TLA SUBMISSIONS ON SCHEDULE 4, *SMARTER AND STRONGER JUSTICE ACT, 2020* –

Amendments to the *Class Proceedings Act, 1992*

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Toronto Lawyers ASSOCIATION TLA

March 16, 2020

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Standing Committee on Justice Policy
Legislative Assembly of Ontario
via online submission

Dear Minister Downey and members of the Standing Committee on Justice Policy,

RE: TLA SUBMISSIONS ON SCHEDULE 4, *SMARTER AND STRONGER JUSTICE ACT, 2020* – Amendments to the *Class Proceedings Act, 1992*

Introduction

The Toronto Lawyers Association (TLA) is the voice of its 3,700 members who practice law in all disciplines across the Greater Toronto Area, including both plaintiff- and defence-side class action lawyers. The TLA has represented the interests of its lawyer members for over 130 years.

On December 9, 2019, the Attorney General of Ontario introduced Bill 161, the *Smarter and Stronger Justice Act, 2019* (Bill 161) which, among other things, proposes many changes to the Ontario *Class Proceedings Act, 1992* ("*CPA*"). Bill 161 has now passed Second Reading. Bill 161 follows a recent comprehensive review of the *CPA* by the Law Commission of Ontario ("LCO"). The proposed amendments in Schedule 4 adopt many of the incremental changes recommended by the LCO and, in some instances, have taken a bolder approach to reform.

Bill 161 proposes changes to numerous aspects of class action practice and procedure in Ontario. The proposed reforms will impact both the delivery of, and access to justice through class proceedings in the province. Accordingly, these proposed reforms deeply concern the TLA, its members, and the public we serve. We are pleased to provide the Attorney General, and the Standing Committee on Justice Policy our comments and concerns about the current draft of Schedule 4 to the Bill.

The TLA commends the government for approaching amendments to the *CPA* with a view to increasing access to justice for the people of Ontario. Many of the proposed reforms to the class actions procedure will help ensure that those involved in class actions, be they plaintiffs, class members, or defendants, receive a fair hearing and just outcome.

The Supreme Court of Canada explained in its seminal 2014 decision in *Hryniak v. Maudlin*,[1] that delivering access to justice in the modern world requires a culture shift "to create an environment promoting timely and affordable access to the civil justice system." This includes moving away from a system encumbered by convention, to a system with simplified and proportional pretrial procedures that are tailored to the needs of the particular case. Applied to class actions, this means that the culture shift should move away from an over-burdened process that puts unnecessary and excessive demands on the parties at the preliminary certification stage.

As discussed below, the TLA is concerned that some of the proposed amendments to the *CPA* will, in fact, work to the detriment of the people whom this government is seeking to protect, and that some of the proposed amendments may be antithetical to the admirable goal of improving access to justice. Where possible, the TLA has identified the concerning sections, and has proposed alternative language that may be more harmonious with the objective of making the justice system more accessible and efficient.

Background

After more than 25 years since its enactment, the *CPA* needed a comprehensive review to determine if it was achieving its intended goals. They are: (i) improving judicial economy; (ii) encouraging behaviour modification; and, most importantly, (iii) providing access to justice to Ontarians who might otherwise be foreclosed from a remedy for the wrongs they have suffered.

After several aborted attempts at this review, the LCO ultimately produced its Report ("the Report") in July 2019[2]. The LCO consulted broadly with the key stakeholders in the class action regime, including the judiciary, defence- and plaintiff-side lawyers, lawyers' organizations, and various special interest groups, including many business interest groups. The Report comprehensively reviews the legislation and the state of class actions in Ontario. The Report is detailed, balanced and objective. The TLA largely agrees with the Report's recommendations, except where a divergence of opinion is expressed below.

Importantly, the TLA agrees with the LCO that it cannot support all the proposed amendments in the Bill, as currently drafted. The TLA adopts the LCO's reasons in its letter to the Honourable Minister of the Attorney General dated January 22, 2020.

Attorney General's Advisory Committee on Class Action Reform (1990)

The Attorney General's Advisory Committee on Class Action Reform[3] consisted of stakeholders with vastly differing interests, including representatives of government, lawyers (though no plaintiff-side lawyers), businesses and consumers. The Advisory Committee reached a consensus about not only the recommendations to the

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[1] *Hryniak v. Mauldin*, 2014 SCC 7.
[2] Law Commission of Ontario, *Class Actions: Objectives, Experiences and Reforms: Final Report* (Toronto: July 2019).
[3] Ministry of the Attorney General, Policy Development Division, *Report of the Attorney General's Advisory Committee on Class Action Reform* (Toronto: Ministry of the Attorney General, 1990) [AGAC Report or Advisory Committee Report].

Government, but also the language of the draft Act. The *CPA* is largely based on the Advisory Committee's draft Act.

Consistent with the AG's directions to the Advisory Committee, the *CPA* does not give special treatment to either plaintiffs or defendants. The *CPA* removes both procedural and substantive barriers to accessing the courts and provides safeguards to all parties involved in the litigation, including maintaining the traditional two-way cost regime that is part of the litigation landscape in this province.

With respect to the preferability test on certification, the Advisory Committee expressly selected the word "preferable" over "superior" because it concluded that " 'preferable' would best draw the court into a consideration of whether the class proceeding was a fair, efficient and manageable method of advancing the claim." This test has been applied without difficulty since the *CPA* was enacted.

The Advisory Committee recommended that the legislation be reviewed to ensure that the envisioned procedures would not "become an unwieldy procedural imposition on the courts and the administration of justice."

The Advisory Committee also recommended that the effectiveness of the CPA be monitored, and, by applying the collected data, any necessary changes to the procedure could be made. The monitoring was to include recording the types of substantive claims being advanced, the class sizes, the effect of certification on advancing the claims, settlement rates, etc., so that a balanced review of the procedure would be possible.

Unfortunately, no such monitoring process was implemented. This failure significantly hampered the LCO's efforts when it undertook the recommended review of the legislation that lead to its current Report. The LCO did its best to make recommendations based on the limited objective data available to it. But the LCO was nonetheless left to rely mostly on the reported experiences, impressions, and hearsay of the stakeholders.

Therefore, the TLA, subject to some minor proposed revisions addressed further below, strongly favours the proposed amendments to the *CPA* that require reporting on the outcomes of the proceedings, so that any future revisions of the *CPA* can be evidence-based.

Discussion of the Proposed Amendments to the *CPA*

The discussion below is subdivided into the following three categories:

1. the amendments that the TLA supports (with or without minor revisions);
2. the amendments that the TLA considers unnecessary; and
3. the amendments that the TLA opposes.

1. Amendments that the TLA Supports (with or without minor revisions)

The TLA supports any amendments that will both decrease the burden on the court system and increase access to justice, and that are consistent with the culture shift endorsed in *Hryniak*. Many of the proposed amendments to the *CPA* will have this effect. The TLA particularly endorses the amendments below, but recommends some minor revisions, as noted.

(a) Registration of proposed class action, S. 2(1.1)

S. 2(1.1), requiring the registration of a proposed class action is essential to the collection of objective data. However, the TLA is concerned that registration on the same day may be impractical, especially if the claim is issued towards the end of the day. In larger centers, process servers are used to file documents with the court, and hence the issued claim may not be returned to the plaintiff's lawyers on the date that it is issued.

Recommendation: extend this timeline to five days (allowing for a Friday issuance, and the claim not being returned until later on the following Monday).

(b) Multi-jurisdictional proceedings, S. 5.1, 5(6), 5(7), 5(8)

The TLA favours the various amendments that are consistent with the Uniform Law Conference of Canada's *Uniform Class Proceedings Act*, particularly regarding multijurisdictional proceedings that bring the *CPA* in line with its counterparts in BC, AB, and SK.

The TLA agrees as well with s. 5(8) that gives the court the discretion to stay a proceeding (including a multijurisdictional proceeding) *before* the certification motion, rather than await the certification hearing, in appropriate cases. In cases of overlapping multijurisdictional proceedings, it is often unfair to the defendants to have to unnecessarily respond to multiple certification motions in multiple jurisdictions. Any early stay order in the less appropriate jurisdiction will likely reduce overlapping proceedings, the risk of inconsistent decisions, and the burden on the courts. Changes that help to relieve the administrative burdens and costs associated with overlapping and duplicative proceedings benefit all class action litigants.

(c) Carriage motions, Ss. 13.1, 34(1.1)

The TLA agrees that amendments setting out an expedited process for the hearing of carriage motions and enumerating the factors that the court should consider on such a motion, fill an important identified gap in the existing legislation.

Establishing a deadline to commence a competing proceeding is appropriate, as the filing of duplicative "copycat" claims should generally be discouraged. But we are concerned that 60 days is too short to allow legitimate claimants and their lawyers to fairly investigate potential claims and then to issue a properly framed claim. Inducing parties to hastily file undeveloped claims may lead to commencing unnecessary and duplicative actions that might not otherwise have been started. This contingency is contrary to the goal of promoting judicial efficiency and reducing the administrative burdens on the courts.

Recommendation: Extend the deadline to commence a competing proceeding to 90 days. This deadline would permit well-considered claims to be filed while discouraging duplicative claims. The suggested additional time also allows more opportunity for lawyers with potentially competing claims to negotiate among themselves and potentially resolve carriage before the duplicative claims are commenced, or before a carriage motion is required.

The TLA also has identified that there is a logistical disconnect between ss. 13.1(3) and (8). Subsection (3) mandates that the carriage motion be brought "no later than 60 days after the day on which the first of the proceedings was commenced." But subsection (8) allows competing claims to be commenced up until 60 days after the first proceeding was commenced. It will be impossible for a carriage motion to be brought within 60 days, if the playing field of potential competing claims is not circumscribed until the 60th day after the first claim was issued. The immediacy within which the carriage motion is to be commenced also leaves no time for the competing claims to be resolved consensually.

Recommendation: Require the carriage motion to be brought no later than 30 days after the expiry of the 90-day period prescribed under s. 13.1(8). This allows the competing claims a total of 120 days to make themselves known and to attempt to resolve the carriage issues before the court's process is engaged, thereby reducing the overall burden on the courts.

(d) Notice, Ss. 17, 20, 27.1(9), 27.1(11)

The legislated requirements to use plain language in both official languages, and reminding that, in some cases, notice ought to be provided to the Public Guardian and Trustee and/or Children's Lawyer are all appropriate amendments, consistent with the *CPA*'s goals.

(e) Reports by Claims Administrator, Ss. 26(12), 27.1(16)

Generally, the TLA strongly endorses the new reporting requirements in the amendments to the *CPA*. As referenced above, the collection of data about how class proceedings are actually being conducted and resolved will assist the future analysis of the *CPA*'s effectiveness and utility and in assessing whether its objectives are being met. This data will help to dispel the prevailing myths and anecdotal hearsay surrounding class proceedings.

The TLA is concerned, however, about the reporting burden the amendments would impose on claims administrators; specifically, the required information might not have been obtained by the claims administrators in the course of their retainer and/or the required information may simply be unavailable. The TLA cautions against overburdening claims administrators with excessive reporting responsibilities, as these duties will necessarily increase the costs of the administration process, thereby driving up the costs of the litigation to both the defendants and to the class.

The TLA's particular concerns about reporting under s. 27.1(16) include the following:

> **3.** "Information respecting the number of class members identified in each affidavit filed under subsection 5(3) in the motion for certification."

The information about the number of known class members filed with the court on the certification motion is already in the court file. This information is often out of date by the end of the case, inaccurate, or no more than a preliminary "best guess". It is rarely an accurate report of the true class size. Hence, it is not helpful information for the purposes of gathering objective, statistical data about class proceedings.

4. "The number of class members who received notice associated with the distribution, and a description of how notice was given."

It is often impossible to report on the number of class members who have, in fact, received notice, except when there has been a direct notice program. Even then, direct notice is rarely the only method of notice. While scope of readership of media publications can be ascertained, this does not translate directly to notice to class members. The total readership of online publications is unascertainable.

8. "The number of class or subclass members who objected to the settlement and the nature of their objections."

The number of opt-outs is not information obtained at the settlement or judgment distribution stage. This is determined at the end of the opt-out period, following the certification order. The plaintiff and/or notice administrator reports to the parties and the court on the number of opt outs at that time.

12. "The solicitor fees and disbursements."

There is no reason to require the claims administrator to report on the solicitor's fees and disbursements. These are fixed by court order. The fees may or may not have been distributed to the plaintiff's lawyers by the claims administrator. These fees and disbursements are often paid to counsel separately or taken off the top before the balance of the settlement fund is paid to the claims administrator.

(f) Resolution of common issues affecting a subclass, S. 27.1(2), (5), (6)

The amendments expressly provide for the resolution of common issues affecting a subclass. These amendments fill a hole in the existing legislation that had caused some confusion and challenges to partially settling claims. These amendments effectively allow the parties to resolve those parts of a claim that can be resolved, while leaving other claims for future adjudication.

It is also useful for the legislation to codify the well-known requirement that the settlement be fair, reasonable and in the best interests of the class. This informs the public of the existing duty of the representative plaintiff to negotiate a settlement for the benefit of the class. The LCO noted that this commonsense amendment will ensure that the standard is the guiding principle on settlement approval.

(g) *Cy-près* distribution, S. 27.2

Adding a section that expressly permits the distribution of awards or settlements on a *cy-près* basis, and the conditions that must be satisfied before a *cy-près* award is made are important amendments.

As the TLA has set out in its separate submissions regarding the proposed amendments to legal aid, the TLA believes that a robust and accessible legal aid program is an essential cornerstone of our judicial system. We encourage the government to ensure that legal aid is fully funded to the maximum extent possible, as every dollar spent on legal aid reduces the financial burdens on society manifold times.

That said, the TLA does not support Legal Aid Ontario as the default recipient of *cy-près* awards or settlement funds. Funding legal aid is an essential government function; but it is rarely, if ever, the "next closest thing" to the affected interests of the members of a class in a civil lawsuit prosecuted as a class proceeding. *Cy-près* settlements arise when the identities of the injured class members cannot be ascertained, or when the cost of distributing the settlement funds to the class would exceed the value of the settlement.

As a side note, it is the view of the TLA that class actions that result in a *cy-près* distribution are not meritless or ill-conceived. They serve one of the three key goals of the *CPA* – behaviour modification. The Committee should be reminded that one of the policy objectives behind the *CPA* is to empower class members to fulfill the role of private attorney generals. Through the class proceedings format, corporations that have injured individuals, breached their obligations to the public or abused their positions of power can be held accountable for their actions.

A good example arises in cases of price fixing conspiracies. While individuals may have only paid a small amount more for the particular product, in the aggregate this could result in millions of dollars of illicit profits. The conspirators should not be permitted to keep these ill-gotten gains just because each individual was minimally damaged. Collectively the profits are properly disgorged, and then applied in the manner that is next best to payment to the class.

Both Canadian and US courts properly reject *cy-près* settlements that have no nexus to the class or the underlying grievance. Class members ought to benefit indirectly, if not directly, from the litigation. *Cy-près* is the next closest thing to putting money into the hands of the class. Unfortunately, naming Legal Aid Ontario, a government-funded non-profit corporation, as the default recipient of cy-près funds has the appearance of the government doing exactly what the courts have admonished, i.e. preferring their own interests over those of the class. If the government remains of the view that there should be a legislated default recipient for cy-près awards, then the TLA recommends that the default recipient be the Law Foundation of Ontario's Access to Justice Fund. It has been repeatedly approved as an appropriate beneficiary of these payments and its work benefits those involved in class proceedings.

(h) Subrogated claims. S. 27.3

The TLA is pleased to see that the legislature intends to establish a designated person to receive copies of claims asserting subrogated claims, and to provide instructions with respect thereto. The lack of clarity and inability to obtain timely instructions from the provincial insurer has been a source of frustration for our members. We note, however, that, as drafted, the section would relate to all subrogated claims, including private insurers. The TLA queries whether this was the government's intent, and if so, how the government will require private entities to have designated recipients and providers of instructions with respect to proposed settlements. If the section is meant only to address Ontario Health's subrogated claims, it should say so.

(i) Mandatory dismissal for delay. S. 29.1

The administrative dismissal of claims that are not being diligently prosecuted is an important addition to the CPA. The TLA recognizes that there are too many cases that have been started, and then not prosecuted with appropriate vigour, or in worst cases, allowed to languish. This can put the administration of justice into disrepute, and it is unfair to both the defendants and the class.

However, we recommend that the automatic dismissal date should be longer than one year from the date the action was commenced. In some cases, particularly where there are foreign defendants, it can take many months to effect service upon those defendants under the Haig Convention or the foreign jurisdiction's rules. In other instances, substitutional service is required. Sometimes, the claim may be amended one or more times before it is served, as additional facts come to light. All of which is to say that it could be more than a year from when the claim was commenced before all the parties have been served. A timetable cannot be established until that has happened.

Recommendation: Amend this section so that automatic dismissal is on the second anniversary of the date the action was commenced. Within that time, the plaintiff ought to be able to effect service and establish a timetable for progressing the litigation, in the vast majority of cases. Extending the deadline to two years will not likely eradicate dead cases. But the extended time will prevent valuable court time being squandered in obtaining orders or timetables that will inevitably be changed because all the parties are not yet engaged in the proceeding.

(j) Appeal routes, S. 30

The TLA, evidently along with the rest of the bar, agrees that changes to appeal routes are necessary and appropriate. We support amendments that give all parties a right of appeal from a certification decision directly to the Court of Appeal. The proposed amendments would provide the same appeal rights to defendants and plaintiffs (symmetrical appeal rights) and eliminate the additional expense and judicial burden of intermediate appeals to the Divisional Court. These reforms will reduce costs and delays.

(k) Settlement approval, S. 32(2.1)

Just as expressly providing that a settlement must be fair and reasonable and in the best interests of the class, it is beneficial to the public to be reassured that, regardless of the terms of any contingency fee retainer agreement made between class counsel and the representative plaintiff, class counsel's fees and disbursements must be approved by the court as being fair and reasonable in all the circumstances.

By endorsing this amendment, the TLA should not be taken to agree with the proposition that currently the fees the court approves to be paid to class counsel are unfair, unreasonable or disproportionate. The courts already have the duty to ensure that legal fees are fair and reasonable. It is a task that the judges approach with great seriousness, and the fees that class counsel are awarded are not disproportionate to the work performed, risks taken, results achieved, and the other factors that are considered by the court. A detailed consideration of class counsel fees and how settling them is to be approached was set out by Strathy J. (as he then was) in *Baker (Estate) v. Sony*.[4]

[4] *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105, at paras. 61 – 71, 86, 87.

2. Amendments that the TLA Considers Unnecessary

The TLA is concerned that some of the proposed amendments are unnecessary either because: (i) the current jurisprudence has already adequately interpreted the existing legislation; or (ii) the matters are more appropriately left to the case management judge to resolve on a case-by-case basis.

As set out above, class actions are simply a procedural vehicle for resolving any type of cause of action involving many people. Given the vast array of the types of cases that may be pursued as class proceedings, often one size does not fit all. Therefore, the case management judge's discretion in managing the claims should not be unnecessarily circumscribed.

Equally, where there is well established jurisprudence and no flaws in the legislation have been identified requiring legislative correction, it serves no end to introduce new legislative provisions. In fact, introducing such new provisions could create uncertainty, increase the burdens on the courts while the interpretation of the new legislation is litigated, add to costs and delay the litigation. Hence the TLA advocates for the enactment of new sections into the *CPA* only in situations where the jurisprudence has identified lacunae in the existing legislation.

(a) Early Resolution of Issues, S. 4.1

The TLA therefore recommends that proposed s. 4.1 (Early Resolution of Issues) is unnecessary, and likely contrary to the goal of increasing judicial economy and litigation efficiencies. While we appreciate that this section was likely meant to respond to the LCO's recommendation that the courts should encourage the use of summary judgment motions in class actions, the LCO's recommendation was tempered by saying that these motions were useful only when they would not lead to increased costs and delays, or give rise to interlocutory appeals, or delay the certification motion.

The question of whether a motion should be brought before, at the same time as, or after certification is a decision that is best left to be determined by the case management judge based upon the unique facts the case before him or her, having in mind these same criteria expressed by the LCO. After 25+ years of wrestling with this scheduling issue, the judiciary is in the best position to determine whether hearing a proposed motion for summary judgment or motion to strike or similar will achieve these goals, and if it should be heard before, at the same time as, or after certification.

Thus, to make it mandatory for summary judgment motions or motions to strike to be heard before the certification motion, or at the same time, and removing the judge's discretion to delay the motion until after certification, invites litigation by installments and the concomitant expense and delay for all parties. As long ago as 2004, in *Garland v Consumers' Gas*, the Supreme Court of Canada cautioned against piecemeal litigation after rendering its decision on the *second round of appeals up to that court*. Quoting McMurtry CJO, Iacobucci J. wrote (for the Court):

> Before employing an instalment approach, it should be considered whether there is potential for such a procedure to result in multiple rounds of

> proceedings through various levels of court. Such an eventuality is to be avoided where possible, as it does little service to the parties or to the efficient administration of justice.[5] [Emphasis added.]

That observation holds equally true today. In the 2017 case of *Butera v Chown, Cairns LLP*, the Ontario Court of Appeal explained in detail the reasons why partial summary judgment is oftentimes inadvisable, raising "further problems that are anathema to the stated objectives underlying *Hryniak*."[6]

The TLA is, therefore, of the view that section 4.1 is unnecessary and unduly restrictive of judicial discretion. The case management judge should continue to have the unfettered discretion to manage the case before her or him, and decide on the timing of any motions proposed by the parties, keeping in mind, as they do, the three goals of the *CPA*.

(b) Court may determine the conduct of proceeding, S. 12

Section 12 is proposed to be amended to include that the court may make orders regarding the conduct of the proceeding on its own initiative. The court already has the inherent jurisdiction to control its own process. A well-established body of law addresses when it is appropriate for the court to act on its own initiative in the case management context.

The TLA is concerned that the addition of this language is meant to signal to the courts that the legislature endorses more judicial activism, or alternatively, that in the absence of express legislation conferring jurisdiction on the court to control its own process, the courts do not have such power. Neither of these is correct. Hence, legislating that which is already within the court's inherent jurisdiction, as here, is unnecessary.

(c) Additional Notice Provisions by Regulation, Ss. 17(5)(j), 18(4)(f)

The TLA is concerned about the addition of s. 17(5)(j) and s. 18(4)(f) that requires notices to include "prescribed information". The TLA submits that the information that is already required under these sections comprehensively covers the information that class members need to make informed decisions or to ascertain whom to contact to address questions or concerns about the class proceeding. Additional information is already added to notices based on the particularities of the case and the purpose for which the notice is being given.

The TLA has no information about what additional information might be prescribed by regulation. So the TLA cannot comment on whether further additional information would in fact benefit the class. While plain language is helpful, excessive information is not. Long and complicated notices tend to be confusing and overwhelming to people who are not familiar with the court process in general and class actions in particular.

Therefore, beyond the already enumerated essential information about the class proceeding, the TLA recommends that the content of notices be left to be crafted by the

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[5] *Garland v. Consumers' Gas Co.*, 2004 SCC 25, at para. 90.
[6] *Butera v. Chown, Cairns LLP*, 2017 ONCA 783, at paras. 22 – 35.

parties and approved by the court. The court's supervisory role already ensures that the notice protects the interests of the affected class and is "the best notice practicable in the circumstances."

For the same reasons, the TLA is opposed to the addition of directions by regulation with respect to the means of giving notice under s. 17(4)5., s. 18(3), 18(4)(f), and s. 19(3)2. As mentioned, class actions cover the gamut of causes of actions, and do not come in "one size fits all." It is therefore incumbent that the parties and the courts have the flexibility to craft a bespoke notice program for each proceeding that is appropriate and proportionate for the affected class and the nature of the claim.

(d) Duty of the Claims Administrator, Ss. 26(11), 27.1(15)

This new addition to the *CPA* is another example of codification of established common law principles. Once appointed by the court, the claims administrator becomes an officer of the court, whose duty is to faithfully fulfill its obligations under the notice approval or settlement approval order. There is no need for the *CPA* to spell out that the administrator is to act competently and diligently – that is implicit in the order appointing it. Failure to act competently would be a breach of the court's order.

3. Amendments that the TLA Opposes

The TLA is concerned that some of the proposed changes to the *CPA* will not have the intended effect of increasing judicial economy, access to justice for Ontarians, or encouraging behaviour modification; but rather, may have the opposite effect - raising barriers to access to justice, defeating judicial economy, complicating the process, and increasing the costs and burdens on the justice system and on all participants. It would seem self-evident that amendments to legislation whose purpose is to enhance access to justice and reduce costs and burdens on the justice system, should achieve those admirable goals.

Below are the TLA's major concerns.

(a) Proposed New Certification Test: "Superiority" and "Predominance", S. 5(1.1)

The TLA's most significant concern echoes that which the Law Commission expressed in its letter to the Honourable Minister of the Attorney General dated January 22, 2020. The TLA opposes importing the concepts of "superiority" and "predominance" into the certification test. Proposed subsection 5(1.1) provides that a class proceeding is the preferable procedure "only if, at a minimum, it is superior to all reasonably available means of determining the entitlement of the class members to relief", and common questions of law or fact "predominate" over individual issues. This amendment runs contrary to the LCO's recommendations. It substantially alters the preferable procedure test as most recently interpreted by the Supreme Court of Canada in *AIC Limited v. Fischer*,[7] which delineates a five-factor test for preferability.

[7] 2013 SCC 69.

The purpose of having a plaintiff pass a certification test is so that the court is satisfied that the action can reasonably be *prosecuted* in the class action format. The question is whether the procedure to accommodate the asserted claims is adequate. The certification test is not a preliminary test of the merits. The screening or "gatekeeper function" that the courts undertake at this point is not meant to be a litmus test of the merits of the claim (so long as a properly pleaded cause of action has been asserted).

Hence, when the Law Commission Report recommended that the courts interpret the existing s. 5(1)(d) preferability test "more rigorously", it was not suggesting that a merits-based test should be added to the *CPA*, or that the government adopt a US-style predominance test – in fact it recommended *against* both such amendments. Rather, it was suggesting that where there are alternative procedures that will reasonably compensate the class, even if those procedures do not provide full compensation, that may suffice, e.g. in the case of an automaker undertaking a full recall of affected vehicles with defective parts.

The proposed amendments in s. 5(1.1), if enacted, will put Ontario's class proceedings legislation significantly at odds with the class action legislation across the country. Ontario's *CPA* would be inconsistent with the efforts of the Uniform Law Conference of Canada ("ULCC") to regularize the class action legislation, nationally, as s. 5(1.1) would create a significantly higher initial threshold for certification. This could encourage forum shopping, effectively pushing Ontario litigants to other jurisdictions to have claims resolved elsewhere that ought properly to be decided by Ontario courts. It will have the unfortunate effect of the courts in other jurisdictions concluding that Ontario is not the preferable forum for the litigation of multijurisdictional class actions because of the barriers raised by the certification test. This reflects poorly on the administration of justice in Ontario.

The TLA is also concerned that changing the certification test and importing undefined terms of uncertain meaning ("superiority" and "predominance") will result in increasing the burdens on the administration of justice. During second reading of the Bill, it was frankly conceded that it will be up to the courts to interpret the meaning of these terms. This is an undesirable outcome. It will result in increased uncertainty for the litigants, increased costs both for the litigants and the judicial system, delays, and add additional judicial burdens to our already overburdened courts. After almost 30 years, the current certification test is well established and understood. Introducing a new test invites further decades of interpretive litigation.

If the government wishes to encourage the courts to apply more rigour to the certification test, then the TLA strongly recommends that this would be best achieved by adopting the certification test set out in the ULCC's *Uniform Class Proceedings Amendment Act*. This test is already incorporated in the class proceedings statutes of British Columbia, Alberta, and Saskatchewan. Under it, the court is required to *consider* whether common issues will predominate, although predomination is not a pre-condition to certification. Aligning Ontario's legislation with the legislation in these provinces is consistent with the overall goal of achieving a consistent class action regime nationally, just as has been done with provincial Securities legislation.

Adopting the ULCC's certification test is also consistent with this government's adoption of the ULCC's uniform legislation dealing with multi-jurisdictional class actions, which has also been proposed in this Bill, and which the TLA supports.

As the Committee considers these amendments to the *CPA,* it is important to keep in mind that there is no objective evidence that meritless proceedings are being commenced in Ontario, or that there is other mischief being wrought under the current class proceedings regime. One should not fall into the fallacious trap of considering that all cases that have failed to meet the certification test were "frivolous" or "meritless" claims, or that "too many" class proceedings are being certified. The little evidence that there is on whether meritless actions are being brought in Ontario is ambiguous at best, and is not based on any objective criteria applied to the question, or even a consistent application of the definition of the terms frivolous or meritless. Objectively, since the *CPA* was enacted, only one case, which was brought in the very early days of the *CPA*, has been characterized as a "strike suit".

There are, of course, cases where the gatekeeper function of the *CPA* has been properly exercised. Cases have been denied certification where the plaintiff failed to properly plead a tenable cause of action, or where a class proceeding is not the preferable procedural vehicle for the resolution of the asserted claims. This does not necessarily translate into the underlying complaint having been "meritless" or "frivolous".[8]

The proposed language of s. 5(1.1) *CPA* seems to be moving towards a US-style certification test. As written, this section will make it more difficult for class actions to be certified. This is not what the Law Commission had in mind when it recommended that the preferability test be applied rigorously. While the TLA supports weeding out unnecessary and frivolous class actions, to reduce an already overburdened court system, it is unnecessary to make major changes to the existing test to achieve that objective.

The current certification test as interpreted by the specialized class action judges who hear these motions is adequate. A minor revision to adopt the ULCC's certification test is a proportionate response to the LCO's recommendations and would bring the *CPA* in line with some other provinces.

The real impact of the proposed new certification test, if enacted, will be twofold: (i) to significantly increase the financial cost to our civil court system, while simultaneously (ii) denying Ontarians access to justice in certain instances, and particularly in cases involving serious injuries. We deal with the latter issue first.

Many civil cases can only viably proceed by way of class action because the damages, individually, are not large and a civil action would be cost-prohibitive.

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[8] For example, certification was denied in the case of the collapse of the Bangladeshi Rana Plaza because Ontario was not the correct forum for their claims to be litigated. In the case of the victims of the Motherisk debacle, the claims were inimical to class treatment because entitlement to compensation would be so idiosyncratic and individualized that there was no real advantage to using the class procedure. Other faulty product cases have not been certified because, from a policy perspective, the jurisprudence has developed to only allow claims where the faulty product has a propensity to be dangerous to person or property.

For example, we have seen class actions certified for price-fixing schemes by large corporations, such as the bread price-fixing conspiracy. Although Loblaws offered $25 gift cards to consumers, and liability to the class has yet to be determined, the quantum of the Loblaws gift card offer suggests that any award or settlement would be nominal on a per consumer basis, although the profits to the conspirators and the harm to society are huge. The class action regime is necessary for such claims to be adjudicated, for the class to get access to justice, and to promote behaviour modification.

Importantly, injury cases also include the subrogated claims of Ontario's public health insurer. Constraining the ability for these claims to be asserted on a class wide basis also constrains the ability of Ontario Health to recover the costs it has incurred in caring for injured Ontarians. This result would be antithetical to the best interests of the taxpayers of Ontario.

The TLA is especially concerned that if the superiority and predominance tests are enacted, then the s. 5(1.1) higher certification threshold will impact most obviously on personal injury cases. In the US, these cases typically are prosecuted through the Multi-District Litigation (MDL) process, which was specifically created to manage mass tort litigation. There is no equivalent in Ontario, and it would be impossible to create, given our differing constitutional structure. US class action legislation and jurisprudence has evolved having in mind its unique court structure that cannot be replicated in Ontario.

Moreover, Ontario's courts are not equipped to handle mass tort litigation. It is the TLA's view that it would take no more than one case involving thousands of injured persons filing individual claims to grind the administration of justice to a halt. To illustrate, in the Indian Residential Schools institutional abuse cases, over 18,000 individual lawsuits were filed across the country. If predominance were the test, it is unlikely that *Cloud v. Canada* and other cases could have been certified, and our courts would still be struggling with the backlog of adjudicating these serious claims. This observation applies equally to pharmaceutical cases, institutional abuse, or other forms of personal injury. These cases involve very serious harms suffered by Ontario's residents.

Our civil justice system already has a significant backlog and lack of judicial resources. It simply cannot handle the additional caseload that would inevitably arise if class actions are disallowed because of the imposition of a predominance test. The lack of resources includes not only to a lack of judges and court space but also administratively.

In Toronto, there is typically a two- to three-year delay for a civil trial from the time the matter is set down. The resultant increase in thousands of individual actions for injured Ontarians will be an insurmountable burden on a system that is already overwhelmed. This outcome should be avoided

The TLA notes that if serious cases of injury are foreclosed from class proceedings, the parties will also lose the benefits of s. 24(5), (6) of the *CPA*, to which no amendments are being proposed. Under these sections, the court may specify an expedited procedure for determining claims to minimize the burdens on both the class members and the courts. This is an important benefit available under the CPA, which would be lost if the cases are foreclosed from this proceeding. Pushing these cases with causation issues into mainstream litigation adds burdens not only to the injured claimants, but also to the

defendants, and the administration of justice. It is contrary to the culture shift encouraged by the Supreme Court in *Hryniak*.

(b) Costs of Notice of Certification, S. 22(1.1)

New s. 22(1.1) provides that costs of notice of certification may only be awarded to a representative plaintiff in the event of success in the class proceeding. Plaintiffs would have to initially bear these costs, which they may in turn seek to recover from the defendants only at the successful end of the proceeding.

While the usual practice is that the representative plaintiff will pay the costs of notice of certification, there may be circumstances where this is not appropriate, nor desired by the defendant. For example, in some cases, the parties may negotiate a consent certification, and as part of the compromise, the defendant agrees to bear some or all of the cost of notice. This often arises in cases where the defendant has lists of the affected class members, and a cost-efficient means of delivering the notice to the class. Sometimes, the defendant will agree that the certification notice will be delivered to class members by it along with its other communications to the class.

Another circumstance in which the defendant may agree to pay the costs of notice arises when a settlement may have been negotiated but certification is to be granted first (often with an opt-out threshold, which if met, would terminate the settlement), followed by the settlement approval motion. Here, the defendant may agree to pay the certification notice costs irrespective of whether the settlement is ultimately approved. These are but a few of the many and varied circumstances where it may be appropriate for the representative plaintiff to be awarded costs of notice of certification outside the narrow circumstance provided in new s. 22(1.1).

There is no principled reason to compel the plaintiff to bear the costs of notice *in all circumstances* prior to their success in the proceeding. This prohibition runs contrary to the goal of providing better access to the courts, as it unnecessarily drives up the costs of the proceeding to be borne by the plaintiff and removes important flexibility among the parties in their negotiations.

(c) Full and Frank Disclosure on Settlement Approval, S. 27.1(7)

Finally, the TLA is concerned about the evidentiary requirements for settlement approval as set out in proposed s. 27.1(7), particularly, the mandate that class counsel must make "full and frank disclosure of all material facts" including "the party's best information respecting … any risks associated with continued litigation".

Since *Dabbs v. Sun Life Assurance Co. of Canada*[9] the Ontario courts have developed and enforced their jurisprudence setting out the information that the courts require to approve a proposed settlement. The settlement approval process is decidedly not a rubber stamp, and the courts will require the lawyers to provide additional information, if they are not satisfied with the evidence adduced in support of a settlement. Some

[9] *Dabbs v. Sun Life Assurance Co. of Canada*, 1998 CanLII 14855 (ON SC).

settlements have not been approved. The judges and all the parties approach the responsibility of informing the court for settlement approval with great seriousness.

Information is also provided to the class members about the settlement in advance. They are provided with, and often take up the opportunity to make submissions about the proposed settlement, and any objections that they have to it, so there is not an "adversarial vacuum". To that end, class counsel must ensure that the information provided to the court and the class fairly and reasonably explains how the settlement was arrived at, and why the settlement is in the best interests of the class.

We note that the LCO concluded that enumerating the *Dabbs* criteria in the *CPA* was unnecessary, and potentially counterproductive, as this might hinder the evolution of the approval criteria or circumscribe the inquiry in unique cases. The LCO noted that the lawyers who negotiated the settlement should provide detailed affidavit evidence in respect of the settlement criteria. The TLA agrees that this disclosure is essential to the settlement approval process.

However, requiring the moving party to make "full and frank disclosure of all material facts", including, in particular, the risks associated with continued litigation and the range of possible recoveries in litigation is problematic. The TLA assumes that by incorporating the language surrounding the jurisprudence in respect of *ex parte* motions, the legislature is intending that the plaintiff's lawyers make the same level of disclosure. This creates irreconcilable conflicts for the plaintiff and his or her lawyer.

It is not unusual for a class action to involve multiple defendants, and to be settled piecemeal. If class counsel is compelled to make full and frank disclosure of all the risks associated with continued litigation and the range of possible recoveries in the litigation, this could severely compromise the class's case against the non-settling defendants. Particularly, if counsel must frankly disclose the perceived weaknesses in the case, or frankly concede the strengths of arguments being asserted by the parties opposite, this could be devastating to the remaining claims, and therefore contrary to the interests of the class, and the duty that the lawyer owes to her or his clients. Mandatory full and frank disclosure to this level will have the deleterious effect of discouraging partial settlements and could force litigation to continue even though some of the parties are otherwise prepared to settle.

"Full and frank disclosure" could be interpreted so broadly as to suggest that class counsel would be required to divulge matters that are protected by solicitor-client and litigation privilege. This is fundamentally at odds with lawyers' duties to their clients and the class and would also provide an unfair advantage to the non-settling defendants. The text of s. 27.1(7) also suggests that settlement privileged communications relating to possible recoveries might have to be disclosed. In *Re Hollinger Inc.*, the Ontario Court of Appeal observed that mandatory disclosure of pre-resolution discussions may have the deleterious effect of discouraging attempts at settlement.[10] None of these possibilities is in keeping with the goals of the *CPA*. Moreover, adding this language will invite years of further, unnecessary litigation as litigants struggle with interpreting this mandatory

[10] *Re Hollinger Inc.*, 2011 ONCA 579, at para. 24.

obligation, thereby adding uncertainty, as well as delay and cost to litigation that would otherwise be resolved.

This is another area where there is no demonstrated need for legislative amendment. While the objective of the legislature is laudable, if the intent was to codify the jurisprudence, in the TLA's view this is an area that is being vigilantly policed by the courts, and class counsel are well aware of their responsibilities to their clients, the class and the court, and are able to carefully balance their competing obligations.

However, if the legislature is intent upon including a section regarding the scope of disclosure to be made on settlement approval, then the TLA recommends that it replace "full and frank" with "fair and candid" disclosure. It should also allow for the affidavit evidence to be delivered in a redacted format to the opposing parties, similar to the redactions to be permitted with respect to funding agreements, so as to prevent tactical advantages being bestowed on the non-settling defendants.

As with other parts of the proposed amendments, the TLA is concerned that s. 27.1(7)10 includes the potential for regulations to mandate additional information and evidence. We reiterate that class actions are diverse, unique and highly complicated. As such, regulations that require evidence for settlement approval are unsuitable.

Conclusion

The TLA thanks the Standing Committee on Justice Policy for considering these submissions. It was time for the *CPA* to undergo a review to correct those areas where the legislation was not meeting its objectives, and to adjust those parts of the legislation that needed fine tuning. The proposed legislation admirably achieves those goals. However, the TLA encourages the government not to enact changes to the CPA that will put Ontario out of step with the legislation in other provinces. The effect of doing so would hurt Ontarians by decreasing access to justice and increasing the burdens on the justice system.

Yours very truly,

Margaret L. Waddell
President
Toronto Lawyers Association