

CHAPTER TWO SCOPE OF PROTECTION

2.5. PROTECTION OF COLLECTIVE INTERESTS

2.5.2. ENGLISH AND NORTH AMERICAN LAWS

2.5.2.B. CLASS ACTIONS IN NORTH AMERICA

Introductory Note

a) The procedural means for a large number of parties to pursue tort claims efficiently were developed further in North America with the advent of the class action, which has blossomed since the 1960s. There are now special rules of procedure for class actions in the United States at the Federal level and in almost all states, and in Canada in three provinces. Although this casebook is not primarily concerned with the law of North American jurisdictions, an exception will be made for class actions, since there appears to be no equivalent mechanism in any European jurisdiction and class actions represent an interesting development as regards the protection of collective interests.

Class actions are an outgrowth of representative actions. In a class action, a single plaintiff is allowed to present a claim against the defendant(s) on behalf of a whole *class* of persons.¹ The *members* of the class are then represented by that plaintiff (who is then accordingly termed the *representative*). The main distinctive feature of a class action, when compared to a representative action, is that no express consent is given by the members of the class for the representative to act for them.² The members of the class do not even need to be identified individually, as long as the class itself is defined. They will probably not appear at all in the court proceedings (so-called *absent members*). Yet members of the class will be bound by the judgment rendered in the class action, whether it is favourable to them or not.

Newberg on Class Actions summarizes the main objectives of class actions as follows:³

1. Judicial economy and efficiency
2. Protection of defendants from inconsistent obligations
3. Protection of the interests of absentees

¹ As mentioned above, only class actions involving a multiplicity of plaintiffs are dealt with here. Problems relating to a multiplicity of causes or defendants are discussed *infra*, Chapter IV, 4.4.

² *Newberg on Class Actions*, 3rd ed. (Colorado Springs: Shepard's/McGraw-Hill) at 1-5, § 1.02.

³ *Ibid.* at 1-20, § 1.06.

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4. Access to judicial relief for small claimaints
5. Enhanced means for private suits to enforce laws and to deter wrongdoing.

It must be underlined that class actions have not been conceived as a new substantive remedy, but rather as an innovative procedural means for plaintiffs to bring before the courts claims which could otherwise also have been pursued individually (at least in theory). The legal provisions on class actions are not therefore meant to create any substantive rights.⁴

b) Rule 23 of the US Federal Rules of Civil Procedure, adopted in 1966, is widely seen as the most influential provision concerning class actions. It has served as a model for most of the class action legislation in North America. The excerpt hereunder shows the main features of the class action procedure. Amongst the conditions for class actions to be admissible, there are the conditions of commonality and preponderance of common issues. The conditions laid down in Rule 23 are found as well in other legal systems that have introduced class actions, such as Quebec; a judgment of the Quebec Court of Appeal is reproduced where the conditions of commonality and preponderance are dealt with.⁵

US Federal Rules of Civil Procedure

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Rule 23

(a) Prerequisites to a class action. One or more members of a class may sue or be sued as representative parties on behalf of all only if

- (1) the class is so numerous that joinder of all members is impracticable,
- (2) there are questions of law or fact common to the class,
- (3) the claims or defences of the representative parties are typical of the claims or defences of the class, and
- (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class actions maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

...(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

- (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
- (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

⁴ Ibid. at 1-7, § 1.02.

⁵ *Infra*, 2.QC.66.

- (C) the desirability of undesirability of concentrating the litigation of the claims in the particular forum;
- (D) the difficulties likely to be encountered in the management of class action.

(c) Determination by order whether class action to be maintained; judgment... (2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion...

Notes

(1) Broadly speaking, the specific procedural rules applying to class actions concern three main steps in the procedure: the introduction of the action, which generally requires the authorization of the court (maintenance in the terminology of Rule 23, certification in many other legal systems), the conduct of the action proper and the judgment on the action.

(2) Rule 23(a) sets out the pre-conditions to class actions under the *Federal Rules of Civil Procedure*: (i) impracticability of joinder, (ii) common questions of law and fact among the members of the class (so-called “commonality”), (iii) typicality of the representative’s claims and (iv) adequate representation by the representative.

Rule 23(b) describes the three categories of class actions maintainable under the Federal Rules of Civil Procedure, and for each category mentions additional conditions which must be fulfilled for the action to be authorized. The first two categories, namely “Rule 23(b)(1)” and “Rule 23(b)(2)” actions, do not generally involve the award of damages and are accordingly not discussed here. Before authorizing an action of the last category, a “Rule 23(b)(3)” action, the court must determine that the two additional conditions listed in Rule 23(b)(3) are fulfilled, that is: (v) predominance of common questions over individual questions and (vi) superiority of the class action over other possible adjudicative methods.

Those six conditions are found in substantively similar terms in other legal systems which have introduced class actions.

Condition (i) refers to the difficulty of proceeding by “traditional” procedures, such as a joinder of parties or a joinder of actions. The condition is usually fulfilled when the class comprises a large number of members; it would then be difficult, if not impossible, to contact them all to elicit a mandate *ad litem* or to coordinate their participation in the proceedings.

Conditions (iii) and (iv) concern the representative: his or her claim should be typical of the claims of the class and furthermore he or she should have the requisite characteristics to pursue the claim on behalf of the class (*i.e.* knowledge of the factual background, willingness to act as representative throughout the proceedings, adequate

professional support, etc.).

Condition (vi) requires the court to weigh the advantages and disadvantages of proceeding through a class action in order to solve the dispute. Rule 23(b)(3) contains a list of matters to be taken into account in the course of making that inquiry.

Conditions (ii) and (v) are often the most troublesome. Indeed it is a rare occurrence where the claims of each and every member of the class are determined strictly by a set of common issues. More often than not, some issues will persist that are individual to each member. Problems of commonality and preponderance of common issues are central to the *Alcan* case decided by the Quebec Court of Appeal.⁶

(3) Pursuant to Rule 23(c)(1) (not reproduced here), the court must, as soon as practicable, make an order on whether the class action is to be maintained. In the case of “Rule 23(b)(3)” actions, the court must also provide for notice to be served on members of the class, if possible individually. Notice can be effected through various means, and in large cases it is often done through newspaper announcements. The notice aims to warn members that the common issues will be litigated in a class action, in a way that will affect their rights. Absent members who do not wish to be affected by the class action must expressly “opt out” of the class within a certain time period; silence is accordingly presumed to constitute acquiescence to inclusion in the class. Members of the class can also ask to appear before the court in the course of the class action proceedings.

Class action legislation in other jurisdictions has tended to follow the model of Rule 23 in this respect by including a requirement that a notice be served as well as the right for absent members to opt out of the class.

(4) As could be expected, the constitutionality of such an “opt out” system was challenged. In *Phillips Petroleum Co. v. Shutts*, the US Supreme Court held that, in cases concerning monetary claims, the due process clause of the US Constitution required at a minimum that the class members are adequately represented by the representative, that they receive appropriate notice of the class action and that they have the right to exclude themselves from the action.⁷ Only if those guarantees are offered can the outcome of the class action bind the absent members.

(5) Once the class action has been authorized and notice has been served, the action as such can be conducted. Common issues are usually tried before the court according to the general rules of procedure, although in most legal systems some special provisions are made in order to safeguard the interests of absent members. For instance, it is often the case that the representative cannot concede certain factual issues without the consent of the court, which must then ensure that the admission is not prejudicial to the absent members; it can be noted that, in accomplishing these functions, the court steps beyond

⁶ *Infra*, 2.QC.55.

⁷ 472 US 797 (1985).

its traditional role in civil proceedings. The wide discretion given to the court in class actions expands its role beyond adjudication to claim management.⁸

(6) The judgment on a class action and the subsequent enforcement measures will be discussed below in relation to the following case.

*Quebec Court of Appeal*⁹ **2.QC.66.**
Comité d'environnement de la Baie Inc. v. Alcan Ltée

CONDITIONS FOR ALLOWING A CLASS ACTION

Pollution by dust

A class action is allowable even if some of the issues cannot be determined at once for all members of the class, as long as the common issues are substantial and significant in relation to the whole claim.

Facts: The plaintiff requested permission to launch a class action on behalf of a class of some 2400 persons living close to harbour installations run by the defendant. The installations were used to store coal, bauxite and alumina for the aluminium plants run by the defendant. Some of those substances escaped as dust into the neighbourhood. The plaintiff alleged that the dust prevented the members of the class from enjoying their homes and led to extra cleaning and maintenance costs.

Held: The court of first instance refused to allow the class action. The Court of Appeal reversed that judgment and remitted the case back to the court of first instance to continue the proceedings.

Judgment: ROTHMAN J.A. (for the Court): "...The [court of first instance] was of the opinion that the recourses of the members of the group do not raise questions of law or of fact that are sufficiently "identical, similar or related" as required by Art. 1003(a) [of the Quebec *Code of Civil Procedure*¹⁰]..."

It is certainly true that the claims of the 2 400 members of the group would not all have been identical. Some were home-owners, some were tenants and they had obviously been residents of the sector of the municipality affected by the port operations for varying periods of time. Their houses were of different dimensions, constructed of different materials and they were of different values. Doubtless, the damages and inconvenience caused by the air pollution varied from house to house, depending on the nature and value of the house and the distance from the port installations and its location with reference to the prevailing wind.

But Art. 1003(a) does not require that *all* of the questions of law or of fact in the claims

⁸ See G. Piché, "Un premier rôle pour juge", in A. Prujiner and J. Roy, eds., *Class Actions in Ontario and Quebec, Proceedings of the First Yves Pratte Conference* (Montreal: Wilson & Lafleur, 1992), 141.

⁹ [1990] RJQ 655.

¹⁰ All further references in the text are to the Quebec *Code of Civil Procedure*, RSQ, c. C-25.

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of the members be identical or similar or related. Nor does the Article even require that the majority of these questions be identical or similar or related. From the text of the Article, it is sufficient if the claims of the members raise some questions of law or of fact that are sufficiently similar or sufficiently related to justify a class action.

I do not, of course, wish to suggest that any common questions in the claims of the members will do, however trivial. But the common questions of fact and of law in this case would appear to be far from trivial. On the face of things, the common questions seem to me substantial and of considerable importance in relation to the individual questions to be decided.

All of the claims of the members are based on the same source - bauxite, alumina and coal dust pollution in the air of a given sector of the municipality emanating from respondent's handling and storage of these substances at the port.

The proof of facts giving rise to responsibility, particularly the technical evidence, is likely to be the same in each case, as is much of the defence evidence on responsibility. Many of the legal questions are likely to be similar — the standard of care required to prevent air pollution of this kind in the circumstances, the applicability of the *volenti non fit injuria* principle and the rule of prescription applicable, are some of the legal questions that come easily to mind.

Doubtless, there are important differences in the damages suffered by the individual members and there may well be defences that apply to some categories of members that do not apply to others.

It may well be that, owing to the differences in the claims of the individual members, the judge might conclude that the evidence does not enable him to establish with sufficient accuracy the total amount of the claims of the members. In that case, he may not be able to order collective recovery as contemplated under Art. 1031... But even if collective recovery, as proposed by appellant, is not feasible or expedient, that, in itself, is no basis for refusing authorization for a class action if the damages of the members can be determined individually. The class action provisions of the Code provide for collective recovery where this is feasible (Art. 1031), but they also provide for individual recovery where individual recovery is more expedient (Art. 1037)...

In the present case, the basis of responsibility of all of the claims of the members is the same — the port operations operated by respondent. Many of the questions of fact would appear to be the same, as are many of the issues of law...

The principal differences between the claims would relate to the damages suffered by the individual members, although even here, there may be some categories of damages that are similar. In the end, it is quite possible that the trial judge may conclude, on the evidence, that he cannot order collective recovery of the damages. He may then limit the common questions in an appropriate manner and order individual recovery of the damages...

In short, the class action provisions of the code allow considerable flexibility in determining which questions will be decided collectively, which questions individually and how the action will proceed. These provisions are, in my view, sufficiently broad to contemplate the bringing of a class action for damages involving a number of important questions that are common to all of the members of the group even though the damages suffered by the members may vary [reference omitted].

In this case, there are some important questions of fact and law that are common to all of the claims of the members. I can see no reason why these common issues should not be decided collectively...

The class action recourse seems to me a particularly useful remedy in appropriate cases of environmental damage. Air or 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 individual law suits, each raising many of with the same issues of fact and law.

In its 1982 Report on Class Actions, a noteworthy comparative study of class action legislation, the Ontario Law Reform Commission describes the American experience:

Environmental class actions may involve environmental harm arising as a result of continuous activity that inflicts damages over an extended period of time. Alternatively, damages may be occasioned by a single accident, such as an oil spill or discharge of poisonous gas. In relation to environmental harm occurring over a period of time, the courts in the United States have adopted an approach similar to that taken with respect to cases involving defective products. Issues relating to causation, such as proof of proximity and contributory negligence, as well as assumptions of risk, have led courts to conclude that individual issues predominate over those of a common nature, thereby precluding class treatment. This restrictive approach to certification has been particularly evident in class actions involving allegations of water and air pollution, for example, and in instances of injury stemming from the presence of allegedly hazardous substances in the work environment.

However, where the class action has been confined to one source of pollution affecting a circumscribed area, certification has been forthcoming. Moreover, as in the products liability area, there are recent cases dealing with water pollution and environmental hazards in the work place in which courts have recognized the efficacy of class actions in determining the often complex common questions concerning the existence and nature of alleged environmental harm, and have deferred individual questions concerning membership in the defined class and damages to subsequent separate hearings...

[O]ur Court noted the evident social purpose of the class action provisions in the Code very shortly after their enactment in 1978. In *Syndicat National des Employées de l'Hôpital St-Charles Borromée v. Lapointe*, [1980] CA 568, it was held at 570:

[Translation] The Act respecting Class Action, adopted in 1978, obviously pursues a social aim; it facilitates access to justice for citizens who share common claims whose pecuniary value is often slight, and who would not dare to launch a court process, or could not appropriately do so, because of their individual circumstances.

If these provisions are to achieve their intended social purpose, they should, in my view, be interpreted and applied with that purpose in mind.”

Notes

(1) In the *Alcan* case, Rothman JA applied Art. 1003 of the Quebec Code of Civil Procedure (CCP), which corresponds to Rule 23(a) examined above. In particular, Art. 1003(a) requires that “the recourses of the members raise identical, similar or related questions of law or fact” for a class action to be authorized. Even if there is no equivalent

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to the additional conditions of Rule 23(b)(3) of the US Federal Rules of Civil Procedure, Rothman J.A. imports into Art. 1003(a) some kind of preponderance test modelled on Rule 23(b)(3); he finds that the common issues are “substantial and of considerable importance in relation to the individual questions”. For Rothman J.A., factual and legal issues relating to fault, causation, defences as well as prescription are common to all members and can properly be adjudicated in a class action. Those issues were in themselves substantial, and, moreover, they could be expected to go a long way towards solving the overall dispute between Alcan and the class, since the only issue left to be settled individually would be the assessment of the loss suffered by each member of the class. That reasoning is to be contrasted with the position of English law as regards representative actions to obtain damages, where the mere fact that damages must be individually assessed until recently sufficed to exclude the use of the representative action mechanism.

The Quebec Court of Appeal remitted the case back to the court of first instance in order to proceed further with the action. In fact, that class action never reached the stage where it was decided on the merits. A settlement intervened between the plaintiff in the class action (the *Comité d’environnement*) and Alcan, whereby a formula was devised for each member of the class to receive compensation according to the location of his or her home, the duration of the dust emissions and the degree of inconvenience caused. The plaintiff recognized that remedial actions undertaken by Alcan had abated the nuisance and that the members of the class were no longer incommmodated. A “Committee for good neighbourly relations” was created. The court approved the settlement pursuant to the rules of the Code of Civil Procedure.¹¹

(2) As shown in the annotated case, in the process of assessing whether there is sufficient commonality for a class action to be authorized, the court also separates the issues common to all members of the class from those that are individual to each of them. Common issues will be adjudicated in the course of the class action, while individual issues may be left to be determined at a subsequent stage.

In fact, most class action laws empower the court to divide the class further into subclasses;¹² accordingly, if a given issue cannot be settled for the whole class but could adequately be determined for one or more subclasses, the legal framework encourages that issue to be dealt with within the class action rather than in subsequent proceedings. For instance, in a case of polluting emissions, the court could assess fault, causation and any defences or excuses for the whole class and thereby determine that the defendant is liable to the members of the class according to the damage that they have suffered. The court could then subdivide the class into further subclasses, according to the distance from the source of emissions, and assess the amount of compensation for the members of each subclass, if it is felt that this was an appropriate solution.

(3) The above is only one of the possible forms of recovery which can be granted in a class action. As regards monetary relief, it is interesting here to refer to the Quebec

¹¹ Art. 1025 of the Quebec *Code of Civil Procedure*, see *Comité d’environnement de La Baie Inc. v. Société d’électrolyse et de chimie Alcan Ltée* (19 May 1993), Chicoutimi 150-06-000002-865 (Sup. Ct.).

¹² See eg Rule 23(4) of the US *Federal Rules of Civil Procedure*.

Code of Civil Procedure (CCP),¹³ where the forms of recovery were codified to a greater extent than in the leading US statutes when class actions were introduced in 1978.¹⁴ When monetary damages are awarded, the court must order either collective or individual recovery (Art. 1028 CCP), collective recovery being the preferred form.

Collective recovery is awarded when the court can assess the total amount of compensation due to the whole class with sufficient accuracy (Art. 1031 CCP). It can take the form of either a monetary amount or a reparative measure (e.g. customer rebates on subsequent purchases of a product or service¹⁵) or even a combination of both (Art. 1032 CCP). Where collective recovery involves the payment of a monetary amount, the court orders that this amount be deposited with the court and distributed among the members according to a formula to be determined by the court, if feasible (Art. 1033 CCP). A notice will then be published so that all members of the class can come and claim their share of the collective recovery at the court within a certain time; any remainder can be used as the court decides, in the interest of the members of the class (Art. 1034, 1036).¹⁶

Individual assessment and recovery will take place when the individual issues still to be determined do not allow for a precise assessment of the amount of damages due. In that case, members of the class will be requested to appear individually before the court or an officer of the court, in order to decide on the remaining issues and determine the amount of damages due by the defendant to the individual member (Art. 1038, 1039 CCP). The common issues are settled by the judgment on the class action and cannot be re-opened in the course of individual cases.

In the annotated case, the defendant argued that the class action should not be authorized because the court could not, even by making subclasses as explained above, provide for collective recovery, as the plaintiff had requested. Rothman J.A. answered that, irrespective of what the plaintiff required, it was up to the court to decide what form of recovery would be granted; the mere fact that collective recovery might be impossible did not mean that the class action could not go ahead. Here as well, it can be seen that class action legislation gives the court large powers to manage claims and compensation, in addition to the traditional powers of adjudication.

¹³ See L. Ducharme, "Le recours collectif au Québec: l'exécution des jugements", in A. Prujiner and J. Roy, eds., *Class Actions in Ontario and Quebec, Proceedings of the First Yves Pratte Conference* (Montreal: Wilson & Lafleur, 1992) 191.

¹⁴ The general scheme of the *Code of Civil Procedure* has subsequently been followed in the Ontario *Act respecting Class Proceedings*, SO 1992, c. 6 and in the British Columbia *Class Proceedings Act*, SBC 1995, c. 21.

¹⁵ For instance, in *Viau v. SCFP* (16 August 1991), Longueuil 550-06-000002-886 (Sup. Ct.), the defendant union was found liable to the class of public transportation users for the disruption caused by an illegal strike. Instead of attempting to refund relatively small amounts of money to the users, the Court found it more appropriate to order the union to pay an amount which would enable the public transportation authority to offer free public transportation for a certain period.

¹⁶ In *Clavel v. Productions musicales Donald K. Donald* (19 January 1996), Montreal 500-06-000010-922, JE 96-582 (Sup. Ct.), the defendants (concert organizers and the rock band Guns'n'Roses) were found liable to the class of 54,000 spectators who attended a Guns'n'Roses concert which was terminated abruptly without reason. Since it was impracticable to distribute a modest sum (CAD 5.50) to each member of the class, the aggregate amount (CAD 300,000) was allocated to a number of non-profit-making organizations working with young people.

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(4) It is apparent from the above that class action legislation favours the aggregation of claims and the determination of issues within the class action proceeding to the greatest extent possible. As a consequence, even if class actions are conceived as a procedural vehicle without substantial impact (see above), in practice they will tend to expand the scope of protection granted by tort law. In the annotated case, for instance, it would have been almost impossible to regroup and coordinate the whole class of plaintiffs for a joint action along traditional lines. Conversely, it is doubtful that a single plaintiff could have obtained the same kind of relief against a large industrial operator such as Alcan, if only because of the obvious inequality of resources to dedicate to litigation. By launching a class action, the plaintiffs were able to affect the perception of the case: instead of a single disgruntled neighbour suing the large industrial installation, it was the whole neighbourhood which went before the court. Class actions contribute to turning a series of small individual interests into a more powerful “collective” interest. As Rothman JA writes (quoting from the OLRC report in support), the class action is ideally suited to certain environmental claims, because it brings the environmental issue to the fore out of a mass of claims.¹⁷

Similarly, by separating collective and individual issues, class actions can also influence the merits of the case. In the class litigation surrounding defective Intra-Uterine Devices (IUDs), for example, it was found that the design of the IUDs was a common issue which as such justified that a class action be authorized, while the insertion of the IUD by the physician, the duration of its use, the health of the recipient, etc. were individual issues left to be litigated later.¹⁸ The class action therefore focused the debate on the way the IUDs were designed and manufactured, and prevented the defendant from seeking to muddy waters by underlining the numerous possible causes of the damage to the plaintiff, as would probably have happened in an individual case.

¹⁷ See *Nadon v. Ville d'Anjou*, [1994] RJQ 1823 (CA), where a plaintiff launched a class action on behalf of all the persons affected by ragweed pollen against the municipalities of the Montreal region, for failing to enforce regulations on the eradication of ragweed.

¹⁸ *Tremaine v. A.H. Robins Canada Inc.* (30 October 1990), Québec 200-09-000208-873, JE 90-1642 (CA).