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This submission is filed on behalf of the law firms[1] listed below in response to the Federal Court of Appeal and Federal Court Rules committee invitation to participate on the Federal Court Rules – 2024 Global Review (the "**Rule Proposal**"):

- Camp Fiorante Matthews Mogerman (Vancouver)
- Foreman & Company (London)
- Koskie Minsky LLP (Toronto and Vancouver)

[1] This submission reflects the views of the undersigned law firms and is not meant to represent the views of our clients.

- Siskinds LLP (London, Toronto, Vancouver, and an affiliate office in Quebec City)
- Slater Vecchio LLP (Vancouver and Montreal)
- Sotos LLP (Toronto)

These firms are among the leading Canadian class action firms, specializing in competition law class actions. Together these firms have collected well over a billion dollars in settlements from foreign companies alleged to have engaged in price fixing that affected Canadian consumers and businesses. The affected products are used by virtually every Canadian business and consumer. Examples include a wide variety of products, ranging from DRAM (a type of semiconductor memory), lithium-ion batteries, LCD panels, optical disc drives, automotive parts, commodity chemicals, manufacturing inputs, and chocolate bars. Distribution of these funds to Canadians is ongoing, and millions of Canadians have and will continue to benefit from these efforts. In many of these cases, there has been no related Competition Bureau action. Total fines collected by the Competition Bureau in related investigations are less than $200 million.

In addition, these firms have pursued public interest-oriented class action litigation against the federal government in wide ranging areas, including for Indigenous peoples, veterans, and pensioners. This includes, most prominently, claims relating to serious breaches of the *Charter*.

In our view, the current Federal Court regime has several attractive features for plaintiffs, including: judges with subject matter expertise, active case management, and no costs. We do not see any need for major reform.

The Rules Proposal seems to flow from the recent Ontario amendments to the *Ontario Class Proceedings Act, 1992*. As explained below, those amendments were contrary to recommendations from the Law Commission of Ontario ("**LCO**"). The LCO conducted an "independent, evidence-based and comprehensive review" of class actions in Ontario and a thorough consultation process. The LCO was staffed and contributed to by a substantial team of leading Academics, Judiciary, and a strong balance of plaintiff and defence side class actions practitioners.[2]

The response by the plaintiffs' bar to the Ontario amendments has been to shift their practice to other more favourable jurisdictions. Since the amendments, comparably more class actions have been actively litigated in other provinces, most notably British Columbia, and in Federal Court.

The Proposal states an intention to "Revise the Rules governing class actions to reflect procedural changes in the provinces." The provinces are not uniform in their class action regimes. Ontario and Prince Edward Island have similar regimes – which are the strictest in the country in terms of the certification requirements and costs. The other common law provinces have regimes that are similar to the existing Federal Court regime. Quebec has the lowest threshold for certification (authorization) and is largely a no cost regime (any costs awards are uncommon and, to the extent awarded, are low in magnitude).

CERTIFICATION – PREDOMINANCE AND SUPERIORITY REQUIREMENT

The certification test contained in Rule 334.16 of the *Federal Courts Rules* requires no amendment on the issue of predominance and superiority. The existing *Federal Courts Rules* list

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[2] Law Commission of Ontario, Class Actions: Objectives, Experiences and Reforms, Final Report, July 2019, introductory pages.

predominance and superiority-related considerations as express factors to be considered, rather than mandatory requirements at Rule 34.16(2)(a)-(e).

The existing test within the *Federal Court Rules* already reflects an optimized balance that serves access to justice far better than the Ontario amendments that were implemented in 2020. The existing certification test in the *Federal Courts Rules* (which) is also well aligned and broadly consistent with the certification tests in every common law province and territory in Canada except for Ontario and Prince Edward Island. It is Ontario which is the notable outlier on this issue.

The Ontario amendments were controversial. They were requested jointly by banking and insurance lobby groups (the Canadian Banker's Association and the Canadian Life and Health Insurance Association).[3]

The Ontario amendments were opposed by well-informed and diverse organizations, most notably the LCO. The LCO concluded that the "certification regime in Ontario does not warrant major reforms to the statutory or evidential tests."[4] After seeing the proposed amendments in Bill 161, the *Smarter and Stronger Justice Act*, the LCO wrote a letter to the Ministry of the Attorney General expressing concerns with the predominance and superiority requirements:

> 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

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[3] Canadian Bankers Association and Canada Life and Health Insurance Association Joint Response to Consultation Paper on class action reform, CBA-CLHIA-CA-Submission.pdf (lco-cdo.org), May 31, 2020, p 1, 10-11.
[4] Law Commission of Ontario, Class Actions: Objectives, Experiences and Reforms, Final Report, July 2019, p. 36.

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 3 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.[5]

Similarly, a bipartisan group of Defence and Plaintiff side lawyers comprising a task force of the Advocates' Society also advocated against the Ontario amendments. The Advocates' Society stated that adopting the concepts of superiority and predomination would have "significant undesirable consequences" and gave the following examples:

"- It will put Ontario's certification test significantly out of step with legislation in the other provinces and territories, thereby putting Ontario at odds with the efforts of the Uniform Law Conference of Canada to regularize the class action legislation across the country through its Uniform Class Proceedings Amendment Act, which has been adopted in the three western-most provinces already;

- It may therefore encourage forum shopping or, alternatively but to the same effect, push Ontario litigants into other jurisdictions upon the courts' application of the multijurisdictional class action reforms proposed under proposed ss. 5(6) and (7), with the result that both Ontario residents who have been harmed by mass wrongs, and defendants whose business centres are located in this province may have their disputes adjudicated in other provincial forums rather than by the courts of their home province;

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[5] LCO Letter to Ministry of the Attorney General, *Re: Class Proceedings Amendments, Bill 161, the Smarter and Stronger Justice Act*, January 22, 2020 LCO-Letter-re-Bill-161-Class-Actions-Final-Jan-22-2020.pdf (lco-cdo.org). [emphasis in original]

> - It may impede access to justice for the victims of many forms of mass wrongs in Ontario, with the unwelcome effect that Ontarians will have unequal access to the courts compared to their counterparts in other provinces and territories;
>
> - It may lead to the imposition of significant additional burdens on the administration of justice, as the courts, whose resources are already stretched, do not have the administrative capabilities, facilities, or capacity to manage mass tort litigation; and
>
> - It will increase uncertainty, litigation costs, multiplicity of court proceedings, and the use of court resources as the meaning and application of these new concepts of superiority and predominance are subjected to judicial interpretation."[6]

The Advocates' Society also expressed concerns that the proposed superiority and predominance requirements would hamper access to justice and favour defendants:

> "Incorporating the predominance requirement may resurrect barriers to redress for a broad range of cases that can be successfully prosecuted under the current regime but may be derailed by the predomination requirement, including particularly claims involving personal injuries. In some cases, a class proceeding will be the only feasible means of accessing the courts of Ontario."
>
> […]
>
> "The Society notes with concern that the proposed superiority and predominance test weighs in favour of defendants and may prevent meritorious cases from being heard in Ontario. Based upon the available information about the results in class proceedings, there is no principled basis for making it more difficult for plaintiffs to have their claims heard on the merits in Ontario, by imposing additional procedural impediments to allowing plaintiffs access to class proceedings."[7]

Both organizations recommended an approach that is consistent with the existing test within Rule 334.16.

The Ontario-style amendments favour defence side interests at the expense of claimants. The amendments also impact and potentially compromise to all cases, not just those that are perceived to have low merit on a preliminary basis.

As one example, class action lawsuits have allowed Indigenous persons and communities to address a wide range of issues, including federal and provincial discriminatory practices, Charter violations, and residential school abuses. Such cases have traditionally required individual issues management and determinations following the determination of common issues. The results that have been accomplished in that area to date reflect some of the highest and best uses of common and individualized processes in the class proceedings field. These are important legal tools which must be enhanced through consistent use and experience rather than discarded. Ontario-style amendments – specifically the predominance requirement - threaten that form of access to justice by making it more challenging to assert claims with significant individual issues.

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[6] The Advocates' Society Letter *Re: Bill 161, Smarter and Stronger Justice Act, 2019*, April 14, 2020, p 5-6. The_Advocates_Society_Letter_re_Bill_161.pdf

[7] The Advocates' Society Letter *Re: Bill 161, Smarter and Stronger Justice Act, 2019*, April 14, 2020, p 8-9. The_Advocates_Society_Letter_re_Bill_161.pdf

Most importantly, the Ontario-style amendments run contrary to the actual needs of claimants within the Canadian legal system. It is a well recognized reality that individual legal processes are inaccessible to many Canadians because they are too expensive, too slow and psychologically taxing for litigants. The capacity to enhance aggregated or mass legal processes should be regarded as one part of a solution to that problem – one that must not be reduced or curtailed during this time of crisis in access to justice.

In addition to our commentary on the substance of the amendments, Ontario-style changes to the mature test and related jurisprudence under Rule 334.16 will also create disruption and a chill in class action filings under the *Federal Courts Rules*. Plaintiff-side practitioners do not regard the Ontario-style rules as attractive in the national context as they present potentially adverse variables that can impair the interests of their clients. New Rules will require new interpretation, which is likely to be subject to appellate review. This uncertainty is an unattractive element for any claimant and their counsel.

For these reasons, this group of firms advocates for the maintenance of the existing test in Rule 334.16.

GUIDANCE ON COSTS

Imposing an adverse cost regime will significantly undermine access to justice in the Federal Court. The threat of adverse costs is a significant deterrent to an individual litigant starting a class action, and is at odds with the class action goals of access to justice and behavioural modification.

Ontario's cost regime, on which the proposed amendments are based, was adopted despite clear and contrary recommendations.[8] And it has persisted despite recommendations to abandon it.[9] Indeed, the LCO recommended that Ontario move *away* from an adverse cost regime in its 2019 Report.[10] The LCO explained that the magnitude of adverse costs orders has undermined litigants' access to justice, creating several unintended consequences such as the abandonment of appeals and deterring public interest litigation:

> …There was no dispute among stakeholders, however, that cost orders have risen over the past several years. The magnitude of these cost orders is an access to justice problem. Additional consequences of two-way costs in class actions are indemnities and the associated cost to the class; trading appeal rights to avoid paying costs; deterring public interest litigation; and keeping the market for class counsel very narrow.[11]

Commissions that have been empanelled to consider class action issues, including the original Ontario Law Reform Commission ("**OLRC**"), have consistently recommended against an adverse cost rule.[12] More than 40 years ago, the OLRC stressed that class actions should not be subject to the ordinary costs rule:

> At the outset we wish to state our unanimous conclusion that class actions brought under the proposed *Class Actions Act* should be governed by a set of cost rules

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[8] Ontario Law Reform Commission, "Report on Class Actions" in 1982 OLRC Report, at p. 647
[9] Law Commission of Ontario, Class Actions: Objectives, Experiences and Reforms, Final Report, July 2019, p. 9.
[10] Law Commission of Ontario, Class Actions: Objectives, Experiences and Reforms, Final Report, July 2019, p. 9.
[11] Law Commission of Ontario, Class Actions: Objectives, Experiences and Reforms, Final Report, July 2019, p. 9.
[12] Ontario Law Reform Commission, "Report on Class Actions" in 1982 OLRC Report, at p. 647.

> different from those that now apply in Ontario to individual actions brought in the Supreme Court and the county and district courts [now the Superior Court] …[13]
>
> …It is therefore the view of the Commission that, if the expanded class action procedure is to be utilized at all, the present cost rule cannot continue to apply…[14]

Instead of adopting the ORLC's recommendation, the Ontario Legislature created the Class Proceeding Fund ("**CPF**") through an amendment to the *Law Society Act* in 1992, and an initial grant of funding.[15] The CPF uses this funding, which has grown substantially over time, to indemnify representative plaintiffs in class actions against adverse costs in the event they are not successful. In exchange for funding, the CPF receives a levy in the amount of 10% of any awards or settlements in favour of the class, plus a return of any funded disbursements.

The CPF is Ontario's attempt to address the chilling effect of costs on access to justice. The CPF can choose to indemnify representative plaintiffs based on public interest as well as financial considerations, making it a key tool for promoting access to justice in Ontario. But this system, while historically successful, has come under substantial strain. As the LCO explained, the magnitude of today's adverse cost orders poses a serious threat to access to justice:

> …[C]osts orders have risen exponentially over the past several years. In a 2013 costs decision, Justice Belobaba analyzed contested costs orders issued between 2007 and 2013 and found the average award to be $163,000 in twenty-three cases where less than $500,000 was sought, and over $388,000 in thirteen cases where more than $500,000 was requested. By contrast, only three adverse costs awards were reported in 1998; in two cases, costs were fixed at $5,000 and $15,000, while in the third case the quantum was not specified. And in the past few years, costs orders in the millions of dollars have been made against unsuccessful plaintiffs and defendants. In the words of one judge: "costs in class proceedings have gotten out of control."
>
> The LCO's review of costs decisions confirms that ever-increasing costs orders are being granted more and more frequently. While this assessment is necessarily confined to publicly available costs decisions, the increase in quantum of adverse costs has been confirmed by stakeholders consulted by the LCO and in judicial pronouncements. In their submissions to the LCO, the Class Proceedings Fund (CPF), for example, corroborates this trend. Their analysis of 146 funded cases reveals that costs paid by the CPF have increased exponentially, from an average of $50,000 a case in 2001 to an average of almost $450,000 in 2017.
>
> The magnitude of these costs orders is an access to justice problem. As the Supreme Court of Canada described them, class actions have become the "sport of kings in the sense that only kings or equivalent can afford it". Courts continue to express concern about the role of costs as barriers to justice. Cost orders are also a problem because it brings so much uncertainty [sic] to the law. Because liability for costs is borne by the representative plaintiff and not the entire class, an adverse costs order may well spell financial ruin for the individual representative. This risk is so high that the current Chief Justice of Ontario stated bluntly in *Dugal* that no

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[13] Ontario Law Reform Commission, "Report on Class Actions" in 1982 OLRC Report, at p. 647.
[14] Ontario Law Reform Commission, "Report on Class Actions" in 1982 OLRC Report, at p. 663.
[15] See e.g., *Law Society Act*, RSO 1990, c L.8 s. 59.1. See e.g., Class Proceedings Fund, "Funding and Reporting" website page. The CPF's initial funding came from a $500,000 grant from The Law Foundation of Ontario.

> rational person would ever agree to act as a representative without a costs indemnity.[16]

The LCO, in the face of these problems, recommended "eradicating the costs rule altogether", because "the status quo is not an option."[17] In the end, the LCO set out four "no cost" alternative options as reflecting the best way forward."[18] In Ontario's specific case, bearing in mind the unique role of the CPF as a litigation funder, the LCO recommended a "modified" no-cost rule: "No costs for certification and ancillary proceedings."[19]

Ontario, regrettably, did not adopt the LCO's recommendations. But the LCO's recommendations were correct and addressed a dire problem. The situation would be even more dire in the Federal Court if a cost regime like Ontario were adopted, because there is no equivalent to the CPF in Federal Court: adverse costs would simply create a serious chilling effect to class action litigation.

The Federal Court has exclusive jurisdiction over many important areas of law, especially those related to the liability of the federal Crown. Imposing adverse costs will discourage important actions – including claims by Canada's Indigenous people, pensioners, RCMP officers and veterans. An adverse cost regime, without public interest funding, would likely grind these cases to a halt.

An adverse cost regime in Federal Court will lead to a rise in private, third-party litigation funding. While litigation funders play an important role in facilitating access to justice, they are for-profit entities based outside of Canada. They are unlikely to fund public interest litigation where damage components are a smaller part of the relief sought, and they may not be willing to fund litigation against the federal government. In Ontario, such public interest litigation is funded through the CPF. Effectively requiring litigants to seek third-party funding to prosecute actions in the Federal Court is not in keeping with the class action goals of access to justice and behaviour modification.

The LCO, when considering changes to Ontario's untenable cost regime, recommended a no-cost rule for certification and ancillary proceedings. But that recommendation was based on the existence of the CPF, which could fund public interest cases and counterbalance the impact on access to justice flowing from an adverse cost regime. In the absence of an equivalent to the CPF, the Federal Court should not depart from its longstanding no-cost rule.

In summary, the Federal Court's no-cost regime works. It has led to meaningful justice for millions of Canadians. It also serves to deter unreasonable conduct – in that costs are available where: (i) the conduct of a party unnecessarily lengthened the duration of the proceeding; (ii) any step in the proceeding by a party was improper, vexatious or unnecessary or was taken through negligence, mistake or excessive caution; or (iii) exceptional circumstances make it unjust to deprive the successful party of costs.

If there is to be a change in how class action costs are dealt with, then the change it should come from Parliament. Otherwise, the regime should stand unaltered.

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[16] Law Commission of Ontario, Class Actions: Objectives, Experiences and Reforms, Final Report, July 2019, p. 79.
[17] Law Commission of Ontario, Class Actions: Objectives, Experiences and Reforms, Final Report, July 2019, p. 83.
[18] Law Commission of Ontario, Class Actions: Objectives, Experiences and Reforms, Final Report, July 2019, p. 84.
[19] Law Commission of Ontario, Class Actions: Objectives, Experiences and Reforms, Final Report, July 2019, p. 85.

PRE-CERTIFICATION MOTION

Adding a requirement that the Federal Court must hear dispositive or issue-narrowing motions before or at certification (as under the amended Ontario *Class Proceedings Act* at s. 4.1) will undermine the Court's exercise of discretion and history of practical and effective case management.

As a practical matter, the Federal Court already has the ability to hear motions to strike in advance of certification and has done so (see for example *Pass Herald Ltd. v. Google LLC et al.*, pending before Chief Justice Crampton). Rule 221 specifically grants the Court the power to order, "at any time", that a pleading be struck out in whole or in part, which would address any concerns in cases which would be subject to any such dispositive or issue-narrowing motions.

Further, in Ontario, the scope of s. 4.1 remains unclear. Justice Belobaba concluded that a defendant has the presumptive right to have certain motions be heard prior to certification, which can be displaced if there is an overarching and good reason for the motion to be heard together with certification (*Dufault v. Toronto Dominion Bank*, 2020 ONSC 6223). By contrast, commenting on s. 4.1, Justice Perell stated that "nothing much is likely to change in the future, other than the rhetorical temperature of the case management conference to schedule motions" (*Strathdee v. Johnson & Johnson Inc.*, 2021 ONSC 7557).

In addition, currently, Rule 213 allows a party to bring a summary judgment motion "at any time *after* the defendant has filed a defence" (emphasis added). Nothing in the wording of rule 213 currently prevents this Court from hearing motions for summary judgment so long as a defence is filed, and the filing of such a defence is subject to this Court's discretion. In fact, Justice Strickland has noted this Court's normal approach that "whether a defendant must file a defence prior to certification is purely a matter of judicial discretion" (*Poundmaker Cree Nation v. Canada*, 2017 FC 447). Accordingly, whether or not the Court can hear a pre-certification summary judgment motion in any proposed class action is thus already within the Court's discretion.

In short, this Court already has ample powers to exercise its discretion to hear motions prior to certification, in the appropriate circumstances, which would be dispositive or otherwise assist in narrowing the issues. We submit that there is no utility or efficiency associated with the introduction of a rule like s. 4.1 of the CPA, which arguably tilts the balance in favour of defendants' dispositive motions.

CONCLUSION

In summary, the *Federal Court Rules* as they relate to certification, costs and pre-certification motions do not require amendment, and the rule changes proposed will deter class action filings in the Federal Court.

We welcome the opportunity to discuss this submission or address any questions.

 for:

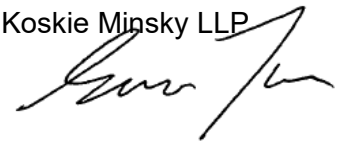
Camp Fiorante Matthews Mogerman

Foreman & Company

 for:

Koskie Minsky LLP

Siskinds LLP



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