SUBMISSIONS OF THE AD HOC DEFENCE COUNSEL GROUP REGARDING THE LAW COMMISSION OF ONTARIO CONSULTATION PAPER

This submission is made on behalf of an *ad hoc* group of class action defence counsel (the "Defence Group"[1]) that volunteered to collaborate on giving collective feedback to the Law Commission of Ontario (the "LCO") in respect of the questions set out in the LCO's March 2018 Consultation Paper. This group consists of experienced defence counsel from several national law firms that practice predominantly in the area of class proceedings.

It is our understanding that many defence counsel across the province have already spoken with the LCO on both a formal and informal basis to ensure that a broad spectrum of views concerning class proceedings issues are heard and understood by the LCO, including those of defendants, who are a constituency that is commonly and substantively affected by class actions policy and procedure. The Defence Group has reviewed the commentary provided by other defence-related bodies, including the International Association of Defense Counsel ("IADC"), which has submitted thorough and thoughtful analysis of the questions posed by the LCO. Unlike the broad response of the IADC, our commentary will focus on only five of the consultation questions posed by the LCO. These five were chosen because there was a broad consensus among the Defence Group (as well as other counsel initially canvassed for this exercise) that these questions were the most pressing and deserving of comment.

The questions we have addressed are as follows:

Question 1: "How can delay in class actions be reduced?"

The tools to ensure the reduction of delay in class actions are to a large extent known and already available to the class action bar. Justice Rosenberg's comment that "the case management judge plays an important role in guiding the evolution of the proceeding" is perhaps an understatement, as judges, both in their roles as case-managers and triers of fact via summary judgment motions and trials, are integral to expediting any class proceeding process.[2] The devotion of significant judicial resources exclusively to class proceedings, as well as the practice of individual judges in imposing practical but efficient schedules reflective of the unique circumstances of each case, does and will continue to provide the most tangible benefits to the system as whole.

---

[1] These submissions reflect the views of the signatories and/or their firms (as set out below) and do not necessarily reflect the views of any particular client(s) represented by the signatories.

[2] *Brown v. Canada (Attorney General)*, 2013 ONCA 18 (CanLII), <http://canlii.ca/t/fvn87> at para. 45.

The Supreme Court of Canada in *Endean v. British Columbia* commented that Section 12 of the *Class Proceedings Act* entitles case management judges in class actions "to seek and impose creative solutions to the efficient determination of the issues", and that it imbues the case management judge with a "broad, discretionary jurisdiction".[3] The Supreme Court endorsed the view of the Ontario courts that Section 12 should be considered a "flexible tool for adapting procedures on a case specific basis."[4] That provision provides ample authority to judges to manage and schedule class actions in a fair but efficient fashion. In other words, delays in class actions can be, and frequently are, reduced on a case-by-case basis by a robust case management process.

As suggested in the IADC's submission, many delays in the litigation process occur as a result of class counsel declining to push matters forward. Commonly cited reasons for the delay, in the Defence Group's experience, tend to include:

a) The Canadian litigation "piggybacking" on larger, existing U.S. litigation and class counsel waiting for the U.S. litigation, investigations or regulatory proceedings to develop;

b) The workload of class counsel;

c) The complexity of the proceeding;

d) The extraordinary number of parties often involved, any one of which may have equal rights to delay the process or to seek indulgences of time;

e) A professed need for extended investigations or document review, particularly where class counsel are unaccustomed to, or unprepared for, the demands of managing class proceedings prior to certification;

f) The multi-jurisdictional nature of the dispute, and other factors.

These factors are largely out of defence counsel's control. To some extent, case management must be applied to prevent these delays from becoming unreasonable; and the question of whether or not class counsel will have the capacity to manage a proceeding of the magnitude intended should be a proper and thorough consideration for carriage motions and the evaluation of a litigation plan.

---

[3] *Endean v. British Columbia*, [2016] 2 SCR 162, 2016 SCC 42 (CanLII), <http://canlii.ca/t/gv6g4> at para, 38.
[4] *Ontario New Home Warranty Program v. Chevron Chemical Co. (1999)*, 1999 CanLII 15098 (ON SC), 46 O.R. (3d) 130 (S.C.J.) (CanLII) <http://canlii.ca/t/1wfjr>

Given the factual scope and complexity of many class proceedings, the Defence Group further suggests that the requirement for the certification motion to be heard ninety (90) days from the service of the statement of defence is largely an anachronism and unreflective of common practice. It should be removed from the legislation.

The IADC's comments regarding administrative dismissal are certainly worth considering, particularly given the stigma of public reports of legal proceedings – and class actions in particular – and the requisite reporting obligations for many defendants. This proposed dismissal process would at least provide a gatekeeper function for meritless proceedings that have been brought but effectively abandoned by class counsel.

Because of the tolling provisions in class actions legislation (Section 28 of the Ontario *CPA*), the Defence Group reports dozens of clients whose businesses remain in limbo for years or decades as the cases against them remain inert, with no hope of administrative dismissal. A related and pressing concern – the disposition of 'zombie actions' – is discussed further below.

Question 2: "Given that class actions must provide access to compensation to class members, how should distribution processes be improved?"

Question 13: "Should the Class Proceedings Act or Rules of Civil Procedure be amended to promote mandatory, consistent reporting on class action proceedings and data?"

The following submission addresses both questions listed above, as both involve the availability and quality of information and data concerning the class action process in Ontario.

The Defence Group disputes the underlying assumption in Question 2. Class actions are procedural creations allowing numerous plaintiffs to bring individually non-viable claims collectively. Class action plaintiffs are no more entitled to compensation by virtue of bringing a class action than any other plaintiff is entitled to compensation by virtue of bringing an individual action.

The Supreme Court in *Dutton v. Western Canadian Shopping Centres*[5] recognized access to justice as one of the three "important advantages" of a class action. That decision did not, however, guarantee access to full compensation of all plaintiffs' claims. Among other things, the Defence Group has noted a gradual evolution towards that principle – that plaintiffs should not

[5] *Western Canadian Shopping Centres Inc. v. Dutton,* [2001] 2 SCR 534, 2001 SCC 46 (CanLII), <http://canlii.ca/t/520c>

only have their day in court, but that they should be as successful as possible, which was not and could not have been the aim of the legislation.

This development is most acutely observable in the court's consideration of the preferable procedure criterion, which is increasingly considered by primarily focusing on what procedure might yield the highest monetary recovery for the class irrespective of the advantages and disadvantages of alternative procedures.

The Defence Group wishes the Commission to consider that the 'access to justice' advantage of class actions applies both ways. While class actions certainly allow plaintiffs a laudable opportunity to advance individually non-viable claims, they also permit defendants to resolve those outstanding claims that would be non-viable to manage individually. Both parties benefit from these collective recourse procedures, and the merits of the underlying claims should not be assumed in reviewing the legislation.

In respect of best practices for distributing monetary awards to class members, while the Defence Group has little expertise in this area, it encourages the Commission to reach out to claims administrators in Canada and the U.S., who have extensive experience in putting the abstract plans of counsel into practice and may have more practical recommendations than those that do not engage in the daily practice of claims distribution. Anecdotally, members of the Defence Group report encounters with Claims Administrators complaining that the practice of leaving distribution procedures up to counsel without the input of professionals is highly inefficient and results in lower take-up rates.

The Defence Group endorses any steps that would render class proceedings more transparent. It would be of great benefit both to courts and to their clients to have an accurate assessment of the number of claims being brought in any given area of law, and to examine relative take-up rates. This information would promote information-based negotiation and facilitate reasonable settlement discussions.

Use of the National Class Action Database ("NCAD") should be mandatory, among other things in order to minimize the number of 'zombie actions' created. 'Zombie actions' is a colloquial term that has gained currency among the defence bar, as there has been a need to label a phenomenon that has become a prevailing concern among defendants. Zombie actions are so named because they refer to claims that are neither dead nor alive. It is common for a defendant to be one of dozens of parties named in a class action, but then to have the action

stayed in favour of another action, perhaps in another jurisdiction. In many cases, that main action may not name that same defendant.

That defendant then suffers from having the stayed claim against it outstanding indefinitely, due to the tolling provisions of the CPA. There is no procedure at present to provide any finality to a defendant in a zombie action, who must carry a reserve on the books, report to its insurer, and admit a class action is pending in public reporting for the indefinite future even if a claim is completely meritless. Accordingly, the mandatory use of the NCAD is to be encouraged as a prophylactic against the creation of zombie actions.

The Defence Group is reluctant to adopt an absolute requirement for a public report summarizing the outcomes of the settlement distribution after its conclusion. In some circumstances, confidentiality may be necessary and desirable for both parties. It is recommended that the privacy or publicity of a settlement agreement continue to be subject to the supervision of the court.

If any reporting is to be made mandatory, the Defence Group is primarily interested in the take-up rates in Ontario class actions. Anecdotally, some retail cases have been proven to have extraordinary take-up rates but securities class actions take-up is reported anecdotally to be quite low. This type of information, including the practical outcomes of distribution (e.g., amounts distributed *cy-près,* amounts distributed on a *pro rata* basis, etc.) would be useful both in further policy debates and in strategic or settlement discussions. It is legitimate for defendants to stiffly oppose cases that fall into categories associated with traditionally low take-up rates. Conversely, actions that could be expected in an historical context to be of interest to a large number of class members should be considered accordingly as the defendant seeks to make or accept a settlement offer.

In respect of whether the CPA should be amended to specify more detailed requirements regarding distribution practices, improved monitoring, or reporting, class proceedings may be too multifarious to easily admit of a broad rule requiring disclosure. Such a rule could engage issues ranging from the protection of trade secrets and proprietary competitive information to personal health information and/or financial disclosures. The specifics of monitoring and distribution should be left in all cases to the supervising judge.

Question 3: "What changes, if any, should be made to the costs rules in the CPA?"

The Defence Group submits that the "loser pays" costs regime should be maintained for class proceedings in Ontario.

Ontario is a unique class proceeding environment in respect of the reduction of costs-related barriers to access to justice. As has been discussed in recent costs decisions, the existence of the Class Proceedings Fund; the availability of indemnification by multiple well-funded, entrepreneurial class counsel firms; and the emergence of a third-party funding regime provide plaintiffs with numerous options to backstop potential personal financial liability for adverse costs awards.

Many defendants are confronted with "bet the company"-style litigation when defending class actions, as they have no choice but to vigorously defend the claims brought against them. Counterclaims are largely unavailable to them in the types of proceedings that are involved (i.e., secondary-market securities, product liability, consumer protection, etc.). Class counsel are generally sophisticated and well understand the risks and rewards of high-stakes litigation. They are able to recover amounts that are multiples of actual legal costs expended by way of factoring their fees into their retainers and subsequent judgment or settlement compensation. On the other hand, defendants have to often spend millions of dollars to defend complex actions that may never have been viable to begin with. Costs awards, even at a fraction of actual expenditures, are usually the only opportunity for successful defendants to obtain some sort of compensation for what are occasionally purely speculative claims. Moreover, the availability of substantial adverse costs awards creates a necessary disincentive against plaintiffs bringing non-meritorious claims.

As stated in *2038724 Ontario Limited v. Quizno's Canada Restaurant Corporation*[6], defendants, just as much as plaintiffs, are entitled to access to justice, and the court in exercising its discretion regarding costs must be aware of the access to justice implications of its awards to both plaintiffs and defendants. Class action procedure is meant to level, not tip, the playing field in favour of plaintiffs. Plaintiffs should not be able to escape potential costs consequences that they would have been exposed to in any other type of action. The two-way costs rule should be maintained to preserve a modicum of justice for defendants who are wrongly pulled into the high–stakes, entrepreneurial system of class proceedings in Canada.

---

[6] *2038724 Ontario Limited v. Quizno's Canada Restaurant Corporation*, 2010 ONSC 5390 (CanLII), <http://canlii.ca/t/2cswq> at paras. 16-17.

There was also some suggestion amongst the Defence Group that there should be more transparency in respect of plaintiff indemnification and funding arrangements to ensure that defendants have the opportunity to move for security for costs, without such a motion being seen as tactical. If there is no possibility that the defendants' costs will ever be paid, both defendants and the court have a right to know, as it would impact the course of the proceeding substantially; however, in the current environment the Defence Group believes any motion to that effect would be rejected outright. In a similar regard, as discussed by the IADC, funding transparency as well as a direct right of action against indemnitors such as third party funders would ensure that a defendant's successful costs award does not ultimately become meaningless.

Question 8: "In light of existing constitutional restrictions, what is the most effective way for courts to case manage multi-jurisdictional class actions in Canada?"

The best way forward for facilitating the hearing of multijurisdictional class actions would involve a multilateral legislative solution eliminating the underlying constitutional concerns; or alternatively a determination that the inherent power of the court to join necessary and proper parties to an action before it permits a superior court to hear a multijurisdictional class action. As both of these developments are extremely unlikely, the Defence Group fully endorses the CBA Judicial Protocol for Multijurisdictional Class Actions as the best currently achievable solution in the absence of those extraordinary developments.

The Defence Group also endorses the approach taken by Alberta, Saskatchewan and British Columbia to incorporate procedures for staying local proceedings in order to facilitate multijurisdictional class actions in other jurisdictions. The Defence Group therefore endorses an amendment to the CPA consistent with the *Uniform Class Proceedings Amendment Act* of the Uniform Law Conference of Canada.

Question 10: "What is the appropriate process for appealing class action certification decisions?"

The Defence Group is of the view that it would be desirable if all appeals from certification decisions would proceed directly to the Court of Appeal as of right.

In the Defence Group's experience, the involvement of the Divisional Court in certification appeals does not appear to be empirically supportable as promoting the most expedient resolution of class proceedings. Given the stakes involved in class actions, parties with a genuine difference on a point of law will tend to carry on until their appeals are exhausted. The Defence Group's preliminary research, based on a sampling of cases in the last 10 years, suggested that it may be the case that more than half of certification decisions appealed on their merits to the Divisional Court were further appealed to the Court of Appeal. If the LCO determines that to be reflective of actual practice, then the extraordinary delay and expense involved in preparing the appeal to the Divisional Court – and more importantly, the extended detention of valuable trial judges – may not advance the imperative of judicial economy in resolving a class proceeding.

The Defence Group is also of the view that the dichotomy between appeal routes between plaintiffs and defendants is fundamentally unfair to defendants, unsupportable and invites unnecessary procedural steps.

Because an appeal from a successful certification motion is an appeal of an interlocutory decision and an appeal from an unsuccessful certification motion is (debatably) an appeal of a final decision, a plaintiff's appeal route is presumably to the Court of Appeal whereas the defendant's appeal route from the same decision is presumably to the Divisional Court. Given the stakes for defendants in class proceedings, the inequality in appeal routes tilts the playing field in favour of plaintiffs rather than levelling it.

The issue of certification represents a massive financial risk to both parties, and impacts significantly on leverage for potential settlement of class proceedings, and as such should be recognized as equally important to both parties.

In cases of divided success – which are common – there is also built-in confusion as to the correct appeal route due to the fundamental imbalance imposed by the process. Added to this is the complexity in appeal routes where summary judgment motions and other motions have been heard concurrently with certification motions. A simplified, predictable process is encouraged, and a route to the Court of Appeal as of right would constitute a fair, simplified process.

If the Court of Appeal were to consider a leave test for class proceedings, the Defence Group suggests that the leave test may have to be tailored to the unique nature of class proceedings. The standard test for leave to appeal often sees appeals of certification decisions refused leave because the decisions ostensibly concern only the parties involved and not matters of general importance. That standard analysis does not adequately reflect the fact that class actions by their very nature involve questions of importance to the broader public; or the fact that the financial, political and human stakes involved in these motions tend to dwarf those involved in a typical civil matter. The appeal of a certification decision may not necessarily be of less public importance than the appeal of a final decision in a standard civil trial, yet it is arbitrarily being treated as such. Even if no legislative test were to be advanced, the Defence Group would respectfully suggest the judiciary interpret the existing test for leave in such a way as to recognize that the parties are not entirely private; and that matters between a defendant and a plaintiff class generally *are* matters of public importance.

Conclusion

The Defence Group appreciates the opportunity to provide supplementary views on the issues raised by the traditional defence-related organizations, and trusts that any suggested class proceedings reforms reflect the general principle of both plaintiffs and defendants having the right to a fair and balanced procedure that provides access to justice to all litigants.

Cassels Brock & Blackwell LLP

Wendy Berman
Lara Jackson
Jeremy Martin
Tim Pinos
Derek Ronde

Torys LLP

Linda Plumpton

Osler Hoskin & Harcourt LLP

Craig Lockwood
Chris Naudie

Gowlings WLG LLP

Scott Kugler
Steven Sofer
Mary Thomson
John Callaghan