

IADC Calls for Class Action Reforms in Ontario, Canada

The **International Association of Defense Counsel** (IADC) recently submitted to the Law Commission of Ontario (LCO) recommendations for reform to the Ontario Class Proceedings Act (CPA) that could eventually affect class action legislation in Ontario and other Canadian provinces.

The IADC began the initiative in 2014 by forming its Canadian Class Actions Task Force to study and develop positions on key issues that the Ontario government asked the LCO to consider. The LCO has described the project as the most comprehensive assessment of the CPA in more than 25 years.

In a release, the organization said the Task Force is made up of IADC members who are lawyers with class action experience in Canada, the United States and Australia. The Task Force also includes representation from Lawyers for Civil Justice, DRI – The Voice of the Defense Bar and the Federation of Defense and Corporate Counsel, all of which have members who represent and serve as in-house attorneys with companies exposed to class actions in Ontario. All of these organizations, along with the Canadian Defence Lawyers and the Product Liability Advisory Council, supported the Task Force's submission to the LCO.

The release continues:

“The IADC is committed to improving civil justice, and to positive reform of the civil justice system. This includes ensuring fairness in the judicial process and a proper balance between plaintiffs and defendants in litigation procedures in the United States, Canada and other countries as well,” said Gordon McKee, an IADC board member, chair of the Canadian Class Actions Task Force, and a partner at

Blake, Cassels & Graydon LLP in Toronto. “When the Law Commission of Ontario requested stakeholder input as part of its review of class action procedures, the IADC committed to responding on behalf of its members who represent corporate defense interests.”

IADC members include lawyers with large and small law firms, senior counsel in corporate law departments, and corporate and insurance executives. A significant number of IADC members are Canadian, and many other IADC members represent multinational companies with subsidiaries that do business in Canada and/or that have been defendants in class actions in Ontario and other parts of Canada.

“Our corporate defense perception is that class action procedures in Ontario currently are unbalanced and unduly tilted in favor of plaintiffs, and a more level procedural playing field between plaintiffs and defendants is required to achieve fairness and judicial economy,” said Peter J. Pliszka, also a member of the IADC and its Canadian Class Actions Task Force, as well as a partner with Fasken Martineau DuMoulin LLP in Toronto. “We want to help ensure access to just outcomes that are not driven by matters extraneous to the merits of a case.”

McKee added that, for example, the current regime in Ontario can create undue pressure on companies to settle class actions for extraneous reasons such as the high cost of defense, potential impact on shareholder value or business transactions, and negative publicity surrounding a claim regardless of its lack of merit.

The IADC’s Canadian Class Actions Task Force recommendations for more fair and efficient class proceedings in Ontario include:

- Adding a merits analysis prior to or at certification, and giving the court more ability to critically review evidence,

to weed out class actions with little or no merit, and to narrow overly broad class actions at an early stage;

- Requiring the court to consider coordinated case management and discovery as an alternative to a class action where there are a small number of cases, to allow more timely and proportionate resolution of the claims of the putative class members;

- Allowing plaintiffs and defendants equal opportunities to appeal certification decisions, and discouraging wasted resources and costs caused by material changes to the class claims/issues/definition on appeal;

- Codifying transparency and other requirements for third-party litigation funding to prevent unfairness to the parties or the class members and to remove incentives to fund claims with little or no merit; and

- Adopting provisions to address overlapping class proceedings in multiple provinces, including requiring a certification judge to consider whether he or she should defer to an overlapping class action in another jurisdiction.

After considering input from the IADC and other submissions, the LCO says it plans to issue a final report to the Ontario government at the end of this year or in early 2019. It is expected that the LCO's report will also be carefully considered by governments in other Canadian provinces.