

Law Commission of Ontario launches consultations for its Class Actions Reform Project

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The Law Commission of Ontario (LCO) just released its first [consultation paper on class actions](#) [PDF], and launched a province-wide consultation process for its [Class Actions: Objectives, Experiences and Reforms project](#). The LCO's process may lead to fundamental reforms that will affect how welcoming Ontario is for class actions and more generally the availability of collective relief in Canada.

The LCO has identified a number of key concerns: the delay and cost of moving class actions forward in the current court system; the fact that certification motions are resource intensive and are often appealed to multiple levels of courts; and the delays associated with litigating a class action to trial. The LCO is also focused on multi-jurisdictional class actions, which procedurally complicate and delay cases. One might expect any reforms to address such concerns.

The LCO's launch marks the start of a four-month consultation period during which the LCO will receive input from a variety of stakeholders with an interest in class actions in Ontario. The LCO's [consultation paper](#) [PDF] identifies the purpose and the scope of the consultation process, and sets out the details and timelines for stakeholders to provide feedback.

Background: The Class Actions Project

The LCO is a law reform agency with a mandate of improving access to justice and promoting legal reform. The Ontario legislature first adopted the *Class Proceeding Act, 1992*, (the CPA) 25 years ago, following the recommendations of the Ontario government's Advisory Committee on Class Action Reform that were made in 1990. Since that time, class actions in Ontario have multiplied in volume, have become increasingly complex and have had significant policy and financial implications for both plaintiffs and defendants.

The LCO's Class Actions Project represents the first evidence-based examination of the effectiveness of collective relief in Ontario in more than 25 years. The Class Actions Project has two main goals:

1. surveying a wide range of stakeholders about their experience with class actions in Ontario
2. providing a practical analysis of class actions from the perspective of (i) access to justice, (ii) judicial economy and (iii) deterrence or behaviour modification

Following the completion of its consultation process, the LCO intends to produce an independent final report on class actions issues, which may include recommendations for law reform that could affect both plaintiffs and defendants.

The Class Actions Project was launched in October 2017. In the first phase, from November 2017 to January 2018, the LCO interviewed a broad range of individuals and organizations to identify the most critical issues in class actions litigation in Ontario.

Based on the first round of interviews, the LCO developed a list of 13 key consultation questions, as set out below.

Key concerns and potential reforms

The LCO identified some key concerns of participants, and noted a variety of preliminary potential options to address them, including the following:

- the significant delay in litigating class actions. Many causes and potential solutions were identified including:
 - plaintiff counsel carriage motions – a “first to file” rule for carriage is an option and
 - appeals of certification motions – eliminating appeals to the Ontario Divisional Court, with appeals going directly to the Court of Appeal, is an option.
- contested certification motions, which some people stated often involved a large amount of evidence on the merits of the case.
- class counsel fees – whether they were proportionate to class recovery. One option noted was to structure class counsel fees to improve take-up rates in settlements. This could increase the cost of settlements for defendants.
- delay and challenges inherent in multi-jurisdictional class actions. Canada does not have a system for sorting out which province should take primary charge over an asserted nationwide class. Ontario’s CPA is silent on this subject. The LCO noted that Alberta and Saskatchewan courts must determine whether it would be preferable for claims to be resolved in another jurisdiction.

The consultation questions

The LCO identified 13 questions to be subject to consultation:

- How can delays in class actions be reduced?
- Given that class actions must provide access to compensation to class members, how should distribution processes be improved?
- What changes, if any, should be made to the costs rule in the CPA?
- Is the current process for settlement and fee approval appropriate?
- Is the current approach to certification under s. 5 of the CPA appropriate?
- Are class actions meeting the objective of behaviour modification? What factors (or kinds of cases) increase (or reduce) the likelihood of behaviour modification?
- Please describe class members’ and representative plaintiffs’ experience of class actions.
- In light of existing constitutional restrictions, what is the most effective way for courts to case manage multi-jurisdictional class actions in Canada?
- How should Ontario courts address the issue of carriage in class actions?
- What is the appropriate process for appealing class action certification decisions?

- What best practices would lead a case more efficiently through discoveries, to trial and ultimately to judgment? Are there unique challenges in trials of common issues that the CPA and/or judges could address? What can judges do to facilitate quicker resolutions and shorter delays?
- In addition to the issues listed in this paper, are there provisions in the CPA that need updating to more accurately reflect current jurisprudence and practice? If so, what are your specific recommendations?
- Should the *Class Proceedings Act* or Rules of Civil Procedure be amended to promote mandatory, consistent reporting on class actions proceedings and data?

The LCO's list of questions invites consultation on many areas that will be of interest to defendants that have been implicated in class proceeding legislation, including the question of costs, the test for class certification (and whether it should include a threshold merits inquiry), the role of third-party funders and the management of multi-jurisdictional class actions. Given the breadth of these issues, the LCO's consultation may address the concern of many defendants relating to the incidence and adverse economic impacts of strategic class proceeding litigation, particularly from the perspective of potential additional costs that are imposed on companies that conduct business in Canada.

Next steps: The consultation process

The LCO's Class Actions Project will invite significant commentary from plaintiffs, defendants, consumers and industry organizations as well as interested counsel and academics. The result of the consultation remains to be seen, but the consultation represents the first opportunity in a generation to objectively examine the impact of class proceeding legislation from an empirical perspective, and could profoundly affect the future of collective relief in Ontario. The project's consultation process is an excellent opportunity for organizations to provide their insight into the most pressing problems in class actions litigation today.

Public and private organizations, members of the legal profession and other interested parties can participate in the consultation process by contacting the LCO or by providing written submissions by May 11, 2018. Osler will keep you apprised of developments in the LCO's Class Actions Project, and will be facilitating submissions to the LCO. If you or your organization wish to make submissions or learn more about this process, please contact Osler at classactionsproject@osler.com.