

The Honourable Doug Downey
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Standing Committee on Justice Policy
Online Submission

Dear Attorney General Downey and the Standing Committee on Justice Policy,

Thank you for the opportunity to provide submissions on the Government of Ontario's Bill 161, *Smarter and Stronger Justice Act, 2020*.

Introduction

We are five of Ontario's leading Plaintiff class action firms. We have acted on behalf of the Plaintiffs in dozens of class actions. We share the government's desire to increase the efficiency of class action litigation.

However, we are concerned about Bill 161's inclusion of a new predominance and superiority requirements in the test for certification under the *Class Proceedings Act, 1992*. We believe these changes will have a significant detrimental effect on the rights of Ontarians, and place a greater strain on court resources, thereby decreasing efficiency in a manner that will both frustrate access to justice and increase the burden on taxpayers.

We have had the opportunity to review the Law Commission of Ontario's letter to Minister Downey, dated January 22, 2020, and agree that the negative impact of these changes will far outweigh any of the other positive elements of the proposed amendments to the legislation.

For the reasons addressed below, it is our collective opinion that the predominance and superiority requirements should be removed from Bill 161. We would be happy to discuss this issue further with the Committee.

The Predominance Requirement

Bill 161's predominance test would require that the issues in common to a class proceeding — such as whether a medical device manufacturer fell below the appropriate standard in its design or manufacture of a product — exceed the issues to be determined individually, after the completion of the trial of the common issues — such as the assessment of each class member's injuries. We are concerned that this could fundamentally change the test for certification.

Until now, in all jurisdictions in Canada, the existence of sometimes complex individual issues — such as whether a person's health issues were caused by the medical device and are compensable at law — does not bar a class action from being certified, as long as a judge finds that the common issues will substantially move the case forward, the case overall is manageable,

and that certification is consistent with the principles of access to justice and judicial economy, among other things.

Bill 161's mandatory predominance requirement could fundamentally alter this dynamic. We know this because a similar requirement exists in the United States' Federal Rules of Civil Procedure¹ (specifically s. 23(b)(3)), where it has been used to prevent various types of class proceedings from being certified.

The current ability of judges to certify such cases has enabled Ontarians to recover for harms they suffer from, for example, flawed medical products, such as certain types of hip implants, transvaginal mesh and pacemakers. Whenever personal injury claims are resolved, the injured victims have gained access to legal system and a remedy. In addition, Ontario Health gains a recovery for its subrogated claim related to the services provided to the injured class members. If these sorts of claims are foreclosed from prosecution as class actions because of the application of a predominance test, injured Ontarians lose access to a remedy and the subrogated recoveries to the Ontario Health Insurance Program could be reduced by millions of dollars per year. Obviously, such a result is contrary to the interests of Ontarians and the Ontario Government.

In addition to the monies returned to the Ontario Health Insurance Program, the current regime – without a predominance test - has permitted access to justice for many vulnerable sectors of your constituents, including, *inter alia* senior citizens (hip implant and nursing home negligence), Indigenous peoples (residential schools) and veterans of the Canadian Armed Forces (pension actions and sexual harassment).

We are concerned that, just as in the US, the mandatory language of Bill 161's predominance test — which requires that “at a minimum” common issues predominate over individual issues — would make it difficult for various types of class proceedings to be certified, including cases against medical device and pharmaceutical manufacturers.

By adopting a novel test for certification that has no other Canadian parallel, Bill 161 risks depriving Ontarians of rights available in every other jurisdiction in Canada. In this respect we echo the concerns expressed by the Law Commission that the predominance test would have prevented numerous important class proceedings that benefited Ontarians, including tainted blood cases, cases involving Indian residential schools, cases against pharmaceutical and medical device companies, and environmental tragedies, from succeeding.

We also believe that the predominance test could preclude Ontarians who have suffered as a result of mismanagement in long-term care homes from pursuing class actions against the homes as these cases involve complex individual health issues. In *Glover v Toronto* (2009 CanLII 16740), for example, the Ontario Superior Court certified a class action regarding an outbreak of Legionnaires' disease at a long-term care home despite the existence of significant individual issues.

¹ *Federal Rules of Civil Procedure*, s. 23(b)(3)

In addition, the test does not serve the Government's objective of improving procedural efficiency in the judicial system. It will result in years of additional protracted litigation and appeals as parties test the limits of this new certification test. If meritorious class actions are precluded from proceeding as class actions, then in some cases we would be forced to commence thousands of individual actions, in place of a single class action, causing an unnecessary strain on the court system.

The Superiority Requirement

Bill 161 will restrict certification to cases where a class action is "superior to ... any other remedial scheme or program". The equivalent provision in the United States' Federal Rules of Civil Procedure (s. 23(b)(3)) requires "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

Ontario's proposal imposes a barrier for victims – particularly consumer and small-business victims – that is far more onerous than the superiority test in the United States. The amendment may permit wrongdoers to devise voluntary programs that insulate them from class actions without providing meaningful redress to victims. The programs need not involve any adjudication to ensure that the remedy is fair. Without a mechanism for discovery, there is no way for a court to determine whether a remedial program leaves a wrongdoer enriched, with the result that wrongdoing can be more profitable and negligence less costly.

On the broadest interpretation of the proposed superiority requirement, a potential defendant will have complete discretion to determine which victims are eligible for redress, how much to spend to avoid liability, and what hoops victims must jump through to participate in the program. The defendant in a price-fixing or illegal overcharge claim, for example, may offer its consumer victims vouchers in an amount of its choosing, thereby guarding its illegal profits and compelling its victims to make further purchases.

One of the key purposes of class actions is to deter bad behaviour. The proposed amendments will limit class actions in Ontario from achieving this goal. If defendants can craft their own remedies, it will reduce their incentive to meet the standard of care and to treat Ontario's consumers and small businesses fairly. This would be bad for consumers, bad for businesses that comply with the law, and ultimately bad for competition.

Proposed Amendment to Predomination and Superiority Requirements

We would propose that, at a minimum, Bill 161's predominance and superiority requirements be replaced by the factors contained in Alberta's *Class Proceedings Act*,² which is based upon the Uniform Law Conference's draft class action legislation. This test was implemented by the

² Alberta *Class Proceedings Act* s. 5(2)

Progressive Conservative government in that province in 2010 and was subsequently adopted in British Columbia and Saskatchewan. Alberta's Act states:

"In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the Court may consider any matter that the Court considers relevant to making that determination, but in making that determination the Court must consider at least the following:

- (a) whether questions of fact or law common to the prospective class members predominate over any questions affecting only individual prospective class members;
- (b) whether a significant number of the prospective class members have a valid interest in individually controlling the prosecution of separate actions;
- (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
- (d) whether other means of resolving the claims are less practical or less efficient;
- (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means."

The adoption of this test would still significantly toughen Ontario's certification requirement by requiring courts to consider issues of predomination and the availability of other means of resolving claims when deciding whether to certify an action. It has resulted in actions being dismissed in the provinces that adopted it.

It is our collective opinion that adopting the Uniform Law Conference's test would serve two goals, first it would require the courts to apply additional rigour to determining if the certification test has been met in any particular case, as recommended by the Law Commission of Ontario, and second, it would bring Ontario's legislation in line with the class proceedings legislation in other provinces, adding clarity and certainty regarding the certification test across the country. Meeting the objective of uniformity of legislation among the provinces is particularly germane because many class actions are national in scope, and may involve competing proceedings in other jurisdictions. Ontarians should be given the ability to prosecute their claims on an equal procedural footing with those in other provinces.

Thank you for your time.

Sincerely,

Foreman & Company LLP
Koskie Minsky LLP
Siskinds LLP
Sotos LLP
Waddell Phillips PC