REVIEW OF CLASS ACTIONS IN ONTARIO

Issues to be Considered

November 2013
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Project Scope

I. BACKGROUND

A. Origin of Ontario’s Class Proceedings Act

Ontario’s Class Proceedings Act (CPA) came into force in 1993, with three goals: to improve access to justice, to enable more efficient and effective judicial management of complex cases of mass injury, and to coerce behavioral modification through public accountability.

Prior to the CPA, class actions in Ontario were prescribed by one rule – Rule 75 of the Rules of Practice, Supreme Court of Ontario:

Where there are numerous persons having the same interest, one or more may sue or be sued or may be authorized by the court to defend on behalf of, or for the benefit of, all.\(^2\)

Rule 75 allowed a representative plaintiff to commence an action on behalf of a class, thereby binding it, without the knowledge and consent of its absent members and without any judicial oversight to ensure their interests were considered.

When the Honourable Mr. Justice Estey, in G.M. (Canada) v. Naken, chided that the rule was “totally inadequate” for the task of managing a complex and unwieldy action involving a potential class of 2000 members,\(^3\) the Ontario government of the day had already turned its mind to the enormous task of building a comprehensive procedure for class actions, virtually out of nothing.

In 1976, then Attorney General, the Honourable Roy McMurtry, formally referred the matter to the Ontario Law Reform Commission (OLRC) to develop recommendations for a class action procedure for Ontario. The OLRC released its report in 1982.\(^4\) It was an exceptional and voluminous treatise that comprehensively explored the numerous policy and practice challenges evident at the time, while recommending thoughtful options for a class procedure going forward.

That report formed the foundational blue print for eventual legislation in many other provinces. Ontario took a slightly different route, and created legislation that more closely reflected the
recommendations of the Ontario Attorney General’s Advisory Committee on Class Action Reform (AG’s Advisory Committee Report), which was established in 1989, with a report released in 1990.\textsuperscript{5}

To support the goals of the legislation, and in recognition that the procedure would be of limited assistance if the plaintiff could not fund costly litigation, the government created the Class Proceedings Fund (CPF) by amendments to the \textit{Law Society Act}.\textsuperscript{6} It was funded by an initial $500,000 endowment from the Law Foundation of Ontario (LFO). Currently, the CPF is funded through a 10 per cent statutory levy on all awards in matters funded by it. The amount received through levies is unpredictable, and may not be sufficient to offset cost awards for which the CPF may be liable in matters where certification was refused.\textsuperscript{7}

\section*{B. Reasons for the Current Review}

A review of Ontario’s class action framework is timely, if not overdue; twenty years have passed since Ontario first developed a framework tailored to the class action challenges of the time. Many cases have come and gone through the system in accordance with the CPA procedure. They have spanned the gamut of causes of action: product liability, consumer protection (e.g., payday loans/criminal interest rates), environmental mass tort (e.g., Walkerton), mass personal injury, labour (e.g., employee misclassification) and government action (e.g., Residential Schools). In addition, new statutory forms of civil liability, such as secondary market misrepresentation under the Ontario \textit{Securities Act},\textsuperscript{8} have been developed that are amenable to class proceedings. Also, private third party funders are entering the fray, and they bring with them some new considerations for the administration of justice.\textsuperscript{9}

It is unclear whether the CPA is working as intended and many unforeseen challenges associated with it have become fodder for discussion in conferences, academic papers, professional associations, social media and other commentary.

The OLRC noted in its report that when choosing a procedural model for class actions, it was important to consider the extent to which the scheme “will operate to ensure (1) that actions are actually commenced in situations where mass wrongs deserve redress, (2) that the interests of absent class members are protected, and (3) that class actions that should not be allowed to proceed are effectively weeded out.”\textsuperscript{10} Are the procedures enabling practitioners effectively to achieve these objectives?
In the concluding sentences of the AG’s Advisory Committee Report, under the heading “Monitoring the Legislation”, the Committee spoke of the importance of ongoing review as follows:

In the early years of such a procedure it will be important to know what sorts of substantive claims are advanced within a class proceeding, how numerous are the classes, what effect does certification (and each element of the test) have on advancement of claim, how long does a proceeding take, at what rate and point are cases settled and on what terms, whether a judicial attitude about the procedure has emerged, the role of the legal profession and contingency fees and so on. This type of information will allow a balanced review of the procedure and will form the basis of discussions around fine tuning the procedure or any possible need for more significant change. 11

The LCO’s review will address many of these issues, as well as others that have arisen since the actual implementation of the legislation.

II. THE SCOPE OF REVIEW

A. Introduction

While the CPA is procedural in nature, its objectives of access to justice, judicial economy and behavioral modification make it a potentially powerful tool when applied to a wide array of complex, high-stakes litigation. This is especially so, given the significant discretion courts have to tailor the procedure to the particular challenges of various class actions.

The review will also consider challenges beyond the four corners of the legislation, such as the sustainability of the CPF, concerns around self-dealing and challenges in relation to national actions.

The following issues have been specifically identified through preliminary research and informal consultations with Ontario counsel, academics and others as important for examination. The list is far from exhaustive and is the result of preliminary consultations only. As with all LCO projects, further consultation will raise additional issues that will be included in the review (similarly, it may be that consultations will indicate that issues identified in this document will not need to be further considered).
B. Issues to be addressed

1. Access to Justice

   a. Rate of take-up

In support of a class action procedure, the OLRC discussed in detail the potential for social, psychological and economic circumstances that can thwart one’s individual access to the courts for compensation in a meritorious claim.12

And the OLRC acknowledged that, in some instances, a class proceeding may not be enough to mitigate the impact of social and psychological barriers. Such barriers may manifest in poor take-up of claims for compensation by eligible claimants. The OLRC posited that low take-up rates should not be taken as either an indication of disinterest by class members or a failure of the procedure, so long as “the proportion of class members who file claims is reasonable in the light of the practical obstacles to the distribution of the recovery in the particular case.”13 This raises the question – is there a rate of take-up by class members that is never acceptable, regardless of the circumstances?

The LCO has heard anecdotally from different stakeholders that in Ontario (and Canada) there is insufficient empirical evidence on take-up rates to know whether class action procedure is effective in mitigating the social, psychological and economic barriers to accessing justice; to the extent that data exist, the numbers are disturbing.14

In a 2009 Ontario survey of 16 plaintiff class action firms that inquired, in part, about the take-up rates in settled matters, one firm indicated that out of four settled actions, two had take-up rates of less than one percent. Other firms reported that take up rates could simply not be determined. What ought to be the response, legislative or otherwise, when take-up rates are not adequate on any measure?15

Consistently low take-up rates raise the following important questions to be considered in the course of this review:

- Why are take-up rates so low?
- Are notices alerting class members about key stages of the litigation reaching their targets?
- Are the notices understood?
- How creative are private class administrators in their efforts to reach class members?
- What are their reporting requirements to the court with respect to take-up rates? How are class administrators selected?
• How significant is the choice of claims process to settlement negotiations?
• How does the claims process, including requirements that class members verify their injury and complete complicated claims forms, impact take-up?
• Do any other factors explain low take-up rates?

Sections 17 to 19 of the CPA set out the basic content that must be included in notices to class members, whether in respect of certification of the class action, in advance of a fairness hearing to consider a settlement motion, or when their individual participation is required in order to make a claim for compensation. Courts are required to approve these notices, yet take-up rates appear to remain chronically dismal.

The courts are becoming increasingly aware of the challenges with take-up rates and are looking for novel ways to increase these numbers. In Lavier v. MyTravel Canada Holidays, the Ontario Court of Appeal considered whether plaintiff counsel’s request for approval of further fees beyond that contained in the settlement agreement was excessive in all the circumstances. The Court found that given that there was only a 9 per cent take-up rate, which disposed of only 17 per cent of the $2.25 million award, the extra fees were exorbitant in the circumstances, and that take up rates are an important measure of access to justice in class actions.16 Interestingly, the settlement agreement in that matter also included a provision whereby any amount remaining in the fund for class members would eventually revert back to MyTravel. Given that only approximately $333,000 had been distributed through the claims process, the end result would be that MyTravel’s actual out of pocket payment is much less than appears in the (court approved) Settlement Agreement.

If the discussion of take up rates, and other gauges of the CPA’s effectiveness are to be evidence-based, more quantitative research is required. The LCO’s undertaking of this project on class actions may offer sufficient leverage to encourage cooperation and to generate the needed raw data from a variety of stakeholders, including class counsel and private claims administrators, to allow for analysis.

b. Procedural efficiency

The CPA was structured to provide judges with sufficient power to manage large, complicated matters efficiently and to deliver timely results. Any analysis of access to justice must consider the key provisions and litigation steps that impact the direction of the proceedings and the rights of class members in a representative action. To that end the LCO has heard about, and will consider, a number of procedural challenges that have been exposed through practice and that require melioration, as appropriate. They are:
• the test for certification, burden of proof and evidentiary requirements;
• the appeal routes;
• the ordering of various motions;
• carriage motions; and
• notice provisions.

2. The Class Proceedings Fund
The ongoing sustainability of the CPF has been raised as a priority issue by academics, both sides of the bar and the judiciary. The CPF covers disbursements and any adverse cost awards in cases it has approved for funding. There is a statutory 10 per cent levy on all plaintiff awards in CPF-funded matters for the sustenance of the fund. Since its inception, the CPF has considered more than 130 applications for funding and has approved 82 of them, 30 of which have resulted in settlements or awards.

Given that Ontario’s class proceedings legislation adopted “ordinary” costs rules for class proceedings (instead of a regime of “no costs”) there appears to be some agreement amongst all that a sustainable public fund is required to achieve meaningful access to justice for litigants.

As noted earlier, the AG’s Advisory Committee Report recommended the creation of a sustainable public fund. The Committee believed a sustainable public fund would help to mitigate the disincentives, such as adverse cost awards, to assuming the role of class representative, when individual plaintiff recovery may be trifling; and would relieve plaintiff counsel from having to assume the risks of litigation that ought to be pursued in the public interest.

A public interest component of the litigation is a necessary prerequisite for CPF eligibility. This public interest is triggered in a number of different litigation contexts, such as misclassification of employees resulting in unpaid overtime; breaches of government duty in the operation of facilities for disabled minors; and environmental damage.

Today, the CPF is grappling with lengthy funded litigation involving multiple appeals, and the unpredictability of adverse cost awards. By way of context, in the fall of 2012 an adverse cost award of $1.766 million in the matter of Smith v. Inco was made in favour of Inco against the LFO as public funder for the plaintiff class. The amount ordered was half that requested by the defendant. It came after long and protracted litigation which commenced in 2001. In his reasons in the Smith v. Inco matter, Justice Henderson stated,
The Fund is available for the purpose of facilitating access to justice for large groups of the population who may wish to pursue a class proceeding. However, the Fund is not bottomless and a costs order that would cripple the Fund should not be made as it could unduly stifle subsequent claims.\textsuperscript{23}

The potential size of adverse cost awards in the class actions context has shone the light on some potential frailties within Ontario’s existing CPF structure.

Firstly, it is not publicly insured. If the CPF were to run out of funds, there is no statutory guarantee that the government would step in to prevent a fiscal cliff.

Secondly, while the LFO must find that the public interest is engaged before it will grant funding to a plaintiff applicant, there is no comfort that the court will agree that the matter in fact does engage the public interest, or that the costs will be significantly discounted to reflect that fact. Case law on the issue of certification and the determination of costs offers little consistency and predictability for the LFO when assessing the litigation risk.

Thirdly, the 10 per cent statutory levy on all awards or settlements fails to offer the LFO sufficient flexibility to alter the size of the levy to reflect more accurately the risk and better to compete with private third party funders for less risky matters with the potential for a large award.

The LCO will conduct a comprehensive review of the CPF, and its policy and funding framework, having regard to other public funding models, such as \textit{Le Fonds} in Quebec.

\textbf{3. Third Party Funders of Class Actions}

Academics and members of both the plaintiff and defence bar have asked that private third party funding be considered in the course of any comprehensive review of class proceedings in Ontario. We agree that this is an appropriate subject for review.

Courts have recently examined the propriety of third party funding beyond that provided by the CPF, or through contingency arrangements (under section 33(1) of the CPA).

Whether third party funding is inherently champertous was considered in the context of class actions in \textit{Metzler Investment GMBH v. Gildan Activewear Inc.}\textsuperscript{24} The Court in \textit{Metzler} determined that third party agreements are not inherently champertous, but can become so in the presence
of an improper purpose. Over-compensation, improper motive and the potential for “officious intermeddling” in the litigation have been identified as examples of improper purpose.

As importantly, the Court in *Dugal v. Manulife Financial Corporation* viewed such arrangements as having the potential to enhance access to justice by offering an alternative to contingency fee arrangements or the CPF. On this point, Justice Strathy noted that “[the CPF] may or may not accept the application. If it accepts the application, its fee is an inflexible 10% of the recovery.” He went on to remark that

> [t]he funding agreement helps to promote one of the important goals of the CPA – providing access to justice. That goal would be illusory if access to justice were deterred by the prospect of a crushing costs award to be borne by the representative plaintiff or counsel. In this sense, the agreement is beneficial to the proper administration of justice.

In Ontario, courts are aware of the risks and benefits posed by third party funders and make best efforts to craft provisions to protect the class from improper interference by third party funders.

Yet the LCO has heard that it is the very nature of class actions (where individual class members may not know or care about the litigation) that may give rise to a situation where plaintiff counsel have effective free rein in significant decision-making, and where their interests may be more closely aligned with the funder *vis à vis* the costs and benefits of different litigation strategies. Negotiated settlements that include significant fees to be paid out to plaintiff counsel (and funder, pursuant to the funding agreement), always include the necessary language to speak to any judicial concerns about self-dealing, statements attesting to the fact that counsel have acted professionally, and at arms-length.

In the absence of a savvy or interested plaintiff representative to supervise the litigation, and in the face of the financial temptations that class actions offer, how can the court reduce the risk of self-dealing? Does the CPA offer sufficient tools and guidance to the courts to assist in this regard?

Some of those we consulted (academics, the defence bar and the judiciary) raised concern about whether the LSUC’s existing *Rules of Professional Conduct* are an effective regulatory mechanism to ensure against self-dealing. We were urged during discussions not to meander too far in this inquiry into a discussion of the general adequacy of existing *Rules of Professional Conduct* for effectively regulating the behaviour of counsel; rather, the project ought to consider where across the continuum of class proceedings the risk of conflict of interest may crystallize, so that
adequate safeguards and mitigation strategies can be developed and implemented. The Law Society is then in the best place to determine whether its rules should be strengthened to deal with identified risks.

4. Adverse Costs

Initial consultations with members of both the plaintiff and defence class action bar in Ontario reflect a concern that the general ‘costs follow the event’ rules in Ontario applicable to individual actions may be ineffective and inappropriate in the context of class actions.

In Ontario, the Court’s authority and discretion to award costs to the successful party flows from section 131 of the Courts of Justice Act. Pursuant to section 31 of the CPA, the Court, in assessing costs, may consider whether the class action was a “test case, raised a novel point of law, or involved a matter of public interest”. It is clear from Kerr v Daniel Leather Inc and McCracken v Canadian National Railway that section 31 is to be interpreted as a “permissive” section and therefore the Court is not necessarily obligated to discount costs simply because the public interest is triggered by the litigation.

Cost orders in favour of the winning party in relation to contested motions within the litigation process, such as certification motions, are to be paid within 30 days of the ruling. In contrast to Ontario, there is a “no cost” rule in each of British Columbia, Saskatchewan, Manitoba and Newfoundland, unless the Court finds in a given matter that there has been vexatious, frivolous or abusive conduct on the part of any party.

In some recent decisions, judges have raised concerns that the current cost rules in Ontario may frustrate the access to justice objective of the CPA.

Firstly, in the 2011 decision Dugal, when considering the propriety of third party funding of class actions, Mr. Justice Strathy stated,

One of the important goals of class proceedings is to provide access to justice to large groups of people who have claims that cannot be economically pursued individually. In Ontario, the costs rules applicable to ordinary actions apply to class proceedings – the loser pays. The costs of losing can be astronomical – well beyond the reach of all but the powerful and very wealthy – not exactly the group the legislature had in mind when the C.P.A. was enacted.
Secondly, in *Bayens v Kinross Gold Corporation*, Justice Perell questioned why the AG’s Advisory Committee Report rejected the no-cost regime proposed by the OLRC in favour of a loser-pays regime, when such a regime creates a strong economic disincentive for plaintiffs to bring claims.\(^{32}\)

After describing indemnity agreements by class counsel and third party funding beyond that provided by the CPF as the outcome of adverse cost rules, Justice Perell went on to say,

> It may be wise for the Legislature to revisit whether any of this is what it intended when it rejected the Law Reform Commission’s recommendation that class actions be governed by the loser pays principle. In the meantime, the court is now challenged with developing the jurisdiction to determine when third party funding should be approved for a particular case.\(^{33}\)

Thirdly, in a recent trilogy of decisions on costs, Justice Belobaba bemoaned Ontario’s existing cost regime, noting that risk and reality of high cost awards following the certification motion could detrimentally affect the number and nature of class actions going forward.\(^{34}\)

The LCO has heard anecdotally that the failure of a certification motion can motivate an isolated plaintiff representative on advice of counsel who has provided an indemnity for costs, to seek the best terms for exit from the litigation including agreeing to abandon any right of appeal, in exchange for an agreement by the defendant to waive costs in the matter. In such a situation, it is plausible that the financial interests of the representative plaintiff (or plaintiff counsel or third party funder or both) may diverge from the putative class, whose interests may support an appeal of the refusal to certify. Subsections 30(4) and 30(5) of the CPA provide some protection to class members by allowing a class member to appeal either an order dismissing certification or an order with respect to the value of the individual’s claim. The extent to which these provisions have been relied upon, however, is unclear.

Conversely, the LCO has heard that an order for costs against a defendant who has lost the certification motion, can act as significant leverage for plaintiff counsel in settlement negotiations.

The LCO has also been asked to consider the impact of costs motions on judicial resources. Provinces without an adverse cost regime do not have to contend with such issues. A comparative analysis of the way in which adverse costs alter the landscape of class actions in Canada would assist to paint a clearer picture of its impact.
In its 1982 Report, the OLRC acknowledged that there was insufficient jurisprudence at the time on the issue of whether the regular loser-pays rule ought to apply in class actions, to assist it to make informed recommendations on the question of cost rules in class actions.\textsuperscript{35} Twenty years after the CPA came into force, a sufficient number of cost awards have been made, and there is now an opportunity to re-examine the issue, informed by the evidence.

The viability of the CPF, concerns about third party funding and adverse costs are all inter-related. The CPF and third party funders are creatures of an adverse cost regime.

\textbf{5. Remedies}

It has been argued that take-up rates as a measure of access to justice by class members are not the only indicator of the CPA’s success. On this view, a remedy which has the effect of deterring and modifying poor corporate behavior through forced disgorgement of related profits is deemed to be a class procedure success story regardless of whether any individual class member receives any direct compensation.

On this argument, access to justice as measured by strong take-up does not have a preferred status (as argued by the OLRC\textsuperscript{36}) over the other goals of court efficiency or behavioural modification, and need not be satisfied if the important societal goal of behavioural modification will result.

“Waiver of tort” has recently surfaced in Ontario as a manifestation of this idea that class actions can be strictly regulatory in scope, with the goal of holding large defendant companies responsible through disgorgement of their improperly earned profits. Waiver of tort appears in the law of restitution as an action based upon restitution for wrongdoing rather than as an autonomous unjust enrichment claim. In an autonomous unjust enrichment claim, one must establish an unjust enrichment of the defendant at the expense of the class. In a claim for restitution for wrongdoing, compensable loss to the claimant is not a necessary part of the claim, and therefore need not be part of the relief.

An issue to be definitively determined in Ontario is the exact nature of a waiver of tort claim. Is it an independent cause of action; an alternative articulation of a claim in tort that gives rise to disgorgement but still dependent upon proof of a tort; or merely a remedial response that provides for disgorgement in places where compensatory damages are available? Although these matters have been raised in a number of class action cases in Ontario, the actions have settled before the questions could be argued on their merits.
6.  

Cy Près Doctrine, Reversion, Forfeiture

a. Cy Près

Cy près (“as close as practically possible”) is an equitable doctrine relied upon by a court when a testator’s charitable gift cannot be implemented, because it would be either impractical or illegal. Through reliance on this doctrine, the court may order that a gift be distributed to an alternative charitable source which as closely as possible reflects the testator’s intention.

Pursuant to section 26(1) of the CPA, courts have broad statutory discretion when tailoring the distribution of an aggregate award, permitting “[t]he court [to] direct any means of distribution of amounts awarded under section 24 or 25 that it considers appropriate”.

The option of a “cy près-like” award is set out in section 26(4) of the CPA for use when it would be impractical (cost of distribution vis à vis the size of individual compensation) or impossible to distribute all or part of the award directly. When distribution to the class is either impracticable or impossible, cy près distributions are designed, at least in theory, to benefit class members tangibly, if indirectly, and to prevent awards from reverting back to the defendant in the event that they are unclaimed. Cy près as part of settlement can arise in three instances: to distribute the entirety of the award, a portion, or the residue, after all attempts at direct distribution have failed.37

Since the funds ostensibly belong to the class, the only restriction on the court’s jurisdiction to order distribution cy près, is that it be satisfied that the award “be applied in any manner that may reasonably be expected to benefit class members” and that “a reasonable number of class members who would not otherwise receive monetary relief would benefit from the order”.38

It is important to note that in the Ontario context, the vast majority of class actions resolve by way of settlement rather than contested common issues trials. In Ontario, out of hundreds of class actions that have been commenced, only 17 have led to common issues trials.39 While courts are required to approve settlement proposals, they are guided by the common law doctrine that arms-length, negotiated settlement proposals are presumed to be fair and reasonable.

The LCO has heard concerns about cy près on a number of fronts:

- that section 26(4) offers insufficient guidance to ensure judicial consistency in approach when determining the propriety of a proposed cy près recipient;
that there have been a number of approved settlements without an apparent link between the cy prés recipient and the nature of the harm experienced by the plaintiff class; and

that there are inadequate accountability measures, such as a report-back to the court requirement, to assess whether, at the end of the day, the funds are applied as intended.

The case cited most frequently as an example of the misappropriation of cy prés, is the Garland v. Consumers Gas class action that dealt with an allegation of criminal interest rates. The matter settled for $22 million, with $9 million by way of cy prés going to the Winter Warmth Program, which provides financial assistance to families who could not otherwise pay their gas bill. The flaw in the plan, its critics argue, is that it is Enbridge who benefits from the funnelling of money to this particular organization, as it helps to ensure gas bills are paid. Of note, as well, is that Enbridge (the successor of Consumers Gas) ultimately filed for a price hike before the Ontario Energy Board (which was approved) to help it absorb the costs of the Garland settlement, effectively downloading the cost of the lawsuit to existing customers.\(^ {40} \) In such a situation, where is the deterrence factor and who is receiving access to justice? In other matters, awards have been made cy prés to an organization which itself is committed to the goal of access to justice.\(^ {41} \)

In Sorenson v Easyhome Ltd, Justice Perrell first approved a proposed cy prés beneficiary, but then rejected it when he learned from defence counsel that there was a pre-existing relationship between the charitable organization, FAIR Canada, and plaintiff counsel. He explained,

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\text{The court should have regard to the objectives of access to justice for class members and behaviour modification of the defendant as factors in considering whether or not to approve a particular cy prés distribution}
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\text{...}
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\text{However well meaning, the prospect of a cy prés distribution should not be used by Class Counsel, defence counsel, the defendant, or a judge as an opportunity to benefit charities with which they may be associated or which they may favour. To maintain the integrity of the class action regime, the indirect benefits of the class action should be exclusively for the class members.}^{42}
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Interestingly, in a different class action settlement which preceded Sorenson, and which involved the same plaintiff counsel but a different judge, FAIR Canada was approved as an appropriate cy prés charity – most likely because the pre-existing relationship between plaintiff counsel and FAIR Canada was not made known to the Court.\(^ {43} \)

In the context of class actions which generate large awards, is money intended for class members actually distributed in a manner that is as close as practically possible?
b. **Reversion**

Arguably, the *cy près* option was a legislative effort to neutralize the impact of the reversionary provision in section 26(10) of the CPA, which requires that any monies not distributed within a timeframe set by the court, be returned to the defendant, without further motion to the court. Such a provision was recommended by the AG’s Advisory Committee Report in accordance with the direction of the Attorney General of the day as the preferred route to the forfeiture of any award residue to the Crown.\(^{44}\)

It is not clear why the AG’s Advisory Committee Report recommended section 26(10), when such a provision potentially undermines behavioral modification. Since it need not require a fresh motion, there is no court record that would reflect the frequency of its use in practice. However, it is not uncommon to see a reversion clause included in settlement agreements. The LCO has heard that defense counsel may insist upon a reversion clause as part of a negotiated settlement. A reversion clause combined with a complicated claims process can have the global effect of reducing the amount actually spent out of the settlement fund, the remainder of unspent funds reverting back to the defendant.

c. **Forfeiture**

The OLRC had rejected the notion of reversion as one that would run counter to the goal of behavioural modification, and one that would reduce any incentive by the defendant to assist in the identification of individual class members. In contrast, the OLRC recommended the inclusion of a forfeiture provision to require that any remainder of an award be forfeited to the Crown.\(^{45}\)

The LCO will examine the policy, procedure and jurisprudence with respect to *cy près*, reversion and forfeiture, having regard to the issues raised herein.

7. **Securities Class Actions**

Statutory liability for a securities issuer’s material misrepresentations has been available for some time in Ontario for primary market purchasers (i.e., those who buy securities directly from an issuer or its underwriter) under the *Securities Act* (SA). A negligent misrepresentation cause of action may also be available at common law in certain circumstances. The difference between the two causes of action is that the statutory cause of action includes a “deemed reliance” provision relieving the plaintiff from having to prove reliance, whereas at common law, individual reliance must always be proven.
In 2005 a new section was added to the SA which created a new right of action for secondary-market security holders. The enactment of Part XXIII.1 of the SA provided relief for secondary security holders. This was particularly significant. Previously, potential plaintiffs who had obtained securities through the secondary market (e.g., through a stock exchange) lacked privity of contract with the defendant issuer, and therefore had limited legal recourse. Also the requirement of the common law tort of misrepresentation for proof of individual reliance was a formidable hurdle, and one that is not particularly suitable to class procedure. With the new SA provisions, there is a statutory assumption of reliance which makes class procedure more tenable.

The LCO has heard that secondary market class actions have changed, and continue to change, the landscape of class actions in Ontario and in Canada. At the end of 2011, it was reported that 35 of these kinds of class actions had been filed in Ontario since the SA was amended. Out of those, 24 remained active in early 2012.46

Secondary market securities class action litigation typically involves sophisticated securities purchasers, including pension and other sorts of investment funds. Stakeholders have suggested that secondary market securities class actions are not the sort of actions that were anticipated by the OLRC, when it set out to build a compensatory regime for psychologically, socially or economically marginalized claimants.47

The LCO has also heard a concern that secondary market securities actions have the potential to generate “strike suits” whereby plaintiffs launch actions with the sole intent to mount pressure toward a quick settlement of the matter. The balancing act apparently sought by legislators to mitigate such concerns involved the placement of a statutory cap on potential recovery of $1 million (or 5 percent of its market capitalization, as defined by regulation) for actions brought pursuant to Section 138.3, as set out in Section 138.1.

In recent years however, a number of Ontario class actions have been raised claiming the American common law doctrine of “fraud on the market”48 in an effort to pursue class actions that will be unaffected by statutory caps but still able to dispense with the need for proof of individual reliance. Whether this doctrine will ultimately be adopted is uncertain and there is concern that its adoption may upset the legislative balance.49 In the meantime, the LCO will consider the appropriate interplay between securities class actions based on common law, and those that are statutorily based.

The secondary market liability regime in Ontario’s SA has a number of important procedural features, including a preliminary merit-based leave test that litigants must satisfy to be able to
proceed, as well as a strict limitation period. Recent jurisprudence has dealt principally with these procedural features and how they interact, or conflict, with certain provisions of the CPA. For instance, the strict limitation period within which a secondary market action can be launched under section 138.3 of the SA cannot be reconciled with section 28 of the CPA, which allows for the staying of limitation periods pending the commencement of an action. The inconsistency in these two provisions is currently before the Court of Appeal in a number of cases, and will be considered as part of this project.

The LCO intends to consider securities class actions brought pursuant to the SA, to determine whether the CPA sufficiently equips courts to effectively manage these matters, while ensuring that the interests of absent class members are properly considered. Also, the LCO proposes to explore opportunities for better harmonization between the CPA and SA, having regard to challenges already mentioned.

8. The National Class

In Canada, the Federal Court has limited constitutional jurisdiction over subject matter, yet broad geographic jurisdiction, whereas provincial courts have broad subject matter jurisdiction, and restricted geographical jurisdiction. The result is that actions can be commenced by different plaintiffs in each province simultaneously, without the court or the parties knowing about the others’ activities. And each action may attempt to bind the entire class. There is no reliable database to help prospective plaintiffs to see whether a potential matter has already been launched in another province. This can lead to needless duplication of effort. There is no easy way to determine which claim, out of competing claims, should go forward, and if each goes forward, what will it mean for class members?

In 2005, the Uniform Law Conference of Canada recommended the development of a national database to help plaintiff counsel to determine whether an action has been started in a different jurisdiction. The challenge is that few plaintiff counsel are willing to put information about their specific claim (a copy of the statement of claim must be filed), on a national data base, for fear that another potential plaintiff counsel will steal their work product. Without reasonable compliance by plaintiff counsel in this regard, that database cannot be relied upon for very much.

The defence and plaintiff bar, the judiciary and academics all share concerns with respect to national class actions. When a matter is brought in Ontario, can it purport to represent the interests of class members outside the province? How are certification and other orders issued in one province, enforced in other provinces?
National class actions are not unique to securities matters. Product liability (such as breast implant failure) can involve consumers from across the country. Duplication of actions can only confuse class members who may be members of different class actions.

The existence and effective management of duplicate actions commenced across jurisdictions has been the subject of significant discussion and debate. Canada’s constitutional framework does not allow a court in Ontario to assume jurisdiction over an identical action in Nova Scotia. Similarly, it does not lend itself to a system such as the multi-district litigation system established in the United States, wherein a panel of federal judges coordinate inter-state actions and ensure orderly management of cross-jurisdictional challenges.

The Uniform Law Conference of Canada recommended some options for better uniformity and harmony in provincial class action legislation across Canada. For instance, it looked at the opt-out provisions of provincial class action legislation, which includes members by default, unless they opt out. However, in the context of the national class, a person may want to opt-out of an action in her home province of Ontario, in favour of an action in British Columbia. To allow this to occur, British Columbia ultimately included a provision in its statute that would allow an out-of-province class member to opt-in to the action, during the period within which British Columbia residents could opt out, following certification. Such a provision recognized the legitimate and different interests of inter-province versus extra-province claimants, and accommodates those interests accordingly. Ontario does not have any similar provision. It has been suggested that the lack of such a provision in Ontario reduces the rights of a class member to choose his or her preferred avenue of redress, even if it is outside of Ontario.

There are other disparities amongst the different class proceeding regimes in Canada, which can serve to exponentially confound class members and the courts as they try to parse the differences and their ramifications. Tests for certification and rules around costs only become more troublesome in the context of the national class.

There have been strong efforts to respond to the various challenges of the national class. The Canadian Bar Association facilitated the development of a protocol for the management of multi-jurisdictional class actions that was approved by all Chief Justices in Canada and by the Canadian Judicial Council. It is similar to that developed by the American Bar Association, albeit there are constitutional differences between Canada and the States, which make direct comparison difficult.
The Courts have engaged some novel and constructive efforts to overcome some of the problems of jurisdiction in national actions. For instance, in *Parsons v. The Canadian Red Cross Society* (the Hepatitis C settlement), Winkler CJO found that neither constitutional, statutory nor common law precluded the Court from sitting outside its geographic jurisdiction if it would assist access to justice and judicial efficiency. In that matter, Ontario, British Columbia and Quebec had supervisory jurisdiction over the ongoing administration of the national settlement. A motion was brought asking all three courts to approve an extension of the period within which claims could be filed. Rather than holding three hearings in three separate provinces, Justice Winkler saw the benefit of holding one hearing, presided over by a justice of each of the three provinces. He noted that

> It is apparent that holding a single hearing instead of three will save expense and valuable resources. Equally important is that a single hearing will help to avoid potential additional costs by facilitating the process of rendering consistent judgments as mandated by the settlement agreement. Should the courts reach inconsistent orders, the parties may be required to re-attend, thereby requiring further legal costs that would be borne by the settlement trust.  

The LCO intends to consider opportunities across the litigation continuum, where the procedure could be amended with the following objectives:

- to provide Ontario’s courts with better tools to manage such actions; and
- to provide Ontario’s class members with sufficient protection, regardless of where the action has been commenced.

### III. OUTLINE OF PROJECT PROCESS

A full methodology will be developed. Briefly, the project plan is as follows:

- The MAG LCO Counsel in Residence will lead the project. Support will be available from the LCO Research Lawyer, depending upon need and availability.
- The LCO’s student program will provide some part-time supports during the academic year (approximately 5 to 10 hours per week), as well as the support of a dedicated full-time student during the summer months.
- The LCO’s administrative staff will provide the standard supports for consultation activities and administration.
- The LCO will make a call for commissioned research papers to fill certain research needs, which are beyond the resources of the LCO.
The next step will be the development of a methodology document to be brought to the Board for approval.

The LCO will develop a discussion paper and develop and implement a plan for formal and pro-active consultations with relevant constituencies.

The LCO will consider consultative tools such a forums and symposia, as the project moves forward. It may develop discrete events dedicated to any element of this topic, if such a forum would be helpful and constructive for the project.

It will release an interim report with draft recommendations after approval by the Board for feedback.

The LCO will prepare a final report that incorporates the feedback to the interim report and any additional research and consultation that will be required.
ENDNOTES

2. RRO 1980, Reg 540.
11. MAG, AG’s Advisory Committee Report, Vol 1, note 5, 77.
12. OLRC, Report, Vol 1, note 4, 139.
13. OLRC, Report, Vol 1, note 4, 133.
17. As mandated by Class Proceedings, O Reg 771/92, r 10(3)(b) [pursuant to the Law Society Act].
26. Ibid, para 32.
27. Ibid, para 33.
28. See, for instance, Perell J’s comments in Fehr v Sun Life Assurance Company of Canada, 2012 ONSC 2715.
29. RSO 1990, c C.43.
33. Ibid, paras 32 and 35.
35. OLRC, Report, vol 3, note 4, 656.
36. OLRC, Report, vol 1, note 4, 140-146.
38. CPA, note 1, s 26(4).


41 Cassano v Toronto-Dominion Bank (2009), 98 OR (3d) 543, 79 CPC (6th) 291 (SCJ). Identify the recipient

42 Sorenson v Easyhome Ltd, 2013 ONSC 4017 at paras 29-30 (Sorenson).

43 See the settlement agreement in Dobbie v Arctic Glacier Income Fund, online: <http://www.classaction.ca/CMSFiles/PDF/Securities/Arctic/ARCTIC%20GLACIER%20SETTLEMENT%20AGREEMENT.pdf>.

44 See its AG’s Advisory Committee Report, note 5, 46-47.

45 See the OLRC’s Report, note 4, 582-583.


47 While the OLRC did anticipate that securities class actions might be possible, it did not envision the size or prevalence of such actions. See the OLRC Report, note 4, 232-241.


51 See, however, the CBA’s attempt to institute the National Class Actions Database, online: <http://www.cba.org/ClassActions/Main/gate/index/about.aspx>.
