FAIR | Canadian Foundation *for* Advancement *of* Investor Rights

May 11, 2020

The Honourable Doug Downey
Ministry of the Attorney General
720 Bay Street McMurtry-Scott Building
11th Floor
Toronto ON M7A 2S9

Standing Committee on Justice Policy
Room 1405, Whitney Block
Queen's Park, Toronto, ON M7A 1A2

Re: Class Proceedings Amendments, Bill 161, the Smarter and Stronger Justice Act

Dear Minister Downey,

I want to personally thank you for your consideration of the matter about which I write to you today. My name is Douglas Walker and I am the Deputy Director at FAIR Canada. One of FAIR Canada's stated strategic objectives is to provide advice to governments at all levels on policy issues relating to Canadian shareholders and individual investors.

From our perspective as Canada's national voice for investors, I am writing to ask you to reconsider including a predominance test in the amendments to the *Class Proceedings Act, 1992*, as proposed in the current draft of Bill 161, the *Smarter Stronger Justice Act, 2020*. As Minister, you will be keenly aware that this amendment would heighten the existing threshold for class action certification in this province, making it harder for individuals to seek justice through class action lawsuits.

Our organization is very concerned about the impacts that this amendment will have on Canadian investors. There have been many occasions in which investors have relied on class action lawsuits for protection. For instance, plaintiffs sought damages on behalf of Canadian investors in the seminal case of *Green v. CIBC*, and related cases, which was argued to the Supreme Court of Canada, and in which FAIR Canada was granted intervenor status. The plaintiffs in those actions had been the victims of serious misrepresentations in corporate public disclosure documents.

As you are no doubt aware, when, in 2005, Part XXIII.1 was added to the *Securities Act*, it added a provision permitting actions to be brought by investors for secondary market misrepresentations. One of the express policy objectives behind the amendment was to make it possible for individual investors to assume the role of private attorney general, and through class action proceedings assist in regulating the capital markets and thereby increase investor confidence. The enactment of Part XXIII.1 was an important consumer protection initiative, and in practice, it has proven to be reasonably effective both in providing investors in the secondary

market with a means of redress, and also encouraging corporate compliance. There are a number of successful cases that have been prosecuted to date which have been a credit to the regime.

Part XXIII.1, section 138.8 of the *Securities Act* already contains a preliminary merits assessment. Before the action may proceed, the plaintiff must establish that the action is brought in good faith, and that there is a reasonable possibility that the action will be resolved in favour of the plaintiff. This requirement was added as a counter-balance to the removal of the need for the plaintiff to prove reliance upon the issuer's misrepresentations.

In practice, the leave to proceed motion is generally a very substantial legal undertaking, requiring the plaintiff to marshal substantial legal resources and expert evidence. Further, the leave to proceed motion heavily favours cases with overt and well publicized merit over cases involving more complex liability scenarios. As you can appreciate, the defendants are at a marked advantage in cases where a pre-discovery record does not fully reveal the scope of the alleged misrepresentation.

It is also important to note that even under the current regime, there remain important concerns that Part XXIII.1 does not apply effectively to meritorious cases that fall within a lower range for economic losses to investors due to the statutory liability limits. In essence, the liability limits effectively preclude misrepresentation cases in connection with small cap companies because the liability caps render them uneconomical to litigate. That is true even though the actual calculable economic losses to investors using the formula contained in the statute might greatly exceed the statutory damages caps. Even in much larger cases, the liability limits generally serve to reduce the investors' rights to recover the actual economic losses suffered by them.

In the context of securities class actions, therefore, there are already enormous statutory, economic, and practical safeguards against potentially unmeritorious actions being commenced.

FAIR Canada is concerned that if the predominance amendment as currently drafted is passed into legislation, then this will unreasonably increase barriers to securities misrepresentation class actions, and thereby undermine or defeat the very purpose for which Part XXIII.1 *Securities Act* was enacted.

First, the meaning of "predominance" will undoubtedly be debated among litigants, leading to uncertainty, and increased cost and expense both for the parties and the courts. Lack of certainty in respect of the test to be met could result in claims that relate to genuine misrepresentations not being certified simply because the plaintiff did not marshall the evidence that the courts ultimately determine is necessary. Presently the test is well known, including the evidentiary burden on the plaintiff. Adding an element of uncertainty defeats the objective of providing access to the courts for investors.

Second, on the assumption that "predominance" will be interpreted in a manner consistent with Federal Rule 23(b)(3) under the US class action regime, this will put an unfair evidentiary burden on the injured investors. In the US the Supreme Court has held that the analysis under Rule 23(b)(3) is to be "rigorous" and that it will frequently involve some overlap with the merits of the claim. But, in the United States, the litigation regime allows for extensive pre-certification disclosure, including witness depositions and comprehensive document production, which

makes it easier for the plaintiff to produce a certification motion record that includes merit-based evidence.

The same is not true in Canada.

Oftentimes, the corporations will argue that damages cannot be proven because the market is not efficient, and as such damages would have to be proven on an individual basis. With predominance as part of the test, investors would be burdened with proving loss causation at certification through expert evidence, which will drive up the costs of the certification motion, and increasing the risk that certification will be denied, simply because the investor will not yet have had access to the documents that go to the merits of the claim.

There is no clear or justifiable reason that explains why an amendment to add predominance and superiority tests to the *Class Proceedings Act, 1992* is necessary. The current threshold is a fair balance between the competing interests of the parties, but most importantly, it is not so high as to defeat the important ameliorative purpose of the *Act*, which is to assist in ensuring that corporate misconduct is discouraged, and that injured people can actually pursue a remedy for the harms they have suffered.

We ask, therefore, that you seriously consider removing the predominance amendment from Bill 161. I thank you again for your consideration.

Best regards,

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