



BY **ADEN THOMPSON-KLEIN**
TLABC Member

Aden Thompson-Klein is a class action lawyer in the Vancouver office of Klein Lawyers LLP. Aden acts for plaintiffs in a variety of class actions, including cases involving anti-competitive behavior, privacy breaches, government negligence and defective medical products. Aden has a Bachelor of Commerce with Honors from the University of British Columbia and Juris Doctor from the University of Toronto.

Municipalities and Class Actions in Canada

Introduction

The involvement of municipalities in Canadian class proceedings is nothing new. Municipalities occupy a unique position in Canadian class proceedings. Their decisions often affect thousands of residents in the same way, making a municipality a common defendant. Their conduct is particularly amenable to common issue determination. At the same time, municipalities enjoy a range of statutory and common law protections unavailable to private defendants, including policy immunity doctrines and statutory bars to certain causes of action. These competing forces have produced a distinct body of certification jurisprudence that continues to evolve as municipalities become increasingly involved in civil litigation.

Municipal Defendants

The Supreme Court of Canada has commented on the importance of being able to sue a municipality:

[T]here are good reasons to hold public authorities liable for negligent activities falling outside this core policy sphere where they cause harm to private parties. Municipalities function in many ways as private individuals or corporations do” and have the ability to “spread losses” (Makuch, at p. 239). Liability for operational activities is “a useful protection to the citizen whose ever-increasing reliance on public officials seems to be a feature of our age” (*Kamloops*, at p. 26).¹

In a class action context, municipal defendants create opportunities and challenges. On the one hand, a municipality’s actions impact large groups of people in a similar manner. Infrastructure decisions, maintenance practices, emergency response protocols, and environmental management systems generally affect large groups of residents in similar ways. Municipal conduct frequently lends itself to common issue determination because a single decision or course of conduct may affect thousands of residents simultaneously.

On the other hand, municipalities frequently argue that causation and damages require individualized inquiries. Property damage, business losses, personal injuries, and remediation costs may vary substantially among class members. Moreover, municipalities benefit from public law doctrines, statutory immunities, and policy-based defences that can complicate litigation.

As a result, certification battles often focus on whether there is a suitable cause of action and whether the proceeding can be structured around common conduct issues while leaving individual loss assessments for later stages.

Cause of Action: Nuisance Immunity and Core Policy Immunity

Many provinces have enacted municipality statutes with statutory immunity against nuisance claims. For example, in *Stadnyk v. The Corporation of the City of Thunder Bay*, 2023 ONSC 3920, the plaintiff sued the City of Thunder Bay for negligence and private nuisance. The City had added high concentrations of sodium hydroxide to the municipal water supply. This caused pinhole leaks in the plumbing pipes, which in turn caused water damage to people's homes and other properties.

The City defendant did not oppose certification of the negligence claim. However, it sought to strike the nuisance claim. The City relied on section 449 of the *Municipal Act*, 2001, SO 2001, c 25, which provides municipalities with statutory immunity from nuisance claims.

The Court certified the negligence claim but denied certification of the nuisance claim. The Court agreed that section 449 of the *Municipal Act* provides statutory immunity against nuisance:

[54] The text of s. 449 of the *Municipal Act*, 2001 ... stipulates that “no proceeding based on nuisance, in connection with the escape of water ... from water works (facilities for the collection, production, treatment, storage, supply or distribution of water), shall be commenced against, a municipality ...”

[55] In the immediate case, Ms. Stadnyk has brought ... based on pinhole leaks that are in connection with the escape of water from the water works of the City of Thunder Bay.

[56] ... It is plain and obvious that s. 449 bars Ms. Stadnyk's private nuisance claim.

Another common defence available to municipal defendants is often core policy immunity. Policy immunity has become one of the most important substantive defences available to municipalities in negligence litigation. The doctrine reflects the principle that courts should not second-guess core governmental policy decisions involving social, political, or economic considerations.

SUPPORTING THE NEXT GENERATION OF LAWYERS



**TRIAL LAWYERS
ASSOCIATION OF BC**

TLABC membership for Law Students and Articling Students is COMPLIMENTARY!

tlabc.org/join

In *Nelson v. Marchi*, 2021 SCC 41, the Supreme Court of Canada laid out the test for core policy immunity. The plaintiff slipped on a sidewalk curb that had not been properly cleaned. The City of Nelson was responsible for plowing the sidewalk. The plaintiff sued the city in negligence. The City argued that it was immune from civil liability because plowing the sidewalk fell within its ‘core policy decisions.’

The Supreme Court of Canada reaffirmed that governments may be liable for operational negligence but remain immune from claims that challenge “core policy” decisions. The Court explained that the doctrine protects governmental decision-making involving social, political, and economic considerations that are properly accountable through democratic processes rather than private litigation.

The Court established the test for determining whether a government’s decision is a core policy decision or an operational decision:

[68] [F]our factors emerge that help in assessing the nature of a government’s decision: (1) the level and responsibilities of the decision-maker; (2) the process by which the decision was made; (3) the nature and extent of budgetary considerations; and (4) the extent to which the decision was based on objective criteria. The underlying rationale — protecting the legislative and executive branch’s core institutional roles and competencies necessary for the separation of powers — serves as an overarching guiding principle for how to weigh the factors in the analysis. Thus, the nature of the decision along with the hallmarks and factors that inform its nature must be assessed in light of the purpose animating core policy immunity.

Although *Marchi* arose outside the class action context, its significance for certification motions is substantial. Municipal defendants increasingly invoke policy immunity at the pleadings and certification stages to argue that the impugned conduct is not justiciable in negligence. Municipalities may argue that decisions concerning budget allocations, inspection frequencies, maintenance priorities, staffing levels, and capital planning constitute protected policy choices. Plaintiffs typically contend that the alleged wrongdoing concerns operational implementation rather than policy formulation.

Other Certification Factors: Commonality and Preferability

Municipalities are frequent class action defendants because their conduct affects large groups of residents simultaneously. For example, a municipality may be named as a defendant arising from their responsibility for public infrastructure including roads, stormwater systems, sanitary sewers, dikes, culverts, bridges, and water systems.

Plaintiffs typically seek to frame common issues around the municipality’s conduct rather than individual consequences. A municipality’s failure to operate or maintain these systems in a safe manner can impact many residents. Common issues may include whether the municipality negligently designed, maintained, inspected, or operated the relevant infrastructure and whether policy decisions contributed to the loss. These inquiries tend to be common issues as they focus on a single actor’s conduct. As the Federal Court stated in *Stonechild v. Canada*, 2022 FC 914, “the commonality of the questions is enhanced by the fact that there is a single defendant.”²

However, there are still challenges associated with municipal defendants. This is particularly the case where the claim turns on individualized interference and damages. For example, in *Stadnyk v. The Corporation of the City of Thunder Bay*, 2023 ONSC 3920, the Court analyzed the alleged nuisance claim for common issue and preferability. The Court noted that the concept of a nuisance claim required “findings of fact that would have to be made for each class member... As the description of the law of private nuisance above reveals, proof of private nuisance involves a two-step inquiry, and the first step is the seriousness of the interference.”³ The Court held there is “no commonality of the seriousness of the interference.”⁴ Class members had differing impacts with some class members not impacted by the chemical leak at all:

[97] ... For some, the interference would arguably appear to meet the non-trivial threshold first step of the nuisance determination; however, for other Class Members, it would appear that the damage suffered is tolerable, which is to say trivial and not actionable. The point is that the circumstances of the nuisance claim in the immediate case require individual inquiries of the Class Members.

[98] The second step of the proof of nuisance involves the unreasonableness of the defendant’s interference. As noted above where actual physical damage occurs

particularly if the damage is of a permanent nature, it may not require any lengthy balancing analysis to conclude that the interference is unreasonable. However, in the immediate case, once again, whether actual physical damage occurred is an idiosyncratic issue and not a common one and once again the unreasonableness of the defendant's interference has to be decided on an individual basis because the physical damage in the immediate case went through the range of no damage (but the risk of damage) to substantial damage and once again the analysis requires inquiries of the effects of the nuisance on individual Class Members.

[99] Ms. Stadnyk argued that there was a commonality that all of the Class Members experienced the interference of having sodium hydroxide added to the water that flowed to their homes and all of the Class Members experienced a corrosive chemical reaction in their copper pipes in their homes. However, that commonality breaks down into individual inquiries of what was the effect at their particular home of the City's having added sodium hydroxide to the water reaching their homes. The commonality also breaks down because some Class Members suffered damages and some have not and some may never suffer damages. Further, where damages to the property or to the use and enjoyment of the property have occurred, the issue of whether the damages are substantial enough or the interference unreasonable requires individual inquiries.

The Court noted that the "substantial work of the nuisance claim can only occur at individual issues trials where the serious of the interference and the unreasonableness of the interference will be determined."⁵ Accordingly, individual actions were preferable to a class action.

In *Hollick v. Toronto (City)*, 2001 SCC 68, the plaintiff complained of noise and physical pollution from a landfill owned and operated by the City of Toronto. The plaintiff alleged that the landfill emitted large quantities of methane, hydrogen sulphide, vinyl chloride and other toxic gases, obnoxious odours, fumes, smoke and airborne, bird-borne or air-blown sediment, particulates, dirt and litter, as well as creating loud noises and strong vibrations. The plaintiff sought certify a class action on behalf of 30,000 residents who lived in the vicinity of the landfill.

COMMON ISSUES MAY INCLUDE WHETHER THE MUNICIPALITY NEGLIGENTLY DESIGNED, MAINTAINED, INSPECTED, OR OPERATED THE RELEVANT INFRASTRUCTURE AND WHETHER POLICY DECISIONS CONTRIBUTED TO THE LOSS. THESE INQUIRIES TEND TO BE COMMON ISSUES AS THEY FOCUS ON A SINGLE ACTOR'S CONDUCT.

The Supreme Court of Canada analyzed the elements of the class certification test. The court noted that the defendant did not dispute that the plaintiff pled a cause of action. There was also an identifiable class of people. However, the Court did not agree that a class action was the preferable procedure.

The case is different from *Stadnyk* as there were suitable issues common to all class members. Specifically, the municipality's emission of pollutants into the air "would be common to all those who have claims against the respondent."⁶ However, while there were suitable common issues identified by the plaintiff, the plaintiff was unable to demonstrate that a class action is the preferable procedure for determining class members' claims due to the differing impacts on class members:

[32] I am not persuaded that the class action would be the preferable means of resolving the class members' claims. Turning first to the issue of judicial economy, I note that any common issue here is negligible in relation to the individual issues. While each of the class members must, in order to recover, establish that the Keele Valley landfill emitted physical or noise pollution, there is no reason to think that any pollution was distributed evenly across the geographical area or time period specified in the class definition. On the contrary, it is likely that some areas were affected more seriously than others, and that some areas were affected at one time while other areas were affected at other times. ... Some class members are close to the site, some are further away. Some class members are close to other possible sources of pollution. Once the common issue is seen in the context of the entire claim, it becomes difficult to say that the resolution of the common issue will significantly advance the action.

[33] Nor would allowing a class action here serve the interests of access to justice. The appellant posits that class members' claims may be so small that it would not be worthwhile for them to pursue relief individually. In many cases this is indeed a real danger. ... The central problem with the appellant's argument is that, if it is in fact true that the claims are so small as to engage access to justice concerns, it would seem that the Small Claims Trust Fund would provide an ideal avenue of redress. ... If, on the other hand, the Small Claims Trust Fund is not sufficiently large to handle the class members' claims, one must question whether the access to justice concern is engaged at all. If class members have substantial claims, it is likely that they will find it worthwhile to bring individual actions. The fact that no claims have been made against the Small Claims Trust Fund may suggest that the class members claims are either so small as to be non-existent or so large as to provide sufficient incentive for individual action. In either case access to justice is not a serious concern. ...

The Supreme Court's decision in *Hollick* remains an important reminder that the existence of common issues does not automatically establish preferability. Although the Court accepted that questions relating to the operation of the landfill were common to all class members, it concluded that individual issues concerning exposure, causation, and damages predominated. As a result, resolution of the common issues did not materially advance the litigation.

Municipal Plaintiffs

On the rare occasion, a municipality serves as the representative plaintiff. This is what is occurring in the PFAS litigation. The BC provincial government and several municipalities are seeking recovery of water treatment and remediation costs allegedly caused by chemical manufacturers. The claim alleges that manufacturers knew, or ought to have known, that PFAS chemicals were persistent, bioaccumulative, and potentially harmful, yet continued to market and distribute them without adequate warnings. The municipalities and the province are seeking recovery of public remediation costs rather than personal injury damages.⁷

Municipalities possess several characteristics that make them attractive representative plaintiffs. First, municipalities often sustain substantial and measurable

economic losses. Second, they maintain records capable of supporting aggregate damages claims. Third, municipalities may enjoy public credibility that strengthens the perceived legitimacy of the litigation. Municipal plaintiff actions also avoid some of the individualized causation challenges that arise in personal injury class actions. Rather than proving individual injuries suffered by thousands of class members, municipalities frequently seek recovery of institutional expenditures incurred in responding to a common problem.

The PFAS litigation may signal the beginning of a broader trend toward environmental cost-recovery actions by municipalities.

Conclusion

Municipal class actions sit at the intersection of private law, public law, and collective redress. The same characteristics that make municipalities attractive class action defendants — their ability to affect large populations through centralized decision-making — also give rise to distinctive immunity doctrines and certification challenges. As municipalities increasingly participate in environmental and cost-recovery litigation, both as defendants and plaintiffs, practitioners will need to navigate a growing body of jurisprudence that reflects this unique institutional role.

Understanding the unique procedural and substantive issues associated with municipal parties will therefore remain essential for both plaintiff and defence counsel in the years ahead. ■

-
1. *Nelson (City) v. Marchi*, 2021 SCC 41, para 48
 2. *Stonechild v. Canada*, 2022 FC 914, para. 46
 3. *Stadnyk v. The Corporation of the City of Thunder Bay*, 2023 ONSC 3920, para. 95
 4. *Stadnyk v. The Corporation of the City of Thunder Bay*, 2023 ONSC 3920, para. 96
 5. *Stadnyk v. The Corporation of the City of Thunder Bay*, 2023 ONSC 3920, para. 105
 6. *Hollick v. Toronto (City)*, 2001 SCC 68, para. 19
 7. Doug Beazley, "The Fight Against Forever Chemicals" (28 January 2025), online: Canadian Bar Association, National Magazine <<https://nationalmagazine.ca/en-ca/articles/hot-topics-in-law/2025/the-fight-against-forever-chemicals>>