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May 30, 2018

Mr. Aneurin (Nye) Thomas
Executive Director
Law Commission of Ontario
Osgoode Hall Law School
York University
2032 Ignat Kaneff Building
4700 Keele Street
Toronto, ON M3J 1P3

Dear Mr. Thomas:

Re: Consultation on Class Action Project

The Ontario Chamber of Commerce (OCC) is pleased to provide this submission in response to the Law Commission of Ontario (LCO) Consultation Paper released in March 2018, which set out a number of specific questions on which the LCO seeks consultation from affected groups with respect to the Ontario *Class Proceeding Act, 1992* (the CPA).

For more than a century, the OCC has been the independent, non-partisan voice of business. As Ontario's business advocate, we represent over 135 communities and more than 60,000 members across the province, all of which are committed to working with government to promote economic growth and prosperity across the province.

Within our membership, we count numerous industries that all share an interest in productive and balanced reform of the CPA, regardless of whether individual firms have been themselves involved in a class action suit. In this document, we seek to represent a broad business viewpoint, one which reflects those pertinent interests and concerns shared by businesses that engage directly with consumers.

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Background

In October 2017, the U.S. Chamber Institute for Legal Reform provided its paper *Recipe for Reform – A Proposal for Improving Canadian Class Action Procedures* to the LCO. The OCC fully endorses and supports the 12 recommended reforms set out in that document. We understand that a copy of *Recipe for Reform* has already been provided to the LCO by the U.S. Chamber.

The OCC also has received a copy of the U.S. Chamber's submission in response to the LCO's Consultation Paper, and we further endorse and support this additional commentary, which will be submitted to the LCO in advance of the May 31 deadline.

The OCC strongly supports these suggested reforms as we believe they provide a more balanced class actions regime going forward under the Ontario CPA. The recommended process changes are more attuned to the interests of both plaintiffs and defendants in class action litigation.

In our view, the U.S. Chamber's October 2017 recommendations and its additional May 2018 submission recognize and support the goals of access to justice and judicial economy, and provide a more rational approach to the achievement of those goals.

With respect to the objective of behaviour modification, we recognize that this aspect has been entwined as part of class action litigation in Ontario for the past 25 years, but note that there is a lack of any data to establish that class action litigation has actually achieved behaviour modification.

In addition, the OCC also supports the submissions made by its members' industry groups, including the Canadian Vehicle Manufacturers' Association, Innovative Medicines Canada, the Canadian Life and Health Insurance Association and the Canadian Bankers Association.

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Response to the Consultation Paper

Consultation Question 1:

How can delay in class actions be reduced?

- How may practices be changed to shorten delays?
- How might judges manage cases more efficiently?
- Should the statutory deadline for filing of a certification motion, or any other deadline applicable in class action practice, be changed?
- What changes in legislation could help cases proceed more efficiently?

The OCC maintains that, in any suggested reforms, the importance of the motion for certification should be reinforced, not lessened. The timeframe for the hearing of the certification motion will depend upon the particular circumstances of each case. Most often that timeframe is largely driven by counsel involved in that process, along with the evidence needed and the availability of the judges assigned to hear class actions in Ontario. There is no need to enforce a 90-day deadline when that timeframe cannot practically be achieved in any event. In many cases, there is a need for significant evidence, including expert evidence, at the certification stage.

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Consultation Question 2:

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

- What are the best practices for distributing monetary awards to members?
- How can transaction or agency costs be reduced in distributions?
- Is transparency important in class actions? If so, how can reporting and monitoring be improved?
- Should judges require parties or claims administrator to file a public report summarizing the outcomes of the settlement distribution after its conclusion? What should the report contain?
- Should the CPA be amended to specify more detailed requirements regarding distribution practices, improved monitoring, or reporting?

While this consultation question focuses more on the plaintiff side, the OCC notes that issues of privacy on the question on transparency must be recognized. These pose fundamental concerns with respect to the issue of public reporting and monitoring.

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Consultation Question 3:

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

- Should Ontario retain the two-way costs rule?
- Is the cost of indemnities against adverse costs a concern?
- Should the Class Proceedings Fund have the flexibility to alter its current 10% levy and/or to fund legal fees?
- Is third party funding a positive development in class action practice? Should it be more tightly regulated?
- Should the source and extent of funding be disclosed to courts?

The OCC maintains that the two-way costs rule should continue. Our system of civil litigation is based on a process whereby "costs follow the event". We strongly recommend that no change be made in that regard, based on the goal of a balanced approach to class action litigation.

With respect to third party litigation funding, the OCC recommends that there be an obligation of disclosure not just to the court, but to the defendant in any such litigation. The CPA should recognize, in its regulation of third party funding, that the third party can be directly obligated to pay any costs awards to the defendant.

The OCC fully adopts the recommendation in the U.S. Chamber's October 2017 Paper as follows:

(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 controlling the litigation;

(c) the funder must avoid conflicts of interest and permit plaintiffs to control decision making over issues that affect their interests, such as when to settle and for how much;

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

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(e) if the funder gives an indemnity for costs, the defendant will have a direct right of action against the funder for any costs award in its favor, and the funder will provide security for costs if requested by the defendant;

(f) the funder must be financially able to satisfy an adverse costs award in the litigation;

(g) 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;

(h) the representative plaintiff must have had independent legal advice on the counsel retainer and third-party funding agreement; and

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.

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Consultation Question 4:

Is the current process for settlement and fee approval appropriate?

- Is the legal test for settlement approval sufficient?
- Which factors should a court consider in awarding counsel fees?
- Should counsel fees be proportional to or dependent upon class recoveries?
- Should fees be awarded on a sliding scale, that is, a reduced percentage of recovery as the size of recovery increases?
- What changes, if any, should be made to the process by which fees are awarded?
- Is there a role for an *amicus curae* at settlement and/or fee approval?

The OCC does not recommend any change to the CPA's test for settlement approval. The "fair and reasonable test" is appropriate.

In terms of counsel fees on the plaintiff side, we support the Court's examination of the proportional amount of counsel fees versus the amount of recovery. The OCC also supports examination and consideration of whether a fair result on fees can be achieved by use of a sliding scale approach.

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Consultation Question 5:

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

- What is the appropriate evidentiary standard at the certification motion?
- Should courts consider the merits of a proposed class action at certification?
- Should Ontario move in the direction of Québec by requiring only a limited evidentiary basis at the motion for certification?
- Should Ontario abandon the requirement for certification, or preliminary hearings altogether?

The OCC adopts the recommendation from the U.S. Chamber's October 2017 paper. We recommend that a "merits assessment" be added as a criterion for class certification. The language set out in this recommendation is that Section 5(1) of the CPA include a further provision as follows: "(f) there is a reasonable possibility that the action will be resolved at trial in favour of the class".

The OCC supports this recommendation. This added criterion would allow for a class proceedings judge to examine aspect of the merits of the case, without applying the "no genuine issue for trial" test required on summary judgment.

The OCC also recommends that Section 5(1)(d) of the CPA be amended to include a provision for examination of a regulatory regime which would properly allow for recognition that the regulatory regime has "covered" the matter. We therefore recommend that Section 5(1)(d) of the CPA be amended effectively to override the Supreme Court of Canada's ruling in *AIC Limited v. Fischer*.

The OCC also supports the recommendation of the U.S. Chamber regarding the test for preferable procedure. We recommend that the CPA require a certification motion judge to consider co-ordinating case management discovery and individual cases, based on the nature of the case and the experience, as an alternative to certification of the action as a class action, where there are a small number of potential claimants.

The OCC also fully supports amendment of the CPA to require that the plaintiff demonstrate that the test for certification has been met (other than the reasonable cause of action test in Section 5(1)(a) of the CPA) by evidentiary proof on a balance of probabilities. This will require the court to weigh competing evidence, where relevant to the establishment of those requirements, and again allows for a more balanced approach to the issue of certification.

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Consultation Question 6:

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

The OCC notes that there is a lack of any data upon which to assess the objective of behaviour modification. We must stress that many of our members are in heavily-regulated areas; the concern of those members is with respect to regulatory compliance. This concern predominates over any concern with respect to the effect of a class action. It is our view that the objective of behaviour modification is more of a theoretical exercise. The lack of any scientific data does not justify its continued heavy emphasis in the examination and consideration of the preferability test.

Consultation Question 7:

Please describe class members' and representative plaintiffs' experience of class actions:

- How can class action processes be improved for class members and representative plaintiffs?
- Are there certain kinds of disputes or legal problems that class actions are not addressing?
- How can technology be used to keep class members better informed?
- Should the CPA include specific provisions regarding the rights of objecting class members to disclosure, representation and entitlement to costs?

The OCC recommends that the LCO give strong consideration to the experience of defendants in class actions, as well as plaintiffs, including the defendants' fundamental concern on the restriction, which presently exists, on the ability to communicate with class members. For example, in the area of employment class actions, there are many situations whereby ongoing employees of the defendant, once identified as part of a class, are effectively shielded from communication with their employer, where there ought not to be such a restriction.

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Consultation Question 8:

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

- Is the 2018 CBA Protocol sufficient to address multi-jurisdictional class actions?
- Is statutory guidance desirable, or should this issue be left to the courts?
- Should legislative amendments like those in the Saskatchewan and Alberta statutes be considered?

The OCC supports amendments, such as those contained in the Saskatchewan and Alberta statutes, with respect to the approach to, and consideration of, multi-jurisdictional class actions.

Consultation Question 9:

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

- Should a modified "first to file" rule be considered in Ontario?
- Should the CPA be amended to provide guidance on carriage issues? If so, what reforms would you recommend?

The OCC recommends that a "first to file" rule ought to be modified. The CPA ought to be amended to provide guidance on carriage of motions with respect to criteria that should be consistent in their application and should not be based on a "first to file" approach.

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Consultation Question 10:

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

- Should appeals from successful certification decisions be taken directly to the Divisional Court, without the need to obtain leave?
- Should all appeals from certification decisions proceed directly to the Court of Appeal? Is the leave to appeal test appropriate?

The OCC fully supports recommendation 4 in the U.S. Chamber's October 2017 paper. We urge amendment to the CPA to provide for a level playing field with respect to appeal rights, in contrast to the current provisions of the CPA which are unfairly weighted to the plaintiff side.

Consultation Question 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 judge do to facilitate quicker resolutions and shorter delays?

The OCC supports an amendment to the CPA whereby discoveries of class members can be conducted, subject to control by the CPA Judge of the number of any such discoveries and their time limits.

Consultation Question 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?

As noted earlier and at the outset of this letter, the OCC fully supports the recommendation of the U.S. Chamber's October 2017 paper. In addition, we further endorse the recommendations made in the U.S. Chamber's May 2018 submission as follows.

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The OCC fully endorses and supports the recommendation that would amend the limitation tolling provisions such that the tolling commences only when a claim is certified, but is retroactive to the date the claim was commenced.

The OCC further supports the recommendation that would toll the limitation periods for defendants' claims for contribution and indemnity from the date the class members' claims are tolled until the date when the identities of class members or potential contributors can be discovered.

The OCC further endorses the recommendation which would permit defendants to make offers to settle the claims of one class member or a sub-group of class members at any time post-certification.

Consultation Question 13:

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

- What information should be collected?
- How can barriers or disincentives to better data collection be reduced?
- How can technology be used to facilitate greater data collection and reporting?

The OCC has concerns about data collection beyond the collection of the issued case names themselves, particularly related to privacy concerns on other information collection. We raise the concern about where the additional information would be reported, in the public domain.

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Conclusion

The OCC and its members believe that reforms are needed to achieve a fairer and better balance in class action litigation. This document, taken in concert with the U.S. Chamber's report and submission as well as the submission of our member industries, reflects a necessary business perspective that we hope will be well represented in the LCO's recommendations to the Province of Ontario.

We appreciate the opportunity to comment on your review, and thank you for your attention to the matter.

Sincerely,

Rocco Rossi
President & CEO
Ontario Chamber of Commerce