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DELIVERED VIA E-MAIL: lawcommission@lco-cdo.org **May 31, 2018**

Law Commission of Ontario
Osgoode Hall Law School, York University
2032 Ignat Kaneff Building
4700 Keele Street
Toronto, Ontario
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Re: LCO Consultation Paper: Class Actions

Introduction

This is in response to the Law Commission of Ontario ("LCO") request for comments on its Class Action Consultation Paper dated March 2018 ("Consultation Paper"). We understand that the consultation deadline was extended to May 31, 2018.

We welcome the initiative of the Law Commission of Ontario ("LCO") to improve the Ontario class action regime, and are grateful for the opportunity to participate in its public consultation process.

After a brief description of our firm and our practice, we will provide our comments regarding the specific questions posed by the LCO in the Consultation Paper.

Rochon Genova LLP: Who We Are

Rochon Genova LLP is among Canada's leading plaintiff-side class action firms. The firm has served as class counsel on a number of significant securities, consumer and mass accident class actions across Canada. Members of our Class Actions Group have been lead or co-lead counsel on significant matters involving corporate defendants SNC-Lavalin (securities), Nortel (securities), Barrick Gold (securities), CIBC (securities), Mutual Fund Market Timing (securities), Home Capital Group (securities), Maple Leaf Foods (tainted meat), Toyota (unintended acceleration), Volkswagen (faulty emissions control), Bell (consumer), Telus (consumer) , Rana Plaza (mass fatality building collapse), and the Lac-Mégantic train disaster.

Through nearly twenty years of representing class action plaintiffs, Rochon Genova LLP's lawyers have gained a unique perspective on the opportunities and challenges which the current Ontario regulatory regime presents.

We wish to offer the following observations in response to the specific questions posed by LCO.

The Consultation Questions

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

How can practices be changed to shorten delays?

Delay in the prosecution of complex litigation, including class actions, defies an easy solution.

Class actions are already subject to mandatory case management which has as its objective the timely and efficient prosecution of cases. Nevertheless, for various reasons, the prosecution of class actions is often neither timely nor efficient.

We note that class actions progress significantly faster to a merits determination in Quebec than they do in Ontario.[1] In Quebec, certification is treated as a truly procedural step, as it should be. By way of contrast, in Ontario, the prosecution of actions through certification and discovery has become far more complex and document intensive than should be required. The certification motion, for example, has in recent years expanded in evidentiary scope far beyond than that contemplated by the *Class Proceedings Act* ("CPA") (and are much more complicated, expensive and time consuming that they are in Quebec). Further, pre-certification motions on pleadings (Rule 21 motions) have also added an additional layer of unnecessary delay and expense, which is compounded when appeal rights are exhausted.

Any solution to the problem of delay would necessarily involve court-imposed or legislative restrictions on the volume of evidence proffered in class action motion practice, the types of motions that can be brought at various stages of the proceeding, or both.

Quite apart from any legislative response, we would also urge counsel and the courts to be more efficient in the scheduling and consolidation of procedural steps. For example, pre-certification pleadings motions should be discouraged when such issues may be efficiently and effectively dealt with within the CPA section 5(1)(a) analysis at certification.

Another important reason for delay is the limited number of judges who are assigned to case manage the actions, and the crowded dockets of those case management judges who are assigned. We would urge an expansion of the roster of judges who can take on class action case management.

How might judges manage cases more efficiently?

We are of the view that generally, judges manage cases in an efficient manner. In general, judges' availability, rather than any case management procedures, contribute to the slow progress of class actions.

However, we repeat our earlier comment that, except in demonstrably exceptional circumstances, pre-certification motions should be discouraged.

As to our comment regarding judicial resources, we propose that a greater number of judges be available to case manage class proceedings. This can be achieved by expanding the list of eligible

[1] See, e.g., Jonathan Foreman, "Summary of Class Action Trial Activity Across Canada" (April 8, 2016).

judges beyond the "class actions list" adopted in several regions, including Toronto. We propose, instead, that a rotating list of judges be available to take on case management assignments in respect of newly launched class actions. This will expose a greater number of judges to this practice area and will ensure that no judge has an overwhelming caseload of class action files.

What changes in legislation could help cases proceed more efficiently?

We do not believe that legislative changes are required to help cases proceed more efficiently. We believe this can be achieved on an administrative level by assigning newly filed class actions to a larger roster of judges.

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?

In our view, among the factors which deter the public from claiming compensation in class actions is the complexity involved in filing a claim. To this end, best practices for distributing compensation should promote convenience and early determination of the award amount.

We believe that the current standard of care requires the maintenance of an online portal where class members can conveniently and quickly apply for compensation. Ideally, it would indicate the projected award amount immediately upon completion of a claim; although that is not feasible in cases where awards are determined *pro rata*. Claim forms must be easy to read and readily understood by a wide cross-section of the public.

How can transaction or agency costs be reduced in distributions?

Transaction costs may be reduced through electronic funds transfers, rather than issuing and mailing cheques. Parties should be encouraged to collect and use electronic payment information. Similarly, as described above, electronic claims portals reduce transaction costs and may encourage class participation.

Is transparency important in class actions? If so, how can reporting and monitoring be improved?

Transparency is extremely important in class actions. Class members must, at all times, be apprised of the progress of the action or the distribution process, as appropriate.

To this end, we support imposing standards upon class counsel's ongoing disclosure regarding the progress of the action on class counsel's website, as discussed more fully below in response to question 7.

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?

Yes. We support a requirement upon the parties or claims administrator to file a public report summarizing the outcomes of the settlement distribution after its conclusion. We note, however, that the expense of compiling such a report would fall upon the class and may be prohibitive in

smaller class actions. Therefore, the case management judge must retain the discretion to waive this requirement where appropriate.

Should the CPA be amended to specify more detailed requirements regarding distribution practices, improved monitoring, or reporting?

Yes, as discussed above and in response to question 7 below, we support the imposition of disclosure standards upon class counsel and administrators in respect of the progress of the action and the outcome of distribution. The imposition of minimum disclosure standards will improve the class members' experience and contribute to greater transparency.

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?

In contrast to British Columbia, Saskatchewan, Manitoba and Newfoundland, and to a large degree, the Province of Quebec, the Province of Ontario has adopted a "loser-pays" regime which imposes significant costs on the losing parties in a class action.

The adverse cost regime is the single greatest inhibitor to the growth of class actions in Ontario.

Recently, several extremely large (+$1 million) cost awards have been levied against plaintiffs who were unsuccessful on certification and/or pre-certification motions.[2] Significant adverse cost awards limit both the number of cases brought and the number of firms that can effectively represent plaintiffs in putative class actions.

Thus, "access to justice is undermined when class counsel are deterred from bringing meritorious actions by the risk of extremely high adverse cost awards."[3] If fostering a viable class action regime is one of the goals of the CPA, adverse costs must be curtailed or preferably eliminated.

In addition, the novel class action will be effectively eliminated if these large awards are allowed to stand. Class counsel should be encouraged to test the waters with meritorious but perhaps novel claims. The chilling effect of the million dollar award will have the effect of slowing the evolution of our jurisprudence.

Furthermore, we are aware of no empirical evidence that the no-costs provinces, such as British Columbia or Saskatchewan, are over-run by unmeritorious class actions as compared to Ontario.

Is the cost of indemnities against adverse costs a concern?

Yes. Both the cost and availability of third-party indemnities against adverse costs remain a concern. We believe that Canadian plaintiffs still have only a limited choice when it comes to securing third party funding and/or indemnity against adverse costs. If none of the small group of litigation funders operating in Ontario wish to support a proposed class action, the only funding

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2 See, for example, *Yip v. HSBC Holdings plc*, 2017 ONSC 6848; *Das v. George Weston Limited*, 2017 ONSC 5583.

3 Alexandra Teodorescu, "Lower Cost Awards in Class Actions. What Does it Mean for Access to Justice?" *Commercial Litigation Update* (October 2014).

option is the Class Proceedings Fund, which charges a 10% statutory levy, which may be excessive especially in the very large cases.

Should the Class Proceedings Fund have the flexibility to alter its current 10% levy and/or to fund legal fees?

We support giving the Class Proceedings Fund the flexibility to alter its current 10% levy and/or to fund legal fees.

Currently, the Fund has no flexibility to reduce the 10% rate, pursuant to Ont. Reg. 771/92. Providing the Fund with the flexibility to reduce its levy would eliminate the Fund's current disadvantage as compared to private funders who may, and do, offer lower rates.

This is particularly so in the very large case, where, but for the statutory mandate, a 10% levy would be very difficult to justify given the risk undertaken by the CPF.

Allowing the CPF to compete with private funders in all respects will improve access to justice.

Is third party funding a positive development in class action practice? Should it be more tightly regulated?

Third party funding is a very positive development in class action practice. It enhances access to justice. It can mitigate against the chilling effect large cost awards have upon counsel's readiness to prosecute new cases.

We believe the current framework is appropriate and do not believe that class action funding needs additional regulation. To reiterate, we believe that regulation of the CPF should be liberalized to enable the fund to better compete with private funders.

Should the source and extent of funding be disclosed to the courts?

We do not believe that any additional disclosure requirements need to be imposed upon third party funders.

Third party funding arrangements must already be approved by the courts. As part of their review, courts may introduce changes into the funding agreements.[4] We believe that the current system of court supervision of third party funders works well and facilitates access to justice on the one hand, while guarding against champerty and maintenance on the other.

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

Is the legal test for settlement approval sufficient?

In our view, the legal test for settlement approval is sufficient.

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4 See, most recently, *Houle v. St. Jude Medical Inc.*, 2017 ONSC 5129.

The difficulty expressed by judges in evaluating the adequacy of a proposed settlement[5] stems not from the inadequacy of the statutory test, but rather from the inherent limitation facing the Court in evaluating the strengths and weaknesses of a particular case without access to privileged information.

We believe that the difficulty facing a judge on settlement approval is a corollary of the open court principle and cannot be easily resolved. Class counsel cannot reveal privileged information regarding their risk assessment to the Court, in the presence of the public and defense counsel, given the risk that the settlement will not be approved and litigation will proceed despite this disclosure.

Therefore, we do not believe that the statutory test requires an amendment. No amendment can resolve the fundamental difficulty judges face in evaluating the adequacy of a settlement without access to privileged information in the possession of either side.

Which factors should a court consider in awarding counsel fees?

Class counsel's fees should be proportionate to the recovery. All other factors, such as time billed or risk incurred, are either irrelevant or cannot be properly evaluated by the court, as noted by Belobaba J.:

> I couldn't understand this reasoning. Why should it matter how much actual time was spent by class counsel? What if the settlement was achieved as a result of "one imaginative, brilliant hour" rather than "one thousand plodding hours"? If the settlement is in the best interests of the class and the retainer agreement provided for, say, a one-third contingency fee, and was fully understood and agreed to by the representative plaintiff, why should the court be concerned about the time that was actually docketed? This only encourages docket-padding and over-lawyering, both of which are already pervasive problems in class action litigation.[6]
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> [...]
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> If "risks incurred" was something judges could really measure on the material provided, then this metric might make sense. Everyone understands that class counsel accept and carry enormous risks when they undertake a class action. But I

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5 See, for example, *Leslie v Agnico-Eagle Mines*, 2016 ONSC 532 at para 7-8: "[S]. 29(2) of the CPA requires court approval of every class action settlement before it can take effect. Judges must be satisfied that the proposed settlement is fair and reasonable and in the best interests of the class. But how does a judge do this? Judges are obviously not in position to second-guess the actual amount of the proposed settlement. Nor should they do so. The most they can do, apart from making sure that the settlement was negotiated at arm's length by competent counsel, is (1) scrutinize the actual agreement and supporting affidavit material for any so-called "structural" indicators that suggest collusion or conflict of interest and (2) satisfy themselves that the settlement amount falls within a range or zone of reasonableness. Unfortunately, class counsel rarely provides much information about why the settlement falls within a zone of reasonableness. That is, information explaining why the case settled for $17 million and not say $37 million or $57 million?"

6 *Ibid.* at para 5.

> don't understand how a judge, post-hoc and in hindsight, confronted with untested, self-serving assertions about the many risks incurred, can measure or assess those risks in any meaningful fashion and then purport to use this assessment as a principled measure in approving class counsel's legal fees.[7]

So long as the requested fees are proportionate to recovery and well understood by the representative plaintiff who entered the retainer agreement, they should be presumptively valid. No other factors need to be analyzed in such a case.

Should counsel fees be proportional to or dependent upon class recoveries?

Class counsel's fees should be proportional to, and dependent on, class recoveries. This ensures that the interests of class counsel are aligned with the interests of the class members.

Should fees be awarded on a sliding scale, that is, a reduced percentage of recovery as the size of recovery increases?

We do not believe that a universal answer to this question can be provided in legislation.

In all cases, the retainer must be the principal reference in awarding class counsel fees. As discussed below, fees constituting up to 1/3 of the class' recovery may be presumptively valid. The presumption can be rebutted on account of certain factors, including an exceptionally large class award.

While in some cases, class counsel fee may appropriately be reduced on account of the size of the award, such a reduction should be left in the discretion of the judge rather than codified in legislation.

What changes, if any, should be made to the process by which fees aware awarded?

In our view, the current process for fee approval requires statutory clarification, because a split has emerged in Ontario jurisprudence as to whether a retainer of 1/3 is presumptively valid.

Justice Belobaba in *Cannon v. Funds for Canada Foundation*[8] has noted that the "well-intentioned judicial efforts to rationalize legal fee approvals by discussing arguably irrelevant or immeasurable metrics such as docketed time (irrelevant) or risks incurred (immeasurable)" were misguided. He endorsed a "top down", rather than a "bottom up" approach, which would consider fees of up to 1/3 to be presumptively valid, subject to rebuttal on several grounds, including excessive total amount or a lack of understanding or true acceptance on the part of the plaintiff.

In contrast, other judges continue to apply the multi-factorial "bottom up" framework which looks at risk, among other factors, to assess the appropriateness of the counsel's fee request.[9]

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7 *Ibid.* at para 6.

8 2013 ONSC 7686. See also: *Middlemiss v. Penn West Petroleum*, 2016 ONSC 3537 to the same effect.

9 *Mancinelli v Royal Bank of Canada*, 2017 ONSC 2324.

It would be desirable to harmonize various judges' approaches to fee approval on the basis of the "presumptive validity" proposed by Belobaba J.

Absent features such as reversionary settlements, coupons or other *indicia* of misalignment of interests between counsel and the class, a fee request at or below 1/3 of an award or settlement should be presumptively valid.

Is there a role for an amicus curae at settlement and/or fee approval?

We do not believe that *amicus curae* have a role to play at settlement and/or fee approval. The same limitations on disclosure of privileged information which apply to judges would restrict the analysis an *amicus curae* can provide. Therefore, the value of any additional insight to be provided by *amicus curae* is very limited. In contrast, the *amicus curae* fee would be imposed upon the class and further reduce its recovery.

We oppose the introduction of *amici curae* into the settlement or fee approval process.

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?

The current approach could benefit from clarification in one crucial respect: the "some basis in fact" requirement should be clarified in the legislation.

It is well established that the class representative must show some basis in fact for each of the certification requirements set out in the provincial class action legislation, other than the requirement that the pleadings disclose a cause of action.[10] However, the content of this requirement is unclear.

In *Kalra v Mercedes Benz*,[11] Belobaba J. stated that, while he had long believed that the "some basis in fact" was a two-step test, one that required the plaintiff to show some evidence for the existence of the proposed common issue and some evidence that the proposed common issue has class-wide commonality, he has come to understand that it is a one-step test. The one-step test asks only whether the evidence that the proposed common issue applies class-wide. The Plaintiff, in Justice Belobaba's analysis, does not have the burden to show that the alleged common issue actually exists. Indeed, the Plaintiff often is not in a position to do so at certification, prior to production and discovery.

Belobaba J.'s *dictum* appears to us to be consistent with the Supreme Court's reminder in *Pro-Sys* that "In order to establish commonality, evidence that the acts alleged actually occurred is not required. Rather, the factual evidence required at this stage goes only to establishing whether [the

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10 *Hollick v. Toronto (City),* 2001 SCC 68 (CanLII), [2001] 3 S.C.R. 158 [GET PINPOINT]; *PRO SYS* [GET PINPOINT]

11 2017 ONSC 3795

common issues] are common to all the class members."[12] Nevertheless, other courts have not adopted Belobaba J.'s clear *dictum*.[13]

In our opinion, this *dictum* should be written into the legislation. It makes sense and is consistent with the goals of the CPA and applicable appellate jurisprudence. Decisions of the other courts to the contrary are not.

It is most important that the statute clarifies the basis in fact for *what* the plaintiff is required to demonstrate. Requiring the plaintiffs to demonstrate a basis in fact for the existence of the alleged common issue is inconsistent with the statutory language and case law, including Supreme Court *dicta*. Instead, plaintiffs must be only be required to demonstrate a basis in fact for the ability to analyze the issue in common, not for the merits of the underlying allegation.

It would be desirable to clarify precisely what the "some basis in fact" formula refers to, in the legislation.

Should courts consider the merits of a proposed class action at certification?

No. The Supreme Court has been clear that "[t]he certification stage is decidedly not meant to be a test of the merits of the action …Any inquiry into the merits of the action will not be relevant on a motion for certification."[14] Other Canadian courts agree:

> "the certification motion is a procedural motion that has nothing to do with the merits of the proceeding."[15]
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> "the certification stage is not meant to determine the merits of the action. Indeed the Court must be vigilant to ensure that the certification application does not become mired down in the merits of an individual claim."[16]
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> "any inquiry into the merits of the action will not be relevant on a motion for certification."[17]
>
> "[I]t is clear that no assessment of the merits of the claim takes place at the certification stage […]"[18]

This makes sense from a policy perspective. As Winkler J., as he then was, noted, in *Caputo*, "[t]he CPA is a procedural statute, rather than substantive, and creates no new cause of action. A motion for certification under the Act deals only with whether the action ought properly to proceed

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12 *ProSys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 (CanLII) at para. 110.

13 *Fulawka v. Bank of Nova Scotia,* 2012 ONCA 443 (CanLII) at para. 79; *Batten v. Boehringer Ingelheim (Canada) Ltd.,* 2017 ONSC 6098.

14 *Hollick v Toronto (City*, 2001 SCC 68 at para 16.

15 *Dine v Biomet,* 2015 ONSC 1911 at para 11.

16 *Pardy v Bayer Inc.*, [2003] N.J. No. 210 (T.D.) at para 48.

17 *Caputo v. Imperial Tobacco Ltd.*, 1997 CanLII 12162 (ON SC)

18 *Ernewein v. General Motors of Canada Ltd.,* 2005 BCCA 540 (CanLII) at para. 25

by way of class action."[19] Accordingly, the *CPA* cannot mandate the analysis of the merits of an action in the guise of a procedural requirement.

Furthermore, at certification, the parties are ill-equipped to lead evidence on the merits. At certification, parties have not yet exchanged productions. Oral discovery has not yet happened. The plaintiff, in particular, is at an informational disadvantage. To impose an evidentiary burden on the merits upon the plaintiff at certification would, in some cases, end a meritorious claim simply because of the procedural stage at which such a burden is imposed.

Should Ontario move in the direction of Quebec by requiring only a limited evidentiary basis at the motion for certification?

Yes. Limiting the evidence required at certification is fair, because, as discussed above, at certification the plaintiffs are not in possession of much relevant evidence which they would only obtain as part of the discovery process. Furthermore, such a limitation would lower the cost and delay involved in class action litigation and allow cases to move faster toward a merits determination.

Should Ontario abandon the requirement for certification, or preliminary hearings altogether?

No. The logic of a class proceeding dictates that a determination must be made as to whether an action can proceed on a class-wide basis, and whether the outcome binds the entire class. Such a determination must take place early on in the life of the litigation. However, as discussed above, such a determination cannot involve an assessment of the merits of the action and must not impose an overly onerous evidentiary burden on the party seeking certification, prior to discovery.

Consultation Question 6: Are class actions meeting the objective of behavior modification? What factors (or kinds of cases) increase (or reduce) the likelihood of behavior modification?

More empirical work is required to properly analyze this question. Public sources suggest that behavior modification is working, at least with securities class actions. In particular, Brian Fitzpatrick, a law professor at Vanderbilt University, has recently published a draft paper which demonstrates that class actions are effective at deterring corporate misconduct.[20] Similarly, a paper published by Georgetown University Law Center supports the deterrence rationale for securities class actions: "if companies pay it will make their officers and boards change their behaviour, increase investor belief in the markets, and support the publicness [*sic*] goals of securities regulations."[21] Another academic study found "significant deterrence" associated with class action lawsuits in respect of fraudulent financial reporting.[22] Columbia professor John C. Coffee Jr.

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19 *Caputo, supra.*

20 Alison Frankel, "Law prof (and ex-Scalia clerk): Evidence shows class actions deter corporate misconduct" *Reuters* (August 29, 2017).

21 Hillary A. Sale and Robert B. Thompson, "Market Intermediation, Publicness, and Securities Class Actions", Georgetown University Law Center (2015).

22 Jared Jennings, Simi Kedia and Shivaram Rajgopal, "The Deterrent Effects of SEC Enforcement and Class Action Litigation" (2011), available at SSRN: Jennings, Jared N. and Kedia, Simi and Rajgopal, Shivaram, The Deterrent Effects of SEC Enforcement and Class Action Litigation

writes that "securities class actions do seem sufficiently pervasive to constitute a deterrent threat for most public corporations."[23]

We note also that class actions change in character over time. For instance, securities options manipulation class actions, which were relatively numerous a few years ago, are hardly initiated now. Conversely, an increasing number of financial benchmark manipulation cases have been launched in recent years. If class actions presented no deterrent, one would expect to see corporate defendants engage in the same type of misconduct repeatedly. This appears not to be so. The evolution of the types of class actions suggests that class actions present a sufficient deterrent against corporate engaging in the same type of misconduct which has resulted in the payment of a substantial judgment or settlement.

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?

In our view, one impediment to members of the public volunteering to serve as a representative plaintiff is the regime's inability to adequately compensate them for their time, inconvenience and stress. (As discussed previously, the imposition of substantial adverse costs awards is another important impediment.)

It would be desirable for the CPA to mandate modest compensation for representative plaintiffs.

Today, representative plaintiffs in successful class actions are entitled to a nominal "honorarium" (usually, a few thousand dollars). However, such honoraria are always in the discretion of the court.

In addition the class action process can be improved for all class members by requiring class counsel to provide a minimum level of disclosure and periodic updates regarding the progress of the class action, as discussed in more detail below.

Are there certain kinds of disputes or legal problems that class actions are not addressing?

Anecdotally, over the past few years, a number of viable class actions have not been brought forth because of the absence of a suitable representative plaintiff. If members of the public knew in advance that, should they serve as a representative plaintiff, and should the action be successful, they would be entitled to modest compensation, they may be more likely to volunteer for this important public service.

How can technology be used to keep class members better informed?

Class counsel already use technology to communicate with class members. However, the adoption of technology is uneven across all class counsel firms. It would be desirable that a minimum

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(December 2011). Available at SSRN: https://ssrn.com/abstract=1868578 or http://dx.doi.org/10.2139/ssrn.1868578.

[23] John C. Coffee Jr., "Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation" 106 Colum. L. Rev. 1534 (2006)

standard of informational updates be statutorily prescribed. As a base line, reference can be made to the National Class Action Database maintained by the CBA. Currently, submissions to the database are voluntary. Submissions could be made mandatory, and furthermore, class counsel could be mandated to post an update on their website each time a motion such as certification or summary judgment is decided, or an appeal is resolved. This will ensure that class members do not feel isolated from the progress of their litigation for prolonged periods of time.

Should the CPA include specific provisions regarding the rights of objecting parties to disclosure, representation and entitlement to costs?

No. We believe that objecting parties currently have access to appropriate disclosure. There is no evidence that objectors cannot secure counsel, or that an entitlement to costs would facilitate meaningful objections to class action settlements.

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 CPA Protocol sufficient to address multi-jurisdictional class actions?

Given the existing constitutional constraints, the 2018 CBA protocol may be the best solution available to manage multi-jurisdictional class actions.

Is statutory guidance desirable, or should this issue be left to the courts?

Statutory guidance is not desirable, in light of the limitations placed on provincial legislatures in Canada.

Should legislative amendments like those in the Saskatchewan and Alberta statutes be considered?

No. Legislative amendments such as those in the Saskatchewan and Alberta statutes do not provide predictability as to the outcome of a multi-jurisdictional carriage dispute and do not bind the courts of other provinces.

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?

The existing carriage process does not work. It pits well qualified plaintiff-side firms against one another; compares case theories in open court and in full "view" of the defendants' counsel before the proceeding gets underway; and remains unpredictable. Often carriage motions are a "coin toss" and can be unseemly.

Reform is needed.

We hesitate to uncritically endorse a "first to file" rule.

While such a rule may eliminate a large number of carriage contests, the down side is that "first to file" results in a race to the court house and can discourage thoughtful and thorough investigation before the filing of suit. In addition, "first to file" discourages new entrants to class action practice

by rewarding existing firms capable of preparing claims immediately. Such a system encourages "speed" in filing claims and does not emphasize a considered approach to the practice area. Such counsel are able to leverage this non-substantive advantage into co-counsel arrangements which are ultimately sub-optimal.

Should the CPA be amended to provide guidance on carriage issues? If so, what reforms would you recommend?

No.

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?

We believe the Divisional Court should be eliminated, and all appeals should proceed directly to the Court of Appeal. Increasingly, cases advance slowly toward a merits determination due to multiple levels of appeal involved in the review of the certification motion. Eliminating one step from the appellate process will streamline class action litigation and enable cases to progress to a merits determination sooner.

Should all appeals from certification decisions proceed directly to the Court of Appeal? Is the leave to appeal test appropriate?

Yes, all appeals from certification decisions should proceed directly to the Court of Appeal. Appeals from motions granting certification should require leave to proceed to the Court of Appeal. Appeals from denied certification motions should be as of right.

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 judges do to facilitate quicker resolutions and shorter delays?

N/A

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?

N/A

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?

The primary goal of information collection should be transparency *vis-à-vis* the class members. To this end, and as discussed above, we support initiatives that mandate class counsel to provide periodic updates to class members on their websites in respect of the progress of a class proceeding.

Further, we would support mandating claims administrators to provide a public report upon the conclusion of administration, although a waiver from such a duty should be in the discretion of a judge. We believe that the national class action database provides an appropriate set of categories of information to be collected.

How can barriers or disincentives be reduced?

As stated above, a legislative amendment is required to mandate a minimum level of disclosure to ensure class members are adequately informed.

How can technology be used to facilitate greater data collection and reporting?

We believe that technology for greater data collection and reporting already exists, and only a legislative change is required. As discussed above, we would propose that, at a minimum, class counsel be required to submit all new cases to the National Class Action Database maintained by the CBA, and to provide a similar level of disclosure on their own websites.

Respectfully,

Rochon Genova LLP

Per: Joel Rochon, Peter Jervis, Douglas Worndl and Ronald Podolny