CONSUMERS COUNCIL OF CANADA

June 3, 2020

Hon. Doug Downey
Ministry of the Attorney General
720 Bay Street McMurtry-Scott Building, 11th Floor
Toronto ON M7A 2S9

Re: Class Proceedings Amendments, Bill 161, the Smarter and Stronger Justice Act

To the Honourable Doug Downey and the Standing Committee on Justice Policy:

On behalf of the Consumers Council of Canada ("the Council"), I'm writing to share the Council's reservations about some proposed changes to the *Class Proceedings Act* included in Bill 161, *The Smarter and Stronger Justice Act*.

The Council continues to agree with the thrust of the reforms proposed by the Law Commission of Ontario (LCO) following its extensive consultation process on class actions in Ontario. And it supports many elements of Bill 161 proposed by the present government.

However, the Council has deep concerns about changes related to the *Class Proceedings Act* that would increase the certification threshold for class actions.

Following the introduction of Bill 161, the LCO offered a follow up letter to the Office of the Attorney General outlining support for certain provisions within the Bill and strongly opposing other measures, such as the newly introduced "predominance" and "superiority" tests – these tests were rejected in the analysis by the LCO.

The view of the Council closely aligns with that of the LCO. The Council is concerned that the provision (s.5(1.1), or the "predomination requirement"), by increasing the requirements to establish that class action is the preferable procedure, will impose unnecessary barriers to access to justice for consumers and other claimants.

For example, the Government of Ontario has applied inconsistent reasoning to require predomination in Ontario when it has, for good reason, subscribed to the national opioid healthcare cost recovery litigation underway in British Columbia. This litigation likely could not have been undertaken under the Ontario government's proposed legislative changes due to the predomination element of Bill 161. British Columbia does not have a predomination requirement of preferable procedure. Nor should Ontario.

As you are aware, class actions have been a way for Ontario consumers to obtain fair treatment and redress concerning marketplace irregularities such as price fixing and privacy breaches.

Patients have sought justice when harmed by unsafe drugs, medical devices and unsound care practices.

Such groups of harmed consumers – often including some of the most vulnerable persons in Ontario – should have their access to justice protected, enhanced and improved, not degraded. Class actions often provide the only path to both justice and meaningful compensation. The existence of a potent regime of class actions is an important deterrent to misconduct, and helps reduce the need for direct government action in the marketplace.

The introduction of the “predominance” amendment will profoundly advantage frequently powerful defendants at the expense of plaintiffs and run counter to the stated goals of the present government (i.e. to make the justice system faster and cost-effective for the taxpayer and hold the powerful accountable for their actions). In fact, and as the LCO has expressed, the proposed changes will “increase costs, lengthen delays, and undermine the access to justice and judicial efficiency goals of the [Ontario Class Proceedings Act] and class actions generally.”

The present government has declared an intention to be “For the People.” The changes to the *Class Proceedings Act* included in Bill 161 will not advance the interests of the people of Ontario. A requirement for a “predominance” test is inconsistent with Ontario’s long-standing, successful approach to class actions. It puts justice even further beyond the reach of the average person in Ontario than is unfortunately already the case.

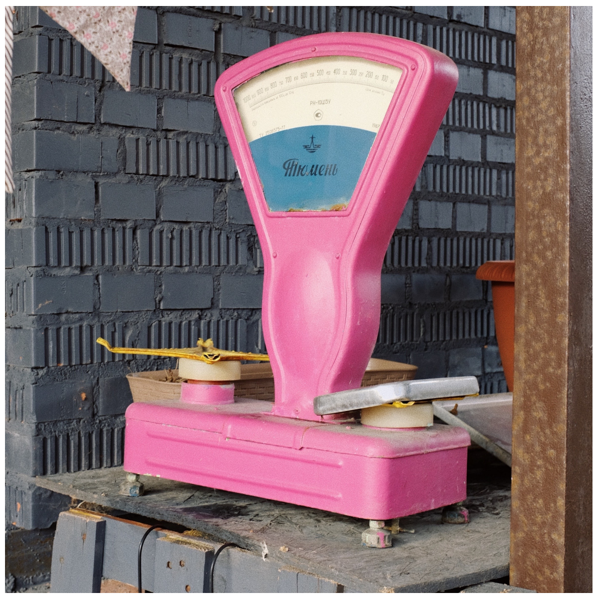
These specific measures will mean the people of Ontario will have comparatively fewer legal rights and less access to justice than can be found elsewhere in Canada.

Consumers Council of Canada strongly encourages the government to consider its more detailed recommendations contained in its Spotlight Report titled *Class Actions and Access to Justice in Ontario,* focus on passing the constructive reforms contained within Bill 161, but to reconsider and remove from the bill the “predominance” amendment to the *Class Proceedings Act.*

Sincerely,

Don Mercer
President
Consumers Council of Canada

Class Actions and Access to Justice in Ontario



Consumer Activated Spotlight

May 2020

Consumers Council of Canada

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A Consumers Council of Canada *Spotlight Report* concerning class actions and access to justice in Ontario. Bill 161, *The Smarter and Stronger Justice Act*, while including many important and recommended reforms, includes changes specific changes to the *Class Proceedings Act* that threaten access to justice and redress for Ontario consumers and tilts marketplace power away from the people of Ontario towards powerful economic interests. Those changes by imposing new "predominance" and "superiority" tests before certification of class action lawsuits could lead to the need for more, not less direct government involvement in the marketplace, by removing a tool of consumers to obtain both justice and redress when harmed physically and financially.

Keywords: class action, consumer protection

Class Actions and Access to Justice in Ontario

I

Introduction

Consumers' ability to act for themselves, alone or in association with others, represents a fundamental right to justice, which should not be denied.

Consumers Council of Canada is a non-profit, voluntary consumer organization that addresses multiple consumer issues impacting housing, financial services, energy pricing and supply, telecommunications, consumer product and food safety, trade practices, regulatory modernization and many others.

The Council seeks an efficient, equitable and safe marketplace in which consumers can exercise their rights and responsibilities. It works closely with other consumer organizations, national and international standards bodies, industry self-regulatory bodies, and governments at all levels to achieve this objective.

The Council therefore takes an interest in maintaining and improving protections for consumers and their access to justice to obtain redress for harms, such as afforded by an effective class action regime. It works towards a better marketplace for Canadians.

II

Background

Serious gaps exist in consumers’ access to justice in Ontario which should not be widened by new measures of government or business .

Millions of consumers in Canada face problems in the marketplace each year. A significant number of them are vulnerable consumers. The vulnerability of many consumers are created by conditions in the marketplace.

The large numbers of seeking free legal assistance as well as the large numbers of people who feel justice is unachievable on their own, for reasons of time or cost, demonstrates the need for legal procedures that allow consumers to associate their claims in order to achieve the economies of scale necessary to pursue justice, especially where the nature of the harms are complex to prove.

More not fewer ways for consumers to economically obtain justice and redress are required. This lack of access to justice is costly to injured individuals, society and to taxpayers, who are too often left to foot the bill for damages done.

Repeated, common, unresolved problems consume consumers

A Consumers Council of Canada research report, *Consumer Protection, Civil Enforcement & Consumer Advocacy*, completed in 2009 with the assistance of the Ontario government, Legal Aid Ontario and the Office of Consumer Affairs, Industry Canada, found that a large number of consumer protection issues arise repeatedly. Unfair business practices and other statutory offences account for most of the reported consumer/debtor problems, as compared to scams or frauds or honest disputes, it was reported. And at least 50 percent of consumer clients at agencies, law clinics or student legal aid societies have been the victims of an offence under one or more statutes in Ontario. In some other provinces this is as high as 65 percent. Among the remedies for lack of access to justice identified by the Council is “assistance for class action lawsuits.” And the Consumers Council of Canada experienced directly the significance of this when notices of class action settlements against payday loan lenders created the greatest traffic to its website to do with a single topic in the history of its website, an outcome facilitated almost entirely by ‘organic search’, as consumers looked for a source of information and referral information concerning the settlement that they could trust. This is not a surprising outcome. Survey research conducted nationally for Consumers Council of Canada by Environics and reported in the Council’s 2019 report *Super Complainers: Greater Public Inclusiveness in Government Complaint Handling*, found consumer organizations as trustworthy or effective to assist initially with a consumer complaint as the courts or government and more trustworthy than lawyers, industry arbitrators, news media, manufacturers or retailers or social media. Government is considered to be only somewhat or not very responsive to their complaints against companies. They find it difficult to identify where to complain to government. Interestingly, the research found the public will blame governments, not corporate lobbyists for a failure to improve handling of consumer complaints.

The high costs of consumer problems

The Canadian Forum on Civil Justice (CFJC) has an impressive body of work concerning the lack of access to justice and its costs. A CFJC report titled *The Cost of Justice: Weighing the Costs of Fair & Effective Resolution to Legal Problems* found that in Canada "between 45-48% of the population has a legal problem at any given time with just a small proportion of these addressed by the courts … or with formal legal representation." This study found a tendency for legal problems to cluster, "often leading to additional health, economic and social problems that have significant costs for individuals, their families, businesses, and society as a whole." It added: "… not knowing where to seek help or feeling powerless to do so are significant reasons given for inaction." It warned of "the very considerable social costs of non-resolution that are borne by social and health services, income supports, disability plans, employment insurance, and other services." And it pointed out the mounting evidence that members of the public cannot afford to resolve their legal problems on their own.

Consumer problems lead the list of civil justice problems

The CFJC, in its 2016 report titled *Everyday Legal Problems and the Cost of Justice in Canada: Overview Report*, identified through a national survey that the most frequently occurring everyday legal problems are *consumer* [our emphasis], debt and employment problems, and that "within any given three-year period, adult Canadians experience approximately 35,745,000 separate everyday legal problems." These problems were found to cost Canadians just over $7.7 billion a year. Assisting consumers with their problems is demonstrably a 'pocket book issue' for consumers. The CFJC estimated the costs to the state of everyday legal problems is at least $800 million a year. Access to justice is demonstrably a ‘pocket book issue’ for taxpayers, too.

Sensitive to unfairness: Canadian-born, less-educated and seniors

The CFJC’s report *Everyday Legal Problems and the Cost of Justice in Canada: Born in Canada* said: (1) People living in Canada who were born here are more likely than those who were not born in Canada to feel the justice system is unfair. (2) The largest percentage of shared opinion (39.3%) that the legal system works better for rich people than poor people was among those people born in Canada who felt this strongly. This is followed by 36.4% of people born in Canada who somewhat agree that the legal system works better for rich people than poor people. This may indicate people more experienced with Canada’s justice system are more dissatisfied by it.

The CFJC’s report *Everyday Legal Problems and the Cost of Justice in Canada: Education* found a sharp divide based on education between those who felt the system of justice is both fair and fair to both rich and poor. People with high school or less education are more likely to find the system unfair.

Seniors are the age demographic most likely to feel Canada’s system of justice is unfair or unfair based on wealth, the CFJC reported in *Everyday Legal Problems and the Cost of Justice in Canada: Age*.

What region has the highest incidence of everyday legal problems?

CFJC reported in *Everyday Legal Problems and the Cost of Justice in Canada: Region* that the region of Canada with the highest incidence of everyday legal problems is Ontario.

Class action offers a route to justice

Among other measures, speedy and efficient certification and hearings of class action lawsuits is one way to make access to justice more affordable for people in Ontario harmed in the marketplace. Class action certifications and successful suits, both, create something of a market incentive to reduce the number of consumer problems. Impediments to certifying class actions will further reduce the ability of people to turn to the courts to address their problems. As it is, the CFJC found a mere 7% of people have reported appearing before a court or tribunal to resolve their problems. And only 19% obtained legal advice, even though 81% of those people reported the advice they obtained was helpful. Consumers can benefit from a path to advice and representation.

Consumer organizations can help resolve problems, achieve justice

The CFJCS research also found that most consumers (68%) who turned to advocacy organizations for non-legal assistance found it helpful. This despite the fact, as several Council and other's research reports have found, consumer advocacy organizations report being overwhelmed and significantly under funded to confront their responsibilities assisting and representing consumers. In fact, the Council's previously referenced "Super Complainers" report found the public believes (86 percent) that governments should seek more meaningful relationships with consumer organizations to address consumer welfare and harm. Consumers see benefit in the investment of penalties levied against misbehaving businesses and regulatory fees charged to all businesses being invested in consumer and public interest organizations to conduct independent consumer welfare/harm impact analysis..

Barriers to legal and non-legal assistance continue to be erected, to the detriment of consumers, significant numbers of whom (49%), the CFJC reported, found negotiation with the other party was not a useful method. Even those people who achieved some kind of resolution of their problems felt having some kind of support would have improved their outcomes.

III

Commentary on Ontario Bill 161

The time has come to ensure that access to justice is enhanced for Ontario residents, especially as consumers.

General comments

The Council agrees with the thrust of the reforms proposed to the Class Proceedings Act (CPA) by the Law Commission of Ontario following its extensive consultation process, in addition to your own review and consultations.

The time has come to modernize the CPA, to ensure that access to justice is enhanced for Ontario residents, especially as consumers.

Enhancement requires increased speed of process and certainty of availability of the economies of scale essential to consumer access to justice.

Measures supported by the Council

The following items in Bill 161 are supported by the Council:

- The cy pres provisions (new s.27.2), which will ensure appropriate distribution of unclaimed settlement or judgement proceeds to worthy organizations, which the Council can hope will include organizations like itself and other quality organizations dedicated to consumer and public interest causes such as the Public Interest Advocacy Centre and the Canadian Environmental Law Association.

- The carriage provisions (new s. 13.1), which are intended to speedily resolve carriage contests. This is a very good thing to achieve. This provision will have a real impact on a facet of class action practice that causes extensive delay and indirect costs to class members through attribution of services on carriage contests in the ultimate fee request presented to the court by class action counsel.
- The provision (new s.5.1) respecting multi-jurisdictional class proceedings, which is in accordance with comments by practitioners who are involved in class proceedings across Canada, and leading academic publications emphasizing the need for judicial comity and efficiency in Canada.
- The provision (new s. 17(4) to (6)) respecting improved notice mechanisms, which will increase the chance of consumer participation in class actions.
- The provision (new s. 27.1) respecting settlement approval, which improves the judicial mandate and the science of adjudication by specifying the factors that ought to go into settlement approval, and justifiably extend the monitoring function of the court.
- The provision (new s. 33.1) for judicial approval of third-party funding arrangements, which offers prospects for increased access to justice.

This list is not exhaustive.

The Council generally supports implementation of the reforms proposed by the Law Commission.

Measures opposed by the Council

Two provisions in Bill 161 would erect barriers to access to justice for consumers:

1. The Council is concerned that the provision (new s. 4.1) mandating that summary judgement motions be heard in advance of certification will delay the decision on certification in almost every case by two years or longer, while defendants embark upon summary judgement motions. This is unnecessary. The existing jurisprudence recognizes the court's principled discretion to permit an advance summary judgement motion while maintaining the necessary focus on the certification decision.
2. The Council is concerned that the provision (new s.5(1.1)), by increasing the requirements to establish that class action is the preferable procedure, will impose unnecessary barriers to access to justice for consumers and other claimants. This refers to the pre-domination requirement. The Council notes that this requirement was rejected in the analysis by the Law Commission. It emanates from American class action practice. Note that the American state and federal courts are well known to be far more efficient and expeditious than Ontario courts, so a rejection of class procedure south of the border does not doom a case to the typical 10+ year odyssey that goes on in Ontario civil litigation. The Government of Ontario is inconsistent to require predomination when it has, for good reason, subscribed to the national opioid healthcare cost recovery litigation underway in British Columbia, which it probably could not have undertaken under the proposed legislation due to the predomination element of Bill 161. British Columbia does not have a predomination requirement of preferable procedure. Nor should Ontario.

   In addition to the predomination requirement, the new preferable procedure test implies that access to justice through administrative tribunals and other legal processes is automatically superior to courts. In the Council's experience, this is not always the case. The ability of an aggrieved consumer to choose the civil justice system by way of class action is important, given the appropriateness of civil remedies. Criminal courts (provincial and superior) have jurisdiction to order restitution to victims of crime. However, not all problems affecting consumers can be efficiently addressed case by case by tribunals capable of ordering restitution or by courts. The Superior Court, by hearing class actions, can determine compensation due to consumers and others. Also, that aggrieved consumers can elect to pursue justice and restitution through class action provides an incentive to potential plaintiffs to avoid misconduct and respect other forms of dispute resolution. Removing this has the potential to increase marketplace misconduct, increase the requirements for direct government surveillance and enforcement concerning business conduct, and reduce the efficiency of both alternative dispute resolution options and the system of justice.

Measures recommended by the Council

The Council finds that a better bill would appropriately address the aforementioned concerns and include:

1. a modified definition of consumer for purposes of the bundle of rights set out in Consumer Protection Act, 2002;
2. a modification of the preferable procedure requirement to deem class procedure preferable unless the defendant satisfies the court that it would be unworkable;
3. no cost of consumer claims;
4. provision for consumer claim representatives; and
5. effective judicial case management.