



Submission to  
**Ministry of  
Attorney General**  
regarding

***CLASS PROCEEDINGS ACT, R.S.B.C. 1996, C. 50***

**Issued by:**

**Class Action Section  
Canadian Bar Association  
British Columbia Branch  
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## **PREFACE**

The Canadian Bar Association nationally represents over 35,000 members and the British Columbia Branch (the “CBABC”) has over 6,500 members. Its members practise law in many different areas and the CBABC has established 74 different Sections to provide a focus for lawyers who practise in similar areas to participate in continuing legal education, research and law reform. The CBABC also establishes special committees from time to time to deal with issues of interest to the CBABC.

This submission was prepared by a special committee of the CBABC Class Action Section (the “CBABC Class Action Section”). The comments expressed in this submission reflect the views of the CBABC Class Action Section only and are not necessarily the views of the CBABC as a whole.

## SUBMISSIONS

### **Introduction**

The *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (the “Act”) permits a member of a class who is resident in British Columbia to commence proceedings in court on behalf of that class. Currently, the Act does not allow for national opt out class actions. That means the Act does not expressly permit a British Columbia court to certify, on an opt-out basis, a class that includes class members residing or located outside of British Columbia.

The CBABC Class Action Section recommends that the government amend the Act to allow for national opt out class actions so that the Act would expressly permit British Columbia courts to certify, on an opt-out basis, a class that includes class members residing or located outside of British Columbia.

In October 2011, the CBABC Class Action Section met to discuss this amendment. After hearing from both sides of the Bar on this issue, we voted to recommend this amendment. We attach a copy of our signed resolution.

Permitting national opt out class actions for British Columbia, would bring British Columbia in line with the vast majority of provinces and territories, including Alberta, which recently implemented a similar amendment to its class

proceedings. This amendment would also be consistent with the recommendations of the Uniform Law Conference of Canada (“ULCC”):

- Report Of The Uniform Law Conference Of Canada’s Committee On The National Class And Related Interjurisdictional Issues: Background, Analysis, And Recommendations (March 9, 2005);<sup>1</sup> and
- Supplementary Report On Multi-Jurisdictional Class Proceedings In Canada (The Special Working Group on Multi-Jurisdictional Class Proceedings) (August, 2006).<sup>2</sup>

In 2011, the Canadian Bar Association National Task Force on Class Actions released the Consultation Paper: Canadian Judicial Protocol for the Management of Multijurisdictional Class Actions.<sup>3</sup> This Consultation Paper provides useful background on the need for consistent interlocking legislation providing for national opt-out class proceedings.

We also attach a copy of the recent Alberta amending legislation, which would be the same structure we recommend for British Columbia.<sup>4</sup>

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<sup>1</sup> Available at: [http://ulcc.ca/en/poam2/National\\_Class\\_Actions\\_Rep\\_En.pdf](http://ulcc.ca/en/poam2/National_Class_Actions_Rep_En.pdf).

<sup>2</sup> Available at: [http://ulcc.ca/en/poam2/National\\_Class\\_Actions\\_Supplementary\\_Report\\_En.pdf](http://ulcc.ca/en/poam2/National_Class_Actions_Supplementary_Report_En.pdf).

<sup>3</sup> Available at: [http://www.cba.org/CBA/ClassActionsTaskForce/PDF/Consultation\\_eng.pdf](http://www.cba.org/CBA/ClassActionsTaskForce/PDF/Consultation_eng.pdf).

<sup>4</sup> *Class Proceedings Amendment Act, 2010*, S.A. 2010, c. 15 (in force March 1, 2011). Available as consolidated version at: <http://canlii.org/en/ab/laws/stat/sa-2003-c-c-16.5/latest/sa-2003-c-c-16.5.html>.

## **The Nature of the Problem and the Solution**

At present, British Columbia only allows a national “opt in” class proceeding.

This effectively means that for the vast majority of cases, a British Columbia class proceeding can only include British Columbia residents, regardless of whether the case has national implications.

The majority of provinces and territories have national “opt out” class proceedings, which allow their courts to certify class proceedings that include Canadians from other provinces, including British Columbia.

The key recommendations of the ULCC reports were that all provinces should change their legislation to permit the certification of multijurisdictional class action on an opt-out basis, and require that notice be given to counsel in similar class actions in other provinces before a certification motion was heard. The expectation was that if there was a level playing field among provinces and systems in place to ensure that courts and counsel knew what was happening in other jurisdictions, the usual principles of comity could then be relied upon to avoid and resolve conflicts. This proposed amendment would promote national consistency and create an even playing field for British Columbian citizens and courts.

## National Consistency

At this time, all provinces with class action legislation allow national opt out class actions save for Newfoundland, New Brunswick and British Columbia. Most recently, on March 1, 2011, Alberta joined the ranks of provinces allowing national opt out class actions.

Ontario was the first province to allow national opt out class actions. Although their statute did not address this issue directly, courts began certifying such actions as early as 1995.<sup>5</sup> As such, many Ontario class actions certified since then have been national in scope.

Quebec's statute did not directly address this issue either. However, as early as 1992, Quebec courts certified national opt out actions.<sup>6</sup> More recently, certification of such claims has become even more common.<sup>7</sup>

Manitoba's statute specifically allowed for national opt out class actions from the moment of its passage in 2002<sup>8</sup>.

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<sup>5</sup> *Nantais v Teletronics Proprietary Canada Ltd* (1995), 40 CPC (3d) 245 (Ont CJ Gen Div). Available at: <http://canlii.org/en/on/onca/doc/1995/1995canlii618/1995canlii618.pdf>.

<sup>6</sup> *Masson v Thomson*, 1993 RJQ 69 (CA). Available in French only at: <http://www.jugements.qc.ca>.

<sup>7</sup> *Brito v Pfizer Canada Inc*, 2008 RJQ 1420 (SC). Available in French only at: <http://www.jugements.qc.ca>.

<sup>8</sup> *Class Proceedings Act*, CCSM c C130. Available at: <http://canlii.org/en/mb/laws/stat/ccsm-c-c130/latest/ccsm-c-c130.html>.

In 2005, the ULCC reviewed its model class action legislation, which originally had the “opt in” structure found in British Columbia’s statute. The ULCC determined that this approach was no longer necessary or efficient, and amended its model statute to provide for a national “opt out” structure.<sup>9</sup> A copy of the working paper supporting these changes is attached, as is their new model statute.

Saskatchewan’s statute originally had the same “opt in” structure as B.C.’s current legislation. However, in 2008 Saskatchewan adopted the ULCC’s recommendations, and converted their statute to national “opt out” structure.<sup>10</sup>

As noted above, in 2011 Alberta also adopted the ULCC’s recommendations and converted to national “opt out”.

The United States has always allowed for certification of national opt out class actions as well.<sup>11</sup>

By permitting national opt out class actions for British Columbia, British Columbia would be consistent with the other Western Provinces of Alberta and Saskatchewan and would further the principles behind the New West Partnership. The New West Partnership is a comprehensive agreement on trade, investment and labour mobility between British Columbia, Alberta and Saskatchewan. The New West Partnership aims to remove barriers that restrict or impair trade,

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<sup>9</sup> *Class Proceedings Act* (Consolidated 2006), available at: [http://www.ulcc.ca/en/us/Class\\_Proceedings\\_Act\\_Consolidation\\_En.pdf](http://www.ulcc.ca/en/us/Class_Proceedings_Act_Consolidation_En.pdf).

<sup>10</sup> *Class Actions Act*, SS 2001, c C-12.01. Available at: <http://canlii.org/en/sk/laws/stat/ss-2001-c-12.01/latest/ss-2001-c-c-12.01.html>.

<sup>11</sup> *Phillips Petroleum Co v Shutts*, 472 US 797 (1985). Available at: <http://supreme.justia.com/us/472/797/>.

investment or labour mobility and enhance competitiveness, economic growth and stability.<sup>12</sup> Permitting national opt out class actions for British Columbia would remove these barriers and enhance competitiveness, economic growth and stability.

### **An Even Playing Field**

As more provinces adopt national opt out class actions, less legal work will be done in British Columbia. In British Columbia, small business makes up 98 per cent of all businesses in British Columbia.<sup>13</sup> Most lawyers in British Columbia work in law firms that are small businesses. Absent the proposed amendment, British Columbia citizens will be represented disproportionately by foreign lawyers. This, in turn, also means fewer taxes paid to British Columbia by lawyers for their legal fees arising out of class actions. To ensure an even playing field for class actions, British Columbia we recommend that the Act be amended to permit national opt out class actions.

### **Addressing The Concerns**

There may be some concern that permitting national opt out class actions will result in actions being filed in British Columbia that should not be litigated in this Province. However, simply because the court may certify a national opt out class action does not mean that it must. Even after Act is amended as we are recommending, the court will still have regard to the substantive law of

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<sup>12</sup> Available at: <http://www.newwestpartnership.ca/NWP-Agreement>.

<sup>13</sup> British Columbia Small Business Profile 2011 at page 1. Available at: <http://www.resourcecentre.gov.bc.ca/pdf/SmallBusEngWeb.pdf>.

jurisdiction, extraterritoriality, and constitutionality, as well as the procedural concept of *forum non conveniens*, in assessing whether a British Columbia action should be certified on a national basis. Indeed, the ULCC amendments adopted in Alberta and Saskatchewan provide for parties in any competing actions filed in other provinces to be given notice of any hearing in British Columbia, so that they may make submissions as to the appropriate jurisdiction. But if the Act is amended as we recommend, this amendment will at least make the tool available to British Columbia judges in appropriate cases.

## CONCLUSION

The CBABC Class Action Section welcomes the opportunity to provide further discussion with the Ministry of Attorney General on permitting national opt out class actions for British Columbia.

Any communications can be directed to:

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