CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

ENVIRONMENTAL CIVIL ACTIONS IN ONTARIO: THE PLAINTIFF'S PRELIMINARY CONSIDERATIONS

Prepared by: Richard D. Lindgren
CELA Counsel

Prepared for: Ontario Bar Association's "The Anatomy of an Environmental Civil Action" (Toronto, May 30, 2012)

130 SPADINA AVE • SUITE 301 • TORONTO • ON. • M5V 2L4
TEL: 416/960-2284 • FAX: 416/960-9392 • WEB SITE: www.cela.ca

TABLE OF CONTENTS

ENVIRONMENTAL CIVIL ACTIONS IN ONTARIO: THE PLAINTIFF'S PRELIMINARY CONSIDERATIONS

By
Richard D. Lindgren[1]

Ontario's class proceedings legislation has been in place for two decades. Over that timeframe, however, relatively few environmental class proceedings have been certified, and only one class proceeding has gone to trial on common issues. In this article, the author reviews some of the legal, factual and strategic considerations which should be taken into account as the plaintiff's counsel determines whether an environmental claim should be brought as a class proceeding or individual action in Ontario.

PART I – INTRODUCTION

Ontario's *Class Proceedings Act, 1992*[2] (CPA) was enacted for the purposes of enhancing access to justice, ensuring judicial economy, and modifying defendants' behaviour in cases involving mass torts.[3] However, it remains to be seen whether – or to what extent – these objectives are being effectively achieved in the environmental context across the province.

The passage of the CPA followed the release of a 1990 report from the Attorney General's Advisory Committee on Class Action Reform. Among other things, this Report observed that:

> It is an unavoidable fact that modern industrialized societies such as Ontario will suffer mass injuries. North Americans have already witnessed incidents of widespread harm from defective products... So, too, have they seen mass environmental injury such as the incident at Three Mile Island or the recent PCB fire in Quebec... A class action, in which many similarly injured persons join together, can provide an effective and efficient means of litigating such mass claims.[4]

---

[1] Counsel, Canadian Environmental Law Association (CELA). The author served as CELA's representative on the Attorney General's Advisory Committee on Class Action Reform. The research assistance of Kyra Bell-Pasht, CELA's student-at-law, during the preparation of this paper is gratefully acknowledged by the author.

[2] *Class Proceedings Act,* S.O. 1992, c.6.

[3] For additional information on the origins of, and rationale for, this legislative reform, see Ontario Law Reform Commission, *Report on Class Actions* (Toronto: Queen's Printer, 1982); Ontario Ministry of the Attorney General, *Report of the Attorney General's Advisory Committee on Class Action Reform* (Toronto: Queen's Printer, 1990); and Michael A. Eizenga and Emrys Davis, "A History of Class Actions: Modern Lessons from Deep Roots" (2011), 7 *Canadian Class Action Review* 5. See also Christine Kneteman, "Revitalizing Environmental Class Actions: Quebecois Lessons for English Canada" (2010), 6 *Canadian Class Action Review* 261; and Patrick Hayes, "Exploring the Viability of Class Actions Arising from Environmental Toxic Torts: Overcoming Barriers to Certification" (2009), 19 J.E.L.P. 189.

[4] Ontario Ministry of the Attorney General, *Report of the Attorney General's Advisory Committee on Class Action Reform* (Toronto: Queen's Printer, 1990) at 16.

In a 1990 case involving widespread environmental harm, similar observations were made by the Quebec Court of Appeal:

> 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 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 harm done when compared to numerous individual lawsuits, each raising many of the same issues of fact and law.[5]

Ontario's Court of Appeal has further opined that there appears to be a natural fit between environmental claims and class proceedings for the purposes of modifying corporate behaviour:

> Thus, modification of behaviour does not only look at the particular defendant but looks more broadly at similar defendants, such as the other operators of refineries who are able to avoid the full costs and consequences of their polluting activities because the impact is diverse and often has minimal impact on any one individual. This is why environmental claims are well-suited to class proceedings. To repeat what McLachlin C.J.C. said in *Western Canadian Shopping Centres Inc.*, *supra* at para. 26: "Environmental pollution may have consequences for citizens all over the country."[6]

However, despite such favourable commentary, environmental class proceedings have been relatively infrequent across the province, even though the CPA has now been in force in Ontario for two decades. To date, only a small handful of environmental class proceedings have been certified under the CPA (sometimes on consent), and so far only one environmental class proceeding has gone to trial in Ontario on common issues respecting liability and damages.[7] A summary of some key certification decisions in environmental class proceedings in Ontario is set out below in Appendix A.

In contrast, over the past two decades, a larger number of individual civil actions have been commenced by Ontarians claiming damages arising from environmental harm. It

---

[5] *Comite d'environnement de La Baie Inc. v. Societe d'electrolyse et de chimie Alcan Ltee,* (1990), 6 C.E.L.R. (N.S..) 150 at 162.

[6] *Pearson v. Inco Ltd.* (2005), 20 C.E.L.R. (3d) 258 (Ont. C.A.), para.88. See also M. Eizenga, M. Peerless, and J. Callaghan, *Class Actions Law and Practice (2nd ed.)* (Markham: LexisNexis, 2008) at Sections 2.20 to 2.22; and Heather McCleod-Kilmurray, "*Hollick* and Environmental Class Actions: Putting the Substance into Class Action Procedure," (2002-2003) 34 *Ottawa L. Rev.* 363 at 283.

[7] Certification was granted under the CPA in *Pearson v. Inco Ltd.* (2005), 20 C.E.L.R. (3d) 258 (Ont. C.A.) ["*Inco*"] in respect of claims involving the aerial deposition of substances discharged from a nickel refinery in Port Colborne. The representative plaintiff in *Inco* was successful at trial, but the judgment was reversed on appeal: see 2010 ONSC 3790; revd. 2011 ONCA 628. Leave to appeal to the Supreme Court of Canada was refused on April 26, 2012.

therefore appears that the cost, complexity and uncertainty associated with class proceedings have militated against greater use of this procedural mechanism in the environmental context in Ontario.

This is not to say that Ontario has not experienced serious environmental incidents potentially affecting (or posing risks to) large numbers of Ontarians over the past two decades. To the contrary, there are well-known examples across the province where the environment or local residents have been chronically exposed to widespread, low-level discharges of contaminants into air, land or water from industrial, commercial or institutional facilities for prolonged periods of time. Similarly, there have been a number of instances involving a single catastrophic release of elevated concentrations of contaminants into the environment or upon nearby properties as a result of spills, explosions, fires, upset conditions, or other emergency situations.

However, where such incidents occur and appear to be actionable, it seems far more likely that aggrieved persons will elect to commence individual actions rather than initiate class proceedings under the CPA. The CPA jurisprudence to date suggests that while certification is generally obtainable in the environmental context, it may be exceedingly difficult to obtain certification of environmental class proceedings involving personal injury or other health-based claims.

Accordingly, where the cost and complexity of the intended claim makes it uneconomical to pursue individual actions, an environmental class proceeding should be considered as a viable procedural option for redressing mass torts, particularly in cases involving property damages. However, if the class proceeding route is taken, then it is important for the plaintiff's counsel to not focus solely on certification; instead, counsel should remain mindful of what must be pleaded and proven in order to succeed at trial.

The purpose of this paper is to briefly review the factual, legal and strategic considerations that confront prospective plaintiffs (and their counsel) when determining whether a class proceeding or individual action should be commenced in respect of environmental harm.

PART II – OVERVIEW OF THE PLAINTIFF'S CONSIDERATIONS

When advising clients to sue or not sue in respect of environmental harm, lawyers should be mindful of the basic considerations which underlie any threshold determination of whether litigation should be commenced. A checklist summarizing these general considerations is attached to this paper as Appendix B.

These initial considerations generally apply to both environmental and non-environmental cases, and typically include careful assessments of various matters by the plaintiff's counsel, including (but not necessarily limited to):

- is there an identifiable defendant that is not judgment-proof, bankrupt or dissolved?

- is there more than one tortfeasor; if so, should joint and several liability be pleaded?
- what is the relevant limitation period?
- if there are limitations concerns, when was the cause of action discoverable?
- are there any special notice or leave requirements before an action can be commenced?
- is there a need for expert evidence re liability and/or damages?
- what is the plaintiff's overall objective (i.e. compensation, injunctive relief, etc.)?
- what is the likelihood of success?
- what is the quantum of the fees/disbursements necessary to commence and maintain the action?
- what is the likely extent of the plaintiff's exposure to an adverse cost award?

It is beyond the scope of this paper to canvass each of these initial considerations in any particular detail, or to exhaustively review all aspects of the jurisprudence that has emerged under the CPA or other class action regimes across Canada or other jurisdictions.[8] Instead, the remainder of this paper addresses some of the key questions which arise when environmental litigation is being contemplated by an Ontario plaintiff, especially if a class proceeding appears to be an option for bringing the prospective claims.

(a) Status of Environmental Class Proceedings in Ontario

In a well-known trilogy of cases,[9] the Supreme Court of Canada has signaled that courts should undertake a fair and flexible approach to certifying class proceedings in order to achieve the public policy objectives of access to justice, judicial economy and efficiency, and behaviour modification. Nevertheless, representative plaintiffs in Ontario must still be able to demonstrate that the certification criteria in the CPA are met before the claim will permitted to proceed as a class proceeding.

In particular, section 5 of the CPA provides that:

> 5(1). The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> (a) the pleadings or the notice of application discloses a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
>
> (c) the claims or defences of the class members raise common issues;
>
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a representative plaintiff or defendant who,
>
> (i) would fairly and adequately represent the interests of the class,

---

[8] Generally, see M. Eizenga, M. Peerless, and J. Callaghan, *Class Actions Law and Practice (2nd ed.)* (Markham: LexisNexis, 2008).

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

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

Since 1992, over one dozen environmental cases have been brought to court for certification under the CPA (see Appendix A below). In several cases, certification was granted (sometimes on consent for settlement purposes) in high-profile matters such as the Plastimet fire[10] and the Walkerton drinking water tragedy.[11] In other cases, certification was refused for various reasons relating to the criteria set out in the CPA.[12] In a recent environmental case involving the propane depot explosion in Toronto, the parties' arguments regarding certification were heard in mid-May 2012.[13]

The main "lessons learned" from these certification decisions in the environmental context are described in the following sections of this paper.

(b) Cause of Action Considerations

A class proceeding is simply a procedural mechanism, and the CPA does not create or expand any causes of action. Therefore, regardless of whether environmental litigation is framed as an individual action or class proceeding, the plaintiff must be able to plead and prove one or more causes of action on the facts of the case.

In environmental litigation, Ontario plaintiffs generally rely upon the following common law causes of action, depending upon the circumstances of their claims:

- nuisance;
- negligence;
- trespass;
- strict liability (*Rylands v Fletcher*);
- riparian rights;
- negligent misrepresentation;
- breach of contract.

In addition, there are certain statutory causes of action which may be available to Ontario plaintiffs. These include:

---

[10] *Cotter v. Levy*, [2000] O.J.No.3287 (Ont. S.C.J.). This class proceeding was subsequently settled: see http://www.blaney.com/sites/default/files/article_plastimet_case_study.pdf

[11] Certification was granted on consent (and the case settled) under the CPA in respect of claims arising from the bacteriological contamination of municipal drinking water in Walkerton: see Ontario Superior Court of Justice File No. 00-CV-192173CP and www.walkertoncompensationplan.ca.

[12] Environmental cases where certification was refused include: *Hollick v. City of Toronto,* [2001] 3 S.C.R. 158 ["*Hollick*"]; and *Grace v. Fort Erie (Town)* (2003), 42 M.P.L.R. (3d) 180 (Ont. S.C.J.).

[13] *Durling v. Sunrise Propane Energy Group Inc.*, [2011] O.J. No.5806 (Ont. S.C.J.).

- section 99 of Ontario's *Environmental Protection Act* (loss/damage from spilled pollutants);
- section 84 of Ontario's *Environmental Bill of Rights* (harm to public resources);[14]
- section 22 of the federal *Canadian Environmental Protection Act, 1999* (environmental protection action);
- section 40 of the federal *Canadian Environmental Protection Act, 1999* (loss/damage from non-compliance with Act or regulations);
- section 42(3) of the federal *Fisheries Act* (unlawful discharge of deleterious substance causing loss of income to commercial fishermen).

If the plaintiff elects to advance environmental claims through a class proceeding, the CPA jurisprudence has made it clear that section 5(1)(a) of the Act is not a "preliminary merits" test that involves the weighing of conflicting evidence on substantive matters. Instead, the motions judge must merely determine whether the plaintiff's statement of claim (or amended statement of claim, as is often the case) discloses a cause of action.[15] It is therefore incumbent upon the plaintiff's counsel to carefully draft the pleadings in a manner that fully sets out the facts and law needed to succeed in the cause(s) of action being relied upon in the litigation.

(c) Defining the Class

In certain mass tort cases, it is relatively straightforward to identify and delineate the class of persons who suffered loss or injury as a result of the defendant's alleged errors or omissions (i.e. passengers in airplane crashes, purchasers of defective products, etc.). In environmental cases, however, the appropriate definition of the class may pose some difficulty, as it is important to ensure that the proposed class is neither over-inclusive or under-inclusive. There must also be a rational connection between the defined class and the common issues identified by the representative plaintiff (see below).[16]

Representative plaintiffs in environmental class proceedings have typically used objective criteria (i.e. geographic and/or temporal limitations, without reference to merits of the action) to help define the class of aggrieved persons on whose behalf the litigation is being commenced. In *Hollick*, for example, the Supreme Court of Canada endorsed the following class description that potentially included 30,000 people near a landfill site:

> The appellant Hollick complains of noise and physical pollution from the Keele Valley landfill, which is owned and operated by the respondent City of Toronto. The appellant sought certification, under Ontario's *Class Proceedings Act, 1992*, to represent some 30,000 people who live in the vicinity of the landfill, in particular:

---

[14] However, subsection 84(7) of the *Environmental Bill of Rights* provides that this statutory cause of action cannot be brought or maintained as a class proceeding under the CPA, presumably because it may be viewed as another form of representative action. See also section 37(a) of the CPA; and M. Faieta et al., *Environmental Harm: Civil Actions and Compensation* (Toronto: Butterworths, 1996), at 360-361.

[15] M. Eizenga, M. Peerless, and J. Callaghan, *Class Actions Law and Practice (2nd ed.)* (Markham: LexisNexis, 2008), Sections 3.9 to 3.13.

[16] *Cloud v. Canada,* [2004] O.J. No. 4924 (Ont. C.A.).

> A. All persons who have owned or occupied property in the Regional Municipality of York, in the geographic area bounded by Rutherford Road on the south, Jane Street on the west, King Vaughan Road on the north and Yonge Street on the east, at any time on or after February 3, 1991, or where such person is deceased, the personal representative of the estate of the deceased person; and
>
> B. All living parents, grandparents, children, grandchildren, siblings, and spouses (within the meaning of s. 61 of the *Family Law Act*) of persons who were owners and/or occupiers . . .

The first question, therefore, is whether there is an identifiable class. In my view, there is. The appellant has defined the class by reference to objective criteria; a person is a member of the class if he or she owned or occupied property inside a specified area within a specified period of time. Whether a given person is a member of the class can be determined without reference to the merits of the action. While the appellant has not named every member of the class, it is clear that the class is bounded (that is, not unlimited). There is, therefore, an identifiable class within the meaning of s. 5(1)(b).[17]

Similarly, in the *Inco* litigation, the Ontario Court of Appeal approved a geographically restricted and time-limited definition of the class of aggrieved persons:

> In my view, the appellant has met the identifiable class requirement. The appellant has defined the class by objective criteria. As in *Hollick* at para. 17, "a person is a member of the class if he or she owned ... property inside a specified area within a specified period of time. Whether a given person is a member of the class can be determined without reference to the merits of the action." Again, to use the words of *Hollick* at para. 17, "while the appellant has not named every member of the class, it is clear that the class is bounded (that is, not unlimited)." The class definition was slightly refined before this court as follows:
>
> > All persons owning property since March 26, 1995 within the area of the City of Port Colborne bounded by Lake Erie to the south, Neff Road/Michael Road to the east, Third Concession to the north and Cement Road/Main Street West/Hwy 58 to the west, or where such person is deceased, the heir(s), executor(s), administrator(s), assign(s) or personal representative(s) of the estate of the deceased persons.
>
> That the class can be defined by objective criteria does not fully determine the identifiable class issue. The appellant must also show a rational relationship between the class and the common issues. In *Hollick*, at para. 21, McLachlin C.J.C. held that this requirement is not an onerous one, all that is required is

[17] *Hollick*, at paras. 2, 17.

"some showing" that the class is not "unnecessarily broad".[18]

(d) Health Claims vs. Property Claims

The conventional view is that it will be exceedingly difficult to obtain certification of environmental class proceedings that include health-based claims (i.e. physical injury, serious illness or disease, psychological trauma, etc.), which may require individual assessments and/or proof of causation for numerous persons within the defined class. This view draws support from cases such as *Inco,* where the Ontario Court of Appeal granted certification after the plaintiff dropped all health-based claims (and limited the claim to property value depreciation) during the course of the appeal process.[19]

Similarly, health-based claims were excluded by an Ontario judge who certified a class proceeding brought on behalf of persons who were evacuated from a large area after a major fire at a manufacturing facility:

> I am satisfied that the claims for the evacuated class members (estimated to be under $1,000 each) can be assessed through an aggregate assessment of damages. For the others in the proposed Class, in my opinion, the health effects, property devaluation and agricultural damage as alleged require individual assessments and separate trial of causation issues before individual claims can be determined.[20]

In addition, an Alberta case involving groundwater contamination was certified in relation to property-based claims rather than health-based claims.[21] In Nova Scotia, an environmental class proceeding was certified in relation to property-based claims after the plaintiffs dropped compensation claims for personal injury with respect to contaminants emanating from a steel mill for a lengthy period of time.[22] In Newfoundland, certification was denied in a class proceeding that involved health-based claims by persons exposed to herbicides sprayed at a military base.[23]

Despite this jurisprudence, it should be noted that health-based claims have been included within non-environmental cases which have been certified as class proceedings (i.e. defective drugs or medical devices). Similarly, environmental class proceedings involving health-based claims have been readily certified by Quebec courts.[24] In addition, there have been some environmental cases in Ontario which have been certified as class

---

[18] *Pearson v. Inco Ltd.* (2005), 20 C.E.L.R. (3d) 258 (Ont. C.A.), at paras.56-57.
[19] *Ibid.,* at paras.11-12, 18, 24, 41, 44, 50-51, 70-71.
[20] *Ludwig v. 1099029 Ontario Ltd. et al.,* [2004] O.J. No. 4573 (Ont. S.C.J.) at para. 51.
[21] *Windsor v. Canadian Pacific Railway Ltd.,* 2006 ABQB 348 (Alta. Q.B.).
[22] *MacQueen v. Sydney Steel Corp.,* 2011 NSSC 484 (NS SC) at paras.5, 41, 45.
[23] *Ring v. Canada,* 2010 NLCA 20 (NL CA). See also *Bryson v. Canada,* 2009 NBQB 204 (NB QB).
[24] Christine Kneteman, "Revitalizing Environmental Class Actions: Quebecois Lessons for English Canada" (2010), 6 *Canadian Class Action Review* 261, at 273-274.

proceedings even though health-based claims were put forward by the representative plaintiffs.[25]

In light of this track record, it appears that the odds of obtaining certification under the CPA may be increased if the representative plaintiff's claims are limited to property damage (i.e. property value diminution, remediation expenses, etc.). This is because omitting potential health-based claims will reduce the number, nature and complexity of so-called "individual issues" which may be invoked by the defendant – or accepted by the motions judge – as barriers to certification. Conversely, the plaintiff's prospects of success on the certification motion may be diminished if the statement of claim is primarily focused on health-based claims, particularly those involving historic contamination or situations where pollutants have been widely (or unevenly) dispersed into air, land or water over an extensive area.

In summary, it remains possible – but difficult – in Ontario to obtain certification for an environmental class proceeding involving health-based claims, except perhaps in those rare cases where liability has been admitted and/or an acceptable settlement package has been negotiated between the parties.

(e) Preferable Procedure and Common Issues

In assessing whether a class proceeding is the "preferable procedure" under section 5(1)(d) of the CPA, the courts will have regard for the purposes of the Act and evaluate whether the proposed class proceeding would be: (i) a fair, efficient and manageable method of advancing the claim; and (ii) preferable to other reasonably available means of resolving the claims of class members.[26]

In *Hollick*, one of the main stumbling blocks to certification was the Supreme Court of Canada's determination that, on the facts of the particular case, a class proceeding was not the "preferable procedure" for resolving common issues. In particular, the Court noted the existence of a $100,000 "Small Claims Trust Fund" to address off-site nuisance claims arising from the defendant's landfill site. The Court further observed that if affected residents had more sizeable or significant claims against the defendant (i.e. larger than the $5,000 per claim limit imposed by the Fund), then these could be advanced through individual actions:

> The central problem with the appellant's argument is that, if it is in fact true that the claims are so small as to engage access to justice concerns, it would seem that the Small Claims Trust Fund would provide an ideal avenue of redress. Indeed, since the Small Claims Trust Fund establishes a no-fault scheme, it is likely to provide redress far more quickly than would the judicial system. If, on the other hand, the Small Claims Trust Fund is not sufficiently large to handle the class

[25] However, the precedential value of some of these cases may be limited since the certification orders were made on consent for the purposes of implementing court-approved settlement agreements (i.e. the Walkerton case).

[26] *Pearson v. Inco Ltd.* (2005), 20 C.E.L.R. (3d) 258 (Ont. C.A.), at para.67.

> members' claims, one must question whether the access to justice concern is engaged at all. If class members have substantial claims, it is likely that they will find it worthwhile to bring individual actions. The fact that no claims have been made against the Small Claims Trust Fund may suggest that the class members claims are either so small as to be non-existent or so large as to provide sufficient incentive for individual action. In either case access to justice is not a serious concern. Of course, the existence of a compensatory scheme under which class members can pursue relief is not in itself grounds for denying a class action — even if the compensatory scheme promises to provide redress more quickly: see *Rumley v. British Columbia*, 2001 SCC 69 (S.C.C.), at para. 38. The existence of such a scheme, however, provides one consideration that must be taken into account when assessing the seriousness of access-to-justice concerns.[27]

On the other hand, in the *Inco* case, the existence of a "Community Based Risk Assessment" process (which provided for site remediation but not monetary compensation) was held not to be a bar to certifying the class proceeding:

> Despite the strong argument supporting the alternative of the CBRA, I am satisfied that it does not address the access to justice concerns. The CBRA does not address the core issue of this lawsuit: the alleged widespread damage to land values throughout Port Colborne caused by the past pollution. Remediation is limited to qualifying individual properties with significant contamination. It is open to the class members to argue that it does not address the injury already caused. Inco may be able to show that land values may rebound after remediation, but that is an issue for the trial.[28]

The Court further held that "it is not possible to reach a conclusion on preferable procedure without having a clear understanding of the common issues."[29] "Common issues" are defined under the CPA as: (i) common but not necessarily identical issues of fact; or (ii) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.[30]

The resolution of "common issues" of fact or law is arguably one of the main reasons for utilizing class proceedings (rather than such issues adjudicated in a multiplicity of individual actions). In considering whether there is sufficient commonality in the plaintiff's proposed "common issues", the courts will, *inter alia*, consider whether the resolution of such issues will help move the litigation along. Such issues do not have to "predominate" over individual issues, or be determinative of liability or otherwise fully resolve the litigation. Nevertheless, the common issues must be an important or significant component in the claim as a whole.[31]

---

[27] *Hollick*, at para.33.
[28] *Pearson v. Inco Ltd.* (2005), 20 C.E.L.R. (3d) 258 (Ont. C.A.) at para.80.
[29] *Ibid.*, at para.24.
[30] CPA, section 1.
[31] M. Eizenga, M. Peerless, and J. Callaghan, *Class Actions Law and Practice (2nd ed.)* (Markham: LexisNexis, 2008), Sections 3.66 to 3.95, 3.106.

(f) Causation Considerations

Unlike civil actions arising from impaired driving or "slip and fall" situations, environmental cases often involve daunting evidentiary issues in relation to cause-effect relationships. Even on a balance of probabilities, it can sometimes be exceedingly difficult to establish the causal linkage between the defendant's emission of a toxic substance and the particular injury or property damage being claimed by the plaintiff.

Accordingly, plaintiffs in individual actions and class proceedings will almost always find it necessary in environmental cases to retain qualified experts in various disciplines in order to prove causation to the satisfaction of the trial judge. Defendants in such cases invariably respond by calling their own suite of experts to produce reports and testify at trial. Not only does the expert-intensive nature of environmental litigation increase the parties' costs (and potential cost exposure), but it also leaves the trial judge with the unenviable task of assessing voluminous technical evidence and conflicting scientific opinion.[32]

However, the Supreme Court of Canada has provided guidance in helping resolve causation issues in civil cases. For example, the Court has held that: (i) causation is "a practical question of fact" that should be answered by "ordinary common sense"; (ii) causation "need not be determined by scientific precision"; and (iii) a trial judge may infer causation even though "positive or scientific proof of causation has not been adduced."[33]

Similarly, when determining causation, a trial judge should consider whether there is direct evidence from which the cause of the plaintiffs' damages can be determined, or, alternatively, whether there is circumstantial evidence from which the cause of the plaintiffs' damages can be inferred.[34] While the "but for" test is the general requirement for factual causation, the Supreme Court of Canada has recognized an alternative "material contribution" test, which may be applicable where: (i) through no fault of their own, it is impossible for the plaintiffs to prove "but for" causation (e.g. limits of scientific knowledge); and (ii) it is clear that the defendant breached its duty of care, thereby exposing the plaintiffs to an unreasonable risk of injury, and the plaintiffs suffered that form of injury.[35]

At all material times, counsel for representative plaintiffs in environmental cases should be mindful of causation issues as the pleadings are crafted and the evidence is assembled.

---

[32] At the *Berendsen* trial, the parties presented opinion evidence from a dozen experts in varied disciplines such as hydrogeology, organic chemistry, environmental toxicology, dairy cattle management, veterinary science, and damages assessment: see *Berendsen v. Ontario* (2008), 34 C.E.L.R. (3d) 223 (Ont. S.C.J.); revd. 2009 ONCA 845; leave to appeal to the SCC granted but appeal withdrawn. Similarly, at the *Inco* common issues trial, 13 experts were called as witnesses by the parties.

[33] *Snell v. Farrell*, [1990] 2 S.C.R. 311, at paras. 29, 32, 33; *Athey v. Leonati*, [1996] 3 S.C.R. 458, at paras. 12-20.

[34] *Fontaine v. British Columbia*, [1998] 1 S.C.R. 424, at para. 27.

[35] *Resurfice Corp. v. Hanke*, [2007] 1 S.C.R. 333 at paras.24-25.

While a certification motion under the CPA is an important procedural step, the plaintiff's counsel should be cognizant of what needs to be pleaded and proven at trial in order to obtain a favourable judgment. In this regard, certification should not be viewed as an end in itself, but as a means to an end (i.e. successful outcome for the representative plaintiff and other class members).

PART III – INDIVIDUAL ACTION OR CLASS PROCEEDING?

In the environmental context, an individual action or a class proceeding will typically involve the same: (i) causes of action; (ii) standard of proof; and (iii) legal, technical and scientific issues regarding causation; and (iv) other evidentiary hurdles from the plaintiff's perspective. Both forms of litigation are also generally subject to the same *Rules of Civil Procedure* governing pleadings, pre-trial matters, and the conduct of the trial.[36]

Thus, the initial decision to frame environmental litigation as an individual action or class proceeding largely depends upon an assessment by the plaintiff's counsel of the financial implications and the resources necessary to conduct the litigation to its completion.[37]

In cases where the claimed damages are relatively small for each aggrieved person, but where the experts' costs and lawyers' fees may be prohibitive, then bringing an environmental dispute forward as a class proceeding may make strategic and fiscal sense since this mechanism allows plaintiffs to pool resources, or to access other funding sources.[38] Moreover, if the action is certified under the CPA as a class action, then the representative plaintiff may enjoy considerable leverage in terms of negotiating an acceptable settlement with the defendant. However, it would not be prudent for representative plaintiff to assume *ab initio* that settlement will automatically follow certification. To the contrary, the representative plaintiff (and, indeed, individual plaintiffs) should realistically anticipate that all liability and damage issues will be vigorously contested at all stages by the defendant.

However, if the plaintiff's claim is sufficiently large to warrant the expenses (and adverse cost risks) associated with an individual action, then that mechanism may be the appropriate vehicle for suing in relation to environmental harm. In such circumstances, it is reasonable to anticipate that a motions judge may determine that an individual action is not only viable, but is also the preferable procedure for resolving environmental disputes involving sizeable monetary claims or requiring individualized assessment of health-

---

[36] CPA, section 35. See also section 12 of the CPA, which confers broad judicial authority to ensure the "fair and expeditious" determination of class proceedings.

[37] Michael Cochrane, *Class Actions* (Aurora: Canada Law Book, 1993) at 5.

[38] Representative plaintiffs in Ontario may apply for financial assistance (i.e. for disbursements, expert witnesses, etc.) from the Class Proceedings Fund administered by the Law Foundation of Ontario. Where such assistance has been provided, the plaintiff, if successful, must repay the amount (plus a percentage of the judgment or settlement) to the Fund. If the plaintiff is unsuccessful, then the defendant may be entitled to recover costs from the Fund: see *Law Society Amendment Act (Class Proceedings Funding), 1992,* S.O. 1992, c.7; O.Reg.771/92 as am.; and Rule 12.04 of the *Rules of Civil Procedure.* See also section 31 of the CPA regarding the courts' cost discretion in class proceedings.

based damages. In any event, commencing an individual action rather than a class proceeding eliminates extra procedural steps (i.e. the certification motion and consequential appeals), and gives the plaintiff greater control over the conduct of the litigation while minimizing the supervisory role of the courts.[39] In this regard, it should be noted that several key steps of class proceedings in Ontario (i.e. certification, de-certification, provision of notice, judgment distribution, approval of settlements, legal fee agreements/increases, etc.) require judicial scrutiny under the CPA.

In conclusion, a class proceeding should be seriously considered by counsel as a procedural option for advancing environmental claims in situations where property-based damages are being claimed, but may be uneconomical to pursue as individual actions due to the cost of the litigation or the modest quantum of damages suffered by aggrieved persons. On the other hand, where the property-based damages are sizeable, or where it appears that the CPA certification criteria cannot be met (particularly if health-based environmental damages are claimed), then framing the litigation as an individual action (or aggregating individual actions through the joinder rule[40]) may be the advisable procedural route.

May 2012

[39] Michael Cochrane, *Class Actions* (Aurora: Canada Law Book, 1993) at 7.
[40] Rule 5.02 of the *Rules of Civil Procedure.*

APPENDIX A

ONTARIO CERTIFICATION DECISIONS IN ENVIRONMENTAL CASES

The following summary describes some of the key certification decisions rendered under Ontario's CPA in environmental cases to date.

Environmental Cases Certified under the CPA

Plaunt v. Renfrew Power Generation Inc., 2011 ONSC 4087 (Ont. S.C.J.)

Certification granted for class of lakefront property owners claiming damages in relation to shoreline erosion and water level fluctuations arising from hydroelectric dam operated by the defendant under statutory licence since 1930.

Blair v. Toronto Community Housing Corp., [2011] O.J. No.3347 (Ont. S.C.J.)

Certification granted for class of tenants in relation to various claims arising from a fire at an apartment owned by defendant landlord.

Wamboldt v. Northstar Aerospace (Canada) Inc., [2009] O.J. No. 2583 (Ont. S.C.J.)

Certification granted for class of landowners for the purposes of settlement in relation to property-related claims arising from the off-site movement of contaminants in groundwater from a manufacturing facility.

Grant v. Canada, [2009] O.J. No.5253 (Ont. S.C.J.)

Certification granted for class of First Nations residents claiming health-related damages from living in residential premises containing toxic mould.

Pearson v. Inco Ltd. (2005), 20 C.E.L.R. (3d) 258 (Ont. C.A.); leave to appeal refused 2006 CarswellOnt 4020 (SCC)

Certification granted for class of landowners claiming property value depreciation in relation to aerial deposition of nickel oxides from nearby industrial facility.

Ludwig v. 1099029 Ontario Limited et al., [2004] O.J. No. 4573 (Ont. S.C.J.)

Certification granted for class of residents who were evacuated from an area following major fire at a polystyrene manufacturing facility.

Smith v. Brockton, 00-CV-192173CP (Ont. S.C.J.)

Certification granted (and the action settled) for class of persons claiming various damages resulting from the bacteriological contamination of a municipal drinking water system.

Cotter v. Levy, [2000] O.J. No. 3287 (Ont. S.C.J.)

Certification granted for class (and sub-classes) of persons in relation to personal injury and property-based claims involving air and water pollution arising from large fire at a plastics recycling facility.

Mangan v. Inco Ltd. (1998), 38 O.R. (3d) 703 (Ont.Ct. Gen.Div.)

Certification granted (and the action settled) for class of persons arising from discharge of gaseous emissions from an industrial facility

Environmental Cases Not Certified under the CPA

Defazio v. Ontario, [2007] O.J. No. 902 (Ont. S.C.J.)

Certification denied for class of persons claiming health-based damages arising from presence of asbestos in a subway station.

Dumoulin v. Ontario, [2005] O.J. No.3961; supplementary reasons [2006] O.J. No. 1233 (Ont. S.C.J.)

Certification denied for class of persons claiming health-based damages arising from presence of toxic mould in the defendant's courthouse.

Grace v. Fort Erie (Town) (2003), 42 M.P.L.R. (3d) 180 (Ont. S.C.J.)

Certification denied for class of residents claiming health-based and property-related damages in relation to the supply and potability of drinking water from defendant municipality.

Hollick v. City of Toronto, [2001] 3 S.C.R. 158

Certification denied for class of residents claiming various damages in relation to off-site impacts arising from the use and operation of a large municipal landfill.

Other Notable Environmental Cases under the CPA

Durling v. Sunrise Propane Energy Group Inc., [2011] O.J. No.5806 (Ont. S.C.J.)

Consent certification order refused due to proposed inclusion of a six-month "claims bar" which unduly limited rights of potential class members in respect of health-based and property-related damages caused by explosions at propane depot.

Bellefeuille v. Canadian Pacific Railway Ltd., [2011] O.J. No. 1937 (Ont.Div.Ct.)

Plaintiffs permitted to amend statement of claim to convert their action to a class proceeding in respect of property-related damages arising from diesel fuel spills.

APPENDIX B

PLAINTFF'S PRELIMINARY CHECKLIST: ENVIRONMENTAL LITIGATION

The following list of factors is generally intended to identify key threshold issues which should be considered before a prospective plaintiff decides to commence an individual action or class proceeding in relation to environmental harm. This list is not intended to be exhaustive of all matters which should be considered by counsel and discussed with clients prior to the commencement of litigation. Instead, this list provides illustrative examples of issues of fact, law and strategy which typically arise in environmental litigation. Whether or not these factors (or others) are relevant to a particular claim is highly fact-specific, and must therefore be determined on a case-by-case basis.

Initial Matters

- identifiable defendant that is not judgment-proof, bankrupt, dissolved, or that has not disappeared?
- more than one tortfeasor (including municipal, provincial or federal levels of government)?
- joint/several liability (section 2 of *Negligence Act*)?
- limitation period and/or discoverability?
- any special notice or leave requirements (i.e. court-appointed receiver-managers)?
- need for expert evidence re liability/damages?
- likelihood of success?
- full or limited retainer?
- client identification?
- conflict check?
- is the action statute-barred?
- what is plaintiff's overall objective (i.e. compensation, injunctive relief, etc.)?
- which level of court (i.e. Small Claims Court, Superior Court of Justice, Federal Court, etc.)?
- which court procedure (i.e. simplified process, individual action, class proceeding)?
- joinder/consolidation/test case?
- any anticipated service issues (i.e. service *ex juris,* substituted service, etc.)?

Liability

- does plaintiff have one or more common law causes of action available on the facts, such as:
  - (i) private nuisance?
  - (ii) public nuisance (section 103 of *Environmental Bill of Rights*)?;
  - (iii) negligence?
  - (iv) trespass to land?
  - (v) trespass to the person?

(vi) strict liability (*Rylands v Fletcher*)?
(vii) riparian rights?
(viii) negligent/fradulent misrepresentation?
(ix) breach of contract?
(x) intentional torts (assault/battery)?
(xi) others?

- does plaintiff have one or more statutory causes of action available on the facts, such as:
  (i) section 99 of the *Environmental Protection Act*?
  (ii) section 84 of the *Environmental Bill of Rights*?
  (iii) section 22 of *Canadian Environmental Protection Act*?
  (iv) section 40 of *Canadian Environmental Protection Act*?
  (v) section 42(3) of *Fisheries Act*?
  (vi) others?
- does plaintiff have proof of causation on a balance of probabilities?
- if not, did defendant materially contribute to plaintiff's harm/loss?
- any evidence of contributory negligence?
- which liability defences may be invoked by defendant?
- any *res judicata* or issue estoppel considerations?

Damages

- has plaintiff attempted to mitigate damages?
- nature/extent of damages attributable to defendant's conduct:
  (i) personal injury/*Family Law Act* claims?
  (ii) business loss?
  (iii) loss of normal use/enjoyment of property?
  (iv) property value depreciation or "stigma"?
  (v) cleanup/remediation costs;
  (vi) re-financing costs;
  (vii) others?
- quantification of plaintiff's general damages?
- special damages?
- punitive, aggravated, exemplary damages?

Class Proceeding

- can plaintiff satisfy the certification test (section 5 of CPA):
  (i) cause of action?
  (ii) identifiable class (or sub-classes)?
  (iii) common issues?
  (iv) preferable procedure?
  (v) fair/adequate representation of class?
  (vi) workable litigation plan (including notice)?
  (vii) no conflict of interest re common issues?

- funding available for legal fees/disbursements (i.e. Class Proceedings Fund administered by Law Foundation of Ontario)?
- discovery considerations?
- use of statistical evidence?
- distribution of judgment or settlement?
- contingency fee arrangement (including "multiplier" of base fee)?

Remedies

- declaration?
- injunction (i.e. mandatory, prohibitory, etc.)?
- award of monetary damages (general, special, etc)?
- punitive, exemplary, or aggravated damages?
- costs (including scale) and applicable taxes?
- pre- and post-judgment interest (*Courts of Justice Act*)?
- need for interlocutory relief?
- others?

Other Considerations

- place of trial?
- co-counsel arrangement?
- others?