

## CIVIL JUSTICE RESPONSE AND CLASS ACTIONS AND MULTI-PARTY LITIGATION

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### IN THIS ISSUE

*This article gives an update on the IADC Canadian Class Action Task Force's activities in connection with class action reform in Ontario, including the recent release of the Law Commission of Ontario's report on class actions and the Attorney General of Ontario's consultations on class action modernization.*

## An Update on IADC Initiatives Towards Class Action Reform in Ontario, Canada

### ABOUT THE AUTHORS

Nicole Henderson, Gord McKee, Scott Maidment, Peter Pliszka and Glenn Zakaib are all class action litigators in Toronto, Ontario and members of the IADC Canadian Class Action Task Force. They were the primary authors of the Task Force's submissions to the Law Commission of Ontario, and have been involved in consultations with the Law Commission and the Attorney General of Ontario regarding class action reform.

## ABOUT THE COMMITTEES

The **Civil Justice Response Committee** works to establish a nationwide information network that promotes the rapid dissemination of information about legislation, rulemaking, judicial selection, and key elections likely to affect civil litigation and liability laws, in order to give IADC members and their clients timely opportunities to participate in these processes armed with information that can affect the outcome of the debate or controversy. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article, contact:



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The **Class Actions and Multi-Party Litigation Committee** serves all members with an interest in class action trends and issues raised across the country in class action cases. Members publish newsletters on developments in class action law and present on topics of interest at committee meetings. The Committee has sponsored or co-sponsored a number of major CLE programs recently, such as one on the sub-prime mortgage and financial crisis class actions currently being filed across the country. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article, contact:



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On July 17, 2019, the Law Commission of Ontario (LCO) released its long-awaited report titled *Class Actions: Objectives, Experiences and Reforms*, with 47 recommendations for reform. This report was the culmination of a project first announced in 2013, when the Ontario government asked the LCO to engage in a comprehensive review of the Ontario *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (“CPA”) and experiences with that legislation since it came into force in 1993. Since the release of its report, the Ontario Ministry of the Attorney General has been canvassing the views of stakeholders on the LCO’s recommendations and considering possible reforms of the CPA.

The IADC was an active participant in the LCO’s review, making extensive submissions on a range of issues that greatly affect corporate defendants’ interests in this area. This submission was supported and formally adopted by Lawyers for Civil Justice, the Federation of Defense and Corporate Counsel, DRI - The Voice of the Defense Bar, the Canadian Defence Lawyers, and the Product Liability Advisory Council.

The following is a report on the LCO project, the IADC’s involvement, the LCO’s recommendations and the status of the Ontario government’s review of same.

## Background

The LCO was created in 2007 by an agreement among the Law Foundation of Ontario, the Attorney General of Ontario,

Osgoode Hall Law School of York University, the Law Society of Upper Canada and the Ontario Law Deans. Its mandate is to make recommendations to, among other things: make the legal system more relevant, accessible and efficient; simplify or clarify the law; and use technology to create access to justice.

The LCO’s review of the CPA was the first independent and comprehensive assessment of class actions in Ontario since the enactment of the CPA more than 25 years ago. The LCO described the main objectives of its review as: 1) to survey the experience with class actions in Ontario; and 2) to provide an “independent and practical” analysis of class actions from the perspective of their three primary objectives: access to justice, judicial economy, and deterrence.

The LCO ultimately appointed two Canadian academics to act as principal researchers. It also appointed an expert reference group consisting of representatives of the bar and academia that was chaired by a retired judge of the Ontario Court of Appeal. During its review, the LCO mined data from court files to the extent practically feasible and consulted with stakeholders from across the Ontario justice system. In 2018, the LCO released a consultation paper and invited written submissions from stakeholders. It received thirty-two public written submissions.

The IADC took a leadership role as soon as the project was announced, striking a Canadian Class Actions Project Task Force,

which was chaired by Past IADC Board Member Gord McKee. The Task Force included over 15 IADC members, some of whom are also members of the other defence organizations that joined in the submission. Its membership also included US and Australian IADC members, to have the benefit of their experiences with different class action and mass tort regimes. The Task Force held several meetings to canvass the experience of its members and consider potential reforms that would be of interest to corporate defendants in class actions in Ontario.

In early 2015, the Task Force produced and circulated extensive briefing materials on issues of interest to IADC members and their clients. The Task Force then held further meetings and consulted with a number of stakeholders. In 2018, the Task Force produced an extensive written submission to the LCO containing numerous recommendations for reform. The submission was primarily authored by Task Force members Gord McKee, Scott Maidment, Peter Pliszka, Glenn Zakaib, and Nicole Henderson. The IADC submission can be found [here](#). Members of the Task Force also met with the LCO's principal researchers, both before and after the written submission, to share with the LCO the experiences and views of the Task Force. Several members of the Task Force also worked with and supported industry and other defence-oriented groups who made their own submissions to the LCO.

### Final Report and Recommendations

The LCO's recommendations span a range of topics including managing class actions, carriage disputes, coordinating multijurisdictional actions, certification, settlement approvals, settlement distributions, class counsel fee approvals, adverse costs awards, behaviour modification and appeals. The LCO accepted, either entirely or in part, several recommendations made in the IADC Task Force's submission, as reflected in the following LCO recommendations:

- Recommendation #1: That the CPA be amended to establish a one-year deadline within which the certification motion schedule must be set, and the plaintiffs' motion record filed (unless the court orders otherwise).
- Recommendation #2: That the CPA be amended to provide for administrative dismissal if the plaintiff does not file its certification material before the proposed one-year deadline or in compliance with any case management order setting an alternate deadline for filing those materials.
- Recommendation #12: That the CPA be amended to add provisions consistent with legislation in Alberta, British Columbia and Saskatchewan designed to promote better

multijurisdictional coordination of overlapping class actions.

- Recommendation #16: That the courts interpret the preferable procedure requirement of the certification test more rigorously.
- Recommendation #17: That the courts support pre-certification summary judgment motions or motions to strike if such a motion will dispose of the action, or will narrow issues to be determined or evidence to be filed at certification.
- Recommendation #38: That the CPA be amended to give the court the discretion to adjust class counsel fees as a percentage of the total recovery to ensure a reasonable fee bears an appropriate relationship to the results achieved.
- Recommendation #41: That the CPA be amended to permit third-party/private funding of class actions only if certain listed requirements are met, including transparency, court approval and the ability for defendants to recover costs awards directly from the funder.
- Recommendation #47: That the CPA be amended to provide symmetrical appeal rights for plaintiffs and defendants with both parties having the right to appeal from class certification orders.

The LCO's final report can be found [here](#).

Two of the key issues in the review were certification standards and the costs regime for class actions. Under the current regime, it has been noted by courts that there is a relatively low threshold for certification of a class proceeding in Ontario, that the evidentiary burden on the plaintiff is low ("some basis in fact") and, conversely, that the evidentiary burden on the defendants to show that the certification criteria have not been met is high once the plaintiff shows some basis in fact. When the CPA was enacted in 1992, the government of the day decided that meritless class actions would best be deterred by retaining the usual "loser pays" cost regime for class actions, rather than including any assessment of the merits in the certification standard.

The Task Force felt that experience has shown that the "loser pays" costs rule alone has not been enough to deter the commencement of class proceedings with little or no merit. It is disappointing that the LCO did not accept the IADC Task Force's recommendation that the CPA be reformed to introduce a preliminary merits test to the certification criteria, particularly given the LCO's estimates that 73% of contested certification motions in Ontario were granted (roughly equivalent to the Quebec rate but higher than other Canadian jurisdictions), while only 53% of cases decided at the merits stage have concluded with outcomes favourable to the class. The Task Force recommended that the leave test that already exists for secondary market

securities misrepresentation class actions in Ontario be expanded to all class actions. Under that leave test, the plaintiff is required to show good faith in bringing the action and a reasonable possibility of success. The Task Force further recommended that the CPA should be amended to align the certification threshold in Ontario with the framework set out by the United States Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*.

The LCO agreed that “the certification test could be improved to further the objectives of the [CPA]”. It also acknowledged the “legitimate concerns” raised by the IADC Task Force (and others) about overly-broad actions, “copycat” claims, late-filing claims, and actions with scant evidence. Nonetheless, it declined to recommend any legislative reform of the certification criteria. It specifically rejected adoption of the leave test beyond secondary market misrepresentation class actions or the *Dukes* evidentiary standard. The LCO recommended that the courts be “encouraged” to interpret elements of the certification criteria “more rigorously”, although it did not explain how such encouragement could override the existing appellate court precedents reinforcing the existing “low bar” to certification without legislative reforms.

The LCO did, however, recommend reform to the “loser pays” cost regime in class actions. Recommendation #40 of the final report is that the CPA be amended to provide that no costs be awarded for

certification and ancillary motions, regardless of the result. The “loser pays” costs rule would be retained for all other aspects of the action including summary judgment motions, disputes about jurisdiction, de-certification motions, and trial.

The final report did not specifically address several recommendations made by the IADC Task Force on other issues. Those included a recommendation that the representative plaintiff should presumptively bear the costs of notice to the class, alternatives to class proceedings where there are a small number of cases, early appointment of trial judges, clarification of limitation periods for contribution and indemnity claims, and the ability of defendants to make settlement offers to a subgroup of a class.

While the Task Force was pleased to see many of its recommendations reflected in the final report, it is of the view that the LCO did not go far enough to address the continued problem of meritless and overly broad class proceedings and other procedural issues that cause unnecessary difficulties and expense for defendants, as well as additional burden on court resources and costs to all parties. It hopes that the Ontario government will give further consideration to the IADC submission and recommendations as it reviews all of the submissions and canvasses stakeholders.

## Moving Forward

In its final report, the LCO bemoaned the lack of empirical data about class proceedings in Ontario. During the review, it developed a class action database and the final report makes several recommendations that would facilitate better tracking of class actions commenced in Ontario and their results (e.g. whether the case was certified and more detailed information about settlements). The LCO estimated that there have been approximately 1,500 class action proceedings commenced in Ontario in the last 20 years, with approximately 100 actions initiated per year in more recent years. These numbers demonstrate the significance of class proceedings in the Ontario legal landscape and the ongoing importance to the defence community of the issues addressed in the final report.

In June 2018, while the LCO's review was underway, a general election was held in Ontario. The election resulted in a new government led by the Conservative Party. The new government has expressed interest in class action reform, although as of the date of this publication, it has not made any formal announcement or introduced any legislation.

The Ministry of the Attorney General held consultations with several stakeholders during the LCO review and held consultation meetings with representatives of industry and the bar, including members of the IADC Task Force, to gather feedback on the LCO final report. Task Force members Gord

McKee, Peter Pliszka, and Nicole Henderson recently participated in a consultation meeting with the Attorney General and other invitees from both sides of the class action bar in Ontario regarding class action modernization.

The government is not bound by the LCO's recommendations and it remains to be seen to what extent it will adopt them if it proceeds with reform. The IADC Task Force will continue to support its recommendations to the LCO and advocate for reforms that would improve the fairness and efficiency of the class proceedings regime in Ontario for defendants.

*Note: The IADC Canadian Class Actions Task Force included members Gord McKee, Scott Maidment, Peter Pliszka, Glenn Zakaib, Nicole Henderson, Tim Congrove, Chris D'Angelo, Fred Fresard, Colin Loveday, Frank Hirsch, Ken Meyer, Sylvie Rodrigue, Steven Rosenhek, and Mitch Smith.*

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Mark Behrens and Ashley Garry

OCTOBER 2018

[Wisconsin Asbestos Bankruptcy Trust Legislation](#)

Donald H. Carlson, Eric D. Carlson and Laura E. Schuett

FEBRUARY 2018

[Two Years of Asbestos Trust Transparency in Texas](#)

Edward Slaughter, Evelyn Fletcher Davis and Alexa Mizer

[Finding and Closing Judicial Hellholes](#)

Molly Jones and Sherman Joyce

NOVEMBER 2017

[State Court Class Actions? Not in Mississippi](#)

Stephanie M. Rippee

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Lisa A. Rickard and Mark Behrens

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E. Paul Cauley, Jr. and Mary Beth Buckley

OCTOBER 2014

[Rule 23's Ascertainability Requirement: A Powerful Defense to Class Certification](#)

Ryan Ethridge and Frank Hirsch

JUNE 2013

[Fooled Again and Again? -- Not Likely According to the Third Circuit Challenges to 23\(b\)\(2\) Injunction Claims in Consumer Fraud Class Actions](#)

Robert P. Donovan and Jamie D. Taylor

MARCH 2013

[Fraud-on-the-Market Class Certification: Theory, Tolling and Materiality](#)

William J. Kelly, III

FEBRUARY 2013

[Securities Class Actions Year in Review — 2012, The Year Courts of Appeal Weigh In](#)

Gord McKee and Andrea Laing