

CLASS ACTIONS

Objectives, Experiences and Reforms

CONSULTATION PAPER • MARCH 2018



LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

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ABOUT THE LAW COMMISSION OF ONTARIO

The Law Commission of Ontario (LCO) was created by an Agreement among the Law Foundation of Ontario, the Ontario Ministry of the Attorney General, Osgoode Hall Law School and the Law Society of Ontario, all of whom provide funding for the LCO, and the Law Deans of Ontario's law schools. York University also provides funding and in-kind support. The LCO is situated in the Ignat Kaneff Building, the home of Osgoode Hall Law School at York University.

The mandate of the LCO is to recommend law reform measures to enhance the legal system's relevance, effectiveness and accessibility; improve the administration of justice through the clarification and simplification of the law; consider the use of technology to enhance access to justice; stimulate critical legal debate; and support scholarly research. The LCO is independent of government and selects projects that are of interest to and reflective of the diverse communities in Ontario. It has committed to engage in multi-disciplinary research and analysis and make holistic recommendations as well as to collaborate with other bodies and consult with affected groups and the public more generally.

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Curriculum Modules in Ontario Law Schools: A Framework for Teaching about Violence Against Women (August 2012)

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Joint and Several Liability Under the Ontario Business Corporations Act (February 2011)

Division of Pensions Upon Marriage Breakdown (December 2008)

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Disclaimer

The opinions or points of view expressed in our research, findings and recommendations do not necessarily represent the views of our funders, the Law Foundation of Ontario, the Ministry of the Attorney General, Osgoode Hall Law School, and the Law Society of Ontario, or of our supporters, the Law Deans of Ontario, or of York University.

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Chapter One

INTRODUCTION

A. Introduction to the Class Actions Project

Justice Robert Sharpe of the Ontario Court of Appeal has written that:

The most significant modern development in civil justice in Canada has been the emergence of the class action. Class actions respond to the challenges that confront our regime of civil justice, in particular, the need to enhance access to justice and to ensure the efficient and effective use of scarce judicial resources. But class actions are anything but simple. Grouping multiple claims under a single procedural umbrella is a complex and challenging undertaking that has stretched the minds of some of our finest jurists and advocates.¹

The Law Commission of Ontario (LCO) initiated a class actions project to consider Ontario's experience with class actions since the *Class Proceedings Act* (CPA) came into force in 1993.² During this period, class actions have grown significantly in volume, complexity, and impact in Ontario and across Canada. Class actions have had major financial, policy and even cultural implications across the country.

The project's mandate is to research class actions in Ontario and to conduct an independent, evidence-based, and practical analysis of class actions from the perspective of their three objectives: access to justice, judicial economy, and deterrence.

This paper seeks public input comment and advice on a wide range of class action questions and issues. The LCO welcomes submissions on these or any other class action topics. The LCO believes that broad and transparent consultations are integral to successful law reform.

The project will conclude with an independent, evidence-based, and comprehensive analysis of the most pressing class action issues. The LCO's final report will make recommendations for law reform where appropriate to do so.

B. The Law Commission of Ontario

The LCO is Ontario's leading law reform agency. The LCO has a mandate to promote law reform, advance access to justice, and stimulate public debate. The LCO fulfills this mandate through rigorous, evidence-based research; contemporary public policy techniques; and a commitment to public engagement. LCO reports provide independent, principled, and practical recommendations to contemporary legal policy issues.

A Board of Governors, representing a broad cross-section of leaders within Ontario's justice community, guides the LCO's work. Support is provided to the LCO by the Law Foundation of Ontario, Ontario Ministry of the Attorney General, Law Society of Ontario, and Osgoode Hall Law School. The LCO is located at Osgoode Hall Law School in Toronto.

More information about the LCO is available at www.lco-cdo.org.

C. Why Are Class Actions Important?

It is generally acknowledged within Ontario's justice system that class actions have had a significant impact on class action litigants, the justice system, and public policy.

One can appreciate the breadth and impact of class actions simply by surveying the range of cases in the past. Notable class actions in Ontario since the CPA was passed have addressed:

- Consumer protection issues such as payday loans and criminal interest rates
- Environmental accidents, such as the Walkerton tragedy, soil contamination and explosions
- Federal and provincial inmates held in solitary confinement
- Institutional abuse in residential schools and health care facilities
- Labour and employment issues concerning pensions, gender discrimination, misclassification and unpaid overtime
- Mass personal injury involving blood, blood products and *C. difficile* infections
- Privacy breaches concerning credit cards and data security
- Products liability, including implanted medical devices and food product recalls, and
- Securities issues.

Class action lawsuits often involve thousands – if not hundreds of thousands – of potential litigants and millions – if not billions – of dollars in compensation. They can result in huge awards and have a significant impact on the general public, corporate or government behavior and reputations, public policy, and the justice system. It is fair to describe class actions as one of the most high-profile and far-reaching legal procedures in the Canadian justice system.

D. Catalyst For Reform

The LCO initiated this project for several reasons:

- **The project is timely:** Ontario's statutory regime governing class actions took shape as a result of a comprehensive and thoughtful law reform process that culminated twenty-five years ago in the enactment of the CPA. Several important and far-reaching choices underpinned this Act and the countless judicial decisions that followed it. These choices have not been reviewed systematically since the 1990 report of the Ontario government's Advisory Committee on Class Action Reform. The LCO project will be the first comprehensive assessment of Ontario's CPA in more than a generation.
- **The project addresses outstanding, systemic, and controversial justice policy issues:** As noted above, class action legislation and proceedings are generally acknowledged to have significant policy and financial implications for both class members and class action defendants. Class actions also have systemic implications for access to justice, court procedures and efficiency, and government and corporate liability.
- **There is a need for an impartial, independent review of class actions:** Class action discussions are controversial and often influenced by stakeholder interests and perspectives. This project is unique in that the LCO is independent of those interests and committed to an impartial, independent, "public interest" analysis of class action issues.
- **The project is participatory and evidence-based:** There is a comparative lack of comprehensive consultations and empirical research on class actions issues. The LCO project will address these gaps by conducting extensive public consultations and providing a firmer empirical foundation for these issues.

E. Project Objectives, Issues and Terms of Reference

The terms of reference set out the project's objectives and the general issues that will be considered. The terms of reference read, in part, as follows:

The Law Commission of Ontario (LCO), with the support and collaboration of the Faculty of Law, University of Windsor and la Faculté de droit de l'Université de Montréal, is leading an independent study of class actions in Ontario.

The purpose of the project is to research whether class actions are fulfilling their three-part promise to improve access to justice, foster judicial efficiency, and promote behaviour modification.

The project will be based on extensive research and public consultations. The project will conclude with the preparation and distribution of a public report. The report will include analysis and recommendations for reform, where appropriate.

The project will be independent, consultative, balanced, practically oriented, and guided by public interest values....

The project acknowledges its scope is potentially broad, with many complex and controversial issues. Time and resources for the project will be limited. As a result, the project will prioritize and organize its work to focus on systemic issues that affect class actions generally. The project will consider whether Ontario's existing Class Proceedings Act needs to be amended to govern contemporary class action proceedings. The project will also strive to establish an independent, evidence-based record of class actions in Ontario.

The project does not consider reforms to non-CPA statutes or practices. The project's full terms of reference are attached as Appendix A.

F. Relationship to Other Class Action Initiatives

Many organizations and individuals have undertaken significant work regarding class actions in Ontario and elsewhere. The LCO does not want to replicate those initiatives. As a result, the project will work cooperatively with researchers, stakeholders and other organizations to build on current research/policy initiatives and to ensure limited resources are used most effectively. Most notably, the project wishes to acknowledge the important work undertaken by the Canadian Bar Association's National Task Force on Class Actions to address procedural challenges in multi-jurisdictional class actions.³

G. Project Deliverables and Organization

1. Project Deliverables

The project's goal is to produce an independent, evidence-based, and comprehensive analysis of key class action issues. The final report will make recommendations for law reform where appropriate to do so. The final report will also be produced in English and French and distributed widely.

The project is also organizing an empirical study of class actions in Ontario. Once completed, the LCO will make this study publicly available to policy-makers, researchers, practitioners, organizations or others who may wish to access it.

Finally, the LCO will produce a range of user-friendly, accessible, and web-based materials that summarize and explain the final report and its recommendations. These materials will support the LCO’s “knowledge mobilization” strategy for this project. These materials will be produced in English, French, and other languages.

All materials will be posted on the LCO’s project website.

2. Project Organization

The class actions project is being led by the LCO with the support of a distinguished group of academics, justice system leaders, and class action practitioners.

The project’s Principal Researchers are:

- Professor Jasminka Kalajdzic, Faculty of Law, University of Windsor; and,
- Professor Catherine Piché, Faculty of Law, Université de Montréal

The LCO established an expert Reference Group to assist the project’s work. The reference group includes:

- The Honourable Stephen T. Goudge, Chair and Board of Governors Liaison
- Marie Audren, Partner, Audren Rolland LLP
- Tim Buckley, Partner, Borden Ladner Gervais LLP
- Michael A. Eizenga, Partner, Bennett Jones LLP
- Professor Trevor C. W. Farrow, Osgoode Hall Law School
- André Lespérance, Partner, Trudel, Johnston and Lespérance
- Celeste Poltak, Partner, Koskie Minsky LLP
- Linda Rothstein, Partner, Paliare Roland Rosenberg Rothstein

The LCO has also established a Technical Advisory Committee to assist with the empirical component of this project. The group includes:

- Jonathan Foreman, Harrison Pensa LLP
- Gina Papageorgiou, Law Foundation of Ontario
- Michael Rosenberg, McCarthy Tétrault LLP

The empirical project is being assisted by Run Straight Consulting Ltd.

Funding for the project is being provided by the LCO. The project is also supported by the Faculty of Law, University of Windsor and the Faculty of Law at the Université de Montréal Class Action Lab. Additional project funding is being provided by the Ontario Ministry of the Attorney General and the Government of Canada through the Justice Partnership and Innovation Program.

H. Consultation Process/Next Steps

The LCO believes that successful law reform depends on broad and accessible consultations with individuals, communities, and organizations across Ontario.

The Consultation Questions set out in this paper are a guide to the class action issues that have been identified by the LCO so far. The LCO welcomes public comments on these or other class action issues.

The release of the Consultation Paper launches an intensive period of public consultations. During this period, the LCO will organize consultations with members of the public, lawyers and legal organizations, public and private organizations, academics, governments, and others who have an interest in class actions. Our consultations are likely to include meetings, conference calls, webinars, focus groups, and roundtables. Important project documents will be distributed in English and French.

There are many ways to get involved. Ontarians can:

- Learn about the project and sign up for project updates on our project website;
- Contact us to ask about the project or project consultations; or,
- Provide written submissions or comments.

The consultation deadline is **May 31, 2018**.

The LCO can be contacted at:

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Chapter Two



THE CONSULTATION QUESTIONS

What follows below is a list of the consultation questions identified by the LCO so far. A complete examination of the questions, and their relative priority, is included in Chapters Four and Five of the Consultation Paper.

A. Consultation Questions from Chapter Four

Consultation Question 1:

How can delay in class actions be reduced?

- How may practices be changed to shorten delays?
- How might judges manage cases more efficiently?
- Should the statutory deadline for filing of a certification motion, or any other deadline applicable in class action practice, be changed?
- What changes in legislation could help cases proceed more efficiently?

Consultation Question 2:

Given that class actions must provide access to compensation to class members, how should distribution processes be improved?

- What are the best practices for distributing monetary awards to members?
- How can transaction or agency costs be reduced in distributions?
- Is transparency important in class actions? If so, how can reporting and monitoring be improved?
- Should judges require parties or claims administrator to file a public report summarizing the outcomes of the settlement distribution after its conclusion? What should the report contain?
- Should the CPA be amended to specify more detailed requirements regarding distribution practices, improved monitoring, or reporting?

Consultation Question 3:

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

- Should Ontario retain the two-way costs rule?
- Is the cost of indemnities against adverse costs a concern?
- Should the Class Proceedings Fund have the flexibility to alter its current 10% levy and/or to fund legal fees?
- Is third party funding a positive development in class action practice? Should it be more tightly regulated?
- Should the source and extent of funding be disclosed to courts?

Consultation Question 4:

Is the current process for settlement and fee approval appropriate?

- Is the legal test for settlement approval sufficient?
- Which factors should a court consider in awarding counsel fees?
- Should counsel fees be proportional to or dependent upon class recoveries?
- Should fees be awarded on a sliding scale, that is, a reduced percentage of recovery as the size of recovery increases?
- What changes, if any, should be made to the process by which fees are awarded?
- Is there a role for an *amicus curae* at settlement and/or fee approval?

Consultation Question 5:

Is the current approach to certification under s. 5 of the CPA appropriate?

- What is the appropriate evidentiary standard at the certification motion?
- Should courts consider the merits of a proposed class action at certification?
- Should Ontario move in the direction of Québec by requiring only a limited evidentiary basis at the motion for certification?
- Should Ontario abandon the requirement for certification, or preliminary hearings altogether?

Consultation Question 6:

Are class actions meeting the objective of behaviour modification? What factors (or kinds of cases) increase (or reduce) the likelihood of behaviour modification?

Consultation Question 7:

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

- How can class action processes be improved for class members and representative plaintiffs?
- Are there certain kinds of disputes or legal problems that class actions are not addressing?
- How can technology be used to keep class members better informed?
- Should the CPA include specific provisions regarding the rights of objecting class members to disclosure, representation and entitlement to costs?

Consultation Question 8:

In light of existing constitutional restrictions, what is the most effective way for courts to case manage multi-jurisdictional class actions in Canada?

- Is the 2018 CBA Protocol sufficient to address multi-jurisdictional class actions?
- Is statutory guidance desirable, or should this issue be left to the courts?
- Should legislative amendments like those in the Saskatchewan and Alberta statutes be considered?

Consultation Question 9:

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

- Should a modified “first to file” rule be considered in Ontario?
- Should the CPA be amended to provide guidance on carriage issues? If so, what reforms would you recommend?

Consultation Question 10:

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

- Should appeals from successful certification decisions be taken directly to the Divisional Court, without the need to obtain leave?
- Should all appeals from certification decisions proceed directly to the Court of Appeal? Is the leave to appeal test appropriate?

Consultation Question 11:

What best practices would lead a case more efficiently through discoveries, to trial and ultimately to judgment? Are there unique challenges in trials of common issues that the CPA and/or judges could address? What can judges do to facilitate quicker resolutions and shorter delays?

Consultation Question 12:

In addition to the issues listed in this paper, are there provisions in the CPA that need updating to more accurately reflect current jurisprudence and practice? If so, what are your specific recommendations?

Consultation Question from Chapter Five**Consultation Question 13:**

Should the Class Proceedings Act or Rules of Civil Procedure be amended to promote mandatory, consistent reporting on class action proceedings and data?

- What information should be collected?
- How can barriers or disincentives to better data collection be reduced?
- How can technology be used to facilitate greater data collection and reporting?

HISTORY OF CLASS ACTIONS IN ONTARIO

The lengthy development of the CPA⁴ began with six years of research carried out by the Law Reform Commission of Ontario and culminated with the publication of its seminal *Report on Class Actions (Report)* in 1982.⁵ The Report was accompanied by draft legislation, and contained recommendations that have been implemented either through the language of the CPA, or the manner in which the legislation has been interpreted by courts.⁶

Several years later, Ontario Attorney General Ian Scott created an Advisory Committee on Class Action Reform. This committee consulted with a range of stakeholders, and released its Report in 1990,⁷ following which, *Bill 28, An Act respecting Class Proceedings*, was prepared and introduced into the House.⁸

The resulting CPA has remained unchanged to the present day.⁹

The LCO project on class action reform is the first comprehensive, independent review of the CPA since the legislation was introduced.



Chapter Three

WHAT HAVE WE HEARD?

A. Stage One Interviews – Introduction

The LCO’s principal researchers, Professors Catherine Piché and Jasminka Kalajdzic, and LCO staff conducted a series of preliminary interviews of class action stakeholders between November 2017 and January 2018. The primary purpose of our “Stage One” interviews was to help the project prioritize its research and consultation agenda. The LCO asked stakeholders to comment upon whether class actions in Ontario were achieving their objectives; what was or was not working in class action practice; and what changes, if any, should be made to the CPA. The input received during this process helped the LCO develop its research agenda and the consultation questions set out in this paper.

This chapter sets out our Stage One methodology and summarizes its results.

B. Stage One Interviews – Methodology

The LCO used a purposive “key informant” approach for our Stage One interviews in order to interview a broad cross-section of class actions stakeholders. In the end, sixty stakeholders were interviewed. Thirty interviewees were plaintiff or defendant litigators in Ontario and Quebec who practiced in a wide range of class action cases. Other interviewees included judges, class administrators, class members, community organizations and insurers. The LCO also interviewed several counsel and organizations about why they were not using class action litigation to pursue their clients’ claims.

Our principal researchers prepared an Interview Guide containing a set of standardized interview questions that focused on class action practice within the context of the CPA. The Interview Guide is attached as Appendix B.

Interviews were informal, open-ended, and conducted primarily over the phone, lasting one hour but sometimes significantly longer. In addition, all Stage One interviews were conducted on a no-attribution basis. For example, respondents are identified only as plaintiff or defence counsel, not by name, area of practice or firm.

C. Summary of Stage One Interview Responses

1. Access to Justice

Stage One interviewees generally agreed that the CPA advances access to justice and promotes claims that otherwise would otherwise not proceed.

However, many interviewees noted that access to justice in class actions often depends on the type of case. Multiple interviewees stated that access to justice was hindered by “*de minimis*” claims, that is cases where some believe class members obtain minimal compensation compared to the fees for plaintiff counsel. For instance, one person commented that class action legislation creates a good procedure, but is also used by plaintiff counsel as a “centre for profit.” Some interviewees stated that this situation can negatively impact the public perception of whether class actions are useful in facilitating justice.

Some interviewees noted the importance of process and transparency in facilitating access to justice. They further stated that access to justice is not simply access to a courtroom, but access to outcomes. The residential schools settlement was cited as a positive example, including the establishment of the Truth and Reconciliation Commission. Others expressed concerns that counsel and courts do not understand, take into account, or communicate the priorities of class members

through the litigation process and in making settlement decisions. In these circumstances, it was said, class members' access to justice suffers.

Finally, several interviewees described why they do not use class actions to advance their client's or organization's legal claims:

- Other forums or procedures are more accessible, including administrative tribunals with provisions for joint complaints.
- Several counsel stated class actions cannot be viable vehicles for certain types of claims, such as environmental damage, mass torts and human rights, without reform of the substantive law surrounding these claims.
- Class actions often involve significant financial risks (such as the high costs of disbursements, adverse cost awards, or law firm cashflow issues).
- Class actions take a long time: individual litigation can be both faster and more economical.

2. Judicial Economy/Delay

The length of time needed to litigate a class action was a primary concern for many interviewees. Almost all counsel interviewed stated that delay was a factor affecting access to justice and judicial economy. However, there was considerable debate about the cause of delay.

Both plaintiff and defence counsel mentioned less than optimal case management by judges. Some suggested judges should be better trained and resourced to keep cases moving forward. Lack of judicial resources was an issue some interviewees cited. That said, they recognized courts must prioritize hearing criminal cases within the overall context of scarce judicial resources.

Both plaintiff and defence counsel said evidentiary thresholds at the certification stage lead to lengthier certification hearings, thus delaying litigation. Interviewees compared Québec and Ontario law and had different opinions on whether Ontario should adopt the high threshold for admitting evidence at certification in Québec as a model. Some defence counsel suggested including a merits analysis at certification. One person suggested lowering the bar for certification generally, then following certification with a fast and efficient alternative dispute resolution mechanism.

Many interviewees, including plaintiff and defence counsel, cited carriage motions across multiple jurisdictions and within the province, as contributing to delay.

Both plaintiff and defence counsel mentioned appeals, including the additional time taken by hearings of leave applications at the Divisional Court as a cause for delay. A few interviewees, including plaintiff and defence counsel, queried whether the underlying action should continue while appeals are litigated.

Plaintiff counsel cited multiple unmeritorious preliminary motions brought forward before the certification stage by defendants.

One interviewee suggested plaintiff counsel were pleading their claims in a way that is overly broad or ambitious. This, in turn, encourages defendant counsel to bring forward motions prior to certification, and contest certification more aggressively.

On the other hand, defence counsel observed plaintiff counsel sometimes file claims but do not promptly pursue them.

3. Behaviour Modification

Answers to whether class actions result in behaviour modification were mixed. However, almost all interviewees could think of specific circumstances in which they felt defendants changed their actions because of the actual or potential consequences of class action litigation.

Many interviewees – primarily plaintiff counsel but also some defense counsel – felt class actions did achieve behaviour modification. For instance, one commentator observed that there has been a change in employment law where employers are more willing to give employees better severance payouts to avoid the risk of litigation.

Others, including many defense counsel, said they were unsure as to whether class actions created a behaviour modification or deterrence effect. Some defendants view class actions settlements simply as a cost of doing business, while others felt the risk of criminal or regulatory consequences has a bigger influence on modifying behavior.

Many, if not most, interviewees noted the difficulty in measuring behaviour modification.

The LCO was frequently advised that behaviour modification may depend on the type of case. Some interviewees emphasized class actions cannot be treated as monolithic – they may achieve behaviour modification in some areas of law, and in others they may have little impact.

One person suggested behaviour modification does not happen where insurers simply fund settlements and nobody admits liability. Some defense counsel stated future deterrence may not be relevant in cases dealing with mistakes or past actions that defendants acknowledge are wrong. The residential schools settlement was cited as an example of this. Another interviewee said he has not seen any evidence of behaviour modification in three core areas – price fixing, capital markets and securities.

4. Certification Test

There were many comments, from both plaintiff and defense counsel, that the statutory criteria in section 5 of the CPA were basically sound and should remain unchanged. However, interviewees also often criticized how these criteria were applied in practice, such as the amount of evidence allowed by judges on certification motions.

Plaintiff counsel sometimes expressed concern that allowing large volumes of evidence at certification indirectly turned the courts' focus to the merits. On the other hand, some defense counsel advocated that section 5 of the CPA be explicitly changed to allow assessment of cases on the merits.

Several counsel noted the volume of evidence produced and disclosed by parties as part of the certification hearing process was a significant and growing issue, especially for cases involving historical evidence.

5. Multi-Jurisdictional Class Actions

Most interviewees, including plaintiff and defense counsel, cited the procedural challenges in multi-jurisdictional class actions as one of their primary concerns. There is a lack of clarity as to which court should take jurisdiction when competing or overlapping class actions have been filed in multiple provinces. One person also cited global classes as an issue.

Some interviewees suggested the project should consider the CBA Class Action Task Force recommendations on this issue; others told us to look at Saskatchewan and Alberta legislation as a model.

Almost all interviewees acknowledged the constitutional challenges with addressing multi-jurisdictional class actions.

6. Carriage Motions

Plaintiff counsel cited carriage motions as a major issue for both class actions within Ontario and multi-jurisdictional class actions. The delay and expense caused by carriage motions was identified as a significant concern. Some interviewees noted that there was a lack of clarity in the law on which counsel may assume carriage. Some interviewees stated that plaintiff counsel entering into consortiums or deals have a negative impact on class members. Some interviewees noted these deals may increase total counsel fees and disbursements, affecting the award amount available to class members.

One interviewee suggested that while the LCO may not be able to provide recommendations about carriage motions in multi-jurisdictional class actions, the project should look specifically at providing guidance regarding court procedures for conducting carriage motions within Ontario.

7. Appeals

Many interviewees were critical of the delay caused by appeals. The majority supported having a more direct appeal process by eliminating requirements to bring leave to appeal applications at Divisional Court, and instead directing all appeals to the Court of Appeal.

8. Transparency – Settlement and Settlement Distribution

Comments on the transparency of class actions settlements and distribution were mixed. Some interviewees felt judges asked appropriate questions as to how the parties came to a settlement and the terms of that settlement. Others believed it was difficult for judges not to approve a settlement where counsel had agreed on it.

Some interviewees suggested that *amicus curiae* could assist in the settlement process, while others disagreed and said an *amicus* would overly complicate the process and create delay. One suggested involving an *amicus* but allowing counsel to have confidential interviews with the *amicus* as part of the process. Some suggested adding a means through which class members could receive independent legal advice.

With regard to settlement distribution, some expressed concern that class members did not understand the process, or may disagree with decisions made by administrators on award amounts. Some interviewees wondered about issues related to take up rates, such as how many class members are actually interested in claiming damages in a particular case?

Most interviewees supported *cy près* awards, stating that *cy près* awards can support behaviour modification and access to justice in the right circumstances. Almost all interviewees said that *cy près* was better than reversion, though interviewees also noted that counsel's priority should be getting funds to class members. The LCO was also told that *cy près* should not affect plaintiff counsel fees.

9. Class Counsel Fees

Both plaintiff and defence counsel recognized the risk assumed by plaintiff counsel and agreed counsel fees should be proportionate to this risk. That said, both plaintiff and defense counsel frequently commented that that fee awards were unpredictable and judge-dependent.

Some interviewees said that more judicial scrutiny at fee hearings is needed, including an evidence threshold at fee hearings to corroborate counsel records.

Multiple interviewees advocated for doing away with multipliers.

10. Costs

Most interviewees – including both plaintiff and defence counsel – agreed with the current two-way costs rule, stating that the rule discourages frivolous motions and claims, and that there are benefits to the current rule for both plaintiffs and defendants. For example, it was stated that plaintiff counsel are able to use third party litigation funding and the Class Proceedings Fund to offset adverse costs risks.

Some plaintiff counsel expressed concerns about the potential for additional delay in no-cost jurisdictions. They felt no cost jurisdictions encourage defence counsel to bring multiple interlocutory motions because there is no risk of adverse cost consequences.

Others said that adverse costs can create significant risks for plaintiffs, and therefore may discourage plaintiffs from bringing forward claims. They also cited unpredictability in cost award amounts and suggested at least capping costs at certification. Some recommended looking at costs assessment in Québec.

An interviewee who does not litigate class actions noted that the risk of costs is a barrier to access to justice for low-income Ontarians who might otherwise have a viable class action.

11. Notices

There was general agreement that notices have improved. Counsel were said to be both more creative and more willing to use technology to improve client notices. Interviewees also frequently mentioned that long form notices are difficult to understand. Some interviewees suggested notices should state that class members have a right to independent legal advice.

Interviewees also expressed concern that depending on the type of class action, some notices could be inaccessible to class members with certain types of disabilities, or those with low literacy levels.

12. Litigation Funding Arrangements

Many interviewees, including plaintiff counsel, stated that litigation funding arrangements (whether the Class Proceedings Fund or third-party funding) support access to justice. They also stated that the current legal test for approval is generally appropriate. Many counsel suggested that litigation funding supports smaller firms practicing class actions litigation.

On the other hand, some interviewees were concerned that litigation funding arrangements may not be sufficiently transparent. Some interviewees also asked whether litigation funders influence outcomes, including settlement decisions.

OBJECTIVES OF CLASS ACTIONS IN ONTARIO

The three objectives of class actions – access to justice, judicial economy and behaviour modification – were originally set out by the Ontario Law Reform Commission (OLRC) in its 1982 *Report on Class Actions*.¹⁰ These objectives are not included in the *Class Proceedings Act, 1992*, (CPA), but courts have interpreted the *Act* consistent with these objectives.¹¹ The Supreme Court of Canada (SCC) further defined class actions objectives in *Dutton*¹² and *Hollick*.¹³

Access to Justice

In *Dutton*, the SCC defined access to justice in economic terms: class actions make the prosecution of claims more economical by allowing litigation costs to be shared:

*... by allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied[.]*¹⁴

Others define access to justice in class actions more broadly. For example, class actions may allow claimants to overcome non-economic obstacles, including social or psychological characteristics.¹⁵

Judicial Economy

In *Dutton* and *Hollick*, the SCC defined judicial economy as preserving resources for both courts and parties:

*"[...] by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. The efficiencies thus generated free judicial resources that can be directed at resolving other conflicts, and can also reduce the costs of litigation both for plaintiffs (who can share litigation costs) and for defendants (who need litigate the disputed issue only once, rather than numerous times)."*¹⁶

Delay in litigating class actions, and its associated costs, are a component of judicial economy.

Behaviour Modification

The SCC defined behaviour modification in economic terms:

*Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery. Cost-sharing decreases the expense of pursuing legal recourse and accordingly deters potential defendants who might otherwise assume that minor wrongs would not result in litigation.*¹⁷



Chapter Four

CONSULTATION ISSUES

A. Background

Almost 30 years ago, the Attorney General's Advisory Committee on Class Action Reform emphasised the importance of providing an ongoing assessment and review of class action practice and procedure

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.¹⁸

It is evident from the LCO's Stage One interviews that this review is overdue. Commentators from across the spectrum of class actions stakeholders welcomed the opportunity to discuss class actions objectives, the costs and burdens of class actions litigation, procedural difficulties, and potential reforms.

In 1982, the Ontario Law Reform Commission (OLRC) highlighted the importance, when choosing a procedural model for class actions, of considering 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.¹⁹

The three objectives of class proceedings – judicial economy, access to justice, and behaviour modification – originally prescribed by the OLRC were subsequently affirmed by the Supreme Court of Canada in 2001 in *Hollick*.²⁰

This project considers whether the three objectives are being met. The project further considers whether reforms are necessary to address systemic issues in Ontario's class action system while ensuring that mass wrongs are effectively redressed, class members' interests protected, and "unworthy" class cases are weeded out at the onset of the proceedings.

The LCO's Stage One interviews revealed both strengths and weaknesses of the current system. These insights, coupled with practical and theoretical experience of the project's principal researchers, have led the LCO to develop the consultation questions and research priorities set out in this chapter.

B. Consultation Priorities and Parameters

At the outset, it is important to note several parameters to the LCO's approach and consultation questions:

- The LCO is aware there are many unresolved and important class actions issues. The LCO has made a conscious decision to prioritize and focus research and consultations on issues that appear to have a systemic impact on class action litigants, practice, and outcomes. The project also prioritized issues based upon the concerns identified in Stage One interviews, the principal researchers' experience and judgement, and the LCO's analysis of whether an issue was appropriately considered a "law reform" issue. This approach means that there are

several issues that are not discussed (or discussed in detail) in this paper. Individuals or organizations are free to comment upon any class action issue they believe is important, irrespective of whether it is included in this paper. Not surprisingly, some of the issues and questions in this paper overlap.

- The project (and this paper) is informed by existing empirical research where possible to do so. Unfortunately, researchers and policy-makers have comparatively little empirical research regarding key class actions issues such as the outcomes of class actions litigation in Ontario; the distribution of settlement funds to class members; and the length, cost or complexity of class actions matters in this province.²¹ This issue is discussed in more detail below in Chapter Five.
- The LCO's project is focused on the CPA and class actions practice in Ontario. Nevertheless, this paper considers examples and potential reforms from jurisdictions outside Ontario.
- Finally, the LCO's project does not consider substantive amendments to other related legislation.

What follows below is the list of questions identified by the LCO so far. It goes without saying that many of the issues and questions identified in this chapter (and in Chapter Five) are related. The LCO asks, therefore, that readers consider these relationships and dependencies when addressing the questions.

Finally, readers should note that the order or sequence of the consultation questions is based roughly on the frequency that an issue was raised by respondents in our Stage One interviews.

CLASS ACTIONS IN QUEBEC

Class action litigation in Quebec falls within a unique context – Quebec is the only province in Canada with a civil law system. Despite this, there are similar debates in Ontario and Quebec regarding some aspects of class action litigation, though the practices and procedures in each province are different. It is prudent to briefly summarize a few examples here.

First to File

Since 1999, courts in Quebec have used a “first to file” rule to determine who has carriage where multiple parties have filed motions to pursue class actions representing the same class on the same issue.²²

Certification

The *Quebec Code of Civil Procedure* requires “authorization” of a class action in order for the action to continue. Many commentators argue that Quebec’s certification threshold is “plaintiff-friendly.”²³

In Quebec, consideration of proportionality is important in determining whether to authorize a class action.²⁴ Unlike Ontario, there is no requirement in Quebec that a class action be the preferred procedure. As a result, Quebec courts arguably have more discretion to authorize class actions.

Unlike Ontario, class action defendants in Quebec must seek leave to submit evidence and to cross examine at the authorization stage.²⁵

Costs

Quebec has a two-way cost regimes for class actions. Unlike Ontario, however, the quantum of costs is limited. This, provision arguably makes Quebec more “plaintiff-friendly.”

Requirement To Submit Reports

The Rules of Practice of the Superior Court of Quebec in civil matters require claims administrators to submit outcome reports to the court following the conclusion of a class action. These reports list the members who filed a claim, the amount paid to each member, the remaining unclaimed balance, and the amount withheld by the Fonds d’aide aux actions collectives.



C. Consultation Issues

1. Delay

The impact of delay on access to justice has been a primary concern of stakeholders and policy-makers in the Canadian justice system in recent years.²⁶ The issue appears to have reached a “tipping point” in *R v. Jordan*, a 2016 decision of the Supreme Court of Canada.²⁷ *Jordan* considered delay in the Canadian criminal justice system in light of the right “to be tried within a reasonable time” enshrined in s. 11(b) of the *Canadian Charter of Rights and Freedoms*.²⁸ The court stated that “[t]imely justice is one of the hallmarks of a free and democratic society.”²⁹ *Jordan* established a new test in order to alleviate the “culture of delay” beyond which the delay would be considered unreasonable.³⁰ *Jordan* has been a catalyst for an overhaul of courts’ administration across the country.³¹

Class actions are a major part of the administration of civil justice in Ontario. Class actions require tremendous judicial resources and have unique features that affect the ability of class litigants to have their cases prosecuted in a reasonable timeframe. Delays in class actions are systemic and can be attributed to:

- multiple pre-certification motions (to strike, to amend, particulars);
- scheduling challenges;
- significant discoveries (often burdensome and expensive e-discoveries);
- interlocutory appeals; and
- the inherent complexity and novelty of class actions claims.

The delays endemic in class action litigation in Ontario were mentioned frequently in Stage One interviews, as was the need for lawyers to respect the principle of proportionality.

For many lawyers, a crucial factor enhancing delays is certification, and the fact that certification is becoming increasingly more complex to litigate, with arguments often delving into the merits of the case. This incursion into the merits is problematic, as the Supreme Court of Canada stated in *Hollick*:

*the certification stage is decidedly not meant to be a test of the merits of the action [...] Rather the certification stage focuses on the form of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action [...]*³²

Notwithstanding consistent direction from Canadian courts, stakeholders from the class actions defence bar (or defendants themselves) interviewed in Stage One commented on a need to consider a merits test at certification. The LCO welcomes submissions on this issue during our consultations.

Delays in class actions can have important consequences beyond the timing of resolutions and effect on court resources. For example, delays in class actions can affect the settlement value of a case and ultimate monetary outcome. Delays can also directly affect the ability to effectively litigate a case through trial. Over time, class members may forget, disappear, move, or simply lose interest in indemnification. Evidence may deteriorate. Chief Justice Strathy summed up these issues in the case of *Osmun v Cadbury Adams Canada Inc*, where he concluded that

*public confidence in the administration of justice is not enhanced when class action litigation takes many years to resolve. The efficacy of access to justice and behaviour modification, in particular, is diluted by delay.*³³

Many Stage One interviewees stated that class actions put a huge strain on judicial resources. Interviewees also noted, however, that delays are inherent in class actions because proceedings are factually complex. Nevertheless, what would help, they say, is knowing which cases should be in the system at all. This concern was shared by the drafters of the 1982 OLRC Report, as mentioned above. Certification was acknowledged by many stakeholders as the most important stage in class actions, and the most significant in terms of delays and court resources.

Reasons for delays are many, and solutions are complex. Interviewees observed that judges in Ontario are increasingly trying to move toward more summary dispositions, consistent with *Hryniak*.³⁴ The role of the judiciary in class actions is complicated. Judges themselves have often noted the difficulty in adjudicating class actions. For example, former Chief Justice of Ontario Warren Winkler noted that

*a fair and just system of justice requires a courtroom, a judge and a non-adjudication policy which in turn will produce settlements or timely adjudication, and be less costly to the litigants.*³⁵

Similarly, Justice Paul Perell has stated that

*a criticism of the modern class action is a criticism of the role of the judiciary in a modern class-action regime. But it is difficult to measure whether the judiciary is succeeding or failing in carrying out its tasks without an actual assessment of the merits of the claim and defense. The critique of class actions becomes a theoretical inquiry into whether judges have the skill set and the institutional tools to curb any propensity for evil in an otherwise good procedural tool for access to justice.*³⁶

For some practitioners, amending s. 2(3) of the CPA would reduce delay until certification, and improve access to justice as well as the other objectives of class actions.³⁷ One interviewee told the LCO that implementing a six-month certification deadline, potentially extended with leave from the court, would

encourage litigants to focus on the procedural nature of the motion, while creating an achievable schedule. This approach would import some discipline into the class actions regime, shortening delays, decreasing expenses and preserving access to justice.

For other stakeholders, the solution lies in improved case management and imposition of one-year deadlines for the certification hearing.

Consultation Question 1:

How can delay in class actions be reduced?

- How may practices be changed to shorten delays?
- How might judges manage cases more efficiently?
- Should the statutory deadline for filing of a certification motion, or any other deadline applicable in class action practice, be changed?
- What changes in legislation could help cases proceed more efficiently?

2. Settlement Distribution and Transparency of Outcomes

Experience demonstrates that settlements are the most likely outcome of class litigation. Settlements are the result of negotiations between the parties. A proposed settlement agreement is then submitted to the court for approval. In our adversarial system, settlements are designed to result in a fair, efficient, and reasonable resolution for all class members. Nevertheless, it is widely acknowledged that class actions settlements are instruments of “rough justice” due to the inevitable compromises inherent in resolving individual issues in aggregate litigation. This reasoning stands, so long as class members receive benefits in the form of compensation.

Not surprisingly, settlement outcomes are a major issue in class action policy and law. Settlements have a major impact on all three class action objectives.

Unfortunately, we do not have a comprehensive record of class action settlements in Ontario. There are many unanswered questions for such an important issue. For example, how much are members obtaining through class action distributions? How many members of the initial class are being compensated? These are empirical questions that have not been answered

completely to date. Based on research conducted by Professor Piché at the Class Actions Lab (Lab),³⁸ it is interesting, however, to note that the record of class distributions in Québec cases is more successful than what many people had assumed.³⁹ The Lab's data reveal that 55% of class members on average are compensated.⁴⁰ Unfortunately, there is no comparable analysis or statistics in Ontario. From what we know so far, take up rates in Ontario vary wildly, from less than 1% to 100%, according to studies conducted by Professor Kalajdzic in 2009 and 2014.⁴¹

Class actions must provide substantive outcomes to the members, as was recognized by the Supreme Court of Canada in *Fischer*.⁴² Substantive outcomes, in turn, are directly related to questions regarding settlement distribution processes, transaction costs, and transparency/monitoring of settlements. The LCO considers each issue below.

In class actions, the *process* of distributing settlements is a fundamental issue for class members, counsel, the parties, courts, and public policy generally. Everyone has an interest in knowing *how* class funds are distributed and *what sum or proportion* of class funds are distributed. The answers to these questions inform debates about which modes of distribution are most successful, timely, and cost-efficient. As noted above, there is comparatively little empirical research to inform these questions.

The cost of settlement distribution (“transaction costs”) is another important issue. Costs associated with customising allocations are incurred as part of designing the distribution scheme and administering it. These costs may reduce the funds made available for class members or increase the legal costs and disbursements paid by the defendants. Further costs may be incurred to administer the distribution scheme.

The transparency of settlements is a third area of concern. Many interviewees asked whether class members were receiving their share of distributions. For many, lawyers appeared to be benefiting more than the members themselves. In the 2016 *Endean* case, Justice Wagner (now Chief Justice) wrote, in concurrent reasons in his and Justice Karakatsanis’ name, that “a process that is efficient and expeditious, but is ‘a mystery to those who participate in it [...] is not a process that enhances access to justice.”⁴³

The same can be said of class action outcomes. Those outcomes are not generally known in Ontario as there is no mandatory reporting or accounting of class action distribution outcomes. Experience suggests that judges do not consistently order or require reports or accounts of class action outcomes. As is discussed in Chapter Five below, information about class action outcomes is crucial to the credibility of class actions and whether they are meeting their objectives. By way of comparison, in Québec, class action distributions now have to be reported back to the court at the conclusion of every class action case, as a result of amendments to the *Rules of the Superior Court of Quebec in Civil Matters*.⁴⁴ In the U.S., only exceptionally will judges require information about claims rates and disbursements, but the United States House of Representatives passed a bill in 2017 calling for class action lawyers to submit an accounting of payouts in every case to the Federal Judicial Center and the Administrative Office of the U.S. Courts.⁴⁵

Consultation Question 2:

Given that class actions must provide access to compensation to class members, how should distribution processes be improved?

- What are the best practices for distributing monetary awards to members?
- How can transaction or agency costs be reduced in distributions?
- Is transparency important in class actions? If so, how can reporting and monitoring be improved?
- Should judges require parties or claims administrator to file a public report summarizing the outcomes of the settlement distribution after its conclusion? What should the report contain?
- Should the CPA be amended to specify more detailed requirements regarding distribution practices, improved monitoring, or reporting?

3. Costs

The suitability of the two-way cost rule in a class actions has long been a topic of debate. The OLRC recommended against it in their pivotal 1982 report.⁴⁶ Eight years later the Attorney General's Advisory Committee came to the opposite conclusion, recommending that the conventional "costs follow the event" rule apply in class actions.⁴⁷ The Government of Ontario subsequently adopted the Advisory Committee's recommendation when it passed the CPA, stating that the objectives of the two-way costs rule to compensate successful parties and to deter frivolous litigation were equally important in class actions. Importantly, the provincial government sought to address concerns about the chilling effect of the two-way costs rule by also introducing the Class Proceedings Fund, which indemnifies successful applicants against adverse costs awards.⁴⁸

Twenty-five years after the enactment of the CPA, the two-way costs rule is still controversial. Most provinces (including Ontario) have adopted the two-way costs rule. Three provinces (British Columbia, Manitoba and Newfoundland), and the Federal court all have no costs regimes for class proceedings. In these jurisdictions, a successful party may only be entitled to costs in exceptional circumstances (for example, when the court considers that there has been vexatious or abusive conduct on the part of the opposing party).⁴⁹ It is important to note most provinces, including Ontario, allow for exceptions to the two-way costs rule in cases where there is a matter of public interest, a novel point of law or amounts to a test case – the so-called s. 31(1) factors in Ontario's CPA.⁵⁰ Saskatchewan has recently changed its class actions costs rule: The Saskatchewan *Class Actions Act*⁵¹ formerly provided for a no-costs rule, but was amended in 2015 to provide a judicial discretion to award costs.

The LCO was told that the application of the CPA's s. 31(1) test has led to unpredictable and at times inconsistent results. Some interviewees advised the LCO that unsuccessful plaintiffs regularly face substantial costs orders, and the quantum of the orders has risen exponentially since the early days of class actions. A 2017 cost order serves as an extreme example: plaintiffs who lost a certification and jurisdiction motion were ordered to pay the defendants more than \$2.3 million.⁵² In 2013, Justice Belobaba determined the average certification costs order in the previous six years, where costs requests exceeded \$500,000, was roughly \$490,000 against defendants, and \$341,000 against plaintiffs.⁵³

Stage one interviewees did not reach consensus on class action costs in Ontario. Some interviewees strongly believed that the two-way costs rule deters meritorious, smaller damages actions. Others were concerned that the rule leads to unpredictable costs awards. Some interviewees were concerned that third-party funding reduces the sum of money ultimately paid to the class. Still others worried that a no-costs rule would encourage plaintiff firms to litigate weak claims while creating incentives for well-resourced litigants to advance unnecessary interlocutory motions. Yet others stated that the increasing presence of third party funders renders the costs issue moot.

At a general level, the LCO is concerned about the impact of costs on access to justice in class actions. More specifically, the LCO is seeking submissions about the advantages and disadvantages of maintaining the current two-way costs regime in Ontario.

Consultation Question 3:

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

- Should Ontario retain the two-way costs rule?
- Is the cost of indemnities against adverse costs a concern?
- Should the Class Proceedings Fund have the flexibility to alter its current 10% levy and/or to fund legal fees?
- Is third party funding a positive development in class action practice? Should it be more tightly regulated?
- Should the source and extent of funding be disclosed to courts?

4. Court Approval of Plaintiff Counsel Fees and Settlements

This section considers two related issues: court approval of plaintiff counsel fees and court approval of settlements. The answer to these issues can have significant consequences for achievement of the three class action objectives.

Plaintiff counsel fees in class actions are often controversial. A common complaint is that plaintiff counsel appear to earn millions while individual class members receive comparatively little. This situation often generates cynicism and public distrust of class actions and plaintiff counsel.

In this context, it is important to remember that the disparity between lawyers' remuneration and individual class members' recovery is an inevitable and structural feature of class action litigation: plaintiff lawyers are paid to represent a large group of people, each of whom contributes to their fees. Moreover, contingency fees are designed to ensure plaintiffs' lawyers are remunerated appropriately for assuming the financial risk of taking on a big case that may be unsuccessful.

Public cynicism about plaintiff counsel fees can overshadow the fact that courts in Ontario (and throughout Canada) must approve fees. Courts are required to consider class members, compensation, counsel fees, the proper functioning of class actions generally, and access to justice. Plaintiff counsel fees are directly related to access to justice: If fees are set too low, counsel may not pursue claims in the future, a result that could decrease access to justice. On the other hand, if fees are set too high, plaintiff counsel will receive some of the benefit that should have gone to class members, which may decrease access to justice.

Incentives are thus extremely relevant to this discussion. Ontario courts have stated that fair and reasonable compensation must be "sufficient to provide a real economic incentive to lawyers to take on a class proceeding and to do it well."⁵⁴ Accordingly, counsel should be entitled to a fee that is "fair", and might include a premium for the risk undertaken and the result achieved. The fees, however, "must not bring about a settlement that is in the interests of the lawyers, but not in the best interests of the class members as a whole."⁵⁵

Approval of class action settlements is another important and related issue. At a class action settlement approval hearing, judges are presented with an agreement that all parties have agreed to, often after lengthy negotiations. Judges are then asked to approve this agreement largely without modifications, based on a series of criteria derived from the *Dabbs* case.⁵⁶ Judges must then decide whether this agreement is in the best interests of all class members in a context where both parties agree on settlement, where absent class members' interests are presumed, and where approval is, implicitly, strongly encouraged.⁵⁷ Given this, for some Stage One interviewees, aspects of the legal test for settlement approval are problematic.

Courts also appear to be scrutinizing settlements more thoroughly, including fees for plaintiff counsel in relation to settlement approval. Courts appear to show increasing reluctance to approve settlements that do not appear to be fair to the class members. For instance, in *Lavier v. MyTravel Canada Holidays Inc.*, the Ontario Court of Appeal rejected a plaintiff's request for an additional fee premium given the relatively low take-up rate following settlement.⁵⁸ In *Waldman v. Thompson Reuters Canada Limited*, Justice Perell refused to approve a settlement agreement reached in a copyright class action because the settlement did not benefit class members. However, Justice Perell's decision was later quashed by the Ontario Court of Appeal.⁵⁹

Risk has been recognized by the courts as the most pressing consideration at fee approval. In this context, courts will consider proportionality to ensure that fees are not "clearly excessive" or "unduly high" with "little relation to the risk undertaken or the result achieved."⁶⁰

The CPA expressly permits contingency fees in class actions. The courts in Ontario have also stated that contingency fees promote access to justice.⁶¹ Nevertheless, some Stage One interviewees believe that contingency fees bring the profession into disrepute. Particular concern was expressed regarding the Indian Residential School settlement⁶² and subsequent claims process.⁶³

Importantly, the CPA also allows plaintiff counsel to seek court approval to increase their fees by a multiplier after the class proceeding has been concluded successfully.⁶⁴ In addition, legal fees may be sought to be approved as a part of a settlement agreement pertaining to the class action, granted they are fair and reasonable.⁶⁵

In relation to this, some Stage One interviewees suggested that presumptive percentages awarded as counsel fees, pursuant to an often subjective appreciation of “litigation risk”, were too high. In their view, such percentages do not correlate to class distributions.

Several suggestions were made to the LCO that counsel fee awards should be structured to improve take up rates.

Consultation Question 4:

Is the current process for settlement and fee approval appropriate?

- Is the legal test for settlement approval sufficient?
- Which factors should a court consider in awarding counsel fees?
- Should counsel fees should be proportional to or dependent upon class recoveries?
- Should fees be awarded on a sliding scale, that is, a reduced percentage of recovery as the size of recovery increases?
- What changes, if any, should be made to the process by which fees are awarded?
- Is there a role for an *amicus curae* at settlement and/or fee approval?

5. Certification

Certification is a key moment in the life of a class action. A judge determines whether to certify an action as a class proceeding, which permits the case to proceed on behalf of the class. In theory, failure to certify means the action may proceed as an individual action, but in practice it usually signifies the end of the litigation altogether. While certification reflects only that the case is procedurally conducive to class-wide adjudication, and not necessarily that the class will succeed on the merits, it is also true that a plaintiff gains considerable leverage in negotiating with the defendant once a court has certified the action. Experience suggests that the great majority of class actions settle after certification is granted.

For these reasons, it is not surprising that in Ontario, plaintiffs and defendants appear to invest significant resources in preparing for the certification motion.⁶⁶ In Ontario, hundreds of certification decisions have been released, many of them publicly available. They show the jurisprudence has developed over the past twenty-five years, and the judicial approach to the certification test is largely settled.

The LCO asked participants in the Stage One consultations whether they thought it was important to revisit section 5 of the CPA. Most interviewees, including some defence lawyers, stated they did not believe that section 5 of the CPA should be amended. Several interviewees noted, however, that the section 5 test could be *applied* with greater clarity. Specifically, interviewees voiced the following concerns about litigating certification motions:

- there is too much evidence admitted at this stage;
- too frequently the proceedings stray into the merits;
- litigation plans need to be more detailed; and
- the deadline for service of certification material should be extended past the current 90-day rule in the CPA, but then actually enforced.⁶⁷

Some interviewees stated that a predominance requirement should be added to section 5, along with a higher standard of proof. Most, however, including some defence counsel, cautioned against radical reform of section 5. For example, one defence lawyer said it would be disruptive and create uncertainty in a long line of jurisprudence that included clear

pronouncements from the Supreme Court of Canada on the question of proof.⁶⁸ That said, the project does not wish to foreclose discussion about changes to s. 5 of the CPA.

There are radically different approaches to certification in other jurisdictions. In Québec, the threshold for authorization is “relatively low”, with applicants having to provide evidence that they have an “arguable case” in light of the facts alleged and the applicable law.⁶⁹ At this stage, “[a]lthough more than bare allegations are required, this threshold falls comfortably below the civil standard of proof on a balance of probabilities.”⁷⁰ Courts in Québec must consider allegations contained in the authorization motion, as well as documentary evidence, affidavits or transcripts filed into the record.⁷¹ Defendants may seek leave to file useful and relevant evidence where the allegations are, for instance, incomplete, vague or constitute opinion. Leave will be granted only if relevant to either of the authorization criteria.⁷²

Québec’s evidentiary burden remains less demanding than in other parts of Canada. In Ontario, for example, plaintiffs have to demonstrate a sufficient factual basis for certification by way of expert reports and sophisticated evidence. By way of contrast, in Australia, an action is commenced as a class proceeding, without the need to certify, but with the possibility of a defendant applying to discontinue the action as a group proceeding on the bases that costs would be excessive relative to individual proceedings; it would be more efficient to proceed individually; or it is otherwise inappropriate that the claims be pursued by means of a representative proceeding.⁷³

The issue of how much evidence is required to satisfy the s. 5 test was a dominant theme in our Stage One consultations, and was intimately connected with concerns about access to justice, delay and expenses/costs. For this reason, the project welcomes submissions on this issue.

Consultation Question 5:

Is the current approach to certification under s. 5 of the CPA appropriate?

- What is the appropriate evidentiary standard at the certification motion?
- Should courts consider the merits of a proposed class action at certification?
- Should Ontario move in the direction of Québec by requiring only a limited evidentiary basis at the motion for certification?
- Should Ontario abandon the requirement for certification, or preliminary hearings altogether?

6. Behaviour Modification

Behaviour modification is one of the three main objectives of class proceedings⁷⁴ Since class actions make claims possible that would be uneconomical to pursue individually, the Supreme Court of Canada has held that “*class actions serve a regulatory and public law function by encouraging compliance with the substantive law.*”⁷⁵ Courts assess certification criteria through the lens of behaviour modification as well as the other objectives. Behaviour modification is an “inevitable but valuable by-product of furthering access to justice,” and observers have suggested that behaviour modification is the sole justification for litigating some class actions.

Notwithstanding the importance of behaviour modification to class action theory, little is known about the extent to which defendants are either specifically or generally deterred from wrongdoing as a result of class actions. For this reason, Stage One interviewees were asked whether they believed this objective is being fulfilled. In response, interviewees offered some specific examples: in employee overtime cases, employers changed policies as a result of litigation; payday loans litigation contributed to legislative changes in the industry; and counsel reported that advice given to corporate clients will almost always include discussion about the risks of class action litigation.

Many responses to this question could be summarized as follows: while few interviewees could *prove* that class actions encourage behaviour modification, almost all interviewees interviewed *believed* it to be true.

In light of the importance of this objective to the class action regime, and its implications for aspects of class action practice (for example, as it justifies *cy prè*s, aggregate damages, and causation), the general consensus was that experiential or empirical evidence of the ways in which class actions deter wrongful behaviour would be useful.

Consultation Question 6:

Are class actions meeting the objective of behaviour modification? What factors (or kinds of cases) increase (or reduce) the likelihood of behaviour modification?

7. Perspectives of Class Members

Class action research typically focusses on critiques of the case law and judicial interpretations of the CPA. Where the actors in the system are studied, the focus is usually on the lawyers (for example, regarding compensation for risks, or incentives for collusion, etc.) and on the parties being sued. Rarely, if ever, are the perspectives of class members investigated.

Recent access to justice research in Ontario has focussed on ‘bottom-up’ analysis, a public-centered model that puts the residents of the province, and not lawyers, judges and policymakers, squarely at the centre of justice reform.⁷⁶ According to Professor Trevor Farrow, “the importance of understanding the direct needs of those who use the system, as opposed primarily to those who provide it, is only now starting to be appreciated.”⁷⁷

In keeping with this wave of access to justice research, the LCO is committed to hearing from class members and representative plaintiffs. What is class members’ experience of class actions? What issues do class members believe to be the most important in any reform initiative? How did class members benefit from their class action experience, and what is class members’ perspective on how the system could be improved? The LCO will seek the input from current or former class members and representative plaintiffs.

Objecting class members – those who take steps to voice opposition to a proposed settlement or counsel fee, may have unique experiences with the justice system. By objecting to the settlement or fee, they are in a conflict with class counsel. They are often unrepresented. How does the class action regime facilitate, or hinder, objecting class members’ participation in the lawsuit?

Consultation Question 7:

Please describe class members’ and representative plaintiffs’ experience of class actions:

- How can class action processes be improved for class members and representative plaintiffs?
- Are there certain kinds of disputes or legal problems that class actions are not addressing?
- How can technology be used to keep class members better informed?
- Should the CPA include specific provisions regarding the rights of objecting class members to disclosure, representation and entitlement to costs?

8. National Coordination and Carriage

a) Multi-Jurisdictional Class Actions⁷⁸

Over the past few decades, it has become increasingly possible for individuals in Canada to be included in more than one class action for the same injury. The commencement of multiple, duplicative or overlapping national class actions has become frequent, and courts are increasingly being asked to resolve overlapping class proceedings filed in multiple jurisdictions. Significant constitutional issues have been raised about these practices, and opinions have been as divided as their solutions polarized.⁷⁹ Importantly, occurrences of conflicting, parallel class actions may have significant consequences on the users of the system. For instance, plaintiffs may have inefficient, conflicting and inconsistent resolutions of their claims. Delays are noteworthy in these cases, as observed by stakeholders interviewed. Further, when the same class action is launched by different claimants of the same class in multiple jurisdictions, the overall fees are higher because of duplication of legal services; as a result, payout to the class is lower.

How can multijurisdictional class actions be better coordinated in Ontario courts? When two or more courts are seized of a similar or related class action claim, how can the matter be resolved equitably, in the absence of a deciding panel such as the U.S. Judicial Panel on Multidistrict Litigation?⁸⁰ Canadian courts have, in practice, “sought counsel’s advice on the status of related proceedings in an informal attempt to avoid multiplicity.”⁸¹ They also have resorted to a “deferential” approach, where the court in which a national class action is brought will not engage in a forum selection, but will instead generally “defer” to the superior court of another province in respect of the subclass of persons residing in that other province.⁸² In the face of increased confusion and inconsistency, law reform commissions have called for reform to permit effective coordination and management of multiple national class actions. In parallel, the Supreme Court of Canada has acknowledged it is not for the courts to find solutions to the problem of multi-jurisdictional class actions:

[T]he provincial legislatures should pay more attention to the framework for national class actions and the problems they present. More effective methods for managing jurisdictional disputes should be established in the spirit of mutual comity that is required between the courts of different provinces in the Canadian legal space. It is not this Court’s role to define the necessary solutions.”⁸³

In 2005, the Uniform Law Commission of Canada released recommendations for legislative changes to provincial class proceedings statutes,⁸⁴ followed in 2006 by a Supplementary Report by the Special Working Group on Multi-Jurisdictional Class Proceedings.⁸⁵ That Report set out a harmonized scheme for tackling overlapping multi-jurisdictional class proceedings and provided the following:

- (1) every plaintiff has notice of and standing to make submissions in every other competing proceeding;
- (2) every certification motion can potentially function as a national carriage motion; and
- (3) where competing national class proceedings are pending, the court’s certification/carriage decision is informed by both the established carriage motion factors as well as *forum conveniens* considerations.

The ULCC has further recommended that, where overlapping class actions are certified, courts hearing the action adopt the *Guidelines Applicable to Court-to-Court Communications in Cross Border Cases*.⁸⁶ These *Guidelines* have now been adopted in practice directions in Ontario.

In recent years, there have been several statutory or judicial efforts to address, or at least improve, this situation.

Provinces have started to amend their class proceedings legislation to manage multi-jurisdictional class actions more effectively. Both Alberta and Saskatchewan have explicitly permitted multi-jurisdictional class actions to be certified in their jurisdictions,⁸⁷ and provided for refusals of certification in favour of a multi-jurisdictional class action in another province.⁸⁸ Before certifying a multi-jurisdictional class action in Alberta and Saskatchewan, courts must determine whether it would be preferable for some or all of the claims to be resolved in another jurisdiction.⁸⁹ Non-residents who fall within the definition of the certified class will automatically become class members unless they take steps to opt out.⁹⁰

In 2011, the Canadian Bar Association released the Canadian Judicial Protocol for the Management of Multi-Jurisdictional Class Actions (Protocol) to facilitate the management of multijurisdictional class actions by making use of existing class proceedings legislation, Rules of Court and Rules of Civil Procedure in provincial jurisdictions.⁹¹ The Protocol created a Notification List allowing counsel in various actions to be given notice of developments in all the proposed national class actions, and also sought to facilitate the coordination of settlement approval hearings where a joint settlement is proposed for class actions. In late 2017, the CBA released a proposed revised Protocol.⁹²

In February 2018, the CBA membership passed a resolution at the organization's annual general meeting approving a revised protocol that addresses settlement approvals and includes best practices for multi-jurisdictional actions where no settlement is proposed to encourage judges and lawyers to co-ordinate their efforts in the early stages.⁹³

In 2016, the Supreme Court of Canada in *Endean v. British Columbia*⁹⁴ addressed whether judges can hear class action motions in a different province. The majority of the Court held that section 12 of the Ontario and British Columbia class proceedings statutes granted the judges of those provinces broad discretionary powers to manage the proceedings, including the power to sit outside their home province if necessary to ensure the fair and expeditious determination of the case.⁹⁵ The Acts were interpreted broadly, in accordance with their purpose of enhancing access to justice.

Consultation Question 8:

In light of existing constitutional restrictions, what is the most effective way for courts to case manage multi-jurisdictional class actions in Canada?

- Is the 2018 CBA Protocol sufficient to address multi-jurisdictional class actions?
- Is statutory guidance desirable, or should this issue be left to the courts?
- Should legislative amendments like those in the Saskatchewan and Alberta statutes be considered?

b) Carriage Within Ontario

In class proceedings, carriage hearings occur when multiple lawyers seek to be recognized as official counsel for a large group of absent, non-participating class members. The LCO is not aware of an empirical analysis of the number or impact of carriage motions in Ontario. Nevertheless, experience suggests that carriage motions often create delays and inefficiency in the judicial system. The current CPA does not address carriage motions, leaving courts to fashion legal tests to determine lead counsel. Many Stage One interviewees suggested that the judicial interpretation of this test is unpredictable, the procedure is inefficient and time-consuming, and the resulting delay can prejudice the class. Some have suggested that Quebec's "first to file" rule might be more appropriate in this context.⁹⁶

Consultation Question 9:

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

- Should a modified "first to file" rule be considered in Ontario?
- Should the CPA be amended to provide guidance on carriage issues? If so, what reforms would you recommend?

INTERNATIONAL CLASS ACTIONS REFORM

Australia

Australia has had a federal class action legislation since 1992.⁹⁷ Australia does not allow class counsel to charge contingency fees, but does allow the use of third party litigation funders.⁹⁸

The Victoria Law Reform Commission (the “VLRC”) is currently reviewing class actions litigation funding issues, the Australian ban on contingency fees, and increasing oversight of litigation funders these aspects of class action procedure.⁹⁹ The VLRC is expected to issue its report later this year.

USA

The US Congress passed the *Class Action Fairness Act of 2005 (CAFA)*.¹⁰⁰ The stated intention of this legislation was to protect the interests of “class members [who] often receive little or no benefit from class actions, and are sometimes harmed.”¹⁰¹

The CAFA prohibited class counsel in coupon cases from calculating fees based on the gross amount of coupons awarded; instead, the fees must be calculated based on the number of coupons redeemed. The legislation was designed to incentivize class counsel to increase the “take-up rates” in these cases.

The US Congress is currently considering US Bill 2017 H.R. 985 – *Fairness in Class Actions*.¹⁰² This bill calls for class counsel to submit an accounting of class action payouts to the Federal Judicial Centre and the Administrative Office of the US Courts. The legislation would require the Federal Judicial Centre to complete annual reports claim rates, total payments to class members, average and median recoveries, and payments to class counsel.

England

England does not have a formal, legislated class action procedure. The *1996 Wolff Report* recommended a discretionary system of multi-party litigation, or group actions, rather than class actions.¹⁰³ The report was concerned about the perceived excesses of American class action litigation. UK legislators subsequently created the Group Litigation Order to administer group actions in England and Wales. In this process, each member of a class or group is a named party. They must register with the court and individually plead their claim, while being severally liable for costs.¹⁰⁴



9. Leave to Appeal

A strong majority of those interviewed in Stage One agreed the current CPA appeal provisions should be reviewed. Pursuant to s. 30(1), a party may appeal refusal of a certification motion to the Divisional Court. Under s. 30(2), however, a party seeking to appeal a *successful* certification motion must obtain leave of the Divisional Court.

Interviewees estimated the leave requirement adds almost a year to the length of proceedings. Preliminary evidence from Québec suggests that appeals potentially double the length of class action proceedings.¹⁰⁵ As in other areas of class action research, the percentage of cases where leave is sought is unknown. Nor is there empirical research regarding the frequency of leave being granted or denied; how often refusal to certify is appealed; or the rate of success on appeal.

In the interim, the LCO has been informed by many interviewees that the asymmetrical process for appeal is unfair and illogical. Others questioned whether review by the Divisional Court was needed at all, and suggested that all appeals should go straight to the Court of Appeal, where most Divisional Court decisions are reviewed anyway. The LCO invites input about removing the leave requirement under CPA s. 30(2) and whether the appeal route related to any certification decision should proceed directly to the Court of Appeal.

Consultation Question 10:

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

- Should appeals from successful certification decisions be taken directly to the Divisional Court, without the need to obtain leave?
- Should all appeals from certification decisions proceed directly to the Court of Appeal? Is the leave to appeal test appropriate?

10. Pre-Trial and Trial Issues

Although the majority of certified class actions ultimately settle, several dozen cases have gone to trial in Ontario in the past twenty-five years.¹⁰⁶ Lawyers taking class actions to trial face challenges in adapting civil procedure and rules of practice designed for individual litigation to the class action context. For example, discovery principles must accommodate the role of the representative plaintiff and the nature of the trial as limited to defined common issues. The evidence adduced at trial regarding the representative plaintiff must be extrapolated to the entire class. The provision in the CPA that permits statistical evidence has yet to be tested at trial.¹⁰⁷

Although issues surrounding pre-trial litigation and trials did not arise frequently in Stage One consultations, it is important to note that class actions do not inevitably settle. As more cases proceed through discovery, interlocutory motions and ultimately trial, the project invites public input about problems associated with class action litigation, as well as proposed best practices or legislative amendments.

Consultation Question 11:

What best practices would lead a case more efficiently through discoveries, to trial and ultimately to judgment? Are there unique challenges in trials of common issues that the CPA and/or judges could address? What can judges do to facilitate quicker resolutions and shorter delays?

11. Other Issues?

The CPA is more than 25 years old. Since that time, courts have considered several issues that were not contemplated by the CPA's drafters. The LCO has prioritized its consultation and research agenda to the topics set out in this paper, with a focus on whether the three objectives of class actions are being achieved.

That said, it is possible that this paper does not address an issue or matter that may be important in class actions. As a result, the LCO invites comments and submissions on issues that are not included in this paper.

Consultation Question 12:

In addition to the issues listed in this paper, are there provisions in the CPA that need updating to more accurately reflect current jurisprudence and practice? If so, what are your specific recommendations?

Chapter Five



THE EMPIRICAL DATABASE PROJECT

A. Why is Empirical Research Important?

Policy-makers and stakeholders from across Canada's justice system agree upon the need for empirical data, including class actions data. The Canadian Bar Association has emphasized:

*[Data] serve a range of purposes, from informing the public about the justice system and grounding the day to day decision making of justice system participants, to supporting policy making processes and change processes. Metrics enhance people's choices, enable comparisons and learning, increase transparency and create incentives for improving access to justice.*¹⁰⁸

The LCO agrees that empirical data is an important priority and further agrees with the CBA that data and metrics are ultimately a government responsibility. The approach, framework and data collection methods, however, must be developed collaboratively with the commitment of key stakeholders, including the public.¹⁰⁹

B. The Empirical Record of Class Actions in Canada

Professor Catherine Piché has written:

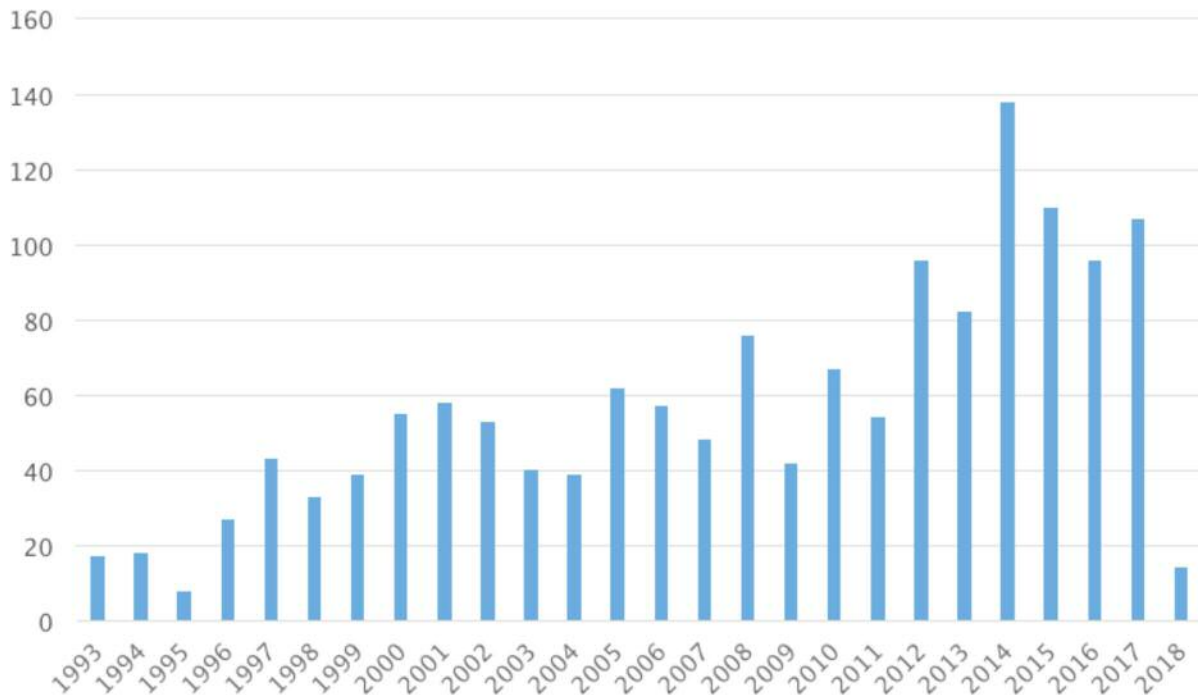
*There is a dearth of data on judicial activity in Canada in all sectors of litigation, including class actions. In fact, apart from the limited and rather informal data gathered by the provinces' superior court class action judges, the court registries, bar association registers, and informal (often more impressionistic) numbers circulating within the class action bar and among judges, no one can reliably draw any conclusions as to class action activity in Canada. Consequently, we do not know if our class action system is truly effective, fair and efficient. We are therefore unable to determine how the law should move forward, evolve and be reformed. Often, law reforms are based on inaccurate data. The absence of a documented monitoring system of implemented reforms makes for an imprecise, opaque civil justice system. The class actions sector is no exception.*¹¹⁰

As the CBA points out, many organizations collect justice data, but their approach, interests, audiences, and methods often differ.¹¹¹ This general observation is equally true in class actions. Over the years, there have been many efforts to collect and publicize data on class actions issues. Notable examples of empirical studies in Ontario and Canada include:

- An analysis of the incidence of trials in class actions¹¹²
- An analysis of take up rates¹¹³
- An examination of class counsel fees¹¹⁴
- Class actions "activity" reports prepared law firms¹¹⁵
- Reports on specific areas of law, including securities class actions¹¹⁶
- Class actions reports prepared by trade associations¹¹⁷
- Reports prepared by class actions funders,¹¹⁸ and
- Academic studies.¹¹⁹

These reports are helpful, and the individuals, firms and organizations supporting this work should be commended. Unfortunately, these efforts are not enough as, despite 25 years of class action proceedings, policy-makers still have very little empirical research regarding issues such as: the outcomes of class actions litigation in Ontario; the distribution of settlement funds to class members; and length, cost or complexity of class actions matters in this province.¹²⁰

Preliminary Estimate:
Number of class action cases filed in Ontario from 1993–2018



This table sets out a preliminary estimate of the number of class actions filed in Ontario per year since the enactment of the *Class Proceedings Act*. The LCO estimates there have been more than 1,450 class actions matters filed during this period. The LCO's estimate is based on data received from the Ontario Ministry of the Attorney General, searches of published decisions on Quicklaw and CanLII, and LCO's efforts to eliminate duplicate records, etc. Note that due to the constraints of our data sources, the LCO has likely underestimated the numbers of cases filed prior to 2005. The LCO will update this data as the project proceeds.

C. Collecting Class Action Data

Why can't policy-makers collect more empirical data about class actions?

At a general level, the answer is that civil court information systems are limited and cannot provide the information necessary for contemporary public policy analysis. These issues present significant challenges for evidence-based or empirical research for all civil matters, including class actions.

At a specific level, the answer is that some of the features of class action proceedings arguably make data difficult to collect and/or analyze. This difficulty begins with the simple matter of categorization: the *Class Proceedings Act* is a procedural statute. Class actions are not a type of case *per se*. This means that for data collection purposes, the class action "identifier" used in court file numbers may not be consistently applied to every class action proceeding.¹²¹ As a result, it may be difficult to even count the number of class actions matters in Ontario. The LCO's experience compiling empirical information for this project, including the historic class action data set out in previous pages, confirms these difficulties. Moreover, even if class actions matters are properly identified, at present it is difficult for current court information systems to identify (and therefore count) significant class actions events such as certification motions, details of approved settlements, etc. In addition, in Ontario, there is no systematic reporting of class action data, and no electronic docket system to make comprehensive court files easily available to the public.

The combination of these factors means that even the most basic class action data in Ontario is sparse.

The lack of empirical data has important consequences for thoughtful discussions (and law reform) about class actions. The lack of empirical data means that policy-makers and stakeholders discussing class action issues very often rely on anecdotes or personal experience rather than empirical data. Personal experience, while obviously important, is not a substitute for data. This is particularly true in class actions, well-informed commentators often come to different conclusions.

The lack of empirical data about class actions may also distort or undermine policy debates about class actions, including but not limited to crucial questions about class actions implementation. Absent data, how can policy-makers assess whether class actions are fulfilling their compensatory objectives?¹²² Or whether class actions are successful in distributing funds to class members?¹²³ Absent empirical analysis, how commentators evaluate or judge class actions transaction costs relative to class actions "outcomes?" The answers to these questions go to the heart of the three class actions objectives and other important policy questions.¹²⁴

As Professor Piché notes,

*"Generalizations are easily made, but true empirical data, evidence and statistics about the outcomes and/or effects of the class action are scarce and unavailable."*¹²⁵

This is not to say that class action data or information does not exist. On the contrary, it often *does* exist but is in hands of court administrators, counsel, claims administrators, or is otherwise effectively "buried" in paper-based court files, etc. The difficulty is that this information – when it does exist – is often not available publicly, consistently, or economically.

Ontario is by no means unique in its lack of class action data. The LCO's informal survey of several Canadian jurisdictions reveals similar challenges in British Columbia, Alberta, and Saskatchewan. (The situation in Québec is unique and will be discussed below.) Not surprisingly, there appears to be more empirical research about class actions in the United States. There too, however, important information gaps persist.¹²⁶ By way of contrast, the Australian Federal Court makes basic class actions statistics and court documents publicly available.¹²⁷

D. Quebec

Access to court documents for class action cases is fairly limited across the country. One exception to this is Quebec, where the Quebec class action registry¹²⁸ provides access to court documents. Statistical data is also available through the Fonds d'aide aux actions collectives.

Otherwise, the Canadian Bar Association's National Class Action Database¹²⁹ makes court documents for some cases available. Class action firms' websites may also publish some documents.¹³⁰

E. University of Montreal Class Action Lab Study

The University of Montreal's Faculty of Law Class Actions Lab (Lab) is currently undertaking the most extensive empirical research into class actions in Canada.¹³¹ The Lab's project is being undertaken in partnership with lawyers, the Québec Bar Association, the Québec Superior Court and Superior Court judges, the Fonds d'aide aux actions collectives, Educaloi, Soquij and Options Consommateurs, and the LCO, among others.¹³²

The first phase of the Lab's project involved analyzing class action files introduced in Québec between 1996 and 2017.¹³³ The project included a compilation and comparison of participation and take-up rates in various class action files, as well as per-plaintiff recovery amounts, among other things. The Lab's project also seeks to shed light on distribution practices, as well as the overall costs of the class action system.

The project's preliminary findings include several important conclusions, at least with respect to class actions in Québec:

- Generally speaking, take-up rates were *"much more impressive than those that had been found before and suggested by the overall literature and media"*¹³⁴
- The *"most important conclusion... is that while take-up rates vary tremendously between the case files studied, class actions do compensate Quebec citizens."*¹³⁵
- High take-up rates *"are reached when a series of favorable factors in the action are found to be present. In the majority of the files for which take-up rates exceeded 75%, class members tended to already be identified or to be readily identifiable... compensation is improved in instances where class members are simple to trace and reach, which is mainly the case in the consumer protection cases. Otherwise, higher take-up rates will generally be reached when the parties have made significant efforts to trace and notify class members."*¹³⁶
- *"Our review of the physical files and the correspondence available within them allowed us to realize that the judge's close involvement in the process decisively and positively influences the success of the class action by enhancing distributions."*¹³⁷
- *"I was surprised to find too few cases in which a final, clear and straightforward accounting report was filed, or where a final judgement was rendered disclosing and approving distributions."*¹³⁸

This project demonstrates both the potential and limitations of class actions empirical research.

Lab researchers report that in the 20 years prior to Québec's 2016 legislative changes requiring disclosure, there was a general lack of transparency regarding class actions outcomes in court dockets and files in Québec. They also discovered considerable inconsistency in court materials, inconsistencies and generic coding, and

*...largely generic and imprecise reports and accountings that did not provide distribution numbers, the progress made in distributions, and/or the details of the claims recovery process. Reports of class distributions were often incomplete, obscure or simply absent from the case file. Additional confusion stemmed from the absence of certainty within the file regarding the scope of the class size. In fact, the confidential nature of the data was on occasion dictated within the settlement agreement, upon agreement between settling counsel and/or as provided in confidentiality agreements.*¹³⁹

In terms of more definite results, the Lab has found, among other things, that a large majority of class actions settle and that settlement occurs largely before authorization. It also has found that the majority of class action cases are consumer ones, followed by state, product liability and contractual responsibility cases. In terms of delays, it has found that on average,

two and half years are required to obtain authorization, and more than eight to see a case conclusion judgment versus five years to see a settlement approved judicially. The Lab has found that 58.08% of the members are compensated, on average (average take-up rate), and that the majority of cases allow for total distributions between \$100,000 and \$10 million. As for costs, the most important conclusion was that a little less than one third of total distributions is awarded to class counsel, and only 6% to claims administrators.

The Lab experience may provide important lessons regarding best practices and rules regarding class actions data in Ontario.

F. The LCO Class Action Empirical Project

An important part of the LCO class actions project is the development of a class actions database. The LCO database is an attempt to fill the “data vacuum” about class actions matters in Ontario. As a result, the LCO believes the database is a crucial part of the larger class actions project.¹⁴⁰

In a best-case scenario, a comprehensive class actions database would include both current and historic data about class actions respecting:

- Court Information
- Parties/Counsel
- Competing class actions, carriage issues and/or national class actions
- Information about the timing (milestones) of major events in the litigation
- Description of the claim
- Description of the class
- Information about certification
- Information about the case outcome
- Appeals
- Information about the case outcome/settlement/trial
- Information about the distribution, and
- Information about costs and counsel fees.

The LCO does not expect its database will present a complete and comprehensive empirical record of all class actions in Ontario. The LCO’s challenge, as noted above, is that many categories of information (case outcomes, settlement details, and distribution, etc.) are not consistently collected or recorded in Ontario’s public court record, reported decisions, or elsewhere. As a result, the LCO will employ best efforts to compile empirical information from a combination of electronic court records, court files, legal databases, and other publicly-available information. The project will also seek the cooperation of counsel, firms, courts, or others to assist in collecting this information.

The LCO expects the database will assist the project’s analysis of access to justice and judicial economy issues. It is not expected the database will address issues respecting deterrence or behaviour modification.

More information about the LCO class actions database project will be made available during the project.

G. Questions for Discussion

The LCO believes class actions policy-makers, practitioners, and stakeholders must redouble their efforts to collect and analyze empirical data about class actions. As the saying goes, good policy requires good data. To this end, the LCO is seeking public comment on initiatives that would fill the “data vacuum” in class actions proceedings.

The LCO does not believe that improved data collection or distribution necessarily depends on the development of new court information systems. Nor should policy-makers (or the public) wait if there are practical, constructive steps that could

be taken in the meantime. For example, the LCO has been advised by counsel and claims administrators that settlement distributions can be significantly enhanced through the use of technology. The use of technology has the collateral benefit of improving data collection.

Not surprisingly, the LCO's preliminary consultations suggest there is a wide and deep consensus amongst all stakeholders on the need for improved data collection in this area.

In order to be effective, experience suggests that a new data collection regime should be mandatory, comprehensive, easy to administer, neutral, and transparent. Experience also suggests that a new data collection system should create incentives for participants to *share* data. Finally, a new data collection regime must also be consistent with ethical rules, privacy legislation, and other appropriate restrictions on data collection and distribution.

It is worth noting that many governments, including the Government of Ontario, are taking steps to address data challenges in the civil justice system.¹⁴¹ Governments are also taking significant steps to promote "open data," citizen's engagement and evidence-based public policy decision-making. Ontario's "Open Data Directive" and "data catalogue" are important initiatives in this regard.

Ontario's *Class Proceedings Act* is 25 years old. The LCO believes it is time to ask if, or how, the Act should be amended to promote better data collection, evidence-based policy-making, transparency, and "open data."

Consultation Question 13:

Should the Class Proceedings Act or Rules of Civil Procedure be amended to promote mandatory, consistent reporting on class action proceedings and data?

- What information should be collected?
- How can barriers or disincentives to better data collection be reduced?
- How can technology be used to facilitate greater data collection and reporting?

Chapter Six

HOW TO GET INVOLVED

The LCO believes that successful law reform depends on broad and accessible consultations with individuals, communities, and organizations across Ontario.

The Consultation Questions set out in this paper are a guide to the class action issues that have been identified by the LCO so far. The LCO welcomes public comments on these or any other class action issues.

The release of the Consultation Paper launches an intensive four-month period of public consultations. During this period, the LCO will organize consultations with members of the public, lawyers and legal organizations, public and private organizations, academics, governments, and others who have an interest in class actions. Our consultations are likely to include meetings, conference calls, webinars, focus groups, and roundtables. Important project documents will be distributed in English and French.

There are many ways to get involved. Ontarians can:

- Learn about the project and sign up for project updates on our [project website](#);
 - Contact us to ask about the project or project consultations; or,
 - Provide written submissions or comments.
- The consultation deadline is May 31, 2018.

The LCO can be contacted at:

Law Commission of Ontario
Osgoode Hall Law School
York University
2032 Ignat Kaneff Building
4700 Keele Street Toronto
ON M3J 1P3

Telephone: 416-650-8406
Toll free: 1-866-950-8406
Email: lawcommission@lco-cdo.org
Web page: www.lco-cdo.org
Twitter @LCO_CDO

Appendix A

PROJECT TERMS OF REFERENCE

Class Actions Research Project

Terms of Reference

September 22, 2017

Overview

The Law Commission of Ontario (LCO), with the support and collaboration of the Faculty of Law, University of Windsor and la Faculté de droit de l'Université de Montréal, is leading an independent study of class actions in Ontario.

The purpose of the project is to research whether class actions are fulfilling their three-part promise to improve access to justice, foster judicial efficiency, and promote behaviour modification.

The project will be based on extensive research and public consultations. The project will conclude with the preparation and distribution of a public report. The report will include analysis and recommendations for reform, where appropriate.

The project will be independent, consultative, balanced, practically oriented, and guided by public interest values.

Project Team

The project is being led by the LCO with the assistance of two principal researchers:

- Professor Jasminka Kalajdzic, Faculty of Law, University of Windsor, and
- Professor Catherine Piché, Faculty of Law, Université de Montréal.

The LCO is the secretariat and administrator for the project. Nye Thomas, Executive Director of the LCO, is the project director.

Reference Group

The project team is organizing an expert Reference Group to assist the project's work. Collectively, the Group will have expertise in the law and practice of class actions, Ontario's justice system, research and consultations, access to justice, and law reform. Group members will be highly-regarded within the legal profession and the community at large.

Project Objectives and Assumptions

The project's objective is to research the experience with class actions in Ontario and to conduct an independent, balanced and practical analysis of class actions from the perspective of their three objectives: access to justice, judicial economy, and deterrence.

The project acknowledges its scope is potentially broad, with many complex and controversial issues. Time and resources for the project will be limited. As a result, the project will prioritize and organize its work to focus on systemic issues that affect class actions generally. The project will consider whether Ontario's existing Class Proceedings Act needs to be amended to govern contemporary class action proceedings. The project will also strive to establish an independent, evidence-based record of class actions in Ontario.

Consultations and Public Outreach

Consultations with the bar, legal organizations, governments, public and private organizations and others who have an interest in class actions are a high priority for the project. The project will distribute a consultation paper to seek public comments on class action issues. The project will also organize in-person meetings/consultations with key individuals, organizations, and stakeholders. Important project materials will be distributed in English and French, and a webpage will be developed for public outreach, information and consultations.

Relationship to Other Class Action Research and Initiatives

Many organizations and individuals have undertaken significant work regarding class actions in Ontario and elsewhere. The project does not want to replicate those initiatives. As a result, the project will work cooperatively with researchers, stakeholders and other organizations to build on current research/policy initiatives and to ensure limited resources are used most effectively.

Funding and Support

Funding for this project is being provided by the LCO. The project is also supported by the Faculty of Law, University of Windsor and Faculty of Law at the Université de Montréal. The project will collaborate with other supporters if it is appropriate to do so. Project funds will be administered by the LCO.

Appendix B

STAGE ONE INTERVIEW QUESTIONS

General Questions

1. Access to justice is one of three objectives in the class action regime. Is this objective being fulfilled?
2. Most class actions take several years to reach resolution. What accounts for the delay? What change in legislation or practice would make class actions more efficient or improve judicial economy?
3. What is the evidence that class actions have deterred wrongdoing? Are you seeing indicia of behaviour modification resulting from class proceedings in Ontario (among your clients or elsewhere)? What are these indicia?

Specific Questions

4. What, if anything, should be changed in the s. 5 CPA certification test?
5. Currently, defendants must obtain leave to appeal a certification order. Should this appeal route be amended and if so, how and why?
6. Should the two-way costs rule be altered?
7. Is the current test for approval of counsel fees adequate?
8. Is the current test for approval of litigation funding arrangements adequate?
9. Should the governing rules or practices of the Class Proceedings Fund be reformed? If so, how?
10. Do you find that the interests of absent members are being well protected during class settlement approvals? If not, how could those be better protected?
11. What do you think of settlement distribution schemes and management in Ontario class actions?
12. How accessible and clear do you find class notices to be for the class members?
13. Is the use of *cy près* distribution of settlements a positive development for access to justice and/or behaviour modification? Should a *cy près* award affect counsel fees?
14. Is the current judicial coordination of multi-jurisdictional (“national”) class actions adequate? If not, do you have suggestions for improvement?

Priorities

15. Of all of the above, how would you prioritize the issues meriting attention and reform? Please list your top three areas of concern.

Further Advice and Names to Contact

16. Do you have any further advice for us as we begin this project? Who do you recommend we talk to during the course of the project?

Appendix C

TYPES OF CLASS ACTIONS

A. Introduction

The *Class Proceedings Act, 1992* (CPA) was enacted to provide courts with an efficient and streamlined means of dealing with complex litigation affecting the interests of potentially great numbers of people.¹⁴² In other words, the legislation did not generate new types of actions but rather a new procedural mechanism for litigating existing types of claims.

Each type of class action must be based on statutory or common law causes of action such as torts (negligence, breach of a fiduciary duty, nuisance) or breach of contract. Newer to litigation as a class action is the Privacy Class Action, following a change in the common law. Surprisingly, however, there are relatively few environmental class actions despite the early expectations of the Ontario Law Reform Commission that environmental class actions were “*an obvious means of achieving redress for harm occasioned by pollution.*”¹⁴³

B. Competition Act (including Price Fixing and Anti-Trust)

In the early years following the enactment of the CPA, there had been only limited opportunity to develop the jurisprudence of competition class actions.¹⁴⁴ By 2003, in *Chadha v. Bayer Inc.*,¹⁴⁵ the Ontario Court of Appeal pondered the utility of employing the federal *Competition Act*¹⁴⁶ to ground class actions.¹⁴⁷ Since then, several antitrust class actions have been certified for the purposes of settlement.¹⁴⁸

A private right of action is conferred on victims of anti-competitive conduct by subsection 36 (1) of the *Competition Act*. Whether class actions will be effective in enforcing competition legislation, however, depends on the plaintiff’s ability to establish an offence has been committed under the statute and that loss or damage has been suffered as a result.¹⁴⁹ Where a plaintiff does establish there has been a prior conviction, class proceedings are more likely to be initiated and often settled.¹⁵⁰ This is due to the operation of subsection 36 (2) of the *Competition Act*, which provides a rebuttable presumption that where a person is convicted of an offence under Part VI of the Act (“*Offences in Relation to Competition*”), evidence in those proceedings concerning the acts or omissions on the person initiating the action is evidence in the action.

C. Consumer Protection (including Consumer Contracts, Financial Services)

In the 2001 decision of *Western Canadian Shopping Centres v. Dutton*,¹⁵¹ the Supreme Court of Canada recognized the importance of class actions to address issues in the consumer sector.¹⁵² Three years later, the Court demonstrated the utility of using a class action for consumers in its decision in *Garland v. Consumers’ Gas Co.*¹⁵³ In that decision, the respondent gas company was ordered to repay late payment penalties that exceeded the interest limit prescribed by the *Criminal Code*.¹⁵⁴

Class actions also have been pleaded in several *Consumer Protection Act, 2002* cases.¹⁵⁵ In an action that was certified, prepaid payment cards issued by the defendant and subject to a variety of fees, were alleged to constitute “unfair practice” under the *Consumer Protection Act*.¹⁵⁶ Similarly, a claim for unjust enrichment based on parking fees that allegedly constituted a violation of the *Consumer Protection Act*, was certified.¹⁵⁷

Other class actions initiated for consumer protection purposes are diverse in scope and have included: students initiating class actions against their schools;¹⁵⁸ charities taking issue with municipal bingo license and administration fees;¹⁵⁹ disputes over fees associated with refurbishment of time share units,¹⁶⁰ expenditures from street reconstruction,¹⁶¹ the quantum of penalties for early prepayment of residential mortgages,¹⁶² and an application for an accounting of oil well operations.¹⁶³

D. Crown Liability (including Breach of Duty, Institutional Harm and Charter Infringements)

*It is hardly surprising that the Crown has been a frequent defendant in class actions. Given the state's presence in the economic and social life in this country, together with the state's deep pockets, litigation against the Crown is to be expected.*¹⁶⁴

Many allegations of breached duties of care by the Crown arise in Aboriginal law cases. In *Brown v. Canada (Attorney General)*¹⁶⁵ the Court found Canada liable in law for breaching a common law duty of care to class members – formerly on-reserve Indian children placed with non-aboriginal families, who then suffered the loss of their aboriginal identity.¹⁶⁶ In *Cloud v. Canada AG*,¹⁶⁷ members of various First Nations proposed an action on behalf of former students of a residential school, that was certified by the Ontario Court of Appeal. *Canada (Attorney General) v. Fontaine*¹⁶⁸ was an appeal to the Supreme Court of Canada from a judgment, affirmed by the Ontario Court of Appeal, that held records from a consolidated class action related to Indian Residential Schools should be destroyed following a 15-year retention. The Crown's appeal was dismissed.

Other actions alleging breaches of Crown duties have included: several cases of long term institutionalization;¹⁶⁹ two proposed actions related to inmates;¹⁷⁰ an action alleging provincial officials prematurely declared a SARS outbreak was under control;¹⁷¹ cases of denying benefits;¹⁷² failure to protect Ontarians from fraud by retailers of lottery tickets;¹⁷³ an action seeking redress for payments of a head tax;¹⁷⁴ suits where the Crown is alleged to be negligent as an industry regulator following a case of mad cow disease¹⁷⁵ and an alleged diminished market for the sale of legal tobacco.¹⁷⁶

E. Employment and Pensions-Related Class Actions

There are three primary types of class actions brought by employees against their employers: cases for breach of contractual or statutory employment standards, mass terminations, and changes to pension and retirement benefits.¹⁷⁷

Breaches of employment standards prescribed by the *Employment Standards Act (ESA)*¹⁷⁸ and *Canada Labour Code (CLC)*,¹⁷⁹ are commonly pleaded as allegations of failure to pay statutory wages,¹⁸⁰ including overtime pay – a concept related to “misclassification” of employees that results in non-payment of overtime.¹⁸¹ Statutory requirements also play a significant role in mass termination or wrongful dismissal cases.

Claims in relation to pensions and post-retirement benefits involve large sums of money and are particularly well suited for resolution by class actions given common questions involving terms of a contract or pension agreement. Further, class members are easily identified and have straightforward individual issues.¹⁸² Corporations,¹⁸³ plan administrators,¹⁸⁴ and governments¹⁸⁵ are some notable targets of pension-related class actions.

F. Environmental Class Actions (including Nuisance)

The Supreme Court of Canada attributed recognition of environmental wrongs as a reason class actions have grown in the first decision of its 2001 Trilogy.¹⁸⁶ In the second decision of the Trilogy, *Hollick v. Toronto (City)*,¹⁸⁷ however, the top court dismissed an appeal to certify a proposed environmental class action. Although the Court found there was a rational connection between the class and asserted common issues,¹⁸⁸ it held that some areas were likely more seriously affected than others.¹⁸⁹ In addition, Ontario's environmental legislation was seen as “go[ing] some way toward addressing legitimate concerns about behaviour modification”.¹⁹⁰ The Court took care to state the disposition in *Hollick* did not mean the requirements for certifying environmental class actions could never be met.¹⁹¹

Following a full trial on the common issues, the trial judge in *Smith v. Inco Limited*¹⁹² [formerly, *Pearson v. Inco Limited*], found the respondent liable for historical nickel contamination from its refinery, and awarded \$36 million for property damage to residents of Port Colborne. In 2011, the trial decision was reversed by the Ontario Court of Appeal which held the trial judge

had erred in finding the respondent liable in private nuisance and strict liability.

As indicated above, in 1982 the Ontario Law Reform Commission reported that environmental class actions were “*an obvious means of achieving redress for harm occasioned by pollution.*”¹⁹³ In practice, however, this has been demonstrated to be less obvious.

G. Franchise Class Actions

The *Arthur Wishart Act (Franchise Disclosure)* of 2000¹⁹⁴ is a statute governing franchise agreements and the operation of businesses under such agreements.¹⁹⁵ Characterized by the Court of Appeal as “*sui generis*”, the Act’s purpose is to redress the power imbalance between franchisors and franchisees by providing a remedy for abuses arising from this imbalance.¹⁹⁶

The intersection of the CPA and the *Arthur Wishart Act* has been described by the Superior Court in *Fairview Donut Inc. v. TDL Group Corp.* as providing “fertile ground for the growth of franchise class actions”.¹⁹⁷ In *Trillium Motor World Ltd. v. General Motors of Canada Ltd.*,¹⁹⁸ the Court stated the franchise relationship typically involved the existence of franchisees that operated under a standard contract, as well as a common “system” and common treatment of franchisees by the franchisor – all of which could result common issues of fact or law capable of being resolved on a class-wide basis.¹⁹⁹ In other words, the proceeding was seen as especially apt as a class action.²⁰⁰

Although some aspects of franchise suits may advance the goals of both the CPA and *Arthur Wishart Act*,²⁰¹ the Superior Court of Justice has cautioned that not every franchise case will be suitable to certify.²⁰² This is because individual issues may still remain after the common issues have been determined.²⁰³

H. Insurance Class Actions

The high cost of defending certification motions, and supporting settlements through payments for notice campaigns and claims administration costs, have enabled insurers to assess the costs of defending trials, including indemnity payments that may be required by the decisions.²⁰⁴ The broad range of causes of action pleaded in class actions has important implications for insurance coverage as claims are made in relation to directors’ and officers’ liability, adverse effects to the environment, and commercial general liability.²⁰⁵

Claims have been brought against insurers directly, with mixed results, for example involving allegations of: insurers’ practices regarding car parts and the quality of parts supplied,²⁰⁶ failing to pay full cash value of policies,²⁰⁷ selling “vanishing premium” life insurance policies where representations are made that premiums will reach a point after which no further premiums will have to be paid,²⁰⁸ breaches of standard mortgage contracts,²⁰⁹ and negligent misrepresentations concerning return on investments,²¹⁰ to name a few.

Securities class actions, in particular, pose a significant risk exposure to liability for directors and officers, causing them to turn to their D&O policies for coverage for defence and indemnification purposes.²¹¹ It therefore, is worth noting the data in Table, that there have been 89 securities actions launched in the province, making them the fourth most common class action.

These developments in the insurance industry pose challenges for underwriting. This is because risks must be assessed in the context of potential class proceedings and against a backdrop where case law is fluid and evolving.²¹²

I. Mass Torts (Personal Injury and Tainted Food)

This category of class actions tends to be characterized by a single incident mass tort and as such, there usually is not a dispute about the appropriate class.²¹³ Nonetheless, even where a plaintiff’s proposal does not meet the requirements of “class” and “sub-classes”, the action may still be certified conditionally where there is a strong access to justice goal.²¹⁴ Up to

the point of certification, however, class size can be reduced substantially through use of a compensation plan – a device with the ethical value of accepting responsibility.²¹⁵

Class actions in Ontario have been certified for such diverse factual situations as: an Air France flight skidding off a runway and bursting into flames;²¹⁶ food product recall;²¹⁷ contamination of blood and blood products by HIV virus;²¹⁸ fire in a TTC subway tunnel resulting in people on two trains being treated for smoke inhalation;²¹⁹ fire destroying a self-storage facility where the sprinkler system and stand-pipe water connection were not working;²²⁰ and allegations of students with learning disabilities and behavioural problems being physically, sexually, emotionally, and psychologically abused at school.²²¹

Other proposed class actions have failed to be certified based upon a number of issues including complexity of the action,²²² and failure to disclose a reasonable cause of action.²²³

J. Other Class Actions

The class actions in this group were varied and not captured by other categories. They included primarily defamation actions, as well as a procurement bid, restructuring streetscape and streetcar tracks matter, breach of fiduciary duty, a small claims court matter, a few tax liability cases, and copyright infringement.

K. Privacy Class Actions

There have been a few instances in Ontario where class actions have been initiated with intrusion upon seclusion as one of the causes of action pleaded. Two of these cases have concerned allegations of improperly accessing personal health information in hospitals. In *Daniells v. McLellan*,²²⁴ the facts concerned McLellan, who was an employee of the North Bay Regional Health Centre until her dismissal. Prior to her dismissal, McLellan was discovered to have improperly accessed confidential personal health information of more than 5,000 patients in the hospital. *Hopkins v. Kay*²²⁵ was a case where the plaintiff asserted a claim for intrusion upon seclusion arising from her hospitalization in Peterborough Regional Health Centre. She alleged that while there, her personal health records were improperly accessed causing her to fear for her safety given that her ex-husband inflicted injuries on her that resulted in her hospitalization.²²⁶

Other class actions initiated for intrusion upon seclusion include *Bennett v. Lenovo*,²²⁷ a case where the plaintiff bought a laptop and found it had been loaded with a program enabling hackers to collect confidential personal information from users without their knowledge or consent. *Evans v. Bank of Nova Scotia*²²⁸ involved a bank employee who provided private and confidential information of bank clients to his girlfriend, who then disseminated the information to third parties for fraudulent purposes. In *Maksimovic v. Sony Canada Ltd.*,²²⁹ the plaintiffs were purchasers and users of Playstation and related accounts. Following a cyber-attack by third parties, access was gained to the account holder information of consumers. Following the attacks, the plaintiffs launched class actions, pleading breaches of their privacy rights. This action was certified and later settled.

Where remedies are concerned in a class action for intrusion upon seclusion, the most important function of damages awarded, is compensation.²³⁰ Where compensation is one of the goals of a damages award, an aggregate assessment can be made if it is reasonable to conclude that each member of a class experienced some degree of damage.²³¹

L. Professional Negligence Class Actions (Solicitor and Medical Professional)

The pivotal issue in professional negligence cases against lawyers is whether a duty of care is owed. Accordingly, if there is no factual basis to establish a duty, a motion to certify will fail.²³² In the first case of professional negligence against a lawyer that was certified in Ontario,²³³ however, even though there was no contact between the plaintiff and the lawyer, the Court

found it “at least arguable” that a claim of reliance could be supported against the defendant solicitor.²³⁴

Where medical cases are concerned, there may be insufficient common issues, making it difficult to define a class.²³⁵ Nonetheless, there have been a number of class actions certified where there is infection or risk of infection in the class members, including: an outbreak of hepatitis B in electroencephalography clinics;²³⁶ patients treated in hospital who developed *c. difficile* infections;²³⁷ persons who were notified by their hospital that the method used to clean biopsy equipment may have been inadequate to eliminate the transmission of viruses such as hepatitis B, hepatitis C and HIV;²³⁸ and residents of a home for the aged who contracted Legionnaire’s disease.²³⁹ By contrast, in a proposed class action concerning contact with people diagnosed with tuberculosis in a hospital, the Ontario Court of Appeal found the harm suffered and assessment of damages were inherently individual in nature.²⁴⁰

In addition, there have been several class actions initiated in relation to obstetrical/ gynecological matters, including one suit related to unnecessary surgery that was certified and settled,²⁴¹ another that involved so many contested and complicated motions in a medical malpractice matter, the Court made arrangements to have one judge hearing all the motions;²⁴² and one matter that was discontinued.²⁴³

M. Product Liability (including Pharmaceuticals, Medical Devices and Consumer Goods)

Product liability cases generally are negligence actions involving pharmaceuticals,²⁴⁴ medical devices,²⁴⁵ and consumer goods.²⁴⁶ These actions lend themselves to litigation by class proceeding²⁴⁷ owing to their core commonality – they involve a product alleged to be defective – where determining liability to the representative plaintiff determines liability to the class.²⁴⁸

Even where a case raises complex issues of causation and damages, however, it may still be certified provided the issues are capable of adjudication as a class.²⁴⁹ Further, commonality may be accepted by the Court for the purposes of settlement even where the common issues and other issues might otherwise be disputed.²⁵⁰ Doing so promotes the goals of accessing justice, judicial economy and behavioural modification. Ontario Courts have articulated the important public policy role played by private class actions in assisting to regulate this sector.²⁵¹

Endnotes

- 1 Warren K. Winkler, Paul M. Perell, Jasminka Kalajdzic and Alison Warner, *The Law of Class Actions in Canada*, (Toronto: 2014) Canada Law Book, at "Foreword", page ix.
- 2 *Class Proceedings Act*, 1992, SO 1992, c-6.
- 3 <https://www.cba.org/News-Media/News/2017/July/Class-action-task-force-consultation>
- 4 Above, note 2.
- 5 Ontario Law Reform Commission, Report on Class Actions, (Toronto: Ministry of the Attorney General, 1982), Volume 1, 291, online: <<https://archive.org/details/reportonclassact01onta>> (OLRC Report).
- 6 Same.
- 7 Suzanne Chiodo, *Class Roots: The Genesis of the Ontario Class Proceedings Act, 1966-1993* (Master of Laws, York University, 2016) at 4. See also, Ministry of the Attorney General, Report of the Attorney General's Advisory Committee on Class Action Reform, 1990, (Toronto). (AG Report) Action Reform, 1990, (Toronto).
- 8 Ontario, Legislative Assembly, Official Report of Debates (Hansard), 35th Parl, 2nd Sess (May 4, 1992). Online: <http://hansardindex.ontla.on.ca/hansardeissue/35-2/1016.htm>
- 9 Above, note 2.
- 10 Above, note 5.
- 11 See generally, Matthew Good, "Access to Justice, Judicial Economy, and Behaviour Modification: Exploring the Goals of Canadian Class Actions," *Alberta Law Review* (2009) 47:1 at 189-191.
- 12 *Western Canada Shopping Centres Inc. v. Dutton*, 2001 SCC 46.
- 13 *Hollick v. Toronto (City)*, 2001 SCC 68.
- 14 *Dutton*, above, note 12, at para. 28; See also *Hollick*, same, at para. 15.
- 15 See Good, note 11, at 190; See also OLRC Report, above, note 5.
- 16 *Dutton*, above, note 12, at para. 27; See also *Hollick*, above, note 13, at para. 15.
- 17 *Dutton*, above, note 12, at para. 29.
- 18 Above, AG Report, note 4, at 1.
- 19 Above, note 5.
- 20 *Hollick*, above, note 13, at para. 27. Also see Good, above note 11, at 206.
- 21 See, e.g., Catherine Piché, "Class Action Value", 2018, 19 *Theoretical Inquiries L.* 261.
22. *Schmidt v. Johnson & Johnson Inc.*, 2012 QCCA 2132
- 23 See, for example, Luis Millan, "Quebec Appeal Court lowers threshold for class action certification." Online: <https://www.thelawyersdaily.ca/articles/5205/quebec-appeal-court-lowers-threshold-for-class-action-certification>; see also Jessica Fruchtermann & Katerina Kostopoulos, "The Authorization Stage in Quebec's Class Action: Useful or a Mere Formality?" Online: <http://www.classactionslab.ca/news/2018/01/12/blog-the-authorization-stage-in-quebecs-class-action-useful-or-a-mere-formality/>
- 24 *Code of Civil Procedure*, CQLR, c. C-25.01 2014, a. 18
- 25 *Same*, a. 574
- 26 *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631. Also see The Honourable Bob Runciman, Chair & The Honourable George Baker, P.C., Deputy Chair, "Delaying Justice is Denying Justice", *Report of the Standing Senate Committee on Legal and Constitutional Affairs*, August 2016, online at https://sencanada.ca/content/sen/committee/421/LCJC/Reports/CourtDelaysStudyInterimReport_e.pdf (Report outlined the problems in the criminal justice system post-*Jordan*).
- 27 *Jordan*, same
- 28 *Same*.
- 29 *Same*, at para. 1.
- 30 See *Jordan*, same, at para. 5. This ceiling was 18 months for trials in provincial court and 30 months for trials in the superior court system from the time of charge to the end of the trial.
- 31 See Runciman, above, at 26.

- 32 Above, *Hollick*, note 13, at para. 16.
- 33 *Osmun v Cadbury Adams Canada Inc.*, Scheduling Direction, October 18, 2011, at paras 10 and 15.
- 34 *Hryniak v. Mauldin*, [2014] 1 SCR 87, 2014 SCC 7.
- 35 See e.g., the Honourable Chief Justice Warren K. Winkler, *Evaluation of Civil Case Management in the Toronto Region: A Report on the Implementation of the Toronto Practice Direction and Rule 78*, February 2008, available online at <http://www.ontariocourts.ca/coa/en/ps/reports/rule78.pdf>.
- 36 Paul M. Perell, "Class Action Devils and Angels", (2013) 30 *T. M. Cooley L. Rev.* 285.
- 37 See, e.g., <https://www.siskinds.com/has-the-time-come-to-amend-section/>.
- 38 Class Actions Laboratoire, Faculté de Droit, Université de Montréal.
- 39 Above, note 21, at 291.
- 40 Same, at 292.
- 41 J. Kalajdzic, *Class Actions in Canada: The Promise and the Reality of Access to Justice* (2018: Vancouver) UBC Press [Forthcoming]
- 42 *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949, at para. 31.
- 43 *Endean v. British Columbia*, 2016 SCC 42, [2016] 2 S.C.R. 162, para. 92 citing R. A. Macdonald, "Access to Justice in Canada Today: Scope, Scale and Ambitions", in J. Bass, W. A. Bogart and F. H. Zemans, eds., *Access to Justice for a New Century — The Way Forward* (2005) at 19.
- 44 *Règlement de la Cour supérieure du Québec en matière civile* [Rules of the Superior Court of Québec in Civil Matters], r. 0.2.1, c C-25.01 (Can. Que.), Rule 59 (translated by the Report's authors) (emphasis added):
In the case of a judgment ordering collective recovery of the claims with individual liquidation, the special clerk or the third party appointed by the court (i.e., the claims administrator, for example, or a representative of the defendant) shall file in the court a detailed report of its administration, after the expiry of the deadline given to the members to present claims, and shall give notice of this report to the parties and to the Public Fund (the Fonds d'aide aux actions collectives). This report shall list the members who produced a claim, the amount paid to each, the amount of the balance and the amount deducted pursuant to [...]
- 45 H.R.985 - *Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017* 115th Congress (2017-2018).
- 46 Above, note 5, at 647.
- 47 Above, AG Report, note 7, at 56.
- 48 The Class Proceedings Fund, administered by the Law Foundation of Ontario, was established pursuant to the *Law Society Act*, RSO 1990, c. L.8, s. 59.1.
- 49 See e.g. British Columbia's *Class Proceedings Act*, RSBC 1996, c. 50, s. 37(2).
- 50 CPA, above note 2, s. 31(1).
- 51 CSS 2001, c. C-12.01, s. 40(1).
- 52 *Das v. George Weston Limited*, 2017 ONSC 5583. The plaintiffs were indemnified by the Class Proceedings Fund but courts have stated that the existence of such an indemnity is irrelevant to the determination of whether, and in what sum, costs should be ordered against a plaintiff.
- 53 *Crisante v. DePuy Orthopaedics*, 2013 ONSC 6351, at para. 5.
- 54 *Smith v. National Money Mart*, 2010 ONSC 1334, [2010] O.J. No. 873, at paras. 21-23.
- 55 Same.
- 56 *Dabbs v. Sun Life Assurance*, [1998] O.J. No. 1598 (Gen. Div.), at para. 11.
- 57 Catherine Piché, *Fairness in Class Action Settlements* (Toronto, Carswell 2012), at 122ff (on the role and responsibilities of class action settlement judges).
- 58 *Lavier v. MyTravel Canada Holidays Inc.*, 2013 ONCA 92. Also see *Eidoo v. Infineon Technologies AG*, 2013 ONSC 853 (CanLII), where the Ontario Superior Court of Justice significantly reduced a fee request because the plaintiffs had not yet presented any plan for distributing the balance of the funds to class members.

- 59 *Waldman v Thomson Reuters Canada Limited*, 2014 ONSC 1288; appeal quashed by the Ontario Court of Appeal in 2015 ONCA 53.
- 60 *Lavier*, above, note 58, at, para. 32.
- 61 *Osmun v Cadbury Adams Canada Inc.*, 2010 ONSC 2752, at para. 21: “provide access to justice by permitting the lawyer, not the client, to finance the litigation [...] Effective class actions simply would not be possible without contingent fees. Contingent fee awards serve as an incentive to plaintiffs’ counsel to take on difficult but important class action litigation.”
- 62 *Canada (Attorney General) v Merchant Law Group LLP*, 2017 SKCA 62.
- 63 *Fontaine v. Canada (Attorney General)*, 2012 BCSC 1671.
- 64 See CPA above, note 2, ss. 33(7) and (8).
- 65 See e.g., *McCallum-Boxe v. Sony*, 2015 ONSC 6896 (where the court stood against “settlement-driven legal fee arrangements”, at 13).
- 66 At this preliminary point in the project, it appears the number of consented motions has been increasing, with defendants opting not to contest certification and instead, moving to the merits of the action more quickly.
- 67 CPA, above, note 2, s.2(3) provides that the motion for certification must be made “within ninety days after the later of:
(i) the date on which the last statement of defence, notice of intent to defend or notice of appearance is delivered, and
(ii) the date on which the time prescribed by the rules of court for delivery of the last statement of defence, notice of intent to defend or a notice of appearance expires without its being delivered;”
or otherwise, with leave of the court. This rule is honoured in its breach, both because defendants are not generally required to file a defence until after certification, and because as a matter of practice, 90 days is considered too short a time within which to prepare motion material.
- 68 *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013] 3 SCR 477, 2013 SCC 57 at paras. 103-105.
- 69 *Infineon Technologies AG v. Option consommateurs*, [2013] S.C.J. No. 59, [2013] 3 S.C.R. 600 (S.C.C.), paras. 65-67, 79-80, 89, 94, 100-101, 120, 125, 127, 130, 133-36, 144.
- 70 Same, para. 127.
- 71 *Option consommateurs c. Bell mobilité*, [2008] J.Q. no. 11736, 2008 QCCA 2201, at para. 30.
- 72 *A. v. Les Frères du Sacré-Coeur*, 2017 QCCS 34.
- 73 *Federal Court of Australia Act 1976*, Part IVA, s. 33N.
- 74 *Dutton*, above, note 12, , at para.29.
- 75 Above, note 1, at 4.
- 76 See e.g. Trevor C.W. Farrow, “What is Access to Justice?” (2014) 51:3 *Osgoode Hall Law Journal* 957-988 and sources cited there at notes 1 and 2.
- 77 Same, at 961.
- 78 “Multi-jurisdictional class actions” are synonymous to “national class actions” in this context. However, for some “multi-jurisdictional class actions” is a more accurate term because those actions do not always span the entire country.
- 79 See e.g., Janet Walker, “Are National Class Actions Constitutional?: A Reply to Hogg and McKee”, (2010) 48:1 *Osgoode Hall Law Journal* 95, at 143; Peter W. Hogg & S. Gordon McKee, “Are National Class Actions Constitutional?” (2010) 26 *N.J.C.L.* 279. Also see: Joseph Marcus, “National Class Actions in Canada: Yet Another Call for Clarity and Coordination”, (2012) 8:1 *Can. Class Action Rev.* 43; Colin K. Irving & Mathieu Bouchard, “National Opt Out Class Actions, A Constitutional Assessment”, (2009) 26 *N.J.C.L.* 111; F. Paul Morrison, Eric Gertner & Hovsep Afarian, “The Rise and Possible Demise of the National Class in Canada”, (2004) 1 *Can. Class Action Rev.* 67 and Stephen Lamont, “The Problem of the National Class: Extra-territorial Class Definitions and the Jurisdiction of the Court”, (2001) 24 *Advocates’ Q.* 252.
- 80 See 28 U.S.C.A. §1407. Online: <<http://www.jpml.uscourts.gov>>.
- 81 Janet Walker, “Coordinating Multijurisdiction Class Actions Through Existing Certification Processes”, (2005) 42.1 *Canadian Business Law Journal* 112, at 120.
- 82 Scott Maidment, “Forum Selection in National Class Actions: A Common Issues Approach”, (2009) 5:2 *Can. Class Action Rev.* 133, at 134.
- 83 *Canada Post Corp v. Lépine*, 2009 SCC 16, at para. 57, per LeBel, J.
- 84 Uniform Law Conference of Canada, “Report of the Uniform Law Conference of Canada’s

- Committee on the National Class and Related Interjurisdictional Issues: Background, Analysis, and Recommendations,” (St. John’s: Civil Section, Uniform Law Conference of Canada, March 2005). Online: <http://www.ulcc.ca/en/annual-meetings/254-2005-st-johns-nf/civil-section-documents/912-interjurisdictional-class-acts-consultation>.
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- 85 Uniform Law Conference of Canada, “Supplementary Report on Multi-Jurisdictional Class Proceedings in Canada: Special Working Group on Multi-Jurisdictional Class Proceedings” (Edmonton: Civil Section, Uniform Law Conference of Canada, August 2006). Online: <http://www.classactionlitigation.com/ClassAction/sSupplementaryReport.pdf>.
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- 88 S. 9.1(2) of the Alberta CPA; s.6.1(1)(b) of the Saskatchewan CAA.
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- 89 The tests for preferability are the same in both provinces and include the interests of parties in relevant jurisdictions, serving the ends of justice, avoiding irreconcilable judgments and promoting judicial economy: Alberta CPA, s. 5(7); Saskatchewan CAA, s.6(3)(a).
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- 90 Ss. 17 and 17.1 of the Alberta CPA; s.6.1(2) of the Saskatchewan CAA above, note 87.
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- 91 See e.g., Resolution 11-03-A, adopting the CBA Protoco. Online: <http://www.cba.org/getattachment/Our-Work/Resolutions/Resolutions/2011/Protocole-judiciaire-sur-les-recours-collectifs/11-03-A.pdf>.
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- 92 Canadian Bar Association, *Canadian Judicial Protocol for the Management of MultiJurisdictional Class Actions and the Provision of Class Action Notice* (October 23, 2017). Online: https://www.cba.org/CBAMediaLibrary/cba_na/PDFs/Sections/multijurisdictionalClassActionProtocol_bil.pdf.
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- 93 Alex Robinson, *CBA resolution provides for best practices in multi-jurisdictional class actions* (February 20, 2018). Online: <http://www.canadianlawyermag.com/legalfeeds/author/alex-robinson/cba-resolution-provides-for-best-practices-in-multi-jurisdictional-cla>
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- 94 [2016] 2 SCR 162, 2016 SCC 42.
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- 95 Same, paras. 62 and 82.
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- 96 *Schmidt v. Johnson & Johnson Inc.*, 2012 QCCA 2132.
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- 98 Same, paras. 1.1-1.14.
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- 101 Michael A. Eizenga and Emrys Davis, “A History of Class Actions: Modern Lessons from Deep Roots” (2011) 7 *Can Class Act Rev* 5, 19.
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- 103 See “Access to Justice Final Report”, by the right Honourable the Lord Woolf, Master of the Rolls, July 1996, *Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*. Online: <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/civil/final/sec4c.htm#c17>. See also Neil Andrews, “Multi-Party Proceedings in England: Representative and Group Actions,” 11 *Duke J. Com & Int’l L.* 249 2001, 262.
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- 104 See “Part 19 – Parties and Group Litigation.” Online: Ministry of Justice http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part19#rule19_10.
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- 105 See Class Actions Lab Data, on file with Prof. Piché.
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- 106 Jonathan Foreman, “Summary of Common Issues Trial Activity Across Canada” (April 8, 2016). Online: <https://harrisonpensa.com/lawyers/jonathan-foreman>. Also see Jon Foreman & Genevieve Meisenheimer, “The Evolution of the Class Action Trial in Ontario,” (2014) 4:2 *UWOJ Leg Stud* 3.
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- 107 CPA, above, note 2, s. 23.
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- 108 *Reaching Equal Justice: An Invitation to Envision and Act*, Report of the CBA Access to Justice Committee; November 2013. This approach is supported by many stakeholders across the justice system, including the National Action Committee on Access to Justice.
- 109 Same, at 146.
- 110 Above, note 21, at 263-264.
- 111 Above, note 108, at 145.
- 112 Jon Forman, & Genevieve Meisenheimer, "The Evolution of the Class Action Trial in Ontario," (2014) 4:3 *Western Journal of Legal Studies*. Online: <https://ir.lib.uwo.ca/cgi/viewcontent.cgi?referer=https://www.google.ca/&httpsredir=1&article=1107&context=uwojls>.
- 113 Ward Branch, Greg McMullen, "Take-Up Rates: The Real Measure of Access to Justice". Online: http://static1.1.sqspcdn.com/static/f/299713/12187013/1305222675693/branch_mcmullen-take_up_rates.pdf?token=roUmMGIC3bl29Zlw7AzEKRJ6B1M%3D
- 114 Alarie, Benjamin, Flynn, Peter, "Accumulating Wisdom: An Updated Empirical Examination of Class Counsel's Fees in Ontario Class Actions" (February 2014) 9(2) *Canadian Class Action Review*, 355-84. Available at SSRN: <https://ssrn.com/abstract=2363798> or <http://dx.doi.org/10.2139/ssrn.2363798>
- 115 For example, see a report by the law firm Blakes summarizing class actions matters in Alberta. Online: <http://www.blakes.com/English/WhatWeDo/Practices/LitigationAndDisputeResolution/Pages/The-State-of-Class-Actions-in-Alberta---January-2015.a.spx>.
- 116 Stefan Boettrich, Svetlana Starykh, "Recent Trends in Securities Class Action Litigation: 2016 Full-Year Review Record Number of Cases Filed, Led By Growth in Merger Objections Highest Number of Dismissals in the Shortest Amount of Time", Januray 23, 2017. Online: <http://www.nera.com/publications/archive/2017/recent-trends-in-securities-class-action-litigation--2016-full-y.html>
- 117 For example, U.S. Chamber of Commerce, "Painting an Unsettling Landscape: Canadian Class Actions 2011-2014". Online: http://www.instituteforlegalreform.com/uploads/sites/1/CanadianClassAction_v10Web.pdf.
- 118 See, e.g., Law Foundation, 2016 Annual Report on Class Proceedings. Online: <http://www.lawfoundation.on.ca/wp-content/uploads/Report-on-Class-Proceedings-2016-EN.pdf>
- 119 Jasminka Kalajdzic, "Access to Justice for the Masses? A Critical Analysis of Class Actions in Ontario," (2009) . Online: https://tspace.library.utoronto.ca/bitstream/1807/18780/6/Kalajdzic_Jasminka_200911_LLM_Thesis.pdf; Catherine Piché "The Value of Class Actions", in Trevor C.V. Farrow and Lesley A. Jacobs (eds), *The Cost and Value of Justice*, 2018, to be published; Catherine Piché, "Le recouvrement et l'indemnisation des membres dans l'action collective", (2016) 94 Can. B. Rev. 171; and Suzanne Chiodo, above, note 7.
- 120 Above, note 21.
- 121 American researcher Nicolas Pace points out "*art of the fact that a class actions is not a type of case based on a specific theory of liability... Rather, it describes a procedural concept that may or may not be officially applied to the case at some point in its life...*": "Class Actions in the United States of America: An Overview of the Process and the Empirical Literature" – Online: http://globalclassactions.stanford.edu/sites/default/files/USA_National_Report.pdf, at 46.
- 122 See, e.g., Catherine Piché, *The Value of Class Actions* (May 1, 2017). *Theoretical Inquiries in Law*, 2017.
- 123 Same.
- 124 Above, note 102.
- 125 Above, note 21, at 265.
- 126 American researcher Christopher Hodges has written, "*Despite the huge literature that asserts the doctrinal value of the US theory and practice of class actions, it is striking that the above issues are not more widely discussed, and there is a relatively limited quantity of reliable empirical research*" Quoted in "*US Class Actions: Promise and Reality*" (2015) EUI Department of Law Research Paper No. 2015/36, at 27. Online: <https://ssrn.com/abstract=2665228> or <http://dx.doi.org/10.2139/ssrn.2665228>.
- 127 The Australian Federal Court publishes annual statistics on the number and nature of class action filings, and makes key document available by hyperlink. Online:

<http://www.fedcourt.gov.au/law-and-practice/class-actions/class-actions>

- 128 The Québec registry has been coded online since 1 January 2009, and is not retroactive. It provides access, on the Web, to Québec class action procedures and related forms, notices and related exhibits and documents (although not systematically). The registry is available on the website of the Québec Courts, online at www.tribunaux.qc.ca.)
- 129 The CBA Database does not provide a comprehensive listing of all class action lawsuits because it is a voluntary initiative. Nonetheless, according to the website <http://www.cba.org/Publications-Resources/Class-Action-Database?lang=en-CA>, it “assists lawyers, courts and the public with the challenges presented by multi-jurisdictional class actions and reduces uncertainty for those presumptively included in more than one class action and subject to conflicting court judgements. It also informs counsel about the size and composition of class membership in a given class action, and judges on the class member’s bound by their decisions.”
- 130 See, e.g., documents uploaded by Koskie Minsky on their Ontario Prisoner Class Action. Online: <https://kmlaw.ca/cases/ontario-prisoner-class-action/>
- 131 Above, note 21.
- 132 Above, note 21, at 262.
- 133 Above, at 128.
- 134 Above, note 21.
- 135 Above, note 21, emphasis in original.
- 136 Above, note 21, at 294.
- 137 Above, note 21, at 299.
- 138 Above, note 21, at 299.
- 139 Above, note 21, at 289.
- 140 The LCO is supporting the database project, in part, through a grant from the federal Department of Justice’s Justice Partner and Innovation Fund. Online: <http://www.justice.gc.ca/eng/fund-fina/jsp-sjp/jpip-pjpi.html>.
- 141 For a good Canadian example, British Columbia enacted the **Justice Reform and Transparency Act, 2013** in March 2013. The Act is one part of the provincial government’s justice reform initiative aimed at making the justice system more efficient and effective. This legislation sets the framework for a well-functioning, transparent justice system that is strengthened by greater collaboration among justice leaders. The act has three purposes:
1. to establish a new model to foster justice system collaboration and open data
 2. create new dialogue with the public about the system’s performance, and
 3. make reforms to the administration of the courts.
- The Act is accompanied by the BC government’s Justice Data Dashboard Initiative, available at <https://justicebcdashboard.bimeapp.com/players/beta/jbc>. The dashboard includes extensive information from the courts and corrections, including service data like average case length, number of cases heard and applications filed. The online tools enable users to filter content according to geography, date ranges, case type, type of court, etc. For information about data reform efforts in Ontario, see <https://www.ontario.ca/page/september-2016-mandate-letter-attorney-general> and <https://www.ontario.ca/page/ontarios-open-data-directive>.
- 142 Mr. Hampton moving first reading of *Bill 28, an Act respecting Class Proceedings*, *Hansard*, December 17, 1990.
- 143 Above, note 5, at 269.
- 144 John B. Laskin, Linda M. Plumpton, and Amanda M. Kemshaw, (2006), “The Certification of Competition-Related Class Actions in Canada”, *Litigating Conspiracy: An Analysis of Competition Class Actions*, ed. by Stephen G.A. Pitel, (Toronto: Irwin Law), at 219.
- 145 2003 CanLII 35843 (OCA).
- 146 RSC 1985, c. C-34.
- 147 At para. 65 the Court stated: “...the question of whether and how consumers will be able to use class actions to obtain relief from price fixing...remains an open one in this jurisdiction.” The certification motion failed due to the insufficiency of evidence to satisfy the Court that loss could be proved on a class-wide basis.
- 148 John B. Laskin, Linda M. Plumpton, and Amanda M. Kemshaw, (2006), “The Certification of

Competition-Related Class Actions in Canada”, *Litigating Conspiracy: An Analysis of Competition Class Actions*, ed. by Stephen G.A. Pitel, (Toronto: Irwin Law), at 219.

- 149 Same at 221-222.
- 150 Same at 223.
- 151 Above, note 12.
- 152 In particular, the Court mentioned the rise of mass production and faulty products: same, at para. 26.
- 153 [2004] 1 SCR 629. Similar examples of using class proceedings to address over-charging are found in the following: *Pichette v. Toronto Hydro*; *Griffiths v. Toronto Hydro-Electric Commission*, [2010] O.J. No. 3185 (SCJ), the certification motion succeeded in response to the claim the utility’s late payment fees violated the *Criminal Code* provisions regarding illegal rates of interest. The matter was settled. *Joseph v. Quik Payday Inc.*, [2006] O.J. No. 4835 (SCJ) was a matter certified and settled in relation to the “cheque cashing fees”, interest and other charges imposed by Quik Payday so it received interest at a rate in violation of the *Criminal Code*. *Kruba v. RBC Dominion Securities Inc.*, [2013] O.J. No. 1519 (SCJ) was a matter that was certified and settled in relation to claims the defendants charged unauthorized amounts in the conversion of currency, therefore breaching their standard form accounts. A claim that Canada Post Corporation received increased parcel shipping charges contrary to the *Weights and Measures Act*, R.S.C. 1985, c. W-6, was certified in *Lee Valley Tools Ltd. v. Canada Post Corp.*, [2007] O.J. No. 4942. In *DeWolf v. Bell ExpressVu Inc.*, [2008] O.J. No. 4769, Divisional Court allowed the defendant’s leave to appeal a successful certification motion. The case concerned whether an administration fee charged to the defendant’s customers constituted “interest” under the *Criminal Code*.
- 154 RSC 1985, c. C-45, s. 347.
- 155 S.O. 2002, c. 30, Sched. A.
- 156 *Bernstein v Peoples Trust Company*, 2017 ONSC 752.
- 157 *Graham v. Impark*, 2010 ONSC 4982 (SCJ), para. 113.
- 158 Following a faculty strike that resulted in students missing class time, the Court granted York University’s motion for summary judgment, given the representative plaintiff could not establish monetary damages: *Ciano v. York University*, [2000] O.J. No. 183 (SCJ); appeal dismissed by the OCA, [2000] O.J. No. 3482. A different result ensued in *Hickey-Button v. Loyalist College of Applied Arts & Technology*, [2006] O.J. No. 2393. There, the plaintiffs entered the nursing program at Loyalist and contended the option to obtain a nursing degree from Queens’ University in four years as represented by the defendant, was not available. The Court of Appeal certified their action.
- 159 *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City)*, [2017] O.J. No. 3444. Certified by the Ontario Court of Appeal.
- 160 *D.L.T.E. Holdings Ltd. v. Horseshoe Resort Corp.*, [2005] O.J. No. 4942 (SCJ). The plaintiff’s motion for summary judgment was dismissed when the Court held competing inferences should not be drawn from disputed facts on a summary judgment.
- 161 *Despault v. King West Village Lofts Ltd.*, [2001] O.J. No. 2933 (SCJ). This action was certified.
- 162 *Arabi v. Toronto-Dominion Bank*, 2006 CanLII 17330 (ON SC).
- 163 *Ewing v. Francisco Petroleum Enterprises Inc.*, [1994] O.J. No. 1852 (SCJ). The action was certified.
- 164 L. Sossin, “Revisiting Class Actions Against the Crown: Balancing Public and Private Legal Accountability for Government Action,” *Accessing Justice: Appraising Class Actions Ten Years After Dutton, Hollick & Rumley*, ed. by Jasminka Kalajdzic (Toronto: 2011) LexisNexis, at 33.
- 165 [2017] O.J. No. 692.
- 166 Same. The Court held a trial was not required in the issue: para. 86.
- 167 [2004] O.J. No. 4924 (OCA). Lv to appeal to the Supreme Court of Canada dismissed: *M.C.C. v. Canada (Attorney General)*, [2005] S.C.C.A. No. 50.
- 168 2017 SCC 47.
- 169 *Gray v. Ontario*, 2006 CanLii 1764 (ON SCDC). This case involved the closure of three institutions that were home to severely developmentally delayed adults. Applications for judicial review concerning Ministerial discretion to close the institutions and transfer out the residents, were dismissed. *Slark (Litigation guardian of) v. Ontario*, [2017] O.J. No. 3544 (SCJ) concerned three class actions that were settled. *Seed v. Ontario*, [2017] O.J. No. 2958 (SCJ) concerned historical abuse at a school for

- the blind; and *McKillop (Litigation guardian of) v. Ontario*, [2014] O.J. No. 942 (SCJ) dealt with approval of settlements in two actions related to provincially operated residential facilities for adults with developmental delays.
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- 170 *In Lauzon v. Canada (Attorney General)*, [2014] O.J. No. 2402 (SCJ), prisoners prevented from wearing commemorative t-shirts alleged a breach of their Charter, section 2(b) freedom of expression rights. The certification motion was dismissed, as was the case in another proposed action, *Nixon v. Canada (Attorney General)*, [2002] O.J. No. 1009 (SCJ), where a number of fires were set by inmates in Kingston Penitentiary.
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- 171 *Williams v. Canada (Attorney General)*, [2005] O.J. No. 3508 (SCJ).
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- 172 *Wareham v. Ontario (Minister of Community and Social Services)*, 2008 ONCA 771. In this case, the plaintiffs were welfare recipients under the Ontario Disability Support Program who pleaded breaches of sections 7 and 15 of the Charter associated with disputed adjudications of benefits claims. The claim was struck with leave to amend. Claims for funding for autism therapy included *Thomas v. Ontario*, [2004] O.J. No. 3340 (motion for an interlocutory mandatory order dismissed); and in *Sagharian (Litigation guardian of) v. Ontario (Minister of Education)*, [2012] O.J. No. 2743 (SCJ) the action was discontinued; while similarly, a proposed action alleging failure to provide adequate teaching for disabled students in *Niebert (Litigation Guardian of) v. Simcoe County District School Board*, [2004] O.J. No. 2524 (SCJ), was not certified.
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- 173 *Loveless v. Ontario Lottery and Gaming Corporation*, 2011 ONSC 4744. The motion for certification was dismissed.
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- 174 *Mack v. Canada (Attorney General)*, [2002] O.J. No. 3488 (OCA).
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- 175 *Sauer v. Ontario*, [2010] O.J. No. 3381 (SCJ).
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- 176 *Weninger Farms Ltd. v. Canada (Minister of National Revenue)*, [2012] O.J. No. 3735.
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- 177 Louis Sokolov, Colleen Bauman, "Common Cause: Employment-related Class Actions in Canada" (2011) 53 *Sup. Ct. L. Rev.* 249, at 250. Linda Plumpton, Sarah Whitmore, "Employment-Related Class Actions" (October 2, 2014) Class Actions – A bootcamp for Litigators, Law Society of Upper Canada: Continuing Professional Development (Toronto), at 6-1.
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- 178 RSO 1990, c. E.14.
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- 179 RSC 1985, c. L-2.
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- 180 *Halabi v. Becker Milk Co.*, 1998 CanLii 14681 (ON SC), was a case alleging failure to pay "wages. There, the Court held that proceedings under the ESA were "clearly preferable" to the proposed class action given that the proceedings were quick, cost the complainant employee nothing, and further did not require intervention by judges. Later, in *Kumar v. Sharp Business Forms Inc.*: 2001 CanLii 28301, the Superior Court of Justice held that not only did the ESA lack a provision to consolidate employee complaints to be heard by an employment standards officer, the Act expressly provided for a civil action being available as an alternative to the administrative procedure of the ESA: at para.41.
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- 181 In 2012, the Court of Appeal released the "Overtime Trilogy": *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443; *Fresco v. Canadian Imperial Bank of Commerce*, 2012 ONCA 444; and *McCracken v. Canadian National Railway Co.*, 2012 ONCA 445. In *Fulawka* and *Fresco*, claims brought by employees/ class members against banks succeeded in their arguments that overtime policies requiring pre-approval by a manager to compensate employees, created barriers for overtime pay. By contrast, in *McCracken*, the plaintiff's assertion of position misclassification was rejected by the Court of Appeal which found there were "different job responsibilities and functions of class members, who hold many different job titles and who work in a variety of workplaces with different reporting structures and different sizes of workforce: at para. 128.
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- 182 McCarthy Tétrault. *Defending Class Actions in Canada*, 2nd ed. (Toronto: 2007) CCH, page 48-9.
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- 183 See *Smith v. Sino-Forest Corporation*, 2012 ONSC 24; *Caponi v. Canada Life Assurance Company*, 2009 CanLii 592 (ON SC), where the Court stated, "The litigation is about the conduct of the defendants and whether they acted improperly, to the detriment of the Plan beneficiaries. A class proceeding is, in my view, the preferable procedure to determine this issue:" *O'Neill v. General Motors of Canada Ltd.*, 2014 ONSC 4742, was a case where post-retirement health care cuts to 3,200 class members were made, causing the class members, as the Court found, to have to assume new financial burdens when, given their age and susceptibility to health problems, they were not able to do so. See also *General Motors of Canada v. Abrams*, 2011 ONSC 5338.
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- 184 *Chapman v. Benefit Plan Administrators*, 2013 ONSC 3318. The plaintiff brought an action against trustees, administrative agents and actuaries of the benefit plan, alleging negligence and breach of trust arising from early retirement being permitted while the plan was experiencing solvency issues. The action was certified.
- 185 *Ontario Public Service Employees Union and Sue McSheffrey, v. Ontario*, [2005] O.J. No. 1841, was a case that was certified, then settled. The Superior Court of Justice found the Government had appropriated the plaintiff's pension benefits without compensation as a result of restructuring activities. A related class action also was certified and settled: *Ontario Nurses' Association v. Ontario*. The decision is unreported.
- 186 Above, note 12, at para. 26.
- 187 *Hollick*, above, note 12.
- 188 Same, at para. 19. The common issues related to complaints of odour and noise emanating from a city owned landfill.
- 189 Same, at para. 32.
- 190 Same, at para. 35. The legislation referenced in the decision the *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28, ss. 61(1) and 74(1); and the *Environmental Protection Act*, S.O. 1993, c. 28, ss. 14(1), 172(1), and 186(1).
- 191 Same, at para. 37.
- 192 Above, note 5.
- 193 2011 ONCA 628.
- 194 SO 2000, c-3.
- 195 Same, at s. 2(1).
- 196 *Salah v. Timothy's Coffees of the World Inc.*, 2010 ONCA 673, at para. 26. The lower court found the appellant had breached a franchise agreement with the respondents. That agreement provided the respondents with a conditional right of renewal – a right the appellant had denied. The trial judge awarded damages for breach of contract, breach of the duty of good faith and mental distress. The Court of Appeal agreed and dismissed the appeal.
- 197 2012 ONSC 1252, at para. 205. In this putative class action, the plaintiffs complained they were required to buy ingredients used in their products at unreasonably high prices, which cut into their profits. The Court found the claim met the requirements of s. 5(1)(a) to (d) of the CPA. Nonetheless, it was held the action could not succeed, because it would require the Court to rewrite their franchise agreements to provide the plaintiffs a greater share of profits than that derived from the franchisor's business system.
- 198 2011 ONSC 1300. Trillium asserted the wind down agreements some dealerships were required to sign after the economic collapse in the auto industry, were "franchise agreements" as defined in the *Arthur Wishart Act*. The defendant, General Motors of Canada Ltd., agreed the dealers were franchisees under that Act. Accordingly, the defendant had a duty to deliver a disclosure document before a franchisee was required to sign the agreement and failure to do so constituted a breach of the statutory duty of fair dealing. The action was certified under the CPA.
- 199 Same.
- 200 Same, at para. 57.
- 201 Same at para. 59.
- 202 Same.
- 203 Same, at para. 58.
- 204 Cheryl Wooden, Tim Buckley, Keith Batten. "Class Actions and the Insurance Industry", (Fall 2011) *Canadian Insurance Law Newsletter*, at 3.
- 205 Same.
- 206 *Blatt Holdings Ltd. v. Traders General Insurance Co.*, [2001] OJ 949 (SCJ).
- 207 Although the insurers had breached statutory conditions, the Superior Court of Justice in *Empke v. Security National Insurance Co.*, [2003] Canlii 47286, held the claims exceeded the limitation period and there was no evidence of concealment of material facts that would supercede the limitation period. Accordingly, the Court granted the summary judgement motion of the insurers. See also: *Veley v. CGU Insurance Co. of Canada* [2004] OJ 143 (SCJ). The next year, however, the Court of Appeal in *Segnitz v. Royal & SunAlliance Insurance Co. of Canada*, [2005] OJ 2436 held the insurers' payment obligation was not quantified by the statutory condition at issue when the insurer chose to pay the cash value of the care and take the salvage.

- 208 *McKrow v. Manufacturers' Life Insurance Co.*, [1998] OJ 4692 (OCJ(GD)). The Court certified the action and approved the proposed settlement.
- 209 *McLaine v. London Life Insurance Co.*, [2007] OJ 5035 (SCJ – Div.Ct.) concerned a case where plaintiffs appealed dismissal of their application for certification. The appeal was dismissed.
- 210 *Fantyl v. Transamerica Life Canada*, 2016 ONCA 633, lv. to appeal to SCC denied 2016 SCCA No. 448.
- 211 Above, note 208, at 3.
- 212 Roger J. Horst, *Class Actions: A New Battleground for Insurers in Canada*. Online: www.blaney.com/files/article_class_insurance.pdf.
- 213 *Hollick*, above, note 13, at para. 20.
- 214 *Cotter v. Levy*, [1998] O.J. No. 5842 (O.C.J.(G.D.)), at para. 15.
- 215 In *Blair v. Toronto Community Housing Corp.*, [2011] O.J. No. 3347 (SCJ), where a fire hazard was created in the building occupied by the class representative and a large fire resulted, the action was certified. At para. 71, the Court found the compensation plan did not seem to be motivated by a wish to avoid a class action. In addition, the Court held that certification should not prevent the defendant from attempting to compensate or remediate the harm they may have caused.
- 216 *Abdulrahim v. Air France*, [2009] O.J. No. 5550 (SCJ). This action was settled.
- 217 *Bilodeau v. Maple Leaf Foods*, [2009] O.J. No. 1006 (SCJ). This action was settled.
- 218 *Re Canadian Red Cross Society*, [2008] O.J. No. 4114 (SCJ). This was a motion for advice and directions in a proceeding under the *Companies Creditors' Arrangement Act*, RSC 1985, c C-36.
- 219 *Bywater v. Toronto Transit Commission (TTC)*, [1998] O.J. No. 4913 (SCJ).
- 220 *Da Silva v. 2162095 Ontario Ltd.*, [2016] O.J. No. 2397 (SCJ).
- 221 *Johnston v. Sheila Morrison Schools*, [2010] O.J. No. 2473 (SCJ). This action was settled.
- 222 *Caputo v. Imperial Tobacco*, [2004] O.J. No. 299 (SCJ), at paras. 12 and 13 (personal injuries suffered by millions of Ontario smokers and their families, with allegations the manufacturers designed and produced inherently defective and dangerous products, marketed with knowledge they were addictive and harmful – action not certified and discontinued).
- 223 *Cavanaugh v. Grenville Christian College*, 2013 ONCA 139. The Court of Appeal stated the motion Judge's decision to deny certification was correct and grounded in the court's inherent power to dismiss an action where the claim did not offer a reasonable cause of action: at para. 19.
- 224 2017 ONSC 3466.
- 225 2015 ONCA 112.
- 226 The Hospital brought a Rule 21 motion, arguing the jurisdiction of the Superior Court of Justice was ousted on the ground the *Personal Health Information Protection Act*, 2004("PHIPA") SO 2004, c.3, Sch. A was an exhaustive code in relation to patient records. The Ontario Hospital Association intervened to support the position of the Hospital and argued that PHIPA's balance would be disturbed if claims based on *Jones v. Tsige*, 2012 ONCA 32 were entertained by the courts in relation to personal health information. The Court of Appeal disagreed, holding PHIPA contemplated the possibility of actions for damages in Court in light of the language in section 71 of PHIPA. It provides immunity for a good faith compliance attempt in an "action or other proceeding for damages:" at para. 41.
- 227 2017 ONSC 1082.
- 228 2014 ONSC 2135.
- 229 2013 CanLii 41305.
- 230 *Daniells v. McLellan*, 2017 ONSC 6887, at para. 19.
- 231 Same. The Court concluded "*the present case is one in which a common issues trial judge could determine a base amount of damages without proof of loss for each class member on the basis that every class member's privacy was breached, and was breached in the same way*": at para. 23.
- 232 This was the case in *Abdool v. Anaheim Management*, [1993] O.J. No. 1820 (SCJ), where the Court held there was no factual basis to establish a fiduciary duty against the solicitors: para. 47. The motion to certify failed. By contrast, in *Hodge v. Neinstein*, [2017] O.J. No. 3109, the Court of Appeal certified a breach of fiduciary duty claim with respect to interest allegedly charged contrary to the *Solicitors Act*.

- 233 *Clients of JNP Financial Services Inc. v. Paul*, [2001] O.J. No. 1616 (SCJ): para. 8. This was the settlement decision related to *Delgrosso v. Paul*.
- 234 *Delgrosso v. Paul*, [1999] O.J. No. 5742 (SCJ). This case was the certification decision in *Clients of JNP Financial Services Inc. v. Paul*. Here, the Court held even though there was no contact between the plaintiff and the lawyer it was a common issue requiring resolution by trial: para.11.
- 235 Susan Lightstone. "Class-action lawsuits medicine's newest legal headache" *CMAJ*, 2001 Sep 4; 165(5): 622.
- 236 *Anderson v. Wilson*, [1999] O.J. No. 2494. (OCA). Infected patients were included in the class while uninfected people and family law claimants were identified as a subclass.
- 237 *Elliot Estate v. Joseph Brant Memorial Hospital*, [2013] O.J. No. 49 (SCJ). Action was certified and settled. 223 patients were infected, 91 of whom died of their infections.
- 238 *Farkas v. Sunnybrook and Women's College Health Sciences Centre*, [2009] O.J. No. 3533 (SCJ). There were 749 patients in the class. The action was certified and settled.
- 239 *Glover v. Toronto (City)*, [2014] O.J. No. 712 (SCJ). Approximately 135 people, consisting of 70 residents, 21 visitors and 39 staff members, contracted Legionnaire's Disease. There were 23 reported deaths. The action was certified and settled.
- 240 *Healey v. Lakeridge Health Corp.*, [2011] O.J. No. 231 (OCA).
- 241 *Bellaire v. Daya*, [2007] O.J. No. 4819 (SCJ). A review conducted of Dr. Daya's practice led to the conclusion that as many as 93 patients had undergone unnecessary or inappropriate metroplasties.
- 242 *Bisson v. Wai-Ping*, [2005] O.J. No. 739 (SCJ).
- 243 *Hudson v. Austin*, [2010] O.J. No. 2015 (SCJ).
- 244 *Banerjee v. Shire Biochem Inc.*, 2010 ONSC 889 (drug for treating Parkinson's – action certified); *Batten v. Boehringer Ingelheim*, 2017 ONSC 53 (drug for treating atrial fibrillation – action not certified as there was no basis to conclude the class suffered harm from not being warned about the absence of an antidote); *Boulanger v. Johnson & Johnson Corp.*, [2007] O.J. No. 179 (SCJ) (drug
Prepulsid used to treat gastroesophageal reflux – action certified); *Brown v. Janssen Inc.*, [2015] O.J. No. 1453 (SCJ) (anti-psychotic drugs, Risperdal and Invega); *Coleman v. Bayer Inc.*, [2004] O.J. No. 1974, ONSC (cholesterol lowering drug, Baycol. Action certified on the agreed common issue and settled); *Goodridge v. Pfizer Canada Inc.*, 2010 ONSC 1095 (promoting Neurontin for "off-label" uses – action certified); *Heward v. Eli Lilly Co.*, 2010 ONSC 3403, (Zyprexa, an anti-psychotic medication – action certified and settled); *Hunt v. Mezentco*, 2017 ONSC 2140 (preparing, combining, mixing, compounding, *Ledyit v. Bristol Meyers Squibb Canada*, [2008] O.J. No. 119 (SCJ) (potential for liver damage associated with use of Nefazodone – action certified and settled).
- 245 *Andersen v. St. Jude Medical Inc.* 2012 ONSC 3660 (mechanical prosthetic heart valves coated with Silzone – action certified but common issues trial was dismissed); *Bendall v. McGhan Medical Corp.*, [1993] O.J. No. 4699 (silicone gel breast implants – action certified and settled); *Bisignano v. La Corporation Instrumentarium Inc.*, [1999] O.J. No. 4346 (Vitek TMJ implants – action certified and settled); *Crisante v. DePuy Orthopaedics Inc.*, [2013] O.J. No. 3881 (SCJ) (hip replacements – action certified); *Dine v. Biomet Inc.*, 2015 ONSC 7050 (metal-on-metal hip implant systems – action certified); *Griffin v. Dell Canada Inc.*, 2010 ONCA 29 (overheating notebook computers – action certified); *Klein v. American Medical Systems*, [2006] O.J. No. 2188 (SCJ) (medical device used to alleviate or cure female incontinence); *Lambert v. Guidant Corporation*, [2009] O.J. No. 6461 (SCJ) (design, testing, manufacture and sale of cardiac pacemakers); *Lefrancois v. Guidant Corporation*, [2009] O.J. No. 4129 (SCJ) (defibrillators – action certified); *Logan v. Canada (Minister of Health)*, [2004] O.J. No. 2769 (C.A.) (TMJ implants).
- 246 *Barwin v. IKO Industries Ltd.*, 2017 ONSC 3520 (SCJ) (organic roofing shingles – action certified and settled); *Berkovits v. Canon*, 2010 ONSC 3952 (SCJ) (Canon cameras); *Bonanno v. Maytag Corp.*, [2005] O.J. No. 3810 (SCJ) design, manufacture, sale and servicing of washing machines – action certified and settled); *Bondy v. Toshiba of Canada*, [2007] O.J. No. 784 (SCJ) (design, manufacture and distribution of notebook computers); *Butler v. Honda Canada*, [2009] O.J. No. 2263 (SCJ) (Honda and Acura automobiles – action certified and settled); *Garipey v. Shell Oil Corp.*, [2004] O.J. No. 5309 (SCJ-Div. Ct) (polybutylene plumbing pipe and acetal insert fittings – motion to certify dismissed); *Glube v. Pella*, 2013 ONSC 6164 (design and manufacturing of Pella windows and doors – action certified and settled); *Hamilton v. Toyota*

Motor Sales, 2014 ONSC 785 (SCJ) (recalls of Toyotas and Lexus vehicles – action certified and settled); *Harper v. American Medical Systems*, 2015 ONSC 3434 (transvaginal mesh medical devices – action certified).

247 *Wilson v Servier*, [2000] O.J. No. 3392, (SCJ), at para. 118.

248 *Ontario New Home Warranty Program v. Chevron Chemical Co.*, [1999] O.J. No. 2245 (SCJ), at para. 95.

249 In *Banerjee*, above, note 244, the common issue of whether the drug Permax caused a serious risk of behavioural changes, did not require individual determination. This was because the issue was framed generally, inquiring whether Permax was *capable* of causing the alleged side effects: at para. 34.

250 *Ledyit v. Bristol Meyers Squibb Canada*, above, note 244, at para. 18.

251 For example, see *Wilson v Servier*, above, note 247, at para. 126; and *Banerjee*, above, note 244, where the Court was satisfied the case would promote behavioural modification in relation to testing and marketing pharmaceuticals: at para. 41.
