CLASS ACTION CLINIC
Windsor Law

Jasminka Kalajdzic
Director | Associate Professor
E: kalajj@uwindsor.ca
T: 519.253.3000 ext 4225

Honourable Simon Jolin-Barrette
Minister of Justice & Attorney General

By email: sma.smaj@justice.gouv.qc.ca

July 30, 2021

Submission Re: Class Action Reform in Québec

The Class Action Clinic at the University of Windsor offers these submissions in response to the Honourable Minister of Justice's public consultation on possible class action reform in Québec. In light of our experience with individual class members in a variety of class actions, we have a unique perspective on the class action system that we hope will be useful.

OUR MISSION + SERVICES

The Class Action Clinic's central mission is to serve the needs of class members across Canada. Launched in October 2019, we are the first not-for-profit organization designed to provide class members summary advice, assistance with filing claims in settlement distribution processes, and representation in court proceedings. The Clinic is also dedicated to creating greater awareness about class actions through public education, outreach, and research. The Clinic does not initiate or conduct class actions, and it is not funded by either the plaintiffs' or defence bar, or any industry group. Its sole purpose is to help individual class members, and in doing so, better fulfill the access to justice promise of the class action regime. A more complete description of our services can be found on the Clinic's website: www.classactionclinic.com.

The Clinic is directed by Jasminka Kalajdzic, an Associate Professor of Law at the University of Windsor, and one of Canada's leading class action scholar. She was co-lead researcher with Prof. Catherine Piché of the Law Commission of Ontario's Class Action Project. Andrew Eckart, formerly a class action litigator, serves as Staff Lawyer and oversees the work of law student case workers. Mr. Eckart also represents Clinic clients in court proceedings.

THE PROBLEM OF DELAY

It is our understanding that the Minister's Public Consultation flows from the recommendations in the Class Action Laboratory's 2019 Report, *Perspectives de réforme de l'action collective au*

Québec ["2019 Report"]. In that Report, Prof. Piché identified delay as an issue affecting judicial resources and impeding access to justice. She proposed changes to the authorization test and more robust case management as possible options for reducing delay. We comment briefly on both options.

Case management

The Clinic agrees that delay in the civil justice system is a problem across Canada. We adopt the recommendation of the Law Commission of Ontario at page 22 of its Report[1] that mandatory first case management conferences be held within 60 days of service of the Statement of Claim (*la demande*) to set a schedule for the litigation. Such a requirement is a useful and not onerous amendment. The Minister may also wish to consider an automatic dismissal for delay if the plaintiff does not meet its filing requirements. This may be particularly useful in light of the first-to-file rule, and will ensure that the lawyers with carriage move their case along.

Changes to authorization test

The Clinic does not have the expertise to comment specifically on the possible amendments to Article 575 of the Code. Rather, in light of our experience with class members, we offer the following cautions: making authorization more difficult in order to reduce the number of class actions is antithetical to the goals of the regime. The Supreme Court of Canada has repeatedly stated that class action legislation "should be construed generously to give full effect to its benefits".[2] Limiting the number of class actions in order to conserve judicial resources does not promote access to justice or behaviour modification – it only helps defendants.

Further, changing the authorization test will not cure any perceived bad practices or deter unethical lawyers. Those problems are best addressed directly, with more precise ethical rules for class action practitioners, and judicial guidance.

THE PROBLEM OF INADEQUATE SETTLEMENTS

Another theme in the 2019 Report is the need to ensure that class actions actually deliver access to justice to members. High costs of litigation that then translate into very high fees for counsel at the expense of class members do not promote access to justice. The Clinic shares the view that class action settlements must not overcompensate class counsel and must be fair to the class. As Prof. Piché has written in her academic work, it is the role of the court to strictly scrutinize proposed settlements and protect the interests of the class.[3]

---

[1] Law Commission of Ontario, *Class Action: Objectives, Experiences and Reforms Final Report* (July 2019).
[2] *Hollick v. Toronto (City),* [2001] 3 S.C.R. 158.

[3] Catherine Piché, " Judging Fairness in Class Action Settlements" (2010) 28 Windsor Yearbook of Access to Justice 111.

The Clinic's representation of dozens of class members over the past two years has revealed that much more can be done to ensure the settlement approval process is more robust and achieves the goals of the settlement approval process. The following structural elements are worthy of serious consideration:

- Counsel must make full and fair disclosure of all facts relevant to the proposed settlement.[4] Although the judge takes an active role at the settlement hearing, the lack of an adversarial context requires that counsel make full disclosure, in much the same way that parties are required to do on an *ex parte* motion.

- The best notice practicable should be ordered of both certification and settlement, using plain language and direct mail where possible. Effective notice is a precondition to the exercise of class members' rights (opting out, objecting to proposed settlements, and making a settlement claim). Studies of effective notice plans ought to be undertaken to ensure judges have the most up to date information possible about current best practices. Option consommateurs' 2010 study, for example, would provide a useful starting point.[5]

- Where a class action involves historical abuse, both counsel and the judge should adopt a trauma-informed approach to all materials and procedure.

- Decisions to *approve* settlements are currently not reviewable by appellate courts. In contrast, class counsel and defendants can appeal a decision to *reject* a proposed settlement. This asymmetry is not principled and is bad policy. Objecting class members ought to be able to appeal an order approving a settlement on the basis (for example) that the parties did not make full disclosure of material facts, the judge misapprehended the evidence, or the judge made an error of law. To ensure consistency of approach, the Code could be amended to explicitly provide for such rights of appeal and the standard on which review will be undertaken.

- In situations where the opt-out deadline for an action has expired before a settlement is reached, judges should turn their mind to the possibility that a second or extended opt-out is granted. There have been a number of recent cases in which class members are bound by a settlement in which they are not eligible for any compensation or eligible for significantly discounted compensation.[6] The risk of many class members opting out at the

---

[4] Law Commission of Ontario, *Class Action: Objectives, Experiences and Reforms Final Report* (July 2019) at pp. 55-56; and *Class Proceedings Act, 1992*, SO 1992, c. 6, s. 27.1(7) [amendments in force as of October 1, 2020].

[5] Option consommateurs, "Recours collectifs: deux modèles d'avis pour mieux communiquer avec les membres" (June 2011), online: http://www.option-consommateurs.org/wp-content/uploads/2017/07/recours-collectifs-avis-juin-2011.pdf.

[6] See for example *Wenham v. Canada (Attorney General),* 2020 FC 588, where one-third of the class members (Thalidomide victims) were excluded from the settlement but not permitted to opt out and continue or start their own litigation.

settlement stage is a risk that should be borne by class counsel and the defendant; it will incentivize them to offer the best possible settlement.

PROTECTING THE CLASS ACTION REGIME IS GOOD PUBLIC POLICY

The Clinic submits that protecting the integrity of the class action regime is good public policy. As previously stated, overly restricting the authorization test undermines access to justice for class members. Importantly, it also undermines the *deterrence* function of class actions. Even governments that are particularly sympathetic to business interests recognize that markets require rules to work properly; for example, laws against fraud or anti-competitive behaviour protect consumers *and* businesses that seek to operate in a fair marketplace. Those rules need to be enforced. Civil litigation (as opposed to regulatory agencies) is an important way to enforce regulations and thus promote the rule of law. Specifically, in the words of a former Attorney-General, class action litigation is a "cost-effective way to promote private enforcement and thereby take some of the pressure off enforcement by the budget-restrained government ministries."[7] Promoting class actions, as opposed to restricting them, therefore, is good for Québec.

Greater protection of class member rights – by giving them the right to appeal a decision approving an improvident settlement, or by legislating a second opportunity to opt out when they would otherwise be bound by a settlement that does not entitle them to any compensation – creates proper incentives for both class counsel and defendants to ensure settlements are adequate. The residents of Québec, like all of the clients that the Class Action Clinic serves, deserve a modernized class action regime that gives them faster, more transparent relief and more meaningful access to justice.

Thank you for considering our submissions.

Sincerely,

Jasminka Kalajdzic

---

[7] Ian Scott and N. McCormick, To Make a Difference: A Memoir (Stoddart, 2001) at 182, as cited in Hon. I. Binnie, "Mr. Attorney Ian Scott and the ghost of Sir Oliver Mowat" (Spring 2004) 22 Advocates' Soc. J. No. 4, 4. For the Conservative argument favouring private enforcement by way of class action litigation, see Brian T. Fitzpatrick, *The Conservative Case for Class Actions* (U. Chicago Press, 2019).