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Submission to the Standing Committee on Justice
Policy

Bill 161: Smarter and Stronger Justice Act, 2019

Canadian Civil Liberties Association

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Canadian Civil Liberties Association (CCLA)

The CCLA fights for the civil liberties, human rights, and democratic freedoms of all people across Canada. Founded in 1964, we are an independent, national charity, working in the courts, before legislative committees, in the classrooms, and in the streets, protecting the rights and freedoms cherished by Canadians and entrenched in our Constitution.

Overview

CCLA makes this written submission to the Standing Committee on Justice Policy regarding two significant aspects of Bill 161:

- 1) changes to the *Class Proceedings Act* (Schedule 4); and
- 2) changes to the structure of Legal Aid Ontario and the provision of legal aid services through amendments to the *Legal Aid Services Act, 1998* (Schedule 15) and the creation of a new *Legal Services Act, 2019* (Schedule 16).

With respect to the changes to the legal aid scheme in Ontario, CCLA expresses its concern that these changes are being considered by the Committee at a time when vulnerable Ontarians and the service providers and organizations that serve them are facing unprecedented challenges. In our view, Schedules 15 & 16 should be severed from the Bill and the government should engage in consultations with stakeholders when those individuals and groups are able to meaningfully participate in such discussions.

A. Schedule 4: Class Proceedings Act

Not every change to public policy starts and ends in a legislature. Residential schools reconciliation between indigenous people and the Government of Canada resulted from a class action, bravely led by former National Chief of the Assembly of First Nations, Phil Fontaine, O.C. Victims of the hepatitis C tainted blood scandal of the 1990s sought justice through a class action against the Red Cross, and governments federal and provincial. Several remedies were successfully obtained through the courts in that case, many of which would be impractical for a government to resolve, such as compensation claims and eligibility. In fact, some issues implicating governments are simply best addressed through judicial fact finding rather than legislative or executive debate.

CCLA believes that class proceedings have a valuable role to play in our civil justice system and in achieving access to justice. In circumstances where individuals could not reasonably obtain recourse for wrongs done and damage incurred, a class proceeding is an important mechanism. CCLA does not want to see changes to Ontario's class proceedings statute that would undermine the effectiveness of this important mechanism.

Proposed amendments to the *Class Proceedings Act* include recommendations of the Law Commission of Ontario (LCO). Those amendments will no doubt modernize the statute in a way that has been needed for many years.

Unfortunately, there is one significant change to the statute which may well undo all of the good that would be accomplished by the other proposed amendments. In particular, the proposed changes to the certification test are wrong and harmful.

Schedule 4 of Bill 161 proposes amending section 5 of the *Class Proceedings Act* to add a new subsection (1.1) which states that in a motion for certification, a class proceeding is the preferable procedure for resolving the common issues

only if, at a minimum,

(a) it is superior to all reasonably available means of determining the entitlement of the class members to relief or addressing the impugned conduct of the defendant, including, as applicable, a quasi-judicial or administrative proceeding, the case management of individual claims in a civil proceeding, or any remedial scheme or program outside of a proceeding; and

(b) the questions of fact or law common to the class members predominate over any questions affecting only individual class members.

These new superiority and predominance tests constitute a radical change in the approach to class action certification. The LCO has expressed its concerns about this new approach,¹ arguing that the change in the test for certification will effectively restrict class actions and access to justice in a variety of areas, and are inconsistent with the law in other jurisdictions in Canada, with Ontarians having fewer rights than Canadians in other provinces. The amendments wrongly import an American approach that is inconsistent with longstanding Canadian jurisprudence.

This error is multiplied by recent changes to the Ontario Crown's liability. In fact, the proposed amendment would preclude a residential schools class action against the Crown, had it been brought against Ontario rather than Canada. The same is true of the tainted blood class action, for which former Premier Mike Harris offered to pay an additional \$200 million in compensation for all Ontario victims of hepatitis C poisoning. Indeed, the LCO notes that the changes, when combined with new restrictions on proceedings against the Crown introduced by the new *Crown Liability and Proceedings Act*, risk making it very difficult for Ontarians to hold their provincial government agencies accountable for negligence and other wrongs. CCLA has elsewhere expressed its very serious concerns about the impact of the *CLPA* on the ability of people in

¹ Letter from Law Commission of Ontario Chair Andrew Pinto to Attorney General Doug Downey, dated January 22, 2020, available online: <https://www.lco-cdo.org/wp-content/uploads/2020/01/LCO-Letter-re-Bill-161-Class-Actions-Final-Jan-22-2020.pdf>.

Ontario to hold their government accountable. We agree with the LCO that the proposed changes to the certification test exacerbates these concerns.

It is difficult to understand why the government would propose a bill that adopts so many of the recommendations made after extensive study and thoughtful consideration by the LCO, only to undermine those reforms by Americanizing the test for certification. The changes contemplated by the Bill dramatically tips the scales in favour of defendants who almost always already have an upper hand in terms of resources. We urge the Committee to reject this proposed change to the test for certification and amend Schedule 4 of the Bill to remove clause 7(2).

B. Schedules 15 & 16: Legal Aid Services Act

CCLA believes that a strong legal aid system is of vital importance and that access to justice must be a focus of any such system. We note that the Committee is considering significant changes to the legal aid system at a time when those most impacted by these changes (those with insecure income and housing, those living in poverty, those struggling with mental health issues and addictions) are dealing with new challenges and may not be able to meaningfully participate in the Committee process or otherwise speak out about the impact that these changes will have. In light of the ongoing coronavirus pandemic, the number of Ontarians who face an uncertain economic future has been growing and may continue to do so for some time. Many of these individuals may require legal services for assistance with housing issues, labour issues, and accessing government benefits. Legal Aid Ontario teamed up with counsel to perform extraordinary work during COVID19, which inevitably saved many lives. To the extent that the changes proposed in Schedules 15 and 16 of Bill 161 may reduce the legal services available to Ontario's vulnerable populations, the cost of providing services to these individuals in other systems may undermine any cost benefit occasioned by the changes.

We urge the committee to pose questions of the government and probe the reasons behind the proposed changes to the *Legal Aid Services Act*. Is the goal to reduce the services currently provided or provide the same services in a different or more efficient manner? While the legislation currently requires LAO to cover services in certain areas of the law, the new statute makes funding of almost all services discretionary. On the face of the statute, it appears that LAO will be doing less than it currently does, notwithstanding that the province continues to face very significant access to justice issues. Given the even greater challenges our province will face as the economy struggles to recover, are these changes truly beneficial? Are they necessary?

As noted at the outset of this brief, we urge the Committee to sever Schedules 15 and 16 from the Bill so that it can be reconsidered at a time when all stakeholders can meaningfully participate in the process.