



INSURANCE

M A T T E R S

SUMMER 2004 VOL.3/ ISSUE #2

The Alberta Class Proceedings Act



On April 1, 2004, the Alberta *Class Proceedings Act* (the “Act”) came into force providing a new process for multiple parties with shared interests through collective legal action. The Act provides a potential solution to the lack of fairness and efficiency in previous multiple-party proceedings. It also clarifies key procedural elements of class proceedings ignored under the prior law such as certification, costs, discovery and appeals.

Generally, the Act aims for consistency, accessibility and fairness in the law governing multiple party proceedings. The Act sets out rules dictating when a class proceeding may be commenced, what groups of people can participate, how class proceedings will be run and how compensation will be addressed.

– continued on page 2

Class Proceedings Acts in Alberta, Ontario and British Columbia: Experiences and Comparisons5

CPA Comparison Chart.....Insert

Footnotes for The Alberta Class Proceedings Act.....Insert

Footnotes for Class Proceedings Acts in Alberta, Ontario and British Columbia: Experiences and Comparisons.....Insert

– continued from cover

While the reforms enacted under the Act are formally procedural in nature and do not create new substantive rights, the Act will have significant effects on multiple party proceedings in Alberta.

BEFORE THE ACT: THE COMMON LAW AND RULE 42

In Alberta, multiple proceedings prior to the Class Proceedings Act were governed largely by Rule 42 of the Alberta Rules of Court, the so-called “representative action rule,” intended to be used where multiple persons have identical or similar claims against a particular defendant.

Under this rule, if a “common interest” can be established then a representative party may sue on behalf of a group of plaintiffs or defend on behalf of a group of defendants. In *Western Canadian Shopping Centres Inc. v. Dutton*, the Supreme Court of Canada held that Rule 42 applies only where the following conditions are met:

- 1) the class is capable of clear definition;
- 2) there are issues of fact or law common to all class members;
- 3) success for one class member means success for all;
- 4) the class representative must adequately represent the class.¹

RELEVANT AREAS OF LAW

Class proceedings are relevant to litigation encompassing many areas of the law, including environmental, securities, consumer and competition, misrepresentation, wrongful dismissal, institutional abuse, pension issue cases, and price fixing cases.²

REASONS FOR THE NEW CLASS PROCEEDINGS ACT

The legislative scheme of Rule 42 and relevant case law lacked comprehensiveness to deal with the complexities of multiple-party legislation. This led the SCC to observe, in 1983, that there was a need for “a comprehensive legislative scheme for the institution and conduct of class actions”³. More specifically, there has been judicial criticism of the old law because it did not properly address assessment of damages, costs, access to pre-trial procedures by non-parties, effects of class actions on individual rights of actions, and the effects of limitation statutes.⁴

Courts and commentators have identified three major advantages of class action proceedings legislation: judicial economy, improved access to justice and behaviour modification.

The argument regarding judicial economy states that class actions allow the courts to deal efficiently, and relatively inexpensively with a large number of claims made by similarly situated persons who have all suffered injury or damages as a result of the actions of the same defendant. Conversely, class actions may allow for efficient and inexpensive disposition of a claim against a large number of defendants. This is especially true where the legislation provides for clear, predictable procedures.⁵

Courts and commentators have identified three major advantages of class action proceedings legislation: judicial economy, improved access to justice and behaviour modification.

The argument regarding improved access to justice holds many claims will not be individually litigated because of economic, psychological or social barriers. However, if class proceedings litigation creates a mechanism for bringing claims collectively, then an increased number of claimants may have access to the legal system. What’s more, studies show empirical evidence that class actions provide access to the justice system to a broader range of persons.⁶

Behaviour modification is based on the general argument that class proceedings legislation provides a mechanism for promoting class actions which, in turn, will deter potential defendants from engaging in harmful activity with the potential to lead to class actions.⁷

THE CLASS PROCEEDINGS ACT

Application of Act

The scope of the Act is set out in s. 42(1): a proceeding can be certified as a class

proceeding regardless of whether the cause of action arose before or after the Act came into force. The Act, however, does not apply to:

- a) a proceeding that may be brought in a representative capacity under another Act;
- b) a proceeding required by law to be brought in a representative capacity; or
- 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.

Commencing an action and certification

Under s. 2 of the Act one member of a class may commence a proceeding in the Court on behalf of the members of that class. The first necessary step is to apply to the Court for an order certifying the proceeding as a class proceeding and appointing a member of the class as the representative plaintiff. The representative plaintiff is generally responsible for the litigation of the proceeding on behalf of the plaintiff class. He or she is usually but not necessarily a member of the class⁸. An application for certification made by a plaintiff must be made within a certain period of time, generally within 90 days unless the Court gives leave⁹.

Under s. 3(1), a defendant, as well as a plaintiff to a proceeding, can also apply to have a proceeding certified as a class proceeding and have the court appoint a member of the class as representative plaintiff. A defendant is entitled to apply at any point during the proceedings.

Once an application for certification is made, the Court considers a number of requirements for certification:

- 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;
- 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 (s. 5).

In deciding whether or not to certify a proceeding, the Court is not entitled to refuse certification based on the following matters set out in s. 8:

- a) the relief 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 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.

Three elements of the certification requirements are likely to create sources of dispute in litigation: common issues, to advance the claim and notify class members, and show that a class proceeding is the “preferable procedure for the fair and efficient resolution of common issues”.

If the Court decides to certify a proceeding as a class proceeding, it will issue a certification order which contains any provisions that the Court considers appropriate, plus mandatory provisions regarding description of the class, an appointment of the representative plaintiff, the nature of the claims asserted by the class, the relief sought by the class, the common issues for the class, the manner and time for opting out of the proceeding, and the manner

– continued on page 4



Section 18(2) states that after discovery of the representative plaintiff(s), a defendant may, with leave of the Court, discover other class members.

– continued from page 3
and time within which a non-resident of Alberta may opt into the proceeding. Once the certification order has been issued the matter is a class proceeding under the Act.

DISCOVERY

Sections 18 and 19 of the Act deal with discovery, granting parties to a class proceeding the same rights of discovery under the Rules of Court against one another as they would have in any other proceeding. Section 18(2) states that after discovery of the representative plaintiff(s), a defendant may, with leave of the Court, discover other class members.

Under s. 18(5), the Court may direct the parties to propose which parties should be discovered, and may consequently direct the proposed parties to submit to discovery.

NOTICE

One of the key areas of concern is notice and the need to inform people who will directly or potentially be affected by a class action proceeding of its existence and development. In general notice is the responsibility of the representative plaintiff, unless the Court orders otherwise. The Court must approve any notice given under the Act. There are a variety of kinds of notice that may be required under the Act, all of which may result in costs. The Court may make any order regarding the apportionment of the costs of notice (see ss. 20 – 25).

DAMAGE AWARDS

Under s. 30, the Court can order an aggregate monetary award for a class, but only after providing the defendant with an opportunity to make submissions to the Court dealing with any matter touching on the proposed order, and only if the following conditions are met:

- 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 other subclass members.

If an aggregate award is ordered, the Court may have the authority to order that some or all class or subclass members share in the award on a proportional basis.

The Court may determine that individual claims are necessary to give effect to its orders as to damages and if this determination is made, must specify the procedures for determining those claims. The Court also has the authority to direct the distribution of awards in any way it deems appropriate and to apply any undistributed portion of an award in such a way as the Court believes would reasonably be expected to benefit class and subclass members (ss. 32 – 34).

There are a number of provisions in the Act relating to fees and costs. In Alberta, the Act creates a risk that a representative plaintiff will be held liable for costs, without providing any protection against costs such as a litigation fund designed to pay costs.

TERMINATION OF PROCEEDINGS

Unlike most proceedings, a class proceeding may only be settled, discontinued or abandoned with the approval of the Court and subject to terms the Court considers appropriate. More specifically, settlements in class proceedings under the Act are binding only if: approved by the Court; are binding on all class members only to the extent provided by the Court; and may involve notice if the Court so directs (s. 35).

APPEALS

Section 36 provides explicitly for a right of appeal without leave to the Court of Appeal from:

- 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, or

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

COSTS, FEES AND DISBURSEMENTS

There are a number of provisions in the Act relating to fees and costs. In Alberta, the Act creates a risk that a representative plaintiff will be held liable for costs, without providing any protection against costs such as a litigation fund designed to pay costs. This is different from acts in other jurisdictions, that provide some sort of protection against costs in class proceedings due to the potential for costs much higher than in typical proceedings. Further, in Alberta there are no provisions in the Act expressly exempting a defendant from liability for costs in a class proceeding.

Another cost issue stems from contingency fee agreements. Under s. 38, a lawyer may enter into a contingency fee agreement with a representative plaintiff involved in a class action proceeding, provided that the agreement is in writing, is signed by the lawyer and representative plaintiff, is sufficiently precise, and contains all of the required information enumerated in s. 38(3) of the Act. A representative plaintiff may terminate a contingency fee agreement by written notice. This termination may be effected without incurring liability for any costs other than reasonable disbursements if notice is given within five days of being served with a copy of the contingency agreement. More importantly, a contingency fee agreement between a lawyer and a representative plaintiff is not enforceable unless it has been approved by the Court at the time of certification and reviewed by the trial or settlement judge after common issues have been resolved or a settlement has been reached (s. 39).

OTHER MATTERS

Under s. 41, of the Act, the Rules of Court apply to class proceedings. However, if there is a conflict between the Rules of Court and the provisions of the Act, then the Act prevails. The Act contains a number of provisions relating to limitation periods contained in s. 40, including suspension of the limitation period if a party can reasonably assume that he or she is a party in another proceeding.■

Class Proceedings Acts in Alberta, Ontario and British Columbia: Experiences and Comparisons

While Alberta proclaimed its *Class Proceedings Act*¹ (“CPA”) governing class proceedings in force on April 1, 2004, similar acts have been in force in Ontario and British Columbia since the early to mid-90s². The CPAs in these three provinces are substantially similar to one another, but there are important differences that may influence Alberta’s experience.

CERTIFICATION

Plaintiff’s Class Proceeding

The first step in proceeding with a class action in Alberta, Ontario or B.C. is for one party to commence a court action on behalf of prospective class members. Any member of the prospective class may commence the process in Alberta and Ontario, but in B.C. only a resident of that province may do so³.

Once the proceeding has been commenced, an application must be made to the court to certify it as a class proceeding⁴. If the action is certified, the party making the application becomes the representative plaintiff for the class⁵. In Alberta and British Columbia, the court can certify a representative plaintiff who is outside the class if it is necessary to avoid a substantial injustice to the class. Section 2(6) of the Alberta CPA also allows an incorporated non-profit organization to act as representative plaintiff.

The deadline for the application for certification is virtually identical in each province, generally, the latter of 90 days from the service date of the Statement of Defence and the expiry of the prescribed service date for an undelivered Statement of Defence. The court can also give leave for any other deadline⁶.

The requirements for certification are virtually the same in all three provinces⁷. Interestingly, none of the requirements calls upon the court to assess the merit of the certification application, but some courts have commented otherwise. In *Hollick v. City of Toronto*⁸, the Ontario Court of Appeal stated there was “no error in looking beyond the pleadings and to the evidence presented to assist in the application of the criteria set forth” in the Ontario CPA⁹. The Supreme Court of Canada agreed on appeal, finding that the class representative must show some basis in fact for each of the certification requirements¹⁰. It appears that the merits of the action will be considered during the certification application, which is “intended to screen claims that are not appropriate for class action treatment”¹¹.

Defendant’s Class Proceeding

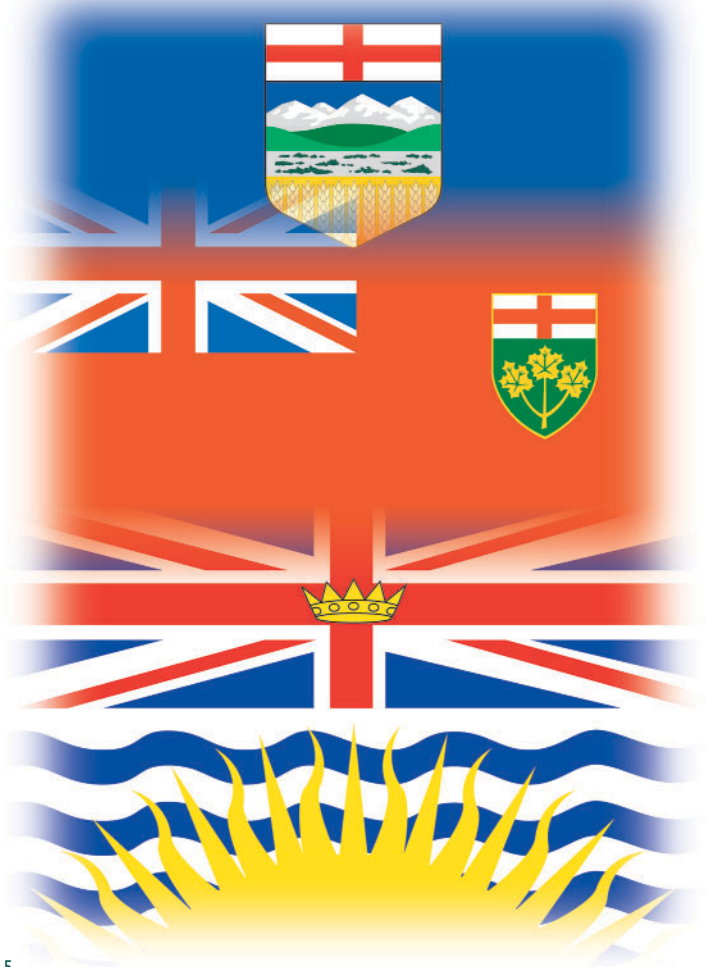
The provinces differ in their approach to defendant class proceedings. Each allows a defendant to make an application to the court to certify

the proceeding as a class proceeding and appoint a representative plaintiff². B.C. and Ontario require that the party be a defendant to two or more proceedings, but the Alberta CPA explicitly states that a defendant can apply regardless of whether or not more than one proceeding has been commenced against that defendant.

In Ontario, s. 4 of the CPA also provides that any party to a proceeding against multiple defendants can make an application to certify it as a class proceeding and appoint a representative defendant. The Alberta and B.C. CPAs do not provide for representative defendants in class proceedings.

Despite the availability of defendant class certification, the Ontario and B.C. experience has been almost exclusively related to plaintiff classes¹³.

– continued on page 6



– continued from page 5

Class Certification

While the criteria for certification are similar in every province, the provinces deal differently with their application. Sections 5(1) of the Ontario *CPA* and 4(1) of the B.C. *CPA* require the court to certify the class proceeding if the criteria stated in those sections are met. Section 5(1) of the Alberta *CPA* merely requires that the criteria be met in order for the certification order to proceed. In determining whether a class proceeding would be the “preferable procedure for the fair and efficient resolution of the common issues,” both Alberta and B.C. provide specific guidelines that the court must consider¹⁴. Ontario does not provide similar guidelines.

Motions

The Ontario *CPA* contains a unique stipulation that the same judge cannot hear motions before the trial of common issues and preside at the trial of those issues without consent of the parties¹⁵. The judge hearing motions serves as a case manager and often deals with pre-certification hearings where counsel discuss issues and likely make motions¹⁶. This led to judges becoming adept at handling procedural and substantive issues involved in pre-trial proceedings¹⁷.

In Alberta, there is no similarly express provision. Under s. 41, the Rules of Court apply unless inconsistent with the *CPA*. Thus, any case management system currently being used in Alberta could be used for proceedings under the *CPA* unless inconsistent with the Rules of Court. Case management is widely used in Canada and the normal rule is that the same judge hears all pre-trial applications can also preside at the trial of common issues¹⁸. In Alberta, the case management judge is not specifically prohibited from hearing the trial itself.

OPTING-IN AND OPTING-OUT

The determination of who is and who is not a member of a class under a *CPA* is important because all provinces provide that all class members are bound by any judgment regarding common issues¹⁹.

The Ontario *CPA* does not make a distinction between residents and non-residents²⁰. Parties that meet the criteria for a class are included as part of that class unless they opt-out, giving rise to what has been called a “national” class action including residents of other jurisdictions²¹. To date, Ontario and B.C. courts have shown a willingness to certify classes affecting parties outside of their respective provinces²². This raises the constitutional question of whether a provincial legislature can make laws affecting residents of other jurisdictions. The Supreme Court of Canada held in *Moran v. Pyle National (Canada)*²³ that a province could assert jurisdiction over a non-resident where there is a “real and substantial connection” between the subject of the action and the particular province. The reasoning in *Moran* was agreed with and extended in scope from tort to contract liability in *Morguard Investments Ltd. v. De Savoye*²⁴.

The *CPAs* of Alberta and B.C. both make a distinction between residents and non-residents in class proceedings. In both provinces, residents that meet the criteria for the class are initially considered to be members of the class but can opt-out, in which case they will not be bound by the judgment or settlement for the class²⁵. Non-residents in both provinces must opt-in to become members of the class, avoiding the jurisdictional problem of a national class by requiring non-resident class members to consent to the jurisdiction of the court²⁶. Section 7(3) of the Alberta *CPA* and s. 6(2) of the B.C. *CPA* require that any class made up of resident and non-resident persons be divided into resident and non-resident subclasses.

All provinces provide for existing class members to opt-out of class proceedings. Ontario and B.C. require the member to comply with the certification order to opt-out²⁷, but Alberta additionally allows a member to opt-out when permitted by the *CPA*, by the certification order or by the court²⁸.

COSTS

The cost of bringing a class proceeding can be substantial and the determination of who bears the cost of legal fees and disbursements is important. In the Ontario *CPA*, the court has discretion to award court costs against a plaintiff and may consider whether the class proceeding was a “test case, raised a novel point of law or involved a matter of public

interest” in its determination²⁹. Class members other than the representative party cannot be liable for costs except when resolving individual claims³⁰. Although it is possible, Ontario courts have generally not awarded costs where a reasonably pursued class action was either not certified or ultimately unsuccessful³¹. Plaintiffs in B.C. are more protected from the imposition of costs than those in any other jurisdiction. Under s. 37 of the B.C. *CPA*, costs can be awarded against a party if the class proceeding was vexatious or frivolous, if there was abusive conduct on the part of a party, if there has been an improper or unnecessary step taken for the purpose of delay or increasing cost, or if there are exceptional circumstances. As in Ontario, class members other than the representative party are not liable for costs³². In Alberta, s. 37 of the *CPA* gives the court discretion to award costs as provided for under the Rules of Court. Moreover, unlike Ontario and B.C., Alberta class members other than the representative party could be held liable for costs without providing any protection or reimbursement³³. This provision is unique in Canada as it exposes the representative plaintiff to costs without providing protection against them³⁴.

Ontario has established a Class Proceedings Fund³⁵. The Fund is to support plaintiffs in class proceedings for disbursements and to pay court costs awarded against a plaintiff that has received financial support from the Fund³⁶. The Fund was initially endowed with \$500,000³⁷ and requires a 10% levy from any judgment or settlement in favour of a funded party to be repaid to the Fund along with the amount of financial support paid by the Fund³⁸. Despite this levy, the fund balance was only approximately \$685,000 as of December 2000.

Case management is widely used in Canada and the normal rule is that the same judge hears all pre-trial applications can also preside at the trial of common issues. In Alberta, the case management judge is not specifically prohibited from hearing the trial itself.



Settlement of class proceedings has become an attractive option to both plaintiffs and defendants.

As noted by Professor Garry D. Watson, Q.C., there had been 22 applications as of April 2001. Of these, only eight were approved for funding and only one levy had been received³⁹. Professor Watson comments that, in addition to relatively few applications, none of the “big, successful” cases had applied for funding, contributing to a low Fund balance⁴⁰. The 2002 Annual Report of the Law Foundation of Ontario shows that there were only two applications in 2001 and three in 2002, and only one of the 2001 applications received funding⁴¹. However, the Fund balance had grown to \$3,492,427 as of December 2002, mainly due to a levy of \$2,756,860 resulting from a large settlement for a funded plaintiff. Alberta and B.C. do not have similar funds to cover costs and disbursements of parties in class proceedings.

FEES

The *CPA*s of Ontario and B.C. provide that any arrangement regarding fees and disbursements must be in writing. It must state the terms of the arrangement, the method by which payment is to be made, and give an estimate of the expected fee whether it is contingent or not⁴². The Alberta *CPA* is silent on fee arrangements other than contingency arrangements, which it similarly requires to be in writing⁴³.

All of the provinces allow contingency fee arrangements⁴⁴. In B.C., however, contingency agreements are widely used and the *CPA* does not contain a specific permissive section for class proceedings. Unlike Ontario and British Columbia, the Alberta *CPA* contains a provision that “a contingency fee agreement must be in precise and understandable terms” and requires that specific information be included (s. 38). Alberta also provides for the termination of a contingency fee

arrangement by the representative plaintiff, whereas Ontario and B.C. do not⁴⁵. The Ontario *CPA* is the only Act that specifically allows fees to be increased from the base rate by a multiplier⁴⁶.

Ontario and B.C. require any agreement regarding fees and disbursements to be approved by the court to be enforceable⁴⁷, whereas Alberta’s *CPA* only requires contingency fee agreements to be approved by the court. However, Alberta requirements are stricter: the contingency arrangement must be approved prior to or at the time certification is applied for, and must be approved again upon judgment or settlement to ensure that the agreement is fair and reasonable in the circumstances⁴⁸. If court approval is not obtained, all provinces contain provisions allowing the court to determine the amount owing to the lawyer, direct an inquiry into the amount owing, or direct that the amount owing be determined in any other manner⁴⁹.

SETTLEMENT

Settlement of class proceedings has become an attractive option to both plaintiffs and defendants. It can reduce costs and uncertainty, bring forward payment dates for claims and stop the accumulation of high pre-settlement interest⁵⁰.

All of the provincial *CPA*s expressly provide that no settlement is binding unless approved by the court⁵¹. In Ontario, the court has “made it clear that the settlement of a class proceeding will be approved only if the result appropriately protects the interests of absent class members”⁵².

– continued on back cover

– continued from page 7

It is not uncommon in Ontario and B.C. for a defendant conditionally to admit liability and agree on a settlement, subject to the proceeding being certified by the court⁵³. As stated by the B.C. Supreme Court in *Haney Iron Works Ltd. v. Manufacturers Life Insurance Co*⁵⁴, requiring a defendant either to challenge a certification application or to waive its right to do so will increase time and expense, frustrating the goal of judicial efficiency. The court determined that:

the goal of efficient judicial handling of these types of cases is best achieved by affirming the right of a defendant to support an application for certification and settlement approval while at the same time preserving its right to contest certification in the event that the settlement is not approved⁵⁵.

Unlike the Ontario or B.C. *CPA*s, s. 4 of the Alberta *CPA* expressly provides for settlement contingent upon certification, and designates that a class pursuing such an arrangement constitutes a “settlement class.”

A certification order can also be made contingent upon a subsequent settlement and of no effect if the settlement is not agreed upon. In *Knowles v. Wyeth-Ayerst Canada Inc.*⁵⁶, the court gave preliminary approval for a settlement but held that if the court did not give final approval to the settlement, the court, the certification and settlement order was void and the parties restored to their previous legal position⁵⁷.

DISTRIBUTION OF AWARDS

All Acts provide that the court may distribute an award in any manner that it considers appropriate⁵⁸. In Alberta and B.C., any

award undistributed within the time set by the court can be applied in any manner that would reasonably be expected to benefit class or subclass members⁵⁹. In Ontario, however, any undistributed award shall automatically be returned to the party against whom the award was made without any order from the court⁶⁰.

Unlike the Ontario or B.C. CPA’s, s. 4 of the Alberta CPA expressly provides for settlement contingent upon certification, and designates that a class pursuing such an arrangement constitutes a “settlement class.”

APPEALS

Alberta and B.C. contain similar provisions regarding appeals⁶¹. Any party may make appeals regarding common issues in the class proceeding. In Alberta, appeal “without leave” is expressly provided. In Ontario, a party can appeal a certification order only with leave of the Ontario Court (General Division)⁶². In all provinces, any class or subclass member may bring an

appeal if the representative plaintiff does not⁶³. In Ontario, however, a class member must first make an application to the court for leave to act as the representative plaintiff before bringing the appeal⁶⁴.

LIMITATION PERIODS

Under the Ontario *CPA*, any limitation period applicable to a cause of action is suspended upon the commencement of any class proceeding⁶⁵. In B.C., the limitation period is only suspended upon the application for certification being granted⁶⁶. Section 40 of the Alberta *CPA* expressly provides that the limitation period is suspended upon the commencement of a class proceeding whether or not the proceeding is certified.▶

o n r e c o r d

INSURANCE MATTERS AND OTHER ISSUES OF ON RECORD ARE AVAILABLE ON OUR WEB SITE WWW.BDPLAW.COM
For a complete list of authorities used in drafting these articles please contact the Editor:

Insurance Matters, Editor-in-Chief

Donald J. Chernichen, Q.C. djc@bdplaw.com(403)260-0101

Insurance Matters, Editor

Joan D. Bilsland jdb@bdplaw.com(403)260-5706

Insurance Matters, Managing Editor

Jamie Niessen jamie@bdplaw.com...(403)260-0219

Contributing Writers & Researchers:

Aaron Rogers and Sarah Weingarten

Contact

For additional copies, address changes, or to suggest articles for future consideration, please contact our Catherine Leitch in our Marketing Department at (403) 260-0345 or at cat@bdplaw.com.

General Notice

On Record is published by BD&P to provide our clients with timely information as a value-added service. The articles contained here should not be considered as legal advice due to their general nature. Please contact the authors, or other members of our insurance team directly for more detailed information or specific professional advice.

w w w . b d p l a w . c o m

CPA Comparison Chart

CPA Comparison Chart	
Commencement	
ALL CPA ACTS >	s. 2(1)
ALBERTA CPA >	Any prospective member of class may commence
ONTARIO CPA >	Same as Alberta
BC CPA >	Only resident of BC may commence
Certification	
ALL CPA ACTS >	s. 2(2) – Application must be made for certification
ALBERTA CPA >	s. 2(4) – Court can certify representative plaintiff not part of class to avoid substantial injustice to class
ONTARIO CPA >	Same as Alberta
BC CPA >	s. 2(6) – Incorporated not-for-profit can act as representative plaintiff if appropriate
Certification Requirements	
ALL CPA ACTS >	(a) pleadings disclose cause of action (b) identifiable class of 2 or more persons (c) claims of class members raise common issues; (e) person eligible to be representative plaintiff
ALBERTA CPA >	s. 5(1) – following criteria must be met for certification: (d) class procedure would be preferable procedure for fair and efficient resolution of common issues
ONTARIO CPA >	s. 5(1) – Court shall certify if: (d) class procedure would be preferable procedure resolution of common issues
BC CPA >	s. 4(1) – Court must certify if: (d) Same as Alberta
Defendant Class Proceedings	
ALL CPA ACTS >	Defendant can apply to certify class proceeding
Opting-In/Out	
ALL CPA ACTS >	All class members bound by judgment re common issues
ALBERTA CPA >	s. 17(1)(a) – residents included in class unless opt-out s. 17(1)(b) – non-residents not included in class unless opt-in
ONTARIO CPA >	s. 9 – no distinction between residents and non-residents
BC CPA >	Same as Alberta
Costs	
ALBERTA CPA >	s. 37- can awards costs as per Rules of Court
ONTARIO CPA >	s. 31(1) – can award costs under Courts of Justice Act s. 31(2) – class members other than representative plaintiff not liable for costs Class Proceedings Fund – support plaintiffs re disbursements, court costs
BC CPA >	s. 37 – can only award costs if proceeding vexatious, frivolous, abusive conduct, improper or unnecessary increase in cost or delay s. 37(4) – class members other than representative plaintiff not liable for costs
Fees	
ALL CPA ACTS >	Contingency fee agreements allowed
Settlement	
ALL CPA ACTS >	No settlement binding unless approved by court
ALBERTA CPA >	s. 35(3)
ONTARIO CPA >	S. 29(2)
BC CPA >	S. 35(3)
Distribution of Award	
ALL CPA ACTS >	Court distribute award in appropriate manner
ALBERTA CPA >	s. 33(1)
ONTARIO CPA >	s. 26(1)
BC CPA >	s. 33(1)
Appeals	
ALL CPA ACTS >	Any class member may bring appeal if representative plaintiff does not

THE ALBERTA CLASS PROCEEDINGS ACT

Footnotes

¹*Western Canadian Shopping Centres Inc. v. Dutton* 2 S.C.R. 534, 201 D.L.R. (4th) 385; 1 W.W.R. 1 (WleC) (“Dutton”). For other leading cases on the application of Rule 42, see: *Naken v. General Motors* (1983), 144 D.L.R. (3d) 385 (S.C.C.) (“Naken”); *Korte v. Deloitte, Haskins and Sells* (1993), 8 Alta. L.R. (3d) 337 (C.A.).

²Michael A. Eizenga, Michael J. Peerless and Charles M. Wright, *Class Actions Law and Practice* (Markham: Butterworth’s, 2004) at 2-11-2-31.

³Naken, *supra* note 1 in Alberta Law Reform Institute, *Class Actions: Final Report No. 85* (Edmonton: Alberta Law Reform Institute, 2000) at 10 (“ALRI”).

⁴ALRI, *supra* note 3 at 16, discussing the Supreme Court of Canada decision in *Naken*, *supra* note 1.

⁵Eizenga, *supra* note 2 at 1.2.

⁶*Ibid.*, at 1.3.

⁷*Ibid.*, at 1.3.

⁸ss. 2(4),(6).

⁹s. 2(3).

CLASS PROCEEDINGS ACTS IN ALBERTA, ONTARIO AND BRITISH COLUMBIA: EXPERIENCES AND COMPARISONS

Footnotes

¹*Class Proceedings Act*, S.A. 2003, c. C-16.5.

²*Class Proceedings Act*, 1992, S.O. 1992, c. 6 and *Class Proceedings Act*, R.S.B.C. 1996, c. 50.

³s. 2(1) of all Acts.

⁴s. 2(2) of all Acts.

⁵s. 2(4) of both Acts.

⁶s. 2(3) of all Acts.

⁷Alberta *CPA*, s. 5(1); Ontario *CPA*, s. 5(1); BC *CPA*, s. 4(1).

⁸(1999), 181 D.L.R. (4th) 426, 46 O.R. (3d) 257 (C.A.).

⁹*Ibid.*, at para. 12.

¹⁰*Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 25.

¹¹*Robertson v. The Thompson Corporation et al.*, [1999] O.J. No. 908, 43 O.R. (3d) 389 (Gen. Div.).

¹²Alberta *CPA*, s. 3(1); Ontario *CPA*, s. 3; BC *CPA*, s. 3.

¹³S. Gordon McKee & Sharissa M. Ellyn, Blake, Cassels & Graydon LLP, “An Overview of Class Action Legislation in Canada” (March 5-6, 2002) at 4, online: Insight Information <<http://inconference.insightinfo.com>> (“McKee”).

¹⁴Alberta *CPA*, s. 5(2); BC *CPA*, s. 4(2).

¹⁵Ontario *CPA*, ss. 34(1) and 34(3).

¹⁶Glenn Gibson, “Class Action Lawsuits in Canada” (May, 2001) WP 44.

¹⁷Charles F. Scott, Lax O’Sullivan Scott LLP, “National Class Actions: Some Practical Realities and Approaches for Settlement from the Ontario Perspective” (January 24-25, 2002) at 4, online: Insight Information <<http://inconference.insightinfo.com>> (“Scott”).

¹⁸Alberta Law Reform Institute, *Class Actions: Final Report No.85* (Edmonton: Alberta Law Reform Institute, 2000) at 110 (“ALRI”).

¹⁹Alberta *CPA*, s. 27; Ontario *CPA*, s. 27; BC *CPA*, s. 26.

²⁰see Ontario *CPA*, s. 9.

²¹Craig Jones, *Theory of Class Actions* (Chapter 7: Features and Problems of Canadian Class Action Regimes) at 1 (QL); ALRI at 94.

²²Steven Leitel, MacLeod Dixon LLP, “National Class Actions – the Canadian Conundrum” (Paper presented to the Legal Education Society of Alberta: Class Proceedings: Bill 25, 2003) [unpublished] at 1; McKee at 6; Scott at 4.

²³[1975] 1 S.C.R. 393.

²⁴[1990] 3 S.C.R. 1077.

²⁵Alberta *CPA*, s. 17(1)(a); BC *CPA*, s. 16(1).

²⁶Alberta *CPA*, s. 17(1)(b); BC *CPA*, s. 16(2).

²⁷Ontario *CPA*, s. 9; BC *CPA*, s. 16(1).

²⁸Alberta *CPA*, s. 17(1)(e).

²⁹Ontario *CPA*, s. 31(1).

³⁰*Ibid.*, s. 31(2).

³¹Kirk M. Baert, Koskie Minsky, “Cost in Class Proceedings” (January 27, 2003) at 10, online: Insight Information <<http://inconference.insightinfo.com>> Clint G. Docken, Q.C., Docken & Company, “Costs in Representative and Class Actions: The Big Chill” (Paper presented to the Legal Education Society of Alberta: Class Proceedings: Bill 25, 2003) [unpublished] at 4 (“Docken”).

³²BC *CPA*, s. 37(4).

³³*Law Society Act*, R.S.O. 1990, c. L.8, s. 59.1(1) (“*Law Society Act*”).

³⁴Docken at 2.

³⁵*Law Society Act*, s. 59.1(1).

³⁶*Ibid.*, s. 59.1(2).

³⁷*Ibid.*, s. 59.1(1).

³⁸*Law Society Act*, O. Reg. 771/92, s. 10.

³⁹“Fee Shifting in Ontario Class Actions and the Failure of Ontario’s Class Proceedings Fund to Meet its Intended Purpose” (Paper presented to the First Annual National Class Action Symposium: Class Actions: Where Are We At and Where Are We Going?, April 20 & 21, 2001) [unpublished] at 3.

⁴⁰*Ibid.*, at 4.

⁴¹The Law Foundation of Ontario, at 6, online: <<http://www.lawfoundation-on.org/lawfoundationhome.htm>>

⁴²Ontario *CPA*, s. 32(1); BC *CPA*, s. 38(1).

⁴³Alberta *CPA*, s. 38(2).

⁴⁴Alberta *CPA*, s. 38; Ontario *CPA*, s. 33(1).

⁴⁵*Ibid.*, s. 38.

⁴⁶Ontario *CPA*, s. 33(4).

⁴⁷Ontario *CPA*, s. 32(2); BC *CPA*, s. 38(2).

⁴⁸Alberta *CPA*, s. 39(1)

⁴⁹Alberta *CPA*, s. 39(7); Ontario *CPA*, s. 32(4); BC *CPA*, s. 38(7)

⁵⁰Scott at 5.

⁵¹Alberta *CPA*, s. 35(3); Ontario *CPA*, s. 29(2), BC *CPA*, s. 35(3)

⁵²Patricia D.S. Jackson, “Abuses Described in Recent U.S. Study Unlikely Here” (November 2000) 20 *Lawyers Weekly* 25 (QL).

⁵³Craig Jones, *Theory of Class Actions* (Chapter 7: Features and Problems of Canadian Class Action Regimes) at 1 (QL).

⁵⁴[1998] B.C.J. No. 2936, 169 D.L.R. (4th) 565 at para. 14 (S.C.).

⁵⁵*Ibid.*, at para. 15.

⁵⁶[2001] O.J. No. 1812, 16 C.P.C. (5th) 330 (Sup. Ct. J.) at para. 53.

⁵⁷*Ibid.*, at para. 53.

⁵⁸Alberta *CPA*, s. 33(1); Ontario *CPA*, s. 26(1); BC *CPA*, s. 33(1).

⁵⁹s. 34(1) of both Acts.

⁶⁰Ontario *CPA*, s. 26(10).

⁶¹s. 36 of both Acts.

⁶²Ontario *CPA*, s. 30(2)

⁶³Alberta *CPA*, s. 36(3); BC *CPA*, s. 26(2)

⁶⁴Ontario *CPA*, ss. 30(4) and 30(5).

⁶⁵Ontario *CPA*, s. 28(1).

⁶⁶BC *CPA*, s. 39(1)