To: The Parliamentary Joint Committee on Corporations and Financial Services

Public Submission From: Andrew Roman

Subject: Inquiry into Litigation Funding and the regulation of the class action industry.

Introduction of the Author

I am a recently retired lawyer from Ontario, Canada, with much of my 45 year career focused on practising, teaching and publishing about the law and economics of class actions. I have represented numerous defendants (and a few plaintiffs) in several high-profile Canadian and multinational class actions. In the past 18 months I have appeared as an invited witness before two Canadian House of Commons committees and one Canadian Senate committee on proposed legislation.

I have also had a relationship to class actions law in Australia. In 1986/87 the ALRC retained me as a consultant to prepare a report on class actions. On 19 June, 2018 the Victoria Law Reform Commission published its report "Class Actions and Access to Justice" in which it cited, in six places, my submission to the Commission on that study.

I have no connection to any political party or corporation in Australia or Canada, and have received no financial or other compensation for this submission.

Australia's treatment of class actions has been better that North America's. I would like Australia to continue to do better.

Summary of Submission

The Attorney-General's 13 May 2020 media release (hereafter, MR) states that justice is not a business. I respectfully agree. But if you can't pay for access you can't get justice. And that's how class action funders help Australians to get justice.

The Terms of Reference lists 14 individual questions, but their essence can be simplified into two basic questions.

1. Are there too many class actions in Australia?

That depends on whether there is a certain right number of class actions, more than which is too many. But there is no right number. The question is like asking "Is that piece of string too long?" Answer: "How long would you like it to be?"

2. Are the funders of the successful actions getting too much money at the expense of the class members?

Funders are getting the market rate for the risk and duration of their investment, as explained below. The risks and costs of individual cases will vary widely, as will their outcomes. A 10% share of the award in a case in which the award is very large may be excessive, while 30+% in another case in which the award is relatively small and the risk substantial may be perfectly fair. This Parliamentary Committee has neither the time nor the resources to examine the details of each case as they are filed in the future. That is the function of judges.

The lawyers' and funders' shares of the award in a successful class action are carefully supervised by the judiciary. If the Parliamentary Committee has faith in Australia's judges, who have had extensive experience in class actions, there is no case for any new government intervention. Intervention would be justified only if there is compelling evidence that a lack of faith in the Australian judiciary's ability to treat class members fairly is justified.

If the Parliamentary Committee recommends new legislation or regulation to govern the financing of class actions, it must be mindful of the consequences. Restricting funding for risky/costly class actions decreases the number of such actions. This would decrease the awards to Australians who have suffered injury or loss, even as similarly harmed people in other countries receive compensation. If this new intervention results in immunizing certain defendants' misconduct from judicial scrutiny, while reducing compensation for Australians suffering compensable injury or loss, it will prove to be an unpopular and unsustainable intervention.

Background

For plaintiffs, class actions are very expensive, with high risk. Someone has to pay, and to take the risk of loss. Who should that someone be?

As the class members don't pay for the plaintiff's costs of litigation there are only two other possibilities: the plaintiff's law firm (if it has enough resources) and an outside funder. I have seen plaintiffs' law firms "bet the firm" on a class action and lose; these firms are gone.

If the plaintiffs' lawyers run out of money or lose at court, class members don't pay any of the defendant's costs. For class members this is risk free and cost free litigation, a luxury no one else in the litigation process enjoys.

To justify a risky investment of potentially millions of dollars in a lawsuit for someone else's benefit, there must be an opportunity for reward commensurate with the risk. The class actions that succeed financially must pay enough to compensate for those that don't.

If an opinion polling company was to ask class members whether they would prefer their government to protect them by discouraging class action funders, most of them would say 'No thank you. I risk nothing by being a member of the class, so don't protect me by destroying the economics of those who are prepared to assume that risk for my benefit'.

The "Booming Litigation Funding Industry"?

The goal of the Attorney-General's 13 May 2020 media release appears to be to protect class members from excessive profiteering by the "booming litigation funding industry".

The number of recent class actions (44 in 2019 versus 55 in 2018) does not suggest a boom. If there has been growth in funding, that is a function of the economics of supply and demand. Funding is being supplied only because there is a market demand for it.

If the cases being funded were without legal merit the funders would soon lose all their investments, and stop funding. As the funding has continued it must be because there are enough meritorious cases to make it profitable. Without this funding these cases would be unaffordable, and all the class members would still be saddled with their losses.

Litigation funding has a market cost commensurate with the investment risk. Consider whether your Committee is better positioned than the market and the judiciary to judge the fairness of the contractual terms of such funding?

The Fair Share Issue

The MR seeks to ensure that Australians "get their fair share of legal settlements". What is a fair share? How will it be determined? I know of no legal or economic test for determining the fair share when one party invests all the money and takes all the risk, while all the others are free riders, with no risk, but a reasonable likelihood of reward. It requires individual judgement in each case.

The International Dimension

In class actions, unlike in geography, Australia is not an island unto itself. Many class actions involve multinational claims of mass torts, products liability, consumer protection, investor/shareholder deception and similar issues. With millions of class members globally, the defendant often be unable to compensate everyone in every country. Australian plaintiffs' counsel may have to work with lawyers in other countries. Again, such international actions will be financed by funders, not by class members. If the other countries make litigation funding easier while Australia creates barriers to funding, the losers will be the Australian class members who suffer uncompensated injury or loss, to the benefit of foreign multinationals or their insurers.

The Most Important Class Actions

The most important class actions are the ones you never see. They don't appear in judicial decisions because no one will bring them. That's because no one will finance them. This results in a high cost to society, of uncompensated injury and loss. The issue now is whether Australia should increase, decrease or leave unchanged the current disincentives to class action financing. Any change will create both winners and losers. Who do you want those to be?

Comments on Selected Questions in the Terms of Reference

<u>Question 1: what evidence is available regarding the quantum of fees, costs and commissions earned by litigation funders and the treatment of that income;</u>

This question will be very difficult, if not impossible to answer with available information within a reasonable time.

Doing it properly would require a detailed, complex three-part analysis.

First, assess each funder's entire litigation portfolio, over enough years to provide a representative sample size. This would require a detailed audit of all of the necessary financial data, some of which would be proprietary and confidential. Realistically, how could this Committee obtain the necessary information? And, even if you could get it, for all funders, would you would have the teams of accountants and economists to conduct a proper analysis of it within a reasonable time?

Second, balance the financial successes against failures, to determine the net result, positive or negative, for each funder.

Finally, assess the risk/reward relationship (see chart below) and make a difficult judgement about whether the net rewards are commensurate with the risks taken, or are too low or too high.

Without such a detailed examination public policy could only be based on isolated anecdotes and speculation.

Question 2: the impact of litigation funding on the damages and other compensation received by class members in class actions funded by litigation funders;

This question appears to be based on the fourth paragraph of the MR: when litigation funders were involved, the median return to class members was just 51%, versus 85% when a funder was not involved. This seems to assume (i) that a 51% return is unfair, and (ii) the funder's profit was the sole cause of the difference in recovery. It is doubtful that these assumptions are correct.

If getting 51% of an award is unfair it begs the question "compared to what?" Every class member would be better off getting 51% of something compared to 100% of nothing. Getting nothing would be the result if the litigation wasn't funded. Why is it fair to increase the likelihood that all the mums and dads mentioned in the MR get nothing while negligent or deceptive defendants, foreign and domestic, keep everything?

The fact that 85% of the award goes to class members when there are no funders involved is, by itself, meaningless, without considering the different kinds of class actions that do and do not require external funding and the size of the court award or settlement.

The 85% recovery is most likely because the class action was either low-cost and/or relatively low risk, enabling the law firm itself to fund it. External funding is only required for very expensive and/or very risky class actions.

If class action funding is really so highly profitable there will be numerous competing funders making funding offers to the plaintiff's law firm. The law firms would accept the lowest offer, as that would give the class members and the law firm the highest return. Therefore, instead of seeking to drive away class action funders, encourage more of them, to enhance competition for lower percentages of the court award.

If a new law was to fix a maximum percentage for funders, that percentage would necessarily be arbitrary. It would deprive potential class members of any recovery where the evidence was contentious or the defendant was a deep-pocketed corporation or government. Such a law would facilitate the continued infliction of the injury or loss.

Question 9: what evidence is becoming available with respect to the present and potential future impact of class actions on the Australia and economy; and

Question 12: the potential impact of Australia's current class-action industry on vulnerable Australian businesses already suffering the impacts of the COVID 19 pandemic;

As a percentage of the total economy of Australia class action awards from past and current class actions are trivially small. The same is true of impact on the recovery from the COVID-19 pandemic.

Class actions to be filed after the pandemic lockdown ends will not be resolved for several months or years after the Australian economy will be on the path to recovery, and, will only impact particular defendants, not the entire economy.

One could speculate that class actions will be a deterrent to future investment in the Australian economy and to recovery from the pandemic. However, as there are no facts in the future, there can be no evidence to support this speculation.

On the other hand, one could speculate that future government policies may reduce funding for meritorious class actions. This would result in continuing injury and loss to the Australian victims of negligence and other causes of legal action, who would have less money to spend on purchasing Australian goods and services. Less money for a consumer-driven recovery could also harm the economy.

Your Committee should not rely on any such speculation. I expect that Questions 9 and 12 will prove unanswerable on any sound factual basis.

Question 10: the effect of unilateral legislative and regulatory changes to class-action procedure and litigation funding.

This question will be difficult to answer because key words are undefined. Surely the effect of the changes have to depend on what those unspecified unilateral changes are, over what unspecified time.

Presumably, unilateral changes mean changes to Australian law that are not found in other, comparable jurisdictions. As a broad generalization it can be said that if those changes make Australia a less friendly jurisdiction for class actions there will be fewer of them.

Funding today is a factor in perhaps half of all Federal Court cases in Australia, according to the Victoria LRC report. Defendants now know that a funder is unlikely to run out of money, so that increasing both sides' costs often just means paying more at the end of the day. Thus, in many class actions the

existence of funding gets class members more compensation, sooner, at a lower total cost to society. In other words, such funding arrangements are usually economically efficient. Undermining economic efficiency, just when the Australian economy needs to recover from COVID-19, would be bad for business as well as for government.

Gratitude has a short memory. When there is some mass disaster everyone screams “do something to fix it and spare no expense”. After no expense has been spared by whoever takes the risk, the sentiment shifts to “let’s pay the lawyers (or the funders) next to nothing because we were right in the first place”. This is like having your cake and eating someone else’s too.

Profit is not a four-letter word. Why begrudge a funder a reasonable, judicially-controlled profit in return for giving many Australians greater access to justice?