

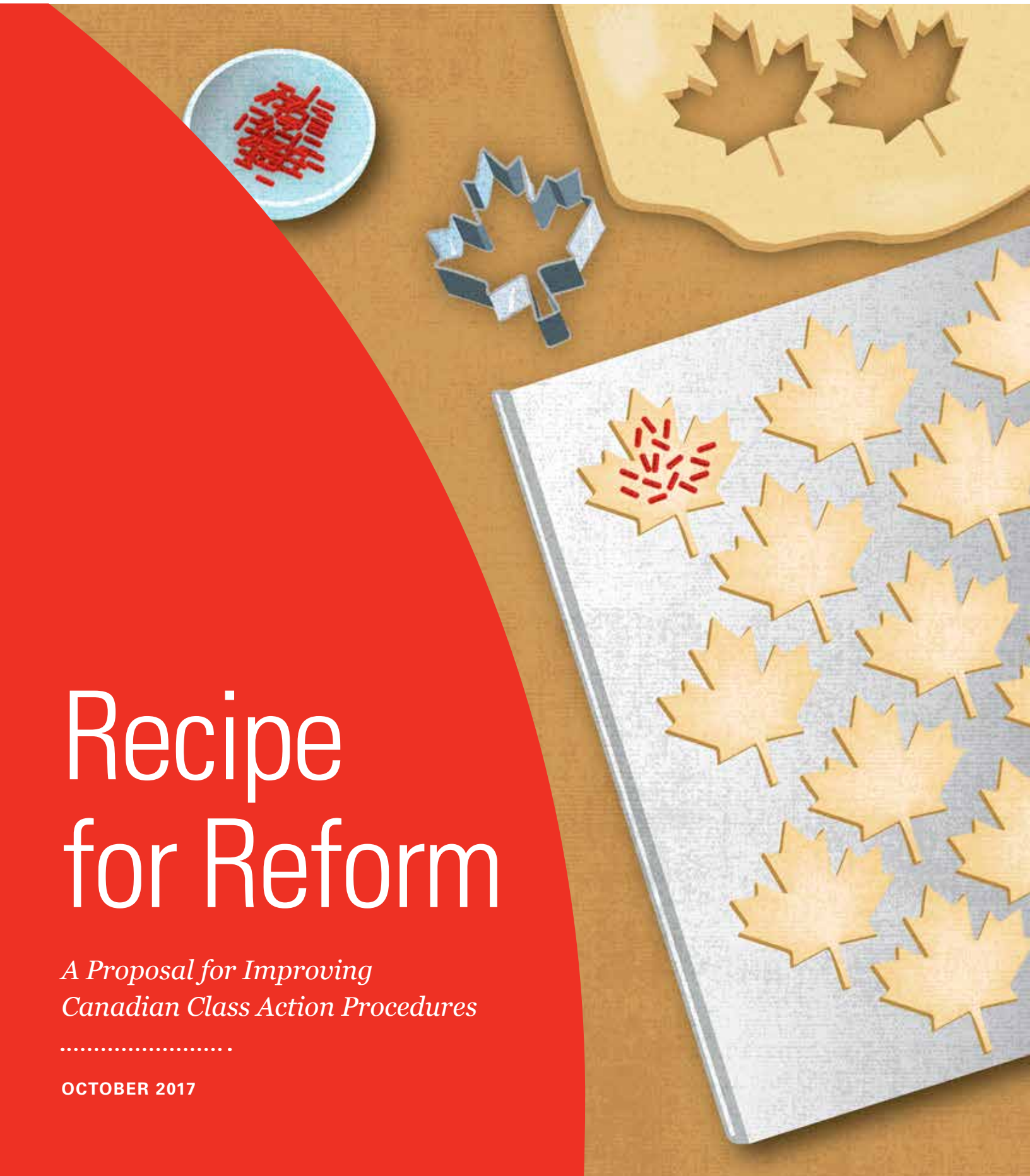


U.S. CHAMBER
Institute for Legal Reform

Recipe for Reform

*A Proposal for Improving
Canadian Class Action Procedures*

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OCTOBER 2017





U.S. CHAMBER
Institute for Legal Reform

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Introduction and Executive Summary

In recent years, class action litigation in Canada has become commonplace, growing or threatening to grow in frequency in many areas of law, resulting in an increasingly favorable environment for class actions and many substantial and high profile settlements.¹ While many accept that class actions will be part of the litigation landscape in Canada for the long term and can be an appropriate procedural vehicle in some cases, they also come with significant costs, particularly when class actions are commenced that have little or no merit but the pressures on companies to settle the cases are substantial.²

In addition to the economic and reputational risks for businesses that find themselves defending class proceedings, the economic costs of class action litigation may ultimately be felt by 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 potential 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 ultimate expense of shareholders, taxpayers and consumers.

The often stated objectives of class proceedings are to promote access to justice, judicial economy and behavior

modification. With respect to the first and perhaps most important of these objectives, 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 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 access to justice.

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To understand whether class proceedings legislation was “working as intended”, the Ontario government asked the Law Commission of Ontario (LCO) to engage in a comprehensive review of the Ontario *Class Proceedings Act, 1992* and experiences with that legislation since it came into force in 1993.⁸ Given Ontario’s status as a leader in this area, many thought that the LCO’s recommendations and any subsequent action taken by the Ontario government could influence reforms in other Canadian provinces and territories.

Unfortunately, the LCO review process was placed on an indefinite hold, with no meaningful activity on the review for more than two years. However, many troubling trends have continued apace in class proceedings in Ontario and other Canadian provinces. One judge in Quebec recently

went so far as to suggest that the Quebec legislature should reconsider the usefulness of the authorization (certification) step.⁹

There is now renewed interest in this issue, with the LCO announcing on September 22, 2017, that it was launching a project entitled “Class Actions: Objectives, Experience and Reforms”, with consultations expected to begin in late 2017 and a report to be released in late 2018.

As this paper will describe in more detail, specific reforms¹⁰ 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 among plaintiffs, defendants, and others with interests in the litigation.¹¹

Accordingly, this paper describes a dozen procedural reforms that address certification standards, appeals, overlapping cases, tolling of limitations, third party litigation funding transparency, and several other topics.

While these recommended reforms focus on the Ontario *Class Proceedings Act*, they are equally warranted in other provinces with similar provisions in their class action legislation. The recommended reforms are as follows:

1. Add a merits assessment as a criterion for class certification.
2. Require plaintiffs to demonstrate by evidentiary proof that the 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.
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 by default the costs of notice of certification be borne by the plaintiff.
8. Codify transparency and other requirements for third party litigation funding.
9. Provide that tolling of limitation period 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 a sub-group of class members at any time post-certification.

Reform Recommendation #1

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.¹²

The lower the certification threshold, the higher the risk of meritless and extortionate class actions being brought, with the goal of extracting unjust settlements. While class actions are proceeding to common issues trials in Canada with more frequency,¹³ it remains the case

that most 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 inherent reputational pressure from publicity surrounding many class proceedings.¹⁴

Some provinces, including Ontario, have implemented a “loser pays” costs system as a mechanism to try to discourage frivolous class actions.¹⁵ However, no common law province has implemented any form of merits threshold in its certification criteria.¹⁶ 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 has

“The lower the certification threshold, the higher the risk of meritless and extortionate class actions being brought, with the goal of extracting unjust settlements.”

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. Finally, 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.

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 in pursuit of the access to justice objectives of class proceedings legislation.

Legislated certification criteria should be amended to include a preliminary merits assessment similar to the one conducted 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.¹⁷ 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.¹⁸ This leave requirement in securities legislation applies in addition to the usual "loser pays" costs rule in Ontario.

*Theratechnologies Inc. v 121851 Canada Inc.*¹⁹ and *Canadian Imperial Bank of Commerce v Green*²⁰ 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"²¹—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".²² In *Green*, the Supreme Court commented that the leave threshold in the Ontario *Securities Act*²³ reflected a deliberate weighing of the interests of potential plaintiffs and defendants and, in turn, a balance between deterrence and compensation.²⁴

Experience with securities class actions in Ontario to date indicates that the requirement for a modest merits assessment has not discouraged 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.²⁵

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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,²⁶ 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,²⁷ forcing defendants to incur the time and costs of the certification motion, even in cases that have little or no merit. Second, despite some case law suggesting that discovery is not a prerequisite for a summary judgment motion,²⁸ class counsel may

well be allowed to proceed with 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.²⁹

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* 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 the access to justice objectives of class action legislation.

Reform Recommendation #2

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, Canadian class proceedings legislation 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 the criterion that the pleadings disclose a reasonable cause of action) is met.³⁰ At the certification stage, the Court is not required to resolve conflicting facts and evidence,³¹ and as discussed above, must refrain from delving into the “merits” of the underlying claims.

At a minimum, the legislation 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*.³² 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

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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,³³ 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 proven on a class-wide basis.³⁴ 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.³⁵

However, the methodology requirement has not been consistently applied or interpreted in subsequent decisions,³⁶ largely owing to the court’s inability or reluctance to scrutinize expert evidence at the certification stage.

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 resources 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.

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Reform Recommendation #3

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.³⁷ However, that conclusion will only be tested when cases start to proceed through all stages of trial, including the individual issues stage, which has rarely occurred to date.³⁸

Currently, a class action may be certified with as few as two class members. Although cases involving small classes (fewer than 100 members) can be certified, these cases could be 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,³⁹ even when alternatives would seemingly be more efficient or cost-effective.⁴⁰

“ *Having cases coordinated within each province could help to address as yet unresolved jurisdiction, choice of law (limitation period) and enforcement issues.* ”

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.⁴¹ 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 more discretion to direct procedures that will lead to the timely and proportionate resolution of the claims of the putative class.⁴²

Reform Recommendation #4

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.⁴³ 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 raised by 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.

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Reform Recommendation #5

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 an acceptable practice, they seem to have given more latitude to plaintiff appellants to change their positions in class proceedings.⁴⁴ 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”.⁴⁵

Unfortunately, this practice encourages plaintiffs (especially when 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 findings. 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.⁴⁶ Moreover, the defendants will also have been deprived of the opportunity

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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.

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, resulting in greater access to justice (as costs are reduced) and a better use of court resources, and is fairer to defendants.

Reform Recommendation #6

Adopt provisions similar to Saskatchewan regarding multi-jurisdiction class actions to facilitate better coordination 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.⁴⁷ 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 country,⁴⁸ class action defendants are still often left fighting a battle on multiple fronts in the absence of clearer mechanisms for coordination.⁴⁹

While the Canadian Bar Association (CBA) adopted a protocol for the settlement of multi-jurisdictional class actions,⁵⁰ 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,⁵¹ there

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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.⁵²

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.⁵³ 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,⁵⁴ and legislative reform to adopt similar provisions in Ontario (as well as in other provinces that do not have those provisions yet) should be enacted to provide clear direction to the Ontario courts in the future and facilitate better and more efficient coordination of overlapping cases.

Reform Recommendation #7

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

The Ontario class action legislation currently provides that the court may make any order it considers appropriate concerning the 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.⁵⁵ 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.⁵⁶ 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 “loser pays” 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.

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Reform Recommendation #8

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

Over the last decade, plaintiffs have increasingly turned to third party litigation funders who have no connection to the dispute to finance class action litigation.⁵⁷ Although Canadian class proceedings legislation 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 to the defendant of the motion for approval.⁵⁸

While Ontario courts on a number of occasions called for disclosure of the funding agreement to the defendants as well, not all courts in Canada have taken that approach,⁵⁹ and one judge in Ontario recently indicated that there could be cases where the defendants should not have full access to the funding agreement.⁶⁰ Since TPLF is becoming more common, the rules with respect to the practice remain unclear. 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; and to cede control of the litigation from

the plaintiffs. Reforms should be made to class action legislation, including Ontario's, 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 settle.⁶¹ 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. 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.⁶²

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.⁶³ In light of the experience to date, some basic criteria for the approval of TPLF should be codified in the class proceedings legislation, 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 be satisfied that the funder did not initiate and will not be controlling the litigation;
- c. The funding must be necessary to ensure access to justice in the circumstances of the particular case;
- d. The funder must be financially able to satisfy an adverse costs award in the litigation;
- e. 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;
- f. The representative plaintiff must have had independent legal advice on the counsel retainer and third party funding agreement; and
- g. 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 that has indemnified the representative plaintiff for any adverse costs award.

“ *Class proceedings legislation should also provide mechanisms for a successful defendant to enforce a costs award directly against any third party litigation funder that has indemnified the representative plaintiff for any adverse costs award.* **”**

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.⁶⁴ 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 Ontario’s *Class Proceedings Act* provides that cost awards in favour of a defendant are enforceable only against the representative plaintiff, the *Law Society Act*⁶⁵ provides a direct right of action by the defendant against the Class Proceedings Fund 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 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.⁶⁶

Reform Recommendation #9

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.⁶⁷ This interpretation removes an incentive for plaintiffs' counsel to move their cases

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forward. In practice, many uncertified class actions have been brought and then languished for several years.

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 provinces⁶⁸ and provide incentives for plaintiffs to diligently prosecute cases, while still offering 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 Recommendation #11, would address the issue of inactive cases potentially tolling limitation periods indefinitely to the prejudice of defendants.

Reform Recommendation #10

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 cross claims) 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.⁶⁹ 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 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 members' 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 class members and assess whether any third party or cross claims are appropriate or necessary.⁷⁰

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 based on the identities of potential contributors.

“ 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 members' alleged losses. ”

Reform Recommendation #11

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

The court rules in some provinces provide for the automatic dismissal by the court staff of civil proceedings for want of prosecution. Typically, such rules provide that an action will be automatically dismissed if it has not been set down for trial or otherwise resolved within a specified time period, unless the court orders otherwise or the parties consent. Despite the fact that a province's ordinary rules of court apply to class proceedings, as a matter of practice such administrative dismissal rules have never been applied to actions commenced under class proceedings legislation. In Ontario, the practice of exempting class proceedings from these rules was recently codified.⁷¹

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 effects⁷² 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.⁷³

“ 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. ”

Class proceedings statutes 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.

The amendments could also provide that class counsel must publish notice of the administrative dismissal of the action within two weeks of dismissal 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.

This process should allay any 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.

Reform Recommendation #12

Permit defendants to make offers to settle the claims of 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.⁷⁴

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 sub-group 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. When 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 the claims of a sub-group 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 sub-group of class members should also be permitted to accept a settlement offer without the agreement of the representative plaintiff, subject to court approval.

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

Under Canada's federal structure, the national government lacks Constitutional authority to enact a country-wide solution. Thus, any reform measures must be enacted on a province-by-province basis. As a leader in class action litigation, Ontario is well placed to lead in enacting sensible reforms that will better balance its class action regime.

The twelve reforms suggested in this paper are designed to achieve that balance. 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 possible 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. Otherwise, these cases often

involve such high stakes for defendants that they forego litigating with legitimate defenses to avoid even the remote risk of losing a case.

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.

For convenience, a summary chart of the proposed reforms can be found in the Appendix, with suggestions for specific modifications and amendments to enact them.

SUBJECT MATTER	CURRENT LEGISLATIVE PROVISION IN ONTARIO	RECOMMENDATION
<p>Certification</p>	<p>Class Proceedings Act, 1992, S.O. 1992, c. 6 5 (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if:</p> <ul style="list-style-type: none"> (a) the pleadings or the notice of application discloses a cause of action; (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant; (c) the claims or defences of the class members raise common issues; (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and (e) there is a representative plaintiff or defendant who, <ul style="list-style-type: none"> (i) would fairly and adequately represent the interests of the class; (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding; and (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members. 	<p>Add a merits assessment to the class certification criterion, requiring a “reasonable possibility of success” .</p> <p>Specifically, add to sub-section 5 (1) the following:</p> <p>(f) there is a reasonable possibility that the action will be resolved at trial in favour of the class.</p> <p><i>(Recommendation #1)</i></p>
<p>Evidentiary Burden</p>	<p>Class Proceedings Act, 1992, S.O. 1992, c. 6 No evidentiary burden is expressly stated—the Act has been interpreted by the courts to require only “some basis in the evidence”; the court will not weigh competing evidence even on the certification criteria.</p>	<p>Amend the Act to require that the plaintiff demonstrate that the certification requirements have been met by evidentiary proof on a balance of probabilities, and require the court to weigh competing evidence where relevant to the establishment of those requirements.</p> <p><i>(Recommendation #2)</i></p>
<p>Numerosity and Preferable Procedure</p>	<p>Class Proceedings Act, 1992, S.O. 1992, c. 6 5 (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if:</p> <ul style="list-style-type: none"> ... (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant; ... (d) a class proceeding would be the preferable procedure for the resolution of the common issues. 	<p>Amend the Act to require the certification motion judge to consider coordinated case management and discovery in individual cases, based on the nature of the case and their experience, as an alternative to certifying a class action where there are a small number of potential claimants.</p> <p><i>(Recommendation #3)</i></p>

SUBJECT MATTER	CURRENT LEGISLATIVE PROVISION IN ONTARIO	RECOMMENDATION
<p>Appeal Rights</p>	<p>Class Proceedings Act, 1992, S.O. 1992, c. 6 30 (1) A party may appeal to the Divisional Court from an order refusing to certify a proceeding as a class proceeding and from an order decertifying a proceeding. (2) A party may appeal to the Divisional Court from an order certifying a proceeding as a class proceeding, with leave of the Superior Court of Justice as provided in the rules of court.</p>	<p>Make appeal rights symmetrical, allowing a defendant to appeal as of right. <i>(Recommendation #4)</i></p>
<p>Amendment of Class Definition and Common to Appeal</p>	<p>Class Proceedings Act, 1992, S.O. 1992, c. 6 5 (4) The court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence. No provision addresses amendments on appeal.</p>	<p>Amend the Act to require a plaintiff to: (1) abandon any appeal if one has been brought, and return to the judge hearing the class certification motion for rehearing; and (2) pay the defendants' partial indemnity costs of the original certification motion, if the plaintiff wishes to amend the proposed class definition or common issues. <i>(Recommendation #5)</i></p>
<p>Multi-Jurisdictional Class Actions</p>	<p>Class Proceedings Act, 1992, S.O. 1992, c. 6 No provision expressly addresses multi-jurisdictional class actions.</p>	<p>Adopt provisions similar to Saskatchewan regarding multi-jurisdictional class actions: 6 (2) If a multi-jurisdictional class action, or a proposed multi-jurisdictional class action, has been commenced elsewhere in Canada that involves subject-matter that is the same as or similar to that of the action being considered pursuant to this section, the court shall determine whether it would be preferable for some or all of the claims or common issues raised by those claims of the proposed class members to be resolved in that class action. (3) For the purposes of making a determination pursuant to subsection (2), the court shall: (a) be guided by the following objectives: (i) ensuring that the interests of all of the parties in each of the relevant jurisdictions are given due consideration; (ii) ensuring that the ends of justice are served; (iii) avoiding, where possible, the risk of irreconcilable judgments; and (iv) promoting judicial economy. (b) consider all relevant factors, including the following: (i) the alleged basis of liability, including the applicable laws; (ii) the stage each of the actions has reached; (iii) the plan for the proposed multi-jurisdictional class action, including the viability of the plan and the capacity and resources for advancing the action on behalf of the proposed class;</p>

(iv) the location of the representative plaintiffs and class members in the various actions, including the ability of representative plaintiffs to participate in the actions and to represent the interests of the class members; and

(v) the location of evidence and witnesses.

6.1 (1) The court may make any order it considers appropriate in an application to certify a multi-jurisdictional class action, including the following:

- (a) an order certifying the action as a multi-jurisdictional class action if:
 - (i) the criteria set out in subsection 6 (1) have been satisfied; and
 - (ii) having regard to subsections 6 (2) and (3), the court determines that Saskatchewan is the appropriate venue for the multi-jurisdictional class action.

(b) an order refusing to certify the action if the court determines that it should proceed as a multi-jurisdictional class action in another jurisdiction;

(c) an order refusing to certify a portion of a proposed class if that portion of the class contains members who may be included in a pending or proposed class action in another jurisdiction.

(2) If the court certifies a multi-jurisdictional class action, the court may:

- (a) divide the class into resident and non-resident subclasses;
- (b) appoint a separate representative plaintiff for each subclass; and
- (c) specify the manner in which, and the time within which, members of each subclass may opt out of the action.

See also notice provisions in section 4.

(Recommendation #6)

Costs of Certification Notice

Class Proceedings Act, 1992, S.O. 1992, c. 6

22 (1) The court may make any order it considers appropriate as to the costs of any notice under section 17, 18 or 19, including an order apportioning costs among parties.

Amend the Act to require that the costs of notice of the certification of the action, and any other notice to the class in advance of a decision in its favour on the merits, be borne by the representative plaintiff by default.
(Recommendation #7)

SUBJECT MATTER	CURRENT LEGISLATIVE PROVISION IN ONTARIO	RECOMMENDATION
<p>Third Party Litigation Funding</p>	<p>Class Proceedings Act, 1992, S.O. 1992, c. 6 No provision expressly addresses third party litigation funding, although section 59.1 of the <i>Law Society Act</i> allows a representative plaintiff to apply for disbursements funding from the Class Proceedings Fund, subject to the limitations and conditions expressed therein and in related regulations.</p> <p>Law Society Act, R.S.O. 1990, c. L.8 59.4 (1) A defendant to a proceeding may apply to the board for payment from the Class Proceedings Fund in respect of a costs award made in the proceeding in the defendant's favour against a plaintiff who has received financial support from the Class Proceedings Fund in respect of the proceeding.</p>	<p>Codify transparency and other requirements in relation to third party litigation funding, such as the following:</p> <ul style="list-style-type: none"> (a) funding arrangements should be promptly disclosed to both the court and defendants, and cannot be the subject of a claim for privilege; (b) the court must be satisfied that the funder did not initiate and will not be controlling the litigation; (c) the funder must avoid conflicts of interest and permit plaintiffs to control decision making over issues that affect their interests, such as when to settle and for how much; (d) the funding must be necessary to ensure access to justice in the circumstances of the particular case; (e) if the funder gives an indemnity for costs, the defendant will have a direct right of action against the funder for any costs award in its favor, and the funder will provide security for costs if requested by the defendant; (f) the funder must be financially able to satisfy an adverse costs award in the litigation; (g) any compensation to be provided to the funder under the arrangement must be fair and reasonable having regard for the objectives of the class proceedings legislation; (h) the representative plaintiff must have had independent legal advice on the counsel retainer and third party funding agreement; and (i) 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. <p>(Recommendation #8)</p>
<p>Limitation Periods</p>	<p>Class Proceedings Act, 1992, S.O. 1992, c. 6 28 (1) Subject to subsection (2), any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the class proceeding and resumes running against the class member when:</p> <ul style="list-style-type: none"> (a) the member opts out of the class proceeding; (b) an amendment that has the effect of excluding the member from the class is made to the certification order; 	<p>Provide that limitation periods applicable to class members begin tolling only once the action is certified, retroactively to the date the claim was issued.</p> <p>(Recommendation #9)</p>

SUBJECT MATTER	CURRENT LEGISLATIVE PROVISION IN ONTARIO	RECOMMENDATION
	<p>(c) a decertification order is made under section 10;</p> <p>(d) the class proceeding is dismissed without an adjudication on the merits;</p> <p>(e) the class proceeding is abandoned or discontinued with the approval of the court; or</p> <p>(f) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise.</p>	
<p>Limitation Periods for Defendants' Claims for Contribution and Indemnity</p>	<p>Class Proceedings Act, 1992, S.O. 1992, c. 6 No provisions expressly address limitation periods for defendants' claims for contribution and indemnity.</p>	<p>Expressly provide that limitation periods for defendants' claims for contribution and indemnity are tolled until individual class members identify themselves and can be discovered on the identities of potential contributors. <i>(Recommendation #10)</i></p>
<p>Administrative Delay</p>	<p>R.R.O. 1990, Reg. 194: Rules of Civil Procedure 48.14 (1) Unless the court orders otherwise, the registrar shall dismiss an action for delay in either of the following circumstances, subject to subrules (4) to (8):</p> <ol style="list-style-type: none"> 1. The action has not been set down for trial or terminated by any means by the fifth anniversary of the commencement of the action. 2. The action was struck off a trial list and has not been restored to a trial list or otherwise terminated by any means by the second anniversary of being struck off. O. Reg. 170/14, s. 10; O. Reg. 487/16, s. 8 (1). <p><i>Exceptions</i></p> <p>(1.1) Subrule (1) does not apply to,</p> <p>...</p> <p>(b) actions under the <i>Class Proceedings Act, 1992</i>.</p>	<p>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:</p> <ol style="list-style-type: none"> (a) a certification motion record is served and the plaintiffs' counsel certifies that it is complete; (b) the parties agree to a timetable for service of the certification motion record; or (c) the case management judge orders that the action should be permitted to continue and sets a timetable for service of the certification motion record. <p>Further, 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. <i>(Recommendation #11)</i></p>
<p>Settlement</p>	<p>Class Proceedings Act, 1992, S.O. 1992, c. 6 29 (2) A settlement of a class proceeding is not binding unless approved by the court. (3) A settlement of a class proceeding that is approved by the court binds all class members.</p>	<p>Permit defendants to make offers to settle the claims of one or a sub-group of class members at any time post-certification and to require a representative plaintiff to communicate such an offer to affected class members. <i>(Recommendation #12)</i></p>

Endnotes

- 1 In March 2015, the U.S. Chamber Institute for Legal Reform (ILR) published a research paper entitled “Painting an Unsettling Landscape: Canadian Class Actions 2011-2014”, in which the U.S. Chamber 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”).
- 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”.
- 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).
- 8 Review of Class Actions in Ontario: Issues to be Considered, available at <http://www.lco-cdo.org/en/our-current-projects/class-actions/review-of-class-actions-in-ontario-issues-to-be-considered-by-the-law-commission-of-ontario/>.
- 9 *Charles v Boiron Canada Inc.*, 2016 QCCA 1716 (CanLII).

- 10 See Appendix.
- 11 Due to Canada's federal structure, any reform measures must be enacted on a province-by-province basis, by the legislature of each Canadian province and territory that has class proceedings legislation in place. While coordination between provinces is certainly desirable, it is generally felt that the federal government does not have constitutional authority to legislate a national solution.
- 12 *Painting an Unsettling Landscape*, note 1 *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.
- 13 *Painting an Unsettling Landscape*, note 1 *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 al*, 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 Itée*, 2016 QCCS 5083.
- 14 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").
- 15 *Painting an Unsettling Landscape*, note 1 *supra* at p. 39.
- 16 *Painting an Unsettling Landscape*, note 1 *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.
- 17 *Painting an Unsettling Landscape*, note 1 *supra* at pp. 20-21; see also *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.
- 18 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.
- 19 *Theratechnologies*, 2015 SCC 18.
- 20 *Green*, 2015 SCC 60.
- 21 *Green* at paras 67-69.
- 22 *Theratechnologies* at para 38. See also Anthony Duggan, Jacob Ziegal,, Jasmine 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").
- 23 R.S.O. 1990, c. S.5.
- 24 *Green* at para 69.

- 25 “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>.
- 26 *Painting an Unsettling Landscape*, note 1 *supra* at p. 26.
- 27 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”.
- 28 *See Fehr v Sun Life*, 2014 ONSC 2183 at paras 24-25.
- 29 *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.
- 30 *Painting an Unsettling Landscape*, note 1 *supra* at pp. 1-2, 5.
- 31 *Id.* at p.16
- 32 564 U.S. 338 (2011), 131 S. Ct. 2541.
- 33 *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.
- 34 *Pro-Sys Consultants Ltd. v Microsoft Corporation*, *supra* at paras. 115-118.
- 35 *Painting an Unsettling Landscape*, note 1 *supra* at p. 12.
- 36 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, 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.
- 37 The leading case on the preferability question is discussed in *Painting an Unsettling Landscape*, note 1 *supra* at page 22.
- 38 *Id.* 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.”
- 39 *See O’Brien v Bard Canada Inc.*, 2015 ONSC 2470 at paras 230-232.
- 40 *See for example, Hudson v Austin*, 2010 ONSC 2789.
- 41 *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).

- 42 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”.
- 43 *Class Proceedings Act, 1992*, SO 1992, c. 6 at ss. 30(1) and (2).
- 44 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.
- 45 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.
- 46 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.
- 47 *Painting an Unsettling Landscape*, note 1 *supra* at pp. 32-33.
- 48 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.
- 49 *Painting an Unsettling Landscape*, note 1 *supra* at pp. 32-33.
- 50 *Id.* at p. 32.
- 51 *Endean v British Columbia*, 2016 SCC 42.
- 52 *Painting an Unsettling Landscape*, note 1 *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.
- 53 *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.
- 54 *Babin v Bayer Inc, et al*, 2017 ONSC 3200, at para. 34.
- 55 *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 22(1).
- 56 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).
- 57 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.
- 58 *Painting an Unsettling Landscape*, note 1 *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. However, there are no appeal court decisions in Ontario on these requirements as yet.
- 59 *Schneider v Royal Crown Gold Reserve Inc*, 2016 SKQB 278 (CanLII).

- 60 *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.
- 61 *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”).
- 62 *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*, note 61 *supra*.
- 63 *See* “Third Party Litigation Funding (TPLF)” (U.S. Chamber Institute for Legal Reform, 2016) <http://www.instituteforlegalreform.com/issues/third-party-litigation-funding?p=2>. *See also* Lisa Rickard and Marx Behrens, *supra* note 61, where the authors 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.
- 64 *Painting an Unsettling Landscape*, note 1 *supra* at p. 30.
- 65 R.S.O. 1990, c. L.8.
- 66 *See for example*, R.R.O. 1990, Reg. 194: *Rules of Civil Procedure*, Rule 56.01(1).
- 67 *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.
- 68 *See for example, Class Proceedings Act*, [RSBC 1996], c. 50 at s. 39.
- 69 *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.
- 70 *See* *Painting an Unsettling Landscape*, note 1 *supra* at p. 7.
- 71 R.R.O. 1990, Reg. 194: *Rules of Civil Procedure*, at Rule 48.14(1.1), as amended.
- 72 *See Warner v Smith & Nephew Inc.*, 2016 ABCA 223 at para 72.
- 73 *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”.
- 74 *Berry v Pulley*, 2011 ONSC 1378 at paras 86-89.



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