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VIA EMAIL

Nye Thomas
Law Commission of Ontario
Osgoode Hall Law School, York University
2032 Ignat Kaneff Building
4700 Keele Street
Toronto, ON M3J 1P3

Dear Mr. Thomas:

Re: Class Actions Consultation Paper

We write to provide comments on behalf of our firm's class actions group in response to the consultation paper of the Law Commission of Ontario ("LCO") titled *Class Actions: Objectives, Experiences and Reforms* (Toronto: March, 2018) (the "Consultation Paper"). As you may know, Paliare Roland has a specialized group of lawyers with experience both in prosecuting and defending class proceedings. We have acted on contested certification motions, complex interlocutory steps and in common issues trials. We have also been retained to act as counsel to class and defence counsel on particular issues in the context of ongoing cases.

We have reviewed the Consultation Paper with interest. We agree that examination of Ontario's class proceedings regime is timely and that reform in a number of areas is warranted. In the spirit of participating in the reform process, we wish to provide comments on aspects of seven of the consultation issues the LCO has identified.

Consultation Issue #1: Delay

While we agree that delay is a serious problem in class proceedings, we do not support imposing a deadline for the hearing of the certification motion as part of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*CPA*") as a solution. In our experience, cases differ too significantly for a single deadline to be appropriate for all proceedings.

The corollary of imposing a presumptive statutory deadline would be to require the parties to justify a hearing after that date. Some cases do not move more quickly for reasons that the parties should not be forced to disclose to the court or to the public, such as resolution negotiations or regulatory or criminal investigations. The *CPA* should therefore not require the parties to seek an

extension of time from the court. As discussed below, changes to the appellate process would, in our view, substantially increase the efficiency of class proceedings without imposing arbitrary deadlines on the certification process.

Although it is worthwhile to consider methods of reducing delay prior to certification, our experience has been that more of the delay associated with class proceedings occurs during the discovery process following certification. In particular, the unique feature of a class proceeding—that is, the presence of common issues—generates disputes over the scope of documentary and oral discovery because relevance is not solely defined in the pleadings. For the same reason, it can be difficult for the parties to resolve the contents of a discovery plan.

We see one solution to these problems as imposing meaningful cost-consequences for failure to comply with court-ordered timetables governing discovery and discovery-related motions, absent exceptional circumstances. A related solution is to increase the number of case management judges. If each judge is managing fewer actions, they will have greater familiarity with the particulars of each action and can more efficiently resolve disputes over the finer points of the discovery process.

Consultation Issue #3: Costs

Our focus on the third consultation issue is the Class Proceedings Fund. We believe the Fund is an integral part of Ontario's class proceedings regime that has ensured the regime's viability and has achieved access to justice, particularly by funding public-interest litigation that would not otherwise be economically feasible. We support incremental changes to the Fund so that it may continue to fulfil this vital function in the future.

Because of its important role in providing funding to cases with a public interest element that might not otherwise be viable, the Fund faces different economic considerations than those private funders face. Accordingly, we support flexibility for the Fund, but not at the expense of its public interest objectives.

Our view is that the Class Proceedings Fund should be permitted to adjust the percentage recovery it obtains when deciding whether to approve cases. Affording the Fund some flexibility to determine its percentage of recovery in particular cases including, potentially, a percentage payable to the Fund that decreases as the total quantum of recovery to the Class increases past certain thresholds, may make the fund more competitive with private funders while also affording greater fairness to the Class.

However, we do not support reform to enable the Class Proceedings Fund to fund counsel fees. Our view is that the Fund should continue to cover disbursements and provide an adverse costs indemnity in exchange for a percentage of a proceeding's recovery. Funding class counsel's fees would, in

our view, mark a fundamental change in the incentives for litigating class proceedings and would be too complex for the Fund to monitor and assess efficiently. While there may be appropriate cases in which, subject to court approval, private funders are permitted to pay all or a portion of counsel fees, this would, in our view, require court scrutiny on a case-by-case basis to ensure the best interests of the class and the integrity of the process are protected.

Consultation Issue #4: Fee Approval

Like the other parties with whom the LCO has consulted, we do not support the use of multipliers to calculate class counsel's fees. In general, we think a percentage of the recovery from the defendants, considered together with any relevant non-tangible factors, is the best approach to measuring fees for class counsel. Percentage-based fees align the interests of class counsel and class members and incentivize efficient litigation.

Our experience both prosecuting and defending class proceedings means that we understand that there are considerations unique to each side of a case.

In our view, the negative perception that has developed concerning class counsel's fees is fuelled, in part, by defendants challenging class counsel's fees in the absence of a comparator against which such fees may be reasonably assessed in any particular case.

One approach we think deserves consideration is that if the defendants wish to challenge the quantum of class counsel's fees, they should disclose to the court the total fees that have been paid to defence counsel in connection with the proceeding. That disclosure would allow the court to assess more realistically whether class counsel's recovery is reasonable—having due regard to the increased risks of prosecuting a case on a contingency basis and the importance of contingency fees to providing access to justice—and provide a balanced picture of the expense involved in litigating complex matters.

Consultation Issue #5: Certification

In our view, the certification criteria are generally appropriate. In particular, we do not support adoption of a preliminary merits test. It would be unfair to putative representative plaintiffs to require them to establish the substantive merits of a claim without requiring the defendants to adduce evidence and produce documents to allow the putative representative plaintiffs to satisfy the standard of scrutiny applied. Imposing such a requirement would generate additional costs and delay in the certification process.

We think that the enhanced summary judgment powers contemplated in *Hryniak v. Mauldin*, 2014 SCC 7, may be used effectively together with certification motions, or shortly thereafter, to weed out unmeritorious proposed or certified class proceedings. Moreover, as a practical matter, given the substantial risks involved in commencing a class proceeding as a result of the costs rules, we do

not believe that frivolous claims are pressing problem in Ontario. Simply put, we do not see a persuasive case for instituting a preliminary merits test and anticipate that doing so would create new problems or exacerbate existing ones, including, in particular, cost and delay.

Consultation Issue #8: Carriage

Carriage is among the most difficult aspects of Ontario's class proceedings regime. The current carriage process is inefficient and arbitrary and, in our view, is in need of reform. Our view is that the *CPA* should be amended to replace the current 16-factor test that has developed on carriage motions.

We do not favour a first-to-file rule. As has been explained elsewhere,[1] such a rule would create an incentive for claims to be filed before there has been a reasonable opportunity to assess the merits of the case and to ensure that the proposed representative plaintiff is suitable.

The overarching objective in fashioning a test for a carriage motion must be to advance the best interests of the putative class.

In our view, the interests of the class in determining carriage can be addressed through the consideration of two factors: (1) case theory, and (2) class counsel's plan for the management and effective prosecution of the case.

The first factor is relatively straightforward: the carriage motion judge should examine the manner in which a case has been pleaded, especially the cause(s) of action being pursued, the legal basis underpinning the allegations, and any other relevant non-privileged information pertaining to the scope of the claim.

The second factor encompasses the proposed litigation plan, the ability of counsel to litigate the proceeding in accordance with the plan, and the work counsel has conducted in support of the plan (to the extent it is not privileged). In dealing with this factor, we do not favour a beauty contest between (or among) counsel seeking carriage, but we do believe that the court must be satisfied (as would a prospective client on a significant litigation matter) that counsel have the experience, resources, and competence to litigate a proceeding through a contested common issues trial.

Work conducted to advance the case prior to carriage should be approached with caution. In addition to significant concern over the ability to protect privilege (solicitor-client and litigation), it cannot be in the best interests of the putative class for work to be performed for the purpose of obtaining carriage. Strategic considerations may dictate that items such as preliminary expert reports or certification records cannot be delivered before a carriage motion—and thereby become subject to the scrutiny of the defendants—without compromising the

[1] See, for example, *Ewert v. Canada (Attorney General)*, 2014 BCSC 215 at para. 43.

interests of the putative class. Only work that will meaningfully advance the interests of the class should be incentivized.

Consultation Issue #9: Appeals

The appeal rules for certification decisions in section 30 of the *CPA* should be amended.

Our opinion is that the presence of the Divisional Court in certification-related appeals only serves to increase expense and delay. Not only would allowing all appeals to proceed directly to the Court of Appeal without the need to obtain leave enhance efficiency; it would also avoid the divided appeal routes that may currently arise where there are other motions heard together with certification, such as motions to strike.[2] With the efficiency gained by eliminating leave motions and multiple levels of appeal, we do not think it is necessary to force cases to continue while appeals unfold. Doing so would only create inefficiency in the event that a decision is reversed.

Thank you for the opportunity to provide submissions to the LCO on these important issues.

Yours very truly,
PALIARE ROLAND ROSENBERG ROTHSTEIN LLP

per Odette Soriano
OS:p

c: Linda Rothstein / Ken Rosenberg / Paul Davis

[2] See, for example, *Cavanaugh v. Grenville Christian College*, 2013 ONCA 139.