ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

CLASS ACTIONS

Consultation Memorandum No. 9

March 2000

ALBERTA LAW REFORM INSTITUTE

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This consultation paper was written by Margaret A. Shone, one of the Institute's counsel. Ms. Shone has been greatly assisted by the members of an ad hoc project committee. The project committee consists of three Institute Board members–Professor R.J. Wood (Chair), The Hon. Mr. Justice B.R. Burrows and Peter J.M. Lown, Q.C. (Director); Vivian R. Stevenson (another of the Institute's counsel); and the following external advisors who have graciously donated their time and expertise to assist the Institute in carrying out this project:

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PREFACE AND INVITATION TO COMMENT

In this project, we will examine the existing law and procedures that govern proceedings in which a number of plaintiffs have the same or similar claims against a defendant, assess the problems in the operation of that law, and, if appropriate, make recommendations for improvements that will alleviate those problems. In so doing, we will consider whether it is necessary, or possible, to provide a more satisfactory procedural framework in which to meet the multiple plaintiff litigation demands of modern Alberta. Ancillary to this, we will examine whether the law requires any changes where a number of defendants are in the same or a similar position in relation to claims brought against them.

The Institute's purpose in issuing a Consultation Memorandum at this time is to allow interested persons the opportunity to consider whether there is any need for reform. If there is a need, we welcome comments on what direction reform should take. Any comments sent to the Institute will be considered when the Institute determines what final recommendations, if any, it will make to the Alberta Minister of Justice.

The Memorandum consists of three chapters and an Appendix containing the *Class Proceedings Act* adopted by the Uniform Law Conference of Canada in 1996 (the ULCC). Chapter 1 introduces the project and its purpose. Chapter 2 describes the procedures available for dealing with class actions under the existing law in Alberta and elsewhere. Chapter 3 raises issues relating to the possible reform of the existing Alberta law. It is being circulated for the purpose of obtaining the views of members of various sectors of the Alberta public.

We would like to hear from as many people as possible in response to the questions we have raised. To this end, in addition to distributing the Memorandum to the large number of people on our mailing list, we will also be posting it on our Internet Website which is open to the public and allows for easy downloading. We may arrange further consultation or host further discussion, once the initial round of comments is obtained.

Comments on the issues raised in this Memorandum should reach the Institute on or before May 31st, 2000.

Comments should be addressed to:

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Table of Contents

ABBREVIATIONS

The following tables give abbreviations for the major references referred to in this consultation document.

Statutes / Rules

Abbreviation	Jurisdiction	Title	Citation
AR	Alberta	Rules of Court	AR 390/68
BC Act	British Columbia	*Class Proceedings Act*	R.S.B.C. 1996, c. 50
ManLRC Act	Manitoba	*Class Proceedings Act*	Proposed by Manitoba Law Reform Commission in ManLRC Report S.O. 1992, c. 6
Ont Act	Ontario	*Class Proceedings Act, 1992*	
Que Code	Quebec	Code of Civil Procedure	
ULCC	Canada	*Class Proceedings Act*	Proposed by Uniform Law Conference of Canada (appended to this Consultation Memorandum)

Canadian Books and Looseleaf Services

Abbreviation	Citation
Branch	Ward K. Branch, *Class Actions in Canada*, looseleaf service (Vancouver: Western Legal Publications, December 1998).
Cochrane	Michael G. Cochrane, *Class Actions: A Guide to the class Proceedings Act, 1992* (Aurora, Ontario: Canada Law Book Inc., 1993).
Eizenga, Peerless & Wright	Michael A. Eizenga, Michael J. Peerless and Charles M. Wright, *Class Actions Law and Practice*, looseleaf service (Toronto and Vancouver: Butterworths, June 1999).
Stevenson & Cote (1)	Stevenson and Cote, *Rules of Civil Procedure 2000*
Stevenson & Cote (2)	Stevenson & Cote, *Civil Procedure Guide*, (Edmonton: Juriliber, 1996), 2 vols.
Sullivan	James Sullivan, *A Guide to the British Columbia Class Proceedings Act* (Toronto and Vancouver: Butterworths, March 1997).

Government / Law Reform Publications

Abbreviation	Jurisdiction	Citation
ALRC Report	Australia	The Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No. 46 (Canberra: Commonwealth of Australia, 1988).
BC Consultation Document	British Columbia	Ministry of the Attorney General, *Consultation Document: Class Action Legislation for British Columbia* (Victoria: Queen's Printer, May 1994).
CBA Report	Canada	Canadian Bar Association, *Report of the Task Force on Systems of Civil Justice* (August 1996).
ManLRC Report	Manitoba	Manitoba Law Reform Commission, *Class Proceedings*, Report #100 (Winnipeg: Manitoba Publications Branch, January 1999).
Man Task Force Report	Manitoba	*Manitoba Civil Justice Review Task Force Report* (1996).
NSW Briefing Paper	Australia	Marie Swain, "Class Actions in New South Wales," NSW Parliamentary Library Briefing Paper No 22/96.
OLRC Report	Ontario	Ontario Law Reform Commission, *Report on Class Actions*, 3 vols. (Toronto: Ministry of the Attorney General, 1982).
Ont Advisory Committee Report	Ontario	Ontario *Report of the Attorney General's Advisory Committee on Class Actions Reform* (1990).
SALC Report / WP	South Africa	South African Law Commission, *The Recognition of a Class Action in South African Law* (Report, 1997) / (Working Paper 57, 1995).
SLC Report	Scotland	Scottish Law Commission, *Multi-Party Actions*, Report #154 (1996).
ULCC DP	Canada	Ruth Rogers, *A Uniform Class Actions Statute*, 1995 Proceedings of the Uniform Law Conference of Canada, Appendix O; www.law.ualberta.ca/alri/ulc/95pro/395o.htm.
VLRAC	Australia	Victorian Attorney-General's Law Reform Advisory Council, *Class Actions in Victoria: Time For A New Approach* (Report, 1997).
Woolf Report	England	Lord Woolf, *Access to Justice* (Final Report, 1996).

LIST OF ISSUES

I. Purpose of Project

A. The Problem: Alberta's Civil Justice System May Not Adequately Accommodate Class Actions

[1] Chemical storage tanks explode emitting noxious gases that spread over a nearby residential area. A large number of residents subsequently experience ill health. Their symptoms vary. A group of Alberta entrepreneurs solicit funds from investors around the globe for commercial development that does not take place as promised. The investment monies are not returned. Some of these investors relied on information in a prospectus that turned out to be false; others invested on the advice of brokers who acted as intermediaries. A large Alberta-based financial institution collapses and many persons of modest means stand to lose their hard-earned savings. Each had been assured, either in promotional literature or by officers of the company, that the financial institution stood on a solid footing and their money was safe. A roofing material deteriorates in 10 years instead of being good for 25 years as advertised by the manufacturers after testing and approval by government regulators. Owners of homes using this roofing material are prematurely put to the expense of having their roofs redone.

[2] The phenomenon of many individuals having the same or similar claims against the same defendant is a modern reality. Law suits are being brought in a wide variety of cases, including cases involving defective consumer or industrial products, misrepresentation of products or services, securities breaches, mass disasters and creeping disasters (such as injury to health over a prolonged time period or environmental damage).[1]

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[1] The ManLRC Report gives a detailed account of the types of litigation that can involve multiple plaintiffs with similar claims:

Class actions are useful in tort cases for mass disaster claims (claims arising from single incident mass accidents, such as train derailments and environmental disasters) and for creeping disaster claims (claims for bodily injury arising from consumer products, such as tobacco and asbestos, or medical products, such as intra-uterine devices, breast implants, contaminated blood, jaw implants, silver mercury filings and heart pacemakers). Other uses include "claims of group defamation, nuisance, the principle in *Rylands v. Fletcher*, various statutory torts, damages claims for breach of *Charter* rights, claims arising from illegal strikes, negligent house construction, and negligent misstatement" (ManLRC Report at 17-18).

Class actions are useful in contract cases for consumer claims for defective products, such as defective toilets, house siding, plastic blinds and heaters. Other uses include misrepresentations, wage and wrongful

(continued...)

[3] But is the civil justice system keeping up with the times? Do the processes currently available to deal with such claims meet the fundamental principles of a civil justice system? Do they proceed in a way that is fair to the interests of both plaintiffs and defendants? Can they be readily known? Is their application certain? Are they efficient? Do they keep time and expense in check?

[4] Many people think not. Some have gone so far as to state that "the legal system requires overhaul in order to deal properly with multi-plaintiff actions."[2]

[5] The problems are particularly apparent in cases where the number of claimants is large but the individual damages are small, and in cases where the evidence required to make out the claim is technical and complex. The litigation process in circumstances such as these can be costly, slow and cumbersome. Many persons simply cannot afford the justice the system offers. Indeed, recommendations from the Alberta Summit on Justice held in Calgary, January 27-29, 1999 urged the government to examine "ways to expedite the current justice process and make it more affordable" and "ways to simplify the present justice system so that it is more 'user friendly' and less complicated and intimidating".[3]

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[1] (...continued)
dismissal claims, disputes over franchise agreements, claims against educational institutions. (ManLRC Report at 18-19)

In the United States, class actions are useful in commercial law for securities cases arising out of a breach of fiduciary obligations, a failure to disclose or negligent or misleading representations, but securities and other commercial law class action claims are not common in Canada. (ManLRC Report at 19-20).

[2] ManLRC Report at 3, concurring with and quoting from the Woolf Report at 223 on the situation in England and Wales at 223.

[3] Recommendations, *Report of the All-Party MLA Public Consultation* (which formed the basis for discussion at the Alberta Summit on Justice). The core recommendations in the *Final Report of the Alberta Summit on Justice* included a recommendation that "the language, procedures, and accessibility of the justice system be simplified, made more user friendly, and made easier to understand" and that "recommendations contained in previous studies and report ... be reviewed and implemented". In the Response of the Government of Alberta to the *Final Report, Alberta Summit on Justice*, the Government states its commitments to the eight main themes and 25 core recommendations put forward in the Report of the Justice Summit. These include "simplifying access to the justice system" (theme two) and "taking action on previous studies and reports on justice" (theme seven).

[6] One of the goals of the civil justice system should be to "achieve a balance between the normal rights of claimants and defendants, to pursue and defend cases individually, and the interests of a group of parties to litigate the action as a whole in an effective manner".[4] This point can be expressed in different ways. If plaintiffs are unable to pursue their rights in court, defendants will not be held accountable for their acts. By giving plaintiffs access to the courts, the civil justice systems helps to regulate conduct in the community. Indeed, one objective identified for class actions is the modification of wrongful behaviour on the part of actual or potential defendants.[5]

[7] The problems with the procedural mechanisms currently available in civil justice systems to handle cases in which a number of plaintiffs have the same or a similar interest in the subject matter of the litigation have been apparent throughout the British Commonwealth–in Canada,[6] the United Kingdom,[7] Australia,[8] Scotland[9] and South Africa.[10] As Lord Woolf observed, of England:[11]

> As we become an increasingly mass producing and mass consuming society, one product or service with a flaw has the potential to injure or cause other loss to more and more people. Yet our civil justice system has not adapted to mass legal actions. We still largely treat them as a collection of individual cases, with the findings in one case having only limited relevance in law to all of the others.

[8] The Supreme Court of Canada recognized the inadequacies of the existing law in 1983 in the case of *Naken v. General Motors of Canada Ltd.* when it identified "the need for a comprehensive legislative scheme for the institution and conduct of class

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[4] Woolf Report at 223, §2, quoted in ManLRC Report at 3.

[5] *Abdool v. Anaheim Management Ltd.* (1) (1993), 15 O.R. (3d) 39 at 45-46 (Gen. Div.), citing OLRC Report; aff'd *Abdool v. Anaheim Management Ltd.* (2) (1995), 21 O.R. (3d) 453 at 462 (Div. Ct.).

[6] CBA Report (August 1996); Man Task Force Report (1996); Ont Advisory Committee Report (1990); BC Consultation Document (May 1994); ManLRC Report (January 1999).

[7] Woolf Report (1996).

[8] ALRC Report (1988); VLRAC Report (1997); NSW Briefing Paper (1996).

[9] SLC Report (1996).

[10] SALC Report (1997).

[11] ManLRC Report at 1-2, quoting from the National Consumer Council in its submission to Lord Woolf's inquiry in England.

actions".[12] According to the Court, the lack of detail in the historic "representative action" rule (in Alberta, Rule 42) meant that it was not intended to impose a new and distinct method of proceeding upon the generally established pattern of procedure and was inadequate to launch a complex and uncertain action.

[9] The Alberta Court of Appeal recognized the inadequacies of the existing law in 1998 in the case of *Western Canadian Shopping Centres, Inc. v. Dutton.*[13] The Court applied Rule 42 in this case, but commented, albeit *in obiter*, that "this area of the law is clearly in want of legislative reform to provide a more uniform and efficient way to deal with class action law suits".[14]

[10] Because of the inadequacies, Albertans who face barriers to bringing their own action in Alberta are sometimes obliged to join litigation proceedings brought in other jurisdictions in order to obtain relief. For example, Alberta women who had silicone gel breast implant claims chose to join a British Columbia class action rather than attempt action under Alberta Rule 42.[15]

[11] In assessing the situation in England and Wales, Lord Woolf concluded that "[the absence of specific rules of court for multi-party actions] causes difficulties when actions involving many parties are brought". He went on to observe that, "[i]n addition to the existing procedures being difficult to use, they have proved disproportionately costly" and that "[i]t is now generally recognised, by judges, practitioners and consumer representatives, that there is a need for a new approach" to court procedures. We think that Lord Woolf's observations apply equally well to the current situation under Alberta's civil justice system.

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[12] (1983), 144 D.L.R. (3d) 385 at 410.

[13] (1998), 228 A.R. 188.

[14] The S.C.C. granted leave to appeal and cross-appeal this decision on Dec. 9, 1999, [1999] S.C.C.A. No. 59, online: QL (AJ).

[15] *Harrington v. Dow Corning Corp.* (1), (1996), 48 C.P.C. (3d) 28, 22 B.C.L.R. (3d) 97 (S.C.); *Harrington v. Dow Corning Corp.* (2), (1997), 29 B.C.L.R. (3d) 88 (S.C.); *Harrington v. Dow Corning Corp.* (3), unreported (January 29, 1999), Vancouver C954330 (B.C.S.C.). An Alberta resident was the representative plaintiff for the non-resident subclass in *Chace v. Crane Canada Ltd.* (1996), 5 C.P.C. (4th) 292, aff'd 14 C.P.C. (4th) 197 (B.C.C.A.).

[12] On the basis of this information and concerns that have been expressed to us by the Benchers of the Law Society of Alberta and a number of lawyers who have represented plaintiffs or defendants in multiple-plaintiff similar-claim litigation in Alberta, we have determined that there is significant interest in reform of the law in this area and, clearly, an issue that should be addressed.

B. The Objective: To Ensure that Alberta's Civil Justice System for Class Actions is Fair, Certain and Efficient

[13] The objective is to ensure that Alberta's civil justice system meets the fundamental principles of a good civil justice system in situations where many plaintiffs have the same or similar claims against one or more defendants. These principles have been stated by others. They are the principles that we will apply in assessing the adequacy of the existing law for handling class actions. They are also the principles that we will apply in considering the advantages or disadvantages of any proposals for change.

1. Plaintiffs should be able to bring deserving claims

[14] The principle that plaintiffs should have access to bring deserving claims involves the elements identified in the Alberta Summit on Justice: expediting the current justice process, making it more affordable, and finding ways to simplify it so that it is more "user friendly" and less complicated and intimidating. The goal of providing better access to justice for plaintiffs is one that has been identified in many discussions on the limitations of the existing law. The Ontario Law Reform Commission spoke of "the goal of permitting the advancement of meritorious claims which have henceforth been uneconomical to pursue because the damages for each individual plaintiff would be too small for each claimant to recover through usual court procedures".[16] Lord Woolf spoke of providing "access to justice where large numbers of people have been affected by another's conduct, but individual loss is so small that it makes an individual action economically unviable".[17] Several reports have

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[16] Quoted in *Abdool v. Anaheim Management Ltd.* (1), *supra* note 5.

[17] Woolf Report at 223, §2.

spoken of providing "access to justice for persons who fail to pursue legal remedies to which they are entitled for social or psychological reasons".[18]

2. Defendants should be protected from unreasonable claims

[15] Attention to the principle that defendants should be protected against unreasonable claims will ensure that the procedural balance is not tipped too far on the side of the interests of plaintiffs. The principle embodies the idea that defendants should not have to spend money or face adverse publicity as a result of unfounded claims brought against them. Further, the principle encompasses the idea that, where plaintiffs are able to make out a recognizable cause of action, the civil justice system should provide defendants with an opportunity to make their defence in a proceeding in which the rules are known, and the results can be predicted with a reasonable degree of certainty, obtained within a reasonable length of time and limited in cost–all of which accords with our third principle.

3. The civil justice process should be certain and efficient

[16] A good civil justice system embodies the goal of "judicial economy" which has often been identified by others. The Ontario Law Reform Commission spoke of "the goal of resolving a large number of disputes in which there are common issues of fact or law within a single proceedings, to avoid inconsistent results, and prevent the court's resources from being overwhelmed by a multiplicity of proceedings" and of "an economy of scale" that can come from "permitting a representative plaintiff to sue for damages for an entire class".[19] Lord Woolf spoke of providing "expeditious, effective and proportionate methods of resolving cases, where individual damages are large enough to justify individual action but where the number of claimants and the nature of the issues involved means that the cases cannot be managed satisfactorily in accordance with normal procedure".[20]

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[18] ManLRC Report at 1-2. The OLRC made a similar observation.

[19] Quoted in *Abdool v. Anaheim Management Ltd.* (1), *supra* note 5.

[20] Woolf Report, quoted in ManLRC Report at 3.

II. The Existing Law

A. Alberta

1. Judicature Act, section 8: Court power to avoid a multiplicity of proceedings

[17] The *Judicature Act*[21] gives the Court of Queen's Bench and Court of Appeal broad power to handle a matter so as to avoid all multiplicity of proceedings.[22] Section 8 provides:

> The Court in the exercise of its jurisdiction in every proceeding pending before it has power to grant and shall grant, either absolutely or on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to which any of the parties thereto may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, so that as far as possible all matters in controversy between the parties can be completely determined and all multiplicity of legal proceedings concerning those matters avoided.

Apart from the general jurisdiction of the court under section 8 of the *Judicature Act*, statutory authorization is usually restricted to specific narrow circumstances.[23]

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[21] *Judicature Act*, R.S.A. 1980, c. J-1.

[22] In *Anderson Exploration Ltd. v. Pan-Alberta Gas Ltd.* (1997), 53 Alta. L.R. (3d) 204 (Q.B.), the Court used this section to interpret Rule 42 broadly on an application by the defendant to convert an action by 9 of 425 natural gas producers to a representative action so that the decision would bind the remaining 416 producers.

[23] Statutory provisions may authorize class action proceedings in specific situations. (Modern class actions legislation excludes class actions authorized by other statutes from the operation of the Act: ULCC, s. 41.)

Such proceedings are often found in commercial transaction legislation. In Alberta, the *Fraudulent Preferences Act*, R.S.A. 1980, c. F-18, s. 10(1), permits one or more creditors to sue for rescission, or to have declared void, a transaction that has been impeached for fraud. It provides:

> One or more creditors may, for the benefit of creditors generally or for the benefit of those creditors who have been injured, delayed, prejudiced or postponed by the impeached transaction, sue for the rescission of, or to have declared void, agreements, deeds, instruments or other transactions made or entered into in fraud of creditors in violation of this Act or by this Act declared void.

The *Fair Trading Act*, S.A. 1998, c. F-1.05, s. 17, authorizes action by a consumer organization or a group of consumers against a supplier of goods or services for a declaration that an act or practice is an unfair practice and an injunction restraining the supplier from engaging in the unfair practice. The *Personal Property Security Act*, S.A. 1988, c. P-4.05, s. 53, requires that an action for the recovery of damages brought by a trustee under a trust indenture must be brought on behalf of all persons with interests in the trust indenture. The *Securities Act*, S.A. 1981, c. S-6.1, also has specific class proceedings provisions.

The *Fatal Accidents Act*, R.S.A. 1980, c. F-5, s. 3(1), enables a class action to be brought "for the benefit of the wife, husband, cohabitant, parent, child, brother or sister" of the deceased person. Ordinarily the action should be brought by the executor or administrator of the deceased person but if no action is

(continued...)

2. Rule 42: Representative Actions

[18] Only one existing procedure is specifically intended to handle litigation by a number of persons who have the same or similar claims against a defendant. That is Rule 42. Rule 42 provides a procedural device for handling, in a single proceeding, litigation in which numerous plaintiffs (or defendants) are similarly situated, whether or not they are party to the action.[24] It provides:

> Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all.

Assuming an applicant meets the "common interest" test, Rule 42 allows a representative party to sue on behalf of a group of plaintiffs (or defend on behalf of a group of defendants). Once appointed, the representative acts on behalf of all the members of the defined class, who are bound by the outcome of the case.

[19] Rule 42 does not confer any new causes of action (or defences). It simply provides a procedure through which existing causes of action (or defences) can be

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[23] (...continued)
brought within one year of the death, then the action may be brought, for the benefit of all, "by and in the name of all or any of the persons for whose benefit the action" could have been taken by the executor or administrator: *ibid.*, s. 3(2) and (3).

On occasion, a statute may provide a specific remedy that has a broader application than the individual plaintiff's case, making the statutory remedy preferable to a class action: Eizenga, Peerless & Wright at §2.9. An example is found in business corporations acts which gives a right to obtain a share valuation.

[24] The discussion in this memo is confined to an examination of the law and practice under Rule 42 (AR 390/68, s. 42). Rules 41 and 43 (AR 390/68, ss. 41 and 43), also provide for representative actions. Of these, Rule 43 is the more widely known (to lawyers and members of the public), and the more widely used. It allows a trustee, executor or administrator to bring an action on behalf of the parties being represented without the necessity of joining the beneficial owner: *Paterson et al. v. Hamilton et al.*, [1997] 199 A.R. 399 (Q.B.). Rule 43 provides:

> Trustees, executors or administrators may sue and be sued on behalf of or as representing the property or estate of which they are trustees, or representatives without joining any of the persons beneficially interested in the trust or estate, and shall be considered as representing those persons.

Several other rules supplement it with operational details. The experience under Rule 43 may be helpful to an understanding of what is meant and intended by Rule 42: Stevenson & Cote (1) at 53.

Rule 41, which is the lesser known of the two, permits suit by a representative plaintiff in an action for the prevention of waste or protection of property. It says:

> In any action for prevention of waste or otherwise for the protection of property, one person may sue on behalf of himself and all other persons having the same or a similar interest.

dealt with more effectively than through numerous individual actions. As Stevenson and Cote explain:[25]

> The idea is that instead of many lawsuits, or one lawsuit with many named parties, one person, or several representative persons can sue or defend on behalf of a group with a "common interest".

[20] The concept of special procedures, where many persons have the same interest in the subject matter of the litigation, originated in the Court of Chancery as an equitable remedy. Ordinarily, the Court required all parties to an action to be present "so that a final end might be made of the controversy." However, the Court relaxed this requirement in cases where "the parties were so numerous that you never could 'come to justice'" by allowing one or more representatives to conduct the litigation on behalf of others.[26] Later, when the courts of equity and common law were fused, that procedure was enacted in the Rules of Procedure Schedule appended to the *Supreme Court of Judicature Acts of 1873 and 1875*.[27]

[21] Rule 42 is similar to "representative action" rules that exist, or have existed, in other jurisdictions in the common law world. However, over the years, the courts have limited the scope of application of the historic Chancery rule.

[22] The Supreme Court of Canada considered the scope of the representative action rule then in force in Ontario (similar to Alberta Rule 42) in 1983.[28] It restricted the operation of the historic rule severely, requiring the following conditions to be met:

(a) the principal issues of law and fact are the same for each plaintiff;
(b) the class is clear and finite;
(c) there is a discernible fund or asset against which the claim can be made; and
(d) the plaintiffs claim the same remedy.

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[25] Stevenson & Cote (1) at 52.

[26] *Duke of Bedford v. Ellis*, [1901] A.C. 1 at 8 (H.L.) *per* Lord Macnaghten.

[27] *The Supreme Court of Judicature Act, 1873* (U.K.), 36 & 37 Vict. 8, c. 66, Sch. Rule of Procedure, s. 10 and *The Supreme Court of Judicature Act, 1875* (U.K.), 38 & 39 Vict. 10, c. 77, Order XVI, First Sch., s. 9.

[28] *Naken v. General Motors of Canada Ltd.*, *supra* note 12.

The Alberta Court of Appeal held in 1993 that, for Rule 42 to apply, the following four requirements must be satisfied:[29]

> (a) The class must be capable of clear and definite definition;
> (b) The principal issues of law and fact must be the same;
> (c) Success for one of the plaintiffs will mean success for all;
> (d) No individual assessment of the claims of individuals need be made.

A recent Alberta decision adds a fifth requirement that judgment in the action must be able to bind the parties (in this case, non-resident plaintiffs).[30]

[23] According to the Supreme Court of Canada,[31] the inadequacies of the historic representative action rule include that it does not address matters such as:

(1) assessing damages arising from many different situations;
(2) costs, especially with respect to non-parties;
(3) access to pre-trial procedures by non-parties or by parties against non-parties or applying pre-hearing procedures to a reference (service of notice, modification of discovery rules and approval of settlements);
(4) the effect of the class action on a non-party's own right of action (lack of provisions for opting out, uncertain application of the *res judicata* doctrine); or
(5) the effect of the *Statute of Limitations* (uncertain application of limitation periods).

[24] Problems identified by lawyers in Alberta include:

> ***Uncertain procedure***. Rule 42 is ambiguous as to many of its procedural aspects. The current practice under Rule 42 is difficult to discover. The practice under Rule 42 is unpredictable.

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[29] *Korte v. Deloitte, Haskins and Sells* (1993), 8 Alta. L.R. (3d) 337 at 342. Contrast the earlier case of *Lunney v. Agostini* (1983), 27 Alta. L.R. (2d) 177 at 180 (Q.B.), in which Purvis J. distinguished "common interest" in Alberta's Rule 42 from "same interest" in the comparable rule in other jurisdictions, saying that the use of the words "common interest" makes it "easier to support a class or representative action in this jurisdiction that in others that do not use the same term in the rule."

[30] *Interclaim Holdings et al. v. Timothy Down et al.*, decision by Madam Justice Kent of the Alberta Court of Queen's Bench, November 23, 1999, Action No. 9901-04122, [1999] A.J. No. 1381, online: QL (AJ)..

[31] *Naken v. General Motors of Canada Ltd.*, *supra* note 12.

Narrow Interpretation. The narrow interpretation the courts have given to Rule 42 excludes cases that would benefit from a more certain and efficient procedure.

Examination for discovery. Whether or not the parties, including members of the class, will have the right to examine other parties for discovery is an important issue.

Limitation periods. Limitation periods can cause difficulty for both plaintiffs and defendants.[32]

Settlement. The mechanics of settlement are not clear. For example, under Rule 344, for court intervention for settlement purposes and payment in discharge, all plaintiffs have to be involved. Defendants want to know whether the settlement will be a complete settlement.

Identification of the Class. Defendants want to know who is in the defined class. The Rule 42 class must be capable of "clear and definite definition" but dispositions sometimes leave doubt.

Costs. Defendants want to know who will pay the costs if the action fails, and whether they can obtain security for costs.

Distribution of award. Defendants want to know who will scrutinize what goes out to potential plaintiffs.

3. Other procedures

[25] A variety of other procedural devices are of some use in cases where many persons have the same or a similar interest in the outcome of litigation. They include: test cases; judicial case management; group litigation; and a *pot pourri* of other means.

a. Test cases

[26] One plaintiff may put forward a case in order to test the likely outcome in other cases. Advantages are that the results of the test case may lead to the efficient resolution of other litigation through settlement, or help narrow the issues that are litigated in subsequent cases. Moreover, the parties to the test case itself can probe the

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[32] See *infra*, chapter 3, heading C.12.

merits without the procedural complexity involved in a class action. Disadvantages include the following.[33] First, "[t]est case litigation puts inordinate power in the hands of the 'test' plaintiff" who will pursue the result that is most beneficial to that plaintiff personally. For example, the test case may be settled without a resolution of the underlying issues (as in the Dalkon contraceptive shield litigation) and therefore may "not necessarily facilitate the settlement of subsequent litigation". Second, "[t]est case litigation is not binding on the determination of either liability or damages except as between the parties named in the litigation." Of course, "a judicial resolution of test case litigation, particularly on the issue of liability, can influence the parties' willingness to settle." Third, American experience "indicates that the original litigants tend to reap a damages windfall".

b. Judicial case management

[27] The court may appoint a judge to case manage claims of a similar nature made in separate actions. Indeed, the Alberta Court of Appeal has expressed the view that "[s]ome of the problems encountered [under Rule 42] could be dealt with through strict case management".[34]

[28] Judicial case management is a relatively new phenomenon in Canada. It is employed in cases where there is a need for judicial supervision or intervention on an ongoing basis. It can lead to streamlined procedures, faster timelines and earlier settlement. Other possibilities are: the diversion of cases to alternative dispute resolution where this is likely to be beneficial, the encouragement of a spirit of co-operation between the parties and the avoidance of unnecessary combativeness, the identification and reduction of issues and the reduction of cost.[35]

[29] Judicial case management has been used effectively in Alberta cases involving multiple plaintiffs, either in conjunction with or independently of Rule 42. As one commentator has observed, the appointment of a case management judge "can allow for cooperative and efficient sharing of discovery material and, in an appropriate case,

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[33] ManLRC Report at 11.

[34] *Western Canadian Shopping Centres Inc. v. Dutton*, *supra* note 13 at 193.

[35] Woolf Report.

can transmit some of the benefits of a class proceeding."[36] However, like the practice under Rule 42, the case management practice is uneven, being recreated case by case.

c. Group litigation

[30] A group of plaintiffs with similar claims may agree to work together for the purpose of settlement negotiations with the defendant or advancing their cases under judicial case management. In effect, they create an informal class in order to work together.[37] The Alberta wrongful sterilization litigation, which was recently settled, provides an example. In this example, group litigation was facilitated by judicial case management.[38] A similar process involving group litigation under unified case management is being followed in the residential schools cases now being litigated.

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[36] Eizenga, Peerless & Wright at 2.3.

[37] This has been called a "quasi" class proceeding: Clint G. Docken and Thomas W. Buglas, "Alberta's Mass Tort Malaise", a paper prepared for the Alberta CBA Mid-Winter Meeting 2000.

[38] The following account is based on information gathered from Justice Wachowich, Jon Faulds (one of the plaintiffs' counsel) and Donna Molzan of Alberta Justice:

After 200 or more wrongful sterilization claims had been commenced against the Alberta government, Chief Justice Moore appointed a case management judge (Justice Wachowich) to handle them. Later, a trial judge (Justice Belzil) was appointed to deal with procedural matters relating to the eventual trial.

Defence counsel requested that a plaintiff committee be formed so that defence counsel would not have to deal with 60 or 70 individual lawyers. The plaintiff committee consisted of 3 counsel. Two of the counsel represented the majority of the claims and the third counsel communicated with the remaining individual lawyers, some 30 or 40 handling mainly smaller claims. A fourth counsel was appointed to handle claims for dependent adults who were under public trusteeship; these were all very similar and settled early. The judge and counsel set regular case meeting and target dates. The plaintiff committee also met regularly.

In order to bring as many claimants as possible into the process, potential claimants were served with notice asking them to come to court by a certain date if they wanted to be included. Many contacted did not want to claim (in effect, "opting out").

The situations of the plaintiffs were not all the same. For example, some of the plaintiffs were adults who had consented to the sterilization, some had children prior to the sterilization and some were children whose parents had consented or requested the sterilization. With the concurrence of the case management judge, defence counsel and the plaintiff committee chose 17 or so cases to go forward and concentrated on the procedures necessary to deal with them. They set up a parallel track for other claims in order to keep them running. When the government appointed a negotiator for the defence, the plaintiff committee participated in the negotiations.

The case management required about a year of the judge's time. The Rules of Court were construed liberally for the purpose of expediting the proceedings. Interlocutory applications to the Court of Appeal objecting to some of the case management rulings slowed the process down, but overall, the process can be considered a success. It led to a satisfactory outcome for most claims (a few were not settled and are still outstanding).

[31] One advantage of group litigation is the flexibility it provides to allow the parties to design their own procedure. Disadvantages include: each plaintiff must commence an individual action; it may not be possible to obtain the cooperation of all or a substantial number of plaintiffs and the defendant; there is lack of procedural certainty at the outset; and the process of coming to agreement on how the group will conduct itself may be ponderous and time-consuming.

d. Pot pourri

[32] Other procedures available to streamline litigation include: special determinations allowing for the resolution of legal matters without full discovery and trial procedures, the joinder of parties and consolidation of actions, and the law respecting capacity to sue and be sued, public interest standing and intervener rules.

> ***Special determinations***. Examples of special determinations include an application for the interpretation of a contract or statutory provision (Rule 410(e)) and summary judgment procedures (Rules 159-164). These are helpful in some situations but not universally appropriate for class actions.
>
> ***Joinder of parties***. A number of Alberta Rules provide for joinder of parties to an action (e.g., Rules 36-40, 46 and 52-53). These rules are useful, but they "cannot replace class proceedings because they can result in cumbersome and expensive proceedings" for handling multiple plaintiff actions for the same or similar claims, this being "precisely what class proceedings legislation is designed to avoid".[39]
>
> ***Consolidation of actions***. Consolidation of actions under Rule 229 may offer some of the advantages of class actions, particularly when the class is small. However, the consolidation of actions is unlikely to provide "a practical solution to the pre-trial problems that arise when there are numerous plaintiffs" and "this device [does not] facilitate settlement".[40]
>
> ***Capacity to sue and be sued***. Representative action may be "ideal for groups like unincorporated associations such as first nations, union, or yacht clubs or, as R. 43 tells us, beneficiaries of an estate who can sue or be sued through the

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[39] ManLRC Report at 13.

[40] *Ibid.* at 9-10.

executor or administrator".[41] It enables "collective entities without formal legal personalities ... to commence proceedings under the authority of a representative order or pursuant to the ... rule on proceedings by or against unincorporated entities."[42] However, many issues are not addressed by such a provision.

Public interest standing and intervener status. The rules on standing and intervener status are of limited utility in allowing more than one plaintiff to bring forward their cases in one proceeding. The Supreme Court of Canada restrictions on the situations in which public interest standing is recognized make this device "a totally inadequate substitute for class proceedings."[43] That is because "[c]lass proceedings do not usually require a determination of the validity of legislation, and their liability issues are normally heavily dependent on findings of fact, such as causation, foreseeability, or contractual interpretation."[44]

B. Other Jurisdictions

1. Canada

[33] Like Alberta, several Canadian provinces continue to use the historic representative action rule and other procedural mechanisms similar to those in Alberta to handle cases where a number of plaintiffs have the same claim against a defendant.

[34] Other provinces have replaced the historic rule with a statutory regime by enacting "class proceedings" legislation.[45] In fact, as the Manitoba Law Reform Commission has pointed out, "[t]he vast majority of Canadians now have access to modern class proceedings regimes".[46] Quebec enacted legislation in 1979, Ontario in

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[41] Stevenson and Cote (1) at 52.

[42] ManLRC Report at 9-10.

[43] *Ibid.* at 12.

[44] *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236.

[45] The consideration of the reasons for having or avoiding class proceedings legislation should not be confused with the separate considerations that apply to issues about the creation of new causes of action, the propriety of looking for clients after a calamity, contingency fees or more business for lawyers.

[46] ManLRC Report at 15.

1992 (in force January 1, 1993)[47] and British Columbia in 1995.[48] In addition to this, the Uniform Law Conference of Canada made recommendations for the adoption of a Uniform *Class Proceedings Act* in 1996, and the Manitoba Law Reform Commission made recommendations for class proceedings legislation in a report issued in January 1999. The Ontario and British Columbia Acts and the Acts recommended by the Uniform Law Conference of Canada and the Manitoba Law Reform Commission all "take pains to ensure that barriers to class proceedings (particularly barriers identified in the American or Quebec jurisprudence, or in decisions like that of the Supreme Court of Canada in *Naken*) are removed and minimized".[49]

[35] Not only is class proceedings legislation gaining in popularity in Canada but also a Canadian model is emerging. The Canadian legislation and proposals for legislation all permit class proceedings in a wide range of circumstances. The ULCC is representative of the Canadian model. It is appended for reference purposes (Appendix A).

[36] Under Canadian class proceedings regimes, as under Rule 42, issues common to multiple plaintiffs are determined together through the device of a representative plaintiff, leaving individual issues to be decided on their own. The effect is that "the proceedings directly affect persons not before the court (that is, all who may have a common claim)".[50] Like Rule 42, class proceedings regimes do not confer any new causes of action. A class action is conducted by one person who, as "representative plaintiff", acts on behalf of other persons who have the same or similar claims against a defendant. These other persons form a "class". As class members, they are not party to, and do not ordinarily participate in, the proceedings. Nevertheless, they are bound by the outcome of the litigation. Therefore, the court has a role to ensure that the interests of the class members are protected.

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[47] The Ont Act is based on recommendations made in the OLRC Report and the Ont Advisory Committee Report. The OLRC recommendations were even more closely followed in the B.C. and Uniform Class Proceedings Acts: Sullivan at 6.

[48] The BC Act was enacted following consultation on the BC Consultation Document.

[49] ManLRC Report at 37.

[50] *Ibid.* at 3-4.

2. United States

[37] The United States led the move to modern class proceedings legislation. Rule 23 of the United States Federal Rules of Civil Procedure, first adopted in 1938, is considered "the dawn of the modern age of class proceedings":[51]

> Rule 23 provided for the use of class actions to obtain both equitable and legal relief and provided guidance to the courts as to the types of actions that were appropriate for a class action. [Its adoption] promoted the use of class actions in the United States and provided authority for the binding nature of judgments on the class.

Federal Rule 23 was substantially broadened in the early 1950s and then again in 1966 when amendments:[52]

> ... significantly improved class action procedure and it became a popular method of resolving disputes. The new r. 23 dealt with such issues as the rights of class members and the methods of ensuring the fulfilment of those rights. The new rule also sought to ensure the fair and efficient conduct of class actions by providing the courts with broad discretion and powers to manage class actions.

[38] Class proceedings legislation is now widespread in the United States, not only under the federal rules but also under state legislation. According to the Manitoba Law Reform Commission, several attributes of American law and procedure, of which the availability of class actions is only one, have caused the United States to be "favoured as a destination by forum-shopping plaintiffs":[53]

> The United States, either in the federal or the state courts, has been long favoured as a destination by forum-shopping plaintiffs because of the availability of not only class actions, but also the plaintiff favouring rules and practices on contingency fees, civil jury trials, various strict liability doctrines for tort actions, and the lavish use of exemplary and punitive damages.

These attributes are not characteristic of Canadian law and procedure.

3. Australia

[39] Australia enacted "Representative Proceedings" legislation in 1991 (as Part IVA of the *Federal Court of Australia Act 1976*).[54] This legislation permits "representative

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[51] *The Law of 50 States*, quoted in Sullivan at 2-3.

[52] Sullivan at 2-3.

[53] ManLRC Report at 13.

[54] The legislation arose from recommendations made in the ALRC Report.

proceedings in circumstances that extend well beyond what was traditionally regarded as the scope of the rule [governing representative actions]."[55]

4. Studies recommending class proceedings legislation

[40] Law reform commissions in several jurisdictions have recommended class proceedings legislation. We have already referred to the recommendations of the Uniform Law Conference of Canada and the Manitoba Law Reform Commission which adopt the model of the Ontario and British Columbia Acts. Class proceedings legislation has been recommended by the Victorian Attorney-General's Law Reform Advisory Council,[56] the Scottish Law Commission,[57] and the South African Law Commission.[58] Various bar and government studies have also led to recommendations for the enactment of class proceedings legislation.[59]

ISSUE No. 1
Should Alberta class actions procedures be reformed?

[41] On the assumption that change is necessary, chapter 3 raises a number of issues to address in designing a new procedure for class actions in Alberta.

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[55] NSW Briefing Paper at 20, citing Gleeson CJ in *Esanda Finance Corporation Ltd v. Carnie & Anor* (1992) 29 N.S.W.L.R. 382 at 388.

[56] VLRAC Report.

[57] SLC Report.

[58] SALC Report.

[59] For a more complete listing, *see* Chapter 1, notes 6 and 7.

III. A New Procedure for Class Actions

[42] In an ordinary action, each litigant is a party in their own right. In a class action, a "representative plaintiff" is a party. The representative plaintiff conducts the action on behalf of other claimants who are members of the "class" but who, for the most part, do not participate in the proceedings. Once the class has been determined, the class members are bound by the outcome of the litigation, even though they do not participate. These are the essential differences between an ordinary action and a class action.

[43] In this chapter, we ask questions about the prospective details of a new procedure for plaintiff class actions in Alberta. Prior to bringing the chapter to a conclusion and reiterating our invitation to comment, we also ask whether the law should enable a representative defendant to defend an action on behalf of a defendant class.

A. Criteria for identifying actions for which class action procedures are appropriate

ISSUE No. 2
What characteristics should be required for an action to proceed as a class action?

1. Why the issue arises

[44] In some cases, class action procedures may be required to give claimants access to justice and to handle similar claims efficiently. In other cases, the imposition of class action procedures may be unfair either to claimants or defendants. It is necessary to have some criterion or criteria by which it can be determined whether or not class action procedures are appropriate.

2. Rule 42

[45] Two features characterize a representative action under Rule 42. There must be "numerous persons" who have a "common interest in the subject of an intended

action". The number of persons required to be "numerous" is uncertain. The "common interest" must be the "same interest" for all class members.

3. Class proceedings precedents

[46] Two requirements of Canadian class proceedings regimes are similar to the Rule 42 requirements. First, class proceedings regimes require that there be "an identifiable class of 2 or more persons" (ULCC, s. 4(b)). Naming a small number of persons–2 or more–avoids the "numerosity" debate, under Rule 42, on the number of persons required for a representative action.[60] In contrast to Rule 42, the class members do not need to be individually identified at the outset of the litigation. The members of the class must be "capable of determination in some objective manner" but it "is not necessary for the precise number or identity of the class members to be known" at this point in time.[61]

[47] Second, like Rule 42, Canadian class proceedings regimes require that "the claims of the class members raise a common issue" (ULCC, s. 4(c)). (Class proceedings legislation substitutes the words "common issue" for the words "common interest" in the historic representative action rule.) However, unlike Rule 42, these regimes avoid the debate about whether a "common interest" must be the "same interest" by defining a "common issue" to mean (ULCC, s. 1):

> (a) common but not necessarily identical issues of fact, or
>
> (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

They avoid debate over the extent, if at all, to which the common issue must predominate over individual issues by adding, after the requirement that the claims of the class members raise a common issue, the words "whether or not those common issues predominate over issues affecting only individual members". The result is that under Canadian class proceedings regimes, the common issues do not have to be

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[60] It would be rare for a class action consisting of two persons to go forward as a class action because a class action is unlikely to be the preferable procedure for the resolution of the common issues: Sullivan at 46. However, Ont Act, s. 2(1) permits "...one or more members of a class to commence a class actions proceeding...".

[61] *Peppiatt v. Nicol* (1993), 16 O.R. (3d) 133 at 141 (Gen. Div.).

determinative of liability.[62] What is required is simply that the resolution of the common issues will advance the proceedings.[63] The requirement that the common issues must predominate over individual issues has been a bone of much contention in the United States.[64]

[48] Canadian class proceedings regimes add a third requirement. It is that a class proceeding must be the "preferable procedure for the resolution of the common issues" (ULCC, s. 4(d)). This determination is made taking into consideration the goals of the legislation. In Ontario, these are: access to justice for claims that are otherwise uneconomic to pursue; judicial economy to avoid inconsistent results and prevent the court's resources from being overwhelmed by a multiplicity of proceedings; and modification of the behaviour of actual or potential defendants.[65] Of these, the most successful argument is that the class proceeding will enhance access to the courts.[66] Courts have also considered the risk of inconsistent findings of liability in separate litigation,[67] the possibility that a class proceeding will put the parties on a

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[62] *Harrington v. Dow Corning Corp.* (1), *supra* note 15 at 112.

[63] See Eizenga, Peerless & Wright at 3.14-3.15. In Ontario, a "common issue is sufficient if it is an issue of fact or law common to all claims, and ... its resolution in favour of the plaintiffs will advance the interest of the class, leaving individual issues to be litigated later in separate trials, if necessary": *Endean v. Canadian Red Cross Society* (1997), 148 D.L.R. (4th) 158, rev'd on other grounds 157 D.L.R. (4th) 465 (B.C.C.A.). In British Columbia, it is not necessary that resolution of the common issues produce the same result for all class members: *Chace v. Crane*, *supra* note 15.

[64] United States *Federal Rules of Civil Procedure*, 383 U.S. 1029 (1966), r. 23. As discussed in connection with the "preferable procedure" criterion, two jurisdictions reopen the predominance debate by requiring the court to consider predominance, among other matters, when assessing whether or not a class proceeding would be preferable to any other procedural course for the fair and efficient resolution of the common issues.

[65] *Abdool v. Anaheim Management Ltd.* (1), *supra* note 5.

[66] Sullivan at 53-54, citing *Bendall v. McGhan Medical Corp.* (1993), 14 O.R. (3d) 734, 16 C.P.C. (3d) 156, supp. reasons unreported (October 22, 1993), Toronto 14219/93, motion for leave to appeal dismissed [1993] O.J. 4210 (November 26, 1993), Toronto 14219/93 (Gen. Div.), and *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995), 25 O.R. (3d) 331, 127 D.L.R. (4th) 552, 40 C.P.C. (3d) 245 (Gen. Div.), leave to appeal refused 25 O.R. (3d) 331 at 347 (Div. Ct.); but compare *Tiemstra v. Insurance Corp. of British Columbia* (1996), 49 C.P.C. (3d) 139, aff'd 12 C.P.C. (4th) 197 (B.C.C.A.), finding that there was no access to justice where a significant portion of the class had taken individual action.

[67] *Nantais v. Telectronics Proprietary (Canada) Ltd.*, *ibid.* at 339-40.

more even economic footing[68] and the possible loss of procedural safeguards for the defendant.[69]

[49] The word "preferable" was deliberately chosen over words such as "reasonable" or "superior". The Ontario Attorney General's Advisory Committee on Class Action Reform thought that "preferable" would best draw the court into a consideration of whether or not the class proceeding is preferable to other procedural options as a fair, efficient and manageable method to advance the claims.[70]

[50] British Columbia and the Manitoba Law Reform Commission add a list of five factors that the court must consider in determining "whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues"[71] (ULCC s. 4, note [1]). The factors appear to restrict the circumstances in which the class proceeding would be preferable. The considerations are: whether the common issues predominate over individual issues; whether individual members have a valid interest in pursuing separate actions; whether any of the claims are or have been the subject of other proceedings; whether other means of resolving the claims are less practical or efficient; and whether the administration of the class proceeding would create undue difficulty.

[51] The list reopens the predominance debate by requiring the court to consider predominance, among other matters, when assessing whether or not a class proceeding would be preferable to any other procedural course for the fair and efficient resolution

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[68] *Chace v. Crane Canada Ltd.*, *supra* note 15 at para. 22; *Nantais v. Telectronics Proprietary (Canada) Ltd.*, *ibid.*

[69] *Sutherland v. Canadian Red Cross Society* at 652; *Abdool v. Anaheim Management Ltd.*, *supra* note 5. Two examples are: the loss of a right to examine for discovery and the loss of the opportunity to claim over against potential indemnifiers. The right to examine for discovery under class proceedings regimes is discussed under heading C.6 of this chapter.

[70] Sullivan at 53, citing the Ont Advisory Committee Report.

[71] BC and ManLRC Acts, s. 4(2). For cases in which the court has considered procedural alternatives, see *Ewing v. Francisco Petroleum Enterprises Inc.* (1994), 29 C.P.C. (3d) 212 at 213-14 (Ont. Gen. Div.) and *Chace v. Crane Canada Inc.*, *supra* note 15 at para. 65 (test case inadequate).

of the common issues.[72] However, in this list, the predominance of the common issue is just one factor to be weighed; predominance is not a mandatory requirement.

[52] In addition to predominance, factors that may influence a decision about whether a class proceeding is a preferable proceeding include: the economics of the litigation; the number of individual issues to be dealt with; the complexities if there are third party claims; and the alternative means available for adjudicating the dispute.[73]

4. Creation of subclasses

[53] Canadian class proceedings regimes provide for the creation of subclasses (ULCC, s. 6).[74] A subclass can be defined as "a group within a class that has common issues against a defendant that are shared by some but not all of the class members". The characteristics required to form a class must be present to form a subclass. Dividing plaintiffs into subclasses could lead to a more efficient resolution of claims than might be otherwise possible. For example, it could be useful in determining damages where some persons have been injured by a defective product whereas others have suffered worry or inconvenience from being placed at risk. It could also be useful to divide plaintiffs into subclasses for the purpose of assessing liability or damages where plaintiffs have obtained a defective product from different distributors who have made different representations about the product.

5. Request for comments

[54] Comments are requested on Issue No. 2.

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[72] BC and ManLRC Acts, s. 4(2). See *Tiemstra v. Insurance Corp. of British Columbia*, *supra* note 66, for a judicial consideration of this provision. Sullivan argues that the Court went off course in this case by "considering the proceeding as a whole and the resolution of individual claims rather than the determination of the common issues."

[73] Eizenga, Peerless & Wright at 3.26-3.32.

[74] See e.g. *Peppiatt v. Royal Bank of Canada* (1996), 27 O.R. (3d) 462 (Gen. Div.).

B. Establishing the presence of the characteristics

ISSUE No. 3
Should the decision that an action should proceed as a class action be made by:
(a) the representative plaintiff, in pleadings
(b) court decision on plaintiff's application or defendant's objection, or
(c) mandatory prior court approval, on application by
(i) the proposed representative plaintiff,
(ii) any class member, or
(iii) a defendant?

1. Why the issue arises

[55] Issue No. 2 is directed towards identifying the criteria that make a group of similar claims suitable for a class action. It will then be necessary in individual cases to decide whether those criteria are satisfied. Issue No. 3 canvasses the ways in which this decision might be made.

2. Rule 42

[56] Under Rule 42, a representation action is initiated when the plaintiff sues in a representative capacity. If the defendant objects to the use of a representative action, the court decides whether or not it is appropriate to proceed under Rule 42. In practice, a plaintiff who is unsure whether Rule 42 is the appropriate procedure asks the court for direction.

3. Class proceedings precedents

[57] Canadian class proceedings regimes require court approval before an action can go forward as a class proceeding. This mandatory prior court approval is given in a "certification" order. Certification is the critical step that converts the proceeding from one between the parties named in the pleadings to a class proceeding. This step is critical because it is only upon certification that the class members, rather than just the named parties, become bound by the outcome of the case on the common issues.

[58] Usually, the plaintiff who proposes to represent the class will make the application (ULCC, s. 2). However, a defendant may apply where two or more plaintiffs have a common issue against that defendant (ULCC, s. 3). Potential advantages for a defendant of a class action include: the consolidation of all claims against the defendant; the ability to deal with one representative plaintiff who has authority to bind the class, whether or not all of its members are specifically identified; the minimization of legal costs; access to statutory case management to expedite the court's handling of the case; and the chance to have common issues involving matters such as the interpretation of statutory language or contractual documents resolved in one case.[75]

[59] Mandatory prior court approval ensures adequate protection of the various interests of all class members and guards against potential abuse of process. On the other hand, prior court approval is a departure from the usual practice governing individual suits. It places an added burden on the representative plaintiff, as well as on the courts. If the defendant's application leads to a class action, the plaintiffs will have been denied the option of pursuing their individual claims in the manner they consider to be most efficient and effective.

[60] If the conditions for certification are not satisfied and the court refuses to certify the proceeding (ULCC, s. 9) or if the proceeding is later decertified (ULCC, s. 10), the court may direct how the proceedings may continue (ULCC, s. 9).

4. A word about jurisdiction

[61] Often, the wrong that is the subject of a class proceeding will have occurred in more than one province or to the residents of more than one province, or both. In *Morguard Investments Ltd. v. De Savoye*, the Supreme Court of Canada held that the power or authority of a court to hear and decide a dispute involving persons outside of that province is limited by principles of order and fairness.[76] These principles are satisfied only where there is "a real and substantial connection" between the province assuming jurisdiction and the defendant or the subject-matter of the law suit. The

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[75] Cochrane at 82.

[76] *Morguard Investments Ltd. v. De Savoye,* [1990] 3 S.C.R. 1077.

Court's decision in *Hunt v. T & N plc*[77] elevated the requirement of "a real and substantial connection" to a "constitutional imperative", such that it "has become the absolute constitutional limit on the power of each province to confer judicial jurisdiction on its courts."[78]

[62] If challenged, a plaintiff who seeks to certify a class action will have to convince the court that it has jurisdiction over the dispute. At least two decisions suggest that, in a class proceeding, the fact of a common issue coupled with the policy objective of avoiding a multiplicity of proceedings supports a finding of a "real and substantial connection" where it otherwise might not exist.[79]

[63] The decision on jurisdiction is important if a court in another province is to recognize a judgment granted in a class proceeding for the purposes of enforcing it against a defendant. It is also important if a court in another province is to recognize a

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[77] (1994), 109 D.L.R. (4th) 16.

[78] Castel at 54. Even if there is a real and substantial connection, the court may refuse jurisdiction where there is a more convenient or appropriate forum elsewhere: for a detailed discussion, see *Amchem Products Inc. et al v. Workers' Compensation Board et al.* (1993), 102 D.L.R. (4th) 96.

[79] In *Harrington v. Dow Corning Corp.*, *supra* note 15, the plaintiffs sought to certify a class action in British Columbia seeking damages from a manufacturer and distributors of breast implants. The proposed class was to include "all women who have been implanted ... and are resident in Canada, anywhere other than Ontario and Quebec, or were implanted in Canada, anywhere other than Ontario and Quebec." The defendant did not manufacture the implants in B.C., but implantation of their product did occur there in some cases. The defendant resisted the inclusion of the class of plaintiffs (both B.C. residents and non-residents) who had received implants in provinces other than B.C. on the basis there was no real and substantial connection between those plaintiffs and the B.C. forum. The court concluded that the "demands of multi-claimant manufacturers' liability litigation require recognition of concurrent jurisdiction of courts within Canada" and that "there is no utility in having the same factual issues litigated in several jurisdictions if the claims can be consolidated." Accordingly, the common issue in and of itself provided a "real and substantial" connection, and the class was certified. The decision is under appeal.

In *Nantais v. Telectronics Proprietary (Canada) Ltd.*, *supra* note 66, the plaintiffs claimed against the manufacturer of allegedly defective leads for pacemakers. The leads implanted in Canada were made outside Canada, but marketed in Canada through Ontario, by members of the corporate family of defendants. The statement of claim alleged improper design , manufacture, inspection and marketing by the defendants. The defendant opposed the certification of a class which included persons outside of Ontario. The Ontario legislation is silent on the question whether or not a class may contain non-residents. However, the court allowed their inclusion because of the policy reason behind class proceeding legislation to avoid a multiplicity of proceedings. The decision is somewhat confusing in light of the comment that "[a]ny questions of the treatment of non-members of the class ... through some future successful jurisdictional argument, would be dealt with separately."

judgment granted in a class proceeding as a bar to an action in that province by a plaintiff who has not actually "opted in" to a class proceeding.[80]

5. Request for comments

[64] Comments are requested on Issue No. 3.

C. Consequences of a decision that an action should proceed as a class action

1. Choice of representative plaintiff

ISSUE No. 4

(1) Should the representative plaintiff be chosen by:

- **(a) self-selection,**
- **(b) class member selection, or**
- **(c) court determination or approval on application by**
  - **(i) the proposed representative plaintiff**
  - **(ii) a class member, or**
  - **(iii) the defendant?**

(2) What qualities should the representative plaintiff have?

a. Why the issue arises

[65] The selection of the representative plaintiff is important because the representative plaintiff conducts the litigation on the common issue or issues, making all decisions and giving all directions which are necessary for that purpose, and for that purpose represents the rights, interests and obligations of all class members.

b. Rule 42

[66] Under Rule 42, the plaintiff who brings the representative action is self-selected. No particular requirements are set out in the Rule.

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[80] See *infra* under heading C.2.c.ii. A good discussion of jurisdictional issues in class actions if found in: H. Patrick Glenn, "The Bre-X Affair and Cross-Border Class Actions" 79 Can. Bar Rev. 280.

c. Class actions precedents

[67] Before approving an action as a class action, Canadian class proceedings regimes require the court to be satisfied that there is a representative plaintiff who (ULCC, s. 4(e)):

> (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, an interest that is in conflict with the interests of other class members.

The selection of a representative plaintiff may be more difficult where the defendant applies because no individual plaintiff may be willing to assume the burden of responsibilities that a representative plaintiff carries.[81]

Fair and adequate representation. The representative plaintiff's situation does not have to be typical of the situations of the class members.[82] Where differences in the situations of the class member are significant, subclasses could be formed with their own representative plaintiffs.[83] Other factors courts have looked at to determine whether a representative plaintiff is appropriate include: selection by other class members; retention of experienced counsel; and willingness to proceed with the action.[84]

Workable plan. The representative plaintiff must produce a plan for the class proceeding that "sets out a workable method of advancing the proceeding on

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[81] Sullivan at 16. Usually, the representative plaintiff will be self-appointed and the defendant will point out the plaintiff's inadequacies from the defendant's perspective. That is because, procedurally, other class members are not usually involved at this stage. The certification hearing takes place in chambers, the only parties ordinarily being the plaintiff and defendant with the evidence of the proposed plaintiff's appropriateness coming from the plaintiff's own affidavit, the defendant's cross-examination of the plaintiff on that affidavit or argument from the defendant's particular knowledge of the plaintiff: *ibid.* at 29-32.

[82] *Abdool v. Anaheim Management Ltd.* (2), *supra* note 5 at 465; see also *Nantais. V. Telectronics Proprietary (Canada) Ltd., supra* note 66, and *Harrington v. Dow Corning Corp., supra* note 15. Compare *Sutherland v. Canadian Red Cross Society* (1994), 27 O.R. (3d) 645 at 646 (Gen. Div.).

[83] *Campbell v. Flexwatt Corp.* (1996), 25 B.C.L.R. (3d) 329, 50 C.P.C. (3d) 290, 3 C.P.C. (4th) 208 (supp. Reasons), aff'd in part 15 C.P.C. (4th) 1, 44 B.C.L.R. (3d) 343, additional reasons at 105 B.C.A.C. 158, leave to appeal refused 228 N.R. 197n (S.C.C.); see also *Peppiatt v. Royal Bank of Canada, supra* note 74.

[84] *Peppiatt v. Nicol, supra* note 61 at 141.

behalf of the class and of notifying the class members" (ULCC, s. 4(e)(ii)).[85] It should set out the procedure proposed for the resolution of individual issues that remain after the resolution of the common issues. Courts understand that a plan produced at this early stage is likely to be sketchy and they approach it flexibly, accepting that changes are likely to be needed as the action progresses.[86]

No conflict of interest. This condition applies only with respect to the common issue. The fact that the proposed representative plaintiff has an interest that is somewhat different from that of other class members does not prevent that person from being appropriate.[87] Several provisions protect class members against the risks that might arise from the certification of an inappropriate representative plaintiff. These include that class members: receive notification of the certification, can opt out of the proceeding and have the opportunity to intervene; and the court must approve any settlement, discontinuance or abandonment.[88]

[68] One question is: must the representative plaintiff be a member of the class? Canadian class proceedings regimes allow the court to approve a person who is not a member of the class as the representative plaintiff, but "only if it is necessary to do so in order to avoid a substantial injustice to the class" (ULCC, s. 2(4)). The exception could be useful in cases where a particular individual or organization possesses special ability, experience or resources that would enable it to conduct the case on behalf of all class members.[89]

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[85] The "plan should also have within it a breakdown of the stages of the proceeding and a time frame for the completion of each stage": Sullivan at 61, citing *Campbell v. Flexwatt Corp.*, *supra* note 83 at para. 26.

[86] *Harrington v. Dow Corning Corp.*, *supra* note 15 at 114; *Peppiatt v. Nicol*, *supra* note 61 at 141.

[87] *Ewing v. Francisco Petroleum Enterprises Inc.* (1994), 29 C.P.C. (3d) 212 (Ont. Gen. Div.); *Chace v. Crane Canada Inc.*, *supra* note 15.

[88] Sullivan at 61, referring to ss. 15, 16, 19 and 35 of the BC Act which are essentially the same as ss. 15, 16, 19 and 35 of the ULCC.

[89] ULCC DP, Part 3, heading 1(d).

[69] Another possibility would be to allow the class members to select the representative plaintiff. For this purpose, a two-step process could be put in place.[90] In step one, the party seeking approval for a class action would demonstrate that the prerequisite characteristics were present. This would lead to provisional approval. In step two, the potential class members would be notified of the provisional approval and given a chance to participate in a second hearing, giving their views on the desirability of a class action and on the choice of representative plaintiff if the use of the new procedure is approved. Alternatively, as would be possible under Canadian class proceedings regimes, use could be made of the court's power to adjourn (ULCC, s. 5).

d. Request for comments

[70] Comments are requested on Issue No. 4.

2. Determination of class: opting out or opting in?

ISSUE No. 5

(1) Should a potential class member be:

- **(a) included in the class unless they opt out,**
- **(b) excluded from the class unless they opt in,**
- **(c) entitled to confirm their status as a class member or non-class member?**

(2) Should resident and non-resident class members be treated differently?

a. Why the issues arise

[71] The interests of the class will be affected by a class action. An important question is whether each member of the class should have an opportunity to decide whether or not to be included in the class action. (Justice requires that they be notified: see discussion of notice under heading C.4.b.)

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[90] Certification under Canadian class proceedings regimes is essentially a one-step process, although the court has discretion to adjourn the application where the parties need time to amend their materials or pleadings or gather further evidence (ULCC, s. 5(1)). In practice, in Ontario, certification regularly proceeds in two stages: first, "to determine the threshold question of whether the proceeding is appropriate for class action"; and, second, "to work out the specific contents of the certification order": Eizenga, Peerless & Wright at 1.6 citing *Bendall v. McGhan Medical Corp.*, *supra* note 66.

b. Rule 42

[72] Rule 42 does not specify how individual class members are to be determined.

c. Class proceedings precedents

[73] Class proceeding precedents raise the issue of whether class members have the right to "opt in" to the class action or to "opt out" of it.

i. Resident class members

[74] The choice made in Canadian class proceedings legislation for resident class members is that the class member is included in the class action but may opt out of it (ULCC, ss. 16 and 19(6)(b)). "Opting out" requires a class member to take an affirmative step in order to avoid being bound by the outcome of the class action. General advantages of "opting out" include that: barriers to justice are reduced for socially vulnerable class members because they are automatically included; the interests of class members are protected by other procedural requirements; and defendants can know more precisely than in an "opt in" regime, how many class members they may face in subsequent individual proceedings. On the other hand, a class member who fails to opt out in time is bound by the result whether or not they want to be.

ii. Non-resident class members

[75] As previously stated, at times the wrong that is the subject of a class proceeding will have occurred in more than one province or to the residents of more than one province, or both. British Columbia and the ULCC and ManLRC recommendations require non-residents to take the affirmative step of "opting in" to the class proceeding in order to share in any benefits that may be obtained for the class. From a jurisdictional perspective, "opting in" has the advantage of indicating that the non-resident accepts the jurisdiction of the court such that they would be precluded by the doctrine of *res judicata* from later suing or benefitting from a suit brought in another jurisdiction. General advantages of "opting in" include that: a class member will be bound by the result only if they intend to be; the outcome will not bind individuals who have no knowledge of the lawsuit; and all class members who stand to benefit will have shown some minimal interest in the litigation. On the other hand, an "opt in" requirement may deny access to justice to potential class members who fail to opt in because of economic, psychological and social barriers. As well, potential class members who would choose to opt in may not know of the proceeding.

[76] The Ontario class proceedings legislation does not mention residency. Courts in that province have developed the concept of a "national" class and in assuming jurisdiction on this basis, purported to bind both resident and non-resident class members who have been given reasonable notice of the class proceeding and have not opted out. The problem of the status of a person who is deemed to be a class member but who has not submitted to the jurisdiction is unique to class proceedings. That is because, in ordinary litigation, the plaintiff normally will have chosen the forum in which they have sued and so cannot later challenge the jurisdiction of that forum. What would happen if a non-resident class member chose to take action or join a class in a proceeding brought against the same defendant with respect to the same subject matter in another province? Could that person successfully argue that the original court lacked jurisdiction over them? In *Nantais v. Telectronics Proprietary (Canada) Ltd.*, the Ontario court found the approach taken in the United States persuasive.[91] Courts in the United States concentrate not on jurisdiction but on whether the plaintiffs were afforded due process. Once a potential class member is given reasonable notice and the opportunity to opt out a judgment is binding on that individual. Failure to opt out is treated as implied consent to be bound by the class judgment for jurisdictional purposes.[92]

iii. Clarification of status

[77] Potential class members may not know from the definition of the class whether or not they are included in, and therefore bound by, the outcome of the litigation. It would be helpful to provide potential class members with a procedure that allows them to confirm their status as class members or non-class members. Such provision would give a person who is in doubt a firm basis from which to make their own litigation decisions.

d. Request for comments

[78] Comments are requested on Issue No. 5.

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[91] *Supra* note 66. In dismissing the appeal on jurisdiction, Mr. Justice Zuber commented, "Whether the result reached in an Ontario court in a class proceeding will bind members of the class in other provinces who remained passive and simply did not opt out, remains to be seen. The law of *res judicata* may have to adapt itself to the class proceeding concept."

[92] See e.g. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) U.S.S.C.

3. Right of class members to participate in the conduct of the class action

ISSUE No. 6
In what circumstances, if any, should class members be allowed to participate in the conduct of a class action?

a. Why the issue arises

[79] A class action is likely to affect the legal rights of class members. While efficiency requires that a class action be conducted by a representative plaintiff or plaintiffs, there remains a question as to whether or not other members of the class should be able to participate in the making of decisions. (Note that this issue is not directed to the question whether class members can be compelled to participate, e.g., by being subject to examination for discovery.)

b. Rule 42

[80] Rule 42 is silent with respect to the participation of class members in the conduct of the litigation.

c. Class proceedings precedents

[81] Under Canadian class proceedings regimes, the court has discretion, at any time, to "permit one or more class members to participate in the proceeding if this would be useful to the class" (ULCC, s. 15). (In addition to opportunities to participate at different points in the procedure, provisions on notice and court supervision help to protect the interests of class members.)

d. Request for comments

[82] Comments are requested on Issue No. 6.

4. Notice

ISSUE No. 7
What, if any, changes should be made to the existing notice provisions to accommodate class actions?

a. Why the issue arises

[83] The question of notice arises because the rights of the members of the class are affected by the class action and it is at least arguable that all members should have notice, not only of the commencement of the class action but also of at least some important events in the class action, so that they may take steps to protect their interests.

b. Rule 42

[84] Rule 42 does not make specific provision with respect to notice to class members.

[85] Under the Alberta Rules, notice is ordinarily required to be served only on parties. Rule 23 gives the court discretion to direct substituted service or to dispense with service where prompt personal service is impractical. Rule 387.1 allows the court to dispense with service of notice to some parties in a multi-party action. One exception is Rule 408: on an originating notice, Rule 408 allows the court to give directions as to the persons to be served "whether those persons are or are not parties".

c. Class proceedings precedents

[86] Canadian class proceedings regimes require notice to be given to class members in three circumstances. First, the representative plaintiff must notify class members that the action has been certified as a class action (ULCC, s. 19). The notice must contain information on a variety of matters. It is the notice by which class members learn of the class action and its impact on their rights. This notice is of fundamental importance because it informs class members of their right to decide whether or not to be included in the class and bound by the outcome of the proceedings. Class members must have been notified in order to be bound. Second, where the court determines the common issues in favour of the class members and individual members are required to participate in the determination of individual issues, the representative plaintiff must notify those class members of this fact (ULCC, s. 20). Third, the court may order any party to give notice where "necessary to protect the interests of any class member or party or to ensure the fair conduct of the proceeding" (ULCC, s. 21). Relative to the third situation, the court is required to consider whether notice should be given where the court dismisses a class action or approves a settlement, discontinuance or abandonment (ULCC, s. 35(5)). In all of these instances, the court must approve the

notice before it is given (ULCC, s. 22). The court also has discretion to order one party to give the notice required of another party (ULCC, s. 23) and to order costs, including the apportionment of costs among parties (ULCC, s. 24).

[87] The court has discretion to order that notice be given by any "means or combination of means that the court considers appropriate" (ULCC, s. 19(4)). The means specified include: personal delivery; mail; posting, advertising, publishing or leafleting; and individually notifying a sample group within the class.

d. Request for comments

[88] Comments are requested on Issue No. 7.

5. Judicial case management

ISSUE No. 8
Should any changes be made to the existing judicial case management systems to accommodate class actions or are the existing provisions sufficient?

a. Why the issue arises

[89] Judicial case management has become an important tool in the management of complex lawsuits. It is important to know whether that tool will be available in class actions and how the two procedures will be integrated.

b. Rule 42

[90] Rule 42 gives no guidance with respect to the use of judicial case management, so the usual Rules would apply. The authority for case management is found partly in the inherent jurisdiction of the Court of Queen's Bench, under the *Judicature Act*, to manage the proceedings that come before it and partly in a variety of Alberta Rules and Practice Notes that allow judicial case management, usually in the discretion of the court:

> *Rule 219* provides for a pre-trial conference at any stage of the proceeding on the application of a party or on the court's own motion.

Practice Note 2 requires a pre-trial conference to be held within 3 months of the direction that an action is to be tried by a civil jury, and thereafter as necessary.

Practice Note 3 provides more flexible mechanisms for case management through the use of one or more "pre-trial conferences". At least one pre-trial conference is mandatory for any trial set for longer than 3 days or a civil jury trial.

Practice Note 4 requires a pre-trial conference to be held prior to a certificate of readiness being filed in trials set for longer than 5 days.

Practice Note 7 automatically places under case management trials that it is anticipated will take more than 25 days.

Rule 668 allows a party involved in a Part 48 streamlined procedure action to apply for case management. *Rule 665* permits application for a pre-trial conference.

Rule 243 allows a party to move for directions respecting the pace or timing of procedural steps in an action.

Rule 244 permits the court to give directions for the expeditious determination of an action.

c. Class proceedings precedents

[91] Under Canadian class proceedings regimes, courts assume an active case management role in every case. They do so because most class actions are complex and because class actions determine the rights and obligations of persons not before the court. The management role encompasses a variety of matters, including: deciding on certification; making sure that the class is properly represented; scrutinizing the plan for the class proceeding; overseeing the conduct of the proceeding; tailoring the rules as necessary to accommodate the class proceeding; playing an active role in managing the case (in part to protect the absent plaintiffs); approving settlements and the class lawyers' fees and disbursements; and generally protecting the interests of the "absent" class members, that is, the class members whose interests are represented by the "representative plaintiff" but who are not themselves "party" to the proceeding. (A list of 23 judicial tools, both procedural and substantive, provided to the court to manage a class proceeding in British Columbia is appended–Appendix B).

[92] The class proceedings usually go forward in three stages: first, the determination of common issues of the main class; second, the determination of common issues of a subclass; and third, the determination of individual issues requiring the participation of individual class members (ULCC, s. 11). The regimes make it clear that the court has control over the conduct of the proceedings (ULCC, s. 12) and discretion to stay or sever any related proceeding (ULCC, s. 13). Usually, the same judge hears all pre-trial applications and may, but need not, preside at the trial of the common issues (ULCC, s. 14). However, in Ontario, the pre-trial judge may preside at the trial only with the consent of the parties (Ont. s. 34(3)).

d. Request for comments

[93] Comments are requested on Issue No. 8.

6. Discovery

ISSUE No. 9
What changes, if any, should be made to the existing provisions on
(a) discovery,
(b) notice to admit facts,
(c) the examination of a class member as a witness on an application in a class proceeding, or
(d) any other means of compelling evidence
in order to accommodate class actions?

a. Why the issue arises

[94] Questions arise about the extent to which a class member should be treated as a party for the purpose of compelling evidence, or the extent to which a party can be compelled to obtain information from a class member. Discovery of records and oral examination for discovery or interrogatories are important tools in litigation. In a particular case, a defendant may need to examine class members for discovery but defendants generally should not have an unlimited right to do so, as the availability of such a procedure would in some cases lead to inefficiency and delay. In addition, any party to an action may examine a witness in order to obtain evidence for use on an application in the action. The question whether that is appropriate where the witness is a class member in a class action should be addressed, as should the question whether a

class member should be called on to respond to a notice to admit facts or an opinion as correct.

b. Rule 42

[95] Rule 42 does not make special provision for discovery. Therefore, the general Rules would apply. These Rules ordinarily apply only with respect to parties to the litigation. The Part 13 Rules require the parties to file affidavits of, and produce or make available for inspection, "relevant and material" records. They also permit a party to orally examine under oath any other party who is adverse in interest, or employees of the other party. During discovery, a party may enter into an undertaking to obtain information from a non-party. Rule 230 permits a party to call on another party to admit facts. In the case of *Western Canadian Shopping Centres Inc. v. Dutton*, the Alberta Court of Appeal authorized the treatment of class members as parties under Rules 187 (discovery of records) and 201 (examination for discovery). These Rules allow "a person for whose benefit an action is prosecuted or defended" to be "regarded as a party" for the purposes described.

[96] Rule 42 does not make any special provision for the examination of a class member as a witness on an application in a class action. Therefore, the general rules would apply. Rule 266 allows a party to examine a witness for the purpose of using this evidence upon any motion, petition or other proceeding before the court.

[97] Rule 42 is silent about any requirement that a class member respond to a notice to admit facts or accept that an opinion is correct. Rule 230 allows a party to issue a notice calling upon another party to admit facts. Rule 230.1 is similar. It allows a party to call upon another party to admit as correct any written opinion included in or attached to the notice.

c. Class proceedings precedents

[98] Under Canadian class proceedings regimes, the parties have the same rights of discovery with respect to each other on the common issue as they would have in any other action (ULCC, s. 17(1)). Where subclasses have been formed, the defendant also has the right to discover the representative plaintiff in each subclass. The more difficult issues have to do with rights of discovery with respect to class members. Canadian regimes allow the defendant to examine individual class members; however,

this cannot take place until after discovery of the representative plaintiff and then only with leave of the court (ULCC, s. 17(2)). In making its decision, the court must consider named factors (ULCC, s. 17(3)). A class member who fails to submit to discovery is subject to the sanctions that apply to parties under the Rules in that jurisdiction.

[99] In the interests of the efficiency of the class proceeding, Canadian class proceedings prohibit the examination of a class member, other than a representative plaintiff, as a witness before an application is heard. The court has discretion to make an exception by giving leave to examine (ULCC, s. 18).

d. Request for comments

[100] Comments are requested on Issue No. 9.

7. Settlement, discontinuance and abandonment

ISSUE No. 10
What provision, if any, should be made to ensure that the settlement, discontinuance or abandonment of a class action does not unfairly prejudice the rights of class members?

a. Why the issue arises

[101] A representative plaintiff has the power to settle, discontinue or abandon a class action. However, doing so affects the rights of class members. It is therefore necessary to consider whether class members need some special protection in such cases.

b. Alberta Rules

[102] Rule 42 is silent on the subject of settlement, discontinuance or abandonment. In ordinary actions, parties make their own settlements. To facilitate settlement, parties may avail themselves of Rules 165 to 174 that provide for compromise using court process. If an action is resolved prior to judgment it must be discontinued. Rule 225 permits the plaintiff to discontinue an action at any time before entry for trial, subject to payment of the defendant's costs. An action may also be discontinued before trial if all the parties consent. Otherwise, withdrawal or discontinuance requires leave of the court.

c. Class proceedings precedents

[103] Under Canadian class proceedings regimes, a class action cannot be settled, discontinued or abandoned without court approval (ULCC, s. 35). That is because the interests of class members are affected by the outcome and the court must ensure that their interests have been served by the decision. The court, which bears a considerable burden, is "entitled to insist on sufficient evidence to permit the judge to exercise an objective, impartial and independent assessment of the fairness of the settlement in all the circumstances".[93] An American commentator gives eight factors that courts in the United States consider in relation to settlement:[94]

> (1) likelihood of recovery, or likelihood of success
> (2) amount and nature of discovery evidence
> (3) settlement terms and conditions
> (4) recommendation and experience of counsel
> (5) future expense and likely duration of litigation
> (6) recommendation of neutral parties if any
> (7) number of objectors and nature of objections
> (8) the presence of good faith and the absence of collusion

The ManLRC Report suggests that the court assess whether the settlement is fair, reasonable and in the best interests of those affected by it, with reference to a list of 6 factors:

> (a) the settlement terms and conditions,
> (b) the nature and likely duration and cost of the proceeding,
> (c) the amount offered in relation to the likelihood of success in the proceeding,
> (d) the expressed opinions of class members other than the representative party,
> (e) recommendations of neutral parties, if any, and
> (f) whether satisfactory arrangements have been made for the distribution of money to be paid to the class members.

In protecting the interests of class members, even where it dismisses a class proceeding, the court must consider whether to require the representative plaintiff to notify class members (ULCC, s. 35(5).

[104] Canadian class proceedings statutes to note require statutory notice of an application for court approval of a settlement. However, the parties sometimes announce the terms of the settlement in advance of the settlement hearing "in order to

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[93] Eizenga, Peerless & Wright at 9.11, citing *Dabbs v. Sun Life Insurance Co. of Canada*, unreported (February 24, 1998), Toronto 96-CT-022862 (Ont. Gen. Div.), [1998] O.J. No. 1598, online: QL (OJ).

[94] Newburg on Class Actions at s. 11.4 and 11.43, cited in Eizenga, Peerless & Wright at 9.8.

give class members an opportunity to attend the hearing, and potentially, to allow them a forum in which to state objections or voice concerns."[95]

[105] Courts in both Ontario and British Columbia have approved a settlement prior to certification (sometimes called a "settlement class").[96] In such cases, the defendant's consent to the settlement is usually contingent on the court's approval.

d. Request for comments

[106] Comments are requested on Issue No. 10.

8. Damages Awards

ISSUE No. 11
What, if any, provision should be made with respect to the relief that the court may order in a class action? For example, should the court be empowered to award aggregate monetary damages?

a. Why the issue arises

[107] In some cases, efficiency and fairness will require that, once the common questions are decided, class members should pursue their claims individually. In other cases, efficiency and fairness will best be served by providing a global amount to be divided among class members. It is therefore necessary to consider whether the court should have special powers in making awards of damages in class actions.

b. Rule 42

[108] As interpreted by the courts, under Rule 42 all class members must have the same damages or damages that can be calculated using the same formula. Subject to this, the damages are assessed on an individual basis.

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[95] Eizenga, Peerless & Wright at 9.7, citing *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 36 O.R. (3d) 770 at 778 (Div. Ct.).

[96] See e.g. *Haney Iron Works Ltd. v. Manufacturers Life Insurance Co.* (1998), 169 D.L.R. (4th) 565.

c. Class proceedings precedents

[109] Canadian class proceedings regimes allow the court to make an order for an aggregate monetary award of damages with respect to the defendant's liability on the common issues (ULCC, s. 29). Statistical evidence may be admitted for the purpose of determining the amount of an aggregate monetary award, or how the award should be distributed among the class members (ULCC, s. 30). The court has power to order that the aggregate monetary award be shared on an average or proportional basis (ULCC, s. 31). The court may use this power where distribution on another basis would be impractical or inefficient, or where recovery would be denied to a substantial number of class members if the award were distributed on another basis (ULCC, s. 31(1)). Class members may apply for permission to prove their claims on an individual basis (ULCC, s. 31(2). Alternatively, the court may order that an aggregate monetary award be divided among class members on an individual basis (ULCC, s. 32). In this event, the court must specify the procedures for determining the individual claims, minimizing the burden on class members.

d. Request for comments

[110] Comments are requested on Issue No. 11.

9. Appeal

ISSUE No. 12
What, if any, changes should be made to accommodate appeals in class actions?

a. Why the issue arises

[111] In reviewing class action procedures, it is desirable to consider whether or not the rules for appeals in ordinary actions will operate satisfactorily in class actions.

b. Rule 42

[112] Rule 42 is silent with respect to the right of appeal so the general rules apply. Rule 505 allows appeal as of right to the Court of Appeal from the decision of a judge of the Court of Queen's Bench sitting in court or in chambers. The appeal can be taken only with leave of the Court of Queen's Bench where the parties consented to

the decision, or if is as to costs, or the controversy involves a sum estimable at $1,000 or less, exclusive of costs.

c. Class proceedings precedents

[113] Canadian class actions regimes allow appeals to be taken from a certification order, judgment on common issues or judgment on individual issues, but the provisions differ from jurisdiction to jurisdiction.

> ***Judgment on common issues***. Canadian class proceedings regimes allow any party to appeal, to the Court of Appeal, a judgment on the common issues or an order respecting an aggregate award (ULCC, s. 36(1). This appeal may be taken without leave.
>
> ***Judgment on, or dismissal of, individual claim***. In British Columbia and under the ULCC and ManLRC recommendations, any party or class member may appeal an order determining an individual claim or dismissing an individual claim for monetary relief (ULCC, s. 36(2). Leave of a justice of the appellate court is required. In Ontario, appeals of awards of more than $3,000 may be taken to the Divisional Court without leave. Appeals of awards of $3,000 or less, or the dismissal of an individual claim, require leave of the Ontario Court (General Division). (For further refinements, see ULCC , s. 36, note [1].)
>
> ***Certification order***. In British Columbia and under the ULCC and ManLRC recommendations, any party may appeal a certification order, an order refusing certification, or a decertification order to the Court of Appeal (ULCC, s. 36). Leave of a justice of the appellate court is required under the ULCC and ManLRC recommendations, but not in BC. Ontario requires the leave of the Ontario Court (General Division) in the case of a certification order, but not otherwise. The reason for the Ontario leave requirement is a concern that defendants with a right of appeal would appeal in every case, thereby delaying the class proceeding.[97]

[114] In certain circumstances, a class member may apply for leave to act as the representative plaintiff for purposes of an appeal on certification, judgment on the common issues or a judgment of aggregate damages (ULCC, s. 36(4) and (5)). This

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[97] Sullivan at 130. Leave was refused in *Nantais v. Telectronics Proprietary (Canada) Ltd.*, *supra* note 66.

may occur where the representative plaintiff does not appeal, or seek leave to appeal, the order or judgment within the time permitted, or abandons an appeal.

[115] Other appeals would follow the ordinary appeal rules.

d. Request for comments

[116] Comments are requested on Issue No. 12.

10. Costs as between parties

ISSUE No. 13
What, if any, provision should be made with respect to the award of costs in class actions?

a. Why the issue arises

[117] On the one hand, representative plaintiffs are unlikely to be willing to act if they will be liable for defendants' costs, and such reluctance may defeat the intention of class action rules. On the other hand, the considerations that entitle defendants to be paid their costs in ordinary actions apply in class actions. Costs therefore raise difficult and important issues in class actions.

b. Rule 42

[118] Rule 42 does not say anything about costs. Costs therefore follow the ordinary rules. The general rule governing costs between parties is Rule 601. It gives the court broad discretion in awarding costs. This discretion is "subject to any Rule expressly requiring costs to be ordered" (Rule 601(1)). In practice the general rule is that costs are awarded to the successful litigant. The court may decide not to award costs at all. Where it does award costs, the court may decide the scale of costs. According to Stevenson and Cote, in a representative action "individual members of the group are jointly and severally liable for costs."[98]

c. Class proceedings precedents

[119] Unless legislation provides otherwise, the representative plaintiff will be responsible for costs. Canadian class proceedings regimes provide "cost and fee

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[98] Stevenson & Cote (1) at 53.

provisions that are designed to ensure that the representative plaintiff is not required to assume a burden of costs which would, in effect, preclude their participation, and to ensure that lawyers will be willing to take on class proceedings on behalf of representative plaintiffs."[99] Class members are liable only for costs having to do with the determination of their own individual claims (ULCC, main s. 37(1); ULCC, alternative s. 37(4)).

[120] Differences of opinion exist about how costs relating to the common issue should be dealt with. Jurisdictions adopting the ULCC are given a choice between two alternative approaches.

[121] Ontario and the main ULCC provision illustrate one approach to costs. They give the court discretion to award costs against the parties much as it would in an ordinary action (ULCC, main s. 37). However, Ontario goes further. In Ontario, the government has protected unsuccessful representative plaintiffs from having to pay costs by establishing a "Class Proceedings Fund".[100] This Fund was established by a $500,000 endowment from the Law Foundation of Ontario. It came into existence when the Ontario *Class Proceedings Act, 1992* took effect and is administered by the Law Foundation. Monies are available from the Fund to assist the representative plaintiff to pay disbursements so that the class action can proceed. If the plaintiff fails in the action, monies from the Fund are also available to indemnify the representative plaintiff for costs awarded in favour of the defendant. In order to replenish the Fund, a levy is made on a successful settlement or judgment in favour of a representative plaintiff and class that has received financial assistance.[101]

[122] British Columbia, the ULCC alternative and ManLRC recommendations illustrate the second approach to costs. They prohibit the court from awarding costs in the class action to any party (ULCC, alternative s. 37(1)). The prohibition is subject to

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[99] ManLRC Report at 16.

[100] *Law Society Amendment Act (Class Proceedings Funding), 1992*, S.O. 1992.

[101] The levy consists of the amount of any financial support paid plus 10 per cent of the award or settlement funds to which the representative plaintiff and any member of the class is entitled: Ont. Reg. 77/92, s. 10. A judgment authorizing a settlement, discontinuance or abandonment must give directions regarding the payment of any levy in favour of the Fund: Rule 12.05(1)(d) of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (enacted O. Reg. 770/92, s. 5).

exceptions for: vexatious, frivolous or abusive conduct; improper or unnecessary steps; or "exceptional circumstances that make it unjust to deprive the successful party of costs" (ULCC, alternative s. 37(2)).

[123] The issue whether or not the court should be able to award costs against the representative plaintiff in a class action is a difficult one to resolve. On the one hand, the potential burden of costs may weigh so heavily that plaintiffs with deserving claims will be discouraged from bringing them to court. On the other hand, costs operate as a useful deterrent against the bringing of unreasonable claims and there is merit in this as well. The challenge is to strike a fair balance between the rights of potential plaintiffs and defendants. Ontario has chosen one solution; British Columbia another. We note that different rules regarding costs among Canadian jurisdictions may encourage parties to shop for a forum in which they will be better off. This prospect is not one to be encouraged.

d. Request for comments

[124] Comments are requested on Issue No. 13.

11. Legal fees and disbursements incurred in the conduct of a class action

ISSUE No. 14
What, if any, provision should be made with respect to the payment of legal fees and disbursements in a class action?

a. Why the issue arises

[125] Litigation has to be funded, whether by the client or, in the first instance, in accordance with a contingency agreement under which the lawyer funds disbursements. The funding of a class action is likely to be more complex than usual, as solicitor-client agreements are likely to affect the interests of class members as well as the representative plaintiff, so that special arrangements should be considered.

b. Rule 42

[126] Rule 42 makes no special provision with respect to legal fees and disbursements. The general rules therefore apply. Solicitor and client costs must be reasonable (Rule 613) and are subject to taxation (Rule 614). Contingency fee agreements are permitted

(Rules 615-617). They must be made in writing and filed, within 15 days of execution, with the clerk of the court. They are filed on a confidential basis. The client may request review of the agreement and the clerk or judge has power to approve the agreement, or vary, modify or disallow it, in which case compensation will be payable as it would have been if a contingency arrangement had not been made (Rules 618 and 619). A contingency fee agreement may cover (Rule 615):

> ... the amount and manner of payment' of the whole or any part of past or future services, fees, charges or disbursements in respect of business done or to be done by the barrister and solicitor either by a gross sum or by commission or percentage or by salary or otherwise and either at the same or a greater or less rate, than the rate at which [the barrister and solicitor] would otherwise be entitled to be remunerated, subject to taxation.

Supplementary to the Rules of Court, effective April 1, 2000, the Law Society of Alberta will incorporate new rules for contingency fees into its *Code of Professional Conduct*.[102]

c. Class proceedings precedents

[127] Canadian class proceedings regimes make express provision with respect to an agreement respecting fees and disbursements between a solicitor and a representative plaintiff (ULCC, s. 38(1)). An agreement must be in writing, state the terms under which fees and disbursements are to be paid, estimate the expected fee, and state how payment is to be made. Court approval must be obtained for the agreement to be valid (ULCC, s. 38(2)). If the court does not approve the agreement, it may determine the amount owing itself, or direct how this determination is to be made (ULCC, s. 38(7)). The amounts payable under an enforceable agreement constitute a first charge on any settlement funds or monetary award recovered in the class action (ULCC, s. 38(6)). In contrast, the Ontario Law Reform Commission recommended that fees and disbursements payable by a representative party, and disbursements that have already been paid to a lawyer, be deducted from the damages award and that each class member pay costs in proportion to his or her share of the award.[103]

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[102] Alan Macleod, Q.C., "New rules for contingency fees", 63 *Benchers' Advisory* (Feb. 2000), http://www.lawsocietyalbereta.com/pubs/advisory/63/8.htm.

[103] ULCC DP at Part C, heading 11(b).

[128] Contingency agreements are not ordinarily allowed in Ontario. Therefore, Ontario makes a special exception for a written agreement between a solicitor and representative party in a class action in section 33 of its Act (ULCC, s. 38, note [3]).

[129] With leave of the court, notice of certification may include "a solicitation of contributions from class members to assist in paying solicitors' fees and disbursements" (ULCC, s. 19(7)).

d. Request for comments

[130] Comments are requested on Issue No. 14.

12. Limitation periods

ISSUE No. 15
Should limitations periods be suspended for class members during the conduct of a class action?

a. Why the issue arises

[131] The bringing of an action on a claim in an ordinary action stops the limitation period from running against the plaintiff. It is necessary to know whether or not the bringing of a class action stops the limitation period from running against class members who, technically, have not brought the class action, but whose claims are being asserted in the class action.

b. Rule 42

[132] Here again, Rule 42 is silent. The ordinary limitation rules will stop the limitation period running against the representative plaintiff. However, the effect of a class action on limitation periods that run against class members is uncertain.

c. Class proceedings precedents

[133] Canadian class proceedings regimes suspend the running of limitation periods where it is reasonable for a person to assume that they are a member of a class action (ULCC, s. 39). In Ontario, the suspension runs from the commencement of the proceeding in every case. In British Columbia and under the ULCC and ManLRC recommendations, it runs from the commencement of the proceeding, but only in

cases where the proceeding is certified. This means that potential class members must initiate individual actions if the limitation period is at risk of expiring prior to the certification decision (ULCC, ss. 1 and 39, read together).

[134] The limitation period resumes when: the class member opts out; a court ruling excludes a person from class membership; a certification order amendment excludes a class member; a court decertifies the class action; the class action is dismissed, or discontinued or abandoned or settled with court approval; or after expiration of the time for appeal or disposition on appeal (ULCC, s. 39(2) and (3)).

d. Request for comments

[135] Comments are requested on Issue No. 15.

13. Role of representative plaintiff's counsel

ISSUE No. 16

What are the implications of class proceedings legislation for lawyers and how should they be dealt with?

a. Why the issue arises

[136] In jurisdictions that have enacted class proceedings legislation, the representative plaintiff's counsel bears a number of duties that do not arise in traditional litigation. The implications for lawyers of introducing such legislation should be considered.

b. Rule 42

[137] Rule 42 is silent about the duties of counsel acting for a representative party. The duties, if such exist, must be found elsewhere in law or policy.

c. Class proceedings precedents

[138] In 1993, following the enactment of the Ontario class proceedings legislation, the Law Society of Upper Canada issued a document that attributed to counsel a professional duty to identify the potential for a class proceeding.[104] It would be

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[104] Law Society of Upper Canada, *Class Proceedings: Guidelines for Practitioners* (January 1993).

advisable for counsel to consider the answers to a number of questions before agreeing to commence a class proceeding:[105]

(1) Is the client appropriate and willing to act as representative plaintiff for the class?

(2) Is the client aware of the time and financial obligations required in becoming the representative plaintiff (which may include extensive and possibly personal cross-examination by the defendant)?

(3) Does the class as a whole exist and what is the scope of that class?

(4) Is it in the client's best interests to pursue the claim on an individual basis or through a class proceeding?

(5) How will costs be handled in a class action, and can the client carry their own disbursements?

(6) Is the client prepared for a proceeding that will likely be longer than individual litigation and more difficult to extricate themself from?

(7) Does the client understand the procedure for determining whether a class action is appropriate and the possibility of a significant loss of privacy?

(8) Can the law firm afford to carry the litigation?

(9) Is counsel sufficiently experienced and competent to take the class proceeding?

(10) Is the client aware that a class proceeding may already have been started concerning the same issues and class?

d. Request for comments

[139] Comments are requested on Issue No. 16.

D. Defendant class action

ISSUE No. 17
Should any changes be made with respect to defendant class actions?

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[105] Sullivan at 18-20.

1. Why the issue arises

[140] Two or more defendants may be in the same or a similar position in relation to a claim against them. The question arises whether it should be possible for such defendants to form a class and defend claims brought against them through a representative defendant.

2. Rule 42

[141] Rule 42 allows the court to authorize one or more defendants to defend on behalf of and for the benefit of a class of defendants.

3. Class proceedings precedents

[142] In Ontario, the court may certify a class consisting of two or more defendants and appoint a representative defendant (ULCC, s. 3, note [1]).[106] Any party may make the application. The legislation or recommendations in other jurisdictions are silent in this regard.

[143] Advantages of a defendant class action include that: it makes it possible for a plaintiff to obtain relatively small claims against a number of defendant in situations where it would not be economically viable to bring an action against each defendant individually; forming a defendant class may toll the limitation period against defendant class members who could not have been served in time; inconsistent or varying adjudications or re-litigation of the same issues is avoided; and judicial resources can be saved.

[144] Disadvantages include that: defendant class members would likely opt out and force plaintiffs to bear the cost of bringing individual actions against them; due process problems may be created if legislation subjects absent defendant class members to the coercive power of the court (termination of causes of action, binding effect of judgment); where certification is denied, members of a defendant class could be sued after the expiration of the original limitation period even though they may not have had notice of the class action; problems selecting a representative defendant (on plaintiff's application) may require the court or plaintiff to choose; and an unwilling

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[106] See *Chippewas of Sarnia Band v. Canada (A.-G.)* (1996), 29 O.R. (3d) 549, 2 C.P.C. (4th) 295, additional reasons given at 2 C.P.C. (4th) 322 (Gen. Div.), for a discussion of the potential value of a defendant's class proceeding.

representative defendant might inadequately represent the interests of the class in order to disqualify itself.[107]

4. Request for comments

[145] Comments are requested on Issue No. 17.

E. Conclusion and Invitation to Comment

[146] This Consultation Memorandum proceeds from the proposition that Alberta's civil justice system may not adequately accommodate class actions. We have asked whether Alberta class actions procedures should be reformed. Anticipating that this question will be answered in the affirmative, we have raised issues to consider in designing a new procedure for class actions in Alberta.

[147] As stated in the Preface to this Consultation Memorandum, our objectives in the project are:

(1) to examine the existing law and procedures that govern proceedings in which a number of plaintiffs have the same or similar claims against a defendant,

(2) to assess the problems in the operation of that law,

(3) if appropriate, to make recommendations for improvements that will alleviate those problems,

(4) in so doing, to consider whether it is necessary, or possible, to provide a more satisfactory procedural framework in which to meet the multiple plaintiff litigation demands of modern Alberta, and

(5) ancillary to this, to examine whether the law requires any changes where a number of defendants are in the same or a similar position in relation to claims brought against them.

[148] In addressing these objectives, we want to ensure that Alberta's civil justice system for class actions is fair, certain and efficient. To be fair, the law should enable plaintiffs to bring deserving claims and protect defendants from unreasonable claims. The process for resolving issues should be certain and efficient.

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[107] ULCC DP at Part C, heading 17.

[149] Our purpose in issuing a Consultation Memorandum at this time is to allow interested persons the opportunity to consider whether there is any need for reform and, if there is a need, to advise us on the direction that reform should take. We would like to hear from as many people as possible. To this end, in addition to distributing the Memorandum to the large number of people on our mailing list, we will also be posting it on our Internet Website: *http://www.law.ualberta.ca/alri/* which is open to the public and allows for easy downloading. We may arrange further consultation or host further discussion, once the initial round of comments is obtained.

[150] Comments on the issues raised in this Memorandum should reach the Institute on or before May 31st, 2000. Comments should be addressed to:

Alberta Law Reform Institute
402 Law Centre
University of Alberta
Edmonton, Alberta, T6G 2H5

Re: Class Actions Project

Fax: 780-492-1790
Email: reform@alri.ualberta.ca

APPENDIX A – ULCC *CLASS PROCEEDINGS ACT*

Contents

PART I: Definitions

Definitions

1. In this Act:

"certification order" means an order certifying a proceeding as a class proceeding;

"class proceeding" means a proceeding certified as a class proceeding under Part 2;

"common issues" means

(a) common but not necessarily identical issues of fact, or

(b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

"court", except in sections 36 (4) and 37, means the [superior court of the jurisdiction];

"defendant" includes a respondent;

"plaintiff" includes a petitioner.

ULCC Commentary: Section 1 contains the definitions for the Act. Throughout the Act, a "plaintiff" includes a representative plaintiff and a petitioner but does not extend to other class members. Section 1 also sets out a definition of "common issues" that is designed to override the common law on when a "representative action" is permitted.

Other Jurisdictions:

[1] In Ont. s. 1, "court" means the Ontario Court (General Division) and excludes the Small Claims Court; in B.C. s. 1, "court", except in ss. 36(4) [representative plaintiff leave to appeal] and 37 [costs, includes Court of Appeal], means the Supreme Court; in ManLRC s. 1, "court", except in s. 37 [costs, includes Court of Appeal], means the Court of Queen's Bench.

PART II: Certification

Plaintiff's class proceeding

2.- (1) One member of a class of persons who are resident in [the enacting jurisdiction] may commence a proceeding in the court on behalf of the members of that class.

(2) The person who commences a proceeding under subsection (1) must make an application to a judge of the court for an order certifying the proceeding as a class proceeding and, subject to subsection (4), appointing the person as representative plaintiff.

(3) An application under subsection (2) must be made

(a) within 90 days after the later of

(i) the date on which the last appearance or statement of defence was delivered, and

(ii) the date on which the time prescribed by the [rules of court] for delivery of the last appearance or statement of defence expires without its being delivered, or

(b) with leave of the court at any other time.

(4) The court may certify a person who is not a member of the class as the representative plaintiff for the class proceeding only if it is necessary to do so in order to avoid a substantial injustice to the class.

ULCC Commentary: Section 2 sets out the procedures for commencing a proceeding and for applying to the court to have that proceeding certified as a class proceeding. This section also permits the court to certify a non-class member as a representative plaintiff in order to avoid a substantial injustice to the class. This provision is similar to the Quebec legislation.

Other Jurisdictions:

[1] Ont. s. 2(1) permits one or more members of a class to commence a class actions proceeding and does not specify that the member or members must be "resident" in Ontario.

[2] Ont. does not have a subsection (4).

Defendant's class proceeding

3. A defendant to two or more proceedings may, at any stage of one of the proceedings, make an application to a judge of the court for an order certifying the proceedings as a class proceeding and appointing a representative plaintiff.

ULCC Commentary: Section 3 permits a defendant to two or more proceedings to apply to the court for a order certifying those proceedings as a class proceeding. The section is intended to allow a defendant to consolidate proceedings against him or her if the court is satisfied those proceedings meet the test for a class proceeding.

Other Jurisdictions:

[1] Ont. s. 4 permits the court, on motion, to appoint a representative defendant to represent a class consisting of two or more defendants:

> Any party to a proceeding against two or more defendants may, at any stage of the proceeding, make a motion to a judge of the court for an order certifying the proceeding as a class proceeding and appointing a representative defendant.

[2] In Alberta, the appointment of a representative for a defendant class is permitted by AR 42.

Class certification

4. The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if

(a) the pleadings disclose a cause of action,

(b) there is an identifiable class of 2 or more persons,

(c) the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members,

(d) a class proceeding would be the preferable procedure for the resolution of the common issues, and

(e) there is a representative plaintiff 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, an interest that is in conflict with the interests of other class members.

ULCC Commentary: Section 4 sets out the tests that a proceeding must clear in order to be certified as a class proceeding by the court. Clause (C) was included so that common issues did not have "outnumber" or "outweigh" individual issues. This was to avoid the result of the trial level decision in Abdool v. Anaheim Management Ltd. There the court refused to certify the case because it found that the common issues did not predominate over the individual decisions.

Other Jurisdictions:

[1] B.C. and ManLRC add s. 4(2):

> In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> (a) whether questions of fact or law common to the membersof the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling theprosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;

(d) whether other means of resolving the claims are lesspractical or less efficient;
(e) whether the administration of the class proceeding wouldcreate greater difficulties than those likely to be experienced if relief were sought by other means.

Certification application

5.- (1) The court may adjourn the application for certification to permit the parties to amend their materials or pleadings or to permit further evidence.

(2) An order certifying a proceeding as a class proceeding is not a determination of the merits of the proceeding.

ULCC Commentary: This section allows the court to adjourn the application for certification in order to permit parties to amend their materials or in order to permit further evidence.

Other Jurisdictions:

[1] B.C. s. 5(1) requires the application to be supported by an affidavit of the applicant. B.C. ss. 5(2) to (5) set out further requirements with respect to the filing and delivery of the affidavit:

(1) An application for a certification order under section 2 (2) or 3 must be supported by an affidavit of the applicant.
(2) A copy of the notice of motion and supporting affidavit must be filed and
(a) delivered to all persons who are parties of record, and
(b) served on any other persons named in the style of proceedings.
(3) Unless otherwise ordered, there must be at least 14 days between
(a) the delivery or service of a notice of motion andsupporting affidavit, and
(b) the day named in the notice of motion for the hearing.
(4) Unless otherwise ordered, a person to whom a notice of motion and affidavit is delivered under this section or on whom a notice of motion and affidavit is served under this section must, not less than 5 days or such other period as the court may order before the date of the hearing of the application, file an affidavit and deliver a copy of the filed affidavit to all persons who are parties of record.
(5) A person filing an affidavit under subsection (2) or (4) must
(a) set out in the affidavit the material facts on which theperson intends to rely at the hearing of the application,
(b) swear that the person knows of no fact material to the application that has not been disclosed in the person'saffidavit or in any affidavits previously filed in theproceeding, and
(c) provide the person's best information on the number ofmembers in the proposed class.

[2] Ont. s. 5(3) requires each party to file an affidavit that includes information about the class size:

Each party to a motion for certification shall, in an affidavit filed for use on the motion, provide the party's best information on the number of members in the class.

Subclass certification

6.- (1) Despite section 4, if a class includes a subclass whose members have claims that raise common issues not shared by all the class members so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court may, in addition to the representative plaintiff for the class, appoint a representative plaintiff for each subclass who

(a) would fairly and adequately represent the interests of the subclass,

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

(c) does not have, on the common issues for the subclass, an interest that is in conflict with the interests of other subclass members.

(2) A class that comprises persons resident in [the enacting jurisdiction] and persons not resident in [the enacting jurisdiction] must be divided into resident and non-resident subclasses.

ULCC Commentary: Where a class includes a subclass, whose members have claims that raise common issues, section 6 permits the court to appoint a representative plaintiff for that subclass, subject to certain conditions. Subclassing has been included to permit the more efficient and just determination of proceedings that have numerous issues which may not be common to all class members.

Other Jurisdictions:
[1] Courts in Ontario have certified the representation of a "national" class.

Certain matters not bar to certification

7. The court must not refuse to certify a proceeding as a class proceeding by reason only of one or more of the following:

(a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;

(b) the relief claimed relates to separate contracts involving different class members;

(c) different remedies are sought for different class members;

(d) the number of class members or the identity of each class member is not ascertained or may not be ascertainable;

(e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

ULCC Commentary: Section 7 recognizes the courts historic conservatism in class proceedings by expressly stating certain matters that are not to be a bar to certification. Those matters include where the relief claimed will require individual assessment, where the relief claimed relates to separate contracts, where different remedies are sought for different class members and where the number and identity of class members is not ascertainable.

Contents of certification order

8.- (1) A certification order must

(a) describe the class in respect of which the order was made by setting out the class's identifying characteristics,

(b) appoint the representative plaintiff for the class,

(c) state the nature of the claims asserted on behalf of the class,

(d) state the relief sought by the class,

(e) set out the common issues for the class,

(f) state the manner in which and the time within which a class member may opt out of the proceeding,

(g) state the manner in which, and the time within which, a person who is not a resident of [the enacting jurisdiction] may opt in to the proceeding, and

(h) include any other provisions the court considers appropriate.

(2) If a class includes a subclass whose members have claims that raise common issues not shared by all the class members so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the certification order must include the same information in relation to the subclass that, under subsection (1), is required in relation to the class.

(3) The court may at any time amend a certification order on the application of a party or class member or on its own motion.

ULCC Commentary: Section 8 requires that a certification order must describe the class, appoint the representative plaintiff(s), state the nature of the claims asserted and the relief sought, set out the common issues for the class, state the manner for opting out of a class and any other provisions the court considers appropriate.

Other Jurisdictions:

[1] B.C. adds s. 8(4):

> Without limiting the generality of subsection (3), where it appears to the court that a representative plaintiff is not acting in the best interests of the class, the court may substitute another class member or any other person as the representative plaintiff.

Refusal to certify

9. If the court refuses to certify a proceeding as a class proceeding, the court may permit the proceeding to continue as one or more proceedings between different parties and, for that purpose, the court may

(a) order the addition, deletion or substitution of parties,

(b) order the amendment of the pleadings, and

(c) make any other order that it considers appropriate.

ULCC Commentary: If a court refuses to certify a proceeding as a class proceeding, section 9 allows the court to permit the proceeding to continue as a "non-class" proceeding and to order the addition, deletion or substitution of parties, the amendment of the pleadings or to make any other order the court considers appropriate. In this way, the plaintiff(s) can still pursue a legal remedy despite the fact that the court has refused to certify the matter as a class proceeding.

If conditions for certification not satisfied

10.- (1) Without limiting subsection 8 (3), at any time after a certification order is made under this Part, the court may amend the certification order, decertify the proceeding or make any other order it considers appropriate if it appears to the court that the conditions mentioned in section 4 or subsection 6 (1) are not satisfied with respect to a class proceeding.

(2) If the court makes a decertification order under subsection (1), the court may permit the proceeding to continue as one or more proceedings between different parties and may make any order referred to in section 9 (a) to (c) in relation to each of those proceedings.

ULCC Commentary: Section 10 allows the court to amend the certification order or decertify the proceeding if the court is satisfied that the conditions described in section 4 or 6 are no longer met.

PART III: Conduct of Class Proceedings

Role of Court

Stages of class proceedings

11.- (1) Unless the court otherwise orders under section 12, in a class proceeding,

(a) common issues for a class must be determined together,

(b) common issues for a subclass must be determined together, and

(c) individual issues that require the participation of individual class members must be determined individually in accordance with sections 27 and 28.

(2) The court may give judgment in respect of the common issues and separate judgments in respect of any other issue.

ULCC Commentary: According to this section, in a class proceeding, common issues for a class must be determined together, common issues for a subclass must be determined together and individual issues that require the participation of individual class members must be determined in accordance with sections 27 and 28. This structure should help to ensure that class proceedings are heard in the most efficient manner possible.

Court may determine conduct of proceeding

12. The court may at any time make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, may impose on one or more of the parties the terms it considers appropriate.

ULCC Commentary: Section 12 grants the court broad discretion in making orders to ensure the "fair and expeditious determination" of a class proceeding. This broad discretion is thought necessary as the court must protect not only the interests of the representative plaintiff and the defendant but also the interests of absent class members.

Court may stay any other proceeding

13. The court may at any time stay or sever any proceeding related to the class proceeding on the terms the court considers appropriate.

ULCC Commentary: This section gives the court wide discretion to stay or sever any proceeding related to a class proceeding. Like section 12, this discretion was necessary to allow the court to protect the interests of the representative plaintiff, defendant and absent class members.

Applications

14.- (1) The judge who makes a certification order is to hear all applications in the class proceeding before the trial of the common issues.

(2) If a judge who has heard applications under subsection (1) becomes unavailable for any reason to hear an application in the class proceeding, the chief justice of the court may assign another judge of the court to hear the application.

(3) A judge who hears applications under subsection (1) or (2) may but need not preside at the trial of the common issues.

ULCC Commentary: The requirement that a judge who hears the certification order is to hear all applications that arise before the trial on the common issues is included as another effort to determine the issues arising in a certification hearing in an expeditious manner by recognizing the complex nature of class proceedings.

Other Jurisdictions:
[1] Under Ont. s. 34(3), the motions judge shall not preside at the trial of the common issues "unless the parties agree otherwise".

Participation of Class Members

Participation of class members

15.- (1) In order to ensure the fair and adequate representation of the interests of the class or any subclass or for any other appropriate reason, the court may, at any time in a class proceeding, permit one or more class members to participate in the proceeding if this would be useful to the class.

(2) Participation under subsection (1) must be in the manner and on the terms, including terms as to costs, that the court considers appropriate.

ULCC Commentary: Section 15 permits the courts to allow class members to participate in the class proceeding if their participation is necessary to ensure the fair and adequate representation of the interests of the class.

Opting out and opting in

16.- (1) A member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order.

(2) Subject to subsection (4), a person who is not a resident of [the enacting jurisdiction] may, in the manner and within the time specified in the certification order made in respect of a class proceeding, opt in to that class proceeding if the

person would be, but for not being a resident of [the enacting jurisdiction], a member of the class involved in the class proceeding.

(3) A person referred to in subsection (2) who opts in to a class proceeding is from that time a member of the class involved in the class proceeding for every purpose of this Act.

(4) A person may not opt in to a class proceeding under subsection (2) unless the subclass of which the person is to become a member has or will have, at the time the person becomes a member, a representative plaintiff who satisfies the requirements of section 6 (1) (a), (b) and (c).

(5) If a subclass is created as a result of persons opting in to a class proceeding under subsection (2), the representative plaintiff for that subclass must ensure that the certification order for the class proceeding is amended, if necessary, to comply with section 8(2).

ULCC Commentary: The draft bill is based on an opt out model of class proceedings for residents and on an opt in model for non-residents of the jurisdiction. This means that persons who match the characteristics of the class as set out in the certification order are, if residents, members of the class until they opt out of the proceeding and, if not residents, not members unless they opt in.

Discovery

17.- (1) Parties to a class proceeding have the same rights of discovery under the [rules of court] against one another as they would have in any other proceeding.

(2) After discovery of the representative plaintiff or, in a proceeding referred to in section 6, one or more of the representative plaintiffs, a defendant may, with leave of the court, discover other class members.

(3) In deciding whether to grant a defendant leave to discover other class members, the court must consider

(a) the stage of the class proceeding and the issues to be determined at that stage,

(b) the presence of subclasses,

(c) whether the discovery is necessary in view of the defences of the party seeking leave,

(d) the approximate monetary value of individual claims, if any,

(e) whether discovery would result in oppression or in undue annoyance, burden or expense for the class members sought to be discovered, and

(f) any other matter the court considers relevant.

(4) A class member is subject to the same sanctions under the [rules of court] as a party for failure to submit to discovery.

ULCC Commentary: Section 17 sets out the discovery rules in a class proceeding. To avoid the possibility that the defendant could attempt to discover each class member, the section permits the defendant to discover class members other than the representative plaintiff only with leave of the court. This section also sets out a number of criteria the court must consider before granting the defendant leave to discover other class members.

Examination of class members before an application

18.- (1) A party may not require a class member, other than a representative plaintiff, to be examined as a witness before the hearing of any application, except with leave of the court.

(2) Subsection 17 (3) applies to a decision whether to grant leave under subsection (1) of this section.

ULCC Commentary: Section 18 ties into section 17 by prohibiting the examination of class members other than the representative plaintiff without leave of the court.

Notices

Notice of certification

19.- (1) Notice that a proceeding has been certified as a class proceeding must be given by the representative plaintiff to the class members in accordance with this section.

(2) The court may dispense with notice if, having regard to the factors set out in subsection (3), the court considers it appropriate to do so.

(3) The court must make an order setting out when and by what means notice is to be given under this section and in doing so must have regard to

(a) the cost of giving notice,

(b) the nature of the relief sought,

(c) the size of the individual claims of the class members,

(d) the number of class members,

(e) the presence of subclasses,

(f) the places of residence of class members, and

(g) any other relevant matter.

(4) The court may order that notice be given by

(a) personal delivery,

(b) mail,

(c) posting, advertising, publishing or leafleting,

(d) individually notifying a sample group within the class, or

(e) any other means or combination of means that the court considers appropriate.

(5) The court may order that notice be given to different class members by different means.

(6) Unless the court orders otherwise, notice under this section must

(a) describe the proceeding, including the names and addresses of the representative plaintiffs and the relief sought,

(b) state the manner in which and the time within which a class member may opt out of the proceeding,

(c) state the manner in which and the time within which a person who is not a resident of [the enacting jurisdiction] may opt in to the proceeding,

(d) describe any counterclaim or third party proceeding being asserted in the proceeding, including the relief sought,

(e) summarize any agreements respecting fees and disbursements

(i) between the representative plaintiff and the representative plaintiff's solicitors, and

(ii) if the recipient of the notice is a member of a subclass, between the representative plaintiff for that subclass and that representative plaintiff's solicitors,

(f) describe the possible financial consequences of the proceedings to class members and subclass members,

(g) state that the judgment on the common issues for the class, whether favourable or not, will bind all class members who do not opt out of the proceeding,

(h) state that the judgment on the common issues for a subclass, whether favourable or not, will bind all subclass members who do not opt out of the proceeding,

(i) describe the rights, if any, of class members to participate in the proceeding,

(j) give an address to which class members may direct inquiries about the proceeding, and

(k) give any other information the court considers appropriate.

(7) With leave of the court, notice under this section may include a solicitation of contributions from class members to assist in paying solicitors' fees and disbursements.

ULCC Commentary: This section recognizes that the notice requirements for a class proceeding will vary widely from proceeding to proceeding. In addition to allowing the court to dispense with notice, where appropriate, section 19 states that the court is to consider factors like the cost of the notice and the size of the class when deciding whether or not to require notice. This section permits notice to be given in a variety of ways and to different class members by different means, all in an attempt to give the court the flexibility to craft an appropriate type of notice. Section 19 also sets out a series of mandatory items that must be included where notice is given including information about the nature of the proceeding, the opt out procedure, a description of the possible financial consequences of the proceeding for class members and a summary of any agreement respecting fees and disbursements.

Other Jurisdictions:

[1] B.C. s. 19(3) adds as a factor "whether some or all of the class members may opt out of the class proceeding".

[2] ManLRC s. 19(4) adds as a factor "creating and maintaining an Internet site".

Notice of determination of common issues

20.- (1) Where the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, the representative party shall give notice to those members in accordance with this section.

(2) Subsections 19 (3) to (5) apply to notice given under this section.

(3) Notice under this section must

(a) state that common issues have been determined,

(b) identify the common issues that have been determined and explain the determinations made,

(c) state that members of the class or subclass may be entitled to individual relief,

(d) describe the steps that must be taken to establish an individual claim,

(e) state that failure on the part of a member of the class or subclass to take those steps will result in the member not being entitled to assert an individual claim except with leave of the court,

(f) give an address to which members of the class or subclass may direct inquiries about the proceeding, and

(g) give any other information that the court considers appropriate.

ULCC Commentary: Section 20 states that, if a court can only determine individual issues after receiving the evidence of individual class members, then the representative plaintiff must give notice to the individual class members in accordance with this section and subsection (3) to (5) of section 19.

Notice to protect interests of affected persons

21.- (1) At any time in a class proceeding, the court may order any party to give notice to the persons that the court considers necessary to protect the interests of any class member or party or to ensure the fair conduct of the proceeding.

(2) Subsections 19 (3) to (5) apply to notice given under this section.

ULCC Commentary: Section 21 is also a notice section. This section permits the court to order any party to give notice to a person, if the court determines that notice is necessary to protect the interests of any class member or party or to ensure the fair conduct of the class proceeding.

Approval of notice by the court

22. A notice under this Division must be approved by the court before it is given.

ULCC Commentary:
This section requires that all notices given under this Division must be approved by the court.

Giving of notice by another party

23. The court may order a party to give the notice required to be given by another party under this Act.

ULCC Commentary: Section 23 permits the court to order one party to give the notice required of another party.

Costs of notice

24.- (1) The court may make any order it considers appropriate as to the costs of any notice under this Division, including an order apportioning costs among parties.

(2) In making an order under subsection (1), the court may have regard to the different interests of a subclass.

ULCC Commentary: This section gives the court discretion in awarding the costs of notice and allows the court to apportion costs among parties and among subclasses.

PART IV: Orders, Awards and Related Procedures

Order on Common Issues and Individual Issues

Contents of order on common issues

25. An order made in respect of a judgment on common issues of a class or subclass must

(a) set out the common issues,

(b) name or describe the class or subclass members to the extent possible,

(c) state the nature of the claims asserted on behalf of the class or subclass, and

(d) specify the relief granted.

ULCC Commentary: The order respecting common issues includes details respecting the common issues, class members, the nature of their claims and the relief granted. It is necessary to include this detail to ensure that it is clear who is bound by the order and to what extent.

Judgment on common issues is binding

26.- (1) A judgment on common issues of a class or subclass binds every member of the class or subclass, as the case may be, who has not opted out of the class proceeding, but only to the extent that the judgment determines common issues that

(a) are set out in the certification order,

(b) relate to claims described in the certification order, and

(c) relate to relief sought by the class or subclass as stated in the certification order.

(2) A judgment on common issues of a class or subclass does not bind a party to the class proceeding in any subsequent proceeding between the party and a person who opted out of the class proceedings.

ULCC Commentary: While the doctrine of *res judicata* prevents parties from re-litigating matters, it is not clear that the doctrine would apply to class members who are not parties. To clarify any uncertainty in the law, subsection (1) provides that the judgment is binding on every class member who has not opted out, to the extent of the common questions and relief specified in the certification order. Subsection (2) ensures that a class member who opts out cannot later benefit from the class action judgment.

Determination of individual issues

27.- (1) If the court determines common issues in favour of a class or subclass and determines that there are issues, other than those that may be determined under section 32, that are applicable only to certain individual members of the class or subclass, the court may

(a) determine those individual issues in further hearings presided over by the judge who determined the common issues or by another judge of the court,

(b) appoint one or more persons including, without limitation, one or more independent experts, to conduct an inquiry into those individual issues under the [rules of court] and report back to the court, or

(c) with the consent of the parties, direct that those individual issues be determined in any other manner.

(2) The court may give any necessary directions relating to the procedures that must be followed in conducting hearings, inquiries and determinations under subsection (1).

(3) In giving directions under subsection (2), the court must choose the least expensive and most expeditious method of determining the individual issues that is consistent with justice to members of the class or subclass and the parties and, in doing so, the court may

(a) dispense with any procedural step that it considers unnecessary, and

(b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate.

(4) The court must set a reasonable time within which individual members of the class or subclass may make claims under this section in respect of the individual issues.

(5) A member of the class or subclass who fails to make a claim within the time set under subsection (4) may not later make a claim under this section in respect of the issues applicable only to that member except with leave of the court.

(6) The court may grant leave under subsection (5) if it is satisfied that

(a) there are apparent grounds for relief,

(b) the delay was not caused by any fault of the person seeking the relief, and

(c) the defendant would not suffer substantial prejudice if leave were granted.

(7) Unless otherwise ordered by the court making a direction under subsection (1) (c), a determination of issues made in accordance with subsection (1) (c) is deemed to be an order of the court.

ULCC Commentary: A procedure is established for determining individual issues that remain after the judgment on the common issues. The court is to develop a procedure that is inexpensive and expeditious. The court is required to set a time limit for class members to make their individual claims, but has a limited ability to waive non-compliance with that time limit.

Individual assessment of liability

28. Without limiting section 27, if, after determining common issues in favour of a class or subclass, the court determines that the defendant's liability to individual class members cannot reasonably be determined without proof by those individual class members, section 27 applies to the determination of the defendant's liability to those class members.

ULCC Commentary: This section provides that section 27 can be used to determine individual liability issues.

Aggregate Awards

Aggregate awards of monetary relief

29.- (1) The court may make an order for an aggregate monetary award in respect of all or any part of a defendant's liability to class members and may give judgment accordingly if

(a) monetary relief is claimed on behalf of some or all class members,

(b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability, and

(c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

(2) Before making an order under subsection (1), the court must provide the defendant with an opportunity to make submissions to the court in respect of any matter touching on the proposed order including, without limitation,

(a) submissions that contest the merits or amount of an award under that subsection, and

(b) submissions that individual proof of monetary relief is required due to the individual nature of the relief.

ULCC Commentary: Although in some cases the injuries to class members will be so varied that individual proceedings will be required to establish the total amount of damages, this section authorizes the treatment of monetary relief as a common question. It is particularly useful when the injuries to the class members are relatively consistent.

Statistical evidence may be used

30.- (1) For the purposes of determining issues relating to the amount or distribution of an aggregate monetary award under this Act, the court may admit as evidence statistical information that would not otherwise be admissible as evidence, including information derived from sampling, if the information was compiled in accordance with principles that are generally accepted by experts in the field of statistics.

(2) A record of statistical information purporting to be prepared by or published under the authority of an enactment of the Parliament of Canada or the legislature of any province may be admitted as evidence without proof of its authenticity.

(3) Statistical information must not be admitted as evidence under this section unless the party seeking to introduce the information

(a) has given to the party against whom the statistical evidence is to be used a copy of the information at least 60 days before that information is to be introduced as evidence,

(b) has complied with subsections (4) and (5), and

(c) introduces the evidence by an expert who is available for cross-examination on that evidence.

(4) Notice under this section must specify the source of any statistical information sought to be introduced that

(a) was prepared or published under the authority of an enactment of the Parliament of Canada or the legislature of any province,

(b) was derived from market quotations, tabulations, lists, directories or other compilations generally used and relied on by members of the public, or

(c) was derived from reference material generally used and relied on by members of an occupational group.

(5) Except with respect to information referred to in subsection (4), notice under this section must

(a) specify the name and qualifications of each person who supervised the preparation of the statistical information sought to be introduced, and

(b) describe any documents prepared or used in the course of preparing the statistical information sought to be introduced.

(6) Unless this section provides otherwise, the law and practice with respect to evidence tendered by an expert in a proceeding applies to a class proceeding.

(7) Except with respect to information referred to in subsection (4), a party against whom statistical information is sought to be introduced under this section may require the party seeking to introduce it to produce for inspection any document that was prepared or used in the course of preparing the information, unless the document discloses the identity of persons responding to a survey who have not consented in writing to the disclosure.

ULCC Commentary: Statistical evidence has been used in class action litigation to reduce the administrative and evidentiary problems encountered in the use of traditional means of proof to establish the effect of a product or practice on a large number of people. The Ontario and British Columbia Acts only allow statistical evidence to be used for the purpose of

determining issues related to the amount or distribution of a monetary award. In the United States, it can also be used to establish liability. This section provides that statistical evidence can be used by the court in determining the amount or distribution of an aggregate monetary award. The party wishing to introduce statistical evidence is to give the other side 60 days' notice of that intention, details respecting its source and must introduce it through an expert. The Quebec Code does not specifically address this issue; instead it gives the court broad powers to prescribe measures to simplify proof.

Average or proportional share of aggregate awards

31.- (1) If the court makes an order under section 29, the court may further order that all or a part of the aggregate monetary award be applied so that some or all individual class or subclass members share in the award on an average or proportional basis if

(a) it would be impractical or inefficient to

(i) identify the class or subclass members entitled to share in the award, or

(ii) determine the exact shares that should be allocated to individual class or subclass members, and

(b) failure to make an order under this subsection would deny recovery to a substantial number of class or subclass members.

(2) If an order is made under subsection (1), any member of the class or subclass in respect of which the order was made may, within the time specified in the order, apply to the court to be excluded from the proposed distribution and to be given the opportunity to prove that member's claim on an individual basis.

(3) In deciding whether to exclude a class or subclass member from an average distribution, the court must consider

(a) the extent to which the class or subclass member's individual claim varies from the average for the class or subclass,

(b) the number of class or subclass members seeking to be excluded from an average distribution, and

(c) whether excluding the class or subclass members referred to in paragraph (b) would unreasonably deplete the amount to be distributed on an average basis.

(4) An amount recovered by a class or subclass member who proves that member's claim on an individual basis must be deducted from the amount to be distributed on an average basis before the distribution.

ULCC Commentary: Where the court makes an aggregate monetary award, it can order that the award be shared by class members on an average or proportional basis. Where individual class members object to receiving an average or proportional share, the court has discretion to allow them to prove their claims on an individual basis.

Individual share of aggregate award

32.- (1) When the court orders that all or a part of an aggregate monetary award under section 29 (1) be divided among individual class or subclass members on an individual basis, the court must determine whether individual claims need to be made to give effect to the order.

(2) If the court determines under subsection (1) that individual claims need to be made, the court must specify the procedures for determining the claims.

(3) In specifying the procedures under subsection (2), the court must minimize the burden on class or subclass members and, for that purpose, the court may authorize

(a) the use of standard proof of claim forms,

(b) the submission of affidavit or other documentary evidence, and

(c) the auditing of claims on a sampling or other basis.

(4) When specifying the procedures under subsection (2), the court must set a reasonable time within which individual class or subclass members may make claims under this section.

(5) A class or subclass member who fails to make a claim within the time set under subsection (4) may not later make a claim under this section except with leave of the court.

(6) Subsection 27 (6) applies to a decision whether to grant leave under subsection (5) of this section.

(7) The court may amend a judgment given under subsection 29 (1) to give effect to a claim made with leave under subsection (5) of this section if the court considers it appropriate to do so.

ULCC Commentary: Where an aggregate award is to be divided among class members on an individual basis, the court will decide how that will be done. For example, the court may

authorize the use of standard claim forms. The time limit set by the court within which those individual claims are to be made may be waived, on the same grounds as for waiver of the time limit in section 27.

Other Jurisdictions:

[1] Ont. s. 24(9) specifies:

> The court may give leave under subsection (8) if it is satisfied that,
>
> (a) there are apparent grounds for relief;
>
> (b) the delay was not caused by any fault of the personseeking the relief; and
>
> (c) the defendant would not suffer substantial prejudice ifleave were given.

Distribution

33.- (1) The court may direct any means of distribution of amounts awarded under this Division that it considers appropriate.

(2) In giving directions under subsection (1), the court may order that

(a) the defendant distribute directly to the class or subclass members the amount of monetary relief to which each class or subclass member is entitled by any means authorized by the court, including abatement and credit,

(b) the defendant pay into court or some other appropriate depository the total amount of the defendant's liability to the class or subclass members until further order of the court, or

(c) any person other than the defendant distribute directly to each of the class or subclass members, by any means authorized by the court, the amount of monetary relief to which that class or subclass member is entitled.

(3) In deciding whether to make an order under clause (2) (a), the court

(a) must consider whether distribution by the defendant is the most practical way of distributing the award, and

(b) may take into account whether the amount of monetary relief to which each class or subclass member is entitled can be determined from the records of the defendant.

(4) The court must supervise the execution of judgments and the distribution of awards under this Division and may stay the whole or any part of an execution or distribution for a reasonable period on the terms it considers appropriate.

(5) The court may order that an award made under this Division be paid

(a) in a lump sum, promptly or within a time set by the court, or

(b) in instalments, on the terms the court considers appropriate.

(6) The court may

(a) order that the costs of distributing an award under this Division, including the costs of any notice associated with the distribution and the fees payable to a person administering the distribution, be paid out of the proceeds of the judgment, and

(b) make any further or other order it considers appropriate.

ULCC Commentary: The court is also given discretion to determine the most efficient way to distribute the funds, whether by immediate or deferred lump sum or in instalments. It may find that distribution by the defendant is the most practical way, particularly if the class members are account holders with the defendant. The costs of distribution may be paid out of the award. British Columbia and Ontario include a similar provision. The Quebec Code does not provide for distribution by the defendant.

Undistributed award

34.- (1) The court may order that all or any part of an award under this Division that has not been distributed within a time set by the court be applied in any manner that may reasonably be expected to benefit class or subclass members, even though the order does not provide for monetary relief to individual class or subclass members.

(2) In deciding whether to make an order under subsection (1), the court must consider

(a) whether the distribution would result in unreasonable benefits to persons who are not members of the class or subclass, and

(b) any other matter the court considers relevant.

(3) The court may make an order under subsection (1) whether or not all the class or subclass members can be identified or all their shares can be exactly determined.

(4) The court may make an order under subsection (1) even if the order would benefit

(a) persons who are not class or subclass members, or

(b) persons who may otherwise receive monetary relief as a result of the class proceeding.

(5) If any part of an award that, under subsection 32 (1), is to be divided among individual class or subclass members remains unclaimed or otherwise undistributed after a time set by the court, the court may order that part of the award

(a) be applied against the cost of the class proceeding,

(b) be forfeited to the Government, or

(c) be returned to the party against whom the award was made.

ULCC Commentary: If part of an aggregate award remains after individual claims have been paid, the court may order that the undistributed funds be used in a manner that will benefit class members generally. This method can be used even if non-class members and class members who have received individual awards would benefit from the distribution. This is often referred to as a cy-prés distribution.

Where money designated to pay individual claims is not all distributed, the court may determine whether it should be returned to the defendant, forfeited to the government or used to pay the costs of the class action. This approach is consistent with the British Columbia Act. The Ontario Act provides that undistributed funds that were designated to pay individual claims be returned to the defendant. In Quebec the court has discretion to determine the appropriate distribution of these funds.

Other Jurisdictions:

[1] Ont. s. 26(10) requires an unclaimed or undistributed award to be "returned to the party against whom the award was made, without further order of the court". It does not offer the options set out in ULCC s. 34(5)(a) and (b).

Termination of Proceedings and Appeals

Settlement, discontinuance, abandonment and dismissal

35.- (1) A class proceeding may be settled, discontinued or abandoned only

(a) with the approval of the court, and

(b) on the terms the court considers appropriate.

(2) A settlement may be concluded in relation to the common issues affecting a subclass only

(a) with the approval of the court, and

(b) on the terms the court considers appropriate.

(3) A settlement under this section is not binding unless approved by the court.

(4) A settlement of a class proceeding or of common issues affecting a subclass that is approved by the court binds every member of the class or subclass who has not opted out of the class proceeding, but only to the extent provided by the court.

(5) In dismissing a class proceeding or in approving a settlement, discontinuance or abandonment, the court must consider whether notice should be given under section 20 and whether the notice should include

(a) an account of the conduct of the proceeding,

(b) a statement of the result of the proceeding, and

(c) a description of any plan for distributing any settlement funds.

ULCC Commentary: A class action cannot be settled, discontinued or abandoned without the approval of the court. A settlement that is approved by the court is binding on every class member. When dismissing a class action or approving a settlement, discontinuance or abandonment, the court must decide whether notice of the order should be given to the class members.

Other Jurisdictions:

[1] ManLRC adds s. 35(6):

> Before approving a settlement under subsections (1) or (2), the court must be satisfied that the agreement is fair, reasonable, and in the best interests of those affected by it.In making that determination, the court must consider, inter alia:
>
> (a) the settlement terms and conditions,
> (b) the nature and likely duration and cost of the proceeding,
> (c) the amount offered in relation to the likelihood of success in the proceeding,
> (d) the expressed opinions of class members other than the representative party,
> (e) recommendations of neutral parties, if any, and
> (f) whether satisfactory arrangements have been made for the distribution of money to be paid to the class members.

Appeals

36.- (1) Any party may appeal without leave to the [appellate court of the enacting jurisdiction] from

(a) a judgment on common issues, or

(b) an order under Division 2 of this Part, other than an order that determines individual claims made by class or subclass members.

(2) With leave of a justice of the [appellate court of the enacting jurisdiction], a class or subclass member, a representative plaintiff or a defendant may appeal to that court any order

(a) determining an individual claim made by a class or subclass member, or

(b) dismissing an individual claim for monetary relief made by a class or subclass member.

(3) With leave of a justice of the [appellate court of the enacting jurisdiction], any party may appeal to the [appellate court of the enacting jurisdiction] from

(a) an order certifying or refusing to certify a proceeding as a class proceeding,

(b) an order decertifying a proceeding.

(4) If a representative plaintiff does not appeal or seek leave to appeal as permitted by subsection (1) or (3) within the time limit for bringing an appeal set under [the relevant section of the enactment establishing the appellate court of the enacting jurisdiction] or if a representative plaintiff abandons an appeal under subsection (1) or (3), any member of the class or subclass for which the representative plaintiff had been appointed may apply to a justice of the [appellate court of the enacting jurisdiction] for leave to act as the representative plaintiff for the purposes of subsection (1) or (3).

(5) An application by a class or subclass member for leave to act as the representative plaintiff under subsection (4) must be made within 30 days after the expiry of the appeal period available to the representative plaintiff or by such other date as the justice may order.

ULCC Commentary: Subsections (1) and (3) allows for an appeal from an order refusing to certify a class action, an order decertifying a class action, a judgment on the common issues and an order respecting an aggregate award.

An appeal from a certification order is available only with leave. This is the Ontario approach. British Columbia provides an appeal as of right, and Quebec does not allow for certification orders to be appealed.

The intention of subsections (2), (4) and (5) is that the local practice of each jurisdiction governing appeals generally is to be followed but is to be augmented where necessary to give a class member, subclass member, representative plaintiff or defendant standing in appropriate circumstances. It follows that subsections (2), (4) and (5) may differ from jurisdiction to jurisdiction.

Other Jurisdictions:

[1] ULCC s. 36(2) is the same as B.C. s. 36(4) and ManLRC s. 36(2). Ont. s. 30(6), (7), (8), allow appeals to the Divisional Court of individual awards of more than $3,000

whereas Ont. s. 30(9), (10) and (11) require leave of the Ontario Court (General Division) to appeal individual awards of $3,000 or less or orders dismissing the claim of an individual class member. Ont. s. 30(6) permits a class member to appeal from an order under Ont. s. 24 or 25 "determining an individual claim made by the member and awarding more than $3,000 to the member", Ont. s. 30(7) permits a representative plaintiff to appeal from an order under Ont. s. 24 in the same circumstances, and Ont. s. 30(8) permits a defendant to appeal from an order under Ont. s. 25. With leave, Ont. s. 30(9) permits a class member to appeal from an order under Ont. s. 24 or 25, Ont. s. 30(10) permits a representative plaintiff to appeal from an order under Ont. s. 24 and Ont. s. 30(11) permits a defendant to appeal from an order under Ont. s. 25.

[2] ULCC s. 36(3) is the same as ManLRC s. 36(3). B.C. s. 36(1)(a) and (b) are the same, except that there is no leave requirement. Ont. s. 30(1) permits a party to appeal without leave "from an order refusing to certify a proceeding as a class proceeding and from an order decertifying a proceeding". Ont. s. 30(2) permits a party to appeal with leave of the Ontario Court (General Division) "from an order certifying a proceeding as a class proceeding". In both cases, the appeal is to the Divisional Court.

PART V: Costs, Fees and Disbursements

Costs

37.- (1) Class members, other than the representative plaintiff, are not liable for costs except with respect to the determination of their own individual claims.

(2) In determining by whom and to what extent costs should be paid, a court may consider whether the class proceeding was a test case, raised a novel point of law or addressed an issue of significant public interest.

(3) A court that orders costs may order that those costs be assessed in any manner that the court considers appropriate.

[Alternatively]

[37.- (1) Subject to this section, neither the [superior or the appellate court of the jurisdiction] may award costs to any party to an application for certification under subsection 2 (2) or section 3, to any party to a class proceeding or to any party to an appeal arising from a class proceeding at any stage of the application, proceeding or appeal.

(2) A court referred to in subsection (1) may only award costs to a party in respect of an application for certification or in respect of all or any part of a class proceeding or an appeal from a class proceeding

(a) at any time that the court considers that there has been vexatious, frivolous or abusive conduct on the part of any party,

(b) at any time that the court considers that an improper or unnecessary application or other step has been made or taken for the purpose of delay or increasing costs or for any other improper purpose, or

(c) at any time that the court considers that there are exceptional circumstances that make it unjust to deprive the successful party of costs.

(3) A court that orders costs under subsection (2) may order that those costs be assessed in any manner that the court considers appropriate.

(4) Class members, other than the person appointed as representative plaintiff for the class, are not liable for costs except with respect to the determination of their own individual claims.

ULCC Commentary: Normal costs rules pose barriers to bringing a class action. Although the whole class may benefit from the action, the representative plaintiff shoulders the burden of paying lawyers' fees and disbursements and will receive only a portion of the total costs back if he or she is successful. The representative plaintiff is also liable for any costs ordered by the court if the action is unsuccessful. This section is based on the section in the Ontario Act respecting costs. It adopts a similar approach to the Quebec Act that provides that, for the most part, the normal costs rules apply. It should be noted that, in class actions legislation generally, this is the approach adopted where a fund is provided to assist the representative plaintiff in paying for the expenses of a class action including any costs that may be awarded against him or her.

The alternative approach, adopted by British Columbia and recommended by the Ontario Law Reform Commission, is a "no costs" rule, in which the presumption is that costs will not be awarded to any party unless there is frivolous, vexatious or abusive conduct by that party.

The approach adopted in each jurisdiction will depend to some extent on whether it establishes a fund to provide financial assistance to representative plaintiffs.

Other Jurisdictions:

[1] ULCC s. 37 is close to Ont. s. 31.

[2] ULCC s. 37(3) differs from Ont. s. 31(3), which says:

> Where an individual claim under section 24 or 25 is within the monetary jurisdiction of the Small Claims Court where the class proceeding was commenced, costs related to the claim shall be assessed as if the claim had been determined by the Small Claims Court.

[3] B.C. and ManLRC adopt the ULCC alternative provision.

Agreements respecting fees and disbursements

38.- (1) An agreement respecting fees and disbursements between a solicitor and a representative plaintiff must be in writing and must

(a) state the terms under which fees and disbursements are to be paid,

(b) give an estimate of the expected fee, whether or not that fee is contingent on success in the class proceeding, and

(c) state the method by which payment is to be made, whether by lump sum or otherwise.

(2) An agreement respecting fees and disbursements between a solicitor and a representative plaintiff is not enforceable unless approved by the court, on the application of the solicitor.

(3) An application under subsection (2) may,

(a) unless the court otherwise orders, be brought without notice to the defendants, or

(b) if notice to the defendants is required, be brought on the terms respecting disclosure of the whole or any part of the agreement respecting fees and disbursements that the court may order.

(4) Interest payable on fees under an agreement approved under subsection (2) must be calculated in the manner set out in the agreement or, if not so set out,

(a) at the interest rate, as that term is defined in [the court order interest Act of the enacting jurisdiction], or

(b) at any other rate the court considers appropriate.

(5) Interest payable on disbursements under an agreement approved under subsection (2) must be calculated in the manner set out in the agreement or, if not so set out,

(a) at the interest rate, as that term is defined in [the court order interest Act of the enacting jurisdiction], or

(b) at any other rate the court considers appropriate, on the balance of disbursements incurred as totalled at the end of each 6 month period following the date of the agreement.

(6) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.

(7) If an agreement is not approved by the court, the court may

(a) determine the amount owing to the solicitor in respect of fees and disbursements,

(b) direct an inquiry, assessment or accounting under the [rules of court] to determine the amount owing, or

(c) direct that the amount owing be determined in any other manner.

ULCC Commentary: Solicitor-client agreements respecting fees are subject to the approval of the court. They must be in writing and specify the terms of payment of fees and disbursements. An application for approval of the agreement will not normally be served on the defendant. The amounts owing under the agreement are a first charge on any funds recovered in the class action.

Other Jurisdictions:

[1] ManLRC adds s. 38(4) as follows:

> An application under subsection (2) must be brought prior to certification of the proceeding as a class proceeding.

[2] ManLRC adds s. 38(9):

> An application under subsection 58(4) of the Law Society Act must be made to
> (a) the judge who presided at the trial of the common issues, or
> (b) the judge who approved the settlement agreement
> as the case may be.

[3] Ont. adds s. 33, as follows:

> 33.(1) Despite the Solicitors Act and An Act Respecting Champerty, being chapter 327 of Revised Statutes of Ontario, 1897, a solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding.
> (2) For the purpose of subsection (1), success in a class proceeding includes,
> (a) a judgment on common issues in favour of some or all class members; and
> (b) a settlement that benefits one or more class members.
> (3) For the purposes of subsections (4) to (7),
> "base fee" means the result of multiplying the total number of hours worked by an hourly rate; ("honoraires de base")
> "multiplier" means a multiple to be applied to a base fee. ("multiplicateur")
> (4) An agreement under subsection (1) may permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier.

PART VI: General

Limitation periods

39.- (1) Subject to subsection (3), any limitation period applicable to a cause of action asserted in a proceeding

(a) is suspended in favour of a person if another proceeding was commenced and it is reasonable for the person to assume that he or she was a class member for the purposes of that other proceeding, and

(b) resumes running against the person when clauses (2) (a) to (g) applies to the person as though he or she was the member referred to in subsection (2).

(2) Subject to subsection (3), any limitation period applicable to a cause of action asserted in a proceeding that is certified as a class proceeding under this Act is suspended in favour of a class member on the commencement of the proceeding and resumes running against the class member when

(a) the member opts out of the class proceeding,

(b) a ruling by the court has the effect of excluding the class member from the class proceeding or from being considered to have ever been a class member,

(c) an amendment is made to the certification order that has the effect of excluding the member from the class proceeding,

(d) a decertification order is made under section 10,

(e) the class proceeding is dismissed without an adjudication on the merits,

(f) the class proceeding is discontinued or abandoned with the approval of the court, or

(g) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise.

(3) If there is a right of appeal in respect of an event described in subsection (2) (a) to (g), the limitation period resumes running as soon as the time for appeal has expired without an appeal being commenced or as soon as any appeal has been finally disposed of.

ULCC Commentary: Generally, statutory limitation periods stop running when an action is commenced. Special rules are needed with respect to the application of limitation periods in class actions. On the commencement of the action the limitation period is suspended for all class members. If the limitation period continued to run against class members until after certification, they might be forced to start individual actions to preserve their causes of action. Time will begin running again when a class member opts out or is excluded from the class or the class action is decertified, dismissed, discontinued, abandoned or settled. Subsection 39 (2) includes a provision that was not addressed in August of 1995. It addresses the issue of what happens if part, but not all, of a class is certified. The wording in clause 39 (2) (b) anticipates this situation and states that a limitation period will recommence if a court rules that a person never was a member of the class proceeding.

Rules of Court

40. The [rules of court] apply to class proceedings to the extent that those rules are not in conflict with this Act.

ULCC Commentary: The Rules of Court apply where they are not in conflict with this Act.Jurisdictions will need to consider whether or not to delete their rule of court that allows for representative proceedings.

Application of Act

41. This Act does not apply to

(a) a proceeding that may be brought in a representative capacity under another Act,

(b) a proceeding required by law to be brought in a representative capacity, and

(c) a representative proceeding commenced before this Act comes into force.

ULCC Commentary: This Act does not apply to proceedings brought in a representative capacity.

APPENDIX B –DISCRETIONARY POWERS OF THE COURT IN CANADIAN CLASS PROCEEDINGS REGIMES

Sullivan at 171, APPENDIX D:

The tools provided to the court to manage a class proceeding are extensive and include:

1. Section 2(4) which allows the court to certify a person who is not a member of the class as the representative plaintiff to the class proceeding if the court considers it necessary to do so to avoid a substantial injustice to the class.

2. Section 5(6) gives the court the discretion to adjourn a certification application to permit the parties to amend the materials or pleadings or permit further evidence.

3. Section 9 provides the court with the discretion to make a variety of orders in lieu of certification of a class proceeding including the addition, deletion or substitution of parties, the amendment of the pleadings or nay other order the court considers appropriate.

4. Section 10(1) allows the court, at any time after the certification order is made, to amend the certification order, decertify the proceedings or make any order it considers appropriate if it appears that the conditions required for certification are not satisfied with respect to the class proceeding. There is no requirement in this section that such an order be made upon application of a party or class member.

5. In s. 10(2), the court may permit the action to proceed, after decertification, and make nay order set out in s. 9.

6. In s. 12, the court may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and may impose on one or more of the parties the terms it considers appropriate. This does not have to be made upon an application of a party.

7. Section 13 provides the court with the discretion to stay any proceeding.

8. In s. 15, the court may, at any time in a class proceeding, permit one or more class members to participate in the class proceeding in the manner and on the terms the court considers appropriate.

9. Section 17 allows the court to permit the discovery of absent class members after the discovery of the representative plaintiff.

10. In s. 19, the court may determine the method by which notice is given to the absent class members. The notice can be given to different class members by different means and must include with that notice a solicitation of contributions from class members to assist in paying solicitors' fees and disbursements. Section 19 also provides the court with the discretion to dispense with notice if it considers it appropriate.

11. Section 21 allows the court to order any party to give notice to whomever the court considers necessary, to protect the interests of a class member of party, or to ensure the fair conduct of the proceeding.

12. Section 22 requires the court's approval of the forms of notice to class members.

13. Section 23 provides the court with the discretion to order a party to give the notice required by any other party under the *Class Proceedings Act,* 1995.

14. Section 24 allows the court to apportion the costs among the parties of any notice the court requires.

15. In s. 27, the court may establish a procedure for the resolution of individual class member's claims. This discretion includes the use of independent experts to conduct the inquiry into the individual issues, hearings by other judges, or any other manner with the consent of the parties.

16. Section 28 allows the court, without limiting s. 27, to determine the defendant's liability to individual class members if that determination is not made through the resolution of the common issue.

17. Section 30 gives the court the discretion to admit as evidence statistical information that would otherwise not be admissible.

18. Section 31 provides the court with the broad discretion to establish a proceeding to determine the individual shares of an aggregate award of damages.

19. Section 33 allows the court to direct any means of distribution of an aggregate award that it considers appropriate.

20. Section 34 provides the court with the discretion to apply, in any manner that may reasonably be expected to benefit the class or subclass members, any portion of the undistributed aggregate award.

21. Section 35 allows the court to provide approval to any consent resolution of a class proceeding.

22. Section 37 permits the court to award costs that it considers are exceptional circumstances that make it unjust to deprive the successful party of costs or when there has been vexatious, frivolous or abusive conduct on the part of any party.

23. Section 38 gives the court the responsibility of approving the agreement respecting fees and disbursements between a solicitor and the representative plaintiff and, if that agreement is not approved, the discretion to determine the amounts owing to the solicitor in respect of fees and disbursements, or direct that the amount owing be determined in any other manner.