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Review of Class Actions and Litigation Funding
Te Aka Matua o te Ture I Law Commission
PO Box 2590
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By email: cal@lawcom.govt.nz

Dear Commission members:

Issues Paper 45: Class Actions & Litigation Funding

I am pleased to provide this brief submission in my capacity as a class action scholar, an associate professor of law at the University of Windsor, and Director of the Class Action Clinic. I also served as the co-lead researcher and co-author of the Law Commission of Ontario's Class Actions Final Report, which you referred to in your Issues Paper. I will address only five of the questions posed in your Paper.

Qu. 4: Should Aotearoa New Zealand have a statutory class actions regime?

I was heartened to see that your preliminary view is that a statutory class action regime would benefit New Zealand's people. As I have previously written:

> Class actions have the distinct potential to promote social good by filling regulatory gaps and ensuring that corporate (and government) wrongdoers do not inevitably escape culpability. I share the belief expressed by many access to justice scholars that class actions are singularly able to redress mass wrongs that would otherwise go unremedied, and to provide meaningful justice to the disempowered in contemporary societies.[1]

I continue to believe that modern society, where corporate actors and government action can harm enormous numbers of people, requires a civil justice system that is commensurate with the scope of that harm. The Supreme Court of Canada, for example, has recognized that the tools of civil procedure developed many decades ago are not

[1] Jasminka Kalajdzic, *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, 2018) at 175.

well-suited to the kinds of complicated cases now coming before the courts.[2] Put simply, without class actions, “the doors of justice remain closed to some plaintiffs, however strong their legal claims.”[3]

Some form of a collective litigation device has been adopted by 38 countries and counting.[4] While class actions remain politically controversial, especially in the United States where corporate lobbies are particularly active, in other parts of the world there is broad recognition that class actions have a useful role to play. Over the course of two years and over 100 meetings with stakeholders during the Law Commission of Ontario (LCO) class action project, I heard many criticisms and suggestions for reform by defendant-oriented groups; importantly, none questioned the utility of the class action regime as a whole, or argued for the eradication of the device. In that sense, all stakeholders agreed that class actions play a useful role in our civil justice system.

Qu. 3: What do you see as the advantages of class actions?

The three primary goals of a class action regime proposed in the Issues Paper remain the cornerstones of the Canadian class action system.

I was honoured to see that you embraced the four-part conception of access to justice that I used in my 2018 book. Canadian courts have also moved away from a narrow view of access to justice as merely access to a court process. The Supreme Court of Canada has stated that access to justice involves two interconnected dimensions: a fair procedure and a just result.[5] I urge you also to address the notions of “meaningful participation” and “transparency” as part of your conception of access to justice for class members. I address specifically how to do so in my answers to question 12, below.

While deterrence as a goal remains somewhat controversial, in that it is difficult to measure deterrence empirically,[6] our courts continue to embrace the deterrence function of civil litigation, particularly with respect to class actions. How much importance is placed on the deterrence function of class action litigation is partly a function of each country’s unique legal and political culture. For example, the less robust a country’s regulatory enforcement schemes, the more vital it is to provide effective private enforcement mechanisms. Moreover, private enforcement can relieve some of the

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[2] Hollick v. Toronto (City), 2001 SCC 68 (CanLII) at para 14.

[3] Western Canadian Shopping Centres Inc. v. Dutton, 2001 SCC 46 (CanLII) at para 28.

[4] Deborah Hensler, “From Sea to Shining Sea: How and Why Class Actions Are Spreading Globally” (2017) 65 Kansas L Rev 965 at 966.

[5] AIC Limited v. Fischer, 2013 SCC 69 at para 24.

[6] It is noteworthy that in my meetings with in-house counsel of major corporations during the LCO project, they provided anecdotal evidence of the deterrent effect of class actions: “the mere existence of the class action regime forces defendants to consider the risk of class actions when considering any course of business activity, and itself provides a deterrent effect.” LCO, *Class Actions: Objectives, Experiences and Reforms* (July 2019) at 90.

pressure from resource-strapped regulatory bodies, and can operate in a symbiotic relationship with government authorities.[7]

I agree with your view that access to justice may be the most important of the three objectives. I would respectfully urge the Commission to consider that some harms may be difficult to quantify using traditional common law or statutory remedies. As I have observed in studying Canadian class action case law, these remedies were developed with individual litigants in mind. Because Canadian courts continue to adhere to the principle that class actions are procedural devices and cannot change substantive law, preconditions for entitlement to damages (for example, having to prove individual causation or reliance) may be incompatible with aggregate relief. The distinction between aggregate litigation (that is, a litigation device that merely aggregates numerous individual claims) and collective litigation (the vindication of diffuse interests) is a key normative issue, one to which Canadian scholars and legislators paid insufficient attention in the creation of the procedure. You have the singular opportunity to avoid the limits present in the Canadian system.

Cappelletti and Garth defined diffuse interests as "collective or fragmented interests such as those in clean air or consumer protection" and noted that the "basic problem they present—the reason for their diffuseness—is that either no one has a right to remedy the infringement of a collective interest or the stake of any one individual in remedying the infringement is too small to induce him or her to seek enforcement action".[8] The quintessential example of diffuse rights is an environmental law case. For instance, communities may be harmed by contaminated water in a way that is difficult to quantify (at least by Canadian tort and statutory standards) – yet there is little doubt that the defendant polluted the water and caused harm.

Another example is in the context of anti-competitive behaviour. There may be little doubt that defendants conspired to fix the price of goods, but it is almost impossible to quantify how much any one class member overpaid for those goods. In such cases, courts have either denied certification because the claim is not suitable for class treatment, or, in the context of settlement, agreed that the funds should be paid cy près, in the name of deterrence.[9]

There is a third way, however, one that I urge the Commission to explore. South and Central American states provide some potential for inspiration. Diffuse rights in Latin America are premised on the idea that there might be a group of individuals (or society as a whole) affected by a defendant's conduct; an individual can bring litigation to ensure that the *public* interest is vindicated. Diffuse rights, also known as third generation rights, are not divisible and thus when breached cannot be quantified in the same way as

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[7] Sam Issacharoff, "Class Actions and State Authority" (2012) 44 Loyola University Chicago LJ 369.

[8] Mauro Cappelletti & Bryant Garth, "Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective" (1978) 27 Buff. L. Rev. 181 at 194.

[9] For a discussion of the use of cy près in class actions, see my paper, entitled "The 'Illusion of Compensation': Cy près Distributions in Canadian Class Actions" (2014) 92:2 Can. Bar Rev. 173.

individual private interests.[10] Group litigation, therefore, needs to be more than just aggregative of individual claims.

To achieve full access to justice for diffuse interests, be they environmental or consumer in nature, a class action statute must facilitate litigation of indivisible group harm. The use of statistical evidence, the awarding of aggregate damages (where a court approximates and then apportions damages owed to the whole class), and the distribution of cy près funds when class members cannot be located, are all unique to class actions and are worthy of study. I also urge you to consider other normative approaches appropriate to your legal history and culture; for example, capturing diffuse harms in the class action regime may be informed by Māori tikanga, and the principle of utu – ea, and thus avoid some of the common law strictures that are ill-suited to collective redress.

Qu. 12: Which features of a class actions regime are essential to ensure the interests of class members are protected?

A class action system that is designed from the perspective of class members is one that avoids many of the disadvantages of existing regimes. The LCO project examined class actions through the lens of the three goals and with class members' interests front of mind. Most of our recommendations for improvement were adopted by the Ontario Legislature in the extensive amendments of the *Class Proceedings Act* that took effect on October 1, 2020.[11] Of these amendments, two are critical for promoting a fair and transparent process: effective notices and mandatory outcome reports. Plain language notices disseminated on social media or in ways that are likely to reach the target class are key to ensuring class members are aware of the litigation and their rights within it. Outcome reports, which require settlement administrators and class counsel to report how funds were distributed, class member claim rates, etc. provide accountability and create incentives for counsel to design settlements that maximize class member recovery.

There are two other features of class action design, however, that were not included in the LCO Class Action report, which I recommend be given serious consideration. In the absence of statutory language on the rights of class members to appeal settlement approval orders, our courts have accepted the view promoted by both class counsel and defence counsel that objecting class members do not have standing to appeal.[12] The consequences of this position are that settlement orders are not subject to review of any kind, even where class members have a legitimate concern with the settlement, or if pertinent information was not before the settlement approval judge. Class action statutes

[10] Manuel A. Gómez, "Will the Birds Stay South? The Rise of Class Actions and Other Forms of Group Litigation Across Latin America" (2012) 3 U. Miami Inter-Am. L. Rev. 43.

[11] *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

[12] For a discussion of this line of cases, see the blog by Class Action Clinic student Daniel MacDonald, "Objection, Your Honour! Can class members dispute settlement orders in class actions?" [blog] (March 2, 2021), online: https://classactionclinic.com/2021/03/02/objection-your-honour-can-class-members-dispute-settlement-orders-in-class-actions/.

ought to include explicit rights of appeal from settlement approval orders and other important decisions in the course of a class action.

Second, assuming New Zealand adopts an opt-out model and a certification process, I recommend that the statute specify that class members who do not opt out at certification will have the ability to opt out at the time of a proposed settlement. Again, because Ontario's *Act* is silent on the matter of second opt-out rights, courts have acceded to counsel's views that such a right should be rarely accorded. Counsel do not like second opt-outs because they complicate settlement negotiations. In my view, however, second opt-out rights create the incentive for counsel to design the best possible settlement. Counsel should bear the risk that dissatisfied class members will opt out and sue individually (a very rare occurrence in Canada in any event).

Qu. 24: Should a court be required to conduct a preliminary merits assessment of a class action or an assessment of the costs and benefits?

As you know, the LCO did not recommend the addition of a preliminary merits test at certification. We studied the issue at length.[13] The Ontario Legislature accepted the LCO's views on this topic despite being a conservative, business-friendly government. It did, however, add a predominance and superiority requirement to certification. We do not yet have any judicial interpretation of the new provisions but I submitted to the Legislature that these amendments are inconsistent with access to justice.[14]

Qu. 35: Should the current adverse costs rule be retained for class actions or is reform desirable?

The LCO devoted considerable attention to the question of adverse costs. We concluded that a no-costs regime was necessary to alleviate some of the issues that had developed in response to the risk and impact of high costs orders.[15] Adverse costs necessitate indemnities, which in turn generate the need for litigation funders. Costs orders are also used as a bargaining chip to force the discontinuance of appeals. And costs exposure deters vulnerable groups and public interest clinics from pursuing class action litigation. Unfortunately, the Ontario government did not adopt this recommendation. Absent counsel willing to take on the risk of adverse costs, it is inevitable litigation funders will fill the void. To the extent that New Zealand's government is reticent about the entry of funders in this space, serious consideration should be given to the adoption of a no-costs regime.

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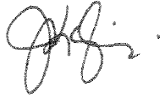
[13] LCO, *Class Actions: Objectives, Experiences and Reforms* (July 2019) at 39-45.

[14] Jasminka Kalajdzic, "Ontario the Outlier: How Changes to the Class Proceedings Act Might Make Certification More Difficult in Ontario Than Anywhere Else" [blog] (July 6, 2020), online: https://classactionclinic.com/2020/07/06/ontario-the-outlier-how-changes-to-the-class-proceedings-act-might-make-certification-more-difficult-in-ontario-than-anywhere-else/.

[15] LCO, *Class Actions: Objectives, Experiences and Reforms* (July 2019) at 78-88.

Thank you for this opportunity to comment on your excellent Paper. If I can be of any assistance in the next stage of your project, please do not hesitate to contact me.

Sincerely,



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