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Standing Committee on Justice Policy

Smarter and Stronger Justice Act, 2020

1st Session
42nd Parliament

Wednesday 10 June 2020

Chair: Roman Baber
Clerk: Christopher Tyrell

Journal des débats (Hansard)

JP-17

Comité permanent de la justice

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

1re session
42e législature

Mercredi 10 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

Wednesday 10 June 2020

Mercredi 10 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 the Standing Committee on Justice Policy to order. We're here to hear submissions 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.

Good morning everyone, again, and welcome. Today's proceedings will be available on the Legislative Assembly website and on the Ontario Legislative Assembly channel.

In addition to myself, we have two more members physically present in the room. We have MPP Lindsey Park and we have MPP Madame Collard. Welcome.

We have the following members participating remotely via Zoom: MPP Will Bouma, MPP Parm Gill, MPP Morrison, MPP Gurratan Singh, MPP Tangri, MPP Yarde, MPP Nicholls and MPP Pang. We're also joined by staff from legislative research, Hansard, interpretation, and broadcast and recording.

To make sure that everyone can understand what is going on, it's important that all participants speak slowly and clearly. Please wait until I recognize you before you start to speak. Since it could take a little time for your audio and video to come on, after I recognize you, please take a brief pause before beginning. As always, all comments by members and witnesses should go through the Chair.

SUBCOMMITTEE REPORT

The Chair (Mr. Roman Baber): I have one other item to mention before we begin. The order of the House, dated June 2, 2020, gives the subcommittee the authority to determine how to proceed with public hearings. We will not need to vote on this report, but I will read it into the record to make sure that all members are aware of its contents.

Your subcommittee on committee business met on June 4, 2020, to consider the method of proceeding 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, and determined the following:

(1) That witnesses be scheduled in groups of three for each one-hour time slot, with seven minutes each for their presentations and 37 minutes for questioning for all three witnesses, divided into three rounds of five and a half minutes for each of the government and official opposition members as a group, and one round of four minutes for the independent member as a group.

(2) That witnesses be arranged into groups of three chronologically, based on the order their requests to appear were submitted.

(3) That all witnesses appear virtually by Zoom or by teleconference.

(4) That all witnesses' submissions and committee documents be distributed electronically to all members and staff of the committee.

I would like to take attendance again before I begin, to see if any additional members have joined us since the end of the pre-committee meeting who have yet to identify themselves. I do not believe we had anyone else join.

I'd also like to formally welcome Madame Collard, to congratulate her on her election and for joining our committee. Welcome.

M^me^ Lucille Collard: Thank you.

The Chair (Mr. Roman Baber): Are there any questions before we begin?

Members, I'll remind you again that in order to speak or if you want me to identify you, please raise your hand physically.

ASSOCIATION OF COMMUNITY LEGAL CLINICS OF ONTARIO

MR. AMAR BHATIA AND MS. JANET MOSHER

LUKE'S PLACE

The Chair (Mr. Roman Baber): Seeing no questions, I'll now call on our first group of presenters.

I'd like to welcome Lenny Abramowicz, the executive director of the Association of Community Legal Clinics of Ontario. I'd also like to welcome Amar Bhatia and Janet Mosher. Finally, I'd like to welcome Carol Barkwell and Pamela Cross from Luke's Place Support and Resource Centre. Welcome.

We'll now begin with Mr. Abramowicz from the Association of Community Legal Clinics of Ontario.

Mr. Abramowicz, please proceed with your seven minutes of initial remarks.

Mr. Lenny Abramowicz: Hello. Greetings to the Chair and to the committee members and to my fellow deputants. Thanks for inviting me to participate at the committee hearings today. My name is Lenny Abramowicz. I'm the executive director of the Association of Community Legal Clinics of Ontario. The association is the representative body for Ontario's 72 community legal clinics. Clinics are non-profit corporations funded by Legal Aid Ontario.

I will focus my presentation today on the legal aid aspects of Bill 161, primarily found in schedule 16, particularly those provisions that impact directly on community legal clinics.

Let me begin by saying that there are many positive aspects of Bill 161, and we commend the government for including them. However, I need to point out that there are also some serious concerns. Today I will focus on the biggest concern for community legal clinics.

Clinics were created by the Bill Davis government in the 1970s. The underlying assumption that led to the development of community legal clinics was that low-income communities know best about their own legal needs, not lawyers in office towers on Bay Street or bureaucrats in downtown Toronto. So the original clinic funding regulation brought in by Roy McMurtry and the Bill Davis government made community legal clinics accountable to legal aid for the funds they received, but made the boards of clinics responsible for the services provided to their communities.

When Ontario's legal aid system was reviewed by the Mike Harris government in the late 1990s, they recognized the strength of the community clinic model. The Attorney General at the time, Charles Harnick, expanded the clinic system and expressly enshrined in the new legislation—the Legal Aid Services Act, which is the current legislation governing legal aid in Ontario—the fact that local community legal clinics were to be rooted in their communities and that they had the obligation to determine the needs of their communities and the legal services to meet those needs. For over 45 years, this has been the model for clinic law services in Ontario.

Community clinics have provided top-quality legal services to low-income Ontarians effectively and for comparatively little cost through storefront law offices scattered right across the province. Clinics are typically the last stop for the most disadvantaged and hardest-to-serve people in our communities, with many of our clients having some form of physical or mental challenges. The clinics are valued by the communities that they serve, and the clinic system in Ontario has been studied by numerous other jurisdictions across the world and referred to as the jewel in Legal Aid Ontario's crown.

This brings us to Bill 161. Although Bill 161 maintains community legal clinics, it changes the model that has made the clinic so successful. Although it continues to recognize that local clinics have a role in determining the legal needs of their communities, it transfers the ultimate authority for determining those legal services to a central bureaucracy, to Legal Aid Ontario. Specifically, section 5(5) of schedule 16 says that Legal Aid Ontario must determine poverty law services. It's true that section 5(5)(b) states that Legal Aid Ontario should have regard to clinics in making that determination, but it shifts the ultimate decision-making to Legal Aid Ontario, and this is for the first time in the 45-year history of the clinic system. This actually turns the clinic model upside down.

Section 5 of Bill 161 appears to be based on the presumption that a group of bureaucrats in downtown Toronto know more about the service needs of people in Brantford or Durham or Barrie, or of the legal challenges being faced by the seniors or disability community than the communities themselves—and to be clear, as someone who has interacted with various large bureaucracies over my working life, not just Legal Aid Ontario, ultimately, central bureaucrats in downtown Toronto, if given this type of authority, will use it. That is simply human nature. It is not casting any aspersions on Legal Aid Ontario or the people who work there, many of whom are tremendous and care deeply about the services they provide. If they are given that type of central authority, ultimately, they will use it, sooner rather than later.

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I have asked many people why Bill 161 makes this change, and the only answer I've been given is, "What happens if a clinic goes rogue and starts providing bad services?" Well, as a first point, this assumes that it's more likely that a local clinic rooted in the community and accountable to that community is going to go rogue, as opposed to a large, central bureaucracy that's divorced from the people they serve. But let's set that issue aside for a second. Giving the central bureaucracy the power to determine the legal needs of local communities because of the potential of a clinic going rogue is like creating a police state because we are worried that a percentage of the population will engage in criminal activity. We should never build a justice system predicated on the potential negative actions of outliers. Rather, we should build the best system possible for the majority of people, and

instead focus our efforts on dealing with those who may abuse the system.

It's important to note that Legal Aid Ontario currently has many tools to deal with a clinic that it has concerns with. For example, Legal Aid Ontario receives quarterly statistical and financial reports. Clinics must submit detailed funding applications. Legal Aid Ontario has a clinic audit program that visits every single clinic in the province and reviews it from top to bottom. The Legal Aid Ontario clinic memorandum of understanding sets out a dispute resolution process that allows Legal Aid Ontario to intercede, to visit a particular clinic it has concerns with and, in fact, even put that clinic, essentially, into trusteeship.

The Chair (Mr. Roman Baber): Thirty seconds.

Mr. Lenny Abramowicz: And, ultimately, Legal Aid Ontario makes the decision whether to fund or not fund a clinic each year.

These accountability powers are not removed by Bill 161, and we have no problem with that. But we do have a problem with removing the fundamental underpinnings of the clinic model that have made it so successful over the years.

We don't believe that Ontario's communities will be benefited by transferring that authority from the local communities to a group of bureaucrats in downtown Toronto. So we would simply ask that a phrase be added to the definition of community legal clinics in section 5(5) of schedule 16 of Bill 161 making it clear it is the responsibility of local clinics to determine the legal needs and services of their communities.

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

We'll now proceed with a seven-minute statement from Amar Bhatia and Janet Mosher. You have a combined seven minutes.

Ms. Janet Mosher: Thank you very much. Honourable members, it is a pleasure to be able to present to you today. I will go first, and my colleague Professor Bhatia will follow.

The Chair (Mr. Roman Baber): Please state your name for the record.

Ms. Janet Mosher: My name is Janet Mosher. I'm an associate professor at Osgoode Hall Law School.

Our focus is on schedule 16 and community legal clinics and student legal aid societies. However, I do want to start with two points which are much broader in scope, and then follow with three points shared by myself and Professor Bhatia that relate specifically to clinics and law student service societies.

The first point relates to access to justice. The word "crisis" has been frequently invoked to describe the state of access to justice in Ontario. Legal aid has a critical role to play in addressing this crisis, and indeed, legal aid has long been understood as existing precisely to address access to justice. That is its purpose. This is clear in the current statute that provides, "The purpose of this act is to promote access to justice throughout Ontario for low-income individuals...."

In contrast, the statement of legislative purpose in section 1 of schedule 16 omits entirely access to justice. It provides, "The purpose of this act is to facilitate the establishment of a flexible and sustainable legal aid system...." Surely, the establishment of a legal aid system is not the end goal—of course, it's important, but it's not the end goal. Rather, the legal aid system is established, it exists, with a goal or purpose in mind, and that goal or purpose is to promote access to justice.

The statement of purpose in the statute matters. It's what administrators, service providers and courts turn to and rely upon when construing legislative intention; that is, in construing what your intention is by creating a statute. When they're interpreting and applying the legislation, that purpose matters enormously. The purpose also gives us the lens through which we should assess every single dimension of the bill and ask whether it's consistent with that purpose; that is, does it promote access to justice?

The second point I want to make is about required legal services. The only legal services required to be provided by the corporation under the bill are those matters where a right to state-funded legal representation exists under the charter or by statute. The provision of legal services in all other areas is not required, but discretionary. This reflects, I think, a significant retrenchment from existing government commitments made clear in section 13 of the current statute, where the corporation shall—it's obligatory—provide legal aid services in criminal, family, clinic and mental health law.

Moreover and importantly, section 15.3 of the bill shifts the financial obligation where courts order that legal services be provided. It shifts that obligation from the Attorney General of Ontario, or the crown in right of Ontario, to Legal Aid Ontario. There's a real risk here that the combined and unintended effect of shifting responsibility to Legal Aid Ontario and making the provision of services in most areas discretionary could be the substantial erosion of access to legal services in virtually all other areas of law. In other words, these provisions have the potential to deepen existing gaps and access to justice, making justice even more remote for those seeking access to stable housing, to health care, to freedom from discrimination, to custody of their children and to safety from abusive partners.

My third and final point relates to the definition of poverty law. Several years ago, I prepared a background study on poverty law for the McCamus review. Consistent across the many submissions received was a plea not to use the language of poverty law in a statute. The reason is, it was too narrowly associated with—a narrow conception of the needs of low-income individuals and disadvantaged communities as related only to housing and income support. These are important legal needs but often not the most pressing needs of particular disadvantaged communities. That's why you'll see in the current statute a broad definition of clinic law, which looks very, very different from the narrower definition of poverty law in the bill, which relates only to housing and income maintenance.

I'm going to leave it there.

The Chair (Mr. Roman Baber): Just under two minutes left.

Ms. Janet Mosher: Professor Bhatia.

Mr. Amar Bhatia: Hi. Thank you also for having us. My name is Amar Bhatia. I'm an associate professor at Osgoode Hall, and I'm here today to talk to you about schedule 16 as well.

I just want to say that I agree with the points made before me and also note that our full detailed thoughts are in the brief that we sent to appear before you. Also, that brief is signed by just shy of 40 law professors, which is no small feat—to get agreement amongst all our diverse opinions.

The main points I want to reiterate today are that you should actually keep section 39.2 of the old Legal Aid Services Act and scrap the proposed section 5.5(b) of the new act. The reason is that you should protect the ability of people who are most affected to decide their own legal needs.

As Lenny was just mentioning, these sections refer to who determines the legal needs in Ontario poverty law. The old act says it should be independent boards of directors of community clinics who determine the needs of both individuals and communities. This bill flips that script and says that the corporation—Legal Aid Ontario—will determine legal needs and only need have regard to legal aid input from the community boards. So they could actually look at what the community clinics are saying and then take no steps to meet the locally determined needs. We think that low-income Ontarians deserve better on this front, and we urge you to keep the determination of legal needs and how to effectively respond to them with communities themselves.

On the second point—and it's near and dear to me as a professor and also a former student at two law clinics—I think it's important to remember the role and partnership of law students with Legal Aid Ontario. LAO has been partnering with student legal aid service societies for more than 50 years, since 1969, and has partnerships at every Ontario law school. These SLASSes, as they're called, receive significant university resources to help do the work of providing services to low-income Ontarians through law students supervised by lawyers. They do good work—

The Chair (Mr. Roman Baber): Please conclude, Professor Bhatia.

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Mr. Amar Bhatia: Okay, thank you. I just wanted to say that it's important to remember that they do good work and they inspire people to do public-minded work, including at legal clinics, sole practitioners and even going—members of this committee, I'm sure, have been participants in clinics. So please keep the sites of this learning by protecting the clinics that benefit our whole community. Thank you.

The Chair (Mr. Roman Baber): Thank you, Professor Bhatia—and, in fact, a number of members on this committee have.

We will now proceed with Pamela Cross, legal director of Luke's Place Support and Resource Centre, for seven minutes of submissions.

Ms. Pamela Cross: Thank you for this opportunity to speak with you about this bill. Luke's

Place Support and Resource Centre, where I am a legal director, provides direct services to women in Durham region who are fleeing abuse and who are involved with family law proceedings. We also conduct research, develop resources and deliver training about intimate partner abuse and family law, and engage in law reform advocacy on the provincial and national levels.

I'd like to preface my remarks about Bill 161 by commending Legal Aid Ontario for its response to the pandemic. Obviously, this pandemic has had a huge impact on the women we serve, both in terms of their exposure to domestic violence and their ability to access courts, to keep them and their children safe. The suspension of eligibility criteria for survivors of family violence during the pandemic has meant that women in very vulnerable situations can access legal advice and legal representation, regardless of the legal issue they're dealing with or their financial situation. This is extremely important, and it's much appreciated.

Not surprisingly, Luke's Place was very interested to see Bill 161 last fall. It will, as of course you all know, amend more than 20 existing pieces of legislation. Of particular concern to us and many other advocates for women who are fleeing abuse are the proposed revisions to the Legal Aid Services Act of 1998. It's certainly the case that this legislation is long overdue for updating, given that it hasn't been amended for more than 20 years. However, the changes proposed in Bill 161 could threaten the already fragile access to justice provided by Legal Aid Ontario to low-income Ontarians generally, and in particular, because of the focus of our work, to women who are leaving abusive relationships.

We think these threats are posed by two proposed changes in particular. First, the mandate of Legal Aid Ontario itself: Under Bill 161, the mandate of legal aid would change from what it is, "to promote access to justice throughout Ontario for low-income individuals," to, as Janet has already said, "to facilitate the establishment of a flexible and sustainable legal aid system that provides effective and high-quality legal aid services throughout Ontario in a client-focused and accountable manner while ensuring value for money."

This change in language indicates a significant shift in what the government expects of Legal Aid Ontario. The removal of promoting access to justice and of low-income individuals in its mandate cuts Legal Aid Ontario loose from what has been central to its operations since its inception, when it replaced the Ontario Legal Aid Plan: a commitment to assisting vulnerable Ontarians to access justice, primarily by funding legal representation for those who cannot afford to pay for a lawyer themselves. The new mandate, rather than retaining this focus, gives equal value to the delivery of legal aid services and cost. There can be little doubt that when these two values conflict—

and they will—cost will trump delivery of legal services again and again.

Our second concern is the language related to delivery of legal services. Section 13.1 of the current legislation states, "The corporation shall provide legal aid services in the areas of criminal law, family law, clinic law and mental health law." Bill 161—again, I know Janet has already brought this up—will change this word in section 4 to "may": "The corporation may, subject to the regulations, provide" legal services in the following areas of law etc. This new permissive, rather than mandatory, language opens the door to the possibility that Legal Aid Ontario could reduce the provision of legal services in favour of providing less expensive services that fall short of legal representation.

Ontario's Domestic Violence Death Review Committee has found that victims of intimate partner abuse are at highest risk of lethal violence during the separation process. Non-lethal forms of abuse also continue to escalate post-separation. It's during this time that many women engage with the family and criminal legal systems, where they're often subjected to legal bullying by their former partner. Women in this vulnerable position must have access to full legal representation to ensure that they understand their legal rights and have a meaningful opportunity to advance them. Ontario's Family Court support workers provide critical support to women as they navigate the family law and court process, but this program cannot serve as an excuse to cut back on funding for full legal representation in cases where family violence has been asserted.

LAO has made a serious commitment to increasing its services and programs for victims of domestic violence through its domestic violence strategy, and it's to be commended for this. However, that implementation is in its early days, and Bill 161 could slow and possibly halt further progress. Coupled with a 30% cut to LAO's budget imposed in last year's provincial budget, the provisions of Bill 161 relating to the Legal Aid Services Act may well jeopardize the safety and well-being of women and children fleeing abuse, thereby denying them access to justice.

Thanks for this opportunity to speak. I'm happy to answer any questions you may have.

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

We'll now proceed with the first round of questioning, with five and half minutes for government members. Please remember to raise your hand if you wish for me to recognize you.

Mrs. Tangri.

Mrs. Nina Tangri: Good morning, everyone. Thank you for joining us.

My first question is for Mr. Abramowicz. The Attorney General has been very public in his strong support of the important work that legal clinics do for Ontarians who are faced with a variety of legal needs. In the new Legal Aid Services Act, 2020, we have recognized that foundational role as something that Legal Aid Ontario must have regard to when it comes to its decisions with respect to providing legal aid services in Ontario's communities. Can you tell us why it is important to have that critical role continue to be recognized in the legislation?

Mr. Lenny Abramowicz: Thank you for the question. Just before I answer, I wanted to point out that the association has provided a written brief which touches on this and many other topics, many of them similar to the issues raised by my co-presenters.

You're absolutely right; the Attorney General has made numerous public statements in support of community clinics and the important work they do, and we recognize and appreciate that. We also recognize the fact, as I've mentioned in my deputation, that there are aspects of Bill 161 that expressly enshrine those into legislation; specifically, the recognition of community legal clinics, independent community legal clinics and poverty law—although as has been pointed out previously, the definition, unfortunately, of poverty law has been narrowed, I would hope, mistakenly or inadvertently. But yes, there is recognition of community legal clinics in the statute, and this is greatly appreciated, and we commend the government and the Attorney General for that.

I do want to point out—and this is picking up on your question—that we believe, likely inadvertently, the language of Bill 161 has shifted the balance, has turned things upside down a little bit, in that there's a recognition of clinics and there are public statements in support of clinics, but then at the same time the wording in section 5(5)(b) makes clinics subservient to Legal Aid Ontario. Once again, like my colleagues, I commend Legal Aid Ontario for their hard work and for the people there who work to support access to justice. But the community clinic model, as you pointed out, is one where clinics are rooted in their community and serve their community, and we don't want Bill 161 to inadvertently create a situation where that great work and the bond between clinics and their communities is broken, and then it's left for people in downtown Toronto to determine the legal needs of communities around the province, whether it's in Kenora, Renfrew or wherever that may be. Thanks.

1030

The Chair (Mr. Roman Baber): Thank you. Back to Ms. Tangri.

Mrs. Nina Tangri: Just as a follow-up to that: The Attorney General has also been very firm in his commitment to ensuring Legal Aid Ontario will continue to focus on providing access to justice to low-income Ontarians. We've heard from a number of stakeholders that the new legislation should specifically refer to these principles. Can you comment on your perspective on the need to include these concepts in the legislation itself?

Mr. Lenny Abramowicz: If that's directed to me, yes. Absolutely I agree with that, and I've heard those comments across the province.

I will say that part of it—I pick up on the comments of my colleagues before and talk about the importance in legislative interpretation, particularly when the previous legislation had those comments, like "disadvantaged

communities," "access to justice." When the legislation is ultimately interpreted by courts or even by the boards of directors of clinics, they look to those phrases to make decisions about the services that will be provided. So that's one reason.

But I'll mention another reason, which is perhaps a bit more ephemeral; and maybe those of us who are lawyers may scoff at it, but it is important. It is the inclusion of those concepts, like disadvantaged communities, like access to justice for low-income communities—it sends a message. It sends a message from the province of Ontario to the people of Ontario that they believe in a legal aid system that is accessible and access to justice that is not just for the rich, not just for the people who can afford the Bay Street lawyers, but those who have to rely on legal aid. That message has been removed, partially, from the bill—again, I'm assuming inadvertently. Our hope is that this committee will play an important role in ensuring that those concepts are returned so that the people of Ontario will understand that it is not the intention of this government to remove them from access to justice.

Thank you for the opportunity to speak to that.

Mrs. Nina Tangri: Thank you very much.

The Chair (Mr. Roman Baber): Thank you, Mr. Abramowicz. With 10 seconds remaining for the government, I propose that we now move to the official opposition for its five and a half minutes of questioning. I recognize MPP Singh.

Mr. Gurratan Singh: Thank you to all the individuals who presented today. I know this model is a little bit different than before. It was our hope that we would have one individual speak at a time, as opposed to three. That was something that we had pushed for but, ultimately, because the constraints of time towards debating that position would result in losing a day, we had to accept this model. I hope that we're able to still get your fulsome thoughts and opinions out today, because it is a different model.

My question is to Janet Mosher, specifically with respect to the change in the mandate of this new piece of legislation. We've talked about the spirit of the mandate being changed and removing "disadvantaged" and "low-income," but pragmatically in the area of law and in the application of this, where can you see this actually impacting Ontarians, and how could it negatively impact Ontarians with respect to access to justice?

Ms. Janet Mosher: Thank you very much for the question.

Partly what I was addressing was the statement of purpose in the statute, and I think other speakers have addressed this as well. Core service providers, administrators—when we're deciding what our obligations are under the statute, we are guided very much by the statement of purpose. So where the statement of purpose tells us, "This is about access to justice and it's about accessing justice for low-income individuals and disadvantaged communities," that's signalling very important things about how we're going to approach and apply that legislation.

I think the signals about access to justice are really important, but I also think the signals about disadvantaged communities and low-income individuals are really important. A central feature of the model of the community clinics that Lenny has alluded to is that embeddedness within community. We have a whole variety of different ways in which communities are conceptualized and operationalized within Legal Aid Ontario, but very importantly, services are identified from within those communities.

Also, the model for delivering the legal services is structured in a way to be responsive to those particular communities. So the delivery model might look very different in parts of rural Ontario, for example, than the delivery model for one of the clinics that has a province-wide mandate to respond to the needs of people with disabilities.

It's important to think about disadvantaged communities and the particular legal needs and the kinds of models that are responsive to them. I think those are all really important signals in the statement of purpose, and as I said as well, the statement of purpose should be our guide for everything else in the act—in asking, do each of these individual provisions in the act help us make good on that purpose and that commitment?

Thank you for the question.

Mr. Gurratan Singh: Thank you very much.

The Chair (Mr. Roman Baber): I'll now recognize Ms. Morrison.

Ms. Suze Morrison: My question is directed at Pamela Cross. You mentioned in your remarks that you're concerned about the language change in Bill 161 from "may" to "shall" in the provision of legal services that could lay the groundwork for the reduction of legal services to the most vulnerable folks in our communities—specifically, in the instances that you mentioned, women leaving intimate partner violence; and these changes are coupled with the 30% cut to legal aid that you mentioned, alongside the 33% cut to the planned increases that were supposed to have gone to rape crisis centres last year, as well as the cancellation of the provincial Roundtable on Violence Against Women.

Is your organization concerned about how all of these cuts that will impact women will compound? What kind of picture does this paint for the future of women in this province trying to seek justice and safely exit violent situations?

Ms. Pamela Cross: Thank you very much for that question.

Just to clarify for the record, it's the change in language from "shall" to "may," not from "may" to "shall" that's of concern. If it was going the other way, I'd be a happier person.

To answer the substantive part of your question, yes, we are very concerned that these cuts and legislative changes are going to build on one another and are going to compound. We know already that it is extremely difficult for a woman to make the decision to leave an abusive relationship. If there are children, she is going to have to

engage with the Family Court system. There may or may not be criminal proceedings under way.

Our work at Luke's Place is focused on family law, so I'll restrict my comments to that venue. We work with many women at Luke's Place and across the province who are unable to access a lawyer either because they don't fit the financial eligibility criteria or because their legal issue isn't one that legal aid covers as presently mandated. Further to that, not all lawyers accept legal aid certificates, so women in small communities and in remote parts of the province have additional barriers to being able to find a lawyer. Then ideally, it would be a lawyer who understands something about domestic violence, but that's a conversation, probably, for a different committee hearing.

I think that with the change in mandate from "shall" to "may," all of those issues I've just identified, coupled with what you've said—all of that together is going to make it very difficult for women to turn to the law with confidence that their safety will be taken into account.

The Chair (Mr. Roman Baber): Thank you very much. We'll now proceed with four minutes of questioning by the independent member.

M^me^ Lucille Collard: My question is for Mr. Abramowicz. You've talked about the importance of local expertise. Could you give us some examples as to how community clinics have used their local expertise to help shape the provision of their legal services previously?

Mr. Lenny Abramowicz: Yes, thank you very much for that question. [*Inaudible*] at the essence of my presentation and of the clinic model. As I mentioned, clinics were predicated on the concept that they have to be rooted in their communities and that they are constantly in connection with their communities. So I, in my job, have had the pleasure of being able to travel across the province and visit clinics, speak to their boards, speak to staff and speak to the communities and notice that although clinics share the same model, the same fundamentals of independent community-based organizations, they're very different in the services that they provide.

For example, I was the executive director and staff lawyer at a community clinic in the east side of downtown Toronto. We dealt with St. James Town, Regent Park, Moss Park. Those were our priority areas. That's where the bulk of our work came from. We did a lot of work in the area of public housing and building relationships with public housing. A clinic in a part of the province of Ontario that has little to no public housing will not do that type of work. Instead, they may be in a community—let's say Sault Ste. Marie, the Algoma clinic—where they may deal with a lot of people who are injured workers and who have issues around employment or disability or problems in the workplace, so that will be where they focus their efforts.

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Similarly, I know that there are clinics that, for example, don't do a lot of injured worker law because there's a department of the Office of the Worker Adviser situated in their catchment area in their community, so it would be a duplication of resources for them to do that type of work. That clinic may work on dealing with domestic workers, because that's a big issue in their community, or migrant farm workers, because that's an issue in their community.

Of course, I'll mention—you're probably all aware of this—the fact that for most of the clinics that exist up in the north, a large part of the work they do is with Indigenous communities and the legal issues of the low-income Indigenous population that they serve, something that a clinic in downtown Toronto would not necessarily engage—or they may engage with Indigenous people, but obviously not with on-reserve types of issues.

These are just, honestly—and thanks for the question, because I could go on for the next three days of your committee hearings and give you examples of how clinics across the province are structured specifically to provide the services of those communities, and that is the model. That's not by accident; that is the model. And the biggest concern that we have with this legislation is it misses that. It instead assumes that a bureaucrat in downtown Toronto would be able to make a determination for Kenora and for Renfrew and for downtown Toronto and for Brantford and for Durham—because we all know that when that happens, what happens is homogenization and there's a one-size-fits-all, and that will not meet the needs of those communities, as 45 years of experience has shown us.

I hope that answers your question.

The Chair (Mr. Roman Baber): Madame Collard, if you could conclude—10 seconds.

M^me^ Lucille Collard: I just want to thank you for your very passionate and detailed answer. I think it helps the committee understand the reality.

Mr. Lenny Abramowicz: Thank you very much.

The Chair (Mr. Roman Baber): We'll now proceed with five and a half minutes of government questions. Mr. Bouma.

Mr. Will Bouma: Thank you, Mr. Chair. Through you, I would like to just ask a question of Mr. Bhatia or Ms. Mosher, because I'm very curious to hear what your opinion is, being from Osgoode Hall.

Over the last 15 years, the funding for legal aid in Ontario has increased exponentially. Again, I don't like to talk necessarily about the money, but the reality is that we've seen an exponential increase in cost with Legal Aid Ontario, and we haven't seen that commensurate improvement in outcomes.

Past consultations and reports, including the Auditor General's 2018 report, have identified a need to improve the system. Stakeholders, including the Association of Community Legal Clinics of Ontario, the Ontario Paralegal Association and the CEO of the LAO, have all said that the changes in Bill 161 modernize the system and put the focus back on client needs.

Don't you think that we need modernization of the legal aid system, particularly in light of the challenges and impacts raised by the recent COVID-19 pandemic and how it has affected the justice system?

I'm not sure who wants to take it.

Mr. Amar Bhatia: Would you like me to start, Janet?

Interjection.

Mr. Amar Bhatia: Okay. Thank you for the question, and, again, thanks for having us.

I think you raised a lot of important points. Certainly, no one before the introduction of this bill thought that the legal aid system was perfect, by any means. I would say, though, that there are a lot of questions about evaluating the impact of legal aid services and their provision. That's something, at least from my own research, that has not really been adequately addressed. So before jumping into modernizing, it might be better to see exactly what the impact of the services are. One example could be in the area of community development, law reform, more systemic approaches in legal aid. Rather than counting the number of clients served, there could be more emphasis on seeing the impact of these changes.

In the context of COVID-19, particularly, there has been a halt on evictions for now. Suppose that all of these tenants are then brought before the board, and you could have hundreds and thousands of cases—that might be a very heavy burden on the system. It might not provide access to justice for those tenants. There might be better, more systemic ways to address these issues, but I don't know that the changes in the current bill will help to do that.

Looking at the issue of the determination of legal needs: The bill also gets rid of funding reconsiderations. So if people in communities want to voice their dissent for how legal aid services are being provided, they no longer have the chance to seek reconsideration through the clinics. They also don't have the chance to vote out these independent boards of community clinics, because now the legal aid determinations will be with the corporation. The bill also requires that the board of Legal Aid Ontario no longer have knowledge and expertise in poverty law.

So I think it's important to modernize the system, but to do it in a way that's informed by those who have experience and have some evidence. The changes right now are moving away from having that evidence and experience, from the independent clinic boards—removing that knowledge from the legal aid board, and then removing the chance to take second looks at funding applications.

Definitely, a lot more work needs to be done assessing the impact of community lawyering through community clinics. I think if we took some time to slow down a little bit, there is definitely a need to modernize.

The Chair (Mr. Roman Baber): Mr. Bouma.

Mr. Will Bouma: As a follow-up: Updating how Legal Aid Ontario works with its service providers to provide these vital services in order to address a changing justice sector is one of our government's key objectives. Can you please speak to how modernizing Legal Aid Ontario is important to supporting how your organization delivers justice services in Ontario?

Mr. Amar Bhatia: Janet, would you like to take that one?

Ms. Janet Mosher: Sorry, I wasn't quite clear on who the question was directed to.

Mr. Will Bouma: I'm sorry; it's to both of you. So you can take a turn.

Ms. Janet Mosher: Picking up from where my colleague left off around modernization of the justice system: Of course, nobody wants to not be modern, but I think we really have to unpack carefully, what does that mean? I'm going to connect this to something that Pamela Cross raised earlier. I do think there are lots and lots of opportunities for innovations that draw on, for example, technologies, and some of those can be very beneficial to particular communities; for example, the ability of a woman to access a protection order electronically rather than in person.

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

Ms. Janet Mosher: Those are important kinds of innovations. I think very often the locus or the place where those ideas are generated comes from local communities and from service providers who have first-hand experience, and where Legal Aid Ontario is a fabulous partner in helping to pursue innovative projects.

The Chair (Mr. Roman Baber): I apologize, Professor Mosher. Unfortunately, the time for government questions has expired.

We'll now proceed with MPP Yarde.

Mr. Kevin Yarde: Thank you, everyone, for joining us today.

The Black Legal Action Centre does some phenomenal work in Ontario. I'll give this question to Janet: How do you feel that these changes will affect this clinic in terms of the great work that they're doing?

Ms. Janet Mosher: That's a really important question, and I think it ties in with much of the conversation that we've had earlier today. Yes, it's a clinic that does amazing work. It's a clinic that is deeply connected to the community that it serves, and that deep connection gives it the understanding of what the central legal issues or the legal needs are and how to be really responsive to those particular legal issues. I think it signals yet again why it's so important that decision-making around legal needs and how to respond to them be located within the clinics themselves. It tells us again why clinic law is so important and why it's also important to retain in the legislation this notion of disadvantaged communities. Those communities are enormously varied in terms of their legal needs and the kinds of responses that are going to most meaningfully respond to those needs.

1050

Again, I think your concrete example points very, very tellingly to what's important in terms of the kinds of amendments we need to see in this bill. So thank you.

The Chair (Mr. Roman Baber): Thank you. Mr. Singh, with three and a half minutes remaining.

Mr. Gurratan Singh: Thank you. My question is for Janet and Professor Bhatia. We agree that modernization is important, but with respect to these changes, I'm going to ask you some pointed questions. Would you agree that the change in purpose and the removal of "low-income" and "access to justice" would negatively impact low-income Ontarians' ability to access justice?

Ms. Janet Mosher: The short answer is yes, absolutely, because—

Mr. Gurratan Singh: I'm going to do a few of these, just to get it all out, okay?

Would you agree that these changes would negatively impact women seeking support in a situation of domestic violence from those legal aid clinics?

Ms. Janet Mosher: Yes.

Mr. Gurratan Singh: Would you agree that these changes would negatively impact racialized communities who are disadvantaged from accessing justice in our province with respect to legal aid?

Ms. Janet Mosher: Yes.

Mr. Gurratan Singh: Would you agree that these changes are ultimately inconsistent with the spirit of legal aid, which is to provide access to justice for vulnerable communities?

Ms. Janet Mosher: Yes.

Mr. Gurratan Singh: Professor Bhatia, would you agree with all those yeses that were provided?

I believe you're muted, Professor Bhatia. I don't want to lose time, so Janet, can you expand on how this will actually prohibit that access to justice?

Ms. Janet Mosher: Very briefly—and I think we've covered some of these key points before—removing that from the mandate gives us a whole different interpretive frame for approaching the legislation itself. Recognizing that "disadvantaged communities" is a concept and a structural frame for the legislation is significant. Without that, what we risk—and I think this goes back to Pam's point—is that we have service provision that kind of looks like a machine. People are able to access routinized, mechanistic forms of legal service that are not responsive to the needs they have based on their own experiences of belonging to particular vulnerable groups in society.

Mr. Gurratan Singh: Since I see Professor Bhatia unmuted—would you agree with all those statements Janet had agreed to earlier there?

Mr. Amar Bhatia: Yes, I would agree.

Mr. Gurratan Singh: Okay. In the dying seconds I believe—how much remaining?

The Chair (Mr. Roman Baber): One minute in this round.

Mr. Gurratan Singh: One minute. Okay, I have more time, then.

Specifically with respect to access to justice for Black communities across Ontario, Mr. Bhatia, since I have you unmuted—would you agree that this would specifically negatively impact Black Ontarians' ability to access justice?

Mr. Amar Bhatia: Yes, I believe it would, and I think there's a fear that if the great structural changes here are centralizing more discretion with the Legal Aid corporation, a lot more devil could be in the details in terms of the regulations, in terms of the policy and operational decisions that won't come before committees like this.

Mr. Gurratan Singh: And ultimately, these changes would result in a legal aid system that would provide less support to low-income and vulnerable Ontarians?

Mr. Amar Bhatia: I believe so, yes.

Mr. Gurratan Singh: Could you expand on that in the dying seconds?

Mr. Amar Bhatia: For example, if people are talking about moving away from criminalizing low-income communities, then you have to talk about community development. If we're cutting these services in these legal aid areas, then I'm not sure how that's going to happen.

The Chair (Mr. Roman Baber): Thank you. We'll now move back to the government with five and a half minutes of questions. MPP Gill.

Mr. Parm Gill: Thank you, Chair. I appreciate the opportunity.

First of all, just before I begin my questioning, I wanted to make a comment in response to MPP Singh's comment in terms of the platform that we're using right now, in terms of having three witnesses appear before the committee instead of one at a time. I do want to say that this format does allow a lot more presenters to appear before the committee. As we've seen, the number has grown significantly. Our government does believe in hearing from a wide variety of stakeholders and individual Ontarians who want to provide information, so we can have as comprehensive as possible consultation and studies on some of these pieces of legislation, especially legislation of this magnitude. I just wanted to leave that there.

My question I'm going to ask Ms. Cross is similar to what my colleague MPP Bouma asked some of the other presenters. Over the last 15 years, funding for Legal Aid Ontario increased significantly, with no improvements, really, in terms of outcomes. Past consultation reports, including the Auditor General's annual report in 2018, have identified the need to improve this system. Stakeholders, including the Association of Community Legal Clinics of Ontario, the Ontario Paralegal Association and others, have all said that changes in Bill 161 modernize the system and put the focus back on clients' needs. Don't you think we need modernization of the legal aid system, particularly in light of the challenges that we're currently facing to deal with COVID-19 and how it has affected the justice sector in general?

Ms. Pamela Cross: Of course we need modernization, but we need modernization after careful thought and consideration, not modernization that's done hastily. I would say—not so specifically with respect to Bill 161, but generally with how the courts have been operating for the past few months—hats off to everybody who has made a system "work" in very complicated and difficult times. Does that mean that what we've managed to make work in a crisis should be what we consider as the desired new normal? Absolutely not.

But I really want to go back to where you started your question. I would disagree with the statement that despite the additional funding for Legal Aid Ontario, there have not been any improvements in outcomes. I can tell you without a shadow of a doubt that there is not a single woman I have worked with who has not had a better outcome in the Family Court System when she has been represented than the women I work with who do not have

legal representation as they make their way through that system.

Are there other problems? Sure, there are. There are problems with the law. That's not what we're here to talk about today. I'd love to see the Children's Law Reform Act rewritten, for example. Do we need to see better community supports for those women so that they can get access to affordable and safe housing? Absolutely. But there is not a shadow of a doubt that having legal representation, especially when you've left an abusive relationship, when you don't have a whole lot of self-esteem or confidence, when you are still terrified of your partner—because as I said in my remarks, he is most likely to kill you as you leave. When he engages in legal bullying, there is not any doubt at all that her outcome will be better when she has a lawyer than when she doesn't. Any changes to the Legal Aid Services Act that make any of that already-too-limited availability less certain is not a good thing.

Mr. Parm Gill: Thank you. Do we have any time left, Mr. Chair?

The Chair (Mr. Roman Baber): I do have a minute and a half left. MPP Park also sought to add to the conversation.

Mr. Parm Gill: Sure. She can go ahead.

Ms. Lindsey Park: This is back to Pamela Cross. I want to thank you for the work you've done during the COVID-19 pandemic at Luke's Place. Your organization has really stepped up during this time, like so many organizations have across the province. On behalf of the committee and the government of Ontario, I want to thank you for the work you're doing.

I couldn't agree with you more when you commented that low-income Ontarians, women fleeing family violence should receive service. That does not change with this act, and that has not changed since we formed government. In fact, the most comprehensive certificate coverage in family law exists for women fleeing domestic violence, and that is important, that that continues.

On top of that, we know that within family law—you and I have had discussions about this in the past—full representation is not needed for everyone. Sometimes people can benefit from 20 minutes of summary advice that's going to direct them to the right community services, whether that's mediation or another alternative dispute resolution mechanism. And we've actually expanded the range of services that legal aid is encouraged to provide through this act, specifically through section 3, including mentioning specifically "unbundled services."

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Can you just comment specifically on the importance of that?

The Chair (Mr. Roman Baber): My apologies; unfortunately, the time for questioning is up. However, the witness may attempt to answer the question subsequently if she wishes.

We'll now move back to the official opposition for five and a half minutes of questioning. Mr. Singh.

Mr. Gurratan Singh: Just to follow up with that previous question: The previous Conservative MPP— my apologies; the name fails me—stated that the protection of women does not change with the changes to this act. My question is to Pamela. Would you agree that that is an incorrect assertion and that the changes to this act do make women more vulnerable in situations of violence?

Ms. Pamela Cross: Absolutely. The changes have the potential to do that because what has been mandatory becomes optional.

I don't want to repeat what all of us have already said this morning; I do want to comment on Ms. Park's comment. Unbundled legal services are certainly an option that's important for Ontarians to have. They have a unique challenge in situations of domestic violence that I would love the opportunity to speak with the committee about, perhaps at another time.

Too often women are told to turn to mediation, as opposed to litigating a family court case. Now, going to court doesn't mean 100% they're going to get the outcome that they need, that they deserve and that's in the best interest of their children, but mediation can be so unsafe for somebody whose partner is abusive, who's threatening her in ways that the mediator isn't even necessarily able to understand or see. And certainly as we talk about modernization, which always seems to mean increased use of technology, some of the disadvantages of mediation can become even greater. So I really beg to differ quite significantly with the way in which Ms. Park described the direction that legal services are moving in Ontario and the impact that they have on women fleeing abuse.

Mr. Gurratan Singh: Would you also agree with the assertion that modernization can be done with respect to services and legal aid without damaging and hurting Ontarians' ability to access justice?

Ms. Pamela Cross: Not only can it be, it must be.

Mr. Gurratan Singh: Exactly. And as I asked a similar delegate in this committee hearing, would you agree that the changes put forward not only put vulnerable women at greater risk, but further, put racialized communities, disadvantaged communities and Black Ontarians at greater risk in their ability to access justice?

Ms. Pamela Cross: Absolutely, and in an intersectional way, so that the increased risk builds one on another in terms of the various marginalizations that many Ontarians are dealing with in their daily lives.

The Chair (Mr. Roman Baber): Mr. Yarde for the three minutes remaining.

Mr. Kevin Yarde: My question is for Janet Mosher. I'll continue along the same line as what MPP Singh was mentioning. Would you believe that if this bill is passed, it would reduce the areas of law that clinics can actually work in?

Ms. Janet Mosher: I think that's an absolute possibility given the way in which the act is presently structured. As I briefly mentioned in my opening remarks, poverty law right now is defined only to include income assistance and housing—that's it. And clinics are recognized as having a foundational role in the provision of poverty law. That means they're recognized as having a role in providing assistance related to income support and housing.

As you've heard from other speakers, the work and the kinds of legal needs that clinics do around the province is much more capacious. There are a huge range of legal needs from different disadvantaged communities. So as presently structured—and maybe this is unintentional—what it does is it essentially limits the ability of clinics to work only in those narrow areas of law and in that way it hamstrings the ability of clinics to respond to their particular communities.

The Chair (Mr. Roman Baber): Back to you, Mr. Yarde, with a minute and a half remaining.

Mr. Kevin Yarde: So would you say it endangers their funding, this bill?

Ms. Janet Mosher: Yes, I do think it endangers their funding. Moreover, schedule 15 provides that all agreements between Legal Aid Ontario and clinics, and Legal Aid Ontario and SLASS come to an end. There is a six-month period to come up with new agreements, and it simply provides that LAO may enter into conversations about new agreements. That leaves everything extraordinarily uncertain about the future funding for clinics.

Mr. Kevin Yarde: Okay. Thank you.

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

Mr. Gurratan Singh: My question is to Lenny. Just to add on to the question I put toward others: Would you agree with the assertion that the changes with respect to legal aid that are proposed in this piece of legislation would negatively impact racialized, Black Ontarians, women in violent situations and their ability to access justice?

The Chair (Mr. Roman Baber): Twenty seconds, Mr. Abramowicz.

Mr. Lenny Abramowicz: I can quickly say yes, it absolutely creates potential for that.

Mr. Gurratan Singh: And in the dying seconds, could you expand on how?

Mr. Lenny Abramowicz: Sure. As Janet just referred to, the limited definition of poverty law, the lack of a reference to disadvantaged communities and particularly the removal of the ability of local clinics to determine the local needs will all limit the possibility of clinics to be able to do work in the areas that you've identified.

Mr. Gurratan Singh: Thank you very much, Mr. Abramowicz.

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

That concludes our first panel for the day. As a reminder, the deadline to send in any written submissions is this Friday at 6 p.m. I want to thank our first group of presenters.

LAW SOCIETY OF ONTARIO

The Chair (Mr. Roman Baber): Now I'd like to welcome our second panel for the day. From the Law Society of Ontario, treasurer Malcolm Mercer and executive director of external relations and communications, Ms. Sheena Weir. Welcome to the Standing Committee on Justice Policy, and thank you for appearing by Zoom today. You will have a collective seven minutes for your opening statements, followed by questions from government, opposition and our independent member. You may begin by stating your name for the record.

Mr. Malcolm Mercer: Thank you for this opportunity to speak to you on behalf of the Law Society of Ontario. My name is Malcolm Mercer. I'm the treasurer of the Law Society. Joining me is Sheena Weir. She is the law society's executive director of external relations and communications.

Le Barreau a l'obligation de protéger l'intérêt public, de maintenir et de faire avancer la cause de la justice et la primauté du droit, de faciliter l'accès à la justice pour la population ontarienne et d'agir de façon opportune, ouverte et efficiente.

As I expressed when this bill was first introduced, the law society welcomes changes to the Law Society Act. These amendments are important and will assist us in our work. We also support, in principle, proposed amendments to the Legal Aid Services Act.

The law society would encourage your committee to consider modest changes to the Legal Aid Services Act. One of the provisions provides that the law society may appoint three to five members of the board, which may be up to 11 members. Depending on how that is read and applied, one could end up with different results; but we believe the intention and the best course is that the law society appointees to the LAO board are proportionate to the board as a whole. We recommend and submit that that proportionality should be made clear.

The second point I would make with respect to the Legal Aid Services Act is with respect to the consultation policy, which you'll see in section 46. We consider it important that the policy be respectful of the expertise of key justice stakeholders and in particular encourage ongoing engagement with the Alliance for Sustainable Legal Aid, which represents a cross-section of lawyer organizations whose members deliver legal aid services.

Related to that, we think it important that there be a meaningful consultation policy that includes or ultimately results in an extension of the bylaw review period. We think that this consultation with stakeholders needs to be robust, and we think it needs to have appropriate timelines when bylaws or rules are being considered, and that stakeholders need to know when things are happening and have a chance to respond. All of these have been expanded on in our written submission that is before you.

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Nous sommes convaincus que ces modifications visent à aider les utilisateurs du système de justice, et les autres partenaires devront s'assurer que la mise en oeuvre atteigne cet objectif.

I would encourage the minister to maintain a significant interest in the health and sustainability of legal aid services in the province—a feat always assisted, I must add, through enhanced funding.

In addition to my comments on legal aid, we support the important changes to the Law Society Act—I'll

mention two. The first is firm regulation. The history of legal regulation through the law society is focused on individual lawyers, individual licensees. We think it's important to focus, as well, on the firms in which people practise. That will allow us to distinguish between types of firms and determine the appropriate regulation for practices of all sizes.

As well, the proposed amendments regarding disclosure of information will provide greater clarity about the law society's ability to disclose information about complaints and investigations, and enhance the ability to be transparent and accountable.

Ceci, combiné aux améliorations proposées à nos procès disciplinaires, nous aidera à travailler dans l'intérêt du public.

Taken together, these changes greatly reduce regulatory burden and use of resources, particularly in cases where the lawyer or paralegal licensee is unresponsive.

We thank the government for its continued partnership in augmenting our regulatory tool kit. We look forward to working with the province and our stakeholders on the implementation of these amendments.

We are pleased to take any questions that you may have. Thank you.

The Chair (Mr. Roman Baber): Thank you very much. For brief parts of your submission, MPP Yarde had some difficulty hearing you. I would just ask members, when they no longer need interpretation, to turn off the interpretation button so there is no interference coming from the Legislative Assembly within the direct feed that they have from Zoom.

We will now proceed with five and a half minutes of questioning by the official opposition. MPP Singh.

Mr. Gurratan Singh: Thank you very much for your presentation. I can direct a question to you and to Sheena Weir—you're collectively together on this; correct?

The Chair (Mr. Roman Baber): Mr. Singh, they are appearing as one entity.

Mr. Gurratan Singh: Okay. We've heard a lot of discussion about the removal of "access to justice" for low-income Ontarians from the proposed legislation. I want to get your thoughts on that. My question is to both Sheena Weir and Malcolm Mercer.

Mr. Malcolm Mercer: We would hope that the result, irrespective of whether the words are in or not, would not make a practical difference in the end. That's our hope. But we consider that it would be better to include those words as part of the mandate of legal aid in Ontario.

Mr. Gurratan Singh: With respect to this idea of hope as legislation—we understand that the purpose of legislation is that we don't have to leave anything up to hope; that by having terms clearly articulated within legislation, it ensures that that protection is enshrined within it.

Would you agree that access to justice for low-income Ontarians should be enshrined within legal aid legislation?

Mr. Malcolm Mercer: As I said, we consider that it would be better that they were.

Mr. Gurratan Singh: Would you consider that the changes to access to justice for low-income Ontarians would potentially have the impact of decreasing access to justice for those communities?

Mr. Malcolm Mercer: Well, the difficulty with the question of what potentially may happen is that one can never be certain, and that's why I guess you take the view that it's better to be explicit. We are hopeful that it won't make a difference, but depending on how matters are administered, obviously it's possible it could make a difference, and that's why we support the inclusion of the words.

Mr. Gurratan Singh: I believe my colleague had a question.

MPP Morrison.

Ms. Suze Morrison: My question is to Mr. Mercer. I know in your comments, you raised concerns about the changes to the board appointment process. Can you just elaborate a little bit more on your concerns there, for the committee?

Mr. Malcolm Mercer: Certainly. The board, under the amendment that's currently before the committee, is to have a board of up to 11 members and the law society appointees are between three and five. It would appear clear that the intent is if there's a bigger board, there would be more law society appointees; if there's a smaller board, there would be fewer. But that's not explicitly said. One could theoretically have a board of 11 but only three law society appointees as opposed to the five. We think it is important to maintain reasonable independence of legal aid, that the law society is an independent participant and be able, if the board is 11, to appoint 5; if it's a smaller board, to appoint fewer.

Ms. Suze Morrison: Where would the bulk of those board appointments come from, of the remaining ones that are not from the law society?

Mr. Malcolm Mercer: Well, those are the government appointments. I'd have to go to the specific provision. I know what we do. It's harder for me to give you clarity as to what would happen through the government. The intent of the board is to have a balance between government appointees and independent appointees through the law society and thereby to have good representation and a range of skills and perspectives.

Ms. Suze Morrison: My interpretation of Bill 161 is that the changes in the board appointment process remove certain requirements for government-appointed board members—that the government could appoint folks who have no experience in things like poverty law or legal aid. Are you concerned about the potential expertise because those requirements are no longer explicitly stated in those government-appointed members?

Mr. Malcolm Mercer: It's always important for any board to have the right skill sets and the right perspectives. With the law society's appointees, we take care to solicit appointments, to look at their contributions. But I guess what I would say is, just as it's important to have perspectives, whether it is from the certificate side or from the clinic side or from the consumer's—people who need legal aid—it's also important for a functioning board to have certain expertise. We would want to make sure that a

good board had accounting expertise, financial expertise, human resources expertise.

I think it's a dangerous path to think that you can micromanage exactly what skills and perspectives are needed on a board. What will be needed today may not be needed in another context or another time. So you're right, there is always the risk of taking away constraint, but you may not have those perspectives brought at the same time in the same way. But if you're looking at it—

The Chair (Mr. Roman Baber): Thank you, Treasurer Mercer. I also noticed that Ms. Weir had her hand raised.

I apologize that we weren't able to get to you during this round of opposition questions.

Ms. Sheena Weir: That's okay.

The Chair (Mr. Roman Baber): However, there will be an opportunity to come back to you again.

We'll now proceed with five and a half minutes of government questions. MPP Park.

Ms. Lindsey Park: Well, thank you for taking the opportunity to join us this morning. It's great to be able to connect, even though it's virtually. We're all adapting to that right now, and I know a lot of the work the law society is doing is around that, so I want to thank you for your continued work as we all work to modernize.

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In your submission, Treasurer Mercer, one of the phrases I think you used was the importance of health and the sustainability of legal aid. We've had a lot of discussions so far about the purposes section and what some people would desire to see in it versus what it says. Specifically those words—different words are used for it, but the words "facilitating the establishment of a flexible and sustainable legal aid system" are right in the purposes section of the new legislation. I know the law society has done lots of work to encourage that flexibility in the types of services lawyers and licensees can provide, in the case of paralegals, for example, as well. Maybe if you can just comment generally on the importance of flexibility in our system.

Mr. Malcolm Mercer: The law society has long been committed to sustainable legal aid. It's fundamentally important to what we do. It's fundamentally important to the mandate of the law society, part of which is in support of access to justice. We obviously think that for people in need, the legal aid system is tremendously important as a matter of core human rights.

"Sustainability" means that there needs to be reasonable predictability of funding, a reasonably strong board, and as well—I take it this is your point—the ability to respond to changes in the needs of people who need legal aid. To the economy—I'll give you a point on the economy: Part of legal aid funding is tied to interest rates. When interest rates go up, the interest on trust accounts goes up, and that helps fund legal aid. When inflation goes down, the opposite is true.

Sustainability is of concern around that because we have funding of legal aid filling human needs that are based on inflation rates, interest rates, that really aren't related to that. So sustainability matters both in terms of predictability, but also in the matter of flexibility based on needs as they change.

I don't know if that answers your question, but I think in a philosophical sense, that's a fair way of thinking about it.

Ms. Lindsey Park: Thank you. I'll maybe direct specifically to a follow-up on that. I think your comments highlight the principles behind a sustainable legal aid system well.

On the point of flexibility, specifically—and I referenced this in earlier remarks; I don't think you had yet joined us as a witness. There's a new section 3 added to the act that outlines the full range of services that legal aid will be able to provide, including alternative dispute resolution services—perhaps certificates for those; it could be in that form—I think specifically unbundled services, public legal education and information. I know the law society has done a lot of work on developing resources to provide public information, legal education and legal information to the public when they're figuring out how to navigate the system.

Can you just speak to the importance of that from your perspective?

Mr. Malcolm Mercer: There was a time when we conceived of legal help being just what a lawyer could provide to a client. We now recognize that of course paralegals can provide legal services, in addition to lawyers. We recognize that it may make sense to have a lawyer or a paralegal provide part of what is required, not all of what is required. That's your point on limited retainers. We recognize the importance of legal information. CLEO, which is part of the legal aid system, is focused on providing legal information to people in need. All of these are important parts of getting information of assistance to people. I support your proposition, and agree with your proposition, that there is a range of ways that we need to help people.

The Chair (Mr. Roman Baber): Fifteen seconds remaining, if you wish.

Ms. Lindsey Park: I'll just take the opportunity to thank you both again for appearing virtually with us this morning.

Mr. Malcolm Mercer: Our pleasure.

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

We'll now proceed with four minutes of questioning by the independent member. MPP Collard.

M^me^ Lucille Collard: Actually, I will skip this question period for now. Thank you.

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

We will now proceed back to the official opposition with five and a half minutes of questioning. Mr. Yarde.

Mr. Kevin Yarde: My question is for Malcolm Mercer and Sheena Weir; either one of you can answer this question. If this bill is passed, do you believe—I know you haven't really talked about it, but a lot of people are asking me these questions—that it would reduce the areas of law that clinics can work in?

Mr. Malcolm Mercer: I think the truth is that I'm not well situated, the law society isn't well situated to give you meaningful advice on that issue. As the law society, our role is to regulate lawyers, regulate paralegals to determine who can become a licensee and how they properly conduct themselves. It's really not part of our mandate, nor expertise, to predict how a particular statute will play out in terms of the operation of the clinics.

We think the clinics are vitally important and we think that supporting them is very much in the public interest. But respectfully, I think we should be modest about our ability to assist you.

The Chair (Mr. Roman Baber): MPP Morrison?

Ms. Suze Morrison: Thank you. I know in my last line of questioning, I saw Ms. Weir put up her hand towards the end on the question related to board appointments. I just wanted to give you the opportunity to jump in if you had any additional comments to make on the board appointment process.

Ms. Sheena Weir: I was just going to say that I've been involved at the law society since the first board was established, and it has always included, with various governments, a robust dialogue around ensuring that we get excellent appointments at the board. The law society's own process that the treasurer alluded to, in fact, is quite robust and follows a process to ensure diverse and skilled appointments. So we've had a lot of good success in developing that board.

The other thing I was going to say, since you've given me an opportunity, is just to support what the treasurer said in the last question: One of the key reasons that we thought the consultation policy the government included in the bill was so important is because it would continue to have dialogue, therefore, and input into any of the ways that legal aid evolves after this legislation is passed.

Ms. Suze Morrison: Thank you so much for that clarity. I know that on the opposition side, my colleagues and I are a little bit concerned about the government expanding the number of government-appointed positions, in light of their current track record on government appointments going to Conservative Party friends and insiders. We've got a long history of documentation on that. So that's primarily our concern—is the taking away of board appointments from the legal community in a way that can be politically manipulated.

I don't want to put you on the seat to respond to that. I know it's probably more of a political issue, but it is a significant concern that we have with this bill—in terms of taking appointments away from the legal community and embedding a larger process within the government itself.

Ms. Sheena Weir: I don't mind answering that at all. It was my understanding—and I think the clear intention of the government—that the appointments would be proportionate, not lopsided. It's that that we would like to see put into the bill, because the intentions of this government could change with another government. So we thought it would be helpful to ensure that that intention was maintained.

Ms. Suze Morrison: Okay. No further questions. Thank you.

Mr. Gurratan Singh: Just to expand on that line of questioning—

The Chair (Mr. Roman Baber): With a minute and a half remaining.

1130

Mr. Gurratan Singh: Just to expand on that line of questioning: The previous model, you would agree, had greater balance with respect to government members and law society members?

Ms. Sheena Weir: My understanding was, the idea was to give flexibility to the board size itself, as opposed to the balance of membership. I read the amendments as meaning to say that we would have three to five members, as would the government, and that the law society would continue to play a role in the appointment of the chair or the selection of the chair. That is the way that we saw the intention of the government, and we thought it would be helpful that that be clearly articulated.

The original size of the board was established in 1998, and it seemed to work quite well. So if there's a need to have flexibility in the overall size, we just think that it would be good to stipulate that the law society's proportion remains the same.

Mr. Gurratan Singh: Just to clarify: The proposed model does not clearly articulate that proportion?

Ms. Sheena Weir: That's correct.

Mr. Gurratan Singh: And the previous model did clearly articulate a balance between government and law society?

Ms. Sheena Weir: Correct.

Mr. Gurratan Singh: No further questions.

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

We'll have an additional 17 minutes of questions or so. I would propose and I would ask, subsequent to the conclusion of this panel, to conduct a quick meeting of the subcommittee. The Clerk will make arrangements to reach out to MPP Singh and Mr. Parm Gill. All right?

So we'll now proceed with government questioning, five and a half minutes. MPP Pang?

Mr. Billy Pang: Thank you for sharing your insights.

This question is for either representatives of the law society. Thank you for working with the Ministry of the Attorney General on the proposed amendments to the Law Society Act.

I understand that two of the proposals in particular are aimed at professional misconduct, and enhancing the power of the law society in dealing with those types of issues.

Can you expand, with some specific references to either disciplinary cases or the feedback that you have received from the bar and the public, why instituting greater maximum fines for professional misconduct and allowing summary revocation of a licence under particular circumstances is required? What types of circumstances are these measures aimed at protecting against? Thank you.

Mr. Malcolm Mercer: I'll respond to that, and Ms. Weir can add if she thinks it's appropriate.

The reason that fines makes sense as a regulatory tool is that sometimes the conduct of a lawyer or a paralegal is designed to maximize their own income. There are times when the best answer, where professional misconduct has been found, is, in effect, to address that advantage by a fine that's appropriate in size.

Currently, the maximum is $10,000. The truth is that there are a range of activities where the economic advantage to misbehaving, if I can describe it that way, is much greater than $10,000, and so having a penalty that fits the misbehaviour or the misconduct makes sense.

The other side of that is, currently our tools, with the $10,000 maximum not being very significant in that context, are to reprimand, to suspend or to revoke a licence, and there are collateral consequences to suspending a licence. Clients can be inconvenienced, someone can lose their livelihood in a way that is disproportional, and it really doesn't solve the problem. So adding a larger fine allows the hearing panel at the tribunal to more carefully choose an appropriate remedy or sanction, depending on the nature of the misconduct in question.

The second is with respect to summary revocations. We have examples where, for example, someone is unable to practise unless they take certain courses or come back with certain medical advice. You could imagine different terms and conditions.

Similarly, people can be suspended for not paying their fees or not paying their insurance obligations. After a certain point in time, effectively, they abandon their practice, yet there's no way, really, to bring that to a head. So by recognizing that after a certain point in time when you're suspended, you've really abandoned your practice, abandoned your licence—these provisions allow that to be put in place to be able to be reacted to.

The Chair (Mr. Roman Baber): MPP Park, with a minute and 45 seconds.

Ms. Lindsey Park: I'll keep my question brief to give you time to answer.

Part of the proposal in this bill, in the amendments to the Law Society Act, is to permit the law society to regulate law firms. I shouldn't assume this, but I understand that the way lawyers are practising and the different firm arrangements have become sometimes more creative, and perhaps part of the proposal is to ensure protection of the public and that law firms and lawyers are regulated adequately by the law society. Can you just explain what some of the thinking is behind that and some of the work the law society intends to do in that area?

Mr. Malcolm Mercer: There are a couple of different areas of significance. One is simply that because we regulate individuals as opposed to firms, we don't have the advantage of being able to deal with firms. For example, it would be better if firms could address the continuing professional development obligations of their members and report collectively, instead of having individual licensees, lawyers or paralegals report. The same would be true with respect to other aspects of regulation. So we see it, in part, as being burden reduction by having more efficient reporting.

As well, it's clear in the modern world that where lawyers and paralegals practise in firms, much of what they do is based on firm policies, procedures, cultures. The truth is that clients hire firms; they often don't just hire individuals. So it makes sense to have firms be accountable, because they are in a very real sense responsible for the way legal services and the practice of law gets delivered.

As you say, there are a range of—

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

Mr. Malcolm Mercer: Yes.

The Chair (Mr. Roman Baber): Thank you. We'll now proceed with five and a half minutes of opposition questions, if any. Mr. Singh.

Mr. Gurratan Singh: I understand the system a little bit better, because I feel like I just—the question got cut short a little bit in my previous line of questioning.

You mentioned, Sheena Weir, that there's this distinction between hope that the government would maintain a balance in the board versus it being clearly articulated. Just to clarify that point: Your understanding at this point is that there is a hope that there would be a balance, but there is at this point no clearly articulated point that says that that balance will be mandated?

Ms. Sheena Weir: I think that it's clearly the intention of this section for there to be balance. It is not clearly articulated, which is why we put that forward, and we let the Attorney General's office know that we'd be putting forward that recommendation. It seems to me that the minister has been pretty clear on it, as well—that the intention is for that. We're hopeful that your committee will consider making that quite explicit, so we look forward to hearing about your clause-by-clause discussions.

Mr. Gurratan Singh: I had asked, similarly to your colleague Mr. Mercer—but just to put the question to you as well: Is it also your hope that the government considers the inclusion of low-income and disadvantaged Ontarians within the purpose of this piece of legislation?

Ms. Sheena Weir: Yes, I think the treasurer was quite clear that it's important. If you look at the work of the law society, we've done a lot of work on access to justice and the sustainability of legal aid. So I think that was fairly clear, Mr. Singh.

Mr. Gurratan Singh: I know my colleague Kevin Yarde had a question as well.

1140

The Chair (Mr. Roman Baber): MPP Yarde with three and a half minutes.

Mr. Kevin Yarde: Thank you—sorry, how much time?

The Chair (Mr. Roman Baber): Three minutes, 20 seconds.

Mr. Kevin Yarde: Three minutes, 20 seconds? Okay. This question is for either Sheena or Malcolm.

We've been talking about the appointment process, and the new criteria for the LAO board of directors increases the number of appointees, as we know, that the government has complete control over. We need to make sure that

the LAO board does not become an arm of the AG office. Do you think that is what's going to happen?

Mr. Malcolm Mercer: I'll leave that to Ms. Weir.

Ms. Sheena Weir: As I've said, it's been clear to me that the intention is to have a balance of government and law society recommendations for the board, so I can only take that at face value. What we've said was that it would be helpful, going forward, if that was explicit in the bill, because this Attorney General's commitment to that fair process—we don't know what the next Attorney General or a future government's intention with that would be. So we thought it would be helpful if this committee would consider making an amendment that would ensure that proportionate balance.

Mr. Kevin Yarde: Okay. Thank you.

The Chair (Mr. Roman Baber): With a minute and 45 seconds left for the official opposition, MPP Morrison.

Ms. Suze Morrison: Thank you so much. I think, Ms. Weir, that last comment you made is particularly important. If we give the government of the day the absolute benefit of the doubt here, we need to make sure that we're crafting legislation that's future-proof. Even if the government of the day has the best intentions of maintaining balance on that board, if it's not explicitly stated in the legislation, a future government may take advantage of that and centralize the authority of Legal Aid Ontario within the AG's office through the government's appointment process. So again, I just want to thank you for that comment. If there's anything else that you would like to add around the board appointment process, we would be happy to get that on the record.

Ms. Sheena Weir: That's good for me. I think we've made our points. Thanks for the opportunity.

The Chair (Mr. Roman Baber): Okay. We'll conclude with five and a half minutes of government questions. MPP Park.

Ms. Lindsey Park: Given that we have a bit of extra time, because there were going to be other witnesses joining you during this portion that weren't able to join us, I thought I would just leave it open-ended and allow you to describe a little bit of the ongoing consultations that have been going on between the government, legal aid partners, clinics, and the law society's involvement in that—because I know they've been quite extensive.

Mr. Malcolm Mercer: Ms. Weir is closest to that. I'm involved, but she is best positioned to describe that to you.

Ms. Sheena Weir: Thank you, Ms. Park. Yes, we've had many discussions both with Legal Aid Ontario and with the government. The history of Legal Aid Ontario—and many of you may not know that the Law Society of Ontario at one time actually administered the Ontario Legal Aid Plan, as it was then known. It was turned into an independent agency of government in 1998. We've had what I like to call an abiding interest—and in fact, we had a paper that we report to convocation, which is our board of directors, that talked about the ongoing commitment we have to legal aid. We've made it a priority at the law society to always have a robust dialogue both with the provincial government and the federal government, which also has a responsibility in the funding of legal aid, to ensure that the sustainability and health of legal aid is a priority. So we have always taken opportunities to meet with Attorneys General of the day, both federally and provincially, and we also have taken a facilitative role for what you heard earlier called the Alliance for Sustainable Legal Aid. On your last panel—Lenny Abramowicz is actually the chair of that alliance of organizations that has as its sole priority speaking out about legal aid issues.

I would be happy to share with the committee some of the work that we do around access to justice. We had a report on access to justice passed by convocation a number of years ago. We also had—I think it was just two years ago, Treasurer—the An Abiding Interest report, which was about the law society's ongoing interest in legal aid and the facilitation of that alliance.

Does that go to your thoughts, Ms. Park?

Ms. Lindsey Park: Yes, that's great. Thank you. Something you mentioned made me think of a follow-up question. Obviously we're in unprecedented times with the COVID-19 pandemic, and there's no question that on the other side of this there's going to be a high demand for certain legal services. Like many other announcements that have been happening in the daily press conferences with the Prime Minister in Ottawa and the Premier here in Ontario, it's a changing landscape, and there are increased funding commitments to meet these needs and respond to the pandemic and the eventual—hopefully—recovery from the pandemic.

You really mentioned the need—that it's partly the responsibility of the federal government to provide funding in the legal aid space, particularly during this pandemic. I know the Attorney General has been clear in his ask to the federal government for additional funding for legal aid as a result of the pandemic. I just wanted to know—I actually don't know, but I assume you would be supportive of that. I just wanted to give you a chance to speak to that.

Mr. Malcolm Mercer: Why don't I simply say that the law society is entirely supportive of both the federal government and the provincial government providing sustainable legal aid. They have different focuses and priorities. What matters to the law society and what matters to legal aid in the end is that the total contribution reasonably meets the needs of Ontarians. I don't think I can say more than that. We approach the provincial government and we approach the federal government because we all want to do the best for people who need legal assistance.

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

Ms. Lindsey Park: I think I'll leave it there, but again, I just want to thank you for joining us and for the hard work you've been doing in responding to the pandemic. We just thank you for being one of the justice partners that works so hard alongside the Ministry of Attorney General to serve Ontarians.

Mr. Malcolm Mercer: Thank you.

The Chair (Mr. Roman Baber): I'd like to thank the Law Society of Ontario for appearing today, and I'd like to thank all members for their participation this morning.

The committee will recess for lunch and we'll resume at 1 o'clock. However, I would ask—I believe that Mr. Singh and Mr. Gill have received a number of emails in the last couple of minutes. We will convene a short meeting of the subcommittee by phone at the noon hour. Otherwise, we'll see everyone else back at 1 o'clock. Thank you very much. The committee is in recess.

The committee recessed from 1149 to 1300.

The Chair (Mr. Roman Baber): Good afternoon, everyone. The Standing Committee on Justice Policy is resuming this afternoon's 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.

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

The Chair (Mr. Roman Baber): We'll proceed immediately with our next witness. Our next panel is again made up of one entity this afternoon. It's the Canadian Environmental Law Association.

I'd like to invite Ms. Theresa McClenaghan, the executive director and counsel at the Canadian Environmental Law Association, to make her initial submissions. Good afternoon, Madam. You're welcome to make submissions for seven minutes. Please begin by stating your name for the record.

Ms. Theresa McClenaghan: Thank you very much. My name is Theresa McClenaghan, and I'm executive director and counsel at the Canadian Environmental Law Association. Thank you for inviting us to make submissions to you today. I'm speaking to you from my home in Paris, Ontario, in Mr. Bouma's riding of Brant county, where my husband and I have raised our children for the last 28 years.

CELA has submitted a written brief to the committee, authored by my colleague Richard Lindgren. I urge you to review it, as it provides you with much more detail on our recommendations than I can cover in the time we have today.

CELA is 50 years old this year and has been funded as a legal aid specialty clinic with a province-wide mandate for over 42 years, since 1978. Over those years, we've represented low-income, vulnerable and disadvantaged communities in cases before the courts and tribunals at all levels, dealing with environmental, health and access-to-justice issues. Our clients include, for example, individuals, families, citizens' groups and First Nations.

We prioritize cases dealing with health impacts of pollution on communities; for example, working to protect their drinking water or ensuring they're protected from legacy chemical spills or air pollution. This includes work such as our RentSafe work, advocating for safe indoor air for tenants together with other clinics and services providers like health units, or our past and current work on getting lead out of drinking water. We also prioritize work providing access to environmental justice and working toward equity in environmental decision-making.

I'm going to address our comments dealing with schedule 4 of the bill, the Class Proceedings Act, and then use my remaining time to provide some comments regarding schedule 16.

In our work, we advocate for legal tools that provide for public participation in decisions that affect the environment people live in and to help protect them against environmental harm, such as the right to make comment or appear before environmental tribunals. CELA was therefore honoured to be a member of the Attorney General's advisory committee that helped draft the Class Proceedings Act. Having served on that original advisory committee, having closely followed the class actions case law under that act, and having provided advice over the years to those wanting to use that legislation and even intervening on significant litigation involving certification of environmental claims under the Class Proceedings Act, we've identified various changes to the Class Proceedings Act so that it can work even better in the interests of access to justice.

Bill 161 proposes to implement several reforms that were recommended by the Law Commission of Ontario in its in-depth study of the Class Proceedings Act in 2017, and we generally commend those, to you. I understand that the Law Commission of Ontario will be here later this week to provide comments to this committee.

For today, I'd like to focus on CELA's recommendation regarding one section in Bill 161 dealing with the Class Proceedings Act; namely, section 5(1.1). CELA recommends that this new clause should be deleted. In our view, the changes proposed in Bill 161 to section 5(1.1) would raise new, unnecessary barriers to environmental class actions in Ontario and would make it harder to have cases certified as class actions in this province. That section would provide that cases be certified only if a class proceeding was both (a), superior to all reasonably available means of determining entitlement to the relief or addressing the conduct of the defendant—that's our paraphrase—or (b), that the common questions of fact and law predominate over the individual questions of fact and law in the proceeding; again, a paraphrase.

CELA recommends, instead, that certification of environmental claims in particular should be made less difficult in the Class Proceedings Act. Relatively few environmental cases have actually been certified under the Class Proceedings Act in Ontario since its inception over 25 years ago. This is unfortunate because environmental cases are precisely the types of claims that class actions are especially suited for. The benefit of an environmental class action could accrue to the population generally, and be very significant, but it may be that few people would have the incentive to take on the issue and incur the risks of litigation on their own account for the benefit of the wider community.

For example, if that proposed section 5(1.1) were in force, important class actions that have been undertaken in the past might not have been certified. This includes the class action on behalf of the people of Walkerton, Ontario, after the drinking water tragedy in the year 2000, 20 years

ago. CELA did not act in that class proceeding, since private bar was available to take that litigation on for the community, but we did represent the community in the inquiry and are very familiar with the events that occurred there.

One individual plaintiff, or a family, might find itself very stretched to take on the costs, risks and pressure of proving the tort claims, and yet class proceeding certification may be the appropriate approach in order to provide the remedy to the individual plaintiffs proposing the class, and the broader community.

I would like to use the remaining time that I have to speak to schedule 16, the proposed changes to the Legal Aid Services Act.

The Chair (Mr. Roman Baber): About a minute left.

Ms. Theresa McClenaghan: Thank you.

The committee heard this morning from the association of community clinics, and we endorse their submission and their written brief. In addition, we would highlight that, as they pointed out, the definition of "clinic law" should be restored to mimic the current definition; a broader purpose statement which better reflects the societal objective of ensuring access to justice should be restored; and finally, that broader areas of law should be included in what clinics practise under the term "poverty law," or a broader definition of "clinic law."

We thank you for the opportunity to speak to you today and note that all of the clinics across the province provide important services to clients. Whether it's the unique impacts of time-of-use electricity pricing on low-income energy consumers or the unique impacts of certain types of pollution on young children—clinics work to advocate for improvements to law and to bring individual cases before the courts and tribunals. Thank you.

The Chair (Mr. Roman Baber): Thank you very much, Ms. McClenaghan. We'll now proceed with five and a half minutes of government questioning. MPP Nicholls?

Mr. Rick Nicholls: Thank you very much, Chair, and good afternoon, Ms. McClenaghan. It's nice to have you here today in Paris, Ontario. Love that little town; love the golf course even better.

I have a question for you. We all know that it can take years for class actions to work their way through the court system. One of the proposed amendments includes allowing cases to be dismissed for delay where no meaningful steps have been taken. Can you please describe, with reference to your experience on the ground, how this amendment will help the court system and litigants alike?

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Ms. Theresa McClenaghan: As I indicated, we don't at all oppose many of the amendments to the act—and in fact, we support them, as recommended by the law commission.

In terms of that particular proceeding, we do generally support that proceeding. It is possible to move litigation relatively expeditiously through the courts, but it is possible that sometimes it can take a long time. If people aren't taking the steps they need to move the case along and people aren't obtaining the relief they deserve, then it may be that some of the case management and other provisions included in the new bill would assist.

Mr. Rick Nicholls: Thank you very much. I appreciate that. I'll turn it over to another one of my colleagues.

The Chair (Mr. Roman Baber): Ms. Park.

Ms. Lindsey Park: Thank you for joining us on this committee, and thank you for the work you do in the name of environmental protection in the province of Ontario.

I'll go back to your answer to the previous question. You mentioned that a number of the proposals in the bill you would be supportive of continuing with. I just wanted to get some clarity around that, as to which ones those were that you see as very important and you're supportive of.

Ms. Theresa McClenaghan: There's a provision to register proceedings under section 2, subsection 1.1, commenced under the act, that will include increased transparency and let people know the matters that are proceeding as class actions. That would be very helpful.

We also support the provision in a number of sections that would allow the court to take account of multi-jurisdictional class proceedings—in other words, proceedings that are occurring in other jurisdictions—and take account of how they can be coordinated and other types of matters that arise when they're happening in multiple jurisdictions.

In addition, there are provisions in terms of proceedings around supervision of costs that we support and notice requirements under the act that we support.

We also support reports regarding distribution of awards and how that's done. Again, that will increase transparency to the affected class and to the public generally.

We also support the provisions around cy pres distribution—in other words, awards that were unclaimed by the class. For example, sometimes those are given to the law foundations across the country to help deliver to charitable purposes and other justice needs. Again, we support that those funds are not sitting basically wasted in an account somewhere.

Limitation period, suspension and discontinuing new class proceedings when they're abandoned, and for delay, as indicated, we do support.

Also, the appeal routes and monetary thresholds we support, although we're recommending that the carriage motions should be appealable to the appeal court.

We support provisions around court approval of agreements regarding fees and disbursements between the solicitor and the representative party, and, finally, the rules for court approval of third-party funding agreements.

The law commission, as I mentioned—and they have far more expertise than me—will be speaking to these later this week. We did provide submissions—my colleague Mr. Lindgren, in particular—in depth to that commission when it was undertaking its study, and that commission heard from many others who are actively involved in class actions in the province.

Ms. Lindsey Park: Excellent. Chair, how much time do I have?

The Chair (Mr. Roman Baber): Forty-five seconds.

Ms. Lindsey Park: Just to finish off, you mentioned cy pres awards, which—many members of this committee aren't lawyers and maybe wouldn't have dealt with that concept before. The idea is, an award is made but there are not people who are there to claim it, but there has been a court case that the award is supposed to benefit. Can you explain that for the committee?

Ms. Theresa McClenaghan: Sometimes that arises because the people don't know and don't make the claim, and sometimes it arises because it's very difficult to identify the people who would benefit. But it's still important to render justice if harm was done to the population at large, through, for example, an improper product being put on the market that doesn't have the easily identifiable consumers. Those funds would be then made available to the foundations, as I mentioned, so that the law foundations could go out. For example, we did one at CELA dealing with source water protection for Indigenous communities based on those kinds of funds.

The Chair (Mr. Roman Baber): Thank you very much. We'll now proceed with five and a half minutes of opposition questions. Mr. Singh?

Mr. Gurratan Singh: I have a variety of questions, and given the limitation of time, if you're able to answer them succinctly and then, following that, we can expand a little bit. If that's possible at all, Theresa, that would really be appreciated.

You mentioned the Law Commission of Ontario's letter, which they've provided, which they have written, providing a quite scathing criticism of Bill 161. Would you agree that class actions are fundamental to our society and fundamental to holding business and government in check because it allows people to come together to collectively do class actions and legal cases together?

Ms. Theresa McClenaghan: Yes, we strongly supported adopting class actions in Ontario.

Mr. Gurratan Singh: Further, the Law Commission of Ontario writes that the changes proposed in this Bill 161, as written—"Applied retroactively these provisions would likely have prevented important and successful class actions regarding Indian residential schools, environmental tragedies (such as Walkerton), tainted blood supplies (such as hepatitis C) and/or price-fixing" and a variety of other areas. You would agree with the Law Commission of Ontario's assessment that the current changes proposed in Bill 161 would have that negative impact on people's ability to do class actions?

Ms. Theresa McClenaghan: Yes. It's section 5.1(1) that I spoke to earlier that would specifically have that outcome.

Mr. Gurratan Singh: And specifically, as applied to Walkerton, it's unlikely that—sorry. Specifically, if it's applied retroactively, cases like Walkerton would be much harder to litigate. Is that fair to say?

Ms. Theresa McClenaghan: Right, right. Walkerton was certified, our understanding is, on consent, but it may be that the defendants would have contested that if they had a provision like section 5.1(1).

Mr. Gurratan Singh: Secondly, just to switch the conversation from class actions to the changes of the purpose of this legislation: Would you agree that the removal of the terms "access to justice" and "low-income" and this narrow definition of "area of practice" would negatively impact, specifically, Black Ontarians, racialized Ontarians, Indigenous Ontarians and women who are fleeing violence—their ability to access justice?

Ms. Theresa McClenaghan: So you're speaking to schedule 16 now, the Legal Aid Services Act. Yes, our concern is that without the purpose statement and the other definitions of disadvantaged communities, such as we have now, all of the communities that you mention and many others would have a much more difficult time accessing justice.

Mr. Gurratan Singh: Going back—and I'm sorry for switching back and forth between the different subjects, but just to go back to this issue of class actions. Specifically, the Law Commission of Ontario writes about the provisions around superiority and predominance, and how that would negatively, once again, impact people's ability to access class actions and hold government or big business to account. Would you agree with the Law Commission of Ontario, their writing in their letter, with respect to this?

Ms. Theresa McClenaghan: Yes, I do. And in the letter that we submitted to the committee yesterday, you'll find us undertaking a similar analysis—that the provisions, taken together, create a lot of uncertainty, in our view, about when courts would determine that a class action is appropriate, and inappropriately restrict the number of actions that proceed as class actions.

Mr. Gurratan Singh: Finally, the Law Commission of Ontario writes that the changes proposed adopt "restrictive American legislative provisions ... that are inconsistent with ... Canadian law." It provides a situation, from my understanding, that would make it much harder for us to even hold big business who do things that are potentially harmful to Ontarians to account through the means of class actions. Would you agree with that position as well?

Ms. Theresa McClenaghan: So our commentary on section 5.1(1) speaks to that point, and our understanding about where those come from arises from some of the commentary from other colleagues in the legal profession who practice class actions and who have written about concerns about importing those tests from American jurisprudence, which do not apply, and which the Supreme Court of Canada has indicated do not apply in Canada today. We recommend to this committee that those new provisions in section 5.1(1) should not be added to the legislation at this time.

Mr. Gurratan Singh: Thank you. Chair, how much more time do I have?

The Chair (Mr. Roman Baber): One minute remaining.

Mr. Gurratan Singh: So just to finalize on this: We've seen that this area of Bill 161 has resulted in creating

negative impacts to access to justice with respect to removing that from its purposes and the limitation to folks being able to organize by way of class actions to hold government and businesses to account. Do you agree that these two factors overall, when taken together, weaken Ontarians' ability to access justice, if these changes are brought into place?

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Ms. Theresa McClenaghan: Each of them in very different ways would raise concerns for me about access to justice. That's why we do recommend removing section 5(1.1) from schedule 4 and restoring a purpose statement and definition of clinic law or analogous language in schedule 16.

Mr. Gurratan Singh: Thank you so much. Those are all my questions.

The Chair (Mr. Roman Baber): Thank you. We'll now proceed with four minutes of questioning to the independent member.

M^me^ Lucille Collard: Environmental reform requires specialized advocates like you to undertake test case litigation, law reform work and community advocacy. Legal Aid Ontario specialty clinics have often undertaken this sort of systemic advocacy very effectively under the current Legal Aid Services Act, and I'm deeply concerned that, under the new act, it will fall outside the scope and capacity of clinics. Do you share the same concerns?

Ms. Theresa McClenaghan: Yes, and partly the way that that arises is the way that Mr. Abramowicz described to you this morning for the association—that at the moment, those provisions exist in memoranda of understanding between Legal Aid Ontario and our boards of directors. All clinics are called on to do that work in the current arrangement, and then the clinic boards determine areas of priority for the clinic community.

For example, in our work—I briefly mentioned it—RentSafe is work that's done by a number of specialty clinics, a number of general service clinics, a number of other service providers looking at how tenants are especially impacted by indoor environmental health concerns like mold, like asthma, like lead on the walls, a number of things. So we each bring our area of expertise. We're not experts in tenant law, but our colleagues at ACTO, who you'll hear from later this week, are, for example.

So yes, that work is extremely important, and if we aren't able to collaborate like that and bring our various areas of expertise forward—for example, we often work with the worker clinics around chemical safety—then important issues like asbestos and workers don't get addressed as effectively.

M^me^ Lucille Collard: Thank you.

The Chair (Mr. Roman Baber): Okay. With no further questions from the independent member, we'll proceed back to the government for five and a half minutes. Mr. Nicholls.

Mr. Rick Nicholls: Again, I'd like to point out a couple of things. The Attorney General has been very public in his strong support of the important work legal clinics do for Ontarians who are faced with a variety of legal needs. In the new Legal Aid Services Act, 2019, we've recognized that the foundational role is something that Legal Aid Ontario must have regard to when it considers decisions with respect to providing legal aid services in Ontario's communities. Could you take a moment to tell us why it's important to have that critical role continue to be recognized in legislation?

Ms. Theresa McClenaghan: The current legislation provides specifically that certain types of legal providers have foundational roles in certain types of legal services. For example, it says right now in the current act, not the new one, that private bar has a foundational role in the delivery of a number of kinds of services, including criminal law, which is very important. Then similarly, clinics have a foundational role in the delivery of clinic law.

But the role of Legal Aid Ontario is also very important, I agree. It's an important accountability mechanism. We're accountable to legal aid and its board as our funder. We prepare an application for funding every single year where we outline how we've accomplished what we said we would do the previous year and talk about what is ahead of us in the coming year. Obviously, we always have to be responsive to the needs of clients, but we try to project those kinds of issues.

We're very accountable for how we spend the money, we provide detailed quarterly reports, and we're very open and have been agreeing for years that we should engage in a process of discussion with Legal Aid Ontario about how to modernize those agreements that we have between our boards and their boards. We're extremely cognizant that we're talking about the public, we're talking about taxpayer funds, we're talking about making sure that our services are benefitting our clients and the broader public both.

Mr. Rick Nicholls: Thank you. Well, we do know that the Attorney General has also been firm in his commitment to ensuring that Legal Aid Ontario will continue to focus on providing access to justice to low-income Ontarians. We've also heard from some stakeholders that the new legislation should specifically refer to these principles. Can you comment on your perspective on the need to include these concepts in the legislation? Would you not agree with that comment?

Ms. Theresa McClenaghan: Yes. Yes, I do. We should include reference to low-income Ontarians. We should include reference to disadvantaged communities, as the legislation does today, yes.

Mr. Rick Nicholls: Thank you very much. I'll turn it over to my colleagues.

The Chair (Mr. Roman Baber): Further questions by the government? Ms. Park.

Ms. Lindsey Park: For the benefit of my fellow committee members who may not know this, CELA, the Canadian Environmental Law Association, does work as one of the legal clinics in Ontario.

Maybe you can just comment specifically on the unique role legal clinics play in providing legal aid services—if I can state that as a broad term and definition that many

types of services fall within—and really connect it to that foundational role you were referring to earlier.

Ms. Theresa McClenaghan: Yes, absolutely. Maybe a good way to put it is to draw a distinction from the kind of work I did when I was in private practice practising environmental law, versus the work I've done for the last 20-plus years since I've been at CELA as a legal clinic.

When we look at an environmental issue at CELA, we're looking at it from the perspective of the impact on low-income and vulnerable, disadvantaged communities. It could be remote. It could be those without access to a say in decision-making that affects their community. That results in a very different analysis than if I were representing a single client as a private bar practitioner. We look at things in a systemic way, so we will take on those individual cases when the clients qualify and if private bar is not appropriately available to assist them, but we also notice what are the systemic issues.

Another example of that type of work, where we have both case work and the systemic work coming together because of the unique position of clinics, is our work with other clinics and other service providers in the Low-Income Energy Network. For the last many, many years, we have advocated for an energy poverty approach that talked about access to conservation programs for low-income communities: for example, access to measures to assist with rate relief for low-income communities, access to terms of service so that their service is not cut off in the middle of winter for heat. Those kinds of issues are things that we understand better because clinics are uniquely situated, working on the front lines, working with our clients directly and seeing those impacts. For example, my understanding of the—

The Chair (Mr. Roman Baber): My apologies—

Ms. Theresa McClenaghan: Okay.

The Chair (Mr. Roman Baber): I'm terribly sorry, Ms. McClenaghan.

The time for government questions in this round is over. We'll turn it back to the official opposition for five and a half minutes. MPP Morrison.

Ms. Suze Morrison: In the context of the 30% cut to legal aid services that took place last year, how was your clinic affected by that cut?

Ms. Theresa McClenaghan: That was a very difficult time for everyone, I agree, including us. Originally, CELA was attributed with a more than 30% cut, just as some of the other specialty clinics were attributed with almost that much. Then we were able to take advantage of the provision under the current legislation that allows us to ask for reconsideration, and the clinic funding committee determined that it was contrary to the rules of natural justice to have imposed a second year of cuts, which that had included, so CELA is working now with a 15% cut, which is our current budget.

That meant that we ended our budget for training, for our library services, for a lot of travel—which I won't call unnecessary, because we do have a province-wide mandate. But we find ways to make other projects where we've raised funds, maybe from a foundation or another way, and use those funds to then get out to see our clients in other communities. It's not easy. We haven't wanted to cut, and we haven't cut our services at all. So that's how we've made that work.

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Ms. Suze Morrison: I am concerned about how this bill changes the areas of law that clinics are allowed to focus on. If those areas of law are not explicitly stated in this bill and we see further cuts coming down to Legal Aid Ontario—regardless of the Attorney General's opinion that these areas of law are important— do you believe that if the funding is not on the table and Legal Aid Ontario is not specifically legislated to fund those areas of law, it will force Legal Aid Ontario to cut those areas and force Legal Aid Ontario to make the cuts that the government may not want to wear themselves?

Ms. Theresa McClenaghan: I think what's possible is that a combination of factors could lead to a future board of directors of Legal Aid Ontario making some really difficult decisions, such as they were attempting to make last year.

Under the current legislation, all of our work is encompassed, but the concerns about the potential to interpret the clause to say that clinics aren't, for example, practising human rights law just because of some wording glitch—I don't think the intention is not to allow for that, but there's the potential for that interpretation. That's why recommendations from ourselves, from the ACLCO and others are to clarify that, to make sure that's not the interpretation, and furthermore, to make sure that legal aid's board and clinic boards have an important role in determining the scope of work done by clinics.

Ms. Suze Morrison: Thank you so much. I'd like to share my time with MPP Yarde.

The Chair (Mr. Roman Baber): Mr. Yarde.

Mr. Kevin Yarde: Some of the proposed changes in Bill 161 regarding class proceedings—how would you say it effectively restricts class actions, or do you think it effectively restricts class actions and access to justice in a broad range of important cases? Would you say that's the case?

Ms. Theresa McClenaghan: It could have that outcome, yes, because of the provisions of section 5(1.1). That's the main section we're concerned about, because that's the one that raises those two new thresholds around the double requirement to show that it's the most suitable amount of range of options and that the common interest predominates over the individual interests, whereas what's usually intended in class actions, and the way it works in Ontario today—and Quebec, for example, has done an even better job with this—is that if you have a number of common actions and they can make things more efficient for everyone, you can go ahead and deal with all of those as a class action and then move on and deal with the individual issues around, maybe, quantification of damages in a further part of that proceeding.

Mr. Kevin Yarde: Would you also say that the proposed changes to Bill 161 would make it harder for vulnerable Ontarians to sue for justice?

Ms. Theresa McClenaghan: In the Class Proceedings Act, that one section would have that result, yes. There are other sections I already listed that I think would help.

In terms of the Legal Aid Services Act, I've already mentioned that that can be improved by improvements to the foundational role of clinics and private bar in their respective areas, as well as definition of clinic law, disadvantaged communities being included and a purpose statement.

Mr. Kevin Yarde: Would you agree that these proposed changes would also gut the ability to pursue class actions, including against, say, this government?

Ms. Theresa McClenaghan: There's a concern that, together with changes that were made to the crown proceedings act recently, which we also made submissions on—it's already in force—there are serious restrictions on the ability to sue government now. So some of the cases that environmental lawyers are very familiar with, which are extremely important cases in the past, and some that my clinic had undertaken some years ago, wouldn't necessarily be able to proceed today. That's another bill that passed—it's not the one before us. But if you put that together with section 5(1.1) of the Class Proceedings Act, if that stays in the bill, then those two things together would make that more difficult.

The Chair (Mr. Roman Baber): Thank you very much, Ms. McClenaghan. Back to the government members for another five and a half minutes: Ms. Park.

Ms. Lindsey Park: I'll just continue on. I think we left off where you were describing your role as a legal clinic and how legal clinics meet some of the unique needs of Ontarians in specific areas of law or specific parts of the province. Maybe you can just describe a bit further how you operate as a community legal clinic in relation to legal aid, just for the benefit of the committee. I think that would be helpful.

Ms. Theresa McClenaghan: First of all, institutionally, our legal clinic like all of the others, as I mentioned, provides an application to legal aid annually. We take account of the provisions of the act, our MOU, the needs of our clients, the community, the direction of our board of directors and things like the strategic initiatives that Legal Aid Ontario has undertaken such as the Aboriginal Legal Services initiative, for example. We put all of that together, make an application and then legal aid makes a determination. As I mentioned, we have a number of reporting requirements with Legal Aid Ontario over the course of the year.

In addition to that, we have geographic catchment areas for the general service clinics, and then the specialty clinics like ourselves—like the one for the elderly, the one for the youth, one for tenants, the one for income security, one for HIV-AIDS and so on—are province-wide in our mandate. All of us, general service clinics and specialty clinics, undertake all those areas of the law that we mentioned: the direct service, the representation in tribunals, in court cases, in interventions. We also do test cases, we do law reform and we do public legal education.

Law reform could, for example, be that the government would all the time reach out to a clinic like ours to ask us to provide comment on a bill that is being considered or an area of law that is being considered to reform. Government frequently asks representatives from all of the clinics to sit on advisory committees in our areas of law. That could be CELA sitting on advisory committees for the Ministry of the Environment or for the Ministry of Energy. It could be another clinic sitting on an advisory committee for the Ministry of Community and Social Services, for example.

Similarly, the tribunals ask us to weigh in on whether their rules are working for our client community. Again, as I was mentioning earlier in terms of energy poverty, for example, when we were asked to attend a meeting on behalf of a First Nation community, we realized that there were a lot of inequities in the way that distribution costs and rates were applying to those communities because they're in low-density areas, and that's the way the formula worked. That led to our advocacy for some reform and subsequent negotiations and changes to the way those worked.

The fact that we bring that kind of a lens to the work, the fact that we work with other service providers like food banks, like public health providers, like other clinics across the province—and we appreciate the implications of the issues we're raising, but we don't attempt to look at those only from, in our case, environmental eyes. We look at them from environmental and equity and low-income, poverty, disadvantaged-communities eyes. And then we say that even though environmentally, for example, many years ago we might have said we wanted full-cost pricing for energy and water, we look at the impact on low-income communities and say, "Actually, that might be true in economic theory, but we don't want that impact to hit the disadvantaged communities in the way that it would."

For example, with the previous government, we were strongly advocating—I might add, without success—for low-income communities to be recognized in terms of where the climate fund would have been directed, to alleviate some of the impacts of that fund on that community—like California did, where it's put 25% of those types of funds directly towards low-income communities and making sure that whole low-income neighbourhoods have access to conservation programs.

So it's that combination of the lived experience of our clients, the interface with all of our other partner service agencies, our own work and our clients' that brings together these holistic solutions.

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The Chair (Mr. Roman Baber): Very good. With 20 seconds remaining—

Ms. Lindsey Park: With 20 seconds, I will just take the opportunity to thank you for appearing before our committee and letting us ask you a few questions, and thank you for the work you do in the community every day.

Ms. Theresa McClenaghan: You're welcome.

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

Back to a final line of questioning to the official opposition: MPP Singh.

Mr. Gurratan Singh: Just back to this point, just to get some clarity: The Law Commission of Ontario writes that Bill 161 adopts a "restrictive American legislative" approach towards class action. Do you have knowledge and can you expand on what the American model, these restrictive qualities, look like in America, as compared to Canada? Are you able to comment on that?

Ms. Theresa McClenaghan: First of all, I want to clarify that CELA has not taken on class action clients, because we don't. Clients might come to us and we might say, "That would be great for a class action," and then we refer them to our lawyer referral list, because the private bar will take on those cases. We make sure we focus on things the private bar won't do. We have expertise on class actions because we help advise the government, we follow them closely, we've intervened around certification motions, and sometimes we've provided affidavits to private lawyers about why the matter is important environmentally, that kind of thing.

In terms of the restrictive concerns we have about section 5(1.1), those particular provisions do come out of both jurisprudence and legislation south of the border, have not been adopted so far in Canada, and we don't want them adopted here. In fact, we will point to Quebec, for example, which has made it more clear that certification needs to be expansive as an access-to-justice tool.

Mr. Gurratan Singh: My question, particularly, is, are you able to reference specifically how that restrictive form of legislation looks in America and how it would limit someone in a Canadian context? Are you able to comment on it?

Ms. Theresa McClenaghan: I'd recommend, for specific case examples, maybe to ask the witnesses—both the law commission is coming and also the Windsor clinic on class actions I saw on your list later this week.

As I mentioned earlier in my remarks, our understanding that that's a parallel comes from the commentary of them and of the private bar lawyers who were commenting on this legislation that we obviously had access to in preparing our remarks. Our own experience comes from following and watching the class actions that have occurred in Ontario and in Canada.

Mr. Gurratan Singh: I believe my colleague has a question.

The Chair (Mr. Roman Baber): Mr. Yarde.

Mr. Kevin Yarde: Would you say that Ontario is taking a step backwards with these proposed changes to class actions? Let me give you an example: Consumers, employees and anyone who is normally in a vulnerable position that needs access to justice through class actions won't be able to get that.

Ms. Theresa McClenaghan: So section 5(1.1) does raise that spectre of reducing access to justice. We advocate that access to justice, including for class actions, should be increased, and vulnerable Ontarians and disadvantaged Ontarians are among those who benefit from a good, strong class proceedings-type legislation, because a lot of the time the outcomes of those cases benefit all Ontarians of all income distributions.

The Chair (Mr. Roman Baber): Under two minutes remaining.

Mr. Gurratan Singh: Back to your area of law, your clinic: Your clinic services the community as an entirety, but you also have specific work, if I'm correct in hearing your remarks, around Indigenous communities. Is that correct?

Ms. Theresa McClenaghan: Right. Indigenous communities are among our clients and our partners and our colleagues, so we've worked with them either on specific cases around protecting drinking water or on law reform projects around protecting source water. For example, a law foundation project allowed us to bring in additional resources and additional lawyers to work with some communities in northern Ontario and in southwestern Ontario, to establish legal precedence and tool kits and draft bylaws for how they could protect their source water.

Mr. Gurratan Singh: And your work has largely been focused on source water. Can you expand on the extent of what that work pertains to?

Ms. Theresa McClenaghan: That's one of the areas of drinking water that we work on, because we, like many, advocate a multi-barrier approach to protecting drinking water. So you protect the source, you protect the distribution system, the treatment system, you monitor you, test—the whole circle.

Source water means you're keeping contaminants out of the place where the drinking water is coming from. CELA was part of the committees to government, all stripes of government, over the years after Walkerton, that looked at how that should be implemented and then helped set up the framework for source protection planning committees across the province, to evaluate where the threats to drinking water are.

Now that steam needs to be expanded to other communities, including First Nations. The legislation does provide for it in Ontario, but there are valid governance reasons that some First Nations would prefer not to use that law. We've helped work on the federal law too. And then some other communities who don't have central drinking water also need access to source protection.

The Chair (Mr. Roman Baber): Thank you very much, Mr. Singh. Unfortunately, the time has expired.

Ms. McClenaghan, I'd like to thank you for your appearance before the committee today, and I'd like to thank the Canadian Environmental Law Association for your testimony. We wish you a wonderful day.

Ms. Theresa McClenaghan: Thank you for having us.

The Chair (Mr. Roman Baber): As a reminder, should you wish to make any additional written submissions, the deadline is 6 p.m. Friday.

Ms. Theresa McClenaghan: Right. We did provide our written submission already to the Clerk, through the platform.

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

TORONTO LAWYERS ASSOCIATION

CHINESE AND SOUTHEAST ASIAN LEGAL CLINIC

SOUTH ASIAN LEGAL CLINIC OF ONTARIO

The Chair (Mr. Roman Baber): Committee members, we'll proceed with our next panel. Joining us are the Toronto Lawyers Association, the Chinese and Southeast Asian Legal Clinic and the South Asian Legal Clinic of Ontario. Welcome, everyone.

I'd like to introduce Margaret Waddell and Aitan Lerner with the Toronto Lawyers Association, Avvy Go with the Chinese and Southeast Asian Legal Clinic and Shalini Konanur with the South Asian Legal Clinic of Ontario. Each of you will have an opportunity to make your initial submission as an entity for a total of seven minutes, followed by a number of rounds of questioning from the opposition, the government and the independent members.

I invite the Toronto Lawyers Association to begin their seven-minute presentation, stating your name for the record. Thank you.

Ms. Margaret Waddell: Thank you. I'll start off. My name is Margaret Waddell. I am the past president of the Toronto Lawyers Association and the current co-chair of its advocacy committee.

The Toronto Lawyers Association represents lawyers of all stripes—big firms, small firms—across the greater Toronto area. We currently have approximately 3,700 members whose voices we are speaking with today in our submissions to you. We represent all members of the bar: criminal lawyers, prosecutors, plaintiff side, defence side, corporate, real estate—across the board. We are everyone.

Mr. Lerner, do you want to say who you are?

Mr. Aitan Lerner: Certainly. Aitan Lerner. I'm on the executive of the Toronto Lawyers Association. I'm here to support Ms. Waddell in these submissions today.

The Chair (Mr. Roman Baber): With five minutes and 50 seconds remaining, unmute, Ms. Waddell.

Ms. Margaret Waddell: We have two areas we'd like to cover. The first is the issue of legal aid and then class actions, so if Mr. Lerner could start with the legal aid submissions.

Mr. Aitan Lerner: Certainly. Thank you very much, Mr. Chair and honourable members.

I'd like to begin by pointing out that we have provided wholesome written submissions for you to consider. I don't want to simply read off and belabour any of the points made in those submissions, and frankly, I'd like to be able to answer as many questions as you may have with respect to those submissions that we made.

Essentially, the Toronto Lawyers Association feels that it's important to point out to the members here that we all appreciate and understand that having a robust legal aid system is important and a bedrock of the legal system in our great province. We've had an opportunity to look at some of the proposed amendments and have commented. I will highlight to you some of the issues that we have and make a few points with respect to some of the particular issues that we've identified.

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Clearly, there's a misunderstanding that needs to be clarified with respect to cost-saving initiatives. It is certainly important for everybody to understand and appreciate that having a more robust legal aid system in place will actually help save money. I know that it may be counterintuitive. It may be something that leaves people scratching their heads and saying, "Why should we spend more money on a more robust legal aid system? We need to save money, and government has to act prudently and responsibly and be fiscally responsible."

I'm not going to go into any of those reports that we alluded to in our written submissions. They're hyperlinked, so if you have them in front of you, feel free to look at those reports. But essentially the reports are clear. By cutting back on legal aid—I can speak specifically; being a criminal defence lawyer, I've been exposed to individuals who are unrepresented in the criminal justice system—it has a really adverse effect on the system.

Issue number one for us is, we know that legal aid is there to assist those who are marginalized in society, those who don't have the financial wherewithal to defend themselves against the state—the state has a tremendous amount of resources that are brought to bear in the prosecution of criminal charges—and individuals who are impecunious find themselves lacking in many ways. When there is a robust legal aid system in place, then we have qualified lawyers who are assisting those individuals and representing them in the courts.

When individuals are unable to have proper legal representation because of lack of funding, you end up with a system that ends up being gummed up even more and spends more time dealing with those unrepresented accused, therefore spending a lot more money in the long run. We see that on a regular and daily basis. It's important to consult with all the stakeholders: the judges, the prosecutors and everybody else who's involved in the criminal justice system, who will essentially say the same thing.

There are six very important proposed changes that are being made or proposed to the Legal Aid Services Act. We feel that some of those changes that are being proposed need to be reconsidered. It's really important that Legal Aid Ontario is independent, as you can appreciate, just like the judges have to be independent and the prosecutor's office needs the discretion of being independent. It would be really terrible if legal aid was not independent. The same government that's prosecuting—how does that look when it's the same government that's controlling whether an individual is entitled to have financial assistance when it comes to being legally aided and represented in the criminal justice system?

In terms of access to justice, it should be explicitly stated as a commitment in the act. The act should continue to require that the Attorney General ensure that the board, as a whole, has the knowledge, skills and experience that are commensurate with a body tasked with providing access to justice for low-income Ontarians.

This is a really important point that needs to be hammered home. Changing the current act by allowing individuals on the board of Legal Aid Ontario who don't have the knowledge necessary is not only not beneficial but highly detrimental, in our respectful opinion.

The Chair (Mr. Roman Baber): I apologize, Mr. Lerner. Unfortunately, you're out of time for your initial submission, but I invite you to integrate the balance of your submission into the question and answer period.

We'll now proceed with the Chinese and Southeast Asian Legal Clinic. I invite you to make your seven-minute submission, beginning with stating your name for the record.

Ms. Avvy Go: Thank you. My name is Avvy Go, and I'm the clinic director of the Chinese and Southeast Asian Legal Clinic. I want to thank the committee for the opportunity to comment on Bill 161.

CSALC is a community-based organization that provides free legal services to low-income members of the Chinese and Southeast Asian communities in Ontario. In addition to client service, we also conduct public legal education and engage in systemic advocacy to advance the rights of our communities.

Among the clients we serve are people with precarious employment and individuals with precarious status. We also serve many women fleeing domestic violence and people with mental health issues and/or physical disabilities. So all of our clients have very complex legal needs due to their social vulnerability as well as economic disadvantage, and all of them face tremendous linguistic and cultural barriers when accessing legal services. It's for that reason that CSALC was formed in 1987—to remove barriers in access to legal aid.

We have provided a written submission, so this afternoon I will just highlight three points. First, I will ask the committee to adopt a racial equity lens when examining the changes to the Legal Aid Services Act, LASA, to ensure racialized communities have equitable access to legal aid. Secondly, we ask you to amend the bill so that community legal clinics, and not Legal Aid Ontario, will determine what services should be provided by legal clinics. Third, we ask you to enshrine in the bill community legal clinics as a foundation of the legal aid system and the need to provide sustainable funding to legal clinics.

Racialized groups, including communities of colour and Indigenous communities, experience ongoing disproportionate levels of poverty, and that's true for members of the Chinese and Southeast Asian communities as well. In Ontario, 22.2% of the Chinese population and 18.4% of the Southeast Asian population live in poverty, as compared to 14.4% for all Ontarians and 11.5% of the population that do not identify as persons of colour. Due to systemic racism, members of racialized communities often face higher rates of underemployment and unemployment, and earn less money if they have a job. They are more likely to live and work in poor conditions and have poorer health outcomes. Members of these communities also experience greater barriers in accessing justice. And as we have already seen, the COVID-19 pandemic has exacerbated many of these pre-existing inequalities. If no action is taken, the challenges faced by these communities will only get worse.

We are opposed to changing LASA to give LAO the power to decide what services legal clinics should provide. As it now stands, the legal aid board and senior management do not reflect our communities—the Chinese and Southeast Asian communities—at all, nor do they have any connection to our communities. Allowing LAO to become the centralized body to determine the legal needs for us would mean, in the case of our communities, that the people who decide what services we should have no connection to us whatsoever.

Not being connected to the communities also means, for instance, that LAO is not able to respond to emerging issues. Right now, as Asian Canadian communities are battling the rise of anti-Asian racism during the pandemic, LAO is not in any position to respond to this critical issue nor offer any appropriate response. This is just one example of why maintaining the community legal clinic board model through legislation is so crucial to all legal clinics, but especially to ethno-racial legal clinics like ours.

As the Canadian public is awakened to the reality of systemic racism, our government must commit itself to reform all public institutions, as well as our laws and policies, to root out racism in all systems, and that includes the legal aid system. That's why we are calling on the committee to ensure that all racialized low-income Ontarians would have equal access to legal aid by amending Bill 161 so that community legal clinics like ours could continue to provide effective and high-quality legal services for our communities in an accountable manner. To that end, we have several recommendations I want to highlight here.

1400

First of all, you should enshrine in the purpose clause in the bill that LAO must guarantee equitable access to legal aid for racialized and other disadvantaged communities in Ontario.

Second, you should continue to recognize in legislation legal clinics as a foundational part of the legal aid system, and the need to provide core and sustainable funding to community legal clinics.

Third, identify and outline the roles played by community boards for legal clinics in the new legislation, just as you have done for the last 20 years.

Fourth, retain in the new law qualifications for appointments to the LAO board and add a requirement that the board must represent the diversity of the province and understand the needs of low-income racialized groups.

Fifth, continue to allow community legal clinics the flexibility to offer a broad range of services to meet the needs of our communities, including systemic advocacy, community development and public legal education.

Finally, we're asking the government and all the parties to support reversing all public funding cuts to legal aid and to community legal clinics.

As our province begins the slow journey to recovery from COVID-19, more than ever we need a strong and

sustainable legal aid system to ensure no one will be left behind.

Thank you very much for your attention.

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

We'll proceed with our final submission for this panel, and that will be Shalini Konanur of the South Asian Legal Clinic of Ontario. Welcome, and would you kindly begin by stating your name for the record?

Ms. Shalini Konanur: Good afternoon, everyone. My name is Shalini Konanur. I'm the executive director of the South Asian Legal Clinic of Ontario. I'm smiling a little because what you're going to hear from me is very similar to what you just heard. I promise you that I did not talk to Avvy when we wrote these submissions.

Thank you to the committee for allowing me to speak today. The South Asian Legal Clinic of Ontario, SALCO, is also a not-for-profit legal aid clinic. Our broad mandate is simply to enhance access to justice for low-income South Asians in Ontario. We do that by providing direct legal service, public legal education and participation in community development and a number of systemic advocacy initiatives. We work in multiple areas of law, including income security, housing, immigration, employment, human rights and family violence. SALCO also works with a large population of clients facing gender-based violence, including clients facing forced marriage, human trafficking, intimate partner violence and elder abuse. We provide service in multiple languages within our communities, including Tamil, Bengali, Hindi, Urdu, Punjabi and Kannada.

South Asians actually make up the largest racialized community in Ontario, totalling approximately 8.7% of Ontario's population, almost 1.1 million people. We fall into poverty at a rate of 18%, disproportionate to the rate of non-racialized communities. This means that over 200,000 South Asians in Ontario live in poverty, below the low-income cut-off guideline. We also know that racialized communities are brought into the justice system at disproportionate rates for a variety of reasons, most notably systemic racism.

I want to take this opportunity to reaffirm and support the submissions made this morning by the Association of Community Legal Clinics of Ontario. Today, my submissions are really going to focus more on the impact of modernization of legal aid on racialized communities like the South Asian community.

My first recommendation: Mandate diversity on Legal Aid Ontario's board of directors; mandate the collection of race-based and other disaggregated data; and apply a race equity lens to modernization.

A critical component of achieving equality in access to justice is to make sure that all levels of legal aid in Ontario are reflective of the large populations of racialized and Indigenous people that it serves. As we speak, people around Ontario and around the world are reflecting on issues of systemic racism and on diversity and inclusion.

I believe that Bill 161 represents a real opportunity to legislate a commitment to diversity at the legal aid board of directors level. Our recommendation is to include a new subsection in section 5 that requires the legal aid board to be reflective of the diverse racialized, Indigenous, and other disadvantaged communities that legal aid services represent.

We also would like the subsection in section 5 to mandate the collection of race-based and other disaggregated data, and we really would like this committee and the government to apply a race equity lens in considering the outcomes of the changes made in Bill 161.

Our second recommendation: Ensure that legal clinics are legislated to provide clinic law—not a "may," but a "shall," which is a word and a phrase that I think you've heard throughout the day. As we know, the current legislation does not make it a requirement to fund clinic law services and clinics.

I do want to take this time to acknowledge, though, that the Attorney General has had wonderful and excellent comments about the critical nature of clinics and is supportive of clinics, and that the legislation does contemplate input from clinics. What it does not do is make it mandatory to fund clinic law services.

I want to take SALCO's story as the reason for why we make this request. SALCO, unlike a lot of other clinics, is actually one of the newer funded clinics. We got our permanent funding in 2007. Why we got it was because Legal Aid Ontario, the South Asian community and the Ministry of the Attorney General did a massive needs assessment and determined that there were significant barriers for the South Asian community to access service. The response to that from the Attorney General and Legal Aid Ontario was that the best, most effective and responsive model was to create a clinic.

That is really a testament to why clinics are so important to the system. We provide direct legal service. Our clinic averages between 90 and 100 legal education sessions in the community annually, in multiple South Asian languages, for communities who have a huge gap in knowledge around what their rights are and what the law is. We do community development work and we work on systemic issues.

With this government, the current government, we are sitting on the community and social service engagement table to provide expertise and input into policing legislation. We have engaged with this government on protections for victims of homicide, on family violence and on forced marriage.

I urge you to consider changes to LASA to legislate that clinics continue to provide clinic law and mandate that they do. For me, clinic law includes income maintenance, housing, human rights, health, education, family violence, gender-based violence and any number of areas of law that are deemed important for the communities that we serve.

You've heard a lot about our next recommendation, so I'll do it very quickly. "Access to justice," "disadvantaged communities," "low income"—three phrases that have been removed from the current Bill 161. Why are they important? Why are these phrases important? The foundation of the work that SALCO does is to enhance access to

justice for low-income clients from a disadvantaged community. This is an opportunity for the government to send a message to our communities that these are the foundational purposes of legal aid in Ontario.

This is a timely issue. Given the conversations that we are having around Canada, around the United States and around the globe, it is timely to recognize that these vulnerabilities are, in essence, the purpose of legal aid.

Our next recommendation is to allow clinics to determine their own needs.

The Chair (Mr. Roman Baber): Thirty seconds.

Ms. Shalini Konanur: Many have spoken about this. Our recommendation is that clinics should be mandated and legislated to be able to make their own determinations of client needs.

SALCO's board of directors and SALCO's staff are heavily embedded in our communities. We are the right organization to be able to determine what the shifting needs of low-income South Asian clients are in Ontario. I echo the comments that a central bureaucracy like Legal Aid Ontario does not have the connection to our communities.

Those are my submissions and my recommendations. I thank you for the opportunity to speak with you today.

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

We'll begin with five and a half minutes by the official opposition. Mr. Yarde.

Mr. Kevin Yarde: I want to thank you for your submissions—very powerful submissions from the individuals we just heard from, from the South Asian Legal Clinic and the Chinese legal clinic—the amazing work you guys do in the community, as well as other clinics, like the Black Legal Action Centre.

With these proposed changes in Bill 161, I want to talk a little bit about—I know you mentioned access to justice in terms of value for money, so the comparison between access to justice and value for money. If passed, would you say that this bill will reduce the areas of law that clinics work in, eliminating the focus on, say, crucial issues like discrimination and human rights? It could be Avvy or any one of you who want to answer that question.

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Ms. Shalini Konanur: Yes, I think there's a strong potential for reduction in services. My understanding and reading of what poverty law is—it's limited to income maintenance and housing. We work in a number of areas of law that may not necessarily fall into the poverty law that clinics do, depending on what Legal Aid Ontario decides.

On the point of value for money: I would like to report to this committee that our clinic went through a value-for-money audit from Legal Aid Ontario. The report from the auditor was that we were, in fact, the most effective and cost-effective way to provide those services.

The Chair (Mr. Roman Baber): Ms. Go.

Ms. Avvy Go: I'll give you an example. For instance, right now, Bill 161 takes employment law out of the list of poverty law. Employment law is one of the areas of law that our clinic has been doing since 1987.

In terms of value for money, I often give this example to media: We often represent clients who are owed money from their employers. In one particular case, we helped a group of clients who collected over $250,000 from the factory where they worked. They used the money to open up a restaurant, and they became one of the most successful restaurants in Scarborough. That's value for money for me. It's not just about how much money we have put in, but the fact that we are able to not just ensure access to justice for the client—they're able to collect the money that is owed to them under the law and use the money to start up their own business, create jobs for other people in the meantime, and have the best sticky rice chicken in the entire country, as far as I am concerned. So that's the kind of work that legal clinics often do—and they are not being counted as part of the value for money for our work.

The Chair (Mr. Roman Baber): Mr. Yarde, if you have no further questions, we'll pass it on to Mr. Singh.

Mr. Gurratan Singh: I only have about two and a half minutes left, so if you could give me very succinct answers to some of these questions—I'm going to go to each of the groups that have presented today.

Would you agree with the position that the removal of "access to justice," "disadvantaged communities" and "low income" that is proposed in Bill 161 and the narrowed definition of the area of practice outlined in the proposed changes in Bill 161 would negatively impact Black, racialized and Indigenous Ontarians, as well as women who are fleeing violence, and their ability to access justice? I'll go to each of you just to get your quick response.

Ms. Margaret Waddell: There's no doubt that that is an accurate summary, yes.

Mr. Gurratan Singh: If everyone could say it for the record, please—Shalini next.

Ms. Shalini Konanur: Yes, I would agree.

Mr. Gurratan Singh: Avvy?

Ms. Avvy Go: Definitely. Yes.

Mr. Gurratan Singh: Aitan?

Mr. Aitan Lerner: Yes, absolutely. I agree with that.

Mr. Gurratan Singh: Further, would you agree that these changes are a step back for Ontario with respect to providing access to justice to folks across our province?

Ms. Margaret Waddell: Yes, I agree.

Mr. Gurratan Singh: Shalini?

Ms. Shalini Konanur: Yes, I agree.

Mr. Gurratan Singh: Avvy?

Ms. Avvy Go: Yes.

Mr. Gurratan Singh: Aitan?

Mr. Aitan Lerner: Absolutely. In the strongest of terms, yes.

Mr. Gurratan Singh: I believe I have 30 seconds left. Is that fair, Chair?

The Chair (Mr. Roman Baber): Twenty seconds.

Mr. Gurratan Singh: Very quickly, just a point of note: This is a new model that is proposed by the government, with respect to this panel. It was something that

members of the opposition—we had hoped that it would have one member presenting at one time. Thank you for engaging at this time, but we had hoped to have one member at one time. The government proposed this process, and out of the risk of not wanting to lose a day, we had to adopt this process. Thank you for considering this process.

We'll have another two rounds of questions afterwards.

The Chair (Mr. Roman Baber): Mr. Singh, you will have an opportunity to ask questions again.

We now go to the government for five and a half minutes of questions, starting with Mr. Bouma.

Mr. Will Bouma: Thank you, Mr. Chair. Through you, I was intrigued, Mr. Lerner, by your submission. I have just a couple of questions for you, but I want to start off with this one, because I can tell you, I'm no lawyer.

You seem to make the argument that we need to make an even more robust legal aid system and that we haven't done enough. As a layperson looking at the exponentially increasing costs of legal aid, to the point that the Auditor General had some real concerns in 2018 in a report that came out, I was wondering if you could tell me—because there have been a lot of resources poured into legal aid, but the Auditor General was not convinced that that money was being spent well. I was wondering if you could, from your vantage point, tell the committee about the successes that have been seen because of the exponentially increased money going into legal aid over the last 15 years.

Mr. Aitan Lerner: There are numerous problems. I can't comment on the administrative costs with respect to running Legal Aid Ontario. I can only speak from my vantage point in terms of seeing how the system works when people are not legally represented.

Have I been able to see that with more money in the system—the short answer to that is in some ways, yes, and in some ways, no. In some ways, I could say yes, because more people are able to have some access to justice through the legal aid system. In some instances, I would say not, because with inflation it's really not fair to compare dollars from 15 years ago to dollars today. Because of inflation, the cost of delivering legal aid and legal services has increased, and as such, the limitations placed on individuals who are living specifically—and I'm going to comment specifically on the Toronto area, where the cost of living is even higher. The cut-off for individuals who qualify for legal aid is too low. As a result, despite the fact that legal aid is putting more money into the system, it's not necessarily addressing all of the issues.

I totally adopt all of the comments made by the other presenters here today and agree with them, just so the record is clear. I think by simply trying to limit expenditures from the treasury, we're really taking a major risk that we're not going to be servicing individuals who are marginalized, as you've heard here today.

Mr. Will Bouma: Good—but the point being, then, in the experiment that has been conducted by dramatically increasing funding to legal aid, you have not been able to point to any serious successes in that. But just moving on—

Mr. Aitan Lerner: No, I'm sorry; that's not entirely accurate. You've heard successes from the two who presented last, after me. Those, I would say, are extremely successful. I am, again, just speaking specifically from my vantage point as a criminal defence lawyer.

Mr. Will Bouma: Very good, and I agree, because they pointed to the cost-benefit analysis that had been done on both of those clinics. I'm very pleased that they were very, very good on that.

I understand that the Toronto Lawyers Association has some views on the Attorney General's proposed changes to the Law Society Act. Two of the proposals in particular are aimed at professional misconduct and enhancing the powers of the law society in dealing with those types of issues. Can you expand, with some specific references to either disciplinary cases that you know or the feedback that you have received from the bar, on why instituting greater maximum fines for professional misconduct and allowing summary revocation of a licence under particular circumstances is required to protect the public? I was just wondering if you could comment on that for me.

Mr. Aitan Lerner: No, I can't. I'm not prepared to comment on that right now. I would defer to my colleague Ms. Waddell, if she's prepared to comment.

Mr. Will Bouma: That would be great. Thank you—just from the Toronto Lawyers Association's point of view.

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The Chair (Mr. Roman Baber): Ms. Waddell, you have about 50 seconds remaining.

Ms. Margaret Waddell: Could you clarify what your issue is?

Mr. Will Bouma: If we expand the greater maximum fines for professional misconduct and allowing summary revocation, are these good things for the public?

Ms. Margaret Waddell: I think that we have a robust system at the law society, but increasing fines isn't necessarily the best way to deal with disciplinary issues. Really, we're talking about either behaviour modification or preventing it in the first place. And increasing fines really doesn't do anything to address either of those issues at the end of the day. The costs that are involved in defending a discipline case are already extraordinary, and the cost awards that are coming out of people who are found to have misbehaved are already achieving the results that we need without adding additional fines on top. Losing your licence is, as I said, tantamount to capital punishment in the area.

The Chair (Mr. Roman Baber): Thank you, Ms. Waddell. That concludes this round of questioning by the government.

We'll now proceed to the independent member for four minutes of questioning.

M^me^ Lucille Collard: The question is for the Toronto Lawyers Association. In your submission, you oppose quite vividly the inclusion of the concept of superiority and predominance into the certification test. I would like to hear more about this and why. Ms. Waddell?

Ms. Margaret Waddell: Sorry. Superiority and predominance are concepts that have been imported in from the American system for class actions, and it's a much higher test that requires looking more deeply into the merits of the case and is inconsistent with the rest of the way that our procedure in class actions works.

In the States, superiority and predominance flow from a different system, where there is advance discovery before the certification motion takes place so that the record is complete before you get to certification. And the test is much more robust. It deals with looking at the merits of the case rather than simply whether the class action is the appropriate process to follow in order to resolve the issues that are being raised.

You heard already from the prior presenter about things like Walkerton, which wouldn't have met the test if predominance and superiority had been involved in the test at the time. The same holds true for such things as institutional abuse; the Indian residential schools would never have passed this test. Long-term-care cases that are now being brought before the court would be seriously at risk of not being certified because of the many individual issues that ultimately result.

Our system, if this was to be put into place, would also put Ontario completely at odds with the certification and class action regime throughout the rest of the common law of Canada, making Ontario an outlier, where it becomes harder for Ontarians to obtain access to justice, access to the courts when they've been wronged, as opposed to any other province. I don't think that's good for Ontarians, I don't think that's good for our judicial system, and it's certainly not fair to the people who have been harmed and have real injuries that need redress.

The Chair (Mr. Roman Baber): We have about a minute left.

Ms. Margaret Waddell: Oh. Well, then let me continue with that.

The issue also would leave us at odds, as I said, with the rest of the world, and there's an easy fix. The easy fix is to put us in line with the rest of the country by following the Uniform Law Commission's model act and enacting the legislation that's proposed there for the preferability test, which includes predominance as a factor to be considered rather than as a mandatory test that must be met. To be consistent with other provinces such as Alberta, Saskatchewan and BC would be a much better way to resolve the issue, if we want to actually have a higher gatekeeper function over what cases are being allowed to proceed as class proceedings.

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

M^me^ Lucille Collard: Just a few seconds?

The Chair (Mr. Roman Baber): Madame Collard, unfortunately you are out of time.

M^me^ Lucille Collard: Okay. I was just going to thank them, but that's fine. Thank you.

The Chair (Mr. Roman Baber): You're welcome to do that.

M^me^ Lucille Collard: Okay. Well, I just want to thank you briefly for all the time and effort you've put in bringing forward those important issues you are actually experiencing so that we can address those in the proposed legislation. So thank you very much.

Ms. Margaret Waddell: You're welcome.

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

We'll now proceed back to the official opposition. Mr. Singh?

Mr. Gurratan Singh: I'll do this question, once again, in a similar fashion, where I'll propose the question and get you all to respond.

Across the world, we are seeing people rising up to protest against anti-Black racism, and the roots of it often found within systemic anti-Black racism that exists in the justice system—and Canada and Ontario in no way having that not applicable to us. We also have a history of systemic anti-Black racism, as per the commission on systemic racism that was once commissioned in Ontario in the 1990s, I believe.

My question to each of you is this: Given the changes that I've articulated earlier around access to justice and the narrowing of practice fields and the removal of "low-income" and "disadvantaged communities," could these changes worsen systemic anti-Black racism in Ontario? I'll just go by way of order that I can see. Mr. Lerner?

Mr. Aitan Lerner: Yes, certainly. If you are just asking me whether I agree with that statement, it certainly is a possibility, based on everything that we've submitted.

Mr. Gurratan Singh: Shalini?

Ms. Shalini Konanur: Yes, I would absolutely say that there is a possibility. A lot of the work that we do is around systemic change and addressing specifically anti-racism, working with the province's Anti-Racism Directorate. All of those things are put in jeopardy by the potential limitations of this legislation.

Mr. Gurratan Singh: Avvy?

Ms. Avvy Go: Not only do I agree with that statement, but I think, more importantly, it highlights an issue that goes back to what we have seen earlier: that it is up to the Black community themselves to say whether or not this change is going to affect them differently—although I would agree, as a general statement, that the changes would not be helpful for any one of us who are dealing with systemic racism of all forms. It also highlights the need for the communities to be in the position to define what they need, as opposed to letting legal aid or some other central body say, "You must do this or you must do that," to address—whether it's anti-Black racism, or anti-Asian racism, for that matter.

Mr. Gurratan Singh: My question now is going to go to Aitan. I've practised previously in criminal defence and I noticed that when you have a well-funded system on both ends, you have greater access to justice and greater cost savings. Because ultimately, you have defence lawyers who are able to be properly remunerated with respect to their certificates and you have crowns who also have access to the resources they need so they're not drowning in files. You have the ability to have better access to

justice, with less appeals and less cost upon the system as a whole. Would you agree with that statement, and could you expand on that?

Mr. Aitan Lerner: I would absolutely agree with that statement. I think that we're speaking specifically here about legal aid, but we see—you're right—a greater level of appeals as a result of individuals who enter either unrepresented or poorly represented.

In terms of expanding on that, I would also agree with you that the entire criminal justice system, not just legal aid as it pertains more broadly to the other areas, which certainly have a bearing directly on the criminal justice system in many ways—we have limited time to get into that right now.

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But certainly, I'd agree with that comment that—probably even the crown attorney's office is underfunded and probably would benefit greatly, from our perspective. We'd end up saving more money if we had a more robust criminal justice system. It would mean that matters get through the criminal justice system more quickly, and we'd spend less time in the criminal justice system—meaning that individual matters and individual cases would spend less time in the criminal justice system, saving the province a lot of money in the long run, for sure. I'd agree with that.

Mr. Gurratan Singh: Chair, how much time do we have left?

The Chair (Mr. Roman Baber): About 40 seconds.

Mr. Gurratan Singh: Kevin, I don't know if you have enough time to ask your question in that time.

The Chair (Mr. Roman Baber): Mr. Yarde?

Mr. Kevin Yarde: Back to Margaret Waddell: I want you to expand a little more about class actions and how the changes to this bill will affect the access to justice.

The Chair (Mr. Roman Baber): If you can try and do that in 20 seconds.

Ms. Margaret Waddell: The issue of access to justice is important in class actions, because class actions allow many, many people to come together and have their claims addressed together in one proceeding. If the barriers are raised for them to access justice, it prevents them from being able to respond to systemic abuses, to corporate malfeasance, on a broad level, but perhaps at a very small damages level. Those kinds of abuses need to be addressed. That's why we enacted this legislation to begin with—so that individuals can act as private attorneys general.

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

We'll now go back to the government for five and a half minutes. Mr. Pang?

Mr. Billy Pang: Thank you, Mr. Chair. Through you direct to Ms. Go of CSALC: When the new legislation was being drafted, we heard from many stakeholders the importance of maintaining the definitions of "community legal clinic" and reference to a clinic's board of directors being comprised of members of the community or communities the board serves. Can you speak to why this is so important for community legal clinics in Ontario?

Ms. Avvy Go: Sure, and thank you for the question. I will just use our clinic as an example. We were set up, as I mentioned, in 1987, to provide services to low-income people who have a linguistic barrier to accessing legal services. The reason why we exist is because the system as a whole was not able to address their particular needs. From day one, we have been very specific about how the board members who are part of our board must also represent the kinds of communities that we serve. The board members themselves also come from the Chinese and Southeast Asian communities so that they can be in a better position to define and identify the needs of these communities.

I'm sure all of us understand: If you are from a particular group or from a particular community, you will have much better understanding or affiliation with that group. You are better able to understand the needs. I cannot speak to the needs of Black communities; I cannot speak to the needs of South Asian communities, nor should I. If you extrapolate from that, that is why, particularly for ethnoracial legal clinics, it's very important that we are in a position to define who we serve and the services we provide, based on a community board model that reflects the diversity of our community.

Mr. Billy Pang: Having said that, is the current proposed definition overly restrictive in that it potentially prohibits qualified people who have strong ties to the communities where clinics operate from joining that clinic's board?

Ms. Avvy Go: The new changes do not even speak to community boards. The LASA actually has particular sections that talk about community board duties and the makeup of the community board. When Bill 161 was introduced, they actually took that whole section away and replaced it by giving the power to Legal Aid Ontario to determine the needs of the community. So you're usurping the power of the community board and passing it on to legal aid.

I spent many years as a bencher at the law society. I was involved in appointing the legal aid board, so I understand the need to make sure the legal aid board has qualified people to serve on the board. But they don't represent communities. These are not people who are low-income by any means. They don't come from any of the communities that Shalini and I serve—none whatsoever. So I think it's very important to maintain the clinic board model, the community board model, while at the same time making sure that the LAO board is also representative of our community.

The Chair (Mr. Roman Baber): With about a minute and 40 seconds remaining, Ms. Park.

Ms. Lindsey Park: I just wanted to get some clarification. We've heard from many stakeholders about the importance of maintaining in the definition of" community legal clinics" reference to the clinic's board of directors and that it be comprised of members of the community or communities the board serves. I think that's inconsistent

with what we've heard from you. But I think we agree that it's important for the community legal clinics to have members of the community on the boards. Is that right?

Ms. Avvy Go: Yes. Correct.

Ms. Shalini Konanur: Our boards are diverse to be able to allow us to understand our communities, but also to allow us to be accountable back to our communities. Our boards represent those communities as a voice to us. So there's a two-way relationship—them providing us with focus on the needs, but also being accountable back to those communities.

The Chair (Mr. Roman Baber): Back to the last round of questioning: For the official opposition, MPP Morrison.

Ms. Suze Morrison: This can go to any or all of the panellists: Can you speak to the impact that the recent 30% cut to legal aid has had on your different organizations?

Ms. Avvy Go: Although on paper we only get a 1% cut, because of the legal aid funding cuts they are no longer able to fund any in-year increases, so we end up with about a 10% cut in our clinic, which results in us having to cut back the time of one of our staff. Compared to many other clinics, you can say that we're in a better position. But you can imagine that once you cut funds to a clinic, it undercuts the clinic's ability to serve clients, and if the clients are very marginalized, very vulnerable, the clients themselves will be directly impacted by the cuts.

So I think it's very important for the government to restore the funding—not only just say, "No more cuts," but restore the funding cuts that happened last year. We don't even know if they are going to continue to cut funding for immigration and refugee law, which is, again, an issue that affects racialized communities in particular. I think we need to pay attention to that one, as well.

The Chair (Mr. Roman Baber): Ms. Morrison, if you have no more questions, we'll move to MPP Singh.

Mr. Gurratan Singh: Similarly, I'm going to try to get all of your input to this one question I have, and then I'll narrow my questions further.

The Law Commission of Ontario, as you're probably aware of, wrote a quite scathing letter with respect to Bill 161 and provided their criticisms of it. They end the letter by saying, "In light of this analysis, the LCO is unable to support Bill 161 as currently drafted," since the many positive elements of the legislation are outweighed by the negative aspects of this legislation. Would you agree, across the board, with respect to access to justice or class actions, to the variety of issues we've identified in this conversation, that looking at the current Bill 161, as drafted, there would actually be an overall negative impact on access to justice in Ontario and, thus, it should be redrafted?

I'm looking at whoever gets unmuted first.

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Ms. Margaret Waddell: Yes, I agree with you. The changes that are proposed in this legislation will raise significant barriers to Ontarians being able to access the justice system for harms that they've suffered, particularly in areas such as personal injuries, environmental harms and institutional abuse. Absolutely, this makes a big difference.

Mr. Gurratan Singh: And the negatives outweigh the positives?

Ms. Margaret Waddell: The negatives outweigh the positives.

Mr. Gurratan Singh: To whoever gets unmuted first—Shalini, Avvy or Aitan?

Ms. Shalini Konanur: I would agree the negatives outweigh the positives.

I would also say, if there's an opportunity to step back—we've heard several times that the Auditor General's report said the numbers have gone down. When I look at the numbers, in particular on the clinic side, there's an interesting footnote that says that the comparator, actually, for the one year that they went down, was a complete shift in the system in the way that we report.

I think there's some work to be done on looking at some of the assumptions that were made in creating this bill—and definitely a negative over a positive.

Mr. Gurratan Singh: And being mindful of the time, if Avvy and Aitan could also respond as well. Aitan, I believe you're unmuted.

Mr. Aitan Lerner: I totally agree with it. The Toronto Lawyers Association agrees with that position. In fact, in our submission we suggest that the government take a step back and have some broader consultation with all of the stakeholders before proceeding with this, because some of the areas that we've identified are only some areas that would certainly be a lot more adverse than any of the benefits we may get from it.

Mr. Gurratan Singh: And Avvy, if we can just quickly get your comments for the record and pass it off to Suze then.

Ms. Suze Morrison: Thank you so much. My question is—

Mr. Gurratan Singh: Suze, I was trying to get her comments really quick, just for the record—if Avvy could just get those on the record.

Ms. Avvy Go: Yes. I think it's important to get rid of all the negatives and keep the positives.

Mr. Gurratan Singh: Sorry, Suze. Go ahead.

Ms. Suze Morrison: No, that's okay.

The Chair (Mr. Roman Baber): Thirty seconds.

Ms. Suze Morrison: I just want to make one quick connection. Does anyone on the panel know the figure offhand of the amount of money that legal aid saves our system overall for every dollar invested in legal aid?

Ms. Avvy Go: Six dollars, according to a study I've seen in the States.

Ms. Suze Morrison: Thank you so much.

The Chair (Mr. Roman Baber): Okay. With 10 seconds left, we'll pass it back to the government for a final round of questioning.

I see Mr. Gill. Welcome back.

Mr. Parm Gill: Thank you, Mr. Chair. I have a couple of questions for Margaret Waddell, if that's possible, first.

You mentioned that the AG-proposed amendments to the class actions lean more into the merits, but the AG

consulted on applying a merits test as proposed by some stakeholders and he explicitly rejected that. Isn't that correct? And can you also discuss why a merits test isn't helpful, in your view?

Ms. Margaret Waddell: First of all, there is no specific reference to a merits test, but by importing into section 5(1.1) the predominance test, if we were to assume that that wording will be interpreted consistently with the States, what you'll see is that in the States and in cases such as Walmart and Dukes, which was an overtime case, the merits bleed into that determination necessarily in the process, and so you cannot say one is not with the other because it really is one and the same thing. So the merits are part of predominance. If we're going to look at American terminology, we have to look at the American law, and that is the state of the American law.

I missed the second part of your question.

Mr. Parm Gill: The second question was, are you aware that the AG had consulted with stakeholders and he explicitly did reject it. Is that correct?

Ms. Margaret Waddell: I am absolutely aware that the AG consulted with stakeholders. I was one of many, and he also had input from many organizations that are in the area. Many suggested there be an explicit merits tests, and there isn't an explicit merits test. He baked it into the using of the "predominance" section instead, which none of the stakeholders advocated in favour of, except for one group of bankers and insurance representatives, who suggested that without any explanation or background as to why we should be going to an American-style system.

Mr. Parm Gill: You also mentioned the US, obviously, and how you think we're moving towards the American class actions. But we have a completely different regime here; is that not right?

Ms. Margaret Waddell: Our regime has been completely different, but the recommendations that we see in Bill 161, schedule 4, for the Class Proceedings Act, move the dial significantly away from what is consistent with the other provinces across the country and the system that we've created to something very different, which is raising significantly more barriers to access to justice through a very different test than the rest of the provinces have in place.

Mr. Parm Gill: It is my understanding that we use a very low evidentiary standard for certifications. Is that correct?

Ms. Margaret Waddell: Right now, the test is "some basis in fact," which is a low evidentiary test. How that would play in when you also have a predominance test is going to be very difficult to ascertain. What I see this creating is an even greater burden on the plaintiffs in order to establish the test even at the "some basis in fact" level, because we don't have pre-certification discovery rights in Ontario or in any of the other common-law provinces. So when you don't have the evidentiary background or the ability to meet a higher threshold, there is a disconnect.

Mr. Parm Gill: Thank you. Do I have a couple of minutes left, Chair?

The Chair (Mr. Roman Baber): You have a minute and 10 seconds remaining, Mr. Gill.

Mr. Parm Gill: Thank you. I'm going to go to Shalini, if that's okay, on my next question.

When the new legislation was being drafted, we heard from many stakeholders about the importance of maintaining, in the definition of "community legal clinic," reference to a clinic's board of directors and that it be comprised of members of the community or communities the board serves. Can you speak to why this is important for community legal clinics in Ontario?

Ms. Shalini Konanur: Absolutely, and I'll speak specifically about the South Asian Legal Clinic. We have required since our inception a complement on our board of members of each of the multiple South Asian communities that are most predominantly served by the clinic. We have required that those members have some sort of active connection to the community. Why it's important is because we engage at a governance level significantly throughout the year on making decisions on the focus of the clinic: what work the clinic should be doing, what shift in focus, and very difficult decisions about capacity and priorities for our work. It is our board that is actually able to understand those communities, understand the needs and provide us with the support and guidance to do that work.

To be frank, there are members on my board from other South Asian communities that I am not from, and so I value deeply their connection to the communities and the expertise that they bring to the organization, and that they're willing to serve in these capacities so that we can do that work. It was our board that mandated and guided us 15 years ago to start the extensive work we do now on forced marriage, and we're one of the few organizations in the country that is a national voice on that. And it is a board that holds us accountable to those communities.

The Chair (Mr. Roman Baber): Thank you very much. That concludes the time we have available for this panel. I thank the panel for their submissions.

I'm going to ask members to recess for five minutes as the Legislative Assembly is working on getting a number of our next panellists on board.

The committee will recess and will resume at 2:55 p.m.

The committee recessed from 1450 to 1456.

The Chair (Mr. Roman Baber): If I can please call a resumption to this afternoon's hearings of the Standing Committee on Justice Policy. We're here to resume the 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.

ONTARIO BAR ASSOCIATION
CANADIAN CIVIL LIBERTIES ASSOCIATION
OMNI BRIDGEWAY CAPITAL (CANADA) LTD.

The Chair (Mr. Roman Baber): Our next panel is set to go. We have Mr. Colin Stevenson with the Ontario Bar Association and Melanie Webb as well. We have Cara

Zwibel with the Canadian Civil Liberties Association joining us. And we have Naomi Loewith and Paul Rand from Omni Bridgeway Capital (Canada) Ltd. Welcome, everyone. You'll each have an opportunity to make initial submissions for seven minutes, followed by questions from the government, the official opposition and an independent member.

I invite the Ontario Bar Association to commence their seven minutes of submissions by stating their name for the record.

Mr. Colin Stevenson: Thank you very much, Mr. Chair and committee members. My name is Colin Stevenson. I'm the president of the Ontario Bar Association, and I will be making these submissions jointly with my colleague Melanie Webb, who's the chair of our criminal justice section. We very much appreciate the opportunity to join you today.

As many of you know, the OBA is Ontario's largest voluntary legal association. We have some 16,000 members. Our members practise in virtually every area of the law. We have 40 sections. One is a class action section, so I'm going to speak to the proposed amendments to the Class Proceedings Act. Melanie is the chair, as I say, of the criminal justice section, so she will speak to the legal aid amendments.

The OBA every year provides—well, last year—325 in-person or online professional development programs to an audience of over 12,000 lawyers. So our members are truly expert in all these areas, and in particular on the two areas upon which we will comment today. As I say, we're going to speak briefly to the two schedules in Bill 161 dealing with the amendments to the Class Proceedings Act and the new legal aid act.

On the Class Proceedings Act: We are an organization, at the OBA, where our expert members act for both the plaintiffs and the defendants, so we are uniquely suited with our expertise to provide balanced advice for the legislation to ensure that it's right for the bar and the public that we all serve.

We would like to start by commending the Attorney General for his consultations with the bar on these proposed reforms and for incorporating many of the reforms that the OBA proposed to the Law Commission of Ontario in 2018 in its report. Many of these amendments will certainly streamline the process and reduce costs and delays.

In our submission to the committee—you have our written submission—we're proposing three amendments to the bill which our members believe will better achieve the government's purposes and protect the interests of the public and our members.

We recognize that one of the major aspects of the proposed reform on the Class Proceedings Act is in respect of introducing superiority and predominance. These are areas of significant contention. I can tell you that there is no consensus among the class actions bar about the advisability of these changes or the specific terms of the requirements. But I must emphasize that our written submission does note that the proposed certification changes could put a category of cases at risk of never being litigated; namely, cases involving socially important issues that are likely not amenable to alternative forms of litigation, but which involve significant individual issues as well. The example in our written submission is the Indian residential schools. The committee needs to take that carefully into account, obviously.

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In terms of our three specific amendments, you have those in writing. I'm not going to reiterate those. I'll be happy to answer questions when we get to that stage of the proceedings.

Now I would like to invite my colleague Ms. Webb to talk about the new legal services act and some amendments we propose there.

Ms. Melanie Webb: The OBA has been a consistent advocate for a strong, sustainable legal aid system, which is critical to a strong civil society. Our submission on Bill 161 and, more broadly, the work our association does on legal aid issues has had the benefit of input from the criminal, family, citizenship and immigration, child and youth, and Aboriginal law sections. Collectively, these sections include lawyers who serve on the front lines of the legal aid system, including crown counsel and those who represent a broad range of clients who come into contact with the system.

We understand the intent of the changes to legal aid under Bill 161 to be depoliticizing some legal aid decisions and giving more flexibility and decision-making power, such as setting financial eligibility, to an arm's-length agency that is closer to the issues, the clients being served and the lawyers who provide service. As the OBA has said from the beginning, the success of these changes hinges on adequate funding and a systematic, constant and robust consultation between the bar and legal aid; we have and will continue to advocate for both.

We are pleased to see the consultation requirement made explicit in the legislation. Our members anticipate a consultation policy that provides continual opportunities for meaningful input.

The OBA has made three recommendations in our submission with respect to legal aid, which the committee members have. They speak to the need for adequate funding and clarity that supports fair and effective legislation.

First, our request for additional funding to LAO, to account for responsibility for court-ordered services, including what are called Rowbotham orders, speaks to the fundamental need for adequate funding. It is our understanding that the government intends this change to come with additional funding, and we have asked that this be formalized prior to the coming into force of that provision of this bill.

Second, we have asked for an amendment to clarify the LAO board composition. It is our understanding that the new formula is intended to allow for flexibility in the size of the board, and not to change the proportionate representation of membership on the board. The bill should simply be amended to reflect this intention.

Lastly, we have asked for an amendment to remove the ability under the proposed act for LAO to immediately impose negative financial consequences on a lawyer who is providing legal aid services without an obligation for LAO to advise the lawyer of the basis of the concern. We recognize the existing reporting obligations lawyers have to ensure the integrity of the legal aid system, and we are not seeking to change that at all. However, the provision as drafted is contrary to principles of fairness and due process. It places an unfair burden on lawyers who are providing legal aid services to Ontario's most vulnerable citizens and could ultimately lead to fewer lawyers being willing to take on legal aid services. Bill 161 should be amended to retain the clear provisions that exist under the current act.

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

I will now move on to the Canadian Civil Liberties Association. You may now begin by stating your name for the record. Ms. Zwibel.

Ms. Cara Zwibel: My name is Cara Zwibel. I'm director of the fundamental freedoms program at the Canadian Civil Liberties Association. For those who don't know, the Canadian Civil Liberties Association, CCLA, is a national non-profit organization that does work throughout the country to protect and promote rights and freedoms. On behalf of the CCLA, I want to thank you, Mr. Chair and members of the committee, for hearing from me. I want to briefly address two parts of the bill before the committee: schedule 4, which amends the Class Proceedings Act, and schedules 15 and 16, which deal with the Legal Aid Services Act.

I'm going to start with the legal aid piece and acknowledge that the bill's attempt to restructure Ontario's legal aid system leaves me with more questions than answers. It's not clear to me if the goal is that legal aid will do more with less. I wonder if the government will acknowledge that legal aid is likely to do less in light of some of the changes that are set out in the bill. Some services that currently must be covered by legal aid would be rendered discretionary under the new statute, and the new statute makes all but a handful of services discretionary. In my view, the government's communications around the need to reorganize legal aid have not been clear, and I believe there is a need for some answers.

I also think it's important to say that those people who are most frequently serviced by legal aid are those living in circumstances of poverty and disadvantage and who often come from marginalized communities. At the moment, as we continue to live in a state of emergency in the province, these people and the organizations that serve them are dealing with questions of daily survival. Reform of the legal aid system may not be on their agenda. So I think it's an inopportune moment for the government to completely reorganize legal aid and would encourage the committee to recommend that schedules 15 and 16 be severed from the bill and reconsidered at a later date, when more fulsome consultations can take place with those affected communities.

On the proposed changes to the Class Proceedings Act, CCLA is in agreement with the Law Commission of Ontario and others who have welcomed many of the proposed amendments that would make class proceedings more efficient and serve the interests of access to justice. We are deeply concerned, however, about the proposal to alter the test for certification; in particular, the superiority and predominance tests that would amend section 5 of the act. These tests undoubtedly raise the bar for plaintiffs seeking certification and, in our view, will severely impede access to justice. When these changes are viewed alongside changes that the government has already made to the law of crown liability in the province, and in particular by, arguably, significantly expanding the scope of crown immunity, CCLA believes that the behaviour-modification goals of class proceedings will also be seriously undermined.

In addition to undermining access to justice, we argue that it's unwise to move the province's certification test out of step with the tests that exist in other provinces, leaving Ontarians with fewer rights than those residing in other parts of the country. The amendments wrongly import an American approach that is inconsistent with long-standing Canadian jurisprudence in the class actions realm.

There are many class actions that have resulted in significant changes in our province, as was already pointed out, that would likely not have survived the new proposed tests for certification. Cases dealing with residential schools and tainted blood, for example, may never have been successfully pursued. We know that these actions have been valuable in modifying behaviour and vindicating rights.

As an organization, the CCLA frequently litigates with the goal of obtaining a declaration from the court; for example, that a government action or statute violates rights. While we believe that governments don't like being told by the courts that they have acted improperly, we also know that a declaration alone is unlikely to modify behaviour. Class actions, with their potential for significant monetary damages, serve an important accountability function that should not be underestimated and that, in our view, would be undermined by this proposed change.

The Law Commission of Ontario, after much consultation and thoughtful and independent analysis, explicitly considered raising the bar for certification and rejected the idea. It made other recommendations to ensure that the preferable procedure part of the certification test gave considerable weight to alternative options, and also suggested practice guidelines to address expense and delay. But its view was clearly that the test for certification in Ontario does not require substantial revision.

We question why the government has paired meaningful reform of the CPA with a certification test that will make access to justice much harder to achieve. And as a result, we urge the committee to recommend removing this proposed amendment from schedule 4 of the bill.

Those are my submissions. Thank you.

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

We will now proceed to Omni Bridgeway for their collective seven minutes of submissions. I invite you to begin by stating your name for the record.

Mr. Paul Rand: Thank you. On behalf of Omni Bridgeway, we appreciate the opportunity to address the committee to share our perspectives on Bill 161 as it pertains to third-party litigation funding in the class action context.

My name is Paul Rand. I'm chief investment officer of Omni Bridgeway Canada. I'm responsible for overseeing the investment and litigation funding activities of Omni Bridgeway across the country. I'm joined by my colleague Naomi Loewith, who is legal counsel as well as an investment manager and the director of strategic partnerships in Canada.

Omni Bridgeway supports the goals of Bill 161 to promote fairness and efficiency in respect of the provision of third-party funding for class actions. My remarks will focus on this aspect of the proposed legislation. To respect the time allotted, Ms. Loewith and I have agreed that I will be making Omni Bridgeway's remarks.

I will first provide a description of litigation funding; second, describe Omni Bridgeway's business; and third, propose a minor drafting recommendation that would add clarity to the litigation funding provisions in a manner that we believe is consistent with the government's proposals.

First, then, about litigation funding: The concept is quite straightforward although new to many. A funder who is not a party to the litigation agrees to pay all or part of the cost of pursuing litigation in return for a fee or a share of the recovery upon success. The expenses covered by a litigation funder can include either lawyers' fees or out-of-pocket disbursements or both. It will not surprise members of the committee that complex litigation can cost hundreds of thousands of dollars, and often millions. A litigation funder helps overcome this significant barrier to the pursuit of a meritorious claim. Litigation funding is a valuable tool to enhance access to justice. In addition to paying the upfront expenses of a lawsuit in a loser-pays court system like Ontario, most litigation funders will agree to pay court-ordered costs.

Litigation funding is generally provided on a non-recourse basis. If the claim fails, the funder receives nothing and typically remains liable for lawyers' fees and other disbursements to be paid, together with any adverse costs that it has agreed to cover. The benefits of litigation funding to a claimant are obvious: They receive capital to pursue their claim where they might otherwise be unable to do so. But maybe less obvious are the benefits to other participants in the legal system. For a defendant, the involvement of a well-capitalized and professional funder offers reassurance that the plaintiff will have the means to satisfy adverse cost orders that may be granted by a court in favour of the defendant. From the court's perspective, a properly resourced claimant means that the courts benefit from well-prepared cases argued by capable counsel.

Funding of this sort is well-established in many common-law regimes across the globe. In the past five years, it has become much more common in Canada, making this an appropriate time to codify principles governing litigation funding for class actions. Ontario is the leader in this regard.

Let me pause briefly to note that we are focused here on class actions, but litigation funding may be provided for a range of disputes. Indeed, Omni Bridgeway's core business in Canada focuses on providing funding for business-to-business litigation, commercial arbitrations and insolvency matters.

Let me move, then, to the second part of my comments, a brief description of Omni Bridgeway, so as to offer you an understanding of what a sophisticated market participant in this industry looks like. This is relevant because we bring to the discussion the perspective of a professional funder with decades of experience across the globe. Omni Bridgeway Ltd. has been a pioneer in the litigation funding market for over 30 years. We have offices in 10 countries, including Canada, Australia, the US, the United Kingdom, Germany, Holland and elsewhere.

In 2016, Omni Bridgeway became the first international funder to open Canadian operations, then under the name Bentham IMF. Today, we have nine staff, including seven lawyers, in our offices in Toronto and Montreal. Our team members previously practised at leading Canadian law firms and corporations before joining the company, and we are active members of the profession. We are engaged in the legal industry in organizations and we volunteer with Pro Bono Ontario.

The company itself is publicly listed on the Australian stock exchange. Accordingly, we provide detailed market reporting and disclosures. Clients, counsel, governments and other interested parties can review our capital adequacy, returns and global commitments.

With our global footprint, a local presence, a public company structure and a legacy of developing litigation funding market, Omni Bridgeway considers itself one of the world's most experienced litigation funders. Through this experience, we have developed rigorous criteria for deciding whether we provide funding in a case. We accept fewer than 5% of the cases where applicants seek funding. We decline cases where we do not believe they are meritorious or where the involvement of a funder would erode the returns such that a class member would not receive a fair share of any outcome. Access to justice and the integrity of the judicial process align with the interests of sophisticated funders like Omni Bridgeway.

Turning quickly to Bill 161, then, our comments are focused on schedule 4 of the bill, and in particular section 33.1. The provisions of Bill 161 relating to litigation funding largely codify key aspects of the relevant common law. Indeed, Omni Bridgeway was part of many of the cases that have developed this jurisprudence, and many of the provisions reflect what we consider best practice.

By way of example, it's appropriate in the context of class actions for a third-party funding agreement to be contingent on court approval. We consider it useful that

the bill's drafters have itemized this set of requirements as far as what a court approval would consider. This promotes both certainty and efficiency. In turn, this ensures that Ontario is a predictable regime for funders and fosters the development of competitive funding and a market that yields the best results for litigants.

Finally, our recommendation: We note that the drafters of the bill clarify at section 27.1 that the appeal route from a certification motion is to the Court of Appeal. In doing so, the proposed legislation promotes clarity and efficiency. We believe that a similar approach could be taken with respect to appeals from a decision on whether or not to approve a litigation funding agreement. Accordingly, we recommend that the legislation clarify that an appeal from a decision on litigation funding agreements be to the Court of Appeal. Doing so would offer clarity on this procedural question and would align with the sensible approach taken elsewhere in the legislation with respect to third-party funding. Thank you.

The Chair (Mr. Roman Baber): Thank you very much, Mr. Rand. We'll begin with a round of questioning: five and a half minutes by the official opposition—sorry, my apologies.

On behalf of the government, Ms. Tangri, please.

Mrs. Nina Tangri: Thank you to all of you for joining us this afternoon.

My question is to Mr. Stevenson and it's regarding small estates.

I understand that in addition to class actions, the law commission issued a report on how to simplify the estates and probate process in Ontario, and the Attorney General listened to those recommendations. Those proposed changes to the Estates Act are just one example of some practical changes that are being proposed in Bill 161.

Could you please tell us how the proposed changes to these small estates in Bill 161 will better serve Ontario's seniors handling the small estates of loved ones and, in turn, better serve Ontarians who are accessing the justice system during difficult times in their lives?

Mr. Colin Stevenson: Thank you very much for the question. It's a pleasure to have the Estates Act also recognized in these proceedings.

The bill does amend the Estates Act to change the probate requirements for small estates in response to a different report of the Law Commission of Ontario dealing with recommendations on simplified procedures for small estates. Of course, small estates end up sometimes paying disproportionate fees considering, by definition, the small size of the amount in dispute.

The OBA has previously advocated on this to help ensure that the law commission's 2015 report recognized the valuable role that lawyers play for clients through what used to be called the probate process on matters of any value. It's difficult, of course, to retain lawyers on small matters, but the OBA is ensuring that that can happen. These amendments also facilitate using lawyers to make the process smoother.

The law commission report has this small-estates procedure which is limited to estates for which cost is an obstacle, and it recommended a gross value of no more than $50,000, regardless of the type of assets.

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With these amendments that are implementing the law commission report, we'll work at the OBA with our members to review this new process to make sure it's going to work and to ensure that the simplified process, which is going to be established by regulation, does work for these small estates. We're committed to ensuring that the regulations are carefully vetted to ensure that the process is smooth, fair, efficient, and allows access to lawyers for these small matters.

Mrs. Nina Tangri: Thank you, and just a follow-up to that: I also understand that there will be regulations to follow this legislation, if it passes, that will also determine the threshold of what constitutes a small estate. Now, my own experience in my riding and speaking with my colleagues across the province—some people also think that the $50,000 is an appropriate threshold; some view as high as $200,000 to be the appropriate threshold. I would just like your views on that, if you could.

Mr. Colin Stevenson: That's really what I was getting at. That's the difficult question. The law commission report said $50,000. We don't have a firm view, given the passage of time since 2015, as to where precisely that line should be drawn. It's certainly advisable to makes the process easier for smaller estates. We would be happy to consult with the government and the opposition as that line gets drawn. We certainly wouldn't oppose a higher limit; $50,000 may indeed be a bit low at this stage.

Mrs. Nina Tangri: Chair, how much time do I have?

The Chair (Mr. Roman Baber): About a minute and 20 seconds.

Mrs. Nina Tangri: Over the last 15 years, funding for legal aid in Ontario increased exponentially. We find that there are sometimes no improvements in those outcomes. Past consultations and reports include the Auditor General's 2018 annual report, which identified the need to improve this system. Stakeholders, including the Association of Community Legal Clinics of Ontario, the Ontario Paralegal Association, and the CEO of LAO, have said the changes in Bill 161 modernize the system and put the focus back on the clients' needs.

In your opinion, do you think that we need to modernize the legal aid system, particularly in light of the challenges and impacts raised by the recent COVID-19 pandemic and how it has affected the justice sector?

Mr. Colin Stevenson: Let me make one comment and then turn it over to Melanie, who is the criminal justice expert. I can tell you that with the advent of COVID-19, OBA has been implementing an innovation agenda all year, and we have facilitated the courts in moving forward extremely quickly to improve using Zoom conferences like this, using Zoom facilities, using Zoom court hearings, and we support the ministry as well in these innovation efforts.

So let me ask Melanie to address your specific question—because, 100%, legal aid has to be efficient and

innovate in this day and age. If you can unmute Melanie, she'll give you the criminal lawyer's perspective.

The Chair (Mr. Roman Baber): If I may, you may have to reserve your answer for the next round of questions.

However, now we will proceed to the official opposition with five and a half minutes. Mr. Yarde.

Mr. Kevin Yarde: I want to thank everyone for joining us today.

My first question is for Cara. I want to talk a little bit about legal aid in the course of some of the poverty concerns and disadvantaged people in our community. Would you say that some of the changes and some of the amendments to Bill 161—its ability to work with and take guidance from communities is key in poverty work and dealing with systemic reforms. Do you believe that these changes would endanger their funding as well?

Ms. Cara Zwibel: Thank you for the question.

I do believe that it's important that the clinics that are working in communities are very much plugged into those communities and are used to doing a whole range of things that don't necessarily fall into the category of just providing legal services. They do legal education. They do outreach work. I think that a lot of what they do is very helpful in informing how they perform the legal work they do for the community.

I certainly have heard the concern raised that some of the changes in the bill put some of those other functions of clinics at risk and perhaps even put the existence of the clinics themselves at risk. I am not steeped in the legal aid system, so I can't forecast exactly what would happen, but I do know that those concerns have been raised, and we certainly share those concerns in terms of the ability of legal aid clinics to consult with and be informed by the communities they serve.

Mr. Kevin Yarde: Would you say these changes would reduce the focus on crucial issues like discrimination and human rights?

Ms. Cara Zwibel: Certainly, the concern that I raised earlier in the submission—that many of the services that are now required to be provided by legal aid for those who meet the eligibility criteria would be swept away by this bill and would become discretionary. There's a small category of cases, I think, in the bill that would remain mandatory, which are those where counsel is required by virtue of the Charter of Rights and Freedoms. That is a small subset of the legal problems that people face, and I do worry that many of those problems won't be adequately addressed, particularly, as the submissions from the OBA highlighted, if legal aid is not adequately funded. I think there is lots of tinkering that we can do with the statute, but really what's at the core of a lot of this is making sure that the legal aid system is adequately funded.

Mr. Kevin Yarde: You mentioned that some class actions would not have survived these new proposals under the new model of Bill 161. Can you give an example of what you're talking about?

Ms. Cara Zwibel: Some of the concerns with this proposal to require that common issues predominate over individual issues might make something like the tainted blood class action a very difficult one to pursue, because while individuals may have been the subject of the same wrong or negligence, how it impacts them individually will vary a great deal. That's an example where the predominance test might not be met, even though a class action seems to clearly be the preferable procedure to pursue something like the tainted blood issue.

Similarly, residential schools—there are certainly a lot of individual issues that would inform how the court would want to assess damages, but also, maybe not a predominant number of common issues, but a significant stable of common issues such that it makes sense to pursue justice in that area under a class proceeding.

Mr. Kevin Yarde: Thank you, Cara. I'm not sure if one of my colleagues has questions, as well.

The Chair (Mr. Roman Baber): Mr. Singh, with 40 seconds left.

Mr. Gurratan Singh: Because I only have 40 seconds left, I'll just give you a quick comment and I'll leave my questions for afterward.

I understand that this is a new model for hearing your remarks today. Generally, we have a one-presenter-at-a-time system. This is a new concept, having a panel of individuals. As the party of the opposition, we advocated for the old model, which was one person at a time and getting their remarks and questions following. I just want to put on the record that I understand that this is a new method and it might restrict some of your time. That's something we have fought for, but given the fact that what was in jeopardy was losing a day of our hearing, we wanted to concede to ensure that we got more people to have their input heard.

I'll leave my comments for the next round.

The Chair (Mr. Roman Baber): Mr. Singh, with respect, the time allotted is for questions. I have heard your concern twice today with respect to the new panel. We have a process in the committee. Of course, the official opposition has recourse to deal with any objections with respect to process. It would be inappropriate, especially by lawyers, to comment on the fact that there was a resolution to this. But I would suggest to you, respectfully, that we let the witnesses focus on their testimony—this is an opportunity to hear from them—and reserve process for the next time we deal with process.

1530

If we could now proceed to the independent member for four minutes of questioning.

M^me^ Lucille Collard: Thank you, Mr. Chair. The question is for Ms. Zwibel. Amendments to the Crown Liability and Proceedings Act under schedule 8 would require would-be litigants seeking to initiate a civil proceeding against a public institution for a misfeasance or bad faith to first prove to the courts that they have a reasonable chance of success. So is the CCLA worried that this will affect Ontarians' ability to seek justice when they are harmed by public institutions?

Ms. Cara Zwibel: Thank you for the question.

Yes, we're concerned that the changes that brought into effect the new Crown Liability and Proceedings Act and replaced the old act—I don't even remember now; liability of the crown act, I think it was called—do make it substantially more difficult to hold government institutions accountable for negligence. The changes that are made to the CLPA under Bill 161 are, by and large, I think a bit of housekeeping from that old bill, from the previous bill, but the real concern comes with the test set out in the CLPA, the requirement to seek leave for certain types of claims. That requirement comes with a requirement often to adduce evidence before the government has even had to file a statement of defence. So you put plaintiffs who are seeking recourse against a government institution in the position of having to largely disclose their whole case before the government has even set out their defence.

I think that statute is very problematic. We're already seeing in the courts the kinds of cases that will be or could be dismissed as a result of the CLPA, if it's interpreted as broadly as we believe the government intended it to be interpreted. So it is a very concerning statute and, when paired with a proposal to amend the certification test under the Class Proceedings Act, it will make recourse against the government in Ontario extremely difficult, and I think seriously disadvantage citizens of this province as compared to those in other parts of the country.

M^me^ Lucille Collard: Do I have time for a question?

The Chair (Mr. Roman Baber): One minute and 20 seconds.

M^me^ Lucille Collard: A question for Melanie Webb: Is the Ontario Bar Association concerned that the proposed changes to legal aid services will affect an accused's ability to receive criminal defence supports through Legal Aid Ontario if they opt for a trial?

Ms. Melanie Webb: Thank you. The Ontario Bar Association absolutely is concerned about the sustainability of legal aid. We would say that it does impact, of course, in particular racialized and marginalized persons. We are very much in favour of preserving the certificate system, which preserves the accused's rights to the choice of counsel.

I'm not sure if there is anything else I could add to that. I missed the second part of the question, unfortunately.

The Chair (Mr. Roman Baber): Twenty seconds.

M^me^ Lucille Collard: It's okay. I think you've captured the essence of the question. I do thank you for your submissions and for the important points you made—and the same to all of the people who have made submissions and are appearing today. Those are very important issues. So thank you.

Ms. Melanie Webb: Thank you.

The Chair (Mr. Roman Baber): We're now going to go back to the government side for five and a half minutes of questioning. Mr. Parm Gill.

Mr. Parm Gill: I want to also thank, of course, all the witnesses for taking the time and appearing before the committee.

My question is for Cara.

Cara, would you be able to maybe help us answer this question? Legal aid has been given greater flexibility in the new legislation to develop and implement rules around how it provides legal services to Ontarians and how it engages with its service providers. This is an important responsibility, which is why we also have mandated that Legal Aid Ontario must prepare and submit to the Attorney General for approval a consultation plan that details how legal aid will consult with stakeholders who might be impacted by these rules. Can you provide your thoughts on how these consultations should take place and whether different types of rules should warrant different types of consultations?

Ms. Cara Zwibel: Thank you for the question.

I don't think I have an answer to what the consultations should or would look like. I think what I want to say in response to your question is that, while requirements to consult are always welcome, a requirement to consult doesn't necessarily transfer to meaningful representation on behalf of those individuals who are consulted, and so we don't want the requirement to consult to become just a box that has to be ticked without the meaningful input and accountability to stakeholders.

So I don't have an answer to that question. Perhaps some of the other panellists have something they would like to say in response to that. But I do worry that a requirement to consult has the risk of just papering over the problem.

Mr. Parm Gill: I appreciate it.

The proposed legislation also requires Legal Aid Ontario to publicly post for common—all rules that require the Attorney General's approval for a period of 15 days. Would you please comment on the appropriateness of this measure and whether or not it should be extended, say, for example, to a 30- or 45-day time period?

Ms. Cara Zwibel: In the absence of any pressing need to obtain feedback in that 15-day period, I'm not sure why you would limit it to such a short time period. Again, the stakeholders, the organizations that work with individual service by legal aid and the individuals themselves that are serviced by legal aid, may not be involved in or used to participating in these kinds of mechanisms of consultation, and so I'm certainly not opposed to providing more time.

Mr. Parm Gill: Thank you. The Attorney General has been very public in his strong support of the important work legal clinics do for Ontarians who are faced with a variety of legal needs. In the new Legal Aid Services Act, 2019, we have recognized that foundational role as something that Legal Aid Ontario must have regard to when it considers decisions with respect to providing legal aid services in Ontario's communities. Can you tell us why it is important to have that critical role continue to be recognized in legislation?

Ms. Cara Zwibel: The critical role of legal clinics?

Mr. Parm Gill: Yes.

Ms. Cara Zwibel: I think that clinics are a very important part of the communities that they serve, whether they serve a geographically based community or a specialized population—so, some of the clinics that deal with

issues around disability or issues around race and discrimination. Those clinics that are rooted in their communities really play a vital role, and it's certainly important that they continue to play an important role.

I'm not convinced that the way in which the new statute has been drafted really does preserve the importance of those clinics. I've certainly heard concerns from some involved in those clinics that this statute may undermine some of the important work that they do, particularly work that doesn't, again, necessarily fit into the classic individual lawyer-client relationship but work that is more rooted in providing services and education and support to the community.

The Chair (Mr. Roman Baber): Thank you very much. That concludes the time in this round of questioning. We'll go back to the official opposition and back to MPP Singh.

1540

Mr. Gurratan Singh: Thank you so much, Chair. We've heard a lot about quite a scathing report that came out from the Law Commission of Ontario talking about how—very similar to the remarks made today—Bill 161 would restrict class actions and access to justice in a broad range of important cases, and specifically that, applied retroactively, these provisions would likely have prevented important and successful class actions, such as the Indian residential schools; environmental tragedies such as Walkerton; tainted blood supplies, such as hepatitis C; and other issues.

I know you've mentioned it, but with these specific and a bit more fulsome references, would you agree that Bill 161, as written, would restrict class actions accordingly? That question, I would send it off to, I guess—I would want remarks from Cara. It's open to, actually, all folks. You can all respond accordingly. Just keep your remarks short, because we only have five minutes and I have some further questions as well.

Ms. Cara Zwibel: My short answer is, yes, it would.

Mr. Gurratan Singh: Okay. We'll go down the line, then. I'll just call them out. Colin? Go ahead.

Mr. Colin Stevenson: There are different views on that. The defence bar has suggested that perhaps not; the plaintiff bar says certainly, yes. We at the bar are pointing out that you, the Legislature, should analyze this question carefully, because there is a real risk that these types of claims will not be able to proceed because of the new requirements. So you're asking the right questions. You're going to have to reach a conclusion on a question that has divided the bar.

Mr. Gurratan Singh: It's fair to say, then—just to follow up on that comment very briefly—that the current way that this legislation is drafted is a divisive point in the sense there is no clear consensus and there is a possibility for either impacts at this point.

Mr. Colin Stevenson: I think that's fair to say.

Mr. Gurratan Singh: Okay. Paul, I believe you were up next.

Mr. Paul Rand: Thank you. As a litigation funder, we haven't analyzed those cases. I think the conclusion is not an unreasonable one.

Mr. Gurratan Singh: Melanie, if you can provide your comments?

Ms. Melanie Webb: Well, I would say that I would adopt Mr. Stevenson's comments. Thank you.

Mr. Gurratan Singh: And then Naomi?

Ms. Naomi Loewith: I have nothing to add further to what Mr. Rand said.

Mr. Gurratan Singh: Thank you. In addition, I'm going to go the next point that's articulated in the Law Commission of Ontario's report with respect to this. They stated that we can all agree that access to justice is strong when we have individuals who are able to engage within this practice of a class action, because it allows individuals to collectively come together to pursue justice. The Law Commission of Ontario's letter discussed how certain changes that are being brought forward with respect to superiority, predominance and a variety of factors will limit that right. Further, they have described how the language being brought forward is more akin to an American legislative approach, and a more restricted American approach. Would you agree with that position? My question is once again to all members of the panel.

Mr. Paul Rand: Let me perhaps offer a comment from a litigation funding perspective. I would say that a change to this certification test will introduce, in the minds of those who might be interested in providing funding to support meritorious claims, the potential for some uncertainty. That could lead to a reduction in the number of organizations interested in participating in the Canadian or Ontario litigation funding market, which, in turn, would of course impact competition in the market to the detriment, in my view, of litigants.

Mr. Gurratan Singh: Going down the line—just out of time, if you can keep it shorter, just because I only have three minutes left or something like that.

The Chair (Mr. Roman Baber): It's about 50 seconds remaining.

Mr. Gurratan Singh: Oh, 50 seconds.

Mr. Colin Stevenson: Very briefly, I'm just going to add that during the second reading, the Attorney General, Doug Downey, listed four reasons why the new certification test would not be interpreted by the judiciary the way the US test has been. Whether you agree with him or not remains to be seen. Mr. Rand wisely pointed out the uncertainty that arises. This is an important concern on the part of the OBA.

Mr. Gurratan Singh: And in the dying seconds, whoever gets the mike next—Melanie?

Ms. Melanie Webb: No, thank you. Again, I adopt Mr. Stevenson's comments.

Mr. Gurratan Singh: Thank you very much.

The Chair (Mr. Roman Baber): We'll now go back to the government side for five and a half minutes of questions. Mr. Nicholls.

Mr. Rick Nicholls: I'm going to direct my question to Mr. Stevenson.

We all know that it takes years for class actions to work their way through the court system. Of course, one of the proposed amendments includes allowing cases to be dismissed for delay where no meaningful steps have been taken. Can you please describe how this amendment will actually help the court system and litigants alike?

Mr. Colin Stevenson: We support this amendment in the sense that there's a need to expedite class proceedings. Speaking as someone who has been on the plaintiff side and pursued many that have dragged on for years, there is fault all around in the delays that have been occasioned. The original legislation was not followed properly or precisely in respect of the original time limits. The idea of imposing a one-year limit on the plaintiff to file a record is not unreasonable, provided you make the amendments that we've sought. There is a very minor amendment that we're seeking, which is, if evidence comes up more than a year after the claim is started that couldn't reasonably have been found to start with, then of course you should allow that in as well. As drafted, that's not enabled. If the government can make that amendment, then we can support this provision.

Mr. Rick Nicholls: Well, that's good news. Thank you, sir.

I do have another question, though. One thing I do hear about when speaking with constituents who have been involved in a class action is the lack of transparency and communication from their lawyers. The Attorney General has proposed measures to ensure that people who are in a class action have more information and better notice about how they can collect their compensation if the case settles, if the plaintiff is in fact successful. Do you mind just taking a few moments and speaking more about the need for this proposed amendment and what it means for injured Ontarians who are part of this class action?

Mr. Colin Stevenson: There are two aspects to notice in a class action that are vital. The first one, which is the subject of an amendment we are proposing, is the notice that's given of the impending certification proceeding. So this is the notice telling people, "We're going to court and we're seeking certification of a class." We want an amendment so that proper funding of the notice can be made, because if you don't get properly funded for the notice, the notice will be inadequate. If you want to make sure that all your constituents know about the motion, let's make sure the notice is properly given. So we've got one minor amendment in the material given.

The second point is the different form of notice that I think you were referring more to. Notice has to be given of a settlement, and the notice has to be broadly given so that people can claim their money. Frankly, the onus is on the plaintiffs' lawyers first, the judge second, and thirdly, to a lesser degree, the defence, to make sure that that notice is broadly given so that all your constituents get what they're entitled to. But the claim has to be advanced in the first place, and the claim has to succeed on the basis of superiority and predominance, and then, if there's a settlement or judgment, then you get to the notice stage you're talking about. But I agree with you completely: Full proper notice is an essential requirement to a class proceeding.

Mr. Rick Nicholls: I appreciate that, sir. I know that we've all seen situations where there has been tremendous frustration on the part of plaintiffs in moving forward on that.

Those are the questions that I have. I'll turn it back over to other members from our team.

The Chair (Mr. Roman Baber): We have one minute, 20 seconds remaining for the government for this particular panel.

If there are no further questions, we'll go back to the opposition to conclude questioning, for five and a half minutes. MPP Singh.

Mr. Gurratan Singh: To continue on my previous line of questioning: We know that often when there is legislation which is put forward which was not thoughtfully construed, the result is the courts having to deal with it, or it would result in a further cumbersome system.

1550

Given the difference of opinion and the divisive nature of approaches and perspectives with respect to class action law, would you agree that it would be far more advantageous and ultimately result in a better system if the government rethought their position and came back with something that did not have this kind of ambiguity or confusion around it? To all members.

Mr. Colin Stevenson: I'll speak briefly because I see that Cara wants to speak, as well.

The fact is that as noted earlier, the bar is divided. Some members of the bar, the defence side, broadly support the proposed amendments. I can safely say there's very intense opposition on the plaintiff side.

One thing that's for sure: Any ambiguity should be avoided. If the Legislature decides in its good judgment to pass this act, let's make sure that any ambiguity is cleared up and it achieves what it's intended to achieve and doesn't do something inadvertently.

I suggest you get Ms. Zwibel's comments as well, from a civil libertarian point of view.

Ms. Cara Zwibel: My impression—and Mr. Stevenson can certainly correct me if I'm wrong—is that many of the amendments contained in schedule 4 of the bill are welcomed by all members of the class action bar, and this question of the certification test is the question that is dividing people. I don't think I'm being overly cynical in saying that there's a reason why it's dividing people and a reason why it's dividing the bar. I think the fact that the defence bar is in favour of these changes does suggest that a switch to this kind of certification regime would be less friendly to plaintiffs and more friendly to defendants. Similarly, the reasons that this change is opposed by the plaintiffs' bar—the same factors are at work there.

If the goal of amending the test in this way is not to raise the bar and make certification more difficult, then I can't understand why these amendments are being proposed in the bill. The Law Commission of Ontario heard from a large number of stakeholders, including members of the defence bar and the plaintiff class action bar, and they

independently came to the conclusion that the test for certification should not be amended.

Mr. Gurratan Singh: From a civil liberties perspective, would you support the position that the current changes restrict the civil liberties of Ontarians in their ability to access justice, particularly with respect to holding government or big business to account?

Ms. Cara Zwibel: I would say that they restrict the ability of individuals to hold others to account using the mechanism of a class action, which can be a very powerful and useful tool.

Mr. Gurratan Singh: I believe MPP Yarde has some questions.

The Chair (Mr. Roman Baber): MPP Yarde, with 90 seconds remaining.

Mr. Kevin Yarde: It sounds like we're almost repeating ourselves, but I wanted to go through this one more time. Cara, what you're saying is that the changes may create additional obstacles to plaintiffs seeking certification in cases involving significant individual issues?

Ms. Cara Zwibel: Yes.

Mr. Kevin Yarde: Thank you.

The Chair (Mr. Roman Baber): Seeing no further questions, that will conclude the panel. I'd like to thank everyone for their participation. I'd also like to thank Mr. Rand and Ms. Loewith, having not been able to weigh in to the discussion too much—I guess class actions get more play than third-party litigation funding arrangements. Thank you nonetheless.

MR. JEREMY MARTIN
SOCIETY OF UNITED PROFESSIONALS
CARP

The Chair (Mr. Roman Baber): We will begin with the next panel even though two of the three panelists are here. The third one is not on yet, but I see no reason we can't commence with initial submissions.

We have Jeremy Martin joining us, and we also have Dana Fisher from the Society of United Professionals joining us.

Mr. Martin, I'll allow you to begin with seven minutes of your initial submissions. Would you please begin by stating your name for the record?

Mr. Jeremy Martin: Good afternoon, Chair and honourable members. Thank you for the opportunity to address you today. My name is Jeremy Martin. I am a partner at Cassels Brock and Blackwell, where I practise class actions law. I've been engaged in the process of the amendments through my roles on the non-partisan OBA class actions section and as the chair of the ad hoc defence bar group that made submissions to the Law Commission of Ontario.

Now, my time is short, so I'll cut straight to the predominance and superiority issues, though I'd like to say first that, no matter what room I've been in—the OBA, the law commission or even the defence bar—we all share a common view about the social value of class actions, and we're all looking for the right balance between inclusivity and efficiency.

If the certification test is too restrictive, vital cases won't be heard. But if it's too loose, if there are too many individual issues to work through on a class-wide basis, then those important cases will take years or decades to resolve, or, for many people, they might not conclude at all, for the class members without the means to pursue a significant individual issues trial. In this case, inefficiency can easily can become injustice, particularly if the class members are elderly, ill or vulnerable.

Some of my colleagues appearing here this week are concerned that importing predominance and superiority requirements, which are drawn from rule 23 of the Federal Rules of Civil Procedure in the US, could curtail access to justice for Ontarians or prevent the kinds of socially beneficial actions that have shaped our province for the better over the last 28 years, since predominance and superiority are the basis upon which many class actions south of the border are not certified.

If I believed that were true, that the American federal regime and its inclination towards tort reform was going to be uprooted and planted here in Ontario, I'd be on the other side of this issue. But in practice, that's not now this is going to work. You haven't heard much yet about how this is going to be applied in practice, so here's what you need to know: Although this language is adopted from the US, class action statutes are applied very differently in Canada. First, we read statutes purposively. We know from the Supreme Court case of Dutton and Western Canadian Shopping Centres that the goals of class proceedings statutes in Canada are to promote access to justice, judicial economy and behaviour modification of wrongdoers, so a Canadian judge will read and apply these new provisions in a way that advances those policy goals.

Now, what does it mean for common issues to predominate? Is it just that there are more common issues than individual ones if you count them all up? Or, as most US jurisdictions have found, are common issues predominating when they're the most important ones or the most challenging ones to prove? A judge will have to decide in each case before her what would make the common issues predominant. In doing so, she'll have to come up with an interpretation that promotes rather than discourages those policy goals, and she'll have to consider the Attorney General's statement, at second reading, that predominance only means the common issues are "a substantial ingredient of class members' claims" overall.

Second, unlike in the US, the representative plaintiff in Ontario does not have to prove on a preponderance of the evidence that the common issues predominate over the individual ones or that a class action is a superior procedure to another process. Our threshold for certification is much lower. It's the "some basis in fact" standard, so all the plaintiff has to show in order to get their case certified is that there's some basis for believing that the common issues will be a substantial ingredient of the class members' claims and that it will be a better route to making class members whole than, say, a refund program or a recall process that is already in effect.

On top of that, Ontario courts do not resolve conflicts in the evidence of the certification stage, meaning that if the plaintiff crosses that threshold of showing the "some basis in fact," that's it—the court won't weigh the defendant's evidence and decide between them; it will certify the case. So not only is the language going to be interpreted in a way that promotes access to justice, and not only is the threshold of proof very low; the plaintiff also will not face the pitched battle of re-proving predominance and superiority here that they do in the United States. But now I have to ask—if a plaintiff cannot show any basis in fact at all for believing that, at the end of the day, the class action will be even a substantial ingredient to the individual claims, or if they cannot show any reason to believe that a class action will be any bit superior to another process that's up and running, then their actions shouldn't be certified because it wouldn't promote access to justice.

1600

There has been a concern expressed that national class actions might move to British Columbia if we adopt these amendments, since it's a more plaintiff-friendly jurisdiction. But it also has predominance and superiority requirements. In their statute, those are only considerations as to preferable procedure. We actually have those in common law in Ontario now, but Ontario is proposing to make them conditions. So, in effect, what is the real difference there between the plaintiff-friendly jurisdiction in BC and what Ontario is proposing? It really just means that if a judge can't find any basis in fact for believing that the class action will actually resolve a substantial part of the issues between parties or for believing that a class action is the best process currently available to class members, then in BC, a judge could certify the case anyway; in Ontario, now we're saying that the judge cannot. That's the difference.

I understand the instinct to say that more cases should be certified, but certification is just an early stage in a process. After that stage can come years or even decades of frustration, as lawyers try to litigate or settle the dozens of interrelated issues, claims and interests between dozens of defendants, third parties, fourth parties, subclasses, insurers and co-representative plaintiffs, which still might leave key questions unanswered. All the while, litigants are awaiting results and feel rightly frustrated and cynical about our justice system. That's where litigants are suffering most right now—not trying to get their actions certified, but waiting for those cases to come to some conclusion at long last.

Don't forget: Even if a certification is refused, not only are appeals and other processes available, but it's common for a motions judge to grant leave to amend. So even with all those benefits, if the plaintiff still loses a certification, the judge will often direct or redraft the claim so the common issues are a substantial ingredient in everyone's claims, certify that second draft and then proceed with a streamlined action.

It isn't enough to say these cases should be certified. These certified cases have to lead to actual results, settlements or judgments, and both of these outcomes are difficult to reach when everyone knows the class action is going to leave lots of unanswered questions for the parties.

Thank you for your kind attention. I look forward to your questions.

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

Before we proceed with questions, we'll allow the other two deponents. I also want to welcome Jana Ray from CARP for joining us.

In the order of appearance, I'll invite Dana Fisher from the Society of United Professionals to make seven minutes of submissions. Please begin by stating your name for the record.

Ms. Dana Fisher: Thank you. Mr. Chair, members of committee, my name is Dana Fisher. I'm the local vice-president of the Legal Aid Ontario Lawyers' Local of the Society of United Professionals, IFPTE Local 160. Among the society's 8,000 members are more than 400 lawyers and legal professionals who work predominantly for Legal Aid Ontario, as well as a number of community and specialty legal clinics.

The Society of United Professionals is deeply concerned by the negative impact Bill 161 will have on our members' work, as well as on the lives of vulnerable members of the public who rely on legal aid services. While we have broad concerns about Bill 161 and the way it will hinder rather than advance access to justice in Ontario, my comments will focus on the bill's schedules 15 and 16 and their harmful impact on LAO-funded services. We call on the government to withdraw Bill 161, or at a minimum to remove schedules 15 and 16 from the legislation.

I will speak first of the purpose and the mandate of the Legal Aid Services Act before Bill 161, and as now contained in Bill 161. There is broad consensus within the legal profession and across the political spectrum that Ontario has an access-to-justice crisis. In spite of this, Bill 161 seeks to literally remove the words "access to justice" from the purpose of the Legal Aid Services Act. The new purpose also removes a reference to serving low-income people and disadvantaged communities. A new purpose, however, is added, that being value for money.

We also have a grave concern about the proposed change to Legal Aid Ontario's mandate. In a key sentence, Bill 161 trades the word "shall" for "may," and in so doing, Bill 161 severely weakens the mandate to provide vulnerable Ontarians with access to justice.

The current wording says, "The corporation"—meaning Legal Aid Ontario—"shall provide legal aid services in the areas of criminal law, family law, clinic law and mental health law" and, "may provide legal aid services in" other "areas." Bill 161 would change that to, "The corporation may, subject to the regulations, provide legal aid services in the following areas of law," and it goes on to list those areas of law.

Rather than continuing to require Legal Aid Ontario to provide legal services to low-income Ontarians who qualify, LAO's mandate would be to choose which services and which areas of law to provide on the basis of achieving the best value for money, without regard for an overarching purpose of serving and providing low-income

Ontarians with access to justice. These changes will deepen Ontario's access-to-justice crisis, which will harm vulnerable Ontarians and slow and add costs to Ontario's already overburdened justice system.

Our members are also concerned about changes to Legal Aid Ontario's governance structure, including how its board is appointed and the future role of the advisory committees to the board. I will next speak to these governance changes.

When the Harris government moved to create Legal Aid Ontario, it commissioned an independent review to inform how the new agency would be structured. Written by a former dean of Osgoode Hall Law School, the report underscored the need to be, and to be seen to be, fully independent of the government. That is why Legal Aid Ontario's board is comprised of appointees selected by the Attorney General as well as the same number selected from a list provided by the Law Society of Ontario.

Bill 161 breaks that balance by increasing the number of provincial appointees to as many as eight and reducing law society appointees to as few as three. This could place an agency whose lawyers are often facing directly opposed to the crown in an apparent or a real conflict of interest.

In a related and concerning note, the independence of LAO from the government has also been removed from Legal Aid Ontario's purpose clause by Bill 161.

The Bill 161 reforms remove all reference to Legal Aid Ontario board advisory committees. As an organization serving a diverse and complex stakeholder community, these committees have great value. The Legal Aid Services Act presently requires certain advisory committees and empowers Legal Aid Ontario to create others, as needs emerge. Advisory committees give former clients, community leaders, academics and lawyers with relevant expertise and experience a formal avenue to offer their best advice so that Legal Aid Ontario can apply its resources effectively.

Currently, there are racialized community and Aboriginal issues advisory committees. Surely, now more than ever, these are essential. The Legal Aid Services Act should continue to require the advisory committees it does now, as well as these additional committees.

Next, I want to address an apparent attempt to download costs of court-ordered appointments onto the already cash-strapped Legal Aid Ontario budget. Bill 161 requires Legal Aid Ontario to shoulder these costs. Presently, the Ministry of the Attorney General covers these costs as stipulated in a memorandum of understanding with Legal Aid Ontario. Media reports have the government on record saying that a similar arrangement will continue. If that is the case, there would be no need for the language added through schedule 15, subsection 39.1(3), and it should be removed.

Finally, I want to discuss the impact of Bill 161 on legal clinics. Due to the government's 2019 cuts, legal clinics are already in a perilous financial state. Bill 161 makes matters worse. The legislation removes the ability to request a formal reconsideration of Legal Aid Ontario clinic funding decisions. Additionally, Bill 161 restricts clinics' scope of work with respect to the services they are presently mandated to offer.

If passed as is, Bill 161 would mean that community legal clinics would not have a mandate to support vulnerable Ontarians in matters related to human rights, health, employment or education. Especially during a pandemic and when society as a whole is reflecting on how to support racialized people and promote equality, the legal clinics must be mandated to continue doing this vital work.

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In conclusion, Bill 161 will do immense harm to vulnerable Ontarians who need more, not less, access to justice. The Society of United Professionals calls on the government to abandon Bill 161 and, instead, to participate in genuine, transparent and evidence-based consultation on access-to-justice reforms that will help vulnerable Ontarians. At minimum, we ask that schedules 15 and 16 of the bill be removed as they will cause the greatest damage to the clients, workers and overall administration of the justice system.

Thank you for your time. I will be pleased to answer any questions when the time comes.

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

We're going to move on. I'd like to welcome Jana Ray from CARP.

Just before we proceed, I wanted to let the deponents know that just because they're seeing three or four members on the screen doesn't mean that the full committee is not in session. In fact, we have MPP Lindsey Park with us, to my right, who doesn't have a Zoom screen, and also MPP Collard. Every time a member shuts off their video, you can't see them, but I can assure you that you have our full attention.

We'll now proceed with Ms. Ray. Please begin your seven minutes of initial submissions, starting by stating your name for the record.

Ms. Jana Ray: I'm Jana Ray. I'm the chief membership and benefits officer for the Canadian Association of Retired Persons or, in short, CARP. We are a not-for-profit, non-partisan organization with over 320,000 members across Canada and with audiences in excess of two million via our media partnerships.

We also have a strong network of 100% volunteer-led community-based seniors who engage locally within one of our 30 chapters across Canada.

Since we're speaking about Ontario today, I'd like to let you know that Ontario is the top province for membership in CARP. We have over 200,000 members in Ontario, with 17 chapters here in the province.

Our mission is to uphold the rights and improve the lives of all Canadians as we age and, typically, our work lives in two major areas, and those are better health care and financial security.

We've been following the progression of Bill 161 since its introduction by the Attorney General of Ontario on December 9, 2019. We've also reviewed the proposed reforms from the Law Commission of Ontario to your study and final report that were largely adopted within the Smarter and Stronger Justice Act, 2020.

CARP stands in alignment with the concerns expressed by the LCO regarding two specific amendments that radically change the test for certification of class actions in two ways: by creating a more demanding superiority test, and by introducing the predominance requirement in certification. We raise these issues with the position that, as written, they have the potential to threaten the health, well-being and access to justice for Ontario's three million seniors.

First, I'd like to discuss the predominance amendment. This amendment would raise the threshold for class action certification by demanding that the collective issues that a group of plaintiffs have in common predominate over their individual issues. When the Attorney General of Ontario introduced Bill 161 on December 9, COVID-19 was not known to the world. In fact, it was not until December 31 that officials in Wuhan, China, reported the discovery of dozens of cases of what was originally thought to be pneumonia arising from an unknown cause, and so much has changed since then. In fairness to those who participated in the LCO study and to the Office of the Attorney General, they did not have the foresight into recent events that provide a glaring example of how this change in legislation could impact Ontarians and, more specifically, socially vulnerable older adults living in long-term care.

COVID-19 has changed us all, and we must take these events into account to make the best decisions for Ontarians moving forward. In the here and now, it is our duty to not only improve and modernize long-term care in this province, but to also have the ability to hold accountable the persons or organizations charged with a duty of care to be responsible for what has occurred. Never before, so clearly or so starkly, have the deficiencies in long-term care been so exposed—from the significant loss of life to the multiple reports of systemic challenges, including outright failures to effectively execute quarantine environments, or the heartbreaking and thoroughly detailed reports provided by the Canadian Armed Forces. As of June 1, 2020, we know of at least a dozen class action lawsuits in Canada regarding the recent events in long-term-care homes, some of which are in Ontario. If the predominance amendment was enforced, this could mean that the plaintiffs who died of COVID-19—from a myriad of specific causes, including, perhaps, lack of staffing, lack of containment, lack of PPE—might not be certified as a class. Just simply because they died of the same illness would not on its own be enough as a predominating factor, possibly.

This also means that residents who were neglected or abused—for example, force-fed to the point of choking, developing bedsores as a result of neglect, or not having had baths or personal care—they might also not be able to form a class despite the fact that their injuries are actually from the same cause, which in this case is systemic negligence. This is indeed both negligence and a breach of contract for those residents in those homes.

This predominance amendment would make it much more difficult to certify class action proceedings in Ontario, and consequently plaintiffs would generally be forced to take legal action individually, an extremely costly and difficult proposition, which most would not be able to undertake.

If the predominance amendment had been in effect in 2009, it is possible that the plaintiffs in the Glover case, about a legionnaires' disease outbreak in a long-term-care facility, would have been prevented from seeking justice for wrongdoings done unto them.

The other amendment of concern is the superiority requirement, which presents a couple of key issues. Firstly, the amendment requires that a judge deems the class action proceeding as the superior option to all other reasonably available means of determining class members' entitlement to relief. Secondly, this requirement also places the onus on the plaintiffs to prove that none of the other procedures are superior. This is an important shift from current jurisprudence, which puts the onus on the defendant to show that there are better alternatives to a class action proceeding. These changes do indeed create barriers in access to justice while adding additional time and cost to the judicial process—something that the Smarter and Stronger Justice Act is intended to reduce.

When we take a closer look at how this legislation could effectively impact older adults in matters regarding areas such as financial exploitation, medical malfeasance or corporate wrongdoing, the high cost needed to advance one's right in legal action, coupled with these amendments, would make access to justice for older adults impractical—not financially viable—whereas class action lawsuits offer a collective response and claim for a specific wrongdoing in a way that is financially viable and impactful in terms of equitable damages.

It's worth noting that these changes could have serious consequences for all Ontarians, not only older adults, and would have likely affected the outcome of such important cases as residential schools, Walkerton, the tainted-blood-supply litigation, insurers' unilateral amendments to health insurance plans, and unpaid wages and overtime.

In closing, CARP would offer that if the government chose to move forward with these changes at this present time, this would send the wrong signal to seniors, family members and caregivers at a time when these recent horrific events in long-term care, some of the most egregious forms of abuse and neglect, have been extensively reported and so thoroughly documented that they are now at the forefront of the public consciousness.

We therefore ask that these two amendments be removed from Bill 161 as they will unfairly compromise seniors' access to justice by making it more difficult for certain types of actions to be litigated in class action.

The Chair (Mr. Roman Baber): Thank you very much, Ms. Ray. We will now commence with five and a half minutes of questioning from the official opposition. MPP Singh?

Mr. Gurratan Singh: Thank you so much. My first question is going to be to Dana Fisher. To your point: Would you agree that the changes to the purposes section with respect to the removal of "access to justice" and the removal of "low-income" and "disadvantaged communities" would negatively impact racialized Ontarians, Black

Ontarians, low-income Ontarians and also women who are fleeing violent situations and their ability to access justice?

Ms. Dana Fisher: Thank you so much for that question.

I would certainly agree that that is a significant risk and an impact that is likely to flow from this change. The current legislation, as it's written in Bill 161 with the purpose clause, strips from it the very fundamental objectives that the McCamus report, as well as Chief Justice McLachlin of the Supreme Court of Canada, identify as being the fundamental objectives of the legal aid system, which is promoting equal access to justice. The fact that this will no longer be in the purpose clause is significant. The purpose clause has some very broad implications. They're used to interpret legislation, as we all know, and it is legislation that authorizes government agents to act. Not having these words and these fundamental purposes in the purpose clause will have a very significant impact, we believe, on the racialized communities, on Black and low-income individuals, and on women, as you indicated, fleeing domestic violence situations. It's significant, and it needs to be added back into the legislation to ensure that this remains the purpose of the Legal Aid Services Act.

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Mr. Gurratan Singh: Further, you mentioned that the board of legal aid is now—the suggestion of how it's going to be composed. Would you agree with the assertion—and keep your comments a bit short because I have a few more questions after this. Would you agree with the assertion that it could create a situation that would be unbalanced in favour of the government in terms of how the board is composed?

Ms. Dana Fisher: Yes, we think this brings into question and risks the independence of the board and of Legal Aid Ontario from the government, coupled also with the fact that "independently" has also been removed from the purpose clause and that the proposed act also lists no criteria now for board members.

Mr. Gurratan Singh: In addition, would you also agree that the negatives put forth in Bill 161 outweigh the positives of modernization and that, as a whole, this piece of legislation would set back Ontario with respect to access to justice?

Ms. Dana Fisher: Yes, absolutely. While modernization is a significant goal and a very important goal, and certainly one that we're recognizing right now as necessary, we don't believe that this act brings forth any concrete modernization strategies or actions that will significantly impact the justice system.

Mr. Gurratan Singh: I believe MPP Yarde has a question?

The Chair (Mr. Roman Baber): MPP Yarde? With two minutes to go.

Mr. Kevin Yarde: My question is to Jana Ray.

You spoke, of course, about the vulnerable seniors and access to justice in the wake of the horrible incidents at long-term-care homes that we've been seeing. I know you did briefly talk a little bit about that and how that would affect their access. I'd like you to maybe just tell us a little bit more about how Bill 161 will impede the access.

Ms. Jana Ray: Well, as I mentioned, both of those amendments put greater challenge and onus of responsibility onto the plaintiff. Again, I'm not an attorney; I'm an advocate. But that said, as described in my outline there around the superiority and the predominance, again, if you have issues—for example, let's look at COVID-19 in long-term care. You've got a number of different individuals. Perhaps there have been different levels of abuse, neglect, negligence that have occurred within there, but the commonality is that it is a systemic problem around the response around COVID-19. That's what we're concerned about—that when these cases are being brought forward, that perhaps with the introduction of the predominance clause, there might be an opportunity for that not to be seen as a common ground between the plaintiffs. And, frankly, for them to move to either a mass tort or perhaps individual litigation just simply isn't accessible for many of these individuals—folks who are in long-term care, where it's either medically necessary for them to be there or they might be on limited funding, that sort of thing.

So we do have concerns around how those clauses impede their ability to access justice, and we just feel it's additional barriers at a time when I know a lot of this discussion around this act and Bill 161 has been—there's been consultation and that sort of thing for some time, but I think what the general perception would be from older adults is that now that they're bringing forward these lawsuits—and frankly, they're within their right to do so. These things have been absolutely egregious that we've been learning about in the media and through these homes. To now be told that they have to jump through additional hoops to seek that justice for the wrongdoings done to their families, especially if they've lost a loved one and that sort of thing—it would certainly send alarms, really, throughout the senior community, I would say, and I think that it would appear to be, yes, challenging.

The Chair (Mr. Roman Baber): Sorry, Ms. Ray. We will be able to come back to you again.

Ms. Jana Ray: No worries.

The Chair (Mr. Roman Baber): We'll now proceed with the government questions, for five and a half minutes. I'll recognize MPP Pang.

Mr. Billy Pang: Thank you, Mr. Chair. Through you to Mr. Martin: The Attorney General, during second reading of this bill, stated that he fully or substantially adopted many of the law commission's recommendations stemming from its July 2019 report titled Class Actions: Objectives, Experiences and Reforms. The law commission noted in its report that approximately 73% of all contested certification motions are granted. They also note that the number of class actions filed in recent years has clearly increased, averaging more than 100 class actions per year.

Despite these statistics and the concerns raised from the stakeholders on the pressures, risks, resources, implementations that defendants incurred in defending these types of actions, the law commission recommended that courts should interpret elements of the section 5 certification test

more rigorously. Can you please describe how that recommendation is not a tenable one and does not actually produce substantive, meaningful access to justice for Ontarians?

Mr. Jeremy Martin: I'm just going to make sure that I understand the question. If I understand, you're asking me to explain how the Law Commission of Ontario's recommendations in respect to section 5 don't go far enough to restrict the—

Mr. Billy Pang: Yes.

Mr. Jeremy Martin: —extent to which class actions are being brought.

The first point to consider is that the guidance there was effectively that—they took a non-partisan view of the section. They assessed that it wasn't fine the way it was and that there did need to be a little bit of tightening up somewhere. They specifically identified the preferable procedure requirement as one that could use some tightening up. But the guidance there was more directed toward the judiciary—just suggesting that they look more carefully at other alternatives and be sure to apply that rigorously.

What's being done here is there are now actual, tangible written standards that will direct a court in a more predictable and concrete way. In that way, you would have a more substantive guideline, I suppose—a more substantive path forward by virtue of having this amendment rather than just the guidance that was suggested by the LCO.

Does that answer the question?

Mr. Billy Pang: More or less. Can you also describe why or how the law commission's recommendations do not address concerns raised by defendants? Specifically, what are some of the pressures or risk issues that the defendants face once they are sued in a class action?

Mr. Jeremy Martin: Sure. I should say, first, that the defence bar received the law commission's report positively. It was a very good piece of work, and it was conducted on a non-partisan basis by some very well-respected academics and advocates within the industry.

There are concerns with the defence bar that it becomes more difficult, when class actions are over-broad, when there are too many issues or when the individual issues dwarf the common issues in a class action, to be able to decide on a path forward. Just to use the example that we have before us today in terms of the care homes: If there was to be a class action based upon systemic negligence over all issues, no matter whether it's the feeding issue or the COVID-19 issue and so on, that action would become very broad and unwieldy. So even if a defendant was interested in trying or settling one part of the case, it becomes more difficult when you're not going to get any closer to knowing what the key issues might ultimately be.

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When there are too many individual issues, they're left for determination later, and we don't get any closer to assessing what that risk might be or what liability we might have. As a result, these over-broad certified class actions can actually impede access to justice a little bit, because even if there is an inclination to have an element of the action tried or some part of the action settled, it becomes more difficult.

Mr. Billy Pang: Thank you. So—

The Chair (Mr. Roman Baber): I'm sorry, Mr. Pang. You're out of time.

If we could please proceed to Madame Collard, the independent member, for four minutes of questions.

M^me^ Lucille Collard: I'll address the question to Jana Ray of CARP.

We've discussed class action proceedings as a tool for the victims of tragedy to access justice in the past. It's clear that we have a tragedy in long-term-care homes in the process of unfolding, with highly personal and significant consequences for some of our most vulnerable residents, and you've spoken to that. How can we change the proposed amendments to the Class Proceedings Act to best reflect the needs of Ontario seniors and address systemic neglect in the long-term-care system? I'd be interested to hear your views on that.

Ms. Jana Ray: In terms of how we would change the amendments in order to address systemic neglect?

M^me^ Lucille Collard: Yes. You've mentioned the proposed changes as having a negative effect. How can we propose a change that will revert it back to something that will help our seniors and our most vulnerable?

Ms. Jana Ray: What we're suggesting is that those amendments create barriers just because of the onus of responsibility. Again, I would love for anyone who's an attorney to weigh in. In terms of how I understand it—when the predominance clause is in fact the group, the collective issue of the group, of the class, has to have predominance over the individual issue; and then the superiority clause is, in fact, that it is the right way forward. A judge has to determine that it is the best—and the onus of responsibility is on the plaintiffs to prove that it is the best course of action for them to actually litigate and move forward. I think that's where the challenge is. That's not currently how it works today. The responsibility lies within the defence to actually explore other options and to assess why it shouldn't be a class action lawsuit.

Also, given some of the other examples that we've had of various class action lawsuits—we're not saying that it undermines the individual's ability to pursue their own access to justice, but at the same time, there are situations that necessitate this kind of action and, frankly, would not be accessible to older adults. It might not be financially viable to older adults.

To answer your question, as far as what suggestions what might be made to move that forward: We're in agreement with the LCO's recommendations for Bill 161. They also echoed the sentiments that we're saying around these two amendments. We'd just like to see them not be there, because we actually do believe, as well, that it's going to create a lot of time and cost in the assessment of the evidence and that sort of thing as they're evaluating whether or not to move it forward in a class action. There's going to be a lot of time and costs spent there versus perhaps in legal proceedings. Either way you slice it and

dice it, the time is going to be spent. We have concerns around that.

Also, I think in the superiority aspect, it's almost as though people have to have a crystal ball and know what the potential outcome is going to be, all of the evidentiary support and everything throughout, as opposed to just right now understanding whether or not there is sufficient evidence to move forward with a class action. At this point now, it's more or less that each participant in that class action has to have—there is an onus of proof on them as to whether or not they have claims to that class action, in addition to the commonality of the class.

There is just a lot of burden on that. That's all that I would say.

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

We'll now go back to the official opposition for five and a half minutes. MPP Morrison.

Ms. Suze Morrison: My comments are directed to Ms. Ray from CARP.

I want to thank you for your presentation. To be quite honest, I share your concern, particularly in the light of COVID-19 and the potential limitation of future class action lawsuits in the long-term-care sector, considering the recent CAF report about the state of our long-term-care homes right now, being able to move forward under these rules.

I just want to clarify: Do you believe that, in your opinion, any class action lawsuits related to COVID-19, brought forward by the family members and survivors of COVID-19 in long-term-care homes, would be classified under these rules that are proposed in this bill?

Ms. Jana Ray: With the attorneys that we consulted on this, yes, they do believe that some of these cases brought forward would in fact be at risk. There are also different stakeholders to contend with. If you look at an action brought against a long-term-care home, for example, it is systemic negligence, and there are responsibilities on the part of government in terms of what we were able to do to effectively quarantine—and, obviously, the inspection and the administration of those homes and that sort of thing falls within the provincial government's responsibility.

That said, there is also an essential breach of contract at the end of day around the care contract that was engaged by the residents themselves and the long-term-care homes. Whether it's an approach from that perspective and the action is taken—I understand that they are in fact class action lawsuits currently in Ontario against operators at large. A couple of specific ones are Sienna, I believe, and Revera. There is also even an action that is being taken against the Ontario government.

I do appreciate and understand where that commonality needs to be assessed, but I think that definitely it does place them at risk. If we get into situations that we're speaking to people about, "Oh, this person had various co-morbidities and, therefore, it might have exacerbated their response to COVID-19," it doesn't actually have a bearing when perhaps that person is in a four-person room and wasn't effectively quarantined, and you had an infected person in a room with three other individuals who were not COVID-positive and now they're all COVID-19-positive, and someone has passed.

It's those kinds of things that I think we really need to look at. I appreciate what Mr. Martin was saying around the fact that it could be viewed as being too broad, but I also think that the issues we're talking about are actually very specific within long-term-care homes. We know that if it's a home that has a lack of staffing, there is the reason. If we know that it's the lack of PPE in another one, then that was the issue. It could have been that they couldn't actually effect a quarantine, and that by and large we're seeing more often than not. There are a lot of different reasons.

I think that the commonality could be assessed within those. We just are worried about some of the other factors that might come as a result of that, based on individual conditions. That's what we're worried about.

Ms. Suze Morrison: Thank you so much. I would like to share the rest of the time with Mr. Yarde.

The Chair (Mr. Roman Baber): MPP Yarde, with a minute and 45 seconds remaining.

Mr. Kevin Yarde: My question is for Dana Fisher.

The changes in Bill 161 with regard to access to justice as well as value for money: Would you say that, if it is passed, it would reduce the areas of law that clinics work on—for instance, eliminating a focus on crucial issues like discrimination and human rights.

Ms. Dana Fisher: Yes, there's a significant risk to the clinics in particular. I'm not sure that it's specific to the language in the purpose clause, although that will have a significant impact as well, by removing some of the identifying, assessing and recognizing of the diverse legal needs of low-income individuals and disadvantaged communities. That language is being removed under this purpose clause that's being proposed, as well as promoting access to justice, as we've talked about.

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But there's additional language that's also highly problematic for the clinics under—and I'm just trying to pull up the section; I believe it's section 39, but I'm just trying to revisit it very quickly here. There are other pieces of this bill that speak to the clinics that will have a dramatic impact on the changes to the types of law that can be practised, from poverty law to clinic law. That impact will be very significant, because there's a much broader definition for poverty law—and we spoke briefly in our statement about the areas of law that would no longer be covered under the proposed legislation.

Mr. Kevin Yarde: Thank you, Dana.

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

Mr. Kevin Yarde: How much time do I have left?

The Chair (Mr. Roman Baber): Unfortunately, you are out of time for this round. However, you will still have another round subsequent to the next PC round.

I recognize MPP Bouma.

Mr. Will Bouma: Thank you, Mr. Chair. Through you to Ms. Fisher, I was intrigued by your testimony and appreciate it very much. I found it interesting that you said

that the phrase "value for money" had no place in any proposed amendments to the legislation. Yet it was a key part of [*inaudible*] two years ago, and in fact, the Auditor General recognized in 2018 that perhaps Ontarians weren't getting appropriate value for money.

I was wondering: If that wouldn't be in the legislation, if that's not the place for it, where would you suggest that that financial piece of value for money go in legal aid to control expenses? Because we've seen a lot of money going into it, and the Auditor General said that we weren't getting good value for money. So where would you propose that piece go into the legal aid system so that Ontarians can expect good value for money?

Ms. Dana Fisher: Thank you for that question. I think it's important to separate what we're saying, which is not that value for money is not important, and not even that it maybe shouldn't be in the act; but very specifically, to have it in the purpose clause of the act is a very significant place for it to be. Keep in mind that the purpose of legislation is the reason for which legislation is created or for which it exists. LASA, the Legal Aid Services Act, should not and does not exist for the purpose of value for money. It should exist and currently exists to provide legal services to those who can't afford them. It exists to balance an adversarial system. It exists to ensure that the state doesn't overpower vulnerable and disadvantaged and disenfranchised and less fortunate individuals, and it really does exist—as it does now and as it should exist—to ensure access to justice.

Value for money is significant, and nobody is suggesting that it shouldn't be a fundamental goal, perhaps, for Legal Aid Ontario and for the government. It's not the purpose of the act. I think there was a previous mention, a quote somewhere that stated that the purpose of the health care system isn't to save money; the purpose is to save lives and provide health care services to the population. That's the same with legal aid. Its purpose is to provide legal aid services, legal access and access to justice.

Saving money or value for money is significant and hugely important, but it's also really important to remember that studies have shown that every dollar spent on legal aid ultimately saves $6 down the road in expenditures for other social services. So really, the best value for Ontario taxpayers is, in fact, money for legal aid and ensuring that access to justice is provided, because if you don't have counsel on both sides of the courtroom—or, I guess, virtual courtrooms now—that process takes exponentially longer. There is less access to justice available, but there is also greater costs to the public and to Ontario taxpayers.

So it's not as simple as just saying, "Value for money should simply be removed." What we're saying is that you're not getting value for money through these cuts, and you're also not getting value for money by not investing in legal aid, but fundamentally, it should not be the purpose of that legislation. I hope that distinction is clear.

Mr. Will Bouma: Very good. You also made—

The Chair (Mr. Roman Baber): Mr. Bouma, with 90 seconds left.

Mr. Will Bouma: Okay, so quickly, then: You also made the statement that Bill 161 did not modernize the system whatsoever. However, the Ontario Paralegal Association and the CEO of Legal Aid Ontario have all said that the changes in Bill 161 modernize the system and put the focus back on client needs. Can you explain to us why you disagree with the Ontario Paralegal Association and the CEO of the LAO?

Ms. Dana Fisher: Not having seen their specific comments about what it is that they think is modernizing, it's hard to speak to that. But I will say that I think what we've seen most recently has been that drastic modernization efforts have been able to occur with regard to the current situation in the pandemic and everything going remote. It's investing in the actual—a lot of the challenges that we found in the Attorney General's report, for example, were that the actual justice system itself didn't have the mechanisms or the resources in place to modernize. So it was less so that legal aid wasn't able to modernize and move forward and more so that the actual Ministry of the Attorney General's systems in place at the courthouses and in other areas weren't in place.

There's always room for modernization and greater efficiency, and we certainly think that there may be avenues for that through this legislation, but they're significantly outweighed by the disadvantages that come with this legislation in terms of the access to justice missing from the legislation, in terms of the downloading of costs in court-appointed counsel, in terms of the advisory committees disappearing and us losing the ability for community input and accountability and transparency in the board compositions.

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

Mr. Will Bouma: Thank you.

The Chair (Mr. Roman Baber): Back to the official opposition, with MPP Singh.

Mr. Gurratan Singh: My question is now going to be directed to Jana Ray.

Jana Ray, are you aware of the Law Commission of Ontario report with respect to their perspective on the changes to Bill 161 with respect to class actions?

Ms. Jana Ray: Yes.

Mr. Gurratan Singh: Yes? You reviewed it? And I know you articulated it beforehand, but just to make it clear for the record: You would agree with their position that the current Bill 161, as it is framed with respect to class actions, would actually inhibit people's ability to access justice and come together collectively, and partake in those actions?

Ms. Jana Ray: Well, actually, the person who championed the report was one of the leaders of that particular report's creation. She's out of Windsor. I can't remember her name at the moment, but she is one of the attorneys that was lead on that project. She actually viewed the two amendments as a step forward. She wrote a rather long passage around the fact that the other elements—they were really, really quite pleased with the commitments—and all of the other areas that were adopted and the reforms

around class actions, but that these two areas also were red flags for the LCO, and so they were concerned about that as well.

Obviously, again, as an advocate, and with CARP—we're not a research body. We're not an organization like that. We do consult with subject matter experts etc., and so we did consult with a number of different attorneys as well as various resources out there, and that was our position as well. A lot of our advocacy comes from our CARP members too, and so, anyone who has articulated any concerns around that to us—and what flagged the issue for us was some of these people who are following this closely, and members who came forward and raised these concerns.

Mr. Gurratan Singh: Okay. Very good. I want to thank all of the folks who are participating today. I know time is limited, but I do want to thank you for your time.

Respectfully, Chair, to your earlier comments: I'll keep my remarks to my overall thoughts on how I think things are going. This is a new process and a new model in which we're doing things in panelled way. Previously, we had done things in a singular way: We had one member who would present and everyone would ask them questions. Myself and the other opposition—we were in favour of that model, which is something that I think was a better model. This is a model that was put forward and that was adopted at the encouragement of the government [*inaudible*] independent perspective on this. It is something we were against, but we had to do it or otherwise we would lose a day of hearings. Just to put that on the record with respect to our perspective on that—in a way that is my own belief and my own idea and my reflections of the way that this is being conducted.

Those are the extent of my questions.

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The Chair (Mr. Roman Baber): That is now the third time that you have put that on the record. I respectfully invite you to make those submissions at appropriate times. You will have an opportunity to discuss the bringing of the next bill in subcommittee and subsequently in full committee. My strong preference is that we use all of our time available toward our deponents. We will certainly litigate this issue again, I'm sure.

Mr. Gurratan Singh: Just respectfully, Chair, my points are not repetitive necessarily to harp on the decisions of the government or the Chair. It's more so just to inform the people who are providing their statements today the context.

The Chair (Mr. Roman Baber): In fairness, Mr. Singh, I do think that we have the benefit of a lively debate, especially in this panel, where we see perspectives from opposing sides of the aisle on the question of class actions. Perhaps I might even disagree with you and say that I actually benefited from hearing from both perspectives at the same time.

We may have a discussion with respect to grouping. I will leave that, again, to the subcommittee. But again, I appreciate your comments, and I invite you to make them at the appropriate time.

Mr. Gurratan Singh: I appreciate that, Chair. Those are the extent of my questions.

The Chair (Mr. Roman Baber): Okay. Well, at the expense to your party's questions, that would leave Mr. Yarde with about 55 seconds.

Mr. Kevin Yarde: Thank you, Chair. I appreciate your giving me the 53 seconds now, I guess, that I have left.

Earlier today, we spoke a little bit about smarter and stronger justice. I'm just trying to think who to give this question to—probably Jana Ray, if you can talk a little bit about long-term-care homes and stronger, smarter justice. Do you feel that Bill 161 will achieve that?

Ms. Jana Ray: I do believe that there are pieces of that that absolutely will help to support and defend. I do also align with Dana Fisher's comments as well around some of the different funding mechanisms and those types of areas through our consultations. So there has been that.

But aside from that, as I mentioned, I'm really here to just speak about those two issues. We would not be able to fully endorse Bill 161 to move forward with those two amendments remaining and keeping them enforced.

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

We'll now conclude this panel with five and a half minutes of government questions. Ms. Park.

Ms. Lindsey Park: Thank you, and I'll direct my questions for the full time towards the representative of CARP that has joined us.

Of course, I won't make you mention on the record which attorneys you've consulted in informing your opinions shared here today. But I will clarify that if this bill is passed, the amendments related to preferable procedure at section 5, subsection (1.1), would only apply to class action proceedings commenced on or after the date the amendments are proclaimed into force. So any lawsuits currently filed—a number were referenced related to the COVID-19 pandemic—would proceed under the current rules. I think there was some fearmongering going on around that. We all take the COVID-19 pandemic very seriously, and I think it's important that it's made very clear that the proposed class action amendments will only affect class actions that have not yet been commenced once the amendments come into force.

I would like to give you an opportunity to say something about that, if you would like to, before I move on.

Ms. Jana Ray: Yes, we fully understand and appreciate that, and we were aware of that. We also still think it's quite early days. We do expect and anticipate that there will be more motions around class action lawsuits around long-term-care scenarios. We also all know that we are not at the end of this pandemic. Depending on what side of the fence you sit on, there are talks about a second wave, what that might look like. And we don't have a vaccine.

What are the key lessons learned around long-term care? Obviously, there's the onus of responsibility in what we can do around the legal recourse that these folks have around the scenarios that have played out till now. Then, of course, there's the other side of that: Are the corrections going to be made? Are the inspections going to be made? Are there going to be proposals for the modernization of

long-term care? Are we going to be able to effectively initiate a quarantine in the next few months and certainly moving into—we're already in June—the fall? What's that going to look like? Hopefully, history will not repeat itself, even recent history.

Ms. Lindsey Park: For sure. I think we've said publicly, as a government, almost daily at the Premier's press conferences, that these are important questions to ask. It's important that they be studied fully, and our government is committed to that. But I'll stick to the bill that's before us, and not go on that tangent, because we could talk about that, obviously, for hours.

You mentioned that, if the proposed changes pass, plaintiffs must sue individually, but they can still bring a class action and try to get it certified if their case is meritorious; correct?

Ms. Jana Ray: Right. If their case is meritorious and they satisfy the test then, yes, they can move forward with a—it's not to say that they can't move forward with a class action; it means that it has to meet these two tests in order to move forward.

Ms. Lindsey Park: If for some reason they don't meet this new test, it's my view that the proposed changes would not preclude individuals from seeking redress from other remedial avenues, but rather these changes would just ensure that a class action is the most appropriate procedure to obtain that redress. So we're not hindering access to justice; we're making sure procedures are available and that this is the preferable procedure. So litigants can still bring a joinder claim, or a test case brought by one resident can still be used by all residents of the home. Is that correct?

Ms. Jana Ray: Yes, as far as I understand. There are other legal avenues to bring forward, as well. What we find is that the financial viability of a class action or sometimes the sheer number of residents and the institutions that they're bringing the class action against—that is really what it comes down to, that financial viability. Of course, now with the proposed amendments and what they're requiring of the plaintiffs themselves and that level of involvement and what happens there, as opposed to it being presented in advance of whether or not they can move forward the class action, versus having that happen through the due course of the class action—I think are a fundamental difference as well. So that would be a concern. But yes, they could certainly pursue it as a mass tort, as I mentioned earlier. Obviously, the settlements and that sort of thing that might come as a result of that would actually be individual. Again, I'm not an attorney, but this is what I understand—that a mass tort would be less desirable in this particular scenario. Of course, for them to bring actions against some of these large-scale organizations may not be financially viable for that individual.

The Chair (Mr. Roman Baber): That concludes the time we have available for this panel. I'd like to thank Ms. Ray, Ms. Fisher and Mr. Martin for their appearance. Have a wonderful day.

We're just going to permit a couple of minutes for the previous panel to come off and the new one to come on.

LEGAL AID FOR ALL
CONSUMERS COUNCIL OF CANADA
SWORN

The Chair (Mr. Roman Baber): Welcome, everyone. We are now at the last panel of the day. I'd like to welcome, from Legal Aid for All, Erika Chan and Sukhpreet Sangha; from the Consumers Council of Canada, Mr. Paul Bates; and from an organization named Sworn—we had a substitution—we have Miranda Corcoran on the line. Do we have Michael Reid joining us as well or no? Okay. We understand that Mr. Reid is not here.

1700

I'd like to give each of you an opportunity to make your initial submissions for seven minutes, followed by questions from government, the official opposition and the independent member.

Interjection.

The Chair (Mr. Roman Baber): Miranda Corcoran? She was substituted. She substituted for Michael Reid.

Interjections.

The Chair (Mr. Roman Baber): Yes, substitutions are permitted because we have an organization appearing.

If we could please start with Legal Aid for All for your seven minutes of submissions—please commence by stating your name for the record.

Ms. Erika Chan: My name is Erika Chan. I am from Legal Aid for All. Thank you for having me today. We have provided written submissions. Legal Aid for All is a campaign to strengthen and improve the legal aid system in Ontario. We are a group of legal workers from different backgrounds who raise concerns with the current legal aid system and envision one that empowers and uplifts communities. Legal Aid for All works toward a system that serves the interests of society and working-class people.

Legal Aid for All makes the following submissions to the Standing Committee on Justice Policy in rejection of schedules 15 and 16 of Bill 161. These schedules propose to replace the Legal Aid Services Act of 1998 with the Legal Aid Services Act of 2019 and impose an unrealistic six-month time limit for renegotiating all existing funding agreements between Legal Aid Ontario and community legal clinics.

I'm going to first speak about the lack of meaningful consultation. These proposed changes are not based on research or meaningful consultation. The Legal Aid Services Act of 1998 was drafted and informed by the work done by an independent task force assembled by the Ontario government to consider all legal aid programs in the province, with the objective of identifying aspects that should be reduced, maintained or enhanced so that the current and future legal needs of low-income residents of Ontario could be met in the most effective and efficient way possible. This led to the 1997 report known as the McCamus review. In contrast, the proposed changes that inform Bill 161 are based on the legal aid modernization project conducted confidentially without public input or oversight. Legal Aid for All submits that closed-door consultation without accountability is not meaningful. The

community members, organizers and community legal clinics that deal with systemic poverty-related issues are best able to identify the needs and impactful solutions. Without public, meaningful and open consultation, the basis of these proposed changes is contrary to the recommendations of past legal aid studies.

As we're all aware, in April 2019, the government made catastrophic cuts to the legal aid system, despite it being an already drastically underfunded system. However, services provided through Legal Aid Ontario and community legal clinics have brought a semblance of balance to this lopsided system.

Now the proposed legislation fundamentally changes the statutory mandate of clinic law services and the independence of clinics in Ontario. As you have heard already, it removes the current 1998 act's explicit purpose of identifying, assessing and recognizing the diverse legal needs of low-income individuals and of disadvantaged communities. Instead, Bill 161 seeks to provide effective and high-quality legal aid services in a client-focused and accountable manner while ensuring value for money. By imposing a financially based mandate, clinics will be pressured to focus on optical or superficial value-for-money problems, preventing them from investing in the long-term work of systemic change that uplifts communities.

Bill 161 also changes the mandate of Legal Aid Ontario so that the provision of poverty law services is discretionary, and states that Legal Aid Ontario "may" provide these services, except for instances of charter violations, rather than "shall" provide these services. Legal Aid for All submits that these services are necessary to ensure that society's most vulnerable have access to justice.

I'm now going to pass it off to my colleague Sukhpreet Sangha.

Ms. Sukhpreet Sangha: Thank you, and thank you to Mr. Chair and the committee for hearing from us today. As noted, my name is Sukhpreet Sangha, and I also appear for Legal Aid for All.

Continuing with my colleague's comments about the limiting of the statutory mandate: LASA, 2019, proposes to limit clinic services to the provision of poverty law services regarding housing and shelter, income assistance and social assistance. This narrow interpretation of the types of law covered by legal aid directly undermines the language explicitly used in LASA, 1998, of clinic law, which was based on extensive consultations and research undertaken for the McCamus review. This language was intended to address the wider-ranging issues that low-income and disadvantaged communities routinely face, including those issues relating to health care, discrimination, education and other public services.

Speaking from my past experience as a clinic staff lawyer, I can state that this limited definition of poverty law will have a significant impact on the ability of clinics to serve their clients. Many of the clients I served were women fleeing abuse, who would no longer be able to receive the crucial summary advice in criminal and family law that our clinic provided. Also, hard-working clients who received our representation in claiming unpaid wages, which were rightfully owed to them and often numbered in the thousands of dollars, would no longer be able to receive clinic assistance in filing claims for those wages under the Employment Standards Act. These are legal issues, among others, commonly experienced by people living in poverty that properly fall within the ambit of clinic work and should remain there.

Internationally, as members of the committee may be aware, Ontario's community legal clinic system is renowned for its focus on community-based justice, legal empowerment and the accomplishments of its clinics in particular. This is supported in the McCamus review, which identifies that a legal aid system should assign a high priority to its role as a proactive change agent in researching, developing, publicizing and promoting substantive and procedural reforms to the broader justice system.

Moving on to the loss of community-based resources: Community legal clinics have reach that cannot be replicated by either a centralized clinic model or the private-bar-and-certificate model. The physical presence of clinics is integral to identifying the specific needs of communities, especially ones in which vulnerable clients face numerous barriers to accessing basic social services, including but not limited to language barriers, mobility impairments, mental disabilities, precarious immigration status, systemic discrimination and the simple lack of time and resources to pursue legal resolutions of their issues due to the realities of living in poverty. The input of community members at a governance level has been instrumental in identifying local needs and making effective use of limited resources.

Finally, I'll briefly note the importance of student legal aid service societies, or SLASS, as a special subset of legal clinics. SLASS are instrumental in training future lawyers who will be committed to public interest lawyering and serving people living in poverty. As a student at Osgoode Hall, I worked at two clinics and they were critical elements of my training. Retaining SLASS is key to continuing to produce lawyers who will serve lower-income clients and take legal aid certificates, which, unfortunately, many lawyers refuse to do.

I know I'm at time, so I will just remind the committee that we've submitted written submissions which include several recommendations. Thank you for your time, and I look forward to your questions.

The Chair (Mr. Roman Baber): Thank you very much. We'll now proceed with Paul Bates of the Consumers Council of Canada. You have seven minutes for your initial submission. Would you kindly state your name for the record.

Mr. Paul Bates: My name is Paul Bates. Greetings, honourable members. I am pleased to speak to the committee, on behalf of the Consumers Council, in support of certain points elaborated in a written brief that you should have before you with a covering letter. I would be pleased to be reminded when there are a couple of minutes remaining. You may feel free to engage in spontaneous applause and I'll realize there are two minutes remaining.

In any event, let me say that the Consumers Council was delighted to see the recommendations of the Law Commission of Ontario being reflected in Bill 161. The age and experience of the class procedure in Canada tells us that there are times to move forward, and many of the changes are laudable, including particularly the cy pres provision, the provisions to permit funders to engage in support of class procedure, and there are many others as set out in the law commission report and our own filing with you.

There are two points I would like to speak about on behalf of consumers specifically. One is the special needs of consumers in court action, and class procedure particularly, and the second is that we have two very significant criticisms of Bill 161.

In terms of consumers' special needs, I would ask you to realize how consumer claims are prototypical for class actions. There are numerous claims.They may not be large in amount. But on their own, they're completely uneconomical for anyone to incur the cost of access to justice in not only out-of-pocket dollars, but stress, time and involvement to conduct a legal proceeding. So they only work if people can seek redress on a court basis, and no individual would take on these costs and risks on their own.

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The special needs we ask you to consider in consumer cases are to relieve consumer plaintiffs of the burden of adverse cost, in the event that the case should be unsuccessful, unless they misconduct the proceeding. This is to reduce a risk barrier that is faced by representatives who serve in consumer class actions. I can tell you that that would bring the practice in Ontario in line with what takes place in the United Kingdom in the case of competition claims—sorry, I misspoke. It takes place in British Columbia and it takes place in the United States.

The second element is to permit persons to serve as class representatives on behalf of consumer claims when they may not have a claim themselves but there is no other way in which the issue can be brought forward before the court. This is, indeed, done in the United Kingdom in competition cases before the tribunal there that authorizes them, and it is permitted in British Columbia legislation. These would reduce barriers and allow viable claims to be presented with less risk, less cost, and to vindicate consumer rights. Those are the modifications, and there are a couple of others in the papers.

Now, in terms of the criticisms that we make of the bill, the first one, and perhaps the most important, is the concept of a predomination requirement. Imagine a consumer claim that meets all the other requirements—there's a viable cause of action, a suitable representative with an appropriate litigation plan that identifies common issues that will advance the claims of all class members—but there will be afterwards, even if the claim succeeds on these common issues, residual individual issues, perhaps of damage, loss, causation or other matters that need to be decided. This can happen in medical products cases, product liability claims, privacy and many other types of claims. The predomination requirement will hinder these cases from going forward. They will permit the judiciary to say, "Well, this case is appropriate for class procedure in Ontario, but even if the plaintiff wins, we're still going to have to hear from class members one by one concerning the quantum of the loss, their loss, the cause of their specific injury etc." And in consumer claims, this is a particularly acute problem because injury claims, medical products claims and so on involve individual damage determination.

That should not be an outcome fostered by Ontario legislation. First of all, there are provisions in the class procedure for—there's a procedural tool kit available to the court by which to set up procedures that are efficient for individual causation and quantification of losses, and the courts are just beginning to discover them with encouragement from the Ontario Court of Appeal. But a predomination requirement will force a court to weigh the number of individual issues against the common issues and, unless there is a clear predomination of the common issues, decline to accept the case.

The other problem with this approach in the legislation, of course, is that the effect of it is that each and every single individual consumer making a claim, if they do—they may not, but if they do—they over and over, one by one, each time have to prove the breach. They have to prove the common issue because, absent a class procedure to determine it, it will not have been determined. Imagine a spectacular privacy breach affecting 300,000 consumers. You either have the breach of privacy legislation determined once and individual remedies may flow or there may be a claims mechanism or whatever—that's option A, the current law—or you could have the court say, "We're not going to have this privacy case proceed in Ontario because there are individual issues and they are not overtaken by the common issues. There's no predomination."

We reject that element vigorously. It's an American feature. They don't know what it means down there. There's nothing but chaos in their jurisprudence from it. I think you should not introduce it when the law commission declined to do so.

Finally, the other element, which I probably only have a moment to refer to, is the concept of prioritizing summary judgment motions. You have to be a litigator to realize the utter chaos that this will introduce. Just ask anybody who comes to speak to you from the defence bar how long a typical case takes—and I've fought them in full. They can be nine, 10, 11, 12, 13, 14 years. If you provide for summary judgments to proceed first, you will add one to four years to all of those cases. I don't think anybody should figure that lawsuits in Ontario taking that long give us any credit at all. All efforts should be the other way, to shortening up the procedure. Again, this is not recommended by the law commission. This has been dealt with in jurisprudence that does not acknowledge that to be the appropriate procedure.

Notwithstanding the absence of spontaneous applause, I may be close to seven minutes and will welcome questions.

The Chair (Mr. Roman Baber): You're past your seven minutes, Mr. Bates. Thank you very much for your submissions.

Finally, I'd like to invite Miranda Corcoran of Sworn for your seven minutes of submissions. Please begin by stating your name for the record.

Ms. Miranda Corcoran: I'm Miranda Corcoran. I'm the director of technology at Sworn. We're a small, Toronto-based start-up building platforms so that Canadian legal professionals can connect securely with their clients for witness signatures.

The section of the bill that we'd like to address today is schedule 19, subsection 3(3) entitled, "Not in person." On one hand, it's of vital importance that Canadian citizens be able to access legal services through digital platforms. In the current context, it's not only a matter of convenience, but one of public health. In the longer term, within a country where a significant portion of our population resides outside of urban centres, the use of digital tools for the provision of legal services has an important role to play in facilitating access to justice. While affordability is an important aspect of this, it's not only an individual's income itself, but also the person's ability to travel to meet with their legal service provider and to take the time off work necessary to do so which create barriers to access. However, existing regulations set forth under PIPEDA or the Electronic Commerce Act do not adequately address the case of online notarization. Further sector-specific guidelines for digital platforms utilized by Canadian legal professionals in the provision of services need to be developed. As Ontario has both the largest number of lawyers and paralegals in any province and a high concentration of technical expertise, it can and should be here where the charge is led in innovation in this area. At a bare minimum, data associated with these interactions should be required to be held in Canada, ideally within the control of a Canadian-owned organization. As Canadian data does not benefit from a GDPR-equivalent stipulation that protection travel with it *[inaudible*], keeping records regarding legal interactions within our own borders is the only way to ensure that privacy appropriate to the privileged nature of this information can be upheld.

It's also worth noting that all major browsers support real-time communication directly between peers for both video streams and data channels through which original documents can be conveyed. This means that third-party services need only facilitate the conveyance of initial signalling messages between the appropriate individuals and can keep records of only the encrypted byte ranges of signed documents, rather than holding original documents in their entirety.

Even if this approach is taken, the privacy of metadata associated with signatures alone is significant enough that the previous suggestion in regard to data sovereignty still stands. Additionally, given subsection 31.3(c) of the Canada Evidence Act, it may be desirable to ensure that additional records are created and stored under the control of a neutral third party.

I was going to delve into some of the technical mechanisms behind digital signatures and PDFs in particular. In the interest of time, I will skip through some of that, but the most important aspects that I'd like to highlight are that the identity certificate format that still is the basis of every digital signature is the X.509 certificate, which is a 1988 standard that was developed to represent higher keys of electronic device systems. When we look at all of the standards in use now, even though it's ETSI, an international not-for-profit that puts out those standards, we've seen Adobe, a single private entity, influence what the norms are globally to a large extent.

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What I mean to say by that is that these standards are old and they were developed with the primary intent of identifying one machine to another. While it's entirely impossible to make use of them to represent a human being, and there's a need to ensure interoperability with other systems used in different jurisdictions, it's important to note that the default implementations make the assumption that one electronic device represents one citizen.

This opens up the dangerous possibility of allowing a device to act as a proxy for an individual's presence and consent and doesn't accurately represent the relationship people have with mobile devices today. Those in comfortable socio-economic situations tend to own and use several devices, whereas those with more constrained means may not have access to a device of their own, and electronic devices are constantly lost, stolen or broken. While it may seem like I'm stating the obvious, it's vitally important that guidelines regarding the use of digital tools in legal transactions take into account the way individuals use electronic devices today.

A core aspect of the value of lawyers within our society is as a body of individuals with a professional obligation to apply specialized expertise, gained through years of education and practice, to represent the best interests of another individual, a group of individuals or a corporation, as the case may be. The systems through which legal services are provided need to emphasize and underscore the importance of this human relationship and interaction.

Furthermore, the legal profession has a long history of being entrusted with roles of identity attestation and record retention, with mechanisms in place to enforce accountability in these areas. Finding ways to hold a given technology accountable to a similar extent is something which is still being navigated. It's also vital that platforms augment, rather than supplant, the roles of the legal professional in these areas.

The approach we've taken to this as a company is to pair video connection and digital signature within a single interface to ensure that the scope of identity certificates is limited to the digital meeting in which signing takes place and to issue these certificates only after the legal service provider has confirmed that the individual appearing at the other end of the connection is who they expect them to be. This is one possible solution of many.

A larger undertaking which would facilitate a digital-first approach to notarization and represent a substantial step toward digital governance at large would be for the Ontario law society to issue digital identity certificates to

its members for use as an electronic Ontario seal, maintaining corresponding public key infrastructure and an API through which these credentials could be accessed. Estonia's implementation of digital governance is an oft-cited example, usually followed up with the caveat that in regions with larger populations, issuing and certifying—

The Chair (Mr. Roman Baber): If you'd be so kind to conclude, Ms. Corcoran.

Ms. Miranda Corcoran: Under normal circumstances, I would ask that resources be invested towards developing these infrastructures further. In the current economic climate, given the fact that much of what you'll hear in the next few days will be around cuts to legal aid services, it seems inappropriate to ask that. And I don't have a good suggestion as to how to balance rolling out these changes to the Notaries Act immediately, but also ensuring that the regulations that guide those implementations are well considered.

I'm appearing before you today as someone for whom a lack of regulation would be very inconvenient, saying please regulate this. The implications at stake are far too great for our government and citizens not to be the ones to shape.

The Chair (Mr. Roman Baber): Thank you very much. We'll proceed with five and a half minutes of questioning by the government first. Mr. Nicholls.

Mr. Rick Nicholls: Again, I want to thank everyone for being part of this rather unique way of our committee hearings and so on. I'd like to direct my questions to Ms. Chan and Ms. Sangha, if you don't mind.

First of all, I'd just like to start off by saying that the approach taken in the new legal aid legislation was to provide legal aid greater flexibility to set rules on everything, from how it works with its service providers to determine how best to deliver legal services to Ontarians, to accounting for and providing for how those service providers are compensated.

This is an important responsibility, which is why we also mandated that Legal Aid Ontario must prepare and submit to the Attorney General for approval a consultation plan that details how legal aid will consult with stakeholders who might be impacted by these rules.

The question is simple: Can you provide your thoughts on how these consultations should take place and whether different types of rules should warrant different types of consultation?

Ms. Erika Chan: I can start off. With respect to your first question regarding how consultations should take place, I think that what we've referenced already, the McCamus review, is a good precedent for doing thorough research based on academic studies and consulting with actual practitioners who are working with low-income and disadvantaged communities.

You also mentioned that this new legislation seeks to provide greater flexibility to legal aid, but while saying that and also taking away a mandate to serve those specific communities that we are here to support—there's no saying how the funds that are provided to legal aid would be used. We're here to ensure that they would be used in a way that specifically impacts low-income and disadvantaged communities in a way that they've already identified would be helpful for them.

I'm not sure if Sukhpreet would want to add to that.

Ms. Sukhpreet Sangha: I'll just add that the most important stakeholders in any consultation regarding legal aid service provision are, of course, the clients themselves—the people who are living in poverty, who are racialized and marginalized, who are accessing legal aid services for an increasingly necessary support. So any meaningful consultation process by legal aid with stakeholders must centre clients. That process should not take place in the context of a pandemic like the one we're currently facing. It needs to take place at a time when people who are living in poverty are meaningfully able to respond and participate in that consultation.

Mr. Rick Nicholls: The Attorney General has been very public in his strong support of the important work that legal clinics do for Ontarians who are faced with a variety of legal needs. In the new Legal Aid Services Act, 2019, we have recognized the foundational role as something that Legal Aid Ontario must have regard to when it considers decisions with respect to providing legal aid services in Ontario's communities.

Can you tell us why it's important to have that critical role continue to be recognized in legislation?

Ms. Sukhpreet Sangha: I can start. It's crucial to include within the statute the foundational role of clinics, and I appreciate that the Attorney General has committed to that importance in several comments. It's crucial because clinics are foundational to the provision of poverty law services, and they have been in the history of the clinic system, and they continue to be in its present reality. We must centre that, again, in the new legislation, as it has been explicitly noted in the former iteration of LASA, because clinics are best situated to provide those services—clinics with community members on their boards who are led by those members with lived experience, some of whom are past clients. They are best situated for many different reasons that we've outlined in our submissions and our comments today, and that's why it's important to maintain that.

The legislation, as it's currently written, speaks to that foundational role yet takes control from the clinics and those community boards by which the clinics are currently run and instead vests it in the corporation of Legal Aid Ontario. So while the language is there in part, the control is moved, and that is very significant as a change to how clinics are run.

The Chair (Mr. Roman Baber): I see that MPP Crawford has joined the committee. MPP Crawford, we just need to confirm that it's indeed you, and tell us where in Ontario you're located.

Mr. Stephen Crawford: Good afternoon, Chair. I'm located here in Oakville.

The Chair (Mr. Roman Baber): Thank you very much. The government's time is up. We're going to move to the official opposition for five and a half minutes, beginning with MPP Yarde.

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Mr. Kevin Yarde: I want to thank all the witnesses showing up today.

My first question is for Sukhpreet Sangha. There were several clinic representatives that were here earlier today. We had the South Asian Legal Clinic and the Chinese legal clinic, and I would like to get your comments on how these clinics—they do amazing work in Ontario. As well, the Black Legal Action Centre also does amazing work. Their work right now: With Bill 161, would you say that it is currently at risk as related to the changes in the bill—say, for instance, access to justice as well as value for money? If this bill is passed, would it eliminate the focus on crucial issues like discrimination and human rights, meaning to reduce the areas of law that these clinics work in?

Ms. Sukhpreet Sangha: Thank you for your question, member Yarde. I would say unequivocally that the answer is yes. As the bill is currently framed, it poses substantial risk to the work of those clinics that you've mentioned, and other clinics being limited to just these two areas of housing and income maintenance and social assistance, which—those two areas are, in many ways, overlapping, so I frame it as two areas. They might lose the right to practise in any other areas, and I think they very likely will if the legislation is not redrafted to expand the definition of poverty law to the definition of clinic law that was previously in the legislation, or expand it in another way that allows for that sort of discrimination-based work, human rights work, and work on the education system that I know BLAC does that is very important. Those clinics would certainly be limited in what they can do.

Also, I must note that they might not even exist. The legislation as it stands has the mandatory provision that funding agreements may be renegotiated, but not that they must be. legal aid, as a corporation, has the option, based on this legislation, of not even funding these clinics, and then they might not even exist. So the answer is an unequivocal yes.

Mr. Kevin Yarde: Okay. Thank you. I'll have my next question by MPP Gurratan Singh.

The Chair (Mr. Roman Baber): MPP Singh.

Mr. Gurratan Singh: Thank you so much, Sukhpreet and Erika. My question to both of you—and if you can answer a bit succinctly, given we only have about three minutes left—would you agree that the removal of "access to justice," "disadvantaged communities" and "low-income" from the purposes section that is proposed in Bill 161, in addition to the narrowing of the practice area, would negatively impact Black, racialized and Indigenous Ontarians, as well as women who are victims of domestic abuse or violence, and their ability to access justice?

Ms. Erika Chan: Yes, I would agree.

Ms. Sukhpreet Sangha: Yes, I would agree as well. Certainly it will have that effect.

Mr. Gurratan Singh: Further, would you agree that this ultimately is in contradiction with the spirit of legal aid, in which the province is to provide access to justice for disadvantaged communities?

Ms. Erika Chan: Yes, I would agree with that.

Ms. Sukhpreet Sangha: Yes, I would agree with that statement as well. The spirit needs to be access to justice, which is explicitly removed from the new legislation proposed.

Mr. Gurratan Singh: Further, would you agree that the changes to the composition of the board for legal aid create a danger in which the government can create an imbalance in the board in favour of the government?

Ms. Erika Chan: Yes, I would agree.

Ms. Sukhpreet Sangha: Yes, I would agree with that as well, and note that the legislation does remove some statutory requirements that previously existed regarding expertise in the areas of poverty law and serving marginalized communities, low-income persons—sorry, "disadvantaged communities" I believe is the language that has been removed, which poses another risk in terms of board member appointments going forward.

Mr. Gurratan Singh: Given that we have about a minute left in this section of the questioning—if you could both briefly let me know how you've seen, in your own area of practice, disadvantaged, marginalized, racialized communities being negatively impacted by cuts to legal aid that have come forward, and potential further ways that this can negatively impact those types of communities.

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

Mr. Gurratan Singh: Just briefly.

Ms. Erika Chan: From the recent cuts, the 30% cuts to legal aid funding, I've already seen the number of appearances in the Ontario Court of Justice reduced, and the amount of duty counsel that is available to clients reduced. It has already had a huge impact on access to justice.

Mr. Gurratan Singh: We have two more rounds so I will leave the rest of my questions for the subsequent rounds.

The Chair (Mr. Roman Baber): Thank you very much. We will now move on to the independent member for four minutes of questions.

M^me^ Lucille Collard: The question is for Ms. Sangha. As a law student involved with legal aid, are you concerned that some of the proposed changes in Bill 161 will have a negative impact on the ability of the student legal aid societies to recruit and train future legal aid lawyers?

Ms. Sukhpreet Sangha: Yes. Thank you for your question. I am concerned with that. I will clarify, though, I am no longer a law student although many people think I appear to be one. I am a lawyer, but I did work for SLASS, student legal aid services societies, as a law student, and the provisions in the new LASA, as proposed, have that same provision about SLASS having to renegotiate their budgets within that six-month time frame. Again, the language is permissive and not mandatory so SLASS could cease to exist as a result of this bill if it passes as currently framed. So that, again, poses a risk of elimination that would remove that important training ground for law students.

M^me^ Lucille Collard: Thank you. I'm just going to close by thanking you all for taking the time and making

the efforts to make those representations to this committee in order for the bill to get the attention on the changes that need to be addressed.

The Chair (Mr. Roman Baber): Thank you, Madame Collard. Back to the government for five and a half minutes, beginning with Mr. Bouma.

Mr. Will Bouma: Thank you, Mr. Chair. Through you, I would like to just ask Mr. Bates—I have a quote here from Don Mercer, who is the president of the Consumers Council of Canada: "Consumers Council of Canada agrees with the reforms that have emerged from the Law Commission of Ontario consultation process and the Attorney General's own review. This legislation is critical to access justice for Ontario residents, especially so for consumers. The council supports the reforms designed to make class representatives and their counsel more transparent and accountable for their actions on behalf of class members."

I was wondering if I could ask you, Mr. Bates, because you've given us some helpful advice on changes that we could be making to the legislation, if you could say what would cause Mr. Mercer to write that and why, in general, the Consumers Council of Canada is supportive of the legislation.

Mr. Paul Bates: I think Mr. Mercer's letter had expressed support for the legislation based upon the amendments that were to be made as recommended by the law commission through an extensive study.

I think in another place in his letter, he does iterate the same two core objections that I have discussed and that our paper filed with you describes.

Mr. Will Bouma: Yes. So if I can just stay on that, then, a little bit; we've heard the two core objections. What parts of the legislation, then, does he approve of apart from those that he has issues with?

Mr. Paul Bates: The legislation has put into effect—the bill at least would put into effect amendments proposed by the law commission in relation to endorsing and structuring rules for cy pres awards, which are underutilized in Ontario as compared to other provinces. That's a good thing. Initial judicial decision-making rejected them, and yet they have a very significant validity. I, for one, and I know my Consumers Council colleagues, would be delighted to see cy pres awards support not only the Consumers Council but very worthy, deserving organizations, such as those that have been represented by the previous speakers on this panel—very well-deserving. So cy pres awards, the more expeditious and less fractious determination of carriage disputes amongst plaintiffs' counsel are examples of suitable reforms.

One reform hinted at in the bill, I think, in the law commission, is the improvement of judicial case management skills. These are really tough cases to manage. There are very few jurists in Canada who have the experience and skill to do so. It is desirable that the judges develop the skills with which to effectively manage these cases so they don't run on and on and become decade-long chapters in everybody's life. They should be over in three to five years. I think we have a potential to get there.

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There are a great many features of the bill to be encouraged, and we hope that the law commission's focus remains that of the bill. There are a couple of very mischievous changes, I must say, that are not progressive, and they will cause no end of problems. I can tell you as a practitioner in the field that it will make it much harder for plaintiffs to, through group redress, get access to justice in Ontario.

Mr. Will Bouma: I appreciate that very much. And if I could just say, Mr. Chair, I do appreciate the format of this, with different witnesses coming before us to hear a variety of views. I will leave any further time to my colleagues.

The Chair (Mr. Roman Baber): With a minute and a half remaining, I can cede additional time to the government or we can move on to the opposition.

Seeing no questions, we'll move on to the opposition for five and a half minutes. Mr. Singh.

Mr. Gurratan Singh: My question is to Mr. Bates with respect to class actions. The Law Commission of Ontario has come out with a pretty scathing letter with respect to their opinion on how Bill 161's changes put forward actually negatively impact Ontarians' ability to access justice by way of class actions. Would you agree with the Law Commission of Ontario's position with respect to this?

Mr. Paul Bates: Well, yes, I do agree. I have read the law commission's letter, and I believe it focuses on the same two elements that the Consumers Council has presented to you today, especially predominance.

Predominance is vague. It's an American concept that has produced hundreds of decisions there that are a toss-up. It tends to be used by judges who identify complexity to the litigation to hinder progress by class procedure because defendants identify a number of individual issues. It's a very different legal system than in the United States. Down there, if a class action is rejected because of a predomination problem, then you can proceed with coordinated, multi-district litigation case management. A pharmaceutical product liability or a privacy claim down there are managed and conducted under judicial supervision with appropriate objectives—

Mr. Gurratan Singh: Just out of the interest of time, Mr. Bates—I don't want to cut you off. So you're in agreement with that position, correct?

Mr. Paul Bates: We do support, and while we have lauded elements of the bill, we maintain that criticism of those two elements; that is to say, the procedures of summary judgment and the other concerning predomination, which the law commission has also spoken about, yes.

Mr. Gurratan Singh: Would you also agree with the law commission's opinion that if applied retroactively, these provisions outlined in Bill 161 would actually have prevented important cases, such as on Indian residential schools; environmental tragedies like Walkerton; and the tainted blood supply, such as hepatitis C, and overall will

just restrict Ontarians' ability to access justice through the mechanism of a class action?

Mr. Paul Bates: Yes, those effects may result from the predomination requirement. They may result. No one knows what that even means, but that will be the position of defendants. There will be great difficulty in certifying such cases. Medical products that cause enormous injuries to people are very diverse as to injuries and causation questions, but they all turn on, "Was there or wasn't there a product defect?" Is predomination going to go this way or that way?

Mr. Gurratan Singh: I note that my colleague MPP Yarde has a question.

The Chair (Mr. Roman Baber): MPP Yarde, with two minutes, 40 seconds.

Mr. Kevin Yarde: I'm going to stick with Mr. Bates. You may have just answered the question in the last session with my colleague from Brampton East. Do you think that these changes are so strict in the certification that it may create additional obstacles for plaintiffs seeking certification in cases involving significant individual issues?

Mr. Paul Bates: Yes, it is a certainty that the predomination element will have that effect. It will reduce the number of cases that are certified and will proceed as a class action. It will prejudice consumers very greatly. One hopes for a narrow judicial interpretation of such a provision on behalf of plaintiffs, but I don't expect that. I think you will see a lot of litigation chaos.

Mr. Kevin Yarde: Okay. I'm not sure if my colleague Suze Morrison has a question, or Gurratan.

The Chair (Mr. Roman Baber): Mr. Singh?

Mr. Gurratan Singh: In the remaining—how long do we have left, Chair?

The Chair (Mr. Roman Baber): A minute, 30 seconds.

Mr. Gurratan Singh: The Law Commission of Ontario, when they came out with their report, ultimately came to the conclusion that the negative aspects of Bill 161 outweigh the positive aspects of modernization—the bill, as it stands right now. Would you agree with that position, that the negatives outweigh the positives, or not?

Mr. Paul Bates: It's a very fine balance. The law commission saw in its report—it issued a comment letter, and we do concur with that comment letter in relation to the same major criticisms that I have identified to you. They're just unfortunate elements that need not be introduced. They are not mandated by the law commission—which was an impressive body of work by both sides, a balanced group of specialists that spent, I think, three years on it. So don't introduce those elements, and there would be support. Maintain those elements; there is resistance.

Mr. Gurratan Singh: Thank you.

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

With 32 seconds remaining, seeing no more questions in this round, we'll go back to the government for its final round. Ms. Park?

Ms. Lindsey Park: Thank you, Chair. I don't have any further questions. I just wanted to thank all the witnesses who have joined us at this late hour, by Queen's Park standards. We really appreciated your participation in this committee.

The Chair (Mr. Roman Baber): Thank you very much, MPP Park. Any further questions from government members, with five minutes or so remaining? Okay.

Seeing none, I'll go back to—final round—the opposition, with five and a half minutes. Mr. Singh?

Mr. Gurratan Singh: Thank you. Turning my attention once again back to Sukhpreet and to Erika: The position put forward is that stronger legal aid actually results in a cost-savings to the province, because ultimately better access to justice results in fewer appeals and it results in a system that flows much more smoothly. Represented clients are able to navigate the legal system far better than self-represented individuals.

In a bit of a succinct fashion, both of you—what are your perspectives with respect to the fact that investing in legal aid will actually save our province money?

Ms. Erika Chan: I can go first. I had noted previously—I believe there were comments about a study done in the US saying there would be $6 in savings per legal aid dollar.

Actually, the brief provided by Professor Bhatia and his colleagues at Osgoode references a study saying savings would be in the amount of $9 to $6 in service spending saved per dollar—and that's based on a 2019 Canadian study.

Ms. Sukhpreet Sangha: I'll just add briefly: Yes, of course, I agree that investment in legal aid does promote cost savings and is, in fact, an efficient move for the provincial government. I believe my colleague just misspoke. It's $9 to $16—I think I heard $9 to $6—just to clarify, and that was a literature review from 2019 that's being cited there. So it's very recent and it's Canadian.

I will also just add that having the current definition of clinic law as what clinics can practise in and serve their clients in actually can promote cost savings as well, because it's efficient. Clients can come to one clinic and likely have the same lawyer or legal worker handle many different legal issues that they are facing. They don't have to access multiple resources, or at least they have access to more resources in one clinic than they would as proposed by this legislation. That is efficient and also saves them from, perhaps, re-traumatizing events of having to re-narrate their story and their circumstances to many different lawyers and other service providers.

Mr. Gurratan Singh: Erika had earlier provided some comments on how she has seen the real impact of the cuts to legal aid, which are maintained by Bill 161. What are your thoughts on that, Sukhpreet?

Ms. Sukhpreet Sangha: I would agree that the impacts were very visible. I also practised in the past as a criminal defence lawyer at a private firm in downtown Toronto and represented many clients on legal aid certificates. I can say that there were definitely very visible impacts on the Ontario Court of Justice and other services—criminal law provisions. For example, duty counsel services were substantially limited by the cuts to legal aid, and that left

many people representing themselves in court, which is not something to be recommended. It does result, as you noted earlier, Mr. Singh, in the likelihood of increased appeals which, again, is not efficient and is a weight on the system's resources.

Interruption.

Ms. Sukhpreet Sangha: I apologize if you can hear noise in the background. My window is open, and there's an ambulance going by.

The Chair (Mr. Roman Baber): Mr. Yarde, with two minutes remaining.

Mr. Kevin Yarde: Thank you, Chair. This question is for Mr. Bates.

I want to switch gears a little bit and talk about class actions with reference to long-term-care homes. Do you feel that Bill 161 will deprive vulnerable seniors access to justice in the wake of what we've seen in nursing homes, the terrible situations we've being seen there, and how do you see that Bill 161 will impede them getting their submissions in on any cases brought forward?

Mr. Paul Bates: The bill will hinder such cases in relation to the predomination requirement because there will be this weighing needed to be done about what the individual issues of cause of injury or death are, the value of such injury in dollars and the like. That weighing being weighed against the character of the common issues could lead to rejection of claims if the common issues don't—to use the adjective that no one knows the meaning of—"predominate." Yes, there is a risk of that.

Now there are some very good firms undertaking those cases. They should be lauded. There are enough problems funding them and organizing them without getting to the end and establishing common issues, meeting all the requirements and having someone say, "Well, there are too many individual issues here. We're not going to have the case." People can try to find a way—find a lawyer and go one by one and prove the common issues in each case over and over. It's ridiculously inefficient.

Mr. Kevin Yarde: How reliable would that be—if somebody is on a fixed income, how could they do that individually?

The Chair (Mr. Roman Baber): Ten seconds.

Mr. Paul Bates: They cannot do that.

Mr. Kevin Yarde: Okay. Thanks.

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

I want to thank everyone on the panel appearing today. Ms. Corcoran, I want to thank you for your appearance. Even though you didn't have an opportunity to participate in questioning, we have not heard at committee yet with respect to remote signing. So I'm grateful to you for that perspective, and I am grateful to everyone else for attending today.

If I could please ask the members of the committee to remain on Zoom for a minute or two subsequent to the departure of our deponents. Thank you very much to the panel and have a good afternoon.

I want to thank everyone attending today. I understand that, at least if everything goes according to schedule, we should be able to conclude hearings by 3 p.m. on Friday.

I also understand that only one of the panels remaining may come short of the three-deponent structure that we have arranged, and that is subject to nobody else dropping out or being a no-show. Only one panel is made up of one person and that will be the very last one on Friday.

Tomorrow, even though committee is scheduled to start at 10 o'clock, the Legislative Assembly folks need to admit everyone in, then we need to do a roll call and make sure that we can get going. So I'd ask everyone to log in no later than a quarter to 10, and with that, subject to no other business, I would propose that we adjourn.

Ms. Lindsey Park: I move adjournment.

The Chair (Mr. Roman Baber): Okay. Thank you, Ms. Park. See you tomorrow at a quarter to 10.

The committee adjourned at 1754.

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