CLASS ACTIONS IN THE GOVERNMENT CONTEXT

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Whether intended or not, in 1993, when the Ontario government passed the *Class Proceedings Act, 1992*, the Province itself became a primary target of class actions. These class actions have come in all shapes and sizes from inmates setting fire to their cell blocks to a major environmental tragedy like Walkerton. In Walkerton, while the insurers have capped their liability, the Province still has an uncapped ongoing exposure.

Governments as large actors in society are a natural target of class actions. Moreover, governments tend to act in ways which are susceptible to class actions in that government actions often treat a large number of people in a similar fashion. In those cases, its is fairly easy to identify the class members, one of the requirements for the certification by the court of a class proceeding. In short, the normal way that governments behave can make it easy for plaintiff's class counsel to define a workable class for the court.

The political element can bedevil the defence of class proceedings by insurers. The recognition of that factor is essential in the successful handling of these claims.

Many class proceedings against governments fall into the category of claims that insurers insuring public bodies have always faced. Insurers have always faced claims against government

that are framed in negligence but that are obviously designed for political pressure. These types of cases frequently raise legal points which are novel or far-fetched. They will always be around. For an insurer facing such a claim in the class proceeding context, it becomes imperative to defeat the claim at the beginning for not disclosing a valid cause of action (a valid cause of action being another requirement for an action to be certified as a class proceeding).

Inmates cases against government also are not new. Far-fetched inmate fuelled causes of action are still far-fetched even if dressed up in class proceeding apparel. These cases tend to be as frivolous as most police and prison claims are. In a recent case, an inmate in a cell block tried to bring a class action on behalf of himself and his cell block members on account of damages they had suffered as a class after a number of inmates on the cell block had set it afire. Justice Malloy saw through that one.[1]

Almost all class actions which are susceptible to certification as class actions are settled. The costs and risks of litigating to the end become too expensive for both sides.

Plastimet: A case study

At first blush, Plastimet[2], a large plastics fire at a Hamilton recycling company in the summer of 1997, appeared to be a political and insurance disaster. Greenpeace certainly called it an environmental disaster at the time. Hundreds of thousands of people were allegedly affected

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1. ***Nixon v. Canada*** (Attorney General), [2002] O.J. No. 1009 (Ont. S.C.J.)

2. ***Cotter v. Levy et al***, (1998), 24 C.P.C. (4th) 92; [1998] O.J. No. 5842; [2000] O.J. No. 1086; [2000] O.J. No. 3287

and hundreds were evacuated. A class action for $200 million was commenced. There were calls for a public inquiry in the legislature.

The case settled in 2001 and a settlement fund of under $4 million was created. Final distribution of the settlement funds was recently approved by the court. The total cost of the settlement was slightly over $2 million and a number of insurers were involved. How that happened is an interesting case study.

The Fire

At approximately 7:45 in the evening of Wednesday, July 9, 1997, a fire started on the rented industrial premises of Plastimet. The fire quickly set ablaze hundreds of tonnes of plastic stored on the site creating a plume of smoke which could be seen a hundred kilometres away. The fire continued to pour smoke and particulate into the air for almost three days.

Two days into the fire, the City of Hamilton ordered an evacuation of 700 residents immediately adjacent to the fire. Hundreds of thousands could smell the soot throughout the City. Ash fell miles away.

The levels of hydrochloric acid were so high near the fire that the metal on fire trucks melted.

Public authorities warned residents not to eat the vegetables from their gardens.

There were calls for a public inquiry and questions in the legislature for years.

At the time of the fire, by all accounts, it appeared to be a major environmental disaster affecting hundreds of thousands of people with incalculable damages whose full extent might not be known for years. A class action seeking $200 million in damages was commenced. Fourteen defendants were named, including the Province of Ontario, defended by Blaneys. Apart from the private persons and companies attached to the site, there were allegations against all three levels of government for failing to prevent the fire.

The Settlement

When the case settled in May 2001, the major claimant turned out to be an American insurance syndicate acting on a subrogation claim for the clean up of a packaging plant across the street from the fire.

Under the settlement, each of the ten thousand residents near the fire could receive $200 each on proof of residency during the fire. A contingency fund was set up for claimants who might have larger claims. The settlement fund contained $3,885.000. After the Referee's final report to the class action judge, the total cost to all insurers of this apparently major class action turned out to be $2,103,004, or barely one per cent of the original claim. For a class of 10,000 people, a $2 million settlement split among insurers barely qualifies as a major loss.

What happened?

Primarily what happened is that the evidence disclosed on the certification hearing established that while this was a really big fire which was difficult to put out, the emissions from the fire did not reach levels to cause concern about long-term health effects and the acute health effects were minor and transitory and, even then, only a minority of the residents immediately

adjacent to the fire suffered any short-term health effects, usually irritation of the eyes, nose and throat.

The certification hearings on a mass tort claim

The entire course of the proceedings were taken up with the certification hearings under the ***Class Proceedings Act***, which took place over a period of two years with 9 court dates. While the certification hearings are said not to determine the merits, factual evidence presented during the certification hearing will inevitably illuminate the issues going to the merits of the case, as well as providing a basis upon which the class action judge can decide whether to certify the action as a class proceeding. Also, if presented with a settlement proposal, as frequently happens, the class action judge has the evidence from the certification hearings as well as any further evidence from the fairness hearing, on which to base an approval of settlement. Judicial approval of all settlements is another requirement in class proceedings, whether those proceedings are certified as a class proceeding or not.

While it is frequently said that the ***Class Proceedings Act*** did not change substantive law, the effect of the ***Class Proceedings Act*** certainly changed and was meant to change the types of actions which would be brought when the quantum of damages were small for each party but where many parties were affected in a similar way.

The Americans have had a mixed reaction to mass tort claims. There are statements in their law which would suggest that class actions are inappropriate in most mass tort cases, especially where individual damages are high. The experience with the Mississauga train derailment prior to the enactment of the Act lead to the view in Ontario that class actions can be appropriate for environmental mass torts.

Indeed, by now, we have the expertise to handle mass tort cases.

The key to making a mass tort claim viable is whether there is a "workable" plan for the proceeding, given the potentially large numbers of claimants.

In such a case, a certification hearing must assess significant evidence about the nature of the claims arising from the mass tort in order to approve a sensible class and sensible plan for the action.

Not all mass torts are manageable as a class action. In ***Hollick v. Toronto***[3], a case which arose from complaints about smells from the Keele Valley Landfill Site, the Supreme Court of Canada upheld the refusal of the Ontario Court of Appeal to certify the action as a class proceeding. The proposed class was 30,000 residents and involved alleged incidents over a period of many years. In the course of their decision, at page 266, the Court of Appeal stated:

> "We are not dealing with a plume that enveloped a neighbourhood for a defined period where, upon proof of the event, it can be assumed that everyone was similarly affected by a legal nuisance."

In the Plastimet case, the Province always acknowledged that it would be possible to propose an appropriate class proceeding. The Province objected to the first proposed plan of proceeding as being wholly unworkable. The certification judge agreed and sent the plaintiffs back to the drawing board on two occasions to prepare a different plan.

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[3] ***Hollick v. Toronto***, [2001] S.C.C. 68, affirming (1999) 46 O.R. (3d) 257 (C.A.)

Evidence at the certification hearing

At the Plastimet certification hearing, the Province presented extensive scientific evidence regarding the emissions from the fire and their effects. This evidence was based on statistical measurements taken by scientists at the time of the fire, including a McMaster professor who took measurements from the roof of the manufacturing plant across the street from the fire. The Provincial mobile TAGA unit also took numerous measurements.

The scientific measurements showed that for most people closest to the fire, the effects of the fire emissions were equivalent to smoking one cigarette on each day of the fire.

In addition to the scientific measurements, the Region conducted a health survey of several hundred residents on the Monday and Tuesday following the fire and found that most residents, about 62 percent, had no short-term health effects from the fire. A medical survey found that only 11 people appeared to have sought medical attention because of the fire.

This evidence is a benefit in representing government. If properly utilized, government resources can be very effective in marshalling evidence helpful to the insurer defending a claim.

After the fire, the Region compensated 9,400 residents at the rate of $100 each on account of residing in areas which were occasionally barricaded during the fire. That government action inevitably defined the extent of the class in the class proceeding.

Defining the class

The issue which caused the plaintiffs the greatest difficulty during the certification hearings was defining the class.

The original definitions proposed were based around the word "exposed" which was the operative word used by Justice Winkler in ***Bywater v. Toronto Transit Commission***[4]. That case involved a fire affecting a defined number of TTC cars.

In considering why he accepted the definition in that case, at page 175, Justice Winkler stated:

> "The purpose of the class definition is three fold: (a) it identifies those persons who have a potential claim for relief against the defendants; (b) it defines the parameters of the law suit so as to identify those persons who are bound by its result; and lastly, (c) it describes who is entitled to notice pursuant to the Act. Thus for the mutual benefit of the plaintiff and the defendant the class definition ought not to be unduly narrow nor unduly broad."

In ***Cotter v. Levy***, supra, Justice Crane stated:

> "This Court requires in this action a definition of 'class' and 'sub-classes' to be certain, objective and readily ascertainable by lay persons….I require a definition that allows claimants and non-claimants to readily identify themselves as to one or the other."

What the evidence in the Plastimet case showed was that "exposure" for a large number of people primarily meant inconvenience. It was only close to the fire that there were any short-term health effects and they were minor and transitory, effectively ending when one stopped breathing the smoke.

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[4] ***Bywater v. Toronto Transit Commission*** (1998), 27 C.P.C. (4th) 172

The definitions of the size of the class originally proposed by plaintiff's counsel essentially encompassed anyone who was at any time under the plume which appeared to cover over a million people. What kind of workable plan could there have been to deal with those claims? Compensating such a class by the government defendants also would make no sense. The main defendant was the City of Hamilton and the plaintiffs would be all the residents of the City of Hamilton. In the end, Justice Crane indicated that he would be prepared to accept a definition of the class with a geographic boundary. He considered the most appropriate geographic boundary to be that which encompassed those residents compensated by the Region.

The Referee

The device of appointing a referee under the ***Rules*** was used to administer the settlement. The parties chose the adjusting firm of Crawford & Company. They made a report which was approved by Justice Crane. This method has the advantage of being part of the existing ***Rules*** with all the usual procedural safeguards already in place. Once the referee's report was accepted, with modifications, by Justice Crane, the settlement funds were distributed to the class members. Almost $2 million from the settlement fund was returned to the insurers as not all members of the class claimed their $200. Also, no member of the class came forward with a personal injury claim against the contingency fund.