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Standing Committee on Justice Policy

Smarter and Stronger Justice Act, 2020

1st Session
42nd Parliament

Thursday 11 June 2020

Chair: Roman Baber
Clerk: Christopher Tyrell

Journal des débats (Hansard)

JP-18

Comité permanent de la justice

Loi de 2020 pour un système judiciaire plus efficace et plus solide

1re session
42e législature

Jeudi 11 juin 2020

Président : Roman Baber
Greffier : Christopher Tyrell

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LEGISLATIVE ASSEMBLY OF ONTARIO

ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

STANDING COMMITTEE ON JUSTICE POLICY

COMITÉ PERMANENT DE LA JUSTICE

Thursday 11 June 2020

Jeudi 11 juin 2020

The committee met at 1000 in room 151 and by video conference.

SMARTER AND STRONGER JUSTICE ACT, 2020

LOI DE 2020 POUR UN SYSTÈME JUDICIAIRE PLUS EFFICACE ET PLUS SOLIDE

Consideration of the following bill:

Bill 161, An Act to enact the Legal Aid Services Act, 2020 and to make various amendments to other Acts dealing with the courts and other justice matters / Projet de loi 161, Loi visant à édicter la Loi de 2020 sur les services d'aide juridique et apportant diverses modifications à des lois traitant des tribunaux et d'autres questions relatives à la justice.

The Chair (Mr. Roman Baber): Good morning, everyone. I call this meeting to order. This is a resumption of the hearings of the Standing Committee on Justice Policy to conduct hearings on Bill 161, An Act to enact the Legal Aid Services Act, 2020 and to make various amendments to other Acts dealing with the courts and other justice matters.

Today's proceedings will be available on the Legislative Assembly website and on the television channel.

We have the following members present. First of all, members in the room: to my right is MPP Lindsey Park; to my left is MPP Lucille Collard. Please note that you will be able to see them through your Zoom link whenever they have the floor. We also have the following members participating remotely: MPP Will Bouma, MPP Parm Gill, MPP Morrison, MPP Singh, MPP Tangri, MPP Rick Nicholls and MPP Wai.

Also, I understand that MPP Yarde has now joined. MPP Yarde, could you kindly confirm that you have joined?

Mr. Kevin Yarde: Thank you, Chair. It's MPP Yarde, and I am in Brampton, of course.

The Chair (Mr. Roman Baber): Thank you so much.

Mr. Kevin Yarde: You're welcome.

The Chair (Mr. Roman Baber): We are also joined by staff from legislative research, Hansard, interpretation and broadcast.

Please make sure you speak slowly. Ask any questions if you have any issues, and please be recognized to speak. Since it could take a little bit of time for your audio to come on, please take a minute before you begin. As always, I kindly ask that all comments by members and witnesses are made through the Chair.

Unless there are any questions before I begin—if we could please unmute everyone. Any questions or issues or preliminary business?

DURHAM COMMUNITY LEGAL CLINIC

MR. MEYER MECHANIC

WADDELL PHILLIPS PROFESSIONAL CORP.

The Chair (Mr. Roman Baber): Seeing none, I understand that our first panel, our 10 a.m. panel, has already come online. I will now invite them to appear before the committee. Specifically, we have the Durham Community Legal Clinic—Omar Ha-Redeye, the executive director, and Aravinth Jegatheesan, staff lawyer; Meyer Mechanic; and Waddell Phillips Professional Corp., specifically John Phillips and Margaret Waddell, I understand, appearing again, through a different capacity. Welcome, everyone.

The format for today's proceeding, as agreed upon and articulated in the report of the subcommittee, is that the panel will appear jointly, with seven minutes for each presenter to begin, followed by questions from the two recognized parties and the independent member.

I would invite the Durham Community Legal Clinic to commence their submissions, specifically by stating their name for the record.

Mr. Omar Ha-Redeye: Good morning. My name is Omar Ha-Redeye. I am the executive director for the Durham Community Legal Clinic.

Mr. Aravinth Jegatheesan: Good morning. My name is Aravinth Jegatheesan. I am the staff lawyer at the Durham Community Legal Clinic.

The Chair (Mr. Roman Baber): Welcome. Please begin.

Mr. Omar Ha-Redeye: Good morning, and thank you for having us here today. It is a pleasure to be here and to be able to comment on Bill 161.

In the review of the agenda, I have noticed that there are indeed many clinics appearing today and my hope is that the committee comes to the conclusion, after hearing all of the submissions, that the clinics themselves are very different in their nature, and that is very much by design.

A little bit of background about the communities that we serve: We serve a population of over 650,000 people

over 2,500 square kilometres. The motto is "a great place to grow." and indeed, the region is growing very rapidly in the western parts of our catchment. It increasingly looks like an urbanized area, similar to Toronto, whereas in the eastern and northern parts of our catchment it is still very rural. So there are obviously some diverse and unique considerations, depending on what part of the catchment area that we're looking at.

We also work very closely with our local politicians, who include the President of the Treasury Board, the Minister of Finance, the chief government whip, the deputy Speaker and the PA to the Attorney General, who of course is on the committee. These are collaborative relationships, and we work consistently with them not only to facilitate services to the communities, but also in terms of legislative amendments, such as with Bill 161. It is important, of course, that we do that in a non-partisan way. We work with every government and we work with every opposition—and that is for every government or every opposition that might be in place.

There are some components of Bill 161 that we have supported, but that's not what we would like to use our time for here today—it's to make more pointed recommendations about how it can be improved. We have provided some substantive written submissions that I would hopefully direct to the committee to review in greater detail, at their leisure.

It is positive that there are elements of this initial draft of the bill that have been modified—in particular, the role of the communities and the boards in relation to the clinics—but we do strongly believe that there is more of a need for greater autonomy and independence in the community legal clinics than what is currently enunciated in Bill 161. These are principles that go all the way back to the very inception of community legal clinics in the Osler report. We're looking at almost 50 years of many different governments and several very comprehensive reviews which have all reaffirmed and emphasized the importance of that independence and that type of model, and I think it is of some concern that that model would be so drastically changed in such a short period of time without proper review and consultation. To put that in perspective: The previous review that occurred under the Osler report entailed 285 written submissions and heard 105 oral submissions over three months and in 10 different centres across the province. That was a very, very extensive review, and it's not the type of review that we've seen in light of Bill 161, unfortunately.

So one of the main principles or messages we would like to convey to the committee is that these principles have worked very well for the clinics. They have ensured that there is autonomy in a way that prevents them from being dictated to, if you will, based on the principles or priorities of whatever government might be in power. Most importantly, it has allowed clinics to maintain a very close relationship with low-income populations. It is actually enunciated in the Osler report that low-income populations typically have an inherent distrust not only of lawyers, the legal system and the justice system, but also of government at large. What that means from a practical perspective is that they may not engage with government services that will ameliorate their poverty, that can actually assist them in the circumstances and the situations they're in. Because of that distrust and because they feel removed from a system that is there, they don't access those resources. So community legal clinics play a crucial role in having those linkages and channels to those communities and also being able to convey those perspectives to policy-makers and governments.

There's an additional concern about constraining or restricting the definition of poverty law in Bill 161. I think we can use the example of our clinic, which was founded in 1985. In the early days of our clinic, the bulk of the work very much focused on income maintenance. We have seen that drastically change, especially over the past five years. The largest area of services that we currently provide is in housing law. The fact that we provide services in the area of housing law doesn't necessarily mean that it's increasing the expense, for example, for landlords; in fact, our experience is that it's quite the opposite. By assisting tenants, we give them the tools that allow them to access those tribunals and inform them about the best way to do so. Without legal representation, they often create unnecessary delays and, more importantly and in light of the broader considerations, create additional expenses for landlords who are struggling with tenants who already feel disenfranchised and frustrated with the system. It's not simply an adversarial role that the community clinics play; in fact, it's always expected and intended to be far beyond that and to assist and educate and facilitate resolution and to ultimately lift individuals out of poverty. That is a non-partisan goal. That is a goal that is shared by all political parties, I would hope.

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In particular, it is important for any community legal clinic to be responsive to the government of the day and the priorities that are being enunciated. In our written submissions, we make reference explicitly to the 2019 budget, at page 44, and the principles that are enunciated there. We actually detail in great length the extent to which we are trying to be responsive to those government priorities, in facilitating access to justice and alleviating poverty.

The Chair (Mr. Roman Baber): Please conclude.

Mr. Omar Ha-Redeye: Thank you for having us, and I'm happy to receive any questions, if there are questions, from the committee.

The Chair (Mr. Roman Baber): Thank you so much, Omar.

We'll now move on to Meyer Mechanic. If you would be so kind as to commence your seven minutes of submissions by stating your name for the record.

Mr. Meyer Mechanic: My name is Meyer Mechanic.

The Chair (Mr. Roman Baber): Thank you.

Mr. Meyer Mechanic: It is my privilege to address the Standing Committee on Justice Policy this morning to discuss Bill 161, the Smarter and Stronger Justice Act, and how we can help modernize the legal system in Ontario. I

want to thank the committee for giving me this opportunity to help advance the use cases for virtual commissioning and notarization, as I think both are large leaps forward in making the legal system more accessible and affordable for Ontarians.

I've spent the last three years researching the efficacy of digital signatures and the verification of legal documents. During this time, my team deciphered that the two key barriers to acceptance of virtual commissioning and notarization were the inability to offer secure and reliable third-party verification of these documents and the risks of fraud associated with different types of remote signing.

My partner, Dmitry Semenovskiy, and I, created a company called Vaultie, an Ontario-born legal tech company, to address these problems using proven technologies, including facial recognition, government identification analysis, blockchain and verifiable credentials. These technologies enable us to bind physical people to digital documents by creating secure, globally verifiable and tamper-proof digital documents.

By my estimation, Ontario produces just over 50 million notarized documents and commissioned documents per year. With each signing event, which could include multiple documents, taking an average of two hours, between travel time and appointment time, the ability to execute these documents remotely takes this arduous task down to minutes and in each event could save hundreds of dollars in combined opportunity and out-of-pocket costs of physically signing a document in pen.

A notarization or commissioned document is often a three-party transaction: There's a signatory, who is asserting certain information; there's a notary or commissioner, who is confirming that these assertions have been made; and there is what we call the gatekeeper, the third party that requires that these assertions be validated in order to unlock permissions associated with the document. The gatekeepers could be financial institutions, border agents, other lawyers—a large group.

Third-party verification is the key attribute that's going to allow a gatekeeper the ability to determine the authenticity of a commissioned or notarized document in order to satisfy their concerns as they relate to fraud and enables permissions associated with these sensitive documents.

E-signature is often referred to as any method of signing a document through electronic means. However, there are many types of remote signatures that all offer different levels of authenticity, security and assurances that a specific person signed a specific document. The use of an ill-equipped remote signature heightens the risk of fraud and could negate the verifiability of a document. It is my view that the regulations regarding Bill 161 should address both of these issues.

In the few weeks since virtual notarization and commissioning has been allowed, first temporarily and now permanently, as a result of Bill 190, we've been keeping in touch with our customers and prospective customers about their experiences, successes and challenges with virtual notarization. We have already heard stories where our customers are able to execute these documents in accordance with the changes proposed in Bill 161 but are having challenges in getting financial institutions to accept them. The gatekeepers need a method of verifying the legitimacy of a document in order to be able to prevent their fraud. For example, statutory declarations of possession from a seller of a home need to be commissioned or notarized. They would need to be verified by the bank or a homebuyer as part of due diligence on a mortgage.

The issue extends beyond financial matters. A single parent is required to produce a notarized letter from another parent when travelling with a child. If a border agent has no ability to verify that letter, we may be putting that child in danger. With the inability to verify a seal which, under Bill 161, no longer needs to be present on oaths, affidavits or declarations, neither the bank nor the border agent has a reliable method to prove that a document has indeed been notarized and isn't fraudulent.

There are two parts of this bill I'd like to see addressed in regulations. Page 30, schedule 5, section 9, in the Commissioners for Taking Affidavits Act: "shall satisfy himself or herself of the genuineness of the signature of the deponent or declarant...." It is our view that the regulation should address a minimum standard for the type of remote signature acceptable for a commissioned document. A simple electronic signature, for example, would negate the verifiability of such an important document and place it at a higher risk for fraud. We've spoken to many lawyers who were defrauded or almost defrauded through the use of an ill-equipped digital signature or inadequate identification verification. We would advocate that a commission document or notarization should have a minimum requirement of a signature tethered to a blockchain or a verifiable credential.

Schedule 19, section 3, subsection (4), "When seal not needed" in changes to the Notaries Act: "It is not necessary to the validity of any such oath, affidavit or declaration that the notary public affix his or her seal." Without some form of verifiable seal, we can foresee future issues and current issues where third parties cannot ascertain the authenticity of documents and are thus unwilling to unlock the specific privileges associated with the document. We think, rather than set an exemption to the requirement of a seal, setting guidelines and regulations for what would constitute or could constitute a digital seal makes sense, whereby a notary could apply a verifiable seal based on proven technologies, and third-party verifiers have the ability to check their validity online.

A digital seal could have the additional benefit of enabling new uses for digital legal documents, such as the creation of original copies and the verification of both original and certified true copies. Furthermore, enabling verifiable seals could save government resources by taking verification from days to seconds, since anyone would be able to perform a verification from their own device.

I'm very excited about the new digital age for legal documents in Ontario. I think that Bill 161 ushers in welcome change that could make legal services more

accessible to the average Ontarian. I want to thank the committee for allowing me the time to speak and would like to offer my help and answer any questions that might come from this presentation.

The Chair (Mr. Roman Baber): Thank you very much, Mr. Mechanic.

We have the Waddell Phillips law firm joining us as our third deponent for the first panel. We have John Phillips and we have Margaret Waddell returning to us. Welcome back. Please commence your seven-minute submission by stating your name for the record.

Mr. John Phillips: John Phillips with Waddell Phillips. Marg will be leading our submissions. I'll follow up.

Ms. Margaret Waddell: I'm Margaret Waddell from Waddell Phillips. I'd like to thank the committee for having us here today to address proposed amendments to the Class Proceedings Act in schedule 4 to Bill 161.

Over the course of today, yesterday and tomorrow, you'll be hearing from a number of members of the plaintiff side class action bar. Waddell Phillips concurs with their submissions and will attempt not to cover the same ground that they will be covering.

We'd like to start by taking a step back to explain to the committee how we got to where we are today. Ontario was at the forefront of the common law provinces in enacting the Class Proceedings Act in 1992. When it did so, it was after a decade of study, starting in 1982 with a three-volume report from the Ontario Law Reform Commission, and then the 1990 Report of the Attorney General's Advisory Committee on Class Action Reform. That committee included representation from diverse stakeholder groups, including lawyer organizations, corporate business interests, public advocacy groups and the Insurance Bureau of Canada.

Despite the diversity of interests, the committee reached a unanimous consensus on draft class action legislation, and the CPA is largely based on the draft act prepared by the committee.

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One of the recommendations that came out of the committee was that the effectiveness of the legislation should be monitored, so that if changes were necessary, they could be addressed based on objective evidence. That did not happen, and we're very pleased to see that, in the new legislation, that kind of objective monitoring will be put in place.

However, over the course of the next 25 years after the legislation was enacted, the law developed as the various aspects of the act have been engaged, and we now have a strong body of interpretive case law from every level of court, including the Supreme Court of Canada. The law is really complex. The decisions are nuanced and many of the decisions are deeply infused with scholarly and policy-based analysis. I think that's important as we go forward in looking at amendments to the act, that this is not simple; this is complicated law, and rushing the legislative changes through would be ill-advised.

One of the important things for the committee to know is there is no objective evidence that the CPA is not doing what it's supposed to do: improve judicial economy, promote behaviour modification and provide access to justice for Ontarians. It does all of those thing, and the track record of cases that have resulted in meaningful, substantive justice for people in the province is too long to list, although my partner will speak to some of them. There's no evidence that the act has been interpreted in a manner that's favourable to either plaintiffs or defendants. Our judges are even-handed and the legislation is procedural in nature. Nor is there evidence that the class action procedure is being abused and that frivolous lawsuits are being brought to extort settlements from blameless defendants

So when the law commission undertook a review of the CPA, there was no groundswell movement calling for material reform of the legislation. The review was undertaken because that had been recommended by the committee—that from time to time, they look to see if the legislation is working as it should. It was and it is working as it was intended to do. It provides procedural mechanisms for aggregation of claims where many individuals have suffered harms from conduct of bad actors.

Importantly, the use of the class action process reduces the burdens on the courts that would otherwise be the case—examples in the case of mass personal injuries where individuals have been harmed by defective medical products, faulty pharmaceuticals, institutional abuse or catastrophic events. In a judicial system that's already massively overburdened, the aggregation of these serious injuries into one proceeding does achieve access for the injured person and it vastly reduces the strains on the judicial system.

Without background, we ask the committee to consider what is the mischief that the proposed amendments to the CPA are meant to achieve. What's the evidence that the system is broken and needs to be reworked into a different model? Is there any evidence before you that the changes proposed by these amendments to the CPA will in fact help to resolve legal issues more quickly or improve Ontarians' access to justice? Respectfully, we believe there is none.

In the submissions made to the LCO, there was only one group that suggested the importation of US concepts of predomination and superiority: the Canadian Bankers Association and the Canadian Life and Health Insurance Association. When they advocated for those changes, they did not explain how or why such a drastic change was warranted. They cherry-picked two concepts out of the US legislation, without identifying that there are other checks and balances that work in tandem with the predomination and superiority test, including unlimited discovery rights in advance of certification and the multi-district litigation process for adjudication of mass tort claims when a class action is precluded because of those tests.

What's important to note about this particular submission is that although it was a complete outlier in suggesting the addition of the US test, they did advocate

in favour of harmonizing the certification test across the country. We agree that the test should be harmonized, and the way to do that is to adopt the uniform model legislation proposed by the Uniform Law Conference of Canada that's in place in Alberta, BC and Saskatchewan. That legislation provides, as part of the preferability analysis, that the court consider whether questions of fact or law predominate over individual issues, but that predomination is not a precondition to certification.

I do have more submissions, but I'd like Mr. Phillips to quickly speak about the Indian residential school experience.

The Chair (Mr. Roman Baber): In 40 seconds, please.

Mr. John Phillips: Members, I represented Phil Fontaine and the Assembly of First Nations on the residential schools matter that proceeded by way of a class action to a resolution. In our workup for that—and we would ask that you take this away as part of your consideration—those claims would not be allowed to move forward under the legislation as it's being contemplated right now. It would not have survived.

One of the consequences is this: When we did an analysis just in Saskatchewan on the number of claims that had been filed individually, assuming a one-week trial per claim, the last claim on the residential schools, not being done through class actions but individually, would have taken place in 2050, utilizing all available judicial resources in Saskatchewan. That's what the aggregation does, and it's exactly what's wrong with the predomination concept that's being floated in the legislation.

So, supplemental to Ms. Waddell's submissions, those are our views from Waddell Phillips, and we ask you to consider them.

The Chair (Mr. Roman Baber): Thank you very much. We'll now begin with questioning, and we'll follow the order in which we were yesterday. That will lead us to the official opposition beginning its questioning with five and a half minutes. I'll recognize MPP Singh.

Mr. Gurratan Singh: My first question is for Omar. Omar, my question to you is as follows: Would you agree that the removal of "low-income," the removal of "disadvantaged communities," the removal of—

Interruption.

Mr. Gurratan Singh: My apologies. There's a phone ringing in the background here—the narrowing, rather, of the practice areas that is proposed in Bill 161 would actually disadvantage Black communities, racialized communities and women fleeing domestic violence, with respect to the changes that are happening in Bill 161, and actually create a greater disadvantage for those communities in accessing justice?

Mr. Omar Ha-Redeye: Certainly. We detail some of this in our submissions. For the members of the committee that are looking for that, you can see that starting from page 7. We do have some very significant concerns around the removal of that language, which very much frames the mandate of community legal clinics.

Access to justice is an enormous issue across Canada. We have been in an access-to-justice crisis now for many years, and there's no dispute about that crisis at every level of government, in every corner of the judiciary and the bar.

Community legal clinics play a crucial role, and as I emphasized, government—and even the profession, the bar—the vast majority of lawyers do not have the close ties and the meaningful relationships with marginalized populations and with low-income populations. We need to facilitate those relationships, not only to alleviate the poverty but also to inform legislation as to the detrimental effects that it may have on those communities. So it is, in our submission, absolutely essential that that type of language be retained in the future act.

Mr. Gurratan Singh: Right now, we're seeing, across the world, folks who are coming up to rise up against anti-Black racism, just to narrow in on that point specifically would you say that the removal of "access to justice," "disadvantaged communities," "low-income communities," could disproportionally negatively impact Black communities trying to access justice and further propagate systemic anti-Black racism within our province?

Mr. Omar Ha-Redeye: This isn't speculative for us. Based on our experiences, we know, and we're seeing this during COVID-19, marginalized populations will invariably experience the worst of any inequity. We're seeing it right now.

More directly to your question: We do have issues of racial profiling and challenges in terms of friction with the Black community in areas of Whitby and Ajax, in particular in our area, and that has been documented. There have been incidents. There is a concern, of course, that if our mandate is in some way shrunk or restricted by LAO, then we're unable to facilitate not only those relationships but also the more crucial issues that are needed in terms of reforming our justice system and having our law enforcement system working collaboratively with our communities to keep them safe—

as opposed to an oppositional type of relationship, which we're very much going to see as these concerns increasingly rise and come to the forefront.

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Mr. Gurratan Singh: Finally, would you agree with the statement that the positives of modernization that are in Bill 161 are outweighed by the negatives, with respect to what we've outlined earlier—the removal of "access to justice," the narrowing of the practice areas—and further, that it could create a step back with respect to access to justice for Ontario, as it is written right now?

Mr. Omar Ha-Redeye: The biggest challenge there—and we start that on page 19 of our written submissions—is in the way that it's structured—starting, really, from page 21, where we detail that, in terms of the timelines we're looking at. Six months after this bill is passed, the LAO has the ability to enter into negotiations of the contracts with the community legal clinics. That is in a very abbreviated timeline, especially when we're looking at the COVID-19 pandemic. So the balance, in our submission, really is not properly considered. If it does proceed as it currently is constructed, we have very, very significant concerns that clinics will be disrupted and the

services that we provide will be disrupted. This isn't an issue of partisan perspectives. We do provide front-line services, all the way from the executive director—that's me—to support staff, in every aspect of our clinic because that's the only way we can operate. So there will be significant impacts on the services that we provide if this proceeds in this manner.

Mr. Gurratan Singh: We probably have around 30 seconds left. Are you able to articulate, very briefly, how the cuts to legal aid that were made previously negatively impacted your clinic?

Mr. Omar Ha-Redeye: I think we were fortunate in that we received an effective 1% cut, as opposed to 22%, like some clinics in Toronto. But that 1% cut was devastating. Staff morale has plummeted. We've had enormous turnover. I'm new to my role as of September of last year. It has impacted the service that we provide, because we are very lean and we provide very efficient services. The clinic system is incredibly interconnected, so cuts elsewhere in the system have a very immediate and direct impact in terms of what we do in Durham region.

The Chair (Mr. Roman Baber): We'll now proceed with five and a half minutes of government questioning. I'll recognize MPP Park.

Ms. Lindsey Park: Thanks for joining us, Omar. We've had a number of good discussions. I know you've come down to Queen's Park a number of times since taking on the role of executive director.

I just want to jump into one of the things you mentioned in your back-and-forth with MPP Singh: specifically, talking about the commitment of Legal Aid Ontario to continue to provide access to justice for low-income Ontarians. I think what I heard from you—and we've heard it from different stakeholders—is that the new legislation should specifically refer to these principles. I wonder if you could just comment on your perspective on the need to include these concepts in the legislation itself.

Mr. Omar Ha-Redeye: Certainly. I will go back to the comments that I said previously. The role of community legal clinics is not to simply provide legal services and representation—it's obviously a very important part of what we do, including for members of your constituency—but it is also to inform, as I described, the legal system, policy-makers and governments as to the impacts that law reforms have on low-income and marginalized populations. We need that expressly indicated in the legislation. Obviously, there's an intermediary between government and the community legal clinics, which is Legal Aid Ontario, which has its own challenges. What we're very much concerned about—and we saw this with the recent cuts—is that those challenges will be disproportionately put on our laps, as opposed to somehow being resolved within LAO.

It is essential that we maintain that mandate of access to justice because it gives us an ability, in our negotiations and our discussions with LAO, to once again affirm that the role of community legal clinics isn't simply to provide services, but it's to assist Legal Aid Ontario, as well as other partners within the justice system, in finding creative and innovative solutions, and that doesn't necessarily mean asking for more money.

As you know very well, in our clinic and the development of the hub that we're doing that's detailed in our written submissions, we are breaking down silos, we are cutting red tape and we have been increasing the focus on the client and the members of the community. That is really what we very much should be continuing to do in our conversations with our funder, and having this wording in the legislation assists us in doing that.

Ms. Lindsey Park: Thanks, Omar. The Attorney General has made many public statements—and I have, in many discussions I've had with stakeholders—on the importance of community legal clinics. There's no question you are doing terrific work in serving the most vulnerable in the Durham region.

Specifically, you mentioned—I think you were referring to the definition of community legal clinics in the legislation. Maybe you can speak to how important it is that that definition specifically reference clinics' boards of directors and that it be comprised of members of the community, or communities, the board serves.

Mr. Omar Ha-Redeye: Yes. This has been going back to the Osler report and the Grange report and every review that has occurred for community legal clinics. The board of directors should be grounded in the community, and not just grounded in the community in terms of residency, but also have some meaningful involvement. The reason for that, for all of the reasons that I explained earlier, is that community legal clinics are themselves very, very diverse across the province of Ontario. The needs of those communities are very diverse.

In our area, in Durham region, we obviously have the GM plant and the job losses over past years as it relates to that, which have required us as a clinic to start to offer more services in the area of employment law, WSIB, human rights law—but not just in terms, again, of legal representation. It's also about assisting those individuals, then, in finding new jobs and getting back on their feet and becoming taxpayers who can contribute towards society in a meaningful way. Those are unique and specific needs to our community that may not be identified or reflected elsewhere across the province, and so that's why the governance and the decision-making and the prioritization need to really occur at the community legal clinic level.

The definition of poverty law, if I could speak to that, in the new legislation doesn't explicitly refer to those areas like employment law and human rights law and WSIB. It gives that flexibility or that definitional ability to our funder. We will once again reaffirm: That has to happen at the local level. That is very much consistent with the principles that are enunciated in this government's 2019 budget, where it said that decision-making and services should be community-oriented, with a lens and with a focus on the needs of the specific community, as opposed to some bureaucrat somewhere else on the other side of the province.

Ms. Lindsey Park: I think we might be out of time.

The Chair (Mr. Roman Baber): We're out of time. Thank you, MPP Park. We'll now proceed to the independent member for four minutes of questions.

Mme Lucille Collard: Thank you, Mr. Chair. The question is for Omar, again. I wanted to touch upon something that you mentioned in the proposed changes. You did comment on the fact that typically people receiving legal aid services demonstrate a sense of distrust towards government institutions. I want to know if you are concerned with this new power that the government would have to appoint the majority of board members on the Legal Aid Ontario board. Could you give me your sense on that and the impact it would have on the image of impartiality that such a government institution should uphold?

Mr. Omar Ha-Redeye: Certainly. It's worth saying that governments obviously come and governments go, and so the structure and the reformulation of the services that we provide through Bill 161 really need to take a longer-view perspective. Perhaps there is a level of comfort in terms of this government and who they may appoint in that respect, but at some point in the future—it's inevitable—it will be a different government, and so we need to ensure that when we're talking about poverty law and we're looking at the needs of low-income people, that that is done in a non-partisan way. Centralizing that and having that, again, in the hands of the funder is not going to achieve that goal.

It's also going to, as you indicated, create greater distrust because you have decision-making and priority-making occurring from individuals who are not known in the community and are completely removed from the community, and may be actually emphasizing or prioritizing needs that aren't actually reflected at the local level. It is important—that was one of the foundational concepts highlighted in the Osler report—to maintain the trust, build the trust and build those bridges with those communities that are already feeling marginalized and are not accessing the resources that are there that are being provided by the government.

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Mme Lucille Collard: Thank you for your answer.

The Chair (Mr. Roman Baber): Thank you. We'll now proceed back to the official opposition for five and a half minutes. I recognize MPP Yarde.

Mr. Kevin Yarde: I'm going to stick with Omar, who is still on the hot seat. I'll try not to repeat some of the questions from MPP Singh.

Regarding justice and value for money: We talked a little bit about that with yesterday's witnesses. I'm just curious if you think that if this bill passes—would it reduce the areas of law that clinics work in, say for instance, eliminating focus on crucial issues like discrimination and human rights? Do you think that would happen?

Mr. Omar Ha-Redeye: It's inevitable that that would happen, especially based on how poverty law is defined in the act.

I think I'll also speak to some of the comments that were made yesterday at the committee, which is that increases in legal aid and specifically in the clinics have indeed been demonstrated to show an increase in services. I know there were some questions around that. We make reference to that in our submissions, explicitly at footnote 25, where we refer to the Office of the Auditor General's 2018 annual report, where legal aid services are examined.

There is a direct impact on services that would occur from prioritizing and restructuring things in this particular way. There is a need, as I've said repeatedly now, for that to happen at the local level and to look at the local needs. I'll use another example of our year-round tax clinic that we have and the fact that many of our constituents don't do their taxes. Again, they're feeling disenfranchised from the system and so they haven't filed their taxes, or feel as if they haven't been working so they don't need to fill their taxes. By having their tax returns done for them for free, they're actually able then to access additional funding and grants that are available from the government. In other words, we're able to bring things from the federal government and federal benefits that might be available to the local level—investments and money that would not otherwise be there that's now being spent in the local economy.

I would suggest that in the COVID-19 and post-pandemic era, where we're going to see an increase in unemployment—we're going to invariably see either a recession or a depression—the role of community legal clinics to be versatile and to be attentive to the needs of their local communities is absolutely paramount.

Mr. Kevin Yarde: Okay. My second question to you, Omar—I know Ms. Waddell talked about it as well briefly. Would you say that the system as it is right now is broken, or does it need fixing?

Mr. Omar Ha-Redeye: As I said when I alluded to the access-to-justice crisis, there is no dispute anywhere in the justice system or in the profession that our legal system is broken—anywhere. I will commend this Attorney General, and Ms. Park is obviously involved with those initiatives, for some of the modernization steps that they have taken, including remote hearings and the use of technology. We do expect that that will improve over time, but it's not going to be enough.

Access to justice, as we detail in our submissions, is not simply a matter of throwing money at a problem. That's not going fix it. We need to transform our system, and we need to transform it specifically in light of marginalized populations and the people who don't have lawyers in their back pocket or in their families. Those are the clients we are actually serving on a regular basis in our community clinics.

Mr. Kevin Yarde: Chair, I just want to ask, how much time do I have left?

The Chair (Mr. Roman Baber): You have a minute and 45 seconds left.

Mr. Kevin Yarde: Okay, good. What I'll do is, I'll switch over to John Phillips, who was cut off when he was talking a little bit about Indian residential schools.

I want to give you an opportunity to talk a little bit more about that. Those claims you had mentioned under this particular set-up would not have survived under the

aggregate. Could you maybe talk a little bit more about that?

Mr. John Phillips: Yes. Thank you for the opportunity. The problem with the predominance test that's being articulated in the new legislation as proposed is: A claim that has major damages for individual claimants can be kicked out of the class action because the predominance test isn't met, and it would then lose the ability to aggregate those claims.

The example of residential schools—and I could list you a dozen others—even the long-term-care facilities would have the same kind of problem: If you can't aggregate the claims, individual [*inaudible*] are going to have to receive, they have large damage components. They are going to go and they are going to overburden the system.

It was a crisis for Saskatchewan if they didn't have an ability to pull together, through a class action, a resolution of the tens of thousands of residential school claims that were individually filed there and literally would have consumed the system until 2050 using all available judicial resources, based on our actuary's calculation. That means they weren't doing family law, they weren't doing criminal law; they were doing nothing but residential schools until the last one was done in 2050, as articulated.

That is what you lose by losing that aggregation. The example of residential schools or long-term-care facilities or you've got the military claims that are going—some of that stuff needs to be brought into the public consciousness. That doesn't happen if you don't have a number of claims brought together. I think you lose the benefits of the system as it is. And I would just echo once more what Ms. Waddell said: The system isn't broken. I hear Mr. Ha-Redeye on other aspects of it; there clearly is a failing in the system for the poor and the vulnerable. But class actions are not something that is crying out for rectification.

The Chair (Mr. Roman Baber): Thank you. Members are welcome to come back to Mr. Phillips when he's back on. For now, we'll move back to the government side with five and a half minutes. I'll recognize MPP Nicholls.

Mr. Rick Nicholls: I would like to address my questions to Ms. Waddell, if that's okay.

First of all, you spoke at length about the need to facilitate access to justice in our class action regime. And, do you know what? I agree with that. But would you agree that access to justice means both procedural access and substantive justice—meaning, you get your day in court to commence your claim but, more importantly, you actually get some relief, monetary or otherwise, in a timely manner.

Ms. Margaret Waddell: Yes. I do agree with you that there are both procedural and substantive aspects to access to justice, and that is part of what the current analysis under the preferability test requires. That was articulated and processed by the Supreme Court of Canada. It is baked into the analysis in the test that exists currently.

Mr. Rick Nicholls: I have another question directed back at you as well, Ms. Waddell. You spoke about how you're worried that the proposed amendments to certification will result in a US model where rather sympathetic cases will not be able to be certified.

But our system here is completely different from the US. From my understanding, our class actions are guided by three principles, including access to justice, whereas the US doesn't have those guiding principles. Also, we don't get into the merits of the case as certification, unlike the US. Lastly, we use a very low evidentiary threshold of "some basis in fact" to guide the preferable procedural analysis, whereas the US uses a preponderance of the evidence. Can you please elaborate further on the differences between the US and Ontario class action models?

Ms. Margaret Waddell: So you've articulated at a high level some of the existing differences between the systems. Ours is a procedural mechanism where the court looks at the nature of the claim and what is being proposed to be pursued by way of a class action and determines whether a class proceeding is the best procedural format for that action to proceed. And it's done at a very preliminary stage in the proceeding, before there have been any examinations for discovery. It's intentionally not meant to be an analysis of the merits of the case.

In the US system, the law has evolved over time, and with the addition of the preponderance test and superiority, what the Supreme Court of the United States said is that merits are essentially ingrained into the analysis of whether or not the case should go ahead in order to determine whether the action is superior to other means of proceeding. Whether the action has predominance of common issues necessarily requires a look into the merits of the case.

Our concern is that if you bring those concepts and infuse them into our legislation, you will be changing the test. You will be importing not just a low evidentiary threshold, but now there's a requirement to establish that there are some merits to the claim and that the claim will be able to be prosecuted successfully.

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That was never what was intended by the legislation at the outset. It was always meant to be: Can we proceed with these cases in this process? So when you import concepts from the States, which has a different system, without all of the checks and balances, then you create, like I said yesterday, a disconnect.

Mr. Rick Nicholls: Very quickly, what I'm hearing from my friends across the aisle is, when you break it down into tangible terms, that they do not accept that an independent judge can decide to not certify a case because there was zero basis in fact, that the common issues were a substantial ingredient of the claim or that class action was the most superior procedure. Why should a case like that, that has no basis in fact, sit in the court system for years, if not decades, and keep people waiting to get their compensation?

Ms. Margaret Waddell: Those cases don't sit in the system for years waiting for people to find out whether it's going to proceed or not. If there is no basis in fact, we have procedural mechanisms in place already in order to have

those actions struck out under rule 21 or to be thrown out at the certification proceeding for not being meritorious.

I can tell you from 25-plus years of experience in this field, those cases are extremely few and far between. Canadians don't bring frivolous cases. The bar is small and it's sophisticated. They know what they're doing, and the cases all have merit behind them.

The Chair (Mr. Roman Baber): Thank you, Mr. Nicholls.

We will move back to the official opposition. I will recognize MPP Morrison.

Ms. Suze Morrison: Thank you so much. My question goes to Mr. Phillips. I've heard from several stakeholders who have come before us on the class action piece that the piece of legislation on the class actions is something that's been imported from the United States. From my perspective, I can't understand how this clause ended up in a piece of legislation in Ontario. Can you maybe explain to me a little bit of the history of where this class action piece came from in the States and how you think it ended up in a piece of legislation here in Ontario?

Mr. John Phillips: I think Ms. Waddell touched on this. The defendant's bar representing the larger corporations are looking for ways to try to shut these things down. That lobbying effort paid off in having those two pieces brought in, but it's brought in a way that loses all of the checks and balances that the US system has. The US system is designed to do very different things and has a very different plaintiff's bar behind it.

We're not like that in Canada. As Ms. Waddell pointed out, it's small; we're a fairly sophisticated operation. Frivolous claims get nailed by the judges when they see them, and they're rare and few and far between. So what we've done is, we've cherry-picked two of the criteria that, if I were a well-heeled corporate defendant, I would like to stick in without looking at the rest of the process. For example, massive amounts of precertification discovery, which is conditioned in the US—we don't have that. We don't want that. And the corporate defendants didn't what that either, but they like the idea of having the restrictive model of predominance and superiority.

So they've cherry-picked some issues that I think would tilt the legislation horribly, and Ontarians would lose a massive benefit—and not just Ontarians, but Canada, because what will happen is, without having a consistent class action model across the system, Ontario cases are going to get litigated in national class actions, just not here.

Ms. Suze Morrison: Thank so much. So from what I'm hearing from you, then, the only real benefit to this clause and this legislation is to large corporations that are trying to protect themselves from class action litigation here in Ontario? The only benefit to this legislation, is for large corporations to not be sued in class actions?

Mr. John Phillips: Yes, that's correct. They're the direct beneficiaries. It's going to work for other defendants as well and even government defendants. But as I said, using aggregation has an impact on judicial resources and management and access to justice, and it's the justice component that we lose. I would urge you not to allow those components to be baked into the system that hasn't been adapted for them.

Ms. Suze Morrison: I want to touch on another piece that you spoke to when you were speaking to the Indian residential school case, and that's the broader social benefit of these types of cases. It's not just for the folks who are going through trying to get their justice, but for the larger social change that has spurred out of some of these cases. Would we be where we are in terms of reconciliation, which still is nowhere near where we need to be, without landmark cases like the Indian residential school case?

Can you speak a little bit to the broader social-change piece that's a benefit to everyone in our communities, from some of these large landmark cases?

Mr. John Phillips: Absolutely. What you will lose if you don't allow an aggregation of claims is the concentration of public interest on issues. For example, with residential schools, the consciousness of that was not around until national chief Phil Fontaine brought it in to public consciousness, and then the class actions, individual actions and test cases started to flow across the country. They were aggregated under the Assembly of First Nations class proceeding in the name of national chief Phil Fontaine. That allowed a single point of contact for the press and for the public to see that. It put that issue front and centre. The apology that took place on the floor of the House of Commons was one of the most moving moments I've attended as a Canadian citizen. That's what you lose. An individual claim being dealt with in Moosonee is not going to have that kind of concentrated public attention. Aggregation is important not just for justice, but for public consciousness.

Ms. Suze Morrison: No further questions.

The Chair (Mr. Roman Baber): With 45 seconds remaining, Mr. Singh.

Mr. Gurratan Singh: My question is to Mr. Phillips. The LCO wrote a very scathing letter that said that, when taken as a whole, the negatives of the proposed changes outweigh the positives of modernization. Would you agree with the LCO's position?

Mr. John Phillips: Absolutely.

Mr. Gurratan Singh: You have 10 more seconds if you want to expand.

Mr. John Phillips: Other than for a very distinct class of defendants, I don't see any benefits from this legislation change in the class proceedings area. The negatives are huge.

The Chair (Mr. Roman Baber): We'll conclude this panel with five and a half minutes of questioning by the government. I'll recognize MPP Park.

Ms. Lindsey Park: I just wanted to close a loop, Ms. Waddell, on some of your comments. I wanted to make sure I heard your evidence properly. This is just a yes or a no question: Is your evidence that there are no delays in the class action system?

Ms. Margaret Waddell: No, I did not say that. There are delays, and some of the parts of the proposed legisla-

tion will improve those. I particularly commend the government for the changes that are proposed with respect to appeal routes. Taking out the middle section dealing with leave to appeal to the Divisional Court and Divisional Court appeals and having bilateral appeals directly to the Court of Appeal is an important change that everybody on both sides of the bar advocated in favour of and that we're very pleased to see in this legislation. Also, the changes with respect to speeding up the process for carriage motions is an excellent move by the government, although I am very concerned about the removal of the right of appeal from a carriage decision. We all know that judges can sometimes make errors. Sometimes those errors are serious errors of law, and that's why we have a leave-to-appeal system for those. I think it's important that that measure remain in place so that there is a check against errors of law by our judges in the carriage process.

Otherwise, those two in particular are areas that this government has proposed changes in that I certainly commend the government for adding to the legislation.

Ms. Lindsey Park: Thank you, Ms. Waddell. I did want to clarify: I'm not going to ask any questions of our second witness, just because the changes to notarization already passed in a previous bill. But I do want to thank you for coming and still sharing your perspective today.

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I'll turn back to Omar with Durham Community Legal Clinic. I found your evidence helpful. I just wanted to ask one specific follow-up question.

Some stakeholders have emphasized the importance that the process Legal Aid Ontario undertakes to determine how to provide legal aid services in the area of poverty law needs to be transparent and based on credible data from all stakeholders.

Would you be in favour of ensuring that Legal Aid Ontario be required to consider certain types of information it receives from all relevant stakeholders in making these decisions? I just want to see if you had a particular perspective on that.

Mr. Omar Ha-Redeye: I do. I think that accountability is important for any taxpayer money, so that's really not a contentious issue. What I will say is that there have been efforts under way for years now where Legal Aid Ontario has been trying to identify and develop the metrics in which to do so. The concern may be, from a clinic level, that because we are all very much focused on providing services, if there is a shift and an emphasis on reporting, that's going to unduly increase administrative costs. I think the concern there would be that that would be also an unnecessary use of taxpayer dollars, if that's not properly construed and streamlined in a system that is quick and efficient. We're not entirely clear that's what's going to transpire.

Ms. Lindsey Park: Just a follow-up on this—I'm just trying to wrap my head around it. What types of information do you think stakeholders could provide to Legal Aid Ontario that would be helpful to them in making these determinations?

The Chair (Mr. Roman Baber): Just about a minute and 15 seconds.

Mr. Omar Ha-Redeye: Part of it is going to be, again, coming from the community legal clinics to legal aid, because we have that information as to what the needs are, but I think part of it is better reporting and through a system that actually is streamlined. There is a system that has been developed within Legal Aid Ontario for reporting back to them certain quantifiable data, but it isn't a system that is necessarily efficient or streamlined, so there is a considerable amount of time and delay from an administrative perspective that goes into using those systems already.

That is my biggest concern. We want accountability. We want to be transparent about how we're spending taxpayer dollars. But we don't want to have to try and do that in a way that's going to spend more taxpayer dollars on administrative tasks. I think that's the inherent tension that we're looking at.

The Chair (Mr. Roman Baber): Thank you very much, Ms. Park.

I want to thank our first panel of presenters. Again, this was a very interesting discussion. Also, I want to thank Omar, in particular, for coming back to our committee and again offering his perspective to us. Ms. Waddell, also, thank you for coming back and offering some additional insight. With that, we'll say goodbye to our first panel and thank them again for their submissions.

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