³⁶

No other provision in the *CPA* addresses dismissal (or sanctions) for delay. Since section 35 of the *CPA* incorporates by reference the *Rules of Civil Procedure*,³⁷ Rules 24.01(1) and 24.01(2), as well as Rule 48.14 can be invoked to move to have the class proceedings dismissed.

C. Analysis

1. Ninety Day Rule

The LCO was advised repeatedly that the ninety day deadline has been consistently (and reasonably) ignored because it is unrealistic in contemporary class action litigation. The LCO proposes amending s. 2(3) of the *Act* to replace the ninety day rule with a deadline of one year within which the certification motion is to be scheduled and the plaintiffs' motion material to be filed. At first glance, the imposition of a longer deadline seems counterintuitive if one is concerned about delay. This reform will only be effective if it is accompanied by considerably less judicial deference to parties seeking an extension to complete their materials.

The imposition and enforcement of a longer deadline for the certification hearing is a significant change in the operation of the statute, and undoubtedly has ramifications for the courts and judicial workload. Strict timelines, however, may lead to counsel producing leaner motion materials, greater cooperation between counsel to meet deadlines, and more efficient hearings. As Siskinds reflects in its submissions, these were the consequences of the cultural shift that took place after the Ontario Court of Appeal's decision in 2012 holding a strict two-year limitation period applied to secondary market misrepresentation claims.³⁸ Siskinds advised the LCO that "[the] same approach needs to be adopted for the certification process. A fixed, but reasonable, deadline for the hearing of the certification motion by the case management judge will help to impose discipline on the process."³⁹

Inevitably, there will be situations where a one-year timetable is unreasonable. The proposed amendment to s. 2 (3) allows for longer timetables, but forces the parties to justify any delay to a judge.

2. Dormant Cases

Both plaintiff and defence counsel were very critical of the dormant case phenomenon.

Counsel from plaintiff firms, for example, told the LCO there are firms that misuse the *Act* by starting cases that they have insufficient resources to pursue and no intention to prosecute in order to force their way into a consortium of law firms actively litigating the claims of the class.⁴⁰

Similarly, a defence-side firm advised the LCO that it has more than 20 dormant cases, actions in which no meaningful steps have been taken since the claim was served or the case management judge assigned.⁴¹ One defence-side stakeholder group advised the LCO that

*Class proceedings that are started but dormant may have several negative effects for defendants, including: the need to disclose the litigation in financial reports and/or auditor's statements, negative reputational impacts, decreased shareholder value, and the substantial costs associated with any necessary preservation of documents and records related to the litigation.*⁴²

It must be emphasized that not all dormant cases are inappropriate. For example, the practice of initiating actions as placeholders while parallel actions in the United States proceed through the American court system accounts for some apparently dormant actions. This practice is somewhat controversial: some lawyers accept that it is more efficient to await resolution of the usually much larger American action, while others complain that the Canadian counterpart ought to move ahead regardless. It is the LCO's view that, so long as the parallel Canadian class action is being case managed, and counsel on both sides agree to hold the case in abeyance pending US resolution, this subcategory of dormant files is a necessary corollary of litigation involving multi-national corporations and does not warrant a legislative response. Cases may also be dormant due to applications to the Class Proceedings Fund or other circumstances, such as early settlement discussions.

Most concerning are dormant actions initiated by counsel who lack the resources or resolve to prosecute them diligently, or who bring unmeritorious claims. Based on the totality of evidence gathered by the LCO, such actions appear to represent a minority of all class proceedings.⁴³ Nevertheless, such actions do not advance the goals of class proceedings, waste judicial resources, and reflect poorly on the justice system and the profession.

In light of this analysis, the LCO recommends introducing an automatic dismissal provision: If a plaintiff does not file their certification material in accordance with the revised s. 2(3) or a case management order, the action should be subject to administrative dismissal. Notice of the dismissal to the putative class would be required, the costs of which would be payable by plaintiffs' counsel, unless the court ordered otherwise. The proposed provision should impose discipline on counsel and create more realistic expectations than does the current 90 day rule.

3. Case Management

Case management is a long-standing issue and priority in Ontario's justice system that both includes and transcends class action litigation.⁴⁴

Representatives from both sides of the bar welcome case management that is less conciliatory toward lawyers' schedules and that imposes page limits and time restrictions for examinations of witnesses and oral arguments.⁴⁵ Counsel referred on a few occasions to American case management judges, who impose tighter timeframes and rigorously enforce deadlines. Sotos LLP, for example, recommended the codification of six principles of case management from the US Federal Judicial Center's (FJC) Manual for Complex Litigation, cited with approval by Chief Justice of Ontario Strathy in a 2015 appellate decision.⁴⁶

Although the LCO does not agree that all six principles are appropriate for *legislative* amendment, some merit further consideration as part of a made-in-Ontario class action Practice Direction, to be discussed below. Regular and periodic monitoring of the status of an action, for instance, are familiar case management tools mandated by the *Rules of Civil Procedure* in other types of actions and may well perform a disciplining function in class action litigation.

Case management could be improved by setting a schedule at the start of the case including agreeing on a timetable for contested certification motions as well as other motions that may be permitted prior to certification. Early discussion about plans to retain experts, conduct examinations for discovery and consider settlement options are also encouraged. A timetable set early in the action requires all counsel to assign adequate resources to litigation of the action.

Case management in class actions could also be improved through two statutory amendments:

First, the LCO recommends adding a provision to the *Act* requiring a first case management conference to be held within sixty days of the last defendant serving a notice of appearance. A timetable set early in the action requires all counsel to assign adequate resources to litigation of the action.

Second, the LCO recommends that s. 12 of the *Act* be amended to give courts greater authority to control class action proceedings. At present, s.12 gives the court discretion to make any order necessary to ensure the fair and expeditious conduct of the proceeding upon application of any party.⁴⁷ Section 12 applies throughout the proceedings.⁴⁸ At present, this authority is dependent on a motion from a party or class member.⁴⁹ This is an appropriate rule/limitation in most circumstances. Nevertheless, the LCO believes courts should be encouraged to more proactively and assertively manage class action proceedings. As a result, the LCO proposes that s. 12 be amended to remove the requirement that the motion be brought by a party.

Finally, the LCO is aware of an important recent initiative in Ontario, the Class Action Bench-Bar Liaison Committee. This initiative was proposed by the Ontario Bar Association in order to develop practice initiatives to improve the conduct of class proceedings in Ontario.⁵⁰ One of the topics under consideration by the Committee is the development of a practice direction for case management and/or standardized court filings. The LCO believes this is a very positive development consistent with our analysis and recommendations. The LCO recommends that the Committee propose case management practice directions that are incremental but ambitious.

In this respect, it is worth citing the six principles or objectives of case management set out in the Federal Judicial Center's Manual for Complex Litigation noted above.⁵¹ The FJC Manual for Complex Litigation is very comprehensive and includes detailed provisions regarding the management of US Federal Court class actions.⁵² According to the Federal Judicial Center, effective judicial management generally has the following characteristics:

- It is active. The judge anticipates problems before they arise rather than waiting passively for counsel to present them. Because the attorneys may become immersed in the details of the case, innovation and creativity in formulating a litigation plan frequently will depend on the judge.
- It is substantive. The judge becomes familiar at an early stage with the substantive issues in order to make informed rulings on issue definition and narrowing, and on related matters, such as scheduling, bifurcation and consolidation, and discovery control.
- It is timely. The judge decides disputes promptly, particularly those that may substantially affect the course or scope of further proceedings. Delayed rulings may be costly and burdensome for litigants and will often delay other litigation events. The parties may prefer that a ruling be timely rather than perfect.
- It is continuing. The judge periodically monitors the progress of the litigation to see that schedules are being followed and to consider necessary modifications of the litigation plan. Interim reports may be ordered between scheduled conferences.
- It is firm, but fair. Time limits and other controls and requirements are not imposed arbitrarily or without considering the views of counsel and they are revised when warranted. Once established, however, schedules are met, and, when necessary, appropriate sanctions are imposed (see section 10.15) for derelictions and dilatory tactics.
- It is careful. An early display of *careful preparation sets the proper tone and enhances the court's credibility and effectiveness with counsel.*

The judge's role is crucial in developing and monitoring an effective plan for the orderly conduct of pretrial and trial proceedings. Although elements and details of the plan will vary with the circumstances of the particular case, each plan must include an appropriate schedule for bringing the case to resolution. Case-management plans ordinarily prescribe a series of procedural steps with firm dates to give direction and

order to the case as it progresses through pretrial proceedings to summary disposition or trial. In some cases, the court can establish an overall plan for the conduct of the litigation at the outset; in others, the plan must be developed and refined in successive stages. It is better to err on the side of over inclusiveness initially and subsequently modify plan components that prove impractical than to omit critical elements. Nevertheless, in litigation involving experienced attorneys working cooperatively, a firm but realistic trial date may suffice if coupled with immediate access to the court for disputes that counsel cannot resolve.⁵³

The LCO recommends that the Class Action Bench-Bar Liaison Committee continue to develop a dedicated Practice Direction to improve case management of class actions. This Direction should be developed in consultation with appropriate stakeholders. The Direction – and case management generally – should be supported by ongoing training and education for the judiciary and class action counsel. The LCO will recommend additional elements of a proposed class action Practice Direction in later chapters.

Later chapters of this report will also consider how to more effectively and efficiently litigate class actions through potential reforms to carriage, multijurisdictional actions, certification, and appeals.

Recommendations

One Year Deadline for Certification Motion

1. The LCO recommends amending s. 2(3) of the *Act* to establish a one year deadline within which the certification motion schedule must be set and the plaintiffs' motion record filed, unless the court orders otherwise.

Administrative Dismissal

2. The LCO recommends adding a new provision to s. 2 of the *Act* requiring that an action be administratively dismissed in the event a plaintiff does not file its certification material in accordance with the revised s. 2(3) or any timetable set out in a case management order. Notice of the dismissal to the putative class would be required, the costs of which would be payable by plaintiffs' counsel, unless the court ordered otherwise.

Case Management

3. The LCO recommends adding a new provision to s. 2 of the *Act* requiring a first case management conference to be held within sixty days of the last defendant being served the Statement of Claim.
4. The LCO recommends s.12 of the *CPA* be amended to read as follows: "The court may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate."
5. The LCO recommends the Class Action Bench-Bar Liaison Committee and/or Civil Rules Committee develop a dedicated Practice Direction or amendment to the *Rules of Civil Procedure* for the case management of class actions. This Direction or Rule should be developed in consultation with appropriate stakeholders and be supported by ongoing training and education for the judiciary and class action counsel.

Chapter Four

CARRIAGE

A. Introduction

Carriage motions are important events in class action litigation. Multiple statements of claim are often filed in Ontario against the same defendants on behalf of the same, or overlapping, classes seeking identical or similar remedies. In these circumstances, competing class counsel firms must either negotiate an agreement amongst themselves or seek an order designating a firm with carriage of the matter.

There was a strong belief on the part of class action stakeholders that the system for determining carriage in Ontario is inefficient and unpredictable. This is because carriage fights cause delay, increase costs, and create uncertainty for both the competing plaintiff firms and defendants. For example, a plaintiff firm may invest significant time and resources on behalf of a prospective class that is ultimately wasted and uncompensated. Defendants may be forced to defend multiple, substantially-similar claims initiated months, or years, apart.

The LCO repeatedly heard that there is a lack of predictability and finality in judicial decision-making at both the initial motion and during the lengthy appeal process. This process consumes substantial private and public resources. For these reasons alone, addressing carriage is an important judicial economy priority for the LCO.

Carriage also has important access to justice consequences for the potential class and class members. Carriage motions compel courts to decide between competing plaintiff firms. Not all firms are created equal, nor are all firms skilled in either class action litigation or the substantive law of the matter being litigated. Carriage, therefore, has significant implications for the quality of class representation.

The LCO has concluded that the *CPA* needs dedicated new provisions to better manage and focus carriage hearings in Ontario. The objective of these provisions should be to promote high-quality representation for class members and judicial efficiency, predictability and finality in carriage decisions. These amendments should include:

- Provisions establishing a dedicated process and timetable for determining carriage;
- New, simpler criteria for courts to use when deciding between competing firms;
- Provisions that ensure carriage orders are final; and,
- Rules respecting the costs of carriage motions.

B. The CPA

The *CPA* does not have dedicated carriage provisions. At present, a motion to determine carriage is brought by one of the competing class counsel firms, or by a defendant, pursuant to sections 12 and 13 of the *CPA*. Section 12 states that a judge may make “any order to ensure the fair and expeditious determination” of a proceeding. Under s. 13, a court can “stay any proceeding related to the class proceeding”.⁵⁴

The initial test for determining carriage was laid out in *Vitapharm v. Hoffman-LaRoche*, where the court identified six factors to be considered in appointing solicitor of record for the class:

- The nature and scope of the causes of action advanced;
- The theories advanced by counsel as being supportive of the claims advanced;
- The state of each class action;
- The number, size and extent of involvement of the proposed representative plaintiffs;
- The relative priority of commencing the class actions; and
- The resources and experiences of counsel.⁵⁵

The list was subsequently expanded by various courts. The factors now also include:

- Funding;
- Definition of class membership;
- Definition of class period;
- Joinder of defendants;
- Correlation between the plaintiff and defendant;
- Prospects for certification;
- Prospects for success at trial; and
- Relationship with actions in other jurisdictions.⁵⁶

Needless to say, this list is comprehensive. In practice, it appears that no single factor predominates, and courts have generally focused on the best interests of the class.⁵⁷ Notably, courts have been unwilling to assess the relative quality of each legal team, stating that the motion is not a “beauty pageant”.⁵⁸

C. Analysis

Class actions stakeholders were universally critical of the current process.

Interveners commented that the existing carriage process “does not work”,⁵⁹ it is “unseemly”⁶⁰ and one of “the thorniest issues”⁶¹ or “the most difficult aspect”⁶² of Ontario’s class action regime. Plaintiffs counsel pointed to the uncertainty of the carriage test as a significant problem in the litigation, and that this leads to “unnecessary partnerships with firms in order to ward off carriage risks.” More generally, counsel state that these disputes do not serve class members and may in fact help the defendants (because they are present at the motion and get insight into the theory and strategy of the plaintiff’s case).⁶³ Defence counsel also decry the wasted resources that inevitably accrue in defending against multiple class actions.⁶⁴

The most obvious consequence of carriage battles is that they cause delay. Stakeholders advised that negotiations, preparation of materials and argument of carriage motions add roughly one year to the life of a class action.⁶⁵ When the carriage order is appealed, the delay is prolonged by another six months or more. In the interim, meaningful progress in the litigation is unlikely. Infighting between counsel does not serve class members.

For competing plaintiff firms, and especially for the firms who are ultimately not awarded carriage, the carriage fight wastes resources. Costs of the motion are usually borne by counsel.

The uncertainty of who will be awarded carriage can also act as a deterrent for reputable firms considering a potential action. This is particularly problematic where one or more of the competing firms files an action with the sole aim of extracting a fee. The LCO agrees that

*“...[c]ommencing a class action with no intention of actively pursuing it is an abuse of the class action procedure because it acts as a disincentive to the commencement of actions by other counsel and plaintiffs who are, in fact, ready, willing and able to proceed with the prosecution of the action.”*⁶⁶

Stakeholders stated that the current procedure for determining carriage does not effectively deter such abusive conduct.

Because defendants are at the carriage motion (though they usually make no submissions), they get an unusual opportunity to learn about class counsel’s litigation strategy. Plaintiffs’ counsel perceive defendants’ presence at the motion to give defendants an unfair advantage.

Due to all of these disadvantages, there is pressure on competing class counsel firms to avoid a motion and to consent to consortiums. While not inherently bad for class members, consortiums can increase the cost of litigation (whether recouped from unsuccessful defendants or paid by class members by way of fees) due to duplication of effort and over-lawyering.

The cost and unpredictability of carriage battles also create perverse incentives for counsel to engage in potentially unethical behaviour. In *Bancroft-Snell v. Visa*, class counsel entered into a fee sharing agreement with a firm in Western Canada, to avoid a protracted carriage fight.⁶⁷ The late filing of the competing class action impeded settlement discussions, and class counsel made the economically rational decision to pay the competitor its investment in the actions out of the settlement proceeds, even though nothing had been achieved for the class, in exchange for the competitor staying its rival actions. The Court of Appeal described this practice as “buying off” competitors in order to settle carriage, and noted that “fee-sharing agreements between competing law firms to avoid litigation over who has carriage of a class action are becoming more common in the industry.”⁶⁸ Ultimately, the Court of Appeal held that carriage settlements may be inevitable and come at a cost, but it is a cost to be borne by class counsel, not by the class either indirectly through a marked up contingency fee or directly from the proceeds of settlement.

The LCO agrees with the Court of Appeal that “competing actions [...] provide little or no benefit to the members of the class” and that carriage motions ought to be discouraged.⁶⁹

1. Options for Discussion

In light of these circumstances, the LCO believes that statutory amendments are needed to bring greater focus, predictability and finality to carriage hearings. In reviewing the procedure for determining carriage in other jurisdictions, at least two options present themselves. The first option is the “first to file” approach used in Québec. The second is inspired by the Australian Law Reform Commission’s (ALRC) proposed amendments to the Australian federal class action regime.⁷⁰ The LCO considers both options below.

Québec’s First-to-File Rule

Québec’s first-to-file rule arose in 1999 in order to efficiently address competing class actions filed by different firms regarding the same subject matter.⁷¹ It was justified as a more reasonable approach in circumstances where perfection in representation is not required.⁷² While efficient, the rule has distinct disadvantages in that it potentially promotes a race to the courthouse and hastily drafted, poorly researched actions.

Such were the facts in *Schmidt*.⁷³ In this case, the plaintiff filed proceedings in several provinces simply to occupy the field without properly pleading a cause of action. The Court of Appeal did not adopt the common law approach to carriage motions, but also confirmed the court’s discretion to depart from the first to file rule where, on the face of the record, it would not be in the interests of the proposed class.

The Court of Appeal thus rejected a rigid application of first-to-file, and modified rules as follows:

1. The first motion for authorization to be filed will, in principle, be the first to be heard;
2. Subsequent motions will be stayed and will proceed only if the first-class action is not authorized;
3. The priority of the first motion may be challenged by lawyers litigating the subsequent class actions; and
4. The onus is on the lawyers in the subsequent cases to show that the first action constitutes an abuse of the first-to-file rule and is not in the best interests of the class.
5. Judges considering motions challenging should not use as criteria the level of preparation, resources or experience of counsel, which involve a highly discretionary and largely subjective excuse.⁷⁴

Québec’s first to file rule is controversial. The Ontario-based stakeholders consulted by the LCO universally rejected this approach, believing that this model encourages a “race to the courthouse” and bad judgment, without regard to the best interests of class members.⁷⁵ Experts in Québec, however, advised the LCO that the post-*Schmidt* rule has proven efficient and effective in practice.

The ALRC Model: Mandatory Notice, Fixed Deadline

A second carriage model considered by the LCO was a variation of a proposal by the Australian Law Reform Commission (ALRC) for addressing competing class actions in that jurisdiction. To ensure that carriage is determined as early as possible,

the ALRC recommended mandatory deadlines in which competing firms are required to file a motion for a carriage order, resulting in a claims bar against subsequently filed actions.

In the ALRC scheme, the filing of a class action would lead to the following steps:

1. Upon filing a class action, the first plaintiff firm would have to notify potential claimants and their lawyers that a class action had been commenced;
2. An order would then be made requiring potential claimants and their lawyers to initiate a competing action within a defined period of time (the ALRC recommended ninety days);
3. At the expiration of this time period, either no competing claims are launched, or a “selection hearing” is scheduled at which the court determines which representative applicant, lawyer and action go forward.⁷⁶ Notably, the ALRC recommended that defendant not be involved in the selection hearing or have access to documents (like any funding agreement) that would give defendants a tactical advantage.⁷⁷

2. Comparing the Options

Key informants from Québec advised the LCO the first-to-file rule operates much differently in practice than Ontario stakeholders might believe. They advised the LCO that there is considerable merit in the Québec approach. Nevertheless, the LCO believes the Québec rule may not be well suited for Ontario for the following reasons:

- the timing and structure of Québec’s authorization process is different than Ontario’s certification process;
- the first to file rule’s “abuse” test is a very high legal standard that provides a considerable advantage to the first filing firm, irrespective of whether there are equally, or more, capable subsequent filers;
- the LCO remains concerned about the potential risk of encouraging a race to the courthouse, rather than high quality claims; and,
- Although the LCO has come to appreciate many benefits of the first-to-file rule, particularly post-*Schmidt*, it is nonetheless important that virtually all of Ontario’s class action stakeholders have rejected this approach.

The LCO sees considerable promise in the second option. The procedure does not over-weight speed of filing in carriage determinations. Rather, the ALRC model provides a structured – though time-limited – opportunity for two or more plaintiff firms to prove to the court why their firm is best suited to represent the class. In this manner, the ALRC model balances the interests of class members (and the court) in identifying the most capable legal representation with the need for expediency and certainty in carriage decisions. The ALRC model also establishes a level-playing field between plaintiff firms who can and should be encouraged to compete on the basis of the quality of their representation, not the speed of their filings. The final and significant advantage to the ALRC model is that it deters late, opportunistic filings and the resulting pressure to pay off competing firms.

From an Ontario perspective, an important criticism of the ALRC approach is the requirement that the initial filing firm notify potential competitors of the action. There is a concern that an equivalent process in Ontario would encourage or promote “copycat” claims. The LCO believes that this is a legitimate concern that suggests adaptation, not rejection, of an ALRC-based approach.

Most importantly, copycat claims can be vetted through active case management. Pleadings that are virtually identical to earlier pleadings are easily detectable. The factors for choosing between firms, explored below, do not favour opportunistic counsel who have a track record of bringing such claims, or who have invested little in the case at bar.

3. Factors for Choosing Between Firms

As noted above, courts in Ontario have identified up to 14 different factors for determining which firm should be appointed to represent the class in a carriage proceeding. By way of contrast, the ALRC rejected a multi-factorial list of considerations on the basis that it can be unwieldy. Instead, the ALRC proposed two guiding principles: courts must choose “the proceeding that best advances the claims and interest of group members in an efficient and cost-effective manner” and must consider “the stated preferences of the group members.”⁷⁸

The LCO agrees that the current list of factors to determine carriage is too complex and promotes uncertainty. In these circumstances, there is a clear need for statutory direction to ensure courts and counsel are able to focus on the most important factors.

The LCO recommends that that court's primary objective in carriage proceedings should be to select the firm that is most likely to advance the claims and interests of class members in an efficient and cost-effective manner. Adding such a provision to the CPA would explicitly prioritize class member's interests and judicial economy in carriage proceedings.

Unlike the ALRC, the LCO believes it is important to identify a limited number of statutory criteria to guide courts in their analysis of choosing between competing firms, including:

- each firm's theory of each case;
- the chances for success at certification and on the merits;
- the experience of counsel in class action litigation or the substantive area at issue; and,
- funding and costs arrangements, including resources of counsel.

This approach will focus carriage proceedings on the most important criteria to distinguish between competing firms. The LCO acknowledges the risk that, over time, the list of factors considered by the court may expand through judicial decision-making. This risk is present, but not inevitable. The LCO is confident that courts will interpret these criteria wisely to determine carriage in favour of the firm best able to represent the class in an efficient and cost-effective manner.

The first criteria (theory of the case), second criteria (chances for success) and fourth criteria (funding) reflect the prevailing view of courts and plaintiff counsel about the appropriate criteria to decide carriage motions. These are common sense, necessary and legally appropriate factors for the court's consideration.

The LCO's third proposed criteria ("experience of counsel in class action litigation and in the substantive area at issue") requires further explanation. There is no question that "experience of counsel" must be a fundamental consideration in carriage proceedings. The LCO believes, however, that "experience of counsel" requires further statutory elaboration. In our view, there is a risk that "experience of counsel" will be interpreted *exclusively* as meaning experience of counsel *in class action litigation*. If so, the statute could effectively bar new entrants to the plaintiff class action "marketplace," including small or emerging firms that have specialized experience and/or a mandate in the substantive area of law at issue. Permanent, statutory privileging of a small number of existing plaintiff firms cannot be justified on public policy or access to justice grounds. As a result, the LCO believes the statute should explicitly state that courts should consider both class action experience and experience in the substantive area of law at issue. "Experience of counsel" should also be interpreted broadly to include consideration of their past cases, the outcomes of those cases (including take-up rate information where available), length of time to resolution, and so on.

In the past, some courts have worried about turning carriage motions into a "beauty contest." This concern, while understandable, should perhaps be updated in light of the importance of the court's role in evaluating competing firms on carriage motions. The quality of plaintiff counsel is directly related to all three class action objectives: access to justice, judicial economy, and behaviour modification. The importance of the court's decision on carriage matters is further heightened given the LCO's recommendation regarding appeals of carriage orders, discussed below.

4. Case Management

In addition to the statutory reforms proposed above, the LCO strongly encourages courts to case manage carriage proceedings proactively. The LCO's carriage recommendations are designed to focus the court's discretion on the best interests of the class and judicial economy, the most significant carriage issues. These reforms will only be successful, however, if they are combined with assertive case management and judicial decision-making that weeds out "copy cat" or extortive claims. Courts should consider using pre-carriage case management conferences and/or cost orders to prevent this behaviour. Courts could also choose, in some circumstances, to decline to hold a carriage motion.

5. Defendants at Carriage Motion

Several plaintiffs' counsel submitted that defendants' counsel should not be present at the carriage hearing as the hearing gives a defendant insight into plaintiffs' legal strategies and resources.⁷⁹

The LCO does not believe defendants can or should be barred from carriage proceedings. There is no way to exclude the defendant without offending the open court principle. That said, the current practice of redacting funding agreements for disclosure to defendants can be adapted to carriage motions to address concerns about giving defendants an unfair preview of the plaintiff's strategy. For example, documents filed on the carriage motion could be redacted but still made available in full to inquiring class members on a confidential basis. The details of this process are best addressed in the Practice Direction we recommend for class actions in Ontario.

6. Carriage Motion Judge

Many stakeholders advised the LCO that it is not appropriate for the case management judge to hear the carriage motion. In this view, judges can become too wedded to the successful claim or uncomfortable choosing between counsel or firms who appear before them frequently.

The LCO believes this is a reasonable concern that could be reflected in the Practice Direction we propose, subject to two qualifications: first, while it may be preferable for non-case management judges to hear carriage motions, this concern must be balanced with the need for expediency. Second, we believe there is a need for consistent training for courts considering carriage motions, as will be discussed below.

7. Appeals

Several stakeholders recommended that the carriage order be final, and not subject to any appeal rights.⁸⁰ There is merit to this proposal. As class membership inevitably overlaps between competing actions, class members do not lose their rights when one firm is chosen over another. There is no significant unfairness, therefore, to removing rights of appeal from the unsuccessful law firm in a carriage fight. This amendment would reduce delay and significantly reduce costs to firms and to the court system.

8. Costs

The practice to date has been for judges to not award costs of the carriage motion to the successful firm. This practice makes sense. Courts, however, do not always stipulate that the successful firm's costs are not to be passed on to the class. As a result, the CPA should be amended to specify that costs of carriage motions cannot to be recouped by class counsel from class members.

9. Judicial Training

Finally, the LCO sees considerable merit in the development of consistent training for courts considering carriage motions. This guidance could perhaps be developed through the National Judicial Institute. The need for this training would be acute if non-class action specialist judges are hearing carriage motions, as discussed above.

Recommendations

Carriage Motions

6. The LCO recommends the *Act* be amended to add specific provisions addressing carriage of class actions. The provisions should specify that:

- A party filing a class action is required to register the action with the CBA Class Action Registry concurrently;
- A carriage motion by competing firms must be brought within sixty days of the issuance of the first action;
- If a carriage motion is filed, it should be heard as soon as the court schedule permits;
- The court's objective in carriage proceedings is to identify the firm that best advances the claims and interest of group members in an efficient and cost-effective manner. As part of this process, the court should consider:
 - each firm's theory of the case;
 - the chances for success at certification and on the merits;
 - the expertise and experience of counsel in class action litigation or the substantive area of law at issue; and,
 - funding and costs arrangements, including the resources of counsel.

Claims Bar

7. The LCO recommends that the *Act* be amended to specify that an order determining which firm has carriage for the case will include a claims bar.

No Appeal of Carriage Decisions

8. The LCO recommends the *Act* be amended to specify that carriage orders are final and cannot be appealed.

Costs

9. The LCO recommends the *Act* be amended to specify that costs of carriage motions are not to be recouped by class counsel from the class.

Carriage Motion Judge

10. The LCO recommends that carriage motions not be heard by the case management judge overseeing a class action.

Judicial Training

11. The LCO recommends the development of uniform or consistent guidance/training for courts considering carriage motions.

Chapter Five

MULTIJURISDICTIONAL CLASS ACTIONS

A. Introduction

The previous chapter addressed issues that arise when overlapping class actions are brought within a single jurisdiction. This chapter addresses situations where several class actions on the same subject-matter are brought concurrently in different jurisdictions.

Multijurisdictional class actions raise a host of constitutional, jurisdictional, and conflict of laws issues, most of which have been thoughtfully addressed elsewhere.⁸¹ Accordingly, the LCO's focus in this report is primarily on identifying potential statutory reforms and/or policy changes that might improve management of multijurisdictional class actions within Ontario, improve judicial economy, and reduce delay and costs for parties and courts.

These issues were raised consistently by stakeholders in our consultations. Stakeholders agreed that this topic generates inefficiencies, costs and considerable delays in class action proceedings.⁸² Stakeholders consistently advised the LCO that the *CPA* does not provide sufficient guidance to Ontario courts when considering overlapping class actions. A majority of stakeholders recommended that the *CPA* be amended to include provisions similar to those of Alberta, British Columbia and Saskatchewan addressing multijurisdictional proceedings.⁸³

The LCO agrees with these recommendations. The number and complexity of multijurisdictional class actions has grown to an extent that could not have been foreseen by the original drafters of the *CPA*. Accordingly, the LCO recommends several reforms to better manage multijurisdictional class actions and promote harmonization between provinces.

First, the LCO supports the recent adoption of 2018 Canadian Bar Association protocol on multijurisdictional class actions as a Practice Direction in Ontario.

Second, the *CPA* should be amended to add provisions consistent with the Uniform Law Conference of Canada's *Uniform Class Proceedings Act (Amendment) 2006*, and to harmonize with Alberta, BC and Saskatchewan multijurisdictional class action legislation.

Third, federal, provincial and territorial (FPT) Ministers of Justice should work together to develop a national protocol or set of rules for the recognition of provincial certification decisions and multijurisdictional classes.

Finally, courts across Canada should develop a uniform or consistent training regarding the management of multijurisdictional class actions.

B. The CPA

The OLRC initially declined to recommend a provision in the *Act* facilitating the coordination of multijurisdictional class proceedings:

In the case of a mass wrong, it is easy to envisage that more than one class action, seeking similar relief, may be commenced. It is also possible that members of the class may commence individual actions against the defendant, either before a class action is brought or in ignorance of the existence of a class action on their behalf. The question that arises is whether the proposed Class Actions Act should contain a specific provision empowering the court to stay other class actions for the same relief or individual actions claiming similar relief. In our opinion, such an express provision is unnecessary, since a court today is able to co-ordinate related actions under its power to stay litigation pursuant to section 18.6 of the Judicature Act, R.S.O.1980, c. 223.⁸⁴

Some years later, the MAG Advisory Committee Report recommended that a specific provision, now found in s. 13 of the CPA, be enacted, in part, to address multijurisdictional class actions.⁸⁵ This section reads: “[t]he court, on its own initiative or on the motion of a party or Class Member, may stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate.”

The question for the LCO is whether this provision provides courts in Ontario with sufficient authority to manage multijurisdictional class actions effectively or whether new statutory provisions are necessary.

C. Analysis

Court responses to the multiplicity of class proceedings have been inconsistent. Because Canadian courts do not have a method or system to supervise this type of litigation, *ad hoc* arrangements have been designed in a limited number of cases, such as the residential schools litigation.⁸⁶ This situation can be problematic. For example, when courts of different provinces are asked to decide on certification of parallel proceedings, they may not apply certification criteria in the same way, leading to important inconsistencies.⁸⁷

As a fundamental principle of civil procedure, the avoidance of a multiplicity of proceedings is codified under Section 138 of the *Courts of Justice Act*.⁸⁸ This principle acknowledges that a multiplicity of identical class actions in more than one jurisdiction may cause disruptions and burdensome duplicity of claims.⁸⁹

In the *Lépine* case, the Supreme Court of Canada took notice of the challenge of administering national class proceedings in Canada and encouraged the creation of “more effective methods of managing jurisdictional disputes” outside the litigation process. Justice LeBel stated that:

*As can be seen in this appeal, the creation of national classes also raises the issue of relations between equal but different superior courts in a federal system in which civil procedure and the administration of justice are under provincial jurisdiction. This case shows that the decisions made may sometimes cause friction between courts in different provinces. This of course often involves problems with communications or contacts between the courts and between the lawyers involved in such proceedings. However, the provincial legislatures should pay more attention to the framework for national class actions and the problems they present. More effective methods for managing jurisdictional disputes should be established in the spirit of mutual comity that is required between the courts of different provinces in the Canadian legal space. It is not this Court’s role to define the necessary solutions. However, it is important to note the problems that sometimes seem to arise in conducting such actions.*⁹⁰

In the years following *Lépine*, lawyers and judges alike have called for a more robust solution to case management of multijurisdictional class actions.⁹¹

In the absence of a forum equivalent to the U.S. Judicial Panel on Multidistrict Litigation, multijurisdictional class actions are currently managed through a deferential approach. That is, a superior court in one jurisdiction will defer to the court in another province in respect of the subclass of persons residing in that province. While stays of multijurisdictional class actions may be ordered,⁹² it has been common practice for the parties to coordinate and consent to one firm taking the lead in seeking certification in one jurisdiction, with the remaining proceedings to be held in abeyance.⁹³

The difficulty managing multijurisdictional class actions has given rise to at least two significant policy initiatives in recent years. The first is the “Canadian Judicial Protocol for the Management of Multijurisdictional Class Actions” developed by the Canadian Bar Association.⁹⁴ The second are various statutory instruments adopted by legislatures in Western Canada. The LCO discusses these initiatives below.

1. CBA Protocol

On May 17, 2019, the Ontario Superior Court of Justice adopted the “Canadian Judicial Protocol for the Management of Multijurisdictional Class Actions” as a Practice Direction.⁹⁵ The Protocol, which was developed by the Canadian Bar Association and endorsed by the Canadian Judicial Council, focuses on the case management of overlapping multijurisdictional class actions, and addresses specific issues related to settlement and notice in such cases. As of June 1, 2019, parties to class proceedings in Ontario are required to comply with its terms.

The Protocol creates a notification mechanism to keep the various courts and parties across Canada informed of existence and progress of the simultaneous class actions. Parties may agree that their case management judge speak to other judges in other jurisdictions who are case managing overlapping class actions, and may also agree to ask their case management judge to direct that a joint case management hearing be held with a judge in any other action. Even in the absence of such an agreement, the judge may still decide to communicate with judges in other jurisdictions about the case.

In sum, the Protocol incorporates the following best practices to promote more active and coordinated case management of overlapping multijurisdictional class actions:

- 1. Information disclosure by plaintiff’s counsel:** prior to the first case management conference in each multijurisdictional class action, plaintiff’s counsel in the action must (i) post their pleadings on the CBA’s Class Action Database, and (ii) compile a list of the names and contact information of all counsel and judges in all actions (the “Notification List”), and provide the court and all other counsel with the Notification List. Plaintiff’s counsel must update the Notification List at any subsequent conference or hearing if any changes become known.
- 2. Judicial communication:** parties to each multijurisdictional class action may agree that the judge in their action speak with the judge in any other action. Further, judges may communicate for the purpose of determining the most efficient process for the consideration of any motions and making any decision as to the appropriateness of any communication. Judges must advise counsel if any such communication occurs and may advise of the nature of the discussions.
- 3. Joint case management conferences:** parties to each multijurisdictional class action may agree that the judge in their action direct that a joint case management hearing be held with the judge in any other action, provided the other judge agrees.
- 4. Notice of, and participation in, particular motions:** if a party to a multijurisdictional class action brings a motion for a stay of proceedings or dismissal based on the existence of other actions or a motion for certification (if the class includes class members in other actions), the party must provide all judges and counsel in all actions with the Notification List and a copy of the notice of motion or application (and copies of the motion record in some cases). An order may be sought to allow counsel or the judge in any other action to participate in the motion to the extent permitted by court rules.

The CBA Protocol and its adoption in Ontario is an important step. It is not a complete solution, however, and the LCO considers additional statutory reforms below.

2. Statutes in Western Canada

Several jurisdictions across Canada have addressed multijurisdictional class proceedings through legislation. For instance, British Columbia, Alberta, Manitoba, Saskatchewan, Québec and Newfoundland & Labrador have statutes stating that non-residents may be included as class members.⁹⁶ In addition, reflecting the recommendations of the Uniform Law Conference of Canada, class proceedings statutes in Saskatchewan, BC and Alberta provide guidance to the courts in adjudicating multijurisdictional proceedings, and addressing problems of parallel class actions.

The overall purpose of the amendments in Western Canada is to clarify issues relating to the management of multijurisdictional class actions by providing: 1) the establishment of an opt-out mechanism for out-of-province class members; 2) criteria for preferability of jurisdiction the courts may use when considering a motion for certification of a multijurisdictional class action; and 3) special orders the court may make with regards to multijurisdictional class actions.

Saskatchewan was the first province to adopt provisions that refer specifically to the management of multijurisdictional class actions by adopting the *Class Actions Amendment Act* in 2007.⁹⁷ This Act sought to avoid conflicting decisions, to provide clarity for defendants as to the size and composition of the class, as well as a method to clearly determine which class members will be bound by what decisions.⁹⁸

Four years later, Alberta amended its class action legislation to permit opt-out multijurisdictional class actions, aiming to avoid the multiplicity of multijurisdictional class actions.⁹⁹ Importantly, Alberta goes further than Saskatchewan in that it also requires the court to consider “the advantages and disadvantages of litigation being conducted in more than one jurisdiction” when determining whether a lawsuit commenced elsewhere in Canada is preferable to an action brought in an Alberta court.¹⁰⁰

Most recently, British Columbia’s *Class Proceedings Amendment Act*¹⁰¹ changes the existing BC framework from an opt-in mechanism to an opt-out mechanism, “consistent with access-to-justice principles [and to] provide a more efficient way to ensure that as many potential claimants as possible are included as class members.”¹⁰²

In sum, provincial statutes in Western Canada have provided considerable guidance as to the objectives and factors courts should consider when determining whether it is preferable for some or all common issues to be resolved in a multijurisdictional class proceeding commenced elsewhere in Canada.¹⁰³ These factors include:

- Ensuring that the interests of all the parties in each of the relevant jurisdictions are given due consideration;
- Ensuring that the ends of justice are served;
- Avoiding, where possible, the risk of irreconcilable judgments; and,
- Promoting judicial economy.

These statutes also provide that the court may consider any other factors it considers relevant, including the following:

- the alleged basis of liability, including the applicable laws;
- the stage each of the proceedings has reached;
- the plan for the proposed multijurisdictional class action, including the viability of the plan and the capacity and resources for advancing the action on behalf of the proposed class;
- the location of the representative plaintiffs and the class members in various actions, including the ability of the representative plaintiffs to participate in the actions and to represent the interests of the class; and,
- the location of evidence and witnesses.¹⁰⁴

Finally, each province has adopted provisions that permit the court to make “any order it considers appropriate to certify a multinational class action.”¹⁰⁵ While these provisions are a codification of the general discretion the courts already exercise regarding multijurisdictional class actions, the amendments enumerate specific examples of orders that the court may issue.

The LCO believes *CPA* should be amended to add provisions consistent with legislation in Alberta, British Columbia and Saskatchewan.

The Alberta decision in *Kohler v. Apotex Inc.*¹⁰⁶ is a good example of how courts have applied the objectives and factors in determining which jurisdiction is appropriate in the management of multijurisdictional class actions. In that case, the court ruled that Alberta was the appropriate venue for determination of the class proceeding, thereby certifying the multijurisdictional class proceeding with a national class. The court denied deference to a parallel Ontario class action and held Alberta to be the appropriate jurisdiction.

Comparing the two jurisdictions with parallel actions, Ontario and Alberta, the *Kohler* court sought to determine which jurisdiction could meet the interests of all claimants to the fullest extent possible. The court held that neither jurisdiction was particularly better situated to address all of the parties' interests.¹⁰⁷

Noting that there was no difference in basis for liability between the two jurisdictions,¹⁰⁸ the court in *Kohler* considered the stage of proceeding for the two actions, the location of the class members and the representative plaintiffs, as well as the advantages of disadvantages of litigation in more than one jurisdiction.

The court noted that Alberta has a legislated mandate to avoid irreconcilable judgments whereas Ontario does not. As a result, the court believed that Alberta would more effectively facilitate the efficient handling of the action and judicial economy.¹⁰⁹ The court concluded that Alberta was the most appropriate venue for the class proceeding and the application for certification of a multijurisdictional lawsuit was granted.

The careful approach to resolving competing multijurisdictional class actions exhibited by the court in *Kohler* and made possible by the statutory provisions in Alberta, while not a perfect solution, provides much needed guidance on a complex legal issue. The statutory provisions allow for an orderly resolution of competing multijurisdictional actions filed in different provinces. For this reason, the LCO believes that the Ontario Act should be amended to add provisions consistent with legislation in Alberta, British Columbia and Saskatchewan.

3. Preclusion and Recognition

Canadian courts have just begun to consider the issue of the preclusive effect of class action certification decisions, class action settlement approval orders or class action judgments issued by one provincial superior court in a different province.¹¹⁰

Canadian courts generally have jurisdiction to recognize and enforce a foreign judgment where a defendant was present in the originating forum where the action was initiated, and the defendant submitted to the judgment by agreement or attornment.¹¹¹

Courts have held that it may be appropriate to enforce a foreign judgment against non-resident class members who have not opted out of a foreign class action if the following three criteria are met: 1) there is a real and substantial connection between the cause of action and the foreign court; 2) the rights of non-residents are adequately represented; and 3) the non-resident class members are afforded procedural fairness, including adequate notice and the right to opt out.¹¹²

The International Bar Association Task Force on International Procedures and Protocols for Collective Redress has released *Guidelines for Recognizing and Enforcing Foreign Judgments for Collective Redress*. The Task Force has recommended that the enforcing court not review the results of the foreign court except in limited circumstances including where the results achieved are "patently inadequate."¹¹³ This test focuses on the requirements of natural justice and due process including notice, the right to opt out and the right to be heard.

4. National Coordination and Judicial Training

The LCO recommends two further initiatives to improve the management of multijurisdictional class actions in Ontario: The LCO believes that federal, provincial and territorial (FPT) Ministers of Justice should work together to develop a national protocol or set of rules for the recognition of provincial certification decisions and multijurisdictional classes. Similarly, courts across Canada should work to develop consistent training for managing multijurisdictional class actions. This training could be provided through the National Judicial Institute or the FPT process described above.

Recommendations

Statutory Amendments to Promote Multijurisdictional Coordination

12. The LCO recommends the *Act* be amended to add provisions consistent with legislation in Alberta, British Columbia and Saskatchewan. More specifically, the *Act* should be amended to:

- Permit courts on their own motion, or on the motion of a party, to make any order the court considers appropriate to certify a multijurisdictional class action;
- Define “multijurisdictional class” as “a proceeding that is brought on behalf of a class of persons that includes persons who do not reside in Ontario”;
- Require a member applying to certify a class proceeding to give notice to the representative plaintiff for any existing or proposed multijurisdictional class proceeding commenced elsewhere in Canada that involves the same or similar subject matter;
- Require a certification judge to consider competing class actions when assessing whether they should defer to an overlapping class action in another jurisdiction, and ensure:
 - that the interests of all parties in each of the relevant jurisdictions are given due consideration;
 - that the ends of justice are served;
 - that irreconcilable judgments are avoided, if possible;
 - that judicial economy is promoted, and
 - that relevant factors are considered, including
 - a) the alleged basis of liability;
 - b) the stage that each of the proceedings has reached;
 - c) the plan for the proposed multijurisdictional class proceeding, including the viability of the plan and the capacity and resources for advancing the proceeding on behalf of the proposed class;
 - d) the location of class members and representative plaintiffs in each of the proceedings;
 - e) the location of evidence and witnesses; and,
 - f) the ease of enforceability.
- Allow judges to certify on an opt-out basis a class including foreign class members.

Preclusion Orders

13. The LCO recommends the *Act* be amended to be consistent with the International Bar Association’s “Guidelines for Recognizing and Enforcing Foreign Judgments for Collective Redress.” More specifically, the *Act* should specify that Ontario courts ensure the non-resident class members are afforded procedural fairness (including adequate notice and the right to opt out) and that Ontario courts review the results of foreign courts only in exceptional circumstances, including where the results achieved are “patently inadequate.”

National Protocols

14. The LCO recommends that federal, provincial and territorial (FPT) Ministers of Justice work together to develop a national protocol or set of rules for the recognition of provincial certification decisions and multijurisdictional classes.

Judicial Training

15. The LCO recommends that courts across Canada develop consistent training regarding the management of multijurisdictional class actions.

Chapter Six

CERTIFICATION

A. Introduction

Certification is a defining moment in the life of a class action. Plaintiffs need the action to be certified in order to proceed, and defendants want the action stopped before it causes reputational harm, generates large fees and increases the plaintiff's leverage.

Certification is the most controversial and partisan area of class actions. Different statutory or evidentiary tests advance, or frustrate, different policy goals and interests of various stakeholders. It is telling that the OBA, which represents both plaintiff and defendant interests, was unable to reach a consensus on certification issues.¹¹⁴

In this chapter, the LCO considers certification from a public interest perspective. The LCO evaluates certification against the three class actions objectives and in the context of the entire class action regime, including costs, fees, delay and multijurisdictional actions.

The LCO estimates that approximately 73% of contested class actions filed in Ontario since 1993 have been certified, in whole or in part. From one perspective, this certificate rate is proof that the certification process favours plaintiffs and that reforms are necessary. From another perspective, the certification rate proves that plaintiff firms are choosing cases appropriately.

The LCO agrees that the certification rate in Ontario is high. Statistics alone, however, cannot answer the question of whether the certification test should be reformed. There is no simple or accepted statistical benchmark of what constitutes an appropriate certification rate. As a result, the LCO's analysis addresses further questions regarding the nature and extent of frivolous class action litigation in Ontario, questions of procedure and fairness, alternatives to the current certification test, and other issues. The LCO's goal is to provide a principled, evidence-based analysis of certification that rises above partisan interests and perspectives.

The LCO has concluded that the certification regime in Ontario does not warrant major reforms to the statutory or evidential tests. We believe that the most significant proposed reforms (adopting a preliminary merits test, amending the "some basis in fact" evidential burden) would introduce procedural and practical concerns that would subvert the objectives of access to justice and judicial economy.

Fairness and due process are key elements of the justice system in Ontario, and pre-trial discovery and trial on the merits are central tenets to fair procedure. Adding a merits analysis to the certification test would require parties to make their case without the procedural protections and advantages proffered at discovery or trial. Such a change would frustrate, rather than further the objectives of the CPA. The costs an early merits analysis would impose on all class actions outweigh the benefit of possibly weeding out an indeterminate number of arguably meritless actions. A preliminary merits test would also lead to more expensive and protracted certification motions for every class action.

The LCO has similarly concluded that the current "some basis in fact" evidential standard should not be changed – either by statute or judicial interpretation – to a "balance of probabilities" standard. A higher evidentiary standard would lead to larger submissions of evidence and therefore more cost and delay. Adopting a "balance of probabilities" standard would also be inconsistent with other Canadian jurisdictions, and might encourage forum shopping within Canada. Finally, raising the evidential standard at certification would overturn longstanding judicial precedents. This issue has been revisited by the courts on numerous occasions and even recently when given the opportunity to change it, the Supreme Court of Canada decided not to.¹¹⁵

The LCO acknowledges that defendants have many legitimate concerns about class proceedings including dormant cases, so-called “copycat” claims, late-filing claims, overly-broad actions, and actions with scant evidence. The LCO believes these concerns can be best addressed through other means that do not have the negative impact on access to justice or judicial economy of a preliminary merits test or a higher evidentiary standard:

- Introduce administrative dismissal for dormant cases where the plaintiff does not file a certification motion record within one year of commencing action;¹¹⁶
- Encourage pro-active case management;¹¹⁷
- Statutory amendment to achieve greater clarity and efficiency with carriage motions;¹¹⁸
- Statutory amendment to allow appeal as of right to the Court of Appeal.¹¹⁹

In addition to these reforms, the LCO also recommends the following:

- Encourage courts interpret s.5(1)(d) of the Act (“preferable procedure”) to give considerable weight to alternative options, especially where a regulatory or remedial scheme exists, a reimbursement procedure is completed and class members have largely been compensated;
- A motion to strike or summary judgment motion should be considered pre-certification if such a motion will dispose of the action, or narrow issues to be determined or evidence to be filed at certification;
- Practice Guidelines to address expense and delay.

B. The Class Proceedings Act

Section 5 of the Class Proceedings Act (CPA) sets out a five part test to certify a class action in Ontario. This section requires that:

1. **The pleadings or the notice of application discloses a cause of action.** The cause of action criterion is satisfied if, assuming all pleaded facts to be true, it is not obvious that the claim will fail.¹²⁰ Thus, certification will be denied only where it is “plain and obvious” that the pleadings disclose no cause of action.¹²¹ This test is the same as used in Rule 21 motions to strike a pleading.¹²²
2. **There is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant.** The purpose of this criterion is to determine who is a member of the class, who will be bound by the outcome, and who is entitled to notice.¹²³
3. **The claims or defences of the class members raise common issues.** For an issue to be “common”, it need only be a substantial ingredient of every class member’s claim and its resolution must be a necessary component to the resolution of every class member’s claim.¹²⁴ A common issue does not mean that an identical answer is necessary for all of the members of the class, or even that the answer must benefit each of them to the same extent. It is enough that the answer to the question does not give rise to conflicting interests among the class members.¹²⁵
4. **A class proceeding would be the preferable procedure for the resolution of the common issues.** The plaintiff must show that 1) “a class proceeding would be a fair, efficient and manageable method of advancing the claim; and 2) that it would be preferable to any other reasonably available means of resolving the class members’ claims.”¹²⁶ The preferability determination must be made by looking at any common issues “in context”, meaning the importance of the common issues must be taken into account in relation to the claims as a whole.¹²⁷ The plaintiff is under no obligation to elaborate on every possible non-litigation alternative.¹²⁸ The defendants have the burden of adducing evidence to support the preferability of an alternative other than individual litigation. If this evidence is admitted, the burden reverts back to the plaintiff to establish the preferability of the class proceeding.¹²⁹

- 5. There is a representative plaintiff or defendant.** Who would fairly and adequately represent the interests of the class members; who has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class members and of notifying class members of the proceeding; and who does not have, on the common issues for the class, an interest in conflict with the interests of other class members.¹³⁰

Section 6 of the *Act* further provides that the Court shall not refuse to certify a proceeding as a class proceeding solely because the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues, the relief claimed relates to separate contracts involving different class members, different remedies are sought for different class members, the number of class members or the identity of each class member is not known, or the class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.

C. The Purpose of Certification

The main issue at certification is whether the claim can appropriately be advanced as a class proceeding.¹³¹ In its 1982 report, the OLRC explained the purpose quite simply:

*The certification procedure requires the court to determine, on the basis of specified criteria, whether the action should be permitted to be brought as a class action. If the court certifies the action, it will proceed in class form. If the court does not certify the action, it will either be dismissed, or will continue as an individual action.*¹³²

Section 5 has been interpreted by courts liberally in order to achieve the three general objectives of class actions: to facilitate access to justice, to modify harmful behaviour, and to increase judicial economy. On the certification motion, the court does not assess the merits of the plaintiff's claim; the court's function is limited to determining whether the certification criteria are satisfied.¹³³ The Supreme Court of Canada has held that certification is a "procedural tool".¹³⁴ It is meant to serve as a meaningful screening device - "a mandatory-procedural-interlocutory-non-dispositive motion that does not decide the merits of the case, in absolute terms."¹³⁵

Certification is a feature of class action legislation across all Anglo-American jurisdictions. Every province except for Prince Edward Island and the Territories have enacted class proceedings legislation that includes some form of certification-type proceeding. The Federal Court Rules have also been amended to include provisions for certification of class proceedings within the Federal Court's jurisdiction. Certification-type proceedings are also a feature of class action proceedings in the United States.¹³⁶

This short analysis confirms an obvious but nevertheless important point in class action law and policy. The debate is not about whether there is a need for a certification test, but rather what form that test should take.

D. Competing Views About Certification

Whether the certification test should be entirely procedural or include an analysis of the substance of the claim is a longstanding debate in Ontario. In its 1982 report, the OLRC proposed that new class action legislation include a "preliminary merits test" as part of the certification requirements. This test would have required the potential class representative to demonstrate that "there is a reasonable possibility that material questions of fact and law common to the class will be resolved at trial in favour of the class".¹³⁷

Notwithstanding the OLRC's recommendation, the provincial government decided against adopting a preliminary merits test and instead adopted a certification requirement that the statement of claim "disclos[e] a cause of action".¹³⁸ The debate on whether certification should consider the merits of the suit or not persists to this day.

It is of note that the legislators also did not follow the OLRC's recommendation that class actions have no cost awards.¹³⁹ Instead, a lower bar to certification was balanced with a two-way cost regime that allows substantive cost awards to be

ordered against an unsuccessful plaintiff. As discussed more fully in Chapter 10, defendant stakeholders are mixed as to the efficacy of cost awards. Some said adverse costs alone are insufficient “to the address the risk of ‘strike suits’ with little or no merit.”¹⁴⁰ Others said that costs do act as a deterrent for frivolous claims.¹⁴¹

A predominant and recurring theme in many defendant submissions is that a preliminary merits test is necessary to discourage “the commencement of frivolous, meritless, or overly broad class proceedings” and to avoid “‘strike suits’ which have little or no factual or legal merit.”¹⁴² Defendants and their counsel suggest that some plaintiff counsel bring weak or extortionate claims “in hopes of extracting a settlement” and that “a higher certification threshold is necessary to ensure that substantive justice is not sacrificed to the access to justice objectives of class proceedings legislation.”¹⁴³ They further explained that the majority of certified actions settle because most companies cannot accept the risks of going to a trial.¹⁴⁴ In this view, a system that places undue pressures on defendants to settle class actions for reasons unrelated to their merits is not one that provides just results.

Not surprisingly, plaintiff counsel are unanimous in recommending against introducing a merits analysis. In this view, the certification motion is intended to be procedural and should remain that way.¹⁴⁵ These submissions cited the lack of evidence available to plaintiffs early in the proceedings and how that puts plaintiffs in an informational disadvantage that may end a meritorious claim.¹⁴⁶ Concern with protracted delay and increased costs were also raised. Increasing the cost of litigation for plaintiffs means that some cases would become uneconomical to pursue.¹⁴⁷

E. Analysis – Should Ontario Adopt a Preliminary Test?

As noted above, the LCO considers certification from several perspectives. For example, the LCO considers whether Ontario should adopt a statutory preliminary merits test. Later sections consider the “some basis in fact” evidential standard. Our first step, however, is to consider that empirical record and our effort to determine Ontario’s certification rate.

The LCO has estimated 73% of contested certification motions in Ontario are granted, in whole or in part. As noted in Chapter 2, there are inherent limits to this evidence. Nevertheless, the LCO believes this is the most comprehensive analysis of the certification rate undertaken in Ontario.

By way of contrast, it has been estimated that, out of 30 cases decided at the merits stage¹⁴⁸ in Ontario, to date, slightly more than half (16 or 53%) have concluded with outcomes favourable to the class.¹⁴⁹ It is important to point out, however, that success on certification does not “foreshadow” the success or failure of the action on the merits and following trial of the common issues.¹⁵⁰

Ontario’s estimated certification rate is roughly equivalent to Québec’s, but higher than other Canadian jurisdictions.

In Québec, data collected by the Class Actions Lab shows a slightly lower rate of approved authorizations, with plaintiff success rates of 63%, and 71% when appeals are considered.¹⁵¹ Québec data has shown that 55 cases out of 82 (67%) resulted in favourable trial outcomes for the class over the same period, suggesting steadily favourable plaintiff outcomes in the province.

According to Ward Branch, in British Columbia 179 certification motions were argued as of February 2018, with a 58% certification rate.¹⁵² The same research estimates the certification rates in Alberta and Saskatchewan to be 59%¹⁵³ and 44% respectively.¹⁵⁴ With only a handful of cases having been filed, certification success rates in Manitoba and in Newfoundland have been estimated at 40% and 58% respectively.¹⁵⁵

It is noteworthy that in all jurisdictions, there appears to be a high percentage of certification by consent, which occur in 37% of cases in Ontario, 26% of cases in British Columbia, 19% of cases in Alberta, and 13.5% in Saskatchewan.¹⁵⁶

The LCO hoped to learn more about certification in Ontario by reviewing *unsuccessful* certification motions. We were able to review 30 cases where certification was denied between 2011 and 2018. Once again, this data is limited and should be

interpreted accordingly.¹⁵⁷ Of the 30 cases where certification was denied, the court found:

- In 25 cases there were no common issues;¹⁵⁸
- In 25 cases a class action was not the preferable procedure;
- In 14 cases there was no cause of action;¹⁵⁹
- In 13 cases the representative plaintiff and/or litigation plan was not adequate; and,
- In 11 cases there was no identifiable class.

As these statistics demonstrate, it was rare for a case to fail certification based on one criterion alone. While common issues and preferable procedure are the criteria most commonly responsible for plaintiff's failure to succeed at certification, there were often other reasons for the denial.

What do these statistics mean? How does Ontario compare with other provinces? Is Ontario's certification rate too high or too low?

These are difficult questions to answer. The Ontario data is incomplete due in part to the incomplete evidential record. It is then difficult to compare Ontario statistics with other provinces due to a myriad of data quality, collection and legal issues. Even if this data were available, the question of the "appropriate" certification rate suffers from an equally if not more vexing definitional issue: The LCO is not aware of any objective benchmark, statistical measure or metric against which to judge whether Ontario's certification rate is too high, too low or appropriate.

Understanding these qualifications, the LCO is prepared to make the following observations regarding the available statistical evidence:

- *All else being equal*, Ontario's certification rate appears to be roughly equivalent to Québec's and higher than in other provinces;
- The statistics suggests a system in which there is a modicum of balance: Almost three quarters (73%) of contested class actions have been certified in Ontario, but certification is by no means automatic; and,
- The certification denial statistics are generally consistent with what the LCO heard during its consultations: failure to meet the *CPA* s. 5 common issues and/or preferable procedure tests are the most frequent reasons for denying certification.

This analysis leads to the inevitable, but understandably frustrating, conclusion that statistics alone cannot answer the question of whether Ontario should introduce a statutory preliminary merits test. As a result, the LCO will now turn its attention to other issues and factors to address this issue.

1. Frivolous or Meritless Litigation

Perhaps the most frequent argument in support of a preliminary merits test is the argument that the current test has allowed too many "frivolous" or "meritless" class actions to be certified. This issue is described in many ways but defendant-friendly advocates often use the words "frivolous", "extortionate", "overly broad", "strike suits" and "meritless" synonymously.

Whether and how much frivolous litigation exists in class actions is an important issue and one that needs to be seriously examined. If these defence submissions are proven correct – if frivolous actions are routinely certified – it could signal that the certification test as it stands is insufficient and needs to be revised.

The LCO devoted considerable effort to determine whether meritless or frivolous are a significant enough issue to justify introducing a preliminary merits test. This was a difficult task due to the inconsistency and uncertainty in what parties mean by these terms and a lack of sound empirical evidence.

Under Rule 2.1,¹⁶⁰ the mechanism created in 2014 for dealing with "frivolous" actions, courts have said that frivolous actions "should be limited to the clearest of cases where the abusive nature of the proceeding is apparent on the face of the

pleading.”¹⁶¹ Frivolous actions are claims “that fail to disclose a reasonable cause of action or are non-justiciable” and claims that are “so devoid of potential merit” there can be “no reasonable expectation” that the plaintiff could succeed;¹⁶² actions that have “no chance of success”.¹⁶³ This is a high bar and it seems fairly rare that a court will dismiss an action because the pleadings are totally devoid of merit.

It seems clear to the LCO that defendant stakeholders *do not* mean frivolous cases that could be dismissed under Rule 2.1. No defendant stakeholder defined frivolous, referred to Rule 2.1 or relied on any common law definition of frivolous in support of a preliminary merits test. This is not surprising: presumably any frivolous case that met those definitions could already be dismissed or denied certification on those grounds.

“Meritless” is a more problematic definition because of its many potential meanings and because merit is ultimately a determination for the trier of fact. The Supreme Court of Canada has defined strike suits as “meritless actions launched in order to coerce targeted defendants into unjust settlements.”¹⁶⁴

Absent a clear definition of “meritless” or “frivolous” for the purposes of class action law, the LCO asked stakeholders for their own definition or for examples of cases or situations that they considered “meritless” and thus should not have been certified.

The US Chamber of Commerce was one of the few defendant organizations to propose a definition of meritless for the purpose of class action certification: “A proposed class action may be meritless either because it has no likely prospect of success on its facts, or because it is not suitable for class treatment, even though there may be some small group of individuals with viable claims against the defendant.”¹⁶⁵ This definition, while helpful, is necessarily incomplete.

A more helpful picture of what defendant organizations consider “frivolous” or “meritless” class actions emerged from the examples that were cited to illustrate this issue. The table on the next page summarizes the kinds of class actions or situations that were presented to the LCO as being “meritless” or “frivolous”.

What emerges from this exercise is that defendants generally define meritless or frivolous class actions to include cases that may include weak legal arguments, weak evidentiary records, little potential benefit to or interest from individual class members, little potential impact on behaviour modification and/or are cases that are otherwise not suitable for class actions.

The LCO will address each example in order to better understand the situations or issues that could justify introducing a preliminary merits test. The LCO also provides its response to the concern in light of the objectives of the CPA and our analysis in this report. An important issue for the LCO is to try to distinguish individual examples of “meritless” or “frivolous” class actions versus *systemic* concerns that would justify a major statutory amendment. A further consideration is whether there are other effective, less disruptive and less costly ways to address the concerns of defendants.

The LCO is confident the above examples are not finite and that given further opportunity, stakeholders could provide more examples of cases they have encountered that they believe are not viable class actions. Nevertheless, the examples listed below do not, by themselves, justify the introduction of a preliminary merits test.

2. The Ontario Securities Class Actions Leave Test

Many defendant stakeholders justified the introduction of a preliminary merits test in the CPA by referencing the leave test in the *Ontario Securities Act*. In this view, the OSA leave test is a successful precedent of a merits based test that already exists in one context of class actions in Ontario.

The OSA leave test provides that plaintiffs seeking to commence an action relating to secondary market disclosure with respect to securities, are required to obtain leave from the court – and a merits analysis is part of the application.¹⁶⁶

EXAMPLES SUBMITTED TO LCO OF MERITLESS/FRIVOLOUS ACTIONS		
Stakeholder Issue Re Meritless or Frivolous Class Actions	Stakeholder Comments	LCO Analysis
Dormant cases.		The LCO agrees that dormant cases do not further the objectives of the CPA. This issue is addressed in Chapter 3.
Class actions that are not technically “frivolous” because there is evidence to support the claim, but no one seems to care about the action other than the lawyers.	The class members don’t care about the action and/or where the harm is so negligible and the potential payout to class members so small, it begs the question of “what’s the point”. For example, plaintiffs initiate a class action as soon as there is a change in a warning label.	In cases where the damage to each individual member is minimal, it is possible the action could still advance the objective of behaviour modification. Further, quantity of damages is not an issue that would be determined on a preliminary merits test of whether the plaintiff might succeed at trial.
An action where there is no evidence of damages.	If the plaintiffs have suffered no damages this shortcoming will not be addressed by 5(1)(a) or Rule 21 because the courts do not assess evidence under those sections.	Damages can be a contentious issue and in most cases the plaintiff and defendant are likely to disagree as to the extent of damages. Defendants have the option to bring a summary judgment motion.
Where all manufacturers in an industry are sued, but some don’t make the product.		LCO agrees that defendants who have no connection to the product in dispute should not be a party to the action. This issue could be dealt with by a Rule 20 or 21 motion brought before or after certification.
Where the court certifies a class that is overly broad.	For example, in <i>Boulanger v. Johnson&Johnson Corp</i> there were only a handful of people with serious heart problems, but the court certified a class of 300,000.	The LCO agrees that the scope of the class is an important factor in the certification process and one the court must consider. Chief Justice McLachlan addressed this issue in <i>Hollick</i> : <i>There must be some showing, however, that the class is not unnecessarily broad – that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on the condition that the definition of the class be amended.</i>
Frivolous class actions that are commenced after a recall.	Some stakeholders argue that a noticeable proportion of product recall cases are strike suits because consumers are already made whole.	This concern is related to the analysis of s.5(1)(d) and whether a class action is the preferable procedure. The issue is whether the regulatory sanctions are sufficient and whether it is reasonable to allow injured parties to seek recovery through civil litigation. The LCO agrees that courts should give more weight to alternative options. This issue is discussed below.

Several stakeholders interviewed by the LCO recommended that Ontario introduce this merits-based threshold for at least some types of class actions, if not for all.¹⁶⁷ The leave test under Part XXIII.1 of the *Securities Act* provides insight into how a preliminary merits test might work in practice.

The history of this additional threshold requirement and the reasons why it came to be are an important part of the discussion as to whether such a standard would be suitable in other contexts.

Abella, J summarized the legislative history succinctly in *Theratechnologies Inc.*

*During the 1990s, following a series of high profile misrepresentations and incidents of questionable disclosure practices among publicly traded companies in Canada, the Toronto Stock Exchange created the Allen Committee to re-examine the regime governing disclosure in the secondary market. The Allen Committee concluded that the “current sanctions and funding available to regulators... are inadequate” and “the remedies available to investors in secondary trading markets who are injured by misleading disclosure are so difficult to pursue that they are, as a practical matter, largely hypothetical”: Committee on Corporate Disclosure, Final Report - Responsible Corporate Disclosure: A Search for Balance (Toronto Stock Exchange, 1997), at p. 5. It recommended the creation of a statutory civil liability regime that would help investors sue issuers, directors, and officers who violated their statutory disclosure obligations.*¹⁶⁸

The merits test in securities class actions is part of a statutory regime created to address the specific problem of public corporations allegedly misleading investors. In the 1990s, securities regulators had a problem with specific incidents of misrepresentation and public perception. The Allen Committee looked for a way to deter corporate non-disclosure and to compensate wronged investors. The Committee’s solution was a statutory scheme for secondary market misrepresentation liability in which it would not be necessary to prove reliance on the misrepresentation – in other words, to reduce the burden of proof on investors. In sum, the Allen Committee suggested the law be amended to make it *easier* for a shareholder, or a class of shareholders, to sue a public corporation.¹⁶⁹

Securities administrators accepted most of the recommendations of the Allen Committee and came up with proposals for implementation. In response to concern that the proposed changes to the law of negligent misrepresentation in secondary securities markets would open the flood gates for potential of U.S. style “strike suits” in Canada, a screening mechanism was introduced.¹⁷⁰ It is of note that the Allen Committee did not believe a flood of unmeritorious claims were likely.¹⁷¹ The screening mechanism required plaintiffs to obtain leave in order to bring an action under the OSA. As part of the leave application, plaintiffs were required to satisfy the court the action was brought in good faith and they had a reasonable possibility of success.¹⁷²

As expected, stakeholders are divided on whether the leave requirement is working. However, a look at the case law suggests that the consideration of the merits under the OSA complicates the class action certification process.¹⁷³ For example, in *Catucci*, the applicants relied on four experts, and the defendants on another two, while 12 000 documents were filed electronically as evidence, and cross-examinations conducted.¹⁷⁴ Adducing such vast amounts of evidence obviously adds to the cost and complexity of the process. The leave test is not intended to be a “mini-trial”.¹⁷⁵

Furthermore, the securities class actions test leads to potentially disproportionate evidence as between plaintiffs and defendants. For instance, the plaintiff’s expert in *Coffin* relied entirely on publicly available information, rendered “less persuasive if said information on its face contains no misrepresentations”¹⁷⁶, whereas the defendants managed to adduce 14,000 electronic documents, fitting into 10 banker boxes, containing mainly non-public, court-sealed, internal corporate documents.¹⁷⁷

The LCO believes introducing a step similar to the securities leave test is neither mandated nor justifiable.

The merits analysis in the OSA context was introduced as one part of a regime developed to address a very specific problem.

One cannot look at the leave requirement in isolation, but rather must see it as one element of a larger regulatory mechanism. The substantive law was statutorily amended to facilitate actions – thus an early review of the substantive case was introduced to balance that change. The LCO is not proposing, nor is it aware of any other parties proposing, changes to substantive areas of law that would encourage or invite strike suits.

3. A Principled Analysis of the Preliminary Merits Test

The sections above considered whether a preliminary merits test could be justified based on Ontario's certification rate, the existence of meritless or frivolous class actions, or the example of leave test in the Ontario *Securities Act*. None of these considerations justifies the introduction of a preliminary merits test.

The LCO now considers the statutory certification test from the perspective of foundational legal principles, including the objectives of access to justice and judicial economy.

Access to Justice and Due Process

Fairness and due process are fundamental principles of procedural law in Ontario and elsewhere, and pre-trial discovery and trial on the merits are central tenets to fair procedure. The LCO concludes that a preliminary merits test frustrates access to justice because it violates the basic concept of due process and fair procedure in class actions.

Access to justice includes access to “just results”. In order to achieve “just results” courts need to have access to an evidentiary record they can weigh and assess. To make a decision on the substance of an action at an interlocutory motion without substantive evidence before the court is problematic. It puts the plaintiff at a significant procedural disadvantage of having to prove their case without access to the defendants records. It also puts courts in the impossible situation of trying to determine the merits of a matter without a full evidentiary record before them. Without fair procedure, you cannot have just results.

It goes without saying that access to justice includes fair procedure for both parties. Defendants would rightly say that forcing a meritless claim to go to trial is a failure of procedural fairness.¹⁷⁸ However, balancing procedural fairness between plaintiffs and defendants is not a new issue, nor is it unique to class actions. Rule 20 governing summary judgement motions was created expressly for this reason: they are a relief valve for defendants. The purpose is to provide a mechanism for defendants to avoid being dragged through the entire litigation process to defend a weak case.

Summary judgment motions are a relevant topic in the discussion of the preliminary merits test in class actions because they demonstrate the difficulty courts face in trying to decide the merits of a matter without a full evidentiary record.

A summary judgment motion is a request by a party (most often the defendant) for the court to dismiss all or part of a claim prior to trial. For years, summary judgement motions were used in a limited way – they were boxed into the small arena of actions where facts were not in dispute. Even then, courts were often reluctant to make a final order on an interlocutory motion. In his seminal report on the *Rules of Civil Litigation*, Coulter Osbourne suggested that in order for courts to determine a matter on its merits prior to trial, the court should be able to weigh the evidence, draw inferences and evaluate credibility.¹⁷⁹ Following the Osbourne Report, changes were made to Rule 20. Subsequently, the Supreme Court clarified the Rule change calling for a “cultural shift” and encouraged parties to file an evidentiary record, conduct cross-examinations, and have mini-trials where the court could assess credibility and weigh evidence.¹⁸⁰ In other words, after years of review and careful consideration, policy analysts and lawmakers determined that in order for a trier of fact to be able to make a factual determination on the merits of an action prior to a full trial, extensive procedural mechanisms were required.

Adding a merits analysis to the certification test would merely move the larger debate upfront in the procedure and require parties to make their case without the procedural protections and advantages proffered at discovery or trial. This introduces significant access to justice issues. It is not insignificant that a certification motion, while technically an interlocutory motion, functions essentially as a final order. If a plaintiff fails at the certification stage, the action is most likely over.

Judicial Efficiency and Costs

The current certification test raises legitimate concerns about cost and delay: would a preliminary merits test address or exacerbate these issues? Proponents of the merits test say that an early assessment of the substance of the matter will improve judicial economy because it will dispose of meritless cases early. Cases with no chance of winning will be weeded out and not use the resources of the justice system.

The LCO agrees that disposing of frivolous cases early furthers the objective of judicial efficiency. However, a preliminary merits test is not the appropriate tool to achieve this goal. Rather, the LCO believes that the reverse is true: introducing a preliminary merits test requirement for each and every class action would frustrate the goal of judicial efficiency because it would force the determination of the matter early in the process for each case (not just the weak ones). The extraordinary time and effort spent upfront developing the merits would come at great cost and delay to all parties.

From a practical view, there is an inherent difficulty in assessing a matter on its merits early in a proceeding. The trier of fact is either making a final determination on limited material (which many triers of fact are reluctant to do), or parties introduce copious amounts of material turning the process into a mini-trial of sorts. This challenge is especially relevant for large and factually complex cases. Rarely will a case be unambiguous enough for a court to make a determination on the merits at such an early stage in the proceeding. Thus, the increase in cost and delay to all parties would be for potentially little benefit. These practical concerns challenge the objective of facilitating judicial economy.

In our interviews, even a few defence-friendly stakeholders admitted that an early merits test may not work from a practical perspective.

A further complication with class action litigation is the multi-jurisdictional nature of these actions. A preliminary merits test does not exist in any Canadian jurisdiction, nor in the United States.¹⁸¹ Such a radical change to the certification test in Ontario would introduce new complexities and uncertainties with managing multi-jurisdictional actions.

Conclusion

The LCO recommends against a preliminary merits test. The introduction of such a test would be a dramatic change from the existing certification process. Such a change would frustrate, rather than further the objectives of the CPA. The costs an early merits analysis would impose on all class actions would outweigh the benefit of possibly weeding out an indeterminate and undefinable number of meritless actions. It would lead to more expensive and protracted certification motions for almost all class action cases, with little chance of correcting the mischief of which the defendants complain. Most importantly, the Ontario civil justice system is not designed to adjudicate the merits of an action prior to full disclosure and while the evidentiary record remains largely in the hands of one side.

The LCO acknowledges, however, that defendants have many legitimate concerns about class proceedings including dormant cases, copy cat claims, late-filing claims, overly-broad actions, and actions with scant evidence. The LCO believes these concerns can be best addressed through other means that do not have the negative impact on access to justice or judicial economy of a preliminary merits test. We will consider alternatives to the preliminary merits test later in this chapter and in other parts of the report.

F. Certification Evidentiary Standard – “Some Basis in Fact”

The CPA does not expressly address the evidentiary burden to be satisfied on a certification motion. The standard of “some basis in fact” (“SBIF”) developed through case law. The Supreme Court of Canada established that the motion serves to determine how the litigation is to proceed and can “appropriately” be prosecuted as a class proceeding.¹⁸² It does not serve as an exhaustive inquiry into factual questions that would be determined at trial when the merits of the claims of class members are in issue.¹⁸³ To allow the case to move forward, certain facts must be demonstrated in order to respect the certification criteria, pursuant to a *de minimis* standard of “some basis in fact”.¹⁸⁴

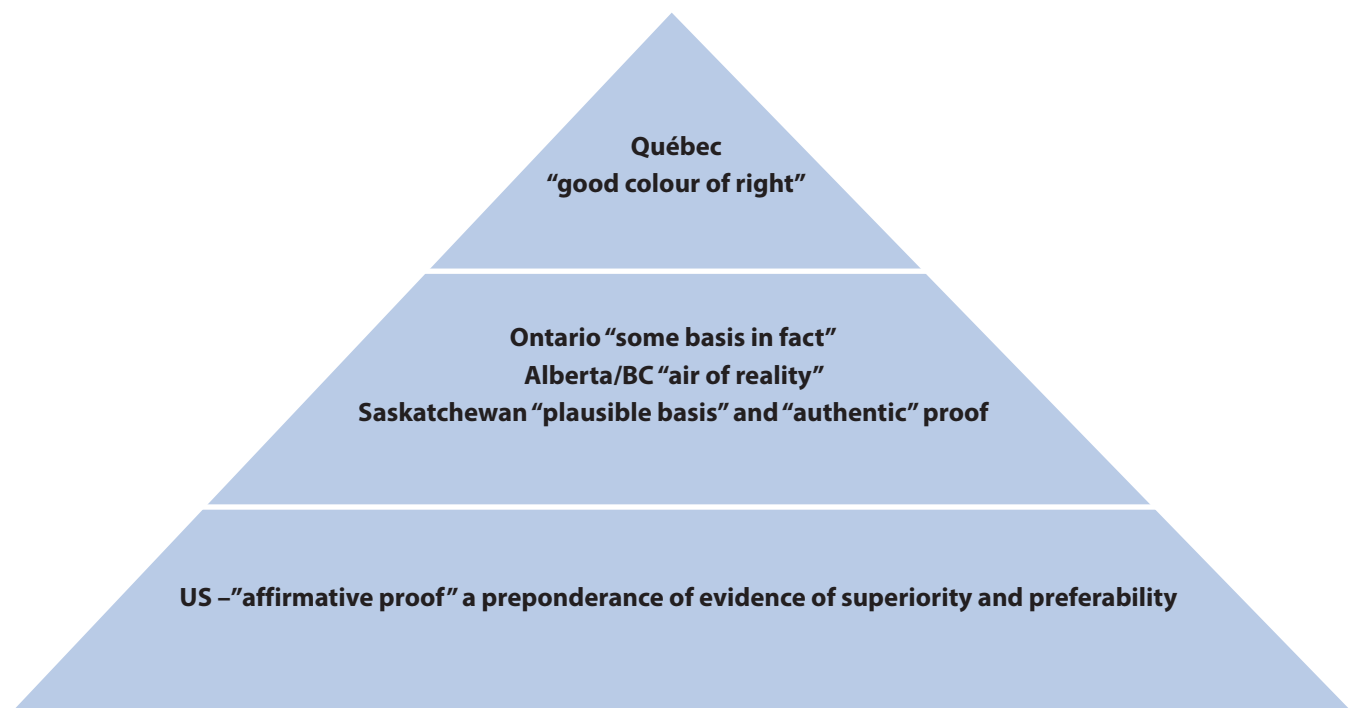
During the consultations, many stakeholders argued for a more stringent evidentiary standard, believing the current threshold to be inadequate.¹⁸⁵ Others noted the inconsistent criteria between the common law provinces and Québec.¹⁸⁶ These stakeholders listed many advantages to changing the evidentiary test. They mentioned the additional evidence at certification that would assist the judges in determining whether the case is spurious, without foreclosing meritorious claims or holding plaintiffs to an unreasonable evidentiary burden. For the International Association of Defence Counsel, notably, the CPA should require the plaintiff to “affirmatively demonstrate compliance with” the certification criteria by evidentiary proof that the certification criteria have been met on a balance of probabilities.¹⁸⁷

The LCO recognizes that “a balance of probabilities” is the standard applied in virtually all other motions in Ontario. The LCO has considered whether this exception from the normal standard is suitable in the context of a class action certification motion. As noted above, many interveners suggest the standard should be “a balance of probabilities”. The LCO does not believe that the evidentiary test should be amended for the reasons that follow.

1. Comparison of Evidentiary Standard in Other Jurisdictions

Given the requirement to show “some basis” for the common issues, the SBIF standard in Ontario can be considered to be more rigorous than the Québec authorization standard of “good colour of right,”¹⁸⁸ but less so than the “air of reality” standard favoured by the courts in British Columbia and Alberta.¹⁸⁹ In Saskatchewan, the “plausible basis” standard applies at certification,¹⁹⁰ requiring that the applicant show an “authentic” cause of action.¹⁹¹ The “plausible basis” test is slightly more rigorous than “plain and obvious”. The American Rule 23 certification standard is the most rigorous, with superiority and preferability criteria, and the need to offer affirmative proof that establishes on a preponderance of the evidence that each of the criteria have been met.¹⁹²

The following chart demonstrates the *general* range or hierarchy of evidentiary standards:



More specifically, even if the “colour of right” Québec standard appears similar to the SBIF standard, the two are distinguishable based on the role that evidence has to play at this stage. While Québec courts are merely required to take a “summary look at the evidence”,¹⁹³ Ontario courts view the evidence at certification as having a serious, obligatory role to play. An evidentiary record must be filed at certification, even if it is not exhaustive.¹⁹⁴

2. U.S. Federal Court Rule 23

Some stakeholders made the suggestion that Ontario adopt certification criteria akin to that of the United States. It is widely believed that the US test for certification is considerably more stringent than that of Ontario. Recent statistics suggest that the success rate at contested certification hearings is now approximately 64%.¹⁹⁵ The LCO evaluated the US certification test and concluded that there is no reason to adopt it.

Class proceedings in the U.S. are governed by US Federal Court Rule 23 (a) and (b). The U.S. certification test is more demanding than Ontario mainly because courts apply a higher evidentiary standard (preponderance of evidence) and are encouraged to conduct a “rigorous analysis”¹⁹⁶ of the evidentiary record including weighing evidence and making factual determinations. There is no preliminary merits test, but courts will wade into the merits of an action where there is overlap with the certification criteria.¹⁹⁷

Further, the U.S. has additional criteria for certification that do not exist in Ontario. Plaintiffs must show that common issues predominate over individual issues (similar to the preferability criterion but a higher threshold); the claims and defences of the parties must be typical of the class and; the proposed class must be so large a “joinder of members is impractical”. For the latter, the number is twenty-five or more, whereas in Ontario a class need only be two or more members.¹⁹⁸

The difference between Ontario and U.S. class action law does not end at certification. The entire class action regime in the U.S. is considerably different than Ontario. In the U.S. extensive discovery is allowed pre-certification¹⁹⁹ and the volume of material produced is often much more expansive.²⁰⁰ Class actions are often heard by a jury, punitive damages are allowed, and there are no cost awards – each party pays their own costs regardless of outcome. Damages awards are generally much larger and lawyer fees tend to be higher in the U.S.²⁰¹

We must look at the U.S. class action system as a whole – not just pluck one element in isolation. The higher evidentiary burden exists in the context of extensive and voluminous discovery. The U.S. system appears to make the test for certification more difficult for plaintiffs, but the damages awards, no-costs system, and lawyer fees favour the plaintiff. Accordingly the LCO sees no reason to adopt provisions of Rule 23 into s.5(1).

3. SBIF Analysis and Conclusion

Given the almost unanimous concern over lengthy delays and expenses in class actions, many of the recommendations made throughout this report focus on improving efficiency. For example, in the Practice Guidelines recommended at the end of this chapter, the LCO asks courts to adopt a restrictive approach to the quantity of evidence filed at certification. The LCO is concerned that raising the evidentiary standard at certification would frustrate this goal and put pressure on parties to submit greater quantities of evidence, which would increase cost and delay. Further, the example of the U.S. class action regime suggests that a higher evidentiary standard could lead to increase the volume of documentary discovery pre-certification. More voluminous pre-certification discovery would also increase costs and delay.

In his academic work, Justice Cullity pointed out that the procedural nature of the motion does not preclude the criteria from being determined on a balance of probabilities. And since the issues determined at certification are not revisited at trial, there is no reason for them to be assessed with an evidentiary standard lower than “balance of probabilities”.²⁰² However, this thinking is countered by the well-established and persuasive caselaw on the issue. Courts have recognized that at the certification stage, “the court is ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight”.²⁰³

The LCO is concerned that raising the evidentiary standard is likely to strain the procedural nature of the motion because it may allow, or even require, courts to look at the merits of a case more so than they already do in order to decide specific certification criteria. This issue is informed by the example of the U.S. class action regime where even though there is no merits test, the merits often creep into the “preponderance of evidence” analysis. As discussed earlier in this chapter, the LCO feels that wading into the merits of an action at the certification stage would frustrate the goals of access to justice and judicial efficiency.

Finally, the certification motion is intended to be a gatekeeper, to weed out motions that are not suitable for class action. This “gatekeeper function” is not intended to prevent class actions from proceeding. The courts have interpreted the legislative intent to be permissive; this liberal approach to certification is consistent, then, with a low evidentiary standard.²⁰⁴ The low threshold is in keeping with the overarching principles of access to justice and judicial economy.

In sum, the LCO has four key concerns with the higher standard:

- a higher evidentiary standard will lead to larger submissions of evidence and could lead to more extensive documentary discovery prior to certification, increasing cost and delay and frustrating judicial efficiency.
- a higher standard would likely lead to a more “merit-focused” discussion of the certification criteria, frustrating judicial efficiency and access to justice.
- “a balance of probabilities” would be a higher standard and out of sync with the rest of Canada on class actions. Our analysis of other jurisdictions confirms this analysis;
- this issue has been revisited by the courts on numerous occasions and even recently when given the opportunity to change it, the SCC decided not to.²⁰⁵ The LCO sees no reason to interfere with this interpretation.

It should be noted that the SBIF standard does not apply to the analysis of whether evidence is admissible. All evidence adduced in order to meet the evidentiary threshold for certification is subject to the standard rules of admissibility.²⁰⁶ “Evidence is inadmissible if it is (1) hearsay that is not admissible through an exception; (2) affidavit evidence that fails to disclose the deponents’ source of information and belief; (3) opinion that is not properly qualified; or (4) is improper argument.”²⁰⁷ The SBIF standard does not lower the threshold for admissibility of evidence. “It simply means that, if the evidence is admissible, the weight of the evidence may be less than what would be required at trial.”²⁰⁸ The LCO believes it is important courts hold parties to the same standards of admissibility of evidence as they do for all other motions in Ontario.

G. Crown Liability and Proceedings Act, 2019

Crown liability did not start out as a research area in this report. The issue of Crown liability arose in the April 11, 2019 Budget Announcement, when the Ontario Government proposed to repeal the *Proceedings Against the Crown Act* (the “PACA”) and replace it with the *Crown Liability and Proceedings Act, 2019* (CLPA). The LCO believes it would be remiss not to comment on this *Act* given its potential implications for class action against the provincial Crown. In **Appendix F**, the LCO discusses the new law on Crown immunity and highlights of its potential implications for class actions against the provincial Crown. Suffice to say, the combination of the new CLPA with a preliminary merits tests and/or change to the evidential standard would be a barrier to access to justice for potential (and current) class action lawsuits against the province.

H. Other Options, Solutions and Best Practices

While the LCO has concluded that neither a change to the evidentiary standard nor the introduction of a preliminary merits test is warranted, the LCO acknowledges that the certification test could be improved to further the objectives of the *Act*.

In this section, the LCO considers several other options, policy responses, and best practices to address some of the shortcomings in the test.

1. Interpreting the Statutory Criteria

The LCO believes the current wording of the five criteria in s.5(1) of the *CPA* is generally sufficient and does not warrant amendment. However, the LCO recommends that courts consider proportionality and give significant weight to alternative options under the preferable procedure analysis.

Preferable Procedure and Proportionality

Counsel representing auto manufacturers suggested making explicit the requirement that judges consider a defendant's recall and replacement or repair of a product in assessing whether the class action is preferable,²⁰⁹ and introduce a provision that would require the court, on a motion brought by the defendant, to consider the alternative procedure *before* a full certification motion is heard.²¹⁰ The goal is to recognize, at an early stage, actions taken by defendants to remedy potential harm. The Canadian Vehicle Manufacturers' Association (CVMA) advised the LCO that "Where a party provides reasonable relief or redress has been, or will be, provided to a prospective class, such remedy or redress should be recognized as a preferable procedure thus negating the need for a class action. The ability to avoid a class action would promote the objective of behaviour modification/deterrence by encouraging companies to voluntarily remedy harm."²¹¹ The CVMA specifically called for the following amendment to s. 5(1)(d):

(d) the class has not been, and will not be, provided with a reasonable alternative means of redress or remedial response by regulatory action, a product recall, a remedy program or through any other procedure other than a class proceeding, and a class proceeding would be the preferable procedure for the resolution of the common issues and the provision of any redress or remedy to the class.

The LCO agrees that the existence of robust recall programs or regulatory action can weigh heavily against the utility of a class action. The lack of damages coupled with the remedial conduct of the defendant can justify rejecting the proposed class action under s. 5(1)(d). However, judges already have the authority to prefer alternate remedies over a class proceeding. The Supreme Court has held that the "preferability requirement is broad enough to take into account all reasonably available means of resolving the class members' claims including avenues of redress other than court actions."²¹²

The issue is not the lack of statutory authority but rather a narrow interpretation of the preferable procedure criterion. To this end, there is merit to the CVMA's recommendation that "for the purposes of Subsection 5(1)(d), a reasonable alternative means of redress or remedial response need not be a complete remedy in law."²¹³ A more generous approach to alternative remedies would disincentivize class actions that are largely duplicative of regulatory or other remedial schemes pursuant to which class members have been compensated. Moreover, there is precedent for closely examining the benefits already accrued by class members. In *AIC v. Fisher* the Supreme Court of Canada held that in the rather unusual case where the alternative proceedings have run their course and the results of those proceedings are known, "the comparative analysis cannot ignore the question of whether a cost-benefit analysis supports the [plaintiffs'] contention that the proposed class proceeding is the preferable way to address their claims."²¹⁴ While the Court determined that substantive access to justice concerns remained at the conclusion of the alternative process before it (class members had recovered less than one-third of their estimated losses), in theory a remedial program that largely makes class members whole ought to be preferred over the more cumbersome, lengthy and expensive class litigation process. As noted by Rady J. in *Richardson v. Samsung*, "the law does not demand perfect compensation. Indeed, perfect compensation is unlikely even if pursued by way of class action."²¹⁵

The cost-benefit analysis averted to in *Fischer* should be given a more generous reading. Although the LCO is not persuaded that legislative amendment is warranted, we encourage judges to give more weight to alternative remedies. There are three main policy reasons justifying a greater emphasis on such alternatives:

- Comprehensive remedial programs may reduce litigation exposure and create positive incentives for compensating harm.
- Such programs may be speedier and less costly than class actions (taking into account that legal fees are not deducted from the compensation).
- Since class actions themselves are vehicles for ‘rough justice’ and rarely indemnify class members fully for all losses sustained, there is no principled reason to expect alternative remedies to provide perfect remedies.

Some will argue that engaging in this limited cost-benefits analysis under s. 5(1)(d) will require parties to engage in the merits. This is true but only insofar as the evidence supporting the alternative procedure necessarily overlaps with the merits. In the minority of cases where a regulatory body or defendant has remediated the harm at issue in the litigation, evidence of the kind admitted in *Fischer* would not be onerous and should be considered carefully by the certification motion judge.

With the rise in importance of the principle of procedural proportionality across Canada,²¹⁶ a costs-benefit approach to class actions could also serve to decide whether the action should be commenced altogether.²¹⁷ As the Supreme Court of Canada stated in *Dutton*, at certification courts should consider “the benefits the class action offers in the circumstances of the case as well as any unfairness that class proceedings may cause. In the end, the court must strike a balance between efficiency and fairness.”²¹⁸ In fact, since *Hryniak*,¹⁹ courts have found that they must consider proportionality in the context of preferable procedure.

*[O]ne should now add to the preferable procedure factors the factor of the relationship between access to justice, which is the preeminent concern of class proceedings, and proportionality in civil procedures. The proportionality analysis, which addresses how much procedure a litigant actually needs to obtain access to justice, fits nicely with the focus on judicial economy and with the part of the preferable procedure analysis that considers manageability and whether the claimants will receive a just and effective remedy for their claims.*²²⁰

Proportionality in civil litigation reflects that the time and expense devoted to a proceeding must be proportionate to what’s at stake. In standard litigation this cost benefit analysis is typically in the context of size of the proceedings (productions, discovery, experts, costs etc). Class actions, however, are by definition large and complex, the costs are huge and the potential exposure is always enormous. The LCO sees proportionality in class actions as a weighing of the cost that large, complex, protracted actions impose on everyone involved including the use of scarce public resources, against the potential benefits of behaviour modification and damages awarded to the class. In the context of trying to determine whether a class action is the preferable procedure, the LCO believes it is reasonable for the court to consider whether the proposed action furthers the three objectives of the CPA.

2. Pre-certification Motions (Summary Judgement Motions)

The LCO encourages the use of summary judgment motions in class actions. This is especially true when: 1) a motion might dispose of the entire proceeding or substantially narrow the issues to be determined; 2) when the delays and costs associated with the motion will be restricted; 3) when the outcome of the motion will promote settlement; 4) when the motion will not give rise to interlocutory appeals and delays affecting certification; 5) when the interests of economy and judicial efficiency will be promoted; and generally, 6) when scheduling the motion in advance of certification would promote the “fair and efficient determination” of the proceeding.²²¹

Given that class proceedings in Ontario must “disclose a cause of action” to be certified, and that the same test applies under this section as that on a motion to strike, class proceedings judges are typically reluctant to hear motions to strike in advance

of certification. However, the LCO believes that such motions may help narrow the issues to which evidence will need to be adduced on the certification motion, which will help restrain the amount of evidence filed at certification, provide more efficiency in procedures, and reduce the potential exposure of defendants in a given case.

Summary judgment motions are underutilized in class actions. The LCO notes the amendments to Rule 20 brought in 2010 and the “cultural shift” called for by the Supreme Court in *Hryniak*,²²² and encourages case management judges to be creative in the use of tools available to them to hear summary judgment motions. The revised summary judgement provisions are intended to allow judges to weigh evidence, make findings of fact and conduct a “mini-trial” if the circumstances call for it.²²³ Summary judgment motion can be a suitable venue to determine issues in a class action involving voluminous and complex evidence.²²⁴

The LCO believes a summary judgment motion is the better forum than the certification motion for a court to discuss the merits of a class action for a number of reasons:

- The merits will be analyzed by the court only in cases where the merits are considered weak. If the merits of the case are a mandatory part of the certification motion, it would mean that in each and every case parties would have to present evidence on the merits – which will increase the work of the courts and add to the cost and delay associated with class actions.
- The timing of a summary judgment motion is flexible. If the evidentiary record supports it, a summary judgment motion could be brought at the same time as the certification motion. If additional evidence is required, the motion could be brought after discoveries. To require the court to analyze the merits on each and every case will frustrate the objective of judicial economy.
- Under Rule 20, there is room for case management judges to engage in enhanced fact finding, properly weigh evidence and order oral evidence. This suggests the court can make a determination on the merits while maintaining procedural fairness.
- The threshold in summary judgment motions as to whether there is a “genuine issue requiring trial” is a more suitable lens through which the court can assess the evidence.

The LCO agrees with the submission of the International Association of Defence Counsel²²⁵ and MEDEC²²⁶ that access to justice requires access to fair results – for both plaintiffs and defendants. The enhanced summary judgment powers articulated by the Supreme Court in *Hryniak* combined with the certification motion should mitigate against defendants feeling pressure to settle weak claims or being held hostage by “extortive and opportunistic claims” as described by the accounting firms.²²⁷

3. Culture Shift

A consistent concern with almost all stakeholders consulted is the enormous expense and slow pace of class actions. Certification motions are often the epicentre of cost and delay complaints. Contested certification motions are lengthy, expensive and hard to manage. In response, the LCO draws from Justice Karakatsanis’ wording in *Hryniak* and calls for a major “culture shift” in certification proceedings.

The LCO believes a three-part strategy is needed to promote a culture shift and improve the efficiency, timeliness and finality of certification motions.

The first part of this strategy was discussed in Chapter 3 of this report where the LCO recommended the establishment of firm timelines to file certification materials, an administrative dismissal provision for tardy plaintiffs, statutory requirements for early case management conferences, and new powers for courts to ensure fair and expeditious proceedings.

The second part of this strategy is the adoption of a dedicated Practice Direction directed towards improving the efficiency and focus of certification motions. The details of the LCO’s proposed Practice Direction are discussed below.

The third and final part of this strategy is a streamlined process for appeals of certification orders. This reform will be discussed in Chapter 12.

As noted above, the purpose of our proposed Practice Direction is to improve the efficiency and timeliness of certification motions. The direction should make clear that the role of the court when hearing certification motions is to balance the rights of the parties with the need for judicial economy. The direction should incorporate a number of best practices, including:

- A case schedule should be set early including dates and deadlines;
- On balance, moving a case forward at a reasonable pace and avoiding delay is a priority over lawyers' schedules;
- Judges should work with parties to narrow the issues raised at the certification motion;
- Judges are expected to exercise far-reaching management powers in a pro-active and creative manner;
- For evidence that is legally admissible, the court should adopt a restrictive approach to the quantity of evidence filed at certification;
- The court exercising "greater scrutiny" of evidence does not translate to counsel producing a "greater quantity" of evidence; and,
- Lawyers should assign adequate resources to litigation of the action, and are encouraged to manage their caseload or share the file with colleagues or other practitioners so the matter can move forward at a reasonable pace and not be delayed due to lawyer unavailability.

Finally, the Practice Direction should explicitly state that parties will be held accountable for complying with the Direction and that the court may impose penalties, including cost awards, if parties inappropriately delay matters, raise erroneous issues or file weak or unnecessary evidence.

Recommendations

16. The LCO recommends that courts interpret the existing elements of s. 5(1)(d) ("preferable procedure") of the certification test more rigorously.
17. The LCO recommends that courts support/endorse pre-certification summary judgment motions or motions to strike if such a motion will dispose of the action, or narrow issues to be determined or evidence to be filed at certification
18. The LCO recommends the dedicated class action Practice Direction recommended in this report include detailed provisions and best practices for certification motions. This Direction should be developed in consultation with appropriate stakeholders.

Chapter Seven

SETTLEMENT APPROVAL

A. Introduction

Settlement approval is a key moment in class action litigation. Courts have repeatedly stated that settlements demand careful judicial scrutiny before they are approved.²²⁸ Professor Kalajdzic summarizes why court supervision in settlement approval is so important:

*Under class proceedings statutes, the courts are entrusted with a critical supervisory role to ensure that the interests of absent class members are protected. The supervisory function is nowhere more important than in the context of a proposed settlement because of the adversarial void created by a negotiated settlement between plaintiff and defendants, both of whom have a vested interest in having the settlement approved...*²²⁹

*Courts and commentators alike have recognized that class counsel's neutrality in this regard is compromised by an inherent conflict of interest. Both plaintiff and defendant counsel seek to have the settlement approved, and there is a risk that the interests of absent class members, and the deficiencies of the proposed settlement, will not be fully pressed. This dynamic creates an adversarial void that a judge alone finds difficult to fill.*²³⁰

Notwithstanding the importance of this task, Ontario lacks definitive empirical or qualitative research about virtually every aspect of the settlement approval process. Unfortunately, the LCO was unable to systematically analyze the nature of judicial scrutiny of proposed settlements. Nor was the LCO able to determine how much court time was devoted to settlement evaluation.

Experience, consultations and research suggest that judicial scrutiny of settlements is mixed. The LCO is aware of many instances where courts took considerable time and effort to evaluate a proposed settlement. The LCO was further advised that Ontario courts appear to be devoting more time to settlement approval.²³¹ Nevertheless, it is true that:

*[settlements] have been approved...that on their face raise serious questions about the adequacy of, and barriers to claiming, compensation.*²³²

*...[if] the length and detail of reasons for judgement are an indication of this role, there is reason to question whether all settlements are being "seriously scrutinized by judges."*²³³

The LCO has concluded there is a need to improve the settlement approval process. A combination of statutory reforms, best practices, transparency and empirical analysis will improve the consistency and quality of judicial decision-making in this difficult task.

The short-term effect of these reforms will be to improve the quality of judicial scrutiny in individual cases. In the long term, these reforms will create higher expectations and responsibilities for counsel proposing settlements, promote evidence-based best practices, improve settlement outcomes for class members, and establish the empirical record necessary to evaluate class actions more thoughtfully.

The LCO emphasizes that these reforms are not necessarily directed to the *standard* of scrutiny. These reforms are best understood as improving the consistency and quality of information available to the court when exercising their discretion.

Nor does the LCO believe that these reforms undermine the deference courts should give to parties to fashion settlements. Deference is appropriate when parties meet the higher informational standards recommended in this report. At the risk of over-simplification, the LCO's approach can be summarized with the maxim "trust but verify."

The analysis in this chapter should be read in conjunction with our analysis in Chapter 8, which addresses settlement distributions. In practice, courts will usually (though not always) consider questions concerning settlement *approval* and settlement *distribution* together. In some cases, judges approve an overall settlement sum with the details of distribution to be vetted at a later date. For this report, however, the LCO has separated the two chapters for explanatory purposes only.

B. The CPA

Section 29(2) of the CPA specifies that all proposed settlements must be judicially approved.²³⁴ The policy and legal basis for the provision is clear and uncontroversial: Judicial approval is necessary and appropriate to ensure that the interests of class members are protected. As the OLRC noted in its 1982 report:

*...there is a real possibility that, without the benefit of appropriate safeguards, parties and their counsel might be tempted to abuse the class action procedure in reaching a settlement.*²³⁵

*Court oversight is necessary to ensure both that plaintiffs do not extort unjust settlements from defendants and that defendants and class counsel do not produce unjust settlements for class members.*²³⁶

Although s. 29(2) states that a settlement of a class proceeding is not binding unless approved by the courts, the section does not set out any criteria or standard for approval. Courts have determined, however, that the appropriate standard of review is whether the proposed settlement is “fair, reasonable and in the best interests of the class.”²³⁷ Courts have further developed a list of factors relevant to this determination, commonly referred to as the “Dabbs” factors:

- Amount and nature of discovery evidence;
- Settlement terms and conditions;
- Recommendation and experience of counsel;
- Future expense and likely duration of litigation;
- Recommendation of neutral parties;
- Number of objectors and nature of objections; and
- The presence of good faith, arms’ length bargaining and the absence of collusion.²³⁸

Courts have held that no single factor predominates and that settlements need only fall within a zone of reasonableness in order to be approved.²³⁹ The party putting forward the proposed settlement has the burden of satisfying the judge of its reasonableness.²⁴⁰

C. Analysis

The LCO researched and consulted widely on the settlement approval process.

In this chapter, the LCO considers three general issues regarding settlement approvals:

- whether the CPA should be amended to add statutory criteria to guide courts in evaluating proposed settlements;
- how to address the “adversarial void” at the settlement approval hearing; and
- the special position of plaintiffs vis-à-vis representing vulnerable class members.

The next chapter considers the crucially important issue of settlement distributions. The proposed settlement distribution plan is a key component of any settlement approval process. Accordingly, these two chapters should be read together.

1. Statutory Approval Criteria

CPA section 29(2) states that “a settlement of a class proceeding is not binding unless approved by the courts” but the section does not set out criteria or standard for approval.

The LCO believes the CPA should be amended to explicitly state that the appropriate standard of review is whether the proposed settlement is “fair, reasonable and in the best interests of the class”. This standard has been widely adopted by parties and courts.²⁴¹ This is a common sense recommendation that will ensure that this standard is the guiding principle when courts evaluate settlement approvals.

A second question is whether the statute should be further amended to add more specific criteria, such as the *Dabbs* factors, to guide judicial decision-making. The LCO did not receive many written submissions regarding the *Dabbs* criteria. In interviews, however, lawyers on both sides of the bar were uniformly content with the current test. Those submissions that we did receive either explicitly recommended that the test remain unchanged,²⁴² or that the current test, including the *Dabbs* factors, be codified.²⁴³

The LCO agrees that the *Dabbs* criteria are appropriate. The LCO further agrees that it is unnecessary to enumerate the *Dabbs* criteria in the CPA given their wide-spread and long-standing acceptance within the judiciary and bar. Enumeration of the specific *Dabbs* criteria could also hinder the evolution of the criteria as may be necessary.

In the LCO’s view, it is not the statutory or common law criteria that need to be addressed in the settlement approval process. The more significant issue is how to improve the quality of the information provided to the court when exercising its supervisory function. This issue is addressed below.

2. The Adversarial Void/Improving Judicial Decision-Making

As noted above, the party putting forward the proposed settlement has the burden of satisfying the judge of its reasonableness. In practice, however, defendants and plaintiffs share a common interest in having the negotiated deal approved, leaving the judge to make his or her findings in an adversarial void.²⁴⁴

Judges, including those interviewed by the LCO for this project, often acknowledge the difficulty of evaluating settlements in these circumstances, particularly in complex cases. In response, some courts have adopted a more inquisitorial, probing approach and are demanding better information from counsel. For example, many judges now eschew boilerplate affidavits “that do nothing more than describe generic litigation risks or class counsel’s so-called ‘experience.’”²⁴⁵

There are a number of incremental reforms that would help judges review and evaluate settlements more effectively:

First, the LCO agrees with the Ontario Bar Association that it should be mandatory for parties to provide a judge with sufficient information to make a determination as to whether the settlement falls within a zone of reasonableness, including the filing of independent affidavit evidence in respect of the settlement approval criteria.²⁴⁶ An independent affidavit requirement would essentially codify the approach taken by recent courts which have rejected boilerplate affidavits.²⁴⁷

The content and author of the independent affidavit, however, requires further consideration.

It would not be appropriate, for example, to submit an affidavit in which the affiant simply states that the proposed settlement meets the *Dabbs* criteria. Instead, the LCO recommends that the Act require detailed affidavit evidence from the lawyers who negotiated the settlement, including supporting documentation, that sets out evidence in respect of the settlement approval criteria, the risks of the litigation, the range of possible recoveries, and information about the chosen method of valuing the settlement. This approach would give the court the benefit of a fact-based, evidentiary record with which to assess the proposed settlement.

The LCO further recommends the *Act* be amended to specify that the counsel proposing the settlement have the duty to make full and frank disclosure to the judge, akin to the duties of lawyers on an *ex parte* motion.²⁴⁸ This duty has been endorsed by judges here and in the United States.²⁴⁹ For example, Chief Justice Winkler (as he then was) stated:

*[A] class proceeding by its very nature involves the issuance of orders or judgments that affect persons who are not before the Court. These absent class members are dependent on the Court to protect their interests. In order to do so, the Court must have all of the available information that has some bearing on the issues, whether favourable or unfavourable to the moving party. It is the obligation of counsel to provide that information in a manner that is consonant with the duty to make full and frank disclosure. Moreover, that information must be provided in a manner that is not misleading or even potentially misleading. In most class proceedings, voluminous records develop as a consequence of the complexity of the litigation. The Court is not equipped, nor should it be required, to engage in a forensic investigation into the material or to mine the record to inform itself. Counsel must direct the Court to all relevant information that would impact on the Court's determination.*²⁵⁰

Counsel commented on a potential conflict between the duty of full and frank disclosure and settlement privilege. The LCO believes that to further the policy objective of access to justice and to understand the best interests of the class, information about discussions surrounding settlement be communicated at the fairness hearing. In that sense, this information would not be privileged as it would constitute an exception. Finally, while the duty to make full and frank disclosure will improve the information available to the court, it will not fully address the difficulties experienced by judges in an uncontested settlement approval hearing. As a result, the LCO further recommends an amendment explicitly authorizing the court to appoint an *amicus curiae* in appropriate circumstances to assist the court in evaluating the proposed settlement.

The LCO anticipates this authority would be used sparingly, as there is no need to make an *amicus* mandatory in all cases.²⁵¹ In some cases, however, an *amicus*, or independent counsel, could assist the court to confront class counsel's unopposed position and thus fill the adversarial void that judges find challenging.²⁵² We expect this need to arise in particularly complex or large cases where an *amicus* could be of critical assistance to a court in fulfilling its independent, supervisory role.²⁵³

The LCO is not convinced by the argument that this amendment is unnecessary because courts already have the inherent authority to appoint *amicus*. The LCO has found no instances where an *amicus* was appointed to assist a settlement approval judge,²⁵⁴ suggesting a need for specific statutory authorization. Nor is the LCO convinced by the argument that appointing an *amicus* is inappropriate because it may reduce the sum available for the settlement distribution. The cost of an *amicus* in the context of settlements worth hundreds of millions, if not billions, of dollars is a small price to pay for appropriate oversight.

Although class members can participate in settlement approval hearings, financial and other barriers can inhibit class members from obtaining representation. The LCO believes a generous approach to Rule 13 motions for intervener status in class actions settlements is consistent with the goal of access to justice.²⁵⁵

3. Improved Notice to Statutory Representatives

Finally, the LCO adopts recommendations of the British Columbia and Ontario Public Guardians and Trustees (OPGT) regarding notice to class members who may be represented by a statutory agency.

Both agencies advised the LCO that they have been involved in several class actions in which class members have statutory guardians, but the agency did not have sufficient notice to participate on the class member's behalf.²⁵⁶ The agencies recommend that the *CPA* be amended to require that notice of certification and notice of a settlement approval hearing be made to appropriate statutory agencies in all actions in which there is a reasonable possibility that some class members are represented by the OPGT, the Office of the Children's Lawyer, or similar agencies. The agencies further recommend that the statute explicitly provide these agencies with the right to participate at the fairness hearing (for example, to ensure notice to class members is adequate).

In light of the substantial settlements in the institutional abuse cases involving thousands of class members who may have a statutory guardian or similar form of representation, the LCO believes these recommendations are prudent and recommends that section 19 of the *Act* be amended accordingly. This section currently gives the court authority to order notice “as it considers necessary to protect the interests of any class member or party or to ensure the fair conduct of the proceeding.” Additional statutory direction is warranted in these circumstances in order to protect the interests of vulnerable class members.

Recommendations

Statutory Standards

19. The LCO recommends s. 29(2) of the *Act* be amended to specify that when considering whether to approve a settlement, the court is required to consider whether the proposed settlement is “fair, reasonable, and in the best interests of the class.”

Evidentiary Requirement

20. The LCO recommends s. 29 of the *Act* be amended to provide class counsel seeking approval of a settlement be required to provide independent affidavit evidence that includes, but is not limited to, evidence respecting the settlement approval criteria, the risks of litigation, the range of possible recoveries, and the method of valuation of the settlement.

Full and Frank Disclosure

21. The LCO recommends that s. 29 of the *Act* be amended to provide that class counsel seeking approval of a settlement has a duty to make full and frank disclosure of all material facts and that failure to do so may be sufficient ground for not approving or setting aside a settlement approval order.

Amicus Curiae

22. The LCO recommends s. 29 of the *Act* be amended to give the court the discretion to appoint an *amicus curiae* to assist the court in considering whether to approve a proposed settlement. The court should have the discretion to determine payment for the *amicus* as the court may deem just.

Notice to OPGT, OCL, and Others

23. The LCO recommends s. 19 of the *Act* be amended to specifically require notice of an action to the Office of Public Guardian and Trustee, the Office of the Children’s Lawyer or any other statutory agency where there is a reasonable possibility that some class members are represented by such an agency. In these circumstances, the OPGT, OCL or others should be given notice of the proceedings as early as possible.

Chapter Eight



SETTLEMENT DISTRIBUTIONS AND CLASS ACTION OUTCOMES

A. Introduction

The previous chapter addressed issues regarding settlement approval. In this chapter, the LCO will consider processes for settlement distributions and reporting on class action outcomes.

The link between class actions, distributions, and access to justice was recognized at the time of enactment of the *Class Proceedings Act*. Similarly, in a broad and progressive view of access to justice, the Supreme Court of Canada's Honorable Cromwell J. held in *Fischer* that class actions must provide access to substantive outcomes.²⁵⁷

Lack of compensation to class members is one of the most common and trenchant criticisms of class actions. Some class members (and some members of the public) believe that class actions operate to benefit class counsel, not class members. Many class action defence lawyers echo these views, stating that access to justice is hindered by class actions in which there is minimal compensation paid to class members.²⁵⁸ Conversely, plaintiff counsel state that class actions have had considerable success in compensating class members.²⁵⁹

These are not idle debates. The success of both an individual class action and the class action model generally is frequently evaluated through the lens of settlement distributions. Settlement distributions are thus a significant focus of attention for class members, counsel, courts, and justice system policymakers.

As in other areas of class action law and policy, the analysis of settlement distributions in Canada has generally suffered due to a lack of empirical information and transparency about settlement outcomes. Fortunately, research on settlements (including the crucial issue of take up rates) is evolving. Recent research from the Class Action Lab at the University of Montreal presents an optimistic, and nuanced, picture.

The LCO's starting point for its review of settlement distributions and class action outcomes is an acknowledgement that the context and practice of settlement distributions has changed dramatically since the *CPA* was first introduced.

Courts (and counsel) in Ontario are faced with a myriad of settlement distributions complexities and issues that could not have been foreseen 30 years ago, including an infinite range of potential class members; complex notice requirements and strategies; new claims assessment and verification procedures; new technology-based distribution procedures; *cy près* distributions; claims administrators; and multijurisdictional settlements. The question for the LCO is whether the *Act* and/or associated rules and practices need to be updated in light of the vast array and sophistication of contemporary class action settlements.

Compensation is an important objective of class actions; settlement distribution is the means by which this objective is fulfilled.²⁶⁰ As a result, settlement distribution cannot be a rote or summary afterthought. It must be a comprehensive feature of class action litigation and class settlements.

Courts should determine the fairness and reasonableness of settlement once the parties have presented a workable administrative plan that is efficient and manageable. Judges should be provided with adequate information in order to rigorously scrutinize all aspects of distribution plans and schemes. Once the settlement has been approved and is being administered, courts should not hesitate to impose obligations on counsel, and notably reporting obligations involving participation rates.

Finally, empirical data and outcome information are important priorities for both the justice system and class action law and policy. As a result, this chapter devotes considerable attention to the reforms we believe are necessary, such as outcome reports, to improve data collection and support evidence-based policymaking in class actions. In order to be effective, experience suggests that outcome reports should be mandatory, comprehensive, easy to administer, neutral and transparent. Experience also suggests that courts and rules should create incentives for parties to participate.

The LCO believes that the effect of these recommendations will be to:

- Promote more active and effective judicial monitoring of the progress and implementation of settlement distributions;
- Improve the content, form and publication of class action notices;
- Promote more consistent, and consistently effective, settlement distribution;
- Promote more transparency and accountability in settlement distributions; and,
- Help distributions to proceed as quickly and efficiently as possible.

The LCO believes these strategies are a first and necessary step to longer-term evaluations of the quality, and thus effectiveness, of class actions.

B. The CPA

The *Act* includes detailed provisions regarding some aspects of settlement distributions. For example, sections 24-26 set out the court's authority to approve and direct distributions. Sections 17-22 include provisions respecting notice of settlements (among other issues).

Given the importance of settlement distributions, it is worth noting what *is not* included in the *Act*. The statute provides little guidance to judges as to how to assess settlements or what issues they are required to consider.²⁶¹ Nor does the *Act* include specific provisions regarding *cy près* distributions, the regulation or oversight of claims administrators, or detailed reporting and monitoring processes.

1. Court's Authority to Approve and Direct Distributions

Section 26 of the *CPA* authorizes the court to direct any means of distribution of amounts awarded whether there is an aggregate assessment (s. 24) or an individual issues trial (s. 25). Section 26 contains considerable detail, but it does not explicitly identify what criteria courts should use when evaluating a proposed settlement. Rather, the section simply provides that courts direct any means of distribution that they consider "appropriate." Importantly, there is no explicit direction in the *CPA* describing the frequency or mandatory nature of reporting requirements.

2. Notice

The *CPA* includes several provisions respecting notice, including sections 17-22 and 29(4).

Section 17 is the key provision. This section gives courts considerable flexibility in approving the content, form and publication of notices. Section 17(6) sets out the information to be contained in the notice. This information includes:

- A description of the proceeding;
- Information regarding how class members can opt out;
- A description of the "possible financial consequences" of the proceeding to class members;
- A summary of fee arrangements;
- A statement that the judgement will bind all class members; and,
- The manner in which class members may participate in the proceeding.

Section 17(4) states that the Court may order that notice may be given personally; by mail, posting, advertising or “leafletting”; or by any means “that the court considers appropriate.”

3. Judicial Interpretations

Absent statutory standards, a considerable body of case law has developed to guide the court’s decision-making on settlement distributions. Courts have held, for example, that courts should have “ample discretion and ample scope for creativity in employing s. 26.”²⁶² Similarly, it has been held that a plan of distribution will be considered appropriate “if in all the circumstances, the plan of distribution is fair, reasonable, and in the best interests of the class.”²⁶³ It has also been recognized that the Court has an ongoing duty to supervise the implementation of settlement and ensure that the interests of class members are continuously protected.²⁶⁴

Ontario courts have emphasised that access to justice should be achieved by “effectively awarding” the available compensation to the class members. According to Justice Perell in *Eidoo*,

26 [...] ideally or optimally, if the access to justice goals of the Class Proceedings Act, 1992 and other class action statutes across the country are to be achieved, the judgment or the settlement funds should be distributed to the class members and not be refunded to the defendant or distributed cy près, which achieves behaviour modification but not access to justice for individual class members. A fundamental policy factor underlying class action statutes across the country is the goal that class members should have access to justice and defendants should not get away with perpetrating small harms to many victims who as individuals would not sensibly incur the costs and risks of litigating for their individual claims. In other words, the ideal distribution scheme for a class action gets the compensation into the hands of the class members.

*27 Ironically, achieving this goal can be frustrated by class members not taking up the recovery available to them. The practical realities of human nature are such that historically, take up rates of class action settlements have been poor where the amounts to be distributed to individual class members are small.*²⁶⁵

Courts have held that the distribution plan must be “capable of being supervised by the court”, which involves the presence of a workable claims process and adequate resources to supervise the settlement.²⁶⁶ Similarly, courts have held that they will refuse to approve a settlement that “curtails [the court’s] ability to evaluate the administration and performance of the administration; [to] adjudicate claims for legal fees by class counsel; or [to] effect changes to ensure that the benefits promised under the settlement are being delivered.”²⁶⁷

Courts have sought to determine whether the process used to develop the distribution protocol was thorough, and whether class counsel “took great care to apprise themselves of the merits of all claims, and to design a distribution which was fair and reasonable in light of that information.”²⁶⁸ Courts have stressed that distribution plans should aim to “promote the distribution of funds to the people who suffered actual loss.”²⁶⁹

C. Analysis

The LCO’s research and consultations revealed several challenges, issues and opportunities for improving settlement distributions.

1. Settlement Distribution Plan

The court’s task of evaluating and overseeing a distribution plan is inherently difficult. Distribution schemes are eclectic and may provide an infinite variety of provisions and specifications. Judicial oversight of distribution plans is individualized and specific to each judge and case.

The idea that a judge must assess a proposed settlement (including a distribution plan) in an adversarial void was introduced in Chapter 7. In addition to an adversarial void, there is also an *informational* void: courts typically do not have access to empirical information or independent research that could be used to assess and compare proposed distribution plans. As a result, the evaluation of proposed distribution plans often relies on the personal experience and opinion of counsel and courts. The adversarial and informational void make it difficult for a court to assess what is in the best interest of the class members and whether or how class members will benefit.

The LCO believes there are several ways to address this adversarial and informational void at the settlement distribution approval stage. These reforms are based on comparative research, best practices that have been developed over the years, and the LCO's consultations.

First, LCO recommends the adoption of a Practice Direction for settlement distribution for class actions. Practice directions for settlement distribution plans are used commonly in the United States. One notable example is the Northern District of California's Procedural Guidance for Class Action Settlements (the "Guidance").²⁷⁰

The Guidance is a detailed six page list governing the information that has to be provided at the motion for both preliminary and final approval of the settlement. At the preliminary approval stage, the Guidance states that the motion for approval should include information about:

- The settlement;
- Settlement administration;
- Notice;
- Opt Outs;
- Objections;
- Attorney Fees;
- Incentive Awards;
- Cy Près Awards;
- Compliance with the *Class Actions Fairness Act*; and
- The past distribution history of class counsel.²⁷¹

The Guidance requires considerable detail in each of these areas. For example, the Guidance includes a requirement that parties state the proposed allocation plan for the fund,²⁷² as well as "the anticipated class recovery under the settlement, the potential class recovery if plaintiffs had fully prevailed on each of their claims, and an explanation of the factors bearing on the amount of the compromise."²⁷³

The Guidance also includes a requirement that parties provide an estimate of "the number and/or percentage of class members who are expected to submit a claim in light of the experience of the selected claims administrator and/or counsel from other recent settlements of similar cases, the identity of the examples used for the estimate, and the reason for the selection of those examples."²⁷⁴

Further, class counsel are required to consider ways to increase notice to class members, which may include:

*identification of potential class members through third-party data sources; use of social media to provide notice to class members; hiring a marketing specialist; providing a settlement website that estimates claim amounts for each specific class member and updating the website periodically to provide accurate claim amounts based on the number of participating class members; and distributions to class members via direct deposit.*²⁷⁵

Finally, the Guidance specifies that "failure to address" the issues in the Guidance "may result in delay or denial of settlement approval".²⁷⁶

The LCO does not recommend the wholesale adoption of the Guidance in Ontario. This model, while comprehensive, overreaches in several respects. Moreover, it is important that any Practice Direction in Ontario that reflects Canadian best practices on settlement distributions.

The Practice Direction proposed by the LCO would include the following provisions:

- First, it would specify that in order for a distribution plan to be approved by the court, the parties should present evidence at the time of settlement approval addressing how the settlement will be administered, supervised and monitored. This evidence should include the following information:
 - Proposed allocation plan for the settlement distribution;
 - Proposed distribution plan for notice, including details about the expected reach rate of such notice;
 - Supervision and monitoring of claims by a third party administrator or otherwise;
 - Anticipated take-up rates; and,
 - Estimated number of objectors and nature of objections.
- Second, the Practice Direction should not be optional. As a result, the LCO recommends that the Practice Direction should specify that parties be required to comply with the Practice Direction as part of their proposed settlement distribution plan.
- Third, the Practice Direction should specify that parties have an obligation to promote efficient and effective distributions. More specifically, the LCO recommends that defendants have a positive obligation and responsibility to collaborate in providing any relevant information that would help to facilitate settlement administration.
- Fourth, the Practice Direction should specify that monitoring and reporting on distributions is an ongoing obligation of the court and parties.
- Finally, the Practice Direction should be updated as necessary to continually identify issues and best practices that promote fair, reasonable, manageable and cost-effective distribution plans.

2. Notice

The significance of notice from an access to justice perspective cannot be underestimated. Simply stated, access to justice for class members depends on effective notice. As Professor Kalajdzic writes:

*Notice is key for several reasons: First, notice to the class of a proposed settlement is a necessary precondition both to the ability to object to the terms of the settlement and to make a claim for a class member's share of the settlement fund. Moreover, an approved settlement has res judicata effect and prevents class members – whether or not they participated in the claims process or even knew about the action – from bringing subsequent actions against the defendants with respect to the same legal dispute.*²⁷⁷

Experience and research demonstrate that unclear and inaccessible class action notices have the potential to lead to low take up rates.²⁷⁸ LCO research and consultations also suggest that the extent, quality and effectiveness of notices can vary tremendously.

Class actions notice expert Todd Hilsee sums up this issue when he states:

*We must reach those people who have a right to choose how their claims are disposed – the class members – through better notice and simpler claims processes.*²⁷⁹

Hilsee suggests that given the flexibility found in the CPA, “additional communications guidance” would help Canadian courts reach members better and more efficaciously.²⁸⁰

Fortunately, in recent years there has been considerable academic research and practical experience in improving the content, form and distribution of notices. The US Federal Judicial Center (FJC) Class Action Notice and Claims Process Checklist is a good illustration of this work.²⁸¹ The FJC Checklist includes practical guidance and questions addressing issues including but not limited to:

Questions:

- Will the notice effectively reach the class?
- Will the notice come to the attention of the class?
- Are the notices informative and easy to understand?

Practical Guidance:

- The form and management of notice before certification and upon preliminary settlement approval;
- Advice for “best practicable” notice plan from a “qualified professional”;
- The design and language of notices;
- Demographic and geographic considerations; and
- Publication and advertising of notices.

As part of this work, the FJC has also developed publication notices to be used as precedents in different types of class actions.²⁸² These precedents even include drafts of language to be included on the envelopes of mailings sent to class members.²⁸³

A similar effort was undertaken by Option consommateurs, a Québec consumer group.²⁸⁴ Like the FJC study before it, the Québec study concluded that notices to class members could be significantly improved through the use of plain language, better design, and more sophisticated use of technology to improve the distribution, understanding, and effectiveness of class action notices.

Stakeholders consulted by the LCO widely confirmed the importance of effective and accessible notices to the success of class actions generally and in specific cases. Stakeholders also reiterated the importance of customizing notices for specific cases and for specific class members. Finally, stakeholders identified many best practices.²⁸⁵

Over the course of our project, the LCO became aware of many comprehensive, positive examples of sophisticated notice programs for class action settlements in Ontario. These programs often included extensive media campaigns, benefited from the advice or assistance of community organizations supporting class members, and/or the use of class action notice experts. These programs also universally developed dedicated websites to announce developments, make resources available, and identify claims procedures. The LCO is also aware of examples of practices that promote innovative, cost-effective, distribution processes that rely on social science and marketing research to improve distributions.²⁸⁶

Given the importance of notice to successful distribution plans, the LCO believes the *CPA* should be amended to promote these reforms. These amendments should include:

- Amending s. 17 of *CPA* to include a plain language requirement, perhaps modeled on precedent in s. 23(c)(2) of the US Federal Rules of Civil Procedure, which states that the information in the notice “must be clearly and concisely state[d] in plain, easily understood language.”
- Including a requirement that the court be required to order the “best notice practicable.”
- Updating s. 17(4) of the *Act* to provide for publication using digital technology, including but not limited to websites.

The proposed settlement distribution Practice Direction, discussed above, should include best practice guidance on notice issues as well.

3. Claims Administrators

Claims administrators are third-party entities appointed by the court to manage the settlement distribution process. There are several such firms operating in Ontario and across Canada. A claims administrator's potential work includes distributing notices to class members, reviewing claims forms, approving or denying claims, and providing distributions to class members.

The role of the administrator is crucial. Administrators are increasingly used in complex settlements in order to maximize distributions and lower transactional costs. One commentator advised the LCO that claims administrators, as much as any other person or organization, can facilitate or frustrate access to justice for class members.

The growth in number and importance of claims administrators could not have been foreseen by the drafters of the *CPA*. As a result, the *Act* is silent on their role and duties in class action litigation.

The LCO was advised that settlement implementation and claims administrators practices are inconsistent, but improving. Claims administration, and administrators, have developed many best practices that improve distributions and reduce administrative costs.²⁸⁷

Notwithstanding these developments, several questions and issues remain outstanding. The LCO was advised, for example, that in some cases involving vulnerable group members, claims administrators are sometimes hard to reach, even inaccessible. The LCO also heard that judges could benefit from more information to compare claims administration and administrators. Others have indicated there is sometimes pressure to reduce the cost of administration to the detriment of class members.²⁸⁸

Finally, there are outstanding legal questions about the duty of care for claims administrators, and to whom they are owed. This issue is highlighted in a recent decision of the Alberta Court of Appeal that considered what obligations a class action settlement administrator has when evaluating an individual class member's claim.²⁸⁹

For all these reasons the LCO concludes that the *CPA* should acknowledge the contemporary role and duties of claims administrators. Most significantly, the LCO believes that there should be more consistency and transparency of the administrator's role. Part of the solution, of course, will be addressed in our Practice Direction recommendations regarding notices, claims form design, publication and distribution. In addition to these requirements, we believe that the *Act* should be amended to include the following specific statutory provisions:

- The authority of the court to appoint a claims administrator upon the recommendation of the parties; and,
- That claims administrators have a duty of competence and diligence.²⁹⁰

The LCO further believes that courts should use their discretionary powers to ensure that the most appropriate claims administrator is appointed, taking into consideration the administrator's skill, experience, cost and knowledge of the anticipated participating class members. The goal should be to promote the most effective participation and distribution in the most cost-effective manner.²⁹¹ Courts and administrators should be particularly mindful of the unique needs of class members in each case and tailor their approach appropriately.

Finally, the LCO recommends that claims administrators submit reports as part of the final approval/reporting on every class action distribution. The purpose of a claims administrator report is two-fold: to assess the distribution in individual cases and to allow courts and counsel to evaluate the administrator's performance.

4. *Cy Près* Distributions

The OLRC stated that the purpose of a *cy près* distribution is to provide a benefit that "approaches as nearly as possible some form of recompense for injured class members."²⁹² Accordingly, where an aggregate settlement recovery is not distributable economically to class members individually, courts may approve *cy près* distributions to credible organizations or institutions that will benefit class members.²⁹³

The LCO believes *cy près* distributions are legitimate for two reasons: they provide an indirect benefit to class members,²⁹⁴ and they promote behaviour modification by ensuring wrongdoers disgorge ill-gotten gains or otherwise internalize the costs of their misconduct.

The CPA currently does not explicitly allow for *cy près* payments, though judges have interpreted sections 24 and 26 to confer jurisdiction to make such payments.

The LCO recommends *cy près* distributions be given an explicit foundation in the Act. These provisions should set out the threshold test for when *cy près* distributions are to be approved, namely, when it is not practical or possible to compensate class members directly, using best but reasonable efforts. The CPA should also stipulate that judges must approve the recipient of the funds keeping in mind any indirect benefits to the class and the behaviour modification goal of the Act.

D. Class Action Outcomes and Reporting

1. Why Empirical Data and Outcome Reporting?

As discussed repeatedly in this report, transparency and empirical data collection should be improved in class actions.²⁹⁵ As a result, it is not surprising that the LCO believes the CPA should be amended to promote better data collection, evidence-based policy-making, transparency, and “open data.”

LCO consultations suggest there is a wide and deep consensus amongst stakeholders on the need for improved data collection and outcome reporting. For example, the plaintiff side law firm Siskinds told us that without adequate empirical data regarding settlement outcomes, we are unable to “assess the effectiveness of current notice and distribution plans.”²⁹⁶

Although there is no systemic reporting of class action outcomes in Ontario, there are several precedents for the LCO to consider.

For example, in Québec there have been recent amendments to the Rules of the Superior Court of Québec in Civil Matters requiring class action distributions to be reported back to the court at the conclusion of every class action case.²⁹⁷ In practice, the Québec court remains seized of the matter until it issues a “jugement de clôture” or closing judgment.

In the U.S., the United States House of Representatives passed a bill in 2017 calling for class action lawyers to submit an accounting of payouts in every case to the Federal Judicial Center and the Administrative Office of the U.S. Courts.²⁹⁸ The Bill did not advance to the Senate before the new Congress was elected in November 2018.

Similarly, the Northern California Guidance, discussed above, contains very detailed empirical requirements. Motions for final approval must disclose data on submitted claims, undeliverable class notices, opt-outs and objectors.²⁹⁹ The Guidance also includes detailed specifications regarding the filing of a Post-Distribution Accounting, which is required to be submitted in an “easy-to-read chart that allows for quick comparison with other cases.” The Post-Distribution Accounting is required to be posted on the settlement website.³⁰⁰

2. What Should Be Reported and When?

Needless to say, outcome reporting requirements can be wide or narrow. The Québec and American examples above provide helpful examples of the kinds of information that should be included in class action outcome reports.

Generally speaking, the LCO believes that class actions outcome reports should provide a high-level, summary “snapshot” of the case outcome. More specifically, outcome reports should include information respecting:

- Amount of the settlement fund and funds paid out;
- Number and description of class members;

- Notice issues, including the form of notice, number of notices sent;
- Participation rate, including the number and percentage of claim forms submitted;
- Payment methods;
- Distribution rate, including “take-up” rate;
- Average, median and range of recoveries per claimant;
- Number of opt-outs and objections;
- Behaviour modification outcomes;
- Counsel fees and costs;
- Cy près distributions;
- Administrative costs; and
- Amounts paid to the Class Proceedings Fund or other litigation funders.

The report should also include summary descriptions of important issues that may have affected the distributions or the overall outcome of the case.

The outcome report should be submitted to the court for approval no later than 60 days after the end of the distribution period.

3. Take-up Rates

One of the most important features of our outcome report proposal is the requirement that parties report on “take-up” rates. Take-up rates have been defined as “the number of class members who file a claim for recovery and are compensated pursuant to a class action settlement or judgment divided by the total number of class members estimated or confirmed”.³⁰¹

The Ontario Court of Appeal has stated that take up rates reflect “the actual benefit to the class” and are an “appropriate measure of the results achieved”.³⁰²

The definition and reporting of take-up rates are controversial. Take-up rates are often a lightning rod for criticism of class actions (and plaintiff firms) if and when the take-up rate in an individual case appears to modest compared to class counsel fees.³⁰³ As a result, plaintiff firms are often concerned about the potential for take-up rates to be misunderstood and/or misinterpreted to justify criticism of class actions and/or specific firms.

The LCO’s view, shared by many, is that take-up rates are an important measure of satisfactory outcomes.³⁰⁴ That said, the definition of take-up rates is a complex undertaking. Should take-up rates be measured against the estimate of the class size at time of certification? Or against the class as described in the statement of claim? Or against a firmer number as may only be determined at the final settlement approval stage?

In the LCO’s view, these are manageable challenges.

From a public administration perspective, the arguments for or against measuring take-up rates raise familiar arguments and concerns. The LCO considered these issues at length in an April 2016 forum titled “Big Data in the Justice System”, which assessed issues of transparency, accountability, and “big data” for government, courts, and tribunals in Ontario.

The LCO’s starting assumption is that that we cannot condone or support *not* collecting and distributing statistical measures of class action outcomes due to a concern about public misunderstanding of statistics or the potential for reputational harm.

We further believe that the answer to the question of “which take-up rate to measure?” is not binary. A better approach, consistent with “big data” best practices, is to report and explain actual or estimated take-up rates and other measures at several milestones in the litigation, including certification, settlement approval and final reporting.

It is also important to remember that take-up rates are not the only measure of success in class actions. Outcome reports

must also include average and median compensation rates, reach rates, participation rates, and behaviour modification as alternative and supporting evidence of class action outcomes and settlement distributions.

The LCO is confident that a comprehensive approach to outcome reporting and data collection will provide a more textured picture of settlement distributions and class action outcomes generally. In this manner, counsel, courts, administrators, researchers and policy makers will gain insights into how to manage distributions most effectively for class members. This approach will allow class action stakeholders to learn important lessons about the success of different approaches and practices relative to different cases.

4. Are Class Actions Successful?

Even if we agree on a definition take-up rates, there remains the complex question of determining what percentage of take up is sufficient to judge a class action to be “successful.” Professor Piché has written that

*[d]etermining the value and success of class actions requires focusing on what the optimal class action might be, in light of its underlying objectives... [There is access to compensation] when a substantial majority of the class members receive monetary relief, even if minimal.*³⁰⁵

The Canadian research on take-up rates is evolving. Professor Kalajdzic’s early research suggested that take-up rates could vary tremendously in Ontario from less than 1% to 100%.³⁰⁶ Later research, from the Class Action Lab at the University of Montreal, presents a more optimistic, and nuanced, picture.³⁰⁷ This research suggests class members receive more compensation – and class actions are more successful – than is often suggested.

The project’s preliminary findings include several important conclusions, at least with respect to class actions in Québec:

- Generally speaking, take-up rates were “much more impressive than those that had been found before and suggested by the overall literature and media”;³⁰⁸
- The “most important conclusion... is that while take-up rates vary tremendously between the case files studied, class actions do compensate Québec citizens.”;³⁰⁹
- High take-up rates “are reached when a series of favorable factors in the action are found to be present. In the majority of the files for which take-up rates exceeded 75%, class members tended to already be identified or to be readily identifiable... compensation is improved in instances where class members are simple to trace and reach, which is mainly the case in the consumer protection cases. Otherwise, higher take-up rates will generally be reached when the parties have made significant efforts to trace and notify class members.”³¹⁰
- “Review of the physical files and the correspondence available within them allowed us to realize that the judge’s close involvement in the process decisively and positively influences the success of the class action by enhancing distributions.”³¹¹

5. Filing and Central Repository for Outcome Reports

The LCO believes that the outcome reports described in this report must be filed with the court in each specific case. It would also be helpful if they were forwarded and posted in some form of public repository or clearinghouse, similar to the Canadian Bar Association’s class action database.³¹² The “host” of this repository could potentially be the Superior Court of Ontario, the Canadian Bar Association or a faculty of law with a specialized interest in class actions. The LCO recommends that interested parties come together to develop this repository.

6. Court Statistics and Data Collection

Court statistics are distinct from the outcome reports described above. Outcome reports describe the outcomes of individual cases. Court statistics describe the experience with class actions systemically.

The LCO's experience trying to collect court statistics on class actions in Ontario was described in Chapter 2 and **Appendix D**

In an ideal world, the Ministry of the Attorney General's electronic court information systems would collect and aggregate a broad range of class action-related statistics and information, including information regarding:

- The date a class action was filed;
- A summary of the type of class action or area of law;
- The dates and summary descriptive information of major events in class action litigation, including:
 - Case management conferences
 - Carriage motions
 - Certification motions
 - Settlement proceedings
 - Trials
 - Appeals
- Names of counsel and judges;
- Case resolution information, including dates and type of resolution (settlement, trial, dismissal, withdrawal, decertification, etc);
- Key documents, including pleadings, court orders and outcome reports;
- Information about related proceedings, including multijurisdictional proceedings.

This kind of robust court information system does not exist at present, nor is it likely to in the near future.

Fortunately, improved court statistics and data collection does not depend on the development of new court information systems. Nor should policy-makers (or the public) wait if there are practical, constructive steps that could be taken in the meantime.

To this end, the LCO is developing a prototype class action data collection instrument that it will release once it is completed. This instrument is designed to collect most of the information described above. This is an important first step in the process of significantly improving data collection and court statistics of class actions in Ontario.

In the long term, the responsibility for court statistics and data collection ultimately belongs to the Ministry of the Attorney General. In the interim, however, there are organizations who might have an interest in facilitating better data collection on class actions, including the organizations such as the Canadian Bar Association or a faculty of law with a specialized interest in class actions. The LCO is committed to working with the Ministry and appropriate stakeholders to develop an updated class action court statistics and data collection instrument.

Recommendations

Practice Direction - Settlement Distributions

24. The LCO recommends the dedicated class action Practice Direction recommended earlier in this report include detailed provisions regarding best practices for proposed settlement distributions. This Direction should be developed in consultation with appropriate stakeholders and be consistent with the analysis and findings in this report. The LCO further recommends that courts be given the discretion to delay or deny a proposed settlement in the event it does not comply with the Practice Direction.
25. The Practice Direction should include detailed requirements regarding evidence to be presented to the court when approving distribution plans, including how the settlement will be administered, supervised and monitored, including:
- Proposed allocation plan for the settlement distributions;
 - Proposed distribution plan for notice, including details about the expected reach rate of such notice and projected supervision and monitoring of claims by a third party administrator or otherwise;
 - Anticipated and actual take-up rates, reach rates, and rejected claims; and,
 - Estimated number of objectors and nature of objections.

Notice

26. The LCO recommends amending s. 17 of the *Act* to include a plain language requirement and a requirement that the court be required to order the “best notice practicable.”
27. The LCO recommends amending s. 17(4) of the *Act* to provide for publication using digital technology, including but not limited to websites.

Claims Administrators

28. The LCO recommends provisions be added to the *Act* confirming the authority of the court to appoint a claims administrator upon the recommendation of the parties. The *Act* should further specify that claims administrators have a duty of competence and diligence.

Cy Près

29. The LCO recommends provisions be added to the *Act* confirming the authority of the court to order *cy près* distributions. The *Act* should state that *cy près* distributions should be approved when it is not practical or possible to compensate class members directly, using best but reasonable efforts. The *CPA* should also stipulate that judges must approve the recipient of the funds keeping in mind any indirect benefits to the class and the behaviour modification goal of the *Act*.

Recommendations (cont'd)

Final Settlement Approval/Reporting

30. The LCO recommends the *Act* be amended to require that parties file an outcome report with the court and all parties no later than 60 days after the end of the distribution period. This report should include the following information:

- Amount of the total settlement fund;
- Number of notices sent to class members as compared to the total number of class members;
- Participation rate (number and percentage of claim forms submitted);
- Distributions including “take-up” rates (number of persons paid as compared to number of class members) and amounts of *cy près* distributions;
- Opt-outs and objections;
- Average, median, largest, and smallest recovery per claimant;
- Notice and payment methods;
- Administrative costs;
- Counsel fees and costs; and,
- Amounts paid to the Class Proceedings Fund or other litigation funders.

Central Repository for Outcome Reports

31. The LCO recommends that interested parties come together to develop a central repository of class action outcome reports.

Court Statistics

32. The LCO recommends that the Ministry of the Attorney General work with appropriate stakeholders to develop an updated class action court statistics and data collection instrument.

Chapter Nine

FEE APPROVAL

A. Introduction

Class counsel fees are one of the most controversial areas of class actions law and policy. A frequent criticism of class actions is that plaintiff counsel often appear to earn millions in counsel fees while individual class members receive comparatively little. This criticism is becoming more frequent in court decisions as well.³¹³ This situation can generate considerable cynicism and public distrust of class actions, plaintiff counsel and the justice system generally.

Over-compensation of lawyers has obvious access to justice implications in that it can result in under-compensation of class members. It also breeds cynicism about the civil justice system, and class actions in particular. Finally, as one stakeholder submitted, fees that are disproportionate to the results obtained may create improper incentives for plaintiffs' counsel to pursue cases with little merit.³¹⁴

Public criticism of counsel fees notwithstanding, it can be easy to overlook the importance of counsel fees to access to justice in class actions. As we noted in our Consultation Paper,

...[it] is important to remember that the disparity between lawyers' remuneration and individual class members' recovery is an inevitable and structural feature of class action litigation: plaintiff lawyers are paid to represent a large group of people, each of whom contributes to their fees. Moreover, contingency fees are designed to ensure plaintiffs' lawyers are remunerated appropriately for assuming the financial risk of taking on a big case that may be unsuccessful.

Public cynicism about plaintiff counsel fees can overshadow the fact that courts in Ontario (and throughout Canada) must approve fees. Courts are required to consider class members, compensation, counsel fees, the proper functioning of class actions generally, and access to justice. Plaintiff counsel fees are directly related to access to justice: If fees are set too low, counsel may not pursue claims in the future, a result that could decrease access to justice. On the other hand, if fees are set too high, plaintiff counsel will receive some of the benefit that should have gone to class members, which may decrease access to justice.

Incentives are thus extremely relevant to this discussion. Ontario courts have stated that fair and reasonable compensation must be "sufficient to provide a real economic incentive to lawyers to take on a class proceeding and to do it well." Accordingly, counsel should be entitled to a fee that is "fair" and might include a premium for the risk undertaken and the result achieved. The fees, however, "must not bring about a settlement that is in the interests of the lawyers, but not in the best interests of the class members as a whole."³¹⁵

It is also important to remember that counsel fees are by no means guaranteed in every class action. Not every class action is certified. Nor is every class action settled or successful on the merits. The economic model of class action financing also requires plaintiff firms to advance significant sums over the course of many years before their fees are collected in a settlement, following a trial or at the end of an appeal. Recent court decisions have also created a sense of uncertainty on counsel fees, at least from many plaintiff firm's perspective.³¹⁶ These factors must be taken into account when considering an appropriate legislative or common law regime governing counsel fees.

It is not the LCO's intention nor mandate to comment upon individual cases or fee awards. Our purpose in this chapter is to assess whether or not the Act needs to be amended in light of Ontario's contemporary experience with class actions.

Counsel fees, like settlements, must be judicially approved and for the same reason: there is a risk that counsel will prefer their own financial interests over the interests of absent class members, and judges must, therefore, scrutinize the fee request closely to protect the interests of the class.³¹⁷ The need for protection exists regardless of the structure of the settlement or the manner in which the fee is calculated. The aim is to ensure that class counsel have continuing incentives to take on class proceedings,³¹⁸ but are not overcompensated to the detriment of class members:

*The suggested compensation may or may not be fair and reasonable, depending upon the outcome of the litigation in light of the difficulty of the case, as well as the time and expenses incurred. Counsel should be well rewarded if the litigation is successful, for assuming the risk and costs of the litigation. The compensation however should not be a windfall resembling a lottery win.*³¹⁹

The LCO's analysis and reforms for counsel fees try to balance these complex variables. The analysis is strongly influenced by the need – expressed frequently in this report – to provide courts with the appropriate tools to fulfill contemporary priorities regarding the transparency and outcomes of complex litigation.

As a starting point, the LCO believes counsel fees must continue to be scrutinized on a case by case basis. As a result, the LCO rejects the adoption of a presumptive percentage or contingency fee in class actions.

Further, the LCO believes the main factors to be considered in awarding counsel fees should be the results achieved for the class and the risks undertaken by counsel. The interpretation of these factors must be clarified, however, to include a more realistic analysis of risks and results.

Finally, the LCO believes that courts should be given statutory authority to evaluate and adjust fees in appropriate circumstances.

LCO recommendations in this area include:

- That the *Act* be amended to specify that counsel fees must be fair and reasonable and approved by the court, regardless of the method of calculation or the source of the payment;
- That the *Act* be amended to specify that the court consider the results achieved for the class and the degree of responsibility assumed by class counsel when considering whether a proposed fee is fair and reasonable. For the purpose of this analysis, the evaluation of “risk” should include consideration of the risk of denial of certification, the risk of losing at trial, and the existence (or not) of reports, investigations, initiatives, litigation, or external litigation funding that may be relevant to the degree of risk assumed by counsel;
- That the *Act* be amended to give the court authority to appoint an *amicus curiae* to assist the court considering fee approvals;
- That the *Act* be amended to give the court the discretion to adjust counsel fees to ensure counsel fees bear an appropriate relationship to results achieved; and,
- That the *Act* be amended to give courts the authority to hold back a small percentage of counsel fees pending the final outcome of the case.

B. The CPA

Fee approval is currently governed by sections 32 and 33 of the *CPA*. Under s. 32(1), a fee agreement between a lawyer and a representative party must be in writing and state the terms under which fees and disbursements shall be paid. The court must approve the agreement if it is to be enforceable, at which point it becomes a first charge on any settlement funds or monetary award.³²⁰ If the court does not approve the agreement, it may determine the appropriate quantum of fees or direct a reference.

Section 33 of the *Act* addresses a particular type of fee agreement, the contingency fee. At the time the *Act* was passed, contingency fees were unlawful in Ontario. The prohibition against contingency fees, grounded largely in the law of champerty, was liberalized first in class proceedings on the basis that the procedure would not be viable without such fees.³²¹ Because contingency fees were a novelty at the time, it was necessary to include specific provisions in the *Act* regarding the process for obtaining such a fee. Now, of course, contingency fees are permitted in virtually all civil litigation matters.³²²

Importantly, the *Act* does not specify the criteria to determine a reasonable fee. While s. 33(8) speaks to a “reasonable fee”, it provides no criteria relevant to the court’s determination. Section 32 does not refer to the requirement of reasonableness at all. Nevertheless, courts have fashioned a test for the determination of counsel fees and made clear that judicial approval is required, whatever the method of calculating them. A judge, therefore, has the final word on what is reasonable compensation for class counsel, whatever the method of calculating the fee or its source.

While many factors have been cited regularly by courts as relevant to the determination of a fair and reasonable fee,³²³ there appears to be agreement that the two most important considerations are 1) the risks undertaken by class counsel, and 2) the success achieved on behalf of the class. There is also judicial support for class counsel’s preferred method of calculating the fee – the percentage of recovery approach – on the basis that it encourages counsel to maximize class compensation and discourages inefficiency.³²⁴

In addition, there is a line of cases that departs from the approach developed in the first two decades of jurisprudence. According to these cases, there should be a presumption that any fee arrangement that gives class counsel 33% or less of the total settlement fund is to be approved, eschewing an examination of risk or result achieved.³²⁵ Only a few courts have adopted the presumptively valid 33 % rule. The original proponent of the rule has also tempered his support for the presumption, especially in large settlements.³²⁶

Two separate studies of fees reveal that the average percentage of settlement value is about 22%.³²⁷ One author has found that the average multiplier in fee approval decisions had decreased from 2.48 in a 2007 study to 1.95 in a 2013 study.³²⁸ The LCO was not able to update these studies nor obtain further data on counsel fees.

C. Submissions

The LCO received several submissions addressing counsel fees.

Plaintiffs’ counsel commented that the jurisprudence with respect to fees is not uniform, which impacts access to justice in that lawyers may be less willing to take on cases and to invest in them appropriately. They expressed a strong preference for predictability, such as the presumptive one-third contingency approach.³²⁹ All plaintiffs’ counsel supported the calculation of fees on a percentage of recovery basis, as opposed to using a base fee/multiplier approach. No class counsel explicitly supported the codification of a sliding scale in the *CPA*, stating this approach is not universally appropriate.³³⁰

Other stakeholder groups had less to say about fees. Defence counsel and defendant groups commented that disproportionately high fees detract from public confidence in the administration of justice and recommended modest changes to the statute.³³¹

Many stakeholders interviewed by the LCO agreed that counsel fees should largely depend on the success achieved for the class and that the ultimate distribution of settlements is a key determinant of “success.” Several interviewees suggested that judges should not award all fees until the claims process is concluded.³³²

D. Analysis

The amount paid to class counsel needs to strike a balance between:

- The need to promote access to justice;
- The interests of the class (whose compensation may be reduced in direct proportion to the amount payable to class counsel);
- The interests of plaintiff firms (whose business model depends on appropriate incentives and predictability of fees); and
- The interests of the administration of justice (which cannot be seen as facilitating windfall recoveries).

The LCO agrees that fee awards should generally be consistent and predictable. The economic model of “entrepreneurial” lawyering would be undermined if firms were unable to make reasonable predictions about potential fee revenues. It is also important to promote consistency and fairness between fee awards.

Many plaintiff firms believe that fairness and predictability in counsel fees is best achieved through the adoption of a statutory or common law rule establishing a presumptive percentage or contingency fee in class actions.

The virtue of a presumptive rule is its predictability and transparency, both of which are important objectives. The drawback, of course, is that a presumptive rule has the potential of minimizing court oversight and reducing scrutiny of counsel fees. This scrutiny is essential given that counsel fees, like settlement approvals, are effectively presented to the court in an adversarial void. Heightened judicial scrutiny is also required due to the fact that counsel fees and compensation to class members is often a zero-sum equation: If fees are inappropriately high, class compensation will be inappropriately reduced. For these reasons, the LCO believes that the appropriateness of a fee can only be determined in the context of each case. As a result, the LCO rejects a presumptive contingency fee approach to counsel fees.

This is not to suggest that the Acts current provisions are sufficient. On the contrary, the LCO recommends a more robust statutory regime, including:

1. Fees Must Be Fair and Reasonable

The Act should explicitly state that the overriding principle in determining fees is that any fee payable to counsel by a representative party (almost always class counsel) must be “fair and reasonable” and must be approved by the court, regardless of the method of calculation or the source of the payment.

This principle is fundamental and has been confirmed by courts repeatedly.³³³ The need for court supervision of counsel fees to protect the interests of the class applies no matter how the fee is calculated or paid. An agreement between class counsel and defendants regarding fees must always subject to judicial scrutiny, precisely because of the risk, first expressed in the OLRC Report, of collusive agreements.

2. Factors to Determine “Fair and Reasonable” Fees

At present, courts appear to consider up to ten factors when deciding whether a proposed fee is “fair and reasonable.” These factors include:

- (a) work performed;
- (b) the factual and legal complexities of the matters dealt with;
- (c) the risk undertaken, including the risk that the matter might not be certified;
- (d) the monetary value of the matters in issue;
- (e) the importance of the matter to the class;
- (f) the degree of skill and competence demonstrated by class counsel;

- (g) the results achieved;
- (h) the ability of the class to pay;
- (i) the expectations of the class as to the amount of the fees; and
- (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.³³⁴

This list is lengthy and promotes uncertainty. Many factors are also effectively irrelevant in the context of modern class actions practice. As was the case with carriage motions, the LCO believes there is a clear need for statutory direction to ensure courts and parties are able to focus on the most important factors, and to avoid inconsistent approaches between courts.

The most important factors for courts to consider when determining if the fee payable to counsel is “fair and reasonable” should be the 1) risks undertaken by counsel, and 2) the results achieved for the class.

“Risk” is currently understood to include the risk of losing on certification and on the merits. This is a necessary but incomplete definition of risk in the context of contemporary class action practice. The LCO proposes that the risk calculus explicitly include the following:

- Consideration of third party reports or investigations. Regulatory investigations and/or other non-class action proceedings may yield material that provides substantial evidence of the liability of the defendant. In these circumstances, class counsel may realistically be assuming less economic risk than when they must prove the merits of the case based on their own investigation. It is worth noting that the standard test applied in American fee approval hearings includes a consideration of “the value of benefits attributable to the efforts of class counsel relative to the efforts of other groups, such as government agencies conducting investigations.”³³⁵
- Parallel litigation in another jurisdiction. Parallel proceedings may increase the prospects of settlement in Ontario, thus reducing class counsel’s risk exposure.
- The existence of third party funding. Where a private funder or the Class Proceedings Fund indemnifies the representative plaintiff against costs and provides assistance to counsel for disbursements, class counsel’s economic risk may be reduced.

The LCO believes that these considerations are necessary components of a realistic and contemporary evaluation of “risk.”

Similarly, the court’s evaluation of “results achieved” should be informed by the detailed outcome reporting requirements the LCO recommended in Chapter 8 of this report. As noted earlier, the LCO believes these reports will provide courts, counsel and the public with a consistent, sophisticated and transparent accounting of the “results achieved” within and between class actions. This information is necessary for courts to oversee and approve counsel fee proposals.

The LCO emphasizes that the proposed fee must be evaluated on its own merits on a case-by-case basis. As a result, the mere fact of a parallel regulatory proceeding or third party funding should not, absent a more thoughtful analysis, become a pretext to reduce counsel fees.

Once a fee is approved by the court, the LCO agrees that, pursuant to s. 32 of the *Act*, it should become a first charge on any settlement funds or monetary award.³³⁶

3. Cross Checks

Whatever the proposed method of calculation, the LCO recommends the *Act* be amended explicitly that courts may use alternative methods as a cross-check. For example, if the proposed fee is a percentage of the settlement, the court should consider what the proposed fee represents as a multiplier calculation.

The use of a cross-check is not unprecedented in Ontario. Both C.J. Winkler in *Parsons* and the Court of Appeal in *Gagne* measured the reasonableness of a proposed fee by using different methods of calculation for comparison purposes.³³⁷ Furthermore, use of ‘lodestar cross-check’ is common practice in U.S. jurisdictions.³³⁸ The Federal Judicial Center

also directs judges to “supplement the percentage method with a lodestar cross-check to see if the hourly rate is reasonable”.³³⁹ The cross-check ensures that there is some relationship between the fees paid and the work performed. This is one way to ensure, as the Ontario Court of Appeal noted in *Lavier*, to apply the principle of proportionality so that fees are not “clearly excessive or unduly high in the sense of having little relation to the risk undertaken or the result achieved.”³⁴⁰

4. *Amicus Curiae*

As noted in previous chapters, the LCO believes courts should have the authority to appoint *amicus curiae* in appropriate circumstances to help courts fill the adversarial and information void in settlement approvals. The LCO believes the same considerations should apply in fee approvals. As a result, the LCO recommends the *Act* be amended to give courts the discretion to appoint *amicus* in these circumstances as well.

5. Sliding Scales

As stated bluntly in *Brown*: “Windfalls should be avoided because class action litigation is not a lottery and the *CPA* was not enacted to make lawyers wealthy.”³⁴¹

The LCO agrees and recommends therefore that courts consider adjusting counsel fees as a percentage of the total recovery when the settlement is very large (the so-called sliding scale approach).

As the size of settlements increases, the percentage of the recovery that the class counsel fee represents should not necessarily increase proportionately. At some point, the recovery by counsel ceases to have a rational connection to the effort expended. Even class counsel interviewed by the LCO who are not in favour of a codified sliding scale concede that applying a standard percentage to mega-fund settlements yields amounts that are “objectively excessive”.³⁴²

Various courts have confirmed this principle stating that, “[g]enerally speaking, in very large or megafund settlements, the greater the amount recovered the lower the percentage that will be justified for legal fees.”³⁴³ Courts have adopted this approach on the basis that a reasonable fee should bear an appropriate relationship to the amount recovered.³⁴⁴ Similarly, in the U.S., both the Third Circuit Task Force Report and the Federal Judicial Center Handbook recommend that “as the total recovery increases the percentage allocated to fees should decrease.”³⁴⁵ It is important courts guard against excessive remuneration that results in less compensation for class members.

The LCO recommends a balanced approach: The *CPA* should not be amended to specify a fixed “sliding scale” or contingency fee in megafund settlements (however that may be defined). Counsel fees in very large settlements should be considered on a case-by-case basis with counsel having a full opportunity to make submissions on their proposed fees. As a result, the *Act* should be amended to give courts the explicit authority to adjust counsel fees as a percentage of the total recovery in order to ensure the fee bears an appropriate relationship to the amount recovered.

6. Holdbacks

As noted in Chapter 8, it is important to create incentives for counsel to ensure settlements are as effective as possible. As a result, the *CPA* should be amended to provide courts with the explicit authority to hold back a small percentage of counsel fees pending the final report on the outcome of the settlement. This discretion should be considered on a case-by-case basis with counsel having a full opportunity to make submissions.

Recommendations

Fees Must Be Fair and Reasonable

33. The LCO recommends s. 32 (2) of the *Act* be amended to specify that any fee payable to counsel by a representative party must be fair and reasonable and must be approved by the court, regardless of the method of calculation or the source of the payment.

Cross Checks

34. The LCO recommends that s.32 and 33 of the *Act* be replaced with a provision that specifies that the court may consider the appropriateness of a proposed fee by using different methods of calculation for comparative purposes.

Fee Approval Criteria

35. The LCO recommends the *Act* be amended in a manner to specify that the court consider the results achieved for the class and the degree of responsibility assumed by class counsel (“risk”) when considering whether a proposed fee is fair and reasonable.

36. The LCO recommends the *Act* be amended to specify that for the purpose of this analysis, the evaluation of “risk” by the court should include consideration of the risk of denial of certification, the risk of losing at trial, and the existence (or not) of reports, investigations, initiatives, litigation, or external litigation funding that may be relevant to the degree of risk assumed by counsel.

Amicus Curiae

37. The LCO recommends the *Act* be amended to give the court the discretion to appoint an *amicus curiae* to assist the court in considering fee approvals. The court should have the discretion to determine payment for the *amicus* as the court may deem just.

Proportionality

38. The LCO recommends the *Act* be amended to give the court the discretion to adjust counsel fees as a percentage of the total recovery in order to ensure a reasonable fee bears an appropriate relationship to the results achieved.

Holdbacks

39. The LCO recommends the *Act* be amended to give the court the discretion to hold back a percentage of proposed counsel fees pending a final report on the outcome of the proceeding in appropriate cases.

Chapter Ten

COSTS

A. Introduction

The high cost of legal services and its impact on access to justice has been the focus of attention by governments, judges, scholars and law reform organizations across Canada for decades. The financial risks and burden of litigation have been chronicled in a multitude of recent civil legal needs studies.³⁴⁶ In addition to the high costs associated with a litigant's own lawyers, litigants in Ontario also bear the risk of paying adverse costs to the opposing party. While contingency fees reduce the barriers to obtaining one's own legal services, the presumption that the losing party will pay the successful party some of their legal fees and disbursements represents a significant deterrent to litigation.

Ontario maintains the usual two-way costs rule in class actions, as it does for other civil litigation, and for the same purposes: to compensate successful litigants for some of their costs; to encourage settlements; to discourage frivolous claims and defences; to discourage inappropriate litigation behaviour; and to facilitate access to justice.³⁴⁷ Generally, the same rules and criteria apply. Subsection 131(1) of the *Courts of Justice Act* is incorporated by reference in s. 31 of the *CPA*, and provides that "[s]ubject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid." As a result, all of the factors set out in the jurisprudence as relevant to the determination of costs in litigation generally apply equally to class proceedings.³⁴⁸ In addition to the usual factors considered by courts in determining costs, however, class action judges have the discretion to consider whether the litigation qualifies as a test case, raises a novel issue of law, or represents a matter of public interest, in determining whether to award costs to the successful litigant, and in what amount.³⁴⁹ Importantly, only representative plaintiffs, not the other class members, are liable for adverse costs orders.³⁵⁰ In reality, representative plaintiffs are routinely indemnified by class counsel, the Class Proceedings Fund or a commercial litigation funder against those orders.³⁵¹

The OLRC did not recommend a two-way costs rule on the basis that it would have a chilling effect on meritorious litigation.³⁵² It proposed instead that plaintiffs whose claims were found to be entirely lacking in merit or parties who engaged in vexatious or abusive conduct would be subject to a discretionary adverse costs award. This modified no-costs rule is what the legislatures of British Columbia, Manitoba, Newfoundland and the Federal Court Rules adopted.³⁵³

The Ontario Legislature, however, chose a different approach. The Attorney General's Advisory Committee on Class Action Reform, which directly preceded the enactment of the new statute, concluded that "the existing costs regime should not be completely restructured to accommodate class proceedings. The answer to accessibility is not the removal of all risk of the obligations for costs, rather, the support of worthwhile class proceedings through assistance with disbursements and protection against adverse cost awards."³⁵⁴ Thus, the Committee, and ultimately the Legislature, opted for the creation of the Class Proceedings Fund and the special factors set out in s. 31(1) of the *CPA* to address the costs barriers to litigation. This compromise between no costs and full two-way costs suggests that the costs regime in class actions was not meant to operate identically to other civil litigation. Indeed, the AG Report shows that there was concern for the chilling effect of costs on the access to justice objective of the class action regime.

In the first decade or so of class actions in Ontario, courts rarely ordered significant costs against plaintiffs. Some courts relied on s. 31(1) either to heavily discount costs to successful defendants or to disallow costs altogether.³⁵⁵ Other courts, while not finding that any of the s. 31(1) criteria applied to the facts of the case before them, nevertheless heavily discounted the costs sought by successful defendants on the basis of the usual cost considerations.³⁵⁶ Moreover, the Court of Appeal has made clear that "in arriving at its costs dispositions, the court must *always* keep in mind the legislative goals of access to justice, behaviour modification and judicial economy."³⁵⁷ Judges have also reduced adverse costs orders against plaintiffs on this basis.³⁵⁸

More recently, courts have been less wary of awarding defendants significant costs orders. Judges are not entirely convinced that awarding substantial costs will have a chilling effect or be repugnant to the concept of access to justice.³⁵⁹ Even while

expressing concern about the high costs of class proceedings, likening them to forest fires in an era of climate change, courts operate on the presumption that costs will be ordered against unsuccessful plaintiffs at certification.³⁶⁰ Despite the additional criteria set out in s. 31(1) and the concerns expressed by the AG Committee and the OLRC in their respective reports about the potential chilling effect of steep costs orders in class actions, large adverse cost awards are regularly made against plaintiffs. The s. 31(1) factors have not been successfully invoked consistently. A review by the LCO of 87 reported decisions in which parties raised s.31(1) arguments reveals that the s. 31 argument was successful in 35 cases.³⁶¹

The issue of costs featured prominently in the LCO's consultations with stakeholders. Not surprisingly, it is a divisive topic where opinions fall largely on partisan lines. All plaintiffs' lawyers and organizations representing class member interests advocated for the abolition of the two-way costs rule in favour of the modified no-costs approach adopted in other provinces and by the Federal Court.³⁶² Virtually all defence counsel and defendant organizations strongly urged the LCO to recommend no changes to the costs rule.

There was no dispute among stakeholders, however, that costs orders have risen exponentially over the past several years. In a 2013 costs decision, Justice Belobaba analyzed 36 contested costs orders issued between 2007 and 2013 and found the average award to be \$163,000 in twenty-three cases where less than \$500,000 was sought, and over \$388,000 in thirteen cases where more than \$500,000 was requested.³⁶³ By contrast, only three adverse costs awards were reported in 1998; in two cases, costs were fixed at \$5,000³⁶⁴ and \$15,000,³⁶⁵ while in the third case the quantum was not specified.³⁶⁶ And in the past few years, costs orders in the millions of dollars have been made against unsuccessful plaintiffs and defendants.³⁶⁷ In the words of one judge: "costs in class proceedings have gotten out of control."³⁶⁸

The LCO's review of costs decisions confirms that ever-increasing costs orders are being granted more and more frequently. While this assessment is necessarily confined to publicly available costs decisions, the increase in quantum of adverse costs has been confirmed by stakeholders consulted by the LCO and in judicial pronouncements. In their submissions to the LCO, the Class Proceedings Fund (CPF), for example, corroborates this trend. Their analysis of 146 funded cases reveals that costs paid by the CPF have increased exponentially, from an average of \$50,000 a case in 2001 to an average of almost \$450,000 in 2017.³⁶⁹

The magnitude of these costs orders is an access to justice problem. As the Supreme Court of Canada described them, class actions have become the "sport of kings in the sense that only kings or equivalent can afford it."³⁷⁰ Courts continue to express concern about the role of costs as barriers to justice. Cost orders are also a problem because it brings so much uncertainty to the law. Because liability for costs is borne by the representative plaintiff and not the entire class, an adverse costs order may well spell financial ruin for the individual representative. This risk is so high that the current Chief Justice of Ontario stated bluntly in *Dugal* that no rational person would ever agree to act as a representative without a costs indemnity.³⁷¹

The consultations and submissions reveal at least three underlying causes for high costs orders:

- Class actions are, by their nature, extremely complex cases involving many parties and often complicated evidentiary and legal issues spanning many years and multiple jurisdictions;
- Certification motions impose an additional cost, over and above the costs of ordinary litigation where the certification step is not required, and they are usually lengthy and involve voluminous evidence;
- The 'safety valve' introduced by the Legislature by way of s. 31 has been applied inconsistently and unpredictably. Indeed, plaintiffs' success in eliminating or reducing adverse costs has declined in recent years.

Reducing costs, therefore, can be achieved by 1) by reducing the complexity and length of class proceedings (specifically, certification and other motions) 2) increasing the scope of s. 31 or 3) eradicating the costs rule altogether. Before turning to these possible solutions, it is important to summarize the consequences of the current regime.

B. Analysis

There is a vast literature and case law on the effects of a two-way costs regime on litigation behaviour and access to justice.³⁷² Stakeholders agree that the risk of adverse costs deters litigation; they disagree, however, as to the kind of litigation that is

deterred. Plaintiffs' counsel state that costs over-deter and result in numerous meritorious cases not being litigated.³⁷³ Similarly, clinics and other non-governmental organizations claim that the risk of costs precludes them from pursuing class actions on behalf of their client groups.³⁷⁴ Conversely, defendants' counsel and defendant organizations argue that costs are necessary to deter frivolous and unmeritorious claims. Some go further and argue that the costs rule, on its own, has not done enough to discourage meritless litigation.³⁷⁵

The costs rule has numerous other effects, some not foreseen by either the OLRC or the Attorney General's Committee, both of whom studied the issue of costs in class actions extensively. The following facts emerge from the LCO's consultations with stakeholders:

1. Indemnities

Because, as judges have acknowledged, no rational person would agree to be personally liable for all adverse costs orders, it has become almost universally true that representative plaintiffs are given a costs indemnity. In the first two decades of class action activity in Ontario, class counsel were the primary source of indemnities to their clients. The second most predominant source of indemnities was the CPF, which has funded approximately 10% of the cases initiated in Ontario as of the end of 2017.³⁷⁶ In the past decade, a small number of representative plaintiffs have obtained indemnities from commercial litigation funders.

Indemnities eliminate the barrier of justice created by adverse costs vis-à-vis the representative plaintiff, but they do so at a cost to the class. The CPF imposes a 10% levy on settlements and trial judgments in return for its indemnity. This 10% return has set the market rate for commercial litigation funders, who appear to charge between 7-10% for their indemnities (and more if there is disbursement funding involved).³⁷⁷ These levies are over and above class counsel's contingency fee. As a result, indemnities have been described as a "tariff on economic recovery" for the class.³⁷⁸ Absent the indemnity necessitated by the risk of costs, net recovery to the class would increase.

Indemnities have another effect with access to justice implications. Applying or negotiating for an indemnity with a third party funder increases transactional costs for the lawyers involved and causes delay. The CPF application process can take up to a year and commercial funding arrangements require court approval. In addition to counsel time, the latter also consumes judicial resources.

2. Costs as Bargaining Chip

One of the unintended consequences of high adverse cost orders against plaintiffs is the abandonment of appeals. Faced with significant costs, class representatives – or, more likely, the lawyers who indemnified them – agree not to pursue an appeal of a failed certification motion or other proceeding in exchange for the defendant not enforcing the costs order. Both plaintiff and defence counsel interviewed by the LCO affirmed that this phenomenon exists. How many appeals have been abandoned for this reason is impossible to discern with precision, but statistics provided by the CPF shed some light. Although the CPF has funded roughly 10% of Ontario class proceedings, its funded actions comprise over half of all appeals of failed certification decisions to the Court of Appeal and 60% of appeals by plaintiffs at the Supreme Court of Canada.³⁷⁹ Thus, substantive access to justice may well be impacted every time a class plaintiff fails to appeal for economic reasons alone.

The risk of costs also serves as a bargaining chip in the decision to go to trial, for both plaintiffs and defendants, although arguably a more pressing concern for plaintiffs. Again, statistics from the CPF support the theory that class counsel who are shielded from the risk of costs are more likely to go to trial than those indemnifying their clients. The CPF has funded a disproportionate number of class actions that were resolved at or mid-trial.³⁸⁰

3. Vulnerable Groups & Low Monetary Value Claims

The use of class actions to advance civil rights and other social causes has a long history in the United States. Indeed, the modern class action rule was drafted primarily to facilitate litigation on behalf of vulnerable groups attacking systemic

racism and other forms of discrimination.³⁸¹ And yet, with few exceptions, public interest lawyers have not utilized the class action device to a great extent in Ontario. Costs are a significant barrier to entry for these types of cases.

The LCO met with several organizations and clinics representing low-income and other vulnerable communities. They were asked to identify the reasons for which they do not use class actions in their public interest litigation strategy. The predominant reason given was the risk of adverse costs.³⁸² These organizations derive no comfort from the s. 31 criteria, stating that the factors add nothing new to judicial discretion regarding costs. The relationship between cost rules, access to justice and public interest litigation predates class proceedings, but is exacerbated by the risk of an adverse cost award that would deplete an organization's entire budget.³⁸³ In a lengthy consultation with several community legal clinics, the LCO was advised that the large quantum of adverse cost awards has undoubtedly had a chilling effect on use of the device for purely public interest litigation.³⁸⁴

The CPF has a statutory mandate to moderate the operation of the normal cost rules. Unlike commercial litigation funders, it considers the public interest value of a case in determining whether to approve a funding application.³⁸⁵ As a result, cases that might otherwise not proceed – on behalf of prisoners, for example, or employees, – have been prosecuted. Indeed, applicants cite the indemnity as the most important reason to apply to the Fund.³⁸⁶ Nevertheless, few organizations or public interest lawyers apply to the CPF, and the CPF has funded only 10% of class actions to date. The importance of an indemnity to some litigants is made obvious in this statistic: when the CPF chooses not to fund a case, litigation may be halted altogether.³⁸⁷

4. Legal Market

The combined effect of costs, indemnities and the nature of claims deemed economical to pursue is that the market for class counsel is still relatively small. Few firms can afford to assume the risk of both working on a contingency fee and adverse costs. The lack of competition in this specialized legal market has obvious access to justice consequences.³⁸⁸ If class counsel are the true gatekeepers for use of the class action device, in that they alone determine which cases to pursue, expanding the number of firms willing to prosecute class actions would be a positive development for access to justice. To the extent that responsibility for regulatory enforcement has been outsourced to, or at least shared with, the private bar, expanding the pool of class counsel will also further the goal of behaviour modification.

C. Options

Given that there is more than one reason for escalating costs orders, and depending upon the effects of such orders one wishes to change, different solutions present themselves. Various ideas are described briefly below.

1. Streamline Certification Process

An obvious way to reduce costs is to reduce the amount of legal work needed to litigate cases. Class actions, by their nature, are very large, complex pieces of litigation, involving many parties and much evidence, sometimes in multiple jurisdictions. Some of the most frequent and largest costs orders, however, are made at the conclusion of the certification motion (as opposed to a summary judgment motion or trial of the merits). Reducing the complexity and length of preparation for and argument of certification will reduce the labour, hence costs, of this stage of class actions.

Adding a preliminary merits test, or raising the evidentiary standard to be applied at certification, would serve to lengthen, not shorten, the certification stage of class actions, and hence increase the costs associated with it. While costs alone are not determinative of any possible recalibration of the certification test, they are a factor to be considered. In Chapter 6, the LCO makes recommendations to streamline the certification process.

2. Strengthen Section 31(1)

The Court of Appeal has confirmed that the approach to costs in class actions is not identical to that in other civil litigation: the section 31(1) factors are different from the usual considerations and are to be given special weight. “[I]n arriving at its

costs dispositions, the court must *always* keep in mind the legislative goals of access to justice, behaviour modification and judicial economy.”³⁸⁹

As discussed above, however, courts’ application of the s. 31(1) factors has been unpredictable. What counts as “test case” litigation, or a “novel issue” or in the “public interest” is contested. Moreover, even when judges conclude one or more of these factors apply in a given case, they may still exercise their discretion to order costs.³⁹⁰ As one judge explained, “although class actions are by design intended to be in the public interest and although they often raise novel issues, it remains the case that it will be relatively rare that the court’s discretion to negate or diminish a costs award will be exercised.”³⁹¹

To reverse the trend of ever-increasing costs and temper their negative consequences, s.31(1) could be given more teeth and serve as a compromise between no-costs and two-way costs. The section could be amended to state that where a court determines that the action raises a novel issue, is a test case or constitutes public interest litigation, there is a *presumption* that costs will be substantially reduced or will not be ordered against an unsuccessful party. Because the rule is intended to address barriers to justice faced by representative parties, the rule could operate in favour of representative parties only.

What constitutes a test case, a novel issue or the public interest would, of necessity, be based on the facts of each case and would continue to be a matter of judicial interpretation. Plaintiffs need not be considered “public interest litigants” for a matter to be in the public interest. The entrepreneurial nature of litigation by itself, or a monetary motive by the plaintiffs, should not be sufficient to displace the characterization of the litigation as one of these types of cases. As the Court of Appeal recently stated, “[t]he fact that the litigation is entrepreneurial is not a proper basis to impose different costs consequences.”³⁹² An action can be in the public interest by virtue of the population of the class, or the subject matter of the litigation. Any action where the majority of the class includes an historically or socio-economically disadvantaged or vulnerable population could be considered a proceeding in the public interest. Beyond the composition of the class, an action could be in the public interest based on its subject matter. “Claims that raise issues that transcend the immediate interests of the litigants and engage broad societal concerns of significant importance are matters of public interest.”³⁹³ Determining what subject matter is considered “public interest” is necessarily fact specific. Actions involving, but not limited to, environmental accidents, institutional abuse, and significant harm to the health and safety of Ontarians could generally be constructed as in the public interest. To date, however, courts have often applied a narrow interpretation of s. 31 (1), thereby diminishing its access to justice impact.

3. Introduce a Modified No-Costs Rule

Another potential solution to the costs problem, and one advocated by many stakeholders, is to adopt a modified no-costs rule in class proceedings. Three other provinces and the Federal Court have gone this route. In Manitoba, British Columbia, and Newfoundland, no costs may be ordered against any party for any stage after and including certification.³⁹⁴ Rule 334.39 of the Federal Court Rules is to the same effect,³⁹⁵ but judicial interpretation of the rule extends the costs immunity to all stages of a proposed class proceeding.³⁹⁶ Courts in all three provinces, and in the Federal Court however, retain the discretion to award costs if there has been vexatious conduct, if unnecessary steps were taken for the purposes of delay, or for any other extraordinary circumstance that renders it unjust to deprive the successful party of their costs.³⁹⁷

The OLRC devoted much attention to the question of costs, and ultimately recommended a modified no-costs regime.³⁹⁸ It did so primarily on the basis that it feared the chilling effect the risk of costs would impose on representative plaintiffs. That fear has not been realized in exactly the way envisioned by the OLRC, since the development of virtually ubiquitous costs indemnities has eliminated the costs barrier vis-à-vis individual plaintiffs. As recounted by stakeholders, however, the barrier has shifted to class counsel, and has impacted class action practice and outcomes in unfavourable ways.

Judges, too, have commented that it may be better to adopt the no-costs rule originally proposed by the OLRC.³⁹⁹ Others have questioned the utility of adverse costs awards and have recognized the risk of an undesirable chilling effect caused by steep cost awards.⁴⁰⁰

There is, therefore, precedent in other Canadian jurisdictions, and support in the literature and in case law, for the adoption of some version of a no-costs rule in respect of class actions.

The question then becomes how expansive the no-costs rule could be. An expansive no-cost rule like the one operating elsewhere in Canada would all but eliminate the need for funders, indemnities and barriers to entry for class action lawyers and public interest litigants. A narrower no-cost rule limited to the certification motion only would address the main barrier, but would pressure some of the principles of the current cost regime.

Class action cost options can be summarized as follows:

4. Option One: Retain Two-Way Costs; No Change to CPA Cost Provisions.

This option would retain the current two-way cost rule without amendment. Given the issues discussed earlier in this chapter such as ever-increasing cost awards, and the deleterious effects of two-way costs (indemnities; counsel trading away appeal rights; deterring public interest litigation; and the lack of competition in the legal market), the LCO believes that the status quo is not an option.

5. Option Two: Two-Way Costs; Strengthening s. 31.

The second option is to maintain the current cost rule but bolster s.31(1) of the *CPA*.

A main concern with adverse costs and access to justice is the barrier with respect to vulnerable communities. To the extent that adverse costs awards may have a chilling effect on community legal aid clinics and public interest organizations' litigation strategy, an emboldened s.31(1) would address these concerns. The purpose of strengthening s.31(1) is to create a "selective no-cost" regime for public interest, novel or test cases.

A framework to assist courts in determining "public interest", "test case" and "novel claims" would perhaps bring coherence to the application of s.31(1). However, there is an inherent difficulty in defining these terms. The analysis required is innately subjective, amorphous and evolving. It is the difficulty of establishing consensus on what constitutes "public interest litigation" or "novel claims" or "test case" that renders bolstering s.31 not only challenging, but also ineffective.

The purpose of s.31(1) is to remove barriers to justice. However, when costs are not addressed until the end of a motion or action, and it is unclear in what circumstances s.31(1) should apply, the risk of adverse costs is not removed. Without clarity on what will be considered "public interest", "test case" or "novel" plaintiffs have no comfort or guarantee they will be able to avoid an adverse cost award. As such, even bolstering s.31(1) would not remove the chilling effect potential adverse costs awards have on vulnerable groups and public interest organizations.

Without some predictability of success in relying on s.31, changing the language of the provision will have little salutary effect.

6. Option Three: No-Costs

On balance, it is possible to argue that the benefits that the two-way costs rules were intended to confer have either not materialized in the class action context or are outweighed by the adverse effects and unintended consequences produced by the rule. The main arguments favouring cost-shifting offered by many stakeholders, including several prominent defendant organizations and firms, are summarized below, along with the LCO's response:

- **Costs discourage frivolous claims.** In consultations with defendants and defence counsel, there were repeated references to frivolous claims and the need to amend the *CPA* in order to more effectively deter them. In the same vein, stakeholders submitted that costs orders are an important deterrent to unmeritorious litigation. However, no empirical data was provided to the LCO confirming the existence of such claims and only one example was cited.⁴⁰¹

There is no evidence that strike suits or other unmeritorious cases have proliferated to any degree in the no costs jurisdictions of Canada. It is self-evident that the risk of adverse costs disproportionately impacts less

resourced litigants or their firms, so that legal clinics or public interest firms will be more discouraged to commence litigation than a well-resourced one. Finally, truly frivolous claims still remain subject to a costs order, in light of the discretion found in s. 37(2) of the B.C., Manitoba and Newfoundland statutes.

- **The costs rule should be consistent across Ontario.** This argument neglects the reality that cost consequences for the representative plaintiff in a class action are unique by comparison to other civil litigation. The costs exposure is exponentially higher than the compensation a typical plaintiff recovers in a class action. As a result, indemnities have become a necessity. The growth of commercial litigation funding is a consequence of the need for indemnities, and such funding is an additional expense to class members. The magnitude of the risk borne by class action firms that continue to provide indemnities affects the number and type of cases they are willing to take on. In any event, the Law Commission is not persuaded that keeping costs simply in order to mirror what is done in other parts of the civil justice system is a sufficient reason to keep the current rule.
- **The Class Proceedings Fund and commercial third party funders ensure meritorious litigation is not deterred.** It was submitted that the concern about the chilling effect of costs orders is addressed by third party funders, be it the CPF or commercial firms. The CPF, however, approves less than half of all applications received, and those it rejects are not necessarily unmeritorious.⁴⁰² Since 1993, the CPF has funded about 10% of all class actions. Commercial litigation funders have funded far fewer class actions, and none on public interest grounds alone. In any event, both kinds of funding come at an additional cost to class members, beyond the contingency fees charged by class counsel.
- **Entrepreneurial lawyers should face cost consequences.** In their submission, the Canadian Bankers Association and the Canadian Life and Health Insurance Association argued that there is “no reason to shelter well-capitalized funders and plaintiffs’ counsel from cost consequences when they are pursuing enormous sums, often for commercial purposes.”⁴⁰³ They are correct in identifying class counsel as the ultimate bearer of the costs risk. They also bear the risk of a contingency fee and large disbursements, and these have proven to be a sufficient disincentive against launching spurious class actions in the no-costs jurisdictions. If, as the LCO explains in the section on Fees, greater judicial attention should be paid to the risks borne by counsel when fees are awarded, the elimination of the risk of adverse costs should be reflected in the calculus and result in a lower fee. From an access to justice perspective, this would be a positive development for class members.
- **Two-way costs help successful plaintiffs fund their ongoing litigation.** The compensatory objective of cost-shifting can prove vital to class counsel firms in need of money to pay for ongoing litigation costs. Eliminating costs thus deprives class counsel of that potential source of funding. Consistently, however, plaintiffs’ counsel reported that they would readily trade this source of funding for the elimination of the risk associated with cost-shifting.
- **Eradicating costs will result in the elimination of the CPF.** It is possible that the adoption of a no cost rule will render the CPF obsolete, since the need for indemnities will be eliminated.⁴⁰⁴ It is also possible, though, that the CPF would evolve to be more focused on funding disbursements or fees, for which demand has increased over the past several years. Moreover, eliminating the risks of unpredictable and very steep costs orders will protect the Fund from a ‘black swan’ event, and allow it (with regulatory amendment) to fund legal fees, thereby expanding the market for plaintiff counsel. As Justice Perell observed in *Houle v St Jude*, “class counsel firms are few and those firms take on only a fraction of the cases that would gratify the goals and policies of the class action regime.”⁴⁰⁵
- **Two-way costs balance certification.** As discussed above and mentioned in Chapter 5, two-way costs was introduced as a balance to s.5(1) of the CPA. Although this balance was considered when the CPA was drafted, the Commission does not see any evidence to suggest such a trade-off is necessary. Three other provinces and the Federal Court have the same certification test and the same standard of proof plus no costs. There is nothing to suggest those regimes are imbalanced.

D. Options for No-Cost Regimes

In conclusion, the LCO believes that a no-costs regime is necessary to help alleviate, to the extent possible, the issues that have developed around the two-way cost system in class actions. The more nuanced issue is the details of what a no-cost system would look like. Below is a chart laying out four options for no-cost regimes in class actions.

Option	Description	Pro's	Con's
Option 1 No costs at any stage of proceeding, except if parties are vexatious.	No costs at any stage of class action proceeding. Section 31 would be amended to provide no-costs but allow adverse costs against parties whose claims or defences are lacking merit or against parties who are vexatious or abusive.	• Significant access to justice reform. • Should result in more compensation for class members. • Should encourage more public interest litigation. • Reduces use of indemnities/ third party funding. • Predictable, straightforward. • Reduces risk for Class Proceedings Fund (CPF). • Possibility of cost awards for vexatious actions to deter frivolous claims/motions	• Would make Ontario the most liberal costs jurisdiction in Canada. • No-cost rule might encourage meritless litigation. • Would require major reform of CPF.
Option 2 No costs for interlocutory proceedings. Two-way costs for merit determinations.	Cost rules based on <i>nature</i> of proceeding. No costs for interlocutory matters, including all pre-certification motions, all certification proceedings, including appeals. Two-way costs for trial and summary judgment.	• Reduces risk of costs award on certification. • Maintains core rationale of two-way costs rule: compensate successful litigants, disincentivize unmeritorious litigation. • Interlocutory/merits distinction is principled and predictable. • Would allow CPF to provide more disbursement and/or fee funding due to reduced costs exposure.	• Partially maintains access to justice barriers of two-way costs. • Would not necessarily increase the number of public interest litigants and/or new entrants. • Unique among Canadian jurisdictions.
Option 3 Two-way costs for proceedings prior to certification. No costs for certification and post-certification.	Cost rules based on <i>timing</i> of proceeding. Two-way costs prior to certification, no costs post-certification.	• Consistent with British Columbia, Manitoba and Newfoundland. • Consistent with principle that 'special' costs rules apply to class actions: Any motion prior to certification would be subject to usual costs rule. • Eliminates biggest theoretical financial exposure facing plaintiffs (trial).	• Generally same disadvantages as Option 2 • Would operate as full no-costs regime in most class action because few go to trial or are decided on Summary Judgment.
Option 4 No costs for certification and ancillary proceedings. Two-way costs for everything else.	No costs for certification including all certification motions, motions for productions, motion to amend certification, and appeals.	• Maintains most of policy rationales for two-way costs and would be least expansive no-costs rule in Canada. • Eliminates significant cost risk currently facing plaintiffs. • More limited costs exposure could reduce levy charged by CPF	• Unique costs regime; Ontario alone would have such a rule. • Does not totally eliminate economic barriers to justice for public interest litigants/new entrants. • Maintains some access to justice barriers of current costs regime

On balance the LCO believes Option 4 is the best solution. Under this scheme there would be no-cost awards for certification motions and all proceedings ancillary to certification including motions for productions, motions to amend a certification order, and appeals from certification. All other proceedings would have two-way costs applied including motions to strike, jurisdiction disputes, summary judgment motions, motions to de-certify, and trials.

The principled reason for introducing such a regime is twofold: (1) certification is a statutorily mandated procedural step that is not related to the merits of the action; and (2) potential adverse cost awards for a certification motion are major and identified barrier.

Notably, under such a regime motions brought before certification – such as a summary judgment motion – would still be subject to the ordinary cost shifting rule. If the purpose of adverse costs is to deter unmeritorious litigation, a case dismissed on summary judgment is, objectively, an unmeritorious one, and could reasonably be expected to attract cost consequences for the losing party. Similarly, if a judge is persuaded at any point in a class proceeding that the action is unmeritorious, a costs award may be made, thus preserving a core purpose of the cost-shifting rule.

The LCO believes that no-costs for certification will improve access to justice, especially for public interest class actions. It will give individuals with limited resources a chance to pursue their rights in court; encourage new counsel to enter the class action landscape; and it will reduce the role of third party funders. This cost scheme reduces the risk to class counsel and third party funders, which should reduce the fee awarded and thereby increase the share of damages disbursed to the class.

E. Third Party Litigation Funding

Under a third party litigation funding (TPLF) contract, a private lender agrees to provide financing and/or indemnification against adverse costs to a representative plaintiff in exchange for a share of the settlement or judgment.⁴⁰⁶ Despite academic debates about how best to regulate the industry,⁴⁰⁷ neither legislation nor a self-regulatory model has emerged.⁴⁰⁸ Nevertheless, courts have relied on s. 12 of the *CPA*⁴⁰⁹ to require judicial approval of TPLF prior to certification,⁴¹⁰ and have developed a number of factors that must be satisfied if a litigation funding agreement is to be approved.⁴¹¹

Courts have generally approved TPLF agreements on the basis that “funding agreements are an acceptable way to promote access to justice.”⁴¹² If counsel is not prepared to provide the representative plaintiff with an indemnity, the representative plaintiff will either abandon the claim or apply to the CPF, which may or may not approve the application and is inflexible in its 10% levy.⁴¹³ The LCO agrees that TPLF promotes access to justice. Further, the LCO believes that class counsel who assume the risk of costs and carry all disbursements are entitled to a higher premium on their legal fees. Conversely, the presence of TPLF or the CPF should result in a corresponding reduction on counsel fees, in order to ensure the net compensation to the class is appropriate.

Because the private funder’s return on investment will be deducted from each class member’s compensation, and to guard against improper meddling in the litigation by a non-party, it is important that funding agreements be reviewed by the court in all cases, even if the representative has obtained independent legal advice. To this end, the requirement that a representative plaintiff bring a motion for court approval of a funding agreement should be codified in the *CPA*. The provisions should also address specific criteria including timing, disclosure, and right of recovery among other factors.

Although the LCO acknowledges that the size of the funder’s return is squarely a matter of access to justice for class members, judges must have the discretion to determine what is an appropriate levy or fee in the circumstances of each type of arrangement. In addition, as the models of funding change, inflexible caps within the *CPA* would be counterproductive.

Similarly, particular terms related to control of the litigation, reporting obligations, rights of exit and privilege are all properly within the scope of judicial scrutiny, as has been the case to date.

F. The Class Proceedings Fund

The CPF does not support a change to its mandated 10% levy on the basis that the quantum it has received in any particular case has never exceeded \$4.3 million and is therefore competitive with the caps on levies negotiated by commercial litigation funders. Moreover, the CPF argued that discretion to determine the applicable levy would entail too much resource-intensive work for the volunteer committee, and that “choking off its levy, particularly in a climate of exponentially rising costs[,] would be disastrous for the CPF and for access to justice in Ontario.”⁴¹⁴ The CPF would, however, welcome the flexibility to partially fund counsel fees in the appropriate case.

The CPF’s submissions were made in the context of a two-way cost system. Under the modified no-cost system recommended by the LCO, the role of the CPF would change. In most cases the plaintiff would not require indemnity until after the certification motion. Although the LCO sympathizes with the CPF in its assessment that it lacks the resources to determine an appropriate levy, given that there is likely to be a different assessment of risk on a matter when it has already been certified, a fixed 10% levy may not make sense.

The LCO agrees with the CPF that an amendment to its constating statute, allowing it to partially fund legal fees, would improve access to justice, as relieving class counsel of the full risk of a contingency fee “partially protects the financial and human capital of class counsel may expand the roster of firms prepared to assume the risks of class action litigation.”⁴¹⁵

Recommendations

Limited No-Costs

40. The LCO recommends the *Act* be amended to provide for no-costs for certification and ancillary motions. Two-way costs would apply to all other aspects of the action including summary judgement motions, disputes about jurisdiction, de-certification motions and trial.

Third Party Funding

41. The LCO recommends that the *Act* be amended to permit third party/private funding state of class actions under the following circumstances:

- The representative plaintiff must bring a motion seeking court approval of a funding agreement;
- The motion must be brought forthwith on notice to the defendant.
- The court retain jurisdiction in an oversight capacity even after the agreement is approved. Any changes to the agreement or disputes arising from it must be brought to the attention of the case management judge;
- The court is entitled to see the full, unredacted agreement. The extent of disclosure of the agreement to the defendant is in the discretion of the judge.
- If an agreement is approved, defendants should be able to recover costs awards directly from the funder.
- The deemed undertaking rule in the Rules of Civil Procedure should be amended to explicitly account for non-parties' duties.
- The existence of funding and the amounts owing to the funder if there is a recovery to the class should be disclosed in the notice of certification.

42. The LCO recommends the court have the discretion to determine what is an appropriate levy or fee in the circumstances of each specific funding arrangement. The LCO does not recommend adopting inflexible or fixed percentages or caps within the *Act*.

43. The LCO recommends that the court retain authority to approve and manage particular terms related to control of the litigation, reporting obligations, and rights of exit and privilege.

Class Proceedings Fund

44. The LCO recommends amending the *Law Society Act* to allow the Class Proceedings Fund to partially fund legal fees in appropriate circumstances.

45. The LCO recommends deferring the consideration of an appropriate CPF levy pending further experience and changes, if any, to the cost rule in the *Class Proceedings Act*.

Chapter Eleven

BEHAVIOUR MODIFICATION

A. Introduction

The Supreme Court of Canada has repeatedly confirmed that behaviour modification is one of the three main objectives of class proceedings.⁴¹⁶ Since class actions make claims possible that would be uneconomical to pursue individually, “class actions serve a regulatory and public law function by encouraging compliance with the substantive law.”⁴¹⁷ The OLRC Report described behaviour modification as an “inevitable, albeit important, by-product of class actions.”⁴¹⁸ For some actions, it has been suggested that behaviour modification is the sole justification for proceeding.⁴¹⁹

Civil litigation generally, and class actions in particular, are said to deter wrongful behaviour by ensuring wrongdoers internalize the costs of their behaviour and by requiring defendants to disgorge unjust gains. Whether this theoretical goal is achieved in practice is a question that has long vexed class action scholars here and abroad.

LCO consultations revealed a variety of views about behaviour modification in class actions. Several plaintiff advocates believe class actions successfully promote behaviour modification in some, but not all, class actions. Defendant representatives, on the other hand, tend to be more skeptical about whether changes to corporate/institutional behaviour can be consistently attributed to class actions. Defendant advocates acknowledge, however, that the “mere existence of the class action regime forces defendants to consider the risk of class actions when considering any course of business activity, and itself provides a deterrent effect.”⁴²⁰

Those the LCO interviewed noted the difficulty in measuring behaviour modification. At present, the most common method for proving that this objective is being achieved is through anecdotal evidence, not statistics or quantitative data.

The LCO heard a variety of views. Some specific examples of behaviour modification were offered:

- In employee overtime cases, employers changed policies as a result of litigation;
- Payday loans litigation contributed to legislative changes in the industry;
- Both defence and in-house counsel reported that advice given to corporate clients will almost always include discussion about the risks of class action litigation;
- One lawyer observed that there has been a change in employment law where employers are more willing to give employees better severance payouts to avoid the risk of litigation; and,
- A plaintiff firm submitted that there has been an increase in the quality and quantity of disclosure and the implementation of more robust risk disclosure in interim and annual filings by public companies.⁴²¹

The LCO does not believe that every class action needs to achieve behaviour modification in order for the objective to be valid in a general sense.⁴²² The important question is whether class actions provide general incentives for increased compliance with the law. The LCO’s research and consultations confirm that the answer is most certainly yes. Class action-related behaviour modification appears to occur in some proceedings; it does not appear in others. In many other proceedings, it is difficult, if not impossible, to isolate the deterrent effect of class actions compared to other factors, such as regulatory proceedings, corporate reputational interests, or legal proceedings initiated outside of Canada.

In these circumstances, the question facing the LCO is not “Does behaviour modification occur in class actions?” or “Is behaviour modification an important class action objective?” The issue, rather, is whether or how the CPA should be amended to better *identify*, and in appropriate circumstances, *promote* behaviour modification within class actions in Ontario?

B. Analysis

1. Behaviour Modification

As noted above, most plaintiff representatives support the deterrent effect of class actions both in general and in specific cases. Several positive examples of class action-based behaviour modification were cited to the LCO, including recent changes in federal correctional institutions following class action litigation regarding solitary confinement practices.⁴²³ Some plaintiff counsel stated, however, that behaviour modification is sometimes more successfully achieved through criminal or regulatory proceedings. Similarly, many access to justice advocates (including community clinics and NGO representatives) advised the LCO that behaviour modification is currently achieved through *Charter* applications, test cases, or administrative proceedings.⁴²⁴

Defendant's responses were mixed. Some defence counsel and defendant representatives (including trade associations and corporate managers) advised the LCO that class actions did not create a general behaviour modification or deterrence effect. In this view, class action settlements were often simply a cost of doing business to be internalized like many other business expenditures.⁴²⁵ However, some defendant representatives stated that the prospect or reality of a class action can have an important deterrent effect on corporate or institutional behaviour in specific contexts. Even the most ardent advocate for defendant interests acknowledges that "the mere existence of the class action regime forces defendants to consider the risk of class actions when considering any course of business activity, and itself provides a deterrent effect."⁴²⁶

Judicial decisions in Ontario appear to reflect the context-specific nature of behaviour modification. For example, Strathy, J (as he then was) stated that payday loans cases "have achieved the goal of behaviour modification by bringing about changes in the regulatory landscape."⁴²⁷ Another judge concluded that the risk of class action liability led a company to take proactive measures and offer compensation to customers.⁴²⁸ And settlements have been approved that specifically provide for changes in the defendant's business practices.⁴²⁹

There are certain types of cases where deterrence will play little or no role. Behaviour modification in heavily regulated industries (such as pharmaceuticals, medical device, or car manufacturing) or in some cases of historical abuses does not appear to be motivated by the need to internalize costs of business or disgorging unlawful gains.

In other contexts, however, the prospect or reality of a class action might lead to considerable the behaviour modification. For example, if a regulator does not impose civil and/or criminal penalties, a large class action settlement may create financial incentives that promote behaviour modification in a way the regulatory proceeding did not.

The complexity of assessing deterrent effects in class actions was confirmed in a recent detailed study of empirical approaches to measuring the compensatory and deterrent effect of antitrust class actions in the US. This study found that these cases failed to compensate consumers in a meaningful way, but did exercise a deterrence function along with personal and corporate fines.⁴³⁰ The study further concluded that, although class actions were not as effective as the threat of government enforcement in preventing anticompetitive behaviour (because they lack the government's investigatory power), class actions can play an important secondary function in enforcing competition laws.⁴³¹

A recent paper by American Professor Brian Fitzpatrick similarly concludes, based on several studies spanning different time periods and involving different types of class actions, that class actions do indeed deter misconduct.⁴³²

As in many other areas of class action law and policy in Ontario, it is very difficult to assess behaviour modification in the absence of consistent reporting on, and understanding of, class action outcomes. Absent this information, debates and discussions about behaviour modification tend to rely on examples of individual cases or personal reflections. In the LCO's view, this situation highlights the need for significantly improved scrutiny of, and reporting on, behaviour modification in both specific cases and class actions generally.

The LCO has identified at least two situations where improved reporting on behaviour modification could improve judicial decision-making in individual cases:

- **Settlement Approval:** Real or potential behaviour modification should be considered by the court when considering whether to approve a settlement.
- **Class Counsel Fees.** In Chapter 9, the LCO recommended that judges ought to consider “results achieved” when considering whether a proposed counsel fee is “fair and reasonable.” Where a class action follows and relies heavily on a concurrent regulatory investigation, the “result achieved” from a behaviour modification perspective may be minimal. Conversely, where a class action targets otherwise unchecked behaviour or fills a regulatory enforcement gap, the “result achieved” may be considerable and a higher fee may be appropriate.

Improved reporting on behaviour modification encourages both parties and courts to fulfill this objective in individual cases. From a public policy perspective, improved reporting would allow litigators, clients, courts, policy-makers and the public to systematically assess the success (or not) of class actions as a vehicle for corporate/institutional deterrence and behaviour modification.

2. *Cy Près*

The discussion above is separate but related to our consideration of *cy près* distributions in class actions.

Cy près distributions are typically justified for two reasons: First, they provide an indirect benefit to class members.⁴³³ Second, *cy près* distributions are intended, in part, to promote behaviour modification because they ensure wrongdoers disgorge ill-gotten gains or otherwise internalize the costs of their misconduct.⁴³⁴ Courts have held that *cy près* awards are justified on the basis that they have a general and specific deterrence function.⁴³⁵

As noted in Chapter 8, the *CPA* currently does not explicitly allow for *cy près* payments, although judges have interpreted sections 24 and 26 to confer jurisdiction to make such payments.

The LCO has already recommended that the *CPA* be amended to include provisions regarding when *cy près* distributions are appropriate and the process for reporting on those distributions.⁴³⁶ Consistent with our analysis in this report, the LCO recommends that settlement outcome reports include information on *cy près* payments, where it is appropriate to do so.

Recommendations

46. The LCO recommends that the mandatory class actions outcome reports include information about behaviour modification outcomes, including changes in corporate or government practices and behaviour that may be attributable to a class action.

Chapter Twelve

APPEALS

A. Introduction

LCO consultations revealed overwhelming support for reform of the current appeal routes for certification decisions.

Interveners were close to unanimous in recommending that certification motions be appealed directly to the Court of Appeal.⁴³⁷ Parties differed as to whether and who should require leave. A number of parties mentioned that the majority of contested certification motions are litigated until appeal options are exhausted, and as such appeal to the Divisional Court only add costs and delay.⁴³⁸ Plaintiff's counsel suggested that the current structure is an impediment to moving the litigation forward on its merits.⁴³⁹ Defence counsel said the current system is too complicated,⁴⁴⁰ and there is no reason for asymmetrical rights between plaintiffs and defendants.⁴⁴¹

B. The CPA

Section 30 of the *CPA* sets out complex provisions governing appeals of class action orders. For example,

- Appeals from certification decisions are addressed under s. 30(1) and (2);
- Appeals by class members are addressed under s. 30(4);
- Judgments on common issues may be appealed pursuant to s. 30(3); and
- Appeals from individual issues trials are governed by subsections 30(6) to (11).

Where not specifically set out in the *CPA*, appeals from other orders are governed by the normal rules of court, namely sections 6 and 19 of the *Courts of Justice Act*.⁴⁴²

Some issues are outstanding. For example, the *CPA* is silent about rights of appeal from third party funding orders; uncertainty about the nature of such orders has resulted in additional litigation on top of the appeal of the orders themselves.⁴⁴⁴ The same is true with respect to appeals of carriage orders.⁴⁴³ The LCO focused its attention on appeals from certification alone, as these are generally considered to be the most significant class actions appeals and the source of most appeals-related delay and costs.

Pursuant to s. 30(1) of the *CPA*, the plaintiff has a direct right of appeal to the Divisional Court from a refusal to certify a proceeding. Under s. 30(2), however, the defendant must obtain leave to appeal from the Divisional Court. The leave application is heard in writing and the Divisional Court provides reasons for decision. After the Divisional Court decides an appeal, further appeals go to the Ontario Court of Appeal with leave;⁴⁴⁵ the leave application is also heard in writing, but the Court of Appeal provides no reasons for its decision granting or denying leave. Whether and how a refusal by the Divisional Court to grant leave to appeal a certification order can itself be appealed has not been resolved.⁴⁴⁶

Ontario's appeal routes for certification decisions are unique in Canada because the Divisional Court and the Ontario Court of Appeal have divided appellate jurisdiction. No other province or the Federal Court have an intermediate court. Moreover, Ontario is the only common law province with asymmetrical appeal rights as between plaintiffs and defendants. The chart below illustrates certification appeal routes established in the *CPA*:

CANADIAN CERTIFICATION APPEAL ROUTES			
	Appeal to Divisional Court (or Equivalent)	Appeal to Court of Appeal with Leave	Direct Right of Appeal to Court of Appeal
Alberta			Plaintiff/Defendant
British Columbia			Plaintiff/Defendant
Manitoba		Plaintiff/Defendant	
New Brunswick		Plaintiff/Defendant	
Newfoundland		Plaintiff/Defendant	
Nova Scotia		Plaintiff/Defendant	
Saskatchewan		Plaintiff/Defendant	
Québec		Defendant	Plaintiff
Federal Court			Plaintiff/Defendant
Ontario	Plaintiff – Direct Defendant – Leave	Plaintiff/Defendant on Appeal from Divisional Court.	

The distinctions created by s.30(1) and (2) as between plaintiffs and defendants cannot be explained by the character of the certification order. The legislature did not draw a distinction between final/interlocutory, and as noted by the Court of Appeal, one must conclude that this decision was “a deliberate one.”⁴⁴⁷ The reasons for the different appeal routes are not apparent in the legislative debates leading up to the enactment of the CPA. The LCO sees this unique treatment as illustrative that certification motions are not like any other procedural motion in litigation and have never been treated as such.

Appeal routes from certification can be complex depending on whether certification is denied in whole or in part. When certification is only partially denied and the plaintiff wishes to appeal, the appeal route is dictated by the ground on which certification was denied: a denial on preferable procedure is considered interlocutory in nature and leave, therefore, is required, while denial under s. 5(1)(a) is considered final and thus no leave is required.⁴⁴⁸ The LCO’s recommendation to remove the leave requirement for the certification motion does away with this complexity. Additionally, it puts plaintiffs and defendants on the same plane, and equalizes appeal rights as between class members in an action that was partially certified.

The OLRC did not see any reason in principle to treat plaintiffs and defendants differently, and recommended that both parties have the right of appeal to the Divisional Court, without leave.⁴⁴⁹ Conversely, there is some suggestion that the Attorney General’s Committee viewed symmetrical appeal routes as constraining class actions, and therefore adopted the asymmetrical approach to offset the potential deterrent effect of a two-way costs rule.⁴⁵⁰

The requirement to go to the Divisional Court is consistent with appeal provisions in Ontario’s civil justice system generally.

C. Analysis

The conventional rationale for requiring appeals to go to the Divisional Court is twofold: 1) to reduce the workload of the Court of Appeal, and 2) to take advantage of the subject-matter expertise of the Superior Court judges who comprise the Divisional Court. The LCO has concluded that neither justification is persuasive in the class action context.

First, the workload of the Court of Appeal is not considerably reduced by imposing the intermediate court requirement. The majority of Divisional Court decisions on certification appear to be appealed further.⁴⁵¹ As the OBA submitted, based

on its sampling of appeals of certification decisions, “the Divisional Court is at best a moderate and occasional filter between certification decisions and the Court of Appeal.”⁴⁵²

The second justification for the Divisional Court’s role in certification appeals also does not pertain. Certification motions are decided by specialized judges appointed to the class action list. Divisional Court judges are not usually designated class action judges. In exercising its review functions, therefore, the Divisional Court is not a specialized tribunal. Any subsequent appeal to the Ontario Court of Appeal is therefore duplicative.⁴⁵³ Some have suggested that the Court of Appeal should create specialized panels particularly for areas such as class actions. It is beyond the scope of this project for the LCO to comment on the strategy and structure of the Court of Appeal, but the LCO can see the utility in developing a class action appellate Practice Direction to judges and parties.

Maintaining Divisional Court appellate review also adds considerable time and expense to the litigation. Stakeholders estimate that it takes a year to navigate the leave to appeal process, more than a year if arguing the appeal. They consistently advise the LCO that access to justice and judicial economy would be served by eliminating the need to go to the Divisional Court. The importance of certification to both parties and the incremental additional costs of appeals are such that both parties will likely appeal the Divisional Court ruling.⁴⁵⁴ Two levels of appeal add time and expense without offering finality.⁴⁵⁵ The Divisional Court therefore cannot be justified on efficiency grounds.

While there was virtual unanimity on eliminating Divisional Court appellate review, stakeholders did not agree on whether defendants should require leave to appeal from the Court of Appeal. Not surprisingly, some plaintiff firms argued that defendants should continue to need leave to appeal.⁴⁵⁶

The LCO cannot see a principled reason to differentiate between parties appealing to the Court of Appeal. There is no question certification is important to both plaintiff and defendants. The interests of the parties in certification motions are significant and “may be equally or even more consequential to the parties than an adverse final decision on the merits of a standard civil case.”⁴⁵⁷ Finally, a direct right of appeal would speed up the appeal process considerably as the time spent on the leave application and decision would be eliminated. Moreover, the development of case law in class actions is facilitated by equal access to appellate review. A direct right of appeal for both parties is appropriate. Requiring both parties to obtain leave to appeal would impede access to justice, add delay and expense, and be inefficient.

For these reasons, the LCO recommends that s. 30 of the *CPA* be amended to provide both parties with a right of appeal to the Ontario Court of Appeal from certification orders. The suggested amendment is to apply specifically and only to appeals from certification motions under s.5(1) of the *CPA*. Certification motions, although technically interlocutory, are of substantial significance and should be treated differently than other appeals in class proceedings. No other interlocutory motion should have a direct right of appeal. Any other interlocutory issue should be subject to existing appeal routes under the provisions of the *CPA* and *Courts of Justice Act*.

The LCO acknowledges that a right of appeal (rather than a leave requirement) to the Court of Appeal raises considerations about the capacity of the Court to hear additional appeals each year. Currently, the number of certification appeals that reach the Court of Appeal are few.⁴⁵⁸ From 2013 to 2018 there are only 31 reported appeals from certification motions to the Divisional Court or Court of Appeal.⁴⁵⁹ In light of the relatively few contested certification decisions each year in Ontario,⁴⁶⁰ and the frequency with which leave to appeal to the Court of Appeal is currently granted from certification matters,⁴⁶¹ it is doubtful that direct appeals would have a significant impact on the workload of the Court of Appeal.

Recommendations

47. The LCO recommends s. 30 of the *Act* be amended to provide both parties with a right of appeal to the Ontario Court of Appeal from certification orders.

Appendix A

LIST OF RECOMMENDATIONS

Chapter 3 – Managing Class Actions

One Year Deadline for Certification Motion

1. The LCO recommends amending s. 2(3) of the *Act* to establish a one year deadline within which the certification motion schedule must be set and the plaintiffs' motion record filed unless the court orders otherwise.

Administrative Dismissal

2. The LCO recommends adding a new provision to s. 2 of the *Act* requiring that an action be administratively dismissed in the event a plaintiff does not file its certification material in accordance with the revised s. 2(3) or any timetable set out in a case management order. Notice of the dismissal to the putative class would be required, the costs of which would be payable by plaintiffs' counsel, unless the court ordered otherwise.

Case Management

3. The LCO recommends adding a new provision to s. 2 of the *Act* requiring a first case management conference to be held within sixty days of the last defendant being served the Statement of Claim.
4. The LCO recommends s.12 of the *CPA* be amended to read as follows: "The court may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate."
5. The LCO recommends the Class Action Bench-Bar Liaison Committee and/or Civil Rules Committee develop a dedicated Practice Direction or amendment to the *Rules of Civil Procedure* for the case management of class actions. This Direction or Rule should be developed in consultation with appropriate stakeholders and be supported by ongoing training and education for the judiciary and class action counsel.

Chapter 4 – Carriage

Carriage Motions

6. The LCO recommends the *Act* be amended to add specific provisions addressing carriage of class actions. The provisions should specify that:
 - A party filing a class action is required to register the action with the CBA Class Action Registry concurrently;
 - A carriage motion by competing firms must be brought within sixty days of the issuance of the first action;
 - If a carriage motion is filed, it should be heard as soon as the court schedule permits;
 - The court's objective in carriage proceedings is to identify the firm that best advances the claims and interest of group members in an efficient and cost-effective manner. As part of this process, the court should consider:
 - each firm's theory of the case;
 - the chances for success at certification and on the merits;
 - the expertise and experience of counsel in class action litigation or the substantive area of law at issue; and,
 - funding and costs arrangements, including the resources of counsel.

Claims Bar

7. The LCO recommends that the *Act* be amended to specify that an order determining which firm has carriage for the case will include a claims bar.

No Appeal of Carriage Decisions

8. The LCO recommends the *Act* be amended to specify that carriage orders are final and cannot be appealed.

Costs

9. The LCO recommends the *Act* be amended to specify that costs of carriage motions are not to be recouped by class counsel from the class.

Carriage Motion Judge

10. The LCO recommends that carriage motions not be heard by the case management judge overseeing a class action.

Judicial Training

11. The LCO recommends the development of uniform or consistent guidance/training for courts considering carriage motions.

Chapter 5 – Multijurisdictional Actions**Statutory Amendments to Promote Multijurisdictional Coordination**

12. The LCO recommends the *Act* be amended to add provisions consistent with legislation in Alberta, British Columbia and Saskatchewan. More specifically, the *Act* should be amended to:

- Permit courts on their own motion, or on the motion of a party, to make any order the court considers appropriate to certify a multijurisdictional class action;
- Define “multijurisdictional class” as “a proceeding that is brought on behalf of a class of persons that includes persons who do not reside in Ontario”;
- Require a member applying to certify a class proceeding to give notice to the representative plaintiff for any existing or proposed multijurisdictional class proceeding commenced elsewhere in Canada that involves the same or similar subject matter;
- Require a certification judge to consider competing class actions when assessing whether they should defer to an overlapping class action in another jurisdiction, and ensure:
 - that the interests of all parties in each of the relevant jurisdictions are given due consideration;
 - that the ends of justice are served;
 - that irreconcilable judgments are avoided, if possible;
 - that judicial economy is promoted, and
 - that relevant factors are considered, including
 - a) the alleged basis of liability;
 - b) the stage that each of the proceedings has reached;
 - c) the plan for the proposed multijurisdictional class proceeding, including the viability of the plan and the capacity and resources for advancing the proceeding on behalf of the proposed class;
 - d) the location of class members and representative plaintiffs in each of the proceedings;
 - e) the location of evidence and witnesses; and,
 - f) the ease of enforceability.
- Allow judges to certify on an opt-out basis a class including foreign class members.

Preclusion Orders

13. The LCO recommends the *Act* be amended to be consistent with the International Bar Association’s “Guidelines for Recognizing and Enforcing Foreign Judgments for Collective Redress.” More specifically, the *Act* should specify that Ontario courts ensure the non-resident class members are afforded procedural fairness (including adequate notice and the right to opt out) and that Ontario courts review the results of foreign courts only in exceptional circumstances, including where the results achieved are “patently inadequate.”

National Protocols

14. The LCO recommends that federal, provincial and territorial (FPT) Ministers of Justice work together to develop a national protocol or set of rules for the recognition of provincial certification decisions and multijurisdictional classes.

Judicial Training

15. The LCO recommends that courts across Canada develop consistent training regarding the management of multijurisdictional class actions.

Chapter 6 – Certification

16. The LCO recommends that courts interpret the existing elements of s. 5(1)(d) (“preferable procedure”) of the certification test more rigorously.
17. The LCO recommends that courts support/endorse pre-certification summary judgment motions or motions to strike if such a motion will dispose of the action, or narrow issues to be determined or evidence to be filed at certification.
18. The LCO recommends the dedicated class action Practice Direction recommended in this report include detailed provisions and best practices for certification motions. This Direction should be developed in consultation with appropriate stakeholders.

Chapter 7 – Settlement Approvals**Statutory Standards**

19. The LCO recommends s. 29(2) of the *Act* be amended to specify that when considering whether to approve a settlement, the court is required to consider whether the proposed settlement is “fair, reasonable, and in the best interests of the class.”

Evidential Requirement

20. The LCO recommends s. 29 of the *Act* be amended to provide class counsel seeking approval of a settlement be required to provide independent affidavit evidence that includes, but is not limited to, evidence respecting the settlement approval criteria, the risks of litigation, the range of possible recoveries, and the method of valuation of the settlement.

Full and Frank Disclosure

21. The LCO recommends that s. 29 of the *Act* be amended to provide that class counsel seeking approval of a settlement have a duty to make full and frank disclosure of all material facts and that failure to do so may be sufficient ground for not approving or setting aside a settlement approval order.

Amicus Curiae

22. The LCO recommends s. 29 of the *Act* be amended to give the court the discretion to appoint an *amicus curiae* to assist the court in considering whether to approve a proposed settlement. The court should have the discretion to determine payment for the *amicus* as the court may deem just.

Notice to OPGT, OCL, and Others

23. The LCO recommends s. 19 of the *Act* be amended to specifically require notice of an action to the Office of Public Guardian and Trustee, the Office of the Children’s Lawyer or any other statutory agency where there is a reasonable possibility that some class members are represented by such an agency. In these circumstances, the OPGT, OCL or others should be given notice of the proceedings as early as possible.

Chapter 8 – Settlement Distributions

Practice Direction

24. The LCO recommends the dedicated class action Practice Direction recommended earlier in this report include detailed provisions regarding best practices for proposed settlement distributions. This Direction should be developed in consultation with appropriate stakeholders and be consistent with the analysis and findings in this report. The LCO further recommends that courts be given the discretion to delay or deny a proposed settlement in the event it does not comply with the Practice Direction.

Report to the Court – Settlement Distributions

25. The Practice Direction should include detailed requirements regarding evidence to be presented to the court when approving distribution plans, including how the settlement will be administered, supervised and monitored, including:
- Proposed allocation plan for the settlement distributions;
 - Proposed distribution plan for notice, including details about the expected reach rate of such notice and projected supervision and monitoring of claims by a third party administrator or otherwise;
 - Anticipated and actual take-up rates, reach rates, and rejected claims; and,
 - Estimated number of objectors and nature of objections.

Notice

26. The LCO recommends amending s. 17 of the *Act* to include a plain language requirement and a requirement that the court be required to order the “best notice practicable.”
27. The LCO recommends amending s. 17(4) of the *Act* to provide for publication using digital technology, including but not limited to websites.

Claims Administrators

28. The LCO recommends provisions be added to the *Act* confirming the authority of the court to appoint a claims administrator upon the recommendation of the parties. The *Act* should further specify that claims administrators have a duty of competence and diligence.

Cy Près

29. The LCO recommends provisions be added to the *Act* confirming the authority of the court to order *cy près* distributions. The *Act* should state that *cy près* distributions should be approved when it is not practical or possible to compensate class members directly, using best but reasonable efforts. The *CPA* should also stipulate that judges must approve the recipient of the funds keeping in mind any indirect benefits to the class and the behaviour modification goal of the *Act*.

Final Settlement Approval/Reporting

30. The LCO recommends the *Act* be amended to require that parties file an outcome report with the court and all parties no later than 60 days after the end of the distribution period. This report should include the following information:
- Amount of the total settlement fund;
 - Number of notices sent to class members as compared to the total number of class members;
 - Participation rate (number and percentage of claim forms submitted);
 - Distributions including, “take-up” rates (number of persons paid as compared to number of class members) and amounts of *cy près* distributions;
 - Opt-outs and objections;
 - Average, median, largest, and smallest recovery per claimant;

- Notice and payment methods;
- Administrative costs;
- Counsel fees and costs; and,
- Amounts paid to the Class Proceedings Fund or other litigation funders.

Central Repository for Outcome Reports

31. The LCO recommends that interested parties come together to develop a central repository of class action outcome reports.

Court Statistics

32. The LCO recommends that the Ministry of the Attorney General work with appropriate stakeholders to develop an updated class action court statistics and data collection instrument.

Chapter 9 – Fee Approval

Fees Must Be Fair and Reasonable

33. The LCO recommends s. 32 (2) of the *Act* be amended to specify that any fee payable to counsel by a representative party must be fair and reasonable and must be approved by the court, regardless of the method of calculation or the source of the payment.

Cross Checks

34. The LCO recommends that s.32 and 33 of the *Act* be replaced with a provision that specifies that the court may consider the appropriateness of a proposed fee by using different methods of calculation for comparative purposes.

Fee Approval Criteria

35. The LCO recommends the *Act* be amended in a manner to specify that the court consider the results achieved for the class and the degree of responsibility assumed by class counsel (“risk”) when considering whether a proposed fee is fair and reasonable.

36. The LCO recommends the *Act* be amended to specify that for the purpose of this analysis, the evaluation of “risk” by the court should include consideration of the risk of denial of certification, the risk of losing at trial, and the existence (or not) of reports, investigations, initiatives, litigation, or external litigation funding that may be relevant to the degree of risk assumed by counsel.

Amicus Curiae

37. The LCO recommends the *Act* be amended to give the court the discretion to appoint an *amicus curiae* to assist the court in considering fee approvals. The court should have the discretion to determine payment for the amicus as the court may deem just.

Proportionality

38. The LCO recommends the *Act* be amended to give the court the discretion to adjust counsel fees as a percentage of the total recovery in order to ensure a reasonable fee bears an appropriate relationship to the results achieved.

Holdbacks

39. The LCO recommends the *Act* be amended to give the court the discretion to hold back a percentage of proposed counsel fees pending a final report on the outcome of the proceeding in appropriate cases.

Chapter 10 – Costs

Limited No-Costs

40. The LCO recommends the *Act* be amended to provide for no-costs for certification and ancillary motions. Two-way costs would apply to all other aspects of the action including summary judgement motions, disputes about jurisdiction, de-certification motions and trial.

Third Party Funding

41. The LCO recommends that the *Act* be amended to permit third party/private funding of class actions under the following circumstances:
- The representative plaintiff must bring a motion seeking court approval of a funding agreement;
 - The motion must be brought forthwith on notice to the defendant.
 - The court should retain jurisdiction in an oversight capacity even after the agreement is approved. Any changes to the agreement or disputes arising from it must be brought to the attention of the case management judge;
 - The court is entitled to see the full, unredacted agreement. The extent of disclosure of the agreement to the defendant is in the discretion of the judge.
 - If an agreement is approved, defendants should be able to recover costs awards directly from the funder.
 - The deemed undertaking rule in the Rules of Civil Procedure should be amended to explicitly account for non-parties' duties.
 - The existence of funding and the amounts owing to the funder if there is a recovery to the class should be disclosed in the notice of certification.

42. The LCO recommends the court have the discretion to determine what is an appropriate levy or fee in the circumstances of each specific funding arrangement. The LCO does not recommend adopting inflexible or fixed percentages or caps within the *Act*.

43. The LCO recommends that the court retain authority to approve and manage particular terms related to control of the litigation, reporting obligations, and rights of exit and privilege.

Class Proceedings Fund

44. The LCO recommends amending the *Law Society Act* to allow the Class Proceedings Fund to partially fund legal fees in appropriate circumstances.
45. The LCO recommends deferring the consideration of an appropriate CPF levy pending further experience and changes, if any, to the cost rule in the *Class Proceedings Act*.

Chapter 11 – Behaviour Modification

46. The LCO recommends that mandatory class actions outcome reports should include information about behaviour modification outcomes, including changes in corporate or government practices and behaviour that may be attributable to a class action.

Chapter 12 – Appeals

47. The LCO recommends s. 30 of the *Act* be amended to provide both parties with a right of appeal to the Ontario Court of Appeal from certification orders.

Appendix B

CLASS ACTION PROJECT TERMS OF REFERENCE

Terms of Reference

The Law Commission of Ontario (LCO), with the support and collaboration of the Faculty of Law, University of Windsor and la Faculté de droit de l'Université de Montréal, is leading an independent study of class actions in Ontario.

The purpose of the project is to research whether class actions are fulfilling their three-part promise to improve access to justice, foster judicial efficiency, and promote behaviour modification.

Project Team

The project is being led by the LCO with the assistance of two principal researchers:

Professor Jasminka Kalajdzic, Faculty of Law, University of Windsor, and

Professor Catherine Piché, Faculty of Law, Université de Montréal.

Project Objectives and Assumptions

The purpose of the project is to research whether class actions are fulfilling their three-part promise to improve access to justice, foster judicial efficiency, and promote behaviour modification.

The project acknowledges its scope is potentially broad, with many complex and controversial issues. Time and resources for the project will be limited. As a result, the project will prioritize and organize its work to focus on systemic issues that affect class actions generally. The project will consider whether Ontario's existing Class Proceedings Act needs to be amended to govern contemporary class action proceedings. The project will also strive to establish an independent, evidence-based record of class actions in Ontario.

Reference Group

The project team is organizing an expert Reference Group to assist the project's work. Collectively, the Group will have expertise in the law and practice of class actions, Ontario's justice system, research and consultations, access to justice, and law reform. Group members will be highly-regarded within the legal profession and the community at large.

Project Objectives and Assumptions

The project's objective is to research the experience with class actions in Ontario and to conduct an independent, balanced and practical analysis of class actions from the perspective of their three objectives: access to justice, judicial economy, and deterrence.

The project acknowledges its scope is potentially broad, with many complex and controversial issues. Time and resources for the project will be limited. As a result, the project will prioritize and organize its work to focus on systemic issues that affect class actions generally. The project will consider whether Ontario's existing Class Proceedings Act needs to be amended to govern contemporary class action proceedings. The project will also strive to establish an independent, evidence-based record of class actions in Ontario.

Consultations and Public Outreach

Consultations with the bar, legal organizations, governments, public and private organizations and others who have an interest in class actions are a high priority for the project. The project will distribute a consultation paper to seek public comments on class action issues. The project will also organize in-person meetings/consultations with key individuals,

organizations, and stakeholders. Important project materials will be distributed in English and French, and a webpage will be developed for public outreach, information and consultations.

Relationship to Other Class Action Research and Initiatives

Many organizations and individuals have undertaken significant work regarding class actions in Ontario and elsewhere. The project does not want to replicate those initiatives. As a result, the project will work cooperatively with researchers, stakeholders and other organizations to build on current research/policy initiatives and to ensure limited resources are used most effectively.

Funding and Support

Funding for this project is being provided by the LCO. The project is also supported by the Faculty of Law, University of Windsor and Faculty of Law at the Université de Montréal. The project will collaborate with other supporters if it is appropriate to do so. Project funds will be administered by the LCO.

Appendix C

LIST OF QUESTIONS IN LCO CLASS ACTION CONSULTATION PAPER

General Questions

1. Access to justice is one of three objectives in the class action regime. Is this objective being fulfilled?
2. Most class actions take several years to reach resolution. What accounts for the delay? What change in legislation or practice would make class actions more efficient or improve judicial economy?
3. What is the evidence that class actions have deterred wrongdoing? Are you seeing indicia of behaviour modification resulting from class proceedings in Ontario (among your clients or elsewhere)? What are these indicia?

Specific Questions

4. What, if anything, should be changed in the s. 5 CPA certification test?
5. Currently, defendants must obtain leave to appeal a certification order. Should this appeal route be amended and if so, how and why?
6. Should the two-way costs rule be altered?
7. Is the current test for approval of counsel fees adequate?
8. Is the current test for approval of litigation funding arrangements adequate?
9. Should the governing rules or practices of the Class Proceedings Fund be reformed? If so, how?
10. Do you find that the interests of absent members are being well protected during class settlement approvals? If not, how could those be better protected?
11. What do you think of settlement distribution schemes and management in Ontario class actions?
12. How accessible and clear do you find class notices to be for the class members?
13. Is the use of *cy près* distribution of settlements a positive development for access to justice and/or behaviour modification? Should a *cy près* award affect counsel fees?
14. Is the current judicial coordination of multi-jurisdictional ("national") class actions adequate? If not, do you have suggestions for improvement?

Priorities

15. Of all of the above, how would you prioritize the issues meriting attention and reform? Please list your top three areas of concern.

Further Advice and Names to Contact

16. Do you have any further advice for us as we begin this project? Who do you recommend we talk to during the course of the project?

Appendix D

EMPIRICAL METHODOLOGY

Introduction

As noted in Chapter 2, the LCO devoted considerable time and resources to developing a database of class actions in Ontario. Our goal was to create a comprehensive list of all class action matters filed in Ontario since the enactment of the *Class Proceedings Act, 1992*.

The objective of this effort was to provide a basic empirical foundation for our analysis of class action law and policy issues. In the end, the LCO believes that it has assembled the most comprehensive and accurate list of class actions matters in Ontario. That said, the LCO encountered many difficulties throughout this research and there were many empirical questions left unanswered.

This Appendix describes how the LCO compiled the data presented in Chapter 2 and other parts of the report.

Methodology

The LCO relied on three primary sources to create its list of class actions.

First, the Ontario Ministry of the Attorney General (MAG) provided the LCO with several lists of class action files (the “MAG lists”). The MAG lists were historical lists of data taken from the FRANK court database. MAG advised us that these lists included all actions that were classified by court registries at the time of filing with a court file number containing the designation ‘CP’.

Unfortunately, the LCO quickly learned that the MAG lists were inconsistent, incomplete and contained many inaccuracies and duplications. The LCO discovered, for example, that not all class action cases have the CP designation in their court file numbers. The LCO also learned that case and party names included on the MAG lists were frequently incorrect or contained inputting errors.

Equally important, MAG court data did not include a complete or even basic record of important milestones within each file or action. The MAG data may specify that a court heard a motion on a certain day, but MAG could not specifically identify the type of motion (certification motion, summary judgement, carriage, settlement approval, etc) or the outcome or order resulting from that motion. Nor could MAG identify whether a particular cases was ongoing, completed, or dormant.

Because the information on the MAG list was incomplete, the LCO turned to its second primary source for information on class action files: published decisions. The LCO searched and cross-referenced the court file numbers listed on the MAG list with published decisions by searching for each file number on CanLII, QuickLaw, and WestLaw. The LCO also searched for all published decisions in Ontario which cited the Ontario *Class Proceedings Act*, again on CanLII, QuickLaw and WestLaw. This provided the LCO with a set of decisions on class action files which LCO staff could then search within in order to find specific information on individual files, including decisions on specific types of motions: certification; settlement approval; appeals and costs. These were organized by the type of motion, along with details on the date of the decision and the result.

Finally, in addition to the two primary sources, the LCO consulted with several law firms, client groups, settlement administrators and others and for any additional information that they could provide. Many individuals and organizations provided the LCO with informal information and data collected their own specific purposes.

The LCO should mention a fourth strategy that proved to be particularly unhelpful: obtaining the physical files and using the public access terminals in courthouses. In September 2018, the LCO requisitioned a small sample of random files of varying age to test whether strategy was useful. The physical files which the LCO ordered from the courts were not

easy to access and were disorganized, incomplete and very difficult to search through. The LCO also worked with courthouse staff to access information on court files from computer terminals at the Toronto and Windsor courthouse. This was a lengthy, inefficient and unproductive process. The computers accessible to LCO staff were slow, difficult to search through, and contained only incomplete information. It is important to note that there is no online access to the information on these terminals. The LCO had to physically attend courthouses to attempt to get this information. This situation contrasts with at least two other provinces (Québec, British Columbia) which make detailed court information easily accessible online.

The Quality and Comprehensiveness of the LCO's "Master List"

The LCO needs to emphasize that no single source of class action information in Ontario (MAG, CanLII and other reporting services, law firms, previous research) represents a comprehensive, definitive record of class proceedings in Ontario.

The LCO's "master list" is the first effort in Ontario to comprehensively and accurately compile and cross-reference class action data from multiple sources. The LCO is confident that its "master list" includes the overwhelming majority of class actions matters filed in Ontario since 1993. That said, the LCO cannot state categorically that its list includes *every* class action matter filed in Ontario.

Outcome Information

After the LCO created its list of class action files, LCO staff began to collect outcome information for each matter, with a focus on certification, settlement approval and appeals. This information was missing, incomplete, or inaccurate in many of the electronic records provided by MAG. As a result, the primary source of information on class action outcomes (certification rates, settlement approval rates, appeals) included in the report are published decisions.

To find this information, the LCO searched databases for decisions citing the *Class Proceedings Act* for decisions on specific types of motions, including certification, settlement approval, carriage, and appeals. These were then organized by the type of motion, along with details on the date of each decision and the result. Certification and settlement approval decisions were categorized as 'granted' when the motion was granted in full, 'granted in part,' when only part of the relief asked for was granted, or if the motion was granted only against some parties, but not all, and as 'dismissed' when none of the relief asked for was granted. Needless to say, this was a very labour intensive process.

Note that because LCO staff focused their searches primarily on decisions explicitly citing the *Class Proceedings Act*, decisions on class action cases that do not cite the *Act* may have been missed.

In addition to published decisions, the LCO also categorized information on certification and settlement approval obtained from law firms and settlement administrators. Most of this information came from the firms' and administrators' websites – these websites sometimes had detailed information on class action cases, and where information was missing, LCO staff attempted to contact the firms to fill in gaps. In the end, this effort proved to be unreliable and unproductive. As a result, the LCO did not rely on this information for its empirical analysis of outcomes.

The LCO has considered the implications and potential limits of relying exclusively on published decisions in analyzing class action outcomes. It is possible (and likely) that published decisions are over-weighted to contested matters. Accordingly, the LCO's data may under-report matters that proceeded on consent.

Timing and Length of Matter Information

The LCO devoted considerable time to researching basic information about the length of class proceedings. This data is crucial if we want to comprehensively understand issues such as delay and costs of class actions. This data would also help the LCO, policy-makers and others develop baseline information to track the progress of reforms.

In the end, the LCO was not confident about its ability to present data respecting the length of time it takes to complete certain class action proceedings, including certification motions and time to resolution.

MAG provided the LCO with summary information about length of proceedings, but the LCO did not include it in the report, as MAG did not provide the LCO with the data, parameters or assumptions underlying this information. Accordingly, the LCO was unable to independently review or verify this material. As a result, the LCO did not have the same level of confidence in this data that it does in the “master list” data or outcome data described above.

Next Steps on Class Action Outcome Reporting and Court Data

As discussed repeatedly in this report, transparency and empirical data collection should be improved in class actions. As a result, it is not surprising that the LCO believes the *Act* should be amended to promote better data collection, evidence-based policy-making, transparency, and “open data.”

It is important to note that outcome reports are distinct from court statistics. Outcome reports describe the outcomes of individual cases. Court statistics describe the experience with class actions systemically. Chapter 8 (“Settlement Distributions”) considers both topics and makes several recommendations.

As noted in Chapter 8, in an ideal world, the Ministry of the Attorney General’s electronic court information systems would collect and aggregate a broad range of class action-related statistics and information, including information regarding:

- The date a class action was filed;
- A summary of the type of class action or area of law;
- The dates and summary descriptive information of major events in class action litigation, including
 - Case management conferences
 - Carriage motions
 - Certification motions
 - Settlement proceedings
 - Trials
 - Appeals
- Names of counsel and judges
- Case resolution information, including dates and type of resolution (settlement, trial, dismissal, withdrawal, decertification, etc)
- Key documents, including pleadings, court orders and outcome reports
- Information about related proceedings, including multijurisdictional proceedings

This kind of robust information system does not exist at present, nor is it likely to in the near future.

Fortunately, improved court statistics and data collection does not depend on the development of new court information systems. Nor should policy-makers (or the public) wait if there are practical, constructive steps that could be taken in the meantime.

To this end, the LCO is developing a prototype class actions data collection instrument that it will release once it is completed. This instrument is designed to collect most of the information described above. This is an important first step in the process of significantly improving data collection and court statistics of class actions in Ontario.

In the long term, the responsibility for court statistics and data collection ultimately belongs to the Ministry of the Attorney General. In the interim, however, there are organizations who might have an interest in facilitating better data collection on class actions, including the Canadian Bar Association or a faculty of law with a specialized interest in class actions. The LCO is committed to working with the Ministry and appropriate stakeholders develop an updated class action court statistics and data collection instrument.

Appendix E

ORGANIZATIONS AND INDIVIDUALS CONTRIBUTING TO THE PROJECT

Many organizations and individuals contributed to this project.

Most significantly, the project's Principal Researchers and Reference Group provided fundamental and exceptional support throughout the project.

The Principal Researchers are:

Professor Jasminka Kalajdzic, Faculty of Law, University of Windsor

Professor Catherine Piché, Faculty of Law, Université de Montréal

The Reference Group includes:

The Honourable Stephen T. Goudge, Chair of the Reference Group and Board of Governors Liaison

Marie Audren, Audren Rolland LLP

Tim Buckley, Global Resolutions Inc. (formerly of Borden Ladner Gervais LLP)

Michael A. Eizenga, Bennett Jones LLP

Professor Trevor C. W. Farrow, Osgoode Hall Law School, York University

André Lespérance, Trudel, Johnston and Lesperance

Celeste Poltak, Koskie Minsky LLP

Linda Rothstein, Paliare Roland Rosenberg Rothstein

In addition to Principal Researchers and Reference Group, the LCO heard from a wide range of individuals and organizations during the course of our work, including a broad cross section lawyers, judges, class administrators, class members, community organizations, insurers, academics, justice system officials, and government representatives.

In accordance with the LCO's Privacy Policy, the names of contributing individuals and the names of individuals who were interviewed by the LCO are not listed here.

The LCO wishes to acknowledge the assistance of the Association of Community Legal Clinics of Ontario, the Canadian Vehicle Manufacturers' Association, the Ministry of the Attorney General, the Ontario Bar Association, the Osgoode Hall Professional Development Program and many firms and counsel for helping to facilitate the LCO's consultations.

Written Submissions

The LCO received written submissions from the following individuals and organizations. The submissions are available on the LCO class action website at www.lco-cdo.org/classactions.

- Ad hoc Defence Counsel Group
- Advocacy Centre for Tenants Ontario
- Bentham IMF Canada
- Bridge Point Litigation Services
- Canadian Environmental Law Association
- Canadian Franchise Association
- Canadian Vehicle Manufacturers' Association
- Canadian Bankers Association
- Canadian Life and Health Insurance Association
- Deloitte LLP

- KPMG LLP
- Ernst & Young LLP
- PricewaterhouseCoopers LLP
- BDO Canada LLP
- MNP LLP
- Community Living Welland Pelham
- Innovative Medicines Canada
- MEDEC
- Insurance Bureau of Canada
- International Association of Defence Counsel
- Katherine Kay
- Law Foundation of Ontario Class Proceedings Committee
- McKenzie Lake Lawyers
- Ontario Bat Association
- Ontario Chamber of Commerce
- Ontario Office of the Public Guardian and Trustee
- Paliare Roland LLP
- Public Guardian and Trustee of British Columbia
- Rochon Genova LLP
- Siskinds LLP
- Sotos LLP
- U.S. Chamber Institute for Legal Reform

Organizations Consulted

In addition to written submissions, the LCO consulted representatives from the follow institutions or organizations.

- Acorn Canada
- Advocacy Centre for the Elderly
- Advocacy Centre for Tenants Ontario
- ARCH Disability Law Centre
- Association of Community Legal Clinics of Ontario
- Audren Rolland
- Bakerlaw
- Barreau du Québec, Comité sur l'action collective
- Bennett Jones
- Blake, Cassels & Graydon LLP
- Blaney McMurtry LLP
- Borden Ladner Gervais LLP
- Brauti Thorning LLP
- Branch MacMaster LLP
- Canada Cartage
- Canadian Environmental Law Association
- Canadian Internet Policy and Public Interest Clinic
- Canadian Vehicle Manufacturers' Association
- Cassels Brock & Blackwell LLP
- Charney Lawyers

- Chinese Southeast Asian Legal Clinic
- Chubb Insurance Company of Canada
- City of Toronto, Legal Services Division
- Consumers Law Group
- Cour d'appel du Québec
- Cour supérieure du Québec
- Crawford and Company Class Actions Services
- EKG Professional Corporation
- Falconers LLP
- Fasken Martineau DuMoulin LLP
- Fonds d'aide aux actions collectives (Québec public fund for class actions)
- Great West Life
- Huronia Group
- Income Security Advocacy Centre
- International Association of Defence Counsel
- Klippensteins
- Koskie Minsky LLP
- Law Foundation of Ontario
- McCarthy Tetrault
- Ministère de la Justice du Québec
- Olthuis, Kleer, Townshend LLP
- Ontario Bar Association, Class Actions Subcommittee
- Ontario Court of Appeal
- Ontario Ministry of the Attorney General
- Ontario Ministry of the Attorney General, Indigenous Justice Division
- Ontario Office of the Children's Lawyer
- Ontario Office of the Public Guardian and Trustee
- Ontario Securities' Commission
- Ontario Superior Court of Justice
- Osgoode Hall Law School
- Paliare Roland Rosenberg Rothstein LLP
- Renfrew Community Legal Clinic
- RicePoint Administration Inc.
- Siskinds LLP
- Sotos LLP
- Stikeman Elliott LLP
- Stipendiary Lecturer in Law, Oriel College, Oxford
- Stockwoods LLP
- The Bruneau Group
- Thomson Rogers Lawyers
- Torkin Manes LLP
- Torsys LLP
- Trudel Johnston & Lespérance LLP
- University of Ottawa, Faculty of Law
- Waddell Phillips Professional Corporation

Appendix F

CROWN LIABILITY AND PROCEEDINGS ACT, 2019

As noted in the report, the LCO is concerned about the potential impact on class actions of the provincial government's *Crown Liability and Proceedings Act, 2019* in Schedule 17 of Bill 100, *An Act to implement Budget measures and to enact, amend and repeal various statutes* (the *CLPA*).¹ This legislation was introduced by the provincial Attorney General on April 11, 2019, and reached Royal Assent on May 29, 2019. The *CLPA* appears to make significant changes to the law governing how certain lawsuits, including class action lawsuits, are brought against the provincial Crown.

The *CLPA* addresses Crown liability in negligence actions, the procedural rules that apply in all proceedings involving the Crown, and repeals the *Proceedings Against the Crown Act (PACA)*.² The *CLPA* does not address actions against the Crown for alleged breach of contract, Charter breaches or judicial review. Attorney General Caroline Mulroney stated that the *CLPA* would update outdated procedures and codify common law.³

This issue arose late in the class actions project. As a result, the LCO has conducted only a preliminary analysis of the *CLPA* and its potential implications for class actions in Ontario.⁴ It is also important to note that this Appendix is limited to the LCO's preliminary analysis of the class actions-related sections of the *CLPA*. This is not a comprehensive review of the *CLPA*.

Issue #1 – Definition of Crown Liability: sections 11(5) and 11(6)

Crown Liability Before the CLPA

At common law, the Crown is immune from liability in tort. This privilege is a vestige of monarchical rule when the King could do no wrong.⁵ The purpose of the *PACA* was to correct this gap and create a statutory cause of action in tort against the Crown.⁶ As a result of *PACA*, the Crown became liable in tort in the same manner as any other person⁷ with some exceptions.

Over the years, in addressing actions of negligence against the Crown, courts carved out a common law immunity to the Crown for certain government activities including enacting legislation and making policy decisions.⁸ To define "policy decision" the Supreme Court introduced a planning/operational distinction in government activity. Planning level decisions – which may include political, historical, and socio-economic factors – involve the exercise of discretionary powers of the government and in which courts are not to intervene. Conversely, operational decisions involve the management of a plan once it is put into place. At the operational level, the Crown can be held liable in negligence.⁹ This distinction of where planning ends and where operation begins is not always easy to draw.¹⁰

Crown Liability Under the CLPA

CLPA sections 11(5)(c) and (6) appear to significantly broaden the areas of the provincial government's potential immunity.

For example, under section 11(5)(c), the definition of "policy decision" is expanded to include immunity for "the manner in which a program, project or other initiative is carried out"; "the Crown's degree of supervision or control"; and "existence of management procedures or oversight mechanisms". As proposed, the wording of these sections appears to describe what have historically been understood to be operational decisions and actions.

Similarly, sections 11(6)(e) and (f) appear to broaden the common law protection granted to the Crown. These sections immunize the Crown in making decisions on whether and the manner in which an investigation, inspection or assessment should be conducted, and whether and the manner in which an enforcement action under an *Act* is carried out.

Depending on how courts interpret these sections, it is possible that parties will not have any recourse against the

government for negligent government activity, including failing to properly inspect a building, failing to clear snow from highways, or for systemic institutional wrongs.

Impact on Class Actions

After a preliminary review, the LCO identified at least 13 class actions in the last three years which the *CLPA* may have prevented from proceeding against the provincial government, in whole or in part.¹¹ Examples of high profile Ontario class actions that could have been or could be blocked include Walkerton,¹² Huronia,¹³ Canadian tainted blood,¹⁴ schools for the deaf,¹⁵ bail delay¹⁶ and improper placement in solitary confinement.¹⁷

Issue #2 – Leave Requirement, sections 17(1) to 17(7)

Section 17 the *CLPA* states that a plaintiff needs leave to bring an action in bad faith or misfeasance against the Crown. To get leave, a court must find that the plaintiff is acting in good faith and that there is a reasonable possibility the proceeding would be resolved in the plaintiff's favour. The plaintiff has to disclose all relevant documents in their possession but has no right to discovery and the Crown is not required to file any materials. There are no costs awarded for the motion.¹⁸

It appears this section was created to deal with the mischief of plaintiffs frivolously pleading bad faith to avoid having to litigate the policy/operational distinction. The theory is that plaintiffs plead bad faith as an allegation so that the matter cannot be struck under Rule 20, 21 or fail certification under s.5(1)(a) on the basis that the allegation against the Crown is a policy decision, not an operational one. Pleading bad faith potentially helps plaintiffs get to discovery, where they might unearth evidence that supports their negligence claim.¹⁹

The LCO is concerned about the potential impact of these provisions on access to justice in class actions. Requiring plaintiffs to prove that they are likely to succeed with an action prior to full discovery, is akin to requiring a preliminary merits test at certification. Chapter 6 of this report discusses why the LCO has rejected an early merits assessment in class action in Ontario.

Chapter 6 also includes an analysis of why a preliminary merits test at the certification motion frustrates the goal of judicial economy. The LCO believes the same logic applies to the leave requirement under the *CLPA*.

Issue #3 – Retroactivity, sections 11(7), 11(8), 30 and 31.

Sections 11(7), 11(8), 30 and 31 of the *CLPA* appear to specify that that the provisions discussed above would apply not only to new actions, but to *existing* proceedings as well. This provision could potentially apply to several existing class actions against the province, thus preventing access to justice for class members whose claim have *already* been certified.²⁰

Conclusion

It remains to be seen how courts will interpret this legislation. Simply stated, the *Crown Liability and Proceedings Act, 2019* could prevent some or potentially all negligence claims against the Province of Ontario, including some or all potential class actions. This situation could create significant if not insurmountable barriers to justice, to judicial economy and to behaviour modification in class actions against the province.

Endnotes

- 1 *Class Proceedings Act*, 1992, SO 1992, c-6.
- 2 Ontario Law Reform Commission, "Report on Class Actions" in 1982 *OLRC Report*, [OLRC Report 1982] online: https://digitalcommons.osgoode.yorku.ca/library_olrc/112/ page 291; Ministry of the Attorney General, Report of the Attorney General's Advisory Committee on Class Action Reform" in 1990 *AG Report* (February 1990) [AG Report 1990]; See also Suzanne Chiodo, *Class Roots: The Genesis of the Ontario Class Proceedings Act, 1966-1993* (A Thesis) [Chiodo] page 4.
- 3 The Hon. Frank Iacobucci, "What is Access to Justice in the Context of Class Actions?" in *Assessing Justice: Appraising Class Actions Ten Years After Dutton*, Hollick and Rumley, Ed. Jasminka Kalajdzic (Markham: LexisNexis, 2011) [Iacobucci] page 19.
- 4 *Ibid*, page 18.
- 5 *AIC Limited v. Fischer*, [2013] 3 SCR 949, [Fischer].
- 6 *Hollick v. Toronto (City)*, 2001 SCC 68 [Hollick].
- 7 OLRC Report 1982, page 291.
- 8 *R. v. Jordan* [2016] 1 SCR 631, 2016 SCC 27 [Jordan], para 29; The Honourable Bob Runciman, Chair, and The Honourable George Baker, P.C., Deputy Chair, "Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada," in 2017 *Report of the Standing Senate Committee on Legal and Constitutional Affairs* (June 2016), online: https://sencanada.ca/content/sen/committee/421/LCJC/reports/Court_Delays_Final_Report_e.pdf
- 9 See for example the concerns of the Auditor General, "Section 4.07, Court Services" (2010 Annual Report); "Section 3.07, Court Services" (2008 Annual Report); "Section 4.12, Youth Justice Services Program" (2014 Annual Report); "Section 3.02, Criminal Prosecutions" (2012 Annual Report); all available online: <http://www.auditor.on.ca/>
- 10 Canadian Bar Association, "Reaching Equal Justice Report: An Invitation to Envision and Act" in 2013 *Report of the CBA Access to Justice Committee* (November 2013) [Canadian Bar Association], online: <http://www.cba.org/>, page 144.
- 11 Our assumptions and methodology are described in Chapter 2.
- 12 Law Commission of Ontario, "Class Actions: Objectives, Experiences and Reforms," in 2018 Consultation Paper [LCO Consultation Report 2018], online: <https://www.lco-cdo.org/wp-content/uploads/2018/07/Class-Action-Consultation-Paper.pdf>
- 13 See Chapter 2 for further details.
- 14 *Fischer*, para 34.
- 15 LCO Consultation Report 2018.
- 16 See LCO website for access to all public submissions made to the class actions project: <https://www.lco-cdo.org/en/our-current-projects/class-actions/>
- 17 Catherine Piché, "Class Action Value", *Theoretical Inquiries in Law* (2018) Vol. 19, No. 1., 263-264; footnotes omitted [Piché, Class Action Value]. See also Jonah B. Gelbach and Deborah R. Hensler, "What We Don't Know About Class Actions but Hope to Know Soon" Vol. 87, No. 1 *Fordham Law Review* (2018) <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5537&context=flr> [Gelbach & Hensler]
- 18 Jon Forman, and Genevieve Meisenheimer, "The Evolution of the Class Action Trial in Ontario," *Western Journal of Legal Studies* (2014) Vol. 4, No.3, online: <https://ir.lib.uwo.ca/cgi/viewcontent.cgi?referer=https://www.google.ca/&httpsredir=1&article=1107&context=uwojls>
- 19 Ward Branch and Greg McMullen, Take-Up Rates: The real measure of access to justice", 8th Annual Symposium on Class Actions (Toronto: Osgoode Hall Law School of York University, 2011), online: http://static1.1.sqspcdn.com/static/f/299713/12187013/1305222675693/branch_mcmullen-take_up_rates.pdf?token=roUmMGIC3bl29Zlw7AzEKRJ6B1M%3D
- 20 Benjamin Alarie and Peter Flynn, "Accumulating Wisdom: An Updated Empirical Examination of Class Counsel's Fees in Ontario Class Actions" Vol. 9, No. 2 *Canadian Class Action Review* (2014) 55- 84, online: <https://ssrn.com/abstract=2363798> or <http://dx.doi.org/10.2139/ssrn.2363798>
- 21 Blakes, Cassels & Graydon LLP, "The State of Class Actions in Alberta: January 2015," (Blakes, 2015) online: <http://www.blakes.com/English/WhatWeDo/Practice/LitigationAndDisputeResolution/Pages/The-State-of-Class-Actions-in-Alberta---January-2015.aspx>

- 22 Stefan Boettrich and Svetlana Starykh, "Recent Trends in Securities Class Action Litigation: 2016 Full-Year Review Record Number of Cases Filed, Led By Growth in Merger Objections Highest Number of Dismissals in the Shortest Amount of Time" (Nera Consulting, 2017), online: http://www.nera.com/content/dam/nera/publications/2017/PUB_2016_Securities_Year-End_Trends_Report_0117.pdf
- 23 See for example, U.S. Chamber Institute for Legal Reform, "Painting an Unsettling Landscape: Canadian Class Actions 2011-2014," (U.S. Chamber of Commerce, 2015), online: http://www.instituteforlegalreform.com/uploads/sites/1/CanadianClassAction_v10Web.pdf
- 24 Law Foundation of Ontario, "Class Proceedings Fund" (2016), online: <https://www.lawfoundation.on.ca/for-lawyers-and-paralegals/class-proceedings-fund/f>
- 25 Jasminka Kalajdzic, "Access to Justice for the Masses? A Critical Analysis of Class Actions in Ontario," University of Toronto, LLM Thesis (February 2010); Catherine Piché "The Value of Class Actions" in Trevor C.V. Farrow and Lesley A. Jacobs (eds), *The Cost and Value of Justice*, 2018, and Catherine Piché, "Le recouvrement et l'indemnisation des membres dans l'action collective", 94 *Can. B. Rev.* 171 (2016); Jasminka Kalajdzic, *Class Actions in Canada: The Promise and Reality of Access to Justice* (Vancouver: UBC Press, 2018).
- 26 See generally Piché, *Class Action Value*.
- 27 For example, American commentators Nicholas Pace and William Rubenstein have written "The lack of transparency concerning class action distribution rates is troubling because so may fundamental issues turn on what is in the missing data." Nicholas Pace and William Rubenstein, "Shedding Light on Outcomes in Class Actions", in Joseph W. Doherty, Robert T. Reville, and Laura Zakaras, (Eds) *Confidentiality, Transparency, and the U.S. Civil Justice System* (Oxford University Press, 2012), page 21.
- 28 NYU Center on Civil Justice, "Multidistrict Litigation" (New York University, 2015) <http://www.law.nyu.edu/sites/default/files/DukeMDLPresentationNote4.pdf>; Gelbach and Hensler, above.
- 29 The LCO's efforts to compile a definitive list of class action matters was challenging. For instance, LCO found that one class action often encompassed multiple court files, each with different styles of cause, parties, and filing dates. With only partial information available on these cases, it was often difficult to determine definitively whether certain files were unique or part of other cases. In these circumstances, the LCO reviewed individual filings, case materials and published records to make informed decisions about whether a filing was unique or related to another class action. Our assumptions and methodology are described in Chapter 2.
- 30 Many class actions include allegations in more than one area of law. In these circumstances, the LCO reviewed any available materials to make informed decisions about the *primary* area of law addressed in each action. A detailed description of the LCO's categorization of class action cases categories is included in Appendix C of the LCO Class Actions Consultation Paper.
- 31 The LCO had considerable difficulty collecting accurate, reliable and/or consistent outcome information from every source other than published decisions. As a result, the LCO has chosen to limit discussion of class action outcomes (including certification motions and settlement proceedings) in this report to analysis of published decisions only.
- 32 See Submissions to the LCO by Ontario Bar Association (OBA), page 4; International Association of Defence Counsel (IADC), para 17, available at the LCO website.
- 33 *Class Proceedings Act*, s. 2.
- 34 See *Smith v. Armstrong*, 2018 ONSC 2435 (citing *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2016 ONSC 3368, *Lalani v. Reeves*, 2016 ONSC 424, *Pardhan v. Bank of Montreal*, 2012 ONSC 2229, and *Kherani v. Bank of Montreal*, 2012 ONSC 2230), para 13.
- 35 *Faris v. Eftimovski*, 2013 ONCA 360.
- 36 *Class Proceedings Act*, 1992, SO 1992, c-6s. 29(4).
- 37 *Rules of Civil Procedure*, RRO 1990, Reg 194.
- 38 Submissions to the LCO by Siskinds LLP, page 3.
- 39 *Ibid*, page 4.
- 40 Interviews with LCO. A well-known example of such an arrangement was described and acutely criticized by Perell J. in *Bancroft-Snell v Visa Canada Corporation*, 2015 ONSC 7275, where Justice Perell prohibited the consortium of lawyers with carriage of the file from paying a firm \$800,000 on the basis

that “[p]utative class counsel should be abused [sic] of the idea that they can commence a class action in the anticipation that they will inevitably share in the contingency fee paid by the classmembers”, para 80.

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- 41 Information provided to the LCO during consultations.
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- 42 Submissions to the LCO by Innovative Medicines Canada and MEDEC page 8; see also submissions of the International Association of Defense Counsel, para 16, and the Ad Hoc. Defense Counsel Group page 2.
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- 43 See our analysis in Chapter 6 for more information.
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- 44 The Honourable Coulter A. Osbourne, “Civil Justice Reform Project” Ministry of the Attorney General of Ontario (November 2007), online: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/>
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- 45 See, for example, Submissions to LCO by Siskinds LLP, page 6. This recommendation was repeated in several LCO interviews with counsel from both plaintiff and defendant firms.
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- 46 Submissions to the LCO by Sotos LLP page 2-3, citing *Amyotrophic Lateral Sclerosis Society of Essex v. Windsor (City)*, 2015 ONCA 572 para 69.
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- 47 Section 12 reads as follows: The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.
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- 48 *Defazio v. Ontario (Labour)*, 2007 CanLII 54668 (ON SC), para 14.
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- 49 See s.12 of the *Class Proceedings Act* “on the motion of a party or class member”.
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- 50 The Committee was proposed by the Ontario Bar Association in a letter to the Honourable Frank Marrocco, dated May 4, 2017. The letter is available at <https://www.oba.org/CMSPages/GetFile.aspx?guid=2a1e09ef-78d7-4ec0-811c-85fe73e0390f>
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- 51 Federal Judicial Center, “Forth Manual for Complex Litigation” (Supreme Court of the United States, 2004) [Federal Judicial Center, Forth Manual], online: <https://www.fjc.gov/content/manual-complex-litigation-fourth-0>
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- 52 The FJC Manual is approximately 800 pages long. The sections discussing class actions are included in section 21. These sections are summarized Barbara J. Rothstein and Thomas E. Willging, “Managing Class Action Litigation: A Pocket Guide for Judges” (Federal Judicial Center, 2010) <https://www.fjc.gov/sites/default/files/2012/ClassGd3.pdf>
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- 53 Federal Judicial Center, Forth Manual, 10.13.
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- 54 *Class Proceedings Act*, s. 12 and 13.
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- 55 *Vitapharm Canada Ltd. v. F. Hoffman Laroché Ltd.*, 2000 CanLII 29027 (ON SC) and *David v. Loblaw; Breckon v. Loblaw*, 2018 ONSC 1298, para 6.
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- 56 *Smith v Sino-Forest Co.*, 2012 ONSC 24; *Kowalsyshyn v Valeant*, 2016 ONSC 3819.
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- 57 *Mancinelli v. Barrick Gold Corporation*, 2016 ONCA 571, para 22.
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- 58 *Quenneville v. Audi AG*, 2018 ONSC 1530 [Audi], para 78.
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- 59 Submissions to the LCO by Rochon Genova LLP, page 12.
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- 60 *Ibid.*
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- 61 Submissions to the LCO by Siskinds LLP, page 18.
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- 62 Submissions to the LCO by Paliare Roland LLP, page 4.
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- 63 Submissions to the LCO by Siskinds LLP, page 18.
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- 64 Information provided to the LCO during consultations.
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- 65 *Ibid.*
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- 66 Winkler et al, *The Law of Class Actions in Canada* (Canada Law Book, 2014) [Winkler et al], page 255, citing *Turon v Abbott Laboratories Ltd.*, 2011 ONSC 4343, para 19.
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- 67 *Bancroft-Snell v Visa Canada Corporation*, 2015 ONSC 7275. [Bancroft-Snell].
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- 68 *Bancroft-Snell v. Visa Canada Corporation*, 2016 ONCA 896, paras 48, 53.
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- 69 *Ibid.*, para 98.
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- 70 Australian Law Reform Commission, “Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders” (ALRC Report, 2018) 105-126 [ALRC Report].
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- 71 *Hotte v. Servier*, 1999 QCCA 13363.
- 72 *Ibid.*
- 73 *Schmidt v. Johnson & Johnson inc.*, 2012 QCCA 2132. [Schmidt]
- 74 *Schmidt*, para 42.
- 75 See, for example, Submissions to the LCO by Ontario Bar Association (OBA), page 14; International Association of Defence Counsel (IADC), para 61; Rochon Genova LLP, page 13; Siskinds LLP, page 19; all available at the LCO's website.
- 76 ALRC Report, pages 114-115.
- 77 *Ibid.*, pages 119-120.
- 78 ALRC Report, page 119; Note that in Australia, where third party funders fund a significant proportion of class actions and historically have required class members individually to sign funding agreements, determining group member preference is possible in a way that does not translate to the Ontario context.
- 79 Information provided to the LCO during consultations.
- 80 Submissions to the LCO by Sotos LLP, page 9; OBA, page 15.
- 81 See notably Valérie Scott, "Access to Justice and Choice of Law Issues in Multi-Jurisdictional Class Actions in Canada," Vol. 43, No. 2 *Ottawa Law Review* (2012), online: <https://ssrn.com/abstract=2717805>; Janet Walker, "Crossborder Class Actions: A View from Across the Border" Vol. 2004, No. 3, *Michigan State Law Review* (2004), page 755; Vaughan Black, Joost Blom, and Janet Walker, "Current Jurisdictional and Recognition Issues in the Conflict of Laws", Vol. 50 *Canadian Business Law Journal* (2011), online; Watson, Gary D., Q.C. and Frank Au. "Constitutional limits on service ex juris: unanswered questions from Morguard", Vol. 23, No. 1-2 *Advocates' Quarterly*, online: https://digitalcommons.osgoode.yorku.ca/scholarly_works/1307/, page 167; J.-G. Castel, *Canadian Conflict of Laws*, 4th ed. (Toronto: Butterworths, 1997).
- 82 See for example, Submissions to LCO by International Association of Defence Counsels (IADC), para 59; Canadian Vehicle Manufacturers Association (CVMA), page 2.
- 83 See Submission to the Law Commission from the "Big Six" Accounting Firms (BDO, Deloitte, EY, KPMG, MNP, PWC), page 18, Ontario Bar Association (OBA), page 14, Siskinds LLP, page 18, International Association of Defence Counsel (IADC) page 60, all available online at the LCO's website.
- 84 Ontario Law Reform Commission, "Report on Class Actions" in 1982 OLRC Report, [OLRC Report 1982], online: https://digitalcommons.osgoode.yorku.ca/library_olrc/112/, page 455.
- 85 Ministry of the Attorney General, "Policy Development Division, Report of the Attorney General's Advisory Committee on Class Action Reform" in 1990 AG's Advisory Committee Report [AG Report 1990].
- 86 *Baxter v. Canada* [Attorney General], 2006 CanLII 41673 (ON SC).
- 87 See *Berg v Canadian Hockey League* 2017 ONSC 2608; *Ontario and Walter v Western Hockey League* 2018 ABCA 188.
- 88 *R.S.O. 1990*, c. C. 43 ("[a]s far as possible, multiplicity of legal proceedings shall be avoided.") S. 106 of the *Courts of Justice Act*, provides that "[a] court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just."
- 89 *Tiboni v. Merck Frosst Canada Ltd.*, 2008 CanLII 37911 (ON SC).
- 90 *Canada Post Corp v. Lépine*, 2009 SCC 16, [Lépine] para. 57.
- 91 See e.g., The Honourable Associate Chief Justice John D. Rooke, "The Problem of Competing Multi-Jurisdictional Class Proceedings: A New Call for Direction" (Paper 2.1 presented at Western Canada Class Actions Conference – 2016), online www.cle.bc.ca/practicepoints/f
- 92 *Brunet v. Zimmer of Canada Ltd.*, 2012 QCCS 1461, where a proposed class action with respect to a defective medical device, the defendant requested a stay of the Québec class action because there was already a national class action in British Columbia. The Québec Superior Court refused on the basis that it sought to protect the interests of the Québec members.
- 93 See Christopher Naudie and Luciana Brasil, "National Class Actions in Canada: The Benefits (and Limits) of the Protocol and the Recurring

- Challenges to Managing National Settlements", 10th National Symposium on Class Actions (Toronto: Osgoode Law School), April 2013.
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- 94 Canadian Bar Association, "Canadian Judicial Protocol for the Management of Multijurisdictional Class Actions" (Canadian Judicial Protocol, 2018) [The Protocol], online: [https://www.cba.org/getattachment/Our-Work/Resolutions/Resolutions/2018/Class-Action-Judicial-Protocols-\(1\)/18-03-A.pdf](https://www.cba.org/getattachment/Our-Work/Resolutions/Resolutions/2018/Class-Action-Judicial-Protocols-(1)/18-03-A.pdf)
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- 95 The Ontario Superior Court of Justice adopted the 2018 Protocol and, as of June 1, 2019, parties to class proceedings shall comply with its terms. Accordingly, Part II of the Ontario Practice Directions (s. 32) was amended to reflect the Court's adoption of the Canadian Bar Association's revised Canadian Judicial Protocol for the Management of Multi-Jurisdictional Class Actions and the Provision of Class Action Notice: <http://www.ontariocourts.ca/scj/practice/practice-directions/provincial/>
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- 96 *The Class Proceedings Act*, C.C.S.M. c. C. 130, s. 6(3) and 16 (Manitoba); *Class Actions Act*, S.N.L. 2001, c. C-18.1, ss. 9(1)(g) (Newfoundland & Labrador); *The Class Actions Act*, S.S. 2001, c. C-12.01, s. 6.1 (Saskatchewan); *Class Proceedings Act*, S.A. 2003, c. C-16-5, s. 9.1(1) (Alberta). Changes to Québec's Code of Civil Procedure, which have come into force on January 1, 2016, expressly prohibit courts from refusing to authorize a class action in Québec on the sole ground that proposed class members are already members of a class in a multijurisdictional action brought outside of Québec. Article 577 C.C.P. provides that when a court considers a motion to stay a pending action, it "is required to have regard for the protection of the rights and interests of Québec residents". Also *Boehmer c. Bard Canada inc.*, 2016 QCCS 4702. [Boehmer].
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- 97 *The Class Actions Amendment Act*, SS 2007, c 21.
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- 98 At the second reading, the legislation was hoped to "facilitate interjurisdictional types of class actions that are not available to us at this time." See Hon. Min. Quennel, Bill No. 44 — The Class Actions Amendment Act, 2007/ Loi de 2007 modifiant la Loi sur les recours collectifs, (Hansard, Saskatchewan, March 14 2007), online : <http://docs.legassembly.sk.ca/legdocs/Legislative%20Assembly/Hansard/25L35/070314Hansard.pdf#page=16>, page 831
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- 99 *Class Proceedings Act*, SA 2003 ch. C-16.5 (Alberta).
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- 100 *Class Proceedings Act*, SA 2003, c. C-16.5, s. 5(8)(f) (Alberta).
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- 101 *Class Proceedings Amendment Act*, 2018, online: <http://www.bclaws.ca>
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- 102 Hon. D. Eby, "Bill 21" (Hansard, British Columbia, April 25, 2018), online: <https://www.leg.bc.ca/documents-data/debate-transcripts/41st-parliament/3rd-session/20180425pm-Hansard-n125#125B:1800>
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- 103 Sections 6(2)-(3) of the Saskatchewan Act, ss. 5(6)-(8) of the Alberta Act, and ss. 4(3)-(5) in the BC Act.
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- 104 In Saskatchewan: s. 6(3) of *The Class Actions Act*, 2001 c. C-12.01 ; in Alberta: s. 5(8) in the *Class Proceedings Act*, 2003 c.C-16.5; In BC: s. 4(4) of *Class Proceedings Act*, RSBC 1996 c-50.
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- 105 Saskatchewan Act at s. 6.1(1); Alberta Act at s. 9.1(1) and BC Act at s. 4.1(1).
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- 106 *Kohler v. Apotex Inc.*, 2015 ABQB 610 [Apotex] For additional cases that interpret these provisions: *Wuttnee v. Merck Frosst Canada Inc.*, 2008 SKQB 229; *Brooks v. Canada* (AG), 2009 SKQB 509.
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- 107 *Apotex*, para 27.
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- 108 *Ibid*, para 38.
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- 109 *Ibid*, para 29-30.
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- 110 However, in *Currie v. McDonalds Restaurants of Canada Ltd. et al.*, 2005 CanLII 3360 (ON CA), the Ontario Court of Appeal decided that provided there is a real and substantial connection linking the cause of action to the foreign jurisdiction, the rights of non-resident class members are adequately represented, and non-resident class members are provided procedural fairness including adequate notice, it may be appropriate to attach jurisdictional consequences to an unnamed plaintiff's failure to opt-out; See also Janet Walker, "Recognizing Multijurisdiction Class Action Judgments within Canada: Key Questions—Suggested Answers," All Papers, Osgoode Digital Commons (2008), Paper 236, online: https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?referer=https://www.google.ca/&httpsredir=1&article=1235&context=all_papers
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- 111 *Morguard Investments Ltd. v. De Savoye*, [1990] 3 SCR 1077, para 43.
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- 112 *Parsons v. McDonald's Restaurants of Canada Ltd.*, 2004 CanLII 28275 (ON SC), *Silver v. Imax*. 2013 ONSC 1667.
- 113 Chief Justice Winkler, "Guidelines for Recognizing and Enforcing Foreign Judgements..." *Report of the International Bar Association Task Force on International Procedures and Protocols for Collective Redress* (McCarthy Tetrault), pages 6-7.
- 114 Submissions to the LCO by the Ontario Bar Association (OBA), page 11.
- 115 *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, [2013] 3 SCR 477, [*Pro-Sys*], paras 100-105.
- 116 See Chapter 3 of this report.
- 117 See Chapter 3 of this report.
- 118 See Chapter 4 of this report.
- 119 See Chapter 12 of this report.
- 120 *Pro-Sys*, para 63; See also: *Hollick v. Toronto (City)*, [2001] 3 SCR 158, [*Hollick*], para 25; *Alberta v. Elder Advocates of Alberta Society*, [2011] 2 SCR 261, para 20.
- 121 *Hunt v. Carey Canada Inc.*, [1990] 2 SCR 959, page 412; *Cloud et al v. The Attorney General of Canada et al.* [2004] 73 O.R. (3d) 401 (C.A.), para 41.
- 122 *Good v. Toronto Police*, 2013 ONSC 3026, para 14.
- 123 *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCR 58 [*Sun-Rype*], paras 52-76.
- 124 *Hollick*, para 18.
- 125 *Kalra v Mercedes Benz*, 2017 ONSC 3795, para 38.
- 126 *Hollick*, paras 28 and 31, *AIC Limited v. Fischer*, [2013] 3 SCR 949, [*Fischer*], para 48; T. Archibald, G. Killeen, J.C. Morton, Ontario Superior Court Practice (Markham, LexisNexis, 2017).
- 127 *Hollick*, para 30.
- 128 *Fischer*, para 49.
- 129 *Fischer*, para 48-49.
- 130 *Class Proceedings Act*, S.O. 1992, c.6, s. 5.
- 131 *Hollick*, paras 28-9.
- 132 Ontario Law Reform Commission, "Report on Class Actions" in 1982 OLRC Report, [OLRC Report 1982], online: https://digitalcommons.osgoode.yorku.ca/library_oirc/112/, page 304.
- 133 Perell J in *Waldman v. Thomson Reuters*, 2012 ONSC 2238, para 132.
- 134 *Hollick*, para 14.
- 135 *McCracken v. Canadian National Railway Company*, 2012 ONSC 6838 [*McCracken*], paras. 84-87.
- 136 Federal Rules of Civil Procedure, Rule 23, online <https://www.federalrulesofcivilprocedure.org/frcp/title-iv-parties/rule-23-class-actions/>.
- 137 OLRC Report 1982, page 862.
- 138 S. 5(1)(a).
- 139 OLRC Report 1982, page 313.
- 140 Submissions to the LCO by Innovative Medicines of Canada and MEDEC (Joint Submission), page 10.
- 141 Submissions to the LCO by Ad Hoc Defence Counsel Group, page 6.
- 142 Submissions to the LCO by Ontario Chamber of Commerce, U.S. Chamber – Institute for Legal Reform, International Association of Defence Counsel (IADC), Innovative Medicines of Canada and MEDEC, available online at the LCO website.
- 143 *Ibid.*
- 144 Risks include damages exposure, costs of defence, harm to shareholder value, pressure on company reputation, and interference with corporate transactions.
- 145 Rochon Genova referenced Winkler J in *Caputo*: "[t]he CPA is a procedural statute, rather than substantive, and creates no new cause of action. A motion for certification under the Act deals only with whether the action ought properly to proceed by way of class action." See Submissions to the LCO by Rochon Genova LLP, pages 9-10 referencing *Caputo v. Imperial Tobacco Ltd.*, 1997 CanLII 12162 (ONSC).
- 146 Siskinds argues that if a preliminary merits test were introduced, "there would need to be concurrent amendments to permit plaintiffs access to non-public documents of the defendant... if the intention was to introduce a preliminary merits test at certification with corresponding discovery rights in favour of plaintiffs, we see little utility in maintaining a

- certification requirement at all. See submissions to the LCO by Siskinds LLP, page 7.
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- 147 *Ibid*, Siskinds LLP, page 7.
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- 148 Clarify “merits” as trial only or other merits determinations like summary judgment.
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- 149 The Honourable Ward Branch, *Class Actions in Canada: Second Edition* (Canada: Thomson Reuters) [Branch], para 22.20.
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- 150 Warren K. Winkler, Paul M. Perrell, Jasminka Kalajdzic and others, *The Law of Class Actions in Canada* (Canada: Thomson Reuters) [Winkler et al], page 28.
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- 151 It is also noteworthy that in Québec, contrary to prior anecdotal opinion, 61% of cases settle before authorization, as compared to 39% after authorization, Piché, *L'Action Collective: Ses Succès et Ses Défis*, (Montréal: Éditions Thémis, 2019) [Piché, *l'action collective*], page 43.
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- 152 Branch, para 22.30. Note that the LCO was not able to independently verify the statistics cited in the Branch text, and it is not clear whether the rates include the results of appeals of certification.
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- 153 Branch, para. 22.40; It is also noteworthy that in Québec, contrary to prior anecdotal opinion, 61% of cases settle before authorization, as compared to 39% after authorization: Piché, *The Class Action Effect* (Éditions Yvon Blais, 2018), pages 74-78.
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- 154 Branch, para. 22.50.
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- 155 Branch, para. 22.60 and 22.80.
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- 156 According to statistics derived from Branch, para. 22.10.
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- 157 The LCO reviewed all reported decisions where certification was denied during this period. LCO did not include cases dismissed by summary judgment motion, for limitation period, cases that failed to get leave under s.138 of the *Securities Act* or any other reason. The LCO looked at cases only at first instance and did not address whether they were overturned on appeal.
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- 158 In 3 of these 25 cases, the court found that there were some issues that satisfied the common issues test, but that those issues failed other criteria.
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- 159 In 6 of the 14 – the court found some of the plaintiff had a cause of action on some issues and not on others.
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- 160 *Rules of Civil Procedure*, R.R.O 1990, Reg 194.
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- 161 *Scaduto v. LSUC*, 2015 ONCA 733, para 8.
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- 162 *Brown v. Lloyd's of London*, 2015 ONCA 235, para 11.
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- 163 *Shafirovitch v. Scarborough Hospital*, 2015 ONSC 7627, para 5.
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- 164 *CIBC v. Green*, 2015 SCC 60, [Green] para 67.
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- 165 See Submissions to the LCO by US Chamber of Commerce.
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- 166 *Securities Act*, R.S.O. 1990, c. S.5, s.138.8.
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- 167 See Submissions to the LCO by MEDEC, page 17; See also submissions to the LCO by the “Big Six” Accounting Firms (BDO, Deloitte, EY, KPMG, MNP, PWC), Canadian Bankers Association and Canadian Life and Health Insurance Association (Joint Submission), International Association of Defense Counsel (IADC) and US Chamber Institute for Legal Reform, all available online at LCO’s website.
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- 168 *Theratechnologies inc. v. 121851 Canada inc.*, 2015 SCC 18, para 29. [Theratechnologies]
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- 169 Thomas A. Allen, Toronto Exchange, “Responsible Corporate Disclosure: a Search for Balance Final Report,” in 1997 Allen Committee Report, [Allen Committee Report, 1997].
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- 170 *Green*, paras 67-68, referencing CSA Notice 53-302, page 7389.
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- 171 Allen Committee Report, 1997, pages 26-27.
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- 172 *Green*, paras 63-69.
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- 173 *Mask v. Silvercorp Metals Inc.*, 2016 ONCA 641, para 41.
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- 174 *Catucci v. Valeant Pharmaceutical Inc.*, 2017 QCCS 3870.
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- 175 *Theratechnologies*, para 39.
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- 176 *Coffin v. Atlantic Power Corp.*, 2015 ONSC 3686, para 23.
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- 177 *Ibid*, paras 23-24.
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- 178 This issue was discussed by Morden A.C.J.O. in *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (Ont. C.A.), page 551.
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- 179 "[F]rom my reading of the Court of Appeal's decisions on summary judgment, it is how the court has confined the scope of the powers of a motion judge or master under rule 20, not the "no genuine issue for trial" test itself, that has limited the effectiveness of the rule... If the objective is to provide an effective mechanism for the court to dispose of cases early where in the opinion of the court a trial is unnecessary after reviewing the best available evidence from the parties, then it seems to me to be preferable to provide the court with the express authority to do what some decisions of the Court of Appeal have said a motion judge or master cannot do. That is, permit the court on a summary judgment motion to weigh the evidence, draw inferences and evaluate credibility in appropriate cases. Therefore, any new rule 20 should provide a basis for the motion judge to determine whether such an assessment can safely be made on the motion, or whether the interests of justice require that the issue be determined by the trier of fact at trial". Coulter A. Osborne, QC, *Civil Justice Reform Project*, Ministry of the Attorney General, November 2007. See List of Recommendations 2.5. Summary Disposition of Cases (Rules 20 and 21).
- 180 *Hryniak v. Mauldin*, 2014 SCC 7.
- 181 The US Federal Rule does not contain an explicit merits analysis. The higher evidentiary burden imposed on the plaintiff, however, as well as the different certification criteria, result in significantly more overlap between the certification test and the merits of the action.
- 182 *Hollick v. Toronto (City)*, [2001] 3 SCR 158, [Hollick], paras 28-9.
- 183 *Lambert v. Guidant Corp.*, [2009] O.J. No. 1910 (S.C.J.) para 82.
- 184 *Kalra v. Mercedes Benz Canada Inc.*, 2017 ONSC 3795, para 10; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57; *Glover v. Toronto (City)*, [2009] O.J. No. 1523, para 15 ("the certification requirement is not a requirement to show that the action will probably or possibly succeed. It is not a requirement to show that a prima facie case has been made out. It is not a requirement to show that there is a genuine issue for trial."); *Hollick v. Toronto (City)*, 2001 SCC 68, para 25; *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58, para 48. Also see Celeste Poltak, "Evidentiary standards and the challenge on certification", (2011) Vol. 31, no.16, *The Lawyers Weekly*.
- 185 Submissions to the LCO by U.S. Chamber of Commerce – Institute for Legal Reform, Innovative Medicines Canada (Medec), International Association of Defence Counsel (IADC).
- 186 Submissions to the LCO by Rochon Genova LLP.
- 187 Submissions to the LCO by Internaional Association of Defence Counsel (IADC), para 51.
- 188 *Options consommateurs v. Novopharm Ltd.*, 2005 QCCA 437 (Que. C.A.), paras 23-38, leave to appeal refused (2005), 2005 CarswellQue 7143 (S.C.C.).
- 189 *Windsor v. Canadian Pacific Railway*, 2007 ABCA 294 (Alta. C.A.), para 35; *Ernewein v. GM of Canada Ltd.*, 2005 BCCA 540 (B.C.C.A.), leave to appeal refused (2006), 386 W.A.C. 320 (S.C.C.).
- 190 *Thorpe v. Honda Canada Inc.*, 2011 SKQB 72 (Sask. Q.B.), para 33, with additional reasons 2011 SKQB 72 (Sask. Q.B.) ("(...) the representative plaintiff has to satisfy the judge that the pleadings disclose an apparently authentic or genuine cause of action on the basis of the facts as pleaded and the law that applies.").
- 191 *Hoffman v. Monsanto Canada Inc.*, (2007) 283 D.L.R. (4th) 190 (Sask C.A.), leave to appeal SCC refused.
- 192 Catherine Piché, "Evidence and Provisional Measures in Complex Litigation and Class Actions in Canada", in *Procesos Colectivos – Class Actions* (E. Oteiza, dir.) (I International Conference & XXIII Iberoamerican Procedural Law Convention), IIDP – AADP, Buenos Aires, Argentina, 2012, page 173, citing *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 303, at 323 (3rd Cir. 2009).
- 193 *Asselin c. Desjardins Cabinet de services financiers inc.* Cour d'appel, EYB 2017-286339 (« porter un regard sommaire sur cette preuve, qui devrait elle-même être d'une certaine frugalité. »).
- 194 *McCracken v. Canadian National Railway Company*, 2010 ONSC 4520, para 282; and *Lambert v. Guidant Corporation*, 2009 CanLII 23379 (ONSC), para 82.
- 195 In a 2005 study led by Thomas E. Willging & Shannon R. Wheatman, funded by the Federal Judicial Center and entitled "An Empirical Examination of Attorneys' Choice of Forum in Class Action Litigation", available online at <https://www.uscourts.gov/sites/default/files/clact05.pdf>, the authors found that the courts certified 24% of the cases as class actions and denied

certification in 19% of them. They also found that within the certified cases, 58% were certified for settlement and 42% were certified for trial or litigation; Also see Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, "Empirical Study of Class Actions in Four Federal District Courts" (Federal Judicial Center, 1996); Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, "An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges", 71 *NYU Law Review* 74 (1996). The FJC's 1996 research focused on class actions terminated in 1992–1994 in four federal district courts, and based on examination of court files, reported a class certification rate of 37%. See FJC 1996 Study, at page 7. The percentage of those cases certified for settlement was 39%; See: *The Cultural Analysis of Class Action Law*, Catherine Piche, *Journal of Civil Law Studies*, Vol.2, No. 1, 2009; *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35, para 11-12; *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, [2013] 3 S.C.R. 600, para 40, 64-65 and 68; *Marcotte v. Longueuil (City)*, 2009 SCC 43, [2009] 3 S.C.R. 65, para 22; *Sibiga v. Fido Solutions inc.*, 2016 QCCA 1299, para 71 and 80; *Asselin c. Desjardins Cabinet de services financiers inc.* Cour d'appel, EYB 2017-286339 (« porter un regard sommaire sur cette preuve, qui devrait elle-même être d'une certaine frugalité. »).

- 196 *Wal-Mart Stores Inc. v. Dukes et al.*, 564 U.S. 338 (2011).
- 197 *Ibid.*, 351.
- 198 Robert Carson, Olivia Dixon, Jessica Harding, U.S. *Guide to Class Actions in Canada* (Osler, 2018).
- 199 *Ibid.* By contrast, in Ontario pre-certification production is focused and limited and the party seeking production must show why the requested documents are relevant to certification.
- 200 *Ibid.*
- 201 Jill Yates, "Comparison between Canada and US Class Action Law and Practice" (McCarthy Tétrault LLP, 2012), online: <https://www.slideshare.net/jyatesdahlgren/comparison-between-canadian-and-us-class-actions-law-and-practice-15504793>
- 202 Cullity J., "Certification in Class Proceedings — The Curious Requirement of 'Some Basis in Fact'" (2011), 51 *Can. Bus. L.J.* 407, page 422.
- 203 Para 102, citing *Cloud*, para 50; *Irving Paper Ltd. v. Atofina Chemicals Inc.* (2009), 99 O.R. (3d) 358 (S.C.J.), para 119, citing *Hague v. Liberty Mutual Insurance Co.* (2004), 13 C.P.C. (6th) 1 (Ont. S.C.J.).

- 204 *Pro-Sys Consultants Ltd. v. Microsoft Corp.* 2013 SCC 57; *Hollick v. Toronto (City)*, 2001 SCC 68.
- 205 *Pro-Sys*, paras 100-105; *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187.
- 206 *Pro-Sys*, para 32.
- 207 *Andriuk v. Merrill Lynch Canada Inc.*, 2013 ABQB 422, para 43; *Chopik v. Mitsubishi Paper Mills Ltd.*, [2002] O.J. No. 2780.
- 208 *Williams v. Canon Canada Inc.*, 2011 ONSC 6571, para 94.
- 209 In a typical auto part recall class action, the class cannot seek damages for the cost of repairing the part as the defendant will have a recall program in place to do so. Instead, the class claims either *de minimis* damages for the inconvenience associated with, for example, not having the use of the vehicle during the period in which it was being repaired, or damages representing the diminution in value of the vehicle. The loss of value can be significant, or quite small.
- 210 Submissions to the LCO by the Canadian Vehicle Manufacturers' Association, page 2.
- 211 *Ibid.*
- 212 *Fischer*, para 19.
- 213 *Ibid.* The LCO does not endorse the CVMA's suggestion of allowing a piecemeal approach to certification. There are other measures contained in the Recommendations aimed at reducing delay in getting to certification.
- 214 *Fischer*, para 58.
- 215 *Richardson v. Samsung*, 2018 ONSC 6130, para 78.
- 216 Art. 19 C.C.P. (Québec); Alexandra Belley-McKinnon, "Les espoirs brisés du principe de proportionnalité", CCAR, The LCO wishes to emphasize here that while proportionality in Québec class actions is not a separate criterion the motion judge can rely on to refuse authorization of an action that otherwise meets the certification criteria: *Dell'Aniello v. Vivendi Canada Inc.*, 2014 SCC 1, paras. 64-68. See also The Honourable Coulter A. Osborne, "Summary of Findings and Recommendations of the Civil Justice Reform Project" (Ontario Ministry of the Attorney General, 2007) [Osborne], online: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/>
- 217 *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 SCR 534, 2001 SCC 46) [Dutton],

- para 44; Catherine Piché, *The Fourth Dimension to Class Actions: Access to a Meaningful Benefit* (Montréal, Éd. Yvon Blais, 2018) [Piché, the Forth Dimension], page 500.
- 218 *Dutton*, para 44; See the general principle of proportionality within the *Rules of Civil Procedure* applicable in Ontario at Rule 1.04 (1.1), notably, provides that “In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.” The LCO wishes to emphasise here that while proportionality in Québec class actions is not a separate criterion the motion judge can rely on it to refuse authorization of an action that otherwise meets the certification criteria: *Dell’Aniello v. Vivendi Canada Inc.*, 2014 SCC 1 (S.C.C.), at paras 64-68. See also Osborne.
- 219 2014 SCC 7.
- 220 See discussion by Perell J. in *Green v. The Hospital for Sick Children*, 2017 ONSC 6545, para 141.
- 221 See *Cannon v Funds for Canada Foundation*, 2010 ONSC 146, para 15.
- 222 *Hyrniak*, para 28.
- 223 *Rules of Civil Procedure* R.R.O. 1990, Reg. 194, see Rule 20.04(2.1) and 20.04 (2.2).
- 224 *Wise v. Abbott Laboratories, Ltd.* 2016 ONSC 7275.
- 225 Submissions to the LCO by International Association of Defence Counsel (IADC).
- 226 Submissions to the LCO by Innovative Medicines Canada and MEDEC (Joint Submission).
- 227 Submissions to the LCO by “Big Six” Accounting Firms.
- 228 *Dabbs v. Sun Life Assurance Co.*, 1998 Canlii 14855 (ONSC) [...“class action settlements must be seriously scrutinized by judges”, para 30.
- 229 Kalajdzic, *Class Actions in Canada*, page 91.
- 230 *Ibid*, page 97.
- 231 Information provided to the LCO during consultations.
- 232 Kalajdzic, *Class Actions in Canada*, page 91.
- 233 *Ibid*, page 101.
- 234 *Class Proceedings Act*, s. 29(2).
- 235 OLRC Report, 1982.
- 236 OLRC Report, 1982, page 146.
- 237 *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 OR (3d) 429, [Dabbs], para 30.
- 238 *Dabbs v. Sun Life Assurance Co. of Canada*, 1998 CarswellOnt 5823 (Gen Div), para 13.
- 239 *Waldman v. Thomson Reuters Canada Ltd.*, 2016 ONSC 2622, para 30.
- 240 Where both the plaintiff and the defendant move for settlement approval, both have the burden of satisfying the judge that the settlement is fair: *Dabbs*, para 46.
- 241 Most recently, see *Shah v. LG Chem Ltd.*, 2019 Canlii 51185 (ONSC), para 29.
- 242 Submissions to the LCO by the Ontario Chamber of Commerce, page 7, Rochon Genova, page 5, Ontario Bar Association, page 9, all available online at LCO’s website.
- 243 Submissions to the LCO by Insurance Bureau of Canada (IBC), page 4.
- 244 Professor Jasminka Kalajdzic discusses the adversarial void phenomenon and the need for greater judicial scrutiny in “Access to a Just Result: Revisiting Settlement Standards and Cy Près Distributions” (2010) 6 Can Class Action Rev 215. See also Catherine Piché, *Fairness in Class Action Settlements* (Toronto: Carswell, 2011) and Jasminka Kalajdzic, *Class Actions in Canada: The Promise and Reality of Access to Justice* (Vancouver: UBC Press, 2018).
- 245 *Leslie v Agnico-Eagle Mines Ltd*, 2016 ONSC 532 [Agnico-Eagle].
- 246 Submission to the LCO by the Ontario Bar Association, page 11.
- 247 *Sheridan Chevrolent v. Furakawa*, 2016 ONSC 729, paras 10-12.
- 248 Under rule 39.01(6) of the *Rules of Civil Procedure*, “Where a notice or application is made without notice, the moving party or applicant shall make full and fair disclosure of all material facts, and

failure to do so is in itself sufficient ground for setting aside any Order obtained on the motion or application.” Because settlement approval hearings are generally unopposed, they are similar to motions on consent or those without notice.

- 249 American Law Institute, *Principles of the Law of Aggregate Litigation* (American Law Institute, 2010), online: <https://www.ali.org/publications/show/aggregate-litigation/>
- 250 *McCarthy v. Canadian Red Cross Society*, [2001] 8 C.P.C. (5th) 349 (Ont.S.C.J.), para 21.
- 251 Counsel for the appellant in *Smith Estate v National Money Mart Company*, 2011 ONCA 233 submitted that it was “perhaps a flaw in the legislation” that judges must test the case being put to them, while also impartially adjudicating it (para. 19). This would suggest that the *Act* should mandate the appointment of independent counsel in all fee approvals. No stakeholder, however, supported such an amendment. More importantly, the argument suggests that judges cannot both scrutinize the record by ask probing questions and adjudicate impartially. The LCO finds no support for such a view.
- 252 *Smith Estate v National Money Mart Company*, (2011) ONCA 233; *Agnico-Eagle*.
- 253 See, for example, Submissions to the LCO by Siskinds LLP, page 14. The firm recognized that an amicus may be helpful in some cases, but stated that it should be the exception, not the rule.
- 254 In Québec, the Court Appeal allowed an amicus on a settlement approval motion in *Abihisira c. Johnston*, 2019 QCCA 657. In Ontario, the courts have appointed an amicus in other contexts. In *Bancroft-Snell v. Visa Canada Corporation*, 2016 ONCA 896, an amicus was appointed to assist the Court of Appeal on the issue of counsel fee arrangements, and in *Bozsik v. Livingston*, 2019 ONSC 2268, the motion judge appointed an amicus to assist with the fee request. An amicus was also appointed in *Waldman v Thomson Reuters Canada Limited*, 2016 ONSC 2622, an appeal of a dismissal of a motion to approve a settlement.
- 255 The LCO endorses the approach taken in *Abihisira c. Johnston*, 2019 QCCA 657 where the Québec Court of Appeal granted intervener status to a lawyer who was not a class member but who had specific concerns about a proposed settlement.
- 256 Submissions to the LCO by Ontario Public Guardian and Trustee (OPGT), page 6.
- 257 *AIC Limited v. Fischer*, 2013 SCC 69 [Fischer], para 56.
- 258 Information provided to the LCO during consultations.
- 259 Information provided to the LCO during consultations.
- 260 Piché, Fourth Dimension To Class Actions, page 20.
- 261 Winkler et al, *The Law of Class Actions in Canada* (Canada Law Book, 2014) [Winkler et al], page 327; Thomas A. Cromwell, “Examination of the Ontario Law Reform Commission Report on Class Actions” (2018) *Ottawa Law Review* Volume 15 [Cromwell], page 588.
- 262 *Zaniewicz v. Zungui Haixi Corporation*, 2013 ONSC 5490, para 57.
- 263 *Ibid*, para 59.
- 264 *Baxter v. Canada (Attorney General)*, 2006 CanLII 41673 (ON SC), para. 50.
- 265 *Eidoo v. Infineon Technologies AG*, [2015] O.J. No. 4558, par. 26. Interestingly enough, this remark cannot be replicated for Québec. In Québec, the Class Actions Lab has found no correlation between those individual amounts distributed and higher take-up rates: see First Empirical Report.
- 266 [Winkler & al.], pages 331-333.
- 267 *Ibid.*, page 330, citing Baxter at paras 55 and 75.
- 268 *Pro-Sys Consultants Ltd. v. Infineon Technologies*, 2014 BCSC 1936 [Pro-Sys], para 36.
- 269 *Ibid*.
- 270 Northern District of California, Procedural Guidance for Class Action Settlements, 2018, United States District Court [Northern California Guidance], available at: <https://www.cand.uscourts.gov/ClassActionSettlementGuidance>
- 271 *Ibid*, s. 1-11.
- 272 *Ibid*, s. 1(f).
- 273 *Ibid*, s. 1 (e).

- 274 *Ibid*, s. 1 (g).
- 275 *Ibid*, s. 3.
- 276 Preamble to Northern California Guidance.
- 277 Jasminka Kalajdzic, *Class Actions in Canada: The Promise and Reality of Access to Justice* (Vancouver: UBC Press, 2018), [Kalajdzic, *Class Actions in Canada*] page 91.
- 278 Todd B. Hilsee, "Effective Class Action Notice Promotes Access to Justice: Insight from a New U.S. Federal Judicial Center Checklist" 53 *Supreme Court Law Review* (2d) 275 (2011) [Hilsee], para 11.
- 279 *Ibid*, para 12.
- 280 *Ibid*, para 13.
- 281 Federal Judicial Center, "Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide" (Federal Judicial Center 2010), online: <https://www.fjc.gov/sites/default/files/2012/NotCheck.pdf>
- 282 Federal Judicial Center, "Class Actions Forms and Notices" (Federal Judicial Center), online: <https://www.fjc.gov/subject/class-action-forms-notices>
- 283 Federal Judicial Center, "Securities Class Action Certification and Settlement: Language for Envelope" (Federal Judicial Center), online: <https://www.fjc.gov/sites/default/files/2015/ClaAct03.pdf>
- 284 Option consommateurs, «Recours collectifs : des modèles de formulaires de réclamation afin de faciliter l'accès à la justice. Une étude de cas, » (Option consommateurs, 2012), online: <http://option-consommateurs.org/wp-content/uploads/2017/08/recours-collectifs-formulaires-juin-2012-1.pdf>
- 285 For example, during consultations a claims administrator suggested that in many cases direct notice is most effective. For the Mackenzie Lake Law Firm, as well as Rochon Genova, targeted online notice platforms are ideal ways of reaching the class members, see submission to LCO by Mackenzie LLP at page 2 and Rochon Genova at page 3.
- 286 See generally, Francis E. McGovern, "Distribution of Funds in Class Actions-Claims Administration," 35 *Journal of Corporation Law* 123-134 (2009).
- 287 Information provided to the LCO during consultations.
- 288 Information provided to the LCO during consultations.
- 289 *DePagie v Crawford & Company Inc.*, 2018 ABCA 326 [DePagie].
- 290 See generally a discussion of claim's administrator's duties in *DePagie*, paras 16-34.
- 291 Submission to the LCO by Ontario Bar Association, pages 5-6.
- 292 Ontario Law Reform Commission, "Report on Class Actions" in 1982 *OLRC Report*, [OLRC Report 1982], page 572.
- 293 *Sutherland v Boots Pharmaceutical plc* (2002), 21 C.P.C. (5th) 196 (Ont. SCJ) at para. 16; *Alfresh Beverages Canada Corp v Hoechst AG* (2002), 16 C.P.C. (5th) 301 (Ont. SCJ) [Alfresh]. Also see *Sorenson v. Easyhome Ltd.*, [2013] O.J. No. 2711, 2013 ONSC 4017, 228 A.C.W.S. (3d) 934, 49 C.P.C. (7th) 305, 2013 CarswellOnt 7898, para 26.
- 294 This is true only if there is a close nexus between the use of the funds and the class. For a fuller discussion, see Jasminka Kalajdzic, "The 'Illusion of Compensation': Cy Près Distributions in Canadian Class Actions" *Can Bar Review* 92:2 (2013), online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2427868, page 173.
- 295 See Chapter 2 for additional information on empirical data collection on class actions.
- 296 See submission to the LCO by Siskinds LLP, page 9.
- 297 *Règlement de la Cour supérieure du Québec en matière civile* [Rules of the Superior Court of Québec in Civil Matters], r. 0.2.1, c C-25.01 (Can. Que.), Rule 59 (translated by the Report's authors) (emphasis added): In the case of a judgment ordering collective recovery of the claims with individual liquidation, the special clerk or the third party appointed by the court (i.e., the claims administrator, for example, or a representative of the defendant) shall file in the court a detailed report of its administration, after the expiry of the deadline given to the members to present claims, and shall give notice of this report to the parties and to the Public Fund (the Fonds d'aide aux actions collectives). This report shall list the members who produced a claim, the amount paid to each, the amount of the balance and the amount deducted pursuant to [...].

there is evidence before the court that the requested legal fees are excessive, unseemly or otherwise unreasonable – *whatever the amount of the judgment or settlement* – the class action judge should roll up her sleeves and examine the risk incurred to help her decide whether the amount being requested by class counsel is indeed fair and reasonable.”

- 327 Janet Walker et al, *Class Actions in Canada: Cases, Notes and Materials* (2nd ed.) (Toronto: Emond, 2018), page 235-238. (Average percentage: 22.6%); Benjamin Alarie and Peter Anthony Flynn, “Accumulating Wisdom: An Updated Empirical Examination of Class Counsel’s Fees in Ontario Class Actions” (2014) 9(2) *Can Class Action Rev* 355 (22% or 1.95 multiplier).
- 328 Benjamin Alarie, “Rethinking the Approval of Class Counsel’s Fees in Ontario Class Actions” (study of 29 cases) Vol.4, No. 15 *Can Class Action Rev* (2007); Alarie and Flynn, page 371 (study of 109 cases).
- 329 Information provided to the LCO during consultations. See also *Cannon*.
- 330 Submissions to the LCO by Rochon Genova, page 7.
- 331 Information provided to the LCO during consultations.
- 332 Information provided to the LCO during consultations.
- 333 *Brown v. Canada (Attorney General)*, 2018 ONSC 3429, paras 11-12; *Welsh v. Ontario*, 2018 ONSC 3217, and *Welsh v. Ontario*, 2019 ONCA 41; *Dabbs v. Sun Life Assurance* (1998) 40 O.R. (3d) 429 (Gen Div) aff’d (1998) 41 O.R. (3d) 97 (C.A.).
- 334 *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 (S.C.J.), para 28.
- 335 *Re Diet Drugs*, 582 F.3d 524 (3rd Cir.2009) para 541.
- 336 *Class Proceedings Act*, ss. 32(2) and (3).
- 337 *Gagne v. Silcorp Ltd.*, 1998 CanLII 1584 (ON CA); *Parsons v. McDonald’s Restaurants of Canada Ltd.*, 2004 CanLII 28275 (ONSC) [Parsons], paras 62-66. In *Parsons*, class counsel sought a lump sum; CJ Winkler considered the percentage approach and the multiplier approach as yardsticks for gauging fairness of the lump sum.
- 338 *Re Diet Drugs*, 582 F.3d 524 (3rd Cir.2009) para 545.
- 339 Barbara J. Rothstein and Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* (3rd ed., Federal Judicial Center, 2010), [Rothstein and Willging], online: <https://www.fjc.gov/sites/default/files/2012/ClassGd3.pdf>, page 35.
- 340 *Lavier v. MyTravel Canada Holidays Inc.*, 2013 ONCA 92, para 32.
- 341 *Brown*, para 51.
- 342 Information provided to the LCO during consultations.
- 343 *Buote Estate v. Canada*, 2014 FC 773, para 21.
- 344 *Manuge v. Canada*, 2013 FC 341, para 50, *Brown*, para 49.
- 345 United States Third Circuit Task Force, *Court Awarded Attorney Fees: Report of the Third Circuit Task Force* (Task Force, 1985), 108 FRD 237, 257; Rothstein and Willging, page 36.
- 346 One of the most recent studies concludes that “[l]argely because of cost, very few Canadians will be able to afford to resolve these types of legal problems,” referring to civil and family law disputes: Trevor Farrow et al, *Everyday Legal Problems and the Cost of Justice in Canada: Overview Report* (Toronto: Canadian Forum on Civil Justice, 2016), page 3; There are hundreds of other studies, reports and papers on the relationship between cost and unmet legal needs. Among the most often cited are: Ab Currie, “A National Survey of the Civil Justice Problems Of Low And Moderate Income Canadians: Incidence And Patterns” (National Survey of Civil Justice Problems: Research and Statistics Division, Department of Justice, Canada, 2006), online: <http://cfcj-fcjc.org/docs/2006/currie-en.pdf>; Mary Stratton and Travis Anderson, “Social, Economic and Health Problems Associated with a Lack of Access to the Courts,” (Special report from the Civil Justice System and the Public Project Commissioned by the Research and Statistics Division, Department of Justice Canada, 2006), online: <https://cfcj-fcjc.org/sites/default/files/docs/2008/cjsp-socialproblems-en.pdf>; Coulter A. Osborne, *Civil Justice Reform Project: Summary of findings & recommendations* (Toronto: Ontario Ministry of the Attorney General, 2007), online: <http://plelearningexchange.ca/database/civil-justice-reform-project-summary-findings-recommendations/>; Gayla Reid and John Malcolmson, *Civil Hub Research Project: Needs Mapping* (BC Legal Services Society, 2007); Saskatchewan Ministry of

- Justice and Attorney General, *Unrepresented Litigants Access to Justice Committee Final Report* (November 2007), online: <file:///C:/Users/rostr/Downloads/32313-Final-Report-Unrepresented-Litigants.pdf>; Canadian Forum on Civil Justice, *Alberta Self-Represented Litigants Mapping Project: Final Report* by Mary Stratton (2007); Michael Trebilcock, (Report of the Legal Aid Review 2008), online: http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/trebilcock/legal_aid_report_2008_EN.pdf; Ontario Civil Legal Needs Project Steering Committee, *Listening to Ontarians* (2010); Canadian Bar Association Access to Justice Committee, "Reaching Equal Justice: An Invitation to Envision and Act," Summary Report (Canadian Bar Association, August 2013), online: [https://www.cba.org/Publications-Resources/Resources/Equal-Justice-Initiative/Reaching-Equal-Justice-An-Invitation-to-Envisi-\(1\)](https://www.cba.org/Publications-Resources/Resources/Equal-Justice-Initiative/Reaching-Equal-Justice-An-Invitation-to-Envisi-(1))
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- 347 *Lavie v. MyTravel Canada Holidays Inc.*, 2008 2008 CanLII 44697 (ON SC), para 31; *Williams v. Canon Canada Inc.*, 2012 ONSC 1856, para 18.
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- 348 *Pearson v Inco Ltd*, 2006 CanLII 7666 (Ont C.A.); *Good v Toronto Police Services Board*, 2016 ONCA 250, para 109.
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- 349 *Class Proceedings Act*, s. 31(1).
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- 350 *Ibid*, s. 31(2).
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- 351 For a lengthy discussion about costs in class actions, see Jasminka Kalajdzic, *Class Actions in Canada* (UBC Press, 2018), chapter 7.
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- 352 Ontario Law Reform Commission, "Report on Class Actions" in 1982 OLRC Report, [OLRC Report 1982], online: https://digitalcommons.osgoode.yorku.ca/library_olrc/110/, page 647.
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- 353 Québec's rules limit costs to a modest tariff.
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- 354 OLRC Report 1982, page 58.
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- 355 E.g. in *Garland v. Consumers' Gas Co*, 1995 CanLII 7179 (ONSC), no costs were ordered against the plaintiff after losing a summary judgment motion.
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- 356 *Garipey v. Shell Oil Co.*, 2002 CanLII 19450 (ON SC). Less than half of the costs requested by the defendants were granted on the basis that the request was not reasonable.
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- 357 *Good v Toronto Police Services Board*, 2016 ONCA 250, para 110; *Ruffolo v. Sun Life Assurance Co. of Canada*, 2009 ONCA 274 (CanLII), 95 O.R. (3d) 709, para 37.
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- 358 *Williams v Canon Canada Inc.*, 2012 ONSC 1856.
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- 359 *Pearson v Inco*, [2002] OJ No 3522 (Div Ct), paras 40-50, aff'd [2005] OJ No 4918 (CA); *Kerr v Danier Leather*, 2007 SCC 44, para 69.
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- 360 *Heller v Uber Technologies*, 2018 ONSC 1690, para 1.
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- 361 The 87 cases spans from 1994 to 2019. In two of the 35 successful cases s.31 was applied in favour of the defendant. The LCO relied on publicly reported decisions and acknowledges that there may be many other cases in which s.31(1) of the CPA has been raised or applied.
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- 362 See for example *Class Proceedings Act*, RSBC 1996, c 50, s 37. In B.C., courts cannot order costs against a party unless satisfied that there has been frivolous, vexatious or abusive conduct by a party; the step in the proceeding was unnecessary and brought for an improper purpose; or there are exceptional circumstances that render it unjust to deprive the successful party of its costs. Similar provisions exist in Manitoba's *Class Proceedings Act*, CCSM c C130, s 37, in Newfoundland and Labrador's *Class Actions Act*, SNL 2001, c C-18.1, s 37, and under the Federal Court Rules, Federal Courts Rules, SOR/98-106, rule 334.39. Québec courts order nominal costs pursuant to a tariff.
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- 363 *Dugal v. Manulife Financial*, 2013 ONSC 6354.
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- 364 *Taub v. Manufacturers Life Insurance Co*, 1998 CanLII 14853 (ONSC) [costs following failed certification motion].
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- 365 *Hollick v. City of Toronto* (1998) 42 OR (3d) 473 [\$10,000 for failed certification motion and \$5000 for unsuccessful appeal].
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- 366 *Edwards v. Law Society of Upper Canada*, [1998] OJ No. 6192, aff'd 2000 CanLII 5748 (ON CA) [successful motion to strike claim; judge ordered costs on a party-party basis].
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- 367 *Fairview Donut Inc v TDL Group Corp*, 2014 ONSC 776 [defendants awarded \$1.8 million after defeating the plaintiffs in a certification and summary judgment motion]; *Green v Canadian Imperial Bank of Commerce*, 2016 ONSC 3829 [defendants ordered to pay over \$2.6 million for a failed certification and leave motion]; *Hughes v. Liquor Control Board of Ontario*, 2018 ONSC 4862 [Hughes] [\$2.2 million order against plaintiff after defendants succeeded on summary judgment motion].
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- 368 *Hughes*, *ibid* para 14.
- 369 Submission to the LCO by the Class Proceedings Committee, page 14.
- 370 *Kerr v. Danier Leather Inc.*, 2007 SCC 44, para 63.
- 371 *Dugal v. Manulife Financial Corporation*, 2011 ONSC 1785 (CanLII) paras. 28-30.
- 372 For a summary of the literature and jurisprudence, see Jasminka Kalajdzic, *Class Actions in Canada* (UBC Press, 2018), Chapter 7.
- 373 Submission to the LCO by Siskinds LLP, page 10.
- 374 Submission to the LCO by the Canadian Environmental Law Association, page 7.
- 375 Submission to the LCO by Innovative Medicines Canada and MEDEC, page 10.
- 376 Submission to the LCO by Class Proceedings Committee, page 21.
- 377 *Bayens v. Kinross Gold Corporation*, 2013 ONSC 4974, para 41.
- 378 Information provided to the LCO during consultations.
- 379 Gina Papageorgiou, "The Class Proceedings Fund: Separating Fact From Fiction" 10(81) *Class Action Review* (2015), page 90.
- 380 *Ibid.*
- 381 Suzette Malveaux, "The Modern Class Action Rule: Its Civil Rights Roots and Relevance Today" ["https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3103020"](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3103020) 66 *Kan. L. Rev.* 325 (2017); David Marcus, "The Public Interest Class Action" Vol.104, No.4 *Georgetown Law Journal* (2016); David Marcus, "The History of the Modern Class Action, Part II: Litigation and Legitimacy, 1981-1994" ["https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3015581"](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3015581) 17-17. *Arizona Legal Studies Discussion Paper No. 17-17.*
- 382 Information provided to the LCO during consultation.
- 383 Submissions to LCO by CELA, page 7.
- 384 Other factors cited were the lack of expertise in class actions and a concern that class actions do not promote horizontal decision-making among clients.
- 385 Submissions to LCO by Class Proceedings Committee, page 6. "Public interest" was defined by a previous chair of the committee as "issues of broad public importance or which [are] directed towards improving the situation of persons or groups who are historically disadvantaged in society."
- 386 A survey of plaintiffs' lawyers conducted in 2009 and again in 2014 revealed a shift from disbursement funding to indemnities as the primary reason for applying: Jasminka Kalajdzic, *Class Actions in Canada* (Vancouver: UBC Press, 2018), page 162.
- 387 Eight cases have not proceeded due to a rejection by the CPF (email from the CPF to the LCO dated Nov. 20, 2018).
- 388 Justice Perell made the following observation in *Houle v. St. Jude Medical Inc.*, 2017 ONSC 5129, at para. 79: "My own anecdotal observation is that given the expense and forensic risks of class action litigation, class counsel firms are few and those firms take on only a fraction of the cases that would gratify the goals and policies of the class action regime."
- 389 *Good v Toronto Police Services Board*, 2016 ONCA 250, para 110; *Ruffolo v. Sun Life Assurance Co. of Canada*, 2009 ONCA 274 (CanLII), 95 O.R. (3d) 709, para 37.
- 390 *Ruffolo v Sun Life Assurance Company of Canada*, 2009 ONCA 274, para 37.
- 391 *1146845 Ontario Inc v Pillar to Post Inc*, 2015 ONSC 1115, para 17.
- 392 *Yip v. HSBC Holdings plc*, 2018 ONCA 626, para 80.
- 393 *Das v. George Weston*, 2019 ONCA 1053, para 248.
- 394 *Class Proceedings Act*, CCSM c C130, s 37(1) (Manitoba); *Class Proceedings Act*, RSBC 1996 (British Columbia), c 50, s 37(1); *Class Actions Act*, SNL 2001 (Newfoundland and Labrador), c C-18.1, s 37(1).
- 395 *Federal Courts Rules*, SOR/98-106.
- 396 *Campbell v. Canada (Attorney General)*, 2012 FCA 45 (costs immunity attaches to a party to a certification motion; so long as the certification motion record has been served, no costs may be awarded against that party).
- 397 The discretionary provision is contained in s 37(2) in all three statutes.

- 398 Ontario Law Reform Commission, *Report on Class Actions*, (Toronto: Ministry of the Attorney General, 1982), page 647.
- 399 *Rosen v. BMO Nesbitt Burns Inc.*, 2013 ONSC 6356, para 2.
- 400 *McCracken v. Canadian National Railway Company*, 2012 ONSC 6838, paras 57-58, 63, rev'd on other grounds 2012 ONCA 445; *McCracken v. Canadian National Railway Company*, 2012 ONCA 797, para 10.
- 401 *Lozanski v. The Home Depot, Inc.*, 2016 ONSC 5447.
- 402 Submission to LCO by Class Proceedings Committee, page 9.
- 403 Submission to LCO by Canadian Bankers Association and Canadian Life and Health Insurance Association, page 7.
- 404 Submissions to LCO by Class Proceedings Committee, page 17.
- 405 *Houle v St Jude Medical Inc.*, 2017 ONSC 5129, para 79.
- 406 The arrangement is on a non-recourse basis, which means the principal is not repaid, nor is there a return on investment if the action is not successful.
- 407 Poonam Puri, "Profitable Justice: Aligning Third-Party Financing of Litigation with the Normative Functions of the Canadian Judicial System" (2014) 55 *Can Bus LJ* 34; Michael Trebilcock and Elizabeth Kagedan, "An Economic Assessment of Third-Party Litigation Funding of Ontario Class Actions" (2014) 55 *Can Bus LJ* 54; Jasminka Kalajdzic, Peter Cashman & Alana Longmoore, "Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding" (2013) 61:2 *American J Comp Law* 93, 122-127.
- 408 By comparison, the Class Proceedings Fund (CPF) – a not-for-profit version of TPLF that is strictly regulated under the *Law Society Act* and regulations enacted thereunder – is estimated to have funded approximately 10% of all class actions in the province. (*Law Society Act*, RSO 1990, c.L.8 ss 59.1-59.5 and Ontario Regulation 771/92. See also Submission to the LCO, Class Proceedings Fund, page 21.
- 409 Under s. 12 of the *CPA*, a court can "make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination." Judges have ruled that this jurisdiction entitles them to consider a funding agreement even before the action has been certified.
- 410 *Dugal v Manulife Financial Corporation*, 2011 ONSC 1785, para 16.
- 411 *David v Loblaw*, 2018 ONSC 198 [*Loblaw*].
- 412 *Marriott v General Motors of Canada Company*, 2018 ONSC 2535, para 8.
- 413 *Dugal*, para 32.
- 414 Submissions to the LCO by the CPF, page 20.
- 415 *Houle v. St. Jude Medical Inc.*, 2017 ONSC 5129, para 79; aff'd *Houle v. St. Jude Medical Inc.*, 2018 ONSC 6352.
- 416 *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, para 29; *Hollick v. Toronto (City)*, 2001 SCC 68 [*Hollick*], paras 34-35.
- 417 Warren Winkler, Paul Perell, Jasminka Kalajdzic & Alison Warner, *The Law of Class Actions in Canada* (Toronto: Canada Law Book, 2014) [Winkler et al], page 1.
- 418 Ontario Law Reform Commission, "Report on Class Actions" in 1982 *OLRC Report*, [OLRC Report 1982].
- 419 Justices Karakatsanis and Cromwell stated in dissent that behaviour modification is a particularly important goal in price-fixing class actions, where it may not be possible to identify class members or quantify their damages. "While class proceedings are clearly intended to create a more efficient means of recovery for plaintiffs who have suffered harm, there are strong reasons to conclude that class proceedings are not limited to such actions": *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, (2013) 3 SCR 545, 2013 SCC 58, para 97.
- 420 Submission to the LCO by International Association of Defence Counsel, para 56.
- 421 Submissions to LCO by Siskinds LLP, pages 15-16.
- 422 *Bancroft-Snell v Visa Canada Corporation*, 2015 ONSC 7275 [*Bancroft-Snell*], para 50.
- 423 See generally, CBC News, "Federal government ordered to pay \$20M for placing mentally ill inmates in solitary confinement" (CBC, Mar 26, 2019), online: <https://www.cbc.ca/news/canada/toronto/ontario-federal-corrections-solitary-suit-1.5072411> and Koskie Minsky, "Federal Prisoner Mental Health

Class Action” (Koskie Minsky, 2015), online:

<https://kmlaw.ca/cases/prisonermentalhealth/>

- 424 For example, the Canadian Environmental Law Association (CELA) advised the LCO that non-class action proceedings were often more effective. CELA noted, however, that class action have not been readily available in environmental harm cases and that it was, accordingly, inaccurate to state that class actions are incapable of modifying behaviour of polluters. Submission to the LCO by CELA, page 13.
- 425 Submissions to the LCO by Innovative Medicines Canada and MEDEC, page 19.
- 426 Submissions to the LCO by International Association of Defence Counsel (IADC), para 56.
- 427 *Mortillaro v Unicash*, 2011 ONSC 923, para 8.
- 428 *Loblaw*, para 7.
- 429 *Krajewski v. TNow Entertainment Group, Inc.*, 2012 ONSC 3908, para 20.
- 430 Juška, Žygimantas. “The Effectiveness of Private Enforcement and Class Actions to Secure Antitrust Enforcement.” *The Antitrust Bulletin*, V 62, No. 3, (2017), pages 603–637.
- 431 *Ibid*, page 634.
- 432 Brian T. Fitzpatrick, “Do Class Actions Deter Misconduct?” in Catherine Piché, ed., *The Class Action Effect: From the Legislator’s Imagination to Today’s Uses and Practices* (Montréal: Thomson Reuters, 2018) page 184 & 187. While the LCO is conscious of the dangers of assuming empirical data regarding American class actions are equally applicable to Ontario cases, the distinctions between our respective civil litigation and class action regimes are not sufficient to disqualify Professor Fitzpatrick’s argument and the studies he relies upon.
- 433 This is true only if there is a close nexus between the use of the funds and the class. For a fuller discussion, see Jasminka Kalajdzic, “The ‘Illusion of Compensation’: Cy Près Distributions in Canadian Class Actions” 92(2) *Can Bar Review* (2013), online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2427868, page 173.
- 434 *Alfresh Beverages Canada Corp. v. Hoescht AG*, [2002] O.J. No. 79, para 16.
- 435 *Ibid*, para 16.

- 436 See Chapter 8.
- 437 Siskinds was content with the current appeal process and strongly disagreed with the suggestion that appeals from certification motions go directly to the Court of Appeal. Submissions to LCO by Siskinds, page 19.
- 438 Submission to the LCO by the Ontario Bar Association, page 16; Submission by Sotos LLP, page 9; Submissions to LCO by Paliare Roland LLP, page 5.
- 439 Submission to the LCO by McKenzie Lake Lawyers, page 7; Submissions by McKenzie Lake Lawyers; Submission to the LCO by Rochon-Genova LLP, page 13.
- 440 Submission by Ad-Hoc-Defence Counsel, pages 8-9.
- 441 Submission by Innovative Medicines Canada MEDEC, page 20-21.
- 442 *Courts of Justice Act*, RSO 1990, c C.43.
- 443 *Houle v. St. Jude Medical Inc.*, 2018 ONCA 88. The Court of Appeal quashed the appeal of the motions court judge’s rejection of the funding agreement on the basis that the order was interlocutory and that the appellants, therefore, were required to seek leave of the Divisional Court.
- 444 *Locking v. Armtec Infrastructure Inc*, 2012 ONCA 774.
- 445 *Courts of Justice Act*, RSO 1990, c C.43, s 6(1)(a).
- 446 Warren Winkler et al., *The Law of Class Actions in Canada* (Carswell, 2014), page 343; *Mignacca v. Merck Frosst Canada Ltd.*, 2009 ONCA 393.
- 447 *Ludwig v. 1099029 Ontario Limited*, 2007 ONCA 266, para 12.
- 448 *LBP Holdings Ltd. v. Hycroft Gold Corp. et al.*, 2018 ONSC 1794, paras 33-46.
- 449 Ontario Law Reform Commission, “Report on Class Actions” in 1982 OLRC Report [OLRC Report 1982].
- 450 A brief reference to the relationship between certification, costs and appeals was made by Committee member Ed Belobaba: Suzanne Chiodo, “Class Roots: The Genesis of the Ontario Class Proceedings Act, 1966-1993” A Thesis Submitted to the Faculty of Graduate Studies in Partial Fulfillment of the Requirements for the Degree of Master of Laws Graduate Program in Law, York University, Toronto, Ontario (November 2016), page 122.

- 451 Precise numbers are not available because not all decisions are reported, particularly at the Divisional Court level. A search of CanLII for all Court of Appeal decisions between 1993 and October 31, 2018 using search terms “appeal / certification & class” yielded 54 cases. The same search of all Divisional Court cases yielded 77 cases. While this is highly imprecise, it does suggest that Divisional Court decisions are frequently appealed.
- 452 Submissions to the LCO by Ontario Bar Association (OBA), page 16.
- 453 See e.g. *Cassano v. The Toronto-Dominion Bank*, 2007 ONCA 781 where the Court of Appeal analyzed two sets of reasons and ultimately overturned both the certification motion judge and the Divisional Court.
- 454 Submission to the LCO by Canadian Environmental Law Association (CELA), page 14.
- 455 Submissions to the LCO by Canadian Bankers’ Association and Canadian Life and Health Insurance Association, page 19.
- 456 Submissions to the LCO by Rochon Genova, page 13, and Sotos LLP, page 9.
- 457 Submission to the LCO by Ontario Bar Association, page 16.
- 458 For 2018 there are 1,090 Court of Appeal decisions reported in online databases and only two are appeals from certification. In 2017 there are 1,030 Court of Appeal decisions reported in online databases and only one is an appeal from a certification motion. These numbers are from a search of reported decisions on CanLII and Westlaw. The 1,090 and 1,030 are rounded. In 2016 there were five appeals to the Court of Appeal from a certification order, in 2015 and 2014 there were two each year and in 2013 there were three. The appeals refer to certification appeals to court of appeal only and not appeals on other grounds.
- 459 These numbers are from Westlaw and are not precise as not all decisions are reported. The 31 is a total of all appeals to both the Divisional Court and Appeal Court – but appeals were counted once only. The 31 refers to certification appeals only and not appeals on other grounds (unless the other grounds are combined with a certification appeal such as limitation period or summary judgment).
- 460 The LCO was able to find 291 decisions on contested certification motions from 1993 to

2017. This averages out to roughly 12 judgments each year. Even if every single contested certification motion were appealed (and the Commission believes this is terribly unlikely) roughly 12 additional appeals each year is a relatively small increase to the 1000+ appeals the court hears each year. See chapter 2 for more detail on the Commission’s methodology for obtaining data.

- 461 Stakeholders advised the LCO that leave was granted from the Divisional Court in the majority of cases. The LCO was unable to conclude this point with empirical data. However, we believe this is likely accurate.

Appendix Endnotes

- 1 *Crown Liability and Proceedings Act*, S.O. 2019, c.7; Sched 17.
<https://www.ontario.ca/laws/statute/19c07c>;
<https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-100>;
https://www.ola.org/sites/default/files/node-files/bill/document/pdf/2019/2019-05/b100ra_e.pdf
- 2 R.S.O. 1990, C. P. 27
- 3 See “Ontario PCs want to make it next to impossible to sue the government”, Lucas Powers, CBCNews, April 14, 2019.
<https://www.cbc.ca/news/canada/toronto/proceedings-against-the-crown-act-repeal-replace-pcs-1.5097205>
- 4 The LCO would like to thank the Class Action Reference Group and Professors Wade Wright (Faculty of Law, University of Western Ontario) and Bruce Feldhusen (Faculty of Law, Ottawa University) for their helpful discussion and comments on the topic. The opinions and conclusions in this Appendix belong to the LCO and do not necessarily reflect parties consulted.
- 5 Hogg, Monahan and Wright, *Liability of the Crown* 4th Edition (Toronto: Carswell 2011), [Hogg] page 7.
- 6 Ontario Law Reform Commission, “Report on the Liability of the Crown” (1989). *Ontario Law Reform Commission* 1989. [OLRC Report] pages 8-10.
- 7 Section 2 of PACA.
- 8 *City of Kamloops v. Nielson*, [1984] 2 S.C.R. 2., and Hogg pages 225-228.

- 9 This concept originated in U.S. caselaw. The prime example case is of a decision to build a lighthouse would be a planning decision. Once having built the lighthouse, the failure to keep the light burning would be an operational decision. See OLRC 1989 Report, page 13.
- 10 In the 2011 Supreme Court decision *Imperial Tobacco (Knight v. Imperial Tobacco Canada Ltd., 2011 SCC 42, paras 72-91)*, Chief Justice Beverly McLachlan clarified the definition of a policy decision: “decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith.” (para. 90) *Imperial Tobacco* is considered the seminal case on the policy/operational distinction – but by no means the only decision. A full analysis of this issue requires a more in-depth look at the complexity and nuances of the grey area between policy and operational. (Other key cases include: *Hill v. Hamilton-Wentworth Regional Police*, 2007 SCC 41; *Fellowka v. Royal Oak Ventures Inc.*, 2010 SCC 5).
- 11 This statistic represents class actions reported on Westlaw for which the Crown was a defendant and negligence was alleged from 2016-2019.
- 12 *Smith v. Corporation of the Municipality of Brockton* – a class action brought by residents and non-residents of Walkerton, Ontario who were affected by the e-coli outbreak in the water system in May, 2000.
- 13 *Dolmage v. Her Majesty the Queen in Right of Ontario*. This case involved allegations of systemic abuse at provincially run centres for people with developmental disabilities.
- 14 *Parsons v. Canadian Red Cross Society* (2000) 49 O.R. (3d) 281 (SCJ) (actions against the Federal government and other provincial government likely not affected).
- 15 *Welsh v. Ontario*, 2018 ONSC 3217; 2019 ONCA 41
- 16 *Cirillo v. Her Majesty the Queen in Right of Ontario* The Charter breach allegations in this action would not be affected by the CLPA
- 17 <https://www.cbc.ca/news/canada/toronto/segregation-class-action-1.4830482> The Charter breach allegations in this action would not be affected by the CLPA
- 18 See sections 17(1) through 17(7) of CLPA.
- 19 The LCO is unaware of any empirical evidence to suggest that this “mischief” is a significant issue.
- 20 For example, the former residents of Ontario Training Schools matter was certified on December 4, 2018. The plaintiffs seek \$600M from Ontario for period of Jan. 1953 to April 1984. The allegations against the Crown are that the province established and operated the training schools, and created a toxic environment in which physical, sexual and psychological abuse of children in its care was frequent and widespread. Plaintiffs allege the Crown was negligent and breached its fiduciary duty to the class through the establishment, funding, operation, management, administration, supervision and control of 12 training schools. They are also claiming vicarious liability. Under the previous legislation and Supreme Court of Canada jurisprudence, the establishment and funding of the school are likely planning decisions and may not attract liability, while the operation, management, administration, supervision and control would likely constitute operational decisions that do not attract immunity. Under the new legislation, however, all of these actions are likely to be caught by s.5(c)(iii) which directly references “supervision or control” and 5(c) (i) “carrying out... of some or all of a program, project or other initiative”.



LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

January 22, 2020

The Honourable Doug Downey
Ministry of the Attorney General
720 Bay Street
McMurtry-Scott Building 11th Floor
Toronto ON M7A 2S9

Dear Minister,

Re: Class Proceedings Amendments, Bill 161, the *Smarter and Stronger Justice Act*.

On behalf of the Law Commission of Ontario (LCO), I am writing to comment upon the class action provisions of *Bill 161*, the *Smarter and Stronger Justice Act*. These provisions are set out in Schedule 4 of the *Bill*. The LCO will be sending you a second letter that comments upon the *Estates Act* provisions of the *Bill*, which are based on a second LCO report.

As you know, the foundation for the proposed class action amendments is the LCO's July 2019 report, *Class Actions: Objectives, Experiences and Reforms*. The LCO commends the provincial government for substantially adopting numerous LCO recommendations in *Bill 161*, including provisions respecting:

- Timing of certification motions and administrative dismissal;
- Carriage;
- Multijurisdictional class actions;
- Settlement approvals;
- Settlement distributions;
- Fee approval;
- Third party funding; and,
- Appeals.

All else being equal, these provisions would improve access to justice, improve judicial efficiency, reduce delay and costs for all class action stakeholders, and ensure a high degree of accountability and transparency for class action proceedings in Ontario.

Unfortunately, *Bill 161* also includes amendments to the *Class Proceedings Act* certification provisions that are likely to significantly reduce access to justice and worsen class action delays, inefficiencies and costs.

Bill 161 adopts mandatory *and* conjunctive “superiority” and “predominance” tests at certification. **These provisions fundamentally restructure class action law and policy in Ontario by shifting the CPA’s longstanding certification test strongly in favour of defendants.**

“Superiority” and “predominance” requirements were specifically rejected by the LCO. More importantly, these provisions will have a significant and negative impact on access to justice and the administration of justice in Ontario for the following reasons:

- **First, *Bill 161* will effectively restrict class actions and access to justice in a broad range of important cases, including consumer matters, product and medical liability cases, and any potential class actions where there may be a combination of common and individual issues.** Applied retroactively these provisions would likely have prevented important and successful class actions regarding Indian Residential Schools, environmental tragedies (such as Walkerton), tainted blood supplies (such as hepatitis C), and/or price-fixing. The provincial government should not restrict Ontarians’ access to class actions in such broad and important areas.
- **Second, *Bill 161*’s “superiority” and “predominance” provisions are demonstrably inconsistent with certification rules across Canada and will likely increase costs, delays and legal uncertainty for plaintiffs, defendants and justice systems across the country.** As a result, these provisions contradict efforts in Canadian judicial administration to harmonize or at least promote consistent legal rules across the country. These provisions also circumvent *Bill 161*’s very appropriate and necessary multijurisdictional class action reforms.
- **Third, *Bill 161* creates an improbable and unwelcome situation in which Ontarians potentially have fewer legal rights and less access to justice than other Canadians.** This is because the legislation gives rise to situations where a class action could be certified in, say, BC, but not in Ontario. At best, this will result in years of interprovincial litigation, delays and increased costs for litigants and courts. At worst, it will mean that Ontarians may not have access to the same remedies and compensation as other Canadians.
- **Fourth, *Bill 161* adopts restrictive American legislative provisions and priorities that are inconsistent with decades of Canadian law.** The Supreme Court of Canada has

repeatedly stated that the *CPA* “should be construed generously to give full effect to its benefits”. The proposed changes to the certification test are inconsistent with the long-standing Canadian approach to mass harm redress.

- ***Finally, Bill 161 and the new Crown Liability and Proceedings Act create significant barriers for Ontarians wishing to initiate class actions against their provincial government, government agencies, corporations and other institutions.*** The LCO report warned about the combined and negative impact of the new *Crown Liability and Proceedings Act (CLPA)* and the adoption of a preliminary merits test in the *CPA*. This analysis applies equally to *Bill 161*’s superiority and predominance provisions.

The LCO does not believe these issues are cured or balanced by the many positive elements of the legislation. Rather, the effect of *Bill 161*’s superiority and predominance requirements will be to increase costs, lengthen delays, and undermine the access to justice and judicial efficiency goals of the *CPA* and class actions generally.

In light of this analysis, the LCO is unable to support *Bill 161* as currently drafted. The LCO trusts that the provincial government will take the opportunity to reconsider the certification provisions of *Bill 161* over the coming months. The LCO would be pleased to discuss this and any other issues with the Ministry.

Sincerely,



Andrew Pinto
Chair, LCO

CC Irwin Glasberg, Acting Deputy Attorney General
Amanda Iarusso, Director of Policy and Legal Affairs, Attorney General
LCO Class Actions Reference Group