Abstract

This work considers the interplay between the Crown, public authorities and the class action device. The modern-day class action is a relatively recent legal innovation that allows for the collective redress of similarly situated victims through a single strand of litigation. Class actions are most commonly associated with the pursuit and remediation of corporate wrongdoing, however the Canadian government, and the profusion of tentacles that flow from it, have been pursued to a significant extent as class action law has rolled out across Canada.

In stark contrast to commercial defendants, public authorities carry on their activities for the public good and on a not-for-profit basis. The best of intentions and a lack of profit does not imply that liability should be denied however, rather that it should be managed as effectively as possible. The Crown has an arsenal of tools at its disposal to reshape how class actions affect it and how to deal with the issues brought forward in those class actions. This work examines each of these tools and advocates for their careful use to limit the potential impact class action lawsuits pose to public service delivery.
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1. Introduction - Public Authorities in the Class Action Context

It was said of Cleopatra that “age cannot wither her, nor custom stale her infinite variety”\(^1\) and the same sentiment rings true for public authorities. In bad times and good, the public sector endures to deliver a seemingly never-ending array of vital services to the populace including, in brief, mass transit and electricity networks, water systems, policing and prisons, the provision of healthcare, education, and a miscellany of other localized services. The public sector also takes up responsibility for regulating a profusion of hazardous activities and industries. Public services then, are unequivocally part and parcel of an advanced and thriving society. However these mass-scale services and regulatory functions have the potential to fail and inflict harm or injury upon their consumers from time to time; transit systems catch fire\(^2\) and water systems inadvertently become contaminated causing widespread harm.\(^3\) So too do blood banks,\(^4\) hospitals\(^5\) and livestock\(^6\). Such intimate involvement with the citizenry creates enormous potential exposure to class action lawsuits because class litigation exists precisely for the purpose of aggregating and remediating multiple instances of harm spread out amongst many victims.

This first section begins by surveying the history and distinctive semantics of the class action device itself as well as those qualities that make the Crown and public authorities an extremely attractive choice of defendant. Following this extended introduction, the remaining part of the essay canvasses the topic from three perspectives: the limited discourse on the particular subject of Crown exposure to class actions, the unique tools which federal, provincial and municipal governments have used to control their class action risks and claims in the past. Finally, the essay attempts to recommend an effective set of risk management techniques emphasizing while underlying principles, theory and policy.

\(^3\) Smith v. Brockton (Municipality) [2001] O.J. No. 2335. This is referred to colloquially as “Walkerton”, after the town where the disaster occurred.
\(^4\) Parsons v. Canadian Red Cross (1999), 91 ACWS (3d) 351 (Ont SCJ).
1.1. The Class Action Device

Although the notion of group redress existed in the English common law as early as the twelfth century, the modern conception of the class action is a relatively short and uncomplicated chronicle rooted in American federal rules of procedure from 1966. Class action procedures in Canada are chiefly creatures of provincial law pursued through the provincial courts however the Federal Court Rules also permit class proceedings in that court. Debate smouldered on in the common law provinces for well over a decade following the first enactment of class action legislation in Quebec, in 1978. The class action finally gained traction in Canada when Ontario enacted its Class Proceedings Act in 1992 and British Columbia shortly thereafter in 1996. The remaining provinces have followed since, save for Prince Edward Island - the only province to remain without a statutory class proceedings mechanism today.

As against traditional civil litigation, class action practice has several noteworthy features. Class proceedings created “two new roles in civil litigation” which did not exist before: a representative plaintiff (or defendant) and their class counsel. The former is responsible for adequately representing the entire class by instructing the latter as well as bearing the burden of any adverse costs award which may arise should the claim end in failure. This unusual relationship gives rise to perhaps the most remarkable feature on the class action landscape - the notion that plaintiff-side class lawyers are entrepreneurial. Whereas in a non multi-party dispute, where a client will approach their lawyer with the claim they wish to pursue, it falls to an opportunistic class counsel bar to identify potential mass claims in the class action setting and round up the members of the class many of whom may not even realize they have been affected. In the words of McCarthy Tétrault, Canadian class action legislation permits the plaintiffs’

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8 Spence, Susan T., “Looking Back ... In a Collective Way - A short history of class action law” (American Bar Association, Volume 11, Number 6 – July / August 2002).
10 An Act respecting the class action, RSQ, c. R-2.1, as amended.
12 Class Proceedings Act, R.S.B.C. 1996, c. 50.
13 Litigants in that province can avail themselves of a judicially organized class claim despite the lack of class proceedings legislation: Western Canadian Shopping Centres v. Dutton 2001 SCC 46.
15 Class Proceedings Act, S.O. 1992, c. 6, s.5.
lawyer to “seek out and initiate actions that will further the goals of judicial economy, access to justice and the modification of harmful or illegal behaviour.”\textsuperscript{16} In sum, all class action defendants, including public authorities, would do well to remember that class counsel are “the real adversary”\textsuperscript{17} as McCarthy Tétrault puts it, and furthermore that

“it is crucial to recognize that the opposing lawyers are more than just the objective professional representatives of an adversary. They are also entrepreneurs who have more than the usual stake in the terms of any settlement or adjudication. The defendant will be engaged in a negotiation or contest not so much with a group of personally aggrieved claimants as with another business person, who will be motivated by a combination of professional integrity and economic self-interest.”\textsuperscript{18}

By virtue of their scale, class actions are a notoriously expensive production. The representative plaintiff takes on the unenviable responsibility for the likely huge costs incurred should the claim fail. Perversely, and despite this risk, the representative plaintiff will not typically stand to gain a huge award in the event of a win. Accordingly, to make pursuing the underlying goals of the legislation an attractive proposition, legislators consciously increased incentives for class counsel and representative plaintiffs. Class Proceedings Funds were established from which class counsel can apply to fund disbursements and indemnify themselves against adverse costs awards. Contingency fee arrangements between class counsel and the representative plaintiff are permitted and, increasingly, the controversial notion of third party investors funding litigation in which they have no other interest is gaining cautious acceptance from Canadian courts.\textsuperscript{19} By and large however, class counsel work on a contingency free basis and because of this “there is a general "rule of thumb" that the class claim must be at least $2 million in order to sustain efforts

\begin{footnotesize}
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\item[\textsuperscript{16}] McCarthy Tétrault LLP, “Defending Class Actions in Canada” (CCH Canadian Ltd., 2007) at p. 100.
\item[\textsuperscript{17}] Ibid. at p. 245.
\item[\textsuperscript{18}] Ibid.
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required to advance a class proceeding.” Claims under this threshold are likely to be passed over by class counsel for lack of reward.

The watershed moment in the life of a class action claim, in terms of procedure, is certification. This step involves judicial authorization which transforms the original individual claim into a class containing possibly hundreds or thousands of plaintiffs. Without the requirements to prove numerosity, typicality or predominance found in American law, certification is generally easier to obtain for Canadian class plaintiffs, particularly so in Quebec. While the courts, including the Supreme Court of Canada, have held rather plainly that “the certification stage is decidedly not meant to be a test of the merits of the action,” they have also recognized that the net effect in the aftermath of class certification is that the viability of the plaintiff’s claim has been considerably strengthened. In Hollick, the court noted:

“Although the merits of the claims are not in issue (formally), certification motions are major battles, consuming significant time, money and legal resources. The financial costs and other costs of defending a certified class action, together with the defendant’s enhanced exposure to damages, exert powerful pressures to settle.”

Due to the courts recognition of the plaintiff’s colourable claim, defendants frequently incline towards settlement shortly after certification. On the topic of settlement, the court proceeded to hold:

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21 ‘Authorisation’ in Quebec is less onerous than certification in other provinces because the representative plaintiff need only file an unsupported Notice of Motion which is accepted as true for the purposes of certification. In addition, the defendant is not entitled to cross-examine the representative plaintiff on a certification motion and must seek leave to submit written or oral evidence opposing certification.
22 Hollick v. Toronto (City) 2001 SCC 68 at para 16.
23 Ibid. fn. 16 at p. 103.
“In a class action, the pressures to settle are more intense, regardless of the merits of the claim. These pressures arise from the very nature of the class action, which permits the aggregation of numerous claims that expose defendants to large damage awards at no cost or risk to class members other than the representative plaintiff. The size of a potential damage award, the costs of litigating a complex class action, and the adverse publicity generated by protracted class proceedings create strong incentives for a defendant to settle.”

Ever before the passage of class action legislation, three benefits of class actions (judicial economy, access to justice and behavioural modification) were enunciated by both the Ontario Law Reform Commission (the “OLRC”) and endorsed by the Supreme Court of Canada.

Judicial economy is the notion that, by disposing of a multiplicity of lawsuits in a single court proceeding, the class action procedure improves efficiency at the judicial level. As the court put it “by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis.” Class actions thus spare the courts from "days of the same witnesses, exhibits and issues" which would have to be endured were litigants only able to bring forth their issues on an individual basis and assuming each litigant was motivated to do so.

Along with court-level efficiency, the class action is said to improve access to justice by virtue of unlocking a previously inaccessible area of liability. Prior to the introduction of class actions,

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24 Ibid. fn. 16 at p. 132.
26 Ibid. fn. 22.
27 Ibid.
standalone claims for some minor or limited harm could not materialize on the grounds of each being “individually unviable”: i.e., although the litigant legitimately suffered in some way, the potential recovery would not break even in terms of the time, cost and effort required to litigate the claim. The class action operates to allow a collective of similarly situated victims of minor harm to harness the power of their number. The court, again citing the OLRC: “by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own”29.

Behavioural modification, known synonymously as deterrence, is the class actions third goal and indicates that class actions ultimately have a role in policing the marketplace. The damages award is the goal and a collective damages award will be substantial enough to produce the fear of financial strain or bankruptcy. Put simply, by enabling the collective pursuit of what would have been unviable or unlikely claims in the individual sense, potential defendants are forced to behave with an increased sense of caution vis-à-vis this widened axis of liability. Branch describes it so; “[B]ehavioural modification is obtained as claims that might otherwise go unpunished will now be brought. The prospect of class actions removes the “comfort zone” for those who might assume that minor wrongs would not result in litigation.”30 Dewees, Pritchard and Trebilcock assert that:

“[t]he process by which an order to compensate an injured party may modify behaviour is known as “cost internalization”. Forcing a defendant to take into account, or “internalize”, the costs that its activities impose upon plaintiffs can influence the conduct of the defendant through the market mechanism, so as to minimize harm to society.”31

29 Ibid. fn. 22 at para 15.
31 Ibid.
In other words, the class action enables victims to re-direct the cost of harmful behaviour back upon the wrongdoer whereas before they bore such costs themselves for lack of a mechanism to recoup same.

1.2. Some Distinguishing Features of Public Authorities

Public authorities are an attractive class action target and are considered to be those organizations that have some dimension of government ownership / operation and are run expressly for the public good. By contrast, the private sector consists of all those organizations that are neither owned nor operated by government and the beneficiaries of such enterprises are only those consumers that avail of their products or services. Despite the variability between public authorities in terms of size, function, overall structure, and their location within the various layers of government, there are two uniting features that exist at the core of every public agency; how they are funded and how they are overseen or controlled.

Funding Structure & Mission Objectives

Public authorities are not, generally speaking, profit-generating enterprises but rely instead on funding derived from taxation. This financial freedom gives rise to a number of effects. Firstly, it offers public authorities the flexibility to make what are referred to as economically irrational choices, for instance providing services that would be viewed as commercially unviable – and consequently ignored – by private enterprise. It can be argued that the lack of a line-of-sight on a monetary bottom line gives rise to a difference in mentality between public authorities and private enterprises. Might this mentality blunt a more proactive approach on the part of public authorities when it comes to considering class action risk? Lorne Sossin thinks so: “Part of the consequence of political rather than economic bottom lines is often an emphasis on short-term solutions.”

In my view, the different driving forces at work within corporations and public authorities (profit and public interest respectively) result in two flavours of the class action’s behavioural modification objective. At the heart of a public program or service is an intention to provide a benefit to the public. A commercial entity, on the other hand, will complete its decision-making process along the lines of a risk/benefit analysis of its plans or operations. It is and will be more readily prepared to intentionally jeopardize its’ consumers interests where overall it is economically efficient to do so. Although the overarching purpose of the behavioural modification objective is to dissuade negligence generally, the public authority can at least be credited (generally speaking) for not being willingly prepared to jeopardize its customers in the pursuit of profit because it is not its motive to begin with.

The consequences of successful class action claims are always expensive. The lack of self-sustaining revenue streams in public authorities’ funding structures will therefore cause immediate and significant consequences in terms of service delivery where such liabilities become a reality. The ultimate cost arising out of such liabilities, then, is transferred onto taxpayers. A corporate class action defendant on the other hand will have generated profits and there will be a clear link between the wrongdoing and the fruits derived from said wrongdoing.

**Accountability Structure**

In addition to possessing deep pockets to satisfy adverse judgments and settle ‘big ticket’ litigation, political pressure can be brought to bear upon public bodies. Because citizens perceive their government from a distance, a public authority may well be readily associated with government ownership and control even if it is operating entirely independently of government influence. A corporation by contrast is an isolated network that responds to a relatively small and discrete group of individuals including management, shareholders and clients. This link between public authorities and the elected government means that public authorities may be making decisions, overtly or subconsciously, which appeal to their underlying political sensitivities. On occasion, such decision-making may constrain the flexibility of litigation strategies where
fighting claims. For example, political figures may meddle, for better or worse, in a public authorities affairs out of a need to avoid embarrassment or intense media scrutiny.

A related notion, explored in the following section, is that class actions have, as far as the class action bar is concerned, apparently taken on a role as a “means to fight government” and “an important role in shaping public policy and keeping government honest.” While behavioural modification is certainly an objective of the class action device and one which may drive public policy indirectly in some instances, this attitude would appear to suggest class action lawyers now view their role as both regulator and policymaker. This role –shaping public policy– is a development that was certainly never envisaged by the exhaustive OLRC Report and a development worth watching closely.

1.3. Popularity of Suing Governmental Agencies

In the class action context, Ward Branch described the government as the “dream defendant”.

One “frequent hazard in the class action area” class counsel will be mindful of when presented with a potential class action, he continues, is “does the potential defendant have assets?” When scoping out a commercial defendant, would-be class counsel are advised to consider the following:

“When a company has wronged a group of people in a public way, they are often in serious financial trouble even before class litigation commences, for example where: the potential defendant has already been forbidden to sell their main product, or the misrepresentation alleged is that their company has value when, in fact, it does not. By scouring the financial press and any public

34 Ibid.
filings, you can hopefully obtain some insight into this issue. However, in the case of smaller, privately-held entities it may be more difficult. Insurance issues will often loom large here. Although this can be difficult to determine prior to filing, you need to try to find out the following points regarding the insurance situation as soon as possible: (a) Is there any insurance available? (b) If so, is the insurer agreeing to defend the case? (c) Is the insurer raising coverage issues? (d) What are the limits of the policy? (e) Do defence costs deplete the limits? (f) Does the insured still have sufficient assets available to satisfy any excess liability?“\(^{36}\)

Proceeding against a publicly funded defendant clearly does away with class counsels need to examine the records, general wealth and insurance pertaining to that body. Class members are secure in the knowledge that a judgment or settlement of any quantum can be satisfied and thus find themselves at a considerable advantage where their claim is against a public authority or government. Class counsel will also be particularly safe in the knowledge that payment of their generous fee is fully assured thanks to the funding structure of the public sector and especially given that “[i]t is quite clear that all of those who recommended modern class action legislation, the legislators who enacted it and the courts who apply it, agree that plaintiff’s counsel should be generously compensated in the event of success.”\(^{37}\)

Although metrics are difficult to ascertain, in the recent past, there has been a clear upward trend in the complexity and volume of litigation being brought against the Canadian government. The Department of Justice noted in October 2008 that there had been a substantial (four-fold) increase in the number of class action claims brought against the Federal government in the preceding years:

\(^{36}\) Ibid.
\(^{37}\) Ibid. fn. 16 at p. 101.
“the number of new class actions grew from 35 to 150 between 2000 and 2006 and included areas as diverse as Indian Residential School claims, Mad Cow disease, and Hepatitis C. The complexity is also reflected in the increasing number of lawyer hours. Between 2000 and 2004, the number of lawyer hours increased by approximately one-third from 2,019,626 to 2,720,892. In addition, contingent liabilities are a persistent issue; after peaking in 2000/2001, they have remained in the vicinity of $10 billion per year.”

Writing in 2001, Ward Branch noted that:

"About 100 class actions have been filed in B.C. since introduction of the [Class Proceedings] Act in 1995 … Of the actions filed, 34 have been against governments, government agencies or Crown corporations, making public bodies the primary target of the new wave of litigation … As of December 2001, 35 proposed class actions had reached the certification stage. 14 of these cases involved government bodies.”

By virtue of dipping its fingers into an entire range of proverbial pies, there is great potential for the Crown to be joined in class action lawsuits where its involvement is somewhat indirect or peripheral. Although corporate defendants have suffered from a related affliction in so called ‘industry class actions’ this happens far more frequently to the Crown. Class action claims arising out of regulatory negligence often target the direct cause (commercial defendant whose product has caused the loss or injury) and the Crown for allowing the product to be placed in the

39 Ibid. fn. 33.
chain of commerce and, therefore, within the reach of consumers who are later injured. *Pearson v. Inco Limited*\(^{40}\) is illustrative. This was an environmental class action where municipal, regional and provincial governments as well as local school boards were named as defendants at the outset. The source of the pollution was in fact a corporation, the Inco nickel refinery in Port Colborn, which was the sole beneficiary of the profits of the operation. The Crown also had to argue insufficient proximity in *Attis v. Canada (Minister for Health)*\(^{41}\) and *Drady v. Canada (Minister for Health)*\(^{42}\) for failures to regulate the commercial defendant’s defective (but lucrative) products.

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\(^{42}\) *Drady v. Canada (Minister for Health)* [2008] O.J. No. 3772.
2. The Debate – Public Sector Exposure to Class Actions

A central theme outlined in this section is that surprisingly little parliamentary debate took place on the specific point of how the Crown might be affected by the introduction of the class action procedure. Despite a number of extraordinarily expensive class action lawsuits against public authorities, the unique position of public authorities within the class action context remains generally under-discussed to this day.

2.1 British Columbia

During the course of their parliamentary debate on class action legislation in 1995, some British Columbian legislators displayed, at the very least, a degree of awareness of the risk that class actions lawsuits might pose to public authorities. Dennis Mitchell, clearly spotting the issue, made the point that:

“it’s significant the province can now also be pursued by class proceedings. School boards, for instance, can be pursued; a local government or even Crown corporations can be pursued.”


Gordon Wilson picked Mr. Dennis’ point up, adding that, despite measures present in the legislation which would prevent frivolous and vexatious class actions from proceeding,

“[t]here may be, as a result of this vehicle, a potential for a flood of these kinds of things – at least in the first years of the implementation of this act – that we may want to try and deal with.”

44 Ibid.
The then Attorney General, Mr. Gabelmann, dismissed the concerns of both Mr. Mitchell and Mr. Wilson on two grounds. Firstly, he highlighted the experience of Ontario (which had arrived at the class actions party some three years before), saying the class actions brought there were “not suits against government.” Ward Branch noted that Mr. Gabelmann’s submission would have been far better informed had he examined the “astounding” experiences of jurisdictions with the most developed class action regimes (particularly the U.S, in addition Quebec). While the realization of the true scale of the risk facing government and public authorities in Canada was still in the future, Mr. Gabelmann was certainly mistaken when summarily dismissing the concerns raised by his colleagues.

In answer to follow-up queries about public liability and legislation which contains clauses which would work to exclude the use of said legislation against the government, the Mr. Gabelmann simply maintained “this act doesn’t open up any new avenues, other than establishing a procedure for combining together”. While the class action is on its face just another procedure, Mr. Gabelmann missed the point that by virtue of enabling claims which would have remain suppressed but for the existence of the procedure, the procedure was in and of itself for a new avenue for litigating net new claims. Given the practical consequences of permitting class proceedings, the distinction between principle and procedure is blurred to such an extent that it is moot. As Cassels and Jones put it:

“[i]t is outcomes that are most important to the parties as well as to litigators … rights and remedies, it is often remarked, are functionally indistinguishable … Class action procedures make such claims viable to pursue; in the result, many areas of the law that had lain largely dormant have blossomed into hotly contested jurisprudence. Competition law, securities law, and, of course,

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45 Ibid.
46 Ibid.
product liability law owe their current vitality in large part to procedures permitting collective action against the wrongdoer.”

Ultimately, the floodgates proposed by Mr. Wilson never made it into the legislation and a substantial number of cases subsequently arose against various BC public authorities following the passage of the Act. With hindsight, it is not difficult to see how such a measure would have been sensible in terms of limiting class actions taken against the public authorities of British Columbia.

2.2 Ontario

The Government of Ontario, in contrast to that of British Columbia, spared only a fleeting thought to the possible impact the Class Proceedings Act might have on their public sector in part because the OLRC Report on Class Actions,48 was the chief source informing the debate on the introduction of class proceedings in Ontario. While undeniably impressive for its breadth of coverage, the Report did not explicitly explore the position of the public sector or make predictions on how class actions might affect same. The Report of the Attorney General's Advisory Committee on Class Action Reform49 which followed the OLRC Report on Class Actions began with the premise that:

"Ontarians live in a society that strives to maximize access to justice for its citizens. Sophisticated and highly evolved rights and obligations are of little value if they cannot be asserted or enforced effectively and economically.”50

In terms of behavioural modification the report contained the following comment:

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48 Ibid. fn. 25.
50 Ibid. at p. 16.
"Finally the presence of effective remedies of any sort inevitably must contribute to a sharper sense of obligation to the public by those whose actions affect large numbers of people. This is the case whether the obligation is owed by an aircraft manufacturer, a pharmaceutical company, a financial institution or even a government."  

Although this clearly contemplates government, it does seem relegated to a token mention and reflects a general sense that the CPA was primarily intended to impose obligations upon corporations. The Ontario Hansard debates reveal nothing on the topic of government class action liability, leading to, in my view, a fair conclusion that legislators in that province were not alert to the impact facing public authorities and the Crown.

2.3 Elsewhere

The conspicuous absence of debate regarding the implications of class litigation on public authorities is not unique to Canada or Ontario alone. Parliamentarians across Europe, where class action law remains in its infancy have also not said much on the topic of public authorities being subjected to the device. However there is an explanation for this. European jurisdictions are approaching the class action differently and with a different purpose in mind. The European Union has confined its class action proposals to the area of redress for antitrust only and the law firm Freshfields Bruckhaus Deringer note in their “Developments in class actions and third party funding of litigation”, report that while there is a general political will to enhance access to justice, there is a considerable sensitivity towards the experience of the United States and this theme looms large in the discourse surrounding the introduction to the class action in the region. Individual member states are themselves considering class actions but again in a cautious

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51 Ibid. at p. 17.
manner. Structural differences commonly found within European legal systems, such as the general absence of contingency fee rules, jury trials and punitive damages, reflect, more or less, those same features found in Canada that do much to prevent the less desirable elements of the U.S. system taking root.  

Although progress is currently fragmented, lawmakers in Europe are clearly far less inclined towards the idea of exposing their public sectors to the possibility of class action claims focusing instead on the pursuit and punishment of private sector misconduct only.

2.4 The Business Lobby

The US Chamber Institute for Legal Reform, a business lobby, damned class actions on the following basis (among others) in its paper entitled “The Class Action Debate in Europe: Lessons From the U.S. Experience”:

"U.S.-style litigation diverts resources from more productive goals. Class actions force companies to expend their resources on legal and settlement costs instead of in more productive areas, such as research and development. Nowhere is this felt more than in the pharmaceutical industry. For example, between 1999 and 2004, one major U.S. drug maker spent $25 billion [USD] on legal costs and legal reserves to fight class action lawsuits, while devoting only $19 billion [USD] to research and development. Surely such a diversion of resources away from productive R&D is not desirable in any industry. In the pharmaceutical industry, it should be noted that this constitutes a diversion of resources away from the development of potentially life-saving products."  


Unsurprisingly for a group lobbying on behalf of commercial interests, the quote does not mention government entities. The thrust of the argument can nonetheless be applied to public authorities however; instead of providing public services with their funding, resources will have to be diverted into the defence of class actions and the discharge of any settlements or awards which may result. Ultimately, the cost imposed will be imposed on the taxpayer. If we are to have sympathy for the notion that corporate class litigation is wasteful in this way, a similar measure is certainly owed to the public sector when it is forced to meet similar costs.

2.5 Academic Commentary

One of the only commentaries engaging with the topic of class actions from a public law and policy perspective is Lorne Sossin’s work entitled “Class actions against the Crown: a substitution for judicial review on administrative law grounds?”56 In it, Sossin discusses the interesting notion of class actions being used as novel form of judicial review and as a weapon to effect public policy change:

“While class actions against the Crown are not new, they are taking on unprecedented prominence as an alternative to judicial review on administrative law grounds… Increasingly, however, these class actions seek to impose civil liability for government decision-making, based on regulatory negligence or a breach of a minister's fiduciary or other equitable obligations, in circumstances where judicial review could also be available. In other words, rather than seeking to invalidate government decisions, parties are opting to pursue compensation and vindication through civil liability … While this may provide a form of legal accountability, I believe that in many if not most of these cases, class actions are not well-suited to reviewing government action, and in some cases,

56 Ibid. fn. 32.
class actions may result in privatizing key aspects of the policy process with deleterious consequences."\textsuperscript{57}

The traditional view of this topic, in the words of The Honourable Justice Allen M. Linden, is that:

“It cannot be a tort for a government to govern. However, when a government is implementing policy by supplying services, that is, doing things for its people other than governing, it should be subject to ordinary negligence principles … an immunity may be necessary, but it must be limited only to those functions of government that properly can be considered to be “governing”, and not extended to the other tasks of government that might be styled “servicing”.\textsuperscript{58}

The courts are increasingly being presented with class action claims where a blurring of the boundaries between these “governing” and “servicing” functions has taken place. \textit{Williams v. Ontario}\textsuperscript{59} exemplifies the phenomenon of class counsel attempting to reformulate public law claims via the class action device. The claim challenged the government of Ontario’s decision, incorrect and harmful as it transpired later, to ease infection control procedures shortly after an outbreak of Severe Acute Respiratory Syndrome (“SARS”) in Toronto. The plaintiff, a nurse at a hospital infected by the disease, was unsuccessful in challenging what Cullity J deemed to be an (immune) operational policy. \textit{Williams} was one of those, as Sossin puts it;

“class actions against the Crown which seek to attribute liability on the Crown for the preferences pursued by government [and

\textsuperscript{57}Ibid.
\textsuperscript{58} The Honourable Justice Allen M. Linden, “Tort Liability of Governments for Negligence” (B.C. Branch of the Canadian Bar Association, Civil Litigation Section, March 1995) at p. 17. \textit{Cooper v. Hobart}, [2001] 3 S.C.R. 537 is the judicial authority for this concept i.e. that Crown liability exists for operational decisions but not policy decisions of public authorities.
\textsuperscript{59} Ibid. fn. 5 at para 17.
which] may have distorting effects for public policy and for public law.”

Had *Williams* gone the other way, it would have succeeded in distorting operational policy.

A *Charter* remedy class action—which was dismissed—is *Neufeld v. Manitoba*. Pursuant to the Winnipeg Center Courthouse Perimeter Security Program, the person and belongings of some 546,000 people, including Neufeld, himself a class action lawyer, entering the Winnipeg courthouse were searched. The Court of Appeal held the program was in breach of s. 8 of the *Charter*. Shortly thereafter, the Legislature enacted the *Court Security Act*, and the searches duly continued. … notes, correctly in my view, that:

“[t]oo broad an application of the Charter remedy will lead to claims that, in the aggregate, appear absurd, such as the almost $300 million sought by the plaintiffs for the inconvenience of weapons searches upon entering the Winnipeg courthouse. While the Charter is an important tool for advancing the public interest in being free of such searches that fall short of justification, it is in turn difficult for persons so inconvenienced to insist that the indignity they allege requires their fellow citizens pay them money; in such cases, the public interest seems to be twice abused, and the deterrent effect on future government actions questionable.”

This echoes a broader point made by Sossin, who ponders

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60 *Ibid.* fn. 32.
62 *Neufeld v. Manitoba* 2001 MBQB 201, 2002 MBCA 123
63 *Court Security Act* C.C.S.M. c. C. 295
“what more can a class action alleging civil wrongs accomplish beyond reallocating public funds to private litigants in contexts where the government of the day has seen fit not to do so or to do so subject to its own conditions?”

So too does the proposed class action of *Sherry Good v. Toronto Police Services Board and A.G. (Canada)*. The claim in that case is that Toronto Police Force “arrested or otherwise detained but [did not] charge” approximately 800 protestors during the infamous G20 summit held in the city in late June 2010. Accordingly the class action is seeking damages of $45 million from the Toronto Police Services Board and the Attorney General of Canada for a *Charter* breach where punishment of the errant police officers involved, an apology or public enquiry might seem more appropriate. Beyond the price tag, is this an attempt to modify behaviour or public policy? While it can be argued that it is both, policing policy (whether heavy-handed, shameful or otherwise) certainly seems closer to a “governing” function – to use Justice Linden’s terminology – and therefore a “distortion of public policy” – to use Lorne Sossins.

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65 Ibid. fn. 32.
66 Ontario Superior Court of Justice. Court File No. CU-10-408131.
67 Branch, W., “A Way to fight govt” quoting Eric Gillespie, class counsel for the G20 plaintiffs.
3. Past & Current Approaches to Class Action Risk

Notable techniques deployed by government and public authorities (outside what could be described as conventional litigation defence) in response to class action lawsuits are the topic of this section. As an introductory remark, the diversity of the organizations comprising the public sector presents a difficulty in analysis. Firstly, data and empirical evidence regarding legal and operational risk management and litigation strategies are difficult to obtain being confidential and beyond the reach of freedom of information requests. In addition, each public authority will be engaged in differing levels of hazardous activity and this variation gives rise to differing levels of potential exposure to class action claims and makes comparisons difficult. For instance, a moderately competent hospital will likely face liability claims on a frequent basis as compared with (say) a retail operation which in the relative absence of liability claims may find itself at greater risk for failure to comprehend and appreciate the hidden but infrequently encountered risks inherent in its activities.

3.1 Federal

For four years starting in 1999, the Department of Justice implemented the Legal Risk Management Initiative (“LRM”)\(^{68}\). The policy, whose goal was “to develop a sustainable approach to managing legal risks and thereby protect the interests of the Crown and minimize overall costs”\(^{69}\) provided a holistic schema through which legal risk was managed by way of, \textit{inter alia}, monitoring, assessment, reporting (“information sharing”), case management and dispute resolution processes. The framework contemplated both preventative and curative elements. Prevention consisted of the identification of legal risks ahead of time with a view to avoiding or mitigating these through advisory and policy-making services. Where a legal dispute had already materialized against the federal Crown, the policy called for these to be assessed

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\(^{69}\) \textit{Ibid.}
(according to likelihood of an adverse outcome and severity of impact) and actively case managed to the requisite degree. Although the LRM considers every type of legal risk including the risk of class actions, there is force to the argument that if implemented correctly, the Initiative would have the potential to manage exposure to class actions in a very effective manner. Although the LRM evaluation admits there was no data available to formally discern the actual impact of the Initiative, it reported the following benefits from anecdotal accounts given by Department of Justice lawyers:

“- increased awareness of legal risks among clients, largely through joint LRM structures with the clients

- improved quality of legal services to clients through LRM's proactive methods in responding to potential legal risks

- improved management of legal risk as client departments incorporate LRM into their corporate decision-making (particularly those departments with a high volume of litigation)

- improved capacity to track high impact files so that there are "no surprises."

As mentioned above, the overarching concern with regard to legal risks is their potential to affect service delivery. According to the Federal government:

“Under the framework developed by the Department, legal risk management is defined as “the process of making and carrying out decisions that reduce the frequency and severity of legal problems that prejudice the government’s ability to meet its objectives successfully … This definition firmly links LRM to the overall integrated risk management approach: it is a proactive measure to identify potential risks early, and develop and manage a response

70 Ibid.
in order to reduce any negative impacts on the government’s ability to achieve results."\textsuperscript{71}

### 3.2 Provincial & Municipal

Public authorities within the provincial and municipal layers of the Canadian government generally operate autonomously and independently of one another. No equivalent of the high level Federal LRM system exists within these layers of government nor has it ever. As mentioned above, highly exposed public authorities will have a greater tendency towards awareness of their potential liability and may house internal resources dedicated to process claims that routinely arise in a systematic fashion. Hospitals in Ontario, for instance, fight negligence claims strenuously through an insurer and referral of claims to the McCarthy Tétrault LLP law firm. The Toronto Transit Commission on the other hand, handles all of the claims it is faced with (a substantial portion of which relate to personal injury) internally through an in-house Legal Claims Department. Such specialized infrastructure for processing claims can and does prevent class actions from materializing against those public authorities. This, and other administrative resolution systems are discussed in greater detail in the next section.

A uniquely governmental technique – retroactive legislation – has been utilized to defeat a number of class actions on a number of occasions. In *Barbour v. University of British Columbia*\textsuperscript{72}, the BC government came to the aid of *ultra vires* (so held) UBC parking procedures. The magic fix, contained in s. 12 of the *Miscellaneous Statutes Amendment Act 2009*, retroactively added to UBC’s powers\textsuperscript{73} the ability to fine and tow parking miscreants and did away with the need for the province to repay victims of the judgment but not before the conclusion of a drawn out and expensive class action. The B.C Legislature struck again in *Howard Estate v. B.C.*\textsuperscript{74} this time while the class proceedings were in motion and mere days

\textsuperscript{71} Ibid.

\textsuperscript{72} *Barbour v. University of British Columbia* 2006 BCSC 1897.

\textsuperscript{73} S. 27 (2) of the University Act, R.S.B.C. 1996, c. 468.

before a summary judgment hearing. That class action concerned a constitutional challenge on the province’s probate fee rules to which the Legislature’s response was to create a new tax that imposed a cost identical to that of the foul probate rules. The Federal government has also exercised this retroactivity power audaciously. In a particularly harsh ruling against what was objectively a sympathetic plaintiff class, the Supreme Court of Canada upheld legislation which Ottawa had rushed through immunizing itself from suit for having retroactively deprived Albertan war veterans the back payment of interest on pension monies.\(^ {75} \)

The government enjoys more limited exposure to suit thanks to Crown liability rules laid down across a number of statutes. The *Crown Liability and Proceedings Act*\(^ {76} \) sets out the criteria and limitations on claims brought against the federal government while each province has its own statutory regime usually named along the lines of “*Crown Proceedings Act*” or “*Proceedings Against the Crown Act*”. Municipal governments have yet more statutory barriers for intending plaintiffs to surmount such as the *Ontario Municipal Act*.\(^ {77} \) The rules create strict limitation and written notice requirements to extinguish potential claims faster than claims brought against non-Crown targets and “should therefore be kept in mind if the defendant to a class proceeding is, or includes, the Crown.”\(^ {78} \)

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\(^{78}\) *Ibid*. fn. 14 at p.77.
4. Rethinking Class Action Risk – A Fresh Perspective

Governments across Canada have embraced class proceedings as a means of improving access to justice, marketplace behaviour and judicial efficiency. In so doing however, they have substantially increased their own liability and that of every public sector enterprise. To fulfill the overarching mandate of public service delivery, it is incumbent upon government and public authorities to assess and manage their class action risks and seek ways to protect their operations from class action suits in an appropriate manner. This section examines a range of techniques and law reform proposals for effectively minimizing public sector class action exposure. These include government-driven solutions as well as direct measures public authorities can implement to protect themselves without legislative intervention.

4.1 Systematic Risk Management

A proactive ex ante model for managing exposure to class action lawsuits is to be preferred over reactive defence where class action litigation has already arisen. It goes without saying that the detailed consideration ahead of time of the risk potential attached to any given activity increases the likelihood that risks can be identified and negative outcomes averted instead of going unnoticed. Government at all levels would therefore be well advised to consider the introduction (or reintroduction) of formal, structured risk management policies such as the now defunct Legal Risk Management initiative once used by the Department of Justice.

A standalone LRM body has certain advantages which leave it best placed to perform effective legal risk management. Under this system, public authorities would be encouraged or required to report, on a not infrequent basis, detailed descriptions of their operational parameters to the LRM agency for assessment. The public authority would then receive instructions on how to structure the delivery of public services with the least attendant amount of risk. A single, standalone risk management agency with a narrow remit would over time develop an increasingly specialized appreciation for legal risk management and provide a consistent approach as compared with
generalist Crown or public authority lawyers working piecemeal within public sector entities and who might find themselves without the lack of legal risk management expertise and experience. The report on the LRM Initiative, which was operated in both centralized and devolved states, commented that legal risk management techniques proved more effective when administered as a standalone service:

“Following the closure of the LRM Office, the Initiative lost momentum nationally as the strong central vision for LRM faded: few new tools or guidelines were developed; and LRM training was not offered department-wide. Moreover, the Department's non-litigation legal activities (advisory, policy, and legislative services) had not yet been fully integrated into the Initiative. As a result, the prevention side of LRM (avoiding and mitigating legal risks before litigation) remains under-developed.

The devolution of responsibility for LRM to all Department employees runs contrary to a central tenet of risk management - the need for an integrated, systematic approach.”

A similar incarnation of this risk management schema is found in the State Claims Agency (“SCA”) of Ireland, a branch of the National Treasury Management Agency created in 2001 and now ten years old. The class action is not available in Ireland so the body does not have policies considering class action risk specifically. The creation of the body itself however was in fact the direct result of a mass claim made against the State (members of the armed forces claimed *en masse* having been left with damaged hearing arising out of a failure to provide adequate protective wear). Its mandate is remarkably similar to that of the LRM. The Law Reform Commission of Ireland summarized it as follows in its Report exploring the introduction of the class action in Ireland:

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79 Ibid. fn. 68 at p. ii.
80 National Treasury Management Agency (Amendment) Act, 2000 (Ireland).
“[I]dentify risks which might lead to future claims against public bodies. [The SCA] is empowered to liaise with State bodies to ensure that foreseeable risks are managed and controlled in an appropriate fashion and in this way it plays an important preventative role.”

Quite obviously, because an LRM agency relies on fallible assessment and analysis techniques of to predict trouble, its introduction alone cannot absolutely guarantee against class action claims becoming manifest against the Crown and public authorities. However it is asserted that the establishment of an LRM agency can be reasonably expected to provide a strong first line of defence and minimize the risk and number of such claims.

### 4.2 Restricted Crown Liability

What government giveth, government can taketh away. Curtailing Crown liability is the ultimate safeguard, the net effect of which will decisively bar certain claims from being brought at all. As an approach, it is considerably less embarrassing and less costly than making retroactive corrections to class action judgments that have already been handed down. As a result of the heavy-handedness of this approach, any decision to amend the liability profile of the Crown merits careful consideration. The courts in *Eldorado Nuclear* commented:

> “It [the doctrine of Crown immunity] seems to conflict with basic notions of equality before the law. The more active the government becomes in activities that had once been considered the preserve of private persons, the less easy it is to understand why the Crown need be, or ought to be, in a position different from the subject. This Court is not entitled, however, to question the basic concept

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of Crown immunity, for Parliament has unequivocally adopted the premise that the Crown is prima facie immune. The Court must give effect to the statutory direction that the Crown is not bound unless it is "mentioned or referred to" in the enactment."

Hard-coded exemptions from Crown liability are necessary and do exist; for example the Canadian military is completely immune thanks to *Crown Liability and Proceedings Act*. To what extent could or should the government be willing to rollback the ability to use the class action procedure against it or a public authority? First and foremost, this is a question of political appetite. Provincial governments across Canada have been enacting class proceedings legislation free of any Crown suit restrictions in the very recent past. This fact, in light of the steady stream of high-profile class actions against government and public authorities, suggests that the issue of Crown class action risk is not particularly resonant with policymakers at present. Thus, blanket immunity from class action lawsuits for the Crown appears highly unlikely at this time. The option may gain traction in the future where, say, the concept of ‘cost of government’ emerges as a pressing political concern or where the frequency of class actions brought against government or public authorities becomes unsustainable.

**Partial Crown Immunity**

The next possibility is limited restrictions on Crown liability, i.e. legislative amendments devised to immunize certain areas of the public sector which are seen as particularly vulnerable or those which require particularly heavy funding to maintain their operations. Crown immunity is generally deployed to cover specific classes of activity (such as military activities) and are less commonly used to protect the entire operations of the Crown from the use of a procedure (such as class actions). Vital services (such as hospitals) supported solely at taxpayer expense are a clearer contender for a robust Crown immunity formula than those that are revenue-generating.

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83 *Ibid.* fn. 76, s.8.
Immunity could be introduced into the relevant statutes to achieve this end, the justification being a need to manage class action risk and cost of insurance for a vital and free-of-charge public healthcare system. On the other hand, *Arenson v. Toronto (City)* perhaps exemplifies where immunity would be unjustified.⁸⁴ Here, a municipal government caused multiple instance of small economic loss; their parking meters consistently malfunctioned in inclement weather conditions, in turn causing parking fines to be erroneously issued. This scenario is not problematic from a pure class action perspective because it mirrors closely the collection of commercial product liability cases that lend themselves well to the class action procedure. The remedy in those instances is to disgorge the profits made as a result of the corporations’ wrongdoing and re-distribution of same to victims. Thus, in a similar vein, the City of Toronto in *Arenson* had received fines for offences which did not occur ergo the most appropriate remedy is the return of the fines.

### 4.3 Class Action Law Reform

This section contemplates ways in which class action legislation could be reformulated to minimize the quantity of class action claims brought against the Crown and public authorities and to lessen the impact of such claims.

**Chilling Entrepreneurial Lawyering**

The tide of class action lawsuits depends on the imaginative and enterprising efforts of the plaintiff-side class action bar. Thus it follows that an effective policy for stemming the flow of class actions against public authorities would be one that makes the public authority a less attractive target for entrepreneurial class action lawyers. Statutory amendments could be implemented by increasing the costs burden (essentially, a loser pays costs rule for those provinces that do not already operate in this fashion) for cases brought against the Crown, including where the proceedings involve the Crown as a peripheral defendant. This later point

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⁸⁴ *Arenson v. Toronto (City)* 2009 ONCA 169.
regarding peripheral defendant status will weaken the temptation of tagging a government body on to proceedings unless there is a very obvious and proximate connection with the harmful incident. Because class counsel rely heavily on contingency fee arrangements with their clients, this approach would have the overall effect of ensuring the most zealous members of the class action bar would henceforth only advance the most meritorious class action claims (not simply the most lucrative) against public authorities and so-called strike suits “initiated by counsel simply for the benefit of counsel”85 would thus be prevented from occurring against public authorities. Ward Branch comments that proposals in a BC Consultation Paper recommending the introduction of costs into the class action regime on the basis that it would achieve greater fairness for defendants (both public and private) would “greatly discourage potential plaintiffs from pursuing claims through the avenue of class actions and would greatly stifle access to justice”86.

A further possibility to ensure that only the most legitimate grievances are brought forward against public authorities by class counsel is a legislative reform basing the calculation of fees owing to class counsel as a percentage of the dollar amount drawn down from the judgment or settlement awarded to class members, and not as is traditionally the case, calculation based on the overall size of the settlement or judgment. Class counsel would therefore be again dissuaded from taking somewhat trivial but technically meritorious cases to the courts and instead be rewarded for higher take-up rates. Take-up rates are often put forward as a crude or anecdotal metric for establishing the true worth of a given class action; the idea being that low take-up rates are suggestive of disinterest on the part of the injured class members and the fact that the lawyer is off on a frolic of their own87. In addition, class counsel would not be permitted to arrange for automatic distribution of funds to class members in order to realize a higher fee nor would they be permitted to unreasonably pester class members into applying for their compensation.

Changes to Certification

Currently, class action statutes do not take account of public benefit at the certification stage. They could. The public interest is often invoked as a consideration in decisions to grant (or not grant) relief or the use of certain procedures and there is no reason why the same could not be applied to the class action device. Under this new certification assessment, courts would balance public interest considerations in equal measure with the certification criteria and class action objectives. Particular thought could be paid to the true harm done (economic / physical etc.) and the possible effect(s) which the amount claimed on behalf of the class would cause upon the functioning of the public authority defendant in the event the proposed claim is successful. Where the public authority defendant could provide evidence of an absence of gross negligence or egregious factors and that service delivery to a number of persons larger than that of the class would be adversely affected, the court would have the discretion not to certify the action on public interest grounds. The delivery of public services is unique to public defendants and should certainly be seen as a worthy and important consideration alongside access to justice, judicial economy and behavioural modification.

The mere fact that an organization is not a profit-making one is not sufficient to defeat a liability claim where that non-profit organization has caused harm or injury. Nor should it be. In Bazley v. Curry the Supreme Court of Canada held that:

“in a scenario where one party creates the risk and another party is harmed, the one who created the risk should bear the loss. From a policy perspective, the same considerations apply to non-profit organizations as do for-profit organizations.”

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The non-profit justification is perhaps a more meritorious argument where the organization is not generating a profit and is, in addition, paid for by the public for the sole purpose of serving the public. Such reasoning could inform a change of this type, although it is admittedly weak.

**Force Claimants to Opt In**

Rational apathy\(^9^9\) is the idea that many class members would, if left to their own devices, opt to chalk minor harms visited upon them down to experience despite having a claim they could pursue if they so wished. While this is not to say the injury never occurred or was never to some degree or another painful, it recognizes that psychologically there are ‘costs of doing business’ associated with simply getting through life. It can be suggested that there is a subset of class claims that can overcome the regular filter against frivolous, vexatious or abusive but remain to objective observers to some extent trivial. Ward Branch referred to them as "the "my beer at the ballgame did not contain the promised 8 ounces" type of claims which are held up as examples of claimants and lawyers abusing the class action process."\(^9^0\) Reversing the automatic inclusion in a class action and replacement with an onus upon class members to proactively seek redress through participation in cases where a class action is being advanced against a public authority would shrink the size of the class and consequently the quantum of damages that can be claimed against the public authority.

### 4.4 Enterprise Solutions

In light of the fact that public authorities are faced with enterprise style liability for their not-for-profit activities, they ought to consider the mechanisms utilized in the commercial sector to manage and mitigate such risk. The two solutions discussed below are the strategic use of corporate structuring to limit liability, and the use of arbitral clauses in customer contracts where there is a contractual relationship between the public authority and the customer (e.g. hydro


\(^9^0\) Ibid. fn. 86.
companies). In addition, public authorities would be well advised to incorporate a ‘customer care’ type function within their operations with a view to monitoring and resolving customer complaints and being alert to potential risks that bear the hallmarks of a future class action suit.

**Arbitral Clauses**

The unanimous Supreme Court of Canada decision in *Seidel v. Telus Communications Inc.* finally settled the law in relation to the validity and enforceability of mandatory arbitral clauses within contracts of adhesion. The clause signed by Seidel along with every other Telus Communications customer purported to waive the customers right to commence or participate in a class proceeding against the company and imposed upon them mandatory arbitration where a dispute arose. Even prior to *Seidel*, it was already clear that arbitration could be imposed by statute. A clear example is *Ruddell v. B.C. Rail Ltd.* where the BC Court of Appeal reversed certification of the case –which involved the improper allocation and an actuarial surplus– because the Pension Benefits Standards Act explicitly required disputes to be settled by arbitration. As Telus Communications was to discover to its dismay in *Seidel*, mandatory arbitration clause suffer from another weakness: these clauses can be defeated by consumer protection legislation. To date, the Legislatures of Ontario, Quebec, British Columbia and Alberta have already modified their consumer protection legislation, so public authorities operating in these jurisdictions will find mandatory arbitration clauses are accordingly of limited effect should they wish to use and depend upon them. They remain a viable option worthy of some consideration by crown corporations outside of those jurisdictions however.

**Limited Liability**

“Judgment-proofing” is a corporate structuring process which “generally involves the division of the operation into two separate “personalities”: the asset owning “equity company” and the

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93 *Ruddell v. B.C. Rail Ltd.* 2005 BCSC 1504 (Supr Court), 2007 BCCA 269.
“operating company”, whose job it is to carry on the corporate group’s business and thus will almost certainly be the party to attract tort liability.” Effective, corporate groups will hive off valuable assets from the “operating company” to ensure they are protected in the event of an adverse large judgment or settlement against the “operating company”. Lynn M LoPucki points out that “frustration of liability is accepted in the courts and legal literature as the intent of the legislatures in establishing limited liability schemes and a perfectly valid response to risk management.” Ian Leach puts it in the following practical terms:

“[t]herefore, considerable thought should be directed to the possible use of subsidiaries or separate regional corporations to minimize potential class action liability exposure, bearing in mind the high threshold a plaintiff must overcome to tag a parent corporation with liability for the acts of a subsidiary. In order to pierce the corporate veil, two factors must be established: (1) the alter ego must exercise complete control over the corporation or corporations whose separate legal identity is to be ignored, and (2) the corporation or corporations whose separate legal identity is to be ignored must be instruments of fraud or a mechanism to shield the alter ego from its liability for illegal activity … Similarly, appropriate care can be taken to ensure focused liability insurance coverage for the particular corporate entities having a higher exposure to class proceeding liability (This involves not only a regard for adequate monetary limits but also careful review of coverage and occurrence definitions, and the wording of exclusions.)”

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94 Ibid. fn. 47 at p. 279.
96 Leach, I., “Strategies to Avoid or Mitigate Class Action Litigation” The Canadian Class Action Review Volume 6, No. 1 April 2010 87 at p. 95.
In *Walkovsky v. Carlton*\(^{97}\) the New York Court of Appeals was faced with the owner of a cab company that had clearly used the corporate form specifically to deprive the injured plaintiff by incorporation of 10 separate companies with 2 cabs each, each carrying the minimum insurance. Keeting J in dissent:

> “the issue presented by this action is whether the policy of this State, which affords those desiring to engage in a business enterprise the privilege of limited liability though the use of the corporate device, is so strong that it will permit that privilege to continue no matter how much it is abused, no matter how irresponsibly the corporation is operated, no matter what the cost to the public.”\(^{98}\)

Given that the plaintiff failed despite the presence of Keeting J’s reasoned and reasonable condemnation of the defendants behaviour, corporate structuring is clearly an effective and powerful tool for externalizing and spreading risk. Government and public authorities should certainly consider using judgment-proofing techniques to ringfence hazardous activities into Crown corporations thereby limiting the liability arising from such activities.

The enormous costs, awards or settlements typical in class proceedings bring with them a risk of bankruptcy, or as Ward Branch euphemistically terms it, “corporate exhaustion”\(^{99}\). The OLRC was also alert to this danger writing in its report that “large aggregate claims for damages expose defendants to the possibility of a “financial death sentence””\(^{100}\). On the other hand,

> “the bankruptcy process can be used by firms that are not confronting financial failure. These firms … employ bankruptcy to

\(^{98}\) Ibid. fn. 47 at p. 275.
\(^{99}\) Ibid. fn. 35 at p. 8.
\(^{100}\) Ibid. fn. 25 at p. 114
limit liability, even when they are not in the danger of suffering financial or economic distress … defensive bankruptcy filings, because they represent an attempt by mass tort defendants to reign in otherwise unmanageable litigation.”\(^{101}\)

Further;

“From 1976 through 2003, seventy-one companies had gone into bankruptcy over asbestos claims (Asbestos Alliance 2004). And while the asbestos numbers are particularly dramatic, they are hardly unique. Thus, according to David Skeel (2001, 221; also see Delaney 1992), bankruptcy, today, is “the forum of choice for resolving the modern dilemma of mass tort liability.”\(^{102}\)

It must be noted at this point however that implementation of the two foregoing techniques (judgment-proofing and controlled bankruptcy) may be far more difficult to achieve in practice for Crown corporations due to the potential presence of political influences within the public authority accountability structure. Nevertheless they remain an effective tool for managing class action liability.

### 4.5 Insuring Against Regulatory Negligence

The Canadian government has a substantial web of regulatory functions and these give rise to equally substantial liabilities. Among an enormous amount of examples, the Federal government has responsibility over (for instance) Health Canada, provincial governments have substantial

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\(^{101}\) McIntosh, W., Cates, C.L., “Multi-party Litigation” (UBC Press, 2009) at p. 63.

\(^{102}\) Ibid.
responsibilities in relation to the inspection of slaughterhouses and meat packing facilities. The City of Toronto issues permits to bakeries and restaurants as well as building permits with “building construction [being] a significant source of municipal liability in Canada.”

The class plaintiff in Sauer v. Attorney General of Canada et al was a commercial cattle farmer who suffered economic loss by virtue of a ban on the importation of Canadian beef in the United States, Mexico and Japan. Responsibility for regulating the Canadian cattle industry falls to the federal government (the Department of Agriculture) and despite importation inspections, monitoring etc., a cow in Alberta (not Mr. Sauer’s) contracted, and later died from, BSE prompting the ban in international export markets. The federal activities related to ensuring the safety of the food chain in Canada resembles a scheme of insurance because the government inspections etc. purported to vouch for the good health of the livestock. In the commercial insurance model, the insurer will receive cash consideration in exchange for each insurance policy it sells. But the Crown and public authorities do not operate on this basis. When designing a program, it is therefore incumbent upon government departments and public authority officials to consider and factor in the potential for class action liability in the event that the program causes harm and how to fund such a liability.

When viewed through the lens of Sauer, Canada’s nuclear regulation regime is in a similarly vulnerable position. The Nuclear Liability Act, which was enacted in 1976, caps liability for Canadian nuclear power operators at a mere $75 million. Presumably a nuclear accident, unless especially minor, would exceed this amount and the remainder of the tab will be picked up with public monies. As the Fraser Institute put it

“Although the liability cap may result in lower cost electricity, it requires many citizens to bear the risk of catastrophic damages.

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103 Meat Inspection Act R.S.C. , 1985, c. 25 (1st Supp.)
The liability cap is an implicit subsidy to the nuclear industry and should be replaced with unlimited liability.”  

Self Insurance

The purchase of insurance for large-scale public programs may be rendered impossible by reason of cost. As a result, the government goes it alone and provides the program on a self-insured basis. An obvious solution to manage class action exposure in the regulatory contexts is to collect fees which cover both liability for potential damages as well as the administrative overheads incurred in simply carrying out the licensing process. The fund essentially provides a notional insurance fund against which losses can be indemnified should the program come under attack in the future. Variables relating to government activities can be forecasted to some extent by an analysis of past experience and through the use of actuarial techniques. Where insurance is available to smaller-scale bodies, the public authority should, it goes without saying, perform a due diligence exercise on any exclusions and disclose all risks to the insurer to avoid denial of coverage.

4.6 Alternative Dispute Resolution

Alternative dispute resolution (“ADR”) is a relevant consideration at three stages in the class action process. Firstly, a defendant can stave off a certification motion if they are successful in claiming that ADR is preferable to class action. Next, an ADR mechanism can be used to settle the claims and avoid a trial. Finally, ADR can be used to resolve individual claims. McCarthy’s recommend their commercial clients that “the establishment of an out-of-court scheme for the resolution of class member’s claims should be considered at the very outset. This approach is intended to assist in persuading the court that a class action is not the preferable procedure for resolving the common issues.” From the point of view of the commercial defendant, an “out-of-court scheme”, which may take the form of arbitration, mediation or say an organized system for refunding, will almost always resolve the problem in a more timely and cost effective manner.

Preferable Procedure Where Individual Issues

Professor Peter Hogg points out that “class actions morph into an administrative arrangement when victims have to be classified for individual issues.” Similarly, Newberg states that "many problems must be solved through the political or administrative process rather than the courts." Or, as yet another commentator put it, “there is no easy way to deal with such injuries except on a case-by-case basis … when the matter comes to damages the case is virtually always “disaggregated””. Indeed, before the existence of class actions in Canada and where class actions are not available in other jurisdictions, governments and public authorities will routinely handle mass claims administratively. Claims spawned from systemic failures or mass disasters will frequently involve a vast number of highly individual issues and are accordingly not well suited to the class action procedure. From a structural point of view, a class of victims not

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108 Ibid. fn. 16 at p. 264. For instance, in Hollick the efficient no-fault compensation system offered by Ontario’s Ministry of the Environment was satisfactory to the extent that the court did not certify the class action claim.
109 Ibid. fn. 16 at p. 191.
110 Personal interview with Professor Hogg as part of the LLM Theory & Practice Program. Date: May 18, 2011.
112 The Law of Large-Scale Claims - Cassels and Jones – Page 175-6.
affected in the same way contradicts the class action procedure which thrives on a large degree of commonality and consistency between the situation of the class members. In addition to victims each being affected in different ways by the incident, outcomes may well be affected by the pre-incident condition of the victim a fact that the court in Bywater clearly recognized:

"Assessment of damages in each case will be idiosyncratic. All of the usual factors must be considered in assessing individual damage claims for personal injury, such as: the individual plaintiffs [sic] time of exposure to smoke; the extent of any resultant injury; general personal health and medical history; age; any unrelated illness; and other individual considerations. Indeed here, the representative plaintiff was suffering from and experiencing symptoms of food poisoning at the time of the incident. The property damage claims of class members must be assessed individually as the underlying facts will vary from one class member to the next.”\(^{113}\)

Where highly individualized claims are grouped together into a class action, the approach taken is usually to classify victims of the class into sub-classes and this approach is supported by the legislation. In the Walkerton\(^ {114}\) disaster, 9,275 victims were classified into several classes such as ‘Walkerton Resident Class’, ‘Non-Walkerton Class’, ‘Secondary Infection Class’, ‘Other Losses Class’ and ‘Family Class’. When all is said and done however, the variability in claim parameters between individual claimants likely has an impact upon cost. The Australian Law Reform Commission noted that where highly individualized facts are manacled together in a class action, the efficiency of obtaining redress through the class action is lost:

"Where the claims are divergent or complex, the overall costs to the parties and to the administration of justice may be more than the combined cost of separate proceedings. Where the Court is

\(^{113}\) Ibid. fn. 2.
\(^{114}\) Ibid. fn. 3.
unable to deal with grouped claims economically as compared with individual proceedings the proceedings can be separated. Each group member would become responsible for conducting his or her own claim.”

The needless wrestling with complicated individual claims and the costs of class actions can be entirely escaped where a statutory compensation system is in place from the outset. Where intending on compensating of their own accord, the Crown and public authorities should move to establish a compensation system quickly (or have a generalized claims system at the ready, discussed below) to treat individual claims individually. Without an expensive or time consuming class action process to pay for, the compensation fund will also not be eroded by class counsel fees or the notoriously high costs of class litigation. A greater proportion of the compensatory funding can be directly awarded to the injured. Out of an entire compensation pot of $72 million for the victims of the Walkerton disaster, $7.56 million was spent on legal fees. To put this generous fee into perspective, arbitration costs were $252,874 and mediation costs were $32,281. In summary, avoiding class actions by way of providing statutory ADR and compensation systems to remediate widespread diffuse damage caused by public authorities offers taxpayers better value for money and claimants a less complicated method of claiming. In many ways such systems, when implemented correctly, beat the class action at its own game by offering greater levels of access to justice, behavioural modification and judicial economy than the class action itself.

Administrative Tribunal Systems

The availability of a competent administrative law ADR process as an injured party’s first port of call can prevent class actions from materializing against the Crown. From the victims point of view, an administrative system has several attractive features including a generally more

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simplified procedure to navigate with more informal procedures, the possibility of relaxed legal requirements vis-à-vis evidentiary burdens, standing and limitations, it is generally far less expensive, not driven by lawyers, entrepreneurial profit motives, or a combination of these and can resolve claims in a shorter timeframe than the court system.

Class actions offer little in the way of compassion. Oftentimes victims of traumatic mishaps are left with a legacy of tragic facts or memories and these are lost in the class action regime. Put succinctly by McIntosh and Cates:

“Individualized justice may not be realized [through the class action system]. Indeed, claimants whose cases are consolidated with many others may well find their particular grievance and story of hardship entirely lost in the interest of achieving a global resolution.”

An ADR system by contrast is in a better position to offer a more compassionate approach. For instance, the conclusion arrived at regarding the group litigation concerning organ retention by Alder Hey Hospital in the United Kingdom read as follows:

“[the litigation] was settled by way of a three day mediation through the Centre for Effective Dispute Resolution (CEDR). The settlement included financial compensation but it was accepted that the ability to discuss non-financial remedies ensured a successful conclusion. The families involved produced a ‘wish list’ and this resulted in the provision of a memorial plaque at the hospital,

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117 Ibid. fn. 101 at p. 156.
letters of apology, a press conference and contribution to a charity of the claimants’ choice.”

The administrative tribunal process – assuming it is well run – symbolizes acceptance of responsibility on the part of the state. By not requiring the affected plaintiffs to fight through an adversarial system, it relieves them of the financial and emotional burden associated with same. Settling the matter in this fashion casts a more compassionate light on the state in its dealings with its citizens and it avoids reputational problems arising from prolonging adversarial legal proceedings particularly where there are harrowing circumstances of fact present. Overall, the administrative system better serves the public good by comparison to the class action system when used this way.

Centralized Claims Processing

The idea of a generalized, or umbrella, claims body is unknown in Canada but examples elsewhere include the State Claims Agency in Ireland. The Irish SCA has already received mention for its risk management function. As well as its preventative role, the SCA manages civil claims involving most government departments, medical malpractice claims and is

“currently responsible for managing civil claims involving most government departments, claims in connection with medical treatment in hospitals in the State, and its remit may be extended to deal with personal injuries claims against local authorities ... one of


119 The downsides of administrative systems are beyond the scope of this work, however Snyder, A., & Funk-Unrau, N. (2007, Spring). Indian residential school survivors and state designed ADR: A strategy for cooptation? Conflict Resolution Quarterly 24 (3), 285-304 among other works, provides an excellent insight into the problems which must be overcome to make administrative ADR systems a viable alternative to class actions.

120 Ibid. fn. 80.
its primary roles is to make the most efficient use of public resources, particularly by minimising the cost involved.”

Once such an agency is established and operational, certification requirements for class action claims against public bodies can be tweaked to specifically consider if the claims agency might be the “preferable procedure” to process the claims in question. The Court of Appeal held exactly this in the case of Charest. The matter (entitlement to benefits for same sex partners) could be better adjudicated by bodies such as the Administrative Tribunal of Quebec and that is precisely where the court sent it. Because individualized facts will obscure many class action launch attempts where a specialized claims agency is in existence, and because the claims agency structure will only permit claimants to approach individually and on their own behalf only, public authorities and public money are less susceptible to entrepreneurial class action lawyering. The agency can be self-funded and frivolous claims can be repelled by setting a minimum claim amount and by imposing a modest filing fee on each claim. Ultimately, such a system does curtail to some extent the greater level of access to justice bestowed by class action legislation. However it does not foreclose access to justice for those willing to proactively seek access justice for themselves.

121 Ibid. fn. 81 at p.7.
Conclusion

The impact of class actions upon the Crown and public authorities in Canada is not a topic which is widely or deeply researched. But that is not to say it is not worthy of research. On the contrary, study into the awareness levels of public authorities to the risk of class actions as well as empirical evidence illustrating the effects and costs class actions impose upon public authorities, public service delivery and ultimately upon the taxpayer would prove highly insightful for the purposes of planning and managing class action risk within the public sector. In a general sense, class action risk as it applies to the public sector ought to be a live a topic within Crown and public authority discourse.

In my view, there is force to the argument that the entrepreneurial lawyering model at the heart of the class action device in many cases undermines the public interest when it is used to pursue certain claims against non revenue-generating activities of public authorities. The Crown is in a position to establish systematic legal risk management systems to prevent and manage class action risks against public authorities. The Crown is also in a position to carefully foreclose certain class action claims by redrawing the dimensions of its liability profile or through the establishment of effective ADR and compensation systems which could defeat class actions claims from materializing against public bodies.
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