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Attorney General Douglas Downey
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Dear Attorney General Downey,

I write to make my submissions regarding *Bill 161, Smarter and Stronger Justice Act, 2020* (“Bill 161”), and particularly the provisions of that Bill that, if passed, will result in changes to the *Class Proceedings Act, 1992* (“CPA”).¹

As an experienced class actions lawyer who is now working in academia, I am currently finishing my doctorate in class actions and group litigation at Oxford University. I will begin teaching class actions and civil procedure as an Assistant Professor at Western University in London, Ontario, in August of this year. More details of my background can be found at https://law.uwo.ca/about_us/faculty/suzanne_chido.html. The views in this letter and the attached article are strictly my own.

My views on the proposed legislative changes are summarized in the attached article, which was published in the UK’s Civil Justice Quarterly earlier this year. I would draw your attention in particular to the second half of the article, beginning with “Controversial Changes Proposed by Bill 161”. In summary, my views are as follows:

1. The changes that reflect the recommendations of the Law Commission of Ontario (“LCO”) should be enacted, as they are largely enshrined in current case law and, even where they are novel, will lead to more efficiency, accessibility, and transparency in Ontario’s class actions regime; and
2. The proposed superiority and predominance requirements² appear to import the United States’ more restrictive approach to certification, and give the impression that it will become more difficult for Ontario class members to satisfy the certification test under CPA s 5. However, this impression may not be correct, for several reasons:
 - a. The more restrictive US approach is unlikely to be imported, because the same judges will still be deciding certification motions in Ontario and they must abide by the Supreme Court of Canada’s guidance that class action statutes be “construed generously”.³
 - b. The “some basis in fact” standard of proof⁴ will continue to apply to each certification requirement, – a standard that is lower than the US approach of making factual determinations at the certification stage on a preponderance of the evidence, or on a “balance of probabilities”.⁵

¹ SO 1992, c 6 [CPA].

² Bill 161, Schedule 4, section 7(2), amending section 5 of the CPA, *ibid*.

³ *Hollick v Toronto (City)*, 2001 SCC 68 at paras 14-15.

⁴ *Hollick*, *ibid*, at para 25; *AIC Ltd v Fischer*, 2013 SCC 69 at para 48.

⁵ *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at para 101.

- c. As a result, the legislative changes are unlikely to make a great deal of difference to courts' approach to certification. They may filter out class actions that are likely to break down at the individual issues stage; this is in the best interests of class members if there is a more efficient and reasonably available way of determining their entitlement to compensation.

In addition to the above, I would make a plea for more transparency in Ontario's civil justice system. Your Ministry has voiced its intention to "prioritiz[e] the interests of Ontarians in class action lawsuits so they receive faster, more transparent and more meaningful compensation and access to justice".⁶ Justice must not only be done but be seen to be done, and transparency is therefore key to an open, accessible, and procedurally just system.

Transparency is impossible without publicly available data. The authors of the LCO Report, *Class Actions: Objectives, Experiences and Reforms*,⁷ noted the difficulties they encountered in gathering even rudimentary data related to class actions. While your Ministry provided the LCO team with data, it could not "provide even a basic record of important milestones in each action, and could not identify whether a particular case was ongoing, completed, or dormant."⁸ The list of class actions taken from the FRANK database and provided by your Ministry "were inconsistent, incomplete and contained many inaccuracies and duplications" and contained numerous inputting errors.⁹ The LCO concluded that the Ministry did not have a robust court information system that could collect and aggregate a broad range of class actions statistics, and that such a system was not likely to be available in the near future.¹⁰

These frustrations are shared by others attempting to conduct empirical assessments of Ontario's civil justice system.¹¹ This is not the mark of a 21st century justice system. It is not even the mark of a late 20th century justice system.

The efficient and transparent operation of Ontario's class action regime will therefore depend upon the efficient and transparent operation of our civil justice system. Both depend upon a modernization of that system. It is gratifying to see your recent commitments to modernization and digitization. These developments are desperately needed, and will require an infusion of resources and corresponding structural changes in order to be effective.

Thank you for the opportunity to make submissions on this important subject, and I look forward to seeing the outcome of the legislative debate on Bill 161.

Yours sincerely,



Suzanne Chido

⁶ Ministry of the Attorney General, "News Release: Building a Stronger Justice System to Grow Safer Communities" (Ministry of the Attorney General: Toronto, 9 December 2019).

⁷ (Toronto: LCO, 2019).

⁸ *Ibid* at 104.

⁹ *Ibid*.

¹⁰ *Ibid* at 68.

¹¹ Office of the Auditor General of Ontario, *Annual Report 2019: Reports on Correctional Services and Court Operations: Volume 3* (Toronto: Queen's Printer for Ontario, 2019) at 98; *Bon Hillier v Milojevic*, 2010 ONSC 435, at para 37; *Charles Estate (Re)*, 2009 CanLII 57448 (ONSC), at paras 12-13; *Pershad Singh v Thompson (Trustee of)*, 2010 ONSC 4943, at paras 55-60.

"Keep calm and stay classy": Bill 161 and proposed changes to the Ontario Class Proceedings Act

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*C.J.Q. 180 Abstract

On 9 December 2019, the Government of Ontario introduced Bill 161, the Smarter and Stronger Justice Act 2019 (SSJA). This omnibus bill makes changes to a number of existing statutes, including the Class Proceedings Act 1992 (CPA), representing the first major overhaul of Ontario's CPA since it was passed more than 25 years ago. Many of the changes were recommended by the Law Commission of Ontario (LCO) in its report, Class Actions: Objectives, Experiences and Reforms, released in July 2019. Two major modifications to the certification test that focus on the "preferable procedure" criterion could, however, make it more difficult to bring class proceedings in the province. This article will discuss the significance of the changes proposed in Bill 161, and compare those changes to the LCO's recommendations.

Introduction

On 9 December 2019,¹ the Government of Ontario introduced Bill 161, the Smarter and Stronger Justice Act 2019.² This is an omnibus bill that makes changes to a number of existing statutes,

including the Class Proceedings Act 1992 (CPA).³ These changes represent the first major overhaul of Ontario's CPA since it was passed more than 25 years ago.⁴

Many of the changes were recommended by the Law Commission of Ontario (LCO) in its report, *Class Actions: Objectives, Experiences and Reforms*, released in July 2019.⁵ Two major modifications to the certification test, however, could make it more difficult to bring class proceedings in the province. These focus on the "preferable procedure" criterion in s.5(1)(d) of the CPA, which currently **C.J.Q. 181* requires that a class proceeding be "the preferable procedure for the resolution of the common issues".⁶ The modifications would mean that a class proceeding would only be found to be a preferable procedure if (at a minimum) it is "superior to all reasonably available means of determining the entitlement of the class members to relief", and if "the questions of fact or law common to the class members predominate over any questions affecting only individual class members".⁷

The wording of these new provisions is very similar to that of r.23(b)(3) of the US Federal Rules of Civil Procedure,⁸ and they could affect the evolution of class action case law in Ontario. This article will discuss the significance of the changes proposed in Bill 161, in the context of the LCO's recommendations.

The LCO's recommendations

The recommendations of the Law Commission of Ontario were noted and analysed in the previous issue of this journal.⁹ I will summarise them here in two categories: those that are not included in Bill 161, and those that are.¹⁰

Recommendations not included in Bill 161

Bill 161 does not reflect the LCO's recommendations that class actions be exempt from the traditional costs rules, and that the Class Proceedings Fund be permitted to partially fund lawyers' fees. This is no surprise, given the goal of Bill 161 to ensure "businesses experience fewer financial and reputational risks" and to "enhance[e] transparency regarding class counsel fees".¹¹

- **Costs and fees.** The LCO recommended that no costs be awarded on certification and ancillary motions.¹² Although this is consistent with the provisions of class proceedings statutes in four other Canadian jurisdictions,¹³ it is contrary to the traditional "loser pays" costs rules that currently apply in class actions in Ontario,¹⁴ and was therefore the most controversial recommendation in the LCO's report. **C.J.Q. 182* Similarly, Bill 161 did not make any changes to the enabling statute of the Class Proceedings Fund,¹⁵ which would have allowed the partial funding of lawyers' fees.
- **Case management conferences.** The LCO recommended amending the Act to impose a deadline for the first case management conference (that is, 60 days from the last

defendant being served with the claim).¹⁶ Bill 161 does not contain this requirement. It does, however, allow courts to make case management orders on their own motion.¹⁷

Recommendations included in Bill 161

For the most part, however, Bill 161 adopts the LCO's recommendations. Given the reticence of the Ford administration to be seen to facilitate litigation, this is surprising. The sting in the tail, however, is in the provisions of Bill 161 that were not part of the LCO Report. This will be covered in more detail in the next section.

The recommendations included in Bill 161 are largely uncontroversial, and many formalise practices that are already part of the case law. If the bill is passed, the new sections and provisions of the Ontario CPA will be as follows:

- **Timelines for certification motions.** The Bill requires that the filing of the certification motion (or certain other steps) take place within one year of the filing of the Statement of Claim.¹⁸ A new s.29.1 of the CPA states that actions flouting this deadline will face the threat of dismissal for delay, with costs consequences. This provision applies to actions commenced before the legislative changes; the deadline for those actions will run from the date the Bill becomes law.
- **Preliminary motions to be heard before certification.** The Bill encourages courts to hear summary judgment motions, motions to strike out a case, and other preliminary motions before certification, so that cases can be focused or disposed of prior to an expensive certification motion.¹⁹ As stated in the LCO Report, this will enable the certification stage to better perform its function of screening out frivolous proceedings. **C.J.Q. 183*²⁰
- **Funding.** Third-party litigation funding has become an established part of class actions practice in Ontario, and Bill 161 formalises that practice by introducing a new s.33.1 into the CPA.²¹ The funded party is required to seek court approval at the earliest opportunity, the court is given an ongoing supervisory capacity over the funding agreement, and the defendants are able to recover any cost award directly from the funder. Any third-party funding arrangements must be disclosed in the notice of certification, and the court must be satisfied that the agreement is fair and reasonable, will not diminish the solicitor-client relationship, and that the funder can satisfy any indemnity given against adverse costs.
- **Settlement approval.** Bill 161 formalises several requirements already enshrined in the case law.²² According to a new s.27.1 of the CPA, courts can only approve settlements if they are "fair, reasonable, and in the best interests of the class".²³ Counsel must file affidavit evidence regarding the settlement approval criteria, the risks of

litigation, the range of possible recoveries and the valuation of the settlement. Courts may also appoint *amicus curiae* ²⁴ to help them determine the fairness and suitability of a proposed settlement,²⁵ and organisations representing class members under a disability²⁶ must be notified of any settlement approval motion.

- **Settlement distribution.** Importantly for accountability, s.26 of the CPA is amended to require parties to file an outcome report within 60 days of the end of the distribution period, which should contain information on notice, take-up rates, amounts of *cy-près* distributions, opt-outs and objections, the range of per-claimant recoveries, and amounts paid to counsel, claims administrators and litigation funders.²⁷ *Cy-près* distributions, which are permitted under class proceedings statutes in other provinces but which have never explicitly been part of the Ontario CPA (although they are a common practice),²⁸ are now permitted under a new s.27.2 of the CPA if, "using best **C.J.Q. 184* reasonable efforts, it is not practical or possible to compensate class or subclass members directly".²⁹
- **Fee approval.** The current criteria for fee approval under the case law is that counsel fees must be fair, reasonable and approved by the court and that, when considering fee approval, courts should consider the results achieved for the class and the risks assumed by class counsel.³⁰ These are now part of an amended s.32 of the CPA,³¹ along with a provision by which courts may appoint *amicus curiae* for fee approval motions. Courts may also hold back a percentage of counsel fees pending a mandatory final report on the outcome of the proceeding.³²
- **Carriage motions.** The current CPA is silent on competing class proceedings, as well as the "carriage motions" in which the court determines which proceeding will prevail and which will be stayed. The criteria established in the jurisprudence have become unwieldy and opaque. Bill 161 follows the LCO recommendations; a new s.13.1 of the CPA imposes timelines and establishes clear guidelines for determining carriage, so that the process is made more efficient and predictable.³³ New proceedings must be registered.³⁴ Carriage motions must be brought within 60 days of the issuance of the first action, following which competing proceedings may not be brought without leave of the court. In addition, there will be no appeal from carriage decisions, and class counsel will not be able to recoup the costs of carriage motions from class members.
- **Multijurisdictional class actions.** Almost all Canadian provinces now have class proceedings statutes, and most of them allow for the bringing of national opt-out class actions.³⁵ Overlapping actions are therefore commonplace. Bill 161 addresses this phenomenon by enacting the recommendations of the Uniform Law Conference of Canada,³⁶ which require provincial courts to consider whether to defer to another province before certifying a class proceeding (the Western Canadian provinces have **C.J.Q. 185* already amended their statutes in this fashion).³⁷ The Bill contains

specific criteria to guide the courts on this question.³⁸ It is silent, however, on the question of foreign (i.e. non-Canadian) class members.³⁹

- **Appeal routes.** Consistent with the LCO's recommendations, a new s.30 of the CPA gives both parties a right of appeal from certification orders, directly to the Court of Appeal for Ontario.⁴⁰ This eliminates the current requirement to seek permission to appeal, and cuts out the need to proceed through the Divisional Court. It also restricts the ability of an appellant to materially amend their case on appeal. This would prevent an unsuccessful representative plaintiff from amending their materials to reflect the certification judge's concerns, and then achieving certification on appeal. In reality, however, it may simply mean that judges certify cases conditionally, allowing plaintiffs to amend their materials, and also with the result that plaintiffs would be awarded their costs.⁴¹
- **Limitation periods.** Bill 161 clarifies the conditions that will cause the limitation period to resume running against class members, and adds a number of conditions to the existing CPA.⁴²

Controversial changes proposed by Bill 161

The most fundamental changes in Bill 161 revolve around the "preferable procedure" criterion of the certification test. Currently, s.5(1)(d) of the CPA requires that a class proceeding is "the preferable procedure for the resolution of the common issues".⁴³ As with all the certification criteria, the plaintiff must demonstrate "some basis in fact" that this criterion is met.⁴⁴ According to the Supreme Court of Canada,⁴⁵ the test has two parts. **C.J.Q. 186*⁴⁶

First, the class proceeding must be a fair, efficient and manageable method of advancing the class members' claims. The common issues will be considered in the context of the claim as a whole, and their resolution must "significantly advance the action".⁴⁷ Second, it must be preferable to all reasonably available means of resolving the class members' claims.⁴⁸ The court at this stage will consider whether a class action will promote the three rationales of access to justice, judicial economy, and behaviour modification.⁴⁹ If the defendant argues that a specific avenue of redress is preferable, then the onus shifts to the defendant to establish that it is a viable alternative.⁵⁰

The LCO recommended that judges give more weight to alternative remedies when considering whether a class action is the preferable procedure, including regulatory proceedings or reimbursement or recall programmes.⁵¹ It was not, however, "persuaded that legislative amendment is warranted".⁵² By contrast, Bill 161 explicitly establishes "a more stringent test to determine whether a class action is the preferable procedure as opposed to other available alternative dispute mechanisms or compensation schemes".⁵³

Under the new legislation, the plaintiff would bear the burden of satisfying additional requirements with regard to preferability. Specifically, the proposed legislation states that a class proceeding is the preferable procedure

"only if, at a minimum,

- (a) it is superior to all reasonably available means of determining the entitlement of the class members to relief ... and
- (b) the questions of fact or law common to the class members predominate over any questions affecting only individual class members."

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These superiority and predominance requirements are almost identical to the wording in r.23(b)(3) of the US Federal Rules of Civil Procedure,⁵⁵ and alter the preferable procedure test as articulated by the Supreme Court of Canada in 2013.⁵⁶ Each of these requirements will be addressed in turn.

Superiority

Currently, s.5(1)(d) of the CPA states that the class proceeding must be "the preferable procedure for the resolution of the common issues". Under the proposed legislative changes, however, the proceeding can only be the preferable procedure if it is "superior" to other means of "determining the entitlement of the class **C.J.Q. 187* members to relief".⁵⁷ Some commentators have stated that this will require the class proceeding to determine the class members' claims *entirely*, and that such a requirement will significantly lower the number of class actions that are certified.⁵⁸

However, the courts have rarely confined their analysis to the common issues alone when assessing preferability under s.5(1)(d). Instead, and according to the Supreme Court of Canada, the common issues must be viewed contextually in light of all the issues, both common and individual. In *Hollick*, the Court endorsed the following approach⁵⁹:

"The [American] class action [rule] requires that the class action be the superior method to resolve the 'controversy'. The B.C. and Ontario Acts require that the class proceeding be the preferable procedure for the resolution of the 'common issues' (as opposed to the entire controversy). [This] distinctio[n] can be seen as creating a lower threshold for certification in Ontario and B.C. than in the U.S. However, it is still important in B.C. and Ontario to assess the litigation as a whole, including the individual hearing stage, in order to determine whether the class action is the preferable means of resolving the common issues. In the abstract, common issues are always best resolved in a common proceeding. However, it is important to adopt a practical cost-benefit approach to this procedural issue, and to consider the impact of a class proceeding on class members, the defendants, and the court."

Requiring that a proposed class action be the superior means of determining the entitlement of class members to relief, then, does not seem like such a drastic change. This is especially so given the fact that the relaxed "some basis in fact" evidentiary standard will continue to apply to Ontario certification motions.⁶⁰

Nor does it seem especially onerous to require that a class proceeding be compared with "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".⁶¹ The Court in *Hollick* stated that it "cannot ignore the availability of avenues of redress apart from individual actions" and must "look to all reasonably available means of resolving the class members' claims".⁶² The Supreme Court of Canada confirmed this more recently in the 2013 case of **C.J.Q. 188 AIC Ltd v Fischer*.⁶³ This element in fact makes the comparative analysis broader than in the US, where r.23(b)(3) states that the class action must be superior "to other available methods for fairly and efficiently adjudicating the controversy"—implying that the comparison is limited to other forms of court action. By contrast, the courts in Ontario can also compare the action with non-judicial alternatives.⁶⁴

The fact that the Supreme Court of Canada conducted this comparison in *Fischer*, and nevertheless certified the class action even though a percentage of the available compensation had already been obtained through a prosecution by the Ontario Securities Commission, suggests that this element will not make a great deal of difference to the rate of certification of class actions in Ontario. The requirement to compare a class action with other procedures is already part of the British Columbia⁶⁵ and Alberta⁶⁶ class proceedings statutes, under which the courts must consider a number of factors that are worded in a fairly similar fashion to the criteria under r.23(b)(3).

Comparing procedures in terms of their ability to actually get relief to class members supports one of the aims of Bill 161—to "prioritiz[e] the interests of Ontarians in class action lawsuits so they receive faster, more transparent and more meaningful compensation and access to justice".⁶⁷ It also makes sense that class members would not be served well if, following the resolution of the common issues, expensive and time-consuming individual issues trials would still be required in order to determine their entitlement to compensation.⁶⁸ It could be argued that the vast majority of class actions settle before they even reach a common issues trial, let alone individual issues trials. However, it is fairer to both class members (who should not have to rely on the defendants' willingness to settle in order to gain timely compensation) and defendants (who are entitled to defend the claim on its merits) to expect that class proceedings swiftly get relief to class members whose claims merit compensation. If another procedure does so in a superior fashion, then all the better for class members. **C.J.Q. 189*

Predominance

Under the current preferable procedure test in Ontario, preferability can be established even where there are substantial individual issues. The common issues need not predominate, but their resolution must "significantly advance the action".⁶⁹

The requirement under US r.23(b)(3) that "the questions of law or fact common to class members predominate over any questions affecting only individual members" has been interpreted differently by different courts. Historically, the standard was more liberal, so that "the predominance requirement is met if [the] common question is at the heart of the litigation".⁷⁰ In recent years, however, the test has become more demanding. Most courts now require that the common issues "ha[ve] a direct impact on every class member's effort to establish liability that is more substantial than the impact of individualized issues in resolving the claim ... of each class member".⁷¹ The common issues must be key to resolving each class member's claim. If individual issues overwhelm the common issues, then the class action will not be certified.

The fact that Bill 161 imports this predominance test has, therefore, alarmed many stakeholders.⁷² They point out that numerous class actions concerning product liability, employment law, and even the landmark "Indian Residential Schools" litigation, would not have been pursued as class actions under this test.⁷³ The objection to both the predominance and the superiority requirements is that they import a restrictive US approach into a statute that has been "construed generously ... in a way that gives full effect to the benefits foreseen by the drafters".⁷⁴

This alarm may be unwarranted, or at least premature. Canadian courts have held that an issue will only be common when it forms "a substantial ingredient of each of the class members' claims" and where "its resolution is necessary to the resolution of each class member's claim"⁷⁵; this is akin to the more liberal historical standard in the US, and Ontarian courts will probably interpret the new predominance requirement in a similar fashion.⁷⁶ As with superiority, the lower "some basis in fact" standard will continue to apply. Furthermore, predominance is a consideration under the class proceedings statutes of both Alberta⁷⁷ and British **C.J.Q. 190* Columbia,⁷⁸ yet the latter has become one of the most plaintiff-friendly jurisdictions in Canada.

Conclusion

Bill 161 has introduced numerous changes that will make class actions more efficient and transparent, and almost all of them were recommended by the LCO in its report.

The superiority and predominance requirements may lead to more difficulty in getting class actions certified in Ontario, but it is much too early to tell. The prediction that these requirements will import the restrictive US approach is unlikely to be fulfilled, however, given that the same judges will still be deciding certification motions in Ontario and they must abide by the Supreme Court of Canada's holding that class action statutes should be "construed generously".⁷⁹

Finally, the "some basis in fact" standard of proof will continue to apply to each certification requirement⁸⁰ —a standard that is lower than the US approach of making factual determinations at the certification stage on a preponderance of the evidence, or on a "balance of probabilities".⁸¹ In light of all this, there may not be a great deal of change. Even if there is, it is in the interests of class members to avoid class actions that break down at the individual issues stage,⁸² especially if there is a more efficient and reasonably available way of determining their entitlement to compensation.

The changes could have been much more drastic. There was some concern that the Ontario government wanted to amend the "some basis in fact" standard of proof⁸³ and replace it with the US standard. There were also indications that the government might introduce a merits test into certification.⁸⁴ Several stakeholders advocated for these changes in their submissions to the LCO,⁸⁵ but neither has been implemented. This is a pleasant surprise, given the government's willingness to restrict access to the courts in other ways.⁸⁶

While the Ontario government might like these changes to reduce the number of class actions in the province, they are unlikely to do so in any significant way. **C.J.Q. 191* They should, however, make the procedure more expeditious and add certainty to its more penumbrous elements, including the preferable procedure analysis.⁸⁷ Given the strong reaction to some of the proposals in Bill 161, it may also undergo some amendment in committee. As to the final form the Act will take and the extent to which it will change class actions practice in Ontario, only time will tell.

Suzanne Chiodo

Footnotes

- 1 *Ontario, Legislative Assembly, Official Report of Debates (Hansard), 42nd Parl., 1st Sess. (9 December 2019) (Doug Downey).*
- 2 Bill 161, Smarter and Stronger Justice Act 2019 www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-161 [Accessed 20 February 2020]. At the time of the submission of this article, the Bill had passed First Reading and was at Second Reading. All the debates to date can be found at www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-161/debates [Accessed 2 March 2020].
- 3 Class Proceedings Act 1992 (CPA), SO 1992, c.6.
- 4 A minor amendment to the CPA was made in 2006, to reflect the fact that the Ontario Court (General Division) was renamed the Superior Court of Justice.
- 5 *Law Commission of Ontario, Class Actions: Objectives, Experiences and Reforms: Final Report (LCO, 2019).*
- 6 CPA s.5(1)(d).
- 7 Bill 161 (fn.2 above) Sch.4, s.7(2), amending CPA s.5(1)(d).
- 8 Federal Rules of Civil Procedure, Title IV: Parties, r.23: Class Actions, 383 US 1029.

- 9 Suzanne Chiodo, "Law Commission of Ontario Report: Class Actions: Objectives, Experiences and Reforms" (2019) 38(4) C.J.Q. 491.
- 10 This breakdown can be found in *Paul-Erik Veel, "Canada: Bill 161: Much Needed Modernization For Class Actions In Ontario" (Lenczner Slaght, 12 December 2019)*, <https://litigate.com/OnTheDocket#/bill-161-much-needed-modernization-for-class-actions-in-ontario> [Accessed 13 February 2020].
- 11 *Ministry of the Attorney General, "Backgrounder: Better, More Affordable Justice for Families and Consumers" (Toronto, 9 December 2019)*.
- 12 These include appeals, motions for production, and motions to amend a certification order. The LCO recommended that parties should be able to recover their costs on all other motions, including summary judgment and jurisdictional motions: LCO Report (fn.5 above), p.88.
- 13 Class Proceedings Act, RSBC 1996, c.50, s.37; Class Proceedings Act, CCSM c.C130, s.37; Class Actions Act, SNL 2001, c.C-18.1, s.37; Federal Courts Rules, SOR/98-106, Pt 5.1, r.334.39(1).
- 14 Certain exceptions are listed in CPA s.31(1). These include where the class proceeding is a test case, raises a novel point of law or involves a matter of public interest. These exceptions are rarely applied: *Suzanne Chiodo, The Class Actions Controversy: The Origins and Development of the Ontario Class Proceedings Act (Irwin Law, 2018)*, pp.191–194.
- 15 Law Society Act, RSO 1990, c.L.8, ss.59.1–59.5.
- 16 LCO Report (fn.5 above), pp.5, 18–22.
- 17 Bill 161 (fn.2 above), Sch.4, s.14, replacing CPA s.12; LCO Report (fn.5 above), pp.5, 18–22. Under s.12 of the current CPA, the court can only make case management orders on the motion of a party or class member, although (under s.13) it can stay any related proceedings on its own initiative. The suggested amendment would bring CPA s.12 into line with the statutes of other provinces, including British Columbia (fn.13 above) s.12; Manitoba (fn.13 above) s.12; Newfoundland and Labrador (fn.13 above) s.13; Class Proceedings Act, SA 2003, c.C-16.5, s.13(1); Class Proceedings Act, SNS 2007, c.28, s.15; Class Actions Act, SS 2001, c.C-12.01, s.14.
- 18 Bill 161 (fn.2 above) Sch.4, s.26, adding a new s.29.1 to the CPA. The current timeline is 90 days (CPA s.2(3)), which is more honoured in the breach than in the observance.
- 19 Bill 161 (fn.2 above) Sch.4, s.6, adding a new s.4.1 to the CPA. See also s.7(2), amending CPA s.5, regarding multijurisdictional class actions.
- 20 LCO Report (fn.5 above), p.50.
- 21 Bill 161 (fn.2 above) Sch.4, s.31, adding a new s.33.1 to the CPA; LCO Report (fn.5 above), p.88.
- 22 Bill 161 (fn.2 above) Sch.4, s.25, adding a new s.27.1 to the CPA; LCO Report (fn.5 above), pp.55–57.
- 23 *Dabbs v Sun Life Assurance Co of Canada, 1998 CanLII 14855 (ON SC)*, cited with approval in *Dabbs v Sun Life Assurance Co, 1998 CanLII 7165 (ON CA)*.

- 24 Known under the CPR as an Advocate to the Court.
- 25 This was also *Recommendation 8 of the report of the Australian Law Reform Commission, Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders (Report No.134, December 2018)*.
- 26 Parties under disability are known in the CPR as protected parties.
- 27 Bill 161 (fn.2 above) Sch.4, s.23(2), amending CPA s.26; LCO Report (fn.5 above), pp.69–70. This was also Recommendation 10 of the ALRC Report (fn.25 above).
- 28 See, e.g. *Carom v Bre-X Minerals Ltd*, 2014 ONSC 2507 at [124]; *Markson v MBNA Canada Bank*, 2012 ONSC 5891 at [37]–[43].
- 29 Bill 161 (fn.2 above) Sch.4, s.25, adding a new s.27.2 to the CPA. The permissible recipients of *cy-près* funds are any registered charity or non-profit organisation (if that would reasonably be expected to benefit class members directly or indirectly), or Legal Aid Ontario in any other case. See also LCO Report (fn.5 above) 65.
- 30 *Dabbs* (fn.23 above); *Cannon v Funds for Canada Foundation*, 2013 ONSC 7686; *Ramdath v George Brown College*, 2016 ONSC 2662; *Seed v Ontario*, 2017 ONSC 3534; *Brown v Canada (Attorney General)*, 2018 ONSC 3429. See also LCO Report (fn.5 above), pp.72, 77.
- 31 Bill 161 (fn.2 above) Sch.4, s.29(1), amending CPA s.32.
- 32 Bill 161 (fn.2 above) Sch.4, s.29(3), amending CPA s.32; LCO Report (fn.5 above), p.76.
- 33 Bill 161 (fn.2 above) Sch.4, s.16, adding a new s.13.1 to the CPA; LCO Report (fn.5 above), pp.5, 23–29.
- 34 Bill 161 (fn.2 above) Sch.4, s.3(1)–(3), amending CPA s 2.
- 35 That is, a class proceeding commenced in one province, whereby the class is defined to include residents of other provinces across Canada.
- 36 LCO Report (fn.5 above), pp.32–34; Uniform Class Proceedings Act (Amendment) 2006, www.ulcc.ca/en/uniform-acts-new-order/current-uniform-acts/82-josetta-1-en-gb/uniform-actsa/class-proceedings-act/1396-class-proceedings-amendment-multijurisdictional-proceedings [Accessed 22 January 2020].
- 37 Bill 161 (fn.2 above) Sch.4, s.8, adding a new s.5.1 to the CPA. See also s.7(2), amending CPA s.5. The Western Canadian provinces that have amended their statutes are British Columbia (fn.13 above) ss.1, 2, 3.1, 4, 4.1, 44; Alberta ss.1, 2, 5, 9.1; and Saskatchewan (fn.17 above) ss.2, 4, 6, 6.1.
- 38 Bill 161 (fn.2 above) Sch.4, s.7(2). Notice of a certification motion must also be given to the representative plaintiff in a class proceeding or proposed class proceeding in a Canadian jurisdiction other than Ontario, which involves the same or similar subject-matter: Bill 161 (fn.2 above) Sch.4, s.3(3), replacing CPA s.2(3).
- 39 With regard to foreign (ie non-Canadian) class members, the LCO recommends ((fn.5 above), p.34) that judges be allowed to certify opt-out classes with foreign class members, and that the CPA be amended to be consistent with the *International Bar Association's "Guidelines for Recognizing and Enforcing Foreign Judgments for Collective Redress"*, www.ibanet.org/Document/Default.aspx?

DocumentId=C1F679E5-7F71-4A19-B3F6-DF5BC79C07A9 [Accessed 13 February 2020].

40 Bill 161 (fn.2 above) Sch.4, s.27(1), replacing most of CPA s.30; LCO Report (fn.5 above), p.94.

41 Jeremy Martin makes this point in *"Good News and Bad News for Defendants as Ontario Proposes Tightening and Streamlining Class Actions"* (Cassels, 13 December 2019), <https://cassels.com/insights/good-news-and-bad-news-for-defendants-as-ontario-proposes-tightening-and-streamlining-class-actions/> [Accessed 13 February 2020].

42 Bill 161 (fn.2 above) Sch.4, s.26, replacing CPA ss.28 and 29.

43 CPA s.5(1)(d).

44 *Hollick v Toronto (City)*, 2001 SCC 68 at [25]; *AIC Ltd v Fischer*, 2013 SCC 69 at [48].

45 *Hollick* (fn.44 above) at [28].

46 See also Janet Walker (ed.), *Class Actions in Canada: Cases, Notes and Materials* (2nd edn, Emond Montgomery, 2018), p.72.

47 *Hollick* (fn.44 above) at [32].

48 *Fischer* (fn.44 above) at [16]–[20]; *Hollick* (fn.44 above) at [31].

49 *Ontario Law Reform Commission, Report on Class Actions* (Ministry of the Attorney General, 1982). See also *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 at [27]–[29].

50 *Fischer* (fn.44 above) at [49].

51 LCO Report (fn.5 above), pp.37, 49–50.

52 LCO Report (fn.5 above), p.50.

53 Backgrounder (fn.11 above).

54 Bill 161 (fn.2 above) Sch.4, s.7(2), amending CPA s.5.

55 Federal Rules of Civil Procedure, Title IV: Parties, r.23: Class Actions, 383 US 1029.

56 *Fischer* (fn.44 above) at [16]–[20].

57 The proceeding can also be certified if it is the superior means of "addressing the impugned conduct of the defendant" (Bill 161 (fn.2 above) Sch.4, s.7(2)). The proposed changes therefore affirm the behaviour modification goal of class actions.

58 See, e.g. *Jasminka Kalajdzic, "One Step Forward, Two Steps Back: Commentary on Proposed Changes to Ontario's Class Proceedings Act"* (Class Action Clinic Blog, 10 December 2019), <https://classactionclinic.com/blog/> [Accessed 19 January 2020]; *Antonio di Domenico, "Preferability and Proposed Changes to Ontario's Class Action Legislation: Implications for Private Antitrust/ Competition Enforcement"* (Competition Chronicle, 18 December 2019), <https://www.lexology.com/library/detail.aspx?g=bb495934-f600-4542-898d-eadec381929b> [Accessed 5 March 2020].

59 *Hollick* (fn.44 above) at [29]. This approach is articulated in *Ward K. Branch, Class Actions in Canada* (Western Legal Publications, 1996) at [4.690]. It was endorsed again in *Fischer* (fn.44 above) at [21].

60 The standard is relaxed in comparison to the US, where a more stringent "balance of
probabilities" standard is used on certification under r.23(b)(3).
61 Bill 161 (fn.2 above) Sch.4, s.7(2), amending CPA s.5. Some commentators have also
suggested that this list puts the onus on the plaintiff to prove that the class proceeding
is superior with specific reference to these other procedures: Kalajdzic (fn.58 above).
This would be slightly more stringent to the current requirement that plaintiffs prove
that the class proceeding is preferable to all reasonably available means of resolving
the class members' claims. The shift is very subtle, however, so it remains to be seen
whether the courts will interpret the legislation in this fashion.
62 *Hollick* (fn.44 above) at [31].
63 *Fischer* (fn.44 above) at [16].
64 *Fischer* (fn.44 above) at [20].
65 BC CPA (fn.13 above) s.4(2):
"In determining whether a class proceeding would be the preferable procedure for
the fair and efficient resolution of the common issues, the court must consider all
relevant matters including the following:

...

- (b) whether a significant number of the members of the class 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."

66 Alberta CPA (fn.17 above) s.5(2):
"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:

...

- (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."

- 67 *Ministry of the Attorney General, "News Release: Building a Stronger Justice System to Grow Safer Communities" (Toronto, 9 December 2019).*
- 68 Paul-Erik Veel makes this point (fn.10 above).
- 69 *Cloud v Canada (Attorney General), 2004 CanLII 45444 (ON CA)* at [75]–[76]; *Hollick* (fn.44 above) at [30].
- 70 *Powers v Hamilton City Public Defender Comm, 501 F.3d 592, 619 (6th Cir. 2007)*, cited in *John B. Lewis and Sara L. Witt, "Predominance and related issues under Rule 23—a vehicle to rationalize class action jurisprudence" (Lexology, 22 March 2010)*, www.lexology.com/library/detail.aspx?g=f15cad73-c57d-47eb-a507-faccdac24437 [Accessed 13 February 2020].
- 71 *Vega v T-Mobile USA, Inc, 564 F.3d 1256 (11th Cir. 2009) 1270*, cited in *Lewis and Witt* (fn.70 above). See also *Comcast Corp v Behrend, 569 US 27 (2013)*.
- 72 See, for example, letter from the Law Commission of Ontario to The Honourable Doug Downey, Ministry of the Attorney General, dated 22 January 2020 <https://www.lco-cdo.org/wp-content/uploads/2020/01/LCO-Letter-re-Bill-161-Class-Actions-Final-Jan-22-2020.pdf> [Accessed 5 March 2020].
- 73 *Kalajdzic* (fn.58 above). See also *di Domenico* (fn.58 above), who states that competition law class actions may fail at certification under this test.
- 74 *Hollick* (fn.44 above) at [14]–[15].
- 75 *Hollick* (fn.44 above) at [18]; *Dutton* (fn.49 above) at [39].
- 76 The Attorney General pointed this out during the debates on Bill 161: Ontario, *Legislative Assembly, Official Report of Debates (Hansard), 42nd Parl, 1st Sess (19 February 2020) (Doug Downey)*.
- 77 Alberta CPA (fn.17 above) s.5(2):
- "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."

78 BC CPA (fn.13 above) s.4(2):

"In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:

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

79 See Martin (fn.41 above); *Hollick* (fn.44 above) at [14]–[15].

80 The Attorney General pointed this out during the debates on Bill 161: Ontario, *Legislative Assembly, Official Report of Debates (Hansard), 42nd Parl, 1st Sess (19 February 2020)* (Doug Downey).

81 *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at [101].

82 Examples of such class actions include *Webb v K-Mart Canada Ltd*, 1999 CanLII 15078 (Ont. Sup. Ct J.), in which the trial judge ordered court-supervised referees to determine the claims of thousands of individual class members. "This process was largely unsuccessful. Other mechanisms for resolving contested individual issues have met with difficulties": *Class Actions in Canada* (fn.59 above), p.72.

83 *Pro-Sys* (fn.81 above) at [99]–[105]; *Hollick* (fn.44 above).

84 Certification motions in Ontario do not currently involve a determination of the merits of the proceeding: CPA s.5(5).

85 See the submissions to the LCO of the Canadian Bankers Association and Canadian Life and Health Insurance Association (joint submission, 31 May 2018), p.8; the International Association of Defence Counsel (undated) at [51], [79]; Innovative Medicines Canada (31 May 2018), p.1; Ontario Chamber of Commerce (30 May 2018), p.8; US Chamber Institute for Legal Reform (undated), p.3. All submissions to the LCO can be found at www.lco-cdo.org/en/our-current-projects/class-actions/submissions-to-the-consultation-paper/ [Accessed 13 February 2020].

86 For example, through the recent Crown Liability and Proceedings Act 2019, SO 2019, c.7, Sch.17, which has retrospectively expanded immunity for the Crown and made it much harder to sue the Ontario government.

87 This would be welcome in light of decisions such as *Whitehouse v BDO Canada LLP*, 2020 ONSC 144 (holding that preferability only arises where there are mutually exclusive choices of procedure), in which the preferability analysis has increasingly been weighted in favour of the class action.