Innovative Medicines Canada and MEDEC

Submission in response to the Law Commission of Ontario's consultation, "A Public Discussion on Class Actions in Ontario"

May 31, 2018

The following are the submissions of Innovative Medicines Canada (IMC) and MEDEC to the Law Commission of Ontario (LCO) regarding its class actions project. IMC represents Canada's innovative pharmaceutical industry. We help our members discover, develop, and deliver innovative medicines and vaccines. Our membership consists of more than 45 companies, from established organizations to fledgling start-ups, all of whom are revolutionizing healthcare through the discovery and development of new medicines and vaccines. MEDEC represents Canada's innovative medical technology industry. We represent approximately 100 medtech companies (ranging from Canadian-owned to multinationals) that aim to deliver a patient-centred, safe, accessible, innovative and sustainable, universal healthcare system supported by the use of medical technology.

Many of IMC and MEDEC's members have their Canadian head offices in Ontario. Guided by our respective, comprehensive standards for ethical practices, we work with governments, insurance companies, healthcare professionals and stakeholders to advance the field and enhance the wellbeing of Canadians. We are committed to being valued partners in Canada's healthcare system.

Many of IMC and MEDEC's members have experience with Ontario's class proceedings regime, as defendants or potential defendants to class actions. As such, we are pleased to present those submissions to the LCO. From our perspective, a more fair, balanced and efficient class proceedings regime in Ontario would:

i) add a merits analysis and impose a higher evidentiary burden prior to or at certification to discourage the commencement of class actions with little or no merit, or to narrow or weed out such actions at an early stage;

ii) require the court to consider coordinated case management and discovery as an alternative to a class action where there are a small number of cases, which would lead to timely and proportionate resolution of the claims of the putative class;

iii) allow plaintiffs and defendants equal opportunities to appeal certification decisions, and discourage wasted resources and costs caused by material changes to the class claims/issues/definition on appeal;

iv) adopt provisions to address overlapping class proceedings in multiple provinces, including requiring a certification judge to consider whether he or she should defer to an overlapping class action in another jurisdiction;

v) apply the adverse costs consequences of success or failure more equally to plaintiffs and defendants and those who stand to benefit from the proceeding, including:

   a. amending section 31 of the *Class Proceedings Act, 1992* ("CPA"), to reverse a trend that has diluted the intended effects of the loser pays costs rule;

   b. enabling successful defendants to recover costs directly from persons that may have indemnified the representative plaintiff;

c. amending section 22 of the CPA to eliminate the default position that has developed in the case law of requiring defendants to pay for the costs of notifying class members of certification before the court has made a ruling on the merits of the litigation; and

d. controlling the potential adverse consequences of private third party litigation funding.

vi) toll limitation periods for defendants' contribution and indemnity claims from the commencement of the proceeding under the CPA from issuance of the claim through the determination of the common issues and until individual class members identify themselves and can be discovered based on the identities of potential contributors;

vii) allow a defendant to make an offer to settle only the claims of a subgroup of class members at any time after the action is certified, and require the representative plaintiff to communicate such an offer to affected class members.

viii) automatically dismiss class proceedings that are commenced, but not pursued, by class counsel within a reasonable time; and

ix) require the court to consider proposed class counsel fees in view of the result obtained for the class.

INTRODUCTION AND CONTEXT FOR REFORM RECOMMENDATIONS

The member companies of IMC and MEDEC manufacture and/or distribute innovative pharmaceutical medicines and medical technologies. These products improve the well-being of Canadians and, in many cases, save lives.[1] Plaintiff lawyers frequently commence class actions in Ontario (and other provinces) against Canadian companies that design, develop and distribute pharmaceutical medicines or medical devices, merely because the Health Canada approved labelling for that product has been changed, necessarily with the approval of Health Canada. The majority of those patients had serious pre-existing health problems before they used the medical product, benefited from use of the product, did not actively choose to be involved in the proposed class action, and did not even experience the complication alleged to be associated with the product following its use.

While we do not seek to abolish class actions in Ontario or impede true access to justice, we do seek to improve the existing class action regime to make it fair to both sides, and to put in place reforms that recognize the serious pressures on companies to settle even weak or meritless class actions at potentially significant social costs to all. The proliferation of medical product class actions in Ontario has a number of negative effects on industry, including that companies are incurring substantial and unrecoverable costs defending class actions with unwarranted claims and class membership.

[1] Yanick Labrie, "How Pharmaceutical Innovation has Revolutionized Health Care," Montreal Economic Institute, 18 June 2014, accessed online at: <http://www.iedm.org/files/note0614_en.pdf> on 12 January 2015

While class actions can have socially-beneficial deterrent effects, they may equally have negative deterrent effects. For example, both the Ontario and federal governments have adopted policies and programs that encourage innovation and development of new products to improve the well-being of Canadians and reduce health care costs.[2] However, several studies in the life sciences area suggest that the prospect of large liability costs can over-deter socially desirable behavior such as innovation – the very activity our governments have sought to encourage.[3] Another negative deterrent effect could result from negative publicity, necessarily generated by class action notices, about currently marketed or implanted products, potentially and inappropriately altering doctors' and patients' treatment decisions.[4]

Like any cost of doing business, the economic costs of this type of litigation will ultimately be visited on other stakeholders: shareholders,[5] patients and health insurers,[6] and, in more extreme cases, employees (if businesses are forced to cut salaries or jobs).[7] The Canadian public may also bear the social costs of publicity, actively sought by entrepreneurial plaintiffs' lawyers, to the extent that publicity interferes with health care decisions.[8] Notice requirements imposed on the parties in class actions may also require health care workers

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[2] See Ontario Ministry of Research and Innovation, "Ontario's Life Sciences Commercialization Strategy," Ontario's Printer for Ontario, 2010; Government of Canada "Innovation Science and Economic Development and portfolio funding programs" https://www.ic.gc.ca/eic/site/lsg-pdsv.nsf/eng/h_hn01725.html. Also see the 2017 budget, "Building a Strong Middle Class" at p. 158 https://www.budget.gc.ca/2017/docs/plan/budget-2017-en.pdf.

[3] Giovanna Roccamo, "Medical Implants and Other Health Care Products: Theories of Liability and Modern Trends" (1994) 16 Advoc. Q. 421; Steven Garber, "Product Liability, Punitive Damages, Business Decision and Economic Outcomes" (1998) Wis. L Rev. 237; Steven Garber, *Product Liability and the Economics of Pharmaceuticals and Medical Devices* (Santa Monica: Rand Institute for Civil Justice, 1993); Richard Manning, "Changing Rules in Tort Law and the Market for Childhood Vaccines" (1994) 37 J.L. & Econ. 247; Richard Manning "Is the Insurance Aspect of Producer Liability Valued by Consumers? Liability Changes and Childhood Vaccine Consumption" (1996) 13 J. Risk Uncertainty 37.

[4] As evidence that this can have an impact on patient decision-making, in a recent survey released by the US Chamber Institute for Legal Reform, one in four respondents taking targeted prescriptions said they would immediately stop taking their medications – without consulting their doctor – after seeing a trial lawyer advertisement (see http://www.instituteforlegalreform.com/uploads/sites/1/2017_ILR_Rx_Drug_Survey_Key_Findings_D1c.pdf). These issues are important enough to have been the subject of a hearing before the US House Judiciary Committee, Subcommittee on the Constitution and Civil Justice, "Examining Ethical Responsibilities Regarding Attorney Advertising", which was held on June 23, 2017. The witness list and written testimonies, Committee press release and full statement and a link to watch the webcast of the hearing can be found at www.judiciary.house.gov.

[5] See for example "Economic Consequences: The Real Costs of U.S. Securities Class Action Litigation", U.S. Chamber Institute for Legal Reform, February 28, 2014.

[6] In pricing or availability of products.

[7] For example, Dow Corning, Bristol-Myers Squibb Co. and Bioplasty Inc. left the breast implant business after numerous lawsuits were filed by women who alleged that the implants caused them various health problems. Also see also *Warner v. Smith & Nephew Inc.*, 2016 ABCA 223 [*Warner*] at paragraph72 (minority decision).

[8] See *Player v. Janssen-Ortho Inc.*, et al., 2014 BCSC 1122 at para 184 – "…Upon certification public notices stating that the drug is the subject of a class action and alleging the drug is unsafe and can cause death in ordinary use is likely to alarm anyone who is using or perhaps even prescribing fentanyl….if the evidence is insufficient to support

to be distracted from their normal tasks to implement notice programs.[9] The public is affected even more broadly if medical innovation is discouraged.

All pharmaceutical medicines and medical technologies have potential risks, and in many cases scientific developments and real world use later reveal risks that were not anticipated, though no one's fault. The description of those risks in the original product labelling, and in subsequent label changes, is a product of greater knowledge and approved by Health Canada in most cases. Individuals who use pharmaceutical medicines or who benefit from medical technologies often suffer from serious illnesses and experience a variety of symptoms and complications as a result of those illnesses. The mere fact that a person has a complication while using a medical product does not mean the product caused the complication, nor that the complication is sufficient to warrant discontinuing use of the product.

The current regime does not strike the right balance between the benefits and costs of class proceedings.[10] On the one hand, individuals who experience unexpected adverse outcomes as a result of conduct falling below a reasonable standard of care should be compensated fairly. In some cases, class proceedings may be an appropriate procedural vehicle for such compensation. On the other hand, class actions come with significant costs and cases that do not warrant those costs should be halted before they are realized. Experience with pharmaceutical class actions in Ontario has shown that several reforms are needed to the Ontario CPA for it to fairly achieve its objectives without unduly affecting health care decisions, innovation, or the cost or availability of pharmaceutical medicines.[11]

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the action then the consequences associated with involvement in an extensive and expensive class action are very serious."

[9] For example, in the Zimmer Durom Cup litigation, *Jones v Zimmer GMBH*, 2016 BCSC 1847, the Court ordered that the Notice of Certification be distributed to 95 hospitals across Canada and that the hospitals be directed to mail the notice to patients who had been implanted with the device; also see the Order made in the Stryker Rejuvenate Modular hip litigation, requiring that hospitals give notice of certification of the class proceeding and mail a copy of the notice to each person implanted at the hospital with the device: https://kmlaw.ca/wp-content/uploads/2014/05/Order_3mar16.pdf

[10] Studying the benefits and costs of this form of litigation is extremely difficult. Determining whether on balance class actions do more good than harm ultimately requires a consensus on how to weigh the social benefits against their costs, a consensus that does not exist yet. In the absence of consensus, however, more effort can still be invested in regulating class action practice and seeking to improve the balance between public good and private gain – recognizing that class actions have a powerful capacity to do not only good but ill as well. *Hensler, Deborah, et al., Report - Class Action Dilemmas, Pursuing Public Goals for Private Gain, Rand Institute for Civil Justice*, January 1, 1999, at pages 5, 401-402, 468-489 and 471-472.

[11] Class actions are an important issue for many companies and can affect availability of products. In a recent survey of 803 corporate counsel by Norton Rose Fulbright, May 2015, class actions were identified as one of the most important issues in litigation affecting their companies: 2015 Litigation Trends Annual Survey, http://www.nortonrosefulbright.com/files/20150514-2015-litigation-trends-survey_v24-128746.pdf at p. 10. In a survey of 1203 in-house general counsel, senior litigators or attorneys and other senior executives at companies with at least $100 million in annual revenues for the US Chamber Institute of Law Reform, three quarters of respondents reported that a state's litigation environment is likely to affect important business decisions at their

The Supreme Court of Canada has expressly stated that access to justice, one of the key imperatives of class actions, requires access to just results and not simply to the judicial process.[12] Both plaintiffs and defendants are entitled to access to just results.[13] Assessing whether the existing class actions regime provides access to just outcomes requires examination of both the merits of decisions and settlements, since the vast majority of class actions that are certified have ultimately settled.

While we support a justice system in which plaintiffs are compensated fairly when deserved, a system that places undue pressure on defendants to settle class actions for reasons unrelated to their merits is not one that will provide just results.[14] Pressure to settle a class proceeding can arise from the sheer size of the damages exposure, the enormous costs of defence (both financially and in diverted employee time), pressures on shareholder value and company reputation, and the potential for the mere existence of the litigation to interfere with transactions such as the sale, merger, or acquisition of a business.

Since the CPA came into force in 1993, numerous class proceedings have been commenced in Ontario against companies in the life sciences space, such as pharmaceutical or medical device manufacturers. The overwhelming majority of such class actions in which certification has been sought have been certified. In addition, many cases have been commenced, with publicity, but never pursued – presumably because some plaintiffs' counsel considered them to be without sufficient or any merit. Increasingly, class actions are commenced not only in relation to products that were recalled[15] but also in relation to new, innovative, lifesaving, and currently-used and approved medical products.

There has not been a single common issues trial in an Ontario pharmaceutical class action in the more than two decades that the CPA has been in force,[16] and only one in Ontario involving a medical device.[17] Cases have either been settled, are dormant or are ongoing. At present, the class certification process in Canada does not involve any merits assessment, so the frequency of certification does not mean the cases have merit. Likewise, the fact that many Ontario cases have been settled and that there have not been any trials does not demonstrate that such actions were meritorious. As one Canadian judge has stated: "Most class actions never proceed to trial on the merits. The reason is that the stakes are too high for the parties to gamble on a desirable outcome. By the same token, however, the process creates significant risk that an

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companies such as where to locate or do business: Ranking the States, http://www.instituteforlegalreform.com/uploads/sites/1/ILR15077-HarrisReport_BF2.pdf at p. 4

[12] *AIC Limited v. Fischer, 2013* SCC 69 at para 56

[13] *2038742 Ontario Limited v. Quiznos' Canada Restaurant Corp., 2010* ONSC 5390 (CanLii) at para. 17-18

[14] See *Trial Lawyers Association of British Columbia v. Attorney General of British Columbia*; 2014 SCC 59 at para. 47 – burdens that prevent litigants from bringing frivolous claims do not unduly interfere with access to justice, and may rather increase overall access.

[15] Even the recall of a product does not mean the manufacturer did anything wrong, or that compensation from the company is warranted; see *Andersen v St. Jude Medical 2012* ONSC 3660

[16] In the one Canadian pharmaceutical class action that has gone to a common issues trial, in Quebec, the action was ultimately dismissed after 19 days of trial and considerable expense to the company: *Brousseau c. Laboratoires Abbott ltée*, 2016 QCCS 5083 (CanLii).

[17] *Andersen v. St. Jude Medical, supra.*

innocent defendant will be obliged to join in the settlement to avoid the risk of tremendous damages that a case on the merits entails."[18]

We believe that life sciences companies have, in some cases, settled class proceedings in Ontario for reasons extraneous to their merits, or on terms that are disproportionate to the merits of the action. As mentioned above, commencement of a class action in Ontario can result in significant pressure on the defendant to settle the proceeding, even where the class's claims are flawed or meritless. Factors contributing to settlement pressure in the pharmaceutical and medical device field include, among others:

- the size of the potential damages exposure (which can be significant in many medical products liability class actions, because they allege serious personal injuries across a broad class of users of the product, many of whom have serious health issues that are unrelated to the product, and also frequently claim disgorgement remedies regardless of injury);
- the substantial economic costs of defending a class proceeding (both legal fees/disbursements and diverted employee time), that the defendant will often be practically unable to recover, coupled with the fact that those companies are frequently ordered to pay the plaintiffs' legal costs of certification and notice costs regardless of the lack of merit in the cases;
- the reputational pressure from publicity, which is inherent in many class proceedings, regardless of their merits, and potential negative impact on relations with payers, health care providers and patients.

Many Ontario class proceedings involving pharmaceutical medicines or medical technologies are prompted by events that are inherent and unavoidable in the development and sale of those products, such as: labelling updates or recalls resulting from experience in patients that could only be seen after widespread use of the product; scientific developments postdating development and sale of the product; or off-label use decisions by health care providers over many years.[19]

No medical product is completely without risk. Companies develop and market medical products, Health Canada approves them for safety, health technology assessment agencies make recommendations regarding their effectiveness relative to other available treatments, provincial formularies or private insurance companies add them to their lists, and finally health care professionals prescribe them (having regard for the balance of benefits and risks, and based on the existing state of medical and scientific knowledge). All medical products have benefits as well as risks, as described in product labelling. Labelling may also be updated as new information regarding the benefits and risks of a product comes to light, which is not unusual given evolving science and ongoing study of medical conditions and medical products. In rare cases, a drug or device may be recalled in the event of new information regarding its safety and efficacy.

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[18] *Sun-Rype Products, infra.*

[19] They are often "copycat" litigation, following on US litigation and/or lawyer advertising on US TV channels.

These activities are already extensively regulated by Health Canada under the *Food and Drugs Act* and associated regulations. The activities of the companies – from product development, clinical testing, sale and product labelling – are ultimately approved by Health Canada at each stage and reviewed over time. Nonetheless, such activities – including changes in labelling of products that continue to be marketed to the benefit of patients – increasingly prompt costly class action litigation as a matter of course, and has sometimes been the stated factual basis for the court to certify proceedings related to those products.

Statements of claim in medical product class actions typically claim substantial personal injury damages on behalf of any person who used the medical product in issue during the class period, aggravated or punitive damages and, in some cases, also medical monitoring remedies and claims for an accounting and disgorgement of the defendant's revenues from the sale of that medical product. Such class actions have been routinely certified (plaintiffs' counsel often argue that they are "quintessentially certifiable") and the potential liability exposure can be significant.

Yet in many cases, a medical product class action does not serve the goals of judicial economy, let alone behaviour modification. Experience suggests that, in many cases, the number of class members that will be able to prove a compensable injury in the individual actions phase of a class proceeding is disproportionately small in light of the time and expense such complex actions take to litigate.[20] Medical product class actions are generally in the nature of personal injury actions, and individual awards and settlements would in most cases be significant enough to merit an individual claim.

With the forgoing context, principles and objectives in mind, we hereunder impart our position on the various issues as set out by the LCO in its Consultation Paper dated March 2018.

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

Class actions, particularly those that involve complex scientific and medical issues, are generally some of the most complicated civil cases, and require a reasonable amount of time and process to be fairly adjudicated. The mere fact that class actions take a long time to reach a trial does not necessarily mean there has been "unreasonable" delay.

For the most part, the *Rules of Civil Procedure* (including the embedded proportionality principles) and case management process in class actions in Ontario provide an adequate means to bring a class action to trial within a reasonable period of time. In our experience, what might be perceived by some to be unreasonable delays most often occur where class counsel does not wish to move the case forward quickly (whether due to other competing time commitments, a desire to let the litigation mature in other venues or wait for more

[20] E.g. *Boulanger v. Johnson & Johnson Corp.*, [2009] O.J. No. 4497 (Ont. S.C.), 181 A.C.W.S. (3d) 898 the class action was certified on behalf of all users of the medicine Prepulsid – estimated at more than 350,000 and possibly millions; the case later settled and only five class members established to the satisfaction of a panel of qualified medical doctors, that they actually had the complications that could have been at issue (a negotiated list of complications arguably caused by use of the medicine). Class member compensation under the settlement was, in the end, significantly less than the amount allocated to provincial health insurers and less than a third of the amount allocated to class counsel.

scientific study, or for other strategic reasons), or where the parties have chosen resolution that requires complex negotiations, sometimes in multiple jurisdictions.

However, delay sometimes occurs because the claim is without merit, overbroad or lacking in clarity or precision. Defendants often take steps where they can, under the current legislative provisions and court rules, to try to address those concerns. Recommendations are made in other sections of this submission that will ultimately help to reduce the occurrence of those events. However, two related recommendations that are specific to the delay issue are set out below.

It is clear from experience that a rule requiring the certification motion to be heard within a specific period of time in Ontario is not practical, given the necessary steps in a class proceeding and the variety of types of cases that are brought. The current 90-day time period should be removed from the legislation.

We propose that a form of administrative dismissal rule should be adopted to deal with cases that are launched but never pursued. The *Rules of Civil Procedure* regarding administrative dismissal for delay (five years) are not applied to actions commenced under the CPA. As a result, many defendants, particularly in pharmaceutical and medical device cases, are exposed to class proceedings and tolling of limitation periods (discussed further below) in which a statement of claim has been served but no steps have been taken to advance the action. Such cases may languish for years. In our view, many such actions are not diligently prosecuted because they have little or no merit or, for other reasons, are not truly suitable for a class proceeding.

Class proceedings that are started but dormant may have several negative effects for defendants, including: the need to disclose the litigation in financial reports and/or auditor's statements, negative reputational impacts, decreased shareholder value, and the substantial costs associated with any necessary preservation of documents and records related to the litigation. The defendant and other stakeholders are left to bear these negative effects unless the defendant is prepared to incur the time and expense of moving what it perceives to be a frivolous class action forward itself, and ultimately bringing a motion for dismissal for delay when the plaintiff does not meet the case management judge's deadlines.

The CPA should be amended to provide effective mechanisms not only to discourage meritless claims but also to ensure that class proceedings that are not seriously being prosecuted by the representative plaintiffs are dismissed without the need for costly actions by the defendant. The most straightforward approach would be for the CPA to be amended to provide that a class proceeding will be automatically dismissed for delay by the case management judge on the second anniversary of the commencement of the action, unless one of the following events occurs before then: 1) a certification motion record is served and the plaintiffs' counsel certifies that it is complete; 2) the parties agree to a timetable for service of the certification motion record; or 3) the case management judge orders either that the action should be permitted to continue and sets a timetable for service of the certification motion record, or that the action should be held in abeyance.

To the extent that there are concerns about the interests of potential class members other than the representative plaintiff who may be relying on the existence of the class proceeding as tolling limitation periods, the amendments could also provide that class counsel must publish, at their own expense, notice of the administrative dismissal of the action within two weeks of same. This could be done by posting a notice and a copy of the order on class counsel's website and mailing copies directly to any putative class members that have contacted or are known to class counsel.

Consultation Question 2: Settlement Compensation – "How should distribution processes be improved?"

While we do not have a position on some of the questions raised under this heading, we do wish to comment on the significance, if any, of low take-up rates. Low take-up rates do not necessarily mean that the class action did not provide appropriate substantive outcomes. In the pharmaceutical medicines and medical device context, low uptake rates are more likely to be a function of the class action being overbroad from the outset. Most medical product class actions in Ontario have sought certification of a class of all users of a product during the class period, but in many cases only a small proportion of class members will have experienced the complication or injury alleged to be caused by the product. In medical product class actions, a frequent obstacle to negotiating a settlement is a dispute as to how many class members, if any, will have experienced the complication at issue in the litigation once the action reaches the individual issues phase.

In most instances, low take-up rates in class action settlements are not due to inadequate notice or overly complex claims procedures, but rather the fact that few class members have experienced the complication at issue. Based on experience to date, we have no reason to believe that any supposed lack of notice or overly complicated claims processes deter class members from participating in settlements in this space. Imposing more robust notice programs or different claims procedures would be unlikely to improve take-up rates, but would impose additional costs that would unjustifiably drive up settlement values or impede reasonable settlements. Having a merits review as part of the class certification process would allow the court to give greater consideration to the class definition and size, and ultimately facilitate fairer settlements.[21]

Consultation Question 3: Costs – "What changes if any should be made to the costs rule in the CPA?"

Ontario should remain a "loser pays" costs jurisdiction for class actions, to help discourage class actions that are meritless or are wholly disproportionate to any potential merit. At the time the CPA was introduced, it was contemplated that there should be some statutory mechanism to discourage frivolous class actions or so-called "strike suits". As noted in the Consultation Paper, although the Legislature did not implement a merits test at certification, the loser pays costs rule was intended, in part, to assist in discouraging meritless class proceedings.

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[21] See for example *Tiboni v Merck Frosst Canada Ltd.*, [2008] O.J. No. 2996 (Ont. S.C.) at paras 71 and 78, citing *Attis v Canada (Ministry of Health),* [2007] O.J. No. 1744 (Ont. S.C.): "The fact that the class definition may contain persons who did not suffer any injury is an expected outcome of a class definition….This is virtually ordained by the authorities that preclude merits-based class definitions." We note here that a larger percentage of medical product cases authorized in Quebec seem to have defined the class as users who experienced the complication at issue, not all users. For example, see *Sifneos c Pfizer Inc.*, 2017 QCCS 978 and *Brito c Pfizer Canada Inc., 2008* QCCS 2231, where the plaintiff initially wanted to represent any person who used the drug, regardless of any complication, but the class definition was narrowed at the authorization hearing; also see *Kramar c Johnson & Johnson*, 2018 QCCS 1846*; Dallaire c Eli Lilly Canada Inc.*, 2006 QCCS 4223*; Brousseau c Laboratoires Abbott ltée*, 2011 QCCS 5211.

The loser pays cost rule, on its own, has not fully achieved the objective of discouraging meritless cases in the pharmaceutical medicines and medical device area. As noted above, many cases have been started in Ontario though never pursued, while others have been started and pursued for everyone who used the product when only a small handful had experienced a complication. Examples of other cases brought without merit include *Wise v Abbott Laboratories, Limited*[22], *Batten v. Boehringer Ingelheim (Canada) Ltd.*[23], and *Martin v AstraZeneca*[24], all involving currently marketed products approved by Health Canada.

Further, third party funding – whether through the Class Proceedings Fund or private funders – reduces the costs disincentives for the representative plaintiff (and his or her counsel, who often indemnify the representative plaintiff). However, it is still important to ensure that the funders are required to indemnify and are thereby exposed to adverse costs consequences. This would provide some incentive to funders to factor the merits of the case into their funding decisions, and help disincentivize them from funding meritless litigation.

Accordingly, while recommending that the loser pays costs rule be maintained in Ontario for class actions, we also recommend changes to the certification test that would allow for an early assessment of the merits of the case – as described in our response to Consultation Question 5, below.

Because third-party funders can spread the risk of an adverse costs award across a portfolio of cases, the merits and losers pays disincentive likely carry less weight as a factor in funding decisions. The loser pays costs rule is not enough to weed out meritless cases before they are started, bringing about great expense to the parties and court system.

With respect to other aspects of the costs rules in the CPA, we recommend that amendments be made: a) to section 31 of the CPA, to reverse a trend that has diluted the intended effects of the loser pays costs rule; b) to enable successful defendants to recover costs directly from persons that may have indemnified the representative plaintiff; c) to section 22, to eliminate the default position that has developed in the case law of requiring defendants to pay for the costs of notifying class members of certification before the court has made a ruling on the merits of the litigation; and (d) to control the potential adverse consequences of private third party funding.

a) Section 31 of the CPA

The salutary effects of a loser pays cost regime have not been fully realized, in part, because the application of subsection 31(1) of the CPA has diluted its impact on plaintiffs and potential plaintiffs. Subsection 31(1) permits the court, in fixing costs in a class proceeding, to consider whether the case was a test case, raised any novel issues of law, or involved a matter of public interest.

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[22] 2016 ONSC 7275
[23] 2017 ONSC 6098
[24] 2012 ONSC 2744, aff'd 2013 ONSC 1169 (Div. Ct.)

Some decisions, if applied more broadly, would have prevented this dilution. In 2007, the Supreme Court of Canada refused to apply subsection 31(1) to reduce or eliminate the trial judge's award of costs to the defendant following a defence verdict in a securities class action trial, noting that it should not be assumed that class proceedings invariably engage access to justice concerns to an extent sufficient to justify withholding costs from the successful party.[25] The Supreme Court noted that protracted litigation had become the "sport of kings" in the sense that only "kings or equivalent" could afford it, and that "those who inflict it on others in the hope of significant personal gain and fail can generally expect adverse costs consequences."[26] More recently, an Ontario judge rejected the notion that section 31 of the CPA was intended to "impose a public interest burden on defendants" by imposing an asymmetrical costs system.[27]

Nonetheless, there has been some inconsistency in application of the provision. In some cases, even where a defendant has been successful on a certification motion or at trial and was therefore *prima facie* entitled to costs, the purported presence of one or more of the section 31 factors, or broader concerns regarding access to justice, have resulted in the court substantially discounting the quantum of the award that would otherwise be payable to the defendant – and in some cases, ordering that no costs be paid at all.[28]

Although nothing in the legislation mandates uneven application, the court's discretion under section 31 of the CPA has been applied to operate overwhelmingly in favour of plaintiffs; the provision has rarely, if ever, been applied to benefit defendants. For instance, in one case where the defendant prevailed after more than a decade of litigation on the merits following a successful appeal from a common issues trial decision, a finding that the case was "novel" was cited by the court as one reason for a 50% reduction in the costs that otherwise would have been awarded to the successful defendant – even though any novelty in the case would presumably have made it more burdensome for the defendants to litigate as well.[29] In another case, the defendants were denied any meaningful costs relief despite the fact that the plaintiffs' certification motion failed as originally framed, and was granted only following an adjournment of the motion to permit the plaintiffs to obtain further evidence and essentially recast their case.[30]

For clarity, subsection 31(1) of the CPA should be amended to clarify the limited circumstances under which it is intended to apply.

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[25] *Kerr v Danier Leather Inc.,* [2007] 3 SCR 331, 2007 SCC 44 at para 69
[26] *Kerr v Danier Leather Inc., supra* at para 63
[27] *Holley v The Northern Trust Company, Canada,* 2014 ONSC 3057 at para 23; also see *Das v. George Weston Limited,* 2017 ONSC 5583 ("Das") at paras 129-134, where the Court held that although the case was in the public interest, "it would not be just or fair to regard it as one of the exceptional cases where either party should be exempt from the normal rule that costs will follow the event". We note that *Das* is currently under appeal.
[28] See for example *McCracken v Canadian National Railway Company,* 2012 ONCA 797, *Martin v AstraZeneca Pharmaceuticals PLC,* 2012 ONSC 4666, *Williams v Canon Canada Inc.,* 2012 ONSC 1856, *Ruffolo v Sun Life Assurance Company of Canada* (2008), 90 OR (3d) 59, *Sutherland v Hudson's Bay Company* (2008), 64 CCEL (3d) 211 (SCJ)
[29] *Smith v Inco,* 2012 ONSC 5094
[30] *Vester v Boston Scientific,* 2017 ONSC 2498.

b) Direct Right of Action Against Costs Indemnitors

A successful defendant may also face significant obstacles enforcing a costs award in its favour. Pursuant to subsection 31(2) of the CPA, only the representative plaintiff(s) is liable to pay a costs award made in favour of a defendant. In practice, many representative plaintiffs are indemnified by class counsel or a third-party litigation funder against the risk of an adverse costs award, as few are in a position to bear the risk of an adverse costs award in complex litigation themselves. The defendant, however, does not ordinarily have any right to enforce a costs award directly against a person who may have indemnified the representative plaintiff (except where the action has been funded by the Class Proceedings Fund), even though the indemnitors would have chosen to indemnify in the hope that they would benefit greatly if the class action is settled or successful.

A successful defendant may therefore find itself in the unenviable position of trying to enforce a costs award against an individual representative plaintiff who is effectively impecunious, potentially by putting the representative plaintiff into bankruptcy in order to be able to pursue a claim against the indemnitor. Unless the indemnitor adequately and fully factors the merits of the case into its decisions on whether to indemnify (third party funders may not, even if the Class Proceedings Fund does), the "loser pays" costs rule loses much of its salutary (albeit limited) effect of discouraging meritless or otherwise unwarranted class actions. Accordingly, defendants should be given a direct right of action – against any person who agrees to indemnify the representative plaintiff for costs in return for a fee or other compensation – for any costs award in the defendant's favour.

c) Costs of notice

Additionally, defendants in medical products class actions have often been required to pay the costs of providing class members with notice that the court has certified the class action[31] – essentially, requiring defendants to pay for being sued,[32] prior to any consideration of the merits of the action – notwithstanding that there is nothing in the CPA that requires these expenses to be borne by defendants by default. Subsection 22(1) of the CPA, which addresses the costs of notice, should be amended to provide that the costs of notice of class certification should, by default, be paid by the representative plaintiff (or his or her indemnitors) absent a request by the defendant for notice beyond what the court would otherwise consider fair and reasonable or other extraordinary circumstances. In a survey of some of IMC and MEDEC's member companies, respondents indicated that the defendant(s) had been ordered to pay the costs of notice in over 80% of class actions that had been certified against them.

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[31] See *Crisante v DePuy Orthopaedics*, 2013 ONSC 5186 at para 63; *Boulanger v Johnson & Johnson Corp.*, [2007] O.J. No. 2766 at para 5; *Rowlands v Durham Region Health*, 2011 ONSC 719 at para 49.

[32] *Nantais v Telectronics Proprietary (Canada) Ltd.*, [1005] O.J. No. 2592 (OCJ (Gen Div)), 25 O.D. (3d) 331 at para 86: "The plaintiffs asked for an advance from the defendants to cover the cost of preparing and sending notices. It seems to me to be novel indeed to suggest that the defendant should pay in advance for the privilege of being sued".

d) Third party litigation funding

The CPA does not currently address the issue of third party litigation funding (TPLF), but its availability can have a significant impact on the likelihood of strike suits/meritless class actions, as well as the ability or cost of resolving same.[33] Third party funders are, like insurers, able to spread risk and therefore take more risk of an adverse outcome in an individual case with the hope of significant gains across an inventory of cases. This encourages funding decisions to be driven by economic considerations rather than a hard assessment of the merits of a case. For instance, a third party funder might be incentivized to fund a class proceeding of questionable or no merit, likely in exchange for the right to claim a higher proportion of an award or settlement, with the expectation that extraneous pressures will force defendants to settle. This is particularly true in medical product class actions in Ontario, where funders may perceive their risk as being very low because the vast majority of cases have settled and only one case has proceeded to trial.

TPLF arrangements have been approved by the Ontario courts in several class proceedings on an *ad hoc* basis. Given the risk of funders inciting or facilitating meritless litigation or interfering with settlements on terms fair to the class, and the additional costs to the class of having to pay the funder's fees, it is important to legislate restrictions that will ensure TPLF does not result in more meritless class actions, fewer or more expensive settlements and/or unfairness to the parties to the litigation. As TPLF is becoming more common, the CPA should be amended to provide clear rules and restrictions on its use. In particular, the legislation should discourage third party funders from "stirring up" class actions of dubious merit, and to provide safeguards to ensure that successful defendants are able to recover their costs in funded actions.

Several lower courts in Ontario have ruled that TPLF must be promptly disclosed to and approved by the court, and have set forth requirements for court approval including notice of the motion for approval to the defendant.[34] While Ontario courts on a number of occasions called for disclosure of the funding agreement to the defendants as well, not all courts in Canada have taken that approach,[35] and one decision in Ontario indicated that there could be cases where the defendants should not have full access to the funding agreement.[36] Reforms should be made to Ontario's class action legislation to provide clear rules and restrictions on the use of TPLF, and afford procedures to review compliance with the rules.

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[33] While the Class Proceedings Fund is notionally a form of TPLF, there are applicable regulations in place that minimize its adverse effects on the parties or judicial resources. For example, the Law Foundation is to consider whether the case has merit in making funding decisions, has limited resources, has no control over the conduct of the funded actions, and it is directly responsible for the defendants' costs if the class action is unsuccessful.

[34] For the most recent statement in Ontario regarding the requirements for court approval of TPLF, see *Houle v St Jude Medical, Inc et al.*, 2017 ONSC 5129; appeal to OCA quashed, 2018 ONCA 88, but appeal to the Divisional Court to be heard in October 2018. However, there are no appeal court decisions in Ontario on these requirements as yet.

[35] *Schneider v Royal Crown Gold Reserve Inc,* 2016 SKQB 278 (CanLII). *Roth v. Alberta (Minister of Human Resources and Employment),* 2005 ABQB 505*; Hayes v. City of Saint John* (April 19, 2016) (SCJ-533-2013) (N.B.Q.B.).

[36] *Berg v. Canadian Hockey League, et al.,* 2017 ONSC 2608 (CanLII) at paras. 15-22; see also reference to "with appropriate redactions" in *Houle v St Jude Medical, Inc et al.*, 2017 ONSC 5129 at para. 74.

To date, TPLF arrangements have been evaluated and approved on a case-by-case basis by the courts. Given the risk of abuse of TPLF arrangements, there is a clear need for both court oversight and transparency.[37] In light of the experience to date, some basic criteria for the approval of TPLF should be codified in the class proceedings legislation, including at a minimum that:

a. funding arrangements should be promptly disclosed to both the court and defendants, and cannot be the subject of a claim for privilege;

b. the funding agreement must be approved by the court; the motion for approval must be on notice to the defendant, and the defendant must have standing to make submissions;

c. the court must be satisfied that the funder did not initiate and will not be controlling the litigation;

d. the funding must be necessary to ensure access to justice in the circumstances of the particular case;

e. the funder must be financially able to satisfy an adverse costs award in the litigation;

f. any compensation to be provided to the funder under the arrangement must be fair and reasonable having regard for the objectives CPA;

g. the representative plaintiff must have had independent legal advice on the counsel retainer and third party funding agreement; and

h. to the extent that confidential information may be provided to the funder over the course of the litigation, the funder must keep the information confidential and be subject to the same confidentiality rules and orders as the representative plaintiff.

An issue not yet directly addressed in some cases relates to the obligation of the funder to satisfy an adverse costs award in the litigation. The CPA should provide mechanisms for a successful defendant to enforce a costs award directly against a third party litigation funder. The *Law Society Act* provides a direct right of action by the defendant against the Class Proceedings Fund in actions that it funds.[38] The same right should be introduced as against third party litigation funders, who are no differently situated than the Class Proceedings Fund to this extent. The CPA should also be amended to provide that a defendant may obtain an order for security for costs as against a third party litigation funder, where the funder (as opposed to the representative plaintiff) meets any of the criteria set out in Rule 56.01 of the *Rules of Civil Procedure* (*"Security for Costs" – "Where Available"*).

Consultation Question 4: Court approval – "Is the current process for settlement and fee approval appropriate?"

We believe the current test and process for settlement approval is both sufficient and appropriate.

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[37] See "Third Party Litigation Funding (TPLF)" (U.S. Chamber Institute for Legal Reform, 2016).
[38] *Law Society Act,* RSO 1990, c. L.8, s. 59.4

The LCO's Consultation Paper correctly notes that there is a degree of public cynicism about plaintiff counsel fees. Certainly, any perception that plaintiffs' counsel are recovering fees that are disproportionate to the results they have obtained for class members detracts from public confidence in the administration of justice. Aside from the issue of public perception, approving disproportionately high counsel fees will incentivize plaintiffs' counsel to pursue class proceedings that have little merit or benefit to the putative class.

The risk of disproportionately high counsel fees being recovered is, in our experience, particularly acute in pharmaceutical and medical device class actions because it is often the case that only a small subsection of class members will be eligible to recover anything under a settlement. In pharmaceutical and medical device actions, classes consisting of all individuals who consumed a particular medicine or who were implanted with a particular medical device are routinely certified. Conversely, however, it is just as routine for settlements to provide compensation only to those class members who have experienced a particular clinical event after taking the medicine. Although such settlements are fair and reasonable in many cases, they ultimately result in a very small number of class members having eligible claims under the settlement. In such cases, plaintiff counsel's fees can easily be seen as incongruous with the true value of the settlement obtained for class members.

This situation is exacerbated by a line of cases finding that certain contingency fee arrangements are presumptively acceptable and should be approved by the court for the purpose of fixing counsel fees. For instance, at least one judge has held that a one-third contingency is presumptively reasonable and acceptable, regardless of the amounts involved.[39] Such a broad-brush approach is prone to result in disproportionately high counsel fees being awarded in at least some cases, further incentivizing class actions that have limited or no benefit to the public.

The CPA should be amended to provide that – in approving counsel fees in the context of a judgment or settlement – the court should give regard to the proportionality of the proposed fee in view of the result obtained for the class. While, as the Consultation Paper notes, class counsel will almost inevitably recover more than any individual class member, the court should still be able to evaluate the reasonableness of the proposed fee having regard to the overall result obtained for the class.

Consultation Question 5: Certification standards – "Is the current approach to certification under s.5 of the CPA appropriate?"

We recommend that both the substantive threshold for certification and the evidentiary burden on plaintiffs be reformed. We also recommend reform of the certification appeal rights to make them the same for both sides.

The lower the certification threshold and the lighter the evidentiary burden, the higher the risk of meritless and extortionate class actions being brought with the goal of extracting an unjust settlement, because of the

[39] *Cannon v. Funds for Canada Foundation,* 2013 ONSC 7686 at paras. 8-12; *Middlemiss v Penn West Petroleum ltd.,* 2016 ONSC 3537 at para 19; *O'Brien v Bard Canada Inc.,* 2016 ONSC 3076 at para 16.

pressures to settle that a class action brings to bear on companies regardless of the merit of the claim.[40] This was identified as a concern the Ontario Law Reform Commission's (OLRC) 1982 Report on Class Actions, in which it was proposed that a merits test be included in the certification threshold.

In the context of securities class actions, the Ontario Legislature chose to include a merits test, in addition to the loser pays costs rule, to discourage strike suits in the context of secondary market securities misrepresentation class actions. In *Canadian Imperial Bank of Canada v Green*,[41] the majority of the Supreme Court of Canada described strike suits as meritless actions launched in order to coerce targeted defendants into unjust settlements. Similar to general comments by the OLRC in its 1982 report, the Supreme Court noted that the legal environment in Canada was sufficiently different from the U.S. to prevent a "flood of meritless suits". However, the Supreme Court found that the Ontario Legislature had nonetheless accepted that the depth of public concern and some examples of "entrepreneurial litigation" in Canada justified further measures to prevent strike suits in secondary market securities class actions. Accordingly, a leave test was added, requiring good faith in the bringing of the suit and a reasonable possibility of success.

We submit that the same level of public concern and examples of entrepreneurial litigation now exist in the context of pharmaceutical and medical device class actions. Experience has now indicated that a similar merits test should be introduced for medical product class actions (at the least), given the risks and costs as discussed above. The leave test has effectively weeded out those cases that should not be allowed to proceed as class actions in the securities context, and would do so equally well in pharmaceutical and medical device class actions. For example, the leave test was used to stop a securities class action in Quebec claiming that information about the potential side effects of a drug and the FDA's questions about those side effects amounted to a material change in a company's business, operations or capital – thereby triggering timely disclosure obligations under section 73 of the *Securities Act.* [42]

We appreciate that a formal merits assessment at certification in matters other than securities claims may be seen by some as being too stringent, resulting in increased costs of certification motions and increased evidence to be assessed by the Court at the certification stage.[43] However, experience has shown that there needs to be more weeding out of claims with little or no merit, and of claims that are overly broad and do not address the goals of class proceedings. In effect, we recommend that there be a levelling of the playing field between plaintiffs and defendants in class proceedings. The addition of some consideration for the merits of the litigation or the breadth of the litigation would allow the parties to focus more carefully on the proper claims which may be capable of class treatment. This proposal, if adopted, would eliminate claims that are doomed to failure at the trial of the merits and would avoid the unnecessary taxing of judicial

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[40] *Sun-Rype Products Ltd. v Archer Daniels Midland Co.,* [2010] BCSC 992 at para. 18, appeals allowed on other grounds, 2011 BCCA 187 and 2013 SCC 58; see also *Warner* at paras 71-72.
[41] 2015 SCC 60 at paras 67-68 per Coté J, and at para 130 per Cromwell J.
[42] *Theratechnologies Inc. v. 121851 Canada Inc.,* 2015 SCC 18, [2015] 2 S.C.R. 106
[43] It is worth noting that adding such a merits test will not necessarily increase costs materially in every case. Class counsel should be investigating the merits of the cases before commencing them. Defendants in secondary market misrepresentation securities class actions do not always debate the merits of the claim at the certification stage, where it is clear for example that the low threshold will be met.

resources, while at the same time providing a measured level of access to justice. An early merits examination also avoids the unnecessary accumulation of expenses of the litigation for both sides.

With the benefit of more than two decades of experience under the present CPA, we submit that the loser pays costs rule does not alone adequately address the risk of strike suits in the area of pharmaceuticals and medical devices. Plaintiffs and their indemnitors – class counsel and third party litigation funders – are unlikely to be deterred by the prospect of an adverse costs award at a certification motion because most pharmaceutical and medical device class actions have been certified even when opposed under the current regime. Further, as the overwhelming majority of certified actions have ultimately settled, the prospect of an adverse costs award following a merits adjudication is also unlikely to be a sufficient deterrent on its own. Some merits analysis and a higher evidentiary burden are necessary prior to or at certification to ensure that substantive justice – "just results" – are not sacrificed in favour of access to process alone, and to ensure that the access to justice objectives of the legislation are achieved.[44]

As noted, the costs of defending class actions and of settlements in the area of pharmaceuticals and medical devices also have broader societal impacts in terms of potentially affecting decisions of health care professionals or discouraging innovation or limiting availability of products – outcomes that are clearly undesirable from a public policy perspective. A higher certification threshold would make it more likely that only class actions that are meritorious enough to outweigh these negative societal impacts are brought and/or permitted to proceed.

Evidentiary burden

Presently, the CPA does not expressly address the evidentiary burden on a certification motion. We submit that, at a minimum, the legislation should be amended to align the certification threshold in Ontario with the framework set out by the United States Supreme Court in *Wal-Mart Stores, Inc. v. Dukes,*[45] given the importance of these proceedings and potential risks and costs of same. First, the CPA should go beyond the "some basis in fact" burden of proof, so as to require the plaintiff to "affirmatively demonstrate compliance with" the certification criteria, with evidentiary proof that the certification criteria have been met on a balance of probabilities – the standard applied in most other civil proceedings. Second, to avoid a lack of consistency with the current case law, the CPA should expressly provide that evidence – and, in particular, expert evidence – filed on the certification motion must meet the test for admissibility.[46] The CPA should

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[44] Adding a merits test at the certification stage will not add substantially to the cost of the certification motion, particularly having regard for the importance of such a motion and the potential societal costs of certifying cases of little merit; it should not require precertification discovery, just as it does not in the securities leave cases – *Mask v. Silvercorp Metals Inc.*, 2014 ONSC 4161 (CanLII), leave denied *Mask v. Silvercorp Metals, Inc.*, 2014 ONSC 4647 (CanLII); this is a reason to have an early merits assessment as part of certification, rather than leaving merits to the more expensive and lengthy summary judgment motion, as in *Wise v Abbott Laboratories Limited,* 2016 ONSC 7275, where extensive production had to happen before the motion for judgment.

[45] 564 US 338 (2011), 131 S Ct 2541

[46] It is not uncommon for plaintiffs to file a solicitor's affidavit, which attaches evidence including expert reports authored by others who are not witnesses in the proceedings. See for example *Pro-Sys Consultants Ltd. v*

furthermore empower the certification judge to weigh and resolve conflicts in the evidence filed on a certification motion, to enable a "rigorous analysis" of the record to determine whether the certification criteria have been met.

Preferable procedure

Recent experience has also suggested that a higher "numerosity" requirement, or amendment to the preferability test, may have some utility in cases where the number of putative class members with injury is small. Currently, a class may be certified with as few as two class members. Although cases involving small classes (fewer than 100 members) have been certified, arguably these could be as or more easily handled with coordinated case management. Having cases coordinated within each province could help to address unresolved jurisdiction, choice of law (limitation period) and enforcement issues.

Nonetheless, plaintiffs' counsels have been disinclined to use any procedural vehicle other than class actions to litigate mass wrongs,[47] even when alternatives would seemingly be more efficient or cost-effective.[48] One or two Ontario judges have attempted to direct coordinated case management instead of proposed class proceedings where there are small numbers of claimants, but those decisions have been overturned by appellate courts, citing existing certification standards.[49]

The CPA should be amended to require the court to consider coordinated case management and discovery as an alternative to a class action where there are a small number of cases. This would give trial judges more discretion to direct procedures that will lead to the timely and proportionate resolution of the claims of the putative class.[50]

Consultation Question 6: Behaviour modification

While behaviour modification is a recognized and accepted theory behind class actions, it would be extremely difficult for the LCO to empirically study whether class actions are meeting this objective. Further, and as noted above, any such study would have to consider both positive and negative behaviour

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Microsoft Corp., 2008 BCSC 1263; *Schick v Boehringer Ingelheim (Canada) Ltd.,* 2011 ONSC 63; *White v Merck Frosst Canada* (2004) 129 A.C.W.S. (3d) 255 (Ont. S.C.); *Ernewein v General Motors of Canada Ltd.,* 2005 BCCA 540; *Pardy v Bayer Inc.,* 2003 NLSCTD 130.

[47] See *O'Brien v Bard Canada Inc.,* 2015 ONSC 2470 at paras 230-232.

[48] See for example, *Hudson v Austin*, 2010 ONSC 2789.

[49] See for example, *Cavanaugh v. Grenville Christian College,* 2014 CanLII 7350; *Excalibur Special Opportunities LP v Schwartz Levitsky Feldman LLP*, 2016 ONCA 916 [*Excalibur*], leave to appeal to SCC ref'd 2017 CarswellOnt2638 (SCC).

[50] In *Excalibur*, the Ontario Court of Appeal held that the motion judge erred in finding that the preferable procedure criterion was not met because the joinder of ordinary claims was preferable to a class action, "which, although manageable would be and has shown itself to be more procedurally cumbersome and protracted than a regular action". The Ontario Court of Appeal held that there was no evidence before the motion judge that joinder was available as an alternative procedure and "that other class members would be prepared to assume the burdens, risks and responsibilities of commencing their own claims".

modification and the larger societal costs of class actions – particularly in the pharmaceutical medicines and medical device area.[51] Having a more fair and balanced class action system, including a more robust certification test and evidentiary threshold, would allow the court to consider more meaningfully both sides of the behaviour modification question in the particular case before it.

IMC and MEDEC member companies already have ample incentives to ensure that the products they distribute are safe and effective. Members' profitability is tied to their ability to develop products that effectively treat medical conditions and that are safe for use (free from unacceptable risk of harm). A company that neglects patient safety will not be prosperous or provide value to its shareholders, leaving aside the threat of class action litigation.

Moreover, the life sciences industry is already one of the most heavily regulated segments of the Canadian economy, through the provisions of the *Food and Drugs Act* and its regulations, among other statutes. Health Canada approval is required for all pharmaceutical medicines and most medical devices, and post-market monitoring (including reporting of adverse events, labelling changes, and recalls) is also subject to oversight and scrutiny by Health Canada.

While IMC and MEDEC's member companies already have more than enough incentives to and do act responsibly, the mere threat of class action litigation forces any company thinking otherwise to consider that possibility in their business risk analysis. The reforms we propose to more fairly balance the existing regime will not detract from the incentives already in place for companies to act responsibly. Conversely, the prospect and reality of meritless or extortionate product liability class actions that the reforms seek to discourage have a number of potentially negative societal implications including stifling innovation, interfering with health care decision making and distracting health care workers from patient treatment.

Consultation Question 7: Perspectives of class members

We defer to others to describe class members' and representative plaintiffs' experience with class actions.

Consultation Question 8: National Coordination – "What is the most effective way for courts to case manage multi-jurisdictional class actions in Canada?"

There are a number of unresolved constitutional issues concerning multi-jurisdictional class actions and the certification of national classes. Some of these fall outside the purview of the LCO, not to mention the constitutional competence of the Ontario Legislature. While we acknowledge the important strides made in this regard through the Canadian Bar Association Protocols mentioned in the LCO Consultation Paper, we believe the CPA could provide more effective mechanisms for national coordination, particularly at the certification stage.

[51] Whether one accepts the evidence for negative consequences of medical product class actions discussed earlier, there is at least as strong a theoretical underpinning for those as there is for the theory of positive behaviour modification.

The commencement of overlapping class actions across different provinces remains an issue of concern for defendants, who often find themselves defending class actions with the same class members on more than one front. Presently, the CPA does not provide the court any guidance as to what consideration it should give to the existence of other overlapping class actions when it is asked to certify a multijurisdictional class action in Ontario.

We recommend that the CPA be amended to include provisions – similar to those in the legislation of Alberta and Saskatchewan – to require a certification judge to consider whether he or she should defer to an overlapping class action in another jurisdiction, in whole or in part, even if that results in a refusal to certify that class action before Ontario courts.[52]

Consultation Question 9: Carriage motions – "How should Ontario courts address the issue of carriage in class actions?"

We are of the view that the task of determining which of competing plaintiffs' firms should take carriage of a proposed class proceeding should continue to be done by judges hearing carriage motions. A "first to file" rule would do nothing to promote the best interests of class members and would only incentivize the hasty filing of ill-conceived and poorly pleaded class proceedings in a "race to the courthouse steps" to obtain a carriage foothold. The procedural issues that result from the need to ameliorate poorly planned proceedings create undue costs and delay for everyone, and this should be avoided.

Consultation Question 10: Leave to appeal – "What is the appropriate process for appealing class certification decisions?"

The problems posed by low certification standards are compounded by asymmetrical appeal rights following a certification decision, which allow a plaintiff to appeal "as of right" while a defendant must first obtain leave to appeal. Many applications for leave are denied, delaying or preventing appellate consideration of issues important to defendants, while issues important to plaintiffs are automatically eligible for review. Given the importance of the certification motion and the fact that many cases settle after certification, certification is equally important to both sides and fairness demands that both should have the same rights of appeal. There is no principled reason for asymmetrical appeal rights, and the CPA should be amended to provide equal rights of appeal to plaintiffs and defendants.

The CPA should also be amended to discourage the practice of plaintiffs – who have been unsuccessful on a certification motion – to narrow or recast their proposed class definitions and common issues for certification on appeal. This could be accomplished by requiring the plaintiff to bring a motion to the case management judge if they seek to materially change the proposed class definition or common issues at any time.

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[52] *Class Actions Act,* SS 2001, c C-12.01, ss. 4(2)(c), 6(2), 6(3), 6.1 (as amended); *Class Proceedings Act,* SA 2003, c C-16.5, ss. 2(2)(b), 5(6), 5(7), 5(8), 9.1

Appellate courts have allowed plaintiffs to recast their claim with an altered class definition and changed common issues during the appeal, taking the view that unless there is prejudice to the defendant, it is open for a plaintiff to recast its case on appeal to make it more suitable for certification.[53] Class counsel are often making wholesale changes to their proposed class definition and/or common issues before the Divisional Court or Court of Appeal. This turns the appeal into a reargument of the certification motion, deprives the defendant of any opportunity to test fairly and fully the proposed revisions to the common issues with evidence, deprives the courts of the expertise of judges who have been assigned to hear the case at first instance, and requires that multiple judges determine issues that could and should have been heard by one judge.[54]

In addition, the ability of a representative plaintiff to alter almost every facet of the proposed class proceeding on appeal makes appellate review difficult and encourages such behaviour by plaintiff's counsel. This furthermore leaves defendants in a position of having to both address the decision from which the appeal is made and reargue certification based on new claims, altered class definitions and altered or additional common issues, often without a complete and admissible, or any, evidentiary foundation.[55]

The current practice encourages plaintiffs (especially where funded, and indemnified for costs) to be extremely broad in their demands at the certification motion, knowing they can take a more moderate approach on appeal – and with the benefit of already having the certification judge's decisions/reasoning. This certainly does not promote fairness or efficiency for the parties, but rather undermines the goal of judicial economy. Under the existing regime, the appeal court is essentially called upon to engage in a *de novo* review of the certification criteria rather than apply the more limited standards of review ordinarily applicable to appeals.

Even in cases where a costs order is made in the court below[56], partial indemnity costs do not fully compensate the defendants for the wasted time and expense of the original motion. Moreover, the defendants will also have been deprived of the ability to consider consenting to (or not opposing) the narrowed class and common issues, thereby missing the opportunity to potentially avoid altogether the costs, inconvenience, and judicial resources associated with an opposed certification motion.

Legislative reform of the appeal process should be considered to provide fair process for both defendants and plaintiffs, so as to preserve the proper role of the certification/case management judge and appellate courts in class proceedings, and to discourage wasted costs, time, and effort.

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[53] *Markson v. MBNA Canada Bank*, 2007 ONCA 334 at para 39.
[54] *Keatley Surveying Ltd. v. Teranet Inc.,* 2014 ONSC 1677, at para 39
[55] *Sherry Good v. Toronto Police Services Board* 2014 ONSC 4583, paras 13 to 16
[56] Costs orders may not reflect the significant wasted effort and expense of this approach. For example, in *Vester v Boston Scientific Ltd.*, 2017 ONSC 1095, the Court refused to award costs to the defendant of the first unsuccessful motion for certification when the plaintiff was later successful, on new evidence and recasted issues, in persuading the judge to certify a class action.

Consultation Question 11: Pre-trial and trial issues – Are there unique challenges in trials of common issues that the CPA and/or judges could address? What can judges do to facilitate quicker resolutions and shorter delays?"

Adoption of the recommendations made in this submission would ameliorate many issues that tend to lead to pre-trial delay. As stated elsewhere in this submission, relatively few class proceedings have ultimately proceeded to a common issues trial. Those that do, however, tend to be long trials with significant legal and factual complexity.

The earlier appointment of a trial judge, once it is determined that a common issues trial will be required, would be helpful for all parties to permit pre-trial issues to be raised and determined in a timely manner by the judge that will ultimately be trying the case. This would also allow the parties and the court to turn their minds to trial management issues earlier on in the process, which would only lead to more efficiently run hearings.

Consultation Question 12: Other issues – "Are there provisions in the CPA that need updating to more accurately reflect current jurisprudence and practice?"

Limitation periods and tolling

It is unclear under the current CPA at what point the Legislature originally intended that limitation periods for class members' claims would start to toll. It has been argued that section 28 of the CPA only tolls claims of class members (other than the named plaintiff) from the date when the class proceeding is certified (i.e. becomes a "class proceeding," rather than just a "proceeding commenced under this Act"). On this view, the 90-day time limit for bringing the certification motion appeared to be the mechanism by which the Legislature intended to address concerns about limitation periods expiring before the action was certified.

However, that argument has been rejected.[57] The CPA has been interpreted to provide that limitation periods are tolled in favour of class members from the commencement of the proceeding (and the 90-day requirement has been found to be wholly impractical). This interpretation removes an incentive for plaintiffs' counsel to move their cases forward or seek to discontinue them.[58] As noted earlier, many class actions have been brought and then languished for years without any motion for certification being brought, and we have made a recommendation under Consultation Question 1 (Delay) that we believe would address this concern.

However, the Court's interpretation of the CPA limitation tolling provision, in combination with the current *Limitations Act, 2002*, has created an issue with respect to contribution and indemnity claims. The CPA does

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[57] *Logan v Canada (Minister of Health)* (2004), 71 OR (3d) 451 (CA), cited with approval in *Canadian Imperial Bank of Commerce v Green*, 2015 SCC 60 at para 61.

[58] This interpretation of the Act has also created an anomalous situation whereby dismissal of the certification motion does not end the tolling of the limitation period for class members other than the named plaintiff: see *Ragoonanan v Imperial Tobacco Canada Limited,* 2011 ONSC 6187. If the interpretation is truly what the Legislature intended, then dismissal of the certification motion should be added to section 28 of the CPA as an event that ends tolling.

not expressly address the treatment of limitation periods for third party claims or crossclaims by defendants against others who may have contributed to one or more class members' alleged losses. The two-year limitation period for the commencement of claims for contribution and indemnity under section 18 of the *Limitations Act, 2002* – combined with the interpretation of the CPA that tolling limitation periods for class members start from the commencement of the action – raise the potential for an argument that defendants to class actions have to commence third party and crossclaims against persons who contributed to the loss of every potential class member even before an action is certified.

Prior to the individual issues phase of a class action, a defendant in a pharmaceutical or medical device class proceeding does not typically know the identities of potential class members, let alone have any information about the identities of health care providers who may have treated them, or others whose conduct may have caused or contributed to the class members' alleged losses. As discovery of class members other than the representative plaintiff is generally not permitted during the common issues phase of the proceeding, the defendants must await individual claims and production of clinical records or other information during the individual issues phase to identify class members and assess whether any third party or crossclaims are appropriate or necessary.

Accordingly and for greater certainty, section 28 of the CPA or section 18 of the *Limitations Act, 2002* should be amended to make it clear that limitation periods for defendants to bring claims for contribution and indemnity are tolled from the commencement of the proceeding under the CPA from issuance of the claim through the determination of the common issues and until individual class members identify themselves and can be discovered based on the identities of potential contributors.

Settlement offers

While the CPA does not directly address how settlement offers must be made or communicated to class members, at least one judge has held that the defendant may only communicate a settlement offer to the representative plaintiff, and that the representative plaintiff is not obligated to inform class members of the settlement offer if he or she decides it should not be accepted.[59]

That ruling, if ultimately upheld by appellate courts, would pose an obstacle to the early and fair settlement of class member claims where the defendant is prepared to settle the action with a subgroup of class members that does not include the representative plaintiff. In a pharmaceutical or medical device class action, a defendant may be prepared to make an offer to settle the claims of class members who have experienced a specific complication after taking/using the medical product in issue. Where that offer does not include the representative plaintiff, he or she does not have to pass that offer along to the affected class members and would have little motivation to do so. This is not only unfair to defendants, but it also prevents class members with stronger claims from receiving fair compensation in a timely manner.

The CPA should be amended to allow a defendant to make an offer to settle only the claims of a subgroup of class members at any time after the action is certified, and requiring the representative plaintiff to

[59] *Berry v Pulley,* 2011 ONSC 1378 at paras 86-89

communicate such an offer to affected class members. A subgroup of class members should also be permitted to accept a settlement offer without the agreement of the representative plaintiff, subject to court approval. Although there is no reason to believe that such amendments would lead to improper or abusive settlement offers, motions for directions would remain available to obtain the court's guidance or intervention if necessary.

Consultation Question 13: Mandatory reporting – "Should the CPA or Rules of Civil Procedure be amended to promote mandatory, consistent reporting on class action proceedings and data?"

IMC and MEDEC do not have a position on this issue.

CONCLUSION

From IMC and MEDEC's perspective, a fair and efficient class proceedings regime in Ontario is one that would be more likely to provide true access to justice to both class members and defendants, that would not waste judicial resources, and that better balances the potential positive and negative societal effects of class actions. In particular, this type of regime would: 1) discourage the commencement of frivolous or meritless and/or overbroad class proceedings, and provide for such actions to be weeded out or narrowed at an early stage; 2) apply the cost consequences of success or failure equally to plaintiffs and defendants, and ensure transparency and reasonable limits on litigation funding and costs indemnities; 3) provide a cost-effective mechanism to dismiss class proceedings that are commenced but not pursued by class counsel within a reasonable time; 4) facilitate the settlement of meritorious class proceedings on reasonable terms; and 5) ensure that case management judges are able to effectively address the inefficiencies in overlapping class proceedings in different provinces.

We applaud the Law Commission of Ontario for undertaking this important project and implore it to seriously consider these submissions and proposals for reform. Please be advised that interested members of both IMC and MEDEC have been surveyed as regards their experiences with class actions. We would be pleased to discuss the survey results and the foregoing recommendations with the LCO at its convenience.

Special thanks to Gordon McKee and Nicole Henderson (Blake, Cassels & Graydon LLP), and to the International Association of Defence Counsel's Canadian Class Actions Task Force with whom they worked, for their input into our consideration of the options for class action reform in Canada.