

June 12, 2020

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 specifically as it relates to amendments to the *Class Proceedings Act (CPA)*.

Dear Standing Committee of Justice,

Innovative Medicines Canada (IMC) represents Canada's innovative pharmaceutical sector. We appreciate the government's efforts to keep Ontarians safe and healthy during the COVID-19 pandemic. In addition to updating you on some of our efforts around COVID-19, we are writing to again commend the government for its efforts and goals reflected in Bill 161, *The Smarter Stronger Justice Act*.

Our members are fully engaged in fighting the COVID-19 virus for Ontario patients. From donations of personal protective equipment for front-line workers, and collaborations to speed up the discovery of effective treatments and vaccines, to freeing up medically-trained employees to volunteer in the healthcare systems, every company is doing something to support Canada's response to COVID-19.

We continue to be hopeful that treatment or prevention for COVID-19 will be available soon. The following is exemplary of some of our industry members' ongoing efforts in research to develop vaccines or therapies to combat COVID-19:

- AstraZeneca is advancing its ongoing response to address the unprecedented challenges of COVID-19, collaborating with a number of countries and multilateral organizations to make the University of Oxford's potential vaccine widely accessible around the world in an equitable



manner. The Company has concluded the first agreements for at least 400 million doses and has secured total manufacturing capacity for one billion doses so far and will begin first deliveries in September 2020. AstraZeneca aims to conclude further agreements supported by several parallel supply chains, which will expand capacity further over the next months to ensure the delivery of a globally accessible vaccine.

- Eli Lilly, working with the NIH, recently announced the commencement of trials of certain compounds as potential treatments for COVID-19. Results are expected within the next 2 months.
- Johnson & Johnson and BARDA, together have committed more than \$1B to the research of a novel Coronavirus vaccine development, expecting to initiate Ph 1 human clinical studies by September this year. Johnson & Johnson plans to establish new vaccine manufacturing capabilities to begin production at risk to ensure global vaccine supply.
- Sanofi Pasteur (the vaccines global business unit) has collaborated with BARDA to establish state of the art facilities for sustainable production that will eventually be used for its COVID-19 program. Leveraging its previous development work for a SARS (a coronavirus) vaccine, Sanofi Pasteur aspires to unlock a fast path forward for developing a COVID-19 vaccine.

When vaccines and treatments become available to Canadians, our members are hopeful that a robust *CPA* will be in place, a regime that is more balanced and fairer to both sides. We appreciate that class actions serve an important societal function for vulnerable or disadvantaged members of our society. However, our courts need more effective tools to eliminate spurious cases that serve little or no social utility, do not result in meaningful compensation to the class, increase the burden on judicial resources, and which delay the courts from hearing more important causes. While we maintain that a preliminary merits test as a screening mechanism for all class actions, not just certain ones under *Securities Act*, would be the better



tool, we believe that the Bill 161 class action reforms will achieve more balance and will be a substantial improvement to the status quo.

From our perspective, Bill 161 is not intended to prevent, nor will it prevent, meritorious cases appropriate for class treatment from proceeding. Indeed, it will allow them to proceed more quickly towards a resolution. Specifically, the predominance and superiority elements added to the certification test in Bill 161 are incremental changes, not the radical change some would make them out to be, and we can have confidence that they will be interpreted and applied in individual cases by judges sensitive to access to justice concerns from all perspectives.

The enhanced predominance requirement will allow courts to deny certification in cases where there are significant issues better litigated without the added expense and judicial burdens of a class proceeding. This provision aims to prevent unmanageable cases that lack real commonality from clogging the judicial system. Serious meritorious cases prompted by systematic neglect, or other systemic malfeasance, and appropriately defined, are unlikely to fail to meet the predominance test because the question of whether there was systemic negligence or other wrongdoing will remain a “predominant” component of those cases.

The superiority requirement will expressly allow courts to deny certification where a fair process has already been implemented to resolve claims, through recall or service programs, through a regulatory process, or through alternative dispute resolution. This benefits everyone, including plaintiffs, who can have recourse to a process that has been determined by the judge to be as good or better. It will also encourage defendants to be proactive about resolving multi-party disputes and to design creative and efficient processes to compensate those who may have been harmed by their conduct.

For the reasons cited in our January 21, 2020 letter, we also reiterate that the proposed change with respect to subsection 27.2(1) of the Act may inadvertently create unfairness. This amendment would give the Court



the ability to order a *Cy Pres* award on a contested basis (absent settlement) in certain circumstances, that would be distributed not to class members but to persons or entities that are not impacted by the alleged misconduct. While the LCO final report¹ recommended certain reforms related to *Cy Pres* distributions in the context of aggregate settlement recovery (negotiated and agreed to by both parties), it made no recommendation regarding the use of such awards in the face of an objection from one of the parties. *Cy Pres* awards in the latter context circumvent the usual requirement in Ontario civil litigation for parties claiming compensatory damages to come forward and show that losses were caused to them by the alleged wrongful conduct. Accordingly, we ask that proposed change with respect to subsection 27.2(1) be removed from the Bill.

Allowing the courts to order that a *Cy Pres* payment be made to persons who are not members of the class and who could not establish any loss caused by the alleged conduct (or in the context where class members do not come forward to establish their loss and causation) effectively converts what should be a compensatory award into a punitive damages award, and will indirectly circumvent the principles applicable to such awards. If punishment is the objective, then it should be accomplished through a clear and express statutory provision with fines payable to the government, not by way of windfall awards to uninjured private entities.

Thank you for your consideration. We are happy to work and collaborate with the Ontario government at any time with respect to these issues, and please do not hesitate to contact us if you have any questions.

¹ Class Actions Objectives, Experiences and Reforms Final Report July 2019 (<https://www.lco-cdo.org/wp-content/uploads/2019/07/LCO-Class-Actions-Report-FINAL-July-17-2019.pdf>)



Sincerely,

Declan Hamill,

Vice-President, Legal, Regulatory Affairs and Compliance

Innovative Medicines Canada

About Innovative Medicines Canada

Innovative Medicines Canada is the national voice of Canada's innovative pharmaceutical industry. We advocate for policies that enable the discovery, development and commercialization of innovative medicines and vaccines that improve the lives of all Canadians. We support our members' commitment to being valued partners in the Canadian healthcare system.