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June 12, 2020

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

Dear Chair Baber and Committee Members:

RE: Class Proceedings Act, 1992 proposed amendments

We are taking this opportunity to provide you with a written copy of our opening remarks with respect to the proposed Amendments to the Class Proceedings Act in Sch. 4 to Bill 161, which we were not able to complete due to the time limits on submissions. I hope that you will find them useful in your consideration of these amendments.

Having now heard the submissions of many other stakeholders, I can confirm that we agree with the submissions of the LCO, the Windsor Law Clinic, Mr. Bach, Mr. Foreman, Mr. Brown, Mr. Sterns, and the others who spoke against the introduction of the proposed s. 5(1.1) into the Act.

There are a great many other concerns that our firm holds with respect to the proposed amendments, some of which are readily resolved through drafting changes, and others of which we would submit ought not to be included in the amendments. We concur with the submissions of the Toronto Lawyers' Association, and are largely in agreement with the recommendations and submissions of The Advocates Society. The Committee should note that both the TLA and TAS represent both the plaintiff and the defence bar, and both sides of the bar were actively involved in preparing both organizations' submissions. Both organizations, like our firm, urge the government to step back from the proposed changes to include predominance and superiority in the certification test, and instead to adopt the language of the model Act drafted by the Uniform Law Conference of Canada.

Here are our submissions in written form:

I would like to start by taking a step back to explain to the Committee how we got to where we are today.

Ontario was at the forefront of the common law provinces in enacting the CPA in 1992. When it did so, it had been after a decade of study, starting with the 1982 - 3 volume report from the Ontario Law Reform Commission, and then the 1990 Report of the Attorney General's Advisory Committee on Class Action Reform. That Committee included representation from diverse

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stakeholder groups, including lawyer organizations, corporate business interests, public advocacy groups, and the Insurance Bureau of Canada.

Despite this diversity of interests, the Committee reached a unanimous consensus on the draft class action legislation. The CPA is largely based upon the draft act prepared by that Committee.

One of the recommendations that came out of the Committee was that the effectiveness of the legislation should be monitored, so that if changes were necessary they could be addressed, based upon objective evidence. That did not happen.

Over the course of the next 25 years, the law have developed as the various aspects of the Act have been engaged, and we now have a strong body of interpretive case law, from every level of court, including the Supreme Court of Canada. The law is complex, the decisions are nuanced and many are deeply infused with scholarly and policy-based analyses.

What is very important for this Committee to know is that there is no objective evidence that the CPA is not doing what it was supposed to do – improve judicial economy, promote behaviour modification, and provide access to justice for Ontarians. It does all of those things, and the track record of cases that have resulted in meaningful substantive justice for the people of this province is too long to list.

There is no evidence that the Act has been interpreted in a manner that is favourable to either plaintiffs or defendants. Our judges are even handed and the legislation is only procedural in nature.

There is no evidence that the class action procedure is being abused, and that frivolous lawsuits are being brought to extort settlements from blameless defendants.

So, when the Law Commission of Ontario undertook a review of the CPA, there was no groundswell movement calling for material reform of the legislation. It was, and it is working as it was intended to do – it provides a procedural mechanism for the aggregation of claims where many individuals have suffered harms arising from the conduct of bad actors. It is for many people and many harms, the only tenable way for them to achieve access to justice, because the harms are small and could not be feasibly prosecuted individually. It allows those who are marginalized, of limited financial resources, and those who are uninformed of their rights to achieve justice.

And importantly, the use of the class action process reduces the burdens on the courts that would otherwise be the case, for example in the case of mass personal injuries where individuals have been harmed by defective medical products, faulty pharmaceuticals, institutional abuse, or catastrophic events. In a judicial system that is already massively overburdened, the aggregation

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of these seriously injuries into one proceeding achieves access to justice for the injured persons, and vastly reduces the strains on the judicial system.

With that background, we ask the Committee to consider – what is the mischief that the proposed amendments to the CPA are meant to achieve? What evidence is there that the system is broken and needs to be reworked into a different model?

Is there any evidence before you that the changes proposed by these amendments to the CPA will in fact help to resolve legal issues more quickly or improve Ontarian's access to justice?

Respectfully, we believe that there is none. But you have heard and will hear from many parties who have been involved in this practice for decades, and who will tell you that many of the proposed amendments will not improve access to justice. They, in fact, will be harmful by both creating barriers to the justice system and by potentially flooding the courts with mass claims, when there is in Canada no effective mechanism for processing mass torts.

In the submissions made to the LCO, there was only one that suggested the importation of the US concepts of predominance and superiority into the Act. That was by the Canadian Bankers Association and the Canadian Life & Health Insurance Association. They also advocated for other changes, all of which would make the Act less accessible, and that would defeat its intended purpose. The submission did not provide practical recommendations about how these concepts could be integrated into the Ontario class action regime, nor did they explain why such a drastic change was warranted. The submission cherry picked two concepts that have resulted in drastically limiting the scope of class proceedings in the US without identifying that the US Federal Rules of Court also contain other checks and balances that work in tandem with the predominance and superiority test, including unlimited discovery rights in advance of the certification motion, and the Multidistrict Litigation process for the adjudication of mass tort claims when a class action is precluded by the predominance and superiority test.

What is important to note about this particular submission is that, although it was a complete outlier in suggesting the addition of predominance and superiority, even they advocated in favour of harmonizing the certification test across the country.

We agree the test should be harmonized. Ontario should not become an outlier and adopt a certification test that would put it entirely at odds with the class action regimes in other provinces. Adopting predominance and superiority will be raising barriers to access to justice for Ontarians that do not exist anywhere else. Ontarians will not have a smarter and stronger class action regime. It will be harsher and preclusive.

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But there is a ready solution if this government has concluded that the courts should be applying a more robust analysis of whether a class proceeding is the preferable procedure. It should then adopt the model legislation drafted by the Uniform Law Conference of Canada, which is in place in AB, BC and SK. That legislation provides that as part of the preferability analysis, the court must consider whether questions of fact or law common to the class predominate over individual issues; but predominance is not a precondition to certification.

The model Act does not import the US concept of superiority. When the drafters of the CPA chose the word preferability for the certification test, they rejected superiority. There is now almost 30 years of jurisprudence analyzing the preferability test. To change the language now is simply to invite decades more of judicial debate, appeals and uncertainty.

This holds equally true with respect to predominance. Appeals and uncertainty will be the inevitable result. That means delays. It means more time in court. It means cases that may potentially not be brought because of the risk, uncertainty and delay, and that all means that Ontarians will not be achieving better access to justice.

I have focused my remarks on this one aspect of the proposed amendments to the Act that are most problematic. But there are, in fact, many other issues with the legislation as drafted. I commend to the Committee the written submission of the TLA and The Advocates' Society, both of whom represent both defence and plaintiff side lawyers, and who have delivered detailed and thoughtful analyses of the whole of the draft legislation.

We remain at your service and would be pleased to be able to provide insight and commentary regarding appropriate wording for any changes to the Act, to help avoid unforeseen consequences. As you are no doubt well aware by now, the law in this area is complicated, and it can take years to fully appreciate the complexities of how the legislation works in action.

Yours truly,

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