

Class Action Task Force

BACKGROUND

- Overlapping, multijurisdictional class actions (class actions commenced in more than one jurisdiction ostensibly covering extra-jurisdictional claimants) impede access to justice. They create confusion for members of the public who may be presumptively included in more than one class action and subject to conflicting court judgments. They also create uncertainty as to the size and composition of class membership in a class action, thereby increasing litigation costs, jeopardizing the viability of existing class actions, and magnifying the risk to law firms litigating such cases. They dissipate court resources as different courts in different jurisdictions might hear and issue decisions on the same set of facts involving the same claimants. The public, the judiciary, and the litigation bar alike are frustrated by the existing system.
- Attempts to address the problem include the creation of model provincial class action legislation by the Uniform Law Conference of Canada and CBA's national class action database. However, problems caused by overlapping, multijurisdictional class actions remain, and seem to be increasing as multijurisdictional class actions become the norm for class proceedings in Canada.
- The CBA took the next step in solving the problem by establishing a National Class Action Task Force, which was launched at the Mid-Winter Meeting in February 2010.
- The Task Force was envisioned a two-pronged initiative. First, it will develop a judicial protocol to consolidate proceedings as an interim solution. It will then seek a permanent, legislative solution for acceptance in all jurisdictions.
- Task Force members include leaders in the class action bar, judges and academics. Lawyers are from both the plaintiff and defence bar, including corporate counsel and lawyers from law firms involved in class action litigation.

CURRENT STATUS

- Task Force first met in April 2010, to discuss the problem of multijurisdictional class actions and potential solutions. A legislative reform proposal involving possible involvement of the Federal Court could have an impact on a judicial protocol. It was decided to tackle this proposal and the protocol simultaneously. Subcommittees to address each aspect were created.
- Task Force obtained an opinion from Professor Patrick Monahan on the constitutional difficulties of legislative reform involving the Federal Court. The Task Force confirmed its decision to give priority to finding less constitutionally contentious ways to address the problem that would not require legislative amendment in all provincial jurisdictions.
- The Protocol Subcommittee completed a draft protocol, which the Task Force approved for consultation. Consultation with CBA members and other class action counsel occurred in June and July 2011, assisted by a short discussion paper.

- As a result of the feedback in the consultation, the draft Protocol was amended, and, together with Cross-Border Protocols developed by the American Bar Association, was endorsed by CBA Council in August 2011. Amendments to the Protocol were primarily to remove the case management provisions for further study by the Task Force.
- In September 2011, the Protocol was endorsed by the Canadian Judicial Council, who encouraged the Task Force to continue its work on case management.
- In October 2011, the Task Force obtained a constitutional opinion from Professor Patrick Monahan about the case management provisions in the draft Protocol, given some concerns raised about their constitutionality in the consultation. The opinion expressed that the provisions would be constitutionally sound.

NEXT STEPS

- The Task Force continues to discuss inclusion of case management provisions in the Protocol.
- The Task Force is monitoring implementation of the Protocol in all Canadian jurisdictions.
- Once the work on the Protocol is completed and it is in use by the courts, the Task Force will assess its effectiveness and then consider options for legislative reform, including the model legislation developed by the Uniform Law Conference of Canada.