April 14, 2020

VIA EMAIL: roman.baber@pc.ola.org; comm-justicepolicy@ola.org

Mr. Roman Baber, M.P.P.
Chair of the Standing Committee on Justice Policy
c/o Mr. Christopher Tyrell, Clerk of the Committee
99 Wellesley Street West
Room 1405, Whitney Block
Queen's Park
Toronto, ON M7A 1A2

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

RE: Bill 161, *Smarter and Stronger Justice Act, 2019*

The Advocates' Society, established in 1963, is a not-for-profit association of more than 6,000 members throughout Canada, including approximately 5,000 in Ontario. The mandate of The Advocates' Society (the "Society") includes, among other things, making submissions to governments and others on matters that affect access to justice, the administration of justice, and the practice of law by advocates.

The Society has reviewed with keen interest the wide-ranging justice reforms proposed by Bill 161, the *Smarter and Stronger Justice Act, 2019*, and struck several task forces to examine the proposed amendments. We are writing to provide the Standing Committee on Justice Policy with comments on Bill 161 and to propose some specific amendments for the Committee's consideration.

Our submissions below are organized according to the Schedules to Bill 161. References to section numbers are to the sections as they would appear in the relevant Acts as amended by Bill 161 in its current form.

I. SCHEDULE 1, *ADMINISTRATION OF JUSTICE ACT*, R.S.O. 1990, C. A.6

Bill 161's proposed changes to the *Administration of Justice Act* regarding fee waiver certificates include changes to eligibility and the inclusion of a new scheme permitting the revocation of fee waiver certificates.

(1) Eligibility

Per Schedule 1 to Bill 161, the phrase "the person lacks the financial means to pay fees" in paragraph 1 of s. 4.4(7) and s. 4.7(3) will be replaced with "the person cannot, without undue hardship, afford to pay fees", when referring to a person who may qualify for a fee waiver certificate. This language change is both unfair and unnecessary. The new proposed phrasing is vague and the subtle difference in wording could render fee waiver certificate applicants ineligible who should still otherwise qualify. The

qualifications to request a waiver are already quite stringent.[1] The phrase "without undue hardship" is much more open to interpretation than the comparably concrete meaning of "lacks", which can only be reasonably interpreted as "does not have". "Undue hardship" opens the doors for scrutiny and inequitable discretion. What is defined as "undue hardship" by one person may not be by another. Court fees can be onerous, and in circumstances may deter persons from accessing justice. The proposed wording will not only increase confusion amongst those who make the decision to accept or deny these requests, but cause unnecessary confusion in clauses where the meaning is already clear.

(2) Fee Waiver Revocation

Section 4.10 is a new proposed provision setting out when fee waiver certificates may be revoked, and by whom. Subsections 4.10(1) and (2) say "…a certificate may be revoked if the judge, deputy judge or case management master is of the opinion that the person's actions in the proceeding or enforcement are frivolous, vexatious or otherwise an abuse of the process of the court."

As previously mentioned, the requirements for fee waiver certificates are strict. Waivers are meant to assist low-income individuals in accessing justice. Low-income individuals are often vulnerable or marginalized people, who revocation may disproportionately impact. Eligible individuals may be unrepresented. Discerning whether an individual's actions in a proceeding are frivolous on a prospective basis will ordinarily be very difficult to discern, particularly in cases where the individual lacks representation. Opportunities for preemptive revocation must be strictly and narrowly defined. The current basis for revocation appears to permit revocation at the court's initiative, without a clear process or applicable evidentiary standard. A prerequisite to revocation should be a determination, on the basis of evidence, that an individual's proceeding or motion has been found to be frivolous, vexatious, or an abuse of process. This ensures that individuals are entitled to the applicable procedural rules and protections which are ordinarily afforded to individuals depending on the nature of the proceedings at issue.

It is further recommended that ss. 4.10(1) and (2) clarify that revocation may only occur on a prospective basis.

II. SCHEDULE 3, *CIVIL REMEDIES ACT, 2001*, S.O. 2001, C. 28

On October 22, 2019, the Society made a submission in response to the government's consultation about the implementation of an administrative forfeiture scheme and other potential changes to the *Civil Remedies Act, 2001*. That submission is attached for your reference. We were pleased to see that a number of our suggestions have been incorporated into the amendments proposed for the *Civil Remedies Act, 2001* by Schedule 3 to Bill 161. We remain concerned about some aspects of the proposed amendments, however.

(1) Administrative Forfeiture

In the Society's October 2019 submission, we pointed out the potential problems with allowing notice of administrative forfeiture to be given by mail to a last known address. Schedule 3 to Bill 161 proposes to

[1] Ministry of the Attorney General, *Having your court fees waived*, online: Ministry of the Attorney General https://www.attorneygeneral.jus.gov.on.ca/english/courts/feewaiver/index.php.

require three attempts at personal service of the notice and then, rather than service by mail, the government can leave the notice at the person's last known address (s. 1.3). In the Society's view, the proposed rule strikes a better balance between expediency and notice to people affected by the administrative forfeiture.

The Society also suggested that the proposed 75-day deadline for filing a notice of dispute of administrative forfeiture was too short. Schedule 3 to Bill 161 now proposes a deadline of 120 days (ss. 1.1, 1.5). We regard this as a better approach. The Society further suggested that information in the notice of dispute should not be required to be given under oath, which we acknowledge was also adopted.

The Society remains concerned with the proposal in Schedule 3, unchanged from the original proposal, that a person who suffers administrative forfeiture and wishes to challenge it after the fact must demonstrate that their failure to submit a notice of dispute within the deadline was "not wilful or deliberate" (s. 1.10). In our view, this requirement puts up inappropriate barriers to the challenge of the forfeiture on the merits.

(2) Amending the Definition of "Instrument of Unlawful Activity"

Originally, amendments were proposed for s. 7's definition of an "instrument of unlawful activity". The Society was concerned that those amendments might create confusion. We appreciate that those amendments are no longer proposed.

(3) Disclosure Orders

The Society notes that Schedule 3 to Bill 161 proposes to add several provisions to the *Civil Remedies Act, 2001*, permitting the government to seek orders for the disclosure of information or records on a without-notice basis (ss. 3.1, 8.1, 11.2.1, 13.1).

The legal parallel of this production power is the common law *Anton Piller* order. As a creature of common law, *Anton Piller* orders, which would apply to the Attorney General in forfeiture cases, have evolved alongside tight judicial controls. Since this production power is statutory, the absence of express statutory controls is likely to lead to confusion regarding which controls, if any, apply to the Attorney General's use of the power.

Thus, we reiterate the concerns we outlined in our October 2019 submission regarding these powers: they are unnecessary (such powers already exist at common law), and if implemented as framed, do not provide adequate or clear procedural safeguards.

(4) Maintenance of Property by Public Body

Schedule 3 to Bill 161 proposes to authorize the government to maintain possession of property "for a reasonable period of time" so that the government can move for an interim preservation order under the *Civil Remedies Act, 2001* (s. 18.2). The Society remains concerned that the "reasonable period of time" is too open-ended and should be replaced with a determinate period, such as 45 days, which could be extended by order of the court.

(5) Annual Report

In our October 2019 submission, the Society supported the proposal that the government should be required to report annually on its activities under the *Civil Remedies Act, 2001.* We therefore support the inclusion of s. 20.1 proposed by Schedule 3 to Bill 161, requiring the government to prepare an annual report containing general information and statistics regarding the activities and proceedings conducted under this legislation in the previous year. We encourage the government to ensure the annual report is published in a manner that is readily accessible to and understandable by Ontarians.

III. SCHEDULE 4, *CLASS PROCEEDINGS ACT, 1992*, S.O. 1992, C. 6

The Society has among its membership practitioners who act in all capacities in class proceedings, including for plaintiffs and for defendants.

(1) Early Resolution of Issues

In its present form, Schedule 4 to Bill 161 proposes to add the following provision to the *Class Proceedings Act, 1992* ("*CPA*"):

> Early resolution of issues
> 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.

This section appears to be intended to implement the recommendation of the Law Commission of Ontario ("LCO") that courts should encourage the use of summary judgment motions in class actions, especially when: "1) a motion might dispose of the entire proceeding or substantially narrow the issues to be determined; 2) when the delays and costs associated with the motion will be restricted; 3) when the outcome of the motion will promote settlement; 4) when the motion will not give rise to interlocutory appeals and delays affecting certification; 5) when the interests of economy and judicial efficiency will be promoted; and generally, 6) when scheduling the motion in advance of certification would promote the 'fair and efficient determination' of the proceeding."[2]

While the Society agrees with the LCO that summary judgment motions can promote efficiency and access to justice in appropriate cases, the Society does not support a provision that would create a presumption that such motions shall be heard prior to certification, unless the court orders that the motions be heard together. The Society is concerned that the proposed section, if adopted in its current form, could actually reduce the efficiency and increase the costs of class actions litigation.

By creating a presumption that the court should hear motions prior to certification, even if they would only dispose of the proceeding "in part" or merely narrow the issues to be determined or the evidence to be adduced, the section creates a risk of litigation by instalments. When such motions are heard prior to certification, they may result in appeals and lengthy delays before the court hears the certification motion

[2] Law Commission of Ontario, *Class Actions: Objectives, Experiences and Reforms, Final Report*, July 2019, at p. 50 ("LCO Final Report").

itself. Moreover, by providing that the only other option available to the Court is to order that the motions be heard together, the section could be read as precluding post-certification motions. Such motions may be appropriate in some cases.

The Society is of the view that the proposed new section should be amended to promote judicial efficiency and access to justice by ensuring that:

- The judge case-managing a given class proceeding will retain the discretion to decide the timing of various motions on a case-by-case basis;
- There will be some consistency in the test that judges will apply when determining the order in which motions will be decided; and
- There will not be motions to determine the order in which courts will hear pre-certification and certification motions and that parties not be able to appeal timing decisions.

The Society recommends that the Legislature amend the proposed new provision in the following way:

> Early resolution of issues
> 4.1 (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 substantial part, or substantially narrow the issues to be determined, the scope of necessary discovery or the evidence to be adduced in the proceeding, that motion ~~shall~~ may be heard and disposed of before the motion for certification, unless the court orders ~~that the two motions be heard together~~otherwise.
>
> (2) In deciding whether to make such an order, the court may consider:
> (a) the likelihood of delays and costs associated with the motion;
> (b) whether the motion, if successful, would decrease the costs to the parties;
> (c) whether the outcome of the motion will promote settlement;
> (d) whether the motion could give rise to interlocutory appeals and delays that would affect certification;
> (e) the interests of economy and judicial efficiency;
> (f) generally, whether scheduling the motion in advance of certification would promote the fair and efficient determination of the proceeding; and
> (g) any other factor that the court may determine is relevant.
>
> (3) Any request for an order under subsection (1) shall be heard and decided at a case conference.
>
> (4) A determination made under subsection (3) is final and not subject to appeal.

The factors set out in s. 4.1(2)(a), (c), (d), (e), and (f) are taken from the reasons in *Cannon v. Funds for Canada Foundation*,[3] while s. 4.1(2)(b) is intended to ensure fairness and access to justice for all parties, and s. 4.1(2)(g) is intended to preserve judicial discretion to consider additional factors where appropriate. The proposed language also incorporates many of the same factors that the LCO considered relevant to the determination of which motions should be heard prior to certification.

It is the Society's view that its proposed language will promote the LCO's goal of encouraging preliminary motions in appropriate cases, while preserving judges' discretion to deal with cases on an individual basis.

[3] 2010 ONSC 146, at para. 15.

At the same time, it will encourage consistency in those determinations by setting out a list of factors that the court should consider and promote efficiency by ensuring that sequencing decisions will be made at case conferences and not be subject to appeal.

(2) Test for Certification

The proposed amendment to s. 5 of the *CPA* reads:

> (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.

a. Overview

The Society's view is that there is no pressing need for any amendment to the certification criteria under s. 5(1) of the *CPA*. The LCO came to the same conclusion after its extensive study of the *CPA*, stating "the certification regime in Ontario does not warrant major reforms to the statutory or evidential tests."[4]

However, if the Government wishes to stiffen the certification test, the most sensible manner in which to do so is to adopt the provision recommended by the Uniform Law Conference of Canada in its *Uniform Class Proceedings Amendment Act*, which is already in force in British Columbia,[5] Alberta, and Saskatchewan. Such a provision would require the court to consider whether common issues will predominate, although it does not require predomination as a condition to the certification of a proceeding.

The proposed amendment imports the concepts of "superiority" and "predomination" from the United States' *Federal Rules of Civil Procedure*. The Society is concerned adopting those concepts into the Ontario litigation context will have significant undesirable consequences:

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[4] LCO Final Report, *supra*, at pp. 7, 36.

[5] Subsection 4(2) of British Columbia's *Class Proceedings Act*, R.S.B.C. 1996, c. 50, provides as follows:

> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

- 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;
- 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.

b. <u>The Context for the Society's Position</u>

The enactment of the *CPA* in 1992 followed a wide-ranging study and analysis of the existing class action regimes in other jurisdictions. The Legislature specifically rejected the recommendations of the Ontario Law Reform Commission to include the US concepts of superiority and predominance as part of a merits-based certification test, opting, instead, in favour of the five-part procedural test in the current *CPA*.

Ontario's courts now have nearly thirty years of experience with the existing certification criteria. The courts, including the Supreme Court of Canada, have provided strong interpretive jurisprudence addressing how the certification test ought to be approached, emphasizing the ameliorative effects of class action legislation in providing access to justice and judicial economy, and promoting behaviour modification.

More recently, the LCO's review of the *CPA* did not recommend changes to the certification criteria out of a concern that changes designed to impose a higher burden on plaintiffs at certification would "subvert the objectives of access to justice and judicial economy". Although the LCO did not expressly consider importing superiority and predominance into the certification test, the logic of the LCO's conclusions regarding the imposition of a merits test applies with equal force to the proposed amendments.

c. <u>The First Concern: National Consistency</u>

The Society is particularly concerned that the introduction of superiority and predominance to the certification test will put Ontario's class action regime significantly out of step with the class action procedures throughout the rest of the country. Bill 161 proposes to incorporate the provisions with respect to multijurisdictional class proceedings from the *Uniform Class Proceedings Amendment Act*.[6] The

[6] Schedule 4 to Bill 161, proposed ss. 5(6) and 5(7).

Society supports that proposed amendment, which is a step towards cohesive class action legislation across Canada.

However, adding superiority and predominance to the certification test will create a substantially higher hurdle, or in some cases a barrier, to class certification in Ontario relative to other provinces. This elevated standard will weigh against finding that Ontario is the preferable forum in the case of multijurisdictional class proceedings, even if the parties are primarily based in Ontario. This is not in the best interests of Ontarians, be they class members or defendants.

The Uniform Law Conference of Canada's *Uniform Class Proceedings Amendment Act* has informed the recent enactment and amendment of class proceedings legislation in other provinces. Increased uniformity in these legislative regimes is beneficial to all litigants, as it provides certainty with respect to both the interpretation of the legislation and the evidentiary burden to be met on certification.

The proposed amendments are a significant step away from the objective of national uniformity, which is an acknowledged good. The Society notes, for example, in the context of securities legislation, the provinces' unified approach to the governing legislation has provided certainty and enhanced corporate good governance. A similar approach should be applied in the class proceedings context. Accordingly, the Society recommends that in lieu of the proposed s. 5(1.1), the legislature enact a provision that mirrors s. 4(2) of the BC *Class Proceedings Act*.

d. <u>The Second Concern: Access to Justice</u>

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.

In the United States, these cases, which are typically not certified as class proceedings, are governed through the Multi-District Litigation ("MDL") process specifically created for the management of mass tort or group litigation. The MDL process provides individual litigants and the courts with tools to gather and manage mass tort litigation economically and efficiently, thereby providing an avenue for those litigants to access the courts. There is no Canadian equivalent to the MDL process. Given the different constitutional structures between the US and Canada, an MDL process is not possible here. Analogies to the American system should therefore not be drawn without a comprehensive understanding of the legislative and common law context in that country.

Ontario's courts are currently ill-equipped to manage mass tort litigation other than through the *CPA*, and could not do so without a significant injection of resources as well as legislative action. In the Society's view, one incident involving thousands of injured persons who filed individual actions because a class action was inaccessible to them could grind the administration of justice to a halt. For example, in the instance of the Indian Residential Schools institutional abuse cases, over 18,000 individual lawsuits had been filed across the country, in addition to several class actions. Had a predominance test been in place, the class actions may not have met the test for certification. This would not have meant the end of those claims. Rather, it is likely that they would have consumed a huge proportion of the judicial resources of each province for decades. Clearly, that was not a tenable outcome. The same could be said in respect of claims in respect of medical devices or drugs causing widespread injury. These cases involve very serious

harms suffered by Ontario's residents, and by Ontario's public health insurer which has subrogated claims in respect of the cost of care provided for those injuries.

It is fundamental that these individuals, and all Ontarians, are entitled to adjudication of their claims. However, absent a class proceedings regime that provides them with the means to have their claims determined collectively in an efficient and economic fashion, they will either be deprived of meaningful access to justice, or their claims will overwhelm the court system, throwing the administration of justice into disrepute, and denying meaningful redress for injured Ontarians.

e. Conclusion

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.

There exist significant deterrents to abusive practice in class actions, including the risk of significant costs payable in the event of unsuccessful actions. While some claims may not meet the current test for certification, and some may ultimately fail on the merits, that does not mean that those claims are abusive or groundless from the outset. In fact, the statistics for the success or failure of class proceedings are much on par with any other litigation. Without a policy basis for this dramatic change from the established certification test, the Society cannot endorse the proposed revisions to the certification test.

(3) Carriage Motions

Provisions of Schedule 4 address carriage motions. The proposed amendments, if enacted, will become new ss. 13.1 and 34(1.1) of the *CPA*. In proposing these amendments, the government has adopted the recommendations made by the LCO in Chapter 4 of its Final Report. Subject to the comments made below, the Society generally supports the proposed amendments for the reasons set out in the LCO Final Report.

The Society notes that new s. 13.1(2) uses permissive language: "Where two or more proceedings under this Act involve the same or similar subject matter and some or all of the same class members, the court may, on the motion of a representative plaintiff in one of the proceedings, order that one or more of the proceedings be stayed." The intention behind using permissive language may well be to recognize that judges may occasionally wish to consolidate two or more proceedings and award carriage to multiple sets of counsel, rather than awarding carriage to counsel in only one of the competing proceedings. The language of the provision, however, leaves open the possibility that a judge could choose not to resolve a genuine carriage dispute at all, and instead allow multiple overlapping or duplicative proceedings to proceed. Such an outcome would be unfair to both class members and defendants alike. The Society therefore proposes that the language of this new provision be revised to make clear that the court may order that one or more of the proceedings be stayed or that two or more proceedings be consolidated, but in all cases shall order that only one proceeding may move forward. The Society also proposes that a consequential amendment be made to new s. 13.1(6) to delete the words "staying a proceeding".

The Society recognizes that there are circumstances in which it may be in the interests of justice for multiple proceedings to move forward notwithstanding that they have a degree of overlap. For instance, it may be appropriate for multiple proceedings to move forward where they involve entirely different

defendants, or where different classes are affected in unique ways by the same conduct such that the interests of the classes are not aligned. The Society notes, however, that new s. 13.1(2) applies only to proceedings that "involve the same or similar subject matter and some or all of the same class members". Moreover, new s. 1.1 provides that: "A determination under this Act as to whether two or more proceedings involve the same or similar subject matter shall include consideration of whether the proceedings involve the same or similar causes of action and the same or affiliated defendants." The proposed amendments therefore provide the court with the flexibility to allow multiple proceedings to move forward in circumstances where it is truly appropriate to do so.

Neither new s. 13.1(2) nor new s. 13.1(3) mandates that a representative plaintiff in one or more of the proceedings bring a carriage motion to begin with. This is unproblematic in circumstances where plaintiffs' counsel in the competing proceedings reach an agreement concerning carriage such that only one proceeding will move forward, or when at least one representative plaintiff takes the initiative to bring the motion. However, in the unlikely event that no such agreement is reached and no carriage motion is brought, there should be an alternative mechanism to bring the matter before the court. The Society therefore proposes that defendants be able to trigger the carriage motion process. This can be accomplished by revising new s. 13.1(2) to add the words "or a defendant" after "on the motion of a representative plaintiff". Although defendants can already move for a stay of overlapping or duplicative proceedings pursuant to s. 106 of the *Courts of Justice Act*[7] and Rule 21.01(3)(c) of the *Rules of Civil Procedure*,[8] such motions can be cumbersome and do not necessarily result in the elimination of a multiplicity of overlapping or duplicative proceedings.

The Society supports the imposition of a deadline to commence a competing proceeding, but is concerned that the 60-day deadline prescribed in new s. 13.1(3) may be too short to allow representative plaintiffs and their counsel to properly investigate potential claims, decide whether to sue and then prepare a Statement of Claim or Notice of Action. Late filings should not be encouraged or rewarded, but neither should premature filings. The Society believes that a 90-day deadline to commence a competing proceeding would strike the appropriate balance. The Society also believes that parties should then have a brief additional period of time to initiate a carriage motion. It would not be fair or efficient to expect parties and their counsel to bring such a motion before or immediately upon the expiry of the deadline for commencing a competing proceeding.

In the circumstances, the Society proposes that new s. 13.1 be revised as follows:

> Carriage Motions
> 13.1 (1) In this section,
> "carriage motion" means a motion for an order under this section.
>
> Stay of other proceedings
> (2) Where two or more proceedings under this Act involve the same or similar subject matter and some or all of the same class members, the court may, on the motion of a representative plaintiff or a defendant in one of the proceedings, order that one or more of the proceedings be stayed or that two or more of the proceedings be consolidated, but shall in all circumstances permit only one proceeding to move forward.

[7] R.S.O. 1990, c. C.43.
[8] R.R.O. 1990, Reg. 194.

Timing
(3) A carriage motion shall be ~~made~~ initiated by service of a Notion of Motion no later than ~~60~~ 30 days after the ~~day on which the first of the proceedings was commenced~~ expiry of the 90-day period prescribed by subsection 8, and shall be heard as soon as is practicable.

Considerations
(~~4~~) On a carriage motion, the court shall determine which proceeding would best advance the claims of the class members in an efficient and cost-effective manner, and shall, for the purpose, consider,

(a) each representative plaintiff's theory of its case, including the amount of work performed to date to develop and support the theory;
(b) the relative likelihood of success in each proceeding, both on the motion for certification and as a class proceeding;
(c) the expertise and experience of, and results previously achieved by, each solicitor in class proceedings litigation or in the substantive areas of law at issue; and
(d) the funding of each proceeding, including the resources of the solicitor and any applicable third-party funding agreements as defined in section 33.1, and the sufficiency of such funding in the circumstances.

Decision final
(5) The decision of the court on a carriage motion is final and not subject to appeal.

Bar on proceedings without leave
(6) In making an order under this section ~~staying a proceeding~~, the court shall also bar the commencement, without leave of the court, of any proceeding under this Act involving the same or similar subject matter and some or all of the same class members.

Costs
(7) Solicitors for the representative plaintiffs who are parties to the carriage motion shall bear the costs of the motion, and shall not attempt to recoup any portion of the costs from the class or any class member, or from the defendant.

Bar on proceedings without leave following motion period
(8) Despite section 2, a proceeding may not be commenced under that section without leave of the court if,

(a) the proceeding would involve the same or similar subject matter and some or all of the same class members as an existing proceeding under this Act; and
(b) more than ~~60~~ 90 days have passed since the existing proceeding was commenced.

(4) Notice of Certification

The Society commends the clarifications that Bill 161 has incorporated in respect of the noticing provisions in the *CPA*, including the express reminder that notice should, in some cases, be provided to the Public Guardian and Trustee, and must use plain language in both official languages. However, we have several concerns with the current language in the draft legislation.

First, s. 17(5)(j) makes reference to the inclusion of prescribed information. Without having any information about what additional information might be required by regulation, the Society cannot

comment on the wisdom of such additional information. In our experience, the details that are enumerated in this section comprise all the necessary information that every certification notice must provide. Any additional information is typically case-specific, which is consistent with s. 17(5)(k), requiring notice to include "any other information the court considers appropriate" and s. 17(6), requiring notice to be the best notice that is practicable. We envision that further compelled information could be excessive and confusing to the class, inappropriate in some cases, or irrelevant in others. Beyond the basic information required by statute, the Society is therefore of the view that the notice contents should be left to be determined and approved by the court on a case-by-case basis, in keeping with the instructions provided in the amended *CPA*.

To the same end, the Society opposes the addition of directions by regulation with respect to the means of giving notice under s. 17(4)5, s. 18(3), and s. 19(3)2, and under s. 18(4)(f) with respect to notices other than certification notices.

The Society also notes with concern the inclusion of new s. 22(1.1), which provides that costs of notice of certification may only be awarded to a representative plaintiff in circumstances where the representative plaintiff is successful in the proceeding. While the usual practice is that the representative plaintiff will pay the costs of notice of certification, there may be circumstances where this is not appropriate and the Society recommends that Bill 161 make provision for this. For example, in some cases, certification is granted on consent and the parties agree upon a notice protocol that includes the defendant bearing some or all of the notice costs as part of the compromise. In other cases, the defendant will agree that the certification notice will be delivered to class members by it along with its other communications to the class. In other instances, a settlement may have been negotiated that requires certification to be granted first, followed by settlement, and the defendant agrees to pay the certification notice costs irrespective of whether or not the settlement is ultimately approved. These are but a few of the many and varied circumstances where it may be appropriate for the representative plaintiff to be awarded costs of notice of certification outside the narrow circumstance provided in new s. 22(1.1).

(5) Settlement

In large measure, the Society approves of the proposed amendments to the *CPA* at s. 27.1. It is helpful to mandate by statute the well-known standard that a settlement must be fair, reasonable and in the best interests of the class, to ensure that the public is informed of the foundational standard upon which settlements will be judged. As the LCO noted in its Final Report, this is a common sense amendment that will ensure that this standard is the guiding principle on settlement approval.

The proposed amendments also provide clarity and certainty with respect to the settlement approval process. In particular, ss. 27.1(2) and (6) are helpful additions to the legislation, confirming that it is possible to effect a partial settlement on behalf of a subclass. These changes will assist parties in reaching partial resolutions of the proceedings expeditiously, without the need for the parties to achieve a full resolution of all parts of the proceeding.

a. Concerns re: Prescription of Evidentiary Requirements for Settlement Approval in s. 27.1(7)

However, the Society does have concerns regarding the proposed legislative change to mandate the evidentiary requirements for a settlement approval in proposed s. 27.1(7), which provides:

Evidentiary requirements

(7) On a motion for approval of a settlement, the moving party shall make full and frank disclosure of all materials facts, including, in one or more affidavits filed for use on the motion, the party's best information respecting the following matters, which the court shall consider in determining whether to approve the settlement:

1. Evidence as to how the settlement meets the requirements of subsection (5).
2. Any risks associated with continued litigation.
3. The range of possible recoveries in the litigation.
4. The method used for valuation of the settlement.
5. The total number of class or subclass members, as the case may be.
6. A plan for allocating and distributing the settlement funds, including any proposal respecting the appointment of an administrator under subsection (14), and the anticipated costs associated with the distribution.
7. The number of class or subclass members expected to make a claim under the settlement and, of them, the numbers of class or subclass members who are and who are not expected to receive settlement funds.
8. The number of class or subclass members who have objected or are expected to object to the settlement, and the nature or anticipated nature of the objections.
9. A plan for giving notice of the settlement to class or subclass members in the event of an order under section 19, and the number of class or subclass members who are expected to obtain the notice.
10. Any other prescribed information.

There is already well developed and robust case law that sets out the information that the courts require before they will approve a proposed settlement, commonly referred to as the *Dabbs* criteria. In our members' experience, the judiciary and class counsel approach the responsibility of settlement approval with great seriousness, and current case law has demonstrated that the settlement approval process is not a rubber stamping of a deal negotiated by the parties. Class members can and do make submissions to the court if they are not content with a proposed settlement.

In its Final Report, the LCO expressed the view that enumerating the *Dabbs* criteria in the *CPA* was unnecessary, and doing so could also hinder the evolution of the criteria as may be necessary. The Society agrees with this view. The Society also agrees with the view expressed in the LCO Final Report that it is appropriate for the lawyers who negotiated the settlement to provide detailed affidavit evidence in respect of the settlement criteria to be assessed by the court. However, the Society does have concerns with the proposed legislative requirement that would require the moving party to make "full and frank disclosure of all material facts", including, in particular, the risks associated with continued litigation and the range of possible recoveries in litigation. The Society's concerns in this regard arise from the potential irreconcilable conflict between a duty of full and frank disclosure to the court and the preservation of privilege (including both solicitor-client and litigation privilege as well as settlement privilege). Due to these concerns and the Society's views that the case law is sufficiently well-developed that class counsel are able to fairly disclose all the information that the court requires to adjudicate upon each settlement without the need to include a prescriptive list of the evidentiary requirements within the *CPA*, the Society recommends that proposed s. 27.1(7) is not necessary or called for. In the alternative, the Society recommends that proposed s. 27.1(7) be qualified to make it clear that the "full and frank disclosure" requirement is expressly subject to counsel's obligation to preserve privilege. The rationale for the Society's recommendation in this regard is further elaborated below.

Oftentimes a class action will be settled piecemeal when there are multiple defendants or a variety of subclasses, or both. If class counsel is mandated by the legislation to make full and frank disclosure, including of all the risks associated with continued litigation and the range of possible recoveries in the litigation, this could severely compromise the case against the remaining defendants, or for the remaining subclasses. The use of the term "full and frank disclosure" of risks and possible recoveries suggests that the same level of disclosure would be required as on an *ex parte* motion, and that counsel must advise the court of the weaknesses that class counsel have identified in their case, or concede the merits of arguments being asserted by the parties opposite. It suggests that class counsel would be required to divulge matters that are protected by solicitor-client and litigation privilege. This is fundamentally at odds with lawyers' duties to their clients and the class, and would provide an unfair advantage to the non-settling defendants. Furthermore, the language in proposed s. 27.1(7) also suggests that settlement privileged communications relating to possible recoveries might have to be disclosed – something which the Court of Appeal for Ontario addressed in the CCAA context in *Re Hollinger Inc*.,[9] noting that mandatory disclosure of pre-resolution discussions may have the deleterious effect of discouraging attempts at settlement.

In the Society's members' experience, the judiciary are vigilant to protect the class members against unfavourable settlements, and are not reticent to ask for more information should they require additional information to make a decision. This is an area where there is no demonstrated need for legislative amendment, and the Society considers that it is best left to the judiciary to assess the evidence on each settlement approval motion, based upon its own unique facts.

To that same end, the Society is concerned that Schedule 4 to Bill 161 proposes a provision (s. 27.1(7)10) that would allow for additional mandated information and evidence to be prescribed by regulation. Class actions are, by their very nature, highly complicated. They cover every nature and sort of cause of action. They are not "one size fits all". Accordingly, they are inherently unsuited to the prescription of evidence for settlement approval by regulation.

b. <u>Concerns re: Claims Administration Provisions (s. 27.1(15) and (16))</u>

The proposed amendments regarding claims administration at ss. 27.1(15) and 27.1(16) provide:

> Duty of administrator, other person or entity
> (15) An administrator appointed by the court or, if no administrator is appointed, the person or entity who administers the distribution of the settlement funds, shall administer the distribution in a competent and diligent manner.
>
> Report
> (16) No later than 60 days after the date on which the settlement funds are fully distributed, including any distribution under section 27.2, the administrator or other person or entity who administered the distribution shall file with the court a report containing their best information respecting the following:
> 1. The amount of the settlement funds before distribution.
> 2. The total number of class or subclass members.
> 3. Information respecting the number of class members identified in each affidavit filed under subsection 5 (3) in the motion for certification.

[9] 2011 ONCA 579.

4. The number of class members who received notice associated with the distribution, and a description of how notice was given.
5. The number of class or subclass members who made a claim under the settlement and, of them, the numbers of class or subclass members who did and who did not receive settlement funds.
6. The amount of the settlement funds distributed to class or subclass members and a description of how the settlement funds were distributed.
7. The amount and recipients of any distribution under section 27.2, and the amount, if any, that was subject to reversion or otherwise returned to the defendant.
8. The number of class or subclass members who objected to the settlement and the nature of their objections.
9. The number of class or subclass members who opted out of the class proceeding.
10. The smallest and largest amounts distributed to class or subclass members, the average and the median of the amounts distributed to class or subclass members, and any other aggregate data respecting the distribution that the administrator or other person or entity who administered the distribution considers to be relevant.
11. The administrative costs associated with the distribution of the settlement funds.
12. The solicitor fees and disbursements.
13. Any amount paid to the Class Proceedings Fund established under the *Law Society Act* or to a funder under a third-party funding agreement approved under section 33.1.
14. Any other information the court requires to be included in the report.

With respect to claims administration, the Society agrees that the addition of express language permitting the court to appoint a claims administrator and mandating a report to the court at the end of the administration are helpful additions to the legislation. However, the Society is of the view that proposed s. 27.1(15) is unnecessary and superfluous. Once appointed, the claims administrator is an officer of the court. It must necessarily administer the settlement in a competent and diligent manner.

With respect to the final report on administration, some of the information that s. 27.1(16) mandates is inappropriate, may be unnecessary, or may not be within the knowledge of the claims administrator. Particularly:

2 and 3. The total number of class or subclass members may be unknown or unascertainable. For example, in a price fixing conspiracy, the number of purchasers of the product is unknowable. In a securities misrepresentation case, the number of shareholders is likely unknown.

4. Absent direct notice, the number of class members who received notice of the settlement is also incalculable.

8. Objectors make their objections to the settlement known to the court, not to the claims administrator. The number of objections is therefore not within the knowledge of the claims administrator.

9. Unless the claim is certified and settled at the same time, the claims administrator may not have information about the number of individuals who opted out of the class proceeding. When a case is certified, there is already an obligation on the part of class counsel or the notice administrator to report to the court and to the defendants regarding the number of opt outs, and their identity.

12. Solicitor fees and disbursements are approved by the court, usually at the same time as the settlement approval. Having the claims administrator report to the court on this is redundant.

c. Proposed Amendments Regarding Distribution on Cy-près Basis (s. 27.2)

The proposed amendment at s. 27.2 provides:

> Award amounts
> 27.2 (1) The court may order that all or part of an award under section 24 that has not been distributed to class or subclass members within a time set by the court be paid to the person or entity determined under subsection (3) on a *cy-près* basis, if the court is satisfied that, using best reasonable efforts, it is not practical or possible to compensate class or subclass members directly.
>
> Settlement funds
> (2) In approving a settlement under section 27.1, the court may approve settlement terms that provide for the payment of all or part of the settlement funds to the person or entity determined under subsection (3) on a *cy-près* basis, if the court is satisfied that, using best reasonable efforts, it is not practical or possible to compensate class or subclass members directly.
>
> Recipient
> (3) For the purposes of subsections (1) and (2), payment may be made on a *cy-près* basis to,
>
> (a) a registered charity within the meaning of the *Income Tax Act* (Canada) or non-profit organization that is agreed on by the parties, if the court determines that payment of the amount to the registered charity or non-profit organization would reasonably be expected to directly or indirectly benefit the class or subclass members; or
> (b) Legal Aid Ontario, in any other case.

The Society welcomes the addition of express statutory language regarding the payment of settlement funds on a cy-près basis and, in particular, that cy-près payments are only to occur when it is not practical or possible to compensate the class directly. However, the Society believes that the proposed amendment that would limit cy-près payments to registered charities or non-profit organizations is overly restrictive. In some instances a charity or non-profit may not be "the next closest thing" to the class. For example, in some instances, settlement funds have been paid to research institutes or universities. Medical centres or other private institutions may, in some cases, also be appropriate cy-près recipients. Limiting by legislation those who might be worthy and appropriate recipients of a cy-près award may not serve the best interests of the affected class.

The Society would also like to point out that s. 27.2(3)(b), designating Legal Aid Ontario as the default recipient of cy-près awards, may not achieve the goals of the *CPA* (providing access to justice in civil matters, achieving judicial efficiency, and behaviour modification). Legal Aid Ontario may not be the "next closest thing" to the interests of the injured class. The Society is of course a firm supporter of Legal Aid Ontario, and we have impressed upon this government the need for robust, sustainable financial support of legal aid by the government. However, if the intent of the proposed amendment is to establish a default recipient for cy-près awards when no other entity is a more appropriate recipient, then the Society recommends that the government consider the Class Proceedings Fund of The Law Foundation of Ontario. This will serve to further the goals of the *CPA* by providing financial support for other class actions and encouraging the pursuit of class actions.

(6) Appeals

The Society supports the proposed amendments to s. 30(1), giving plaintiffs and defendants symmetrical rights of appeal to the Court of Appeal from any certification decision.

The Society has serious concerns, however, about the proposed amendments to s. 30(2). That section, as amended, states:

> No amendments of materials on appeal
> 30 (2) The Appellant may not materially amend the notice of certification motion, pleadings or notice of application on an appeal of an order refusing to certify a proceeding as a class proceeding, except with leave of the court in exceptional or unforeseen circumstances.

The Society agrees with the basic premise that a party should not, as a matter of course, be permitted to materially recast its case on appeal from a certification decision if it irreparably prejudices the other parties or the appeal. As noted by the Court of Appeal in *Keatley Surveying Ltd. v. Teranet Inc.*,[10] the practice of permitting plaintiffs to recast certification motions on appeal "undermines the way class action certification motions should proceed through the courts", as it "deprives the courts of the expertise of the judges who have been assigned to hear these cases at first instance."[11] It is in the interests of the administration of justice, including the effective use of court resources and the interests of parties in knowing the case they have to meet, for there to be judicial management to ensure that there are reasonable limits on amendments, and that where amendments are made, the other party is given a reasonable opportunity to respond.

However, there are compelling reasons why class action plaintiffs, in appropriate circumstances, should not be held strictly at the certification stage or at the appeal to their pleadings and arguments exactly as formulated. There may well be cases that <u>in substance</u> are entirely suitable for adjudication on a class-wide basis, but that require some formal recasting in order to meet the requirements of certification. As the court noted in *Keatley,* disallowing such amendments on appeal may have the unintended effect of frustrating the very objects of the *CPA:* judicial economy, access to justice, and behaviour modification.

As currently drafted, the amended s. 30(2) would statutorily restrict the court's discretion to permit any material amendments except in "exceptional or unforeseen circumstances". In the Society's view, this language is unduly restrictive and does not adequately address the countervailing interests at issue. Rather, the governing consideration as to whether leave to amend is granted should be the degree of prejudice or disadvantage, if any, that would be caused to the defendant by permitting the amendments in question. This approach is consistent with Rule 26.01 of the *Rules of Civil Procedure*, which provides that "[o]n motion at any stage of an action the court shall grant leave to amend a pleading on such terms that are just, <u>unless prejudice would result that could not be compensated for by costs or an adjournment</u>" [emphasis added]. It is also consistent with the approach currently followed by Ontario courts.[12] Where an appellate court determines that allowing material amendments would not cause incurable prejudice to the defendant (for instance, where the revisions rest on the existing record and the defendant has a full opportunity to respond), leave should not be denied solely on the basis that the circumstances were not "exceptional or unforeseen".

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[10] 2015 ONCA 248.
[11] *Ibid.,* at para. 45.
[12] See e.g., *Keatley, supra* at paras. 24, 29-30, 41-43; *Hodge v. Neinstein,* 2017 ONCA 494, at paras. 186-187.

In light of the above, the Society recommends the adoption of the following amended s. 30(2), which properly balances the interests of the parties and ensures the proper administration of justice:

> Amendments of materials on appeal
> 30 (2) The Court may grant leave to amend the notice of certification motion, pleadings or notice of application on an appeal of an order refusing to certify a proceeding as a class proceeding in appropriate circumstances, unless prejudice would result that cannot be compensated for by an adjournment or an award of costs.

IV. SCHEDULE 8, *CROWN LIABILITY AND PROCEEDINGS ACT, 2019*, S.O. 2019, C. 7, SCHED. 17

The Society notes that s. 17 of the *Crown Liability and Proceedings Act, 2019*, is repealed and re-enacted by Schedule 8 to Bill 161. In its current form, this section requires a person to obtain leave of the court before bringing a proceeding against the Crown for misfeasance in public office or a tort based on bad faith. On such a motion, the plaintiff has to serve and file an affidavit setting out the material facts on which they intend to rely, and an affidavit of documents. The Crown has no correlative obligation to disclose the material facts relating to its defence. The Crown is further not subject to discovery in relation to the motion, despite the fact that they may possess information a plaintiff needs to obtain leave of the court. The court shall not grant leave unless it is satisfied that the proceeding is brought in good faith and there is a reasonable possibility it will be resolved in the plaintiff's favour. Regardless of outcome, each party is to bear their own costs of this motion.

The effect of the repeal and re-enactment is to add a requirement to s. 17 that, in addition to seeking leave of the court, a claimant must serve notice on the Crown of the claims in the intended proceeding, containing sufficient particulars, at least 60 days before the notice of motion for leave to bring the proceeding is filed. The Attorney General may further require "such additional particulars … as in his or her opinion are necessary to enable the claims to be investigated."

This new requirement adds yet another hurdle to be surmounted by a claimant seeking redress from the Crown for misfeasance in public office or a tort based on bad faith. Its effect is to further impede access to justice for potential victims of government wrongdoing. The Society recognizes that this notice requirement mimics that in s. 18 (notice of claim for damages against the Crown). However, we are uncertain why this notice would be necessary in cases where leave of the court already has to be sought to commence the claim, and what the claimant's notice containing particulars would add to the information contained in the affidavit they are subsequently required to file on the motion for leave.

V. SCHEDULE 12, *JURIES ACT*, R.S.O. 1990, C. J.3

We note that s. 15 of the *Juries Act* is to be amended so that the address of a person selected is no longer included in the information to be disclosed in the panel list. Further, we note that s. 18 of the *Juries Act* is amended to provide a mechanism by which a motion can be brought before the court to obtain disclosure of the addresses if it is considered necessary to ensure trial fairness or is otherwise in the interests of justice.

(1) Importance of Street Addresses of Potential Jurors in Civil Proceedings

At the Ministry of the Attorney General's request, the Society provided input with respect to this issue previously. Our letter dated March 29, 2019, is enclosed for your ease of reference.

It is unfortunate that the government failed to heed the advice and concerns identified by the Society in that letter.

We indicated that, in our view, the provision of juror addresses was integral to the civil jury trial process as it serves a number of important purposes. The importance of counsel's ability to run conflicts checks on potential jurors, and the need to maintain this bare minimum of information as part of the jury selection process, was addressed in our previous submission. Moreover, we set out alternative measures to address privacy concerns, including the availability of a publication ban where necessary, as well as a requirement that the list be provided to counsel only in encrypted, or password-protected forms, and the requirement that the list be disposed of after the trial and appeal process is complete.

It is unclear why the government felt these safeguards were inadequate, or why the important role played by the provision of juror addresses in the administration of justice has been discounted.

(2) Importance of Street Addresses of Potential Jurors in Criminal Proceedings

The availability of juror addresses is equally important in the criminal context. Peremptory challenges to jurors were recently abolished. To have a juror excused, counsel must now make a motion in open court, with evidence, to challenge a juror for cause. It is now virtually a requirement of professional competence to ethically research the public profiles of potential jurors in order to gather evidence of possible bias to present to a judge on such a motion. This research is critical to ensuring the impartiality of the jury and cannot be undertaken accurately without access to juror addresses.

(3) The Motion Proposed by the Amendment is Impractical and Expensive

The proposed amendment to s. 18 provides that a judge may, on motion, order that the place of residence of each juror be disclosed with the panel list if it is necessary to ensure trial fairness or is otherwise in the interests of justice.

For the reasons set out in our previous submission, it is the Society's view that the disclosure of juror addresses is invariably necessary to ensure trial fairness (to avoid conflicts of interest or mistrials based on conflicts of interest discovered late, and to provide important information to assist in jury selection).

Moreover, requiring motions to be brought in each case in advance of trial to obtain juror addresses would only serve to add expense and delay to an already overburdened justice system.

Since panel lists are only released 10 days before trial, there is no realistic ability to bring a motion after the list is released (and potential conflicts identified) and before trial. Accordingly, such motions will need to be brought well in advance of the release of the panel list in order to ensure this critical information is included in the list. It is anticipated that such motions would become a routine pre-trial procedure.

It is the Society's view that such an expensive and inefficient process is unadvisable and avoidable.

VI. SCHEDULE 14, *LAW SOCIETY ACT*, R.S.O. 1990, C. L.8

(1) Amendments to Section 48(1)

Subsection 48(1) of the current *Law Society Act* allows a person appointed by Convocation to make an order revoking a licensee's licence on a summary basis in certain circumstances. Specifically, summary revocation is available where an order has been made under s. 46, s. 47(1), or s. 47.1 of the *Law Society Act* and remains in effect more than 12 months after it was made.

The current version and proposed amended version of s. 48(1) are set out below, along with the provisions of the *Law Society Act* that they reference.

Current version of s. 48(1)	**Proposed amended version of s. 48(1)**
Summary revocation **48** (1) A person appointed for the purpose by Convocation may make an order revoking a licensee's licence if an order under section 46, clause 47 (1) (a) or section 47.1 is still in effect more than 12 months after it was made.	**48** (1) A person appointed for the purpose by Convocation may make an order revoking a licensee's licence if, (a) an order under section 46, clause 47 (1) (a) or section 47.1 is still in effect more than 12 months after it was made; or (b) an order under subparagraph 3 ii or iii of subsection 35 (1) is still in effect more than 24 months after it was made.
Note: ss. 46(1), 47(1), and 47.1 provide as follows: **Summary suspension for non-payment** 46 (1) A person appointed for the purpose by Convocation may make an order suspending a licensee's licence if, for the period prescribed by the by-laws, the licensee has been in default for failure to pay a fee or levy payable to the Society. **Summary suspension for failure to complete or file** 47 (1) A person appointed for the purpose by Convocation may make an order suspending a licensee's licence if, for the period prescribed by the by-laws, (a) the licensee has been in default for failure to complete or file with the Society any certificate, report or other document that the licensee is required to file under the by-laws; or **Summary suspension for failure to comply with indemnity requirements** 47.1 (1) A person appointed for the purpose by Convocation may make an order suspending a licensee's licence if the licensee has failed to comply with the requirements of the by-laws with respect to indemnity for professional liability.	Note: s. 35(1)3 ii and iii provide as follows: **Conduct orders** 35 (1) 3. An order suspending the licensee's licence, … ii. until terms and conditions specified by the Hearing Division are met to the satisfaction of the Society, or iii. for a definite period and, after that, until terms and conditions specified by the Hearing Division are met to the satisfaction of the Society.

Thus, under the current legislation, a licensee's licence may be summarily revoked if the licensee's licence has been summarily suspended for non-payment of fees; failing to complete or file a required certificate, report, or other document; or failing to comply with requirements with respect to indemnity for professional liability, and the suspension has not been lifted after 12 months.

The proposed amendments in Schedule 14 to Bill 161 would add to s. 48(1) a new ground for summary revocation. If the Law Society Hearing Division has made an order under s. 35(1)3 ii or iii, and the order is still in effect more than 24 months after it was made, the licensee's licence may be revoked on a summary basis. Subsection 35(1) sets out the orders that the Hearing Division may make if it finds that a licensee has engaged in professional misconduct or conduct unbecoming a licensee.

If the Hearing Division makes an order under s. 35(1)3 ii suspending a licensee's licence until specific terms and conditions are met to the satisfaction of the Law Society, and the licensee has not met those terms and conditions within 24 months of the date of the order, the amendments to s. 48(1) would allow the licensee's suspended licence to be summarily revoked. Similarly, summary revocation is available if the Hearing Division imposed an order under s. 35(1)3 iii suspending a licensee's licence for a definite period of time, with the suspension to continue thereafter until specified terms and conditions are met, and those terms and conditions are not met within 24 months of the date of the order.

The purpose of the proposed amendments appears to be to encourage licensees who are subject to suspensions, the termination of which depend on meeting specified terms and conditions, to fulfil those terms and conditions on a timely basis. In principle, the policy choice reflected in the proposed amendments to s. 48(1) is not inherently objectionable. However, there is a practical concern about the amendment as currently drafted. Subparagraph 35(1)3 iii does not put any upper limit on the length of a suspension that the Hearing Division can impose. In theory, the Hearing Division can impose suspensions of 24 months or longer. Since summary revocation would be available where an order is still in effect more than 24 months after the order was made, if the definite period of the suspension is longer than 24 months, the suspension order would necessarily remain in effect more than 24 months after it was made. The suspension could summarily become a revocation regardless of whether the licensee has fulfilled the requisite terms and conditions. That would be the case even though the Hearing Division elected to impose a suspension rather than revocation.

There is a significant difference between suspensions and revocations for professionals. The summary revocation process does not provide the licensee with an opportunity to be heard, nor is there anything in the *Law Society Act* or the proposed amendments that would remove the summary revocation power if the licensee was incapable of having the suspension order lifted within 24 months by meeting the specified terms and conditions. The licensee would have a right under s. 49.32(3) to appeal the summary revocation to the Appeal Division. In situations where the licensee was incapable of having the suspension lifted within 24 months, it would be unduly burdensome on the licensee to require them to challenge a summary revocation through an appeal. While it might be unlikely that the Hearing Division will impose a suspension longer than 24 months before having it continue until specified terms and conditions are met, it is possible and the likelihood (or unlikelihood) of these concerns materializing is not adequate reason not to address them by revising the proposed amendments.

There are a variety of ways in which the problem might be addressed. The most obvious would be for the amendments to provide that a licence may be revoked if the terms and conditions imposed under s. 35(1)3 iii have not been met more than 24 months after the definite period of the suspension has ended. That change would bring the availability of summary revocation for orders under s. 35(1)3 iii in line with its

availability for orders under subparagraph ii – that is, a licensee has 24 months to fulfil terms and conditions on which a suspension depends, failing which their licence may be summarily revoked.

VII. SCHEDULE 15, *LEGAL AID SERVICES ACT, 1998*, S.O. 1998, C. 26

It is not clear why Schedule 15 to Bill 161 amends certain sections of the *Legal Aid Services Act, 1998* (the "current *Act*"), to then follow with Schedule 16, which seeks to repeal and replace the current *Act*. Nevertheless, Schedule 15 in part proposes to add provisions that address clinic agreements (s. 72.3), and specifically, to permit Legal Aid Ontario ("LAO") to cancel existing memorandums of understanding for the provision of legal services and negotiate new agreements with clinics. The new section is silent, however, on what criteria will inform and guide the negotiation of the terms of any new agreement(s).

It is noteworthy that the Law Society of Ontario Legal Aid Working Group's Report to Convocation, dated January 25, 2018, summarized LAO's mixed model of service delivery provided to low-income Ontarians and the scope of services provided through clinics in particular.[13] Specifically, "poverty law services" are delivered through a network of 74 independent, community-based clinics.[14] Fifty-seven serve specific geographic communities, while 17 are "specialty clinics" that focus on specific areas of poverty law or client populations that reflect a diversity of communities. LAO has very specific strategies to better serve vulnerable client groups, which include Aboriginal justice, mental health, domestic violence, racialized communities, and bail.[15]

These clinics and directed strategies provide much-needed services, and we encourage very careful consideration of their needs and continued support in any renegotiation of service agreements.

VIII. SCHEDULE 16, *LEGAL AID SERVICES ACT, 2019*

Schedule 16 to Bill 161 will repeal the current *Legal Aid Services Act, 1998*, and replace it with the *Legal Aid Services Act, 2019* (the "new *Act*").

(1) Purpose of the Act and Objects of Legal Aid Ontario

The purpose of the new *Act* has shrunk significantly in comparison with the current *Act*. In particular, the purpose found in s. 1(c) of the current *Act*, which speaks to "identifying, assessing and recognizing the diverse legal needs of low-income individuals and of disadvantaged communities in Ontario" has been removed. There is no reference in the purpose of the new *Act* to poverty or disadvantage, or to access to justice. This is problematic, as LAO exists to ensure that Ontarians who otherwise cannot afford legal representation will not be further disadvantaged when dealing with legal proceedings.

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[13] Law Society of Ontario Legal Aid Working Group, *Report to Convocation, January 25, 2018*, at paras. 29-43 (see in particular the chart at para. 35), online: Law Society of Ontario https://lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/c/convocation-jan-2018-legal-aid-working-group-report(2).pdf.

[14] *Ibid.*, at para. 38.

[15] *Ibid.*, at para. 39.

The current *Act* sets out that the first object of LAO is "to establish and administer a cost-effective and efficient system for providing high quality legal aid services to low-income individuals in Ontario" (s. 4, emphasis added). The objects as set out in s. 17 of the new *Act* do not refer specifically to low-income Ontarians. Instead, they refer simply to "individuals" in Ontario. This is troubling, as the purpose (s. 1) and objects and principles (s. 17) of the new *Act* set out the importance of administering legal aid services in a fiscally responsible manner, but they do not specify who will receive these services. In the current *Act*, legal aid services are also described as "high quality"; this descriptor has been removed from the objects of the new *Act,* although it remains in the purpose of the new *Act*.

We suggest that s. 17(1)(a) be amended to read "to establish and administer a flexible and sustainable system for providing high quality legal aid services to low-income individuals in Ontario." This would ensure consistency throughout the new Act, while still ensuring that the focus remains on low-income Ontarians. It would also ensure that there is a reference to the balance that must be struck between cost, efficiency, and quality.

(2) Service Categories

Section 4 of the new *Act* also delineates the service categories for LAO differently than the current *Act*. Under the current *Act*, LAO "shall" provide legal services for criminal, family, clinic, and mental health law (s. 13(1)). It "may" provide services in other areas of civil law (s. 13(2)), but "shall not" provide legal services for defamation, relator actions, proceedings for recovery of a penalty, election law, or other prescribed civil law cases (s. 13(3)). Under the new *Act*, the mandatory services noted above have been listed within nine broad categories and LAO "may" provide legal aid services within these categories. This subsection is subject to regulations. However, it is concerning that the effect of this provision makes all LAO services potentially discretionary, subject to any regulations that state otherwise. We suggest that, at a minimum, the regulations set out the mandatory nature of the services that are provided for under the current *Act*.

(3) Composition of LAO's Board of Directors

Under the current *Act*, LAO's Board of Directors shall be composed of 5 members selected by the Attorney General from a list of people recommended by the Law Society of Ontario ("LSO"), 5 members selected by the Attorney General, and a Chair who is selected by the Attorney General from a list recommended by a committee composed of a representative of the Attorney General, a representative of the Treasurer of the LSO, and a third person agreed on by both (s. 5). A majority of the Board has to be non-lawyers.

Under the new *Act*, the Board can be up to 11 members (s. 21). At least 3 but no more than 5 of the members are selected by the Attorney General from a list recommended by the LSO. The rest are picked by the Attorney General. The Chair is appointed from among the members of the Board. The Attorney General is required to consult with the LSO about the Chair.

Under the new *Act*, the Attorney General is in a position to control the majority of the Board. The Attorney General could appoint the minimum 3 Board members from the list of LSO recommendations and up to 8 people of his choice to the Board. In choosing the Chair, there is no guarantee that the Attorney General will actually listen to the LSO – he just has to "consult" them. There is the very realistic potential that LAO's Board could lose its independence from the Attorney General.

The current *Act* also sets out specific criteria to consider when selecting candidates for the Board, which include legal and business knowledge, skills, and experience, including in the area of the "special legal needs of and the provision of legal services to low-income individuals and disadvantaged communities" (s. 5(4)). There are no criteria listed in the new *Act,* which may result in a Board that has little understanding of the special concerns and issues facing low-income Ontarians.

The rationale for these changes to the composition of LAO's Board is not clear to the Society. These changes may have a serious impact on the provision of legal aid services to Ontarians who need them most. We suggest that consideration be given to maintaining the provisions of the current *Act* with respect to Board composition and criteria for membership.

(4) Payment by LAO for Court-Ordered Legal Services

Section 15 of the new *Act* establishes that the cost of court-ordered legal services will be borne by LAO, even if the order specifies that the services are to be provided by the Attorney General of Ontario. This provision only applies to provincial matters that would otherwise have been funded by the Attorney General of Ontario or the Crown in right of Ontario.

At present, court-ordered legal services are paid for by the Ministry of the Attorney General, but administered by LAO. After initial confirmation of funding by the Ministry, LAO is responsible for establishing a budget for the legal work (in relevant cases), receiving and approving accounts, and issuing payment to the approved legal service provider.

The Society does not take issue with the proposal to have funding for court-appointed counsel come from LAO. However, we are concerned that the proposed amendments do not indicate how LAO will pay for court-ordered legal services. LAO's budget is already stretched thin providing its existing services. In 2018-2019, the cost of court-ordered counsel to the Ministry of the Attorney General was approximately $5.3 million.[16] If LAO is to assume responsibility for these costs, it is imperative that its budget be increased to ensure that there are adequate funds available for court-ordered legal services each year. If the government intends to provide an additional, guaranteed annual budget for court-ordered legal services to LAO, the Society takes no issue with the proposal. If, however, LAO will be expected to cover the cost of court-ordered legal services from its existing budget, we implore the government to reconsider.

(5) Amounts Owing Under Contribution Agreements

The new *Act* states that any amount owing under a contribution agreement is a debt owing to LAO "that may be recovered in any court of competent jurisdiction" (s. 9(3)). LAO can issue a notice where a person is in default, setting out the amount owing, and file it with the Superior Court of Justice or the Small Claims Court, and the notice is enforceable as if it were an order of that court (s. 9(4)-(5)).

With the exception of s. 9(6), detailed immediately below, this concept remains virtually unchanged from the existing legislation. There are, of course, concerns that turning a defaulted contribution agreement

[16] *Legal Aid Ontario Audited Financial Statements, 2018-2019*, online: Legal Aid Ontario https://www.legalaid.on.ca/wp-content/uploads/2018-19-Audited-Financial-Statements_EN.pdf. Accounts receivable (total) from "MAG protocol cases". We are not certain whether the category "MAG protocol cases" includes all court-ordered legal services for which LAO will assume budgetary responsibility. As a result, this may not represent the total expected annual cost of funding court-ordered legal services.

into a debt could negatively impact the future prospects of an individual who seeks to reintegrate into society upon completion of sentence.

(6) Refusal to Agree to Contribution Agreement

More problematic is s. 9(6), which deems an individual who refuses to agree to a contribution agreement to have refused to receive legal aid services. This "deemed refusal" of legal aid services could lead to an increase in the number of unrepresented accused.

The Ministry of the Attorney General's *Report of The Review of Large and Complex Criminal Case Procedures* recognizes that it is challenging for the trial judge to ensure a fair and efficient trial where the accused is either unrepresented or self-represented, writing:

> The criminal justice system often does not work as it should when an accused is not represented and cannot present or challenge the evidence in a meaningful way.[17]

Rather than reducing the cost to the system, the deeming provision in s. 9(6) may instead increase the likelihood of unfair trials and wrongful convictions, increasing the financial burden on the system. This may also have a very real human impact, risking an increase in the incarceration rates of communities who are already marginalized.

(7) Possible Contribution Requirement for Individuals with Court-Ordered Counsel

As mentioned above, s. 15(1) of the new *Act* mandates that LAO shall provide services in a number of other circumstances, in addition to those particularized at s. 7(1) of the *Act,* including when the court determines the accused requires representation to meet the requirements of the *Charter*, when LAO "reasonably determines" that the individual requires representation to meet the requirements of the *Charter*, some youth matters, cross-examination of a witness pursuant to an order made under s. 486.3 of the *Criminal Code*, representation of the accused for mental health disposition issues, and the appointment of *amicus curiae* in a criminal or child protection proceeding.[18]

Section 15(4) makes the *Act*, rules, and regulations apply to services provided under this section. Thus, s. 9 of the *Act* applies, which includes the deemed rejection of legal aid services where an individual refuses to enter into a contribution agreement upon request. The interaction of these proposed provisions raises several serious concerns.

Court-ordered appointments often occur because of the complexity of the matter, because the accused cannot pay for his or her own lawyer privately (but is not eligible for legal aid), or because of the ungovernability of the accused. At times, the accused has declined to obtain their own legal counsel for various reasons. There are also limited appointments in certain circumstances, such as those identified

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[17] Ministry of the Attorney General, *Report Of The Review Of Large And Complex Criminal Case Procedures*, online: Ministry of the Attorney General https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/lesage_code/ (see Chapter 7 – Managing the Unrepresented Accused).

[18] Section 15(2) states that this applies only if the services are ordered or expected to be paid for or provided by the Attorney General or Ontario or the Crown in right of Ontario. We note that the right to counsel of individuals in hearings regarding the production of records or admissibility of evidence in s. 278.4(2.1) or s. 278.94(3) of the *Criminal Code* are not listed in s. 15 of the new *Act*.

under s. 486.3 of the *Criminal Code* so that a witness is not directly cross-examined by the accused. In other cases, it may be important to involve counsel because the matter deals with novel legal issues. Whatever the circumstance, the appointment of counsel is intended to increase the efficiency of the court process, ensure that any novel legal issues are dealt with competently, and in some cases, ensure vulnerable witnesses are cross-examined in a manner that serves the proper administration of justice. The use of counsel in these scenarios reduces the cost and burden on the justice system overall.

There are cases where the accused cannot have a fair trial without assistance. Recommendation 40 of the *Report of The Review of Large and Complex Criminal Case Procedures* states:

> Trial Judges should exercise their common law power to appoint *amicus curiae* in a long complex trial where the accused is unrepresented or chooses to be self-represented and where such appointment is likely to assist in ensuring the fairness of the trial. Wherever possible, the appointment should be made at an early stage, to prevent delays of the trial. The *amicus* should generally be allowed to play an expanded role, including the examination and cross-examination of witnesses, whenever feasible.

The value of counsel in such circumstances is not contentious. However, the deemed refusal provision could be disastrous in any of the circumstances outlined above where court-ordered counsel is necessary to conduct a fair, focused, and efficient hearing, and yet the accused refuses to enter into a contribution agreement.

Further, we are concerned about the possible result where an accused refuses to enter into a contribution agreement in circumstances where counsel has been appointed pursuant to s. 486.3 of the *Criminal Code*. The language in the *Criminal Code* regarding many of these appointments is mandatory (see ss. 486.3(1) and (2)). While the language in the new *Act* respecting a contribution agreement does not make such an agreement mandatory in all cases, there is no obvious mechanism to resolve a conflict between a decision to require a contribution agreement under s. 9(1) of the new *Act* and the *Criminal Code.* Delay arising from this impasse could result in a matter unnecessarily exceeding the *Jordan* ceiling. The same issue might arise in cases where an accused in need of the assistance of *amicus curiae* declines to enter into a contribution agreement.

From a practical perspective, this contribution power might dissuade individuals in other scenarios (such as a novel legal issue) from relying on legal expertise where both the accused and the justice system would benefit from the involvement of counsel. Overall, the interplay between ss. 9 and 15 of the *new* Act increases the risk of wrongful convictions and unfair trials.

In addition, the Court of Appeal for Ontario has affirmed that, albeit in rare circumstances, *amicus curiae* may be appointed in family matters.[19] The direction by the Court prior to an *amicus curiae* appointment is to first consider Legal Aid. If a Legal Aid certificate were to be appropriate, but the individual declined to enter into a contribution agreement, we again fear that the Court would be left without the assistance of counsel when it is needed to ensure the just disposition of the case. Just as in criminal matters, the interests of justice are served by these appointments, and the use of counsel in these scenarios reduces the overall cost and burden on the justice system.

[19] *Morwald-Benevides v. Benevides*, 2019 ONCA 1023.

The Society recommends that the new *Act* specify that the regime regarding contribution agreements in s. 9 does not apply to legal aid services provided under s. 15 of the new *Act*.

(8) Determinations Regarding Failures to Disclose

The Society notes that in the current *Act*, when either an applicant for legal aid services or a lawyer or service provider may have failed to discharge their disclosure obligations to LAO, a hearing may be held to determine whether any obligations have not been discharged. If such a finding is made after a hearing, LAO is entitled to cancel any legal aid services or certificates, and recover amounts paid for legal services (s. 44). Under the new *Act*, it appears that this hearing has been replaced by LAO's ability to declare that an individual or service provider is not entitled to legal aid services or payment therefor, and recover amounts paid for legal aid services; the individual or the service provider may thereafter apply in accordance with the rules for a review of LAO's determinations (s. 10).

The Society is concerned about this less formal process for obtaining an order for repayment of amounts paid for legal services. Determinations may be made without due process that would include knowing the details of the allegations, being afforded the opportunity to make representations on what is being alleged, and being provided with reasons for any such determination that could withstand independent review.

Thank you for providing The Advocates' Society with the opportunity to make these submissions. We would be pleased to answer any questions you may have.

Yours sincerely,

Scott Maidment
President

CC: The Honourable Doug Downey, M.P.P., Attorney General of Ontario
Vicki White, Chief Executive Officer, The Advocates' Society

Attachments:

1. Letter to Irwin Glasberg, Assistant Deputy Attorney General, dated October 22, 2019
2. Letter to Sheila Bristo, Assistant Deputy Attorney General, dated March 29, 2019

Members of The Advocates' Society's Bill 161 Task Forces:

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October 22, 2019

Irwin Glasberg
Assistant Deputy Attorney General
Ministry of the Attorney General
McMurtry-Scott Building
720 Bay Street, 7th Floor
Toronto, ON M7A 2S9

Dear Mr. Glasberg:

RE: Proposed Reforms to *Civil Remedies Act, 2001*

As you know, The Advocates' Society, established in 1963, is a not-for-profit association of more than 6,000 members throughout Canada. The mandate of The Advocates' Society includes, among other things, making submissions to governments and other entities on matters that affect access to justice, the administration of justice and the practice of law by advocates. The majority of our members practice law in Ontario.

This letter is in response to your letter dated September 4, 2019, regarding proposed amendments to modernize the *Civil Remedies Act, 2001*. The Advocates' Society reviewed the modernization proposals with keen interest and struck a task force to examine the issues more closely.

Introduction

Civil forfeiture is an exceptional procedure that should be kept within appropriate bounds. It relies on a showing of unlawful activity, either past or future, without any of the safeguards of the criminal law. It is a civil law process, yet it is only available to government. In this process, government has the benefit of police investigations, criminal powers to search and seize, and its significant resources. It then commences court proceedings in which it seeks to confiscate the property of Ontarians. It is important that this exceptional process be kept within appropriate limits and that appropriate safeguards – including judicial oversight – be maintained.

It is also important to recognize that civil forfeiture proceedings can be fueled by stereotypes and suspicion, rather than sound reasoning. In at least one reported case in Ontario, a Superior Court judge criticized the Civil Remedies for Illicit Activities Office ("CRIA") for relying on mere eccentric behaviour as opposed to evidence of unlawful conduct:

> […] [T]he burden [of the Attorney General] cannot be satisfied by the mere casting of suspicion or speculation that does not rise to the level of proof on the balance of probabilities.
>
> The concept of freedom includes the freedom to be eccentric, the freedom to carry cash instead of paying transaction fees to banks, the freedom to speak ones native language to friends and the

> freedom to walk the streets while being young, male and black. It includes the freedom to treat police with suspicion, rudeness or even hostility when confronted by them however unwise, suspicious or simply impolite that attitude may appear to others. It is dangerous to assume without substantial evidence that those who do not look, think or act like the majority must have something to hide or be involved in unlawful activity. Freedom is not lightly to be eroded by dispensing with the protections the Legislature enacted in the *Civil Remedies Act* […][1]

It is respectfully submitted that these words are important to remember as the government considers removing important protections from the existing legislation.

Administrative forfeiture – an erosion of public confidence in the Ontario justice system

The major proposed change is the introduction of an administrative forfeiture scheme. The Society is deeply concerned about the impact of this proposed change on Ontarians.

Administrative forfeiture departs from widely accepted norms of civil justice and threatens to undermine public confidence in the Ontario justice system. It allows the transfer of ownership of property from Ontarians to the government without the matter ever seeing the inside of a courtroom. Currently, even if no one opposes a forfeiture application, the government still has to show a judge, with evidence, that the property is either proceeds or instruments of crime. Involuntary transfers of property do not occur without a court examining whether the relevant legal test has been met. That requirement may be perceived as onerous and inconvenient. But exempting the government from this basic requirement poses serious concerns to the perceived fairness of the forfeiture process. For example, in the proposed administrative forfeiture process, the government is the party that draws up the list of persons who may have an interest in the property and then serves them by mail. The list may be too narrow, and service by mail can be ineffective (see below). Judicial oversight is needed to ensure all persons who may have an interest in the property are notified.

The experience of other Canadian jurisdictions with administrative forfeiture demonstrates that the risks raised above are not theoretical. The system in British Columbia has been criticized as unjust. It has also grown to dominate the civil forfeiture system. A recent CBC News article stated that the administrative system accounts for 80% of all civil forfeiture cases in that province. The article notes that only 16% of administrative civil forfeiture cases opened in 2018 were disputed. The result was that, in 2018, the province took in $2.54 million in cash, 221 vehicles and 438 cellphones without having to show any evidence of a connection to crime.[2]

One further problem with existing administrative forfeiture schemes is that they allow notice to be given by mail to a last known address. That will not be possible if authorities are not able to tie the property to any particular person, or if they have no last known address. Mail may be lost or taken by third parties. Further, notice sent by registered mail is simply deemed to have been received a certain period of time after mailing, even where actual service does not occur. The general rule for litigants in Ontario is that originating documents must be served personally absent a judicial order. This rule has an important function: ensuring that people know about and can participate in legal proceedings that may affect their

[1] *Attorney General of Ontario v $8,740 In Canadian Currency*, 2016 ONSC 3773 at paras 2-3 per Dunphy J (emphasis added).
[2] https://www.cbc.ca/news/canada/british-columbia/bc-administrative-civil-forfeiture-data-part-two-1.5180210

rights. The Advocates' Society recommends that any scheme, if introduced, should require service in a manner consistent with the general rules for Ontario litigants.

Next, there will be cases where it will be difficult or impossible for a person to submit a notice of dispute within the proposed 75-day deadline. The person may not understand the notice because of a language barrier or a disability. For similar reasons, they may be unable to prepare and submit a valid notice of dispute. This scheme puts vulnerable citizens at greater risk of losing their property unjustly to the government.

Other jurisdictions require that the person disputing the notice set out information about the nature of their claim to the property and the basis for their dispute, and require that it be in the form of a sworn affidavit or other solemn declaration. This requires people to provide information to the government, under oath, before a formal forfeiture proceeding is even commenced. The government will be free to use this information against them in a formal forfeiture proceeding. Ontarians with difficulty with English or literacy, or those who have trouble writing an affidavit or having it commissioned, may be unable to file a notice of dispute. Again, in a normal civil action, Ontarians do not have to submit evidence under oath in order to resist a claim and put the plaintiff to proof of their claim. At most, we submit, the disputing party should simply have to indicate that he or she disputes the government's proposed forfeiture.

The procedures for challenging administrative forfeiture after the fact which exist in other jurisdictions also do not present satisfactory alternatives. Under other jurisdictions' administrative forfeiture schemes, a person has to prove that their failure to dispute was not deliberate or wilful, and that they commenced the challenge as soon as reasonably possible after learning of the forfeiture. This may be an inappropriately heavy burden, particularly for members of vulnerable groups described above.

In short, the proposed procedure threatens to relieve the government from basic judicial oversight of property seizures, and puts significant barriers in front of the person whose property is being seized.

Finally, The Advocates' Society notes that the government has identified one benefit of administrative forfeiture in the consultation proposal: "it may assist police to clear out assets without identifiable owners which they are holding." However, if the property is illegal to possess, then the police can and should destroy it. If it is not illegal to possess, the police can be authorized to sell or otherwise dispose of the property after the expiry of a long period of time (a number of years). There is no need to use civil forfeiture to address the problem of unclaimed property, especially within the very short timeline of 75 days. Further, in many cases, police will not have evidence tying unclaimed property to unlawful activity; in such cases, ordinary forfeiture would not be available, and administrative forfeiture would provide a shortcut that could lead to the unwarranted confiscation of Ontarians' property.

Replace serious bodily harm with bodily harm

It is proposed that, for the purposes of the definition of "instruments", the words "serious bodily harm" be replaced with "bodily harm." It is suggested in the proposal document that there is presently some difficulty applying "serious bodily harm" in cases involving sexual offences. Respectfully, we do not see this amendment as necessary or beneficial.

There is no apparent need for the amendment. First, we have been unable to identify any reported litigation under the *Act* where the application was dismissed because of the threshold of "serious bodily

harm." Litigation seeking to apply the Act to sexual offences is extremely rare to begin with. Second, "serious bodily harm" has been interpreted broadly and can include the psychological harm caused by sexual assault.[3]

Removing the qualifier "serious" would significantly broaden the scope of the Act. The power of the state to confiscate private property is an extraordinary measure that should only be used in respect of serious criminal activity.

Statutory production power

The Attorney General is considering enacting a without-notice production power similar to s. 6(3)(d) of Saskatchewan's *Seizure of Criminal Property Act, 2009*.[4]

This new power does not appear to be necessary. First, the typical *CRA* case springs from a police investigation, and so CRIA has access to the fruits of police searches and seizures.

Second, once a *CRA* proceeding begins, the Attorney General already has significant rights to seek production and examination under the *Rules of Civil Procedure*. Forfeiture proceedings can be commenced either by way of action or by way of application (s. 2(2)).[5] The *Rules of Civil Procedure* afford the Attorney General considerable examination and production rights in an action (see for example, Rules 30 and 31), and an application (see for example Rules 34.10 and 39.03).

The power under consideration would go much further. Rather than giving other parties an opportunity to respond to a request for production, the power would allow CRIA to seek an order without notice. As such, the proposed power is much more like a production order or search warrant under the *Criminal Code* than any existing power available to civil litigants.[6]

The one arguable exception in civil litigation is an *Anton Piller* order, which is also granted in civil litigation without notice to the opposing party, and which allows the plaintiff to exercise the kind of investigative powers usually reserved to the police.

Our law recognizes *Anton Piller* orders as exceptional and fraught with the danger of misuse. The courts have long recognized that a without-notice seizure of documents, in the civil context, is a draconian power reserved for the clearest of cases (see *British Columbia (Attorney General) v. Malik,* [2011] 1 SCR 657, at para 5). It is for this reason that they are kept under tight judicial control. For instance, *Anton Piller* orders typically include, among other things, the appointment of a supervising solicitor, an undertaking regarding damages, a minimal impairment provision, protection of solicitor-client communications, a limited use clause, time and place restrictions, provisions giving time to consult with counsel, and provisions allowing the defendant an opportunity to review the seized documents before release to the moving party. If a without-notice production power is included in the *CRA*, it should include similar safeguards.[7]

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[3] See, *R. v. McCraw*, [1991] 3 S.C.R. 72

[4] We note that no other province has included a Saskatchewan-type document production power in its civil forfeiture legislation.

[5] Applications can also be converted to actions: paragraph 38.10(1)(b) of the *Rules of Civil Procedure*.

[6] The Saskatchewan legislation also allows the court to authorize entry, search, and seizure in private premises.

[7] In addition, as stated by Professor Mullan, a statutory *Anton Piller* power [like s. 6(3)(d) of the Saskatchewan legislation] may attract scrutiny under the *Canadian Charter of Rights and Freedoms* (See "Anton Piller Orders: Life

As stated above, the proposed power does not appear to be necessary. It would also deprive respondents of procedural protections: they would lose participatory rights without the safeguards associated with *Anton Piller* orders. We repeat that, if the government gives itself special powers that work to its advantage in civil litigation that it initiates and pursues for economic gain, it could erode public confidence in the justice system.

Retaining property to make a referral

We do not support the proposal to authorize police to retain property for "a reasonable period of time." This is too open-ended, and puts the burden on affected Ontarians to go to court to try to establish that the time period is not "reasonable." If the current 30-day time period is too short, a longer but still determinate period could be substituted – perhaps 45 days.

However, we are not aware that the 30-day period is too short to put together an application for an interim preservation order. In our experience, CRIA usually relies on *ex parte* or urgent motion procedures and can be in court within a few days of filing the application. We understand that in some cases better communication could be encouraged between the federal authorities that handle drug prosecutions and CRIA. Again, this can be done without extending the time period for police to retain property.

We also note that the proposed change potentially conflicts with s. 490(9) of the *Criminal Code*, which provides that the judge shall "order it to be returned to that person."

Annual reporting

The Advocates' Society supports this proposal. We agree that, given the impact of forfeiture on Ontarians, and given the already-exceptional nature of the procedure, CRIA should publish data on its activities in a manner that is readily accessible to Ontarians.

Clarify the definition of "instruments of unlawful activity"

Property is only an "instrument" if it is likely to be used, *in the future*, in certain unlawful activity. The mere fact that property has been used *in the past* in unlawful activity is not sufficient. Subsection 7(2) simply creates a presumption that past use indicates likely future use.

The proposed revision to s. 7(2) may make the provision linguistically more straightforward, but may lead to its own kind of confusion. Because the revised s. 7(2) would remove the "likely to" language from the provision, courts may jump straight from past use to the finding that property is an "instrument." The escape valve of "absence of evidence to the contrary" is uncoupled from what the evidence to the contrary is of, namely "that the property is likely to be used to engage in unlawful activity." All of this poses the risk of significant confusion and, potentially, the granting of forfeiture where it is not legally

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at the Extremity of the Courts' Powers", in *Remedies: Issues and Perspectives*, Berryman, (1991: Carswell), pp. 189-217). The constitutionality of a statutory *Anton Piller*-like provision appears not to have been litigated. Nevertheless, the Saskatchewan legislation appears to be constitutionally suspect, at least for its failure to expressly protect against incursions on solicitor-client privilege (see generally, *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 SCR 209).

appropriate – i.e. to punish for past conduct rather than to prevent future conduct. This would increase the vulnerability of Part III to constitutional challenge.[8]

Thank you for providing The Advocates' Society with the opportunity to make these submissions. I would be pleased to discuss these submissions with you at your convenience.

Yours truly,

Scott Maidment
President

C: Dave Mollica, Director of Policy & Professional Development

The Advocates' Society Civil Remedies Reform Task Force
Scott C. Hutchison, *Henein Hutchison LLP*, Toronto
Lisa Jørgensen, *Cooper Jørgensen*, Toronto
Richard Macklin, *Stevenson Whelton LLP*, Toronto
Anthony Moustacalis, *Anthony Moustacalis & Associates*, Toronto
Kate Robertson, *Markson Law Professional Corporation*, Toronto
Fredrick Schumann, *Stockwoods LLP*, Toronto

[8] The constitutionality of Part III was not addressed in the Supreme Court of Canada's decision that upheld the constitutionality of Part II: *Chatterjee v Ontario (Attorney General)*, [2009] 1 SCR 624, 2009 SCC 19 at para 9.

March 29, 2019

Sheila Bristo
Assistant Deputy Attorney General
Ministry of the Attorney General, Court Services Division
2nd Floor
720 Bay Street
Toronto, ON M7A 2S9

Dear Ms. Bristo:

RE: Proposed amendments to the Ontario *Juries Act*

In the 55 years since its establishment as a not-for-profit association in 1963, The Advocates' Society has come to have over 6,000 members throughout Canada, more than 5,000 of whom practise and reside in Ontario. The mandate of The Advocates' Society includes, among other things, making submissions to governments and other entities on matters that affect access to justice, the administration of justice and the practice of law by advocates. Our members routinely appear before all levels of Court in Ontario, and are uniquely positioned to speak to the issue on which you seek input.

We have reviewed with interest your letter of February 27, 2019 advising the members of the legal community of the Ministry's proposal for amending Section 8 of the *Juries Act* to remove juror street addresses from jury panel lists. Although the material we have been provided does not indicate the issues that have triggered this consultation, we believe that the primary motivation for this change is a concern for the privacy interests of potential jurors.

The Advocates' Society assembled a Task Force to examine the proposal to amend the *Juries Act* more closely. The Task Force focused its consideration of a proposed legislative amendment on jury panel lists in the **civil** context. The Advocates' Society recognizes that there are different issues that arise with respect to juror privacy in criminal trials, and has left the detailed consideration of these issues to other stakeholders. The Advocates' Society would propose that any amendments are made to the Ontario *Juries Act* should bear in mind the differences between potential jurors in civil matters and criminal matters.

While we acknowledge the concern that, with regard to civil trials, jurors' privacy interests should receive a certain level of protection, we believe that the removal of juror address information could cause significant challenges and delays within the civil trial process. We therefore propose below an alternative means of achieving the goal of reasonable protection of juror privacy.

Importance of street addresses of potential jurors in civil proceedings

Jury street addresses are critical, because street addresses allow trial counsel for the parties to conduct conflict of interest searches before jury selection begins. These conflict searches are needed to know

whether potential jurors are current or former firm clients, relatives, neighbours, witnesses, or even law firm staff. Experience suggests that judicial pre-screening of the jury panel will not uncover potential conflicts. As a result, conflicts may not be discovered and addressed prior to the selection of the jury. This information routinely turns up conflicts, particularly in small communities and where large law firms have multiple clients. It is common for names to be on the list that appear to create a conflict, and only by checking the home address of the juror can counsel be certain whether the individual is one with whom there is an actual conflict.

Moreover, if conflicts are identified early, then potential jurors can likewise be notified early, saving them from the time, expense and inconvenience of unnecessary court appearances. A proper conflict search cannot be conducted without the full street address of the potential juror. The first three letters of a juror's postal code would be insufficient for an accurate conflict search to be performed. Without juror street addresses, this information will be uncovered only during questioning. As a result, jury selection will take longer. The jury selection process will be unnecessarily prolonged resulting in a waste of judicial and court resources as well as an inconvenience to the entire jury panel.

Discovering a conflict after the jury has been empanelled could cause a mistrial, thereby wasting court and party resources. This would be even worse if a juror conflict were to be identified at the end of the trial. Thus, the inability to perform early and accurate conflict checks would likely cause a number of unintended consequences in the event of a late disclosure resulting in a mistrial.

It should likewise be noted that juror addresses provide trial lawyers important background information about potential jurors that is useful to determine whether the person would be suitable as a juror. For example, the address may indicate whether a potential juror is familiar with the scene of an accident. There is other intangible information that a trial counsel can obtain about a potential juror from their address. In addition, the underrepresentation of First Nations peoples living in reserve communities on juries in Ontario is a highly complex matter and has been the subject of extensive examination by the Ministry of the Attorney General since 2013. At present, until viable alternatives to the current sources of compiling a jury roll are proposed, Band residency information is the only source information available to ensure inclusiveness of reserve residents. In Ontario, the parties and their counsel receive minimal information about potential jurors compared to the other jurisdictions where jury questioning and examinations are common. To remove street address information would provide litigants and their counsel with even more limited information and may impact the parties' ability to fairly select an impartial jury.

As noted above, we understand the need to balance the privacy rights of citizens against the needs of the state in the administration of justice. We agree that private information that serves no or little useful purpose should not be compelled as a matter of mere protocol. It is our view, however, that the provision of juror addresses serves a number of important and useful purposes integral to the civil jury trial process.

Because of the potential impact on the ability of lawyers to run conflicts checks on potential jurors and the need to have even this bare minimum of information as part of the selection process, The Advocates' Society would oppose proposed amendments to the *Juries Act* which would eliminate the provision for disclosure of potential civil jurors' addresses. The accurate and efficient administration of justice must outweigh the privacy concerns that were outlined in the Ministry's letter of February 27, 2019. It is our view that most members of the public would not object to the disclosure of their address if there is a legitimate purpose for the disclosure of this information and if such disclosure will ensure that the time, expense and inconvenience of an unnecessary court appearance are minimized.

Alternative Measure: Publication Ban / Sealing Order

We recognize that there may be special circumstances in a particular case where it would be appropriate to take measures to protect a potential juror's address by way of a limited sealing order or publication ban. A provision in Ontario's *Juries Act* similar to Section 631 of the *Criminal Code* that would allow judges to make orders where necessary for the proper administration of justice would be appropriate in the civil context. This would be preferable to amending the *Juries Act* to remove the requirement for listing juror street addresses on the jury panel list. Potential jurors should be given the opportunity to seek such an order prior to the publication and release of the jury list.

Furthermore, additional safeguards could be required with respect to privacy protections in relation to the information on the jury lists. Some of the many protections include requiring that the lists be provided to counsel only in an electronic, encrypted or password-protected form, and that the lists must be appropriately disposed of or deleted after the trial and any final appeal period has expired. (See *Bernard v. Canada (Attorney General)*, 2014 SCC 13.)

Thank you for the opportunity to present the views of our members on this important issue.

Yours truly,

Brian Gover
President

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