ENVIRONMENTAL AND OHS CLASS ACTIONS: PLAYING FOR "KEEPS"

by Stuart Chambers, Partner

Many heavy industry companies operating in Canada require licences from environmental regulatory authorities where their operations may have an impact on the environment. They must also comply with federal, provincial and municipal environmental laws. Further, all companies have a general obligation to reasonably ensure the health and safety of their employees. When an environmental or OHS incident occurs, the company responsible may face charges or other penalties under "Health, Safety and Environment" legislation. However, their liability may not be confined to the regulatory arena – companies may face exposure to lawsuits claiming damages arising from these same activities. In fact, even if the activity in question was properly licenced, that would not automatically protect the company from civil judgments against it. And when the lawsuits are advanced as class actions, the costs of defending and the scope of damages awarded by the court may ultimately ruin the company. A class action is a hard fight, one often played for "keeps".

The landscape of civil litigation in Canada was fundamentally altered by the introduction of provincial class action legislation, commencing in B.C., Ontario and Quebec in the 1990s and now encompassing almost every province and territory. Alberta's legislation came into force in 2004.

A class action is in most respects the same as any other civil lawsuit. However, a critical distinction is that upon Court approval or "certification", the action proceeds on the instruction of an identified representative Plaintiff (or several, in the case of sub-classes) on behalf of all members of the class. Class members who do not opt out of the litigation (in most cases - some jurisdictions such as B.C. provide for "opting in" by non-residents in order to be bound) are bound by the outcome of the litigation. The principal rationales for class actions include the efficiency of combining numerous proceedings into one action, the saving of scarce judicial resources by doing so, and an enhanced ability to access justice on the part of individual litigants. Commencing separate actions would often be uneconomic, in particular where the claims are, on an individual basis, small. However, aggregated on behalf of a large class, claims can become a formidable threat to Defendants.

Although class actions are generally conceived in the context of product liability suits and, more recently, securities issues, they may also have an impact in areas more traditionally addressed through regulatory rather than civil litigation proceedings. For instance, environmental issues have of late have become more prominent in the class proceedings arena.

A recent example is the 2011 decision of the Ontario Court of Appeal in *Smith* v. *Inco Limited*. In this case, the class comprised all residents of the Ontario municipality of Port Colborne. The claims related to damages alleged to have been suffered resulting from the operation of a nickel refinery in that community by the Defendant. Specifically, the damages alleged were not human health effects or soil contamination, but rather, that property values in Port Colborne had not appreciated as quickly as in neighbouring, comparable communities.

This action was certified by the Ontario courts as a class action and proceeded to trial. Although the class was largely successful at trial, the judgment in its favour was overturned by the Ontario Court of Appeal in the fall of 2011, on a number of legal and factual bases. As I noted in my article in the Winter 2011 edition of the McLennan Ross *Legal Counsel*, this action is of potentially great significance to environmental class proceedings, given its restrictive application of the limitations legislation (the laws that require a lawsuit to be started within a specified period of time after the injured party becomes aware, or should have become aware, that they have a claim to advance – in Alberta, generally two years). In brief, the lower Courts found that the limitation period only began to run against the Class upon the publication by government authorities of health concerns associated with nickel contamination. However, the Court of Appeal found that whether or not the individual class members knew of the potential for a claim of property damages associated with such risks, was an individual issue and could not proceed as a class action.

Alberta has also seen environmental issues addressed through class proceedings. In *Paron* v. *Alberta (Environmental Protection)*, the Court denied a certification application brought on behalf of cottage owners of Wabamun Lake. The class action intended to seek damages and an injunction for thermal pollution attributed to an electrical engineering plant operated near the lake, which allegedly interfered with the cottage owners' enjoyment and value of their properties. Another Alberta action, *Windsor* v. *Canadian Pacific Railway Ltd.*, was certified on behalf of a class of landowners in the Ogden community of Calgary who claimed that contamination had flowed from the Defendant's operating site to the groundwater beneath their homes and commercial properties, reducing their values.

The above are simply three examples of environmental issues which have led not only to litigation, rather than (or in addition to) the intervention of the environmental regulators, but to a class proceeding on behalf of a group of allegedly impacted landowners. In two of the three described cases, certification was granted (although in the *Inco* decision, the Court of Appeal dramatically restricted the scope of certification by classifying certain issues as not suitable for a class action). Accordingly, there continues to be every reason to believe that the class action tool will be used by environmental law practitioners on behalf of their clients, to advance claims that might not be economic or feasible on an individual basis. Further, this provides a powerful tool to redress environmental issues, where impacted land owners and others are not satisfied with the steps taken by the environmental regulatory authorities. Indeed, as I noted in my Spring 2009 article in *Legal Counsel*, the Supreme Court of Canada has held that compliance with environmental regulations and licencing does not necessarily preclude liability in damages to, for example, neighbouring landowners who are adversely affected by a company's operations. Therefore, an operator may be exposed to civil lawsuits, including class actions, even where it has complied with all applicable environmental regulations and no regulatory enforcement is taking place.

By contrast, we do not see in Canada any significant development of class actions in the occupational health and safety field. At first blush, this appears somewhat odd. Occupational health and safety issues can similarly affect groups of claimants such as employees, and indeed can have precisely the same effect on such groups of claimants, all of which would appear to be well suited to the class proceeding mechanism. However, on further review it becomes clear that occupational health and safety class proceedings in Canada are generally not feasible. This is primarily due to the

presence of workers' compensation legislation in all provinces. Workers' compensation legislation provides compensation to workers who are injured on the job, on a no-fault basis. However, the statutory trade-off for this compensation is that workers are generally not permitted to pursue litigation against their employers in relation to those same injuries. For instance, although the Alberta legislation permits the Workers' Compensation Board ("WCB") to allow an injured worker to sue third parties who are not covered by the *Workers' Compensation Act* ("WCA"), such consent is rarely granted. Where it is granted, the WCB can maintain significant control over the prosecution including the ability to direct counsel and to deny approval to any settlement[1]. Furthermore, the WCB is entitled to bring that same action in the name of the worker without his or her consent. However, as with all administrative bodies, the WCB cannot exercise its powers unless there is a reasonable basis to do so[2]. Thus, as Professor Garry Watson of Osgoode Law School noted, the existence of workers' compensation legislation in Canada explains why Canada, unlike the United States, has not had asbestos litigation[3].

Professor Watson's conclusion is illustrated by the recent Alberta decision of *Stewart* v. *Enterprise Universal Inc.*, where the Defendant sought a summary dismissal of a class action lawsuit relating to illness allegedly arising from asbestos exposure. The Defendant, Enterprise, had already pled guilty to one count of violating Alberta's *Occupational Health and Safety Act.* Enterprise was successful in arguing that the action should be dismissed on the basis that workers' compensation legislation barred the Court action.

A further roadblock to occupational health and safety claims in Canada relates to the ability of the Crown to protect itself from liability in the same manner as workers' compensation legislative schemes protect private employers. In this regard, proposed class proceedings have been denied certification in Saskatchewan, Newfoundland and New Brunswick respecting persons alleged to have been harmed by the spraying of defoliating chemical agents. One of the reasons specified by the Newfoundland Court of Appeal for denying certification was that a majority of the proposed class members were likely barred by federal legislation limiting the liability of the Crown, on the similar basis to workers' compensation statutes. Essentially, federal legislation insulated the federal Crown from any actions where pension or compensation had been paid in respect of the particular injury or damage. In the case of these "Agent Orange" injuries, the Canada *Pension Act* had provided for payments to service members in connection with injuries or diseases suffered arising out of, or directly connected with, military service. Interestingly, Professor Watson suggests in his article that the existence of specific or "ad hoc" government compensation schemes may well be a response to the institution of class actions. In other words, government finance compensatory packages (such as those resulting from Hepatitis C claims against the national blood banks system), may well be a response – or a preventative measure in relation – to class actions.

A potential avenue for civil liability may arise indirectly, through possible impacts on family members, friends or close contacts of injured workers. As an example, if family members of

[1] See section 22 of the WCA.

[2] *Gutierrez v. Jeske*, 2005 ABCA 110.

[3] Garry D. Watson, *Class Actions: The Canadian Experience*, Duke Journal of Comparative & International Law, Vol. 11: 269-287 at 271.

workers suffering from asbestos-related illness were proven to have suffered illness themselves as a result of such asbestos contamination, it would appear an open question at present in Canada as to whether the employer could in that situation be found liable to the injured family members if they brought a class action. Certainly, legislation such as the WCA would not appear to preclude such a lawsuit from being launched, because the injured parties would not be "workers" as defined under that legislation nor would their injuries appear to have arisen "in the course of employment". It remains to be seen whether such lawsuits will be brought in Canada and, if so, whether or not they would be successful – it is expected that it would be very difficult in most cases to prove a causal chain of connection between the asbestos contamination, the health of the workers, and the health of the family members bringing the litigation. In addition, the employer would presumably challenge the certification of such an action on the basis that all injuries would have to be individually proven and assessed. On the other hand, the costs of defending class actions, and the risk that such aggregated claims pose to companies of even significant means, is such that even actions with greater evidentiary hurdles to overcome must be taken very seriously.

In sum, while class actions appear to be the "wave of the future" in litigation generally, and in the environmental regulatory field specifically, it would appear that in the context of occupational health and safety injuries, those suffering damages will have to continue to have their losses addressed through either workers' compensation legislation or government compensation packages. It would not appear likely that Canada will see the proliferation of compensation claims over such issues as asbestos exposure as we have seen in the United States to date.