
Monique Jilesen
416-865-2926
mjilesen@litigate.com


Paul-Erik Veel
416-865-2842
pveel@litigate.com

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The LCOâ€™s Class Actions Final Report: The Defence Perspective

As has now been widely reported, the Law Commission of Ontario has released its final report on class actions which makes recommendations to improve the system of class actions in Ontario. Our colleagues, Brian Kolenda and Derek Knoke, commented on those that will be of interest to plaintiffs in their blog post here. We provide the defence counsel perspective here.

Overall, several recommendations made by the LCO will benefit defendants who face class proceedings and will contribute to the efficient administration of justice.

The first two recommendations may be the most significant from a defence perspective. The first recommendation proposes amending the *Class Proceedings Act* to provide that the certification motion must be heard within one year from the date the Statement of Claim is issued. The second recommendation provides that where a certification motion has not been filed within a year, or where there has been some default in a timetable set for the delivery of certification materials, the proceeding should be administratively dismissed.

These recommendations are welcome for defendants and defence counsel, who have faced the problem of zombie class actions. Class actions in Ontario have historically been excused from the rules providing for automatic dismissal for delay under the *Rules of Civil Procedure*. Consequently, once a class action has been commenced, there is no mechanism for it to be automatically disposed of if plaintiffs' counsel does not pursue it.

This has meant that defendants can face dormant, but ongoing litigation for years or, in the worst cases, decades. This is not just annoying, but a practical and sometimes costly problem. Defendants may need to report ongoing litigation for an indefinite period. Defendants may have to undertake expensive preservation of documents ordinarily disposed of in accordance with their organization's records retention policies. This proposed recommendation will help eliminate these costs in cases that plaintiffs' counsel do not intend to pursue.

The LCO proposes that upon the administrative dismissal, notice must be given to potential class members and that

plaintiffs' counsel presumptively bears the cost of the notice. The provision that class members be given notice of the dismissal is reasonable: the dismissal of the action will resume the clock on the limitation periods on individuals' claims. Putting the cost burden for disseminating notice on plaintiffs' counsel is a significant feature of the recommendation – the cost consequences should make them think twice before beginning unmeritorious actions they have no intention of pursuing.

Other than the administrative dismissal provisions, our view is that the most significant proposed recommendations relate to certification motions. The certification motion is often the most significant part of class proceedings. The vast majority of class proceedings are never adjudicated on their merits. Rather, a significant percentage of class proceedings are settled following a successful certification motion by the plaintiffs. Because certification is often the key battle ground, it is also our primary focus of interest in reviewing the LCO's recommendations.

At the outset, we note two recommendations the LCO considered but did not ultimately make: 1) raising the certification standard from "some basis in fact" to the usual balance of probabilities standard; and 2) introducing an initial merits review as part of the certification motion. Both of these were missed opportunities to improve the screening role of the certification motion.

First, with respect to the requirement that the standard for certification be set at the usual balance of probabilities, it continues to surprise us that this would be contentious. The usual standard in civil proceedings in Ontario is the balance of probabilities, and there is no suggestion in the *Class Proceedings Act* that the standard should be anything else on a certification motion.

A balance of probabilities standard ensures that only those proceedings that can, more likely than not, proceed as class actions are certified. As we have noted before in a previous blog , without a balance of probabilities standard, the parties can face the situation that a case proceeds to a common issues trial where, on a balance of probabilities, there are no common issues for the court to resolve. This outcome is absurd.

Introducing more substantial merits review is obviously more controversial. It has been clear from the outset in Canada's class proceedings that certification is procedural rather than substantive. However, early merits analysis is not entirely foreign to class proceedings, such as in the leave requirement that exists for certain secondary market securities class actions.

As we have suggested before in the article “Time to expand analysis of the merits in all class actions”, there is value in an initial merits analysis, even at a low threshold. This ensures that the class actions that proceed are ones that, on the basis of some evidence, have some reasonable prospect of success. They also ensure that defendants do not incur the extraordinary costs of discovery that can be required in class proceedings where there is no reasonable prospect that the plaintiffs will succeed.

While concerns have been raised that an initial merits requirement would increase the length, cost and complexity of certification motions, these concerns are overblown. The typical certification motion already includes a lengthy factual record, generally including expert reports, from plaintiffs and defendants. Given that evidence on the merits is often already led by the parties on certification, there is little risk that they will become longer and more expensive.

Despite our disappointment that the LCO did not adopt these recommendations, there are aspects of the changes to the certification process of which will contribute to more effective administration of class actions.

First, the LCO has recommended that case management judges should more liberally allow for both motions to strike and summary judgment motions pre-certification where such motions would help to resolve the dispute expeditiously or narrow the issues. This is a very positive development. As we have described in a previous blog, some courts have been overly restrictive in letting defendants bring pre-certification motions, on the theory that the certification motion should presumptively be the first step in the proceeding. This approach is misguided. There is significant merit to pre-certification motions, particularly where such motions could resolve all or part of the certification motion or otherwise streamline the proceeding.

The LCO has also recommended a modification of the appeal route from certification. Currently in Ontario, plaintiffs have an automatic right to appeal a denial of certification to the Divisional Court, while defendants must seek leave to appeal a certification decision from the Divisional Court. The LCO has recommended scrapping the Divisional Court route, and simply providing for a direct right of appeal for both parties to the Ontario Court of Appeal.

This recommendation should be welcome to all parties litigating class actions. Given the significance of the certification decisions, there is no justification for requiring defendants to seek leave to appeal. It merely adds an unnecessary step in

the process that adds cost and delay for all parties. It will also be helpful for the Ontario Court of Appeal to hear more appeals of certification decisions in order to develop the law in the area.

Finally, we also welcome the LCO's recommendations for increased clarity regarding the rules around third-party funding. Third-party funding is here to stay and has significant benefits to access to justice and behaviour modification. However, it is important that third-party funding not unduly interfere with the rights of the parties to litigation, so more clarity and predictability around those rules would be welcomed.

Overall, the LCO recommendations of the *Class Proceedings Act* are a welcome step in the right direction. Unfortunately some of those recommendations do not go far enough to ensure that the judicial resources and costs to the parties that class actions reflect are only spent where there is real merit to the proceeding continuing as a class action.

Continue reading: https://www.lco-cdo.org/wp-content/uploads/2019/07/LCO-Class-Actions-Report-FINAL-July-17-2019.pdf