The Pros and Cons of Class Actions in Mass Tort Cases

Have the Lessons of Lac Mégantic Been Learned?
December 8, 2016
OUTLINE

- Purposes of class actions
- History of environmental class actions in Quebec vs the rest of Canada
- Advantages of class actions
- Disadvantages of class actions
“the social fact that gives meaning to the twenty
first century class action is the advent of an
integrated consumer economy focused on the
mass production of goods. The very technology
that allows for the unprecedented outflow of
manufactured products can also lead to the
creation of unprecedented risks.
When such risks materialize, it is unrealistic to
expect each victim to seek personal redress.
Rather, confronted with a collective breach or tort,
consumers, stakeholders, or citizens must be
allowed to combine their efforts and resolve the
legal problem in its entirety.”

Shaun Finn “In a Class All Its Own: The Advent of the Modern Class Action and Its
Code de procédure civil 1003:
1003. Le tribunal autorise l’exercice du recours collectif et attribue le statut de représentant au membre qu’il désigne s’il est d’avis que:
a) les recours des membres soulèvent des questions de droit ou de fait identiques, similaires ou connexes;
b) les faits allégués paraissent justifier les conclusions recherchées;
c) la composition du groupe rend difficile ou peu pratique l’application des articles 59 ou 67; et que
d) le membre auquel il entend attribuer le statut de représentant est en mesure d’assurer une représentation adéquate des membres.
A Brief History of Environmental Class Actions in Canada

- Very often certified in Quebec
- Leading original case - *Alcan*
“The class action recourse seems to me a particularly useful remedy in appropriate cases of environmental damage. Air or water pollution rarely affects just one individual or one piece of property. They often cause harm to many individuals over a large geographic area. The issues involved may be similar in each claim, but they may be complex and expensive to litigate, while the amount involved in each case may be relatively modest. The class action, in these cases, seems an obvious means for dealing with claims for compensation for the harm done when compared to numerous individual law suits, each raising many of the same issues of fact and law.”
Very RARELY certified in the rest of Canada

BUT – exception = **SINGLE INCIDENT** cases
  - e.g.
    - Plastimet fire, Hamilton, Ont;
    - Walkerton, Ont.

WHY? – causation clearer, more commonality than long term, latent environmental harm
Common issues:

1) Were the petroleum products adequately classified and labelled?

2) Did inadequate labelling CAUSE or lead to the harm?

3) Did the defendants KNOW, or ought they to have known, the products were improperly classified and labelled?

4) Ensure that transport was adequate and safe?

5) Negligent in permitting transport by these risky wagons?

6) Was the decision to use these wagons a cause of the harm?

7) Negligent choice of route and carrier?

8) What kinds of damages should be recoverable? (eg punitive)

9) Amount of damages
PROS of Class Actions

- PURPOSES of class actions:
  - Access to justice
  - Judicial economy
  - BEHAVIOR MODIFICATION
Access to Justice

- Certification was EASY in this case (despite wrangling about appropriate defendants)
- WITHOUT certification – VERY costly, financially and emotionally, for individuals to pursue the numerous defendants and satisfy the causation test for each one
Judicial Economy

- Not so relevant when case SETTLES
BEHAVIOUR MODIFICATION

- PRO: Evens the playing field: if there was no certification, it would be one plaintiff or family against all of these corporations and regulators –

- WITH certification, the defendants know:
  - the case WILL get to court
  - Plaintiffs can bring a strong case TOGETHER
  - RISK of a LARGE compensation award
- the fund may be inadequate
- the liability issue is unresolved

- BUT – compensation WAS achieved, which may not have occurred without the class action mechanism
Behaviour modification CON

- Certification often leads to SETTLEMENT
- Issues are not HEARD – no trial, no full record… no opportunity for tort law to evolve to be more responsive to environmental risks
- NO FINDINGS and details about LIABILITY
  - Reduces specific and general deterrence
- Not always clear WHAT the settlement was and WHAT aspects of the harms caused IT WAS FOR
TORT LAW and mass environmental harm

- Tort law is still mainly *anthropocentric*
- Individuals can’t claim for ecological damages
  - Can claim for physical harm to land and reduction in property value
- The government can claim for the cost of the clean up
CHAUDIÈRE RIVER

Quebec’s Environment Department estimates 100,000 litres of oil emptied into the Chaudière River. By the end of November, 52,000 litres of oily water had been pumped from the river.

AT THE DISASTER SITE:
Decontamination efforts are focused on a 31-hectare site in the town of Lac-Mégantic. More than 75,000 cubic metres of contaminated soil has already been trucked to a specially constructed storage area two kilometres outside town.

LAKE MÉGANTIC:
More than 46 million litres of oily water has been pumped out of the lake and Chaudière River so far.

SOURCE:
QUEBEC ENVIRONMENT DEPARTMENT
However – no damages for ECOLOGICAL Harm

- eg value of lake
- Value of clean groundwater
- INHERENT VALUE of environment
- Air quality
- INTERREACTIONS of the pollutants with existing chemicals or other compounds already in the water and air?

These are not in the class action claim
- Maybe tort law should follow lead of more modern environmental legislation in Canada toward more ecocentric approach
- Inherent value of environment, ecosystem services, prevention
- Allow the environment to be a plaintiff in the class action
- New types of remedies
- Stronger tort law leads to stronger deterrence and prevention