

May 31, 2018

Class Action Project  
Law Commission of Ontario  
Osgoode Hall Law School, York University  
2032 Ignat Kaneff Building  
4700 Keele Street  
Toronto, ON  
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To the Law Commission of Ontario's Class Action Law Reform,

**Re: Response to the Law Commission's Request for Comment on Class Action Law Reform**

In response to the Law Commission's March 2018 Consultation Paper on class action law reform, Insurance Bureau of Canada (IBC) is writing to provide its written submissions and comments.

IBC's member companies represent 90 percent of the Canadian property and casualty (P&C) insurance market. Our industry directly and indirectly employs 54,000 people in Ontario through 8,000 insurance carriers, agencies, brokerages, and related firms across the province.

**The Property & Casualty Insurance Industry's Interest in Class Action Law Reform**

The core business of the P&C insurance industry is to assume the financial risk inherent in many personal and business activities. This allows policyholders to protect themselves from unintentional losses and to grant them greater peace of mind with respect to the risks of modern life and commerce. The P&C industry covers a broad range of products and services that can be the subject of class action proceedings. Examples of class proceedings affecting our members include claims for property or bodily injury from defective products, claims resulting from environmental issues or contamination, and claims for privacy and security breaches.

The industry acknowledges the importance of class actions and the three objectives they are meant to advance: access to justice, judicial economy, and deterrence. Given that Ontario's statutory regime governing class actions is over a quarter of a century old, the industry also appreciates the efforts of the Law Commission of Ontario (LCO) to provide an impartial and independent review of class action legislation and proceedings. It is our position that appropriate reform can advance the stated three objectives of class actions and also make a positive contribution to reducing the cost of P&C insurance in Ontario.

**The Scope of IBC's Submissions and Comments**

For the purpose of this written submission, we have limited our review to the *Class Proceedings Act* ("CPA") and the March 2018 Consultation Paper. In particular, IBC and its members focused on the following areas:

- 1) Transparency of Outcomes and award/settlement distributions;
- 2) Treatment of Costs and Third Party Funding;
- 3) Court Approval of Plaintiff Counsel Fees and Settlement; and,
- 4) Collecting data on class actions.

## Submissions and Comments

### 1) Advancing Transparency in Class Action Outcomes

The current rules require judicial approval of settlement agreements. However, there is no requirement on the parties to make public how funds are distributed post-award/settlement. Accordingly, there is no comprehensive record of the allocation of class action awards/settlements in Ontario, and there is no empirical record-keeping in regards to how much the class members actually receive, how many members of the class do not receive compensation, nor the proportionate amount received between class members and counsel. This lack of transparency conceals the apportionment of benefits from class actions and can impede both informed decision-making by future litigants and, most importantly, ongoing monitoring of how well the class action system is performing for plaintiffs.

***We recommend mandatory filing of settlement/award and distribution reports, and making these reports accessible to the legal community and public through a registry.***

Our suggested content for these reports is as follows: summary of the issue in dispute and damages claimed; estimated numbers of individuals within the class; whether the case was settled out of court or through trial; the number of days between certification and settlement/award; sources and amounts of third party funding; settlement/award amount; dollar breakdown of settlement/award distribution between the class, plaintiff counsel compensation, disbursements, and repayment of third party funding (including interest); numbers of class members that actually received payment and average payment per class member; number of days between settlement/award and distribution of payment to class members; and disposition of funds intended for the class, but not actually paid.

Mandatory filing of award/settlement and distribution reports will act as a discipline on counsel, and also provide important metrics and data for future empirical analysis on how class actions are fulfilling their three-part objective of access to justice, judicial efficiency, and behaviour modification.

### 2) Maintaining the Two-Way Costs Rule and Creating Safeguards to Third Party Funding

#### a) *Two-Way Costs Rule*

Ontario's class actions proceedings are governed by a loser-pays principle. While we acknowledge that class actions are high stakes and high costs proceedings, we submit that it is appropriate for unsuccessful plaintiffs to bear financial consequences, lest both plaintiffs and defendants be held captive to unmeritorious and protracted litigation. Furthermore, the two-way costs rule in Ontario is tempered by the judicial discretion available at section 31(1) of the *Class Proceedings Act* to absolve an unsuccessful party from paying costs in test cases and in situations of novel points of law or matters of public interest.

***We recommend maintaining the two-way costs rule as it fairly compensates successful parties and provides a disincentive for frivolous claims. We also recommend maintaining the judicial discretion available in regards to costs as set out in section 31(1) of the Class Proceedings Act.***

*b) Third Party Funding*

Third party funding is one avenue for plaintiffs to overcome the expense of substantial litigation in class action and the risk of adverse costs awards. Accordingly, we acknowledge and accept that third-party funding is a means to promote access to justice for impecunious or disadvantaged plaintiffs who would otherwise have been unable to advance a claim. However, the CPA currently provides no safeguards for protecting the interests of plaintiff classes when third party funding is involved. In this regard, we are aware of situations where third party funders have been overcompensated at the expense of class members who are often absent from or even unaware of the litigation. Accordingly, we recommend the following safeguards:

- i. Immediate disclosure of third party funding: The immediate disclosure of third party funding will help avoid conflicts of interests (for example, if there is a prior relationship between a third party funder and a party or law firm involved in the proceedings), provide transparency to direct and indirect parties to the litigation, and encourage parties to engage in productive settlement discussions with the knowledge of the opposing side's capacity to sustain litigation.

***We recommend that the CPA require the disclosure of third party funding at the outset of litigation, or as soon as a third party funder becomes involved.***

- ii. Court approval with notice to the defendant(s): Although there is no explicit requirement in the CPA, jurisprudence is clear that third party funding is expected to be approved by the court. This condition derives from the court's broad powers pursuant to sections 12 of the CPA and 97 of the Courts of Justice Act (which grants Courts the power to make declaratory orders). While case law also provides some guidance to the court in approving third party funding, there have been cases where plaintiffs have attempted to obtain court approval of third party funding with no notice to the defendant and in closed court.

***We recommend that reform to the CPA incorporate requirements that (i) the plaintiff obtain court approval of third party funding, and (ii) the plaintiff provide notice to the defendant(s).***

- iii. Capping interest rates: We agree that third party funders should be permitted to charge a reasonable rate of interest that is reflective of the time value of money and the level of risk taken on by the lender. However, we are aware of cases where lenders have charged unconscionably high interest rates. When this happens, the amount of interest costs typically comes as an unpleasant surprise – and burden – on the plaintiffs.

***We recommend that there should be a cap on the interest rates charged by third-party funders, and that the cap be tied to market interest rates combined with a reasonable allowance for risk.***

### 3) Court Approval of Plaintiff Counsel Fees and Settlement

Contingency fee agreements provide a way for individuals to access the justice system without facing the initial costs and risks of litigation. We understand that contingency fee agreements are another means to promote access to justice. However, we do have concerns that the allocation of proceeds to plaintiff's counsel can be disproportionately high and unfair as to class members. We therefore recommend the following:

- i. Establishing Clear Rules Governing the use of Contingency Fees Arrangements: Although section 33(1) of the CPA specifically allows for contingency fees, the section does not clearly set out the scope of same. ***We recommend that regulations be enacted to govern their use and ensure protection of the plaintiffs' interests.*** Issues that could be addressed in the regulations include the requirement to file contingency fee agreements in court, criteria for assessing the appropriateness of a contingency agreement (e.g., nature and complexity of the class action; the expense and risk of pursuing the class action), and a requirement to disclose the contingency fee formula.
- ii. Enshrining the Dabbs Criteria: The CPA has no guidelines on how to determine whether a negotiated settlement is fair and reasonable. As noted in the Consultation paper, Courts reach their conclusions based on a series of criteria derived from the Dabbs decision.

***We recommend that the criteria from the Dabbs decision be codified in the CPA for application to settlements.***

- iii. Disclosing the Contingency Fee Formula: Section 17(6) of the CPA requires that the notice of certification summarize any agreements between representative parties and their solicitors "respecting fees and disbursements." However, there is no requirement on plaintiff's counsel to disclose to class members the contingency fee formula being applied.

***In the interest of making class proceedings more transparent to all parties, we recommend that solicitors be required to disclose the contingency fee formula in the notice of certification.***

### 4) Collecting Data

In the above section regarding award/settlement distribution, we highlight the current lack of transparency around key issues relating to class actions and recommend mandatory filing of award/ settlement reports. In addition to that, we propose that the collection of empirical information should relate to key metrics of the litigation process. The information collected will provide further transparency to class proceedings, and assist future litigants in managing their expectations for their own action (including, what time frame, settlement distributions, and costs are to be expected). ***We therefore recommend that the Class Proceedings Act or Rules of Civil Procedure be amended to promote mandatory reporting on class action***

***proceedings and data.*** This information can be collected and digitalized through the courts, and made accessible to the general public in an online directory.

### **Conclusion**

The P&C insurance industry acknowledges the importance of class actions in advancing access to justice, promoting judicial economy, and serving as a deterrence to socially undesirable behavior. However, we are concerned that some aspects of the class action regime are not serving the interests of class members and of the Ontario public. These concerns center on how the regime allows for unfair and significant reduction in the amount that class members ultimately receive in compensation, effects that we believe can be effectively addressed through the reforms recommended in this submission.

IBC is committed to remain actively engaged in the Law Commission's efforts to examine class actions. To this end, we welcome any queries or comments arising from the matters dealt in this submission.

Sincerely,

A handwritten signature in black ink, appearing to read "K. Donaldson", written in a cursive style.

Kim Donaldson  
Vice President, Ontario