MCKENZIE LAKE

LAWYERS

MEMORANDUM

TO: Law Commission of Ontario

FROM: Class Action Practice Group

RE: LCO Class Actions Consultation

DATE: May 31, 2018

---

1. How can delays in class proceedings be reduced?

The first step in moving a class proceeding forward is certification. The certification motion is intended to be a procedural step, not involving the underlying merits of the litigation. The legislation states that the certification motion ought to proceed within 90 days of the filing of the claim.

Over the more than 20 years of practice, certification motions have diverged completely from the legislated intention. They take many years to reach the court, and take up many days of court time to be argued.

In part, this is due to the evidence that the jurisprudence has, over time, allowed and/or required be filed to support the certification motion. While the Supreme Court of Canada set the evidentiary burden at a low bar, i.e. "*some evidence*", in practice multiple expert witnesses are proffered by both parties at the certification stage. These expert opinions often delve deeply into the merits and are only peripherally related to the certification criteria. These expert reports are also often cross-examined, resulting in evidentiary motions and/or the filing of further reply and

sur-reply expert evidence, all of which add to the delay in the hearing and needless complexity of the certification motion.

The legislative mandate that certification is procedural, ought to be more robustly upheld. It may be helpful if the legislation were amended to prescribe evidentiary rules for certification, (i.e. expert evidence can only be filed with leave of the Court, and/or restrict the evidence to affidavit forms only – no cross-examinations prior to certification, if any cross examination, it must occur at the certification motion) or include guidelines with respect to the types of admissible and useful evidence at certification.

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

Notice to class members of compensation is vital to improving settlement take-up rates. We now have access to more targeted notice platforms online. Newspaper notices, replete in legalise, ought not to be the standard or default, there are more economical and efficient forms of notice that ought to be adopted and employed.

3. What changes, if any, should be made to the costs rule in the CPA?

The costs rules in Ontario provide a good and necessary gate against frivolous and/or ill-managed class proceedings that clog up the Court system. However, funding and indemnification against costs ought to be more easily accessible for meritorious/viable actions.

While the Law Foundation is a recognized funding agency that can provide the necessary balance against the costs regime, accessing that funding has become more difficult over time as well as become more time consuming. There ought to be more access and less obstacles to attaining third party funding from other agencies. The manner by which these third party funding arrangements are currently approved in class proceedings needs to be streamlined and formalized. The matter of funding ought to be between the plaintiffs, class counsel and the Courts. There should be no hindrance or intimidation by defendants in that process. The source of funding should not be a factor in the litigation.

4. Is the current process for settlement and fee approval appropriate?

The jurisprudence with respect to fee approval is currently not uniform. There are criteria that have developed in the jurisprudence that help guide courts in their assessment of fees, but they are guidelines only and the Court's discretion in applying and weighting these criteria is not predictable.

More recently, jurisprudence has emerged that presumptively approves contingency fees of 30% or less, where the total value of the settlement against which those fees are calculated is less than $100 million. Beyond that value, there is no consistency as to how fees will be awarded, and therefore no way for class counsel to reasonably assess their risks in undertaking that litigation.

Where the risk-reward cannot be relied upon, class counsel will often hedge their risks by partnering together. These partnering- arrangements are also not consistently acceptable to the Courts and impact on fee awards.

Ultimately, this inconsistency impacts upon access to justice. Given the cases take longer to move through certification and trial phases, the costs of carrying these actions has greatly increased over the years. Without a reasonably reliable approach to fee assessment, fewer actions, particularly those of lower value or more novel claims, will not proceed.

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

The criteria for certification are appropriate. The certification ought not to consider the merits of the litigation. The courts need to more consistently enforce the procedural nature of this step in the proceedings. Summary judgement motions are available and ought to be utilized, after certification, to address merits issues. If certification hearings can proceed as envisioned by the legislation, within 90 days of filing the claim, then the bringing of summary judgment motions thereafter would be a more efficient, economical and fair approach to managing these actions thereafter.

Additional discovery rules or provisions would aid with the timely hearing and assessment of summary judgment motions following certification.

In addition to evidentiary hurdles (discussed above) impacting on the timing of certification motions, pre-certification motions need to be better scrutinized and limited to exceptional circumstances. These also are increasing and contribute to the delay and complexity of certification motions today.

6. Are class actions meeting the objective of behaviour modification? What factors (or kinds of cases) increase (or reduce) the likelihood of behaviour modification?

In the early years of class proceedings, most of the litigation involved medical products liability, almost all of which was premised on claims the medical companies failed to warn consumers/patients of the risks of harm associated with their medical products. There have been fewer and fewer such cases brought forward since that time. Similarly, beginning in or about 2008, there was a surge of securities class actions brought forward, the number of which has now declined considerably. Whether or not these declines are a result of the behaviour modification impact of class proceedings is impossible to say for certain, but it may be a factor.

7. Please describe class members' and representative plaintiffs' experience of class actions.

Class proceeding resolutions have been described by some as a form of "rough justice". Settlements which are, by their nature, compromises, can sometimes be disappointing to class members, who typically are not as informed about the litigation as the representative plaintiffs. Communication with class members about the litigation and its realities is key to managing expectations and improving experiences.

While the class action is a useful mechanism by which to bring together multiple individuals in order to render the litigation viable, there are few if any class actions that have gone through a common issues trial and then proceeded to individual trials for specific damage assessments. As a result, some class members can feel as though they have not been heard or had their "day in court", which can be an important aspect of any litigation, beyond monetary damages.

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

There are models of cross-jurisdictional mass tort litigation in the U.S. ("multi-district litigation" or "MDL"). These cases allow for a single judge in a state to preside over and manage related lawsuits that may have initially been commenced elsewhere (sometimes individual, sometimes state litigation).

> "To be eligible for an MDL, a group of lawsuits must involve one or more common questions of fact. The Judicial Panel on Multidistrict Litigation, consisting of seven appellate and district court judges all from different circuits, decides by majority vote whether to create an MDL and where to send it. The Panel may find an MDL appropriate, even if no party requests or desires one, if it concludes that transfer will serve "the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.""[1]

These MDL proceedings are not class proceedings, and therefore do not technically bind a class of plaintiffs together, but they involve shared expenses, discovery, evidentiary and test trials to the benefit of those within its purview. The MDL proceeding is also advantageous in the context of consistency in decision making: decisions are made by a single judge who will become the expert on the facts and relevant law in those cases.

Some version of this case-managed multi-district litigation may be viable in the Canadian context, in light of current constitutional structures and comity/reciprocity doctrines.

[1] http://www.sgrlaw.com/ttl-articles/1128/

9. How should Ontario courts address the issue of carriage in class actions?

There are criteria that have developed in the jurisprudence that help guide courts in their assessment of carriage, but they are guidelines only and the Court's discretion in applying and weighting these criteria is not predictable. More strict criteria may be helpful.

In the U.S. MDL proceedings, courts nominate lawyers to steering and other committees that have roles in moving the litigation forward. Allowing Courts to also manage the lawyers heading up litigation, like in the U.S., would be more helpful and would transform the carriage motion to an application for a specific position within the litigation. Compensation for these various roles would, like the U.S., also need to be prescribed.

10. What is the appropriate process for appealing class action certification decisions?

It is time consuming, costly and inefficient to apply first for leave to appeal to the Divisional Court, then have that appeal heard by the Divisional Court and then later seek leave and then appeal to the Appeal Court. Certification is supposed to be a preliminary, procedural component of the litigation, the current appellate structure is an impediment to moving the litigation forward to be determined on its merits. Leave to appeal certification decisions should be made in writing directly to the Court of Appeal and then move on to be heard by the Court of Appeal.

11. What best practices would lead a case more efficiently through discoveries, to trial and ultimately to judgment? 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?

Discovery plans ought to be mandatory and court approved through case management, so as to avoid time consuming motions relating to relevancy in particular. Any disagreements with respect to evidentiary issues in general, should first be addressed in case management and only thereafter move on to formal motion, if necessary.

Managing expert evidence would be helpful to class proceedings at certification and at the common issues trial phase, whether that be limiting the number of expert witnesses and/or the manner in which that expert evidence in proffered and tested.

Court approved timetables with respect to all phases of class proceedings ought to be more robustly enforced.

12. In addition to the issues listed in this paper, are there provisions in the CPA that need updating to more accurately reflect current jurisprudence and practice? If so, what are your specific recommendations?

Revisiting the timing (pre- or post-certification), content and method of Notice to class members, with a view to the technological resources now available for effecting that notice, would be helpful.

SL/