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VIA ONLINE SUBMISSION

Chair, Members
Standing Committee on Justice Policy
99 Wellesley Street West
Room 1405, Whitney Block
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Toronto ON M7A 1A2

Dear Mr. Chair and Members of the Standing Committee on Justice Policy:

Re: Bill 161 - *Smarter and Stronger Justice Act, 2020*
(Amendments to the *Class Proceedings Act*)

Thank you for inviting me to appear before the Committee yesterday to give testimony on proposed amendments to the *Class Proceedings Act*.

As I explained, I have practiced for the past 20 years in the field of class actions, representing individuals and small businesses. I am a past president of the Ontario Bar Association (OBA), a past chair of the civil litigation section, and a past chair of public policy of the OBA.

I made submissions on behalf of a group of five leading plaintiff class action firms in Ontario.[1] Our firms have represented tens of thousands of individuals across Ontario who have all been wronged and who have obtained justice through class actions before the courts of Ontario.

To reiterate, **Bill 161 will shut the door of the courts on the most vulnerable people in our society**:

- It will limit the ability of individuals and small businesses to obtain compensation for wrongs done to them by companies, including foreign companies.
- It will re-victimize marginalized groups.
- And it will create barriers to justice for residents of this province that exist nowhere else in Canada.

[1] Foreman & Company LLP, Koskie Minsky LLP, Siskinds LLP, Sotos LLP, and Waddell Phillips PC.

My submissions focus on two elements of Bill 161, specifically the predomination requirement and the superiority requirement that are found in section 7(2) of the Bill:

7(2) Section 5 of the Act is amended by adding the following subsections:

(1.1) In the case of a motion under section 2, a class proceeding is the preferable procedure for the resolution of common issues under clause (1) (d) only if, at a minimum,

(a) it is superior to all reasonably available means of determining the entitlement of the class members to relief or addressing the impugned conduct of the defendant, including, as applicable, a quasi-judicial or administrative proceeding, the case management of individual claims in a civil proceeding, or any remedial scheme or program outside of a proceeding; and

(b) the questions of fact or law common to the class members predominate over any questions affecting only individual class members.

The Predomination requirement

Predomination means that the court cannot allow a class action to proceed if individual issues will likely predominate over common issues.

'Individual issues' is shorthand for how each person is affected by a common wrongdoing, a common disaster or a common tragedy.

No two individuals are exactly the same and no two people experience harm in the same way. Individual issues exist, to some extent, in many of the most important class actions. That is not a barrier to bringing a class action under the current class action regime.

Take, for example, the case of a roof collapse at a mall, as happened in Elliot Lake in 2012. Some people were killed or permanently maimed by the collapse. Other suffered minor injuries but may have also experienced emotional trauma. Some businesses never recovered, while others did. Those are the types of 'individual issues' that exist in almost every case where there is suffering.

Under our current law, a class action will focus on the main question that is common to all class members, *i.e.*, the cause of the roof collapse, and whether the builders, architects and engineers were negligent or not. Once those common issues are addressed, often through costly expert evidence, the *Class Proceedings Act* allows individual issues to be addressed later in separate, mini hearings that are often quick and informal.

Under Bill 161's predomination test, because the extent of the individual issues would likely predominate over the common issues – different types of personal injury, varying severity, different impacts on different business, including income loss and property damage – every person and every small business in that mall would have to sue individually, some for minor damages. Each person and each business would have to engage an expert and lead evidence to prove the cause of the roof collapse, and establish the liability of the builders, architects and engineers. The

cost of suing individually would be beyond the ability of most victims, and thus the vast majority of these people and businesses would never have access to justice because of Bill 161.

Take a more current example, that of long-term care (LTC) homes – Altamont Care Community (Scarborough—Rouge Park), Camilla Care Community (Mississauga—Lakeshore), Downsview Long Term Care Centre (York Centre), Eatonville Care Centre (Etobicoke—Centre), Holland Christian Homes Grace Manor (Mississauga—Streetsville), Orchard Villa (Pickering—Uxbridge), River Glen Haven Nursing Home (York—Simcoe), Woodbridge Vista Care Community (Vaughan—Woodbridge), to name a few.

These are real examples where neglect, in many cases by for-profit companies, has caused so much suffering and death to our seniors. Each affected resident likely has a variety of pre-existing conditions. Not all victims were affected by the neglect in the same way. Some residents have recovered, some have injuries that will persist, and some have tragically lost their lives. Bill 161 will likely prevent victims and their families from suing LTC homes in a class action because determining the extent of harm suffered by each individual, and the cause of that harm, will likely predominate over what is common to their suffering, which is the shameful neglect of these vulnerable residents by their homes.

Bill 161 will insulate LTC homes from liability.

Last week, Joanne Dykeman, a senior executive of Sienna Senior Living, reportedly called victims' families "blood-sucking class action lawsuit people" after hearing of their loved ones' suffering. She knows and resents that class actions may force her company to compensate the victims of its neglect.

Yet one week later, this Government is rushing through a Bill that will deprive these LTC victims and their families of access to the courts.

This Government claims to be "For the People." But by passing this Bill, it is on the side of Ms. Dykeman. It is on the side of Sienna Senior Living and its insurers.

This is not fear-mongering. In a 2009 decision involving an outbreak Legionnaires disease at a long-term care home, the Ontario Superior Court noted that many individual questions would need to be determined after the common questions are decided but specifically said that Ontario does not have a predomination test and therefore certified the case as a class action.[2]

There is no doubt that if Bill 161 is passed as is, residents of Sienna Senior Living – one of whose homes was recently taken over by the military – will be denied access to justice through a class action. Their cases will be too small and too costly to bring as individual actions. They will be denied justice because of Bill 161.

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[2] *Glover v City of Toronto*, 2009 CanLII 16740 (Ont Sup Ct).

The Committee asked if I was aware of any example (not hypotheticals) in which the predomination of individual issues barred certification. Since common-issues predomination is not currently a prerequisite, there are no such examples in Ontario.

We know from the BC experience, where common-issues predomination is a consideration but not a requirement for certification, that the requirement may bar certain product-liability and *Charter* claims.[3]

The experience in the US is also instructive. Despite decades of litigation, the predomination requirement remains the source of considerably uncertainty in the US. Defendants have successfully relied on the predominance of individual issues to avoid certification of consumer claims regarding deceptive practices[4] and defective medical devices,[5] asbestos claims,[6] workplace discrimination claims,[7] antitrust claims,[8] fraud claims by businesses,[9] contract claims by royalty holders,[10] and multijurisdictional matters.[11]

The Superiority requirement

The superiority requirement means that if another procedure for obtaining compensation, or for punishing a wrongdoer, exists then a class action cannot proceed.

Take for example, a case of an organization that systemically discriminates against a marginalized racial group or the LGBTQ community. A class action would likely be barred because each of the hundreds of victims *could* pay a fee and lodge an individual complaint before the Ontario Human Rights Commission against the organization. That process, although clearly more costly, time-consuming and confusing for individual victims than a class action would be a barrier to a class action under Bill 161.

In fact, the superiority requirement as drafted is far broader than the US equivalent. Under Bill 161, virtually any other alternative process, including one created by the wrongdoer itself, will be

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[3] *Harrington v Dow Corning Corp.*, 2000 BCCA 605 (breast implants); *Thorburn v British Columbia (Public Safety and Solicitor General)*, 2013 BCCA 480 (strip searches).

[4] *Castano v American Tobacco*, 22 Ill.84 F.3d 734 (5th Cir. 1996) (claim in respect of nicotine addiction would require individual analysis of each claim); *Pilgrim v Universal Health Card, LLC*, 660 F.3d 943 (6th Cir. 2011) (certification of deceptive advertising claim overturned because it engaged laws of multiple US states).

[5] *In re St. Jude Med. Inc., Silzone Heart Valve Prods. Liab. Litig.*, 522 F.3d 836, 838 (8th Cir. 2008) (defective medical device class action barred because of individual reliance issues).

[6] *Georgine v Amchem Products Inc.*, 83 F. 3d 610 (3d Cir. Pa. 1996).

[7] *Wal-Mart v Dukes*, 564 U.S. 338 (2011) (employment discrimination class action barred because of varied individual circumstances of employees).

[8] *Comcast Corp. v Behrend*, 569 U.S. 27 (2013) (individual damages issues barred certification of an antitrust class action).

[9] *Sandwich Chef of Texas v Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 220 (5th Cir. 2003) (allegations by businesses that insurers defrauded policyholders could not be certified because of reliance issues).

[10] *Stirman v Exxon Corp*, 280 F.3d 554 (5th Cir. 2002) (contract claim by royalty owners against lessee could not be certified because in the law of the jurisdictions at issue).

[11] *Stirman v Exxon Corp*, *ibid*; and *Pilgrim v Universal Health Card, LLC*, *supra* note 4.

insulate the wrongdoer from liability. It will preclude the public from discovering the scope of the wrongdoer's misconduct, and will ultimately ensure that wrongdoing is more profitable.

Recommendation

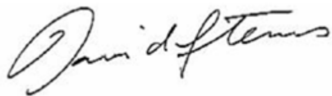
The predomination and superiority obstacles in Bill 161 are the result of lobbying of big business.

In its extensive review of Ontario's class action regime, the Law Commission of Ontario (LCO) considered submissions from the US Chamber of Commerce and Canadian Bankers Association on making our procedure more friendly to defendants. The LCO made 47 recommendations to improve class actions in Ontario, none of which was to introduce predomination or superiority requirements at certification.

Class actions are truly for the people. Bill 161's amendments to the class certification procedure are ***not*** for the people.

The Ford Government must decide whose side it is on. If this government is truly For the People – if it cares about people and Ontario's small businesses, and not just the profits of large multinationals – the predomination and superiority requirements must be removed from this Bill.

Yours very truly,
SOTOS LLP



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