PIAC

PUBLIC INTEREST ADVOCACY CENTRE
LE CENTRE POUR LA DÉFENSE DE L'INTÉRÊT PUBLIC

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June 5, 2020

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

Standing Committee on Justice Policy
Room 1405, Whitney Block
Queen's Park, Toronto, ON M7A 1A2

Dear Minister Downey,

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

Written Submission of the Public Interest Advocacy Centre

It is our pleasure to provide our written submission to the Justice Policy Standing Committee on possible amendments to the *Class Proceedings Act, 1992,* as proposed in the current draft of Bill 161, the *Smarter Stronger Justice Act, 2020.*

The Public Interest Advocacy Centre (PIAC) supports efforts to make class proceedings more efficient in Ontario; however, PIAC resists amendments to class proceedings legislation that would make it harder for consumers to access justice, or to hold wrongdoing defendants to account. In particular, PIAC requests that the Committee reject the new "predominance" and "superiority" legal tests that will likely inhibit the ability of consumers to certify meritorious class actions. The Ontario Government should facilitate—not hamper—the ability of Ontario consumers to access justice. An efficient mechanism for class-wide redress serves an important function in maintaining fair and competitive markets.

Sincerely,

[original signed]

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Written Submission to the Standing Committee on Judicial Policy

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

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Introduction

The Public Interest Advocacy Centre (PIAC) files this written submission to the Standing Committee on Judicial Policy, requesting that the Committee either **reject or reconsider the amendments** to the *Class Proceedings Act, 1992,* ("CPA, 1992") as proposed in the present version of Bill 161, the *Smarter Stronger Justice Act, 2020*, Schedule 4, ("Bill 161") and in particular, the proposed amendments to the CPA 1992 found in subsection 7(2) of Bill 161.

PIAC is a national not-for-profit organization and registered charity that provides legal and research services on behalf of consumer interests—particularly vulnerable consumers—concerning the provision of important public services. Our organization advocates for the fair and balanced interpretation and application of Canadian law to protect and preserve the public interest. PIAC has pursued this work for over 40 years.

PIAC has for many years been active on matters affecting consumer access to justice including mandatory arbitration clauses[1] and anti-SLAPP legislation,[2] to protect Ontario and Canadian consumers.

Class Actions Protect Consumers

In PIAC's view, class actions achieve **three main policy objectives**:[3]

1. **Affording greater access to justice as well as obtaining redress for consumers:** Class actions improve access to justice by allowing fixed litigation costs to be divided over a large number of plaintiffs. They can allow victims to receive compensation when it would otherwise be economically unfeasible for victims to sue on their own. Without class actions, the doors of justice remain closed to many injury victims, however strong their legal claims may be, because they cannot afford or do not know how to sue individually. Sharing costs ensures that injuries are not left unremedied.

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[1] See: PIAC, "Mandatory Arbitration and Consumer Contracts" (1 November 2004). Online: https://www.piac.ca/our-specialities/mandatory-arbitration-and-consumer-contracts/ and linked report: https://www.piac.ca/wp-content/uploads/2014/11/manditory_arbitration.pdf

[2] See: PIAC, "PIAC Welcomes New Ontario Law to Prevent Strategic Lawsuits" (30 October 2015). Online: https://www.piac.ca/our-specialities/piac-welcomes-new-ontario-law-to-prevent-strategic-lawsuits/

[3] *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46.

In many consumer claims, individual losses are small, even if they result from illegal, wrongful and/or negligent conduct. Presently, it costs $102 to file a claim in Small Claims Court. No reasonable consumer would file a claim for a loss under $102, even if the defendant imposed an equivalent loss across a large class of consumers for immense wrongful gains.

2. **Encouraging wrongdoers to modify their behaviour:** Class actions encourage companies and governments to act appropriately. Potential wrongdoers cannot ignore their obligations to society if they can expect to repay the costs of their wrongdoing through a class action. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct. Class actions provide an opportunity for corporate boards and government executive levels to focus their attention on consumer and citizen issues and make sure their organizations are contributing to safe and fair consumer markets.

   With relatively small losses in the consumer context, potential defendants know that for any one plaintiff, the expense of bringing suit would far exceed the likely recovery. If potential defendants know that there is relatively little risk in profitable misconduct, they will have more incentive to proactively ensure compliance with the law.

3. **Enhancing judicial economy:** By aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. The efficiencies free judicial resources that can be directed at resolving other conflicts and can also reduce the costs of litigation both for plaintiffs (who can share litigation costs) and for defendants (who need to litigate the disputed issue only once, rather than numerous times). Ontario's Superior Court, for instance, alone saw more than 73,000 civil suits commenced in 2018.[4]

   In product liability cases where individual injuries are substantial enough to justify individual litigation, class actions shield our already over-burdened courts from having to determine common issues of liability over and over.

[4] The Superior Court of Justice: Enhancing Public Trust: Report for 2017-18, online: https://www.ontariocourts.ca/scj/files/annualreport/2017-2018-EN.pdf at 12.

Ultimately, PIAC believes that class actions help level the playing field between ordinary consumers and corporations, and between small businesses and larger competitors. They have achieved significant legal victories for Canadians, including holding banks and payday lenders to account,[5] disgorging the proceeds of price-fixing cartels,[6] and compensating consumer victims of defective products.[7] Any changes to Ontario's class actions legislation should further the above policy objectives—not undermine them.

As a public interest group, PIAC will focus on the effects of Bill 161's amendments to the *Class Proceedings Act, 1992* on consumers. Class actions play an important role in today's world. The rise of mass production, the globalization of corporate ownership, the advent of the mega-corporation, and the recognition of corporate social responsibility have all contributed to their growth. Any changes to Ontario's class actions legislation should favour the public interest.

Issue: New Test for "Preferable Procedure" in Class Actions is Unfair to Consumers

The issue PIAC wishes to address in this submission is whether it is in the interests of ordinary consumers to modify the legal test of whether a class proceeding is the preferable procedure for the resolution of common issues to require:

- **"superiority"** of a class action to all other "reasonably available means" to "determining the entitlement of the class members to relief" or "addressing the impugned conduct of the defendant"; and
- **"predominance"** of questions of fact and law common to the class as a whole over "any questions affecting only individual class members".[8]

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[5] E.g. Harrison Pensa LLP, "Settlements reached in payday loan class actions" (8 October 2015), online: https://www.newswire.ca/news-releases/settlements-reached-in-payday-loan-class-actions-531238881.html.
[6] E.g. Canadian Lawyer, "Courts in Ontario, B.C. and Quebec approve settlements in car parts price-fixing class action" (23 February 2020), online: https://www.canadianlawyermag.com/practice-areas/litigation/courts-in-ontario-b.c.-and-quebec-approve-settlements-in-car-parts-price-fixing-class-action/326582
[7] E.g. Newswire, "Announcing a Class Action Settlement Involving Current or Former Owners or Lessees of Certain Mazda, Subaru, Saab, Lexus, Scion and Toyota Vehicles' (8 November 2019), online: https://www.newswire.ca/news-releases/announcing-a-class-action-settlement-involving-current-or-former-owners-or-lessees-of-certain-mazda-subaru-saab-lexus-scion-and-toyota-vehicles-856042936.html
[8] See Bill 161, "An Act to enact the Legal Aid Services Act, 2019 and to make various amendments to other Acts dealing with the courts and other justice matters" (First Reading: December 9, 2019), 1ST SESSION, 42ND

The proposed amendments clearly and severely raise the existing threshold for class action certification in Ontario. Raising the threshold makes it much harder, and in many situations likely impossible, for everyday Ontarians to seek legal redress for wrongs they have suffered in a variety of areas where their persons were injured by products or services and as well to their rights in core consumer markets, such as financial services, telecommunications, insurance and many others.

Element of New Test: Predominance

Dealing first with the proposed "**predominance**" test, we note that it will put an unfair burden on victims who suffered different injuries as a result of a common cause. In such cases, if the individual issues of fact and law among consumers predominate over the common causal issues, all victims will be forced to seek compensation individually, or forego it altogether. These victims, and the courts, will lose the efficiency advantage of common determinations of the illegality of defendants' conduct, the defectiveness of defendants' products, or the standard of care, to name a few examples. These claims typically involve personal injuries.

Under the current test for class action certification, there must be issues of fact or law common to all class members. The underlying question courts ask at this stage of the certification process is whether allowing the suit to proceed as a representative one will avoid the duplication of the fact-finding or legal analysis.[9]

In other words, an issue will be common only where its resolution is necessary to the resolution of each class member's claim. The class members' claims must share a "substantial common ingredient" to justify a class action.[10]

The predominance test is narrower and would replace the broader "substantial common ingredient" test. This change imposes an onerous hurdle for consumers and other potential plaintiffs, such as small businesses.

LEGISLATURE, ONTARIO, 68 ELIZABETH II, 2019, at s. 7(2) proposing an amendment introducing new subsection 5(1.1) to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, as am. Online: https://www.ola.org/sites/default/files/node-files/bill/document/pdf/2019/2019-12/b161_e.pdf

9 Western Canadian Shopping Centres Inc v Dutton, 2001 SCC 46.

10 Western Canadian Shopping Centres Inc v Dutton, 2001 SCC 46.

To give one example, requiring consumers to prove that common issues of fact and law predominate over other individual issues will bar meritorious product liability cases. Defendant manufacturers in such cases may argue that, even if their products can be dangerous, they should not have to compensate a class of consumers whose injuries are unique—however horrific—because the victims' individual injuries predominate.

Under the existing procedure, on the other hand, courts resolve issues common to the class, leaving any remaining individual issues to be resolved afterwards. Courts may decide, class-wide, that a manufacturer knew that its products were harmful. Once the common issues are decided, class members can make claims for their unique injuries. This allows the common issues to be resolved efficiently, without each victim having to re-litigate the defendant's liability.

The proposed predominance requirement will likely result in unfairness and inefficiency, since it would bar legitimate class actions and require meritorious claims to proceed individually, if at all. The point of class actions is, fundamentally, to enable victims to litigate common issues together, and in so doing, protect defendants and courts from many similar claims.

Element of New Test: Superiority

The new "**superiority**" requirement is harmful to Ontarians in their role as consumers in the economy because it potentially gives defendant companies a low-cost and ineffective method of avoiding an otherwise meritorious class proceedings if they offer minimal compensation – such as coupons, gift cards, or perhaps only an apology – for the alleged wrongdoing. The compensation in all likelihood will be well below the value a judge of the court may have awarded if the class action was certified and allowed proceeded to trial or settlement.

The superiority test will obstruct access to justice because it will incentivize defendants to offer "alternative methods" of compensation in order to bar certification and avoid liability. Many individuals will not have the financial means to proceed with their cases individually, meaning many Ontarians will not receive their due compensation and will go without justice.

Consider the impacts of this amendment on a few recent examples. In 2019, the Ontario Superior Court of Justice granted judgment on behalf of Ontario gift cards holders whose cards were subject to illegal fees and expiry dates.[11] In this case, the defendant sold products that it labelled as “gift cards”, and when the Ontario government introduced consumer-protection regulations to limit fees and expiries, the company re-labelled the cards as “prepaid cards”.

Superior Court Justice Paul Perell awarded $16.8 million through the lawsuit. This compensation that might have been thwarted had the superiority requirement been in place as it is currently drafted. Throughout the litigation, the defendant asserted that consumers’ unused balances were always available for consumers to use, an assertion contrary to the express terms of its Cardholder Agreements (which permitted Quebec residents *only* to request replacement cards on expiry).[12] With the superiority requirement, a similar defendant may argue that it was always open to Ontario consumers to call and demand a replacement card, knowing full well that this is contrary to the terms and conditions of their contract, that few consumers would actually do so, and that it could instruct its customer support representatives to refuse any such requests.

PIAC is concerned that the proposed superiority requirement will incentivize companies to develop inadequate or sham remedial programs in order to escape liability for real wrongs.

The superiority amendment is a very real concern for consumer protection. Imagine a retailer that is caught price-fixing. The retailer might, for example, offer its customers gift cards or coupons, as a token gesture of goodwill. It can decide which consumers are eligible, how much to give them, and establish a procedure of its choosing to determine how consumer victims can make (or prove) their claim. The gift cards or coupons will, as a result, bring back customers who might otherwise have gone to competitors, and perhaps increase the retailer’s sales. The wrongdoing, together with the gesture, may end up profiting the retailer overall. This scenario is potentially what occurred in the on-going class action against Loblaws for bread price-fixing, where Loblaws’ $25 gift cards to consumers could meet the superiority test and bar the class action.[13] We therefore note that after this proposed change to the test, there would be nothing to

11 *Bernstein v Peoples Trust Company*, 2019 ONSC 2867.
12 *Bernstein v Peoples Trust Company*, 2019 ONSC 2867 at para 248.
13 Sophia Harris, “Loblaws $25 gift card offer to end as class action lawsuits for price-fixing gear up”, *CBC News* (6 May 2018), online: https://www.cbc.ca/news/business/loblaws-25-gift-card-class-action-lawsuits-bread-price-fixing-1.4648642

stop a retailer from engaging in such conduct, now that it clearly comes with no risk of a class action.

The superiority test effectively takes the question of how much consumers should be compensated out of the hands of an independent judiciary and places it into the hands of the company's management. This presents a conflict of interest and perverts the notion of administration of justice. The Committee should firmly reject any amendments to class action proceedings that could create this reality.

Consumers have little to no bargaining power and far fewer legal resources compared to large commercial entities. Class actions are an important legal tool that helps consumers bring their case to court in an efficient and effective way. The proposed "predominance" and "superiority" tests are clearly designed to undermine the goals of consumer access to justice and to obtain appropriate redress for wrongs, as well as avoid corporate behaviour modification, all of which is, we submit, contrary to the public interest.

Recommendations

The proposed changes do not reflect the nature of Canadian class action litigation. The "predominance test" is adapted from the US rules almost word for word. Ontario's new "superiority" requirement, however, is even more hostile to victims than the superiority requirement in the US because in that country a class action may be certified if and only if "a class action is superior to other available methods for fairly *and* efficiently adjudicating the controversy."

The US and Ontario certification tests are different because the litigation contexts are different:

- Canadian class action trials are judge-alone, whereas jury trials are common in US class actions. In Canada, damages are determined by judges with expertise in measuring the amount required to compensate victims' losses and tend to follow a conservative culture. Canadian judges do not issue the astronomical awards we have seen from US juries.
- Unlike in the US, the losing party in an Ontario lawsuit pays some of the winning party's legal fees, which makes it costly for plaintiffs to start meritless lawsuits.

- Further, Canadian judges take an active role in determining whether claims should proceed as class actions and scrutinizing the fairness of class action settlements.

As a result, frivolous cases are far more common in the US than they are in Canada. **The proposed class action amendments attempt to address a reality that simply does not exist in Canada**. Instead, the changes restrict the ability of individual consumers with modest claims to access justice. Class actions were designed *precisely* to help get around this problem. The proposed changes would rob Ontarians of an important legal tool that fosters a fairer and more competitive marketplace. The Committee ought not to allow this to happen.

Therefore, PIAC **recommends** that the Committee reject the proposed amendments above and, instead, consider the expert recommendations of the Law Commission of Ontario on whether a class proceeding is the preferable procedure for the resolution of common issues.[14] To recap, the LCO recommendations did **not** recommend amendment of the test but rather that the present preferable procedure test be "interpreted" (by courts) "more strictly"; that courts use more "pre-certification summary judgment motions or motions to strike" and that a dedicated class action Practice Direction, as outlined in the Report and "developed in consultation with appropriate stakeholders" include "detailed provisions and best practices for certification motions". To be clear, these are recommendations designed to tighten interpretation of the existing preferable procedure test, not to raise the bar so high that consumers and citizens can no longer clear it. This Committee should follow those recommendations.

Conclusion

Large corporations have many advantages over consumers in the market. Class actions are one way that consumers can hold them accountable for wrongdoing in those markets.

If corporate entities can simply neutralize their civil liability by offering some victims some small portion of their wrongful profits, class actions will no longer be able to keep them honest.

[14] Law Commission of Ontario, "Class Actions: Objectives, Experiences and Reforms" Final Report, July 2019, Recommendations 16, 17 and 18, at p. 97. Online: https://www.lco-cdo.org/wp-content/uploads/2019/07/LCO-Class-Actions-Report-FINAL-July-17-2019.pdf

And if wrongdoers can rely on the many different injuries they have caused, to close the courts' doors (especially to the most deserving victims), they will only be held liable to those victims who can afford to sue individually.

The "predominance" and "superiority" changes to class action certification will make Ontarians uniquely vulnerable among Canadians residing elsewhere in the country. PIAC believes that, if the interests of ordinary Ontario consumers are a consideration, this Committee should recommend the removal of the Bill's clause 7(2) and its proposed amendment to CPA 1992 to include new subsection 5(1.1), to ensure that corporate wrongdoing will not be made more profitable, and that victims in Ontario will be able to access compensation if that wrongdoing occurs.