



THE NUNAVUT COURT OF JUSTICE

PRACTICE DIRECTIVE #42

IMPLEMENTATION OF THE CANADIAN JUDICIAL PROTOCOL FOR THE MANAGEMENT OF MULTI-JURISDICTIONAL CLASS ACTIONS

Explanatory Note:

The Nunavut Court of Justice is adopting the Canadian Judicial Protocol on class actions. The Protocol was developed in order to alleviate some of the problems posed by overlapping multijurisdictional class actions on the administration of justice. The Protocol does so by creating standardized procedures for notification and implementation of settlement agreements.

Canadian Judicial Protocol for the Management of Multi-Jurisdictional Class Actions

Definitions

1. In this Protocol:
 - a) “Action” means a putative, certified or authorized class action in which the subject matter is the same as the subject matter of a putative, certified, authorized class action in two or more provinces.
 - b) “Court” means a court in a jurisdiction in which an Action is filed.
 - c) “Counsel” includes parties that are self-represented.

Applications

2. Where a court intends to apply this Protocol (in whole or in part), Counsel shall be given notice and an opportunity to be heard on the sections of this Protocol to be employed. Where this Protocol is adopted in whole or in part following such a hearing, an order shall issue to that effect.

Notice Obligations

3. All parties to an Action shall advise the Court of any other Action of which they are aware.
4. Plaintiff Counsel shall post the pleadings in their Action on the Canadian Bar Association Class Action Database at www.cba.org/classaction.

5. A Notification List shall be created by counsel listing the names of all Counsel, with appropriate contact information, in all Actions and this list shall be provided to the Court.
6. All motions made by a party shall be on notice to the Notification List.

Settlement Approval

7. Where there is a joint settlement of the Actions, the parties shall proceed by way of a motion for Multijurisdictional Class Settlement Approval served on all parties and filed in all Courts.
8. A motion for Multijurisdictional Class Settlement Approval shall include a proposed notice to class members suitable for use in all jurisdictions. The notice should include the following information, subject to the applicable legislation:
 - a) a summary of the case and an explanation of how to obtain a copy of the originating process (e.g. statement of claim or motion for authorization);
 - b) a definition of the class and any subclasses;
 - c) a list of the class actions which are the subject of the Motion for Multijurisdictional Class Settlement Approval, and a list of any other Actions of which counsel or any party is aware;
 - d) information on the essential terms of the proposed settlement, including:
 - i. the nature and amount of relief
 - ii. the nature and bases of any non-monetary benefits;
 - iii. the procedures for allocating and distributing settlement funds;
 - iv. the method for filing a proof of claim;
 - v. the locations where class members can obtain a copy of or examine the settlement agreement and other relevant materials;
 - vi. information, if practical, that may enable class members to calculate or estimate their individual recoveries;
 - e) the options open to class members and the implications of each option (including if applicable, opting out, participating, objecting, submitting a claim or doing nothing), along with the deadlines for taking any actions;
 - f) a summary of the maximum amounts sought by class counsel for fees, including disbursements, reimbursements of expenses and applicable taxes;
 - g) the time and place of the hearing to consider approval of the settlement and the methods by which class members may object to the settlement, or the fees sought by class counsel;

- h) the method for objecting to (or, if permitted, for opting out of) the settlement, including a statement that the class members have the right to object to the settlement, and/or applications for fees and/or the distribution of any remaining balance of funds;
 - i) a statement that the settlement will bind all class members who have not opted out (if it is an opt-out class action); and
 - j) the address and phone number of class counsel and the appointed Claims Administrator and an explanation of how to make inquiries of either.
9. Once all materials relating to a motion for Multijurisdictional Class Settlement Approval have been filed in all jurisdictions where Multijurisdictional Class Settlement Approval is sought, the Courts may communicate for the purpose of determining:
- a) the scheduling of approval hearings, including any fairness hearings;
 - b) whether the Courts agree that a uniform Multijurisdictional Class Settlement Approval Order should be issued or if different orders are required to comply with provincial legislation;
 - c) the content of a Multijurisdictional Class Settlement Approval Order (s);
 - d) the manner in which the Multijurisdictional Class Settlement Approval Order(s) is to be administered;
 - e) the manner and form in which notice to class members will be provided; or
 - f) any other issue relevant to the Motion for Multijurisdictional Class Settlement Approval.
10. Where it is determined by all courts that the Settlement Approval hearing or the fairness hearing will be held jointly, such hearings shall be conducted in a manner that will permit all parties and all judges to participate in the hearings. This may be done by video link or other means.
11. A Multijurisdictional Class Settlement Approval Order may be issued in any form and in any manner which, in the opinion all Courts, is just and expeditious. If necessary, each Court may issue a separate Order to reflect the applicable legislation in a given province.
12. Notice of Settlement Approval Order(s) should contain the information provided in paragraph 8, subject to the applicable legislation.
13. A Multijurisdictional Class Settlement Approval Order may designate a Judge of any Court as Designated Settlement Administration Judge.
14. A Designated Settlement Administration Judge may, if the Order so provides, determine any dispute arising from the Settlement Agreement, regardless of the jurisdiction in which that dispute arises, and may make such orders as are just and expedient for the orderly administration of the Settlement Agreement. However, each Court will retain jurisdiction to deal with issues arising from their respective Orders.

Protocol on Court-to-Court Communications in Canada-U.S. Cross- Border Class Actions

1. Where a court intends to apply this Protocol (with or without modifications), counsel in that case shall be given notice and an opportunity to be heard on the sections of this Protocol to be employed. Following such a hearing, the adoption of part or all of this Protocol should, wherever possible, be set forth in orders or minutes or other notice to counsel in the case before it is applied. The Protocol, as and to the extent adopted by the court, shall thereafter be maintained on the docket of the court for the case. (Guideline 1)
2. All counsel should advise the court of any other class actions involving or arising out of (in whole or in part) the same claims or events as in the case before it (a “Related Class Action”) of which they or their client(s) are aware.
3. If a Court has been appraised of a Related Class Action and this Protocol has been adopted, wherever there is commonality among substantive or procedural issues in the proceedings, the court should communicate with the other court(s) in the manner prescribed by this Protocol with the goal of coordinating proceedings before it with proceedings in other jurisdiction(s). (Guidelines 2 and 16; Article 25)
4. Arrangements contemplated under this Protocol do not constitute:
 - a) (i) a relinquishment, compromise, waiver, abridgement or extension by the court of any *in personam* or subject matter jurisdiction, powers, responsibilities or authority; or (ii) a determination of any procedural or substantive matter in controversy before the court or before any other court(s); or
 - b) a relinquishment, compromise, waiver or abridgement by any of the parties of any of their jurisdictional, substantive or procedural rights, claims or defenses, or a diminution of the effect of, or rights with respect to, any of the orders made by the court or the other court(s). (Guideline 17)
5. Prior to a communication with another court, the court should be satisfied that the proposed communication is consistent with the applicable rules of procedure or other governing law in its jurisdiction. (Guideline 1)
6. Each court should designate a Liaison Counsel for plaintiffs and a Liaison Counsel for defendants in the proceedings before it to whom, in the first instance, materials from the other court(s) should be provided by e-mail, facsimile or other specified means and who should be responsible for providing materials to the other court(s). (Guideline 12; Article 14)
7. Courts may communicate without parties present, provided:
 - a) such communication pertains solely to procedural , coordination or other non-substantive matters;
 - b) counsel for all affected parties are given advance notice of the communication; and,
 - c) following the communication, counsel are given a summary of the communication. (Guidelines 8 and 9)
8. Communications from a court to another court or court(s) may take place by or through the court:

- a) sending or transmitting copies of formal orders, judgments, opinions, reasons for decision or endorsements, other than documents under seal, directly to the other court(s); and/or,
 - b) participating in two-way communications with the other courts(s) by correspondence, telephone or video conference call or other electronic means. (Guideline 6)
9. A court may conduct a joint hearing with another court or court(s). The following should apply to any joint hearing unless the parties agree otherwise:
- a) each court and counsel for all parties should be able to hear the proceedings simultaneously in the other court(s);
 - b) courts and counsel should be alert to privilege and immunity-related issues, including where the law may differ from one jurisdiction to another, and arrangements should be made on a case-by-case basis to address these issues; and,
 - c) submissions or applications by the representative of any party should be made only to the court in which the representative making the submission is appearing unless the representative is specifically given permission by the other court to make submissions to it. (Guideline 9)

Notice Protocol: Coordinating Notice(s) to the Class(es) in Multijurisdictional Class Proceedings

Protocols of General Application

1. **Compliance.** The Form of Notice must satisfy applicable constitutional, statutory and procedural requirements of each relevant jurisdiction.
2. **Plain Language.** Any notice given to class members should use plain and clear language, and not be overly technical or legalistic. Laypersons reading the notice should be able to understand how the class proceedings will affect their rights.

Commentary: Demographics of Notice

Recipients. In devising the content of and means by which notice is given, the parties and the courts should consider the demographic composition of the class (including age, physical or mental disability, language, literacy, geographical setting or culture). In particular, if any of the class members reside in Canada, notice should be provided in French and English. Notice to French-speaking class members should include publications that will reach French-speaking Canadians outside Quebec.

3. **Purpose.** The purpose of the notice is to provide information to class members. The notice should not be an advocacy piece for class or defence counsel, nor should it contain opinions regarding the likelihood of success of the action.

4. **Adapt Notice to Medium.** Where notice is given in multiple media, the content of each notice should be adapted to be appropriate to that medium; however, there should be at least one “long-form” of notice available to class members that complies with section 5 of this Protocol.

Protocols Applicable to Class Certification

5. **Contents.** A long-form notice given in respect of certification of a class proceedings should generally contain:
- a) a description of the proceeding, including the names of the representative plaintiffs, the names of opposing parties and counsel, a summary of the nature of the action and the parties’ claims and defences, the class definition, the common issues to be determined and the damages or other relief sought, the events giving rise to the case, and relevant procedural history;
 - b) a description of any other class actions of which counsel or their clients(s) are aware involving or arising out of (in whole or in part) the same claims or events as in the case before the Court and in which an alleged or certified class’s membership includes some or all of the members of the class in the case that is the subject of the notice (a “Related Class Action”);
 - c) whether a right to opt out of the proceeding is available and, if so, a statement about the manner and timeframe in which class members may opt out of the proceeding;
 - d) if applicable, a description of the potential financial consequences of the proceedings to class members;
 - e) a summary of any agreements or understandings with class counsel regarding fees and disbursements, including contingency fee arrangements;
 - f) a description of any counterclaims being asserted and relief sought;
 - g) a statement 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) a description of class members’ rights to participate in the proceeding or appear through an attorney if they desire; and
 - j) an address to which class members may direct inquiries about the proceeding.
6. **Timing.** Notice of certification of a class proceeding should ordinarily be given to class members as soon as practicable, following certification.

Protocols Applicable to Settlement of a Class Proceeding

7. **Content.** Notice given in respect of settlement of a class proceeding which, if approved, is intended to bind class members in more than one jurisdiction should generally:
- a) summarize the claims, relief sought and defences, and any relevant procedural history (e.g. motions for summary judgment, motions for certification, etc.);
 - b) define the class and any subclasses, including any settlement class, and include estimates of the size of the class and any subclasses;
 - c) describe any Related class Actions pending, including any settlement, of which counsel or their client(s) are aware;
 - d) describe the essential terms of the proposed settlement, including the nature and amount of relief, the procedures for allocating and distributing settlement funds, including the method for filing a proof of claim;
 - e) provide information about where class members can obtain a copy of examine the settlement agreement and other relevant materials;
 - f) if practical, provide information that will enable class members to calculate or at least estimate the range of their of individual recoveries;
 - g) describe clearly the options open to the class members and the implications of each option (including, if applicable, opting out , participating , objecting, submitting a claim or doing nothing), along with the deadlines for taking any action;
 - h) explain the nature of and basis for any valuation of nonmonetary benefits, if the settlement includes them;
 - i) disclose any compensatory or other benefits payable to or requested by the class representatives;
 - j) provide information regarding the maximum amounts sought by class counsel for fees, including disbursements, reimbursement of expenses and applicable taxes and the bases for which those amounts are claimed;
 - k) state the time and place of the hearing to consider approval of the settlement;
 - l) describe the method for objecting to (or, if permitted, for opting out of) the settlement, including that class members have the right to object to the settlement, and /or application for fees and/or the distribution of any remaining balance of funds;

- m) state that the settlement will bind all class members who have not opted out (if it is an opt-out class action); and
- n) prominently display the address and phone number of class counsel and the appointed Claims Administrator and explain how to make inquiries of either.

Where “short-form” notice is provided to the class in the first instance (e.g. for cost reasons), such notice should include information explaining how individual class members can obtain the long-form notice or other information about the settlement, whether via website, telephone call-in center or other means approved by the Court.

- 8. Single Notice to Class Members. Where class proceedings have been commenced in more than one jurisdiction and a global settlement of all proceedings has been achieved, the parties to the various proceedings and the respective courts with jurisdiction should, at minimum, endeavour to co-ordinate the approval of the contents of a single notice of the proposed settlement to class members, wherever resident. If notice by more than one form is to be provided (e.g., mail, internet or other publication) the parties and courts should endeavour to coordinate the approval of a single form of each.

This practice directive comes into force on February 1, 2012.

Issued this 18th day of January 2012 upon the direction of the Judges of the Nunavut Court of Justice.

Mr. Justice R. Kilpatrick

Mr. Justice E. Johnson

Mr. Justice N. Sharkey

Madam Justice S. Cooper