



## **OBA Submission on Bill 161's Proposed Changes to the *Class Proceedings Act***

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Submitted to: Ministry of Attorney General

Submitted by: Ontario Bar Association



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BAR ASSOCIATION  
A Branch of the  
Canadian Bar Association

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## General Introduction

The Ontario Bar Association (“OBA”) appreciates the opportunity to provide submissions to the Ministry of the Attorney General in response to the amendments to the *Class Proceedings Act* under Schedule 4 of Bill 161, *Smarter and Stronger Justice Act 2019*.

## The Ontario Bar Association

Established in 1907, the OBA is the largest volunteer lawyer association in Ontario, with over 16,000 members who practice on the frontlines of the justice system, providing services to people and businesses in virtually every area of law in every part of the province. Each year, through the work of our 40 practice sections, the OBA provides dozens of submissions to government for the profession and the public interest, and delivers over 325 in-person and on-line professional development programs to an audience of over 12,000 lawyers, judges, students and professors.

This submission has been prepared on behalf of the OBA Class Actions Law Section which is composed of class actions law practitioners representing both plaintiff and defence side clients.

## Introduction to Submission

We commend the government for accepting many of the OBA’s recommendations to streamline the class action process and reduce delays – including changes that would better manage multi-jurisdictional cases and carriage motions, and eliminate unnecessary appeals.

*A Consensus Risk of the Proposed Certification Changes:* The proposed changes to the certification requirements to introduce superiority and predominance requirements are an area of significant contention. While there is no consensus amongst the class actions bar about the advisability of the changes, or the specific terms of the requirements, our members recognize that there are cases involving socially important issues that are likely not amenable to alternative forms of litigation, and that involve significant individual issues (the Indian Residential Schools case is an example). The proposed certification changes could put this category of cases at risk of never being litigated at all.



## Recommended Consensus Revisions

For the purposes of this submission, the OBA is only providing recommendations on three specific sections of the Bill that, on a consensus basis, our members believe could be amended to better achieve the government's purpose and the interests of the public and our members. As you may expect, our members have differing positions on other various proposed amendments. Those positions are not addressed in this submission.

Based on our members' knowledge of the applicable legal principles and their thorough understanding of this area, we recommend revisions to the following amendments under Schedule 4 of Bill 161 to the *Class Proceedings Act*:

1. Section 4.1 - Early Resolution of Issues
2. Section 22 (1.1) – Costs of Notice of Certification
3. Section 29.1 – Mandatory Dismissal for Delay

### 1. Section 4.1 – Early Resolution of Issues

#### The Issue

Section 4.1 of the Act permits motions to be brought prior to the hearing of the certification motion in an effort to dispose of actions or to narrow the issues or evidence at an early stage of the proceeding.

The provision as currently drafted does not allow for the court to order that a motion be heard after the certification motion. The discretion is limited to ordering that the other motion be heard together with the certification motion. There may be circumstances in which it is appropriate for a proposed motion to be heard after the certification motion, and not prior to, or concurrently with, the certification motion.

As such, the proposal below is being recommended:

#### ***Early resolution of issues***

***s. 4.1*** *If, before the hearing of the motion for certification, a motion is made under the rules of court that may dispose of the proceeding in whole or in part, or narrow the issues to be determined or the evidence to be adduced in the proceeding, that motion shall be heard and disposed of before the motion for certification, unless the court orders that the two motions be heard together otherwise.*



## 2. Section 22 (1.1) – Costs of Notice of Certification

### The Issue

Section 22 of the Act is amended by adding subsection 1.1 in order to award the costs of a notice of certification to a representative plaintiff only if they are successful in the class proceeding, and not at any earlier time.

With this new provision, there is no discretion to award costs at an earlier stage of the proceeding. The proposed amendments (please see below) provides for some flexibility through judicial discretion in exceptional cases, or where agreed to by the parties. If plaintiffs are not able to recover costs of the notice program (following a potentially costly certification battle), notice programs may be less comprehensive and robust. This would not support access to justice or be in the public interest. Furthermore, this flexibility also allows for the more unusual cases where the defendants have a greater interest than the plaintiffs in a more robust notice program.

As such, the proposal below is being recommended:

### ***Exception, costs of notice of certification*** **Section 22**

*(1.1) Despite subsection (1), the costs of any notice under section 17 may be awarded to the representative plaintiff only in the event of success in the class proceeding and, for greater certainty, shall not, absent exceptional circumstances or the parties' consent, be ordered to be paid by the defendant at any earlier time in the proceeding.*

## 3. Section 29.1 - Mandatory Dismissal for Delay

### The Issue

The new Section 29.1 provides for a process for dismissing a proceeding for delay in order to reduce the number of dormant cases clogging up the system. The OBA appreciates that the government is moving on a recommendation put forward by its members to eliminate dormant cases, however in order to strike a balance it is proposed that this does not preclude a representative plaintiff from filing supplementary evidence that was not reasonably available to them when they filed their final and complete motion record.



The proposed amendment to Section 29.1 is intended to ensure that the representative plaintiff is not precluded from filing, after its final and complete motion record for the motion for certification is filed, any evidence that was not reasonably available to the representative plaintiff prior to the first anniversary of the commencement of the action. For example, the representative plaintiff may file a final and complete certification record before the first anniversary of the day on which the proceeding was commenced. However, additional evidence may arise after the first anniversary that was not reasonably available to the representative plaintiff prior to that date. As drafted, the filing of this additional evidence by the representative plaintiff after the first anniversary could give rise to a dismissal of the proceeding for delay on the basis that a final and complete motion record was not filed by the first anniversary of the commencement of the proceeding. The amendment seeks to ensure that the filing of evidence that was not reasonably available to the plaintiff at the first anniversary of the commencement of the claim could not trigger a motion for dismissal for delay.

As such, the proposal below is being recommended:

***Mandatory Dismissal for Delay:  
Section 29.1***

***S. 29.1 (1) The court shall, on motion, dismiss for delay a proceeding commenced under section 2 unless, by the first anniversary of the day on which the proceeding was commenced,***

- a) the representative plaintiff has filed a final and complete motion record in the motion for certification;*
- b) the parties have agreed in writing to a timetable for service of the representative plaintiff's motion record in the motion for certification or for completion of one or more other steps required to advance the proceeding, and have filed the timetable with the court;*
- (c) the court has ordered that the proceeding not be dismissed and has established a timetable for service of the representative plaintiff's motion record in the motion for certification or for the completion of one or more other steps required to advance the proceeding; or*
- (d) any other steps, occurrences or circumstances specified by the regulations have taken place.*

***(2) For clarity, a representative plaintiff is not precluded from filing a supplementary motion record containing evidence that was not reasonably available to them at the time they filed their final and complete motion record pursuant to s.29.1(1)(a).***



## **Conclusion**

Once again, the OBA appreciates the opportunity to provide comments to the amendments to the *Class Proceedings Act* under Schedule 4 of Bill 161 and would be pleased to answer any questions that may arise. We look forward to participating in future consultations as the Bill moves forward through the legislative process.