

ONTARIO CLASS ACTION BENCH-BAR LIAISON COMMITTEE

REPORT FOR THE PERIOD ENDING DECEMBER 31, 2019

This is the first report of the Ontario Class Action Bench-Bar Liaison Committee.

This report contains a description of the Committee and its membership, a progress report on its work to date and current projects, and a review of next steps for the Committee in 2020 and beyond.

This report is dedicated to Eric Hoaken, who was an enthusiastic member of the Committee.

About the Committee

Purpose

- The Class Action Bench-Bar Liaison Committee is a bench-bar committee in Ontario established for the following purposes:
 - to develop practice initiatives to improve the conduct of class proceedings, and
 - to facilitate communication between class action bench and bar.
- Law reform is not the specific purpose of the Committee, but practice initiatives pursued by the Committee may contribute to the development of Practice Directions or inform future legal reform projects.

History

- The Committee was proposed by the OBA Class Actions Section Executive to Associate Chief Justice Frank Marrocco in 2017. The Committee was constituted in early 2018.

Terms of Reference

- The Terms of Reference of the Committee are available on the Ontario Bar

Association website at www.oba.org/Class-Action-Liaison

Membership

- The bench members of the Committee are appointed from time to time by the Associate Chief Justice of the Superior Court of Justice. The Associate Chief Justice may appoint other members of the Committee who are not judges.
- The initial bar members of the Committee were appointed by the Associate Chief Justice. Thereafter, the bar members of the Committee are selected by the Committee (subject to approval by the Associate Chief Justice), after consultation with the Class Actions Section Executive of the Ontario Bar Association, The Advocates' Society, and such other bar associations or other bodies as the Committee may decide or the Associate Chief Justice may direct, through a process that ensures, to the extent reasonably possible:
 - representation of both plaintiff and defence perspectives
 - regional representation
 - gender representation and representation of equity seeking groups
 - representation of public and private sector lawyers
- There are up to 12 bar members of the Committee. Membership in a particular bar association or other body is not a requirement for membership on the Committee.
- The bar members are appointed for two-year terms, with terms beginning in January of each year, with half of the bar members appointed annually, following a public call for nominations.
- A list of the current members of the Committee, and a list of the members of the Committee from its creation until December 31, 2019, are found at Appendix A.

Administrative Positions

- The Class Action Liaison Committee has the following administrative positions:
 - Two Co-Chairs, one appointed by the Associate Chief Justice from among the bench members of the Committee, and one selected by the Committee from among its bar members.
 - A Secretary, who need not be a member of the Committee.
 - Working Group Chairs as selected from time to time by the Working Groups of the Committee.

Communication with the bench and bar

- The Committee engages in communication with the bench and bar in connection with its practice improvement initiatives, by, among other things:
 - soliciting input on priorities;
 - soliciting input on proposed or draft practice improvement initiatives;
 - raising awareness about the role of the Committee, and its initiatives;
 - conducting continuing legal education; and
 - publication of an annual report summarizing the work of the Committee in the past year.
- To date, the Committee has undertaken a number of communication initiatives, including publication of this Report, creation of a webpage, presentations at the OBA's annual Class Action Colloquium, issuance of a call for nominations for bar members, and social media communications.

Working Group initiatives

- In 2018-2019, the Committee operated four working groups, each of which spearheaded an initiative relating to the conduct of class proceedings. These four initiatives are detailed here.

Case Management Working Group

- The case management working group examined whether it would be useful to develop a Practice Direction relating to case management of class proceedings in Ontario. The working group looked at four conceptual models for a case management Practice Direction:
 - Mandatory court-administered early case management: Under a Practice Direction providing for mandatory early case management, it would be mandatory for the court to schedule a case management conference within a specified period of time after the last defendant is served with the statement of claim.
 - Mandatory court-administered early case management subject to consent opt out: This second approach is the same as #1, except that the parties may, on consent, opt out of the requirement for an early case management conference. If the parties are agreed that an early case management conference is not necessary, they can so advise the court and the case management conference will either not be scheduled or will be cancelled.

- Mandatory consultation between counsel, with mandatory notification to the court whether an early case management meeting is requested: Under this approach, the court would not automatically schedule a case management conference within a prescribed time. Instead, counsel would be required to consult with one another within a prescribed time, and to file a form with the court either requesting a case management conference or electing to defer. If the form was not filed, the court could schedule a case management conference.
 - Mandatory consultation between counsel, with best practices guidance provided to counsel: Under this approach, counsel would be required to consult with one another about case management issues within a prescribed time, but with no requirement to file anything with the court. The Practice Direction would direct counsel to a best practices guide relating to case management in class proceedings.
- The working group and the Committee as a whole discussed and debated at some length the merits of the different models. Consideration was given to the burdens that requiring mandatory court-administered case management for all cases would impose upon the Superior Court, as well as the pros and cons of requiring case management of cases that neither plaintiff nor defence is seeking to have managed.
 - The case management working group developed a case management checklist, to be made available to counsel and judges involved in class proceedings.
 - The working group is continuing its work. By the close of 2019, its focus was on the merits of preparing a Practice Direction reflecting either Option #3 or 4 listed above.
 - It is anticipated that, if the Committee resolves to recommend a Practice Direction dealing with case management, it will be put forward for consideration in 2020 along with certain other Practice Direction recommendations arising out of the work of the other working groups.

Standardized Filings Working Group

- The goal of the standardized filings working group is to provide direction to class action bench and bar members in Ontario regarding the standardization of filings in class proceedings, with a view to promoting judicial economy and efficiency.
- This working group has prepared a draft list of cases to form a Standardized Book of Authorities for class proceedings. It is proposed that the cases will be available to judges through the Superior Court intranet, thus eliminating the need for counsel to include these cases in their Books of Authorities. The Standardized Book of Authorities would be updated periodically to reflect the latest key judicial developments.

Costs and Funding Working Group

- The costs and funding working group prepared a draft Practice Direction regarding the delivery of costs outlines prior to the certification hearing.
- This working group also prepared a draft litigation funding educational document. This document provides information to bench and bar members in Ontario regarding relevant considerations to the assessment of litigation funding agreements. It will be made available publicly in 2020.

Multijurisdictional Class Actions Working Group

- The multijurisdictional class actions working group was formed but its work was paused pending the implementation of the Canadian Judicial Protocol for the Management of Multijurisdictional Class Actions. With that Protocol now incorporated into a Practice Direction, the working group will be considering in 2020 certain discrete follow on issues.

LCO recommendations relevant to the Committee

- The Law Commission of Ontario issued its Final Report on Class Actions in July 2019. The Report makes several recommendations relevant to the role of the Class Action Bench-Bar Liaison Committee. There is specific discussion and recommendation relating to the role of the Committee, and the LCO makes recommendations for future Practice Directions.
- In Chapter 3 of the Report, the LCO recommends that the Committee develop a dedicated Practice Direction for the case management of class actions. The LCO states:

Finally, the LCO is aware of an important recent initiative in Ontario, the Class Action Bench-Bar Liaison Committee. This initiative was proposed by the Ontario Bar Association in order to develop practice initiatives to improve the conduct of class proceedings in Ontario. One of the topics under consideration by the Committee is the development of a practice direction for case management and/or standardized court filings. The LCO believes this is a very positive development consistent with our analysis and recommendations. The LCO recommends that the Committee propose case management practice directions that are incremental but ambitious.

[...]

- The LCO recommends that the Class Action Bench-Bar Liaison Committee

continue to develop a dedicated Practice Direction to improve case management of class actions. ... The LCO will recommend additional elements of a proposed class action Practice Direction in later chapters.

- The LCO's formal recommendation relating to this topic (Recommendation #5) states as follows:
 - 5. The LCO recommends the Class Action Bench-Bar Liaison Committee and/or Civil Rules Committee develop a dedicated Practice Direction or amendment to the Rules of Civil Procedure for the case management of class actions. This Direction or Rule should be developed in consultation with appropriate stakeholders and be supported by ongoing training and education for the judiciary and class action counsel.
- The LCO made several other recommendations regarding the development of Practice Directions in respect of other class proceedings topics, including carriage motions, certification motions, settlement distribution, notices, claim form design, publication, distribution, and class action appeals.
- The Committee will consider the recommendations of the LCO as it continues its work.

What's next: 2020 and beyond

- The Committee aims to finalize Practice Direction recommendations in 2020, as well as certain educational tools.
- The Committee is now considering further practice improvement initiatives beyond the topics addressed by the four working groups in 2019.
- The Committee will continue to engage in active communication with the Ontario bench and bar, providing updates about upcoming educational programs and to report on work product.
- For more information about the Committee and its work, please visit its website at www.oba.org/Class-Action-Liaison

Appendix A – Members of the Committee

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- The current members of the Committee are:

Bench members:

- Associate Chief Justice Frank N. Marrocco (ex officio)
- Mr. Justice Gerald Taylor (Central South Region)
- Mr. Justice Mark L. Edwards (Central East Region) (Judicial Chair)
- Madam Justice Deena Baltman (Central West Region)
- Mr. Justice Russell Raikes (Southwest Region)
- Mr. Justice Robert Smith (East Region)
- Mr. Justice Paul Perell (Toronto Region)
- Mr. Justice Edward Morgan (Toronto Region)

Superior Court of Justice representative:

- Joshua Patlik, Counsel, Office of the Chief Justice

Bar members:

- Sandra Barton, Gowling WLG
- Chantelle Cseh, Davies Ward Phillips Vineberg LLP
- Emrys Davis, Bennett Jones LLP
- Tony Di Domenico, Fasken Martineau DuMoulin LLP
- David Kent, McMillan LLP
- Jean-Marc Leclerc, Sotos LLP
- David Outerbridge, Torys LLP (Chair)
- Jonathan Ptak, Koskie Minsky LLP
- Mirilyn Sharp, Blaney McMurtry LLP

- Linda Visser, Siskinds LLP
- Tina Yang, Waddell Phillips LLP
- Victoria Yankou, Ministry of the Attorney General of Ontario

OBA representative:

- Adela Mall

Secretary:

- Lara Guest, Torys LLP
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- The members of the Committee from its constitution in 2018 until December 31, 2019 included:

Bench members:

- Associate Chief Justice Frank N. Marrocco (ex officio)
- Mr. Justice Gerald Taylor (Central South Region)
- Mr. Justice Mark L. Edwards (Central East Region)
- Madam Justice Deena Baltman (Central West Region)
- Mr. Justice Ian Leach (Southwest Region)
- Mr. Justice Russell Raikes (Southwest Region)
- Mr. Justice Robert Smith (East Region)
- Mr. Justice Paul Perell (Toronto Region)
- Mr. Justice Edward Morgan (Toronto Region)

Superior Court of Justice representative:

- Laura Craig, Counsel, Office of the Chief Justice

Bar members:

- Sandra Barton, Gowling WLG
- Chantelle Cseh, Davies Ward Phillips Vineberg LLP
- Tony Di Domenico, Fasken Martineau DuMoulin LLP

- Eric Hoaken, Lax O'Sullivan Lisus Gottlieb LLP
- Jean-Marc Leclerc, Sotos LLP
- David Outerbridge, Torys LLP
- Celeste Poltak, Koskie Minsky LLP*
- Sylvie Rodrigue, Torys LLP*
- Mirilyn Sharp, Blaney McMurtry LLP
- Jay Strosberg, Strosberg Sasso Sutts LLP*
- Randy Sutton, Norton Rose Fulbright LLP*
- Margaret Waddell, Waddell Phillips LLP*
- Charles Wright, Siskinds LLP*

OBA representative:

- Adela Mall

Secretary:

- Lara Guest, Torys LLP