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May 16, 2018

Law Commission of Ontario
Osgoode Hall Law School, York University
2032 Ignat Kaneff Building
4700 Keele Street
Toronto ON M3J 1P3

Dear Sir or Madam:

Re: Law Commission of Ontario Call for Submissions on Class Actions Reform

This letter is in response to the Law Commission of Ontario's call for submissions on class actions reform.

A. Background

The Public Guardian and Trustee of British Columbia (PGTBC) is a corporation sole established under the *Public Guardian and Trustee Act* with a unique statutory role to protect the interests of British Columbians who lack legal capacity to protect their own interests. The mandate of the PGT is to:

- Protect the legal and financial interests of children under the age of 19 years;
- Protect the legal, financial, personal and health care interests of adults who require assistance in decision making; and
- Administer the estates of deceased and missing persons.

The PGTBC investigates clients' eligibility to make claims in class actions, as part of our mandate to protect their legal interests. The PGTBC has been making claims on behalf of clients in dozens of class actions since the late 1990s, including most significantly the Woodlands School, Indian Residential Schools and Hepatitis C class action settlements.

B. Introduction

Most class actions are structured on the assumption that eligible claimants will be mentally capable of understanding and advancing their own claims. Even those class actions that are intended to provide redress for vulnerable persons, such as institutional class actions, contain many barriers to accessing justice. Few class actions have processes to assist claimants who may not have the mental capacity to understand that they are eligible to claim and are legally unable to advance claims on their own behalf. Below, the PGTBC sets out some of the difficulties that may be experienced by mentally incapable and vulnerable class members and makes suggestions for possible reform.

C. Suggestions for Reform

1. Notification

Special consideration must be given to persons under a legal disability when notifying of class action certifications and settlements. In class proceedings, the court is asked to approve the form of notice to potential class members when the class is certified and settled. This often includes notices placed in newspapers and in other media.

Such notices, however, may not be an effective method of providing information to minors and adults with a mental disability where such persons are expected to be claimants in class actions. The legal ramifications of these notices, in particular the consequences of opting in or opting out, may not be understood by minors and mental incapable adults. Notices should be made easy to understand and tailored as far as possible to the circumstances of persons under disability.

Because many persons under disability will have a Public Guardian and Trustee as their legal guardian, it would be helpful if class action legislation provided that Public Guardians and Trustees were provided with notices of certification and settlement. This gives Public Guardians and Trustees notice of class actions which may affect their clients, and it allows them to take steps in a timely fashion to protect their legal interests.

The PGT recommends that class proceedings legislation be amended to require that notice of certification of a class proceeding and notice of settlement approval in which one or more classes of claimants may be under a legal disability be given to Public Guardians and Trustees.

2. Identifying Eligible Claimants

It is often not possible for mentally incapable individuals to identify whether they are eligible to participate in a class action, or to provide personal histories. Class members under disability rely on family, friends and legal guardians to recognize their legal claims and take appropriate steps. Because it is difficult for our clients to self-identify as being eligible to claim in a class action, upon notification of a class action settlement, the PGTBC attempts where possible to obtain information about potential class members through data matching with government ministries, law firms and other entities to identify eligible clients, as well as evidence provided by the clients' family members and care givers. In the majority of class actions, however, the PGTBC does not have this option.

For those class actions where we cannot data match and class counsel has no client lists, it can be extremely difficult for the PGTBC to identify eligible clients. These clients lose the opportunity to make a claim and obtain legal redress.

A class actions process which truly respects the principle of access to justice would take steps to identify claimants pro-actively, rather than relying on incapable persons or their legal guardians to identify and make claims.

The PGT recommends that a greater obligation be placed on class counsel and defendants to make reasonable efforts to notify potential claimants individually, and where possible to make their claimant lists available for data matching with Public Guardians and Trustees.

3. Substantiating Claims

Substantiating class action claims on behalf of persons under a legal disability can be complex and time-consuming.

Claims forms can be lengthy and detailed, and require comprehensive evidence in the form of medical, pharmacy or institutional records. These records must be ordered, which can be a costly and time-consuming process, and then reviewed and summarised.

Pharmaceutical class actions, in particular, often require that a claimant substantiate the claim by providing complete medical records dating back to several years before the alleged injury. Our clients, due to old age, developmental disabilities, or acquired brain injuries, often have complex and extensive medical histories and have seen dozens of treatment providers over the period of the alleged injury. Medical records older than 10 years may have been destroyed.

In many cases it is difficult to obtain reliable information from the client or family. Often, clients have limited capacity to provide evidence themselves, and are estranged from family, such that collateral information is unavailable. Clients can be re-traumatised if they are interviewed about historical abuse without appropriate supports in place.

Having longer claim periods would allow those acting on behalf of persons under a disability enough time to ascertain whether the individual qualifies as a class member.

Obtaining records can be expensive; doctors can charge up to \$300 for providing medical records. Our clients must pay the cost of obtaining those records, even though we do not know if the client's claim will be successful. The client may not have the financial means to fund such disbursements. In some cases, particularly securities class actions, the size of the potential award does not justify the cost of obtaining substantiating financial records.

The PGTBC recommends that claims periods be made long enough to address the fact that institutional bodies making claims on behalf of large numbers of incapable clients need time to interview their clients and family, and obtain and review records.

The PGTBC recommends that successful claimants be entitled to recover the cost of obtaining records required to substantiate the claim.

D. Summary

As detailed above, persons under disability face significant obstacles in making class actions claims. To address these issues, we suggest the following:

- Notification of certification and of settlement approval to be provided to all Public Guardians and Trustees;
- A greater onus placed on the parties to identify and notify potential claimants;
- Longer claims periods to address the greater complexity of making claims on behalf of incapable persons; and
- The right for successful claimants to be awarded expenses incurred in order to substantiate their claims.

Thank you for considering the PGTBC's submission as part of your consultation process. Please do not hesitate to contact me if you would like to discuss this letter further.

Yours truly,

A handwritten signature in black ink, appearing to read 'Catherine Romanko', with a long horizontal flourish extending to the right.

Catherine Romanko
Public Guardian and Trustee of British Columbia