



Environmental Class Actions¹

A. INTRODUCTION

Ecojustice made the news on March 31st of this year for its representation of the Quebec Environmental Law Centre and Friends of the Earth Canada as intervenors in the case of *St. Lawrence Cement Inc. v. Barrette* at the Supreme Court of Canada. This environmental class action lawsuit involves neighbours seeking damages for harm caused by the cement factory's 42 years of operation in Quebec City, including for noise, odour and dust problems. The Quebec Superior Court found in favour of the plaintiffs, awarding \$15 million in damages. The Quebec Court of Appeal overturned this decision, ruling that nuisance claims cannot be brought as a class action proceeding, and that the right to bring class action claims is limited to property owners, not tenants or the spouses and children of owners. However, the Court of Appeal did find the company to be at fault because of a duty to keep its pollution control equipment in optimal working order. The intervenors are concerned with the precedent that this judgment sets for access to justice for environmental nuisances by limiting the availability of the class action procedure. They also made submissions on how and when individual citizens can bring private nuisance lawsuits to protect the environment, particularly in the face of failures in regulation and law enforcement to prevent property and health damages.

The *St. Lawrence* case highlights the public interest aspect of class action lawsuits and, alongside the many other class actions dealing with environmental harms, raises several issues about access to justice and the challenge of obtaining class action certification largely due to causation issues. The purpose of a class action is to provide access to justice by allowing a procedure whereby a representative plaintiff can sue for the benefit of the entire class. In short, plaintiffs pool the commonalities of their actions rising from the same alleged cause of harm, thereby eliminating the cost barrier of bringing individual actions. This provides economy in the judicial system as a judge hears similar cases at the same time, and is also believed to have a larger deterrent or behaviour modification effect on defendants who are causing the harm than would individual claims. A class action is most useful where the complexity and need for scientific expert evidence makes the cost prohibitive and the possibility of factual conflicts intense.

Although the class action is a relatively new phenomenon in Canada (at least compared with the United States), its importance is growing and it continues to be used for larger scale environmental harms where regulation has failed to address harm to property and human health. Of the eight provincial class action regimes in Canada, Quebec was first to allow this

¹ Thanks to Patrick Hayes for the benefit of his directed studies paper Exploring the Viability of Class Actions Arising from Environmental Toxic Torts: Overcoming Barriers to Certification. April 2008 (unpublished).

proceeding in 1978. Ontario followed suit in 1993 with B.C. enacting the *Class Proceedings Act* in 1995.² They all require a representative of the class to obtain certification before commencing a class action, which one lawyer who specialized in class actions estimates to cost more than \$1 million.³ Traditional common law causes of action, including the tort of nuisance, negligence and strict liability for certain dangerous materials, continue to dominate environmental class actions.

At the turn of the millennium commentators were enthusiastic about the potential for an increase in the use of class action litigation in environmental law, citing a trend best expressed by the Quebec Court of Appeal's former Justice Rothman's statement that "[t]he class action recourse seems to me a particularly useful remedy in appropriate cases of environmental damage."⁴ Former Justice Rothman noted that many individuals over a large geographic area are affected by air and water pollution, and that proving complex issues of causation and harm using scientific evidence is expensive. Class action procedures provide an incentive for individual plaintiffs to pursue the action collectively where the harm raises many of the same issues.

In a 2000 assessment of class action litigation of cases in Quebec, Ontario and B.C., the authors found that the general trend to date had resulted in certification being slightly more likely to be accepted than rejected.⁵ In environmental law cases, certification had been granted for claims involving:

- shoreline erosion;
- gas emissions resulting from an aluminum manufacturing process;
- noise, odors and smoke from a cement plant;
- groundwater contamination from an industrial chemical (resulting in lost property value and lost rents).

However, more recent commentators have noted a judicial chill towards the use of class action procedures for environmental harms.⁶

Although class actions are designed to empower group litigation, environmental class actions are rarely permitted. This is partly because their claims for private law actions seeking monetary compensation cause courts to focus on individual aspects of the problem, and the collective harm caused by widespread environ-

² *Code of Civil Procedure*, R.S.Q. c. C-25., Book IX; *Class Proceedings Act*, S.A. 2003, c. C-16.5; *Class Proceedings Act*, R.S.B.C. 1996, c. 50; *Class Proceedings Act*, C.C.S.M. c. C130; *Class Proceedings Act*, S.N.B. 2006, c. C-5.15; *Class Actions Act*, S.N.L. 2001, c. C-18.1; *Class Proceedings Act, 1992*, S.O. 1992, c.6; *Class Actions Act*, S.S. 2001, c. C-12.01.

³ Julius Melnitzer. Legal Post Special Report: A Piece of the Class Action, Financial Post March 26 2008.

⁴ André Durocher & Martineau Walker. Environmental Class Action Litigation in Canada. American Bar Association International Environmental Law Committee Newsletter Archive (Vol. 2, No. 4 July 2000).

⁵ André Durocher & Martineau Walker, Environmental Class Action Litigation in Canada. American Bar Association International Environmental Law Committee Newsletter Archive (Vol. 2, No. 4 July 2000).

⁶ Heather McLeod-Kilmurray, Hoffman v. Monsanto: Courts, Class Actions and Perceptions of the Problem of GM Drift. 27 Bulletin of Science, Technology & Society (2007) 188.

mental effects is overlooked. Because most environmental lawsuits are prohibitively complex and expensive for individuals to litigate, this results in a denial of justice. It also prevents courts from playing their institutional role in the struggle to craft appropriate legal responses...Greater focus on the role of groups and the collective nature of environmental harms would lead to different approaches to interpreting class action procedure.

Finally, most class actions do not go to trial, although some lawyers specializing in class actions believe that increasingly defendants are opposing them on the merits. They are either abandoned by the plaintiffs or settled because for many defendants it is much less costly to deal with the action outside of court.⁷

The purpose of this background report is to discuss some of the challenges with applying class action proceedings to environmental harms, with a particular emphasis on toxic torts. Section B sets out the class action regime in B.C. as representative of the approach taken in common law jurisdictions in Canada. Section C raises some issues about class action lawsuits based on environmental harm and the ability of those lawsuits to deal with the public interest goals these lawsuits are designed to address.

B. CHARACTERISTICS OF CLASS ACTION PROCEDURES IN B.C.

The *Class Proceedings Act* enables class actions in B.C. From a plaintiff perspective, one member of a class of people may commence a proceeding on behalf of the members of that class. This representative plaintiff must make an application to the Supreme Court for an order certifying the proceeding as a class proceeding and appointing himself or herself as the representative plaintiff.⁸

The Supreme Court must certify a proceeding as a class proceeding if all of the indicia required of class proceedings are met, such as the pleadings disclose a cause of action, there is an identifiable class, the claims of the class members raise common issues (whether or not those common issues predominate over issues affecting only individual members), and a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues:⁹

In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including whether:¹⁰

⁷ Julius Melnitzer. Legal Post Special Report: A Piece of the Class Action, Financial Post March 26 2008.

⁸ *Class Proceedings Act*, R.S.B.C. 1996, c.50 at s.2.

⁹ *Ibid*, s.4(1).

¹⁰ *Ibid*, s.4(2).

- (a) questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
- (b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
- (c) the class proceeding would involve claims that are or have been the subject of any other proceedings;
- (d) other means of resolving the claims are less practical or less efficient;
- (e) the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

Courts must not refuse to certify a class proceeding merely because of a variety of factors relating to the individual nature of each plaintiff's action, including because:¹¹

- (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 known;
- (e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

The court has considerable flexibility to determine the common issues of the class and to hold separate hearings to determine issues applicable only to certain members of the class.¹²

Finally, courts may not award costs to any party in respect of certification, class proceedings or an appeal unless the court considers that there has been frivolous, vexatious or abusive conduct, or where there are exceptional circumstances warranting a costs award.¹³ However, as was made abundantly clear in the *Consumers' Association of Canada v. Coca Cola Bottling Co.*, this protection from costs does not cover proceedings prior to the certification application.¹⁴ The Court of Appeal found that the statute gives no direction as to costs awards before certification, for example when a summary trial procedure is used, so when an action is dismissed prior to the application for certification the ordinary rule that costs follow the event applies, subject to judicial discretion.

This legislative framework emphasizes the court's ability to try multiple similar actions together even where individuals claim different relief and damages while also keeping in mind the need for common issues to predominate over individual ones.

¹¹ *Ibid*, s.7.

¹² *Ibid*, s.27.

¹³ *Ibid*, s.37.

¹⁴ [2007] B.C.J. No. 1625.

C. ISSUES

1. Certification Jurisprudence and Treatment of Environmental Toxic Torts¹⁵

While there is no authoritative statement about certification of environmental class action lawsuits, three 2001 Supreme Court of Canada cases established the current principles for certification in common law jurisdictions.¹⁶ In particular, the court regarded the legislated provision that the class action be the “preferable procedure” as the principal analytical threshold for certification, with an emphasis on evaluating whether the common issues are paramount to the individual issues.¹⁷ Although certification is ostensibly a procedural step, in practice it is a ruling by judge on whether potential plaintiffs will have any access to court for the harm in at issue because the cost will be otherwise prohibitive balanced against the legal soundness of the proposed class action and cost to the defendants.

A judge’s view of the merits of the claim based on the evidence presented during the certification proceedings to show cause of action can influence her or his findings of certification.¹⁸ This challenge is heightened when plaintiffs, required only to show a cause of action, feel compelled to rebut the expert evidence put forward by the defendant in the certification proceeding.

As Heather McLeod-Kilmurray summarizes:¹⁹

Refusing to certify a case as a class action has very serious consequences. The certification decision is not purely procedural...in fact, it has significant substantive effect. It prevents the attainment of the three goals of class actions: access to justice, judicial economy, and behavior modification in cases of widespread harm. Although technically the case can still go forward as an individual claim, the complexity and cost of arguing the scientific and economic issues mean access to justice would be out of reach of the individual...In terms of behavior modification, even if each of the class members could successfully sue individually, the award would not be an aggregate one, and the message would not have the power of a collected action.

¹⁵ Environmental toxic torts can be discussed as “personal injuries suffered as a result of exposure to toxic substances or contaminants released into the environment.” Patrick Hayes, Exploring the Viability of Class Actions Arising from Environmental Toxic Torts: Overcoming Barriers to Certification. April 2008 (unpublished).

¹⁶ *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534; *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158; and *Rumley v. British Columbia*, [2001] 3 S.C.R. 184.

¹⁷ Jamie Cassels and Craig Jones, *The Law of Large Scale Claims: Product Liability, Mass Torts, and Complex Litigation in Canada*, (Toronto, ON: Irwin Law, 2005).

¹⁸ Jessica A. Kimmel, “The Merits of the Merits in the Class Certification Analysis,” (2007) 4 Canadian Class Action Review 3.

¹⁹ Heather McLeod-Kilmurray, *Hoffman v. Monsanto: Courts, Class Actions and Perceptions of the Problem of GM Drift*. 27 Bulletin of Science, Technology & Society (2007) 188 at 198-199.

To date the Canadian tort system has not provided redress for environmental toxic torts, largely because of the difficulties (cost and complexity) with proving both general causation (that a substance is harmful) and specific causation (that it harmed a plaintiff as alleged) because the scientific information about the effect of the toxic substance is absent, unreliable, and often contradictory.²⁰ One need only think of the media coverage over the past ten years of a favourite ingestible – butter, coffee, chocolate, salt, fish – where scientific studies have recommended both for and against their consumption.

The causation problems are multiple. Beginning with the alleged contaminant, it is difficult to determine the concentration of the contamination for each individual in their location of exposure (dose and concentration). In a recent case where a court did ultimately awarded certification, the defendant argued that the court would have to examine such diverse factors as body weight, hand surface area, body surface area, inhalation rate, soil ingestion, soil adherence factor, wild berry ingestion rate, local fish ingestion rate, and wild game ingestion rate to determine exposure and dose levels for each plaintiff.²¹ Likewise, the source of the alleged contamination may have come from several sources or arrived to cause harm in a diffuse or dispersed form (through air or water).²² It is easier to convince a judge that there is causation where a contaminant comes from a concentrated single source, an approach that more closely mirror's tort doctrine's genesis involving direct harm to a single plaintiff from a single defendant. Dispersed pollution also creates a problem of indeterminate plaintiffs because the extent of the pollution and impact on humans is unknown.

The specific effect of pollution on any one plaintiff is also challenging as each individual has different risk and health factors related to their physical composition and lifestyle. Exposure and dose levels affect different people in various ways depending on their age, health, lifestyle, and a variety of other factors such as supervening causal events affecting an individual between the time of exposure and the manifestation of the disease.

This uncertainty of cause and effect points to the inherent difficulty in using a standard of medical causation (some 95 percent certainty) in a venue that requires only a standard of balance of probabilities (51 percent). Expert scientists present evidence and conclusions based on a standard of medical causation that judges must convert into a legal threshold.²³

Courts are also preoccupied, returning to the emphasis established by the Supreme Court of Canada certification trilogy in 2001, with whether individual issues dwarf common issues. Trial court judges speak both of the need to try difficult common issues that will require a lengthy trial in a class action proceeding because both access to justice and judicial economy

²⁰ *Ibid.*

²¹ *Ring v. Canada (Attorney General)*, [2007] N.J. No. 273.

²² Troyen A. Brennan, "Environmental Torts," (1993) 46 Vand. L. Rev. 1.

²³ Lynda Collins, "Material Contribution to Risk and Causation in Toxic Torts," (2001) 11 J. Env. L. & Prac. 105

would be achieved,²⁴ and viewing resolution of the common issues as not reducing the complexity of the proceedings such that individual trials are warranted.²⁵

A telling example of this weighing of common versus individual issues is the *Pearson v. Inco Ltd.* cases involving contamination from a nickel refinery in Port Colborne, Ontario.²⁶ An Ontario Superior Court Justice denied the application for certification because, given the highly individual nature of proving medical causation, the class action was not the preferable proceeding. The Court of Appeal overturned this decision, but it is telling that the plaintiffs had dropped their claims for personal injury and advanced claims only relating to property. Indeed, the Court of Appeal stated in *obiter* that the individual personal injury claims would have overwhelmed the common issues.

On the one hand the *Pearson* case is an historic case, being the first environmental class action outside of Quebec involving alleged long term contamination (up until 2006 Canadian common law courts had only been willing to certify environmental class actions arising from a one-time pollution event), that some commentators believe signal a shift in courts' approach to certification of environmental toxic torts.²⁷ On the other hand, the plaintiffs significantly compromised their comprehensive claim for damages to put forward a case that they believed would be palatable to the court.

The certification jurisprudence for environmental toxic torts stands in sharp contrast to court's willingness to certify class actions in cases of institutional abuse, for example at Indian residential schools. Courts have ruled that class action procedures are the preferable venue and that individual issues would not dwarf common issues despite similar factors that courts have used to deny certification in environmental toxic tort cases -- the difficulty in establishing the causal connection between individual acts of abuse and the future harm suffered, and the apparently individual nature of most of the issues based on personal circumstances.²⁸

Toxic tort class actions relating to product defects have been more successful in obtaining certification than have environmental toxic torts because they more closely resemble a singular concentrated harmful substance where the causation is more easily attributable to the defective product in the eyes of the court.²⁹ Product liability cases involve a class of known individuals that have used or consumed an alleged hazardous substance that caused a specific health impact or range of effects. Courts are also more amenable to claims for

²⁴ See, for example, *Dumoulin v. Ontario* [2005] O.J. No. 3961 (S.C.J.) and *Ring v. Canada (Attorney General)*, [2007] N.J. No. 273.

²⁵ See, for example, *Pearson v. Inco Ltd.*, [2002] O.J. No. 2764 (S.C.J.).

²⁶ *Pearson v. Inco Ltd.*, [2002] O.J. No. 2764 (S.C.J.) and *Pearson v. Inco Ltd.*, [2005] O.J. No. 4918 (C.A.).

²⁷ Stikeman Environmental Law Update, February 2006.

<http://www.stikeman.com/newslett/EnvFeb06.htm>

²⁸ *Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924; *Rumley v. British Columbia*, [2001] 3 S.C.R. 184.

²⁹ Patrick Hayes, Exploring the Viability of Class Actions Arising from Environmental Toxic Torts: Overcoming Barriers to Certification. April 2008 (unpublished).

property damage rather than person injury, as is seen in the *Pearson* case and several others underway in Canada at present.³⁰

This raises the question of the appropriate forum for addressing environmental toxic torts. In addition to taking a more precautionary approach to regulating hazardous substances, further examination of the commonalities of the issues between proposed members of the class may be warranted.

2. Financial Assistance vs. the “No Costs” Rule

A characteristic of class action legislation in Canada is that it provides some relief from the prohibitive cost of initiating and carrying a class proceeding. The B.C. legislation adopts a “no costs” rule where neither party is liable for the other’s costs except where there is frivolous, vexatious or abusive conduct, or where warranted by exceptional circumstances leading to an unjust result.³¹ Other jurisdictions, such as Quebec and Ontario, have established funds to provide financial assistance to the representative plaintiff to finance some of the costs of the action, for example out-of-pocket expenses and/or legal fees. This raises some issues about whether class action proceedings should be encouraged through financial assistance, and if so the preferred method of doing so. Should the public support class actions through a central fund and if so, why not individual actions for environmental contamination that involve regulatory failure? Is a “no costs” rule sufficient assistance for representative plaintiffs and the other members of the class.

3. Group or Public Action in Law

Finally, some commentators view class actions as one of the few ways that individuals can act collectively to oppose state action that causes physical harm:³²

If Yeazell (1987) is correct that the moment of certification “enables one to see the state as it confronts and reflects on the role of groups” (p. 3), *Hoffman* suggests a distinct disinclination to empower groups, at least in situations involving government regulation and largescale, ongoing risks of environmental pollution. The refusal to certify denies affected groups the right to act collectively and to speak in the way they feel is most appropriate for responding to the kinds of harm imposed on them...It is therefore appropriate and necessary that there exist a tool for fighting the harm in the same manner in which it was imposed and experienced. This is not just a question of procedure and judicial economy. It is a question of how we view ourselves as communities and as a society.

³⁰ For example, *Windsor v. Canadian Pacific Railway Ltd.* [2006] A.J. No. 584 (Q.B.), varied [2007] A.J. No. 1047 (C.A.) (certification granted) and *Watson v. Northstar Aerospace* (certification not yet sought) involve claims for loss of property value resulting from "vapour intrusion" where volatile chemicals evaporate from groundwater and into the air in overlying buildings.

³¹ Class Proceedings Act, R.S.B.C. 1996, c.50 s.37.

³² Heather McLeod-Kilmurray, *Hoffman v. Monsanto: Courts, Class Actions and Perceptions of the Problem of GM Drift*. 27 Bulletin of Science, Technology & Society (2007) 188 at 199.

C. DISCUSSION

This paper is a modest attempt to identify some of the issues associated with using class action procedures for environmental harms. To that end, we invite Associates to consider the following questions at our next teleconference on Monday June 9 from 4pm to 6pm:

1. What are the relative advantages of class actions as opposed to representative actions in claims arising from environmental harm? How important are environmental class actions for advancing public interest environmental law?
2. What opportunities exist for crafting class action proceedings to pursuing remedies in cases of environmental harm? Does proof of general causation (that a substance is harmful) not provide a unifying common issue for environmental class actions and a body of evidence for individual plaintiffs or subclasses to use?
3. In addition to the issues adverted in this memo, what additional issues (procedural or substantive) deserve consideration when considering whether and how to proceed?

For More Information:

Legislation

Class Proceedings Act, R.S.B.C. 1996 c. 50.

http://www.qp.gov.bc.ca/statreg/stat/C/96050_01.htm

Articles

Lynda Collins, "Material Contribution to Risk and Causation in Toxic Torts," (2001) 11 J. Env. L. & Prac. 105.

André Durocher & Martineau Walker. Environmental Class Action Litigation in Canada. American Bar Association International Environmental Law Committee Newsletter Archive (Vol. 2, No. 4 July 2000).

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Lana J. Finney. Class Action Certification for Property Damage Due to TCE Contamination Upheld by the Alberta Court of Appeal, Municipal, Planning and Environmental Law Blog Davis and Company October 17 2007.

<http://www.davis.ca/en/blog/Municipal-Planning-and-Environmental-Law-Group/2007/10/17/Class-Action-certification-for-property-damage-due-to-TCE-contamination-upheld-by-the-Alberta-Court-of-Appeal>

Patrick Hayes, Exploring the Viability of Class Actions Arising from Environmental Toxic Torts: Overcoming Barriers to Certification. April 2008 (unpublished).

Albert Lin, "Beyond Tort: Compensating Victims for Environmental Toxic Injury," (2004-2005) 78 S. Cal. L. Rev. 1439.

Heather McCleod-Kilmurray, "*Hollick* and Environmental Class Actions: Putting the Substance into Class Action Procedure," (2002-2003) 34 Ottawa L. Rev. 363.

Heather McLeod-Kilmurray, *Hoffman v. Monsanto*: Courts, Class Actions and Perceptions of the Problem of GM Drift. 27 Bulletin of Science, Technology & Society (2007) 188.

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David Rosenberg, "The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Torts System," (1984) 97 Harv. L. Rev. 851.

Stikeman Environmental Law Update, February 2006.

<http://www.stikeman.com/newslett/EnvFeb06.htm>