

Bill 25
Mr. Rathgeber

BILL 25

2003

CLASS PROCEEDINGS ACT

(Assented to , 2003)

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HER MAJESTY, by and with the advice and consent of the
Legislative Assembly of Alberta, enacts as follows:

Definitions

1 In this Act,

- (a) “certification order” means an order certifying a proceeding as a class proceeding;
- (b) “certified”, in respect of a proceeding, means certified as a class proceeding;
- (c) “class member” means a person who is a member of a class on whose behalf a proceeding that is certified as a class proceeding is commenced or otherwise conducted;
- (d) “class proceeding” means a proceeding certified as a class proceeding under Part 1;
- (e) “common issue” means
 - (i) common but not necessarily identical issues of fact,
or
 - (ii) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

- (f) “Court” means the Court of Queen’s Bench, but in the case of applications, appeals and other proceedings in the Court of Appeal, means the Court of Appeal;
- (g) “decertification order” means an order under which a class proceeding is decertified from being a class proceeding;
- (h) “defendant” includes a respondent;
- (i) “plaintiff” includes a petitioner;
- (j) “prospective class member” means, in respect of a proceeding that has not yet been certified as a class proceeding, a person who will be a class member if the proceeding is certified;
- (k) “prospective subclass member” means, in respect of a proceeding for which a representative plaintiff for a subclass has not yet been appointed, a person who will be a subclass member if a representative plaintiff is appointed for the subclass;
- (l) “representative plaintiff” means a person who is appointed under this Act as the representative plaintiff for a class or subclass in respect of a class proceeding;
- (m) “Rules of Court” means the *Alberta Rules of Court* and includes the Appeal Rules, the Court of Queen’s Bench Practice Notes and the Court of Appeal Practice Notes;
- (n) “settlement class” means those persons who, in respect of a proceeding, constitute a settlement class under section 4;
- (o) “subclass members” means persons who are class members but who also make up a subclass of the class members and who, in respect of that subclass, have a claim that raises common issues that are not shared by all the class members and for whom a representative plaintiff has been appointed.

Part 1 Certification

Plaintiff's class proceeding

2(1) One member of a class of persons may commence a proceeding in the Court on behalf of the members of that class.

(2) A person who commences a proceeding under subsection (1) must make an application to the Court for an order certifying the proceeding as a class proceeding and, subject to subsection (4), appointing that person, or another person who on certification will be a member of the class, as the representative plaintiff.

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

(a) within 90 days after

(i) the day on which the statement of defence was served, or

(ii) the day on which the time prescribed by the Rules of Court for service of the statement of defence expires without its being served,

whichever is the later, or

(b) with leave of the Court, within any other time prescribed by the Court.

(4) Notwithstanding subsection (2), the Court may certify a person who is not a member of the class as the representative plaintiff for the class proceeding but may do so only if, in the opinion of the Court, to do so will avoid a substantial injustice to the class.

(5) A person who may be both a member of a class and a member of a subclass is eligible to be appointed as a representative plaintiff for the class proceeding unless, in the opinion of the Court, it would be inappropriate in the circumstances.

(6) The Court may, where it considers it appropriate, appoint as a representative plaintiff a non-profit organization that is incorporated.

Defendant's class proceeding

3(1) A defendant to a proceeding may, at any stage of the proceeding, make an application to the Court for an order certifying the proceeding as a class proceeding and appointing a person who on certification will be a member of the class as the representative plaintiff, whether or not more than one proceeding has been commenced against the defendant.

(2) Notwithstanding subsection (1), the Court may certify a person who is not a member of the class as the representative plaintiff for the class proceeding but may do so only if, in the opinion of the Court, to do so will avoid a substantial injustice to the class.

(3) Section 2(5) and (6) apply to the appointment of a representative plaintiff under this section.

Certification re settlement of proceeding

4 Where a plaintiff has reached a settlement with a defendant in respect of a proceeding prior to the proceeding's being certified but certification of the proceeding as a class proceeding is being sought as a condition of the settlement for the purposes of imposing the settlement on persons who will be class members in respect of the proceeding if the proceeding is certified as a class proceeding, those persons, on the application for certification being commenced, constitute a settlement class with respect to the proceeding for which certification is being sought.

Class certification

5(1) In order for a proceeding to be certified as a class proceeding on an application made under section 2 or 3, the Court must be satisfied as to each of the following:

- (a) the pleadings disclose a cause of action;
- (b) there is an identifiable class of 2 or more persons;
- (c) the claims of the prospective class members raise a common issue, whether or not the common issue predominates over issues affecting only individual prospective class members;
- (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;

- (e) there is a person eligible to be appointed as a representative plaintiff who, in the opinion of the Court,
 - (i) will 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, in respect of the common issues, an interest that is in conflict with the interests of other prospective class members.

(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the Court may consider any matter that the Court considers relevant to making that determination, but in making that determination the Court must consider at least the following:

- (a) whether questions of fact or law common to the prospective class members predominate over any questions affecting only individual prospective class members;
- (b) whether a significant number of the prospective class members have a valid interest in individually controlling the prosecution 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 less practical or less efficient;
- (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

(3) Where the Court is satisfied as to each of the matters referred to in subsection (1)(a) to (e), the Court is to certify the proceeding as a class proceeding.

(4) The Court may not certify a proceeding as a class proceeding unless the Court is satisfied as to each of the matters referred to in subsection (1)(a) to (e).

(5) Notwithstanding subsection (3), where an application is made to certify a proceeding as a class proceeding for the purposes of binding members of a settlement class, the Court may not certify the proceeding unless the Court has approved the settlement.

Certification application

6(1) The Court may adjourn an 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.

Subclass certification

7(1) Notwithstanding section 5, 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 prospective subclass members requires that they be represented separately, the Court may, in addition to appointing the representative plaintiff for the class, appoint from among the prospective subclass members a representative plaintiff for the subclass who, in the opinion of the Court,

- (a) will 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, in respect of the common issues for the subclass, an interest that is in conflict with the interests of other prospective subclass members.

(2) Where the Court is satisfied that more than one subclass meets the criteria under subsection (1) for a representative plaintiff to be appointed, the Court may appoint a representative plaintiff for each subclass.

(3) If a class is made up of persons who are residents of Alberta and persons who are not residents of Alberta, that class is to be divided into resident and non-resident subclasses.

(4) Notwithstanding subsection (1), the Court may certify a person who is not a member of the subclass as the representative plaintiff for the subclass in the class proceeding but may do so only if, in the opinion of the Court, to do so will avoid a substantial injustice to the subclass.

(5) Section 2(5) and (6) apply to the appointment of a representative plaintiff for a subclass under this section.

Certain matters not bar to certification

8 In determining whether a proceeding is to be certified as a class proceeding, the Court is not to refuse certification 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 prospective class members;
- (c) different remedies are sought for different prospective class members;
- (d) the number of prospective class members or the identity of each prospective class member has not been ascertained or may not be ascertainable;
- (e) the class includes a subclass where the prospective subclass members have claims that raise common issues not shared by all the prospective class members.

Certification order

9(1) Where the Court makes a certification order, the Court may include any provisions that it considers appropriate, but in its order the Court must at least

- (a) describe the class in respect of which the order is 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 Alberta may opt into the proceeding.

(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 represented separately, the certification order must include in relation to the subclass the information that is required under subsection (1) in relation to the class.

(3) Where the certification order is made for the purpose of binding a settlement class, the Court may, as the Court considers appropriate, modify what is required to be included in the order under subsection (1) or (2).

(4) The Court may at any time amend a certification order on the application of a party or class member or on the Court's own motion.

Refusal to certify

10 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 do one or more of the following:

- (a) order the addition, deletion or substitution of parties;
- (b) order the amendment of the pleadings;
- (c) make any other order, not referred to in clause (a) or (b), that the Court considers appropriate.

If conditions for certification not satisfied

11(1) Without limiting section 9(4), if at any time after a certification order is made under this Part the Court, with respect to the class proceeding, determines that it is no longer satisfied as to the matters referred to in section 5 or 7(1), the Court may do one or more of the following:

- (a) amend the certification order;
- (b) decertify the proceeding;
- (c) make any other order, not referred to in clause (a) or (b), that the Court considers appropriate.

(2) If the Court makes an order under subsection (1) decertifying a proceeding as a class proceeding, the Court may

- (a) permit the proceeding to continue as one or more proceedings between different parties, and
- (b) make any order referred to in section 10 in relation to each of those proceedings.

**Part 2
Conduct of Class Proceedings**

**Division 1
Role of Court**

Stages of class proceedings

12(1) In the conduct of a class proceeding,

- (a) common issues for a class are to be determined together,
- (b) common issues for a subclass are to be determined together, and
- (c) individual issues that require the participation of individual class members are to be determined individually in accordance with sections 28 and 29,

except where the Court, under section 13, orders otherwise.

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

Court may determine conduct of proceeding

13(1) The Court may at any time make any order it considers appropriate respecting the conduct of a class proceeding to ensure the fair and expeditious determination of the proceeding and, for that purpose, may impose on one or more of the parties any terms or conditions that the Court considers appropriate.

(2) If the Court is of the opinion that a representative plaintiff is not fairly or adequately representing the interests of the class or a subclass, the Court may substitute another class member or subclass member or any other person as the representative plaintiff.

Court may stay any other proceeding

14 The Court may at any time stay or sever any proceeding related to the class proceeding on any terms or conditions that the Court considers appropriate.

Applications

15(1) The judge of the Court who makes a certification order is to hear all the applications in the class proceeding that take place prior to the trial of the common issues, but if that judge for any reason becomes unavailable to hear an application, the chief justice of the Court may assign another judge of the Court to hear the application.

(2) Except with the consent of all of the parties to a class proceeding, a judge who has heard an application in the class proceeding prior to the trial of the common issues is not eligible to preside at the trial of the common issues.

Division 2 Participation of Class Members

Participation of class members

16(1) For the purposes of ensuring the fair and adequate representation of the interests of the class or any subclass or for any other reason that the Court considers appropriate, the Court may, at any time in a class proceeding, permit one or more class members to participate in the proceeding if, in the opinion of the Court, this would be useful to the class.

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

Opting in and opting out

17(1) For determining, with respect to a class proceeding, whether a person is a class member or remains a class member, the following applies:

- (a) a person who is a resident of Alberta and who meets the criteria to be a class member in respect of the class proceeding is a class member in the class proceeding unless that person, in the manner and within the time provided for in the certification order made in respect of the class proceeding, opts out of the class proceeding;
- (b) subject to clause (d), a person who is not a resident of Alberta may, in the manner and within the time provided for in the certification order made in respect of the class proceeding, opt into the class proceeding if that person would have been included under clause (a) as a class member in the class proceeding had that person been a resident of Alberta;
- (c) a person referred to in clause (b) who opts into a class proceeding is, effective from the time that the person opts in, a class member in the class proceeding for every purpose of this Act;
- (d) a person who is a prospective subclass member may not opt into a class proceeding under clause (b) unless a representative plaintiff who satisfies the requirements of section 7 has been or will have been appointed for the subclass in which the person is to become a subclass member at the time that the person becomes a class member;
- (e) a person who is a class member may, if permitted to do so by this Act, the certification order or the Court, opt out of the class proceeding subject to any terms or conditions imposed under the certification order or by the Court;
- (f) a person referred to in clause (e) who opts out of the class proceeding ceases, effective from the time the person opts

out and subject to any terms or conditions referred to in clause (e), to be a class member in the class proceeding.

(2) If a subclass is created as a result of persons opting into a class proceeding under subsection (1)(b), the representative plaintiff for that subclass must ensure that the certification order for the class proceeding is amended, if necessary, to comply with section 9(2).

(3) Notwithstanding anything in this section, where the Court certifies a proceeding pursuant to an application by a defendant, a class member is prohibited from opting out of the class proceeding other than with leave of the Court.

(4) If the Court grants leave under subsection (3) for a person to opt out of a class proceeding, that person has, as a matter of right, the right to apply to the Court to be added, on any terms or conditions that the Court considers appropriate, as a named plaintiff for the purposes of allowing that plaintiff to conduct the plaintiff's own case.

(5) Notwithstanding anything in this section, the Court may at any time determine whether or not a person is a class member or subclass member subject to any terms or conditions the Court considers appropriate.

Discovery

18(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 7, one or more of the representative plaintiffs, a defendant may, with leave of the Court, discover other class members or subclass members.

(3) Notwithstanding subsection (2), except with leave of the Court, a class member or subclass member may not be examined as a witness for the purpose of using any evidence arising from that examination in respect of any motion, petition or other proceeding before the Court.

(4) In deciding whether to grant a defendant leave to discover other class members or subclass members, the Court may take into consideration any matter that the Court considers relevant, but in making its decision the Court must consider at least the following:

- (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 or subclass members sought to be discovered.

(5) For the purposes of conducting a discovery, the Court may order the parties to propose which class members or subclass members, if any, should be discovered and may direct that those proposed members submit, or specify which of them are to submit, to a discovery.

(6) If a class member or subclass member who is to be examined pursuant to this section fails to submit to discovery, that member is subject to the same sanctions under the Rules of Court as a party who fails to submit to discovery.

Examination of class members before an application

19(1) Except with leave of the Court, a party may not require a class member or subclass member, other than a representative plaintiff, to be examined as a witness before the hearing of any application.

(2) Section 18(4) applies to a decision whether to grant leave under subsection (1) of this section.

Division 3 Notices

Notice of certification

20(1) Notice that a proceeding has been certified must, subject to subsection (3), be given by the representative plaintiff to the class members in accordance with this section and the directions of the Court.

(2) The Court must make an order giving directions as to when and by what means notice is to be given under this section and in doing so the Court may consider any matter that the Court considers relevant, but in making the order the Court must consider at least the following:

- (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.

(3) Notwithstanding anything in this section, the Court may make an order dispensing with notice if, having regard to the matters set out in subsection (2), the Court considers it appropriate to do so.

(4) The Court may order that notice be given by any one or more of the following means:

- (a) personal delivery;
- (b) mail;
- (c) posting, advertising or publishing or distributing leaflets;
- (d) individually notifying a sample group within the class;
- (e) through the use of an internet site;
- (f) any other means or combination of means not referred to in clauses (a) to (e) that the Court considers appropriate.

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

(6) Unless the Court orders otherwise, notice given 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 or subclass 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 Alberta may opt into 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 lawyers, and
 - (ii) if the recipient of the notice is a subclass member, between the representative plaintiff for the subclass and that representative plaintiff's lawyers,
 - (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 reached by settlement or otherwise and 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 reached by settlement or otherwise and 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 and subclass members to participate in the proceeding,
 - (j) give an address to which class members and subclass members may direct inquiries about the proceeding, and
 - (k) give any other information the Court considers appropriate.
- (7) If the application to certify a proceeding was made in respect of a settlement class, a notice given under this section must include

the terms of the settlement and may, on the direction of the Court, be modified otherwise as the Court considers appropriate.

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

Notice of determination of common issues

21(1) Where the Court determines common issues in favour of a class or subclass and considers that the participation of individual class members or subclass members is required to determine individual issues, the representative plaintiff must give notice to those members in accordance with this section.

(2) Section 20(3) to (5) apply to notice given under this section.

(3) A notice given 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 class members or subclass members 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 class member or subclass member to take those steps referred to in clause (d) will result in the member's not being entitled to assert an individual claim except with leave of the Court,
- (f) give an address to which class members and subclass members may direct inquiries about the proceeding, and
- (g) give any other information that the Court considers appropriate.

Notice to protect interests of affected persons

22(1) At any time in a class proceeding, the Court may direct any party to give notice to any persons that the Court considers necessary in order to protect the interests of any class member,

subclass member or party or to ensure the fair conduct of the proceeding.

(2) Section 20(3) to (5) apply to notice given under this section.

Approval of notice by the Court

23 A notice that is to be given under this Division must be approved by the Court before the notice is given.

Giving of notice by another party

24 Where a party is required to give a notice under this Act, the Court may order

- (a) another party also to give the notice, or
- (b) another party to give the notice in the place of the party that was required to give the notice.

Costs of notice

25(1) The Court may make any order that the Court considers appropriate with respect to the costs of any notice that is to be given under this Division, including an order apportioning costs among parties.

(2) In making an order under subsection (1), the Court may take into account the different interests of a subclass.

**Part 3
Orders, Awards and
Related Procedures**

**Division 1
Orders Respecting Common Issues
and Individual Issues**

Contents of order respecting common issues

26 Where the Court makes an order in respect of a judgment on common issues of a class or subclass, the Court may include any provisions that it considers appropriate, but in its order the Court must at least

- (a) set out the common issues;
- (b) name or describe the class members or subclass members to the extent possible;
- (c) state the nature of the claims asserted on behalf of the class or subclass;
- (d) specify the relief granted.

Judgment on common issues is binding

27(1) Subject to subsection (2), a judgment

- (a) on common issues of a class binds every class member, and
- (b) on common issues of a subclass binds every subclass member,

but only to the extent that the judgment determines common issues that

- (c) are set out in the certification order,
- (d) relate to claims described in the certification order, and
- (e) relate to relief sought by the class or subclass as stated in the certification order.

(2) A judgment referred to in subsection (1) does not bind a party to the class proceeding in any subsequent proceeding between that party and a person who has opted out of the class proceeding.

(3) With leave of the Court, a class member or a subclass member who

- (a) did not receive notice of the certification order, or
- (b) by reason of mental disability, did not respond within the specified time set out in the certification notice,

is to be treated as if that person had opted out of the class proceeding.

Determination of individual issues

28(1) If, in determining any common issues in favour of a class or subclass, the Court determines that there are issues, other than those that may be determined under section 32, that are applicable only to certain individual class members or subclass members, 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 not referred to in clause (a) or (b).

(2) The Court may give any directions that the Court considers appropriate relating to the procedures that are to be followed in conducting hearings, inquiries and determinations under subsection (1).

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

- (a) dispense with any procedural step that the Court considers unnecessary, and
- (b) establish, to the extent that the Court considers appropriate,
 - (i) special procedural steps, including steps relating to discovery, to be taken, and
 - (ii) special rules, including rules relating to admission of evidence and means of proof, to be followed.

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

(5) If, with respect to individual issues, a class member or subclass member fails to make a claim within the time set under subsection (4), that member may, with leave of the Court, make a claim under this section at a later time with respect to the issues that are applicable only to that member.

(6) The Court may grant leave under subsection (5) only if the Court 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 will not suffer substantial prejudice if leave is granted.

(7) Where the Court makes a direction under subsection (1)(c), a determination of issues made pursuant to that direction is, unless otherwise ordered by the Court, deemed to be a determination by the Court.

Individual assessment of liability

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

Division 2 Aggregate Awards

Aggregate awards of monetary relief

30(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 or subclass members and may give judgment accordingly if

- (a) monetary relief is claimed on behalf of some or all class members or subclass 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 or subclass members can, in the opinion of the Court, reasonably be determined without proof by individual class members or subclass members.

(2) Before making an order under subsection (1), the Court is to 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 subsection (1), and
- (b) submissions that individual proof of monetary relief is required due to the individual nature of the relief.

Average or proportional share of aggregate awards

31(1) Where the Court makes an order under section 30, the Court may further order that all or a part of the aggregate monetary award be applied so that some or all individual class members or subclass members share in the award on an average or proportional basis if, in the opinion of the Court,

- (a) it would be impractical or inefficient
 - (i) to identify the class members or subclass members entitled to share in the award, or
 - (ii) to determine the exact shares that should be allocated to individual class members or subclass members,

and

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

(2) If an order is made under subsection (1), any class member or subclass member in respect of whom the order was made may, within the time provided for 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 member or subclass member from an average distribution, the Court must consider at least the following:

- (a) the extent to which the class member's or subclass member's individual claim varies from the average for the class or subclass;
- (b) the number of class members or subclass members seeking to be excluded from an average distribution;
- (c) whether excluding the class members or subclass members referred to in clause (b) would unreasonably deplete the amount to be distributed on an average basis.

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

Individual share of aggregate award

32(1) Where the Court orders that all or a part of an aggregate monetary award made under section 30(1) be divided among individual class members 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 endeavour to minimize the burden on class members or subclass members and, for that purpose, the Court may authorize any one or more of the following:

- (a) the use of standard proof of claim forms;
- (b) the submission of affidavit or other documentary evidence;
- (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 members or subclass members may make claims under this section.

(5) If a class member or subclass member fails to make a claim within the time set under subsection (4), that member may, with leave of the Court, make a claim under this section at a later time.

(6) The Court may grant leave under subsection (5) only if the Court 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) neither the defendant nor any class member, subclass member, representative plaintiff or other person will suffer substantial prejudice if leave is granted.

(7) If the Court considers it appropriate to do so, the Court may amend a judgment given under subsection 30(1) to give effect to a claim made pursuant to subsection (5) of this section, but in doing so the Court may not increase the amount of an aggregate monetary award.

Distribution

33(1) The Court may direct that the distribution of amounts awarded under this Division be carried out by any means that the Court considers appropriate.

(2) In giving directions under subsection (1), the Court may order any one or more of the following:

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

- (c) that the defendant pay into Court or some other depository that the Court considers appropriate the total amount of the defendant's liability to the class members until further order of the Court;
- (d) that the defendant pay into Court or some other depository that the Court considers appropriate the total amount of the defendant's liability to the subclass members until further order of the Court;
- (e) that any person other than the defendant distribute directly to the class members or subclass members, by any means authorized by the Court, the amount of monetary relief to which each class member or subclass member is entitled.

(3) In deciding whether to make an order under subsection (2)(a) and (b) or either of them, 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 member or subclass member is entitled is ascertainable using the records of the defendant.

(4) The Court is to supervise the enforcement proceedings in respect of judgments arising under this Act and the distribution of awards under this Division and may stay the whole or any part of an enforcement proceeding or distribution for a reasonable period on any terms or conditions that the Court 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 or conditions 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 the Court considers appropriate.

Undistributed award

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

(2) In deciding whether to make an order under subsection (1), the Court may consider any matter that the Court considers relevant, but in making its decision the Court must at least consider whether the distribution would result in unreasonable benefits to persons who are not class members or subclass members.

(3) The Court may make an order under subsection (1) whether or not all of the class members 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 members or subclass members, or
- (b) persons who may otherwise receive monetary relief as a result of the class proceeding.

(5) If any portion of an award that, under sections 31 and 32, is to be divided among individual class members or subclass members remains unclaimed or otherwise undistributed after the time provided for by the Court, the Court may make any order that the Court considers appropriate with respect to the distribution or other use or application of the unclaimed or undistributed portion of the award.

Division 3 Termination of Proceedings and Appeals

Settlement, discontinuance, abandonment and dismissal

35(1) A class proceeding may be settled, discontinued or abandoned, but only with the approval of the Court and subject to any terms or conditions that the Court considers appropriate.

(2) A settlement may be concluded in relation to the common issues affecting a subclass but only with the approval of the Court and subject to any terms or conditions that the Court considers appropriate.

(3) A settlement to which this section applies is not binding unless approved by the Court.

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

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

(6) In dismissing a class proceeding or in approving a settlement, discontinuance or abandonment of a class proceeding, the Court must consider whether notice should be given under section 21 and whether the notice should include any one or more of the following:

- (a) an account of the conduct of the proceeding;
- (b) a statement of the results of the proceeding;
- (c) a description of any plan for distributing any settlement funds.

Appeals

36(1) Any party may, without leave, appeal to the Court of Appeal from any of the following:

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

- (b) an order decertifying a proceeding;
- (c) a judgment on common issues;
- (d) an order made under Division 2 of this Part, other than an order that determines individual claims made by class members or subclass members.

(2) A class member or subclass member, a representative plaintiff or a defendant may appeal to the Court of Appeal any order

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

(3) If a representative plaintiff

- (a) does not appeal as permitted under this section within the time limit set under the Rules of Court for bringing an appeal, or
- (b) abandons an appeal commenced pursuant to this section,

any class member or subclass member for whom the representative plaintiff was appointed may apply to the Court of Appeal for leave to act as the representative plaintiff for the purposes of bringing or continuing an appeal or seeking leave to appeal.

(4) An application by a class member or subclass member for leave to act as the representative plaintiff under subsection (3) must be made within 30 days from the day of the expiry of the appeal period available to the representative plaintiff or by a later date as may be set by the Court of Appeal.

Part 4

Costs, Fees and Disbursements

Costs

37 With respect to any proceeding or other matter under this Act, the Court may award costs as provided for under the Rules of Court.

Contingency fee agreements

38(1) A lawyer may in respect of a proceeding under this Act enter into a contingency fee agreement with a representative plaintiff respecting the amount and manner of payment for services provided or to be provided and respecting any fees or disbursements in relation to those services and may provide for that payment to be by a gross sum, commission, percentage, salary or otherwise and at the same rate as or at a greater or lesser rate than the rate at which the lawyer would otherwise be entitled to be paid.

(2) A contingency fee agreement

- (a) must be in writing, and
- (b) must be signed by the lawyer and the representative plaintiff.

(3) A contingency fee agreement must be in precise and understandable terms and must set out at least the following:

- (a) the name and address of the representative plaintiff;
- (b) the name and address of the lawyer;
- (c) the nature of the claim;
- (d) the event or contingency on which fees are to be paid to the lawyer;
- (e) the manner in which the contingency fee is to be calculated;
- (f) the maximum fee payable, or the maximum rate to be used to calculate the fee, after deducting disbursements;
- (g) whether the representative plaintiff is responsible to pay disbursements and, if so, a general description of types of disbursements likely to be incurred, other than relatively minor disbursements;
- (h) a statement that, if the representative plaintiff gives notice in writing to the lawyer within 5 days after the representative plaintiff's copy of the contingency fee agreement is served on the representative plaintiff, the representative plaintiff may terminate the contingency fee agreement without incurring any liability for fees, but the

representative plaintiff is liable to reimburse the lawyer for reasonable disbursements.

(4) The contingency fee agreement must be witnessed by a person who sees the representative plaintiff actually sign the agreement, who must then swear an affidavit of execution.

(5) The representative plaintiff must be served with a copy of the signed contingency fee agreement within 10 days after the date on which the agreement is signed, and an affidavit of service to that effect must be executed by the person who serves the copy of the agreement.

(6) Subject to subsection (7), a representative plaintiff may terminate a contingency fee agreement on giving written notice of the termination to the lawyer and the payment of the fees and disbursements owing at the time of the termination or as otherwise agreed on by the representative plaintiff and the lawyer.

(7) A representative plaintiff may terminate a contingency fee agreement without incurring liability for payment of any fees related to or arising from the agreement, but is liable to pay reasonable disbursements, if the representative plaintiff, within 5 days after being served with the copy of the agreement, gives written notice of the termination to the lawyer.

(8) If a representative plaintiff terminates a contingency fee agreement,

- (a) the lawyer must give notice to the class members or subclass members for whom the representative plaintiff was appointed, and
- (b) any class member or subclass member may apply to the Court to act as the representative plaintiff for the purposes of bringing or continuing an action.

(9) This section applies whether or not a class member or subclass member is appointed as the representative plaintiff.

Court approval of contingency fee agreement

39(1) A contingency fee agreement respecting fees and disbursements between a lawyer and a representative plaintiff is not enforceable unless,

- (a) on the application of the lawyer made prior to or at the time of applying for certification of the proceeding, the agreement was approved by the Court, and
- (b) after
 - (i) the common issues have been resolved, in the case of a trial of the common issues, or
 - (ii) a settlement agreement has been approved, in the case of a class proceeding being settled,

the judge who presided over the trial of the common issues or approved the settlement agreement has, on the application of the representative plaintiff or, if the representative plaintiff fails to apply, on the application of the lawyer, reviewed the contingency fee agreement for the purposes of ensuring that the fees and disbursements payable under the agreement are fair and reasonable in the circumstances.

(2) An application under subsection (1) may,

- (a) unless the Court otherwise orders, be brought without notice to the defendant, or
- (b) if notice to the defendant is required, be brought subject to any terms or conditions respecting disclosure of the whole or any part of the agreement relating to any fees and disbursements as the Court may order.

(3) Unless the Court otherwise directs, an application under subsection (1)(b) may only be brought if the notice of the application sets out at least the following:

- (a) the actual amount of the fees and disbursements as calculated;
- (b) the right of any class member or subclass member to object;
- (c) the time and place at which the application is to be heard;
- (d) those steps or procedures that a class member or subclass member must take or carry out in order to be heard.

(4) Interest payable on fees under a contingency fee agreement approved under subsection (1) must be calculated in the manner set out in the agreement or, if not so set out,

(a) at the interest rate prescribed under the *Judgment Interest Act* for pecuniary damages, or

(b) at any other rate that the Court considers appropriate.

(5) Interest payable on disbursements under a contingency fee agreement approved under subsection (1) must be calculated in the manner set out in the agreement or, if not so set out,

(a) at the interest rate prescribed under the *Judgment Interest Act* for pecuniary damages, or

(b) at any other rate that 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 a contingency fee agreement that is enforceable pursuant to this section are a first charge on any settlement funds or monetary award.

(7) If a contingency fee agreement is not approved by the Court or the Court determines that the agreement should not be followed, the Court may

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

(b) direct that an inquiry, assessment or accounting under the Rules of Court be carried out to determine the amount owing, or

(c) direct that the amount owing be determined in any other manner not referred to in clause (a) or (b).

(8) Representative parties may seek funding of their costs and disbursements from other persons and organizations, including persons who are not members of the class.

Part 5 General

Limitation periods

40(1) Subject to subsection (3), any limitation period applicable to a cause of action asserted in a proceeding,

- (a) whether or not the proceeding is ultimately certified, 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 or subclass member for the purposes of that other proceeding, and
- (b) resumes running against the person when any of the clauses of subsection (2) become applicable in respect of that person as though he or she were 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 is suspended in favour of a class member or subclass member on the commencement of the proceeding and resumes running against the class member or subclass member when

- (a) the member opts out of the class proceeding,
- (b) a ruling by the Court has the effect of excluding the member from the class proceeding or from being considered ever to have been a 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 11,
- (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 any matter described in subsection (2), the limitation period resumes running

- (a) when the time for appeal has expired without an appeal's being commenced, or
- (b) if an appeal has been commenced, when the appeal has been finally disposed of.

Rules of Court

41(1) The Rules of Court apply to class proceedings.

(2) Notwithstanding subsection (1), where the Rules of Court are inconsistent with the provisions of this Act, the provisions of this Act prevail.

Application of Act

42(1) Subject to subsection (2), a proceeding may be certified whether the cause of action arose before or after this Act came into force.

(2) This Act does not apply to the following:

- (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;
- (c) a representative proceeding
 - (i) commenced before this Act came into force, or
 - (ii) for which a judgment, or other order that has the effect of concluding the proceeding, has been rendered before this Act came into force whether or not that judgment or order may be subject to an appeal commenced before or after this Act came into force.

Coming into force

43 This Act comes into force on Proclamation.