Law Reform Commission of Saskatchewan

Reform of *The Class Actions Act*

CONSULTATION OPEN
UNTIL FEBRUARY 28, 2022.

The Law Reform Commission's Class Action Act Project

- The Commission decided to take on this project following the release Law Commission of Ontario ("LCO") released its *Final Report, Class Actions: Objectives, Experiences and Reforms* in July of 2019.
  - This led to the Commission identifying a number of recommendations made by the LCO which could be made here in Saskatchewan.
- Consultation paper published in September 2021
  - https://lawreformcommission.sk.ca/Class-Actions-Act-Consultation-Report.pdf
- Consultation survey posted in October 2021
  - https://www.surveymonkey.com/r/NVBRHX7
- Consultation is open until February 28, 2022
- Your comments and opinions are welcome and are an important part of the Commission's deliberations on recommendations for reform

Law Reform Commission of Saskatchewan

The Class Actions Act:

An Overview

- The Supreme Court of Canada, in *Western Canadian Shopping Centres Inc v Dutton*, lists the advantages of advantages of a class action as follows:

1. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis.

2. Second, by allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually.

3. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public.

Law Reform Commission of Saskatchewan

The Class Actions Act:

An Overview

- Saskatchewan, like nearly all jurisdictions in Canada, has enacted legislation specific to class actions.
  - The *CAA* was enacted in 2001.
  - It was amended in 2007 to add provisions dealing with multi-jurisdictional class actions,
  - It was amended again in 2015 to provide courts with an increased discretion to award costs.
- Since its enactment in 2001, the *CAA* has governed class actions in a variety of disputes including but not limited to those based in:
  - agricultural law;
  - environmental law;
  - breach of trust and fiduciary duty;
  - construction law;
  - breach of contract;
  - negligent misrepresentation;
  - pharmaceutical/medical law;
  - consumer protection;
  - securities law;
  - and negligence and personal injury.

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Why is the Law Reform Commission Considering Reform of *The Class Actions Act*?

- The LCO released its Final Report, Class Actions: Objectives, Experiences and Reforms ("LCO Final Report") in July 2019.
- The LCO Final Report considers three questions:
  1. Are class actions in Ontario fulfilling their three objectives: access to justice, judicial economy, and behaviour modification?
  2. Does the *Class Proceedings Act* reflect current class action issues and practice?
  3. Does the *Class Proceedings Act* reflect current priorities in Ontario's justice system?
- The LCO's report had a number of recommendations to amend Ontario's *Class Proceedings Act.*

Law Reform Commission of Saskatchewan

The Class Actions Act, 2022

Why is the Law Reform Commission Considering Reform of *The Class Actions Act*?

- The LCO's report lead to a number of amendments by the Government of Ontario, including:
  - Incorporation of a more stringent standard – modelled on American certification requirements – for satisfying the "preferable procedure" step of the certification test
  - Provisions for coordinating multi-jurisdictional class actions
  - Creation of a procedure for mandatory dismissal of dormant proceedings
  - Procedural changes to increase opportunities for early resolution
  - Removing the requirement for a defendant to seek leave to appeal an order certifying, refusing to certify, or decertifying a proceeding as a class action
  - Introducing a sixty day limit for filing a carriage motion after the first action has been commenced
  - Provisions regarding court approval of third-party funding arrangements
  - Provisions regarding the awarding of costs of certification notice to the representative plaintiff
  - Provisions setting out what must be disclosed when seeking settlement approval from the court

Law Reform Commission of Saskatchewan

The Class Actions Act, 2022

Why is the Law Reform Commission Considering Reform of *The Class Actions Act*?

- There are a number of areas where Saskatchewan's *CAA* can be improved. There are 8 areas of potential reform discussed in the Law Reform Commission's Report:

1. Managing class actions
2. Carriage
3. Certification
4. Settlement approvals
5. Settlement distributions
6. Fee approval
7. Third-party litigation funding
8. Appeals

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Managing Class Actions:

Why is this an issue?

- The *CAA* needs to be able to efficiently manage class action lawsuits, thanks to their size and impact. Oftentimes they are long litigations that affect multitudes of people.
- There are two subcategories that have been identified in Managing Class Actions:
  - Delay
    - Delay concerns the deadline to bring the motion for leave to bring a certification motion.
  - Case Management
    - Case management also concerns the timing of the first case management process, the authority of the court in the proceeding, and the practice direction of the case.
- Ultimately the *CAA* should have the goal of making the process both expedient without making it unfair to either party.

Law Reform Commission of Saskatchewan

Managing Class Actions:

LCO recommendations on Delay

- The LCO made two recommendations pertaining to delay of class actions in its Final Report:

1. Amend section 2(3) "to replace the ninety-day rule with a deadline of one year within which the certification motion is to be scheduled and the plaintiff's motion material to be filed."
2. Add an "automatic dismissal provision: If a plaintiff does not file their certification material in accordance with the revised s. 2(3) or a case management order, the action should be subject to administrative dismissal."

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The Class Actions Act, 2022

Managing Class Actions:

Saskatchewan's Current Provisions on Delay

- Subsection 4(3) of the CAA is similar to former subsection 2(3) of the CPA and contains the ninety-day rule that requires the application to certify the class action and appoint a representative plaintiff to be made:
  - (a) within 90 days after the later of:
    - (i) the date on which the statement of defence was delivered; and
    - (ii) the date on which the time prescribed by The Queen's Bench Rules for delivery of the statement of defence expires without it being delivered; or
  - (b) with leave of the court at any other time.
- The *CAA* does not provide for mandatory dismissal for delay. However, pursuant to section 44 of the *CAA*, The Queen's Bench Rules apply to class actions.

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Managing Class Actions:

Delay

- CONSULTATION QUESTIONS:

- 1. Is pre-certification delay a problem for class actions in Saskatchewan? Should the ninety-day rule be replaced with a one-year deadline within which the certification motion is to be scheduled and the plaintiff's motion material to be filed?

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Managing Class Actions:

Delay

- CONSULTATION QUESTIONS:

- 2. Do dormant class action files pose a problem in Saskatchewan? Should the *CAA* be amended to include a mandatory dismissal provision? Are there any other legislative measures that could be adopted to manage dormant class actions?

Law Reform Commission of Saskatchewan

Managing Class Actions:

LCO recommendations on Case Management

- The LCO made three recommendations pertaining to delay and case management of class actions in its Final Report:
  1. Add a provision requiring a "first case management conference to be held within sixty days of the last defendant serving a notice of appearance."
  2. Amend section 12 of the CPA to "give courts greater authority to control class action proceedings" and "remove the requirement that the motion be brought by a party" to the action.
  3. Develop a "Practice Direction" dedicated to the case management of class actions in consultation with stakeholders and "supported by ongoing training and education for the judiciary and class action counsel."

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The Class Actions Act, 2022

Managing Class Actions:

Saskatchewan's Current Provisions on Delay

- As mentioned above, pursuant to section 44 of the CAA, The Queen's Bench Rules apply to class actions to the extent the rules are not in conflict with the CAA. Division 2 of The Queen's Bench Rules address court assistance in managing litigation. Rule 4-5(3) allows a request for a case management order to be made once a designated judge for case management has been appointed pursuant to Rule 3-90.58 Case management judges have authority to do any of the following pursuant to Rule 4-7(1):
  - (a) order that steps be taken by the parties to identify, simplify or clarify the real issues in dispute;
  - (b) set or adjust dates by which a stage or a step in the action is expected to be complete and order the parties to comply with the dates;
  - (c) make an order to facilitate an application, proceeding, questioning or pre-trial proceeding;
  - (d) make an order to promote the fair and efficient resolution of the action by trial;
  - (e) facilitate efforts the parties may be willing to take towards the efficient resolution of the action or any issue in the action through negotiation or a dispute resolution process other than trial; and
  - (f) make any procedural order that the judge considers necessary.
- Section 14 of the CAA is similar to amended section 12 of the CPA and provides as follows:
  - The court may, at any time, make any order it considers appropriate respecting the conduct of a class action to ensure a fair and expeditious determination and, for that purpose, may impose on one or more of the parties any terms it considers appropriate.
- Section 14 of the CAA – like amended section 12 of the CPA – allows the court on its own initiative to make any order it considers appropriate.

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Managing Class Actions:

Case Management

Consultation Questions:

3. Are the case management provisions in *The Queen's Bench Rules* sufficient or should Saskatchewan consider amending the *CAA* to include specific provisions regarding case management of class actions? If so, what should those rules be?

Law Reform Commission of Saskatchewan

Managing Class Actions:

Case Management

Consultation Questions:

4. Would Practice Directives respecting class actions additional to those that now exist for managing class actions in Saskatchewan have value? Why or why not? What matters should be addressed in a Practice Directive instead of in the *CAA*?

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Carriage:

Why is this an issue?

- It is not uncommon for multiple law firms to commence competing class action proceedings, particularly where a class action has a national scope.
  - When this happens, the competing firms can negotiate an agreement amongst themselves or seek an order granting carriage to one firm.
- Carriage motions compares the actions as well as the firms.
- This process can lead to abuse of the process. As described by the ONCA:
  - "the potential abuse and harm to the integrity of class action proceedings as a whole that could arise from some class counsel taking advantage of the multi-jurisdictional class action landscape in Canada by commencing competing and superfluous class action proceedings for the primary tactical purpose of obtaining an advantageous fee sharing agreement without making any real or legitimate contribution to the benefits received by the class."

Law Reform Commission of Saskatchewan

The Class Actions Act, 2022

Carriage:

LCO recommendations

- The LCO's consultations revealed that all class action stakeholders viewed Ontario's system for determining carriage as both "inefficient and unpredictable." Carriage disputes were said to "cause delay, increase costs, and increase uncertainty."
  - The delay caused by carriage battles is not insignificant; the LCO was advised that carriage motions add approximately one year to the length of a class action, with an additional delay of approximately six months if the carriage order is appealed.
- The LCO considered two options to manage competing class actions more efficiently:
  1) Quebec's "first to file" approach and
  2) an option inspired by the Australian Law Reform Commission's (ALRC) proposed model involving a mandatory deadline to file a motion for carriage and a resulting claims bar.

Law Reform Commission of Saskatchewan

Carriage:

LCO recommendations

- The LCO made six recommendations pertaining to better manage and focus carriage hearings:

1. The LCO recommends the Act be amended to add specific provisions addressing carriage of class actions.
2. The LCO recommends that the Act be amended to specify that an order determining which firm has carriage for the case will include a claims bar.
3. The LCO recommends the Act be amended to specify that carriage orders are final and cannot be appealed.
4. The LCO recommends the Act be amended to specify that costs of carriage motions are not to be recouped by class counsel from the class.
5. The LCO recommends that carriage motions not be heard by the case management judge overseeing a class action.
6. The LCO recommends the development of uniform or consistent guidance/training for courts considering carriage motions.

Law Reform Commission of Saskatchewan

The Class Actions Act, 2022

Carriage:

Saskatchewan's Current Provisions

- Similar to the previous version of the CPA, Saskatchewan's CAA does not contain any provisions specific to carriage motions.
  - Saskatchewan courts have jurisdiction under section 29 of The Queen's Bench Act, 1998 to hear carriage motions and jurisdiction under section 37 of The Queen's Bench Act, 1998 to direct a stay of proceedings where appropriate.
- Saskatchewan courts have applied the test for carriage as set out by the Ontario Superior Court in *Vitapharm Canada Inc v F. Hoffmann-La Roche Ltd*:
  - "[T]he main criterion for the determination of the issue must be keeping in mind the policy objectives of the CPA, what resolution is in the best interests of all putative class members while at the same time fair to the defendants?"
- By relying on the doctrine of abuse of process, Saskatchewan courts – like other courts across Canada - have stayed competing actions filed in multiple jurisdictions for the purpose of tolling limitation periods without any intention to proceed by relying on the doctrine of abuse of process.

Law Reform Commission of Saskatchewan

Carriage

Consultation Question:

5. Should the *CAA* be amended to include carriage motion specific provisions similar to those recommended by the LCO?

Law Reform Commission of Saskatchewan

Certification:

Why is this an issue?

- Certification is a critical step in a class action. If the plaintiffs fail to obtain certification, the class action cannot proceed. Certification is not intended to be a test of the merits of the class action; instead, it is focused on determining whether a class action is a workable form for the action.
- *Hodgkinson v Simms*, [1994] 3 SCR 377:
  - "…equity is not so rigid as to be susceptible to being used as a vehicle for punishing defendants with harsh damage awards out of all proportion to their actual behaviour. On the contrary, where the common law has developed a measured and just principle in response to a particular kind of wrong, equity is flexible enough to borrow from the common law."
- In 2013, the MLRC decided to not recommend apportionment legislation rendering contributory negligence applicable to breaches of fiduciary duty, stating:
  - In the Commission's opinion, it is consistent with principles of fairness to take the fault of the plaintiff into consideration as a relevant factor in appropriate cases of breach of fiduciary duty. However, the courts' equitable jurisdiction currently provides the flexibility to achieve justice and fairness in all of the circumstances, and the Commission does not recommend statutory intervention. Equitable doctrines are being applied satisfactorily by the courts, and should be allowed to continue to develop.

Law Reform Commission of Saskatchewan

Certification:

LCO recommendations

- The LCO considered three potential reforms to the *CPA* in relation to the certification process:

1. Whether a preliminary merits test should be introduced into the certification process;
2. Whether the evidentiary standard for certification should be modified;
3. Whether the certification test in the *CPA* should be improved.
4. Whether courts should be less relucent hear motions to strike in advance of certification.

Law Reform Commission of Saskatchewan

The Class Actions Act, 2022

Certification:

LCO recommendations

- The LCO ultimately concluded that there was no need to recommend major reform to the test for certification in the CPA. The LCO thus made three recommendations in relation to certification in its Final Report, none of which were directed specifically at reform of the CPA:
  1. That "courts interpret the existing elements of s. 5(1)(d) ('preferable procedure') of the certification test more rigorously" and give weight to alternative options (particularly where regulatory or remedial schemes exist, a reimbursement procedure is completed, and class members have largely been compensated).
  2. That "courts support/endorse pre-certification summary judgment motions or motions to strike if such a motion will dispose of the action, or narrow issues to be determined or evidence to be filed at certification."
  3. That a "Practice Direction" on class actions include detailed provisions and best practices for certification motions to address expense and delay.

Law Reform Commission of Saskatchewan

Certification:

Saskatchewan's Current Provisions

- Section 6(1) of Saskatchewan's CAA requires the court to certify an action as a class action if the court is satisfied that:
  - a) the pleadings disclose a cause of action;
  - b) there is an identifiable class;
  - c) the claims of the class members raise common issues, whether or not the common issues predominate over other issues affecting individual members;
  - d) a class action would be the preferable procedure for the resolution of common issues; and
  - e) there is a person willing to be appointed as a representative plaintiff.

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Certification:

Saskatchewan's Preliminary Merits Test

- Saskatchewan's CAA – like Ontario's CPA – does not include a preliminary merits test as part of the certification requirements.
- As of February 2018, Saskatchewan's certification rate was 44%.
  - (a) failing to disclose a cause of action (8);
  - (b) failing to define an identifiable class (9);
  - (c) failing to identify common issues (11);
  - (d) failing to establish that a class action is the preferable procedure (12); and
  - (e) failing to identify a suitable representative plaintiff (7).
- Saskatchewan Court of Appeal has stated that the issues in a certification application are "essentially procedural" and that a "consideration of the merits of the claim is neither necessary nor warranted."
- The Court of Appeal has also stated that the requirement in section 6(1)(a) for the pleadings to disclose a cause of action is an "effective screening mechanism for class action claims."

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Certification:

Preliminary Merits Test

Consultation Question:

6. Are class actions certified too readily in Saskatchewan? If so, is this due to the lack of a preliminary merits test in the *CAA*?

Certification:

Saskatchewan's Evidentiary Standard

- The Supreme Court of Canada reaffirmed its holding in *Hollick* that the standard of proof for establishing each of the certification requirements should be "some basis in fact" in *Pro-Sys Consultants Ltd v Microsoft Corporation*
- The Saskatchewan Court of Appeal has held that while certification hearings do "not allow for an extensive assessment of the complexities and challenges a plaintiff may face in establishing its case," there must be "more than symbolic scrutiny of the evidence."
- Saskatchewan courts apply the "plain and obvious" test to the first criterion – that the pleadings disclose a cause of action – of the certification test.

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Certification

Evidentiary Standard

Consultation Question:

7. Is reform of the *CAA* necessary to alter the evidentiary standard applied to the certification requirements?

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Certification:

Saskatchewan's Preferable Procedure Requirement

- Saskatchewan courts appear to interpret the preferable procedure requirement in section 6(1)(d) of the CAA fairly rigorously; several class actions have failed to achieve certification based on this requirement.
- As discussed above, the LCO was of the view that no legislative reform to the preferable procedure certification requirement was required and instead the LCO encouraged courts to consider the availability of alternative remedies when determining whether a class action is the preferable procedure.

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Certification

Preferable Procedure Requirement

Consultation Question:

8. Is the preferable procedure criterion in the certification test in the *CAA* in need of legislative reform?

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Certification:

Saskatchewan's Pre-certification Motions

- The CAA does not contain provisions specifying whether and how preliminary applications are to be heard.
- However, Saskatchewan courts have discretion to decide whether preliminary applications will be heard prior to, or concurrently with, the certification hearing.
  - Saskatchewan courts, like courts in other provinces, have determined that the certification application should generally be the first application to be heard.
  - In addition, the court will usually defer any preliminary applications to strike or stay class actions to the judge who has been designated to hear the certification application.

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Certification:

Saskatchewan's Preferable Procedure Requirement

- Saskatchewan's summary judgment rules contained in Part 7 of Saskatchewan's Queen's Bench Rules also allow judges to engage in enhanced fact finding, weigh evidence, and order oral evidence.
- As set out above, Saskatchewan courts – like other courts across Canada – have developed an extensive test for determining when an exception should be made to the "certification first, with exceptions" rule.
  - These exceptions are set out in *Piett*.
- Ontario implemented section 4.1 of their *CPA*.

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Certification

Preferable Procedure Requirement

Consultation Question:

- 9. Should the *CAA* be amended to reverse the "certification first, with exceptions" rule currently applied by Saskatchewan courts by adding a provision similar to s. 4.1 of the *CPA*?

Certification

Preferable Procedure Requirement

Consultation Question:

- 10. Do you have any other suggestions for how the certification process could be improved in Saskatchewan?

Law Reform Commission of Saskatchewan

Settlement Approvals:

Why is this an issue?

- The majority of class actions that are certified will ultimately be resolved via a settlement without a trial on the merits of the action.
  - Class action legislation across Canada provides that class actions may only be settled, discontinued, or abandoned with the approval of the court and on the terms the court considers appropriate.
- A lack of a proper settlement approval process can lead to two principle concerns:
  - First is the concern that the entrepreneurial elements of class proceedings not be abused;
  - Second is the concern that class members, who are not usually involved in the prosecution of the class action, receive substantive justice for the wrong done to them.

Law Reform Commission of Saskatchewan

The Class Actions Act, 2022

Settlement Approvals:

LCO Recommendations

- Section 29(2) of Ontario's CPA was similar to the settlement approval provisions found in class actions legislation across Canada
  - It required court approval of a settlement of a class proceeding but did not set out criteria that the court must consider when deciding to approve a settlement.
- The LCO report found that the settlement process required improvement and that such reforms would :
  - "create higher expectations and responsibilities for counsel proposing settlements, promote evidence-based best practices, improve settlement outcomes for class members, and establish the empirical record necessary to evaluate class actions more thoughtfully."

Law Reform Commission of Saskatchewan

The Class Actions Act, 2022

Settlement Approvals:

LCO Recommendations

1. Section 29(2) "be amended to specify that when considering whether to approve a settlement, the court is required to consider whether the proposed settlement is 'fair, reasonable, and in the best interests of the class.'"
2. Section 29 "be amended to provide class counsel seeking approval of settlement be required to provide independent affidavit evidence that includes, but is not limited to, evidence respecting the settlement approval criteria, the risks of litigation, the range of possible recoveries, and the method of valuation of the settlement."
3. Section 29 "be amended to provide that class counsel seeking approval of a settlement have a duty to make full and frank disclosure of all material facts and that failure to do so may be sufficient ground for not approving or setting aside a settlement approval order."
4. Section 29 "be amended to give the court the discretion to appoint an *amicus curiae* to assist the court in considering whether to approve a proposed settlement. The court should have the discretion to determine payment for the *amicus* as the court may deem just."
5. Section 19 of the Act "be amended to specifically require notice of an action to the Office of Public Guardian and Trustee, the Office of the Children's Lawyer or any other statutory agency where there is a reasonable possibility that some class members are represented by such an agency. In these circumstances, the OGPT, OCL or others should be given notice of the proceedings as early as possible."

Law Reform Commission of Saskatchewan

Settlement Approvals:

LCO Recommendations

- The *Dabbs* criteria sets out how courts should asses whether settlements are "fair, reasonable and in the best interests of the class." The criteria is:
  - The amount and nature of discovery evidence;
  - Settlement terms and conditions;
  - Recommendation and experience of counsel;
  - Future expense and likely duration of litigation;
  - Recommendation of neutral parties;
  - Number of objectors and nature of objections; and
  - The presence of good faith, arms' length bargaining and the absence of collusion.
- The LCO was of the view that there was no need to codify the "Dabbs" criteria.

Law Reform Commission of Saskatchewan

Settlement Approvals:

Saskatchewan's Current Provisions

- 38 of the *CAA* requires court approval of settlements in class actions, and provides as follows:
- (1) A class action may be settled, discontinued or abandoned only:
  - (a) with the approval of the court; and
  - (b) on the terms the court considers appropriate.
- (2) A settlement may be concluded in relation to the common issues affecting a subclass only:
  - (a) with the approval of the court; and
  - (b) on the terms the court considers appropriate.
- (3) A settlement pursuant to this section is not binding unless approved by the court.
- (4) A settlement of a class action or of common issues affecting a subclass that is approved by the court binds every member of the class or subclass who has not opted out of the class action, but only to the extent provided by the court.
- (5) In dismissing a class action or in approving a settlement, discontinuance or abandonment, the court shall consider whether notice should be given pursuant to section 22 and whether the notice should include:
  - (a) an account of the conduct of the action;
  - (b) a statement of the result of the action; and
  - (c) a description of any plan for distributing any settlement funds.

Law Reform Commission of Saskatchewan

The Class Actions Act, 2022

Settlement Approvals:

Saskatchewan's Current Provisions

- Saskatchewan is a "class action" is defined as "an action certified as a class action."
  - Section 38 of the *CAA* applies only to class actions that have been certified; class actions settled prior to certification do not require judicial approval of the settlement.
- Section 38 of Saskatchewan's CAA does not specify any criteria that the court should consider in determining whether to approve a proposed class action settlement.
  - Saskatchewan courts must be satisfied that the settlement is fair, reasonable, and in the best interests of the class.
- The *CAA* does not contain a provision specifically describing the court's ability to appoint an *amicus curiae* to assist in the consideration of a proposed settlement or in any other context.

Law Reform Commission of Saskatchewan

Settlement Approvals

Consultation Question:

- 11. Should Saskatchewan's legislation be amended to require court approval of settlements pre-certification? Why or why not?

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Settlement Approvals

Consultation Question:

- 12. Should Saskatchewan's legislation be amended to require the court to consider whether the proposed settlement is "fair, reasonable and in the best interests of the class"? Why or why not?

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Settlement Approvals

Consultation Question:

14. Are other any other criteria that the court should be required to consider in deciding whether to approve a proposed settlement?

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Settlement Approvals

Consultation Question:

15. What, if any, evidentiary requirements should be added to the *CAA* respecting settlements?

Law Reform Commission of Saskatchewan

Settlement Distributions:

Why is this an issue?

- As observed by the LCO in its Final Report, "lack of compensation to class members is one of the most common and trenchant criticisms of class actions."
- Without distribution of sufficient compensation or implementation of other substantive outcomes, it is difficult to claim that class actions further access to justice for class members, and thus, it is important that settlements are distributed as effectively as possible amongst class members.

Law Reform Commission of Saskatchewan

Settlement Distributions:

LCO Recommendations

- The LCO was of the view that settlement distribution cannot be a summary afterthought and instead must be a "comprehensive feature of class action litigation and class settlements."
- Without distribution of sufficient compensation or implementation of other substantive outcomes, it is difficult to claim that class actions further access to justice for class members, and thus, it is important that settlements are distributed as effectively as possible amongst class members.
- The LCO split its recommendations into 4 distinct sections:
  1. *Court Approval and Direction of Distribution Plans*
  2. *Notice Requirements*
  3. *Cy près Distributions*
  4. *Regulating and Monitoring Claims Administrators*

Law Reform Commission of Saskatchewan

Settlement Distributions:

LCO Recommendations: Court Approval and Direction of Distribution Plans

- Section 26 of the CPA authorizes the court to direct any means of distribution where there has been an aggregate assessment or an individual issues trial.
- The section does not set out criteria to be used when evaluating a proposed settlement, instead providing that the court should direct any means of "appropriate" distribution.
  - The *CPA* also does not include explicit requirements pertaining to the frequency or mandatory nature of reporting
- The LCO recommended that a Practice Direction be created for settlement distribution for class actions.
  - The LCO further recommended that courts be given the discretion to delay or deny a proposed settlement if it does not comply with the Practice Direction,
  - the Practice Direction specify that parties have an obligation to promote efficient and effective distributions,
  - and that monitoring and reporting on distributions be an ongoing obligation of the court and parties.

Law Reform Commission of Saskatchewan

The Class Actions Act, 2022

Settlement Distributions:

Saskatchewan's Current Provisions: Court Approval and Direction of Distribution Plans

- Section 36(1) of the *CAA* allows the court to direct any means of distribution of amounts awarded that it considers appropriate.
- The LCO's assessment of section 26 of Ontario's *CPA* is equally applicable to section 36 of Saskatchewan's *CAA*.
- Saskatchewan's CAA does not provide statutory standards for approving a settlement distribution or allocation plan.
  - However, Canadian courts have developed a substantial body of case law guiding this process, and have held that a proposed distribution plan will be appropriate "if in all the circumstances, the plan of distribution is fair, reasonable, and in the best interest of the class."
  - The distribution plan need not be perfect, but "must fall within a range of reasonableness" to be approved by the court.
  - Courts also allow class counsel to act as administrator if "satisfied that class members will receive the promised benefits in a timely and efficient manner." Class counsel acting as administrator are subject to the court's supervision.

Law Reform Commission of Saskatchewan

Settlement Distributions

- CONSULTATION QUESTIONS:
- 18(a). Should the *CAA* be amended to include criteria the court must consider when deciding whether to approve a distribution plan?
- 18(b). What should those criteria be?
- 18(c). Would such criteria be better placed in a Practice Directive than in the *CAA*?

Law Reform Commission of Saskatchewan

Settlement Distributions:

LCO Recommendations: Notice Requirements

- The LCO discovered during its research and consultation on its class actions project that extent, quality, and effectiveness of notices in class actions varies tremendously, and that unclear and inaccessible notices can lead to low take up rates.
- The LCO made the following recommendations for reform of the CPA regarding notice requirements:
  - Section 17 of the CPA be amended "to include a plain language requirement and a requirement that the court be required to order the 'best notice practicable.'"
  - Section 17(4) of the CPA be amended to "provide for publication using digital technology, including but not limited to websites."

Law Reform Commission of Saskatchewan

The Class Actions Act, 2022

Settlement Distributions:

Saskatchewan's Current Provisions: Notice Requirements

- When a court is approving a settlement, subsection 38(5) of the *CAA* requires the court to consider whether notice should be given pursuant to section 22 of the *CAA* and whether the notice should include:
  - (a) an account of the conduct of the action;
  - (b) a statement of the result of the action; and
  - (c) a description of any plan for distributing any settlement funds.
- Section 22 of the CAA contains several requirements for the content of a notice. Section 22 of the CAA is similar to section 17(5) of Ontario's CPA.
- In Saskatchewan there is no current provision requiring that notice of settlement be provided using digital technology, including websites.
- However, *Queen's Bench Rules* Rule 3-96(4) specifies that the court may order "any appropriate means of giving notice" pursuant to clause 21(4)(e) of the *CAA* including "creating and maintaining an Internet site."
- There is also no requirement in the *CAA* for plain language in the notice or a requirement that the notice be the "best notice practicable."

Law Reform Commission of Saskatchewan

Settlement Distributions

Consultation Question:

- 19(a). Should the *CAA* be amended to require that notice be the best notice practicable? Why or Why not?
- 19(b). Should the *CAA* be amended to require notice to be provided using plain language? Why or Why not?
- 19(c). Do you have any recommendations for how the notice procedures for class actions could be improved?

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Settlement Distributions:

LCO Recommendations: Cy près Distributions

- Where it is impractical to disburse settlement funds to class members, the court may order a cy près distribution of the funds to public interest organizations or charities.
- There is no specific provision for cy près in the Ontario, but courts in Ontario have interpreted sections 24 and 26 of the *CPA* as giving the court jurisdiction to order such distributions.
- The LCO recommended that sections of the CPA be added confirming the authority of the court to order cy près distributions.

Law Reform Commission of Saskatchewan

Settlement Distributions:

Saskatchewan's Current Provisions: cy près

- Saskatchewan's *CAA* provides for *cy près* distribution in section 37.
- 37(1) The court may order that all or any part of an award pursuant to this Part that has not been distributed within the time set by the court be applied in any manner that may reasonably be expected to benefit class or subclass members, even though the order does not provide for monetary relief to individual class or subclass members.
- (2) The court shall consider, when determining whether to make an order pursuant to subsection (1):
  - (a) whether the distribution would result in unreasonable benefits to persons who are not class or subclass members; and
  - (b) any other matter the court considers relevant.
  - (3) The court may make an order pursuant to subsection (1) whether or not all the class or subclass members can be identified or all their shares can be exactly determined.
  - (4) The court may make an order pursuant to subsection (1) even if the order would benefit:
  - (a) persons who are not class or subclass members; or
  - (b) persons who might otherwise receive monetary relief as a result of the class action.
  - (5) If any part of an award that, pursuant to subsection 35(1), is to be divided among individual class or subclass members remains unclaimed or otherwise undistributed after a time set by the court, the court may order that part of the award to be:
  - (a) applied against the cost of the class action;
  - (b) paid to the Crown in right of Saskatchewan; or
  - (c) returned to the party against whom the award was made.

Law Reform Commission of Saskatchewan

Settlement Distributions

Consultation Question:

20. Do you have any recommendations for how the *cy près* legislative framework for settlement distributions in Saskatchewan could be improved?

Law Reform Commission of Saskatchewan

Settlement Distributions:

LCO Recommendations: Regulating and Monitoring Claims Administrators

- Claims administrators are appointed by the court to manage settlement distribution, which can entail distributing notice to class members, reviewing and approving or denying claims, and providing distributions.
- The LCO made the following recommendations regarding regulating and monitoring claims administrators:
  - [P]rovisions be added to the [*CPA*] confirming the authority of the court to appoint a claims administrator upon the recommendation of the parties. The [*CPA*] should further specify that claims administrators have a duty of competence and diligence.
  - [T]he [*CPA*] be amended to require that parties file an outcome report with the court and all parties no later than 60 days after the end of the distribution period.

Law Reform Commission of Saskatchewan

The Class Actions Act, 2022

Settlement Distributions:

Saskatchewan's Current Provisions: Regulating and Monitoring Claims Administrators

- Much like Ontario's former *CPA,* Saskatchewan's *CAA* does not contain provisions requiring oversight of claims administrators, or requiring reporting and monitoring of the distribution process.
- The questions that our jurisdiction faces is whether these should be added.

Law Reform Commission of Saskatchewan

The Class Actions Act, 2022

Settlement Distributions

Consultation Question:

21(a). Should Saskatchewan consider implementing mandatory outcome reporting similar to the newly added s. 27.1(16) of Ontario's *CPA*? What are some challenges and/or benefits you anticipate resulting from this type of outcome reporting?

Law Reform Commission of Saskatchewan

Settlement Distributions

Consultation Question:

21(b). Should the *CAA* be amended to provide that claims administrators have a duty of competence and diligence?

Law Reform Commission of Saskatchewan

Fee Approval:

Why is this an issue?

- A frequent criticism of class actions is that plaintiff counsel often appear to earn millions in counsel fees while individual class members receive comparatively little.
  - Over-compensation of lawyers has obvious access to justice implications in that it can result in under-compensation of class members.
- These fees can be a significant burden to access to justice on the other side as if the fees were too low then lawyers might not take on these cases.
  - The economic model of class action financing also requires plaintiff firms to advance significant sums over the course of many years before their fees are collected in a settlement, following a trial or at the end of an appeal.

Law Reform Commission of Saskatchewan

Fee Approval:

LCO Recommendations

- The LCO began its discussion of fee agreement approval by observing that amounts paid to class counsel need to balance:
  - The need to promote access to justice;
  - The interests of the class…;
  - The interest of plaintiff firms…; and
  - The interests of the administration of justice [(and the need to avoid facilitating windfall recoveries)].
- The LCO also noted that fee awards should be consistent, predictable, and fair.
- The LCO considered a statutory rule, but ultimately rejected it.
- Instead they recommended that courts be given the explicit authority to adjust counsel fees to ensure the fee "bears an appropriate relationship to the amount recovered."

Law Reform Commission of Saskatchewan

Fee Approval:

LCO Recommendations

- The LCO recommended that the *CPA* be amended as follows to create a more robust statutory regime surrounding court approval of fee agreements:

1. The *CPA* should explicitly state that the overriding principle in determining fees payable to counsel by a representative party must be "fair and reasonable and must be approved by the court, regardless of the method of calculation or the source of the payment."
2. The *CPA* be amended to include a provision specifying "that the court may consider the appropriateness of a proposed fee by using different methods of calculation" to compare.
3. The *CPA* be amended to "specify that the court consider the results achieved for the class and the degree of responsibility assumed by class counsel ("risk") when considering whether a proposed fee is fair and reasonable."
4. The *CPA* be amended to specify that "the evaluation of 'risk'… should include consideration of the risk of denial of certification, the risk of losing at trial, and the existence (or not) of reports, investigations, initiatives, litigation, or external litigation funding that may be relevant to the degree of risk assumed by counsel."
5. The *CPA* be amended "to give the court the discretion to appoint an *amicus curiae* to assist the court in considering fee approvals. The court should have the discretion to determine payment for the *amicus* as the court may deem just."
6. The *CPA* be amended "to give the court the discretion to adjust counsel fees as a percentage of the total recovery in order to ensure a reasonable fee bears an appropriate relationship to the results achieved."
7. The *CPA* be amended to "give the court discretion to hold back a percentage of proposed counsel fees pending a final report on the outcome of the proceeding in appropriate cases," in order to incentive effective settlement distribution.

Law Reform Commission of Saskatchewan

Fee Approval:

Saskatchewan's Current Provisions

- Section 41(2) of *The Class Actions Act* requires counsel to apply to the court for approval of the fee agreement between counsel and the representative plaintiff in order for the agreement to be enforceable. If the court does not approve the fee agreement, subsection 41(5) allows the court to:
  a) determine the amount owing to the lawyer respecting the fees and disbursements;
  b) direct an inquiry, assessment or accounting pursuant to *The Queen's Bench Rules* to determine the amount owing; or
  c) direct that the amount owing be determined in any other manner.
- Rule 3-97(3) of The Queen's Bench Rules gives the court the authority to amend the terms of the fee agreement if it determines the agreement ought not to be followed.
- Rule 3-97(1) and (2) of *The Queen's Bench Rules* provide two additional procedural requirements surrounding fee approval.

Law Reform Commission of Saskatchewan

Fee Approval:

Saskatchewan's Current Provisions

- The *Class Actions Act* does not explicitly require that fees be fair and reasonable in order to be approved by the court, but the courts have applied this criteria and weighed the following factors:
  a) time expended by the solicitor;
  b) the legal complexity of the matters;
  c) the degree of responsibility assumed by the solicitor;
  d) the monetary value of the matters at issue;
  e) the importance of the matter to the client;
  f) the degree of skill and competence demonstrated by the solicitor;
  g) the results achieved and the contribution of counsel to the result;
  h) the ability of the client to pay; and
  i) the client's expectations as to the amount of the fees.
- These factors only apply to fee arrangements that have been settled.

Law Reform Commission of Saskatchewan

The Class Actions Act, 2022

Fee Approval

Consultation Question:

- 22(a). Should the *CAA* be amended to require fees to be "fair and reasonable" in order to receive court approval? If so, should the *CAA* specify factors to be considered or methods to be utilized in making this determination?

Law Reform Commission of Saskatchewan

Fee Approval

Consultation Question:

- 22(b). Should the *CAA* be amended to require court approval of fees payable to counsel if a class action is settled prior to certification?

Law Reform Commission of Saskatchewan

Fee Approval

Consultation Question:

- 22(c). Should the *CAA* be amended to provide the court with discretion to hold back a portion of fees pending information on distribution to class members?

Law Reform Commission of Saskatchewan

Third-Party Litigation Funding:

Why is this an issue?

- Third party litigation funding ("TPLF") arrangements typically involve a private lender agreeing to finance or provide an indemnification against adverse costs to the representative plaintiff in exchange for a share of the settlement or judgment.
  - In order for the TPLF to bind class members, the TPLF must be approved by the court.
  - TPLF agreements have generally been approved by the courts and are seen as a way to promote access to justice.

Law Reform Commission of Saskatchewan

The Class Actions Act, 2022

Third-Party Litigation Funding:

LCO Recommendations

- LCO recommended that the requirement of court approval of a TPLF be codified, and be permitted under the following conditions:
  - The representative plaintiff must bring a motion seeking court approval of a funding agreement;
  - The motion must be brought forthwith on notice to the defendant;
  - The court retain jurisdiction in an oversight capacity even after the agreement is approved. Any changes to the agreement or disputes arising from it must be brought to the attention of the case management judge;
  - The court is entitled to see the full, unredacted agreement. The extent of disclosure of the agreement to the defendant is in the discretion of the judge;
  - If an agreement is approved, defendants should be able to recover costs awards directly from the funder;
  - The deemed undertaking rule in the Rules of Civil Procedure should be amended to explicitly account for non-parties' duties;
  - The existence of funding and the amounts owing to the funder if there is a recovery to the class should be disclosed in the notice of certification.

Law Reform Commission of Saskatchewan

The Class Actions Act, 2022

Third-Party Litigation Funding:

Saskatchewan's Current Provisions

- Saskatchewan's *CAA* does not contain any specific provisions regarding third party funding. However, Saskatchewan courts have held they have jurisdiction to approve TPLF agreements, and have applied the following factors:
  - a) [Whether the agreement] is necessary to provide access to justice for the class members;
  - b) the division of any settlement or judgment as between the class members and the funder is appropriate;
  - c) the representative plaintiff will instruct counsel and counsel's duties are to the plaintiffs and not the third party funder;
  - d) the plaintiffs will conduct the proceeding in a manner that avoids unnecessary costs and delays;
  - e) the representative plaintiff will not become indifferent to giving instructions to class counsel in the best interests of the class members if he is insulated from an adverse costs award;
  - f) the agreement contains appropriate restrictions with respect to the sharing of information with the third party funder;
  - g) the third party funder is bound by the deemed undertaking and is also bound to keep confidential any confidential or privileged information; and
  - h) [whether the agreement] is governed by the laws of Canada and the province where the action is commenced and is subject to the exclusive jurisdiction of the courts of the province where the action is commenced.

Third-Party Litigation Funding

Consultation Question:

- 23(a). Should the *CAA* be amended to include rules regarding third party funding agreements?

- 23(b). If yes, should Saskatchewan adopt the rules contained in section 33.1 of the *CPA*?

Law Reform Commission of Saskatchewan

Appeals:

LCO Recommendations

- The LCO's Final Report focusses on appeals from certification decisions and ultimately recommends that the CPA be amended to provide both parties with a direct right of appeal to the Ontario Court of Appeal from certification orders.
- Their reasoning included:
  - There is no question certification is important to both plaintiff and defendants.
  - The interests of the parties in certification motions are significant and "may be equally or even more consequential to the parties than an adverse final decision on the merits of a standard civil case."
  - "A direct right of appeal would speed up the appeal process considerably as the time spent on the leave application and decision would be eliminated. Requiring both parties to obtain lave to appeal would impede access to justice, add delay and expense, and be inefficient."

Law Reform Commission of Saskatchewan

Appeals:

Saskatchewan's Current Provisions

- Section 39 of the *CAA* sets out the rights of appeal under the Act and provides as follows:
- 39(1) Any party may, without leave, appeal to the Court of Appeal from:
  - (a) a judgment on common issues; or
  - (b) an order pursuant to sections 31 to 37, other than an order that determines individual claims made by class or subclass members.
- (2) With leave of a justice of the Court of Appeal, a class or subclass member, a representative plaintiff, or a defendant may appeal to that court any order:
  - (a) determining an individual claim made by a class or subclass member; or
  - (b) dismissing an individual claim for monetary relief made by a class or subclass member.
- (3) With leave of a justice of the Court of Appeal, any party may appeal to the Court of Appeal from:
  - (a) an order certifying or refusing to certify an action as a class action; or
  - (b) an order decertifying an action.

Law Reform Commission of Saskatchewan

Appeals:

Saskatchewan's Current Provisions

- Sections 31 – 37 of the *CAA* provide for the following types of orders:
  - Aggregate monetary awards (s. 31)
  - Allowing statistical information to be admissible as evidence (s. 32)
  - Allowing for average or proportional awards (s. 34)
  - Requiring individual claims to be made to give effect to an order that all or part of an aggregate monetary award is to be divided among individual class members on an individual basis (s. 35)
  - Distribution (s. 36)
  - Undistributed awards (s. 37)

Law Reform Commission of Saskatchewan

Appeals:

Saskatchewan's Current Provisions

- In contrast, section 39(3) of the CAA requires leave from a justice of the Court of Appeal to appeal from an order certifying or refusing to certify or an order decertifying a class action.
- The Commission is interested in hearing from practitioners in Saskatchewan as to whether the requirement to obtain leave to appeal these types of orders serves the interests of access to justice and judicial economy in Saskatchewan, and whether amending the CAA to prohibit material amendments to the notice of certification motion, pleadings, or notice of application on an appeal of an order refusing to certify a class action would be beneficial.

Law Reform Commission of Saskatchewan

Appeals

Consultation Question:

- 24(a). Should the requirement to obtain leave to appeal orders determining or dismissing individual claims and orders certifying or refusing to certify or decertifying a class action be removed or amended?

Law Reform Commission of Saskatchewan

Appeals

Consultation Question:

- 24(b). Should the *CAA* be amended to prohibit amendments of materials on appeal?

Law Reform Commission of Saskatchewan

Appeals

Consultation Question:

- 24(c). Should rights of appeal in the *CAA* be limited to certification-related matters?

Law Reform Commission of Saskatchewan

Law Reform Commission of Saskatchewan

Thank you
Any Comments or Questions?

CONSULTATION OPEN
UNTIL FEBRUARY 28, 2022