February 21, 2020

The Honourable Doug Downey  
Attorney General  
Ministry of the Attorney General  
McMurry-Scott Building  
720 Bay Street, 11th Floor  
Toronto, ON M7A 2S9  
By electronic mail: attorneygeneral@ontario.ca

Re: Comments on Class Proceedings Act amendments in Ontario Bill 161, the Smarter and Stronger Justice Act

Dear Attorney General Downey,

The U.S. Chamber Institute for Legal Reform (ILR) is a not-for-profit public advocacy organization affiliated with the U.S. Chamber of Commerce, the world’s largest business federation representing the interests of more than three million businesses of all sizes and sectors, as well as local chambers, and industry associations. ILR’s mission is to champion a fair legal system that promotes economic growth and opportunity. Since ILR’s founding in 1998, it has worked diligently to limit the incidence of litigation abuse in the U.S. courts and has been actively involved in legal reform efforts in the U.S. and abroad. Its members have a direct interest in how litigation is conducted in Ontario, as many have affiliates that carry on business in Ontario, and in Canada more broadly, and have been defendants in class actions in Ontario.

ILR strongly supports proposed reforms to the Class Proceedings Act (CPA) that will promote increased fairness and efficiency in Ontario’s courts.

Many of the proposed amendments are in line with reforms recommended by ILR in our 2017 paper titled Recipe for Reform: A Proposal for Improving Canadian Class Action Procedures and echoed in our submission to the Law Commission of Ontario during their commissioned study of the class action system. Importantly, the proposed amendments include several priority reforms such as (i) symmetrical appeals that allow defendants to appeal as of right, 

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1 Available at https://www.instituteforlegalreform.com/research/recipe-for-reform-a-proposal-for-improving-canadian-class-action-procedures
(ii) better and more efficient coordination of overlapping multi-jurisdictional class actions, and (iii) transparency in third party litigation funding. These amendments will act positively to reduce the likelihood of unwarranted burdens being placed on defendants and the court system by duplicative and/or meritless class actions.

The class certification test is another critically important mechanism for reducing burdens from cases that are inappropriately brought as class actions or have little merit. While Bill 161 includes increased requirements for class certification, we renew our recommendation that the CPA should be amended to include a merits assessment requiring a reasonable possibility of success for the class, similar to the requirement in the Ontario Securities Act. Requiring a modest assessment of the merits at the certification stage would significantly reduce the risk of extortionate class actions that may pressure companies to settle for reasons outside the merit of the action.

Though not addressed in our original submission, ILR also has concerns about the provision in Bill 161 that allows for order of cy pres awards without the consent of both parties. Cy pres awards give nothing to class members, but instead award attorneys and groups with little connection to the litigation. They may create conflicts of interest when the class counsel has a relationship with the recipient group or the recipient group’s ideology is at odds with that of class members. In any case, cy pres awards reduce incentives for class counsel to properly identify class members and see that they are compensated. We recommend that Bill 161 be amended to exclude this expansion of cy pres awards in order to prioritize compensation of injured class members rather than attorneys and third party groups.

We support the majority of the proposed reforms in Bill 161 and view this legislation as a positive step towards a fairer class action system in Ontario. We respectfully ask that you consider amending the bill to include a merits certification test and to exclude any expansion of problematic cy pres awards.

Sincerely,

Harold H. Kim
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cc: Joseph Hillier, Chief of Staff, joseph.hillier@ontario.ca; Amanda Iarusso, Director of Policy and Legal Affairs, amanda.iarusso@ontario.ca