

Goodmans^{LLP} Update

Law Commission of Ontario Recommends Significant Overhaul of Ontario Class Actions Regime

On July 17, 2019, the Law Commission of Ontario (LCO) released its much anticipated report on the Ontario Class Action regime. The report is the product of a 24 month process undertaken by the LCO which included consultation with stakeholders in the justice system throughout Ontario and, according to the LCO, represents the first comprehensive, independent review of Ontario's *Class Proceedings Act* ("CPA"), since its introduction in the early 1990s.

The report contains nearly 50 recommendations for modifying the class action regime in Ontario and candidly recognizes throughout that many of the recommendations will be controversial given the diversity of class-action stakeholders. Some highlights of these recommendations are set out below.

Timely Management of Class Actions

One of the overarching themes of the report was the need to address delay in class actions. The report recognizes that the present "90 day rule" for the bringing of a certification motion is more honoured in its breach than its observance and recommends that a one year deadline, accompanied by an administrative dismissal for failure to abide, would be more appropriate. There are also recommendations for strengthening case management in class proceedings, including mandating a case management conference within 60 days of service of the last defendant and a dedicated practice direction.

Certification Test

With respect to the test for certification of class actions, the report is perhaps more interesting for the recommendations it does not make, than those it does. The report concludes that the certification regime in Ontario does not warrant major reforms. The report acknowledges that Ontario has a high certification rate (73%) and that many stakeholders have suggested a preliminary merits test or a higher evidentiary test at the certification stage to weed out meritless or frivolous proceedings. However, the report concludes that such concerns can be better dealt with by pre-certification summary judgment or strike motions. It's not clear how such pre-certification motions, which have generally been frowned upon in class proceedings, would harmonize with the overarching goal of avoiding delay.

In its only proposed adjustment to the certification test, the LCO recommends the courts more rigorously interpret the portion of the certification test which considers whether a class proceeding is the "preferable procedure" for resolution of the common issues.

Certification Costs

The LCO report recommends there be no costs payable in respect of certification motions, ancillary proceedings (e.g production and amendment motions) and appeals. This would be a marked departure from the existing regime where the unsuccessful party typically pays costs (though, at present, the CPA does provide that the court can consider whether the proceeding was a test case, raises a novel point of law or involves a matter of public interest in assessing those costs).

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Certification Appeals

The LCO recommends that all certification appeals proceed directly to the Ontario Court of Appeal.

***Amicus Curiae* in Settlement and Fee Approval Motions**

The report recommends amending the *CPA* to give the court the discretion to appoint *amicus curiae* (independent counsel) to assist the court in motions for settlement and fee approval. In these motions the court typically does not have an adverse party before it in making its decision. This can be expected to raise the bar in obtaining settlement approval and is in addition to a proposal for more stringent evidence to be provided by class counsel in seeking settlement approval.

Multijurisdictional Proceedings

The LCO recommends the *CPA* be amended to add provisions consistent with legislation in Alberta, British Columbia and Saskatchewan aimed at streamlining multijurisdictional class actions to improve judicial economy and reduce cost and delay.

Next Steps

For the time being the LCO recommendations remain simply recommendations. However, there are indicators that the provincial government may be independently considering legislative changes to the class action landscape. Earlier this year, the provincial government held its own consultations on the *CPA* in roundtable discussions with various stakeholders. It remains to be seen whether those discussions will lead to reform and whether the LCO report will further influence that decision or influence any changes that may ultimately be made.

Should you wish to further discuss the LCO report or class actions more generally, please contact the author or any member of our [Class Action Group](#).