Assessing the feasibility of a class action lawsuit, in regards to the non-essential application of chemical herbicides in Northern Ontario.

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Civil Procedure II:
Class Actions in Canada CML 2214

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Background of the facts

Northern Ontario's pristine waterways and forests are the subject of this paper. The forestry industry of Northern Ontario currently uses the aerial application of herbicides as their primary tool for vegetation management. Herbicides are not used because of a lack of alternatives, but because it is the most cost efficient method (as environmental damage isn't internalized) to achieve the desired results. The herbicides are applied to eliminate the competition for recently planted coniferous seedlings. Glyphosate based "Vision" is currently the primary herbicide, but 2,4-D was widely used in the past. 2,4-D is still used in some forest management units of Northern Ontario, and there is indication that its use may again be on the rise.

Both 2,4-D and glyphosate are known to contaminate ground water, and 2,4-D has been banned in several countries. "[T]he spraying of 2,4-D often contaminates ground water systems... About 91.7% of 2,4-D will eventually end up in water."[1] Scientific studies are increasingly showing concern regarding the health and environmental effects of the herbicides being applied by the forestry industry.[2] There exists a significant possibility that the non-essential application of these chemicals is violating the rights of all Canadians (especially resource dependent Aboriginal communities) to clean drinking water, edible plants, wildlife, and fish.[3] It is the thesis of this paper that environmental degradation, such as the circumstances in this case, would be ideally suited for a class action lawsuit. While class actions regarding environmental damage generally arise from

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[1] 2,4-D fact sheet - Sierra Club of Canada
http://www.sierraclub.ca/national/programs/health-environment/pesticides/2-4-D-fact-sheet.shtml

[2] http://www.healthyottawa.ca ; http://www.Domtar.Org

[3] http://www.whitemoose.ca/Forestry/Herbicide/non-essential-pesticides-petition.doc

a single incident, *Hollick v. Toronto,*[4] [*Hollick*] and *Pearson v. Inco Limited* [5] [*Pearson*] support the notion that a class action for environmental degradation caused from long term practices is feasible.

Carthy J.A. of the Ontario Court of Appeal refused to certify the action in *Hollick* for two main reasons. Firstly, the individual issues far outweighed the common issues and were thus insignificant to the overall action and secondly, there was a small claims fund already established to deal with this issue. However, he did indicate that cases involving pollution which uniformly affects a mass of people, such as polluted drinking water, is the ideal case for environmental class actions.

> Carthy J.A. wrote (at para 10): This group of 30,000 people is not comparable to patients with implants, the occupants of a wrecked train or those who have been drinking polluted water. They are individuals whose lives have each been affected, or not affected, in a different manner and degree and each may or may not be able to hold the respondent liable for a nuisance.

Several general requirements for certification that will be addressed are as follows:

Class Proceedings Act, 1992, S.O. 1992, Chapter 6

Section **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

[4] *Hollick v. Toronto,* [2001] 3 S.C.R. 158 [***Hollick***]
[5] *Pearson v. Inco Limited,* [2005] 78 O.R. (3d) 641 [***Pearson***]

S. 5(1)(a) – Do the pleadings disclose a cause of action?

The court is not to base their decision on their opinion of the ultimate merits of the case. The legislature in fact rejected the recommendation of the Ontario Law Report Commission (OLRC) "that the court examine the substantive merits of the action at the certification stage."[6] However, the court is required to do some very limited probing into the substantive merits of the case. "The applicable test in this respect should be 'the plain and obvious test' employed under rule 21 for striking out a pleading which does not disclose a reasonable cause of action… In short, there is a low threshold to meet in establishing the existence of a cause of action at this stage of a proceeding in order to protect access to our courts…"[7]

The cause of action asserted will depend on the chosen defendant(s). Defendants in this case could include the federal and provincial governments, the Ontario Ministry of Natural Resources (OMNR), the Ontario Ministry of Environment (OMOE), the Pest Management Regulatory Agency (PMRA) who approves the use of these chemicals at the federal level, and the forestry companies applying these chemicals.

Potential causes of action in this case could be framed as:

- Breach of fiduciary obligation

- Negligence

- Failure to warn[8]

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[6] Michael McGowan & Catherine P. Coulter, *Appellant's Factum : John Hollick and The City of Toronto*, (2000) Supreme Court of Canada (para 16).
[7] *Chippewas of Sarnia Band v. Canada*, [1996] 127 D.L.R. (4th) 249 at p. 253 per Adams J.
[8] The links between asbestos and herbicides are significant. See *Beshada v. Johns-Manville Products Corp.*, [1982] 447 A. 2d 539 (N.J.S.C.) and also *Buchan v. Ortho Pharmaceutical (Can.) Ltd.*, [1986] 35 C.C.L.T. 1 (Ont. C.A.) and also *Boulanger v. Johnson & Johnson Corporation*, [2003] CanLII 45096 (ON S.C.D.C.)

- s. 99 of the *Environmental Protection Act*, R.S.O. 1990, c. E.19

- Trespass to Land

- Nuisance

As a general rule, evidence is not required (or admissible) to prove or disprove the cause of action. "The appellant was only required to plead the facts upon which he relies, not the evidence, such as the 2000 announcement by the Ministry…. Evidence is not admissible on the question of whether there is a cause of action pleaded within the meaning of s. 5(1)(a) of the CPA."[9] MacPherson J.A. stated in Carom v. Bre-X that "the courts below accepted the factual background set out in the plaintiffs' statement of claim for purposes of determining whether the plaintiffs' claims should be certified as a class action. I will do the same, but underline that at this point no one should accept those allegations as proven."[10] As such, it's not necessary to produce evidence proving the allegations which form the statement of claim. However, such evidence will be required at later stages of the trial.

In the case at bar it is not "plain and obvious" that the class claims will fail. The claims should legally succeed. As such, the requirements for a cause of action are met.

S. 5(1)(b) – Is there an identifiable class of two or more persons?

Framing of the class may be the most important aspect of this case. The foundation of the rule is that " … **the class must be capable of clear definition**… The definition **should state objective criteria by which members of the class can be identified.**"[11]

"Basically, a carefully pleaded class definition, in an action for damages, should describe:

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[9] *Pearson*, supra note 5 para 52
[10] *Carom v. Bre-X Minerals Ltd.*, [2000] CanLII 16886 (ON C.A.)
[11] *Western Canadian Shopping Centres v. Dutton*, [2001] S.C.R. 46 (S.C.C.) [**W.C.S.C.**] para 38

1. A common transactional fact or status predicated on the cause of action …
2. The time span appropriate to the cause of action
3. Any appropriate geographical scope"[12]

The large geographic area of harm and the variability in harm as between different classes is the source of this difficulty. An under-inclusive class would have the effect of precluding recovery for many injured individuals, but a class definition perceived to be too wide could have the effect of precluding recovery for all of the injured people.

> ***"There must be some showing, however, that the class is not unnecessarily broad*** – that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. ***Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended…"***[13]

The class would ideally compensate all residents of Northern Ontario from the time spraying commenced. However, such a large geographic scope invariably complicates the matter and a smaller "test" case on the merits of the case should be commenced prior to a full blown recovery attempt. One potential "test" case could focus on the township of Chapleau, Ontario with a population of about 2,000 residents and which has members of all listed subclasses. Chapleau would make a good "test" case because the surface water system upstream of the town water intake has been mapped out by the forestry industry as a result of applications for individual environmental assessment I submitted to the Ministry of Environment in April 2006.[14] The entire surface water system upstream

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[12] H.B. Newberg and A. Conte, *Newberg on Class Actions*, 3rd ed. (Colorado Springs: McGraw Hill, 1992) p. 6-75)
[13] *Hollick*, supra note 4 para 21
[14] Chapleau River & area, surface water mapping
http://www.ontariosportsman.com/pesticide-pics/Superior-Martel-Herbicide.jpg

of the township water intake is contained within one forest management unit and controlled by one forestry company.

This particular test case reduces the difficulties which would be encountered if multiple sources were contributing to the water contamination. As stated by Rochon, an identifiable class exists "…when there is a clear link between a group who have suffered damage and a product (for example, a defective car) or an action (for example, food poisoning on a cruise ship). **It becomes harder to argue that there is an identifiable class where there are varying circumstances and various contributing factors that apply to each of the individual members of the class**."[15] Potential difficulties may arise regarding ground water mingling with surface water as no ground water mapping has been done to date for most of northern Ontario.

In general, the class should not be framed as harmed individuals, as this would subjectively define the class. Rather, following the guidance of Winkler J. in *Bywater*[16], the class should be defined in reference to those who have been "exposed to herbicides applied by the defendant(s)", arguably more objective. The class must be framed in a manner that does not arbitrarily exclude those people who share the same interest in the resolving the common issues, as this will be considered by the court in determining whether to certify the class.[17]

The class should in some way include those individuals who will be born in the future, who will be forced to live with the environmental degradation caused from past events beyond their control. This approach would also compensate future generations for pre-

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[15] Rochon et al, *Interlocutory Proceedings*, (Markham: Butterworths, 1996) p. 245
[16] *Bywater v. TTC*, [1999] 27 C.P.C. (4th) 172 (Ont. Gen. Div.) [***Bywater***]
[17] *Caputo v. Imperial Tobacco Ltd.*, [1997] 34 O.R. (3d) 314 (Ont. Gen. Div.) [***Caputo***] para 42-43

natal harm caused by the chemical contamination of their parents. If a child is born with a disability linked to herbicide exposure, then a claim in negligence may be possible.[18] This group should be framed as a subclass as inclusion might otherwise have the effect of making the overall class unidentifiable, and thus defeating recovery for all.

While the total class following a successful test case would be very large, *Hollick* and *Vitapharm Canada Ltd. V. F. Hoffmann-La Roche Ltd.,* [2005] 74 O.R. (3d) 758 (SCJ) [*Vitapharm*] seem to indicate that such a class size doesn't necessarily preclude a determination of an identifiable class. However, it could create an array of difficulties at other stages in the proceedings. The following table is illustrative of the proposed class following successful "test" litigation.

	Hollick *	*Pearson* *	Herbicides
Common transaction	Former or present ownership, or occupation, near the Keele Valley Landfill Site	Former or present property ownership, or occupation, near the Inco Plant in Port Colborne	Former or present ownership, or occupation, in a location exposed to herbicides which were sprayed by the forestry companies
Time Span	From February 3, 1991 onward, based on an applicable 6 year limitation period	From September 2000, when the Ministry of Environment released their contamination report	Variable depending on the cause of action asserted and the sub class involved. Regard must be had to the *Limitations Act*[19] generally, and the *Real Property Limitations Act* for Real Property damage claims. Furthermore, the Limitations Act specifies different limitations periods for claims involving aboriginal rights. The time period would ideally begin when the forestry industry began using herbicides to control vegetation in Ontario. This date would avoid the courts determination that the date was arbitrary, and further demonstrate the rational connection between the class

[18] *Duval v. Seguin*, [1973] 40 D.L.R. (3d) 666 (Ont. C.A.)
[19] *Limitations Act*, 2002, S.O. 2002, chapter 24, Schedule B

			and the common issues.
Geographical Scope	Rutherford Road on the south, Jane Street on the west, King-Vaughan Road on the north, Yonge Street on the east	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.	Provincial boundary of Manitoba to the west, provincial boundary of Quebec to the east, the northern border of Ontario, and the southern boundary of the Artic Watershed (where all surface water flows north).

* The highest court hearing the case found the identifiable class requirement was met.

The southern boundary in the herbicide case study roughly corresponds with the southern limits of the boreal forest, where herbicides are applied to control vegetation by the forestry industry. It's prone to attack on the basis that the forestry industry has applied herbicides below this latitude. However, as the court alluded to in Pearson, it seems odd that the defendant would be able to attack the geographic scope of certification on the grounds that it had in fact polluted a much larger area. Indeed, the herbicides applied to the south of this point would be prone to contaminate the water sources of southern Ontario. For herbicides applied north or south of this point, one must recognize that streams flow into rivers which eventually flow into oceans. Indeed a geographic boundary must be fixed to define the class, though the chemicals are dispersing across the globe.

While using geographic boundaries has a general element of arbitrariness, the plaintiff may choose this tool to objectively define the effected class if it so desires.[20] The court should be wary to refuse certification on the ground that the class is under inclusive, as "few environmental claims could ever be certified as class proceedings" with strict

[20] *Pearson*, supra note 5 para 54

adherence to class membership requirements given the fact that water contamination rarely, if ever, stops at fixed boundaries.[21]

It's also interesting to note that the courts in *Hollick* (at para 32) and *Pearson* (at para 69) took issue with the varying levels of contamination found at different geographic locations. In both these cases, the court felt that such variances would have the effect of requiring individual assessments to advance certain types of claims. In *Hollick*, the court found that claims for nuisance required individual assessments based on the uneven distribution of noxious gases. The court in *Pearson* found that such variability required individual health claims. However, ground and surface water contamination is by nature uniform, and such concerns do not arise.[22]

Limiting the class by reference to time and geographic location meets the requirement that "…the criteria should bear a rational relationship to the common issues asserted by all class members …"[23], the common issue being the exposure to chemical herbicides applied by the forestry industry. The large geographic area, time span for recovery, and quantity of persons which could be expected to be included in the class (upwards of several million) leads to the conclusion that not every class member can be known at certification, or will ever be known. However, "It is not necessary that every class member be named or known."[24]

Several factors require the creation of subclasses including:

- The variation of damage suffered by individuals in different factual circumstances. The difference in damages (due to increased contact with such

[21] *Pearson*, supra note 5 para 61
[22] *Hollick*, supra note 4 para 10
[23] *W.C.S.C.*, supra note 11 para 38
[24] *W.C.S.C.*, supra note 11 para 38 ; See also *Hollick*, supra note 4 para 17 ; See also s. 6.4 of the *Class Proceedings Act*.

chemicals or financial losses unlike other class members) would create a conflict of interest between class members, as those with minor damages would be inclined to settle the claim receiving compensation far below the necessary amount to address other members' damages.[25]

- Different causes of action, contracts, or agreements (treaties) as between different subclasses.
- Different defenses which may be raised by the defendant(s) in relation to some, but not all, subclasses.
- A varying standard of care during the time period of the class.

Potential subclasses could be framed as:

Tree Planters – These individuals are exposed to high concentrations of herbicides in the workplace. Their exposure is continuous while working as they are constantly brushing into foliage covered in herbicides. Furthermore, in many circumstances, there would be no washing facility, and the chemicals would thus remain in contact with the skin for prolonged periods of time. Records of employment could be used to locate this group.

Resource Dependent Tourist Outfitters – This group derives its livelihood from hunting and fishing opportunities in Northern Ontario. Should the wildlife become contaminated with chemical herbicides, the marketability of such locations would greatly decrease. Annual permits of operation operated by the Ministry of Natural Resources could be used to locate this group.

[25] *Pearson*, supra note 5 para 37

Status Aboriginals – The right to hunt and fish edible wildlife is violated and infringed if the wildlife becomes unfit for human consumption due to chemical contamination. Records of status aboriginals are maintained by the Federal Government.

Members of Ontario Métis and Aboriginal Association – The courts recently re-affirmed the Métis (and Aboriginal) constitutional right to hunt and fish in *R. v. Powley,* [2003] 2 S.C.R. 207. While the data base of OMAA would not contain all members of the Aboriginal or Métis community, it would capture many of these individuals. However, as the Supreme Court has set no minimum blood quantum to be considered Métis, this group potentially presents evidentiary problems regarding membership.

Hunting & Fishing License Holders – Users of natural resources would have a special loss, above and beyond the loss suffered by those who don't hunt and fish. As such, additional compensation should be offered to these individuals. Records of hunting and fishing licenses held by the Ministry of Natural Resources would be one method of locating this class.

Time Period Divisions - Subclasses (of the general class and of subclasses) could also be created by breaking down these categories into different time periods as was done in *Rumley v. British Columbia,* [2001] 3 S.C.R. 184 [*Rumley*].[26] This approach would be appropriate if the common issue to be certified was a breach of the standard of care. This standard is bound to vary over time as new information comes forward regarding the health and environmental effects of the herbicides.

All of these class definitions implicitly include people who have moved to live in other provinces. However, it's settled law that a nationwide class may be commenced in

[26] The court finds a varying standard of care and breaks the class into subclasses, membership defined temporally (para 32). As knowledge regarding the health and environmental effects of herbicides continues to evolve, the standard of care would also evolve and temporal subclasses thus seem appropriate.

Ontario if the province has a real and substantial connection with the subject matter of the action and it accords with order and fairness for the court to assume jurisdiction.[27] As the spraying occurred in Ontario, such a requirement would be met.

These subclasses are readily identifiable and in most cases have also experienced damages in excess of the general population. One example requiring individual assessment would be the loss of revenue for tourist outfitters. However, s. 6.1 of the *Class Proceedings Act* explicitly indicates that certification shall not be refused on this ground.

S. 5(1)(c) – Do the claims of the class raise common issues?

The general question, as framed by Justice McLachlin in *Western Canadian Shopping Centres*[28] is "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be 'common' only where its resolution is necessary to the resolution of each class member's claim." However, courts have sometimes held that the asserted common issues are too insignificant to advance the overall action *enough*. Courts have thus refused to find the common issues requirement met, thus denying certification, as was the case in *Hollick*.

There has been some dispute as to the importance of the common issues to the overall action. The standard from the U.S.[29] and British Columbia[30] of requiring the common issue to "predominate" over the individual issues has been rejected in respect to the Ontario *Class Proceedings Act*. The Court of Appeal in *Pearson* made clear its "finding that certification would only be denied on this basis if the common issues

[27] *Nantais v. Telectronics Propriety (Canada) Ltd.*, [1995] 129 D.L.R. (4th) 110 (Ont. Gen. Div.) at p. 262 and at p. 267
[28] *W.C.S.C.*, supra note 11 para 39
[29] *U.S. Federal Rules of Civil Procedure*, Rule 23. Class Actions s. (b)(3)
[30] *Class Proceedings Act*, R.S.B.C. 1996 c. 50 s. 4(2)(a)

advanced were '**relatively unimportant**'. This was not held to be the case here: devaluation of property was deemed sufficiently serious to be pleaded, and in fact had been raised previously, albeit only as a small aspect of the appellant's original claim."[31]

Common Issues to be resolved

- Is there a duty of care owed by the defendant(s) to all or any of the class members?

- If there is a duty of care, what is the standard of care?

- Has the standard of care been breached by any, or all, of the defendants?

- What information did the defendant(s) have regarding the health and environmental effects of the herbicides being applied, and when did they acquire that information?[32]

- Was there negligent misrepresentation by the defendant(s) regarding the health and environmental effects of the herbicides being applied?[33]

- Is there a fiduciary obligation owed by the defendant(s) to all or any of the class members?

- If there is a fiduciary obligation owed, has that obligation been violated?

- Is this a case for punitive and exemplary damages? If so, what is the quantum of the damages which should be awarded? [34]

- What is the amount of aggregate damages which should be awarded to compensate the class members.

- Should injunctive relief of herbicide application be granted in favor of any, or all, classes? What other relief should be granted?

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[31] Douglas F. Harrison, *Canada: Class Action for Long-Term Environmental Harm Certified by Ontario Appeal Court Despite Substantial Individual Assessment Issues* (28 February 2006), online: www.mondaq.com

[32] Common issue framed similarly in *Caputo*, supra note 17

[33] Common issue similarly framed in *Hughes v. Sunbeam*, [2002] 61 O.R. (3d) 433 (Ont. C.A.)

[34] The amount of punitive damages was approved as a common issue in *Rumley v. British Columbia*, [2001] 3 S.C.R. 184. (S.C.C.) [***Rumley***]

- Did the defendant(s) take all reasonable steps to identify and prevent the release of herbicides and their byproducts into the ground and surface water?

- Are either the federal or provincial governments vicariously liable for the acts of the defendant forestry companies?

- How widespread is the distribution of the contaminants of concern, including 2,4-D and Vision, their breakdown and byproducts.

- According to current scientific studies, at what level do the contaminants in question pose risks to the natural environment or to human health, or both?

- Did the ongoing discharge of the contaminants in concern by the defendant(s) amount to a public nuisance?

- Did the ongoing discharge of the contaminants in question amount to a trespass?

- Is the application of herbicides by the defendant(s) a common source of pollution for class members?

- Is there sufficient empirical evidence to establish, without individual testing of all class members water sources, that such water sources have in fact been contaminated to some degree by the herbicides applied by the defendants?

Resolution of these issues would significantly advance the claim as a whole, and would arguably meet the higher threshold of predominating over individual issues. In fact, for many subclasses there would be no need for individual issue resolution after these common questions had been resolved.

S. 5(1)(d) – Is a class proceeding the preferable procedure for the resolution of the common issues?

A number of factors are relevant in determining whether a class action is the preferable procedure to resolve the common issues. The s. 4 of the British Columbia *Class Proceedings Act* explicitly outlines some of these factors. The Ontario courts have taken a less rigid approach to assessing preferable procedure, but do have regard for these factors in different stages of the analysis.

The plaintiffs in *Hollick* met the requirements for class definition, but failed to establish that a class action was the preferable procedure to resolve the matter. The court found that certification would not significantly advance any of the 3 main themes behind class actions: judicial economy, access to justice, and behavioral modification.[35] A significant portion of this decision was the requirement for individual assessment for every class member's claims, and the presence of a small claims fund which was better suited to resolve the matter.

Judicial Economy

The theme is directly related to the resolution of common issues. Resolving these common issues of fact or law once, rather than multiple times, effectively increases judicial economy. If there are more issues separating the class members than bringing them together, "the courts will likely prefer to have the cases tried individually in the ordinary way or by means of alternatives such as joinder, consolidation or test case."[36]

Manageability is also a factor in determining whether the case would meet the goals of judicial economy. A class action is to be considered in relation to thousands of individual actions. As many of the same issues would need to be resolved if proceeding by individual action or by class action, factors such as the distribution of damages and

[35] *Hollick*, supra note 4 para 32 - 34
[36] Rochon et al, *Interlocutory Proceedings*, at p. 247

notice to the class would be the main focus. Cases involving large classes over long periods of time, involving substantial claims, are inherently difficult to manage. However, as indicated by Winkler J. in *Caputo*[37], complexity alone is not a sufficient basis to deny certification.

Allowing the matter to proceed as a class action would effectively resolve the question of liability more efficiently than requiring thousands of individual separate actions, many requiring the same determinations of law and fact.

Access to Justice

Many factors are involved in this case precluding other effective redress for the class members. The cost of litigation, largely due to the level of expert evidence which would be required to demonstrate water contamination, is likely the largest barrier to the effective enforcement of class member rights. Informal discussions with prosecutors for the Department of Fisheries and Oceans (DFO) indicate that a successful prosecution for depositing herbicides into waterways would be in the range of $40,000 given the scientific nature of prosecution. The complex nature of this problem leads to the conclusion that many class members likely do not even realize that their rights are being violated[38], as the effects of these chemicals are often delayed and difficult to trace.

Given the high amount of expert testimony required to succeed in this case, justice would be beyond all but the wealthiest members of society.[39] It's assumed, given

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[37] *Caputo*, supra note 17

[38] Ontario Law Reform Commission, *Report on Class Actions* - Benefits and Costs of Class Actions, b) Social and Psychological Barriers to Redress. "Another barrier to effective enforcement o legal rights may exist where significant injuries occur without the victim's knowledge. Problems of this sort may arise … were victims suffer delayed side effects from dangerous drugs that cannot be traced to particular medication without expert assistance." [***OLRC - Benefits]***

[39] *OLRC – Benefits*, supra note 38 "Certain empirical studies appear to confirm that even if persons are aware of available legal remedies and the amount at stake exceeds the actual costs of enforcing their rights

the large class size, that the individual claims will generally be small in relation to the cost of conducting a conventional single-plaintiff action.[40]

Many of the class members, especially aboriginals who have faced systemic discrimination, may not otherwise resolve the matter in court out of fear of judicial proceedings or a sense of alienation from the legal system. Furthermore, an overwhelming percentage of the residents of Northern Ontario are in an employment relationship (directly or indirectly) with the forestry industry. This relationship thus precludes, in a practical sense, the enforcement of their rights.[41] As such, failure to certify would have the likely effect of precluding recovery for the vast majority class members.

Behavior Modification

It was accepted in *Pearson* (para 31) that a class action would not serve the interest of behavioral modification because the defendants were already regulated by the Ministry of Environment, and the company was already taking remedial action. The focus in *Hollick* (para 34) was in regard to cost internalization for environmental damage. The court found that the small claims fund which was already established would adequately serve this purpose.

In this case, there are few signs of meaningful remedial action, nor any suitable alternative method of resolving individual class member's claims. It will be argued that

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such persons may take no action because of an inaccurate idea that the fees charged by lawyers are well beyond their means."

[40] *OLRC – Benefits*, supra note 38 "If the defendants misconduct has affected a large number of individuals, it may be feasible to bring a class action to assert even individually nonrecoveralbe or nonviable claims."

[41] *OLRC – Benefits*, supra note 38 "Legal action on an individual basis also may be effectively barred where there is a continuing relationship that gives the potential defendant sufficient power over the injured party that economic or other reprisals for the initiation of litigation are a real possibility."

the defendant forestry companies were complying with regulations regarding herbicide application as set out by the Ministry of Environment and the Ministry of Natural Resources. However, it's important to note the plethora of techniques available to accomplish the same result, which are also available to the forestry industry. The province of Quebec banned the use of chemical herbicides in 2001, citing health and environmental concerns. The techniques used in Quebec are available to the Ontario forestry industry, but herbicides are used because they are the least expensive method of vegetation management. Cost internalization serves the important purpose of deterring other corporations from choosing non-essential environmental degradation motivated by increasing shareholder profits.

Allowing for certification would give corporations some incentive to create diligent internal monitoring systems to detect environmental harm at early stages. In this case, neither Tembec nor Domtar, two of the largest multinational forestry companies operating in Northern Ontario, have any post herbicide application water testing program to determine whether or not the applied chemicals are entering public waterways. This is particularly troubling as budgetary cuts in recent years within the Ministry of Natural Resources have resulted in self reporting obligations by the forestry industry. The industry is to voluntarily report environmental law infringements resulting from their operations, but such infringements are not reported if no effort is made to discover them.

The real possibility of a class action lawsuit would guide companies to investigate likely environmental degradation, and to modify their practices in a manner to mitigate or eliminate that possibility. Refusing to certify this action would have the effect of

deterring corporations from making inquiries into environmental violations, with the effect that such violations would continue indefinitely.

Behavior modification isn't to "look to 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."[42] As such, certification could have wide ranging effects on corporations across Canada, who choose not to inquire into environmental degradation caused by their operations.

Other forms of redress

McLachlin CJC in *Hollick* stated for the court at para 33 that "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." In reality, the existence of other schemes is merely one of many factors to be considered in the decision of whether a class action is the most desirable route. The mere availability of other tools of redress isn't necessarily fatal, especially if those other tools have characteristics that render them incapable of providing efficient access to justice.[43]

McLachlin writes at para 37 of *Hollick* that "Ontario's environmental legislation provides other avenues by which the complainant here could ensure that the respondent takes full account of the costs of its actions. While the existence of such legislation certainly does not foreclose the possibility of environmental class actions, it does go some way towards

[42] *Pearson*, supra note 5 para 88

[43] *Rumley*, supra note 34 para 38 "Amongst other limitations, the JICP program limits the recovery of any one complainant to $60,000, and it does not permit complainants to be represented by counsel before the panel. The JICP simply cannot be said to be an adequate alternative to a class proceeding."

addressing legitimate concerns about behaviour modification."

McLachlin CJC referred to:

- s. 61(1) of the Environmental Bill of Rights, a policy review clause.

- s. 74(1) of the Environmental Bill of Rights, an application for investigation

- s. 14(1) of the Environmental Protection Act, a provision prohibiting the release of contaminants which does, or is likely to, cause adverse effect.

- s. 172(2) of the Environmental Protection Act, an application for investigation.

A remedy is also available under s. 99 of the *Environmental Protection Act*[44] *(EPA)* for compensation for a loss incurred as a result of a "*spill*" of a pollutant, including loss of income. However, this right is qualified by s. 91(1) where a "*spill*" is defined as a discharge "*that is abnormal in quality or quantity in light of all the circumstances of the discharge*". Providing that the herbicides were applied in the regular course of business and under approved guidelines, a remedy under the *EPA* would thus be precluded.

Individual litigation, joinder, and consolidation are also alternatives to a class action. However, this option precludes the possibility of financial support from the Class Proceedings Fund. Furthermore, damages against the single plaintiff, or a small group, in the event of loss could financially ruin those individuals. Given the likelihood of a relatively modest award of damages in relation to the cost of successfully enforcing the rights of the plaintiff, failure to allow the suit to proceed by way of class action would effectively preclude recovery.

Conclusions regarding preferable procedure

One factor which has not yet been mentioned is the fact that a finding of punitive

[44] *Environmental Protection Act*, R.S.O. 1990, CHAPTER E.19

damages (if applicable) would only be done once. This would avoid the unfair result of allowing one plaintiff to receive the entire damage award. Furthermore, once payment was made, it would permanently relieve the defendant(s) of the liability from their past actions. The damage award need not be a "once-and-for-all" lump sum award, but rather could follow the compensation structure approved in *Parsons v. Canadian Red Cross Society* [1999] O.J. No. 3572 allowing for periodic claims to be made as health conditions deteriorated, or new empirical evidence of harm was discovered.[45]

The factors in this case, including the high cost to access justice, an adequate damage distribution model based on *Vitapharm* (suggesting that groups such as Sierra Legal Defence Fund, which focus on enhancing environmental protection for the public, should be able to receive unclaimed damages), and the need for behavioral modification, clearly indicate that a class proceeding is the preferable method of resolving this issue.

> As stated by Rothman J.A. in the *Alcan*[46] case, "Air and water pollution rarely affect 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 law suits, each raising many of the same issues of fact and law."

Environmental degradation, especially water pollution (given the current inability to contain contaminants or remove pesticides from drinking water), is the ideal case for a class action lawsuit. This view is consistent with the OLRC Report on Class Actions, where they indicate, "Pollution of our environment seldom affects just one individual or one piece of property; rather, its effects are often felt by many persons over a large geographic area. Accordingly, class actions would appear to be an obvious means of

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[45] *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 para 86

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

achieving redress for harm occasioned by pollution."[47] Given the uniform distribution of herbicide contamination across Northern Ontario, which is now found in its surface and ground water, individual testing in regards to health claims is not required, distinguishing this case from *Hollick* & *Pearson*.

The uniform distribution of water pollution removes the requirement for individual assessments of damages in each and every case, and a class action is thus the most manageable and preferable means to resolve this issue. At para 57 of the defendant's S.C.C. factum in *Hollick*, they explicitly indicate that their case should be distinguished from one that should succeed such as the "situation where people have been drinking polluted water" and that such a case would not require individual assessment of class members. Such a case as this is well suited for an aggregate assessment of damages, further increasing judicial economy. Furthermore, one class action would prevent differing damage findings in different similar cases, or worse, varying results of outcome in similar cases.

[47] OLRC, *Report on Class Actions*, Vol 1, p. 269

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