Cassels

The Law Commission of Ontario Releases Its Long-Awaited Report On Class Action Reform - Will This Lead To Change in Ontario?

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In 1992, Ontario introduced the first class actions statute in common-law Canada. Now, 27 years later, after consultations with dozens of stakeholders across the province, the Law Commission of Ontario has reviewed the efficacy of the class actions regime in Ontario and released its final report: *Class Actions: Objectives, Experiences and Reforms*. The report is the first comprehensive, independent study of class actions in Ontario since the legislation was introduced, and it makes 47 recommendations for improvement.

In response to the Commission's calls for feedback, Cassels Brock's Derek Ronde and Jeremy Martin spearheaded an *ad hoc* committee of defence counsel representing numerous class action defence departments across Bay Street. They, along with Lara Jackson and Tim Pinos, also responded to the Commission independently on behalf of the Cassels Brock Class Actions Group. A copy of the *ad hoc* defence counsel submission can be found here. Jeremy Martin also held the pen for the Ontario Bar Association's bipartisan Class Action executive as it made its submissions to the Commission.

The report was headed by professors Jasminka Kalajdzic (University of Windsor) and Catherine Piché (Université de Montréal), and sought to address a broad range of policy concerns in the class action sphere.

Law Commission Report's Recommendations

Among many other things – including vital statistics that will be relied upon in class proceedings for years to come – the Report makes the following fundamental recommendations that reflect the most pressing concerns of both sides of the class proceedings bar (Note: an asterisk below indicates that the recommendation aligns with a submission of Cassels Brock to the LCO):

- Increase the rarely-followed 90-day deadline for filing certification materials to one (1) year and dismiss claims that do not meet that deadline or adhere to an approved timeline
- Case management should be improved and introduced earlier, within sixty (60) days of the claim being made*
- A new Practice Direction should be adopted for class actions specifically, including detailed guidance on forms of notice to class members
- The *Class Proceedings Act, 1992,* S.O. 1992, c. 6 (CPA) should be amended to include specific

provisions for carriage motions (in which class counsel compete for the right to carriage of a class action), including a sixty (60) day window for interested counsel to file their motions, with service to the class, and no right of appeal*
- The *CPA* should be amended to accommodate the multijurisdictional class action provisions promoted in other provinces and by the CBA Protocol for the Management of Multijurisdictional Class Actions*
- There should be no preliminary merits test of an action prior to certification
- The certification test should remain in place but the "preferable procedure" criterion should be applied more rigorously. Courts should give greater weight to alternative compensation procedures (including recalls)*
- Courts should encourage early motions to strike or seek summary judgment where appropriate*
- Class counsel should be required to provide independent evidence that a negotiated settlement is fair, on a "full and frank disclosure of all material facts" standard
- The authority of the Court to appoint claims administrators and to make *cy-près* awards should be specifically recognized in the statutory language
- Post-settlement "outcome reports" must be filed with the court and all parties

o Those reports and class action statistics should be organized centrally by the Ministry of the Attorney General and other interested parties

o These reports should include information about the defendant's behaviour modification in response to the class action

- The *CPA* should be amended to allow the Court to ensure that class counsel fees are fair and reasonable, including the right to adjust or hold back counsel fees in the event of an unfair or unreasonable outcome*
- Ontario should become a "no-costs" regime in respect of certification and related motions, but the normal costs rules would apply for all other procedural steps, including jurisdictional motions, summary judgment and de-certification motions, and trial
- The *CPA* should be amended to authorize third-party funding of class actions under strict court controls and duties of disclosure
- The Class Proceedings Fund should be permitted to partially fund legal fees in appropriate circumstances
- The role of *amicus curiae* should generally be increased when the proceedings appear to become non-adversarial, such as in settlement approval hearings
- All appeals from a certification motion should go directly to the Court of Appeal, rather than to the Divisional Court in certain circumstances*

In sum, the Report largely endorsed and sought to codify the *status quo* in most contentious areas – most notably certification – but adopted some bipartisan recommendations and sought to remedy some of the

worst abuses and inefficiencies complained of at both sides of the class actions bar. Some of its more contentious recommendations, however – such as the one-year dismissal period, the recommendation of a “no-costs“ rule for all certification-related motions (which tend to be brought by plaintiffs) while maintaining a costs regime for post-certification motions (which tend to be brought by defendants), and the authority for the court to interfere in class counsel’s retainer agreement by adjusting their compensation – may prove to be more controversial in the long term.

We will continue to update our clients as we receive further information from our participation with the Commission and the Ministry of the Attorney General, as well as in stakeholder and other advocacy groups involved in this broader project of legislative reform.
