LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

January 22, 2020

The Honourable Doug Downey
Ministry of the Attorney General
720 Bay Street
McMurtry-Scott Building 11th Floor
Toronto ON M7A 2S9

Dear Minister,

Re: Class Proceedings Amendments, Bill 161, the *Smarter and Stronger Justice Act*.

On behalf of the Law Commission of Ontario (LCO), I am writing to comment upon the class action provisions of *Bill 161*, the *Smarter and Stronger Justice Act*. These provisions are set out in Schedule 4 of the *Bill*. The LCO will be sending you a second letter that comments upon the *Estates Act* provisions of the *Bill*, which are based on a second LCO report.

As you know, the foundation for the proposed class action amendments is the LCO's July 2019 report, *Class Actions: Objectives, Experiences and Reforms*. The LCO commends the provincial government for substantially adopting numerous LCO recommendations in *Bill 161*, including provisions respecting:

- Timing of certification motions and administrative dismissal;
- Carriage;
- Multijurisdictional class actions;
- Settlement approvals;
- Settlement distributions;
- Fee approval;
- Third party funding; and,
- Appeals.

All else being equal, these provisions would improve access to justice, improve judicial efficiency, reduce delay and costs for all class action stakeholders, and ensure a high degree of accountability and transparency for class action proceedings in Ontario.

2032 Ignat Kaneff Building · Osgoode Hall Law School · York University · 4700 Keele Street · Toronto, ON · M3J 1P3
T:(416)650-8406 · Toll Free:1(866)950-8406 · TTY:1(877)650-8082 · F:(416)650-8418
E: LawCommission@lco-cdo.org · www.lco-cdo.org

Unfortunately, *Bill 161* also includes amendments to the *Class Proceedings Act* certification provisions that are likely to significantly reduce access to justice and worsen class action delays, inefficiencies and costs.

Bill 161 adopts mandatory *and* conjunctive "superiority" and "predominance" tests at certification. **These provisions fundamentally restructure class action law and policy in Ontario by shifting the *CPA*'s longstanding certification test strongly in favour of defendants.** "Superiority" and "predominance" requirements were specifically rejected by the LCO. More importantly, these provisions will have a significant and negative impact on access to justice and the administration of justice in Ontario for the following reasons:

- **First, *Bill 161* will effectively restrict class actions and access to justice in a broad range of important cases, including consumer matters, product and medical liability cases, and any potential class actions where there may be a combination of common and individual issues.** Applied retroactively these provisions would likely have prevented important and successful class actions regarding Indian Residential Schools, environmental tragedies (such as Walkerton), tainted blood supplies (such as hepatitis C), and/or price-fixing. The provincial government should not restrict Ontarians' access to class actions in such broad and important areas.

- **Second, *Bill 161's* "superiority" and "predominance" provisions are demonstrably inconsistent with certification rules across Canada and will likely increase costs, delays and legal uncertainty for plaintiffs, defendants and justice systems across the country.** As a result, these provisions contradict efforts in Canadian judicial administration to harmonize or at least promote consistent legal rules across the country. These provisions also circumvent *Bill 161*'s very appropriate and necessary multijurisdictional class action reforms.

- **Third, *Bill 161* creates an improbable and unwelcome situation in which Ontarians potentially have fewer legal rights and less access to justice than other Canadians.** This is because the legislation gives rise to situations where a class action could be certified in, say, BC, but not in Ontario. At best, this will result in years of interprovincial litigation, delays and increased costs for litigants and courts. At worst, it will mean that Ontarians may not have access to the same remedies and compensation as other Canadians.

- **Fourth, *Bill 161* adopts restrictive American legislative provisions and priorities that are inconsistent with decades of Canadian law.** The Supreme Court of Canada has

repeatedly stated that the *CPA* "should be construed generously to give full effect to its benefits". The proposed changes to the certification test are inconsistent with the long-standing Canadian approach to mass harm redress.

- ***Finally, Bill 161* and the new *Crown Liability and Proceedings Act* create significant barriers for Ontarians wishing to initiate class actions against their provincial government, government agencies, corporations and other institutions.** The LCO report warned about the combined and negative impact of the new *Crown Liability and Proceedings Act (CLPA)* and the adoption of a preliminary merits test in the *CPA*. This analysis applies equally to *Bill 161*'s superiority and predominance provisions.

The LCO does not believe these issues are cured or balanced by the many positive elements of the legislation. Rather, the effect of *Bill 161's* superiority and predominance requirements will be to increase costs, lengthen delays, and undermine the access to justice and judicial efficiency goals of the *CPA* and class actions generally.

In light of this analysis, the LCO is unable to support *Bill 161* as currently drafted. The LCO trusts that the provincial government will take the opportunity to reconsider the certification provisions of *Bill 161* over the coming months. The LCO would be pleased to discuss this and any other issues with the Ministry.

Sincerely,

Andrew Pinto
Chair, LCO

CC Irwin Glasberg, Acting Deputy Attorney General
Amanda Iarusso, Director of Policy and Legal Affairs, Attorney General
LCO Class Actions Reference Group