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LCO recommendations point to meaningful change in class actions

The July 17, 2019 final report of the Law Commission of Ontario into class actions has the potential to impact significantly on the prosecution and defence of class actions in Ontario.

The Report is the culmination of a two-year process organized by the LCO. It makes 47 individual recommendations in 10 categories, covering all aspects of class actions. The reforms seek to address perceived issues of delay, cost, carriage battles, multijurisdictional coordination, third party funding and settlements, given the growth in the number and complexity of class actions in Ontario.

This blog post is the first of a two-part series on the LCO's Report. In this post, we provide an overview of some of the recommendations with a focus on those considerations that will be of most interest to plaintiffs and class counsel. In a subsequent post, our colleagues will discuss the implications for defendant stakeholders.

Key plaintiff-side recommendations

Class counsel and litigation funders will be particularly interested in a number of recommendations that have the potential to significantly impact the plaintiff-side practice. These include:

- **Managing Class Actions**. The Report recommends a statutory one-year deadline by which the parties must set the certification motion schedule and the plaintiffs must file their motion record. Failing that, the action would be administratively dismissed, with plaintiffs' counsel bearing the costs of providing notice of the dismissal to the putative class.

- **Carriage**. The Report recommends a statutory requirement to register an action with a national registry concurrently with filing the action. A competing firm must then bring a carriage motion within 60 days of the issuance of the first action.

  A court hearing a carriage motion should grant carriage to the firm that "best advances the claims and interest of

group members in an efficient and cost-effective manner", and there would be no right of appeal from carriage orders.

- **Multijurisdictional Class Actions**. The Report recommends statutory changes to promote multijurisdictional coordination, such as, a requirement that plaintiffs' counsel give notice to representative plaintiff(s) in any existing or proposed multijurisdictional class proceeding commenced in another Canadian jurisdiction involving the same or similar subject matter.

- **Certification**. The Report does not recommend statutory reforms to the test for certification. The Report rejected defendant-stakeholder requests for a preliminary merits-test and for changes to the evidentiary standard because it felt that statutory changes would likely subvert access to justice and judicial economy. Delay and expense would also result from a higher evidentiary standard than the "some basis in fact" standard.

  However, the Report encourages:
  - Courts to give greater weight to alternate remedies when considering whether there is a preferable procedure than a class proceeding (s. 5(1)(d) of the *Class Proceedings Act, 1992*). The Report suggests that courts apply the principle of proportionality and adopt a cost-benefit analysis to assess whether the benefit of the alternate remedy (e.g., recalls, regulatory action, etc.) outweighs the cost of litigation;
  - The use of pre-certification motions. The Report states that the summary judgment motion is a more suitable forum to do a merits-based assessment than the certification motion, which is intended to be a "procedural tool".

- **Settlement Approval**. The Report recommends significant reforms to the settlement approval process to improve the "consistency and quality of information available to the court" when determining whether to approve a settlement. The recommendations include, among other things, amendments to the *CPA*:
  - Requiring class counsel to provide independent and detailed affidavit evidence to support the proposed settlement; and

    - Requiring full and frank disclosure of material facts regarding the settlement.

- **Settlement Distributions and Class Action Outcomes**. The Report notes a lack of information and transparency regarding settlement outcomes. It urges courts to require more information on settlement approval motions as well as mandatory and comprehensive reporting obligations in the form of outcome reports. These outcome reports would be submitted to the court for approval within 60 days after the conclusion of the distribution period.

  Many of these obligations would be set out in a class action Practice Direction to govern this and many other areas of class action law discussed in the Report.

- **Fee Approval**. The Report expresses concern about compensation of class counsel. It suggests statutory amendments that would require courts to consider the results achieved for the class and the degree of responsibility assumed by class counsel for the purpose of determining fees that are fair and reasonable. Controversially, the Report suggests that the presence of third-party litigation funding lowers the risk for class counsel and warrants a reduction in counsel fees.

- **Costs**. The Report recommends a limited no-costs rule. No costs would be available or awarded for certification and ancillary motions absent special circumstances. Ordinary two-way costs rules would apply for all other aspects of the action. The Report notes that certification is a statutorily-mandated procedural step, which is not related to the merits of the action. As such, it should not be a barrier to commencing a putative class action.

  The Report recommends greater judicial scrutiny of third party litigation funding agreements, and it questions the appropriateness of all fixed levies, including the 10% levy imposed by the Class Proceedings Fund.

- **Behaviour Modification**. The Report recommends that outcome reports (discussed above) include information about how the parties have modified their behaviour as a result of the class action, such as changes in corporate or government practices. The source of information that might form the basis of such reports is not entirely clear.

- **Appeals**. The Report recommends statutory amendments to provide both plaintiffs and defendants

with a right of appeal to the Court of Appeal for Ontario from certification orders.

Will the Report's recommendations have their intended effect?

The Report's recommendations are said to be aimed at addressing the well-known objectives of class actions, including access to justice. Many of them have the express goal of decreasing the time and cost of litigation of class actions, particularly at early stages.

More controversially, the Report also seeks to meaningfully change the economic incentives for class counsel and litigation funders, while simultaneously imposing new procedural and reporting requirements. The fact-specific inquiry proposed for judicial review of litigation funding agreements will increase uncertainty for litigation funders, which may reduce the number of cases that firms and funders are willing to fund, thereby creating barriers to access to justice. The new reporting obligations imposed on class counsel may also have the unintended effect of actually increasing what constitutes "fair and reasonable" counsel fees under the proposed new regime.

There may be other unintended consequences from the Report, including:

- **New and strict timelines**. The Report's recommendations will place significant burdens on class counsel. The one-year deadline for filing a motion record and setting the certification motion schedule will require plaintiffs' counsel to devote the resources necessary to work up the action quickly. The 60-day deadline for bringing a carriage motion (together with the recommended test for granting carriage) works at cross-purposes in that it creates pressure on plaintiffs' counsel to issue (or respond to) a statement of claim rapidly. All of this will have the intended effect of compressing the timeline. However, it seems unlikely that this will facilitate the expansion of the legal market for class counsel (an objective identified in the Report). The short timelines will favour incumbent firms who have sufficient capital and talent resources to litigate these issues swiftly.

- **Test for Certification**. The pressure of strict time limits will be tempered somewhat because the Report reinforces the (mostly) clear directive from courts that certification is not to include any substantial merits test.

However, the Report's proposed interpretation of the "preferable procedure" requirement (s. 5(1)(d) of the *CPA*) may have the unintended effect of introducing an assessment of damages into the test for certification. It will be a rare case where the extent of damages (or the defendants' gain) can be adequately assessed at the certification stage, and the risk of denial of certification on this basis will lead to significant uncertainty.

- **Disclosure obligations on class counsel**. The Report imposes new and enhanced reporting obligations on the parties, especially class counsel. In addition, although the Report's proposed outcome reports are filed by the "parties", it is not clear on what basis defendants would be required to cooperate in providing information in support of these reports. At some stage, class members are likely to have to bear the increased costs of this reporting.

- **Judicial oversight of settlements, fees, and costs**. Courts already have discretion, which they do exercise, to scrutinize litigation funding agreements, settlements, fees, and costs. The proposed codification of the court's supervisory function does not represent a marked change in the law.

  However, proposed statutory amendments that would require a court to expressly consider whether to exercise its discretion may create new opportunities for parties to challenge lower court decisions, where a first-instance judge does not expressly aver to his or her discretion.

  Some of the Report's other recommendations are likely to be unwelcome to both plaintiffs and settling defendants because they increase uncertainty surrounding approval of settlements. Any kind of expanded full and frank disclosure requirement for settlement approval (beyond that already recognized in the case law) would fail to recognize that settlements are often based on each party's (and their counsel's) assessment of the risks of litigation in the face of imperfect information. As such, it may actually impede the possibility of settlement where defendants are reluctant to provide sufficient pre-certification or indeed pre-discovery information that would enable a meaningful assessment of risk to facilitate settlement.

- **Costs**. A modified no-costs rule is a welcome change and likely to impact significantly the incentives for defendants' resistance to certification motions. The suggestion by the Report's authors that this will necessarily impact the risk borne by class counsel is not entirely clear. As a practical matter, where funding and an indemnity is in place, no class counsel or plaintiff bears the risk of costs, so the new regime does not reduce "the risk to class counsel". However, we agree that it should decrease the risk borne by litigation funders, pre-certification, which may have the benefit of expanding the market for litigation funding.

- **Appeals**. Granting defendants an appeal as of a right to the Court of Appeal for Ontario from certification orders is a double-edged sword. On the one hand, it simplifies appeal routes. But in a world where every certification order is sure to be appealed, it also ensures delay beyond the time that it currently takes for in-writing motions for leave to appeal to the Divisional Court, very few of which are granted. This may undermine the Report's attempt to reduce delay. In addition, the revocation of all appeal rights from carriage orders (whether as a right or with leave), although reducing delay and costs, will impede appellate courts' ability to act as courts of error-correction in truly obvious cases.

Conclusion

The Report recommends far-reaching changes to the *CPA* and to the law of class actions. It is unclear what changes the legislature, judiciary, and/or the bar will ultimately adopt, but the Report certainly provides much for the legal community to consider and discuss as it seeks to promote the administration of justice in the public interest.

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