CLASS ACTION CLINIC
Windsor Law

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Standing Committee on Justice Policy
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March 4, 2020

Submission Re: Bill 161

The Class Action Clinic at the University of Windsor writes to express concern about proposed changes to the *Class Proceedings Act, 1992*. While the Clinic supports most of the amendments that aim to improve transparency and efficiency of the class action system, the two proposed changes to the certification test are significant and, if implemented, would undermine the improvements to the statute, disadvantage Ontario residents vis-à-vis other Canadians, and weaken, not strengthen, the justice system and rule of law in the province.

OUR MISSION + SERVICES

The Class Action Clinic's central mission is to serve the needs of class members across Canada. Launched in October 2019, it is the first not-for-profit organization designed to provide class members summary advice, assistance with filing claims in settlement distribution processes, and representation in court proceedings. The Clinic is also dedicated to creating greater awareness about class actions through public education, outreach, and research. The Clinic does not initiate or conduct class actions, and is not funded by either the plaintiffs' or defence bar, or any industry group. Its sole purpose is to help individual class members, and in doing so, better fulfill the access to justice promise of the class action regime. A more complete description of our services is attached as Appendix A or can be found on the Clinic's website: www.classactionclinic.com.

The Clinic is directed by Jasminka Kalajdzic, an Associate Professor of Law at the University of Windsor, and Canada's leading class action scholar. Her c.v. is attached at Appendix B. Andrew Eckart, formerly a class action litigator, serves as Supervising Lawyer to oversee the work of law student case workers.

PROPOSED SUPERIORITY CLAUSE

Bill 161 stipulates that a judge may only certify an action as a class proceeding if "it is superior to all reasonably available means of determining the entitlement of the class members to relief". The language comes from U.S. Federal Rule 23 (the American class action law) and is not used anywhere else in Canada. It is a more demanding requirement than the "preferable procedure" test currently used in Ontario and the other common law provinces.[1] Any suggestion that the superiority provision is merely a codification of the current preferable procedure jurisprudence is in error: as a matter of statutory interpretation, courts are bound to consider that amendments which add language must mean something and are not superfluous.[2]

There are two problems with the superiority requirement. First, the current preferable procedure criterion requires the court to consider alternative procedures "for resolving the common issues". In contrast, the proposed superiority clause provides that a judge may only certify a class action if satisfied that the class action is the superior method "for resolving class members' entitlement to relief" or for "addressing the impugned conduct of the defendant". This language raises the standard for certification considerably in that it requires that a judge only certify a class action if it is capable *of resolving the class members' claim entirely*. The requirement is inconsistent with s. 6 of the CPA which states that the existence of individual issues such as the assessment of damages does not preclude a class action.

Second, the inclusion of an enumerated list of other "reasonably available means" in the superiority provision puts the onus on the plaintiff to prove none of the other procedures is superior. This marks a shift in the burden of proof with respect to alternatives to the class action and makes certification much harder to obtain.

While the Law Commission of Ontario's *Class Action Report* recommended that judges give more weight to the existence of recall programs and defendant compensation schemes, it explicitly rejected a proposal that the certification test be modified. The language of the statute is, in the words of the Supreme Court of Canada, "broad enough to take into account all reasonably available means of resolving the class members' claims including avenues of redress other than court actions."[3]

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[1] *Class Proceedings Act, 1992*, SO c.6, s 5(1)(d) ["CPA"].

[2] Ruth Sullivan, "Statutory Interpretation in a New Nutshell" (2003) 82 Can. Bar Rev. 51 at 60. The author cites the following presumption in analyzing legislative texts: "No tautology ('the legislature does not legislate in vain'): there are no superfluous words in legislation; every feature of the text has an identifiable role in the legislative scheme."

[3] Law Commission of Ontario, *Class Actions: Objectives, Experiences and Reforms: Final Report* (July 2019) at 49, citing *AIC v. Fischer* 2013 SCC 69 at para 19.

If the goal of the superiority provision is to make courts consider all potential mechanisms of resolution, the proposal is redundant, as the preferable procedure criterion already compels courts to do so. If the goal is to "incentivize defendants to establish voluntary compensation regimes or protocols",[4] the proposal is unnecessary, because defendants already have those incentives and regularly do offer compensation, resulting in class certification being denied[5] or liability for damages reduced.[6] If the goal is to make fewer cases possible to pursue as class actions, consumers will have fewer options for redress and less access to justice than their counterparts in other provinces.

PREDOMINANCE REQUIREMENT

Bill 161 also makes certification harder by importing a second American principle: it requires that "questions of fact or law common to the class predominate over any questions affecting only individual class members." This language is identical to the predominance requirement in US Federal Rule 23(b)(3). In a 2013 antitrust case brought by consumers against a cable provider, the US Supreme Court described predominance as a "demanding" requirement that merits a "close look".[7] Together, the predominance and superiority requirements are referred to by American academics as the criteria that limit the availability of class actions even where class members share common questions of fact or law.[8] There is no question that Ontario judges will have little choice but to interpret the provision as also narrowing the commonality assessment and reducing the possibility of certification.

Predominance in the United States has been interpreted to mean that the common issues must resolve the litigation, or dwarf the individual issues in number or importance, or constitute the

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[4] Ontario, Legislative Assembly, *Official Report of Debates (Hansard),* No. 143 (February 19, 2020) at 6971 (Hon. Doug Downey).

[5] See e.g. *Kaplan v. Casino Rama*, 2019 ONSC 2025. [Judge noted that the defendant had done everything right following a data breach, plaintiff conceded damages would be nominal, and court ultimately denied certification.]

[6] See e.g. *David v Loblaw*, 2018 ONSC 198. [The court found with respect to Loblaw's offer of $25 gift cards to customers following the bread price-fixing scandal that it "has a right to engage in a marketing campaign, and it equally has a right to reach out to consumers to settle part of its exposure in class action litigation."]

[7] *Comcast Corporation v Behrend*, 569 U.S. 27 (2013).

[8] "Although [Rule 23(b)(3) offers what its drafters called an 'adventuresome' opportunity to unite and bind a class whose members' claims share common questions of fact or law, it has always contained hedges that cabin its applicability. These hedges include the requirements of predominance and superiority and the unlimited right of a class member to opt out. Ultimately, Rule 23(b)(3) creates the possibility of a binding judgment on all members of a mass tort class, but the limitations embedded in the rule make such a judgment – and its potential benefits – difficult to realize." Andrew Bradt, "Something Less and Something More: MDL's Roots as a Class Action Alternative" (2017) 165 Penn. L. Rev. 1711 at 1711-1212 (citations omitted).

majority of contested issues.[9] This requirement has resulted in whole categories of cases being excluded from class action treatment. Mass torts – like defective medical devices or pharmaceutical cases – are not litigated as class actions in the U.S.; instead, a multi-district litigation procedure has developed to deal with the thousands of individual lawsuits that are launched on behalf of harmed consumers. For example, mass accidents are considered to be unsuitable for class treatment because of the many individual issues associated with personal injuries.[10] Creating barriers to class treatment will either decrease access to courts or, as in the case of mass torts in the U.S., increase the number of cases flooding the courts.

The predominance requirement will make many types of mass wrongs difficult or impossible to litigate as class actions. Successful cases in Canada that could not have been pursued as class actions if the predominance test existed, because they involved few common issues and many individual issues, include:

- **Institutional abuse cases**: Indian Residential Schools and other institutional abuse cases were certified on the basis of one or a handful of common issues (the question of whether the Canadian government and churches owed fiduciary duties or duties of care to the class[11]).
- **Unpaid overtime**: in some cases, a single common factual issue has been certified, namely, whether class members worked overtime hours for which they were not paid.[12] In others, the court certified the action even though individual determinations of how many hours were worked by individual class members for which compensation was not received and whether those hours were required or permitted by the employer required a case-by-case evaluation of the evidence relating to each employee.[13]
- **Professional negligence**: a class action against lawyers was certified on the basis of three common issues, namely, whether the lawyers owed duties of care and did they breach them.[14]

Although AG Downey stated in his introduction of the Bill that it will be up to Ontario judges to interpret "predominance" in the specific context of CPA's evidentiary standard, the uncertainty created by the amendment will preoccupy courts for some time and increase risks and costs to

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[9] Caroline Gentry, "A Primer on Class Certification Under Federal Rule 23" (American Bar Association Corporate Counsel CLE Seminar, February 2014) at 6, online: https://www.classactiondeclassified.com/wp-content/uploads/sites/26/2017/08/a_primer_class_certification_under_federal_rule.pdf.

[10] *Amchem Products, Inc. v Windsor*, 521 U.S. 591 (1997) is a U.S. Supreme Court decision that is universally considered to be the pivotal case on the need to read "predominance" and "superiority" narrowly, and is responsible for the restrictive approach to class actions for the next two decades.

[11] *Cloud v. Canada (Attorney General),* 2004 CanLII 45444 (ON CA).

[12] *Eklund v. Goodlife Fitness Centres Inc.*, 2018 ONSC 4146.

[13] *Fresco v. Canadian Imperial Bank of Commerce*, 2012 ONCA 444.

[14] *Rezmuves v. Hohots*, 2019 ONSC 4871.

litigants and the system as a whole. Moreover, the new requirement will inevitably lead to Ontario becoming an outlier in what is a largely consistent national approach to certification. In turn, these two changes disrupt a mature body of case law. To what end?

RESTRICTING ACCESS TO CLASS ACTIONS IS NOT SMARTER, STRONGER JUSTICE

There is simply no evidence that there are too many class actions or a problem of unmeritorious litigation in Ontario. None was cited by the Law Commission in its Final Report, and none has been discussed in any of the press briefings associated with the Bill.

The Ontario government has prided itself on being 'for the people', and making Ontario 'open for business'. Restricting class actions does not further either of these policy goals. First, the people of Ontario deserve to have the same robust procedural tools that are available to other Canadians to pursue those who are negligent or otherwise engaged in misconduct. The other measures introduced in Bill 161 to improve accountability and transparency in class actions help class members attain access to meaningful justice. The Class Action Clinic enthusiastically supports these measures. Putting class actions out of reach, however, especially in areas of product liability or medical injury, decreases incentives for companies to act responsibly.

Moreover, even governments that are particularly sympathetic to business interests recognize that markets require rules to work properly; for example, laws against fraud or anti-competitive behaviour protect consumers *and* businesses that seek to operate in a fair marketplace. Those rules need to be enforced. Civil litigation (as opposed to regulatory agencies) is an important way to enforce regulations and thus promote the rule of law. Specifically, in the words of a former Attorney-General, class action litigation is a "cost-effective way to promote private enforcement and thereby take some of the pressure off enforcement by the budget-restrained government ministries."[15] Promoting class actions, as opposed to restricting them, therefore, is good for Ontario.

Adopting the restrictive American approach to class actions is also fundamentally at odds with the history of class actions in Canada: the CPA was drafted specifically to avoid the restrictive analysis used by American courts. Where the U.S. Supreme Court frames class actions as the "exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only",[16] the Supreme Court of Canada has repeatedly stated that the CPA "should be construed generously to give full effect to its benefits".[17] The proposed changes to

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[15] Ian Scott and N. McCormick, *To Make a Difference: A Memoir* (Stoddart, 2001) at 182, as cited in Hon. I. Binnie, "Mr. Attorney Ian Scott and the ghost of Sir Oliver Mowat" (Spring 2004) 22 Advocates' Soc. J. No. 4, 4. For the Conservative argument favouring private enforcement by way of class action litigation, see Brian T. Fitzpatrick, *The Conservative Case for Class Actions* (U. Chicago Press, 2019).

[16] *Comcast Corporation v Behrend*, 569 U.S. 27 (2013).

[17] *Hollick v. Toronto (City),* [2001] 3 S.C.R. 158.

the certification test are inconsistent with the long-standing Canadian approach to mass harm redress.

The clients that the Class Action Clinic serves welcome a modernized class action regime that gives them faster, more transparent relief and more meaningful access to justice. While we support most of the proposed changes to the CPA, the superiority and predominance requirements would make class actions riskier, less predictable, more expensive and more time-consuming in the short term, and in all likelihood less accessible in the long term. The American experience with these certification requirements and basic tools of statutory interpretation suggest that these changes will have a negative impact on consumers, shareholders and others seeking redress. We respectfully but strongly urge the government to remove these provisions from the proposed amendments.

Sincerely,

Jasminka Kalajdzic Andrew Eckart
Att.

Appendix A

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University of Windsor

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LEGAL INFORMATION & ADVICE

Members of the public often have a vague idea that they may be covered by a class action but do not know what to do to 'be a part of it'. In fact, class members usually need to do nothing to participate formally in the action, but most people, including lawyers who do not practice class action law, are unfamiliar with Ontario's opt-out system. Class members may have received a court notice or other correspondence in the mail confirming they are part of a class action, but need assistance understanding the information. Still others may have been notified that a class action has settled, and they need help figuring out what the settlement means for them. All of these legal questions can be addressed by the Class Action Clinic's team of law students and review counsel. Such assistance will reduce the possibility that a class member misses a deadline or fails to take steps to protect their interests in the litigation. Review counsel and law students will, in the appropriate case, represent class members in court.

SETTLEMENT CLAIMS

It is quite common for approved settlements and judgments to include a claims procedure. Class members receive notices and then must complete claims forms and/or provide documents or other information to a claims administrator who determines the class member's eligibility. These are sometimes complex processes, and class members often need assistance completing the forms. In certain cases, traditional legal clinics have provided support; poverty law clinics can now refer the work to or rely on the Class Action Clinic for class action expertise, so that they can devote scarce resources to traditional clinic work. In other cases, class members have hired lawyers

or “form-fillers” to assist them, but have been mistreated or financially exploited. The Clinic will be an additional resource to class members who require assistance completing claims forms and providing the necessary documents to best support their claims.

CLASS ACTION DATABASE

There have been repeated calls for empirical data about class actions, from both academics, judges and the bar. It is a call supported by all stakeholders interviewed for the Law Commission of Ontario’s (LCO) Class Action Project. The LCO is constructing a database that will be free to the public, and that will contain essential information about past and current class actions, including the name of parties, pleaded causes of action, counsel information, and outcomes. The LCO intends to transfer the database to Windsor Law and the Class Action Clinic will maintain it going forward. Information about new class actions will be available on the database and will serve as a form of notice to potential class members, in addition to providing valuable information to academics, lawyers and judges.

MORE INFORMATION

For more information and to access links to the extensive media coverage of the Clinic, visit www.classactionclinic.com.