Canadian Vehicle
Manufacturers' Association
Association canadienne
des constructeurs de véhicules

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Ms. Jasminka Kalajdzic,
Principal Researcher, LCO Class Actions Project
c/o Law Commission of Ontario
Osgoode Hall Law School, York University
2032 Ignat Kaneff Building
4700 Keele Street
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Re: LCO Class Actions Project -
Canadian Vehicle Manufacturers' Association (CVMA) Submission

Dear Ms. Kalajdzic:

The members of the Canadian Vehicle Manufacturers' Association (CVMA), which include FCA Canada Inc., Ford Motor Company of Canada, Limited and General Motors of Canada Company, greatly appreciated the opportunity to meet with you and the members of the project team in April to discuss this important research.

The CVMA members strongly support the overarching objectives of class actions, that is, to improve access to justice; to foster judicial efficiency; and, to promote behavioural modification/deterrence. This project is an important initiative to identify recommendations that advance the stated objectives above. We note our general support of the positions set out in both the Ontario Chamber of Commerce (OCC)'s submission and the U.S. Chamber Institute for Legal Reform's October 2017 submission entitled, *"Recipe for Reform: A Proposal for Improving Canadian Class Action Procedures"*. However, where those submissions are inconsistent with those set out in this CVMA submission, we do not endorse the inconsistencies in the other submissions. For example, in contrast to the OCC's submission, it is the experience of our members that class actions in Ontario do address the objective of behaviour modification (see further under 2. Preferable Procedure).

In the preparation of this submission, we have considered the focus group discussion as well as the research consultation questions with the objective of providing an automotive manufacturing perspective to the issues raised. To that end, and given the comprehensive submissions from the OCC and U.S. Chamber, we have focused our response on three key issues impacting our sector for your review and consideration:

1. Multiplicity of Proceedings

As noted in the U.S. Chamber report, parallel or overlapping class action proceedings are incredibly expensive and an inefficient use of resources. This is entirely inconsistent with the goal of judicial efficiency. A framework or protocol that provides a more coordinated and balanced approach where one jurisdiction could be determined to take the lead would streamline the process from both a cost and resource perspective.

As requested by the project team, each of our members has compiled and submitted data (individually, under separate cover) listing case name, category of case, commencement, resolution and date the file closed. The data provides clear evidence that there are a number of ongoing multiple proceedings. The majority of these class actions are commenced following the issuance of a recall.

Multiple actions can occur within the same province, within different Canadian jurisdictions, and also in parallel to actions originating in the U.S. against our members' U.S. affiliate companies. The experience of our members is that product liability class actions in particular are often raised in Canada only after they have been raised in the U.S. and the pleadings of the Canadian actions tend to 'copycat' those in the U.S. Where the product development of a vehicle took place in the U.S. and the technical and engineering expertise is based in the U.S., it is an inefficient use of resources of both parties to have a claim in Canada proceed ahead of the U.S. claim.

It is understood that developing a framework, particularly across jurisdictions, is a challenging task. Our recommendation would be legislative reform that provides for:

1. Ontario judges expressly having the power to certify multi-jurisdictional class actions;
2. Ontario judges having the power to refuse to certify or to stay actions in favour of an action in another jurisdiction that is better-suited to hear the action; and
3. the selection of a lead case, with the others being stayed.

2. Preferable Procedure

The Canadian auto industry is heavily regulated and motor vehicle safety legislation has recently been updated to give broader powers to the safety regulator, Transport Canada. Compliance with the safety legislation and investigations by Transport Canada provide safety for Canadian vehicle owners. Where an issue arises with a vehicle, our members issue recalls pursuant to the safety or emissions legislation or commence voluntary programs (such as extended warranties) to maintain customer satisfaction and loyalty. Such actions are consistent with the three objectives of class action legislation. Vehicle owners have *access to justice* and remedies without ever having to engage the court system; the utmost of *judicial economy*. Acts or omissions that might cause harm are addressed and prohibited by safety, emissions and consumer protection legislation and economically *deterred* by the cost of recalls and/or voluntary compensation; and, by the spectre of a class action if a remedy is not voluntarily offered or is ineffective at reasonably addressing the issue. The class action regime therefore works alongside legislation to encourage reasonable redress for consumers by our members.

To promote these objectives, the *Class Proceedings Act* should be amended to recognize, at an early stage, actions taken by defendants to remedy potential harm (outside of the class action process). Where a party provides reasonable relief or redress has been, or will be, provided to a prospective class, such remedy or redress should be recognized as a preferable procedure thus negating the need for a class action. The ability to avoid a class action would promote the objective of behavior modification/deterrence by encouraging companies to voluntarily remedy harm.

The experience of our members is that class action proceedings are often filed by class counsel in response to a recall or other voluntary compensation program issued by the manufacturer. Where the goal of a recall or other program is to remedy an issue and/or compensate vehicle owners, and where that program achieves that goal, there is arguably no loss requiring compensation by an additional costly process, namely a class action. In such cases, the only party benefitting from a class action is entrepreneurial and opportunistic class counsel. Where the class action regime's objective of behavior modification/deterrence is already being met, it is unnecessary and duplicative for the same regime to be used by such counsel to generate fees where the class has already been reasonably compensated by either regulatory or voluntary programs.

The *Class Proceedings Act* should be amended to allow an alternate reasonable recourse to avoid a class action - to be determined at an early stage, and before the parties and the courts have had to expend the time and expense involved in a full certification motion.

In industries like the automotive industry, remedies in the form of no-cost-to-the-customer recalls and voluntary compensation programs are often international, if not global, in scope. Defendants ought to be able to model their remedies in accordance with their global policies and practices and not be burdened with expensive and all-around resource-consuming certification motions and having to pay a plaintiff/class counsel "tax" (in the form of costs) as a result of implementing an appropriate remedy program in Canada. There is little, if any, value added by class counsel to these circumstances. There should be no costs awarded to plaintiffs for having commenced a proposed class proceeding that is later found to be avoided by alternate remedy/redress.

All too often remedial actions taken by defendants - particularly recalls - have the effect of inviting opportunistic class counsel to engage manufacturers in costly and redundant class action litigation when the class members have already been reasonably compensated (for example, by having their vehicle repaired at no cost to class members). We submit that the opposite should be true. Remedy actions should discourage the commencement of class actions and the consumption of precious judicial resources. Class actions should be reserved for those cases where the class is being deprived of a remedy.

Therefore, we respectfully propose the following amendments to the *Class Proceedings Act* with the intention that any barriers to the implementation of the above concept created by the Supreme Court of Canada's decision in *Fischer v. AIC Limited* [2013] 3 S.C.R. 949 be removed:

5 (1) The court shall certify a class proceeding on a motion under Section 2, 3 or 4 if,

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defenses of the class members raise common issues;

(d) the class has not been, and will not be, provided with a reasonable alternative means of redress or remedial response by regulatory action, a product recall, a remedy program or through any other procedure other than a class proceeding, and a class proceeding would be the preferable procedure for the resolution of the common issues and the provision of any redress or remedy to the class; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members. 1992, c. 6, s. 5 (1).

[Proposed New Section] For the purposes of Subsection 5(1)(d), a reasonable alternative means of redress or remedial response need not be a complete remedy in law.

[Proposed New Section] A party to a proceeding commenced under Subsection 2(1) may require that the court determine on a preliminary motion at least one of the issues set out in Subsections 5(1)(a) to (e) before hearing the remainder of the motion to certify the proceeding as a class proceeding. Preparation of the remainder of the motion for certification shall be suspended pending the decision on such a preliminary motion.

Subsection 2(3) should be repealed.

It is expected that, initially, there will be preliminary motion hearings concerning whether or not a remedy/redress offered by a defendant is a reasonable alternative to a class action. However, in our opinion, a body of law will develop on this issue, providing direction to both class and defense counsel, allowing them to determine in advance whether a class action is warranted or whether a different preferable procedure exists. The court process would therefore not have to be engaged, and judicial resources could be saved for those cases where the objectives of class actions are not otherwise being met.

3. Appeals

All references to the Divisional Court in Section 30 of the *Class Proceedings Act* should be replaced by the Court of Appeal. We are concerned that bifurcating appeal rights between the Divisional Court and the Court of Appeal could result in having to be in both Courts at once. For example, an appeal as to whether or not aggregate damages were appropriately awarded in general, is to the Court of Appeal under Section 30(3), and an appeal about the determination of individual claims of class members sharing in the Section 24 aggregate award is to the Divisional Court under Subsections 30(6), (7), (9), or (10) (and we suggest adding (8) and (11)). Reference to Section 24 should be added in subsections 30(8) and 30(11) (in addition to reference to s. 25). The presence of subsections 24(9)(c) and 24(10) shows that a defendant should have the right to appeal the determination of individual claims made under Section 24.

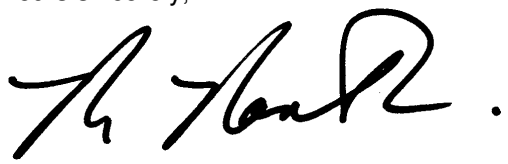
As the U.S. Chamber and OCC have submitted, we also submit that the Leave to appeal provision should be removed from Section 30(2).

Finally, we do not want any amendments to the *Class Proceedings Act* or *Rules of Civil Procedure* made to promote mandatory, consistent reporting on class action proceedings and data to cause any additional cost to be borne by defendants. The parties' privacy obligations would have to be respected in any such amendment as well.

We hope this submission provides an informative contribution to the project and to the development of the final report and recommendations. The CVMA would be very pleased to coordinate any further discussion regarding this submission that would be helpful to the project team. We recognize the complexity of this research and appreciate the opportunity to provide input and context related to automotive manufacturing experiences.

Please do not hesitate to contact me directly at 416-364-9333 if you have any questions or would like any further information.

Yours sincerely,



Mark A. Nantais
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