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BY EMAIL

Law Commission of Ontario
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RE: CELA COMMENTS ON CLASS ACTIONS: OBJECTIVES, EXPERIENCES AND REFORMS (MARCH 2018)

I am writing to provide comments on behalf of the Canadian Environmental Law Association (CELA) in relation to the Law Commission of Ontario (LCO) consultation paper entitled *Class Actions: Objectives, Experiences, and Reforms* (Toronto: March 2018).

CELA commends the LCO's decision to undertake a comprehensive, evidence-based review of Ontario's 25 year-old *Class Proceedings Act (CPA)*. In our view, it is both timely and necessary to closely examine the *CPA* track record, and to identify opportunities for improving and strengthening the *CPA* so that it more readily achieves the threefold purposes of access to justice, judicial economy, and behavior modification.

Accordingly, the purpose of this submission is to present the LCO with a concise summary of CELA's views, experiences and suggested amendments to the *CPA*.¹

I. CELA BACKGROUND

CELA is a public interest law group founded in 1970 for the purposes of using and enhancing environmental laws to protect the environment and safeguard human health. Funded as a specialty legal aid clinic, CELA lawyers represent low-income and vulnerable communities in the courts and before tribunals on a wide variety of environmental and public health issues.

Since our inception, CELA's casework, law reform and public outreach activities have focused on ensuring access to environmental justice. For example, in CELA's 1978 publication of *Environment on Trial*, a number of key statutory reforms – such as facilitating environmental class actions – were advocated in order to enhance public access to the civil courts.

Similarly, in 1989, CELA was appointed as a member of the Attorney General's Advisory Committee on Class Action Reform. The Advisory Committee's 1990 report (which contained a model bill) served as the basis for the 1992 passage of the *CPA*, which has remained unchanged to date.

¹ The legal research assistance of Jessica Karban, CELA's student-at-law, and Anna Lindgren-Tanga, BCL/LLB candidate (McGill, 2019), is gratefully acknowledged by the author.

After the enactment of the *CPA*, CELA has continued to monitor,² and to occasionally get involved in, environmental class actions in Ontario. For example, CELA intervened as a friend of the court before the Ontario Court of Appeal, which certified *Smith v. Inco* as a class action in 2005.³

After the representative plaintiff in *Smith v. Inco* succeeded at trial, the Court of Appeal overturned the trial judgment in 2011 on various grounds,⁴ and CELA provided affidavit evidence to the Supreme Court of Canada in support of the plaintiff's application for leave to appeal, and for subsequent reconsideration of the Court's refusal to grant leave. In addition, CELA counsel was called by the Law Foundation of Ontario as a witness in the 2012 cost hearing held by the trial judge in *Smith v. Inco*.⁵

In light of the above-noted involvement in class action matters, CELA was interviewed in late 2017 by LCO representatives during the Stage One interviews that led to the publication of the LCO consultation paper.

It should be further noted that while CELA undertakes civil litigation on behalf of our clients, these proceedings have been framed as individual actions (or judicial review applications) on behalf of named plaintiffs, rather than as class actions involving representative plaintiffs. In some of CELA's cases, the option of seeking certification under the *CPA* has been carefully considered, but certification has not been pursued in CELA's civil cases due to the cost, complexity and uncertainty under the *CPA* in relation to environmental matters.

For this reason, CELA does not anticipate pleading or relying upon the *CPA* in our future casework unless the Act is amended to address the key barriers to utilizing the *CPA* in the environmental context. Until these barriers are addressed by appropriate statutory amendments, CELA anticipates that the class action mechanism will remain underutilized for environmental claims in Ontario, as discussed below.

II. OVERVIEW OF ENVIRONMENTAL CLASS ACTIONS UNDER THE CPA

Ontario's *CPA* has now been in place for a quarter-century. Over that timeframe, it has been estimated that approximately 900 class actions have been commenced in many diverse areas of

² See <http://www.cela.ca/sites/cela.ca/files/843OBAPaper.pdf>. This 2012 paper surveyed environmental class actions during the first 20 years under the *CPA*. Since 2012, there has been limited class action activity involving environmental claims under the *CPA*: see *Kalra v. Mercedes Benz*, 2017 ONSC 3795 (Ont. S.C.J.) (certification granted in relation to automotive exhaust devices in vehicles sold by defendant); *Quenneville v. Volkswagen Group Canada Inc.*, 2016 ONSC 7959 (Ont SCJ) (certification granted in relation to automotive exhaust devices in vehicles sold by defendant); *Plaunt v. Renfrew Power Generation Inc.*, 2017 ONSC 18 (Ont SCJ) (class action decertified in light of new evidence regarding shoreline property boundaries); and a series of decisions pertaining to the Sunrise propane depot explosion (*Durling v. Sunrise Propane Energy Group Inc.*, [2012] O.J. No. 3408; 2012 ONSC 4196; 2013 ONSC 5830; 2014 ONSC 1041).

³ *Pearson v. Inco Ltd.* (2005), 20 CELR (3d) 258 (ONCA). CELA also served as co-counsel for Ms. Smith and other residents in an application for judicial review in relation to a cleanup order issued against Inco regarding nickel contamination within Port Colborne: *Smith v. Ontario* (2003), 1 CELR. (3d) 245 (Ont. Div. Ct.).

⁴ 2011 ONCA 628; leave to appeal to SCC refused April 26, 2012.

⁵ 2012 ONSC 5094; affd, 2013 ONCA 724.

law, including product liability, consumer/privacy rights, competition law, securities/investors' rights, and employment law.

Many observers also anticipated that over time, the *CPA* would become well-used by representative plaintiffs bringing claims based on contaminant discharges into air, land or water that result in widespread property damage, economic loss or personal injury within affected communities. However, over the past 25 years, relatively few environmental class actions have been certified (as compared to other types of class actions), and, to CELA's knowledge, only one environmental class action (*Smith v. Inco*) has gone to trial on common issues.

As noted above, the passage of the *CPA* followed the release of a 1990 report from the Attorney General's Advisory Committee on Class Action Reform. Among other things, this Report observed that:

It is an unavoidable fact that modern industrialized societies such as Ontario will suffer mass injuries. North Americans have already witnessed incidents of widespread harm from defective products... So, too, have they seen mass environmental injury such as the incident at Three Mile Island or the recent PCB fire in Quebec... A class action, in which many similarly injured persons join together, can provide an effective and efficient means of litigating such mass claims.⁶

In a 1990 case involving widespread environmental harm, similar observations were made by the Quebec Court of Appeal:

The class action recourse seems to me a particularly useful remedy in appropriate cases of environmental damage. Air or water pollution rarely affects just one individual or one piece of property. They often cause harm over a large geographic area. The issues involved may be similar in each claim but they may be complex and expensive to litigate, while the amount involved in each case may be relatively modest. The class action, in these cases, seems an obvious means for dealing with claims for compensation for harm done when compared to numerous individual lawsuits, each raising many of the same issues of fact and law.⁷

Ontario's Court of Appeal has further opined that there appears to be a natural fit between environmental claims and class actions for the purposes of modifying corporate behaviour:

Thus, modification of behaviour does not only look at the particular defendant but looks more broadly at similar defendants, such as the other operators of refineries who are able to avoid the full costs and consequences of their polluting activities because the impact is diverse and often has minimal impact on any one individual. This is why environmental claims are well-suited to class proceedings. To repeat what McLachlin C.J.C. said in

⁶ Ontario Ministry of the Attorney General, *Report of the Attorney General's Advisory Committee on Class Action Reform* (Toronto: Queen's Printer, 1990) at 16.

⁷ *Comite d'environnement de La Baie Inc. v. Societe d'electrolyse et de chimie Alcan Ltee*, (1990), 6 CELR (NS) 150 at 162.

Western Canadian Shopping Centres Inc., *supra* at para. 26: “Environmental pollution may have consequences for citizens all over the country.”⁸

However, despite this favourable judicial and academic commentary, environmental class actions have been relatively infrequent under the *CPA* to date.

This trend has continued despite the fact that over the past 25 years, the province has experienced serious environmental incidents potentially affecting large numbers of Ontarians. For example, there are well-documented situations across Ontario where the environment or local residents have been chronically exposed to widespread, low-level discharges of contaminants into air, land or water from industrial, commercial or institutional facilities for prolonged periods of time (e.g. Sarnia’s “Chemical Valley”).

Similarly, there have been a number of instances involving a single catastrophic release of elevated concentrations of contaminants into the environment, drinking water sources, or nearby properties as a result of spills, explosions, fires, upset conditions, or other emergency situations (e.g. Walkerton Tragedy, Plastimet fire, etc.).

However, where such environmental harm occurs and triggers the commencement of a class action, the *CPA* jurisprudence suggests that certification is obtainable for property-related damages. However, it may be difficult to obtain certification of environmental class actions involving personal injury or other health-based claims.

Accordingly, CELA agrees with the LCO’s observation in the consultation paper that:

[I]n 1982 the Ontario Law Reform Commission reported that environmental class actions were “an obvious means of achieving redress for harm occasioned by pollution.” In practice, however, this has been demonstrated to be less obvious.⁹

CELA’s explanation for the relative infrequency of environmental class actions in Ontario is set out below, together with our suggested reforms to overcome certain financial and legal barriers that militate against bringing environmental class actions under the *CPA*.

III. CELA’S RESPONSE TO CONSULTATION QUESTIONS

The LCO consultation paper sets out thirteen general questions for public response. CELA’s answers to these questions are set out below.

In formulating our answers, CELA has carefully considered the consultation questions from the public interest perspective of our client communities. In addition, our recommendations below are intended to address the overarching objectives of class actions, particularly access to justice. On

⁸ *Pearson v. Inco Ltd.* (2005), 20 CELR (3d) 258 (ONCA), para 88. See also Heather McCleod-Kilmurray, “Hollick and Environmental Class Actions: Putting the Substance into Class Action Procedure,” (2002-2003) 34 *Ottawa L. Rev.* 363 at 283.

⁹ LCO Consultation Paper, page 44.

this point, the Supreme Court of Canada recently observed that ensuring access to justice has now attained paramount importance within the civil court system:

Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.¹⁰

CELA submits that these concerns apply, with necessary modification, to the pre-trial and trial provisions within the *CPA*, which should be closely reviewed by the LCO in order to identify opportunities to improve access to justice, especially in environmental class actions.

Question 1: How can delay in class actions be reduced?

CELA submits that the overall objective is to ensure that class actions can be litigated in a fair, timely and cost-effective manner under the *CPA*.

Unfortunately, it is not uncommon for years to elapse between bringing the initial certification motion, getting to trial if certification is granted, and dealing with any appeals arising from interlocutory or final judgments. In our view, this considerable delay adversely affects the *CPA*'s objectives of access to justice and judicial economy, and has clear financial implications for the parties as well as the administration of civil justice in the province.

However, in order to identify how such delays can be reduced, it is first necessary to differentiate and examine the root causes of delay that may affect class actions in Ontario.

Undoubtedly, some delay may result from the conduct of parties who bring unmeritorious and time-consuming motions or appeals, or who otherwise act in a dilatory manner despite litigation timelines prescribed by the Rules of Civil Procedure. Other delays may be caused by long-standing systemic problems within Ontario's civil court system (e.g. limited judicial resources, lengthy docket backlogs, ineffective case management, etc.) which may plague both individual actions and class actions alike. Addressing these kinds of delay factors goes beyond mere *CPA* reform, and will require a multi-faceted and coordinated approach by governmental and court officials (e.g. appointment of additional judges, expanded judicial training, possible revision of the Rules of Civil Procedure, etc.).

Other types of delay can be attributed to the extra steps (and other procedural options) that are associated with bringing class actions under the *CPA*. As discussed below, CELA submits that there are opportunities to reduce this *CPA*-related delay by streamlining the certification test, restructuring appeals against certification judgments, revising evidentiary rules, and other appropriate reforms. These measures will not necessarily address the above-noted systemic

¹⁰ *Hryniak v Mauldin*, 2014 SCC 7, para 1, per Karakatsanis J.

problems, but they could assist in reducing delays specifically attributable to the current *CPA* regime.

Question 2: Given that class actions must provide access to compensation to class members, how should distribution processes be improved?

In principle, CELA agrees that the distribution of compensation to members of the defined class (or sub-classes) must occur in an equitable, transparent and cost-effective manner. In practice, however, the lack of comprehensive monitoring or public reporting of distribution processes used under the *CPA* makes it difficult to draw any general conclusions about what is working, what is not working, and what needs to be fixed to ensure full and timely compensation to class members.

Nevertheless, CELA is aware of anecdotal accounts from environmental class members who have found distribution processes to be difficult or problematic for them to obtain the compensation to which they are entitled. Some of the reported problems include unreasonable denial of submitted claims, onerous documentation requirements to prove claims, and overall delays in processing and paying claims. However, these kinds of case-specific anecdotes are no substitute for a robust, evidence-based assessment of distribution processes used in different types of class actions under the *CPA*.

To remedy this evidentiary gap, CELA submits that the *CPA* should be amended should require parties (or claim administrators) to file concise reports that are publicly accessible on a centralized registry or database maintained by the Ministry of the Attorney General. The detailed content requirements (or the required form) can be prescribed by regulations¹¹ under the *CPA*, but the reports should, at a minimum, include the following matters:

- Summary of the litigation chronology (including settlement agreements, if any);
- Description of the methodology used to distribute monetary compensation to class members (including notification, eligibility criteria, documentation requirements for claimants, etc.);
- Description of the quantum of compensation claimed by, and actually paid to, class members;
- Reasons why claims have been rejected or disallowed;
- Description of any *cy-pres* distribution arrangements used to disburse funds.

These reports should be filed (and updated as may be required) within a prescribed timeline after distribution has commenced pursuant to a judgment or settlement.

CELA's further comments regarding monitoring of class action activities are set out below in relation to Question 13.

¹¹ Since the *CPA* currently lacks regulation-making provisions, the Act should be amended to authorize the Lieutenant Governor in Council to make regulations that are needed to implement appropriate reforms (e.g. prescribed forms, reporting requirements, centralized registry, etc.).

Question 3: What changes, if any, should be made to the costs rule in the CPA?

In CELA's view, the existing cost provisions in section 31 of the *CPA* are inadequate, and they must be substantially revised in order to better facilitate class actions, particularly those involving harm to the environment or public health.

By way of background, CELA and other members of the Attorney General's Advisory Committee on Class Action Reform spent considerable time debating whether Ontario's traditional cost approach ("costs follow the event") should be retained or revised in the class action context. However, there was no consensus on altering the existing cost regime, and section 31 was eventually adopted by Committee members in order to flag certain cost considerations when judges are making cost decisions under the *CPA* (e.g. was the class action a test case, or did it raise novel points of law or involve a matter of public interest?).

However, the *CPA* experience to date suggests that the status quo approach reflected in section 31 has been problematic, as exemplified by the \$1.7 million cost award made in favour of the defendant in *Smith v. Inco*¹² and other sizeable cost awards made against representative plaintiffs.¹³ Based upon our discussions with members of CELA's client communities, it appears to us that the large quantum of these adverse cost awards has undoubtedly had a chilling effect on the willingness of Ontarians to serve as representative plaintiffs in environmental class actions. These cost awards also raise concern about the long-term sustainability of the Class Proceedings Fund, which may be depleted by such large payouts, and which may impair the Fund's ability to provide financial assistance to representative plaintiffs in other cases.

In essence, the cost factors enumerated in section 31 of the *CPA* are simply a sub-set of the considerations that are already well-established in cost jurisprudence under Rule 57 of the Rules of Civil Procedure. Thus, section 31 really adds nothing new to judicial discretion regarding costs, and does not materially change the traditional cost rules applied in Ontario.

Accordingly, CELA submits that in the context of environmental class actions, it is necessary to revisit the question of whether section 31 should be supplanted by a "no cost" rule (each party bears its own costs), or a "one-way" cost rule (representative plaintiff may recover costs if successful (or may potentially be denied costs), but cannot be ordered to pay the defendant's costs). Of these two options, CELA prefers entrenching an appropriate one-way cost rule within the *CPA*. In our view, if Ontario is serious about improving access to environmental justice, then cost reform under the *CPA* is long overdue.¹⁴

In terms of implementation, CELA has no objection to having the proposed one-way cost rule apply across the board to all different types of class actions under the *CPA*. In the alternative, given the public interest nature of environmental class actions (e.g. where the defendant has discharged

¹² *Supra*, footnote 4.

¹³ See, for example, *Das v. George West Ltd.*, 2017 ONSC 5583 (unsuccessful representative plaintiffs ordered to pay defendants' costs in the amount of \$2.3 million on certification and jurisdictional motions); and *Crisante v. DePuy Orthopaedics*. 2013 ONSC 6351 (average costs awards on certain certification motions are just under \$500,000).

¹⁴ For an analysis of the relationship between cost rules, access to justice and public interest environmental litigation in Canada, see: <http://www.cela.ca/publications/costs-access-justice-public-interest-environmental-litigation>.

contaminants into public waters or local airsheds), CELA submits that the one-way rule could be expressly limited under the *CPA* to claims alleging harm to the environment or public health.

On this point, we note that there are legislative precedents in Ontario for carving out exceptions for environmental cases. For example, while the *Limitations Act* establishes a general two-year limitation period for most civil actions, environmental claims are subject to special provisions under the Act.¹⁵

In the further alternative, if the current two-way cost rule is retained under the *CPA*, then CELA submits that there are a number of potential reforms that should be considered, including:

- capping the parties' cost liability (as occurs under the Quebec class action regime);¹⁶
- limiting the cost liability of the Law Foundation of Ontario where it has provided financial assistance to a representative plaintiff;¹⁷
- revising the Class Proceeding Fund to enable the Law Foundation of Ontario to provide financial assistance in relation to the legal fees incurred by the representative plaintiff;¹⁸
- facilitating greater use of protective or interim cost awards (e.g. *Okanagan*¹⁹ orders) at the commencement of class actions; and
- capping (or eliminating) the requirement for a representative plaintiff to provide an undertaking as to damages where interlocutory injunctive relief is being sought in an environmental class action.

In CELA's view, these and other cost-related reforms will help tackle the economic hurdles associated with bringing an environmental class action under the *CPA*.

At the same time, CELA submits that capping adverse cost liability will not result in a floodgate of frivolous or vexatious environmental class actions, particularly since representative plaintiffs must still be able to pay their own sizeable legal/expert fees and disbursements (unless a contingency fee arrangement is made), and still must satisfy the certification criteria under section 5 of the *CPA* (see below).

Moreover, it appears to CELA that the Law Foundation of Ontario is unlikely to fund an environmental class action that has no reasonable prospect of success. Similarly, the premiums payable to third-party insurers under cost indemnity arrangements (especially for cost awards approaching \$2 million or more) may be out of reach for the low-income persons or vulnerable communities that CELA represents in legal proceedings. CELA is unaware whether – or to what

¹⁵ See *Limitations Act, 2002*, SO 2002, c 24, Schedule B, s 17 (no limitation period for an undiscovered environmental claim, which is defined as a "claim based on an act or omission that caused, contributed to, or permitted the discharge of a contaminant into the natural environment that has caused or is likely to cause an adverse effect").

¹⁶ LCO Consultation Paper, page 18.

¹⁷ Limiting the cost liability of the Law Foundation of Ontario should also help preserve the Class Proceedings Fund to ensure that it remains available to representative plaintiffs in suitable cases across the province.

¹⁸ Quebec's class action fund is authorized to provide financial assistance in relation to the representative plaintiff's legal fees: see sections 25 and 29-31 of the *Act respecting the Fonds d'aide aux actions collectives* (<http://legisquebec.gouv.qc.ca/en/ShowDoc/cs/F-3.2.0.1.1>).

¹⁹ *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 (interim costs awarded to litigant prior to final disposition of case and in any event of the cause).

extent – third-party funding of environmental class actions (in exchange for a portion of any damages awarded) has occurred to date under the *CPA*.

In summary, CELA notes that in its seminal report on class actions, the Ontario Law Reform Commission strongly recommended against using the traditional two-way cost rule in class actions.²⁰ CELA concurs with this recommendation, and we urge the LCO to similarly conclude that it is time to develop a new cost regime that is specifically designed to achieve the societal purposes of the *CPA*.

Question 4: Is the current process for settlement and fee approval appropriate?

To date, CELA has had no direct involvement in getting settlements or fee agreements reviewed and approved by courts under sections 29 and 32 of the *CPA*. Accordingly, we are not in a position to assess what is working – or not working – under the current regime. However, CELA supports the continuing need for court approval of these arrangements, particularly to help safeguard the interests of absent class members.

Question 5: Is the current approach to certification under s.5 of the CPA appropriate?

For the reasons outlined below, CELA submits that the current certification process and criteria under section 5 of the *CPA* represents one of the most significant hurdles for representative plaintiffs in environmental class actions.

As noted by the Quebec Court of Appeal in *Charles c. Boiron Canada inc.*,²¹ certification requirements may actually hinder – not facilitate – access to justice, even under Quebec’s relaxed approach to authorizing class actions:

L'action collective se veut un moyen de faciliter l'accès à la justice alors que, trop souvent, paradoxalement, le processus d'autorisation préalable, dans sa forme actuelle, entrave cet accès. Et lorsqu'il n'est pas une entrave, il est une formalité dont les coûts exorbitants ébranlent la raison d'être ou encore une sorte de mondanité procédurale ne permettant pas un filtrage efficace. Dans tous les cas, il engendre une insatisfaction généralisée, pour ne pas dire – et j'ose le mot – une frustration, qui résonne dans tout le système judiciaire. Certains profitent peut-être de l'affaire (on ne compte plus les dénonciations de l'« industrie » de l'action collective, nouvel avatar de l'« ambulance chasing »), mais cela ne saurait justifier le *statu quo*.

[The class action is meant to facilitate access to justice, although paradoxically, in its current form, the authorisation process hampers access to justice. And when it is not a hindrance, it is a formality with exorbitant costs that serve to undermine the raison d'être or a sort of procedural nicety that does not allow effective filtering. In any case, it generates a generalized dissatisfaction, not to say - and I would venture to say - a frustration, which resonates throughout the judicial system. Some may benefit from this business (there are

²⁰ Ontario Law Reform Commission, *Report on Class Actions, Volume 3* (Toronto: MAG, 1982), Chapter 17.

²¹ 2016 QCCA 1716, para 73, per Bich J.C.A.

countless denunciations of the “industry” of the class action, the new avatar of “ambulance chasing”), but this cannot justify the status quo (unofficial translation)].

CELA submits that these *obiter* comments are also applicable to the more rigorous certification stage under the *CPA*. Accordingly, CELA submits that section 5 of the *CPA* warrants close scrutiny by the LCO. More specifically, we recommend that appropriate reforms should be implemented in order to expedite the certification process and to streamline the certification criteria insofar as they apply to environmental claims.

CELA recognizes that modern class action regimes typically establish a screening test to ensure that only suitable class actions are certified and allowed to proceed to trial. CELA also notes that the Advisory Committee on Class Action Reform recommended in favour of the current certification criteria to ensure that worthy cases can proceed as class actions, and that unsuitable cases are not permitted to continue as class actions.

However, the past 25 years of experience under the *CPA* suggests that certification has become a slow, expensive and unduly complex stage, particularly in relation to environmental class actions. It is therefore appropriate for the LCO to go back to first principles, and to evaluate whether the current threshold in section 5 has been set too high or whether it performs an outmoded “gate-keeper” function that impedes access to justice, especially in the environmental context.

In this regard, CELA notes that some jurists and jurisdictions have questioned whether it is even necessary to have a formal upfront certification process. In Quebec, for example, where the certification test is widely regarded as less demanding than section 5 of the *CPA*, the Quebec Court of Appeal has mused whether the certification stage still has any utility, and invited the Quebec government to consider if certification should be eliminated.²²

Similarly, as noted by the LCO consultation paper, Australia currently has no formal certification stage for class actions. Instead, a representative plaintiff may commence a class action where: (i) seven or more class members have claims against the same defendant; (ii) the claims arise from the same, similar or related circumstances; and (iii) the claims involve a substantial common question of law or fact. However, it is open to defendants to subsequently argue that the case should be “de-certified” and not be allowed to proceed as a class action for various reasons.²³

However, CELA suspects that there may be little political or judicial support in Ontario to wholly repeal section 5 of the *CPA*. The question then becomes whether section 5 should remain intact, or whether certain amendments are required in relation to the certification process or how the criteria are applied in certain cases.

On this point, CELA has no particular concerns about the following criteria in section 5:

- the pleadings or the notice of application discloses a cause of action (subsection 5(1)(a));

²² *Ibid*, paras 69-74.

²³ LCO Consultation Paper, page 25. See also <http://www.lawreform.vic.gov.au/content/6-certification-class-actions>.

- there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant (subsection 5(1)(b)); and
- there is a representative plaintiff or defendant who,
 - would fairly and adequately represent the interests of the class;
 - has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding; and
 - does not have, on the common issues for the class, an interest in conflict with the interests of other class members (subsection 5(1)(e)).

However, CELA remains concerned about how the remaining two criteria have been interpreted and applied under the *CPA*:

- the claims or defences of the class members raise common issues (section 5(1)(c));
- a class proceeding would be the preferable procedure for the resolution of the common issues (section 5(1)(d)).

In environmental class actions, it appears that these two criteria have proven to be the main stumbling blocks to certification in opposed motions, particularly where health-based claims are being advanced.²⁴

In the *Smith* case, for example, certification was denied by the motions judge, who held, *inter alia*, that certain issues (e.g. negligent misrepresentation by regulators) could not proceed on a common basis, and that the proposed class action was not the preferable procedure due to the prevalence of individualized issues and the existence of provincial environmental legislation that could address concerns over behavior modification.²⁵ However, certification was eventually allowed in this case by the Ontario Court of Appeal,²⁶ but only after the representative plaintiff dropped the health claims and focused solely on property value depreciation.

Similarly, in *Hollick v. Toronto*,²⁷ the representative plaintiff proposed a class action on behalf of 30,000 residents in relation to odour, noise and other nuisance impacts caused by a large municipal landfill. However, the Supreme Court of Canada denied certification on the basis that the class action was not the “preferable procedure” for addressing common issues, particularly since a no-fault small claims fund already existed to provide compensation for off-site effects upon site neighbours.

In light of these and other cases²⁸ under the *CPA*, CELA submits that there are two possible options for reform:

²⁴ In some environmental cases, certification was granted on consent (e.g. the class action arising from the Walkerton drinking water tragedy in 2000).

²⁵ *Pearson v. Inco Ltd.*, [2002] O.J. No. 2764 (Ont SCJ), paras 108-113 and 115-138.

²⁶ *Supra*, footnote 2.

²⁷ 2001 SCC 68.

²⁸ See, for example, *Grace v. Fort Erie (Town)* (2003), 42 MPLR. (3d) 180 (Ont SCJ) (certification denied for class of residents claiming health-based and property-related damages in relation to the supply and potability of drinking water from defendant municipality); *Defazio v. Ontario*, [2007] O.J. No.902 (Ont SCJ) (certification denied for class of persons claiming health-based damages arising from presence of asbestos in a subway station); and *Dumoulin v.*

- delete, or alternatively, modify the statutory language used within subsections 5(1)(c) and (d) to ensure that they are applied by the courts in a less restrictive manner in all types of class actions; or
- leave these subsections intact, but insert a new provision that explains how they should be applied in environmental claims, or alternatively, that exempts environmental claims, in whole or in part, from the application of the “common issues” and “preferable procedure” criteria.²⁹

In making this submission, CELA is mindful of the fact that Quebec’s certification test does not contain a “preferable procedure” requirement, and sets out a broader approach to “common issues.” In particular, article 575 of the Quebec Code of Civil Procedure (CCP) has been framed as follows:

The court authorizes the class action and appoints the class member it designates as representative plaintiff if it is of the opinion that

- (1) the claims of the members of the class raise identical, similar or related issues of law or fact;
- (2) the facts alleged appear to justify the conclusions sought;
- (3) the composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings; and
- (4) the class member appointed as representative plaintiff is in a position to properly represent the class members.³⁰

In our view, section 5 of the *CPA* should be amended to more closely resemble the Quebec test in order to better facilitate access to justice.³¹

Regardless of whether the section 5 criteria are retained or modified, there remains the vexing problem of how much evidence should be adduced by the parties at the certification stage. This question, in turn, depends on which standard of proof should be used at the certification stage.

It appears to CELA that lengthy and prolix multi-volume motion records are increasingly being filed by parties at the certification stage under the *CPA*. This strikes CELA as an unwelcome development, particularly since this practice inevitably increases cost and causes delay (e.g. if cross-examinations are undertaken in relation to affidavits or expert reports attached thereto).

Ontario, [2005] O.J. No.3961; supplementary reasons [2006] O.J. No. 1233 (Ont SCJ) (certification denied for class of persons claiming health-based damages arising from presence of toxic mould in the defendant’s courthouse).

²⁹ In effect, this would amount to a legislative overturning of the *CPA* jurisprudence in environmental cases such as *Hollick*. For example, an amendment to the *CPA* could specify that certification cannot be refused in environmental claims on the grounds that other compensation schemes may exist, or that environmental statutes contain provisions that may be applicable to the matter.

³⁰ Art 575 CCP.

³¹ See, for example, *Vivendi Canada Inc. v. Dell’Aniello*, [2014] 1 SCR 3; *Infineon Technologies AG v. Option consommateurs*, [2013] 3 SCR 600; and *Asselin c. Desjardins Cabinet de services financiers inc*, 2017 QCCA 1673.

Moreover, in CELA's opinion, the certification stage under the *CPA* is not intended to decide the merits of the proposed action, nor is it supposed to devolve into a "battle of the experts."

In this regard, CELA prefers the approach undertaken in Quebec, where class action defendants must obtain leave to file responding evidence or to cross-examine on the representative plaintiff's materials.³² In our view, representative plaintiffs under the *CPA* should only have to present sufficient facts to demonstrate that there is a *prima facie* (or arguable) case for certifying the proposed class action.

To make this point abundantly clear to litigants, lawyers and judges, CELA recommends that section 5 of the *CPA* should be amended to specifically entrench this lower evidentiary threshold,³³ as opposed to the "balance of probabilities" standard. In our view, the merits of the claim are best left to be adjudicated at the trial stage, not the certification stage.

Question 6: Are class actions meeting the objective of behaviour modification?

Given the relatively small number of environmental class actions certified under the *CPA* to date, CELA is unable to conclude that the availability (or outcome) of class actions in Ontario has significantly modified the behavior of industrial, commercial, institutional or governmental sectors, or has otherwise prompted them to significantly improve their environmental practices, technologies or safeguards.

For example, recent National Pollutants Release Inventory data demonstrates that the amounts of toxic substances released into Ontario's air, land and water remain consistently higher than other North American jurisdictions.³⁴ Similarly, there are still well-documented "hot spots" in Ontario where residents continue to be chronically exposed to the cumulative effects of various toxic substances emitted from multiple corporate sources. Thus, the spectre of possible *CPA* litigation seems to have had little or no impact in terms of preventing or reducing these emissions, or ameliorating their potential adverse effects upon the environment or human health.

Moreover, it appears to CELA that the fear of quasi-criminal liability (e.g. large fines, jail terms, restoration orders, etc.), under provincial or federal environmental legislation likely motivates more proactive due diligence efforts within these sectors than the remote chance of civil liability imposed under the *CPA*.

CELA therefore concludes that unless changes are made to ensure that class actions under the *CPA* are more readily available in environmental cases, then the behavior modification objective is unlikely to be achieved adequately or at all in relation to environmentally harmful acts or omissions.

³² LCO Consultation Paper, page 18. See also art 574 CCP.

³³ This approach has been used by the Ontario Legislative in crafting the leave-to-appeal test in section 41 of the *Environmental Bill of Rights, 1993*, which has been interpreted by the Divisional Court as requiring only a *prima facie* case to be demonstrated by the prospective appellant: see *Lafarge Canada Inc. v. Ontario Environmental Review Tribunal* (2008), 36 CELR (3d) 191, paras 43-48; leave to appeal to ONCA refused November 26, 2008.

³⁴ See <http://www.cela.ca/response-to-moffet-cepa>.

Question 7: Please describe class members' and representative plaintiffs' experience of class actions?

In CELA's view, this question is best answered by the class members and representative plaintiffs themselves, as opposed to having counsel answer it for them. In particular, it would be instructive for the LCO to pose this question directly to class members and representative plaintiffs in environmental class actions, including *Hollick*, *Smith* and other high-profile cases.

Question 8: In light of existing constitutional restrictions, what is the most effective way for courts to case manage multi-jurisdictional class actions in Canada?

To date, CELA has had no direct involvement in multi-jurisdictional class actions arising in different parts of Canada,³⁵ and therefore is unable to provide a meaningful answer to this question.

Question 9: How should Ontario courts address the issue of carriage in class actions?

To date, CELA has not been directly involved in any carriage disputes where different counsel or law firms have brought competing certification motions under the *CPA* in relation to the same matter. Therefore, CELA is not in a position to provide an evidence-based answer to this question, and we express no views on whether Quebec's "first to file" rule should be modified and adopted under the *CPA*.

Question 10: What is the appropriate process for appealing class action certification decisions?

From an access to justice and judicial economy perspective, CELA questions whether it makes any practical sense to have certification appeals heard by the Divisional Court (with or without leave) when there is a strong possibility that aggrieved parties will likely attempt to appeal the Divisional Court outcome to the Ontario Court of Appeal in any event.

In our view, it would be preferable to simply eliminate the first appeal level, and to have certification appeals heard and decided by the Ontario Court of Appeal at first instance. CELA would further recommend that the appellate process should differentiate between appeals brought by representative plaintiffs and defendants, as follows:

- a decision denying certification may be appealed as of right by the representative plaintiff or, with leave of a judge of the Ontario Court of Appeal, by a member of the class on whose behalf the certification motion was filed; and
- a decision certifying a class action may be appealed only with leave of a judge of the Ontario Court of Appeal.

This approach is used in Quebec,³⁶ and CELA commends its adoption in the *CPA*.

³⁵ See, for example, *Endean v. British Columbia*, 2016 SCC 42 (separate class actions commenced in three different provinces in relation to tainted blood supply).

³⁶ Art 578 CCP.

Question 11: What best practices would lead a case more efficiently through discoveries, to trial and ultimately to judgment? Are there unique challenges in trials of common issues that the CPA and/or judges could address? What can judges do to facilitate quicker resolutions and shorter delays?

As noted above, CELA has not yet acted as trial counsel for representative plaintiffs for various reasons. We therefore take no position on the issues raised by this question, except to say that enhancing access to justice should be the predominant consideration in improving current pre-trial procedures and trials on common issues under the CPA.

Question 12: In addition to the issues listed in this paper, are there provisions in the CPA that need updating to more accurately reflect current jurisprudence and practice. If so, what are your specific recommendations?

In CELA's view, the consultation paper accurately describes the key issues and opportunities that should be immediately addressed under the CPA. Accordingly, it is not necessary to identify or prioritize other CPA reform issues at the present time, with one important exception.

In particular, subsection 37(a) of the CPA specifies that the Act does not apply to "a proceeding that may be brought in a representative capacity under another Act." One such example is the statutory cause of action created under section 84 of the *Environmental Bill of Rights, 1993 (EBR)*,³⁷ which enables Ontarians to commence a civil action to protect public resources from "significant harm." However, the EBR goes on to provide that such actions "may not be commenced or maintained as a class proceeding" under the CPA.³⁸

In CELA's view, there is no compelling public policy rationale for this constraint, and we see no reason why a representative plaintiff should not be allowed to include a section 84 claim where warranted by the facts being alleged in an environmental class action (e.g. where environmental remediation is part of the non-monetary relief requested in the statement of claim). Accordingly, CELA recommends that the CPA should be amended to specify that subsection 37(a) does not apply to a civil claim under section 84 of the EBR. If this exception is created, then it will also be necessary to enact a consequential amendment deleting subsection 84(7) of the EBR.

Question 13: Should the Class Proceedings Act or Rules of Civil Procedure be amended to promote mandatory, consistent reporting on class action proceedings and data?

CELA submits that this question should be answered in the affirmative. Compiling and analyzing the relevant data will greatly assist in tracking class action activities, and determining whether the CPA regime is effective, efficient and equitable. In this regard, CELA recommends the approach used in Quebec, where a publicly accessible registry has been established in relation to class actions in the province.³⁹

³⁷ SO 1993, c 28.

³⁸ *Ibid*, s 84(7).

³⁹ LCO Consultation Paper, pages 34-35. See also art 1050.2 CCP. The Quebec registry can be accessed at: https://services12.justice.gouv.qc.ca/RRC/RRC_Public/Demande/DemandeRecherche.aspx.

In our view, it is preferable to entrench a clear reporting obligation directly into the *CPA* (with corresponding changes to the Rules), together with a new provision that compels the Ontario Legislature (or an appropriate Standing Committee) to conduct a mandatory public review of the Act every five to seven years.⁴⁰ Even if the *CPA* is amended as recommended by CELA or other stakeholders, it would be unacceptable to allow the updated legislation to remain unchanged and unreviewed for another 25 years. CELA submits that periodic and evidence-based public reviews of the *CPA* will undoubtedly help keep the Act in step with changing circumstances, new challenges or emerging judicial trends.

IV. CONCLUSIONS

For the foregoing reasons, CELA concludes that the past 25 years of experience have demonstrated that there is room for considerable improvement in the *CPA*, particularly in relation to costs, certification, evidentiary matters and appeal procedures. The need for *CPA* reform is particularly acute in the environmental context, as various roadblocks in the Act have resulted in infrequent use of environmental class actions, contrary to the previous expectations of CELA, the Ontario Law Reform Commission, and the Advisory Committee on Class Action Reform.

We trust that CELA's views will be taken into account by the LCO as it prepares its next report to outline the key findings and recommendations on potential reforms to the *CPA*. If requested, we would be pleased to speak or meet with LCO representatives to further discuss this important initiative.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION



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⁴⁰ While these kinds of periodic review mechanisms are underutilized in Ontario laws, they exist in several key federal statutes intended to safeguard the environment, such as the *Canadian Environmental Protection Act, 1999*, SC 1999, c 33, s 343 (mandatory review of Act every five years); the *Pest Control Products Act*, SC 2002, c 28, s 80.1 (mandatory review every seven years); and the proposed *Impact Assessment Act* (Bill C-69), s 167 (mandatory review of Act every ten years).