SOTOS
CLASS ACTIONS

180 DUNDAS STREET WEST, SUITE 1200
TORONTO, ONTARIO
CANADA M5G 1Z8

WWW.SOTOSCLASSACTIONS.COM

May 31, 2018

David Sterns
T 416-977-5229
dsterns@sotosllp.com

Assistant: Georgia Scott-McLaren
T 416-977-5333 ext. 310
gscott-mclaren@sotosllp.com

VIA EMAIL

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

Dear Members of the Class Actions Project:

Re: Submissions in Response to the Law Commission of Ontario, Class Actions: Objectives, Experiences and Reforms: Consultation Paper

We are pleased to provide you with the following submissions in response to the Law Commission of Ontario's consultation on class actions.

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

How may practices be changed to shorten delays?

Case management is the key to reducing delays in class actions. With this in mind we respectfully make the following suggestions.

A case conference should be held within 30 days of the filing of a Statement of Claim. At that case conference, a schedule for certification and any preliminary motions should be set.

Timelines should be standardized for each type of class proceeding. Experienced judges and counsel have a general sense of how much time is needed to prepare materials for a typical competition, product liability, consumer, securities or other type of class action. Standardized timelines would enable judges to be more active in case-managing various types of cases.

The current practice is that defendants will not agree to a timetable until they have seen the plaintiff's complete motion record. Most judges defer to the defendants' wishes in this respect meaning that no timetable is often set until many months after the certification record is delivered. This practice results in significant delays to the progress of the action.

A reasonable schedule for certification should be set at the initial case conference regardless of whether or not the plaintiff has delivered its certification record. This will allow actions to move forward expeditiously.

Lastly, a fixed trial date should be given out at the first case conference following certification and should apply regardless of any appeals from certification that may be pending. This trial date should be no more than one year from the date of certification. A fixed trial date is the best means of ensuring that the parties will focus their minds on trial or resolution and not on procedural motions that will only delay resolution on the merits.

How might judges manage cases more efficiently?

Case management principles should be codified in the *Class Proceedings Act* ("CPA"). Strathy J. (as he then was) cited 6 principles of case management from the *Manual for Complex Litigation* which are instructive:

> Effective judicial management generally has the following characteristics:
>
> - It is active. The judge anticipates problems before they arise rather than waiting passively for counsel to present them. Because the attorneys may become immersed in the details of the case, innovation and creativity in formulating a litigation plan frequently will depend on the judge.
>
> - It is substantive. The judge becomes familiar at an early stage with the substantive issues in order to make informed rulings on issue definition and narrowing, and on related matters, such as scheduling, bifurcation and consolidation, and discovery control.
>
> - It is timely. The judge decides disputes promptly, particularly those that may substantively affect the course or scope of further proceedings. Delayed rulings may be costly and burdensome for litigants and will often delay other litigation events. The parties may prefer that a ruling be timely rather than perfect.
>
> - It is continuing. The judge periodically monitors the progress of the litigation to see that schedules are being followed and to consider necessary modifications of the litigation plan. Interim reports may be ordered between scheduled conferences.
>
> - It is firm, but fair. Time limits and other controls and requirements are not imposed arbitrarily or without considering the views of counsel, and they are revised when warranted. Once established, however, schedules are met, and, when necessary, appropriate sanctions are imposed ... for derelictions and dilatory tactics.

- It is careful. An early display of careful preparation sets the proper tone and enhances the court's credibility and effectiveness with counsel.[1]

These principles of case management reflect a theory of case management which is more aligned with the case management principles used by judges in Quebec where the case management judges tend to more actively manage cases. Similarly, in the U.S., class action judges actively manage cases and have sometimes even used their case management powers to prod parties to mediate their dispute. Judges in Ontario should be given more power and discretion under the *CPA*, in line with the principles cited above, to actively case manage the class proceedings they are overseeing.

Case management judges should be encouraged and empowered to manage multi-jurisdictional class proceedings more effectively as discussed in our response to Consultation Question 8.

What changes in legislation could help cases proceed more efficiently?

The principle of timely access to a final determination on the merits should be enshrined as a principle and objective of the *CPA*. By being statutorily enshrined, this principle will give teeth to the principles proposed above.

The response to Consultation Question 10 is also responsive here; if the process for appeals is streamlined, delays in class proceedings will be reduced.

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

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

The *CPA* should be amended to require parties to file a public report summarizing the outcomes of the distribution process once it has concluded. This report should include take-up rates, data on settlement amounts (including median and average payments), information about other costs including class counsel fees and administration costs. The report should be publicly and easily accessible to both members of the bar and members of the public on an online database. Given that the Canadian Bar Association Class Action Database is intended to be a repository of class actions filed across the country, these reports could be filed in this database.

In addition, judges' discretionary powers under s. 12 of the *CPA* should be used to compel assistance from parties, particularly defendants, to make distribution less expensive and more efficient. Judges in Quebec have used their discretionary powers to compel both defendants and third parties to produce relevant contact information to assist distribution. Similar powers should

[1] *Amyotrophic Lateral Sclerosis Society of Essex v. Windsor (City)*, 2015 ONCA 572 at para 69.

be codified in Ontario. This will ensure a more efficient manner of giving notice to a targeted group of class members to assist with the best possible take-up rates.

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?

No. The two-way costs regime acts as a deterrent to bringing smaller and riskier cases. Cost consequences are not needed in order to discourage frivolous cases. Most class actions are brought on a contingency basis. In our experience, counsel do not bring frivolous contingency cases as there is already a significant financial cost to bringing class actions that do not succeed.

British Columbia and the Federal Court both have a no-costs regime (subject to certain exceptions) in their class proceeding legislation.[2] There is no evidence that this has resulted in proportionately more frivolous or unmeritorious cases being brought in the BC or Federal Courts than in Ontario. In both courts, defendants can utilize mechanisms such as motions to strike unmeritorious claims and summary judgment to dismiss unmeritorious claims.

Proposed legislative changes in BC[3] also impact on the desirability of maintaining the two-way costs rule in Ontario. BC has been an "opt-in" regime for non-residents. With the proposed changes, B.C. would change to an opt-out regime for all class members, including non-residents, and it will retain its no costs regime. This may result in British Columbia becoming a preferred jurisdiction for plaintiffs to bring class actions.

If Ontario retains its two-way costs regime, this legislative change in BC could result in forum shopping, which should be discouraged. It would also create two categories of class representatives who bring the exact same case: those who have to pay costs, and those who do not. If class actions are intended to enhance access to justice, it is difficult to explain why an Ontario resident bringing a class action in Ontario would have to pay costs, but that same resident who brought a class action in British Columbia would not. Maintaining the two-way cost regime would therefore impede access to justice.

We recommend replacing the current two-way costs regime with a costs regime similar to that contained in the *Federal Court Rules*[4] Federal Courts Rules, which state:

> 334.39 (1) ... no costs may be awarded against any party to a motion for certification of a proceeding as a class proceeding, to a class proceeding or to an appeal arising from a class proceeding, unless

---

[2] *Class Proceedings Act,* RSBC 1996 c. 50 at s.37; *Federal Courts Rules* SOR/98-106 at s. 334.39.
[3] Bill 21, *Class Proceedings Amendment Act, 2018*, 3rd Sess., 41st Parliament, BC, 2018.
[4] *Federal Court Rules* SOR/98-106

> (a) the conduct of the party unnecessarily lengthened the duration of the proceeding;
> (b) any step in the proceeding by the party was improper, vexatious or unnecessary or was taken through negligence, mistake or excessive caution; or
> (c) exceptional circumstances make it unjust to deprive the successful party of costs.

What changes are suggested if the two-way costs rule is maintained?

If the two-way costs regime remains unchanged, more clarity and consistency is required in the way it is applied. The quantum of costs often varies depending on the judge hearing the motion. For example, Justice Belobaba applies rates specified in "grids" found in the *Rules of Civil Procedure.*[5] Those amounts have not been updated for 13 years.[6] By contrast, Justice Perell does not apply grid rates.

As well, the factors in s. 31(1) of the CPA should be clarified and brought into line with the original intention of the drafters of the CPA. Section 31(1) of the *CPA* provides:

> **31** (1) In exercising its discretion with respect to costs under subsection 131 (1) of the Courts of Justice Act, the court may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest. 1992, c. 6, s. 31 (1).

This section was intended to be a safety valve that would ensure that the adverse cost consequences did not operate so as to discourage meritorious cases in the public interest. However, a review of the jurisprudence has found very few examples where these factors (test case, novel issue or matter of public interest) have actually been applied to reduce or eliminate adverse cost consequences.[7] Section 31(1), which was a critical feature of the CPA regime, has essentially become a dead letter as a result of a series of highly restrictive interpretations.

Even in circumstances where courts have found that one of the factors in s. 31(1) applies, they have declined to exercise their discretion to relieve the unsuccessful party from having to pay

---

[5] See e.g. *Rosen v. BMO Nesbitt Burns Inc.*, 2013 ONSC 6356; *Mask v. Silvercorp Metals Inc.*, 2015 ONSC 7780; *Goldsmith v. National Bank of Canada*, 2015 ONSC 4581; *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2016 ONSC 5496; *Bakshi v. Global Credit*, 2016 ONSC 8095; *Johar v. Best Buy Canada*, 2016 ONSC 6115; *Lavender v. Miller Bernstein*, 2017 ONSC 4739; *Kalra v. Mercedes Benz*, 2017 ONSC 4692.

[6] *Rules of Civil Procedure* RRO 1990, Reg. 194, Rule 57.01(3); Information for the Profession issued by the Costs Subcommittee of the Civil Rules Committee dated July 1, 2005.

[7] See e.g. *Garland v Consumers' Gas Co.* (1995) 22 OR (3d) 767; *Fehringer v Sun Media Corp* [2002] OJ No 5514 (SCJ); *Baldwin v Daubney* [2006] OJ No 3919, (SCJ); *Ruffolo v Sun Life Assurance Co. of Canada* (2008), 90 O.R. (3d) 59 (SCJ); *Fisher v IG Investment Management Ltd* 2010 ONSC 2839 (SCJ); *McCracken v Canadian National Railway Co.* 2012 ONCA 797 (CA); *Smith v Inco Ltd,* 2012 ONSC 5094 (SCJ); *Holley v Northern Trust Co.* [2014] OJ No 2401 (SCJ); *Das v George Weston Ltd* [2017] OJ No 4858 (SCJ).

costs.[8] For example, courts have strictly limited the cases they find are in the "public interest".[9] Similarly, when viewed restrictively, there are very few cases that involve a truly "novel point of law" because even creative legal arguments are ultimately based on certain settled legal principles. Such narrow interpretations make the application of s. 31(1) to reduce cost awards practically impossible. Amendments to give further clarity to factors under s. 31(1) would be salutary. The amendments should clearly signal that costs should be reduced or eliminated altogether in appropriate cases, that this should not be a rarity, and that the presence of a profit motive by counsel or an expectation of a damages payment by class members are not factors to be taken into account.

Just as important is the timing of when the court decides whether to apply the factors. The current practice is that courts decide if s. 31(1) factors apply at the end of the case. By this time, however, plaintiffs' counsel has made an enormous investment of time (it is usually plaintiffs who seek the benefit of s. 31(1)) and could find themselves exposed to an enormous cost award for which they have given an indemnity.

Class counsel should be able to bring a motion **at the outset of the litigation** to find out in advance whether the factors in s. 31(1) will apply if the plaintiffs are unsuccessful. If the Court finds that the factors in s. 31(1) will not apply, the plaintiffs should be permitted to discontinue the class proceeding unless third party funding can be obtained. Bringing this motion at the outset of the litigation would enhance access to justice. It would allow plaintiffs to bring riskier, novel cases that are in the public interest and know at the outset whether or not adverse costs will be awarded if they are unsuccessful. The determination does not need to await the outcome of the case and should not depend on how the litigation was conducted. Whether or not the case was a test case, raised a novel point of law or involved a matter of public interest can all be determined based on the pleadings at an early stage.

In order to mitigate against abusive or improper tactics by either side, the section could be amended to state that where costs dispensation is granted at an early stage of the proceeding, costs may still be awarded against a party if any of the factors in section 334.39 (1) of the *Federal Court Rules* cited above are found.

---

[8] *Das v George Weston Ltd* [2017] OJ No 4858 at para 49.

[9] See e.g. *Kerr v Danier Leather Inc.* [2007] 3 SCR 331 at paras 64-65; *Ruffolo v Sun Life Assurance Co. of Canada*, [2008] OJ No 599 at paras 72-76; *Fisher v IG Investment Management Ltd.* [2010] OJ No 2036 at para 14; *Holley v. Northern Trust Co.*, [2014] O.J. No. 2401 at para 17; *Das v George Weston Ltd* [2017] OJ No 4858 at para 49.

Is third party funding a positive development in class action practice? Should it be more tightly regulated? Should the Class Proceedings Fund have the flexibility to alter its current 10% levy and/or to fund legal fees?

Third party funding is a positive development as it advances of the goals of the CPA. It increases the ability of class counsel to bring cases that may otherwise not be brought because the firms cannot shoulder all of the risks. This flexibility increases access to justice.

The Class Proceedings Fund ("CPF") should be permitted to alter its 10% levy in order to be more competitive. There are examples in the jurisprudence of third party funders providing disbursement and adverse cost award funding at a 7% rate, often with a cap on the total amounts that they can recover. The CPF has no such flexibility. Class counsel must seek the best option for class members. The availability of more competitive third party funding options means that counsel will continue to seek third party funding instead of pursuing funding through the CPF.

A more flexible regime would also benefit the CPF because often simpler and less risky cases are funded by third party funders who charge a lower levy. If the CPF could alter its levy, it could compete for these cases and thereby collect additional levies that will aid in its ability to fund more complicated cases that are in the public interest. A set of objective criteria could be used by the Class Proceedings Committee to determine the appropriate levy.

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

Is the legal test for settlement approval sufficient?

Yes. The jurisprudential test for settlement approval in the *CPA* is well developed, time-tested and works well as it is. We do not recommend any changes to the current test.

Counsel Fees

Counsel fees should in most cases be determined by a straight percentage of the overall settlement. Multipliers are not preferable and are subject to inflation, whereas fees as a percentage of settlement amounts are more objective.

Sliding scale percentages should be used when recoveries are several hundred million dollars or more. However, for smaller settlements, a standard percentage should be used in order to continue to incentivize counsel to bring those smaller cases.

Is there a role of an amicus curiae at settlement and/or fee approval?

Amicus curiae should not become the standard practice in settlement or fee approval, as it will increase costs that will ultimately be borne by the class. Legislative amendments are not needed as courts have inherent jurisdiction to appoint *amicus curiae.*

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

While the legislative and jurisprudential requirements of s. 5 of the CPA are appropriate, the certification procedure itself has, in some cases, become a "battle of the experts." Certification motions can sometimes delve deeply into the merits of the case, instead of being the procedural motion they were intended to be. Active case management can militate against this: timetables and judicial directions can require counsel to file only necessary materials instead of multiple detailed expert opinions (and the resulting cross-examinations) that unnecessarily lengthen the certification process and drive up costs.

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?

The Canadian Bar Association Class Action Judicial Protocol (2018) ("CBA Protocol") is a helpful tool to help with managing multi-jurisdictional class actions and should be expressly recognized in the *CPA*. There should be a statutory requirement on class counsel to utilize the CBA database and to add new class proceedings to the database once an originating process has been filed.

The CBA Protocol should be revised to allow judges to speak to each other about cases commenced in multiple jurisdictions without requiring the consent of all parties to all actions. As the CBA Protocol is currently drafted, if any one counsel objects to the use of the protocol (as has happened in our experience), a contested motion is required to resolve the issue. This is too time-consuming given the public interest in having judges coordinate cases and managing scarce judicial resources.

Consistent with the CBA Protocol, there should be a coordinated multi-jurisdictional case management system, with one judge taking the lead for steps such as scheduling motions and establishing timelines in each of the actions issued in multiple jurisdictions.

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?

No. Courts should incentivize careful investigation and pleading, and decisions made with sound judgment, not cases that have been filed in an attempt to beat others to the courthouse. A first-to-file rule would not take into account the theory of the case, the progress counsel has made on the case, or the experience of counsel in prosecuting the case – all factors which have been found to be determinative in granting carriage.[10]

[10] *Mancinelli v. Barrick Gold Corp.*, 2016 ONCA 571.

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

We propose two amendments. First, carriage motions should be dealt with within 60 days of an action being commenced. Second, there should be no right of appeal from a carriage decision. These proposed amendments will allow carriage motions to be dealt with expeditiously and for the litigation to continue on to determine the merits of the proposed class proceeding.

Consultation Question 10: What is the appropriate process for appealing class action certification decisions?

Appeals of certification decision should lie directly to the Court of Appeal. Appeals to the Divisional Court only add to the costs and delays of certification since parties rarely let the Divisional Court have the last word – leave is usually sought to the Court of Appeal from the Divisional Court. No other jurisdiction in Canada has two different levels of appeal from certification within the province. This additional layer of appeal does nothing to advance the goals of the CPA and makes Ontario a less attractive jurisdiction in which to bring a class action.

If the plaintiff appeals from a denial of certification, there should be no leave requirement to appeal to the Court of Appeal. If a defendant appeals a grant of certification, it should be required to seek leave from the Court of Appeal. This also aligns with the general principles in Ontario where leave is required for interlocutory decisions (granting of certification) but not final decisions (denial of certification)[11] and is consistent with the process in Quebec.[12]

Consultation Question 11: What best practices would lead a case more efficiently through discoveries, to trial and ultimately to judgement? 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?

Aggregate damages should be the rule not the exception in class proceedings. Counsel should exercise propose methods for assessing aggregate damages and courts should encourage them to do this. On this point, Belobaba J. in *Ramdath v. George Brown* held:

> Aggregate damages are essential to the continuing viability of the class action. If all or part of the defendant's monetary liability to class members can be fairly and reasonably determined without proof by individual class members, then class action judges should do so routinely and without hesitation. Aggregate damage awards

[11] *Courts of Justice Act* R.S.O. 1990, c. C.43 at s. 6(1), s. 19(1).
[12] *Code of Civil Procedure* S.Q. 2014, Chapter 1 at art. 578.

> should be more the norm, than the exception. Otherwise, the potential of the class action for enhancing access to justice will not be realized.[13]

In cases that are bifurcated, appeals should only be heard following the resolution of all issues, instead of having appeals at each step along the way which only serves to cause more delay.

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?

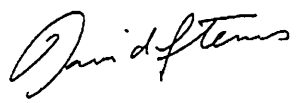
Yes. The obligation to report data should be mandatory in the *CPA* and should include reporting of all steps the litigation has gone through (including appeals and dates of all steps). In the case of settlement or judgment and distribution process and fee approval, the following should be reported: take-up rates, data on settlement/judgment amounts (including median and average distribution amounts) and information about other costs including class counsel fees and administration costs. This type of information will provide measurable data that can be tracked in order to determine the efficacy of the CPA and the class action mechanism.

.....

We recognize the importance of the work that the Commission is doing and thank you for the opportunity to provide these submissions. We look forward to reviewing your recommendations.

Please do not hesitate to contact us for any questions or inquiries regarding these submissions.

Yours very truly,
SOTOS LLP



David Sterns

c: Louis Sokolov, Jean-Marc Leclerc, Remissa Hirji

[13] *Ramdath v. George Brown College*, 2014 ONSC 3066 at para 1.