The U.S. Chamber Institute for Legal Reform (**ILR**) is pleased to make this submission in response to the call for public comment in relation to the Law Commission of Ontario (**LCO**) review of the Ontario *Class Proceedings Act* (**CPA**). ILR welcomes the LCO's study of the CPA and the need for reform in the area of class actions, with the benefit of over 25 years of experience under the current legal regime.

ILR is a not-for-profit public advocacy organisation affiliated with the U.S. Chamber of Commerce, the world's largest business federation representing the interests of more than three million businesses of all sizes and sectors, as well as local chambers, and industry associations. ILR's mission is to ensure a simple, efficient and fair legal system. Since ILR's founding in 1998, it has worked diligently to limit the incidence of litigation abuse in the U.S. courts and has been actively involved in legal reform efforts in the U.S. and abroad. Its members have a direct interest in how litigation is conducted in Canada, as many carry on business in Canada or trade with Canadians.

Given this level of trade and investment, U.S. businesses have a direct interest in the Canadian and Ontario legal systems. They and their subsidiary companies also have direct exposure to litigation in Canada and Ontario, and, in particular, to class actions. Many of these businesses, in fact, have been defendants in class actions in Ontario and elsewhere in Canada over the past 25 years.

The LCO's Consultation Paper, published in March 2018, sets out a series of consultation questions. For ease of reference, we have organized the submissions below, following our introductory comments, using those questions as headings. ILR does not have a specific position on some of the issues raised in the consultation paper, as noted below. Many of ILR's specific recommendations for reform set out below are also described in a paper released in October 2017, entitled *Recipe for Reform*: *A proposal for Improving Canadian Class Action Procedures*, a copy of which was previously provided to the LCO during its Stage 1 consultation process.[1]

[1] In March 2015, ILR also published a research paper entitled "*Painting an Unsettling Landscape: Canadian Class Actions 2011-2014",* in which ILR reviewed notable developments in Canadian class action law and highlighted key defence strategies for businesses facing class action litigation in Canada ("*Painting an Unsettling Landscape"*); available at: http://www.instituteforlegalreform.com/uploads/sites/1/2017_canada_vFINALWEB.pdf.

Introductory comments

Class actions were originally designed to benefit legitimately aggrieved individuals by allowing them to more easily join together and seek efficient legal relief. Nowadays, many class actions come with significant costs, particularly when class actions are commenced that have little or no merit but place substantial pressures on companies to settle the cases.[2] Aside from the obvious economic and reputational risks for businesses that find themselves defending class proceedings, the economic costs of class action litigation may ultimately be passed on to shareholders (in the form of reduced stock value),[3] consumers (in the form of increased prices and lessened or delayed innovation),[4] and employees (in the form of diverted time addressing litigation, and potentially salary or job cuts in extreme cases).[5] These consequences raise serious concerns that many aspects of and developments in the class action regimes in Canada impose unwarranted burdens on defendants and the courts, at the expense ultimately of shareholders, taxpayers and consumers, and support reform of the class action regimes in Canada to strike a fairer balance of the interests of all stakeholders.

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[2] At least some Canadian judges have recognized that most class actions never proceed to a trial on the merits because the stakes are too high for the parties to gamble on a desirable outcome, and the process creates significant risk that an innocent defendant will be obliged to join the settlement to avoid the risk of tremendous damages that a case on the merits entails: see *Sun-Rype Products Ltd. v Archer Daniels Midland Co.,* 2010 BCSC 992 at para 18.

[3] See "*Economic Consequences: The Real Costs of U.S. Securities Class Action Litigation",* (U.S. Chamber Institute for Legal Reform 2014).

[4] See Giovanna Roccamo, *"Medical Implants and Other Health Care Products: Theories of Liability and Modern Trends"* (1994) 16 Advoc. Q. 421; Steven Garber, *"Product Liability, Punitive Damages, Business Decision and Economic Outcomes"* (1998) Wis. L Rev. 237; Steven Garber, "*Product Liability and the Economics of Pharmaceuticals and Medical Devices"* (Santa Monica: Rand Institute for Civil Justice, 1993); Richard Manning, *"Changing Rules in Tort Law and the Market for Childhood Vaccines"* (1994) 37 J.L. & Econ. 247; Richard Manning *"Is the Insurance Aspect of Producer Liability Valued by Consumers? Liability Changes and Childhood Vaccine Consumption"* (1996) 13 J. Risk Uncertainty 37.

[5] See *Warner v Smith & Nephew Inc.,* 2016 ABCA 223 at para 72 (minority decision): "Notwithstanding the accepted advantages of class proceedings, they do impose a cost on the economy. Inappropriate class proceedings can increase the cost of goods, discourage innovation, and distract manufacturers from more productive activities"; *Player v Janssen-Ortho Inc.,* et. al., 2014 BCSC 1122 at para 184: "Upon certification public notices stating that the drug is the subject of a class action and alleging the drug is unsafe and can cause death in ordinary use is likely to alarm anyone who is using or perhaps even prescribing fentanyl….if the evidence is insufficient to support the action then the consequences associated with involvement in an extensive and expensive class action are very serious".

A consistently stated goal of class actions is access to justice. The Supreme Court of Canada has expressly stated that "access to justice" requires access to just results, not simply access to the legal process for its own sake.[6] While many writers in this area focus their remarks on the importance of substantive justice for claimants (class members), some have emphasized the obvious—that defendants, as well as plaintiffs, are entitled to access to justice; in other words, access to just outcomes,[7] whether the outcomes come in the form of a final judgment or a settlement. However, many aspects of the class actions regime, including low certification standards, asymmetrical certification appeal rights (including the ability of plaintiffs to reframe their case for certification on appeal), a sometimes unbalanced application of the loser pays costs regime, and the increasing availability of third party litigation funding, raise questions about whether class actions fairly achieve substantive access to justice objectives, properly understood.

As this submission will describe in more detail, specific reforms are needed to achieve the overarching goals of: a) discouraging the commencement of frivolous, meritless, or overly broad class proceedings; b) encouraging the timely and fair resolution or adjudication of class proceedings; and c) ensuring that the costs of class action litigation are fairly distributed as between plaintiffs, defendants, and others (e.g., third party litigation funders) with interests in the litigation. Accordingly, this submission proposes procedural reforms that address certification standards; appeals; overlapping cases; tolling of limitations; third party litigation funding transparency; and several other topics. In sum, they are to:

1. Add a merits assessment as a criterion for class certification.

2. Require plaintiffs to demonstrate by evidentiary proof that the certification criteria have been met on a balance of probabilities.

3. Require judges to consider management of individual cases instead of certifying a class action where the number of potential claimants is small.

4. Establish symmetrical appeal rights.

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[6] *AIC Limited v Fischer,* 2013 SCC 69 at para 56. See also Trial Lawyers Association of British Columbia v. Attorney General of British Columbia, 2014 SCC 59 at para 47, where it is noted that burdens that prevent litigants from bringing frivolous claims will not be perceived as unduly interfering with access to justice, and may in fact increase efficiency and overall access.

[7] *2038742 Ontario Limited v Quiznos Canada Restaurant Corp.,* 2010 ONSC 5390 at paras 17-18. *See also* The Honorable Frank Iacobucci, *"What is access to justice in the context of class actions?"* in Jasminka Kalajdzic, ed. Accessing Justice: Appraising Class Actions Ten Years After *Dutton, Hollick & Rumley,* 28 (LexisNexis Canada, 2011).

5. Preclude plaintiffs from amending class definitions and common issues on appeal.

6. Adopt provisions to address overlapping class proceedings in multiple provinces.

7. Require that the costs of notice of certification be borne by the plaintiff by default.

8. Codify transparency and other requirements for third party litigation funding.

9. Provide that tolling of limitation periods commences only when the claim is certified, but is retroactive to the date the claim commenced.

10. Toll limitation periods for defendants' contribution and indemnity claims from the date the class members' claims are tolled until the date when the identities of class members can be discovered.

11. Provide for automatic dismissal of class proceedings for want of prosecution.

12. Permit defendants to make offers to settle the claims of one or a sub-group of class members at any time post-certification.

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

Recommendation: Provide for automatic dismissal of class proceedings for want of prosecution.

The *Rules of Civil Procedure* (including the proportionality principles embedded therein) and the case management process in class actions in Ontario seem to provide adequate means to bring a class action to trial within a reasonable period of time where the parties and court collectively wish to do so. What might be perceived by some to be (and sometimes are) unreasonable delays most often occur where class counsel does not wish to move the case forward quickly (whether due to other competing time commitments, a desire to let the litigation mature in other venues or for other strategic reasons), or the parties have chosen to move towards resolution that requires complex negotiations, sometimes in multiple jurisdictions.

Class proceedings are often both factually and legally complex. As such, in many cases they inherently require more time to prosecute than ordinary civil actions for a variety of reasons. However, many class proceedings in Ontario are commenced without any apparent intent to proceed with the class action.

As a result, many defendants are exposed to class proceedings in which a statement of claim has been served but no other steps have been taken to advance the action. Such cases may languish for years. Class proceedings that are started but dormant may have

significant negative effects for defendants including the need to disclose the litigation in financial reports and/or auditor's statements; negative reputational impacts; decreased shareholder value; and the substantial costs associated with preservation of documents and records related to the litigation. The defendant and other stakeholders (e.g., shareholders) are left to bear these negative effects[8] unless the defendant is prepared to incur the time and expense (and potentially more adverse publicity) of moving what it perceives to be a frivolous class action forward itself, and ultimately bringing a motion for dismissal for delay when the plaintiff does not meet the case management judge's deadlines.[9]

The CPA should provide effective mechanisms to ensure that class proceedings that are not seriously being prosecuted by the representative plaintiffs are dismissed without the need for costly actions by the defendant. The most straightforward approach would be the enactment of specific provisions to provide that a class proceeding will be automatically dismissed for delay by the case management judge on the second anniversary of the commencement of the action, unless one of the following events occurs before then: 1) a certification motion record is served and the plaintiffs' counsel certifies that it is complete; 2) the parties agree to a timetable for service of the certification motion record; or 3) the case management judge orders that the action should be permitted to continue and sets a timetable for service of the certification motion record.

To the extent that there are concerns about the interests of potential class members (other than the representative plaintiff) who may be relying on the existence of the class proceeding as tolling limitation periods, the amendments could also provide that class counsel must publish notice of the administrative dismissal of the action within two weeks of same by posting a notice and a copy of the order on class counsel's website and mailing copies directly to any putative class members that have contacted or are known to class counsel.

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[8] See *Warner v Smith & Nephew Inc.,* 2016 ABCA 223 at para 72.

[9] See for example *Hafichuk-Walking et. al. v BCE Inc. et. al.,* 2016 MBCA 32, where class counsel commenced a proposed national class action in Saskatchewan in 2004 against almost all of the Canadian wireless telecommunications companies with regard to system access fees. The same action was then filed by the same class counsel in eight other jurisdictions with similar claims and overlapping class members. The Manitoba Court of Appeal concluded that class counsel never had the intention to pursue the claims filed elsewhere than Saskatchewan, which remained "dormant for 10 years in the pleadings stage…until the (defendants) successfully moved to have the proceedings unconditionally stayed by the motion judge as an abuse of process."

Question 2: How should settlement distribution processes be improved?

Recommendation: No legislative reform is currently required in connection with settlement distribution.

ILR wishes to comment on two assumptions that appear to animate this consultation. First, it is not always the case that "class actions must provide access to compensation to class members." While in some cases it will be appropriate for at least some class members to receive compensation, there are other actions in which the most just outcome is for only some or none of the class members to receive compensation, either because the defendants are not legally liable for the losses alleged, or because some or all class members have not in fact experienced a loss.

Second, in the same vein, supposedly low settlement take-up rates in some cases are not necessarily evidence that a particular class action did not provide appropriate substantive outcomes to class members. In many cases, low uptake rates result from overly broad class definitions that include thousands of people with no legal basis for a claim against the defendants. In other cases, class members may have no interest in pursuing compensation for the alleged wrongs claimed (because the alleged harm is *de minimis*, because the class members do not believe the defendants engaged in any wrongdoing, or because they are satisfied with a remedial program already put in place by the defendants).

Based on experience to date, we have no reason to believe that any supposed lack of notice or overly complicated claims processes deter class members from participating in settlements. The courts are well equipped to determine what notice and claims processes are appropriate, and imposing more robust notice programs or different claims procedures across the board would be unlikely to improve take-up rates, but would impose additional costs that could unjustifiably increase settlement values or impede reasonable settlements.

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

Recommendation: Retain the two-way costs rule for class proceedings.

Ontario should retain the two-way costs rule for class actions, to continue to help discourage class actions that are meritless or wholly disproportionate to any merit there may be in a small number of claims.

At the time the CPA was introduced, it was contemplated that there should be some statutory mechanism to discourage frivolous class actions or so-called "strike suits". As noted in the Consultation Paper, although the Legislature did not implement a merits test at certification, the two-way costs rule was intended, in part, to assist in discouraging meritless class proceedings.

Alone, however, the two-way cost rule has not fully achieved the objective of discouraging meritless cases. Our experience has been that some class counsel nevertheless commence proposed class proceedings that are properly regarded as "strike suits," which have little to no factual or legal merit (or are simply not suitable for class treatment), in the hopes of extracting a settlement.

The increasing availability of third party litigation funding potentially exacerbates this problem. The two-way costs rule likely poses less of an economic threat to third party funders, who can spread the risks of adverse costs award across a portfolio of cases. Accordingly, something more than the ordinary two-way costs rule is required to address the "strike suit" problem. Therefore, while recommending that the two-way costs rule be maintained in Ontario for class actions, we are also recommending (in section 5 below), changes to the certification test that will allow for an early assessment of the merits of the case.

Recommendation: Codify transparency and other requirements in relation to third party litigation funding.

Over the last decade, plaintiffs and their law firms have increasingly turned to third party litigation funders who have no connection to the dispute to finance class action litigation.[10] Third-party litigation funding (TPLF) is the practice of investing in a lawsuit in exchange for a percentage or portion of the settlement or judgment if the case results in a recovery for the plaintiffs. Although the CPA does not currently address the issue of private third party litigation funding (TPLF), such funding arrangements have been approved by provincial courts in several class proceedings. In doing so, courts have ruled that TPLF arrangements are not per se champertous or illegal, although several lower courts have ruled that they must be promptly disclosed to and approved by the court, and have set forth requirements for court approval including notice of the motion for approval to the defendant.[11]

TPLF is becoming more common, but the rules with respect to them remain unsettled. While a limited number of case management judges in Ontario have called for disclosure of the funding agreement to the defendants as well, there is no appellate

[10] Bentham IMF. *"Litigation Funding Roundtable: The Canadian Perspective"* (2016) available at https://www.benthamimf.ca/docs/default-source/default-document-library/white_paper.pdf?sfvrsn=4.

[11] *Painting an Unsettling Landscape,* supra at pp. 34-35. For the most recent statement in Ontario regarding the requirements for court approval of TPLF, see *Houle v St Jude Medical, Inc et al.,* 2017 ONSC 5129 (under appeal). However, there are no appeal court decisions in Ontario on these requirements as yet.

authority on this issue and not all courts in Canada have taken that approach.[12] One judge in Ontario recently indicated that there could be cases where the defendants should not have full access to the funding agreement.[13] At least a handful of TPLF arrangements have been approved by courts in Canada on an *ex parte* basis, without any notice or disclosure to the defendants, or approved on the basis of a sealed record. In these cases, the courts have been forced to make decisions on the appropriateness of the proposed TPLF arrangements without the benefit of any submissions from the defendants, whose interests are also clearly affected.[14]

Funding, if not closely policed, can create negative incentives in class actions to file cases of dubious merit but with the potential for huge returns; to prolong litigation and drive up settlement values[15]; and to cede control of the litigation from the plaintiffs.[16] Reforms should be made to the CPA, to provide clear rules and restrictions on its use, and procedures to review compliance with the rules.

In particular, the legislation should contain safeguards that discourage third-party funders from "stirring up" class actions of dubious merit. For instance, a third party funder might be incentivized to fund a class proceeding of questionable or even no merit, likely in exchange for the right to claim a higher proportion of an award or settlement, with the expectation that extraneous pressures will force defendants to

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[12] *Schneider v Royal Crown Gold Reserve Inc*, 2016 SKQB 278 (CanLII).

[13] *Berg v. Canadian Hockey League, et al.,* 2017 ONSC 2608 (CanLII) at paras. 15-22; see also reference to "with appropriate redactions" in *Houle v St Jude Medical, Inc et al.,* 2017 ONSC 5129 at para. 74.

[14] *Roth v. Alberta (Minister of Human Resources and Employment)*, 2005 ABQB 505; *Hayes v. City of Saint John* (April 19, 2016) (SCJ-533-2013) (N.B.Q.B.); *Schneider*, supra.

[15] https://www.wsj.com/articles/lawsuit-funding-long-hidden-in-the-shadows-faces-calls-for-more-sunlight-1521633600.

[16] ILR comments to the Victoria Law Reform Commission's Consultation on Litigation Funding and Group Proceedings (2017-2018), http://www.lawreform.vic.gov.au/sites/default/files/Submission%2019_US%20Chamber%20Institute%20for%20Legal%20Reform_29-09-17.pdf; see also *"Before the Flood: An Outline of Oversight Options for Third Party Litigation Funding in England & Wales"*, (April 2016), available at: http://www.instituteforlegalreform.com/research/before-the-flood-an-outline-of-oversight-options-for-third-party-litigation-funding-in-england--wales.

settle.[17] To that end the rules should ensure that successful defendants are able to recover their costs from the funders in funded actions.

Furthermore, the recovery expectations of third-party funders may drive up the costs of resolving cases, or become an impediment to early resolution. At present funders, unlike lawyers, owe no fiduciary duties to the claimants in their cases. It is critical that funders be charged with avoiding conflicts of interest and permitting plaintiffs to control decision making over issues such as when to settle and for how much.

To date, TPLF arrangements have been evaluated and approved on a case-by-case basis by the courts. Given the risk of abuse of TPLF arrangements, there is a clear need for both court oversight and transparency of agreements to all parties.[18] In light of the experience to date, some basic criteria for the approval of TPLF should be codified in the CPA, including at a minimum that:

a. funding arrangements should be promptly disclosed to both the court and defendants, and cannot be the subject of a claim for privilege;

b. the court must approve the funding agreement in advance;

c. the court must be satisfied that the funder did not initiate and will not be controlling the litigation (including settlement discussions);

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

e. the funder should be liable for an adverse costs award against the representative plaintiff, and must be financially able to satisfy an adverse costs award in the litigation

[17] See Lisa Rickard and Mark Behrens*, "Transparency needed as third-party litigation funding enters the mainstream"* (IADC Committee Newsletter 2016), (noting that while proponents of TPLF assert that the practice promotes access to justice, the practice can fuel the filing of weak or meritless claims. "Funders are willing to speculate on such cases if the case will prove cheaper for a business to settle than to spend exorbitant sums to litigate, even if the business has valid defenses").

[18] See *"Third Party Litigation Funding (TPLF)"* (U.S. Chamber Institute for Legal Reform, 2016); Lisa Rickard and Mark Behrens also note that courts need to know about the presence of a third party in the litigation to determine how to impose sanctions or other costs for misconduct, if necessary.

f. any compensation to be provided to the funder under the arrangement must be fair and reasonable having regard for the objectives of the class proceedings legislation;

g. the representative plaintiff must have had independent legal advice on the counsel retainer and third party funding agreement; and

h. to the extent that confidential information may be provided to the funder over the course of the litigation, the funder must keep the information confidential and be subject to the same confidentiality rules and orders as the representative plaintiff.

Class proceedings legislation should also provide mechanisms for a successful defendant to enforce a costs award directly against any third party litigation funder. Generally, only the representative plaintiff(s) are liable to pay a costs award made in favour of a defendant, in provinces where costs are available in class proceedings.[19] In practice, many representative plaintiffs are indemnified by class counsel or a third-party funder against the risk of an adverse costs award, as few are in a position to bear the risk of an adverse costs award in complex litigation themselves. The defendant, however, may not have any right to enforce a costs award directly against a person that has indemnified the representative plaintiff.

A successful defendant may therefore find itself in the unenviable position of trying to enforce a costs award against an individual representative plaintiff, possibly through insolvency proceedings that may have negative impacts on that person beyond just the costs award, in order to ultimately recover the costs award from the indemnitor. Even in provinces that have a "loser pays" costs rule for class actions, that rule loses the salutary effect of discouraging meritless or otherwise unwarranted class actions unless the indemnitor actually makes decisions on whether to indemnify based on the merits of the case (which some may not, as discussed above).

There is some precedent for a direct right of action in Ontario, where some class actions are funded by a Class Proceedings Fund established by statute to provide indemnity for disbursements incurred by class counsel, and to assume responsibility to pay any adverse cost award made against a representative plaintiff in cases that it has approved for disbursement funding. Although the CPA provides that cost awards in favour of a defendant are enforceable only against the representative plaintiff, the *Law Society Act*[20] provides a direct right of action by the defendant against the Class Proceedings Fund

[19] *Painting an Unsettling Landscape,* supra at p. 30.

[20] R.S.O. 1990, c. L.8.

in actions that it funds. The same right should be introduced as against third-party litigation funders, who are no differently situated than the Class Proceedings Fund in this respect.

Class proceedings legislation should also be amended to provide that a defendant may obtain an order for security for costs as against a third-party litigation funder, where the funder (rather than the representative plaintiff) meets any of the criteria set out in the provincial rules of court, such as where the funder is located outside of the jurisdiction.[21]

Recommendation: Require that the costs of notice of certification of the class action be borne by the plaintiff by default.

The CPA currently provides that the court may make any order it considers appropriate concerning costs of various notices required to be given in a class action, including the notice of certification of the class action, and may apportion such costs among the parties.[22] It does not say that a defendant who has not yet been found liable in a class action should pay for the costs of the certification notice, and yet defendants have often been ordered to do so when an action has been certified.[23] In essence, the defendant has been required to pay for the "privilege" of being sued, and it is unclear whether those costs would be recoverable under the two-way costs regime if the defendant was later successful in defending the lawsuit.

The unfairness of these decisions is obvious. Class action legislation should be amended to expressly provide that the costs of the certification notice, and any other notice to class members in advance of a decision in their favour on the merits, should, by default, be borne by the representative plaintiff.

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

ILR does not take a position on most of the questions raised under this heading. On the whole, the current procedure and test for settlement approval that has developed at common law properly enables the court to determine whether a proposed settlement is fair and reasonable.

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[21] See for example, R.R.O. 1990, Reg. 194: *Rules of Civil Procedure*, Rule 56.01(1).

[22] *Class Proceedings Act, 1992,* S.O. 1992, c. 6, s. 22(1).

[23] See *Crisante v DePuy Orthopaedics,* 2013 ONSC 5186 at para 63; *Boulanger v Johnson & Johnson Corp.,* [2007] O.J. No. 2766 at para 5; *Endean v Canadian Red Cross Society,* [1997] B.C.J. No. 1209 (B.C.S.C.) at para 71, rev'd in part on other grounds [1998] B.C.J. No. 724 (B.C.C.A).

Question 5: Is the current approach to certification under section 5 of the CPA appropriate?

For the reasons noted in our introductory remarks, low certification standards and evidentiary thresholds are areas of significant concern and call for the reforms described below.

Recommendation: Add a merits assessment to the class certification criterion, requiring a reasonable possibility of success.

A putative class action plaintiff should be required to make a modest showing that the proposed class action has some merit at the certification stage. Based on positive experience with the leave requirement for secondary market securities class actions in the Ontario *Securities Act*, the threshold test for certification of class actions of all types should include a requirement that "there is a reasonable possibility that the action will be resolved at trial in favour of the class."

The Supreme Court of Canada has affirmed that, under the existing class action legislation, "the threshold [for class certification] is a low one" and that the court is not permitted to consider the merits of the plaintiffs' claims when deciding whether to certify a proposed class action.[24]

However, the lower the certification threshold, the higher the risk of meritless and extortionate class actions being brought. The goal of such actions is to leverage an unjust settlement using the pressures to settle that a class action brings to bear on companies regardless of the merit of the claim. While class actions are proceeding to common issues trials in Canada with more frequency,[25] it remains the case that most

[24] *Painting an Unsettling Landscape,* supra at p. 1 and 16. For a more recent example of the application of these principles in Canada, see *Godfrey v. Sony Corporation*, 2017 BCCA 302, where the British Columbia Court of Appeal dismissed an appeal from an order certifying a competition class action including both direct and indirect purchasers, based on the plaintiff's evidence that he had a plausible method to demonstrate that an alleged overcharge reached the indirect purchaser level of the distribution channel, but not each individual within that level.

[25] *Painting an Unsettling Landscape*, supra at pages 23 - 25. While over 100 common issues trials have taken place across the country, the vast majority have been in Quebec, the only civil code jurisdiction in Canada and the province that has had class action legislation the longest (since 1979). The Quebec class action trial against a number of tobacco companies, referred to in that paper, resulted in a $15-billion judgment, although the appeal of that decision remains under reserve; *Letourneau v. JTI MacDonald Corp et a*l, May 27, 2015. In another trial since that paper was written, the Quebec court dismissed an action against Abbott alleging failure to warn of risk in the use of a medicine: *Brousseau c Laboratoires Abbott ltée,* 2016 QCCS 5083.

class actions never reach a trial on the merits. Defendants come under considerable pressure to settle class actions for reasons extraneous to their merit, or on terms that are disproportionate to the merits of the actions. Factors contributing to settlement pressure include the size of potential damages exposure, the enormous economic costs of defending a class proceeding, and the reputational pressure from publicity, which is inherent in many class proceedings, regardless of their merits.[26]

Ontario has implemented a two-way costs system as a mechanism to try to discourage frivolous class actions.[27] However, no common law province has implemented any form of merits threshold in its certification criteria.[28] There are several reasons why the loser pays costs rule—in those provinces that have implemented it—is insufficient alone to address the risk of "strike suits" with little or no merit. First, with a low certification threshold, plaintiffs are unlikely to be deterred by the prospect of a costs award at the certification stage, because so many actions in which certification have been sought have ultimately been certified. Second, many class actions have received third-party funding (discussed further below), and the funder has taken on the plaintiff's exposure to the loser pays costs award. Third, so long as the overwhelming majority of certified actions ultimately settle, the prospect of an adverse costs award following a merits adjudication will not be as effective a deterrent.[29]

While recognizing that a certification motion is a procedural motion and that it precedes discovery, some analysis of the merits of a proposed class action should be mandated at the certification stage to weed out weak claims early. A proposed class action may be meritless either because it has no likely prospect of success on its facts, or because it is not suitable for class treatment, even though there may be some small group of individuals with viable claims against the defendant. A higher certification threshold is necessary to ensure that substantive justice is not sacrificed to the access to justice objectives of class proceedings legislation.

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[26] Canadian judges have recognized that most class actions never proceed to a trial on the merits. See *Sun-Rype Products Ltd. v Archer Daniels Midland Co.,* 2010 BCSC 992 at para 18 (commenting that "[t]he reason is that the stakes are too high for the parties to gamble on a desirable outcome. By the same token, however, the process creates significant risk that an innocent defendant will be obliged to join the settlement to avoid the risk of tremendous damages that a case on the merits entails").

[27] *Painting an Unsettling Landscape,* supra at p. 39.

[28] *Painting an Unsettling Landscape,* supra at pp.5-7. In Quebec, unlike other provinces, courts undertake some assessment of the merits of the named plaintiff's individual claim – *ibid*, at p. 12.

[29] Nonetheless, we note that the risk of strike suits is even higher in other provinces that have adopted a "no costs" regime for class proceedings, such as British Columbia.

Legislated certification criteria should be amended to include a preliminary merits assessment similar to the one conducted to obtain leave to pursue a secondary market misrepresentation claim under the securities legislation in Ontario and Quebec. Under that legislation, in order to obtain leave to pursue such an action, the court must be satisfied that there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.[30] This criterion is assessed on the basis of affidavits filed by both the plaintiff and the defendant and does not require any pre-certification discovery.[31] This leave requirement in securities legislation applies in addition to the usual two-way costs rule in Ontario.

Theratechnologies Inc. v 121851 Canada Inc.[32] and *Canadian Imperial Bank of Commerce v Green*[33] are two recent decisions of the Supreme Court of Canada considering this leave requirement and are instructive on why and how they could be applied generally to class actions. After noting the "depth of public concern" about entrepreneurial litigation and the necessity for measures to prevent "strike suits" in the securities class action context—that is, "meritless actions launched in order to coerce targeted defendants into unjust settlements"[34]—the Supreme Court held that the "[leave] threshold should be more than a 'speed bump'…. In other words, to promote the legislative objective of a robust deterrent screening mechanism so that cases without merit are prevented from proceeding, the threshold requires that there be a reasonable or realistic chance that the action will succeed".[35] In *Green,* the Supreme Court commented that the leave threshold

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[30] *Painting an Unsettling Landscape,* supra at pp. 20-21; also see *Theratechnologies Inc. v 121851 Canada Inc.,* 2015 SCC 18 at paras 33-36; *Mask v Silvercorp Metals Inc.,* 2016 ONCA 641 at paras 35 and 41.

[31] Courts have held that a putative plaintiff who is seeking leave to commence a secondary market liability action cannot obtain discovery of documents from the defendant before cross-examinations on the affidavits and before the leave motion has been decided. See for example, *Mask v Silvercorp Metals,* 2014 ONSC 4161, leave to appeal ref'd 2014 ONSC 4647.

[32] 2015 SCC 18 [*Theratechnologies*].

[33] 2015 SCC 60 [*Green*].

[34] *Green* at paras 67-69.

[35] *Theratechnologies* at para 38. See also Anthony Duggan, Jacob Ziegal, Jassmine Girgis, and David Feldman, *"The Statutory Claim for Secondary Market Misrepresentations after Theratechnologies and Green"* (Canadian Business Law Journal, 2017); *Goldsmith v National Bank of Canada,* 2015 ONSC 2746, aff'd 2016 CarswellOnt 249 (Ont. C.A.) at paras 8-12; *Mask v Silvercorp Metals Inc.,* 2016 ONCA 641 at paras 42-45. *Bradley v Eastern Platinum Ltd.,* 2016 ONSC 1903 at para 50 (noting that the motions judge must undertake "a reasoned consideration of the evidence to ensure that the action has some merit").

in the Ontario *Securities Act*[36] reflected a deliberate weighing of the interests of potential plaintiffs and defendants and, in turn, a balance between deterrence and compensation.[37]

Experience with securities class actions in Ontario to date indicates that the requirement for a modest merits assessment has not discouraged unduly the pursuit of claims with merit, or prevented class proceedings from being pursued by class counsel who believe that they have some merit. A 2017 NERA Economic Consulting study found that the number of securities class action lawsuits filed in Canada more than doubled in 2016 compared to the year before.[38]

There would be considerable benefit to requiring a putative class action plaintiff to make a modest showing that the proposed class action has some merit at the certification stage. Such a requirement would provide a mechanism to weed out proposed class actions that are doomed to fail if they proceed to trial and would help deter the commencement of such claims in the first place. It would also give a certification judge a more meaningful opportunity to narrow a putative class action by refining the proposed class definition and common issues to properly reflect what is really in issue, in those cases that have enough merit to warrant certification.

While summary judgment is becoming an increasingly useful tool in facilitating the efficient adjudication of some class actions on their merits,[39] summary judgment is not a proper substitute for a meaningful screening of proposed class actions at the certification stage. First, many judges will not entertain summary judgment motions prior to the certification hearing,[40] forcing defendants to incur the time and costs of the

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[36] R.S.O. 1990, c. S.5.

[37] *Green* at para 69.

[38] "Trends in Canadian Securities Class Actions: 2016 Update", *NERA Economic Consulting*, (February 22, 2017), available at http://www.nera.com/publications/archive/2017/trends-in-canadian-securities-class-actions-2016-update.html.

[39] *Painting an Unsettling Landscape,* supra at p. 26.

[40] Many Canadian courts have held that as a general rule, the certification motion should be the first procedural step in a class proceeding. See for example *Martin v AstraZeneca Pharmaceuticals,* [2009] O.J. No. 3847, where the court suggested that the general rule should be departed from only in "exceptional circumstances". The court noted that the cases where summary judgment motions have been permitted prior to certification "most commonly raised discrete issues of law that potentially affected the claims of all class members and, although not strictly binding on anyone other than the plaintiffs, were likely to have had the practical effect of leading to an abandonment of the claims of other class members, an early settlement or a narrowing of the issues to be tried".

certification motion even in cases that patently have little or no merit. Second, despite some case law suggesting that discovery is not a prerequisite for a summary judgment motion,[41] class counsel may well be allowed to proceed with the defendant's discovery before the summary judgment motion is heard, adding greatly to the delay and expense of the proceeding.

With an early merits assessment as part of certification, defendants would not need to bring expensive and lengthy summary judgment motions to dismiss unmeritorious claims, and potentially provide extensive pre-motion discovery. By way of example, in one recent pharmaceutical class action, the defendant was successful in dismissing the action prior to certification on the grounds that there was insufficient evidence of general causation; however, extensive documentary production occurred prior to the motion.[42]

Experience has shown that a class action is just as important and potentially problematic whether it relates to a secondary market securities transaction or any other area of law. The rationale in *Theratechnologies*[43] for the leave test applies equally to other types of class actions. Disposing of all types of class actions with little or no merit early in the case, before significant expense and inconvenience is incurred by all parties and the courts will promote and better balance the judicial economy, deterrence and access to justice objectives of class action legislation.

Recommendation: Impose an evidentiary burden on the plaintiff, requiring the plaintiff to affirmatively demonstrate by evidentiary proof that the certification criteria have been met on a balance of probabilities.

Presently, the CPA does not expressly address the evidentiary burden on a certification motion. The Supreme Court of Canada has affirmed that the evidentiary standard is low, requiring the plaintiff to only show "some basis in fact"—practically speaking, some basis in the admissible evidence—that each of the certification criteria (other than

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[41] See *Fehr v Sun Life,* 2014 ONSC 2183 at paras 24-25.

[42] *Wise v Abbott Laboratories Limited,* 2016 ONSC 7275 at para 9. In this case, the representative plaintiff brought a proposed class action against Abbott Laboratories alleging that AndroGel®, a testosterone replacement therapy, causes serious cardiovascular events. The court concluded that there was no genuine issue requiring a trial because there was insufficient evidence of general causation, which was a constituent element in all of the plaintiff's product liability claims. Significantly, the parties filed more than 11,000 pages of materials for the motion, including 22 expert reports from nine experts. There were six days of oral argument.

[43] Supra, footnote 31.

the criterion that the pleadings disclose a reasonable cause of action) is met.[44] At the certification stage, the Court is not required to resolve conflicting facts and evidence,[45] and as discussed above, must refrain from delving into the "merits" of the underlying claims.

At a minimum, the CPA should be amended to align the certification threshold with the framework set out by the United States Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*.[46] The plaintiff should be required to "affirmatively demonstrate compliance with" the certification criteria by evidentiary proof that the certification criteria have been met on a balance of probabilities (not just "some admissible evidence")—the burden of proof applied in most other civil proceedings. Additionally, the certification judge should be empowered to weigh and resolve conflicts in the evidence filed on a certification motion, to enable a "rigorous analysis" of the record to determine whether the certification criteria have been met.

The need for a higher evidentiary threshold is most palpable in cases involving issues of general causation or class-wide loss. In a trilogy of cases in the indirect purchaser context,[47] the Supreme Court of Canada held that a harm or loss-related issue should not be certified unless a plaintiff can adduce some credible and plausible evidence that there is a method by which impact can be proved on a class-wide basis.[48] This principle was applied in the product liability context, when the BC Court of Appeal set aside certification of a class action on the basis that the plaintiff had not provided evidence of a methodology to establish that the class as a whole had been affected or put at risk by the drug.[49] However, the methodology requirement has not been consistently applied or interpreted in subsequent decisions,[50] largely owing to the court's inability or reluctance to scrutinize expert evidence at the certification stage.

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[44] *Painting an Unsettling Landscape,* supra at pp. 1-2, 5.

[45] *Painting an Unsettling Landscape,* supra at p. 16.

[46] 564 U.S. 338 (2011), 131 S. Ct. 2541.

[47] *Pro-Sys Consultants Ltd. v Microsoft Corporation,* 2013 SCC 57; *Sun-Rype Products Limited v Archer Daniels Midland Company,* 2013 SCC 57; and *Infineon Technologies AG v Option Consommateurs,* 2013 SCC 59.

[48] *Pro-Sys Consultants Ltd. v Microsoft Corporation, supra* at paras. *115-118*.

[49] *Painting an Unsettling Landscape,* supra at p. 12.

[50] For example, in *Miller v. Merck Frosst Canada Ltd.,* 2015 BCCA 353, leave to appeal to SCC ref'd 2016 CanLII 20439 (SCC), the BC Court of Appeal agreed with the defendants that the plaintiffs had not "explicitly" set out how causation could be established on a class wide basis but found that,

As noted earlier, the certification motion is an important event with potential ramifications beyond just the motion itself. Certification of a class proceeding can have a significant economic and reputational impact on the defendant and other stakeholders. Certified class proceedings impose considerable burdens on the resource of parties and the court itself. The importance and costs of these proceedings dictate that the evidentiary threshold should be aligned, at a minimum, with the threshold used in the vast majority of other civil proceedings.

Recommendation: Require judges to consider case management of individual cases as an alternative to certifying a class action where there are a small number of potential claimants.

In certifying class actions, Canadian courts often conclude that a class proceeding would be manageable and would achieve the objectives of class actions once they have found that there is a significant common issue to be resolved.[51] However, that conclusion will only be tested when cases start to proceed through all stages of trial, including the individual issues stage, something that has rarely occurred to date.[52]

Currently, a class action may be certified with as few as two class members. Although cases involving small classes (fewer than 100 members) have been certified, these could in many cases be as or more easily handled with coordinated case management and discovery. Having cases coordinated within each province could help to address as yet unresolved jurisdiction, choice of law (limitation period) and enforcement issues. Nonetheless, plaintiffs' counsel have been disinclined to use any procedural vehicle other than class actions to litigate mass wrongs,[53] even when alternatives would seemingly be more efficient or cost-effective.[54]

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in the circumstances of that case, "a 'methodology' for proof of general causation at trial could be inferred"; see also *Batten v Boehringer Ingelheim (Canada) Ltd.,* 2017 ONSC 53 at para 199-201; *O'Brien v Bard Canada Inc.,* 2015 ONSC 2470 at paras 198-204.

[51] The leading case on the preferability question is discussed in *Painting an Unsettling Landscape*, supra at page 22.

[52] *Painting an Unsettling Landscape,* supra at p. 24. It is only where a case proceeds through all stages of trial "that the court and parties will finally see if class actions are truly manageable, and if the answers to common issues do in fact meaningfully advance individual claims, increase access to justice, and reduce the burden on judicial resources".

[53] See *O'Brien v Bard Canada Inc.,* 2015 ONSC 2470 at paras 230-232.

[54] See for example, *Hudson v Austin,* 2010 ONSC 2789.

A few Canadian judges have attempted to direct coordinated case management instead of proposed class proceedings where there are small numbers of claimants, but those decisions have been overturned by appellate courts, citing existing certification standards.[55] Legislative reform requiring the court to consider coordinated case management and discovery as an alternative to a class action, based simply on the nature of the case and their experience, would give the trial judges in the trenches more discretion to direct procedures that will lead to the timely and proportionate resolution of the claims of the putative class.[56]

Question 6: Are class actions meeting the objective of behaviour modification?

ILR has serious concerns with the foundational assumption of this question—namely that a purpose of class actions should be behavior modification and that the class action system actually deters future wrongdoing.[57] There is a substantial difference between theory and practice.

The claim that the treatment of class action liability generally deters wrongful conduct is flawed. The theory of general deterrence holds that when a decision maker believes that choosing lawful conduct will avoid significant costs and penalties that would attach to wrongful behavior, and make any wrongdoing uneconomic, the decision maker has an incentive to act lawfully.[58] Critical to this theory is the notion that the company is likely to pay if it acts wrongfully but not if it acts lawfully.

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[55] See for example, *Cavanaugh v. Grenville Christian College*, 2014 CanLII 7350; *Excalibur Special Opportunities LP v Schwartz Levitsky Feldman LLP,* 2016 ONCA 916 [*Excalibur*], leave to appeal to SCC ref'd 2017 CarswellOnt2638 (SCC).

[56] In *Excalibur,* the Ontario Court of Appeal held that the motion judge erred in finding that the preferable procedure criterion was not met because the joinder of ordinary claims was preferable to a class action, "which, although manageable would be and has shown itself to be more procedurally cumbersome and protracted than a regular action". The Ontario Court of Appeal held that there was no evidence before the motion judge that joinder was available as an alternative procedure and "that other class members would be prepared to assume the burdens, risks and responsibilities of commencing their own claims".

[57] See U.S. Chamber Institute for Legal Reform Comments submitted to the U.S. Consumer Financial Protection Bureau in Response to Notice of Proposed Rulemaking on Arbitration Agreements (Docket ID No. CFBP-2016-0020; RIN 3170-AA51), p. 57, (Aug. 22, 2016), available at: https://www.regulations.gov/document?D=CFPB-2016-0020-3941.

[58] See A. Mitchell Polinsky & Steven Shavell, *The Theory of Public Enforcement of Law*, in 1 Handbook of Law and Economics 403, 427-29 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

An indisputable characteristic of the class action system, however, is that it does not sort cases based on their underlying merits. For that reason, it cannot provide general deterrence. There is no reason to believe that settled cases are necessarily meritorious. It has long been recognized that defendants agree to pay settlements in class actions even when they have a strong chance of prevailing on the merits—either because the costs of defense are higher than the costs of settling or because the downside risk of a large adverse verdict (which would produce adverse publicity, brand damage, etc.).

In too many instances, the class action system fails to distinguish between meritorious and non-meritorious claims—and results in settlements for all cases that survive a motion to dismiss and class certification. For that reason, even a law-abiding company faces the real possibility that it will be sued in a class action and be forced to pay millions of dollars to settle the case rather than seek vindication in a risky trial. The deterrence argument therefore "inadequately accounts for the realities of how class litigation evolves."[59]

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

ILR takes no position on this issue.

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?

Recommendation: Adopt provisions similar to Saskatchewan regarding multi-jurisdiction class actions, to facilitate better co-ordination of overlapping cases in different provinces.

The problem of overlapping class proceedings in different provinces has vexed both plaintiffs and defendants throughout the history of class proceedings in Canada.[60] Given the limited jurisdiction of Canada's Federal Courts, most civil litigation must be brought in provincial superior courts. It is not uncommon for there to be multiple class actions commenced in different provinces concerning the same subject matter, seeking certification of proceedings with overlapping class definitions. Despite judicial criticism of some plaintiffs' counsel who tactically file overlapping proceedings across the

[59] Linda Mullenix, "*Ending Class Actions as We Know Them: Rethinking the American Class Action"*, 64 Emory L.J. 399, 416 (2014).

[60] *Painting an Unsettling Landscape,* supra at pp. 32-33.

country,[61] class action defendants are still often left fighting a battle on multiple fronts in the absence of clearer mechanisms for coordination.[62]

While the Canadian Bar Association (CBA) adopted a protocol for the settlement of multi-jurisdictional class actions,[63] and the Supreme Court of Canada recently confirmed that provincial superior court judges could physically sit together outside a particular judge's own jurisdiction, in order to conduct a settlement hearing in a multi-jurisdictional class action.[64] However**,** there is currently no protocol that would allow for coordination of overlapping class actions in multiple provinces, outside of the settlement context. This is left to the discretion of the individual judges in each province managing the parallel class actions, who may or may not have the same views of the matter.[65]

Alberta and Saskatchewan both have provisions in their class proceedings legislation to empower the court to certify a multi-jurisdictional class action (creating resident and non-resident subclasses as appropriate), or to stay a class proceeding in the province in favour of a multi-jurisdictional proceeding in another province.[66] Where there is a multi-jurisdictional class action underway in another province, these provisions expressly require the court to consider whether it would be preferable for the claims of some or all of the proposed class to be resolved in that other action. A judge in Ontario recently cited a Uniform Law Commission report that was the impetus for the Saskatchewan and Alberta provisions when considering whether to allow a multi-jurisdictional class action to proceed in Ontario,[67] and legislative reform to adopt similar provisions in Ontario (as well as in other provinces that do not have those provisions yet) should be

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[61] See *Hafichuk-Walkin et. al. v BCE Inc. et. al.,* 2016 MBCA 32; *Bancroft-Snell v Visa Canada Corporation,* 2015 ONSC 7275; *Cohen v LG Chem Ltd.,* 2015 QCCS 6463, *Option Consommateurs v Panasonic Corporation,* QCCS File numbers 500-06-00703-146 and 500-06-00704-144, 22 Dec 2015, unreported.

[62] *Painting an Unsettling Landscape,* supra at pp. 32-33.

[63] *Painting an Unsettling Landscape,* supra at p. 32.

[64] *Endean v British Columbia,* 2016 SCC 42.

[65] *Painting an Unsettling Landscape,* supra at p. 33. Although a CBA Task Force is working on a protocol for contested proceedings, the protocols are not legislation and may or may not be adopted by the relevant courts.

[66] *Class Proceedings Act,* SA 2003, c. C-16.5 at ss. 5(6)-(8) and 9.1; *The Class Actions Act, SS 2001,* c. C-12.01 at ss. 4 (re notice and right to appear), 6(2)-(3) and 6.1.

[67] *Babin v. Bayer Inc*, et al, 2017 ONSC 3200, at para. 34.

enacted to provide clear direction to the Ontario courts in the future and facilitate better and more efficient coordination of overlapping cases.

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

Case management judges are presently well-equipped to determine which of competing plaintiffs' firms or consortiums should take carriage of a proposed class proceeding, applying the common law framework that has developed on carriage motions.

Recommendation: Ontario should not adopt a "first to file" rule.

ILR strongly opposes the adoption of a "first to file" rule for class actions. This could only encourage the hasty filing of ill-conceived and poorly pleaded class proceedings in a "race to the courthouse steps" to obtain a carriage foothold. This cannot possibly benefit putative class members. Moreover, the procedural issues that result from the need to amend or restructure poorly-conceived actions create undue costs and delay for everyone.

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

Recommendation: Make appeal rights symmetrical, allowing defendants to appeal as of right.

In Ontario, the problems posed by low certification standards are compounded by asymmetrical appeal rights following a certification decision, allowing a plaintiff to appeal "as of right" while a defendant must first obtain leave to appeal.[68] Other provinces have symmetrical appeal rights, with the same appeal routes for both plaintiffs and defendants. In this regard, Ontario is an outlier. In Ontario, many of the defendants' applications for leave are denied, delaying, or preventing appellate consideration of issues important to defendants, while issues important to plaintiffs get an automatic review.

Given the importance of the certification motion, and the fact that so many cases settle after certification, certification is equally important to both sides and fairness demands that they should have the same rights of appeal. There is no principled reason for asymmetrical appeal rights, and the Ontario class action legislation should be amended to provide equal rights of appeal for both plaintiffs and defendants.

[68] *Class Proceedings Act, 1992,* SO 1992, c. 6 at ss. 30(1) and (2).

Recommendation: Preclude plaintiffs from materially amending class definition and common issues on appeal.

It has become increasingly common for class action plaintiffs who have been denied certification at first instance to substantially re-cast the proposed class action on appeal, usually by amending the proposed class definition and list of common issues. While appellate courts in Ontario have noted that raising entirely new issues on appeal is generally not acceptable practice, they seem to have given more latitude to plaintiff appellants to change their positions in class proceedings.[69] The Ontario Court of Appeal has commented that "class proceedings evolve as they work their way through the court system" and therefore, "there must be some latitude for consideration of issues not raised at first instance provided that the other party is afforded procedural fairness."[70]

Unfortunately, this practice encourages plaintiffs (especially where funded, and indemnified for costs) to use a shotgun approach at the certification stage, with little downside, knowing they can take a more moderate and focused approach on appeal, with the benefit of the certification judge's reasons. This certainly does not promote fairness or efficiency for the parties, or the certification judge for that matter. This practice also undermines the goal of judicial economy, as the appeal court is essentially called upon to engage in a *de novo* review of the certification criteria rather than apply the more limited standards of review ordinarily applicable to appeals.

Even in cases where a costs order is made in the court below, partial indemnity costs do not fully compensate the defendants for the wasted time and expense of the original motion.[71] Moreover, the defendants will also have been deprived of the opportunity to consider consenting to (or not opposing) the narrowed class and common issues, potentially avoiding altogether the costs, inconvenience, and judicial resources of an opposed certification motion.

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[69] See *Keatley Surveying Ltd. v Teranet,* 2015 ONCA 248 [*Keatley*] at paras 21-24; *Good v Toronto (Police Services Board),* 2016 ONCA 250 at paras 51-54; *Hodge v Neinstein,* 2017 ONCA 494 at paras 186-195.

[70] In *Keatley,* the defendant argued that the proposed class definition and common issues considered by the Divisional Court were materially different from those considered by the certification judge, and that by allowing the plaintiff to recast its case on appeal, the defendant was unfairly prejudiced. The Ontario Court of Appeal concluded that the Divisional Court did not err in permitting the proposed representative plaintiff to present a revised class definition and revised common issues to make it more suitable for certification.

[71] See for example, *Vester v Boston Scientific,* 2017 ONSC 2498, where the defendants were denied any meaningful costs relief despite the fact that the plaintiffs' certification motion failed as originally framed, and was granted only following an adjournment of the motion to permit the plaintiffs to obtain further evidence and essentially recast their case.

Legislative reform is appropriate to require the plaintiffs to (1) abandon their appeal if one has been brought, and return to the judge hearing the class certification motion, and (2) pay the defendants' partial indemnity costs of the original certification motion, if they wish to amend their proposed class definition or common issues, with adequate time for the defendants to consider and respond to the amendments. This modification would encourage more preparation and efficiency, result in greater access to justice (as costs are reduced) and a better use of court resources, and is fairer to defendants.

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

ILR does not take a position on this question specifically, but notes that adoption of the recommendations made elsewhere in this submission would address issues that tend to contribute to pre-trial delay.

Question 12: Other issues

ILR appreciates the invitation to make submissions on other issues not otherwise specifically raised by the Consultation Paper.

Recommendation: Amend limitation tolling provisions so that tolling commences only when the claim is certified, but is retroactive to the date the claim was commenced.

Provincial class proceedings legislation generally makes some provision for the tolling of statutory limitation periods for putative class members' claims. In some provinces, notably Ontario, New Brunswick, and Nova Scotia, these provisions do not clearly state whether that tolling begins with the mere issuance of a proposed class proceeding, or only when the proceeding is certified. In Ontario, the limitation period tolling provisions have been interpreted to mean that limitation periods are tolled in favour of class members from the commencement of the proceeding.[72] This interpretation removes an incentive for plaintiffs' counsel to move their cases forward. In practice, many uncertified class actions have been brought and then languished for many years.

[72] *Logan v Canada (Minister of Health)* (2004), 71 OR (3d) 451 (CA), cited with approval in *Canadian Imperial Bank of Commerce v Green*, 2015 SCC 60 at para 61. This interpretation of the Act has created an anomalous situation whereby dismissal of the certification motion does not end the tolling of the limitation period for class members other than the named plaintiff: see *Ragoonanan v Imperial Tobacco Canada Limited*, 2011 ONSC 6187. If the interpretation is truly what the government intended, then dismissal of the certification motion should be added to section 28 of the CPA as an event that ends tolling.

In Ontario and other provinces where the tolling provisions are not clear, class proceedings legislation should be amended to provide that limitation periods applicable to class members begin tolling only once the action is certified, retroactively to the date the claim was issued. Such provisions are already in place in some provinces,[73] and provide incentives for plaintiffs to diligently prosecute cases, while still providing some protection for putative class members.

Alternatively, the Ontario legislation could provide that the dismissal of the certification motion (and the expiration of any related appeal periods) will end the tolling of the limitation period. This, coupled with the administrative dismissal for delay rule suggested, in the discussion of Question 1 above (delay), would address the issue of inactive cases potentially tolling limitation periods indefinitely to the prejudice of defendants.

Recommendation: Toll limitation periods for defendants' claims for contribution and indemnity from the date the class members' claims are tolled until the date when the identities of class members and potential contributors can be discovered.

Class proceedings legislation does not expressly address the treatment of limitation periods for third party contribution and indemnity claims (or crossclaims) by defendants against others who may have contributed to class members' alleged losses. In some provinces including Ontario, there is a general two-year limitation period for the commencement of claims for contribution and indemnity.[74] In practice, proposed class proceedings sometimes take longer than two years to reach a certification hearing, and discovery and final resolution of the common issues may take several years longer than that. As a practical result, class action defendants are often in a position in which they have to decide whether to commence third party and cross claims against persons who contributed to the loss of every potential class member even before an action is certified.

Prior to the individual issues phase, a defendant in a class proceeding often does not know the identities of potential class members let alone have any information about the identities of other individuals whose conduct may have caused or contributed to the class member's alleged losses. Discovery of class members other than the representative plaintiff is generally not permitted during the common issues phase of the proceeding, so the defendants must await discovery during the individual issues phase to identify

[73] See for example, *Class Proceedings Act,* [RSBC 1996], c. 50 at s. 39.

[74] *Limitations Act, 2002,* S.O. 2002, c. 24, Sched. B at ss. 4, 5(1)(2) and 18. Its application in the class proceedings context has not been the subject of a reported decision.

class members and assess whether any third party or cross claims are appropriate or necessary.[75]

Accordingly, and for greater certainty, class proceedings legislation should be amended to make clear that limitation periods for defendants to bring claims for contribution and indemnity are tolled starting from the same point in time when class members' claims are tolled and continuing until after the determination of the common issues, individual class members identify themselves, and those individuals can be discovered on the identities of potential contributors.

Recommendation: Permit defendants to make offers to settle the claims of one or a sub-group of class members at any time post-certification.

While class proceedings legislation does not directly address how settlement offers must be made or communicated to class members, some judges have held that the defendant may only communicate a settlement offer to the representative plaintiff, and the representative plaintiff is not obligated to inform class members of the settlement offer if he or she decides it should not be accepted.[76]

Those decisions pose an obstacle to the early and fair settlement of class member claims where the defendant is prepared to settle the action with a subgroup of class members that does not include the representative plaintiff. In a pharmaceutical class action, for example, a defendant may be prepared to make an offer to settle the claims of class members who have experienced a specific complication after taking the medicine in issue. Where that offer does not include the representative plaintiff, he or she does not have to pass that offer along to the affected class members and would have little motivation to do so. This is not only unfair to defendants, but prevents class members with stronger claims from receiving compensation in a timely way.

Class proceedings legislation should be amended to allow a defendant to make an offer to settle only the claims of a subgroup of class members at any time after the action is certified, and to require a representative plaintiff to communicate such an offer to affected class members. A subgroup of class members should also be permitted to accept a settlement offer without the agreement of the representative plaintiff, subject to court approval.

[75] See supra at p. 7.

[76] *Berry v Pulley,* 2011 ONSC 1378 at paras 86-89.

Although there is no reason to believe that such amendments would lead to improper or abusive settlement offers, motions for directions would remain available to obtain the court's guidance or intervention if necessary.

Conclusion

The reforms suggested in this paper are designed to achieve just balance in class action procedures. In particular, stronger certification standards which place more of a burden on plaintiffs to justify class treatment will go a long way to corralling abusive class proceedings at the earliest practicable opportunity. Similarly, leveling the field for appeals, better managing cases with few plaintiffs and overlapping litigation, correlating tolling rules, and permitting dismissal as an administrative matter for failure to prosecute bring balance and order to these cases, which often involve such high stakes for defendants that they forego litigating with legitimate defenses to avoid even the remote risk of losing them.

It is also important to address third party litigation funding, which is increasingly taking hold as a mechanism to bring these cases and is virtually unregulated. At minimum, mandatory transparency of funding arrangements is in the interest of the courts and parties. Funders should not only be required to assume the risk of adverse costs, but should be made subject to direct actions from successful defendants who seek to recover them. These provisions can only be enforced if courts are aware of the arrangements.