

UNIFORM CLASS PROCEEDINGS ACT (AMENDMENT) 2006

1 *Section 1 is amended by adding the following definition:*

“multi-jurisdictional class proceeding” means a proceeding that

(a) is brought on behalf of a class of persons that includes persons who do not reside in [enacting jurisdiction]; and

(b) is certified as a class proceeding under Part 2.

Comment: ‘Multi-jurisdictional class proceeding’ refers to class actions that involve class members who do not reside in the certifying jurisdiction. With the broad availability of class actions in Canada it is possible that overlapping multi-jurisdictional class actions concerning the same or similar subject matter could be commenced in several different Canadian jurisdictions. As a result, potential class members may find themselves presumptively included in more than one class action in more than one jurisdiction and consequently subject to conflicting determinations. Further, defendants and class counsel may be faced with uncertainty as to the size and composition of the class. In addition, there may be difficulty in determining with certainty which class members will be bound by which decisions. The amendments to the Act modify the existing class action process to resolve the problem of multiplicity in multi-jurisdictional class proceedings.

2 *Subsections 2(1) and (2) are replaced with the following:*

Plaintiff’s class proceeding

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

2(2) The member who commences a proceeding under subsection (1) must

(a) apply to the court for an order

(i) certifying the proceeding as a class proceeding, and

(ii) subject to subsection (4), appointing the member as the representative plaintiff for the class proceeding; and

(b) give notice of the application for certification to

(i) the representative plaintiff in any multi-jurisdictional class proceeding, and

(ii) the representative plaintiff in any proposed multi-jurisdictional class proceeding,

commenced elsewhere in Canada that involves the same or similar subject matter.

Comment: To facilitate the provision of notice in section 2(2)(b), a Canadian Class Proceedings Registry is to be established as a searchable electronic database of class proceedings. The Registry would include all class action filings and annotation of any subsequent material events. It would be operated by an appropriate national body. Counsel applying for certification of an action would be responsible for providing the relevant information at the time the statement of claim is filed and for updating the information at certification, and/or when material events occur.

3 *The following is added after section 3:*

Plaintiff in other proceeding may appear

3.1 **A person who receives notice of an application for certification under clause 2(2)(b) may make submissions at the certification hearing.**

Comment: A plaintiff in a class proceeding who receives notice under section 2(2)(b) may then apply to the make submissions to the court considering certification of the other class proceeding.

4 *Section 4 is amended*

(a) by renumbering it as subsection 4(1);

(b) by striking out “The court must certify” and substituting “Subject to subsections (2) and (3), the court must certify”; and

(c) by adding the following as subsections 4(2) and 4(3):

4(2) **If a multi-jurisdictional class proceeding or a proposed multi-jurisdictional class proceeding has been commenced elsewhere in Canada that involves the same or similar subject matter to that of the proceeding being considered for certification, the court must determine whether it would be preferable for some or all of the claims of the proposed class members to be resolved in that proceeding.**

4(3) **When making a determination under subsection (2), the court must**

(a) be guided by the following objectives:

(i) ensuring that the interests of all parties in each of the relevant jurisdictions are given due consideration,

(ii) ensuring that the ends of justice are served,

(iii) where possible, avoiding irreconcilable judgments,

(iv) promoting judicial economy; and

(b) consider all relevant factors, including the following:

(i) the alleged basis of liability, including the applicable laws,

(ii) the stage each of the proceedings has reached,

(iii) the plan for the proposed multi-jurisdictional class proceeding, including the viability of the plan and the capacity and resources for advancing the proceeding on behalf of the proposed class;

(iv) the location of class members and class representatives in the various proceedings, including the ability of class representatives to participate in the proceedings and to represent the interests of class members,

(v) the location of evidence and witnesses.

Comment: In an effort to reduce the problems caused by overlapping multi-jurisdictional class actions, section 4(3) is added to the Act. This provision assists both the certifying court and a subsequent court in determining whether a related class action in another jurisdiction may be the most suitable forum. It sets out the overarching objective – to consider which jurisdiction would be the most suitable forum based on the interests of all the parties and the ends of justice, including the risk of irreconcilable judgments and judicial economy. It then outlines criteria that a court is to consider in making this determination.

5 *The following is added after section 4:*

Orders in multi-jurisdictional certification

4.1(1) **The court may make any order it considers appropriate in an application to certify a multi-jurisdictional class proceeding, including an order**

(a) certifying the proceeding as a multi-jurisdictional class proceeding if

(i) the criteria in subsection 4(1) have been satisfied, and

(ii) having regard to subsections 4(2) and (3), the court determines that [enacting jurisdiction] is the appropriate venue for the multi-jurisdictional class proceeding;

(b) refusing to certify the proceeding if the court determines that it should proceed as a multi-jurisdictional class proceeding in another jurisdiction; or

(c) refusing to certify a portion of a proposed class if that portion of the class contains members who may be included within a proposed class proceeding in another jurisdiction.

4.1(2) **If the court certifies a multi-jurisdictional class proceeding, it may**

- (a) **divide the class into resident and non-resident subclasses;**
- (b) **appoint a separate representative plaintiff for each subclass; and**
- (c) **specify the manner in which and the time within which members of each subclass may opt out of the proceeding.**

Comment: The addition of section 4.1(1) provides that a court considering certification has the flexibility to consider a range of orders; not simply whether or not to certify a multi-jurisdictional class proceeding. It may also refuse to certify a portion of the proposed class who may be included within a pending or proposed class proceeding in another jurisdiction. Furthermore, depending on the nature of the claims, a court could determine that it is the most suitable forum for the resolution of all or part of the common issues, while assessment of other individual issues should be determined by other fora.

6 *Subsection 6(2) is repealed.*

7 *Subsection 8(1) is amended by adding “and” at the end of clause (f) and repealing clause (g).*

8 *Section 16 is replaced with the following:*

Opting out

16 **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.**

Comment: The amendments to section 16 reflect the recommendation that an opt-out mechanism be adopted for a class that includes class members residing outside the jurisdiction. The reasons for this recommendation are as follows:

- (a) There are strong policy reasons in favour of an opt-out mechanism;
- (b) There is diminished risk that such a mechanism would be found to be unconstitutional; and,
- (c) There is no real reason for treating members of a multi-jurisdictional class differently from those of an intra-provincial class.

9 *Clause 19(6)(c) is repealed.*