

Class Actions in Environmental Law

Commons Institute
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Class Actions

- Class Proceedings Act
- The cases
- What's next?

Class Actions

- When to use?
 - When there are common issues to be determined by a group of individuals
 - Does the proposed class action
 - Serve judicial economy
 - Improve access to justice
 - Promote behaviour modification
 - Each claim on its own may be small, but as a class, it could be significant

Class Actions

- Basic steps
 - Certification motion – court considers if the action will be certified (burden on plaintiff, “some basis in fact”)
 - Notice of claim to members once certified
 - Usually “in” unless “opt out”
 - Common issues tried
 - Individual assessments – dealt with after the common issues

Class Actions

- Certification Motion
 - Class Proceedings Act: s. 5(1) (Ontario)
 - Court shall certify if
 - Pleading discloses a cause of action
 - Identifiable class of 2 more persons with representative plaintiff
 - Claims/defences raise common issues
 - Often a reason why certification fails – individual issues overwhelm common issues
 - Preferable procedure to determine common issues
 - Judicial economy, access to justice, behaviour modification
 - Representative plaintiff or defendant who
 - Fairly & adequately represents the interests of the class
 - Has a plan for the proceeding to advance the proceeding & notify the members of the class
 - Does not have a conflict of interest with other class members

Class Actions

- Certification Motion
 - Court shall not refuse to certify solely because (s.6)
 - Relief claimed includes claim for damages that require individual assessment after common issues resolved
 - Relief claimed relates to separate contracts for different class members
 - Number of class members or identity of each is unknown
 - There is a subclass with claims or defences that have common issues not shared by all class members

Class Actions

- Classic environmental torts
- Damages arising from
 - Negligence
 - Nuisance
 - Strict liability (*Rylands v. Fletcher*)
 - Trespass

Class Actions

- Classic environmental torts
 - Strict liability (*Rylands v. Fletcher*)
 - Strictly liable if bring something onto your land which escapes and causes damage to a neighbour
 - Non-natural use of land
 - Unordinary or unusual use
 - Defendant brought it onto property and would do damage if it escaped
 - There was an escape
 - Unintentional or accidental
 - And the escape caused damage to neighbour's property

Class Actions

- Classic environmental torts
 - Nuisance
 - Indirect injury to or interference with another's land
 - Substantial physical injury to land;
 - Mere presence of a contaminant not enough
 - Need a detrimental effect on the land itself or rights associated with its use (Inco)
 - Midwest (2015 ONCA 819) – lost at trial; but OCA concluded “uncontradicted evidence establishing diminution in the value of the appellant’s property and a human health risk” [leave to appeal sought].
 - Substantially interfering with use or enjoyment of land
 - Unreasonably interfering in light of all circumstances

Class Actions

- Classic environmental torts
 - Trespass
 - Voluntary, direct physical intrusion
 - Directly place an object on another's land
 - most contamination cases are about migration of contaminants through groundwater to neighbouring property
 - Consequential, not direct

Class Actions

- Classic torts – where are we at?
 - Not very far
 - Only one class action decided on the merits (Smith v. Inco)
 - Won at trial, lost on appeal
 - Most don't get certified

Class Actions

- Certified
 - Sunrise Propane (ON)
 - property damage and personal injury; settled after certification (<http://www.sunrisepropaneclassaction.com>)
 - most defendants consented to certification
 - Two did not – re: s.5(1)(a) and (c) [disclose cause of action; common issues]
 - Dismissed against one set of defendants [no cause of action, leave to amend], but not the other [common issues]
 - <http://canlii.ca/t/fs4pb> (2012 ONSC 4196)

Class Actions

- Certified
 - Windsor v. Canadian Pacific Railway (AB) (2006 ABQB 348), varied on appeal (2007 ABCA 294)
 - TCE plume from CPR operations contaminating residential area
 - Certified, but then much of the claim dismissed on a summary judgment motion (2014 ABCA 108 (CanLII))
 - Did not seek certification of personal injury or health claims
 - Nuisance claim for sub-class survived summary judgment motion

SEPTIMUS

Class Actions

- Certified
 - Plaunt v Renfrew Power Generation
 - trespass; certified, one common issue, no further information available
(<http://www.roundlakeclassaction.com/>)
 - Claim for damages for trespass as a result of water encroaching their property, alleged caused by Tramor dam, operated by Renfrew Power Generation Inc.
 - Each element of the test was challenged by defendant; court concluded that the test was met and certified the class action
 - <http://canlii.ca/t/fm38r> (2011 ONSC 4087)

Class Actions

- Certified
 - Smith v. Inco [was Pearson v. Inco]
 - <http://canlii.ca/t/1m147> (2005 CanLII 42474)
 - Court of Appeal ultimately allowed certification but on the narrow issue of property devaluation (health claims abandoned)
 - Won at trial on (strict liability, nuisance)
 - Overturned by court of appeal
 - <http://canlii.ca/t/fnc0x> (2011 ONCA 628 (CanLII))

Class Actions

- Not Certified
 - Hollick v. Toronto (City) (2001 SCC 68)
 - Noise and physical pollution from landfill
 - Common issues negligible vs individual issues
 - Ontario's enviro legislation offered other avenues to pursue claims

Class Actions

- Not Certified
 - Ring v. Canada (2010 NLCA 20 (CanLII))
 - On behalf of those present at Canadian Forces Base Gagetown, NB from 1956 to present
 - Spraying of herbicides (Agent Orange) materially contributed to the risk of causing lymphoma
 - Dow and Pharmacia joined as third parties as they were the manufacturers

Class Actions

- Not Certified
 - Ring v. Canada (2010 NLCA 20 (CanLII))
 - Claims alleged
 - Breach of fiduciary duty owed by Crown and its soldiers
 - No material facts pled to support claim
 - Negligence
 - Occupiers' Liability
 - Class questions re a cause of action
 - those who have lymphoma
 - those who do not – medical monitoring claim – disclosed no cause of action for this sub-class b/c no physical injury

Class Actions

- Not Certified
 - Ring v. Canada (2010 NLCA 20 (CanLII))
 - Definition of class
 - Too broad – proposed class had no meaningful restriction, and this remained problematic with motion judge’s attempt to restrict it
 - All individuals who were at CFB Gaagetown between 1956 and the present – no rational connection to causes of action and common issues
 - **Motion judge added: “who claim they were exposed to dangerous levels of dioxin or hexachlorobenzene while on the Base”**
 - NLCA: this creates no meaningful restriction and could include many who had no actual exposure to the chemicals; does not bear a rational relationship to the common issues asserted by the class members

Class Actions

- Not Certified
 - Ring v. Canada (2010 NLCA 20 (CanLII))
 - Common issues
 - an issue will be common only where its resolution is necessary to the resolution of each class member's claim
 - It's not necessary for common issues to pre-dominate, but it is a matter to be considered re preferable procedure
 - Concluded at para 107: none of the proposed common issues is truly a common issue for each member of the class; even if they were, still have an overwhelming number of individual issues to resolve

Class Actions

- Not Certified
 - MacQueen v. Canada (2013 NSCA 143)
 - Emissions from steel production caused damage to and constituted interference with property rights and integrity of persons (Sydney Tar Ponds)
 - Sought cessation of exposure (remediation or relocation), an medical monitoring program, damages for nuisance, intentional tort of battery, or negligent battery in alternative
 - Disclosed no cause of action for trespass, battery, negligent battery, strict liability
 - Where had a cause of action (negligence, nuisance, breach of fiduciary duty), failed for common issues requirement
 - Many separate findings of facts for the individual cases required
 - Nuisance: problematic because liability is dependent on the impact of the nuisance on each individual and his or her property
 - Health based claims: details of exposure are an individual issues
 - Negligence: duties and standards of care are “moving targets” over time

Class Actions

- In sum
 - Claims for historical contamination very difficult or impossible to succeed at either at certification stage or on the merits
 - Individual issues overwhelm
 - Standards change over time
 - Health based claims impossible unless you are ill now and can show causation
 - medical monitoring claims not yet adopted by Canadian courts

Class Actions

- Are there other approaches to get at environmental wrongs?
- Product liability negligence claim
 - Product causing harm to the environment
 - Neonics (pesticides) made by Syngenta and Bayer
 - claim against manufacturers by beekeepers alleging their product caused them significant damages
 - i.e. massive die-offs of their bees, which pollinated fields that farmers had sprayed with neonics

Class Actions

- Are there other approaches to get at environmental wrongs?
- Securities legislation
 - Mount Polley tailings dam breach in Aug. 2014
 - Share values plummeted
 - S.138.3 OSA: If release a document that contains a misrepresentation, and someone buys issuer's securities when the document was released and before misrepresentation is publicly corrected, without regard to whether person relied on misrepresentation, the person has a right of action for damages against numerous persons
 - Claims also alleged in negligence and negligent misrepresentation

Class Actions

- Mays et al v Snyder et al (Nov 13, 2015)
 - Residents of City of Flint, Michigan claiming damages for contamination of their drinking water beginning April 25, 2014
 - Alleged defendants' deliberate decision to expose them to extreme toxicity of water from Flint River
 - Based in constitutional claim: guarantee and right secured by 14th Amendment
 - Deprived of life, liberty and property when took safe water away and replaced it with water known to be toxic for fiscal purposes

Class Actions

Questions?

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