

**Uniform Law
Conference of Canada**

***Uniform Class
Proceedings Act***

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Uniform Class Proceedings Act

(1996 Proceedings)

PART I

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 issue**” 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.

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.

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.

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(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.

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.

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.

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.

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.

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.

Class Proceedings

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.

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.

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.

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.

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.

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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.

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.

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.

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.

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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.

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.

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.

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.

*Class Proceedings***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.

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.

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.

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.

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.

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(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).

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.

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.

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

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,
- (f) the presence of subclasses,
- (g) the places of residence of class members, and
- (h) any other relevant matter.

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

- (a) personal delivery,
- (b) mail,
- (c) posting, advertising, publishing or leafletting,
- (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,

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- (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.

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.

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,

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- (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.

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.

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.

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.

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.

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.

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.

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,

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- (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.

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.

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

*Class Proceedings***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.

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.

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(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.

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

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- (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.

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.

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(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.

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.

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 further or other order it considers appropriate.

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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.

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.

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.

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.

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.

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(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.

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 for orders granting certification. In that province, appeals from orders refusing certification may be brought without leave. 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.

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.

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(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.]

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.

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.

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- (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.

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.

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).

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(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.

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.

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,

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(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.

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