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The Honourable Doug Downey
Attorney General
Ministry of the Attorney General
McMurtry-Scott Building
720 Bay Street, 11th Floor
Toronto, ON M7A 2S9
doug.downey@pc.ola.org

Response to 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*.

Dear Attorney General Downey:

The International Association of Defence Counsel ("IADC") has published this letter in response to proposed amendments to the Ontario *Class Proceedings Act, 1992* (the "CPA"), set out in Bill 161 of the Legislative Assembly of Ontario (first reading December 9, 2019). The letter is supported and adopted by Lawyers for Civil Justice ("LCJ"), the Federation of Defence and Corporate Counsel ("FDCC"), DRI - the Voice of the Defence Bar ("DRI"), the Canadian Defence Lawyers ("CDL") and Product Liability Advisory Council, Inc. ("PLAC").¹

We commend the Ontario Government for commissioning a review of the experience with class actions in Ontario by the Law Commission of Ontario. We are also encouraged by many of the Government's proposed reforms, which the undersigned organizations supported during the review process.²

Overall, we believe the proposed amendments provide more fair balance in the class action regime. They are incremental reforms that should be considered by the governments of all provinces with class action legislation in Canada. If enacted, the proposed amendments will:

- (a) enhance the preferable procedure requirement for class certification;
- (b) make appeal rights symmetrical and eliminate one level of appeal;
- (c) encourage the use of precertification motions to dispose of meritless proceedings or narrow the issues or evidence on certification;
- (d) codify rules developing by the courts regarding carriage motions, settlement approval, counsel fee approval and third party litigation funding; and,
- (e) allow for better co-ordination of overlapping multi-jurisdictional class actions.

¹ See Schedule "A" for further information about these organizations.

² See IADC Submission to the Law Commission of Ontario regarding its Class Action Project: Objectives, Experiences and Reforms <https://www.lco-cdo.org/wp-content/uploads/2018/06/International-Association-of-Defence-Counsel-CA-Submission.pdf>

While the amendments proposed do not go as far as we had urged in our submission to the LCO, they will improve access to justice for both plaintiffs and defendants and eliminate some unfairness in the existing legislation. They will provide mechanisms to reduce parties' costs and the burden on judicial resources and will allow appropriately prosecuted class actions to proceed to an expeditious resolution. They will also enhance the ability of the Court to terminate meritless proceedings before extensive judicial and party resources are wasted.

It is unfortunate that Bill 161 does not include amendments to provide for all types of class actions the same preliminary merits test that is already in place for *Securities Act* misrepresentation class actions. We continue to believe that such a leave test will provide fairer balance and ensure claims with little or no merit can be disposed of expeditiously, with less ultimate burden on judicial resources and the parties. We encourage the government to reconsider adding this to the Bill.

We also want to highlight one proposed amendment that may create unfairness. The change relates to subsection 27.2(1) of the CPA. The amendment would give the Court the ability to order a *cy prè*s award on a contested basis (absent settlement) in certain circumstances. It is proposed that the award would be distributed not to class members but to persons or entities that are not affected by the alleged misconduct. In its final report,³ the LCO recommended certain reforms related to *cy prè*s distributions, but only in the context of aggregate settlement recovery (negotiated and agreed to by the parties). The LCO made no recommendation regarding the use of such awards in the face of an objection from one of the parties. *Cy prè*s awards in the latter context circumvent the common law requirement that parties claiming compensatory damages prove that losses were caused to them by the alleged wrongful conduct.

At present, damage awards in class actions that cannot be paid to class members will and should revert to the defendants. The use of *cy prè*s awards reduces the incentive for the representative plaintiff and class counsel to ensure that class members – the ostensibly injured parties – get the individualized compensation they have been found to deserve. The potential for a *cy prè*s award has also sometimes been used in other jurisdictions to justify the certification of particularly dubious class actions, where it is obvious that class members will not be identifiable or are never likely to receive any compensation.

In Ontario's civil justice system, awards are intended to be compensatory absent proof of the type of high handed and wilful misconduct that the Supreme Court of Canada has said is required to justify a punitive damages award⁴ (or some clear and express statutory provision to the contrary). Allowing the courts to order that a *cy prè*s 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. This indirectly circumvents the common law principles that the courts have established in order to limit punitive awards and restrict the circumstances in which they may be granted.

Punishment is not the objective of the CPA, which is a procedural statute. In any event, punishment of alleged wrongdoers should be pursued only by clear and express statutory provision, and fines should be paid to the public purse. It should not be achieved by way of windfall awards to uninjured private entities. Moreover, no such change to the substantive law should be made indirectly through an amendment to a procedural statute like the CPA.

³ Class Actions Objectives, Experiences and Reforms Final Report July 2010: <https://www.lco-cdo.org/en/our-current-projects/class-actions/final-report/>

⁴ *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 (CanLII), [2002] 1 SCR 595

We also have a concern related to the proposed amendments to section 12 of the CPA. Fairness and due process demand that the court give notice to the parties and a reasonable opportunity to be heard before the court makes any order on its own initiative under that section. We therefore urge the Legislature to make provision for this.

Finally, we recommend a change to the new proposed section 28(3). Specifically, we recommend that the tolling of the limitation periods in favour of the defendants in section 28(3) be extended to the time at which individual class members make individual claims following a final decision on the common issues trial. The reason for this is that it is only at the point that an individual makes such a claim that a defendant will know or be able to discover the identity of persons that may be liable for contribution or indemnity in respect to that individual's claim.

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We thank the Ontario Government again for its attention to these important issues and for considering the points above.

Sincerely,



Amy Sherry Fischer
IADC President

cc: Andrea Loony, LCJ
John Kouris, DRI
Bernd Heinze, FDCC
Kim Condron, PLAC
Randi Glass, CDL

Schedule "A"

The IADC has been serving a distinguished membership of in house and outside defense attorneys and insurance executives since 1920, and currently has approximately 2,500 invitation-only, peer-reviewed members. Its membership includes lawyers in large and small law firms, senior counsel in corporate law departments, and corporate and insurance executives, including a significant number of Canadian members. Its members represent some of the world's largest corporations, many of which have subsidiaries that do business in Canada and/or have been defendants in class actions in Ontario and other parts of Canada. Among other things, the IADC takes a leadership role in many areas of legal reform and professional development. It has formed a Canadian Class Actions Task Force made up of lawyers with class action experience in Canada, the US and Australia, to study and develop positions on some of the issues under consideration with input from corporations and other organizations representing the interests of the business community. The IADC Task Force also includes representation from LCJ, DRI and FDCC, other defense-oriented organizations that have members who represent companies exposed to class actions in Ontario.

LCJ is a coalition of defense trial lawyer organizations, law firms, and corporations that aims to promote excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases.

The FDCC is composed of recognized leaders in the legal community who are dedicated to promoting knowledge, fellowship, and professionalism of its members as they pursue the course of a balanced justice system, and represent those in need of a defense in civil lawsuits.

DRI has been the voice of the defense bar for sixty years advocating for individuals, defense and commercial litigation attorneys, corporations and corporate counsel, who defend the integrity of the civil justice system. Through its Center for Law and Public Policy, DRI maintains one of the country's most robust U.S. Supreme Court amicus programs, conducts and publishes original scholarly research on critical legal issues and advocates for the defense bar before Congress, state legislatures, and rule-making bodies.

CDL is a non-profit national organization that represents the interests of civil defence lawyers and, by extension, their clients who are litigants in Canadian court proceedings. CDL's membership includes approximately 1400 members from coast to coast in Canada. CDL acts as a voice and resource for its civil defence members, providing a national perspective to the Courts and Government as well as quality defence-specific education and networking opportunities.

PLAC is a non-profit professional association comprised of 90 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of laws affecting product litigation in the United States and elsewhere, with emphasis on how the rules for aggregate litigation affect manufacturers of products and those in the supply chain.