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ARTICLE

Law Commission of Ontario Report on Class Actions — Key Recommendations

On July 17, 2019, nearly two years after announcement of the class action project in September 2017, the Law Commission of Ontario (LCO) issued [its Final Report on recommended changes](#) to Ontario's class action legislation and practice. The LCO has made a total of 47 recommendations for reform that, if implemented as proposed, would see some significant changes to the management and adjudication of class actions in Ontario. Two themes that appear common to many of the recommendations are improving the speed of a proposed class action through the certification stage, and reducing the cost of class action litigation. The recommendations include proposed reforms that will be of interest to plaintiffs and defendants. The following is a high-level summary of the key recommendations of particular concern to those defending a class action:

1. **Managing Class Actions:** The LCO is proposing: (i) that the initial case management conference be held within 60 days of service of the action; and (ii) a one year deadline for setting a certification motion schedule and delivery of a certification motion record by the plaintiff (unless otherwise ordered). Failure to do so would result in the administrative dismissal of the action, with notice to the putative class (at the expense of plaintiffs' counsel). In addition, the LCO is proposing to amend the provision of the *Class Proceedings Act, 1992* (the Act) that grants wide powers to the case management judge to address the conduct of a class proceeding, in order to allow the judge to exercise those powers even absent a motion from a party or class member. Accompanying these recommendations are the proposed development of a Practice Direction or amendment to the Rules applicable to all civil litigation, together with education and training for judges and class counsel. We note that the LCO did not address the following issues: the limitation period within which to bring a claim for contribution or indemnity from potential third parties; or the issue of who bears the costs of providing notice of certification to class members.
2. **Multijurisdictional Class Actions:** The LCO is recommending amendments to expressly allow Ontario courts to certify multijurisdictional classes, whether on its own initiative or on the motion of any party. At the same time, the LCO's recommendations include a requirement for notice to claimants elsewhere in Canada who are advancing similar competing class proceedings of the proposed multijurisdictional class action and direction to the court on the factors to consider in deciding whether to certify a multijurisdictional class. Finally, the LCO is recommending that provincial and territorial Ministers of Justice develop a national protocol to address multijurisdictional class actions and the training of judges on the management of such cases.
3. **Certification:** While some stakeholders proposed a more rigorous test for certification in general, the LCO's focus was on the requirement, in section 5(1)(d) of the Act, that a class action be the "preferable procedure" for the resolution of the common issues. Specifically, the LCO is recommending that courts consider this aspect of the test "more rigorously". While the LCO is not advocating for a legislative amendment, it recommends that judges give "considerable weight" to alternative remedies in line with the rising importance of procedural proportionality across Canada. While courts in Ontario have also traditionally required the certification motion to be the first event in the proceeding, the LCO has recognized the benefits of screening out unmeritorious claims at an early stage. In that regard, the LCO is recommending that courts be more open to permitting pre-certification motions (summary judgment or motions to strike) which may dispose of an action, or narrow issues to be determined or the evidence to be filed at the certification motion. This would be a positive development for defendants. There is also a proposal for the development of a Practice Direction to be followed on certification motions.
4. **Settlement Approval:** The LCO's recommendations include amendments to specify that the court is to consider whether the proposed settlement is "fair, reasonable, and in the best interest of the class", and increased evidentiary requirements on class counsel when seeking approval of a settlement. In addition, the LCO is proposing that the court have discretion to appoint an *amicus curiae* to assist in its consideration of the settlement (with the court having discretion to address what payment is to be made for such assistance and by whom). Once a settlement has been approved, the LCO is proposing development of a Practice Direction to set out best practices for proposed settlement distributions, including the evidence to be placed before the court in relation to notice and the distribution plan. It also proposes that the Act be amended to specifically encourage the use of plain language in notices, affirm the authority of the court to appoint a claims administrator, make specific provision to allow for *cy pres* distributions, and require the preparation and centralized collection of reports detailing the outcome of the implementation of a settlement (outcome report) to permit the gathering of detailed statistics. The outcome report will also address the impact of the class action on one of the Act's core objectives: behaviour modification.
5. **Costs:** To date Ontario has followed a "loser pays" rule for all litigation, including class actions. The LCO's proposal departs from this historical practice and recommends that Ontario follow some other provinces in adopting a "no costs" rule for certification and ancillary motions. The recommendation would maintain the "loser pays" rule for all other motions. The LCO has also recognized the reality of third party funding and is proposing that the Act be amended to permit such funding with approval of the court. For defendants, the important proposal would be to permit successful defendants to recover costs directly from the funder. The LCO also recommends amending the deemed undertaking rule so that non-party funders would be prohibited from using evidence obtained through the discovery process for purposes apart from the litigation itself, in the same way that plaintiffs currently are. For the Class Proceedings Fund, which currently funds only disbursements, the LCO wants to level the playing field for it in comparison to third party funders by allowing the Fund to partially fund plaintiffs' fees in appropriate circumstances.
6. **Appeals:** There has been a longstanding debate about the asymmetrical certification appeal rights of plaintiffs and defendants (plaintiffs currently have an appeal as of right, whereas defendants need leave) as well as a debate over the requirement that parties appeal certification orders to the Divisional Court, when in every other province appeals are to that province's Court of Appeal. The LCO has taken this to heart and is proposing elimination of certification appeals to Divisional Court and an equal right of appeal from a certification motion decision directly to the Court of Appeal.


[The Final Report is open](#) for further comment to the LCO. No specific date has been set as a deadline for receipt of comments. How Ontario's government will address the LCO's recommendations and the timing of any resulting changes to the Act remain to be seen.

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