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May 31, 2018

To the Law Commission of Ontario:

Re: Canadian Bankers Association and Canadian Life and Health Insurance Association joint response to Consultation Paper on class action reform

The Canadian Bankers Association ("CBA") is the voice of more than 60 domestic and foreign banks operating in Canada and their 280,000 employees. The CBA continues to provide governments and others with a centralized contact to all banks on matters relating to banking in Canada. The CBA advocates for public policies that contribute to a sound, thriving banking system to ensure Canadians can succeed in their financial goals.

The Canadian Life and Health Insurance Association ("CLHIA") is a not-for-profit, membership-based organization that represents 99% of Canada's life and health insurance companies. CLHIA's member companies, through a wide range of products and services, help Canadians to protect themselves and their families against the financial risks surrounding premature death, illness and retirement.

The members of the CBA and CLHIA have significant experience with a wide range of class actions, and we are grateful for the opportunity to share our views on the lessons learned over the past quarter century. In the interest of focusing our contribution, we have confined our submissions to the questions in your Consultation Paper that are of greatest importance to our members.

Our detailed submissions are set out in the sections that follow. In brief, we recommend that the *Class Proceedings Act, 1992* (the "*Act*") be updated as follows:

- The test for certification should be enhanced by requiring that common issues predominate over individual issues.
- There should be no change to the current costs regime.
- Routes of appeal from certification should be symmetrical for plaintiffs and defendants, and both should proceed directly to the Court of Appeal as of right.

- Class proceedings should defer to the decisions of expert regulatory or administrative bodies, or at least presume that no further behaviour modification is needed.
- The existence of common issues should provide a basis for a national class, but Ontario courts should nevertheless decline actions that are better prosecuted elsewhere.
- Third-party litigation funders should be regulated as insurers and the defendant should have a right of action against the funder for costs.
- Class actions should be subject to the usual rules governing dismissal for delay, with appropriate modifications to give notice to actual or putative class members.
- Defendants should not be required to deliver a statement of defence before certification.
- The limitation period on third party claims should be tolled until the motion for certification is decided.

We hope that our submissions will help the Law Commission to improve the practice of class actions in Ontario. We would be pleased to discuss our views at greater length, and we look forward to commenting further on the Law Commission's draft policy recommendations.

Signed by:

Craig Anderson
Vice President and General Counsel
Canadian Life and Health Insurance Association

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General Counsel and Vice-President, Legal
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Question #1: Delay

In our view, early case management generally results in a consent timetable that accommodates the factual complexity of the action. In these circumstances, we are not concerned about the time that is required to bring the motion for certification to a hearing, even if it exceeds the time set out in s. 2(3) of the *Act*.

The problems with delay are most acute when plaintiffs unilaterally decide to hold an action in abeyance. Some of these actions stall because plaintiffs lose interest but the prospect of seeking leave to discontinue or abandon the action under s. 29(1) of the *Act* is onerous. Other actions are commenced as placeholders pending the resolution of related litigation in another jurisdiction. While the parties will sometimes agree to proceed first in another jurisdiction, placeholder actions are often left to drift without the consent of the defendant.

Unfortunately, the usual solutions to unilateral delay are inapplicable to class actions. In the ordinary course, an individual action will be dismissed pursuant to Rule 48.14(1) of the *Rules of Civil Procedure* if it is not set down for trial within five years of the issuance of the statement of claim. However, class actions are expressly exempted from administrative dismissal pursuant to Rule 48.14(1.1)(b). Marrocco A.C.J. explained the rationale as follows: "[t]he concern which gave rise to the Rule [Rule 48.14(1)]; namely that parties to an action will decide not to proceed with or settle the action and neglect to inform the Court ought to have no application to a case managed file".[1]

Given the variability in case management practices across Ontario, we take the view that class actions should not be exempted from the application of Rule 48.14. Where case management fails to combat unilateral delay, there is no rationale to permit actions to be held in abeyance indefinitely, only to be revived without warning at some future date. Furthermore, Rule 48.14 should be applied to both new and existing class actions, as it was to individual actions, so as to address the backlog of languishing cases, some more than a decade old.

Rule 48.14(4) contemplates rolling timetables to set the action down for trial. If plaintiffs cannot obtain consent to such a timetable, Rule 48.14(5) contemplates a status hearing to explain the delay. Plaintiffs will either satisfy the court that the delay is justified, or if the action has been *de facto* abandoned, it will be dismissed without further action by any party. We believe that this mechanism to address unilateral delay is, in principle, entirely compatible with class proceedings.

That said, we recognize that some procedural modification may be necessary to adapt Rule 48.14 to the class action context. Specifically, the court may wish to notify actual or putative class members that the limitation period applicable to their claims will no longer be tolled pursuant to s. 28(1) of the *Act*.[2] To this end, s. 29(4) of the *Act* could be amended to require the proposed representative plaintiff to give notice of the administrative dismissal. The *Act* might also be amended to suspend any administrative dismissal for 60 days to allow any interested plaintiffs to commence new claims before the expiry of the limitation period.

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[1] *Daniels v. Grizzell*, 2016 ONSC 7351, at para. 10.

[2] *Ladd v. Vale Canada Limited*, 2012 ONSC 6498, at paras. 12-13.

The problem of delay arises in part because class actions are accorded exceptional status, untethered to the usual requirements of the *Rules*. The approach set out above would leverage the *Rules*, *mutatis mutandis*, to ensure that unilateral delay does not accumulate indefinitely.

Question #3: Costs

We favour maintaining the current adverse cost shifting regime. Because of the availability of the Class Proceedings Fund, as well as a plethora of private third-party funders, it seems unlikely that the prospect of an adverse costs award would bar meritorious litigation. We note that the Class Proceedings Fund is charged with funding cases that engage the public interest,[3] regardless of the expected monetary recovery, thereby ensuring that compelling claims do not slip through the cracks.

We would be concerned about an increase in meritless claims that are effectively strike suits if Ontario adopted a no-costs regime, even at the certification stage. This is particularly worrisome because, as discussed below, these claims may be capable of certification under Ontario's current merits-blind analysis. The bargain recommended by the Ontario Law Reform Commission in its seminal 1982 *Report on Class Actions* contemplated a preliminary merits test as a precondition to a no-costs regime.

Additionally, we disagree that plaintiffs are entitled to relief from the usual cost consequences of unsuccessful litigation, as a matter of course, for the simple reason that they have chosen to prosecute their claim in the form of a class action.[4] Instead, we prefer the more flexible instrument of s. 31(1) of the *Act*, which directs the court to consider whether costs should be reduced because the proceeding "was a test case, raised a novel point of law or involved a matter of public interest".

Not all class actions will engage these interests, and accordingly, not all class actions are entitled to immunity from adverse cost shifting. Many will simply be "entrepreneurial litigation" that takes on a public character only by virtue of aggregating a large number of private claims.[5] As Justice Perell noted in *Das v. George Weston Limited*, a proposed class action advanced on behalf of workers affected by the collapse of a factory in Bangladesh, pursuing social justice through class proceedings is not necessarily a matter of altruism:

> I respect the empathy, faith, fortitude, kindness, and pursuit of justice of the Plaintiffs' lawyers and of the Class Proceedings Fund in taking on the case for the citizens of a foreign land, but a significant motivator in this proposed class action was money, independent of public policy, and the Plaintiffs were intent on intensifying the pressure and risks on the Defendants and to motivate them to settle and to pay a substantial award. This proposed class action was not purely altruistic and the Plaintiffs' lawyers must be taken to have weighed the awards along with the risks when they decided to take on a case that they litigated with little or no mercy, temperance, or proportionality.[6]

Ultimately, we do not believe that access to justice requires an amendment to the existing cost rules. It is rare for a representative plaintiff to be personally liable for costs. Even if no indemnity has been granted, plaintiffs' counsel may be held liable for costs on the basis that they directed the litigation and stood to obtain "extremely large fees from a successful

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[3] O. Reg. 771/92: *Class Proceedings*, s. 5(1) (The Class Proceedings Fund is governed by a regulation promulgated under the *Law Society Act*, R.S.O. 1990 c. L. 8).

[4] *Poulin v. Ford Motor Company of Canada Limited*, 2007 CanLII 56490 (Ont. S.C.J.), at paras. 36-39.

[5] *Yip v. HSBC Holdings plc*, 2017 ONSC 6848, at para. 48.

[6] *Das v. George Weston Limited*, 2017 ONSC 5583, at para. 123.

outcome".[7] Section 31(1) of the *Act* is available for true public interest litigation, but 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. Given the significant expense of litigating such factually complex matters, requiring defendants to bear their the costs of defeating an unmeritorious claim would be contrary to the goal of increasing access to justice for litigants.

[7] *Poulin v. Ford Motor Company of Canada Limited*, 2007 CanLII 56490 (Ont. S.C.J.), at paras. 70-71.

Question #5: Certification

Because the stakes are so high, the court must perform a meaningful gatekeeping function on a motion for certification to ensure that a trial of the common issues would be efficient, economical, and fair to all parties.[8] In our view, however, the jurisprudence on certification has drifted far from the Legislative intent. The application of the test for certification has become lax, and it can fail to bar actions that are unsuited to resolution in a class proceeding.

Class actions do not serve their purpose when certified common issues cannot practicably be resolved on a class-wide basis, where the resolution of these common issues does little to settle the dispute between the parties, or where these issues are so lacking in merit that they cannot justify the expense of a common resolution. Instead, such actions either impose substantial burdens on court resources without delivering meaningful access to justice for plaintiffs, or else they force defendants to settle ill-founded claims because the cost and effort of litigation would be untenable.

We believe that the Law Commission of Ontario should consider three amendments to the test for certification in s. 5(1) of the *Act*, any one of which would substantially alleviate the difficulties set out above:

(a) Require that common issues predominate over individual issues, as in Rule 23 of the United States Federal Rules of Civil Procedure;[9]

(b) Require that the second through fifth of the certification criteria under s. 5(1) of the *Act* be established on a higher evidentiary burden than "some basis in fact", given that commonality, in particular, will have to be proven on a balance of probabilities at trial;[10] and

(c) Require that the plaintiff establish the preliminary merits of the action, as in claims for statutory secondary market misrepresentations under Part XXIII.1 of the *Securities Act*, which requires the plaintiff to prove "a reasonable possibility of success" on the merits to bar baseless claims intended only to force a settlement.[11]

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[8] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, at para. 103: certification must be "a meaningful screening device".

[9] Rule 23(b)(3) of the *Federal Rules of Civil Procedure* states:

> (b) TYPES OF CLASS ACTIONS. A class action may be maintained if Rule 23(a) is satisfied and if:
>
> …
>
> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

[10] See discussion in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, at paras. 101-03.

[11] See s. 138.8(1) of the *Securities Act*, R.S.O. 1990 c. S. 5. In *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60, at paras. 121-22, the Supreme Court of Canada held that this means "there must be a 'reasonable or

We understand that the Law Commission of Ontario is reluctant to consider "radical reform" of the certification criteria.[12] We understand as well that there is resistance to increasing the evidentiary burden on the plaintiff at the certification stage, for fear of impeding access to justice. However, we believe that the introduction of a predominance requirement at the stage of determining preferable procedure under s. 5(1)(d) of the *Act* would not be a "radical" departure from the Legislative intent, and it hews closely to the early jurisprudence. This amendment would focus only on the form of the action, ensuring that the resolution of the common issues will be meaningful, but without touching on the merits of the claim.

An increasingly relaxed approach to certification

The Ontario Law Reform Commission's 1982 *Report on Class Actions* considered and rejected a hard predominance requirement, finding that a more flexible preferable procedure test would be sufficient to bar the certification of class actions that raised overwhelming individual issues.[13] The Supreme Court of Canada initially followed this approach in the landmark decision of *Hollick v. Toronto (City)*, holding that the common issues had to be considered relative to the individual issues that would remain to be determined.[14]

The problem is that leading cases such as the Ontario Court of Appeal's decision in *Cloud v. Canada (Attorney General)* subsequently established a certification standard that accommodates common issues "even if [they] make[] up a very limited aspect of the liability question and even though many individual issues remain to be decided after [their] resolution".[15] *Cloud* held that certification could be granted on the basis of a common issue that is not "negligible" in relation to the individual issues.[16] The importance of the common issue has come to the fore, rather than the prospect of resolving class members' claims on their merits.

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realistic chance that [it] will succeed'" and "[c]aimants must 'offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim'".

[12] Law Commission of Ontario, *Class Actions*: Objectives, Experiences and Reforms, p. 24.

[13] Ontario Law Reform Commission, *Report on Class Actions*, (Ministry of the Attorney General: Toronto, 1982), vol. II, p. 347-48.

[14] *Hollick v. Toronto (City)*, 2001 SCC 68, at para. 30:

> The question of preferability, then, must take into account the importance of the common issues in relation to the claims as a whole. It is true, of course, that the Act contemplates that class actions will be allowable even where there are substantial individual issues: see s. 5. It is also true that the drafters rejected a requirement, such as is contained in the American federal class action rule, that the common issues "predominate" over the individual issues: see *Federal Rules of Civil Procedure*, Rule 23(b)(3) (stating that class action maintainable only if "questions of law or fact common to the members of the class predominate over any questions affecting only individual members"); see also British Columbia *Class Proceedings Act*, s. 4(2)(a) (stating that, in determining whether a class action is the preferable procedures, the court must consider "whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members"). I cannot conclude, however, that the drafters intended the preferability analysis to take place in a vacuum. There must be a consideration of the common issues in context. As the Chair of the Attorney General's Advisory Committee put it, the preferability requirement asks that the class representative "demonstrate that, given all of the circumstances of the particular claim, [a class action] would be preferable to other methods of resolving these claims and, in particular, that it would be preferable to the use of individual proceedings" (emphasis added): M. G. Cochrane, *Class Actions: A Guide to the Class Proceedings Act, 1992* (1993), at p. 27.

[15] *Cloud v. Canada (Attorney General)*, 2004 CanLII 45444 (Ont. C.A.), at para. 53.

[16] *Cloud*, *ibid.*, at para. 76: "[i]n Ontario it is nonetheless essential to assess the importance of the common issues in relation to the claim as a whole. It will not be enough if the common issues are negligible in relation to the individual issues".

This approach results in the certification of single-issue class actions with no prospect of meaningful resolution at a common issues trial, like *Cloud* itself, or *Rumley v. British Columbia*, its predecessor, which faced an application for decertification on the basis that it was unmanageable.[17] Today, Ontario courts are certifying class actions that would require an individual trial for each class member to establish any entitlement to damages, regardless of the resolution of the common issues.[18] These actions are further complicated by the Supreme Court of Canada's holding in *Vivendi Canada Inc. v. Dell'Aniello* that "[a] common question can exist even if the answer given to the question might vary from one member of the class to another".[19] When certification of these actions is a foregone conclusion, the defendant is placed in an impossible position. Experience has shown that actually litigating these individual issues on their merits can take decades, at enormous cost, without producing any meaningful result for the class.[20]

A principled solution

As *Hollick* noted, s. 4(2)(a) of the B.C. *Class Proceedings Act* already offers a partial solution, insofar as it requires the court to consider, when determining the preferable procedure, "whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members".[21] However, the B.C. provision only calls for consideration, and it permits certification even in the absence of predominance.

By contrast, we would prefer to see a presumptive requirement that common issues predominate over individual issues, at least in terms of their significance to the determination of each class member's entitlement to relief. While this presumption could be refuted in exceptional circumstances, it would generally signal that a class action is not worthwhile unless there is a viable means of actually litigating the individual issues that will remain. Where the converse is true, and the individual issues overwhelm the common issues, "the class action concept becomes unmanageable" and the proceedings offer only illusory value to class members – at great cost to the courts and the defendants.[22]

Finally, because our membership is national in scope, we are cognizant of the importance of harmonizing the test for certification across the common law provinces insofar as possible, and we see the imposition of a predominance requirement as a recommendation that should extend beyond Ontario. We believe that a strong recommendation on this point would have the effect of advancing productive reforms in other jurisdictions.

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[17] *Rumley v. British Columbia*, 2001 SCC 69 (certification); and 2003 BCSC 234 (application for decertification).

[18] See, for example, *Baroch v. Canada Cartage Diversified GP Inc.*, 2015 ONSC 40 and *Bozsik v. Livingston International Inc.*, 2016 ONSC 7168. Aggregate damages are not available where the quantum of the defendant's liability cannot be fixed without the evidence of class members, *Fulawka v. The Bank of Nova Scotia*, 2012 ONCA 443, at para. 145.

[19] *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, at para. 45. This civil law authority has been followed in Ontario: see, for example, *Wright v United Parcel Service Canada Ltd.*, 2015 ONSC 2220, at paras. 22-24.

[20] See, for example, *Webb v. K-Mart Canada Ltd.*, 1999 CanLII 15076 (ON SC) and *Webb v. K-Mart Canada Ltd.*, 1999 CanLII 15076 (ON SC). Individual issues proceedings remain ongoing in this class action, despite the passage of more than two decades.

[21] *Class Proceedings Act*, RSBC 1996, c. 50, s. 4(2)(a).

[22] See discussion in *Pearson v. Inco Ltd.*, 2004 CanLII 34446 (Ont. Div. Ct.), at paras. 21-22, rev'd on other grounds, 2006 CanLII 913 (Ont, C.A.).

Question #8: National class actions

We are concerned about the coordination of overlapping class actions sited in different provinces that purport to be national in scope. In our view, the practice of competing counsel commencing parallel or related proceedings in multiple jurisdictions wastes judicial resources and imposes an unfair burden on defendants. We believe that Ontario has an opportunity to join a growing complement of Western provinces in implementing a national solution. In order to do so, the *Act* must explain the circumstances in which Ontario courts will defer to the courts of another province, as well as the circumstances in which they expect deference to their own decisions. The *Act* must also provide all interested parties with an opportunity to seek an early determination of carriage. The Supreme Court of Canada has called for statutory reform to supplement the jurisprudence in this area, and we urge the Law Commission to act.

A theoretical framework

In our view, the jurisprudence has developed a reasoned basis for the assertion of jurisdiction over a national class. The analysis begins with *Club Resorts Ltd. v. Van Breda*, in which the Supreme Court of Canada issued a list of presumptive connecting factors, the presence of any of which gives rise to a court assuming jurisdiction over a matter.[23] The Court was careful to note that its list of presumptive connecting factors was "not closed", and courts should consider "connections that give rise to a relationship with the forum that is similar in nature to the ones that result from the listed factors".[24]

In *Meeking v. Cash Store*, the Manitoba Court of Appeal recognized common issues as a new presumptive connecting factor in multijurisdictional class actions.[25] This presumptive connecting factor arises when a court has territorial jurisdiction over both the defendant and the representative plaintiff, and there are common issues shared by the representative plaintiff and non-resident members of the class. As described by the Ontario Court of Appeal in *Airia Brands Inc. v. Air Canada,* this presumptive connecting factor anchors jurisdiction in the confluence of interest between non-resident plaintiffs and the representative plaintiff.[26]

In *Airia Brands* the Ontario Court of Appeal followed *Meeking*, holding that the Ontario courts had jurisdiction over absent foreign claimants on the basis of common issues. The Court of Appeal found that "[t]he common issues certified by the motion judge related to the core question [of liability]", and extended to the absent foreign claimants.[27]

In our view, *Meeking* articulates a theoretical basis for national class actions, and it paves the way to enforce national class action settlements. Thus, where the courts of another province have validly assumed jurisdiction over an action on the basis of common issues, the *Act* should

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[23] *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17. The four factors articulated by the Court were: (a) the defendant is domiciled or resident in the province; (b) the defendant carries on business in the province; (c) the tort was committed in the province; or (d) a contract connected with the dispute was made in the province. See para 90.

[24] *Van Breda*, *ibid.*, at para 91.

[25] *Meeking v. Cash Store Inc.*, 2013 MBCA 81.

[26] *Airia Brands Inc. v. Air Canada*, 2017 ONCA 792.

[27] *Aria Brands*, *ibid* at para 113.

make clear that the courts of Ontario will enforce the result. This is simply an application of the "full faith and credit" standard in *Morguard Investments Ltd. v. De Savoye*.[28]

Resolving practical problems

Despite the availability of jurisdiction, difficulty has arisen with respect to the additional requirement of procedural fairness. This issue dates to the decision of the Ontario Court of Appeal in *Currie v. McDonald's Restaurants of Canada Ltd.*, which declined to enforce a US class action settlement on the basis that Ontario class members had not been provided adequate notice that their rights were being determined.[29] The issue resurfaced in *Canada Post Corp. v. Lépine*, in which the Supreme Court of Canada refused to enforce an Ontario class action settlement in Quebec, again on the basis that the court-approved notice did not "properly explain the impact of the judgment certifying the class proceeding".[30] The same result obtained in *Meeking*, where the courts of Manitoba refused to enforce part of an Ontario settlement on the basis that the court-approved notice was inadequate.[31]

Canadian class action statutes require that notice of certification be approved by the court, and some provide statutory guidance on the content of the notice and the means of transmitting it.[32] A Canadian court's determination of the adequacy of notice, as a procedural matter, should be entitled to full faith and credit, just like the determination that the settlement itself is fair, reasonable, and in the best interest of the class. The courts of the province in which enforcement is sought should not second guess the determination of the adequacy of notice. Rather, the adequacy of notice should be presumed in the absence of a showing that the approving court was misled, in which case recourse would lie only to the approving court.

The enforcement of national class action settlements is critical to the viability of national class actions and the commensurate efficiencies of avoiding multiple parallel actions in various provinces. Furthermore, defendants' confidence in the enforceability of these settlements works to the advantage of plaintiffs, whose recovery will not be discounted for the prospect that a national settlement may not be enforceable in other provinces.

Imposing reasonable limits

Ultimately, the modified *Meeking* approach set out above calls for a footrace that will encourage class counsel to either form a consortium of all counsel on all related actions, or else prosecute their action without delay. The alternative is for class counsel or the defendant to move to stay a related action on the basis that another action is preferable, as discussed below.[33] Class counsel who do nothing risk having their action resolved, whether by settlement or on the merits, in a manner that precludes further claims. In order to manage competing actions in different jurisdictions, therefore, transparency is vital, as are limits on long arm jurisdiction.

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[28] *Morguard Investments Ltd. v. De Savoye*, [1990] 3 SCR 1077: "As I see it, the courts in one province should give full faith and credit, to use the language of the United States Constitution, to the judgments given by a court in another province or a territory, so long as that court has properly, or appropriately, exercised jurisdiction in the action".

[29] *Currie v. McDonald's Restaurants of Canada Ltd.*, 2005 CanLII 3360 (Ont. C.A.), at paras. 38-40.

[30] *Canada Post Corp. v. Lépine*, 2009 SCC 16, at para. 46.

[31] *Meeking*, *supra*, at paras. 113-15.

[32] See, for example, ss. 17(3)(4) and (6) of the *Act*.

[33] *Kowalyshyn v Valeant Pharmaceuticals International, Inc.*, 2016 ONSC 3819, at para. 272.

The 2018 Canadian Bar Association *Protocol for Managing Multijurisdictional Class Actions* presents a series of best practices to coordinate related actions in different provinces. We believe that these recommendations would ensure that related actions are identified early and case managed in tandem. We expect that these recommendations will also create significant incentives to form a national consortium. The *Protocol's* best practices include:

- Plaintiffs' counsel must post their pleadings on the CBA Class Action Database, advise the Court of any related action of which they are aware, and compile a notification list of the names and contact information of counsel and judges in all related actions.
- The parties should agree to allow communication between judges managing related actions as well as joint case management conferences.
- Parties and judges in all related actions should be notified and given a copy of any motion to stay or dismiss proceedings based on the existence of related actions.
- Parties and judges in all related actions should be notified and given a copy of any motion to certify a class that would overlap with any other proposed class in a related action.
- Judges should exercise discretion in managing differences in class action procedure between provinces, and there are no hard and fast rules in this regard.

While information sharing is important, it does not address the challenge of deciding when the courts of one Canadian jurisdiction should defer to those of another when asked to assume carriage of a national class action. As the Consultation Paper notes, there have been several efforts to determine how to allocate carriage among Canadian jurisdictions, of which the *Protocol* is the latest.[34] These frameworks have been described as a *forum conveniens* test, which considers the connection between the action and the jurisdiction, in both absolute and relative terms.[35]

In *Lépine*, the Supreme Court of Canada called on the provincial Legislatures to "pay more attention to the framework for national class actions" by establishing "[m]ore effective methods for managing jurisdictional disputes", noting that "[i]t is not this Court's role to define the necessary solutions".[36] We believe that Ontario should join a growing number of provinces in amending the *Act* to articulate the circumstances in which it will recognize class action decisions from other provinces for the purpose of enforcement.

Sections 5(6) to (8) of Alberta's *Class Proceedings Act* offer an example of a *forum conveniens* test:

> **5(6)** If a multi-jurisdictional class proceeding or a proposed multi-jurisdictional class proceeding has been commenced elsewhere in Canada that involves subject-matter that is the same as or similar to that of a proceeding being considered for certification under this section, the Court must determine whether it would be preferable for some or all of the claims or common issues raised by the prospective class members to be resolved in the proceeding commenced elsewhere.

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[34] Law Commission of Ontario, *Class Actions*: Objectives, Experiences and Reforms, p. 27-28.

[35] *Babin v Bayer Inc.*, 2017 ONSC 3200, at para. 34.

[36] *Lépine*, *supra*, at para. 57.

(7) When making a determination under subsection (6), the Court must be guided by the following objectives:

(a) ensuring that the interests of all parties in each of the relevant jurisdictions are given due consideration;

(b) ensuring that the ends of justice are served;

(c) where possible, avoiding irreconcilable judgments;

(d) promoting judicial economy.

(8) When making a determination under subsection (6), the Court may consider any matter that the Court considers relevant but must consider at least the following:

(a) the alleged basis of liability, including the applicable laws;

(b) the stage each of the proceedings has reached;

(c) the plan for the proposed multi-jurisdictional class proceeding, including the viability of the plan and the capacity and resources for advancing the proceeding on behalf of the prospective class members;

(d) the location of the class members and representative plaintiffs in the various proceedings, including the ability of the representative plaintiffs to participate in the proceedings and to represent the interests of the class members;

(e) the location of evidence and witnesses;

(f) the advantages and disadvantages of litigation being conducted in more than one jurisdiction.

The foregoing provisions of the Alberta *Class Proceedings Act* are intended to ensure that Alberta does not certify a class action when a competing action in another jurisdiction is manifestly more suitable. In this regard, the Alberta *Class Proceedings Act*, like its Saskatchewan and British Columbia analogues, draws on the model statute formulated by the Uniform Law Conference of Canada.[37] We recommend that the *Act* include a similar provision to ensure that Ontario does not assume carriage of matters that ought to be litigated elsewhere. Thus, the footrace is subject to the principle that victory will not go to the swiftest if an overlapping action in another jurisdiction is materially better.

In our view, however, further statutory guidance is required to determine the procedure by which questions of *forum conveniens* will be brought before the court. We note that the jurisprudence on point has been inconsistent. On one hand, the courts of Saskatchewan have been reluctant to allocate carriage between jurisdictions on a pre-certification motion, preferring instead to

[37] Uniform Law Conference of Canada, Special Working Group on Multi-Jurisdictional Class Proceedings, *Supplementary Report on Multi-Jurisdictional Class Proceedings in Canada*, (Edmonton, Alberta: 2006) http://www.classactionlitigation.com/Class_Actions_Supplementary_Report.pdf, p. 9-10. Saskatchewan's *The Class Actions Act*, S.S. 2001, c. C-12.01, s. 6.1(1)(a)(i) requires the court to determine that Saskatchewan "is the appropriate venue for the multijurisdictional class action". British Columbia recently introduced Bill 21 – 2018, the *Class Proceedings Amendment Act*, 2018, which had its third reading on April 26, 2018, and which introduced criteria for the certification of a multi-jurisdictional class action similar to those in Alberta.

address the issue of overlapping classes at certification.[38] Nevertheless, the courts of Ontario have contemplated a pre-certification motion to stay a proposed class action in favour of proceedings in another province.[39] However, an Ontario court recently refused to grant the proposed representative plaintiffs in an overlapping Saskatchewan action standing at the Ontario motion for certification, despite the fact that a decision on certification was under reserve in Saskatchewan. The Ontario court found that the proposed intervention by the Saskatchewan plaintiffs was a "disruptive request" akin to a "late arriving carriage motion".[40]

The Alberta, Saskatchewan, and British Columbia statutes address competing national class actions as a consideration at certification. In our view, the approach should be more flexible. We recommend that the *Act* be amended to provide that any interested party may move prior to certification for a determination that Ontario should defer to another jurisdiction on the basis of factors similar to those articulated in ss. 5(6) to (8) of the Alberta *Class Proceedings Act*. At that time, any interested party could also seek a declaration that the Ontario action should be stayed in favour of a proposed or actual class proceeding in another jurisdiction, despite the fact that Ontario is *forum conveniens*. This would effectively be a carriage motion, in which the Ontario court would be asked to decide that the interests of overlapping class members would be served by a national class action sited in another jurisdiction.

This approach would settle questions of both suitability and preferability at an early stage. Deciding these question before certification would address the courts' concern about a "late arriving" interjurisdictional carriage sideshow hijacking the motion for certification. An early resolution may also save all parties the expense of a certification motion in Ontario if it is determined that the matter is best prosecuted elsewhere. Where the Ontario courts prefer one action and the courts of another Canadian jurisdiction prefer another action, or where there is no interjurisdictional carriage motion, the winner of the race to a resolution will bind the national class with the force of *res judicata*. In our view, this approach best accommodates the limitations of Canadian federalism and the impossibility of allocating carriage of a national class action to a single jurisdiction in the absence of cooperation among the courts. If the courts cannot choose among the aspirants to the mantle of class counsel, then it is best to follow the first court of competent jurisdiction to resolve the matter.

The way forward

Ultimately, the ability of any single jurisdiction to articulate a framework for the management of national class actions is limited. However, we believe that Ontario should bring its practice into harmony with Alberta, Saskatchewan, and British Columbia by articulating standards for the assumption of national jurisdiction. We believe that Ontario should also seek to improve on the approach in those provinces by specifying procedures to test the appropriateness of an Ontario proceeding prior to certification. Our hope is that movement by Ontario will promote uniformity across the country and answer the Supreme Court of Canada's legislative call to action in *Lépine*.

In the final arithmetic, if all Canadian jurisdictions adopt the approach set out above:

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[38] *Baumung v Bayer Inc.*, 2016 SKQB 221, at para. 38.

[39] *Kowalyshyn v Valeant Pharmaceuticals International, Inc.*, 2016 ONSC 3819, at para. 272.

[40] *Romeo v. Ford Motor Co.*, 2017 ONSC 6674, at para. 19. The court awarded costs against the Saskatchewan plaintiffs.

- Courts and parties would have full information about overlapping class actions and a means of coordinating the proceedings;
- No class action could be certified unless there was a determination that certification was appropriate in view of any overlapping actions in other jurisdictions;
- Even if multiple jurisdictions are suitable for the prosecution of a national class action, it would be open to any interested party to move for an early determination that a particular action is the preferable means of determining the claims of overlapping class members;
- In appropriate circumstances, the courts of any Canadian jurisdiction may validly assume carriage of a national class and decide matters of procedural fairness, such as notice, with the expectation that those decisions will be given full faith and credit in other Canadian jurisdictions.

Finally, it bears mentioning that the framework set out above for the administration of national class actions does not apply to international class actions, where principles of comity may weigh against assuming jurisdiction on the basis of common issues. Any statutory amendments should therefore be directed at national class actions alone.

Question #9: Appeals

The *Act* creates asymmetrical routes of appeal from the motion for certification. Where certification is granted, the defendant may appeal with leave, whereas the plaintiff may appeal a denial of certification as of right.[41] In both cases, the appeal is taken to the Divisional Court. In our view rights of appeal under the *Act* should be amended in three ways. First, rights of appeal should be symmetrical for plaintiffs and defendants. Second, appeals from the motion for certification should be as of right, and without leave. Third, appeals form the motion for certification should be to the Court of Appeal rather than the Divisional Court. These changes would bring Ontario into harmony with other leading common law jurisdictions and eliminate a costly and time-consuming step that undermines both fairness and access to justice.

Symmetrical routes of appeal

The chart below demonstrates that Ontario is the only common law province to impose asymmetrical routes of appeal for plaintiffs and defendants. As discussed above, this asymmetry is a creature of statute, and it sits uncomfortably with the substantive reality that certification of a class action has all the hallmarks of a final order. It is simply unfair to impose a higher threshold for defendants to challenge a decision that is of roughly equal importance to both parties, and both parties should have symmetrical routes of appeal, as they do in every other common law province.

[41] *Act*, ss. 30(1) and (2).

Jurisdiction[42]	*Appeal route if certification is granted (defendant's appeals)*	*Leave required?*	*Appeal route if certification is denied (plaintiffs' appeals)*	*Leave required?*
British Columbia[43]	Court of Appeal	No	Court of Appeal	No
Alberta[44]	Court of Appeal	No	Court of Appeal	No
Saskatchewan[45]	Court of Appeal	Yes	Court of Appeal	Yes
Manitoba[46]	Court of Appeal	Yes	Court of Appeal	Yes
Ontario[47]	Divisional Court	Yes	Court of Appeal	No
Quebec[48]	None	N/A	Court of Appeal[49]	No[50]
New Brunswick[51]	Court of Appeal	Yes	Court of Appeal	Yes
Nova Scotia[52]	Court of Appeal	Yes	Court of Appeal	Yes
Newfoundland and Labrador[53]	Court of Appeal	Yes	Court of Appeal	Yes
Federal[54]	Court of Appeal	No	Court of Appeal	No

Appeals as of right

In our view, because of the importance of the matters decided on the motion for certification, neither plaintiffs nor defendants should require leave to appeal. In Ontario, plaintiffs do not presently require leave to appeal from a denial of certification, and this accords with the practice in other leading class action jurisdictions like British Columbia, Alberta, and the Federal Courts.

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42 Prince Edward Island is not included in the chart because it does not have class proceedings legislation.

43 *Class Proceedings Act*, R.S.B.C. 1996, c. 50, s. 36(1).

44 *Class Proceedings Act*, S.A. 2003, c. C-16.5, s. 36(1)(a).

45 *The Class Actions Act*, S.S. 2001, c. C-12.01, s. 39(3)(a).

46 *Class Proceedings Act*, C.C.S.M. c. C130, s. 36(4)(a).

47 *Act*, ss. 30(1) and (2).

48 *Code of Civil Procedure*, C.Q.L.R. c. C-25, art. 1010.

49 A representative plaintiff cannot, however, appeal common issues that were not authorized if other issues were authorized.

50 A member of the class other than the representative plaintiff may also appeal from the refusal to authorize a class proceeding, but only with leave of a judge of the Court of Appeal.

51 *Class Proceedings Act*, R.S.N.B. 2011, c 125, s. 38(3).

52 *Class Proceedings Act*, S.N.S. 2007, c 28, s. 39(3).

53 *Class Actions Act*, SNL 2001, c C-18.1, s. 36(3)(a).

54 *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 27(1).

This practice is also consistent with the aim of promoting access to justice and reducing the cost of litigation. Seeking leave to appeal is largely duplicative of prosecuting the appeal itself, except it imposes an added expenditure of time and the appeal itself remains to be argued if leave is granted. We favour cutting to the chase and allowing the parties to make their case on appeal without the need to first seek leave.

Appeals to the Court of Appeal

There is no other Canadian jurisdiction that interposes a waystation between the certification judge and the highest provincial or territorial court of appeal. Because motions for certification that raise novel points of law are frequently decided in the Ontario Court of Appeal or the Supreme Court of Canada, the requirement to proceed first to the Divisional Court adds time and expense without offering finality. We note as well that motions for certification are heard by specialized class action judges in many of Ontario's judicial regions. By contrast, there is no requirement that any member of a Divisional Court panel have any expertise in class actions, which raises the question of deference to the certification judge, and further undermines the utility of an intermediate appellate review. Given the significance of the issues at stake on certification, we believe that the appeal for both plaintiffs and defendants should lie to the Court of Appeal.

Question #10: Pre-trial and Trial issues

We have identified two procedural problems that lend themselves to simple and effective statutory solutions.

Misaligned limitation periods

As a practical matter, we are concerned about the misalignment between the limitation periods applicable to the claims of putative class members and the defendant's claims for contribution and indemnity. Section 28(1) of the *Act* provides that "any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the class proceeding". This permits putative class members to wait and see whether they can obtain relief through the proposed class action. So long as that prospect remains alive, there is no need to commence a separate action, and this approach furthers judicial economy.[55]

The problem is that the limitation period applicable to the defendant's claims for contribution and indemnity are not subject to a similar statutory tolling mechanism. This leaves the defendant in a difficult situation. On one hand, if a class were defined in the manner proposed in the notice of motion for certification, the defendant might wish to pursue claims over. On the other hand, if a narrower class were certified, there might be no need to pursue those claims over.

The jurisprudence on the limitation period applicable to claims for contribution and indemnity is unsettled, and some authority suggests that it begins to run from the date of service of the statement of claim, with no accommodation for discoverability.[56] In any event, it is uncertain whether the issue of discoverability even arises because the defendant has knowledge of the facts giving rise to the potential claim. The result is that defendants are often obliged to enter into tolling agreements with a variety of third parties who could be named in the action, or else complicate the certification motion with third party claims. This process is costly and time consuming, and it can needlessly strain relations with third parties, some of whom will never come within the ambit of what is ultimately certified as a class proceeding.

In our view, the undesirable misalignment of limitation periods should be corrected by extending the tolling provisions in s. 28(1) of the *Act* to claims for contribution and indemnity through to the certification of the action or the dismissal of the motion for certification, together with all appeals.

Premature delivery of the statement of defence

The *Act* is silent with respect to the timing of the statement of defence. However, in recent years, courts have unevenly required the delivery of a statement of defence prior to the motion for certification. This practice arises in part from the decision in *Pennyfeather v. Timminco Limited*, which recognized the advantages of closing the pleadings prior to certification.[57] Subsequently, courts have required the delivery of a statement of defence prior to certification in some cases but not others.

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[55] *Ladd v. Vale Canada Limited*, 2012 ONSC 6498, at paras. 12-13.

[56] See, for example, *Hughes v Dyck*, 2016 ONSC 901, at para. 39, discussing s. 18 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B. This position was recently rejected in *Mega International Commercial Bank (Canada) v. Yung*, 2018 ONCA 429, at para. 74, which held that the principle of discoverability applies to claims for contribution and indemnity.

[57] *Pennyfeather v. Timminco Limited*, 2011 ONSC 4257, at paras. 86-92.

In our view, the practice of requiring defendants to deliver a statement of defence prior to certification needlessly wastes resources and is unfair to defendants. Prior to certification, only the named plaintiffs have asserted claims against the defendants, and there is no privity of suit between the defendant and members of the putative class. Furthermore, despite the existence of common issues, the claims of members of the putative class may be distinct from those of the proposed representative plaintiff or plaintiffs.

It is very difficult to deliver a statement of defence in these circumstances. On one hand, defending the claims of the proposed class may require the defendant to investigate and address claims by putative plaintiffs who may ultimately be excluded from the class. On the other hand, defending only the claims of the named plaintiffs may produce a response that is not reflective of the defendant's position in respect of the proposed class, and which will be of little use once a class action is certified. Additionally, Rules 29.02(1) and (1.2) require the defendant to commence third party claims within 10 days of delivering a statement of defence, or else obtain consent or seek leave to commence a third party claim thereafter. This further compounds the problem of premature third party claims discussed above.

In our view, the solution is simple. Section 2 of the *Act* should be amended to stipulate that a statement of defence is required within 90 days of the exhaustion of any appeals from an order certifying a class proceeding, or later on consent of the parties. This approach would not frustrate the powers of a case management judge, who would still be entitled to order the delivery of a statement of defence pursuant to s. 12 of the *Act* in exceptional circumstances. Furthermore, a defendant may still be required to deliver a statement of defence before certification if it wishes to rely on individual issues raised by its defences to defeat certification.

Question #12: Other ideas

We have identified two topics on which we urge the Law Commission to seek the views of stakeholders with the aim of recommending statutory amendments.

Regulation of third-party litigation funding

In recent years, Ontario has seen an increase in third-party litigation funding, with new foreign entrants to the market. The latest development has been an effort to import an Australian funding model, pursuant to which the funder pays a portion of class counsel's fees as they are incurred, in addition to indemnifying the representative plaintiff against adverse costs awards and covering certain disbursements.[58] It is therefore unsurprising that the Law Commission's Phase I consultations identified third-party litigation funders as an important topic for discussion.[59]

Thus far, the regulation of third-party funders has been largely left to safeguards developed by the courts. However, third-party funding poses real dangers, including the prospect of the representative plaintiff binding the class to an improvident bargain, the inability or unwillingness of a funder to honour an indemnity, and the commoditization of class action litigation as another investment class. In light of the potential for abuse, we believe that it is necessary to formalize and expand the current safeguards.

Formalizing the approval of third-party litigation funding agreements

The jurisprudence provides that the representative plaintiff's agreement with a third-party funder cannot bind the class without court approval.[60] The motion for approval must be on notice to the defendant, and the defendant has standing to make submissions on the proposed funding agreement. This approach recognizes the defendant's interest in the motion, insofar as it will rely on the funding agreement when seeking to collect a costs award. The defendant's interest is heightened because third-party litigation funders are frequently foreign corporations with no material assets in Canada.[61] The current approach also recognizes that the defendant's participation injects an adversarial quality to the hearing, which may assist the court in guarding against champerty.[62]

We believe that the *Act* should be amended to formalize and codify the current approach. To this end, the *Act* should specify the procedure for the approval of the funding agreement, and the criteria to be considered. As an alternative, the *Act* could delegate authority to promulgate regulations for the approval of third-party funding agreements.

Regulating third-party litigation funders

Additionally, we believe that third-party litigation funders themselves should be regulated. Although third-party funders may pay certain disbursements incurred by the class, the funder's primary function is usually to indemnify the representative plaintiff against adverse cost awards.

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[58] *Houle v. St. Jude Medical Inc.*, 2017 ONSC 5129.

[59] Law Commission of Ontario, *Class Actions*: Objectives, Experiences and Reforms, p. 14.

[60] *Dugal v. Manulife Financial Corporation*, 2011 ONSC 1785, at para. 5.

[61] *Dugal*, *ibid.*, at para. 35.

[62] *Berg v Canadian Hockey League*, 2016 ONSC 4466, at paras. 108-112.

In the context of Ontario class actions, therefore, the third-party funder's activities are best characterized as the provision of insurance, and the *Act* should refer to the representative plaintiff's indemnity as an insurance policy. We note, in this regard, that the *Insurance Act* defines "insurance" as "the undertaking by one person to indemnify another person against loss or liability for loss in respect of a certain risk or peril to which the object of the insurance may be exposed, or to pay a sum of money or other thing of value upon the happening of a certain event, and includes life insurance".[63] The *Insurance Act* requires insurers to be licensed by the Superintendent of Financial Services, and the provision of insurance to be authorized and supervised by same.[64]

We recognize that other jurisdictions have taken different approaches to the regulation of third-party litigation funders.[65] In Australia, for example, litigation funding agreements are seen as a credit facility, so litigation funders must hold an Australian credit licence.[66] Third-party funders are also subject to the consumer provisions of the Australian *Securities and Investments Commission Act 2001*, which bars unfair or misleading terms in funding agreements. By way of further example, England employs a voluntary Code of Conduct for Litigation Funders, which is overseen by the self-regulating Association of Litigation Funders.[67] The Code sets out best practices and behaviour, and it provides an independent complaints procedure.[68]

In our view, however, international comparisons do not reflect the reality that in the context of Ontario class actions, third-party litigation funders largely exist to offer an indemnity. In this regard, appropriate supervision by the Superintendent of Financial Services would ensure that third-party funders are adequately capitalized to meet their indemnity commitments to representative plaintiffs. The result would be more meaningful protection for representative plaintiffs and defendants alike.

In support of our position, we note that *Berg v. Canadian Hockey League* recognized the possibility that a third-party funding agreement for class action litigation "might be illegal for non-compliance with statutes regulating insurance or investment contracts or securities".[69] That decision adjourned a motion to approve a proposed funding agreement. Immediately thereafter, the funder was subject to a cease and desist order by the Financial Services Commission of Ontario ("FSCO").[70] The FSCO objected to the funder providing insurance without a license, and the funder settled the matter by undertaking to obtain the backing of a Canadian insurer.[71] Ultimately, the funder converted its indemnity agreements into insurance policies.[72] We see no

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[63] *Insurance Act*, R.S.O. 1990, c. I. 8, s. 1.

[64] *Insurance Act*, *ibid.*, s. 40.

[65] As a helpful guide, see *The Third Party Litigation Funding Law Review*. Ed Leslie Perrin. The Law Reviews. 2017. "Australia", pp. 4-5. https://thelawreviews.co.uk/edition/1001113/the-third-party-litigation-funding-law-review-edition-1.

[66] Perrin, *ibid*

[67] Perrin*, ibid,* note 1, pp. 41-44.

[68] Association of Litigation Funders, *Code of Conduct for Litigation Funders*, January 2018.

[69] *Berg v Canadian Hockey League*, 2016 ONSC 4466, at para. 5.

[70] FSCO Interim Cease and Desist Order to Bridgepoint Indemnity Company (Canada) Inc., July 7, 2016, http://www.fsco.gov.on.ca/en/about/enforcement/cdo/Pages/co-bridgepoint.aspx.

[71] Minutes of Settlement between Superintendent of Financial Services and Bridgepoint Indemnity Company (Canada) Inc., September 23, 2016, http://www.fsco.gov.on.ca/en/about/enforcement/cdo/Documents/cdo-2016-09-23.pdf.

[72] Amended Minutes of Settlement between Superintendent of Financial Services and Bridgepoint Indemnity Company (Canada) Inc., December 22, 2016, https://decisions.cisro-ocra.com/ins/onfsc/en/item/214383/index.do.

reason why indemnities offered by other private third-party litigation funders should be treated differently.

Treating a third-party litigation funder's indemnity as a policy of insurance may have the added benefit of giving the defendant a right of action against the funder in the event of a refusal to honour the policy. At present, s. 31(2) of the *Act* provides that only the representative plaintiff is liable to the defendant for costs. The third-party funding agreement, though approved by the court, is merely a contract between the funder and the representative plaintiff. Should the funder refuse to honour the indemnity, and should the plaintiff be impecunious, the defendant would be left without a right of action against the funder, and the representative plaintiff might have no incentive to pursue such a claim. The result would be to deprive the defendant of its ability to recover its costs.

Section 132(1) of the *Insurance Act* offers a potential solution, insofar as it permits an injured party to pursue the insurer directly where the insured fails to pay the judgment.[73] Admittedly, the wording of the section is somewhat imperfect, as it addresses "liability for injury or damage to the person or property of another" rather than costs. However, a more direct approach in the *Act*, or a purposive interpretation of the provision in the *Insurance Act* might be sufficient to grant defendants a direct right of action against a third-party funder for costs. Alternatively, regardless of whether the Law Commission recommends that that third-party litigation funders indemnify the representative plaintiff by way of an insurance policy, we nevertheless favour a statutory direct right of action for defendants against funders for costs. In our view, this is a necessary corollary to the court placing any reliance on the third party funding agreement.

Deference to alternative dispute resolution mechanisms

Our members operate in a highly regulated environment, and their actions are subject to regulatory scrutiny. We are concerned that the preferability analysis under s. 5(d) of the *Act* does not show appropriate deference to regulatory or administrative decision-makers, with the result of wasteful duplication of adjudicative efforts. Regulatory measures often provide faster and cheaper means of resolving disputes, and we take the view that they should be encouraged. To this end, we suggest that the *Act*, or regulations thereunder, recognize regulators and tribunals to which class actions should defer. The decisions of these bodies should either preclude a subsequent class action, or at least introduce a presumption that no further behaviour modification is necessary. This is an important measure to promote judicial economy and deference to the legislative intent of delegating authority to specialized regulatory and administrative decision-makers.

In *Hollick v. Toronto (City)*, the Supreme Court of Canada held that the "preferability analysis requires the court to look at all reasonably available means of resolving the class members' claims, and not just at the possibility of individual actions."[74] The Supreme Court of Canada further developed this approach to preferability in *AIC Limited v. Fischer*, holding that it is necessary to consider whether alternative procedures address the barriers to access to justice.[75] *Fischer* set a high bar in this regard, largely closing the door to the prospect of resisting certification by proving that a regulatory outcome represents a reasonable resolution of the claims asserted by the putative class.[76] The approach advocated by *Fischer* focuses largely

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[73] *Insurance Act*, RSO 1990, c I.8, s. 132(1).

[74] *Hollick v. Toronto (City)*, 2001 SCC 68, at para. 31.

[75] *AIC Limited v. Fischer*, 2013 SCC 69, at para 37.

[76] *Fischer* (S.C.C.), *ibid.*, at paras. 44 and 46.

on procedure, with little analysis of the substantive outcome in the regulatory forum, and no deference to the regulator's view that the resolution was adequate. It is difficult to conceive of an alternative dispute resolution procedure that would pass the *Fischer* test, and we take particular issue with this result when it erodes the delegated authority of a regulatory or administrative decision-maker .

In our view, the *Fischer* standard of preferability is undesirable because it closes the door on regulatory proceedings that can resolve claims more quickly and at lower cost than class actions. Many specialized regulatory bodies are well placed to investigate complaints and, where appropriate, provide redress to persons who might otherwise assert their claims in a class action. These bodies were delegated decision-making authority by the Legislature, and deference is owed to the outcomes that they order.

The *Fisher* approach discourages defendants from offering meaningful compensation in regulatory settlements because a fair settlement will do nothing to deter the inevitable class action that follows. In effect, defendants are loathe to compromise their position when they remain exposed to further litigation.

The facts of *Fischer* are themselves demonstrative. In that case, the Ontario Securities Commission ("OSC") investigated several mutual fund managers whose funds were allegedly subject to market timing that prejudiced long-term investors.[77] OSC Staff negotiated settlements that saw the mutual fund managers pay significant compensation to investors, who were also members of the proposed class. Staff's aim in negotiating these settlements was to "ensure[] that investors will be reimbursed for losses".[78] The OSC considered the settlements negotiated by Staff and approved them on the basis that the settlements were in the public interest.[79] Furthermore, as the motions judge noted, "[t]he OSC was satisfied that the imposition of further or different relief would not better serve the purposes of the Ontario Securities Act".[80] Thereafter, however, a class action was permitted to proceed on the allegation that additional compensation was owed to investors.

Like many regulatory bodies, the OSC does not accord complainants the same participatory rights that they would enjoy as plaintiffs in civil litigation.[81] The OSC, as a regulatory body, will never replicate the procedural rights accorded to plaintiffs in a class proceeding. In these circumstances, *Fischer* was loathe to deny the plaintiffs an opportunity to pursue additional damages. From a policy perspective, however, this discussion misses the point. The OSC was able to recover significant amounts for investors quickly and at no cost. The OSC is an expert body that was acting within the authority of its constituent statute, and it reached a decision on the adequacy of the settlements. The OSC concluded that further compensation was not required, it provided written reasons, and the decision was never challenged. That decision was owed deference, and the courts accorded it none.

As a result of *Fischer*, therefore, regulators and administrative tribunals are hindered in their efforts to calibrate appropriate penalties because the impact of a follow-on class action is unknown, and the offender may be subjected to further punishment. In effect, the regulator is asked to decide the quantum of punitive damages before compensation has been assessed.

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[77] *Fischer* (S.C.C.), *ibid.*, at para. 5.

[78] *Fischer v. IG Investment*, 2010 ONSC 296, at para. 51.

[79] *Fischer* (S.C.J.), *ibid.*, at paras. 16-19 and 48-49.

[80] *Fischer* (S.C.J.), *ibid.*, at para. 48.

[81] *Fischer*, *ibid.*, at paras. 56-62.

We believe that there is room for improvement. As Justice Perell recently noted of the *Act*, "[t]he Legislature has outsourced to entrepreneurial lawyers the prosecutorial function of civil claims against wrongdoers that harm groups and the *Act* claws back for the courts an administrative law jurisdiction that the Legislature otherwise has assigned to tribunals and regulators dealing with labour law, health law, securities law, consumer law, and competition law".[82] In our view, this claw back is the result of developments in the jurisprudence rather than the intent of the Legislature, and it should be reversed.

A class action cannot not oust the exclusive jurisdiction of a regulatory or administrative decision-maker, and the failure to pursue remedies in that forum, like dissatisfaction with the outcome of proceedings in that forum, does not grant jurisdiction to the Superior Court of Justice.[83] The question is what should be done when a regulatory or administrative decision-maker has concurrent, rather than exclusive jurisdiction over the subject of a proposed class action.

Fischer held that "[t]he question is whether the [class action] alternative has the potential to provide effective redress for the substance of the plaintiffs' claims and to do so in a manner that accords suitable procedural rights".[84] In our view, there should be a presumption that this test is satisfied when a regulatory or administrative decision-maker is acting within the scope of its specialized expertise, has jurisdiction to order compensation to members of the proposed class, and reaches a decision on the merits of awarding compensation. In those circumstances, courts should not be asking whether it is possible that the proposed class might have recovered more, but rather, whether the regulatory or administrative decision-maker exceeded its jurisdiction.

The *Act* could articulate the deference owed to regulatory and administrative decision-makers. Alternatively, the *Act* could provide for regulations that define the bodies that are owed deference. In any such list, we would include the following bodies:

- Ontario Securities Commission[85]
- Competition Tribunal[86]
- Ontario Labour Relations Board[87]
- Human Rights Tribunal of Ontario[88]
- Information and Privacy Commissioner of Ontario[89]
- Financial Services Commission of Ontario[90]

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[82] *Das v. George Weston Limited*, 2017 ONSC 5583, at para. 129.

[83] See, for example, *Mackie v. Toronto (City) and Toronto Community Housing Corporation*, 2010 ONSC 3801, at paras. 29-30.

[84] *Fischer* (S.C.C.), *supra*, at para. 37.

[85] http://www.osc.gov.on.ca/

[86] http://www.ct-tc.gc.ca/Home.asp

[87] http://www.olrb.gov.on.ca/english/homepage.htm

[88] http://www.sjto.gov.on.ca/hrto/

[89] https://www.ipc.on.ca/?redirect=https://www.ipc.on.ca/

- Financial Services Tribunal[91]
- Financial Consumer Agency of Canada[92]
- Financial Services Regulatory Authority[93]

Appropriate deference may require that a decision by any of these bodies on the substance of the plaintiffs' claim should presumptively preclude a class action.

In the alternative, there should, at the very least, be a presumption that no further behaviour modification is required once any of these bodies has rendered a decision on the subject matter of the proposed class action. This presumption recognizes that an expert regulatory or administrative body, acting within the mandate conferred by its constituent statute, is expected to take appropriate measures to deter undesirable conduct, if any such measures are necessary.

In these circumstances, the preferability analysis under s. 5(1)(d) of the Act should not ask whether a class action would promote behaviour modification, nor should alternative procedures be assessed through the lens of behaviour modification. The aim of promoting behaviour modification should not justify a class action, as that would only serve to gainsay the regulatory or administrative decision and invite over-deterrence. Appropriate deference requires some other basis to justify a class action, failing which certification should be denied.

Whatever the means of implementing this recommendation, we believe it is important to ensure that the *Act* situates class proceedings in context, and corrects the jurisprudence that takes such a restrictive view of the suitable alternatives to a class action. Class actions should be complementary rather than duplicative.

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[90] http://www.fsco.gov.on.ca/en/about/Pages/default.aspx

[91] http://www.fstontario.ca/en/Pages/default.aspx

[92] https://www.canada.ca/en/financial-consumer-agency.html

[93] http://www.fsrao.ca/

Conclusion

We thank you for considering these submissions and we would be pleased to expand on our views at your convenience.