



OBA Submission on Bill 161, *Smarter and Stronger Justice Act, 2020*

Submitted to: The Standing Committee on
Justice Policy

Submitted by: The Ontario Bar Association



ONTARIO
BAR ASSOCIATION
A Branch of the
Canadian Bar Association

L'ASSOCIATION DU
BARREAU DE L'ONTARIO
Une division de l'Association
du Barreau canadien



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Introduction

The Ontario Bar Association (“**OBA**”) appreciates the opportunity to provide this submission to the Standing Committee on Justice Policy with respect to Schedules 4 and 16 of Bill 161, *Smarter and Stronger Justice Act, 2020*.

The Ontario Bar Association

Established in 1907, the OBA is the largest volunteer lawyer association in Ontario, with over 16,000 members who practice on the frontlines of the justice system, providing services to people and businesses in virtually every area of law in every part of the province.

Each year, through the work of our 40 practice sections, the OBA provides dozens of submissions to government for the profession and the public interest and delivers over 325 in-person and on-line professional development programs to an audience of over 12,000 lawyers, judges, students and professors.

Subject of Submission – Bill 161, Schedules 4 and 16

This submission is comprised of two parts:

- Part 1 – Bill 161, Schedule 4: *Class Proceedings Act, 1992*
- Part 2 – Bill 161, Schedule 16: *Legal Aid Services Act, 2019*



Part 1 – Bill 161, Schedule 4: *Class Proceedings Act*, 1992

Introduction

This part of the submission has been prepared on behalf of the OBA Class Actions Law Section which is composed of class actions law practitioners representing both plaintiff and defence side clients.

We commend the government for accepting many of the OBA's recommendations to streamline the class action process and reduce delays – including changes that would better manage multi-jurisdictional cases and carriage motions, and eliminate unnecessary appeals.

A Consensus Risk of the Proposed Certification Changes: The proposed changes to the certification requirements to introduce superiority and predominance requirements are an area of significant contention. While there is no consensus amongst the class actions bar about the advisability of the changes, or the specific terms of the requirements, our members recognize that there are cases involving socially important issues that are likely not amenable to alternative forms of litigation, and that involve significant individual issues (the Indian Residential Schools case is an example). The proposed certification changes could put this category of cases at risk of never being litigated at all.

Recommended Consensus Revisions

For the purposes of this submission, the OBA is only providing recommendations on three specific sections of the Bill that, on a consensus basis, our members believe could be amended to better achieve the government's purpose and the interests of the public and our members. As you may expect, our members have differing positions on other various proposed amendments. Those positions are not addressed in this submission.



Based on our members' knowledge of the applicable legal principles and their thorough understanding of this area, we recommend revisions to the following amendments under Schedule 4 of Bill 161 to the *Class Proceedings Act*:

1. Section 4.1 - Early Resolution of Issues
2. Section 22 (1.1) – Costs of Notice of Certification
3. Section 29.1 – Mandatory Dismissal for Delay

1. Section 4.1 – Early Resolution of Issues

The Issue

Section 4.1 of the Act permits motions to be brought prior to the hearing of the certification motion in an effort to dispose of actions or to narrow the issues or evidence at an early stage of the proceeding.

The provision as currently drafted does not allow for the court to order that a motion be heard after the certification motion. The discretion is limited to ordering that the other motion be heard together with the certification motion. There may be circumstances in which it is appropriate for a proposed motion to be heard after the certification motion, and not prior to, or concurrently with, the certification motion.

As such, the proposal below is being recommended:

Early resolution of issues

s. 4.1 *If, before the hearing of the motion for certification, a motion is made under the rules of court that may dispose of the proceeding in whole or in part, or narrow the issues to be determined or the evidence to be adduced in the proceeding, that motion shall be heard and disposed of before the motion for certification, unless the court orders ~~that the two motions be heard together~~ otherwise.*



2. Section 22 (1.1) – Costs of Notice of Certification

The Issue

Section 22 of the Act is amended by adding subsection 1.1 in order to award the costs of a notice of certification to a representative plaintiff only if they are successful in the class proceeding, and not at any earlier time.

With this new provision, there is no discretion to award costs at an earlier stage of the proceeding. The proposed amendments (please see below) provides for some flexibility through judicial discretion in exceptional cases, or where agreed to by the parties. If plaintiffs are not able to recover costs of the notice program (following a potentially costly certification battle), notice programs may be less comprehensive and robust. This would not support access to justice or be in the public interest. Furthermore, this flexibility also allows for the more unusual cases where the defendants have a greater interest than the plaintiffs in a more robust notice program.

As such, the proposal below is being recommended:

Exception, costs of notice of certification

Section 22

(1.1) Despite subsection (1), the costs of any notice under section 17 may be awarded to the representative plaintiff only in the event of success in the class proceeding and, for greater certainty, shall not, absent exceptional circumstances or the parties' consent, be ordered to be paid by the defendant at any earlier time in the proceeding.

3. Section 29.1 - Mandatory Dismissal for Delay

The Issue

The new Section 29.1 provides for a process for dismissing a proceeding for delay in order to reduce the number of dormant cases clogging up the system. The OBA appreciates that the government is moving on a recommendation put forward by its members to eliminate dormant cases, however in order to strike a balance it is proposed that this does not preclude



a representative plaintiff from filing supplementary evidence that was not reasonably available to them when they filed their final and complete motion record.

The proposed amendment to Section 29.1 is intended to ensure that the representative plaintiff is not precluded from filing, after its final and complete motion record for the motion for certification is filed, any evidence that was not reasonably available to the representative plaintiff prior to the first anniversary of the commencement of the action. For example, the representative plaintiff may file a final and complete certification record before the first anniversary of the day on which the proceeding was commenced.

However, additional evidence may arise after the first anniversary that was not reasonably available to the representative plaintiff prior to that date. As drafted, the filing of this additional evidence by the representative plaintiff after the first anniversary could give rise to a dismissal of the proceeding for delay on the basis that a final and complete motion record was not filed by the first anniversary of the commencement of the proceeding. The amendment seeks to ensure that the filing of evidence that was not reasonably available to the plaintiff at the first anniversary of the commencement of the claim could not trigger a motion for dismissal for delay.

As such, the proposal below is being recommended:

Mandatory Dismissal for Delay:
Section 29.1

S. 29.1 (1) The court shall, on motion, dismiss for delay a proceeding commenced under section 2 unless, by the first anniversary of the day on which the proceeding was commenced,

- a) the representative plaintiff has filed a final and complete motion record in the motion for certification;***
- (b) the parties have agreed in writing to a timetable for service of the representative plaintiff's motion record in the motion for certification or for completion of one or more other steps required to advance the proceeding, and have filed the timetable with the court;***
- (c) the court has ordered that the proceeding not be dismissed and has established a timetable for service of the representative plaintiff's motion record in the motion for certification or for the completion of one or more other steps required to advance the proceeding; or***



- (d) *any other steps, occurrences or circumstances specified by the regulations have taken place.*
- (2) *For clarity, a representative plaintiff is not precluded from filing a supplementary motion record containing evidence that was not reasonably available to them at the time they filed their final and complete motion record pursuant to s.29.1(1)(a).*

Part 2 – Bill 161, Schedule 16: *Legal Aid Services Act, 2019*

This part of the submission was prepared on behalf of an OBA Working Group that is comprised of members who engage in LAO certificate and clinic work, and who practise in various areas of law including criminal, family, children and youth, immigration and refugee law. With members who represent a broad spectrum of clients, our goal is to provide recommendations that offer concrete, meaningful improvements to the delivery of legal aid services.

Overview

The Attorney General introduced Schedule 16 of Bill 161, which proposes a new *Legal Aid Services Act, 2019* (“the **Act**”), with the aim of giving LAO the tools it needs to help clients resolve their legal issues faster and with fewer roadblocks.

The success of these changes depends on clarity in the legislation, appropriate funding and robust consultation between the bar and LAO. The OBA has and will continue to advocate for all three of these. We are pleased to see the consultation requirement for LAO made explicit in the legislation and we expect a consultation policy that provides continual opportunities for meaningful input.

In this submission, we raise three specific issues that we would like to see addressed with respect to Bill 161:

1. Ensuring additional funding for court-ordered services currently covered directly by the Attorney General;



2. Clarifying a fair process regarding information disclosure for lawyers who represent LAO clients; and,
3. Clarifying representation on the LAO Board.

The OBA's recommendations on these issues are described below.

Recommendations

1. Additional funding for court-ordered services

Section 15 of the Act would require LAO to be responsible for the costs of providing court-appointed counsel, such as under Rowbotham orders and *amicus curiae* orders, which are currently covered directly by the Attorney General.

The experience of our members who act as court-appointed counsel is that the system currently in place has worked effectively.

Without additional funding, this new requirement would place additional financial burdens on LAO that would negatively impact its ability to provide quality legal services.

The OBA requests that the Attorney General ensure that an agreement to provide additional funding to LAO to cover the cost of court-ordered services is in effect prior to the coming into force of the above noted provision, to avoid any negative financial pressure by its operation.

2. A fair process for lawyers who represent LAO clients

Lawyers have existing responsibilities pertaining to information sharing with LAO about the eligibility of their clients who receive legal aid services.

The current act requires that where anything comes to the attention of the lawyer which indicates that a recipient of legal aid services may not be entitled to those services the lawyer shall notify LAO. It also provides that where LAO believes a lawyer has failed to discharge



that obligation LAO may, on notice to the lawyer, hold a hearing to determine whether any of the obligations have not been discharged.¹

By contrast, section 10 of the proposed Act places the same proactive disclosure obligation on the lawyer; however if anything comes to the attention of LAO that indicates that a lawyer has failed to discharge this obligation, LAO may declare that the lawyer is not entitled to payment by LAO and recover from the lawyer amounts to which the lawyer is not entitled. Subsequent to this, the lawyer may apply for a review of LAO's determination.

This ability under the proposed Act for LAO to immediately impose negative financial consequences on a lawyer who is providing legal aid services without any obligation to advise the lawyer of the basis of the concern and permit the lawyer to respond is contrary to principles of fairness and due process. It places an unfair burden on lawyers who are providing legal services to Ontario's most vulnerable citizens and could ultimately lead to fewer lawyers being willing to take on legal aid services. Bill 161 should be amended to retain the clear provisions that exist under the current act.

The OBA recommends removing the proposed Section 10(7) from Schedule 16 and amending Subsection 10(6) as follows (Sub-sections 10(6)(a) and (b) are amended, but left in for reference):

(6) If anything comes to the attention of the Corporation that indicates that a service provider has failed to discharge an obligation under subsection (3), the Corporation may, on notice, hold a hearing to determine whether the service provider has failed to discharge an obligation under (3). If a determination is made that the service provider has failed to discharge an obligation under (3), the Corporation may,

(a) declare that the service provider is not entitled to payment by the Corporation for all or a specified part of the legal aid services provided by the service provider to the individual; and

¹ S. 44 *Legal Aid Services Act, 1998*, S.O. 1998, c. 26



(b) recover from the service provider the amount, if any, paid by the Corporation for the legal aid services for which the service provider is not entitled to payment.

3. Governance of Legal Aid Ontario

The existing act provides that the Board of Directors of LAO shall be composed of five persons recommended by the Attorney General and five persons selected from a list of persons recommended by the Law Society of Ontario, ensuring proportionate representation of Law Society of Ontario recommended and Attorney General recommended appointees on the Board.²

This recognizes the roles that both government and the legal community, as partners, play in providing legal services to Ontario's most vulnerable.

Section 21 of the proposed Act provides that a minimum of three appointees on the ten person board shall be selected from a list of persons recommended by the Law Society but does not retain proportionality between Law Society of Ontario recommended and Attorney General recommended appointees.

The OBA understands that the Attorney General intends this provision to allow for more flexibility in the size of the Board and not to change the proportionate representation on the Board itself.

To clarify the government's continued commitment to a proportionate Board, the OBA recommends amending the proposed Section 21(3) by adding a third provision as follows:

(3) Appointments made under subsection (2) are subject to the following restrictions:

² S. 5 *Legal Aid Services Act*, 1998, S.O. 1998, c. 26



1. At least three but no more than five of the appointees shall be selected by the Minister from a list of persons recommended by the Law Society of Ontario.
2. No more than five practising lawyers may be members of the board.
3. Excluding the person named as chair pursuant to subsection (4), the Minister shall ensure that an equal number of appointees are from the group described in paragraph 1 and all other appointees.

Conclusion

Once again, the OBA appreciates the opportunity to provide this submission to the Standing Committee on Justice Policy with respect to Schedules 4 and 16 of Bill 161, *Smarter and Stronger Justice Act, 2020*.