LIABILITY: 5 Things to Know about Environmental Class Action Lawsuits

The most common form of liability companies can face for acts that harm or impact the environment is fines and other penalties for violations of the requirements in the environmental laws. This type of liability is imposed by the government on behalf of the general public. But if individual members of the public are also impacted, they may pursue your company for liability under nuisance, negligence and other legal theories. And if there are many individuals with similar claims and who suffered similar damages, they may join together to

sue in the form of a class action. Environmental class actions are becoming more common, although they've had mixed success. So here's a primer on five things you need to know about class action lawsuits in case your company is ever named in one.

CLASS ACTIONS 101

Because EHS professionals may be asked to assist in preparing the defence to an environmental class action, it's important that they understand the key elements of such a lawsuit, including:

[learn_more caption="1. Definition of a Class Action"]

A class action'sometimes called a class proceeding'is essentially a legal mechanism for determining common issues or deciding common claims shared by a group of individuals. The key benefits of a class action are that they:

- Free up judicial resources by avoiding multiple proceedings on essentially the same facts with the same legal issues; and
- Permit the filing of lawsuits that would be too expensive for the impacted individuals to bring themselves.

In 2008, the Supreme Court of Canada issued a landmark decision on both class actions and nuisance law. In *St. Lawrence Cement Inc. v. Barrette*, the Court essentially established the right to bring a class action for environmental harm, ordering a cement company to pay $15 million in damages to its neighbours for abnormal and excessive noise, smoke and dust from its plant.[/learn_more]

[learn_more caption="2. Applicable Laws"]

Nearly all jurisdictions in Canada have a statute on class actions that's usually called the *Class Actions Act* or *Class Proceedings Act*. These laws typically spell out:

- How a class is certified (more on this topic below);
- The steps in a class action proceeding;
- How orders and awards will be handled; and
- How costs and fees will be addressed.[/learn_more]

[learn_more caption="3. Kinds of Legal Claims"]

A class action must be based on a legal cause of action or claim. For example, individuals who were harmed by a model of car that allegedly has defective brakes might file a class action against the car's manufacturer for products liability. Environmental class actions are generally based on the following kinds of claims:

Negligence. Negligence is failing to exercise the care toward others that a reasonable person in the same circumstances would've exercised. To prove a negligence claim, one must generally show that:

- The party alleged to be negligent had a duty to the injured party or the general public;
- The defendant's action'or failure to act'wasn't what a reasonably prudent person would have done; and

- That action or failure to act caused damages.

In an environmental context, individuals might sue for negligence if, say, they believe a mine failed to properly maintain a wastewater pond, which, as a result, discharged wastewater onto neighbouring lands and contaminated the soil.

Nuisance. A nuisance claim arises when individuals are unlawfully annoyed, prejudiced or disturbed in the enjoyment of their land. For example, residents who claim they can't spend time in their yards because of the toxic fumes being emitted by a nearby plant might file a nuisance claim.

Strict liability. A company can be 'strictly liable' for any damage to neighbouring properties caused by the escape of a hazardous substance, including damage that isn't caused intentionally or negligently. This kind of claim is often called a *Rylands* claim after an old British case, *Rylands v. Fletcher*. The theory behind this type of claim is that someone who brings something onto land that isn't naturally there and that increases the potential danger to others does so 'at his own peril' and should be held responsible if that thing escapes the land and damages other people's property.

To prove a *Rylands* claim, the person suing for damages must prove two things:

1) The defendant used the land in a 'non-natural' way; and

2) Due to that unnatural use, something 'likely to do mischief,' such as environmental damage, escaped from the land and caused such damage.

***Insider* Says:** For more on *Rylands* claims, see 'When Is Your Company 'Strictly Liable' for Environmental Damage''

Note that class actions claiming property damage, such as contamination of land or water, have been more successful than those claiming that pollution caused health problems such as cancer.

Example: Residents of a municipality sued the federal government, a research center and a munitions manufacturer in a class action for allegedly spilling the solvent trichloroethylene (TCE) on the ground and contaminating the water table and their drinking water wells. They claimed that the TCE contamination was the cause of an abnormally high number of instances of cancer, illnesses and other health effects among former and current residents of the town. The residents sought compensation and damages as well as an order requiring the defendants to decontaminate the water table. They also asked for punitive damages for injuries to their physical integrity and the enjoyment of their property. The Qu□bec Superior Court ruled that the residents hadn't proved the TCE contamination caused increased cases of cancer but it did find that the water contamination was a nuisance [*Spieser v. Canada*].[/learn_more]

[learn_more caption="4. Key Steps in a Class Action"]

The procedures in a class action are typically the same in all jurisdictions and include these key steps:

Filing or application. A person who's a member of the proposed class must file pleadings or an application asking the court to certify the proceeding as a class action. This person is usually the individual who'll be named the

representative of the class (more on this below).

Certification of the class. The court must then determine whether a class action is appropriate for this lawsuit. (See this chart for the certification requirements for class actions in each jurisdiction.) The court may do so by holding a hearing on whether the class meets these certification requirements:

- The pleadings or application disclose a cause of action, such as negligence;
- There's an identifiable class of two or more persons, such as residents of a designated geographical area;
- The claims of the prospective class members raise a common issue, whether or not the common issue predominates over issues affecting only individual prospective class members;
- A class proceeding would be the preferable procedure for the fair and efficient resolution of these common issues; and
- There's a person eligible to be appointed as a 'representative plaintiff' who'll fairly and adequately represent the interests of the whole class; has a plan for the proceeding and for notifying class members about it; and who doesn't have an interest that conflicts with the interests of other prospective class members.

Most jurisdictions' class action laws also spell out the factors the court must consider when deciding whether a class action is the 'preferable procedure.' The court must generally consider any matters it deems relevant as well as whether:

- Questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
- A significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
- The class proceeding would involve claims that are or have been the subject of any other proceedings;
- Other means of resolving the claims are less practical or less efficient; and
- The administration of the class action would create greater difficulties than those likely to be experienced if relief were sought by other means.

Notice to class members. If the court certifies the lawsuit as a class action, the representative plaintiff must notify the individuals who are prospective members of the relevant class about the lawsuit. The class action laws specify the information these notices must contain and the court may also require them to contain additional information. But in general, the notice must:

- Describe the lawsuit, including the names and addresses of the representative plaintiffs and the relief sought, such as payment of damages and remediation of the contamination;
- State how and by when a class member may 'opt out' of or choose not to participate in the class action;
- Describe the possible financial consequences of the proceeding to class members;
- Summarize any agreements made on fees and disbursements between the representative plaintiff and his/her lawyer;
- Disclose any counterclaims being asserted by or against the class;
- State that the judgment on the common issues for the class, whether

favourable or not, will bind all class members who don't opt out of the proceeding;
- Discuss the rights, if any, of class members to participate in the class action; and
- Provide an address to which class members may direct any questions about the proceeding.

The notice can be sent by a variety of means, including:

- Personal delivery;
- Mail;
- Posting, publishing or advertising, such as including a notice in the local paper that serves the area impacted by the alleged environmental claims; or
- Any other means the court finds appropriate.

Trial. When the court certifies the class, it also certifies the common issues that apply to that class. A trial must be held to resolve those issues (provided the class action isn't settled beforehand).

Distribution of damages. If the class prevails and wins damages or another monetary award, the court must then determine the compensation or damages due to the individual class members. If it's too impractical or inefficient to determine the individual shares of the damages, the court can divide the damages or award on a proportional or average basis.[/learn_more]

[learn_more caption="5. Ways to Challenge a Class Action"]

There are two ways to challenge a class action:

Procedurally. The initial challenge to a class action is usually a procedural one that challenges the form of the lawsuit as a class action. The argument is that the lawsuit doesn't qualify as a class action under the law because, say, the issues for the individual class members are too different to warrant a joint proceeding.

Example: Property owners and residents of Sydney, NS sued the governments of Canada and Nova Scotia and a company over the operation of a steel works facility that included a steel mill, coke ovens and tar ponds. They claimed that the facility emitted pollutants that contaminated their properties and posed risks to their health. They asked the court to certify their case as a class action, alleging various claims including trespass, strict liability under *Rylands*, negligence and breach of fiduciary duty. The Nova Scotia Supreme Court certified the class action, so the defendants appealed.

The Nova Scotia Court of Appeal overturned the order certifying the lawsuit as a class action. The court concluded that the alleged facts didn't support the *Rylands*, trespass, battery and negligent battery claims, although they did support nuisance, negligence and breach of fiduciary duty claims. However, these claims weren't sufficiently common to all the prospective class members to justify certification as a class action. So the court ruled that a class action *wasn't* the preferable procedure here because it wouldn't provide the expected benefits of such a proceeding [*Canada (Attorney General) v. MacQueen*].

Note that winning a challenge to the lawsuit as a class action may not be the end of the issue because the individuals who made up the proposed class may

still be able’and desire’to to sue you individually.

Substantively. If you can’t get the lawsuit dismissed as a class action, you can still substantively challenge its underlying negligence, nuisance or other claims.

Example #1: For 66 years, a refinery in the Port Colborne area of Ontario emitted nickel into the air until closing in 1984. In Sept. 2000, the MOE revealed that it had found higher than expected nickel levels in a soil sample from a neighbouring property, generating negative publicity about the area. A group of about 7,000 property owners in the area brought a class action against the refinery, claiming that the negative publicity created by the public disclosure of nickel contamination harmed their property values.

The Ontario Superior Court of Justice ruled for the class, ordering the refinery to pay the class members $36 million. But the Ontario Court of Appeal set aside the verdict. It ruled that the trial court didn’t properly apply *Rylands v. Fletcher*. It also explained that to prove nuisance, the class members had to show that they suffered *actual physical* injury or harm as a result of the refinery’s conduct. In other words, the class had to prove either that the nickel deposits in the soil at any level posed a risk or that the nickel levels were so high that they constituted a risk to human health. Because the class was unable to demonstrate that either of these risks existed, the nuisance claim failed, too [*Smith v. Inco Ltd.*].

Example #2: A rail company that operated a locomotive repair facility discovered that TCE had leaked into the groundwater and migrated to adjacent properties. The owners of the adjacent properties brought a class action based on nuisance and *Rylands* claims. The class action, which consisted of two class groups, sought damages for the reduction in their property values and loss of rental income. The rail company asked the court to dismiss all of the claims. The court dismissed only the nuisance claim made by one of the class groups but retained the nuisance claim made by the other group as well as the *Rylands* claim as to both. The rail company appealed.

The appeals court dismissed the *Rylands* claim made by both class groups, ruling that they’d failed to raise any genuine or triable issue and citing the *Inco Ltd.* case discussed above. Specifically, it found that there was no unreasonable use of lands; it wasn’t foreseeable at the time that the ‘escape’ of the TCE would do damage; and the escape wasn’t the result of an unintended accident or event. But on the nuisance claim, the appeals court agreed that it should proceed as to the one class of property owners [*Windsor v. Canadian Pacific Railway Inc.*].

***Insider* Says:** If you win substantively, the class members won’t be able to go after you on their own because by joining the class, they waived their right to sue you separately on these issues. So barring appeals, winning substantively ends the lawsuit for good.[/learn_more]

BOTTOM LINE

Class actions are a mixed blessing. On the one hand, they enable your company to avoid having to defend itself for the same conduct in multiple court cases. However, they also enable victims who don’t have the resources to sue on their own to file claims against the company. In many cases, class actions are settled

without going to trial on the substantive claims. But as the cases discussed in this article demonstrate, although more environmental class actions are being filed, more companies are taking them to trial’and winning. So as an EHS professional, it’s important that you understand the basics of this unique type of lawsuit.

SHOW YOUR LAWYER

Canada (Attorney General) v. MacQueen, [2013] NSCA 143 (CanLII), Dec. 04, 2013

Smith v. Inco Ltd., [2011] ONSC 628 (CanLII), Oct. 7, 2011

Spieser v. Canada, [2012] QCCS 2801 (CanLII), June 21, 2012

St. Lawrence Cement Inc. v. Barrette, [2008] SCC 64 (CanLII), Nov. 21, 2008

Windsor v. Canadian Pacific Railway Inc., [2014] ABCA 108 (CanLII), March 19, 2014