Court of Queen's Bench of Alberta

Citation: Paron v. Alberta (Environmental Protection), 2006 ABQB 375

Date: 20060519
Docket: 9803 22875
Registry: Edmonton

2006 ABQB 375 (CanLII)

Between:

James Paron, Blair Carmichael and Fraser Carmichael
Gary C. Gylytiuk, Nick Zon and Dwayne Zon

Plaintiffs

- and -

Her Majesty the Queen in Right of Alberta as Represented by
The Minister of Alberta Environmental Protection and
Transalta Utilities Corporation

Defendants

Corrected judgment: A corrigendum was issued on May 25, 2006; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Decision
of
The Honourable Madam Justice J.E. Topolniski

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I. Introduction

[1] Six people who own cottages on the shores of Wabamun Lake, Alberta bring this representative action on their own behalf and purportedly on behalf of some 600 other similarly situated landowners.[1] This application for certification flags concerns about the appropriateness of class litigation where some of the nature of some of the relief sought will injure a significant number of others who also own property on the Lakeshore.

[2] The heart of the Plaintiffs' claim is that thermal pollution, attributed to TransAlta Utilities Corporation's Lakeshore electrical generating plant, has affected the Lake level, interfered with their riparian and littoral rights, and caused lost enjoyment and value of their properties. Their specific complaints include: (a) excessive weed growth, (b) poor water quality, (c) unstable winter ice, (d) declined water levels, (e) air quality, (f) reduced water well yield, and (g) unpleasant odours.

[3] The Plaintiffs seek damages in excess of $25,000,000.00 and an injunction prohibiting TransAlta from drawing any more Lake water for its operations. Further, they seek an order requiring Alberta to raise the Lake level by 'fixing' an artificial outlet weir. The desired effect of the injunction, which is the Plaintiffs' real objective in this litigation, is to restore the Lake to

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[1] The action began in 1998, long before the *Class Proceedings Act* ,S.A. 2003, c. C-16.5 (CPA) was proclaimed in force. The litigation stalled, primarily because of process, so mechanisms from the CPA were imported to help to advance it. See: ***Paron v. Alberta (Environmental Protection)*** (2004), 366 A.R. 183, 2004 ABQB 760.

its “natural historic levels” of approximately 725 meters, 18 inches higher than what the weir currently allows.

[4] While it is undisputed that TransAlta’s operations have had a negative impact on the Lake level, fluctuations and complaints about low water levels and the negative impact on recreational use date back to at least 1915. The level of the Lake has been a longstanding source of controversy amongst stakeholders, a topic recently discussed by Dr. David Schindler, a celebrated Alberta environmental scientist:

> Since 1912, a number of water control structures have been built at the lake outlet; however, agreement on a suitable lake water level has been the subject of controversy for many years. Periods of high water result in complaints of flooding from residents in low-lying areas. Conversely, periods of low water result in complaints of being “left high-and-dry” by residents on higher ground.[2]

[5] The proposed representative plaintiff, Mr. Zon, is one of those who are “high-and-dry”. He has been a committed advocate for increasing the Lake level for many years. Others along the Lakeshore, particularly those in low-lying areas who realistically fear flooding should the Plaintiffs prevail, are opposed to this litigation. Mr. Zon appreciates the likelihood of flooding if he and the other Plaintiffs prevail. His view is that the Plaintiffs are neither required to show that all members of the proposed class share agree with their intended resolution of the litigation or that they are somehow obliged to “conduct an opinion poll about an ideal resolution” on issues concerning the Lake.

II. The Proposed Class

[6] With a view to making the class more amenable to certification[3], the Plaintiffs amended the description of the proposed class as this application progressed. The final version is:

> (a) All Alberta residents who claim that, between 1996 and 2005 they owned residential lands contiguous to Wabamun Lake and that their use and enjoyment of their lands or the value of their lands were adversely affected by diminished water levels in or pollution of Wabamun Lake.
>
> (b) Residential lands contiguous to Wabamun Lake include residential lands where a narrow strip of reserved land exists between the legal land description of the residential lands and the actual Lake edge.

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[2] December, 2004 “Lake Wabamun: A Review of Scientific Studies and Environmental Impacts”, page 5-1.

[3] The Plaintiffs may try to make their claim more amenable to class proceedings per ***Rumley v British Columbia*** (200 1) 205 D. LR. (4th) 39 (S.C.C.) at 3O, and ***Pearson v. Inco et al,*** [2006] O.J. No. 991, 146 A.C.W.S. (3d) 600 (ON C.A.).

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III. Background

a. The Lake

[7] The Lake is a popular residential and recreational destination in the County of Parkland (County), located 64 km west of Edmonton. It is large and shallow, 19.2 km long and 6.6 km wide, with a surface area of 84.6 square km. The mean depth of the Lake is 6.3 m. The maximum depth is 11 m. Various factors affect the Lake level including, precipitation, groundwater, evaporation, industry, and the some 1300 developed properties along the lakeshore. The main source of water is precipitation, while the main source of water loss is surface evaporation.

[8] The Lake level has fluctuated by as much as 1.1 meters over most of the past 100 years. Typically, the fluctuation is about l meter in a 7-10 year cycle however, there have been fluctuations of 1.4 meters. The Lake's small watershed is a factor that tends to magnify long-term fluctuations. Seasonal recording of the Lake level occurred between 1940 and 1960, and thereafter was year-round. The highest recorded level was 725.22 m in 1982. The lowest was 723 .8 1 m in the winter of 1961. The past 10 years have seen a lower level than the long-term range. However; it has risen in the last two years and is beginning to approach historically average levels.

[9] Other lakes in Alberta have undergone similar variations over time and some now experiencing cyclical lows. Low levels of precipitation in recent years have contributed to low lake levels. The pattern of the level, in relation to the long-term average, is similar to that of other nearby lakes.

[10] The current weir level contemplates a high Lake level of 724.55 m. An increase of the Lake level to that sought by the Plaintiffs, 724.96 m, will flood significant areas around the Lake.

[11] Water level and weed growth in the Lake have been a topic of discussion amongst stakeholders for almost 100 years.[4] Weed growth is especially significant in area of the Lake called Moonlight Bay, where Mr. Zon's cottage is, because it is the shallowest part of the Lake. Complaints about weeds have occurred even during periods of very high water. Similarly, reduced winter ice cover is more notable in shallow areas, predominantly along the eastern lakeshores.

[12] The use of artificial drainage channels to control the Lake level dates back to at least the 1920's. The first authorized artificial outlet, a weir built in 1927, was reconstructed and altered

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[4] There have been steps to control weeds for many years, for example, records indicate that the Village of Wabamun purchased an underwater weed cutter in 1935.

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several times - some legally by Alberta and others illegally by vandals during periods of high water to decrease the water level, actions that Alberta describes as “citizens voting with their shovels”. There is presently an unauthorized outflow channel bypassing the current weir (Bypass), however, because the Lake level is low, there has been no outflow since 1992.

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[13] Lakefront land on any larger lake near Edmonton is a valuable commodity. Real estate markets around the Lake are diverse and property values have increased significantly in recent years despite the Lake level and stigma of industrial activity around the lakeshore. Demand outstrips supply in the most desirable areas at the west end of the Lake, the deepest part that is also the farthest from TransAlta’s operations and industrial coal mines around the Lake. The least desirable areas are at the northeast end of the Lake.

[14] Last summer a CNR derailment caused a fuel spill across part of the Lake. Negotiations to resolve damage claims of persons owning lands along the shoreline injured by the spill are underway.

b. The Plaintiffs

[15] Mr. Zon bought his cottage, on the northeast corner of the Lake near Moonlight Bay, in 1974 after many years of frequenting the Lake as a visitor. Mr. Zon was attracted to the lot because “it was high and dry”, standing in contrast to several other lots in the area that were “under water”. Unbeknownst to Mr. Zon, the Lake was then at a historic high.

[16] Mr. Zon has a long history of advocating for change to the Lake level. His first formal complaint about the Lake level and weed growth came 3 years after he bought his lot. His complaint to Alberta’s then Premier was close in time to others’ complaints of excessively high water levels. He then complained to Alberta’s Director of Water Resources about the Lake level and the Bypass, and in 1991, the Alberta Ombudsman investigated and rejected his complaint about the weir level. As a representative of a stakeholders’ organization, he founded the Wabamun Solution Demanders Society and voiced complaints about water levels and weir management to the media in 1996. He participated in administrative tribunal hearings concerning TransAlta’s license, most recently in 2002 when the Environmental Appeal Board (EAB) dismissed his 2002 appeal for want of prosecution.

[17] The Plaintiffs’ real objective in this litigation is to raise the weir level by some 18”. Mr. Zon’s personal hope is for a high water level of 724.96, to be achieved by having the Bypass filled and thereafter letting the Lake fluctuate naturally. Mr. Zon’s attitude about the consequence of injury caused by flooding if the Plaintiffs prevail in fixing a higher weir level is evident from his Examination on Affidavit:

> Q. So what you’re saying is those people. too bad for them, they were silly to build that close to the water, let’s get it up and the flooding’s their problem?
> A. And put it back the way it was.

Q. And putting it back the way it was would flood these people's property?
A. Yes. [5]
...
Q: But do you recall discussion about concerns about areas having a medium and high potential for flooding?
A: When we 're discussing water levels, everybody's got his own discussion.[6]……..

[18] Mr. Zon's complaints about how the Lake level has affected him include:

a) his boat launch is unusable due to low water level and weeds,
b) his well dried up,
c) the Lake water is increasingly stagnant and overgrown with weeds, making it unsuitable for wading, swimming, waterskiing, and boating,
d) a 1997 property appraisal suggests that the recreational potential has fallen by 30%, which equates to approximately $30,000.

[19] The boat launch concern appears to be limited, at least according to Mr. Zon's knowledge, to his area at the northeast Lakeshore. Concerning the property valuation, the decrease in recreational potential is due to the interplay of decreasing water levels and the removal of sand and liner improvements, the latter unrelated to this litigation. Unfortunately, the appraiser offers no breakdown about how each factor impacts on his appraisal.

[20] Apart from Mr. Zon, the other Plaintiffs mostly acquired their land when the water level was at a lower point: Mr. Paron in 1963 and Mr. Carmichael in 1988. Mr. Gilytiuk also purchased at a low water point; however, when buying he relied on a neighbour's advice that the water level would rise.

[5] p.124, ll 1-33 to p. 125, ll. 1-5.

[6] p.56, ll. 18-22.

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c. Other Stakeholders

[21] Diverse groups of landowners populate the shores of the Lake. The actual number of landowners "contiguous" to the Lake is likely over 1000, comprised of private landowners, a First Nations Band, urban communities, and municipal and corporate entities. A study of ownership conducted in 1984 discloses the breakdown of ownership as private land 39%, Paul First Nations 23%, urban community 19%, TransAlta 16%, and Alberta 4%). Zoning around the Lake reflects the diverse interests of stakeholders. There is zoning for residential, agricultural, recreational and commercial use as well as resource extraction.

[22] The 621 permanent residents of the Village of Wabamun (Village), many of whom depend on the generating station economically and see its continued operation as a benefit, have different interests than seasonal recreational users. That sentiment was expressed in 1997, and accords with a 1984 survey of over 700 watershed residents, revealing that agricultural users and permanent residents did not consider the Lake level to be an important issue, while cottage owners thought otherwise.

[23] The First Nations Band has declined to participate on consultation committees, citing concerns of endangering constitutional and Treaty rights if it did so.

[24] There are numerous stakeholders' organizations concerned with the Lake. Mr. Zon founded the Wabamun Solution Demander Society in 1996 after he became disillusioned with the Wabamun Lake Task Force, regarding it as being "stacked with TransAlta sympathizers". The Wabamun Solution Demander Society subsequently merged with, the some 400 member strong, Lake Wabamun Enhancement and Protection Association. The Lake Wabamun Public Advisory Group Later began in 1998. There are yet other interest groups, the Lake Wabamun Watershed Advisory Council, the Wabamun Watch, and Lake Wabamun Preservation.

[25] The most recent views expressed by stakeholders indicate support for the existing weir level. However, the opposite view has been expressed in the past. For example, Mr. Zon testified that he was at a 1988 meeting of "elected officials from around the lake", where the consensus was that the Bypass should be filled to restore the weir to its previous state. A stakeholders' meeting in 1995 was attended by 20 people, 52% of whom voted in favour of raising the weir.[7] A survey conducted by the County in 1991 revealed that close to two-thirds agreed with the existing weir level, and of those opposed, a slight majority wanted it lower, but some wanted it higher. The Village and Parkland voiced opposition to raising the weir level because of flooding risks in 1995, 1996 and 2005. Similarly, a number of Summer Villages voice their opposition: Kapasiwin (1996), Seba Beach (2005), Lakeview (2005), Point Alison (2005), and Betula Beach (2005). In 2005, a number of lakeshore residents expressed their opposition to raising the weir, as has a marina owner.

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[7] Zon says that this vote is the basis for his view that certification is supported by a majority of residential landowners.

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[26] In the context of a 1997 renewal of TransAlta's license to operate the generating station, the Environmental Appeal Board heard appeals (EAB) from the initial approval of the license. The appellants, some of whom are plaintiffs in the present action, had made submissions at the initial application about their concerns and before the EAB. Their submissions were essentially the same concerns as in this litigation - water quality, air quality, and thermal input, with its consequential effects on fish, weeds and winter ice.[8]

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d. Alberta

[27] Alberta owns the lakebed, water and shoreline, and assumed responsibility for maintaining the weir in the late 1940's. The weir's low point was between 724.35m and 724.42m in 1995. It was raised in 1996 to its current level of 724.55 meters.

[28] In the past, Alberta was subject to threats of litigation for damages caused by high water levels.

[29] Alberta licenses TransAlta's operations and is responsible for enforcing environmental protection legislation.

e. TransAlta

[30] TransAlta's operations on the lakeshore began in 1958. Over time, TransAlta has had four operational 'units' designed to operate "over a range of lake levels". In November 2002, TransAlta implemented a phased shutdown of its operations at the Lake. One of the four units was immediately shut down, followed by the shutdown of two others in December 2004. The final unit will be shutdown in 2010.

[31] TransAlta does not dispute that the generating station influenced some Lake conditions. It diverts water from the Lake for cooling in the production of electricity and the heat plume created through the return of heated water affects approximately 5% of the Lake area (or 1% of the volume). This causes the affected area to be 10 to 24 C warmer than surrounding water. Thermal discharge is approximately one-half of the original amounts.

[32] The generating station also affects the Lake level. For example, without it the Lake level in 1995 would have been 0.34 m higher. TransAlta is obliged to restore the Lake level to the "pre-TransAlta state" by repaying its historical water debt by June 2007. To that end, it has returned treated water to the Lake since 1997. It is presently ahead of schedule, and current forecasts suggest that the water repayment will be complete well before the deadline.

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[8] A number of the appellants' suggestions were accepted and imposed as conditions on TransAlta's license. The Minister of Environmental Protection accepted the EAB's recommendations. The decision was not appealed or reviewed. [FN See discussion in: ***Paron v. Alberta (Environmental Protection)*, 2000 ABQB 737** at para. 12.

[33] TransAlta has harvested weeds in certain areas along the eastern shore of the Lake since 1972, and it occasionally harvests weeds in other areas "as required." It has an ice awareness program for winter recreational users of the Lake, including warning signs at all public access points and a fish management plan to minimize fish mortality due to its operations. The volume of harvested weeds has declined over the past five years.[9]

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IV. Analysis

a. The legislation

[34] The Plaintiffs bear the burden of establishing that the action should be a class proceeding based on the criteria outlined in the CPA. There is no room for judicial discretion in a certification application. Section 5(4) is clear - the court "may not certify a proceeding as a class proceeding unless the Court is satisfied as to each of the matters referred to in subsection (1)(a) to (e)", which states:

> 5(1) In order for a proceeding to be certified as a class proceeding on an application made under section 2 or 3, the Court must be satisfied as to each of the following:
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> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
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> (c) 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;
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> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
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> (e) there is a person eligible to be appointed as a representative plaintiff who, in the opinion of the Court,
>
> (i) will fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
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> (iii) does not have, in respect of the common issues, an interest that is in conflict with the interests of other prospective class members.

b. Objectives of class action

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[9] Weed harvesters have been operating for the same number of hours in this time.

[35] The concern at the certification stage of class litigation is on the form of the action and its appropriateness as a class action. While it is not about testing the merits of the action,[10] the merits are nonetheless relevant to identify the common issues, define the class, and ascertain whether class proceeding is the preferable procedure for the fair and efficient resolution of the common issues.[11]

[36] The approach on a certification application is a flexible and liberal one[12]. The object of class litigation was described by Smith J. in ***Endean* v. *Canadian Red Cross Society***,[13] as not to provide perfect justice, but a "fair and efficient resolution" of the common issues. To this end, class action legislation "sets out flexible procedures and clothes the court with broad discretion to ensure that justice is done to all parties."[14]

[37] A purposive approach requires the Court to be mindful of these objectives of class litigation on a certification application:

(1) enhancing judicial economy by avoiding unnecessary duplication of fact-finding and legal analysis (thereby freeing up judicial resources and reducing the cost of litigation),[15]

(2) improving access to justice by dividing litigation costs over a large number of plaintiffs, [16]

(3) effecting behaviour modification by ensuring that actual and potential wrongdoers do not ignore their obligations to the public;[17]

(4) avoiding inconsistent results[18], and

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[10] ***Hollick v. Toronto (City)***, 2001 SCC 68 at para. 16, ***Ayrton v. PRL Financial (Alta.) Ltd.,*** 2006 ABCA 88.

[11] ***Cloud v. Canada* (A.G.)** (2004), 73 O. R. (3d) 401, 247 D. L. R. (4) 667 at para. 48. (C.A.).

[12] ***Pearson et al v, Inco,*** [2005] O.J. No. 4918 at para. 3 saying that the decision in ***Cloud v. The Attorney General of Canada*** (2004), 73 O.R. (3d) 401, 247 D.L.R.(4th) 667 (Ont. C.A.) suggests that a somewhat more liberal approach should be taken to certification of class proceedings.

[13] [1997] B.C.J. No. 1209, (1997), 148, D.L.R. (4th) 158, rev'd on other grounds (1998), 157 D.L.R. (4th) 465 (B.C.C.A.).

[14] ***Eldean*** at para 58; see also ***Metera v. Financial Planning Group***, 2003 ABQB 326, 1 0 W.W.R. 367 and ***Pearson*** where the Ontario Court of Appeal allowed an amendment to the proposed class for that purpose while the case was under appeal.

[15] ***Western Shopping Centres Inc. v.Dutton*** [2001] 2 S.C.R. 534 at paras. 26 – 27.

[16] ***Western Shopping Centres Inc.*** at para. 28.

[17] ***Western Shopping Centres Inc.*** at para. 29.

[18] Alberta Law Reform Institute, *Class Actions, Final Report No. 85 (*Edmonton: Alberta Law Reform Institute, 2000) at par. 114.

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(5) with the assistance of case management and alternative dispute resolution, reducing adversity and increasing the likelihood of reaching a fair and equitable result.[19]

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c. Application of the test for certification

i. Cause of action

[38] The Plaintiffs plead nuisance, ***Rylands v. Fletcher***,[20] interference with riparian rights, and negligence. The claim against TransAlta is in nuisance and negligence, while the claim against Alberta is in negligence alone. TransAlta is alleged to be an environmental polluter, guilty of nuisance and negligence to whom the principle of ***Rylands v. Fletcher*** applies. Alberta is alleged to be negligent in the discharge of statutory and common law duties arising from its roles as: (1) the licensor of TransAlta's operations; (2) the enforcer of environmental laws; and (3) the keeper of the weir.

[39] Section 5(1)(a) of the CPA requires only that the pleadings disclose a cause of action. The Defendants tried unsuccessfully to have the Plaintiffs' pleading struck under Rule 129. TransAlta's application was on the basis that the pleading was an abuse of process, while Alberta's was that it disclosed no cause of action.[21] The Defendants concede that this aspect of the test is met, particularly given the low threshold for showing that a cause of action is disclosed.[22]

ii. Identifiable Class

[40] Section 5(1) (b) of the CPA provides that the class must consist of an identifiable class of two or more persons. The proposed class here is "All Alberta residents who claim that, between 1996 and 2005 they owned residential lands contiguous to Wabamun Lake and that their use and enjoyment of their lands or the value of their lands were adversely affected by diminished water levels in or pollution of Wabamun Lake. Residential lands contiguous to Wabamun Lake include residential lands where a narrow strip of reserved land exists between the legal land description of the residential lands and the actual Lake edge." This definition of what is "contiguous" is intended to ensure that landowners, like Mr. Zon, who have a strip of Crown land between their land and the water's edge are included in the class.

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[19] Alberta Law Reform Institute, *Class Actions, Final Report No. 85 (*Edmonton: Alberta Law Reform Institute, 2000) at par. 114.

[20] ***Rylands v. Fletcher*** (1868), L.R. 3 H.L. 330.

[21] ***Paron v. Alberta (Environmental Protection***), 2000 ABQB 737, ***Paron v. Alberta (Minister of Alberta Environmental Protection)***, 2000 ABQB 464

[22] ***Danyluk v. Ainsworth Technologies Inc.*** (2001), 201 D.L.R. (4th) 193 (S.C.C.) at paras.18 to 25.

[41] Clear class definition at the outset of class litigation is critical because it identifies those: (1) entitled to notice, (2) entitled to relief (if relief is awarded), and (3) bound by a final judgment. Consequently, the definition must be precise, objective, and presently ascertainable.

[42] Class definition must avoid criteria that are subjective or that depend on the merits because: (1) they frustrate efforts to identify class members, (2) contravene the policy against considering the merits of a claim in deciding whether to certify a class, and (3) create potential problems of manageability. The criteria must bear a rational relationship to the common issues asserted by all class members.[23]

[43] In Alberta, the "rational relationship" test continues to be applied at this "identifiable class" stage of the analysis.[24] The test is described in ***Hollick*** (at paras. 20-21):

> The respondent is of course correct to state that implicit in the "identifiable class" requirement is the requirement that there be some rational relationship between the class and common issues. Little has been said about this requirement because, in the usual case, the relationship is clear from the facts. In a single-incident mass tort case (for example, an airplane crash), the scope of the appropriate class is not usually in dispute. The same is true in product liability actions (where the class is usually composed of those who purchased the product), or securities fraud actions (where the class is usually composed of those who owned the stock). In a case such as this, however, the appropriate scope of the class is not so obvious. It falls to the putative representative to show that the class is defined sufficiently narrowly.
>
> ……..
>
> The requirement is not an onerous one. The representative need not show that everyone in the class shares the same interest in the resolution of the asserted common issue. 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: see W. K. Branch, *Class Actions in Canada* (1996), at para. 4.205; ***Webb v. K-Mart Canada Ltd.*** (1999), 45 O.R. (3d) 389 (S.C.J.) (claim for compensation for wrongful dismissal; class definition

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[23] ***Western Canadian Shopping Centres Inc. v. Dutton***, at para. 38, ***Hollick*** at para. 17; W. Branch, *Manual for Complex Litigation*, (3d ed.) (St. Paul: West Publishing, 1995) at p. 217, quoted with approval in ***Bywater v. Toronto Transit Commission*** [1998] O.J. No. 4913 , 27 C. P. C. (4th) 172 (Ont. Gen. Div.) at para. 11; ***Ragoonanan v. Imperial Tobacco Canada Ltd.***, [2005] O.J. No. 4697, 78 O.R. (3d) 98 (S.C.J.) at 39-46.

[24] ***Kristal Inc. v. Nicholl and Akers***, [2006] A.J. No. 253, 2006 ABQB 168 at para. 91.

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overbroad because included those who could be proven to have been terminated for just cause); ***Mouhteros v. DeVry Canada Inc.*** (1998), 41 O.R. (3d) 63 (Gen. Div.) (claim against school for misrepresentations about marketability of students after graduation; class definition over inclusive because included students who had found work after graduation).

[44] The most recent decision of the Ontario Court of Appeal in ***Pearson v. Inco Ltd., et al*** [25] is instructive on this and other aspects of the test for certification. It too was an environmental claim. There, the pollution alleged was from Inco's nickel refinery in Port Colborne, Ontario. The court found that over 66 years Inco had spewed at least 20,000 tons of nickel, including a carcinogen, nickel oxide, into the environment that contaminated the Port Colborne environment. The low-income area adjacent to, and downwind from, the refinery known as the Rodney Street area where the plaintiff lived, was particularly hard hit.

[45] After a Ministry of the Environment announced higher than expected nickel levels in a soil sample in the area, housing sales in the neighbourhood dropped by 45%. The claim was significantly narrowed en route to appeal to make it more amenable to certification, particularly to address class identification concerns. It initially included sweeping claims for damages from the alleged adverse health effects from nickel oxide contamination and property value loss. At appeal only the latter claim remained.

[46] As in ***Hollick***, the Plaintiffs here have not tried to name members of the class. There are two people interested in the action, as required by s. 5(1)(b), and the proposed class has defined boundaries. Also, as in ***Hollick***, the issue of liability is common within the meaning of s. 5(1)(c) in that to prevail individually every member would have to establish, among other things, that TransAlta was a polluter. There is a rational connection between the proposed common issues and the proposed class definition. Persons owning land "contiguous" to the Lake are those likely to be affected by changes in water level and quality in all, or part, of the Lake.

[47] Therefore, on initial review it appears that there is an identifiable class within the meaning of s. 5(1)(b).[26] I accept that the definition is designed to avoid commercial, municipal, or other governmental landowners, a good number of whom oppose this litigation. However, that said, thorny questions concerning the definition arise from its being "claims based" and somewhat dependent upon the merits of the action.

[48] To gain membership in the class in the present case, one must "claim that" between given dates the intended class members' use and enjoyment of their lands or the value of their lands were adversely affected by diminished water levels in, or pollution of, the Lake. Membership is dependent on a state of mind, rendering it impossible for the Defendants to know who is in or out of the class.

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[25] ***Pearson v. Inco Ltd., et*** *al.* [2005] O.J. No. 4918, 261 D.L.R. (4th) (CA).

[26] ***Hollick*** at para. 17

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[49] Persons who would otherwise be class members can argue that they are not bound by the result of the class action, because they never "claimed" anything during the specified period or at a relevant point in time resulting in the undesirable potential of multiple proceedings despite the class action.[27]

[50] ***Pardy (Wheadon) v. Bayer Inc.***[28] and ***Walls v. Bayer Inc.***[29] are parallel pharmaceutical products liability class actions in Newfoundland and Manitoba where the courts permitted certification of a class comprised of people who "claimed personal injury" from ingestion of a drug, observing that while determination of personal injury is subjective, the fact of a claim to personal injury is not.

[51] In ***Pardy***, the court noted that the class definition was essentially consumers who purchased the product and that "narrowing the proposed class by excluding those who do not allege injury seems simply a matter of common sense."[30] Such is not necessarily the case here, however, given the nature of the claims alleged.

[52] The court in ***Pardy*** also took some comfort from the Supreme Court of Canada's apparent acceptance of a claims based definition in ***Rumley v. British Columbia,***[31] something that the Plaintiffs urge here. The action in ***Rumley*** was by former students of a residential school operated by British Columbia. It concerned allegations of abuse over many years and the foundation of the claim was "systemic" negligence by failure to have management and operations procedures that would reasonably have prevented the abuse. The British Columbia Court of Appeal certified the action, varying the class definition to cover all students who "claim to have suffered injury." The Supreme Court of Canada dismissed an appeal from this decision. Although the BC Court of Appeal varied the class definition to a "claims-based" one, it did not undertake any analysis of the reasons why, nor did it discuss the issues arising from such a definition[32]. The appeal to the Supreme Court of Canada was limited and the court simply did

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[27] ***Ragoonanan*** at para. 45, ***T. L. v. Alberta (Director of Child Welfare)***, 2006 ABQB 104 at paras. 65.

[28] ***Pardy (Wheadon) v. Bayer Inc***. (2004), 237 Nfld. & P.E.I.R. 179 (NLSCTD); leave to appeal refused: 2005 NLCA 20, 246 Nfld. & P.E.I.R. 157; leave to appeal refused [2005] S.C.C.A. No. 211.

[29] ***Walls v. Bayer Inc.*** 2005 MBQB 3, 189 Man. R. (2d) 262, leave to appeal denied 2005 MBCA 93, 15 C.P. C. (6th) 377.

[30] ***Pardy*** at para. 109.

[31] ***Rumley v. British Columbia,*** 1999 BCCA 689, 72 B.C.L.R. (3d) 1, aff'd 2001 SCC 69, [2001] 3 S.C.R. 184.

[32] ***Rumley*** (CA) at para. 51.

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not touch on the issue.[33] This does not constitute acceptance of "claims based" class definitions.

[53] As observed by Slatter J. in ***T.L. v. Alberta (Director of Child Welfare)*** (at para. 66), a claims-based definition was unnecessary in both the ***Bayer*** and ***Rumley*** cases. In ***Bayer***, the class could have just as easily been described as "all those who consumed the drug in question and suffered personal injury as a result", and in ***Rumley***, "all students who were, in fact, assaulted at the school".

[54] In the present case, the controversy among putative class members is the driving force for this claims based definition. It is designed to diffuse, or at least minimize, the conflict by restricting membership to those that support the litigation, but for that very reason, this is a subjective definition.

[55] However, if the class definition was restated to remove "claims" as the basis for identification, the result – "all persons whose use and enjoyment or value of their lands were adversely affected by diminished water levels or pollution" – leads to a merit-based definition of the class.

[56] Merit based definitions of classes were discussed in ***Chadha v. Bayer Inc***.[34] There the definition of all those "who have suffered loss or damage as a result of the defendants' conduct" was found to be merits based. There is a clear distinction between that class definition and the ones accepted in ***Hollick*** and ***Pearson;*** those class description defined the classes entirely in terms of all persons living within a prescribed area in a particular time period, without qualifying the definition with the requirement that the members suffered harm.

[57] In ***Hollick*** the Supreme Court of Canada noted:

> The appellant has defined the class by reference to objective criteria; a person is a member of the class if he or she owned or occupied property inside a specified area within a specified period of time. Whether a given person is a member of the class can be determined without reference to the merits of the action.[35]

[58] The *Manual for Complex Litigation*, (3d ed.)[36] states:

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[33] ***Rumley*** (SCC) at para. 26.

[34] ***Chadha v. Bayer Inc***. (2001), 54 O.R. (3d) 520 (Div. Ct.) at paras. 47-50, aff'd (2003), 63 O.R. (3d) 22 (C.A.) at para. 69.

[35] ***Hollick*** at para. 17.

[36] *Manual for Complex Litigation*, (3d ed.) (St. Paul: West Publishing, 1995) at p. 217.

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> Definitions . . . should avoid criteria that are subjective (e.g. a plaintiff's state of mind) or that depend upon the merits (e.g., persons who were discriminated against). Such definitions frustrate efforts to identify class members, contravene the policy against considering the merits of a claim in deciding whether to certify a class, and create potential problems of manageability.

[59] In the present case, the claim is for loss due to lost land use or value because of nuisance, strict liability arising from the rule in ***Rylands and Fletcher*** and negligence. While a certification application is not a decision about the merits, the merits are a factor in assessing the appropriateness of the class definition. Here, as in ***Chadha*** and ***T.L.,*** the definition of the class becomes circular if the class description relies on persons who have suffered harm.[37] In ***Chadha,*** at para. 69, the Ontario Court of Appeal cited with approval the comments of Sharpe J. in ***Robertson v. Thomson Corp.*** (1999), 43 O.R. (3d) 161, 171 D.L.R. (4th) 171 (Gen. Div.) at p. 169 O.R.:

> I agree with Winkler J. in [Bywater v. Toronto Transit Commission, [1998] O.J. No. 4913 (Gen. Div.)] and with [H. Newberg and A. Conte, Newberg on Class Actions, 3rd ed. (West Group, 1992)] at p. 6-61, that the class should be defined in objective terms, and that circular definitions referencing the merits of the claim or subjective characteristics ought to be avoided. Such definitions make it difficult to identify who is a member of the class until the merits have been determined. Definitions based upon the merits of the claim also violate the statutory policy that the merits are not to be decided at the certification stage.

[60] Here, the nature of the action – ***Ryland v. Fletcher,*** riparian and littoral rights, and nuisance – are causes of action in which proof of individual loss is a component of the determination of liability. Class members cannot be identified without first determining who suffered harm, and that determination is integrally dependent upon the merits of the action.

[61] However, not all class definitions that limit class members to those who have suffered harm will be merit based, otherwise class definitions would be too inclusive. For example, in ***Pardy*** the action was based on the allegation that the drug in question was defective and unfit for human consumption. The court concluded it was reasonable to exclude from the class those who did not suffer an injury.

[62] Finally, there is the issue of conflict within the putative class; some want the Lake level lower, some want it higher, some are content. The proposed class definition is intended to minimize the conflict between those opposed to the injunctive relief aspects of this litigation and those supporting it. However, this approach undermines the fundamental requirement for an objective class definition and does not create an "identifiable class" within the meaning required.

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[37] ***T.L.*** at para. 67.

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[63] I conclude that the present class definition is not objective nor are the members of the class readily ascertainable.

iii. Common issues

A. The law

[64] Section 5(1)(c) requires that 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 common issue means common, but not necessarily identical, issues of fact or law that arise from common, but not necessarily, identical facts.[38] There must be some evidence presented to support each common issue: ***Hollick*** (at para. 25).

[65] An issue is common if its resolution is necessary to the resolution of each class member's claim. As such, it must be a substantial ingredient of each of the class members' claims, and resolution of the issue must materially advance the litigation. Something may be a substantial ingredient of the claim even if it makes up a limited aspect of the liability question and even though many individual issues remain to be decided after its resolution. The latter does not undermine the commonality conclusion, but is a factor on the assessment of whether a class action is the "preferable procedure."[39]

[66] Success for one class member must mean success for all; all members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. If one class member is successful on a common issue, either all class members are successful or some class members are indifferent to that issue. There is no common issue, if success for one member of the class means loss for another.[40]

[67] In ***Metera***, Slatter J described the real focus of this analysis as being whether there is a conflict of interest within the class, observing that such conflicts tend to destroy the commonality of interest and put counsel in an impossible situation. In some cases a conflict of interest can be dealt with by naming formal subclasses, and if necessary providing for separate representation for each of the subclasses. Alternatively, the problem can be resolved by redefining the class to exclude those with conflicting interests. However, in other instances the conflict may be so fundamental that it prevents the action from proceeding as a class action, for example, where all the issues are only "sub-class common" and there are no "universally common issues."[41]

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38 CPA s. 1 (e).

39 ***Cloud*** at para. 52, 53 and 58.

40 ***Western Canadian Shopping Centres*** at para. 40.

41 para. 53-57 and ***Western Canadian Shopping Centres Inc.*** at para. 54.

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[68] The assessment of the common issues is contextual, in light of all the issues raised by the case,[42] and caution must be exercised to ensure that the issues are truly common, not just made to appear common by the manner in which they are posed. As noted by Cullity J. in **Egglestone v. Barker**[43] :

> As drafted, the proposed issues have an appearance of commonality in the sense that an affirmative, or negative, answer to the question posed by each of them would resolve the issue in respect of all members of the class. In that sense, the task of framing common issues for the purpose of a motion for certification would rarely, if ever, give rise to difficulty. In most cases, the question whether the defendants are liable to the members of the class could be considered to be a common issue. If that were sufficient, the requirement of commonality would call for nothing more than an exercise in drafting.

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[69] If, on the pleading and evidentiary record, the conclusion is that an issue would have to be decided separately in the light of the particular circumstances of each member, certification on the basis of such an issue is not justified. This is so whether the defect is to be understood as detracting from the commonality of the issue, or as affecting the question of the preferable procedure to be determined under section 5(1)(d) of the CPA.

[70] While the Plaintiffs need not show that everyone in the class shares the same interest in the resolution of a common issue, there must be some showing that the class is not unnecessarily broad. In other words, they must show 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. If the class is capable of more narrow definition, certification should either be disallowed or allowed on condition that the definition is narrowed.[44]

[71] It does not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms, because inevitably such action will break down into individual proceedings.[45]

B. The common issues defined by the Plaintiffs

[72] The Plaintiffs' present statement of the common issues is this:

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42 ***Hollick*** paras. 27-30.

43 **Egglestone v. Barker,** [2003] OJ 3137, 38 C.P.C. (5th) 386 at para.16.

44 ***Hollick*** at para. 21; ***Reid v. Ford Motor Co.,*** [2003] BCSC 1632, 2003 BCSC 1632 at para. 66.

45 ***Rumley*** (SCC)at para. 29.

a. Have the Plaintiffs suffered loss and damages arising from interference with their riparian and littoral rights?

b. Are the Plaintiffs entitled to the water of Wabamun Lake at its natural historic level as agreed to in 1927, 1945, and 1965 without significant decrease in the water level and without significant alteration in its character and quality?

c. Has the operation of the Wabamun Power Plant by TransAlta decreased the level of the Lake 2.9 inches per year and caused a significant decrease in the water level of the Lake?

d. Has the operation of the Wabamun Power Plant by TransAlta caused heat waste to be discharged into the Lake and caused a massive growth of algae and weeds in the Lake?

e. Has Alberta permitted TransAlta to decrease the water level in the Lake and to discharge heat waste into the Lake?

f. Does Alberta have responsibility for the operation and maintenance of a weir at the east end of the Lake?

g. Did Alberta fail to take steps to address an illegal channel, dug in 1982 by vandals around the north end of the weir, thereby causing the Lake to drain through that channel?

h. Did Alberta build a roadway in the vicinity of the weir at an elevation that was 18 inches lower than the historic weir, thereby circumventing the authority of the Province's water controller under the *Water Resources Act*?

i. Have TransAlta and Alberta interfered with the Plaintiffs' riparian and littoral rights by lowering the water level of the Lake and polluting the water of the Lake?

j. Has Alberta failed to bring proceedings against TransAlta to prevent the lowering of the water level of the Lake and the polluting of the water of the Lake?

k. Has Alberta failed to properly regulate the operations of TransAlta to prevent environmental damage to the Lake?

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l. Is TransAlta liable to the Plaintiffs in *Rylands v. Fletcher*, nuisance and negligence?

m. Has Alberta breached its statutory and contractual obligations and duties as well as its duties under the law of negligence?

n. Have the Plaintiffs suffered damages, including the use and enjoyment of their riparian and littoral rights and decrease in the value of their properties?

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[73] These issues can be broken down into distinct categories, some of which raise questions about the appropriateness of the matter proceeding as a class action, whether because of common issue or preferable procedure concerns. The categories and concerns are these:

Issues (c) to (h), (j) (k) and (m)

[74] Issues (c) to (h), (j) (k) and (m) concern the cause of changes in the Lake level and water quality, the operation of the weir, the nature and effect of TransAlta's operations, Alberta's regulation of TransAlta's operations, and the associated existence and breach of Alberta's legal duties to the Plaintiffs. Insofar as these issues are concerned, success for one class member will likely mean success for all. At worst, it will likely mean indifference from some. These are common issues.

Issue (b)

[75] Issue (b) concerns TransAlta's liability in nuisance, either under ordinary nuisance laws or under ***Rylands and Fletcher***. It can only be determined after all individual assessments are completed, because, unlike negligence, where proof of some damage, however minimal, is sufficient to complete the cause of action, the measure of legal culpability in nuisance is a function of the degree of harm it causes to each individual and his or her property. This requires assessment of harm suffered by each individual in relation to his or her particular property by reference to a threshold of a reasonable person occupying the plaintiff's premises.[46] The process for setting the reasonable person threshold is intrinsically more difficult where the area is of mixed or changing use.[47]

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[46] ***Walker v. Pioneer Construction Co. (1967) Ltd.***, (1975), 8 O.R. (2d) 35,56 D.L.R. (3d) 677 (Ont. H.C.J.); ***John Campbell Law Corp. v. Strata Plan 1350,*** 2001 BCJ 2037, 2001 BCSC 1342; ***Grace v. Fort Erie (Town)***, [2003] O.J. No. 3475, 42 M.P.L.R. (3d) 180 (S.C.J.); ***A. G. Manitoba v. Adventure Flight Centres Ltd. (1983)***, 25 C.C.L.T. 295, 42 M.P.L.R. (3d) 180 (Man.Q.B.) at 309; ***Culp v. Township of East York***, [1957] O.J. No. 257 (S.C. A.D.) at 423, Fleming, *The Law of Torts, ed.* at 416-417,419, 421; Linden, *Canadian Tort Law*, 5th ed. (Toronto: Butterworths, 1993) at 503.

[47] Linden, at 516-517; *Clerk and Lindsell on Torts*, 17th ed. (ed. Margaret Brazier), (London, [England] : Sweet & Maxwell, 1995) at 895.

[76] A number of variables that are likely to affect this liability assessment will come into play, some of which are:

a. Lake conditions at the time of a class member's property purchase and the extent that they were a factor in purchase price;
b. The effect of any third party representations about the Lake conditions at the date of property purchase.
c. The level of alleged interference complained of; for example, a person who complains of only marginal interference with a water sport may not be able to prove nuisance or perhaps even damage in negligence, but a person who suffered substantial property damage and recreational interference on a broader scale could have a viable case.
d. The use that a person makes of his or her property, including the time that they spend there; for example, a summer-only cottager will not have a basis to complain about thin winter ice levels and given the evidence, full-time residents may have less concern about recreational use than seasonal cottagers.
e. A person's individual sensitivity to an alleged interference, and whether that sensitivity is abnormal when considered in the context of the threshold of acceptable interference, will weigh in on the assessment.
f. The time frame of a person's damage claims will also be a factor in the assessment. This will vary from member to member. Thus far, all four of the Plaintiffs intend to claim for damages before 1996.
g. The effects of the 2005 CNR derailment fuel spill

[77] As in ***Chadha*** proof of loss is a component of the liability determination, and it will be different for different plaintiffs; thus these are not common issues.

[78] The Plaintiffs claim to entitlement to a "natural historic level as agreed to in 1927, 1945, and 1965", is problematic since there is a conflict of interest amongst the putative class members that is not solvable by the use of subclasses. The answer to the Lake level is not a 'yes or no' question.

[79] There is no evidence that any putative class member is privy to any "agreement" to have the Lake level fixed at a "natural historic level". There is also no evidence of a natural historic level. The only evidence is that finding an "original" or "natural" level may not be feasible given the many variables that have affected the Lake.

[80] Even if there were evidence of a natural historic level, this issue highlights the very real conflict among class members. A claim for the loss of use, enjoyment, or value of lands due to a diminished water level in the Lake over a specified period does not preclude simultaneous opposition to raising the weir level or blocking the Bypass. Indeed, there may be some members of the proposed class who will say that they lost use and enjoyment of the Lake and/or some property value, who nonetheless oppose raising of the effective weir level. There is no consensus among landowners around the Lake on this topic.

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[81] In ***Public Service Alliance of Canada Pension Plan Members v. Public Service Alliance of Canada,***[48] the court rejected certification based on conflicts of interest amongst the class even though, unlike here, it appeared possible that the conflicts might later be resolved.

[82] As Lord Macnaghten stated in ***Duke of Bedford v. Ellis***[49], where a declaration was sought under the former procedure for representative actions:

> Given a common interest and a common grievance, a representative suit was in order **if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent.**
>
> (Emphasis added)

[83] The Plaintiffs minimize concerns about the conflict among class members, urging that the class definition essentially eliminates conflict because it is an "opting in" claim, and even if there is a conflict, subclasses, one for remedies and the other for the action generally, can solve the conflict problem. Although not developed by the Plaintiffs, it would seem that this plan would require a subclass for monetary claims only, a second for injunctive relief only, and a third for both monetary claims and injunctive relief.

[84] Presumably, there would be a liability trial followed by different trials for different remedies for different subclasses. Although the need for subclasses is not a bar to certification[50], the Plaintiffs' proposition does not resolve the live conflict. Given the reality of flooding if the weir is altered by filling the Bypass or otherwise, members of the "monetary claim only" subclass could be placed in the untenable position of being both a Plaintiff and a person seeking Intervener status to oppose subclass proceedings for injunctive relief. Further, it would be impossible for one lawyer to represent all of the subclasses, thus defeating an economy of class litigation.

Issues (a) and (i)

[85] The information needed for the determination of "riparian and littoral rights", issues (a) and (i), does not differ materially from the nuisance allegations. The right of the riparian or littoral owner is not absolute, and like the nuisance claims, this assessment will entail balancing of the rights of a particular plaintiff and the defendants, as well as consideration of the degree of interference with the plaintiffs' rights. Also like the nuisance claims, other factors like

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[48] ***Public Service Alliance of Canada Pension Plan Members v. Public Service Alliance of Canada,*** [2005] O.J. No. 2693 (S.C.J.) at paras.24-27.

[49] ***Duke of Bedford v. Ellis***, [1901] A.C. 1 (H.L.), at page 8

[50] CPA section 8 (e).

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knowledge, variables affecting the purchase price, and representations by others will be relevant to the assessment.[51]

[86] Compounding the issue is the fact that this claim necessarily involves analyzing the interface between an area of land and an area of water, but here approximately one-half of the titles of land purportedly contiguous to the Lake do not actually have contact with the Lake. The class definition is designed to overcome this issue by defining "contiguous" (lands) to include those separated from the water by a strip of Crown land. While this ensures that Mr. Zon and others are included in the putative class, it does not overcome the legal reality that a person's claim for interference with "riparian and littoral rights" requires that the claimant own the banks of the water in question.[52] There can be subclasses, one for those legally contiguous to the Lake and the other for those separated by Crown land; however, there is risk that some members of the legally contiguous subclass may be more than indifferent to this since some may have concerns about inflating the property values of those separated by Crown lands.

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Issue (n)

[87] The determination of issue (n), damages, is subordinate to, and dependent upon, the liability issues. Damages are intrinsically individualistic. While there is evidence of varying degrees of interference with recreational use amongst the Plaintiffs, the only evidence of damages arising from diminished property values is the appraisal of Mr. Zon's property. The appraisal does not offer any breakdown as to what percentage, if any, of the suggested decrease in property value is attributable to the removal of sand and liner improvements from his property, which is unrelated to this action, and that which may be attributed to decreased water levels.

[88] In ***Pearson***, the court had no difficulty finding that the need for property valuations for each class member did not overwhelm the common liability issue. There, unlike the present case, the marketplace was flattened by the government's announcement of contaminants in the geographic area that bounded the class. The same is not true here. Supply and demand continues to drive a vibrant marketplace around the Lake and some variables unrelated to the allegations in this litigation affect property values, including; variations in local jurisdictions surrounding the Lake, the impact of railway lines, and the slopes of Lakeshore properties. Proximity to industrial sites, including TransAlta's plant, is also a factor that affects values.

[89] Finally, there may be limitations issues that arise since it is evident that all of the Plaintiffs intend to claim for damages before 1996.

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[51] Gerard La Forest, *Water Law in Canada: The Atlantic Provinces*, (Information Canada, 1 973) at p.200. See also pp.204-207, ***John Young & Co. v. Bankier Distillery Co.***, [1983] A.C. 691 (H.L.) at 698, ***Scarborough Golf& Country Club v. City of Scarborough et al.*** (1986), 55 O.R. (2d) 193, var'd 66 O.R. (2d) 257 (Ont.C.A.), Thomas C. Buchele, "*State Common Law Actions and Federal Pollution Control Statutes: Can they Work Together*", 1986 U. Ill. L. Rev. 609.

[52] *Water Law in Canada* at p. 200.

d. Preferable procedure for resolving common issues

[90] A class proceeding is the preferable procedure if it presents a fair, efficient and manageable method of determining common issues, and if such determinations will advance the proceeding in accordance with the goals of judicial economy, access to justice, and behaviour modification. The essence of the inquiry is to assess the common and individual issues contextually, and consider the impact of the individual issues on the trial process, including fairness to plaintiffs, defendants and the court. It focuses on two questions: (1) would the class action be a fair, efficient and manageable method of advancing the claim; (2) would the class action be preferable to all other reasonably available means of resolving the claims of class members.[53]

[91] In ***Caputo v. Imperial Tobacco Ltd.***[54], the court described the onus concerning this arm of the certification test as follows:

> … it is not enough for the plaintiffs to establish that there is no other procedure which is preferable to a class proceeding. The court must also be satisfied that a class proceeding would be fair, efficient and manageable. Both parts of the test must be considered in the context of the three goals of the CPA, judicial economy, access to justice and behavioural modification.

[92] Section 5 (2) of the CPA requires the court to consider certain factors in this preferable procedure analysis, many of which codify the common law. It provides:

> In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the Court may consider any matter that the Court considers relevant to making that determination, but in making that determination the Court must consider at least the following:
>
> (a) whether questions of fact or law common to the prospective class members predominate over any questions affecting only individual prospective class members;
> (b) whether a significant number of the prospective class members have a valid interest in individually controlling the prosecution of separate actions;
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;

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[53] ***Hollick*** at para. 27-31; ***Cloud*** at para. 73-75; ***Rumley*** (SCC) at para. 35-39.

[54] ***Caputo v. Imperial Tobacco Ltd.*** (2004), 236 D.L.R. (4th) 348, 22 C.C.L.T. (3d) 261 (Ont. S.C.J.) at para. 62.

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(d) whether other means of resolving the claims are less practical or less efficient;
(e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

e. Representative plaintiff

[93] The representative plaintiff's situation does not have to be typical of the situations of the class members.[55] However, the CPA requires that the representative plaintiff must:

1. fairly and adequately represent the interests of the class,
2. have no conflict of interest with other class members, and
3. have a plan for the proceeding that sets out a workable method of advancing the litigation and of notifying the class members of the proceeding.

[94] It is clear that Mr. Zon has a long history of advocating for change to the Lake level and for improvements to the condition of the Lake generally. The duration and consistency of his past conduct indicate that he would pursue the claim vigorously. His retention of experienced counsel also speaks favourably for his suitability as a representative plaintiff. That said Mr. Zon's attitude of indifference towards class members that will be flooded, particularly those whom he believes should have known better than to move into a "flood plain", if he prevails at the end of the day is troubling. Class members living on a "flood plain" might well view his attitude towards them as the antithesis of a fair and objective representative plaintiff. A representative plaintiff must be objective and fair. Mr. Zon is, at least in this regard, not objective.

[95] The CPA does not define a "conflict of interest" in the context of a representative plaintiff. ALRI's *Final Report No. 85*[56] suggests that this applies only with respect to the common issue, and the fact that the proposed representative plaintiff has an interest that is somewhat different from that of other class members does not prevent that person from being appropriate, citing James Sullivan, *A Guide to the British Columbia Class Proceedings Act* [57]as authority for the proposition.

[96] The Plaintiffs therefore urge that Mr. Zon's conflict with putative class members about resolution of the issues does not qualify as a "conflict of interest" because he does not advocate one answer to a common issue, while other members of the class advocate conflicting answers. This proposition ignores, however, the very conceivable likelihood that there will be some class

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55 Abdool at p. 465.

56 ALRI's *Final Report No. 85* at para. 218.

57 James Sullivan, *A Guide to the British Columbia Class Proceedings Act* (Toronto and Vancouver: Butterworths, March 1997).

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members who claim that their recreational use and enjoyment of their property is impaired, but disagree that the Lake should be restored to a natural and historic level. For example, a person living in a deeper water area near the Village of Wabamun may not be able to enjoy the Lake to the fullest because they cannot boat or swim in the warmer and weedier waters around Moonlight Bay. This is a conflict of interest on the Plaintiffs' common issue (b) concerning "fixing" the Lake level to natural and historic levels.

[97] Mr. Zon has not taken steps to canvass the likelihood of any other persons joining in the litigation if he succeeds in this application. While he is not technically obliged under the CPA to show more than the existence of two persons interested in the action, given the circumstances of this case, it would have been practically prudent for him to have done so, particularly given the very significant, uncontroverted evidence of opposition to the litigation.

[98] The CPA contemplates separate representative plaintiffs for subclasses where the protection of the interests of the prospective subclass members requires that they be represented separately. The qualifications for a subclass representative plaintiff are the same as for representative plaintiffs. The Plaintiffs do not offer any such separate representation.

e. Class litigation objectives

i. Behaviour Modification

[99] The objective of behaviour modification is to ensure that actual and potential wrongdoers do not ignore their obligations to the public.[58]

[100] TransAlta is obliged to repay its historic water debt, and is presently ahead of schedule to do so. It has undertaken programs to address problems created by its operation through cooling water sent back to the Lake, weed control measures, fisheries management and thin ice warning programs. In short, it shows signs of individual behaviour modification. However, based on ***Pearson*** that is insufficient to satisfy this objective. In ***Pearson***, the court rejected the notion that active steps indicating individual behaviour modification through regulatory compliance, remedial and curative action was sufficient to satisfy the objective, since modification of behaviour does not only look at the particular defendant, but more broadly at similarly situated defendants.

[101] Although the impact of behaviour modification from the narrow perspective of this case is apparently met to a significant degree, a class proceeding would achieve the intention of broader behaviour modification.

ii. Access to Justice/ Other Proceedings and Other Recourse

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[58] ***Western Canadian Shopping Centres*** at para. 29, ***Abdool v. Anaheim Management Ltd.,*** (1995), 121 D.L.R. (4th) 496, 21 O.R. (3d) 453 (Ont. Div. Ct.) at 514.

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[102] Class actions provide a means to sue defendants who might otherwise, practically speaking, be immune from suit by allowing claimants to share the cost of litigation and, financially justify the pursuit of smaller value claims that otherwise could be prohibitely expensive.[59]

[103] The Plaintiffs contend that the sheer size of the proposed class mandates finding that a class proceeding is the most efficient manner of proceeding, at the very least for liability issues which are common to all putative members. They urge that class proceedings legislation was intended to address exactly this kind of case because the anticipated costs, heightened by the need for experts, would outweigh any class member's anticipated recovery of damages, and that it would offend judicial economy to require separate actions.

[104] Access to justice was a significant consideration in ***Pearson*** as many of the people whose property values were most seriously impacted were also the most vulnerable and least able to prosecute their individual claims. Many were elderly persons and others were on fixed incomes, were partially employed or unemployed, were persons with disabilities, or were recipients of social assistance. If any of those persons chose to pursue litigation individually against Inco, they would find it extremely difficult. The court observed that while litigation is always a difficult process, it would be extraordinarily so for these plaintiffs. The Plaintiffs in the present case will face significant litigation costs that they understandably wish to spread out over a larger group if they can. However, they are not like the "most vulnerable" persons in ***Pearson***. They are cottagers with recreational properties, and while it may not be cost-efficient for Mr. Zon to pursue the litigation independently, he is not doing that. He is sharing the litigation costs with the other named Plaintiffs.

[105] There is no evidence of competing individual actions or that members of the putative class would prefer to litigate individually, and the Plaintiffs suggest that it is unlikely that anyone else has an interest in controlling separate litigation. Indeed, despite the stakeholders' obvious interest in issues concerning the Lake, as evidenced by the many interest groups and "town hall" meetings, there is absolutely no evidence of any person other than the Plaintiffs, having expressed any interest in litigation against the Defendants.

[106] The CPA does not require evidence of anything more than two or more persons interested in prosecuting an action; however, it is practical for persons seeking certification of a class proceeding to adduce evidence of some support of what they propose. In ***Markson v. MBNA Canada Bank***[60], the motions judge observed that while it is ordinarily unnecessary for the plaintiff to show that all putative class members would approve of, and support, the institution and prosecution of the proceedings, the complete absence of any support from them has been given some weight in decisions in which certification was withheld.

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[59] ALRI *Final Report No. 85* at para. 119].

[60] ***Markson v. MBNA Canada Bank***, [2005] O.J. No. 4625, 78 O.R. (3d) 39 (Div. Ct.) at para. 69.

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[107] ***Markson*** is instructive for other reasons. As here, the remedy sought could have been detrimental to some class members because there was a risk that the Defendant might make it harder for class members to obtain credit or might increase interest rates. The plaintiff there had sought to certify a claim for restitutionary, declaratory and injunctive relief based on the allegation that MBNA Canada Bank received interest on cash advances in violation of the interest section of the Criminal Code. The Ontario Divisional Court upheld the finding that a class action was not the preferable approach where, given the declaratory and injunctive nature of the relief sought, the right to opt out would provide "cold comfort to those who would prefer to pay less interest than to participate as private citizens in the enforcement of the Criminal Code."

[108] In ***Metera***, the court certified the representative action, but refused to impose the proceeding on persons who had not expressed an interest in it. There, the named Plaintiff had notified all putative class members of the action, but not all affected persons responded.[61]

[109] As in ***Markson***, the Plaintiffs are able to pursue their objectives in their individual capacities. Their objectives should not subject others to proceedings when the Plaintiffs' desired outcome – filling the Bypass or other means of raising the Lake level – could be contrary to their best interests. This does not deny access to justice.

[110] Although there is at present no evidence that anyone else is interested in joining in this litigation, the Plaintiffs in time may find financial and other support from others. In either case, they can conduct a test case on liability only and avoid the procedural complexity of a class proceeding. The ALRI *Final Report*[62] cites the advantages of test cases, which may also lead to efficient resolution of other litigation, either through settlement or by narrowing issues in subsequent cases. This approach allows the parties to probe the merits of the action without the procedural complexity involved in a class action.

[111] On the other hand, the disadvantages, described at para. 40 of the ALRI *Report* include: (1) placing inordinate power in the hands of the 'test' plaintiff" who would pursue the most beneficial result for that plaintiff personally, with the attendant risk that the test case may be settled without a resolution of the underlying issues and therefore may "not necessarily facilitate settlement of subsequent litigation; (2) the litigation is not binding except as between the parties named in the litigation; and (3) American experience indicates that the original litigants tend to reap a damages windfall. Alternatively, the Plaintiffs may request the trial of an issue on the question of liability only.

[112] That there have been various environmental assessments, consultations, and tribunal proceedings concerning specific TransAlta operations, some of which Mr. Zon and other Plaintiffs have participated in is telling of their past involvement. However, it is irrelevant to this

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61 ***Metera v. Financial Planning Group (#2)*** (2003), 332 A.R. 244, 2003 ABQB 326 at para. 42.

62 ALRI *Final Report No. 85* at para. 39.

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analysis concerning access to justice and alternate recourse since there has been no alternative scheme for compensation, which was an important factor in Hollick.

iii. Judicial Economy/Administration of Class Proceeding

[113] Judicial economy in the context of class proceedings means a simple and efficient means of dealing with a large number of claims involving common issues of fact or law within a single proceeding with a view to preventing a drain on court resources.[63]

[114] It is clear that some individual issues must be determined after the common issues in many, if not most, class actions, and that fact alone is not alone a bar to certification.[64] In deciding whether a class proceeding is the preferable procedure for resolving the common issues, all of the individual and common issues arising from the claims must be considered in the context of the factual matrix.[65]

[115] In ***Rumley***,[66] even though the issues of injury and causation would have to be litigated in individual proceedings after the resolution of the common issue, the individual issues were found to be a relatively minor aspect of the case. There, the essential question was whether the school should have prevented the abuse of students responded to it differently.

[116] As with negligent misrepresentation cases where individual misrepresentations are alleged, nuisance cases are problematic for certification of a common issue because liability is dependent on the impact of the nuisance on each individual and his or her property. Consequently, the result of a trial for any one claimant cannot generally stand as proof of the cause of action of any other claimant.[67]

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63 ALRI *Final Report No. 85* at para. 113.

64 CPA s. 8; ***Western Canadian Shopping Centres Inc***. at para 54, ***Metera***, at 69, ***Cloud*** at p. 402, ***Rumley (***BCCA) at para. 23, ***Pearson*** at para. 65.

65 ***Hollick*** paras. 27-30.

66 ***Rumley***, at para. 36.

67 ***Kumar v. Mutual Life Assurance Company*** (sub nom. ***Williams v. Mutual Life Assurance Co. of Canada)*** , [2000] O.J. No. 3821, 51 O.R. (3d) 54 (S.C.J.),; appeal dismissed, (2001) 152 O.A.C. 344, 17 C.P.C. (5th) 103, (Ont. Div. Ct.); affirmed, [2003] I.L.R. 1-4181, 226 D.L.R. (4th) 112 (C.A.); additional reasons at 2003 CarswellOnt 1444 (Ont. C.A.); affirmed 47 C.C.L.I. (3d) 60, [2003] I.L.R. 1-4182), additional reasons at 2003 CarswellOnt 1447 (Ont. C.A.), ***Carom v. Bre-X Minerals Ltd.***, (1999) 44 O.R. (3d) 173 (S.C.J.), aff'd 46 O.R. (3d) 3 15 (Div.Ct), appeal granted in part on other grounds (2000) 51 O.R. (3d) 236 (C.A.), leave to appeal dismissed [2000] S.C.C.A. No. 660, ***Mackinnon v. National Money Mart Company***, [2005] B.C.J. No. 399, 2005 BCSC 271 at para. 1.

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[117] In ***Sutherland v. Canada***[68] nuisance from noise pollution emanating from the Vancouver airport was alleged. The court refused certification because liability for each person in the class would depend on many individual factors and, as a result, there was no material fact or important threshold factual issue that was common to all members of the proposed class or to members of identifiable sub-classes. Put otherwise, the case would have broken down into a series of individual adjudications and justice would not be served by allowing it to proceed as a class action.

[118] Similarly, in ***Grace v. Fort Erie (Town)***,[69] the court rejected a class action arising from nuisance where the allegation was property damage caused by discoloured municipal water. The court considered the need for individual assessment of the type and severity of the harm, the duration of the harm, the intrusiveness of the harm, the character of the neighbourhood (including zoning designations), and any abnormal sensitivity on the part of the plaintiff. Individual issues predominated.

[119] ***Hollick*** involved allegations of noise and physical pollution emanating from a landfill. Like ***Grace*** and ***Sutherland***, certification in ***Hollick*** failed primarily because of multiple individual variables. As with the present case, the only way to know if there was an impact on a particular person's property was for that person to come forward and make a complaint. The Supreme Court of Canada found that even though each class member had to establish the emission of physical or noise pollution, when viewed in context of all of the issues, it was difficult to say that resolution of the common issue would significantly advance the action. The court found that any common issue was negligible in relation to the individual issues and refused certification on that basis. The court made it clear, however, that the decision is not to be read as a bar against class proceedings in environmental pollution cases generally, but rather, each case must be decided on its unique facts.[70]

[120] ***Pearson*** is the first environmental nuisance case – the first of its kind certified in Ontario. The Court of Appeal found that the essential question was whether Inco was liable in tort for its emissions and whether the emissions affected the property values of the class members. The narrow issue concerning the quantification of individual claims was a matter for individual litigation. Rosenberg J.A. (at para. 70) observed that as the claim was originally framed, individual claims of injury to health and related claims would have dwarfed the resolution of the common issues, but with the narrowing of the claim that was no longer the case. The court also expressed concern for judicial economy and the possibility of inconsistent outcomes. There, unlike in the present case, the plaintiff narrowed the allegations significantly, there was clear evidence to support the reasons for fallen property values, and there was some expectation that there might be an aggregate assessment of damages.

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68 ***Sutherland v. Canada***, [1997] B.C.J. No. 2550, 15 C.P.C. (4th) 329 (BCSC).

69 ***Grace v. Fort Erie (Town)***, [2003] O.J. No. 3475, 42 M.P.L.R. (3d) 180 (S.C.).

70 ***Hollick*** at para. 37.

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[121] The Plaintiff's focus in this application is on the common issues of liability and breach of the riparian and littoral rights. While they acknowledge that damages "may involve some minor variation" and that any individual issues are relatively minor and less complex from an evidentiary perspective and are capable of resolution once the common issues are resolved. They say that even if there are many individual issues, that does not negate the most efficacious manner of proceeding by having the common issue of liability resolved by a class proceeding. The suggestion is initially appealing. However, given the nature of the claims, individual issues will dwarf any common issues and the creation of subclasses will not solve the problem.

[122] Individual issues arising from proofs for liability findings (in nuisance and interference with riparian and littoral rights) will predominate. There are also concerns about third party liability, for example realtors and vendors. Determination of liability in negligence, which is clearly a subordinate claim, will not materially advance the litigation within the meaning of ***Hollick*** and ***Cloud***.

[123] The need for individual damage calculations is generally not an impediment to certification. Indeed, in ***Hollick***[71], the Supreme Court of Canada stated that the CPA "contemplates that class actions will be allowable even where there are substantial individual issues."

[124] In ***Pearson***, individual assessments of each property were required. Here, the damage calculation is not limited to property valuations. The claim for damages is broadly cast and the assessment will be affected by the extent to which a class member engaged in particular recreational activities, the degree of interference in each recreational activity, and the impact of the alleged wrong, be it in nuisance or negligence, on any given location along the Lakeshore at a particular time. For example, water levels at Moonlight Bay affected Mr. Zon's boating and use of his boathouse over a certain time frame, but boathouse access was unaffected, at least to his knowledge, in other areas.

[125] Administering the number of subclasses to capture various permutations and combinations of alleged property use interference is likely to be unmanageable. Finally, for the reasons discussed in paragraphs 69, 74-75,77, and 106, the use of subclasses will not solve the problem of conflicts amongst the class. As observed in ***Hollick*** and as evidenced by ***Pearson***, this finding does not mean that environmental pollution and nuisance cases will always fall outside of the class action scheme. It simply means that the facts of this case render it unsuitable for class action.

[126] In summary, I find it impossible to conceive how a class proceeding would advance the members claims fairly, efficiently or manageably through the court process. Judicial economy would not be achieved and the ability of class members to attain access to justice through such a

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[71] ***Hollick*** at paragraph 30.

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procedure is very questionable. A class action proceeding in these circumstances would not be fair, efficient or manageable for the parties or for the court.

[127] Borrowing from Shaugnessy J. in ***Price v. Panasonic Canada Inc.***,[72] if certified, this action would have the potential to become something of a "monster of complexity" and cost.

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f. Litigation plan

[128] Turning now to the litigation plan, while it normal for a litigation plan to be somewhat fluid[73], it nonetheless must have some substance to it, providing sufficient detail commensurate with the complexity of the litigation.

[129] As Justice Winkler noted in ***Carom v. Bre-X Minerals Ltd.***[74]:

> A practice has developed in class proceedings of accepting litigation plans in support of certification motions that are sparse and lacking in detail. While this may be appropriate in more straightforward cases, in complex litigation such as the instant case, a detailed plan which meets the requirements of the Act is of critical importance.
>
> The interrelation between the different elements of the certification test under s. 5(1) has been noted previously in these reasons. The requirements set out for the representative plaintiff accordingly, do not stand in isolation. The production of a workable litigation plan serves a twofold purpose: it assists the court in determining whether the class proceeding is indeed the preferable procedure; and it allows the court to determine whether the litigation itself is manageable in its constituted form. The manageability must be assessed in the context of the entirety of the litigation, not just a common issue trial.

[130] This litigation plan falls short of providing the essential elements set pout in ***Bellair v. Independent Orders of Foresters:***[75]

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[72] ***Price v. Panasonic Canada Inc.,*** [2002] O.J. No. 2362, 22 C.P.C. (5th) 382 (SCJ) at para. 48**.**

[73] ***Cloud*** at paras. 94-97.

[74] ***Carom v. Bre-X Minerals Ltd.*** [at page 203]

[75] ***Bellair v. Independent Orders of Foresters*** [2004] O.J. No. 2243, 5 C.P.C. (6th) 84 (SCJ). See also: ***Public Service Alliance of Canada Pension Plan Members v. Public Service Alliance of Canada, Price v. Panasonic Canada Inc.,*** [2002] O.J. No. 2362, 22 C.P.C. (5th) 382 (Ont. S.C.J.) at paras.62-63 , and ***Caputo v. Imperial Tobacco Ltd.*** (2004), 236 D.L.R. (4th) 348, 22 C.C.L.T. (3d) 261 (S.C.J.) at para.78 .

(i) the steps that are going to be taken to identify necessary witnesses and to locate them and gather their evidence;
(ii) the collection of relevant documents from members of the class as well as others;
(iii) the exchange and management of documents produced by all parties;
(iv) ongoing reporting to the class;
(v) mechanisms for responding to inquiries from class members;
(vi) whether the discovery of individuals class members is likely and, if so, the intended process for conducting those discoveries.

[131] Here, the litigation plan has not set out a plan for identifying witnesses or for locating and gathering evidence. While the litigation plan provides a proposed schedule for exchanging documents with Affidavits of Records, it does not provide any means or process for actually collecting documents from members of the class or others.

[132] The plan, however, does adequately deal with providing ongoing reporting to the class members through periodic newsletters and by establishing a website which will also contain information. However, it does not address how class members may communicate with the plaintiffs.

[133] The plan contemplates Examinations for Discovery, but does not indicate if that will be discovery of individual class members or only the representative plaintiff. Moreover, the plan does not realistically address how the plaintiffs intend to deal with the complex and divergent interests of the proposed class members.

[134] Clearly, there are some common issues pertaining to causation and the Defendants' duties and conduct, but once these are decided, each class member's claim will have to determined individually. The nature, extent, timing, and duration of the diminished water levels or pollution are integral to the factual matrix for determining if there is actionable nuisance and, to some degree, interference with riparian or littoral rights. These same issues will affect the assessment of damages for all of the causes of action alleged. The threshold or a grid approach proposed by the Plaintiffs would be so complicated that its value is questionable at best.

[135] The litigation plan also presumes that a global award is possible at the conclusion of the common issues trial. I agree with the Defendants that given the need for individual assessment this is unrealistic, and may serve nothing more than to artificially inflate expectations.

[136] Mr. Zon recognizes that the handling of several aspects of the claim are 'up in the air'. For example, apart from claims that he might advance personally, he is still considering what to do about claims for damages to boats, not sure what the plan is for pollution claims, and does not know who might know if claims for changes in the quality of fish will be made.

V. Conclusion

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[137] This action, as currently constituted, is unsuitable for class certification. It would not serve the ends of either fairness or efficiency to certify it. Accordingly, the application for certification is dismissed.

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Dated at Edmonton, Alberta this 19th day of May, 2006.

J.E. Topolniski
J.C.Q.B.A.

Appearances:

Richard C. Secord and Trina Kondro
Ackroyd Piasta, Roth & Day LLP
for the Plaintiffs

L. Bernette Ho and Steven H. Leitl
MacLeod Dixon LLP
for the Defendant TransAlta Utilities

Neil Boyle
Alberta Justice

Ward Branch
Branch McMaster
for the Defendant Her Majesty the Queen in Right of Alberta

Corrigendum of the Reasons for Decision
of
The Honourable Madam Justice J.E. Topolniski

The name of counsel has been corrected on page 35.

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