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SISKINDS | THE LAW FIRM

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May 31, 2018

Law Commission of Ontario
Osgoode Hall Law School, York University
2032 Ignat Kaneff Building
4700 Keele Street
Toronto, ON M3J 1P3

Dear Sirs/Mesdames:

Re: Law Commission of Ontario's Class Actions Project

We appreciate the opportunity to provide our comments in relation to the questions raised in the Law Commission of Ontario's consultation paper, *Class Actions: Objectives, Experiences and Reforms,* dated March 2018.

Siskinds LLP is one of the leading plaintiff class action firms in Canada. Siskinds LLP was the first law firm to secure certification of a class proceeding under the *Class Proceedings Act, 1992* (the "***CPA***").[1] We have over 25 years' experience acting for plaintiffs in all types of class actions.

The *CPA* is a critical piece of public interest legislation and overall has been effective in achieving the objectives of access to justice, judicial economy and behaviour modification. As discussed below, the recent Volkswagen diesel emissions class actions provide a cogent illustration of the ability of the Ontario class action regime to provide access to justice to Canadians that is not available in the absence of such a regime, for example, in Europe. The Ontario class action system is not perfect — and we have suggested below some ways in which the system could be improved — but it is fundamentally sound. For that reason, we caution against any radical reform of the *CPA* that could have the effect of undermining the objectives of class actions. We commend your efforts to improve the gathering and analysis of empirical data on class actions, as policy decisions regarding changes to the *CPA* should, to the extent possible, be predicated on lessons drawn from such empirical data.

[1] See *Bendall v McGhan Medical Corp*, [1993] OJ No 1948.

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1. How can delay in class actions be reduced?; **5. Is the current approach to certification under s. 5 of the *CPA* appropriate?**

The problem of delay in Ontario class actions

There can be little debate that delays in Ontario class actions are a significant and persistent problem. Some of the delay is inherent in our current system of civil justice and also in the nature of class actions themselves. Class action litigation is generally high-stakes litigation that is hard-fought and protracted. It is unrealistic to expect a massive class action to be resolved in the same timeframe as a small commercial or civil dispute. Having said that, there seems be broad acknowledgement by all stakeholders that steps must be taken to address the inordinate amount of time that it typically takes for a class action to reach resolution.

In our view, the class certification process is the single most significant source of delay in the Ontario regime. It is impossible to discuss delay in the Ontario class action system without addressing issues relating to certification. The issues raised by questions 1 and 5 are inextricably intertwined and we address them together.

Delay in Ontario class actions will not be ameliorated unless and until steps are taken to ensure that certification operates as intended and as it should be: a procedural screening mechanism that is resolved at an early stage of the proceeding and in an expeditious and cost-effective manner. The unfortunate reality is that, over the years, certification has morphed into a protracted and expensive process that operates in a manner that is tantamount to a mini-trial of the substantive merits of the proceeding. It is now quite common for a number of years to pass before the certification motion is heard and finally resolved.

We note that the receipt of notice of certification is often the first time that a class member learns that there is litigation being advanced on their behalf. That knowledge may cause the class member to obtain or maintain certain types of records, be they medical or financial documents, or create memos to themselves of events that could be relevant to the determination of their individual claims. To delay the outcome of the certification motion, and therefore the dissemination of notice, prejudices the rights of class members.

Proposals to address delay in Ontario class actions

We have three specific recommendations for legislative reform that, if enacted, would help to reduce the delays in the Ontario class action system. For each of the proposed rules, we have proposed that there be a carve-out permitting the court to grant leave to accommodate extraordinary circumstances that may justify a departure from the proposed rule.

First, the *CPA* should state that no party is permitted to make a motion until the certification motion is finally determined, except with leave of the court.

There should be a presumption that the certification motion is the first motion to be heard and decided in class actions. Despite this, there is an emerging trend that courts hear various motions prior to certification. This adds significant delay to the process. For example, some courts have heard pre-certification motions to strike under rule 21 of the *Rules of Civil Procedure* on the grounds that the plaintiff's pleading does not disclose a reasonable cause of action. As that matter needs to be addressed for the purposes of section 5(1)(a) of the *CPA*, and has a direct bearing on the other certification criteria, it is inefficient to hive off that matter and determine it separately from the other certification criteria.

We do not propose that there be an absolute rule that there can be no motions determined prior to the certification motion. As indicated, the legislation could provide that it is subject to leave of the court. There are a limited number of motions that are appropriately addressed prior to certification, such as a motion by a defendant to challenge the jurisdiction of the Ontario courts over that defendant or a motion to transfer a class action from one Ontario courthouse to another. It would also be necessary to resolve a carriage motion prior to the hearing of the certification motion. While there may be exceptions in appropriate circumstances, our proposed rule would have the effect of establishing a presumption that the certification motion is the first motion to be heard and courts would be expected to give effect to that presumption when deciding on requests by parties to bring a motion in advance of the certification motion.

Second, the *CPA* should state that the motion for certification must be heard by the motion judge within one year of service of the statement of claim on all defendants, except with leave of the court.[2]

This proposed provision would replace the current section 2(3) of the *CPA* which imposes a 90 day deadline that is almost never followed by counsel. It would complement the statutory provision proposed above requiring the resolution of the certification motion before other motions. In our view, it would encourage a culture change among class action lawyers (on both the plaintiff and the defendant side) and judges as delay has become ingrained in the system. Such a culture change took place in secondary market securities class actions in recent years. An unexpected decision of the Ontario Court of Appeal in 2012 holding that a very strict limitation period applies to claims under the secondary market misrepresentation liability regime of the Ontario *Securities Act* created a need to have the preliminary leave motion mandated by

[2] The deadline is intended to capture the hearing of the certification motion and not the rendering of the decision by the motion judge or the resolution of any appeals from the decision of the motion judge.

that regime heard without delay.[3] In the immediate aftermath of that decision, we observed that class action lawyers (on both sides) and judges worked cooperatively to ensure that leave motions were being heard as a matter of urgency in most cases. The principle of proportionality was readily embraced by all parties. The same approach needs to be adopted for the certification process. A fixed, but reasonable, deadline for the hearing of the certification motion by the case management judge will help to impose discipline on the process.

Third, the *CPA* should state that the defendant is not permitted to file evidence on the motion for certification or cross-examine the deponent of any affidavit filed on behalf of the plaintiff on the motion for certification, except with leave of the court.

This proposed reform addresses the delay in the certification process caused by the fact that defendants routinely treat certification as a mini-trial of the merits of the claims of the class members. There is a pronounced disjunct between the law of certification and how certification operates in practice. That is, the *CPA* is clear that the certification of an action as a class proceeding is not a determination of the merits of the proceeding.[4] Canadian appellate courts have honoured that principle, repeatedly affirming that the requirement that there be "some basis in fact" for the certification criteria other than section 5(1)(a) (which is determined solely on the pleadings, not on evidence) does not call for an examination of the merits of the claims of the class.[5] The "some basis in fact" standard of proof for certification is appropriate. However, in our experience, all of these conventional legal principles are often not reflected in the manner in which certification motions are actually conducted. Defendants will often attempt to venture into the merits of the claims under the guise of arguments about the satisfaction of the certification criteria, and we have found that courts are inconsistent in their policing of the fundamental tenets of certification.

In our view, a significant contributor to this adverse development in the practice of certification motions is the liberal approach to the filing of evidence taken by defendants. Defendants are routinely filing affidavits of fact and expert witnesses that purport to respond to the certification criteria but which are, in reality, primarily directed at challenging the merits of the plaintiff's claims. This practice has a number of pernicious effects. It leads to a costly and time-consuming "sideshow" about matters and issues that are not relevant to the certification motion. It also has the potential to lead a court to base its certification decision on an assessment of the merits of

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[3] *Sharma v Timminco Ltd*, 2012 ONCA 107.
[4] *Class Proceedings Act*, 1992, SO 1992, c 6, s 5(5).
[5] See *Hollick v Metropolitan Toronto (Municipality)*, 2001 SCC 68 at para 16; *Cloud v Canada (Attorney General)*, [2004] OJ No 4924 at para 50; *Pro-Sys Consultants Ltd v Microsoft Corp*, 2013 SCC 57 at paras 99–103; *Fischer v IG Investment Management Ltd*, 2013 SCC 69 at paras 39, 42 and 64; *Musicians' Pension Fund of Canada (Trustee of) v Kinross Gold Corp*, 2014 ONCA 901 at paras 98–99 and 123.

the claims drawn from an incomplete evidentiary record (as documentary production and examinations for discovery will not have taken place by that stage of proceedings).[6]

The filing of voluminous affidavit material by defendants on certification motions greatly expands the scope of the certification exercise and increases the cost and delay associated with the certification process. It expands the procedural steps and disputation in advance of the certification motion through, for example, additional cross-examinations on affidavits (which can lead to disputes about the scheduling of those cross-examinations) and motions regarding refusals and undertakings on those cross-examinations, as well as motions regarding the propriety of the affidavit evidence (*e.g.* regarding the admissibility of evidence of expert witnesses). It also lengthens the hearing of the certification motion itself as the court is required to consider a significant volume of material and range of arguments, which leads to issues in obtaining court dates for hearing of the certification motions. In some courthouses in Ontario, the difference between scheduling a one-day hearing of a certification motion, as opposed to two or more days, can have a significant impact on whether a hearing date can be scheduled within a reasonable timeframe.

With the benefit of hindsight, the practice contemplated by the Attorney General's Advisory Committee on Class Action Reform in its 1990 report has not come to fruition. The Advisory Committee commented in its report that:[7]

> Both the plaintiff and the defendant should be able to file affidavit material on the motion for certification. The Committee specifically considered the Quebec rule whereby only the plaintiff is permitted to file affidavit material. Given the absence of a preliminary merits test in the proposed certification procedure, the volume of affidavit material would likely be less under our proposed model.

As noted above, the absence of a preliminary merits test has not been respected by defendants and, as such, the volume of affidavit material filed on certification motions has not been limited in the manner contemplated by the Advisory Committee.

In our view, a restriction on the ability of defendants to file evidence on certification motions and cross-examine the representative plaintiff (and any other deponent of an affidavit filed on behalf of the plaintiff on the motion for certification) would eliminate the premature examination of the merits of the plaintiff's claims and help to make the certification motion more efficient, streamlined and inexpensive.

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[6] See the comments of Justice Cullity in *Lambert v Guidant Corp*, [2009] OJ No 1910 at paras 56–82.
[7] Ontario, *Report of the Attorney General's Advisory Committee on Class Action Reform*, (Toronto: 1990) at 31.

We recommend that Ontario adopt the approach used in Quebec, where a defendant must seek leave to file evidence and cross-examine at the authorization stage. In our view, that procedure has contributed to the generally speedier resolution of authorization motions in that province.

Finally, in addition to the concrete recommendations for reform that we have proposed above, delays in the certification process could also be improved through more active and aggressive case management by judges. These measures are not necessarily appropriate matters for legislative amendment, but we would be in favour of case management judges controlling the conduct of certification motions in ways that would make the motions proceed more expeditiously and with less expense. That could involve steps such imposing page limits for factums filed on certification motions (as page limits in court practice directions seem to be routinely ignored in class actions), and reducing the duration of oral argument at certification hearings or limiting oral argument to specific certification criteria or issues. We are also in favour of additional designated class action judges, particularly in Toronto where the largest share of Ontario class actions are filed.

Comments on the existing certification criteria

The certification criteria in section 5(1) of the *CPA* are appropriate, except that we would propose that the requirement for a litigation plan in section 5(1)(e)(ii) be eliminated. In our view, litigation plans are of limited utility because they are prepared at an early stage and the case that emerges from certification can often differ quite markedly from the one initially proposed by the representative plaintiff and addressed in the proposed litigation plan. There is more utility in well-crafted discovery plans and trial management plans than there is in a litigation plan proposed for certification.

Other than the proposed repeal of section 5(1)(e)(ii), the current certification criteria, when properly applied, provide a well-adapted framework for determining which cases, and the form in which those cases, should proceed to a determination on the merits. The section 5(1) criteria provide a defendant with sufficient ammunition to challenge a case that it believes is not appropriately conducted as a class action. The result of that challenge may be that the case is not certified at all or it may result in the contours of the class action being circumscribed in some manner (for example, by eliminating rights of action that would be unmanageable or paring back the scope of the class). The early and efficient resolution of the certification motion is of significant benefit to both plaintiffs and defendants in defining the case that will proceed to an adjudication on the merits. That clarity facilitates settlement discussions between plaintiffs and defendants and more definitive outcomes in contested proceedings.

Comments on the proposed introduction of a preliminary merits test at certification

The consultation paper raises for consideration the possibility of introducing a merits analysis at certification. The introduction of a preliminary merits test at certification would significantly undermine the objectives of the *CPA*. By increasing the cost of litigation for plaintiffs, certain cases that are economically viable under the current regime would become uneconomical to pursue. Further, there is no evidence of a flood of unmeritorious class actions that would justify such a radical departure from the current regime. The current system incorporates adequate safeguards for defendants against such actions.

Further, if a preliminary merits test was to be introduced (which we strenuously oppose), it could not be introduced in isolation. There would need to be concurrent amendments to permit plaintiffs access to the non-public documents of the defendant. Unlike in the United States, pre-certification discovery of documents going to the merits of the plaintiff's claims is strictly limited in Ontario.[8] It would be inconsistent with basic notions of fairness in our civil justice system to extinguish the claims of plaintiffs on the merits without discovery given that defendants control all of the evidence that goes to the merits of a class action. The Ontario Law Reform Commission ("**OLRC**") recognized this in its seminal 1982 report. In conjunction with its proposal for a preliminary merits test at certification, it also proposed a procedure that would "guarantee" that a representative plaintiff would have access to information in the possession of the defendant to assist the representative plaintiff in satisfying the preliminary merits test.[9]

If the intention was to introduce a preliminary merits test at certification with corresponding discovery rights in favour of plaintiffs, we see little utility in maintaining a certification requirement at all. It adds an unnecessary additional layer of cost and delay to the process. There are existing procedures under the *Rules of Civil Procedure* to allow defendants to challenge the merits of a class action (*e.g.* summary judgment). If there was no certification requirement, it would be open to a defendant to invoke those procedures at an early stage of a proceeding. If dramatic reform is contemplated, we recommend moving to a regime like that in Australia, where there is no requirement for a plaintiff to obtain certification of a class action (though the defendant is entitled to apply for an order that the proceeding not continue as a class action on certain grounds[10]) and cases generally proceed promptly through ordinary litigation procedures towards a merits determination.

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[8] *Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v Royal Bank of Canada*, 2017 ONSC 87 at para 41.

[9] Ontario Law Reform Commission, *Report on Class Actions*, vol 2 (Toronto: Ministry of the Attorney General, 1982) at 315.

[10] See for example *Federal Court of Australia Act 1976* (Cth), s 33N.

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

Although the distribution of monetary awards is an important part of the class action process, we do not have any concerns about distribution that would merit legislative change. The *CPA* affords parties an unfettered right to develop a distribution plan and this should continue.[11] It would be too cumbersome for the *CPA* to enumerate detailed requirements for distribution approval as there is too much variability between cases for a standard procedure to be imposed. The approach to distribution in a securities class action (which normally involve fairly straightforward mathematical calculations) is profoundly different than the approach taken in a medical products class action (where class members' entitlement is often determined through an assessment of detailed health records and personal circumstances), which in turn is different than the settlement in a price fixing case (where a distribution plan may need to have mechanisms to pay large scale OEM purchasers alongside small claims from individual consumers).[12] In some cases it may make some sense to distribute some or all of the settlement amount *cy-près*, as contemplated by the *CPA*[13] as the damages per class member are too small or too complex to be distributed to individual class members.[14] Given the variability of distribution plans, it would not be prudent to mandate a single approach. Class counsel should be trusted, with the active oversight of the courts, to develop a workable plan to distribute that responds to the idiosyncrasies of each case.

While there is no need for any legislative changes related to distribution, there are some best practices that case management judges should consider in their assessment of the reasonableness of the distribution plan. *First*, class counsel should normally run a competitive bidding process before selecting a claims administrator to ensure that the class is not overpaying for settlement administration services. However, counsel should not be required to select the cheapest administrator. Sometimes the more expensive administrator will possess particular expertise or knowledge (for example when they were the administrator of a related US settlement) that means that it is in the best interests of the class for that administrator to be appointed. The assessment

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[11] Section 26(1) of the *CPA* states that the "court may direct any means of distribution of amounts awarded under section 24 or 25 that it considers appropriate."

[12] For an example of the distribution approach in a securities case, see *Gerard v Detour Gold Corporation*, 2017 ONSC 3966 at paras 16–20 and *Gould v BMO Nesbitt Burns Inc*, [2007] OJ No 1095 at paras 19–23. For an example product liability settlement, see *McSherry v Zimmer GmbH*, 2016 ONSC 4606. For an example price fixing settlement, see *Bratton v Samsung Electronics Co Ltd*, 2015 ONSC 7786 at para 24.

[13] *Class Proceedings Act, 1992*, SO 1992, c 6, s 26(5); *Sorenson v Easyhome*, 2013 ONSC 4017 at paras 24–30.

[14] *Ibid.*

of the appropriate administrator, like the crafting of a distribution plan, is something that should be left to class counsel to deal with on a case by case basis, subject to court oversight.

Second, we would also propose that courts holdback a small proportion of counsel fees until after the completion of the distribution process. The process for distributing funds to class members is complex and issues often arise in the settlement administration process that require and deserve the attention of class counsel. The withholding of a small proportion of settlement funds until the completion of distribution ensures counsel will efficiently respond to any issues that arise. A number of fee awards have included such a holdback. For example, in *Wilson v Servier* the court declined to award the full amount of counsel fees until the completion of the settlement administration process because "it is appropriate for the Court to know how the claims process has worked for claimants … before determining with finality the full and final amount of class counsel fees."[15] A similar requirement was part of the Canadian settlement regarding Kitec plumbing system, as well as the DRAM price-fixing cases.[16] In the US, holdbacks of this nature are quite common, particularly in complex settlement administrations.[17]

Third, we would suggest that a positive obligation be placed on defendants to provide any relevant information that would help to facilitate settlement administration.

Finally, we would welcome increased transparency and improved reporting of settlement outcomes. We think the approach suggested in the consultation paper of a public report filed by the administrator, which should also be filed electronically in a publicly available website, would help assess the efficacy of various distribution plans. As the LCO is well aware, the lack of empirical data regarding settlement outcomes hinders the ability to assess the effectiveness of current notice and distribution plans. Until such data is available, we would urge the LCO to exercise caution and not make significant changes to the *CPA*'s distribution elements.

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

Adverse costs awards are the single greatest impediment to Ontarians' ability to access justice through class proceedings. The rapidly escalating costs awards are alarming. Unless a no-costs

[15] *Wilson v Servier Canada Inc*, [2005] OJ No 1039 at para 99.
[16] *Rosati v Ipex USA LLC and Ipex Inc*, Ontario Court File No: CV-09-14359; *Eidoo v Infineon Technologies AG*, 2014 ONSC 6082 at para 86; and *Fanshawe College v LG Phillips LCD Co*, 2011 ONSC 2484.
[17] See the Entran II litigation, *Huber v Goodyear Tire & Rubber Co*, Case No 03-2-25184-4, Washington DC.

regime is adopted, cost concerns will prevent all but the most economical of cases from being commenced.

Costs have climbed significantly in recent years. As Justice Perell put it, "[l]ike a forest fire in this era of climate change, costs in class proceedings have gotten out of control."[18] In the past year three cost awards in excess of $1 million have been awarded to defendants, including a $2.3 million award to two defendants for a failed certification motion.[19] The size of these awards impacts access to justice because, in many cases, they must be paid by class counsel, who often indemnify the representative plaintiff unless an external indemnity has been provided by the Class Proceedings Fund or private third-party funder.[20]

As Chief Justice Strathy observed when making a $2.6 million costs award to the plaintiff in a securities class action, costs are an "access to justice issue":

> These claims are suitable for class action treatment because no individual class member would take on the risks involved in pursuing individual litigation. The ability of the class to pursue these claims depends on the willingness of class counsel to accept the very substantial risks in exchange for the potential rewards.
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> The risks are – quite simply – the exposure to substantial personal liability for costs and the risk of receiving no compensation for the time and disbursements invested in the case. There is no funding agreement in this case, but the latter risk exists even where there is a funding agreement to indemnify class counsel for an adverse costs award or for some portion of their disbursements. The efficacy of the statutory remedy depends on incentivizing class counsel to take these formidable risks.[21]

While this statement was directed at securities class actions, it applies to class proceedings more generally. Cost concerns hamper access to justice and the efficacy of our class proceedings regime. There are numerous meritorious cases that are not commenced due to concerns about adverse cost awards in the event of a loss. These concerns have increased significantly as cost awards have climbed. Very few litigants can bear multi-million dollar risks on a single action, let alone an interlocutory motion. As a result, increasing cost awards pose a serious, if not existential, threat to class proceedings.

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[18] *Heller v Uber Technologies Inc*, 2018 ONSC 1690 at para 1.
[19] *Yip v HSBC Holdings plc*, 2017 ONSC 6848; *Das v George Weston Limited*, 2017 ONSC 5583; and *Fehr v Sun Life Assurance Co of Canada*, 2017 ONSC 2218.
[20] *Bayens v Kinross Gold Corporation*, 2013 ONSC 4974 at paras 29–33.
[21] *Green v Canadian Imperial Bank of Commerce*, 2016 ONSC 3829 at paras 13–14.

Some incremental changes may help reduce costs risks. External funding, through the Class Proceedings Fund or private funders, helps to defray cost risks. Given the availability of third-party funding at a rate less than the 10% charged by the Fund, we suggest that the Fund should be given increased flexibility to alter its levy and fund, as suggested in the consultation paper. No steps should be taken to reduce plaintiff's access to these funders. All third-party funding agreements are subject to the approval of the court, which has demonstrated a willingness to reject funding agreements that are not in the best interests of the class.[22] We would also suggest that these motions should be heard *ex-parte* so that defendants do not know the source and extent of funding, just as plaintiffs do not know the extent of a defendant's commitment to a case.

However, these solutions will not be enough. The only long-term solution to the problem of adverse costs is the adoption of a no costs regime. This is hardly a radical proposal. Several other provinces have adopted no costs regimes, including British Columbia, Manitoba and Newfoundland without any adverse impact on class action practice.[23] Indeed, the adoption of a no costs regime was the explicit recommendation of the 1982 OLRC report on class actions, which stated that "it should be emphasized that the existing costs rules have the effect of discouraging all class actions, for reasons having nothing to do with their propriety or merits."[24]

Unfortunately, this recommendation was not followed by the 1990 Attorney General's Advisory Committee on Class Action Reform which led to the current *CPA*. However, at least one member of the Advisory Committee has regretted this decision – current class proceedings case management judge Edward Belobaba. In *Brown v Canada (AG)* Justice Belobaba expressed serious concerns about the impact adverse costs are having on class proceedings, stating "No wonder … that the number of class actions on an annual basis is declining. Access to justice, even in the very area that was specifically designed to achieve this goal, is becoming too expensive."[25] He also rued the failure of the Advisory Committee to adopt a no costs regime, stating that "I now realize that I was wrong and that the OLRC was right. I understand that the provincial Law Commission is undertaking a review of the *Class Proceedings Act*, including the costs provisions. Hopefully, our mistake will be corrected."[26]

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[22] *Houle v St Jude Medical Inc*, 2017 ONSC 5129.
[23] *Class Proceedings Act*, RSBC 1996, c 49, s 37; *The Class Proceedings Act*, CCSM, 2002, c C130, s 37; and *Class Actions Act*, SNL 2001, c C-18.1, s 37.
[24] Ontario Law Reform Commission, *Report on Class Actions*, vol 3 (Toronto: Ministry of the Attorney General, 1982) at 663.
[25] *Brown v Canada (AG)*, 2013 ONSC 6887 at Appendix.
[26] *Ibid.* Justice Belobaba repeated these findings in *Sankar v Bell Mobility*, 2013 ONSC 6886 at para 1; *Crisante v DePuy Orthopaedics*, 2013 ONSC 6351 at para 1; *Dugal (Ironworkers Ontario Pension Fund) v Manulife*, 2013 ONSC 6354 at para 1; and *Rosen v BMO Nesbitt Burns*, 2013 ONSC 6356 at para 1.

Justice Belobaba is not the only class action case management judge to express these concerns. In *Bayens v Kinross Gold Corporation* Justice Perell echoed Justice Belobaba's call for change, stating that the "promoters of class proceedings did not foresee the astronomical size of the adverse costs award that have been awarded in class action proceedings, which have substantially intensified the risk and the associated barrier to access to justice" and that, as a result, "[i]t may be wise for the Legislature to revisit whether any of this is what it intended when it rejected the Law Reform Commission's recommendation that class actions not be governed by the loser pays principle."[27] In many other cases Justice Perell has expressed similar concerns, including a recent decision where he stated that "costs in class proceedings are out of control and run-away costs are a threat to access to justice for both plaintiffs and defendants."[28] Other class action case management judges have made similar comments.[29] The LCO should accept the collective wisdom of these experienced class action adjudicators and adopt a no-cost regime for class proceedings.

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

In relation to settlement approval, our view is that the current process for court approval of class action settlements is operating in a robust manner and does not require modification. The legal test for court approval and the factors that have been identified in the case law as being relevant to application of that test are appropriate. In our experience, approving judges impose close scrutiny of proposed settlements befitting their role as protectors of the interests of the class members. In this context, it is obviously critical that courts receive sufficient information to enable them to effectively perform their approval function. Class counsel take seriously their obligation of full and frank disclosure to the court in this context. Judges, too, are demanding more from class counsel. Justice Belobaba has recently expressed the need for approving judges to be provided with detailed and nuanced evidence and submissions to support the conclusion

[27] *Musicians' Pension Fund of Canada (Trustee of) v Kinross Gold Corp*, 2013 ONSC 4974 at para 35.
[28] *Paniccia v MDC Partners Inc*, 2018 ONSC 1775 at para 9. See also *Cavanaugh v Grenville Christian College*, 2012 ONSC 2995 at para 38; *Lavier v MyTravel Canada Holidays Inc*, [2008] OJ No 3377 at para 17; *Holley v Northern Trust Co Canada*, 2014 ONSC 3057 at paras 19–20; *McCracken v Canadian National Railway*, 2012 ONSC 6838 at paras 58, 68–69 and 113; and *Fisher v IG Investment Management Ltd*, 2014 ONSC 6260 at para 13.
[29] See for example the statement of Justice Strathy (as he then was) in *Dugal v Manulife Financial Corporation*, 2011 ONSC 1785 at paras 27–28 and the statement of Justice Horkins in *Martin v Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 4666 at paras 67-68.

that the settlement is fair, reasonable and in the best interests of the class members.[30] This is a positive development and points to the fact that the current system is operating as intended.

We do have concerns about the lack of predictability in class counsel fee awards in class actions. As a practical matter, a law firm considering whether it will take on a class action on a contingent basis is making an investment decision, investing its time and capital in the hope and expectation of a return on that investment in the form of a fee award. Uncertainty of return in the event of success discourages investment by class counsel. Fewer firms willing to take on class actions reduces competition and diminishes access to justice. If courts adopted a uniform approach to fees, class counsel could predict with greater confidence the potential return from a proposed class action, which would encourage investment, particularly in small or particularly risky cases, and also incent efficient and intelligent conduct of the action.

There has been some judicial recognition of the need for greater predictability in the approval of class counsel fees. Justice Belobaba has held that a one-third contingency fee agreement, if fully understood and accepted by the representative plaintiff, should be accorded presumptive validity.[31] His Honour has correctly stated that the "contingency fee approach would inject a much-needed measure of predictability into class counsel's compensation calculus, which in turn would encourage greater use of the class action vehicle, enhancing access to justice."[32] There has been some acceptance of that approach by other judges,[33] but the fact that the approach has not been uniformly adopted by Ontario judges[34] means that there is a continued lack of predictability in fee awards.

In our view, much-needed predictability and certainty would be brought to this area if two basic principles were adopted. These principles should apply to both partial settlements (which often occur in competition class actions) and final settlements.

First, counsel fees should be based on a percentage of the recovery (settlement or judgment) and not based on class counsel time, except in rare cases. It has long been recognized that a percentage approach is superior to a multiplier approach as it rewards efficiency and results.[35] In most cases, the multiplier approach is not in the best interests of the class as it sets the wrong

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[30] See *Sheridan Chevrolet Cadillac Ltd v Furukawa Electric Co*, 2016 ONSC 729; *AFA Livförsäkringsaktiebolag v Agnico-Eagle Mines Ltd*, 2016 ONSC 532; *McIntyre (Litigation guardian of) v Ontario*, 2016 ONSC 2662; *Middlemiss v Penn West Petroleum Ltd*, 2016 ONSC 3537; *Rosen v BMO Nesbitt Burns Inc*, 2016 ONSC 4752.
[31] *Cannon v Funds for Canada Foundation*, 2013 ONSC 7686 at paras 3 and 8.
[32] *Ibid* at para 10.
[33] See *Haddad v The Kaitlin Group Ltd*, 2017 ONSC 7321 at para 17; *Seed v Ontario*, 2017 ONSC 3534 at para 24.
[34] See *Airia Brands Inc v Air Canada*, 2015 ONSC 1643 at para 13.
[35] *Crown Bay Hotel Ltd Partnership v Zurich Indemnity Co of Canada*, [1998] OJ No 1891 at para 11.

incentives for class counsel. Counsel should not be incentivized to spend the most time possible on the file, but rather should be incentivized to effectively prosecute the action and achieve the highest recovery possible for the class. The presumptive or default rule should be that the percentage approach is used. In rare cases, the multiplier approach may be appropriate, such as where the pecuniary recovery is small but non-pecuniary remedies are of great benefit to the class.

Second, consistent with the above-noted approach proposed by Justice Belobaba, if the contingency fee retainer agreement between class counsel and the representative plaintiff provides for a percentage fee of no greater than one-third of the amount recovered, and the retainer agreement is fully understood and accepted by the representative plaintiff, the contingency fee agreement should be accorded presumptive validity. The presumption could be rebutted in appropriate circumstances, including in the case of mega-settlements where the approach would yield counsel fees that would appear objectively excessive.

As Justice Belobaba has noted, the approach of giving presumptive effect to a one-third percentage agreed between class counsel and the representative plaintiff works best where there is an all-cash settlement.[36] Non-cash consideration (*e.g.* coupons, vouchers, discounts, credits or forgiveness of debt) raise unique issues.[37] In those cases, it is important that the approving judge be provided with sufficient evidence to enable her or him to determine the likely value of the non-cash consideration payable to the class members. In some circumstances, the non-cash consideration will be equivalent to cash and there should be no concern about awarding counsel fees on the full value of the non-cash consideration. If the approving judge is not satisfied that the evidence establishes the likely value of the non-cash consideration to class members, it may be appropriate for the court to apply the appropriate percentage rate to a discounted amount or hold back a portion of the counsel fee until there is clarity about the value that class members actually receive from the non-cash consideration.

The consultation paper raises for consideration whether there is a role for *amicus curiae* in settlement approval and/or fee approval. There are examples of Ontario courts appointing *amicus curiae* in the context of both settlement and fee approval.[38] In cases where the facts and issues are somewhat unusual, there is merit in having *amicus curiae* appointed, but this should be the exception rather than the rule. In particular, the benefits of having *amicus curiae*

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[36] *Cannon v Funds for Canada Foundation*, 2013 ONSC 7686 at para 11.
[37] See *Smith Estate v National Money Mart Co*, 2011 ONCA 233.
[38] *Bancroft-Snell v Visa Canada Corp*, 2016 ONCA 896 (approval of class counsel fees); *Waldman v Thomson Reuters Canada Ltd*, 2016 ONSC 2622 (approval of settlement and class counsel fees). More recently, on April 23, 2018, Justice Grace appointed *amicus curiae* in *The Fanshawe College of Applied Arts and Technology v Hitachi, Ltd* (Ontario Superior Court of Justice Court File No 59044CP) in relation to class counsel's fee request.

appointed must be weighed against the downsides, including the additional cost and delay. In our view, the courts have to date taken an appropriate approach to this issue.

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

While we are unaware of any systemic study of this issue, we have seen numerous instances of defendants modifying their behaviour to respond to class action risks. As a result, we are confident that class actions are meeting the objective of behaviour modification and that class members are benefiting from the existence of a robust class proceedings regime.

One of the starkest illustrations of these benefits is the recent Volkswagen diesel emissions class actions. Following news that Volkswagen had deployed a device in its vehicles that deceived federal regulators about the extent of vehicle emissions, class actions were commenced in Ontario and Quebec on behalf of all affected Volkswagen car owners for damages relating to loss in value of the vehicle and repair costs, among other things.[39] After intensive negotiations a class-wide settlement was reached, resulting in payments ranging from $17,240-$28,800 per vehicle owner.[40] Similar settlements were also reached in related US actions.

By contrast, and as the New York Times noted, Volkswagen owners in Europe "at most get a software update and a short length of plastic tubing" – a "startling gap in treatment [that] is the result of European laws that shield corporations from class-action suits…".[41] The discrepancy in outcomes for North American and European Volkswagen customers is a powerful example of why class proceedings serve the interests of Ontarians.

We have also noticed changes to the behaviour of public companies that we believe is the result of the secondary market liability regime that came into force in 2005.[42] In particular there has been a noticeable downturn in the number of accounting restatements – which occur when a public company makes an accounting error of significance requiring it to formally withdraw a previously-issued financial statement. We believe this downturn is caused at least in part by

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[39] Separate class actions were commenced for 2L diesel engines and 3L diesel engines.

[40] *Quenneville v Volkswagen*, 2017 ONSC 2448 at para 12. This settlement was for cars with 2L diesel engines. In the 3L diesel engine action, *Quenneville v Volkswagen Group Canada, Inc*, 2018 ONSC 2516, payments ranged between $4,000-$12,000.

[41] Ewing, Jack. "In the US, VW Owners Get Cash. In Europe, They Get Plastic Tubes", *The New York Times*, (August 15, 2016), online: <https://www.nytimes.com/2016/08/16/business/international/vw-volkswagen-europe-us-lawsuit-settlement.html>.

[42] *Securities Act*, RSO 1990, c S.5, part XXIII.1.

case law which has found that a restatement is "powerful evidence" that a company has failed to live up to its continuous disclosure obligations.[43] We have also noticed an increase in the quality and quantity of disclosure provided, and the implementation of more robust risk disclosure sections in interim and annual filings by public companies. These changes may explain why there has been a decline in the number of secondary market cases commenced in the past 3 years.[44]

We have also seen behaviour modification in the competition area. For example when Loblaws recently admitted participating in a price-fixing conspiracy regarding bread products, it accompanied its public admission with an offer of a $25 card to all Loblaws customers that the court found was "specifically related to the class action liability that it foresees down the road."[45] This benefit would not have existed without robust price-fixing litigation in Canada, further demonstrating the behaviour modification effects of the current class proceedings regime.

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

We are hopeful that individuals with experience as representative plaintiffs or class members will come forward in response to the LCO consultation to offer directly their opinions and insights on the operation of the Ontario class action system. Based on our interactions with representative plaintiffs and class members, the current system is generally viewed in a positive light by those for whose benefit the system was established. The most common complaint that we hear from representative plaintiffs and class members relates to the delay in resolving class actions. They can find it quite difficult to understand how it can take five years or more to resolve a class action, particularly if it is their first interaction with Ontario's civil justice system and therefore have no appreciation of the delay that generally affects civil litigation in Ontario. We have discussed above some proposals for remedying the problem of delay in the Ontario class action regime.

One proposal for reform that we offer on the topic of representative plaintiffs is that the *CPA* should enshrine the entitlement of representative plaintiffs to additional compensation — commonly referred to as honorariums — where they have spearheaded a successful class action.

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[43] *Rahimi v SouthGobi*, 2017 ONCA 719 at para 68. See also *Silver v IMAX Corp*, 2009 CanLII 72342 (ONSC) at para 208.

[44] Bradley A Heys and Robert Patton, "Trends in Canadian Securities Class Actions: 2017 Update. Trickle of New Cases Suggests a Slow Rate of Filings is the New Norm", *NERA Economic Consulting*, (February 20, 2018), online: <http://www.nera.com/content/dam/nera/publications/2018/PUB_2017_Recent_Trends_Canada_0218.pdf>.

[45] *David v Loblaw*, 2018 ONSC 198 at para 7.

An individual who agrees to assume the risks, responsibilities and burdens of acting as a representative plaintiff for the benefit of a wider group of people, understanding that their individual damages claim may be of minimal value, should be entitled to some additional compensation for their efforts in procuring a recovery for the wider group. They serve the public interest by advancing the objectives of the *CPA*. The judicial approach to honorariums is inconsistent and unpredictable.[46] Some judges continue to view honorariums as being reserved for rare or exceptional cases.[47] In our view, the *CPA* should explicitly provide for the payment of an honorarium to a representative plaintiff in an amount determined by the court.

The consultation paper raises for consideration whether the *CPA* should include provisions regarding the rights of objecting class members to disclosure, representation and costs. Objectors play a critical role in the class action system in bringing forward different views and perspectives, particularly in the settlement and fee approval context in which there is some diminution of the ordinary adversarial dynamic. The current system is functioning well and permits and encourages objectors to come forward and voice their opposition. Notice to class members is obviously important in this context. It is important that class members receive timely notice of their right to object and are advised of the manner in which they can exercise that right. In our view, practices and process around notice in class actions have improved markedly in recent years and continue to improve. Costs in favour of[48] or against[49] an objector should be awarded only in exceptional circumstances. In our experience, objectors are generally quite capable of expressing their objections directly and without the assistance of a lawyer. Our view is that, where an objector does retain a lawyer, the objector should bear that expense, other than in exceptional circumstances. Further, the system should not encourage so-called "professional objectors", lawyers who object to class action settlements for the purpose of extracting a payment. This phenomenon has been observed in U.S. class action practice.

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

The phenomenon of multi-jurisdictional class actions is a vexed and vexing issue. Multi-jurisdictional class actions raise unique challenges at both the front-end and back-end of class

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[46] See V Morabito, "Additional Compensation to Representative Plaintiffs in Ontario: Conceptual, Empirical and Comparative Perspectives" (2014) 40:1 Queen's LJ 341.
[47] See *Robinson v Rochester Financial Ltd*, 2012 ONSC 911 at paras 26–44; *Eidoo v Infineon Technologies AG*, 2015 ONSC 2675; *Lozanski v Home Depot Inc*, 2016 ONSC 5447 at paras 78–82.
[48] *Kidd v Canada Life Assurance Co*, 2015 ONSC 1287.
[49] *Dabbs v Sun Life Assurance Co of Canada*, [1998] OJ No 2811.

action litigation, and raise concerns for plaintiffs and defendants alike. While the problems and challenges are clear, the solutions are less so, given the constitutional setting we have in Canada.

We support the Canadian Bar Association's 2018 "Canadian Judicial Protocol for the Management of Multijurisdictional Class Actions and the Provision of Class Action Notice" as a helpful step forward. The practices recommended in the Protocol will foster more cooperative and coordinated management of multi-jurisdictional class actions. In particular, the provisions of the Protocol dealing with communication between judges in the relevant jurisdictions and the holding of joint case management conferences are critical. They provide a mechanism for judges to exercise more active and coordinated case management of multi-jurisdictional class actions.

We would support legislative amendments to incorporate language of the kind that is included in the Alberta[50] and Saskatchewan[51] class proceedings legislation and in the proposed amendments to the British Columbia class proceedings legislation.[52] It would be beneficial to have the *CPA* direct the Ontario courts to consider at certification the issues raised by multi-jurisdictional class actions and take them into account in deciding whether to certify the action and in what form.

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

Carriage is one of the thorniest issues in class action procedure. On the one hand, there are significant problems with the current approach to carriage. Courts have embraced a highly discretionary, seemingly ever-growing, set of 16 factors that make the outcome of carriage decision very unpredictable.[53] This uncertainty has serious consequences for how class actions are litigated. In some circumstances counsel will enter into unnecessary partnerships with firms in order to ward off carriage risks. In other cases class counsel will choose to "roll the dice" and engage in an unnecessary carriage fight, adding to the class' litigation costs and in the process exposing parts of class counsel's litigation strategy to defendants, who currently have the right to attend and even actively participate in a carriage motion.

On the other hand, the alternatives to the current approach may even be worse. We would not want to adopt the approach used in Quebec, in which the firm that is first to file has presumptive

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[50] *Class Proceedings Act*, SA 2003, c C-16.5, ss 2(2)(b), 5(6)–(8), 9.1.
[51] *The Class Actions Act*, SS 2001, c 12.01, ss 4(2)(c), 6(2)–(3), 6.1.
[52] Bill 21, *Class Proceedings Amendment Act, 2018*, 3rd Sess, 41st Leg, British Columbia, (first reading 2018).
[53] *David v Loblaw; Breckon v Loblaw*, 2018 ONSC 1298.

carriage of the action.[54] We are involved with Quebec class proceedings through an affiliated Quebec law firm Siskinds, Desmeules and in our firms' experience the Quebec approach creates perverse incentives, prioritizing speed of drafting over quality and encouraging unscrupulous firms to commence actions that they lack the experience to pursue.

We are not aware of a solution that would definitively resolve this dilemma and, indeed, there may not be one. Embracing any single factor as determinative of carriage will inevitability lead to arbitrary outcomes that are not in the best interests of the class. As a result, the focus of carriage-related reforms should be on improving the predictability of decisions, which would enable class counsel to better understand their position in advance of a carriage motion, and minimizing the inefficiencies and risks of the carriage process.

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

We are content with the current appeal process, including the test for leave to appeal. We strongly disagree with the suggestion in the consultation paper that appeals from successful certification motion should go directly to the Court of Appeal. In our experience a significant majority of contested certification decisions are appealed. The Court of Appeal is burdened enough and should not be required to hear the majority of certification decisions.

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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?

It remains the reality that relatively few class actions in Ontario proceed to trial (although there is now a reasonably large body of class action cases that have gone to trial[55]). The fact that most

[54] *Hotte c Servier Canada Inc*, [2002] RJQ 230.
[55] See J Foreman and G Meisenheimer, "The Evolution of the Class Action Trial in Ontario", (2014) 4:2 UWO J Leg Stud 3.

class actions are resolved by way of settlement is a phenomenon to be lauded not lamented. As the Supreme Court has noted:[56]

> The justice system is on a constant quest for ameliorative strategies that reduce litigation's stubbornly endemic delays, expense and stress. In this evolving mission to confront barriers to access to justice, some strategies for resolving disputes have proven to be more enduringly successful than others. Of these, few can claim the tradition of success rightfully attributed to settlements.

The avoidance of trial in favour of settlement is of significant benefit to the parties and to the system. As the vast majority of class action cases will result in settlement prior to trial, the key policy question is how rules can be structured to facilitate settlement as early as possible in the post-certification phase. In that regard, we see real utility to partial summary judgment motions in the post-certification phase of class actions. We acknowledge that the Court of Appeal has cautioned against the use of partial summary judgment as a general matter.[57] However, in class actions, there will typically be one or a limited number of critical common issues the resolution of which will facilitate settlement.

For those somewhat rare cases that do proceed to trial, the case management judge performs a critical function in ensuring that the case moves efficiently through production and discoveries to trial. Case management judges should take an active and aggressive role in managing the cases through production and discoveries, and being actively involved in the appointment of a trial judge to address, at an early stage, any issues that might hinder the expeditious conduct of the trial.

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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?

We recommend that section 28 of the *CPA* be amended so that, in respect of the events set out in sections 28(1)(b) to (f), the running of any limitation period resumes only upon notice being given to the class members of those events having taken place. Under the current formulation of section 28, class members may be prejudiced if, for example, a class action is discontinued and they are not advised of that discontinuance until a later date. Until notice is given to class members, they will have no reason to believe that they do not have the protection against the

[56] *Sable Offshore Energy Inc v Ameron International Corp*, 2013 SCC 37 at para 1.
[57] *Butera v Chown, Cairns LLP*, 2017 ONCA 783.

running of any limitation period afforded by the *CPA*. This prejudice would be ameliorated by amending the *CPA* to provide that any limitation period resumes running against the class members when notice of discontinuance (or other event, as applicable) is given.

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

We would welcome improved reporting on class actions process. At a minimum the reporting should include the type of action, date of issuance, date of settlement, settlement amount and distribution outcomes. Given that class counsel is inconsistent in reporting cases to the Canadian Bar Association's Class Action Database (despite the existence of a practice direction mandating that counsel do so) we would suggest that the reporting process not be left to class counsel. In order to be useful reporting must be consistent and the reporting scheme must be designed to capture every class action commenced in the province.

Such a process need not be burdensome. For example, there could be a class action specific section of the Information For Court Use (Form 14F) – which is required to be submitted at the outset of all actions in Ontario – to report key information about the class action. A copy of this form should be automatically provided to the reporting authority by the court (to avoid the possibility of counsel failing to provide the form). Furthermore, key decisions, particularly those which terminate a class proceeding (i.e. when certification is denied or a discontinuance is granted) or approve a settlement or grant judgment at trial, should be sent to the reporting authority by the court, while the reporting authority could request that counsel furnish a copy of the relevant motion record where the decision provides insufficient information.

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We would be happy to discuss the above further. We look forward to reviewing the results of the LCO's consultation.

Yours truly,

Siskinds LLP

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On behalf of the Class Action Department of Siskinds LLP