Submissions to the Law Commission of Ontario Regarding its Class Action Project: Objectives Experiences and Reforms

Introduction

1. The following are the submissions of the International Association of Defense Counsel (IADC) to the Law Commission of Ontario in response to its March 2018 Consultation Paper and the Consultation Questions listed therein.[1] These submissions are supported and adopted by Lawyers for Civil Justice (LCJ),[2] the Federation of Defense and Corporate Counsel (FDCC),[3] DRI – The Voice of the Defense Bar (DRI),[4] the Canadian Defence Lawyers (CDL)[5] and the Product Liability Advisory Council (PLAC).[6]

2. The IADC has been serving a distinguished membership of in house and outside defense attorneys and insurance executives since 1920, and currently has approximately 2,500 invitation-only, peer-reviewed members. Its membership includes lawyers in large and small law firms, senior counsel in corporate law departments, and corporate and insurance executives, including a significant number of Canadian members. Importantly for this submission, our members represent some of the world's largest corporations, many of which have subsidiaries

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[1] While many on the IADC Canadian Class Action Project Task Force contributed to its consideration of the options for reform, special thanks to members Peter Pliszka, Scott Maidment, Glenn Zakaib and Gord McKee (Chair), and to Nicole Henderson of Blake, Cassels & Graydon LLP, who collectively invested a great deal of time in the work of the Task Force and in the drafting of this submission.

[2] LCJ is a coalition of defense trial lawyer organizations, law firms, and corporations that aims to promote excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases.

[3] The FDCC is composed of recognized leaders in the legal community who are dedicated to promoting knowledge, fellowship, and professionalism of its members as they pursue the course of a balanced justice system, and represent those in need of a defense in civil lawsuits.

[4] DRI is a leading organization of defense attorneys and in-house counsel. DRI aims to enhance the skills, effectiveness and professionalism of defense lawyers, and to improve the civil justice system.

[5] CDL is a non-profit national organization that represents the interests of civil defence lawyers and, by extension, their clients who are litigants in Canadian court proceedings. CDL's membership includes approximately 1400 members from coast to coast in Canada. CDL acts as a voice and resource for its civil defence members, providing a national perspective to the Courts and Government as well as quality defence-specific education and networking opportunities.

[6] PLAC is a non-profit professional association comprised of 90 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of laws affecting product litigation in the United States and elsewhere, with emphasis on how the rules for aggregate litigation affect manufacturers of products and those in the supply chain.

that do business in Canada and/or have been defendants in class actions in Ontario and other parts of Canada.

3. Among other things, the IADC takes a leadership role in many areas of legal reform and professional development. It has formed a Canadian Class Actions Task Force made up of lawyers with class action experience in Canada, the US and Australia, to study and develop positions on some of the issues the LCO will be considering, with input from corporations and other organizations representing the interests of the business community. The IADC Task Force also includes representation from LCJ, DRI and FDCC, other defense oriented organizations that have members who represent companies exposed to class actions in Ontario.

4. While the IADC and other organizations mentioned represent the interests of companies exposed to class actions, our submission is intended to provide a balanced view of the issues and viewpoints keeping in mind the goals of the legislature in enacting the *Class Proceedings Act, 1992* (the "CPA").

5. The Supreme Court of Canada has expressly stated that access to justice, one of the key imperatives for class actions, requires access to <u>just results</u>, not simply to process for its own sake.[7] Both plaintiffs and defendants are entitled to access to just results.[8] Assessing whether the present class actions regime provides access to just outcomes requires examination of both merits decisions and settlements, because the vast majority of class actions that are certified will ultimately settle. The reason they settle, as many U.S. courts and commentators have observed,[9] is that certification of a class raises the stakes of litigation to such a high level that most companies cannot accept the risk of going to trial. This means that the merits of the claim often go unreviewed by any court. While we support a justice system in which plaintiffs are compensated fairly when deserved, a system that places undue pressures on defendants to settle class actions for reasons unrelated to their merits is not one that provides just results. 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

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

[8] *2038742 Ontario Limited v. Quiznos' Canada Restaurant Corp.,* 2010 ONSC 5390 (CanLii) at para. 17-18

[9] See, e.g., *In Re Rhone Poulenc Rorer, Inc*. 51 F. 3d 1293 (7th Cir. 1995).

existence of the litigation to interfere with transactions such as the sale, merger, or acquisition of a business. Placing burdens on litigants that prevent them from bringing frivolous claims does not unduly interfere with access to justice, and may rather increase overall access. [10]

6. Since the CPA came into force in 1993, numerous class proceedings have been commenced in Ontario against companies in nearly all economic sectors. 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 and therefore presumably felt by plaintiffs' counsel to be without merit.

7. To date, there have been very few common issues trials. Cases have either been settled, are dormant, or are ongoing. The class certification process in Canada does not, at present, involve any merits assessment, so the frequency with which they are certified does not say anything about whether the cases have any merit at all. Likewise, the fact that many Ontario cases have been settled and there have been few 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 innocent defendant will be obliged to join in the settlement to avoid the risk of tremendous damages that a case on the merits entails."[11] We believe that businesses have in a number of cases settled class proceedings in Ontario for reasons extraneous to their merits, or on terms that are disproportionate to the merits of the actions.[12]

8. Finally, by way of introduction, it must be remembered that class actions are merely procedural vehicles. They are not designed to create substantive rights for the class which an individual plaintiff would not otherwise enjoy.[13]

9. From our perspective, a fair and efficient class proceedings regime in Ontario would: 1) discourage the commencement of frivolous or meritless and/or overbroad class proceedings,

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[10] See *Trial Lawyers Association of British Columbia v. Attorney General of British Columbia*; 2014 SCC 59 at para. 47.

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

[12] One example is *Lozanski v. Home Depot*, 2016 ONSC 5447 – see para. 74. There are others, but confidentiality precludes their identification in this submission.

[13] *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60, [2015] 3 S.C.R. 801 at para 49

and provide for such actions to be weeded out or narrowed at an early stage; 2) allow plaintiffs and defendants equal opportunities to appeal certification decisions; 3) apply the costs consequences of success or failure equally to plaintiffs and defendants, and impose reasonable limits and transparency on third party litigation funding and costs indemnities; 4) prevent unnecessary delay, including providing for the summary dismissal of class proceedings that are commenced but not pursued by class counsel within a reasonable time; 5) treat plaintiffs and defendants equally with respect to tolling of limitation periods; 6) facilitate the settlement of meritorious class proceedings on fair and reasonable terms; and 7) ensure that case management judges are able to effectively address the inefficiencies posed by overlapping class proceedings in different provinces.

10. With that by way of introduction, we respond to the LCO's Consultation Questions as follows.

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

11. Class actions are generally some of the most complex of civil cases. They require a considerable amount of time and process to be fairly adjudicated. The mere fact that class actions take a long time to reach a trial or other resolution does not mean there has been "unreasonable" delay.

12. For the most part, it is our experience that the rules of civil procedure (including the proportionality principles embedded therein) and the case management process in class actions in Ontario provide adequate means to bring a class action to trial within a reasonable period of time where the parties and court collectively wish to do so. In our experience, what might be perceived by some to be (and sometimes are) 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 for other strategic reasons), or the parties have chosen to move towards resolution that requires complex negotiations, sometimes in multiple jurisdictions,

13. 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 we believe will ultimately help to reduce the occurrence of those events. But at present, many class actions have been filed in Ontario

without any further steps taken in the action for many years. Some recommendations that are specific to that delay issue follow.

14. 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. That is because of the necessary steps in a class proceeding, the variety of types of cases that are brought, and the constraints on judicial resources in Ontario. The current 90 day time period should be removed from the legislation.

15. Instead, a form of administrative dismissal rule should be adopted to address proposed class proceedings that are commenced and then never pursued. Presently, actions commenced under the CPA are exempted from the provisions of the *Rules of Civil Procedure* that provide for administrative dismissals for delay. Many cases languish in a state of complete dormancy for years. Our experience has led us to believe that many such actions are not moved forward because they have little or no merit or, for other reasons, are not truly suitable for treatment as a class proceeding.

16. Class proceedings that are started but lie dormant may have a number of 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 (e.g. shareholders) are left to bear these negative effects unless the defendant is prepared to incur the time and expense (and potentially more adverse publicity) of moving forward on its own initiative what it perceives to be a frivolous class action, and ultimately bringing a motion for dismissal for delay when the plaintiff does not meet the case management judge's deadlines.

17. The CPA should be amended to provide effective mechanisms not only to discourage meritless claims (as described elsewhere) but also to ensure that class proceedings that are not diligently and 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 by the case management judge for delay 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; 3) the case management judge orders that the

action should be permitted to continue and sets a timetable for service of the certification motion record; or 4) the parties consent to the action being held in abeyance, with approval of the court.

18. 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 notice of the administrative dismissal of the action within two weeks of same 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.

Question 2: "How should [settlement compensation] distribution processes be improved?"

19. 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 many cases, low uptake rates are more likely to be a function of the class action being overbroad from the outset, or the class members having no interest in pursuing the "minor" issues raised in the proceeding (in some cases because they are content with a remedial program put in place by the defendant). In respect of the former, class actions in Ontario have often sought certification of a class that includes many class members who have not experienced the loss or injury that is the subject of the class claims. A frequent obstacle to negotiating a settlement in such a case can be a dispute as to how many class members, if any, have experienced the loss at issue in the litigation and will be able to make a claim once the action reaches the individual issues phase.

20. Low take-up rates in class action settlements are often not due to inadequate notice or overly complex claims procedures, but rather the fact that few class members have experienced the loss. 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. The courts are well equipped to determine what notice and claims processes are appropriate, and imposing more robust notice programs or different claims procedures across the board would be unlikely to improve take-up rates, but would impose additional costs that would unjustifiably increase settlement values or impede reasonable settlements. Having a merits review as part of the class certification process would also allow the court to give greater consideration to and weigh evidence in relation to the class definition and size, and may

ultimately facilitate fairer settlements tied to persons who have experienced material loss.[14]

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

21. Ontario should remain a "loser pays" costs jurisdiction for class actions,[15] to continue to help discourage class actions that are meritless or wholly disproportionate to any merit there may be in a small number of claims.

22. 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 two-way costs rule was intended, in part, to assist in discouraging meritless class proceedings.

23. Alone, however, the two-way cost rule has not fully achieved the objective of discouraging meritless cases. Our experience has been that some class counsel nevertheless commence proposed class proceedings that would be properly regarded as "strike suits," which have little to no factual or legal merit (or are simply not suitable for class treatment), in the hopes of extracting a settlement.

24. The increasing availability of third party litigation funding (including indemnities by funders for adverse costs exposure) potentially exacerbates this problem. The two-way costs rule likely poses less of an economic threat to third party funders, who can spread the risks of adverse costs award across a portfolio of cases. Accordingly, something more than the ordinary two-way costs rule is required to address the "strike suit" problem. Therefore, while

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[14] 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, in medical product class actions like these, a larger percentage of class actions authorized in Quebec have defined the class as users who experienced the complication at issue, not all users of the product, the typical class definition in Ontario: 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, 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 Laboratories Abbott ltée,* 2011 QCCS 5211.

[15] Saskatchewan, a province that historically had a "no costs" rule for class proceedings, has more recently amended its Class Actions Act, S.S. 2001, c.C-12.01, to permit judges to make any order of costs the court considers appropriate at any stage of a class proceeding (Bill 147, An Act to Amend the Class Actions Act, 4th Sess., 27th Leg., Saskatchewan, 2014, assented to 15 May 2015).

recommending that the two-way costs rule be maintained in Ontario for class actions, we are also recommending (in section 5 below), changes to the certification test that will allow for an early assessment of the merits of the case.

25. With respect to other aspects of the costs rules in the CPA, we recommend, for reasons below, that amendments be made: a) to section 31 of the CPA, to reverse the impact of cases that have 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; and (d) to control the potential adverse consequences of private third party funding.

Section 31 of the CPA

26. 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.

27. 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. The Court noted 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.[16] 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."[17] 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

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[16] *Kerr v Danier Leather Inc.*, [2007] 3 SCR 331, 2007 SCC 44 at para 69

[17] *Kerr v Danier Leather Inc., supra* at para 63

costs system.[18]

28. Nonetheless, in many 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.[19]

29. 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 on the merits following a successful appeal from a common issues trial decision (after more than a decade of litigation), 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.[20]

30. For clarity, subsection 31(1) of the Act should be amended to narrow and clarify the limited circumstances under which it is intended to apply and to expressly state that it may be applied in favour of unsuccessful defendants as well as unsuccessful plaintiffs.

Direct right of action against costs indemnitors

31. 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) are liable to pay a costs award made in favour of a defendant. In practice, many representative plaintiffs are

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[18] *Holley v The Northern Trust Company, Canada*, 2014 ONSC 3057 at para 23. While the Court in *Das v. George Weston Limited*, 2017 ONSC 5583 ("Das") also held at paras 129-134 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", the decision is currently under appeal. Greater clarity in the language of the provision would benefit all parties.

[19] 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)

[20] *Smith v Inco,* 2012 ONSC 5094

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 have chosen to indemnify in the hope that they will benefit greatly if the class action is settled or successful.

32. 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 is potentially liable for costs, and has an incentive to make decisions to indemnify based on the merits of the case (third party funders may not, even if the Class Proceedings Fund does), the "loser pays" costs rule loses much of its salutary effect of discouraging meritless or otherwise unwarranted class actions. Accordingly, defendants should be given a direct right of action for any costs award in the defendant's favour against any person who agrees to indemnify the representative plaintiff for costs in return for a fee or other compensation. Doing so would ensure that the risk of an adverse cost award properly rests upon those persons who are involved in the decision to prosecute the action and who stand to benefit materially should it succeed.

Costs of notice

33. Defendants are often ordered to pay the costs of providing class members with notice that a class action has been certified[21] - essentially, requiring defendants to pay for the privilege of being sued,[22] 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. Courts that have ordered defendants to pay the costs of notice have provided little if any justification in their decisions. It cannot be justified on the basis of the loser pays costs rule, because the

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[21] 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.
[22] *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".

notice is required by statute even if the defendant consents to certification. It is a cost of bringing a class action, just like the cost of issuing a statement of claim, subpoenaing witnesses and many other costs normally borne by the plaintiff who chooses to initiate the suit. In order to address decisions that appear to have approached the issue from the opposite perspective, subsection 22(1) of the CPA, which addresses the costs of notice, should be amended to provide that the costs of notice should, by default, be paid by the representative plaintiff (or her indemnitors) absent a request by the defendant for more notice than the Court considers sufficient (fair and reasonable) or other extraordinary circumstances.

Third party litigation funding

34. 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.[23] Third party funders are, like insurers, able to spread risk and therefore take more risk of an adverse outcome in any one class action with the hope of significant gains across an inventory of class actions. 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 even no merit, possibly 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.

35. 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,[24] 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

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[23] 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.

[24] See "Third Party Litigation Funding in the United Kingdom: A Market Analysis" (Justice Not Profit), http://www.justicenotprofit.co.uk/wp-content/uploads/2015/09/Final-TPLF-Paper.pdf

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.

36. Several lower courts in Ontario have ruled that Third Party Litigation Funding agreements must be promptly disclosed to and approved by the court, and have listed requirements for court approval, including notice of the motion for approval to the defendant.[25] 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.[26] One decision in Ontario indicated that there could be cases where the defendants should not have full access to the funding agreement.[27]

37. To date, TPLF arrangements have been evaluated and approved on a case-by-case basis by the courts, and the rules with respect to same are far from clear. Given the risk of abuse of TPLF arrangements, there is a need for clear rules, transparency and court oversight.[28] 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 court must be satisfied that the funder did not initiate and will not be in a position to control the litigation;

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

d. the funder must adduce evidence confirming that it is financially able to satisfy an

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[25] 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 quashed 2018 ONCA 88 but to be heard by Div Ct later this year. However, there are no appeal court decisions in Ontario on these requirements as yet.

[26] *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.).

[27] *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.

[28] See *"Third Party Litigation Funding (TPLF)"* (U.S. Chamber Institute for Legal Reform, 2016). http://www.instituteforlegalreform.com/issues/third-party-litigation-funding?p=4

adverse costs award in the litigation, and such evidence must be updated periodically from time to time through the course of the litigation, failing which the funder should be required to post security for costs in favour of the defendant;

e. any compensation to be provided to the funder under the arrangement must be fair and reasonable having regard for the objectives of the class proceedings legislation;

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

g. 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.

38. 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. 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*.

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

39. Our experience has shown that on the whole, the current procedure and test for settlement approval – as developed and applied by the courts – properly enables the court to determine whether a proposed settlement is fair and reasonable.

40. 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, approval of disproportionately high counsel fees also incentivizes plaintiffs' counsel (and third party funders) to pursue class proceedings that will provide little benefit to the putative class members.

41. 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, if that is the fee to which the representative plaintiff agreed.[29] 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 class.

42. 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 actually and ultimately obtained for the class members themselves, taking into account the actual risk (or lack thereof) undertaken by class counsel, the role performed/value added by Canadian class counsel (in cases where the defendant applies to the Canadian class the same or substantially similar deal that was negotiated in the corresponding litigation in the U.S.), take up rates and the fact that *cy pres* payments often do not benefit class members. 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 actual result obtained for the class, and the contribution made by class counsel in the delivery of that result..

43. We also recommend that the court be expressly allowed to consider, from the outset and as part of the preferability procedure on certification, whether the class members are likely to benefit materially from the proceeding.

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

44. 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.

45. The lower the certification threshold and 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 pressures to settle that a class action brings to bear on

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[29] *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.

companies regardless of the merit of the claim.[30] This was identified as a concern in the Ontario Law Reform Commission's (OLRC) 1982 Report on Class Actions, in which it proposed that a merits test be included in the certification threshold. When the CPA was later introduced, it was contemplated that there should be some mechanism to discourage frivolous class actions or so-called "strike suits", but the Legislature chose to implement only a "loser pays" costs system to do so at that time.

46. In the context of securities class actions, the Legislature later chose to include a merits test, (which operates together with the ordinary two-way costs rule) to discourage strike suits in the context of secondary market securities misrepresentation class actions. In *Canadian Imperial Bank of Canada v Green,*[31] a majority of the Supreme Court of Canada described strike suits as meritless actions launched in order to coerce targeted defendants into unjust settlements. While noting (similar to general comments by the OLRC in its 1982 report), that the legal environment in Canada was sufficiently different from the U.S. to prevent a "flood of meritless suits," the Legislature 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, and accordingly added a leave test requiring good faith in the bringing of the suit and a reasonable possibility of success.

47. We observe that the same level of public concern and examples of entrepreneurial litigation now exist in the context of class actions in other areas. Experience has shown that a similar merits test should now considered for class proceedings in Ontario more broadly, given their risks and costs (as discussed above). In the securities context, the leave test has effectively weeded out those cases that should not be allowed to proceed as class actions in the securities context, and will do so equally well in other class actions. For example, the 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, triggering timely disclosure obligations under s. 73 of the *Securities Act.* [32]

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[30] *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, supra* fn 11 at para 71 - 72

[31] 2015 SCC 60 at paras 67-68 per Coté J, and at para 130 per Cromwell J

[32] *Theratechnologies inc. v. 121851 Canada Inc*., 2015 SCC 18, [2015] 2 S.C.R. 106

48. While a formal merits assessment at certification in matters other than securities claims may be seen by some as too stringent, resulting in increased costs of certification motions and increased evidence to be assessed by the Court at the certification stage,[33] 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 leveling 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 will allow the parties to focus more carefully on the proper claims which may be capable of class treatment. This proposal benefits both parties in class actions in that it eliminates claims which are doomed to failure at the trial of the merits and avoids the unnecessary taxing of judicial 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.

49. With the benefit of more than two decades of experience under the present CPA, we submit that the loser pays costs rule alone does not adequately address the risk of strike suits in this area. 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 class actions have been certified 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 true access to justice objectives of the legislation are achieved.[34]

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[33] 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.

[34] 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

50. The costs of defending class actions and of settlements have broader societal impacts. 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

51. Presently, the CPA does not expressly address the evidentiary burden on a certification motion. We recommend 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,*[35] given the importance of these proceedings and potential risks and costs of same. First, the CPA should require the plaintiff to "affirmatively demonstrate compliance with" the certification criteria by evidentiary proof that the certification criteria have been met on a balance of probabilities (not just "some basis in fact")—the burden of proof applied in most other civil proceedings. Second, to address the lack of consistency in the existing case law, the CPA should expressly provide that the certification judge may only consider evidence (including expert evidence) that meets the ordinary requirements of admissibility. Third, the certification judge should be empowered 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

52. Recent experience has also suggested that a "numerosity" requirement 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 handled as, or even more, easily with coordinated case management. Having cases coordinated within each province could help to address as yet unresolved jurisdiction, choice of law (limitation period) and enforcement issues.

53. Nonetheless, plaintiffs' counsel have been disinclined to use any procedural vehicle

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motion, as in *Wise v Abbott Laboratories, Limited,* 2016 ONSC 7275, where extensive production had to happen before the motion for judgment.

[35] 564 US ___ (2011), 131 S Ct 2541

other than class actions to litigate mass wrongs,[36] even when alternatives would seemingly be more efficient or cost-effective.[37] A few Canadian 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.[38]

54. 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.[39]

55. In addition, the CPA should be amended to override the preferable procedure analysis in *AIC v. Fischer* (SCC).[40] Where a regulatory body has already addressed the defendant's allegedly wrongful conduct, or where the defendant has instituted a remedial or recall program, the Court should not certify a class action if the regulatory action or remedial program falls within a range of reasonableness and any allegedly uncompensated loss appears to be wholly theoretical or *de minimus* in its amount.. While there may be one or a handful of people particularly or uniquely impacted by the alleged misconduct, that can often be addressed more simply and efficiently in individual actions.

Consultation Question 6: Behaviour modification

56. Undue emphasis should not be given to the theory of deterrence when considering class action reforms. The mere existence of the class action regime forces defendants to consider the risk of class actions when considering any course of business activity, and itself provides a

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

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

[38] 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).

[39] 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".

[40] *AIC Limited v Fischer,* 2013 SCC 69.

deterrent effect. The precise terms of the CPA are unlikely to have a material effect on that analysis one way or the other, particularly in heavily regulated industries. Moreover, in some industries, the potential for a class action to be allowed to proceed and the publicity that comes from notices of the allegations can have equally or more negative societal consequences.

Question 7: "Perspectives of class members"

57. We have no submission on this issue.

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

58. A number of unresolved constitutional issues arise in the context of 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 CBA Protocols mentioned in the LCO consultation paper, we believe the CPA could provide more effective mechanisms for national coordination, particularly at the certification stage.

59. 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, resulting in both increased costs but also a waste of judicial resources. Presently, the CPA does not provide the court any guidance as to what consideration, if any, it should give to the existence of other overlapping class actions when it is asked to certify a multijurisdictional class action in Ontario.

60. We recommend that the Ontario CPA be amended to include provisions similar to those in Alberta and Saskatchewan, to require a certification judge to consider whether 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 the class action before her in whole or in part.[41]

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

61. Based on our experience, we recommend that the task of determining which of

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[41] *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

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. This should be avoided.

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

62. The problems posed by low certification standards are compounded by asymmetrical appeal rights following a certification decision, allowing 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 get an automatic review. Given the importance of the certification motion and the fact that so many cases settle after certification, certification is equally important to both sides and fairness demands they 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.

63. 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.

64. Current case law appears to favour an appellate court allowing plaintiffs to recast their claim with an altered class definition and changed common issues, taking the view that unless there is prejudice to the defendant, it is open for a plaintiff to recast its case to make it more suitable for certification[42]. Too often are class counsel making wholesale changes to arrive at a class definition that may be acceptable to the court and doing so at the appeal before the Divisional Court or Court of Appeal. This turns the appeal into a re-argument of the certification motion, deprives the defendant of any opportunity to test fairly and fully the proposed revisions

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[42] *Markson v. MBNA Canada Bank*, 2007 ONCA 334 at para 39; *Keatley Surveying Ltd. V. Teranet Inc*., 2015 ONCA 248; *Good v. Toronto (Police Services Board),* 2016 ONCA 250

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.[43]

65. In addition, the ability of a representative plaintiff to alter almost every facet of the proposed class proceeding on appeal makes appellate review difficult, encourages such behaviour by plaintiff's counsel and 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.[44]

66. Encouraging this practice causes plaintiffs (especially where funded, and indemnified for costs) to be extremely broad in their demands at the certification motion, with little downside, knowing they can take a different approach on appeal, with the benefit of the certification judge's reasons. This certainly does not promote fairness or efficiency for the parties, and undermines the goal of judicial economy. 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.

67. Even in cases where a costs order is made in the court below[45], 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 opportunity to consider consenting to (or not opposing) the narrowed class and common issues, potentially avoiding altogether the costs, inconvenience, and judicial resources of an opposed certification motion.

68. Legislative reform of the appeal process should be considered to provide fair process for defendants, as well as plaintiffs, 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. This reform will also promote more efficient use of judicial resources,

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[43] *Keatley Surveying Ltd. v. Teranet Inc*., 2014 ONSC 1677, at para 39 (Div. Ct.)

[44] *Good v. Toronto Police Services Board* 2014 ONSC 4583, paras 13 to 16 (Div. Ct.)

[45] 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 issues, in persuading the judge to certify a class action.

particularly at a time when courts are rightly focussed on clearing the backlog of criminal cases.

Question 11: " 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?"

69. Adoption of the recommendations made elsewhere in this submission would, in our view, ameliorate many issues that tend to lead to pre-trial delay. As noted 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.

70. Much earlier appointment of a trial judge (e.g. once discoveries are largely complete and before expert evidence is served), when it appears likely 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 way 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 can only lead to more efficiently run hearings.

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

Limitation periods and tolling

71. It is unclear under the current CPA when the Legislature originally intended that limitation periods for class members' claims would start to toll. Some read section 28 of the CPA as providing that tolling would only start when the class proceeding was certified (became 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 was thought to be the mechanism by which the Legislature intended to address concerns about limitation periods expiring before the action was certified.

72. However, the CPA has since been interpreted to provide that limitation periods are tolled in favour of class members from the commencement of the proceeding.[46] This interpretation

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[46] *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. This interpretation of the Act has 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

removes an incentive for plaintiffs' counsel to move their cases forward (or not to bring the meritless actions at all), and in practice, many class actions have been brought and then languished for years without any motion for certification being brought. The class vehicle should not be a means to nullify a limitations period indefinitely. The administrative dismissal proposal addressed above would prevent that.

73. The CPA does not expressly address the treatment of limitation periods for third party claims (or crossclaims) by defendants for contribution and indemnity against others who may have contributed to 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 as tolling limitation periods for class members from the commencement of the action, raise the potential for an argument that defendants to class actions have to commence third party and cross claims against persons who contributed to the loss of every potential class member even before an action is certified. In many cases, the defendants are not even in a position to identify these persons, as pre-certification discovery is generally not permitted (and discovery of class members other than the representative plaintiff is generally not permitted until the individual issues phase of the action).

74. 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 action through the determination of the common issues, and until individual class members identify themselves and can be discovered on the identities of potential contributors.[47]

Settlement offers

75. While the CPA does not directly address how settlement offers must be made or communicated to class members, one judge has held that the defendant may only communicate a settlement offer to the representative plaintiff, and the representative plaintiff is not obligated to inform class members of the settlement offer if he or she decides it should not be accepted.[48]

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dismissal of the certification motion should be added to section 28 of the CPA as an event that ends tolling.

[47] See e.g. *Goodridge v. Pfizer Canada Inc*., 2010 ONSC 1095 at paras 45-49

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

76. That decision if 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 product liability class action, for example, a defendant may be prepared to make an offer to settle the claims of class members who have actually been injured by the product. 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 prevents class members with stronger claims from receiving compensation in a timely way.

77. 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 that the representative plaintiff is required to 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.

78. Although in our submission 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.

Conclusion and summary of recommendations

79. From our perspective, a fair and efficient class proceedings regime in Ontario would: 1) 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, and to narrow or weed out such actions at an early stage; (2) 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; (3) 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; (4) codify transparency and other requirements for third party litigation funding; (5) apply the adverse costs consequences of success or failure more equally to plaintiffs and defendants and those who stand to benefit from the proceeding; (6) require the class representative or her indemnitors to bear the costs of notice of certification as a general rule; (7) 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; (9) toll limitation periods for defendants' contribution and indemnity claims from the commencement of the proceeding under the CPA through the determination of the common issues and until individual class members identify themselves and can be discovered on the identities of potential contributors; (10) 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; (11) automatically dismiss class proceedings that are commenced, but not pursued, by class counsel within a reasonable time; and (12) require the court to consider proposed class counsel fees in view of the result obtained for the class members.

Submissions to the Law Commission of Ontario Regarding its Class Action Project: Objectives Experiences and Reforms

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