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PLASTIMET: A CASE STUDY IN ENVIRONMENTAL CLASS ACTIONS

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THE FIRE

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

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

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

Public authorities warned residents not to eat the vegetables from their gardens. There were calls for a public inquiry.

By all accounts, it appeared to be a major environmental disaster affecting hundreds of thousands of people with incalculable damages whose full extent might not be known for years.

A class action seeking $200 million in damages was commenced[1]. Fourteen defendants were named, including my client, the Province of Ontario. Apart from the private persons and companies attached to the site, there were allegations against all three levels of government for failing to prevent the fire.

THE SETTLEMENT

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

The ten thousand residents near the fire received $200.00 each on proof of residency during the fire. A contingency fund was set up for claimants who might have larger claims. The total cost of the settlement is a maximum of $3,885.000.00. The settlement document is attached to this paper.

What happened?

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

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

While a settlement of almost $4 million is obviously substantial, the quantum assumes nuisance value when one considers that it involves a settlement with 10,000 parties.

THE CERTIFICATION HEARINGS ON A MASS TORT CLAIM

The entire course of the proceedings were taken up with the certification hearings under the ***Class Proceedings Act***, which took place over a period of two years with 9 court dates. While the certification hearings are said not to determine the merits, factual evidence presented during the certification hearing will inevitably illuminate the issues going to the merits of the case, as well as providing a basis upon which the class action judge can decide whether to certify, and if so, to create an appropriate form of class proceeding and plan to deal with the case at hand.

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

The Americans have had a mixed reaction to mass tort claims. There are statements in their law which would suggest that they are inappropriate in most cases. On the other hand, the Canadian experience with the Mississauga train derailment and cases like Air India have lead us to the view that class actions are appropriate for environmental mass torts.

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

The key word for a mass tort claim is "workable", given the potentially large numbers of claimants in a mass tort case.

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

Not all mass torts are manageable as a class action. At this time, we do not know the decision of the Supreme Court of Canada in ***Hollick v. Toronto***[2], a rare case where leave was granted. In that case which arises from complaints about smells from the Keele Valley Landfill Site, the Ontario Court of Appeal refused to certify the action as a class proceeding. The proposed class was 30,000 residents and involved alleged incidents over a period of many years. In the course of that decision, at page 266, the Court of Appeal stated:

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

In Plastimet, the Province always acknowledged that it would be possible to propose an appropriate class proceeding. The Province did object to the first proposed plan of proceeding as being wholly unworkable.

EVIDENCE AT THE CERTIFICATION HEARING

At the Plastimet certification hearing, the Province presented extensive scientific evidence regarding the emissions from the fire and their effects. This evidence was based on

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[2] ***Hollick v. Toronto*** (1999) 46 O.R. (3d) 257 (C.A.)

statistical measurements taken by scientists at the time of the fire, including a McMaster professor who took measurements from the roof of the manufacturing plant across the street from the fire. The Provincial mobile TAGA unit also took numerous measurements.

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

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

After the fire, the Region compensated 9,400 residents at the rate of $100.00 each on account of residing in areas which were occasionally barricaded during the fire.

DEFINING THE CLASS

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

The original definitions proposed were based around the word “exposed” which was the operative word used by Justice Winkler in ***Bywater v. Toronto Transit Commission***[3]. That case involved a fire affecting a defined number of TTC cars.

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

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

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

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

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

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

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

During the course of investigating the claim, the parties determined that there were a number of claimants who were businesses with specific property losses on account of the fire. The largest of these turned out to be Ball Manufacturing. It had a claim for $1,607,804.00 and settled for 50 cents on the dollar, plus a 25 percent contingency fee to class counsel. This was the basis on which the separate business class settled.

As to why the residents were each paid $200.00, the answer is simply that that is an amount the defendants were prepared to pay, the plaintiffs to accept and the judge to approve.

THE REFEREE

We used the device of appointing a referee under the ***Rules*** to administer the settlement. We chose the adjusting firm of Crawford & Company. They will make a report at the end of the year to be approved by the judge. They make interim reports now. This method has the advantage of being part of the existing ***Rules*** with all the usual procedural safeguards already in place. Once the referee's report is accepted by the class action judge, the settlement funds will be distributed.