Hollick and Environmental Class Actions: Putting the Substance into Class Action Procedure

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Hollick *is significant as the first environmental class action to reach the Supreme Court of Canada. Yet it is also important more broadly as an example of how the civil litigation process presents significant barriers to environmental litigants by its failure to grapple with the fundamental dynamics of environmental law. This paper will argue that class action certification decisions are not strictly procedural and that in environmental cases, a contextual approach, informed by the principles of environmental law, would require courts to consider the nature of environmental harm, those affected by it, and the requisite appropriate remedies. This would alter both the courts' approach to the certification test and the outcome of the cases.* Hollick *was not approached primarily as an environmental case, and as a result, the decision can be critiqued as a class action certification decision, as an environmental decision and as a nuisance decision.*

L'affaire Hollick *est importante parce qu'il s'agit du premier recours collectif en droit de l'environnement à se rendre à la Cour suprême du Canada. De façon plus large encore, ce dossier est un bon exemple des obstacles énormes qu'engendre la procédure civile dans ce genre de dossiers parce que la procédure ne répond pas adéquatement à la dynamique fondamentale du droit de l'environnement. L'argument est fait dans cet article que les décisions relatives à la certification d'un recours collectif ne sont pas d'ordre strictement procédural et qu'une approche contextuelle, fondée sur les principes du droit de l'environnement, obligerait les tribunaux à examiner la nature du dommage à l'environnement, le préjudice qui en résulte pour les gens et le redressement qui s'impose. Cela viendrait modifier les critères que les tribunaux appliquent en matière de la certification et les résultats de ces actions. L'affaire* Hollick *n'a pas été traitée originairement comme un cas de droit de l'environnement. En conséquence, il est possible de critiquer cette décision à la fois sur le plan de la certification d'un recours collectif, sur le plan environnemental et sur le plan de la nuisance.*

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HOLLICK V. TORONTO (METROPOLITAN)[1] is the first environmental class action certification decision to reach the Supreme Court of Canada. It has been hailed as part of a "...groundbreaking trilogy of judgments..."[2] interpreting the class action certification requirements as broad and generous.[3] Yet *Hollick*, the only environmental case of the three, is also the only one in which certification was refused, and gives rise to troubling implications.

This paper will argue that certification was denied because the Court overlooked the substantive context in which the procedure was to be interpreted and applied. As a result, the procedure was weakened and the substantive law it was designed to serve was left unassisted. *Hollick*, approached primarily as an environmental case, could have affirmed the relationship between the class action procedure and the Ontario *Environmental Bill of Rights*'[4] public nuisance action. It could also have confirmed the class action procedure as a means of enhancing the utility of private nuisance law, and the remedies of injunctions and grouped damages in pollution prevention.

While important as the first environmental class action to reach the Supreme Court, *Hollick* also has broader significance as an example of what can happen when civil procedure is divorced from the substantive law it is intended to

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1. (1998), 27 C.E.L.R. (N.S.) 48, 18 C.P.C. (4th) 394 (Ont. Crt. Gen. Div.), Jenkins J. [*Hollick* (Motions Court) cited to C.E.L.R.] (the practice of citing the particular judge is not standard, but due to the specialization of motions judges in class actions it seems appropriate in this context: see *Anderson v. Wilson* (1998), 44 O.R. (3d) 673, (1999), 175 D.L.R. (4th) 409, 122 O.A.C. 69 (C.A.) [*Anderson* cited to O.R.]); rev'd (*sub nom. Hollick v. Toronto (City)*) (1999), 42 O.R. (3d) 473, (1998), 168 D.L.R. (4th) 760, (1998) (Ont. Div. Ct.) [*Hollick* (Ont. Div. Ct.) cited to O.R.], aff'd (1999), 46 O.R. (3d) 257, 181 D.L.R. (4th), (C.A.) [*Hollick* (C.A.) cited to O.R.]; aff'd [2001] 3 S.C.R. 158, 205 D.L.R. (4th) 19 [*Hollick* cited to S.C.R.].
2. Cristin Schmitz, "Trilogy of SCC judgments establish requirements for certifying class actions" *Lawyers Weekly* 21:26 (9 November 2001) 1 at 1. The other two cases were *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, (2001), 205 D.L.R. (4th) 39, (2001), 275 N.R. 342 [*Rumley* cited to S.C.R.] and *Western Canadian Shopping Centres v. Dutton*, [2001] 2 S.C.R. 534, (2000), 286 A.R. 201, (2000), 201 D.L.R. (4th) 385 [*Western* cited to S.C.R.]. All three were written for a unanimous Court by the Chief Justice.
3. Indeed, the Court has gone beyond the narrow approach of *General Motors of Canada Ltd. v. Naken*, [1983] 1 S.C.R. 72, (1983), 144 D.L.R. (3d) 385, (1983), 46 N.R. 139 [cited to S.C.R.], even in provinces without class action legislation. See generally Ward K. Branch, *Class Actions in Canada*, looseleaf (Aurora, Ont.: Canada Law Book, 2002). However, Hollick's lawyer, Michael McGowan, conceded the case is "not a strong favourable signal for other environmental cases": see Schmitz, *ibid.* at 17.
4. *Environmental Bill of Rights*, S.O. 1993, c. 28, s. 103 [*EBR*].

serve. In the environmental context, it demonstrates that the civil litigation process presents significant barriers to environmental litigants, generally by failing to grapple with the fundamental dynamics of environmental law.

Pre-trial decisions, in particular, play a significant role in environmental law. Decisions on class action certification, standing, interventions and pre-trial injunctions establish who may bring an action, how it is framed and what happens to the environmental resources in the interim. These procedural issues often determine, if not the ultimate judicial decision, at least its true environmental utility. In addition, because these decisions take place at the pre-trial stage, on limited motions records, they tend to expose judicial "gut reactions" toward the environment. They reveal that there are a variety of judicial philosophies and assumptions about the environment and its priority over competing values and interests. It is this inconsistency of approach and lack of theoretical foundation that demonstrate a need for a judicial "environmental perspective" based on a principled contextual approach to environmental litigation.[5] Such a perspective would have altered the outcome of the *Hollick* decision, and therefore the role of class actions in environmental litigation.

The ensuing analysis proceeds in five parts. Part I sets out the relevant legislation, facts, arguments and decisions in *Hollick*, and situates the case within a larger context. Part II argues that procedure should not be divorced from substance, and that an environmental perspective would have altered the Court's approach to the certification test. Parts III through V address the resulting weaknesses of the case as a class action certification decision, an environmental decision and a nuisance decision.

Part III argues that the Court's interpretation of the Ontario class action certification test, while generous on the identifiable class and commonality requirements, placed too much emphasis on individual rather than common issues. It thereby effectively amended the legislation, which intentionally omitted the requirement that common issues predominate over individual issues in order for certification to be granted. Part IV argues that the Courts made little reference to the environmental harm or the public interest therein, referring to no environmental precedents or principles. This caused it to focus almost exclusively on compensation rather than prevention, thereby ignoring the claim in public nuisance, underemphasizing the injunction remedy requested by the class and overemphasizing the damages sought. Part V demonstrates that this focus on damages monetized the environmental harm, overvalued the adequacy of recovery from the Small Claims Trust Fund operated by the landfill and exaggerated the most individual aspects of the class claims. This was at the expense of considerable common issues in nuisance, such as reasonableness and immediate context, that the class action procedure could have helped to prove. It is concluded that approaching the case primarily as an environmental action, rather than a procedural motion which happened to involve environmental facts, would have created a different focus. It would have allowed environmental principles to structure the vast discretion in the certification process, leading to a decision that reflects the realities of environmental law.

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5. This broader issue is the subject of the author's continuing research.

1. The *Hollick* Decision and the Larger Context

A. THE HOLLICK DECISION

1) Relevant Legislation

A barrier to common law environmental class actions is usually the individual issues in tort actions, which hinder the presentation of environmental problems as collective ones. The legislature has created two statutes in Ontario to overcome this problem.

Substantively, it created new rights of action in environmental legislation, such as the *Environmental Protection Act*[6] in 1990 and the *EBR* in 1993. The class in *Hollick* sought to rely on the public nuisance action in section 103 of the *EBR*, which provides:

> No person who has suffered or may suffer a direct economic loss or direct personal injury as a result of a public nuisance that caused harm to the environment shall be barred from bringing an action without the consent of the Attorney General in respect of the loss or injury only because the person has suffered or may suffer direct economic loss or direct personal injury of the same kind or to the same degree as other persons.[7]

This action was created to overcome the restrictive standing requirement that an individual must prove damages different from those suffered by the public in order to sue in public nuisance. The Environmental Commissioner of Ontario was granted intervenor status before the Supreme Court in *Hollick* to clarify the "interrelationship between s. 103 of the *EBR* and the *Class Proceedings Act, 1992*."[8] The Commissioner demonstrated that the Task Force developing the *Class Proceedings Act, 1992*[9] was working at the same time as groups drafting the *EBR* and the review of the law of standing. The legislature intended that the *EBR* public nuisance action exercisable by means of the procedure being created by the *CPA*, but these submissions were not alluded to in the reasons,[10] and this interrelationship was therefore not clarified by the Court.

Procedurally, the Ontario *CPA* was created to remedy the barriers to representative litigation. Originally, the class action was a means of relaxing the compulsory joinder of all affected parties in courts of equity[11] and its importance grew with the increase in large social and economic actors and mass production

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6. R.S.O. 1990, c. E-19 [*EPA*].
7. *Supra* note 4.
8. *Hollick, supra* note 1 (Factum of the Intervenor, The Environmental Commissioner of Ontario at para. 3) [ECO Factum].
9. S.O. 1992, c. 6 [*CPA*].
10. The Ontario Court of Appeal addressed this claim in some detail, as will be seen below.
11. See John P.S. McLaren, "The Common Law Nuisance Actions and the Environmental Battle—Well-Tempered Swords or Broken Reeds?" (1972) 10 Osgoode Hall L.J. 505 at 518. For general history and discussion of class actions in Ontario, see Ontario Law Reform Commission, *Report on Class Actions* (Toronto: Ministry of the Attorney General, 1982) [*OLRC*]; Ontario Attorney General's Advisory Committee on Class Action Reform, *Report of the Attorney General's Advisory Committee on Class Action Reform* (Toronto: The Committee, 1990) [*AGAC*]; Branch, *supra* note 3; and Michael G. Cochrane, *Class Actions: A Guide to the Class Proceedings Act, 1992* (Aurora, Ont.: Canada Law Book, 1993).

and consumption.[12] Prior to this legislation, grouped proceedings were governed by Rule 12 of the *Rules of Civil Procedure*,[13] which allowed one or more persons with the same interest to bring an action on behalf of all. But the Rule was strictly interpreted to require that class members have the same, not just similar, interests, and the *CPA* was intended to overcome this.[14]

When a class action is commenced, the legislation mandates that a pre-trial motion must be brought seeking certification of the action as a class action.[15] If certification is refused, the action may be brought by the various proposed class members as individual actions.[16] Sections 5 and 6 of the *CPA* set out the requirements for certification in Ontario:

> 5.(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
> (a) the pleadings or the notice of application discloses a cause of action;
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
> (c) the claims or defences of the class members raise common issues;
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
> (e) there is a representative plaintiff or defendant who,
> (i) would fairly and adequately represent the interests of the class,
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.
>
> ...
>
> (5) An order certifying a class proceeding is not a determination of the merits of the proceeding.
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> 6. The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:
> (1) The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
> (2) The relief claimed relates to separate contracts involving different class members.
> (3) Different remedies are sought for different class members.
> (4) The number of class members or the identity of each class member is not known.
> (5) The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.

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12. In *Hollick*, *supra* note 1 at para. 14, the Supreme Court defined the *CPA*'s purpose as being: "[t]o ensure that the courts had a procedural tool sufficiently refined to allow them to deal efficiently, and on a principled rather than ad hoc basis, with the increasingly complicated cases of the modern era." See also *Western*, *supra* note 2.
13. R.R.O. 1990, Reg. 194, rule 12.01: "[w]here there are numerous persons having the same interest, one or more of them may bring or defend a proceeding on behalf or for the benefit of all, or may be authorized by the court to do so."
14. See generally *OLRC*, *supra* note 11 and *AGAC*, *supra* note 11.
15. *CPA*, *supra* note 9, s. 2(2).
16. *Ibid.*, s. 7.

The Supreme Court indicated that the class action procedure has three main goals: judicial economy, access to justice and behaviour modification.[17] The case law emphasizes that the *CPA* does not require common issues to predominate over individual issues, thereby intentionally differing from the American and British Columbian approaches[18] in order to make class actions more readily available.[19] The *CPA* contains tools for dealing with individual issues,[20] and expressly provides that certification should not be denied on the ground that "damages would require individual assessment."[21] This is the legislative context in which the *Hollick* action was commenced.

2) Facts[22]

The *Hollick* action was brought on behalf of 30,000 residents within a 16 square mile area[23] of the Keele Valley Landfill in Vaughan, in an area that "contains a number of industries."[24] Keele Valley has provided the bulk of Toronto's non-hazardous municipal waste landfill, and was a gravel pit before becoming a landfill after a lengthy approval process. It has been operated by the City of Toronto under a series of Certificates of Approval since 1983.[25] It has received international acclaim for its reduction of greenhouse gases and has a complaints system, two full-time provincial Environment Ministry on-site inspectors, detailed reporting requirements, a Liaison Committee set up by the City of Vaughan to "address community concerns related to the site" and a telephone complaints system. Also, like many landfills, it has a Small Claims Trust Fund, required as part of its Certificate of Approval, "in the total amount of $100,000 ... to deal with claims arising from off-site impact to a maximum of $5,000 for each claim."[26] The purpose of such a fund is "to ensure that persons who live in the vicinity of a waste dis-

17. See *Hollick*, *supra* note 1 at para. 15.
18. Predominance is required in damage class actions under American Rule 23(b)(3): see generally Herbert B. Newberg, *Newberg on Class Actions*, 3d ed. looseleaf (New York: Lawyers Cooperative Publishing, 1992). The B.C. Act makes predominance *one* consideration in deciding preferability: see *Campbell v. Flexwatt* (1996), 25 B.C.L.R. (3d) 329 (S.C.), (1997) 34 B.C.L.R. (3d) 343, (1998), 105 B.C.A.C. 158 (C.A.), leave to appeal to S.C.C. refused, [1998], S.C.C.A. No. 13, which held that the B.C. legislation was less restrictive than the U.S. Rule, but more restrictive than the *CPA*. See also the recent decision in *Rumley*, *supra* note 2. For further discussion, see *infra* note 92 and accompanying text.
19. See *Nantais v. Telectronics Proprietary (Canada) Limited* (1995), 25 O.R. (3d) 331, 127 D.L.R. (4th) 552 (Ont. Div. Ct.) [*Nantais*].
20. See *CPA*, *supra* note 9, ss. 11, 25. Section 11 provides for stages of class proceedings, dealing with common issues, then sub-class issues, then individual issues. Section 25 equally deals with individual issues.
21. See *ibid.*, s. 6(1).
22. The facts summarized below are from *Hollick* (Motions Court), *supra* note 1 at 50–53, unless otherwise noted.
23. See *Hollick* (Motions Court), *ibid.* at 50 where it is indicated that the class as certified by the motions judge was comprised of "...all persons who have owned or occupied property in the Regional Municipality of York, in the geographic area bounded by Rutherford Road on the south, Jane Street on the west, King-Vaughan Road on the north and Yonge Street on the east, at any time on or after February 3, 1991 or, where such person is deceased, the personal representative of the estate of the deceased person."
24. *Ibid.* at 52.
25. The landfill closed on December 31, 2002.
26. *Hollick* (Motions Court), *supra* note 1 at 52.

posal site, and who have suffered loss as a result of a nuisance arising from the operation of the waste site, receive compensation for their loss quickly and at little cost."[27] The Keele Valley Fund "is administered by the Ministry of the Environment. Awards from the fund are to be made on a no-fault basis."[28]

The class claimed that the landfill emitted "(a) 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 (collectively referred to as 'Physical Pollution'); and (b) loud noises and strong vibrations (collectively referred to as 'Noise Pollution'), causing 'physical and emotional damages.'"[29] It made claims in public nuisance under section 103 of the *EBR*, as well as the common law actions of private nuisance, negligence,[30] and *Rylands v. Fletcher*,[31] although the Supreme Court focused almost exclusively on the private nuisance claim. The class sought damages—compensatory, punitive and exemplary—as well as an injunction to stop the pollution.

The facts of *Hollick* were unique. The nature and severity of the harm was not comparable to the Walkerton[32] tragedy, or other more dramatic environ-

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27. Mario D. Faieta *et al.*, *Environmental Harm: Civil Actions and Compensation* (Toronto: Butterworths, 1996) at 446–448. It is notable that these conditions are generally approved by the Environmental Assessment Board pursuant to the provincial *Environmental Protection Act* (Faieta, *ibid.* at 443). This administrative supervision strengthens the Court's view that these issues should be left to the waste management process, but it is arguable that the Court should at least have determined whether the class' allegations that the emissions were illegal were true, as a judicial finding of illegality would have helped the group in their subsequent administrative proceedings. As discussed below, civil actions are often useful and necessary to challenge existing administrative rules when they are not achieving acceptable levels of protection. See generally K. Stanton & C. Willmore, "Tort and Environmental Pluralism" in John Lowry & Rod Edmunds, eds., *Environmental Protection and the Common Law* (Oxford: Hart Publishing, 2000) at 93.

28. *Hollick* (Motions Court), *supra* note 1 at 52.

29. *Ibid.* at 51. In the Supreme Court, the respondent noted that air emissions did not exceed required levels, and that no claims had been made against the Fund: see *Hollick*, *supra* note 1 at para. 6.

30. One of the class lawyers stated after the Court of Appeal decision that "[b]y equating negligence and nuisance, [the Court of Appeal judge] thereby wrote the negligence issue out of the case." It is questionable whether negligence does require proof of nuisance, and the connection between these two is more complex than the Court of Appeal's brief analysis reveals. The fact that many of the class action precedents relied on negligence, and the suggestion that reliance on nuisance is the main reason for refusing to certify in *Hollick*, makes this overlooking of the negligence claim troubling.

31. (1868), L.R. 3 H.L. 330, [1873], All E.R. Rep. 1, 19 L.T. 220 [*Rylands*]. This doctrine provides that "the person who for his own purposes brings on to his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, he is prima facie answerable for all damage which is the natural consequence of its escape." This claim in *Rylands* was also overlooked in *Hollick*. McLaren argues that the difference between a claim under *Rylands* and in nuisance is that the former deals with single incidents, while private nuisance deals with "sustained interference" with the plaintiff's interests: see McLaren, *supra* note 11 at 525. Since in *Hollick* it was often suggested that class actions are mainly for single cause or incident situations, it is puzzling that the claim in *Rylands* was overlooked. If this was because the allegation is of ongoing harm in *Hollick* and was thus seen as a nuisance action, the Court overlooked environmental cases where injunctions and damages have been awarded in nuisance, some of which involved multiple plaintiffs, as will be seen below.

32. *Smith v. Brockton (Municipality)*, [2001] O.J. No. 2335, [2003] O.J. No. 959, (Ont. Sup. Crt.) (QL). A provincial public inquiry under Commissioner Justice O'Connor also produced a report: see Honourable Dennis R. O'Connor, "Report of the Walkerton Inquiry: The Events of May 2000 and Related Issues," online: Ontario Ministry of the Attorney General <http://www.attorney-general.jus.gov.on.ca/english/about/pubs/walkerton/part1/WI_Summary.pdf> The class action was settled, and this suggests that the threat of class actions, i.e. the very existence of the procedure, can change the way environmental problems are resolved.

mental harms.[33] In addition, waste management and landfill operations are public services and are highly regulated by the province, encouraging judicial deference,[34] and the Small Claims Trust Fund was designed to compensate those inconvenienced by its operations. Yet a class of 30,000 found this regulatory system, and the alternative recourse of the Fund, to be inadequate protection from serious ongoing harm. Perhaps the Court's promise that *Hollick* was not intended to discourage environmental class actions[35] was intended to emphasize that, given the comparatively mild nature of the harm, the good record of the landfill, the regulation and social importance of waste management, and the availability of the Trust Fund, this was not the best environmental tort 'test case.' Yet these elements are not unique to this case, and their overemphasis prevented deeper analysis of the substantive law raised.

3) Decisions Below

In *Hollick*, the motions judge certified the class, but the appellate courts all agreed that he had erred. Yet they each did so on a different element of the five-part certification test, highlighting the need for clarification of class action procedures. The Divisional Court found no identifiable class (section 5(1)(b) *CPA*) and the Court of Appeal found no common issues that would advance the case (section 5(1)(c) *CPA*). The Supreme Court, finding both an identifiable class and common issues, held that a class action was not the preferable procedure in this case (section 5(1)(d) *CPA*). After four years of litigation through four levels of court, the case never passed the motions stage. This highlights the centrality of certification: if refused, the individually non-recoverable claims[36] are not pursued; if granted, settlement is often reached, as defendants face a more powerful opponent and significantly increased potential liability. Yet it also suggests that the potential benefits of class actions can be stymied by their procedural complexity.

Each level of court faced significantly different facts, evidence and argument, which affected its evaluation of the elements of certification. The Divisional Court had evidence of 150 complaints, the Court of Appeal of 500, and the Supreme Court of over 950 complaints from 1985–93. The Divisional and

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33. However, the class did allege unlawful emissions of "large quantities of ... toxic gases" and harm to health. Certifying the case would have allowed the Court to determine the severity of the harm, and whether the service of waste management could have been provided by other means, or whether technical improvements could result in less harm. See *e.g. Wiebe v. Rural Municipality of de Salaberry*, [1980] 11 C.C.L.T. 82 (Man. Q.B.) [*Wiebe*], where the Court forced a landfill to use less harmful methods of waste management. While Keele Valley has been praised for some of its techniques, technological improvements are continual and the Court should have at least inquired into this issue.
34. Although public services are often found not to legalize nuisance: see *Wiebe*, *ibid.* at 99 ff.
35. The Court in *Hollick* said that the applicant was wrong to characterize the case as an indication that the Ontario Act could not be used in environmental cases. See *Hollick*, *supra* note 1 at para. 37: "[w]hile the applicant has not met the certification requirements here, it does not follow that those requirements could never be met in an environmental tort case. The question of whether an action should be permitted to be prosecuted as a class action is necessarily one that turns on the facts of the case. In this case there were serious questions about preferability. Other environmental tort cases may not raise the same questions. Those cases should be decided on their facts."
36. I.e. claims which are too small to warrant the cost of litigation. See also *OLRC*, *supra* note 11, Vol. II; *Hollick* (Motions Court), *supra* note 1 at 59.

Appeal Courts focused on the odour complaints, while the Supreme Court returned to the full allegations and recalled that an injunction was sought. These variations emphasize that the crucial certification decision proceeds on a preliminary and incomplete record. This strengthens the approach in other recent class action decisions[37] to err on the side of certification where basic commonality is found, and rely on the Court's power to decertify if the fuller trial evidence suggests this is warranted. Erring on the side of certification is also supported in environmental cases specifically by the precautionary principle, as we will see below.[38]

The motions judge found an identifiable class simply because 30,000 people is a "class of two or more persons."[39] He expressly rejected the approach requiring common issues to predominate over individual ones, citing the Law Reform Commission *Report on Class Actions* and eight other cases, concluding that common issues must merely "advance the litigation." He found two common issues: the defendant's liability in general, and its liability for punitive and exemplary damages. Although a defendant "operating a licensed landfill site under strict supervisory conditions need not endure the necessity of modification of behaviour,"[40] the class action was the preferable way to achieve judicial economy and access, since the Small Claims Trust Fund required numerous lawsuits and its maximum recovery was inadequate.[41] Since injunctions are only available where damages would be inadequate, and since the site had been subject to "extensive environmental hearings" and a Certificate of Approval which "involved considerable supervision," a more appropriate remedy was to challenge the Certificate or licence.[42]

The Divisional Court did not mention the injunction, and focused on the identifiable class requirement in section 5(1)(b) *CPA*. It held that "[w]hat is needed to satisfy section 5(1)(b) is evidence from which the motions court judge can conclude that all members included in the class likely have a cause of action against Toronto for interference with their use and enjoyment of their property."[43] While the kind of class alleged could be certified, in this case "the evidence does not make it likely that those 30,000 persons suffered such interference."[44] Evidence that the odours "were pervasive over the entire 16-square-mile area" and that the landfill was the "likely source" of the odours may have achieved certification, and the court left the door open by ordering that the applicant could

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37. See generally the approach of the Supreme Court in *Western*, *supra* note 2. See generally the Ontario courts' approach in *Anderson*, *supra* note 1; *Bendall v. McGhan Medical Corp.* (1993), 14 O.R. (3d) 734, 106 D.L.R. (4th) 339 (Ont. Crt. Gen. Div.) [*Bendall* cited to O.R.].
38. For a more a detailed discussion on the precautionary principle see text accompanying footnote 81.
39. *Hollick* (Motions Court), *supra* note 1 at 58. The defendant City argued the class was too large and uncertain in failing to state whether "transient residents such as students or nannies" were included, and contrasted this uncertainty with single incident/cause class actions such as "a subway crash, a defective product, a disease from a particular procedure" (*ibid.* at 58). The motions judge did not elaborate on his reasons for rejecting these arguments.
40. *Ibid.* at 61.
41. As a result, he went on to examine the *Family Law Act* claims, the adequacy of representation and of the litigation plan of the applicant. These issues were not addressed by subsequent courts, all of whom refused to certify. Therefore, the discussion of these issues is not addressed in this paper.
42. *Ibid.* at 61.
43. *Hollick* (Ont. Div. Ct.), *supra* note 1 at 480.
44. *Ibid.* at 479.

reapply for certification to a different judge "based on further evidence."[45] There were no common issues because the class was too large. Even if the class was limited to those who made the complaints, these spanned seven years and different locations over the 16 square mile area, so they required proof of individual harm. Significantly, the Court hinted at its views that the 'real' uses of damage class actions in environmental tort cases involved "one discrete incident or one continuing event or state of affairs" caused by the City that likely affected all those in the class.[46]

The Court of Appeal found that the merits can be looked to, not for finding a cause of action, but when assessing the existence of an identifiable class, common issues and preferability, because otherwise a mere claim that all elements of the certification test were met would have to be accepted by the Court.[47] It also concluded that private nuisance requires proof of individual harm and is not appropriate for class actions unless they involve the "usual" cases of a single disaster or defective product, and that public nuisance actions should not be brought by class actions. The form of relief and procedure selected by the applicant was inappropriate not just for this case, but for this *kind* of case generally.

4) Reasons of the Supreme Court of Canada

The essence of the Supreme Court's decision was that the individual issues in the private nuisance claims for damages would outweigh the common issues:

> [A]ny 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.[48]

The Court concluded that the class action was not "the preferable means of resolving the claims here"[49] without ever defining the claims or the individual and common issues. It held that "if each of the class members has a claim against the respondent, *some aspect* of the issue of liability is common within the meaning of

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45. *Ibid.* at 480.
46. *Ibid.* at 480. Costs were awarded to the City for the appeal and the certification motion. It was also indicated that the "cross appeal" was dismissed without costs to the City, but no details of this cross appeal were provided.
47. *Hollick* (C.A.), *supra* note 1. The court repeated the decision of the motions judge on the injunction and said nothing further on this issue.
48. *Hollick, supra* note 1 at para. 32.
49. *Ibid.* at para. 36.

section 5(1)(c),"[50] yet it did not determine relevant facts such as the source, location and frequency of pollution.[51] The Court made no reference to environmental caselaw, and new developments in both nuisance and class actions were not permitted to work together in the environmental context. The decision would have been different had the Court taken the context-specific approach set out below.

B. THE DECISION IN CONTEXT

1) The Supreme Court Class Action Certification 'Trilogy'

It is interesting that *Hollick* has been situated as part of the Supreme Court class action 'trilogy' which also included *Western Canadian Shopping Centres*,[52] and *Rumley*.[53] The Chief Justice, for a unanimous court in all three cases, dealt comprehensively with class action certification. *Western* clarified the procedure for provinces without class action legislation, focusing on the Alberta Rules. *Hollick* clarified the Ontario statute. *Rumley*, released the same day as *Hollick*, characterized the B.C. legislation[54] as broadly similar to Ontario's, discussing only the material differences between the two.[55] The three cases deal with significantly different fact situations: *Hollick* was the only environmental case; *Western* dealt with hopeful immigrants whose investments were allegedly mismanaged; and *Rumley* involved allegations of systemic abuse in a residential school for blind and deaf students.

In both *Western* and *Rumley*, the Court certified on the basis of the shared fiduciary duty owed to the plaintiff class. Yet the individual reliance by each class member, the amount of harm suffered and other factors all varied. The Court in *Western* and *Rumley* seemed to go out of its way to override all objections based on individual issues and differences between class members, and take the approach

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50. *Ibid.* at para. 19 [emphasis added]. On its face, it is possible to read this as indicating that there can be common issues where some class members allege negligence, others *Rylands* and others public or private nuisance. This would be a generous reading of the commonality requirement. The alternative is that the Court had reduced the claims to private nuisance.
51. In terms of the facts, the Court said "there is no reason to think" that pollution spread over the entire area, "it is likely" that some areas were worse hit, and other members were close to other "possible sources" of pollution (*ibid.* at para. 32). The Court of Appeal held that "[o]ne could assume from the evidence of complaints that odours have escaped this site from time to time over the years. The issue is whether these odours caused sensible personal discomfort or interfered with the enjoyment of property to such an extent that the individuals affected are deserving of compensation" (*Hollick* (C.A.), *supra* note 1 at para. 23). Both courts seem persuaded that pollution escaped, yet on a pre-trial motion, findings are based on incomplete facts. Far from resulting "in a virtual Royal Commission into the operation of this landfill site without any measurable advance in the litigation" (*ibid.*), determinations of whether the landfill did "emit pollutants into the atmosphere over a six-year period, and if so, when, and to what extent" would allow the Court to determine causation and liability (*ibid.*), preventing conflicting findings, and resulting in judicial economy in compensatory damage determinations. It would also, if the findings were positive, resolve the injunction issue.
52. *Supra* note 2.
53. *Supra* note 2.
54. *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [B.C. *CPA*].
55. Interview of Kirk Baert, counsel for the class, (22 April 2002). Baert suggests that *Rumley* confirmed the B.C. class action test, *Western* gave the B.C. class action test to provinces without class action legislation, and *Hollick* brought the B.C. test to Ontario. Perhaps achieving national consistency in class action proceedings was the true rationale in *Hollick*, rather than any judicial animosity to environmental cases generally, or reluctance to interfere in the waste management system specifically.

that where there is an identifiable class and some commonality, it is best to certify. If it later becomes clear, after the evidentiary limitations of the motions stage, that this was wrong, the Court can decertify. This was a very different approach than that taken in *Hollick*, where the Court seemed to say that the class should not be certified unless it is clear that common issues will predominate.

The decisive factor in *Rumley* was the kind and severity of harm involved.[56] Yet many argue that environmental harm is also irreparable,[57] and while the Court made efforts to overcome procedural barriers to ensure protection, compensation, and deterrence in *Rumley*, it declined to do so in *Hollick*. Is this because class actions are ill-suited to environmental tort cases?

2) Why a Class Action?

Why did the plaintiffs in *Hollick* choose to pursue their case by means of a class action? There are the obvious, but significant, advantages of the funding[58] and contingency fee[59] arrangements, which are particularly crucial in environmental cases, as in any complex cases where cost is prohibitive. The individual action, whether in private law or by the statutory approaches found to be adequate alternatives by the Court, is rarely going to be a viable option for any individual plaintiff in environmental litigation.[60]

Apart from financial reasons, the class action is important for the opportunity it offers plaintiffs to act *as a group*. Environmentalists can present the interference as a single, continuing harm to the community and environment, and request an analysis and a remedy that reflects this reality. In *Hollick*, the courts saw the class as property owners pooling resources in order to recover their individual compensation, rather than as an environmental group seeking pollution prevention. Yet the class did request an injunction and punitive damages, and also claimed public nuisance under the *Environmental Bill of Rights*. It also sought compensatory damages *collectively*, in order to achieve behaviour modification. Yet the analysis was limited primarily to the claims for individual damages in nuisance.

In *Palmer v. Nova Scotia Forest Industries*,[61] another environmental class action, local landowners sought to prevent the spraying of toxic herbicides by a forest company on its forest land near their homes. They sought a *quia timet* injunction and claimed a wide variety of common law grounds including private

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56. The province admitted liability; the extensive external Berger Report recommended an individual compensation scheme (which the Court found to be an inadequate alternative to the class action, see discussion on this point *infra* notes 97, 147, 174). The nature of the harm was so severe and reprehensible that the Court wanted to ensure compensation and to facilitate litigation for those people who were particularly vulnerable, and for that kind of harm, which was irreparable.
57. Indeed, in *Western*, explaining the purposes of the class action, the Court specifically mentioned the widespread impact of environmental pollution: "Conflicts like these pit a large group of complainants against the alleged wrongdoer. ...The class action offers a means of efficiently resolving such disputes in a manner that is fair to all parties" (*Western*, *supra* note 2 at 549).
58. Class Proceedings Fund established by *Law Society Act*, R.S.O. 1990, c. L-8, as am. by S.O 1992, c.7, ss. 3, 59.1- 59.5.
59. *CPA*, *supra* note 9, ss. 32–33.
60. Interview of Kirk Baert, *supra* note 55.
61. (1984), 60 N.S.R. (2d) 271, (1983), 12 C.E.L.R. 157 (N.S.S.C. (T.D.)) [*Palmer* cited to N.S.R.].

nuisance, trespass, *Rylands* and riparian rights. An interlocutory injunction was granted to prevent the spraying but was overturned on appeal. Ultimately the permanent injunction was refused because, despite agreement that the herbicide was a very dangerous chemical, there was insufficient evidence of the risk to health and the environment from the quantities and locations involved.

The decision is relevant because the court agreed that the case could be brought as a class action. All the litigants in *Palmer* were landowners in the vicinity of the forest area to be sprayed, so why not bring individual claims for private nuisance? Wildsmith suggests that "[i]n order to cover unknown factors or contingencies related to wind or drift or runoff and to prevent the possibility of only receiving a plaintiff-specific remedy, the suit was framed as a representative or class action."[62] The trial judge held:

> In this case the interest in result is obviously a common one. The allegation is a risk to health and, if proved, is common to all. The source of the risk claimed is the material proposed to be sprayed by the defendant. The mechanism by which the alleged risk is received, i.e. by direct spray, by drift, by water or by other types of human contact, may differ among those represented in each area. In my opinion, this does not make a critical difference. The probability of harm may vary from one to another of the group, nevertheless it is this probability of harm which is common to all. The degree to each is unimportant, and especially so when the remedy sought is injunctive relief. If successful, the alleged risk disappears and, to that extent, the probability of harm disappears also. Clearly the plaintiffs and those represented by them have a common interest and a common grievance and the relief sought is beneficial to all.[63]

All five judges at various levels "were of the view that a class or representative plaintiff's action was proper."[64] This example reinforces the argument that the class action can have many benefits in environmental cases. By effectively personifying the public or group, the class action: (a) reflects the reality of environmental harm as a shared problem; (b) demonstrates the full scope and extent of the harm; (c) strengthens the argument for injunctive relief by accurately reflecting the nature and strength of interests to be balanced; and (d) can result in damages large enough to alter behaviour. This is why, as will be shown below, the alternative avenues of redress deemed preferable to the class action by the Court in *Hollick* are not adequate replacements for the class action, and why class actions can be very useful tools in environmental litigation.

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62. Bruce H. Wildsmith, "Of Herbicides and Humankind: Palmer's Common Law Lessons" (1986) 24 Osgoode Hall L.J. 161 at 166.
63. *Palmer*, *supra* note 61 at paras. 479–80.
64. Wildsmith, *supra* note 62 at 170.

II. The False Dichotomy between Procedure and Substance

A. PROCEDURE AND SUBSTANCE GENERALLY

One of the problems with procedures such as class actions is that they are often separated from the substantive law they are called upon to serve. The motions judge in *Hollick* said, "[T]he *Class Proceedings Act* is essentially a procedural statute. It does not create a new cause of action."[65] Yet procedure is rarely "solely[66] procedural."[67] Some argue that "procedure's very function is to modify the substantive law."[68] At the very least, procedure exists to enhance the effectiveness of substantive law, and therefore must be applied with an awareness of that substantive context.

Further, it has been said that "[a]s a general principle ... procedural change has substantive impact. It makes litigation easier either for plaintiffs or defendants, thereby affecting the substantive balance between the two. Whether we characterize any revised practice as an 'abuse' or 'reform' depends largely on our evaluation

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65. *Hollick* (Motions Court), *supra* note 1 at 54.
66. See *Peppiatt v. Nicol* (1994), 16 O.R. (3d) 133 at 140, 20 C.P.C. (3d) 272 at para. 30 (Ont. Gen. Div.) [*Peppiatt* cited to O.R.], where the court held that the Act "creates no new cause of action. It is solely procedural and therefore if the court should err it should do so on the side of protecting people who have a right of access to the courts." The court focused on the access to justice goal of class actions and suggested that the approach should be to allow procedure to help achieve the purposes of substantive law. See also *Bendall*, *supra* note 37 at 739.
67. In "Teaching Procedures: The Fiss/Weinrib Debate in Practice" (1991) 41 U.T.L.J. 247 [Roach, "Teaching Procedures"], Kent Roach compares two approaches to civil procedure reflecting the competing "corrective" and "public law" models of justice and suggests that a synthesis would be most useful in ensuring both that the appropriate institution is doing the job in question, and that the institution is doing this job most effectively. He refers to the American civil procedure textbook by Robert M. Cover, Owen M. Fiss & Judith Resnick, *Procedure* (Westbury: Foundation Press, 1988) as espousing this view as part of its "public law" model of litigation, and goes on to provide his view that "[t]his insight should be pushed beyond the domain of reform of adjudicative rules so that the appropriateness of alternative forms of ordering in specific contexts can be examined" (Roach, "Teaching Procedures," *ibid.* at 281). Professor Roach suggests that "greater attention must be paid to the importance of context and that the intellectual conceit of devising trans-substantive procedural rules should be abandoned" (*ibid.*). He sees merit in "a rejection of the demand to universalize procedural rules across different contexts" (*ibid.* at 282). See also the discussion of procedure versus substance in David Dyzenhaus & Evan Fox-Decent, "Rethinking the Process/Substance Distinction: *Baker v. Canada*" (2001) 51 U.T.L.J. 193.
68. Geoffrey B. Hazard, "The Effect of the Class Action Device upon the Substantive Law" (1973) 58 F.R.D. 307 at 307. The author paraphrased the Solicitor General of the United States (Maitland) by saying that "the substantive law is laid down in the interstices of procedure... Substantive law is shaped and articulated by procedural possibilities. Moreover, the function of procedure would be unintelligible if it were not to have substantive consequences. So the question... in the relation of substance and procedure is one of pace and of role: How quickly and how far should the courts go in using procedural devices that are in their disposal? The necessary technique is one of circumspect consideration of the appropriate role of the judicial institution in shaping the substantive consequences of procedures such as those established in Rule 23" (*ibid.* at 307). He also agreed that class actions are responses to "the mass-production of legal problems" (*ibid.* at 309) and that a class can claim to be treated as a class "precisely because in this aspect of their legal status, they were treated as one by their antagonist" (*ibid.* at 310).

of policies underlying the type of litigation likely to be affected."[69] The very fact of legislating the procedure of class actions suggests widespread support for the kinds of substantive issues raised by class proceedings, as they permit some issues to be raised, and raised more powerfully, than they could have been without this procedural option. Certain substantive rights can be exercised which may have been lost. For example, environmental claims are often individually non-recoverable, i.e. too small in value to warrant the cost of litigation. Yet when all those affected gather their relatively small claims together and share the cost of litigation, the claims become recoverable and the wrong can be challenged and corrected.

More uniquely, class actions can have substantive effect in that they allow rights to be exercised in a particular way, i.e. *collectively*. This has several benefits. It can redistribute power in a situation, giving voice to often silent, disparate majorities.[70] It can allow the common law to develop by better demonstrating factual realities and social situations,[71] and by allowing risky or novel claims to be brought by providing financial support and strength in numbers.[72] Some even argue that, "[d]espite its ostensibly procedural nature, there may be persuasive arguments that the Ontario class proceedings legislation creates a new cause of action—a mass tort remedy—where previously one did not exist or existed only tenuously."[73]

The fact that *Hollick* is seen as part of a class action 'trilogy' reinforces the idea that procedure is often divorced from substance. In this trilogy, *Hollick* was the only environmental case, and its only connection with *Rumley*[74] and *Western*[75] was that each case involved the certification procedure. Is it appropriate to interpret the procedural requirements of certification uniformly for cases with such

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69. Hon. Jack B. Weinstein, "Some Reflections on the 'Abusiveness' of Class Actions" (1973) 58 F.R.D. 299 at 299-300. Although generally in favour of class actions, he also cautioned that they can lead to "a subtle erosion of substantive law.... A substantive change may be desirable on policy ground[s], and it is certainly appropriate to consider procedural difficulties in designing a change in the substantive rule, but it is, it seems to me, quite unwise to slip into important changes, in substantive law on the happenstance that a suit is brought by a class rather than by an individual claimant" (*ibid.* at 301–302). However, he later claims that courts can guard against abuse of the procedure, and that class actions are useful to deter "unlawful, socially destructive conduct" (*ibid.* at 304) specifically in the environmental context, since modern society "affords the possibility of illegal behavior, accompanied by widespread diffuse consequences, some procedural means should exist to remedy or at least deter that conduct" (*ibid.* at 305).

70. See *e.g.* the public choice debate in Bruce A. Ackerman, "Beyond Carolene Products" (1985) 98 Harv. L. Rev. 713; Kent Roach, "The Problems of Public Choice: The Case of Short Limitation Periods" (1993) 31 Osgoode Hall L.J. 721.

71. *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, 74 D.L.R. (4th) 321. This was cited in *Endean v. Red Cross Society* (2002), 36 B.C.L.R. (3d) 350 at para. 27, 148 D.L.R. (4th) 158 (S.C.); rev'd on other grounds (1998), 48 B.C.L.R. (3d) 90, 157 D.L.R. (4th) 465 (C.A.), appeal to S.C.C. discontinued Jan 29, 2000. See Wildsmith, *supra* note 62 at 176–7. Compare *Anderson v. Wilson* (1998), 37 O.R. (3d) 235, 156 D.L.R. (4th) 735 (Div. Crt.) [*Anderson* (Div. Crt.) cited to O.R] where the Divisional Court disagreed with the above proposition's universal applicability, saying at 246: "there are enough complicated issues to manage in this case already without turning [this case] into an experimental laboratory for fundamental change in the law of tort."

72. *Anderson*, *supra* note 1.

73. Martin Boodman, "The Malaise of Mass Torts" (1994) 20 Queen's L. J. 213 at 244. He argues at 241 that *Sutherland v. Canadian Red Cross Society* (1994), 17 O.R. (3d) 645 at 651 (Ont. Crt. Gen. Div.) [*Sutherland*] also represents "judicial recognition that mass torts are clearly within the contemplation of the statute."

74. *Supra* note 2.

75. *Supra* note 2.

disparate private or social purposes? The equity origins of class actions and the courts' view that a purposive, flexible and case-specific approach is warranted, suggest that the substantive context should at least inform the approach to certification in each case.

Finally, perhaps the most important danger of divorcing procedure from substance is that this can permit underlying attitudes toward the substantive law and equities of the case, which in fact guide the interpretation and application of procedure, to be hidden behind the screen of procedural technicalities. A substantive contextual approach to procedural issues will force these underlying factors to be enunciated clearly, and will balance competing interests or values explicitly. In *Hollick*, the Supreme Court's decision to leave pollution prevention to ministerial review or challenges to the licences suggests that perhaps the Court believes that environmental protection and waste management are political issues. Where the competing interests are public health and environmental issues such as waste management, the balancing of competing factors (individual versus group interests, the role of courts and of legislatures,) should be done explicitly.[76] The chosen balances should not be portrayed as inevitable consequences of the procedural necessity of achieving judicial economy.[77] This masking of the true reasons for a decision is the danger of taking procedure out of its substantive context.

B. PROCEDURE IN THE ENVIRONMENTAL CONTEXT

Looking at *Hollick* primarily as an environmental case which happens to involve the class action procedure, rather than as a procedural motion that happens to involve environmental facts, would improve both procedure and substance. It would allow environmental principles to structure the discretion in the certification process, and lead to a more predictable approach that responds to the realities of the environmental sphere. An 'environmental perspective' would prevent the pretence of strictly procedural decisions forcing outcomes that appear to be substantively neutral. In other substantive areas, courts should take the relevant context-specific approach that will allow the substantive equities of the case to be served by the class action tool, and enunciate these substantive determining factors in the reasons.

The suggestion of an 'environmental perspective' is not revolutionary.[78] In other environmental cases, the Supreme Court has taken a contextual approach.

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76. *Hollick*, *supra* note 1. In addition, in its contextual approach to preferability, the Court refers to Branch's "cost-benefit analysis" (*ibid.* at para 29). An environmental approach would consider the impact of a class proceeding on the public and on the environment, and would ensure that the notions of cost and benefit are not limited to financial measures, or measures of convenience, but include the costs of unrecoverable and shared resources.

77. See Douglas Laycock, *The Death of the Irreparable Injury Rule* (New York: Oxford University Press, 1991). In this work, which assesses the role of the "irreparable injury" rule in the procedure of injunctions, Douglas Laycock emphasizes that procedural decisions can often mask hidden substantive agendas. In his analysis of the role of the "irreparable injury" rule in injunction decisions, he indicates that there are often hidden procedural and even substantive motives for claiming that this test prevails, and one of the substantive motives are the courts' "[h]ostility to the [m]erits of [the] [p]laintiff's [c]ase" (*ibid.* at 196). Hiding substantive decisions behind the "strictly procedural" approach is helpful neither to an accurate interpretation of the procedural provisions nor to the aims of the substantive law, since neither are elaborated upon expressly and openly.

78. McLaren, *supra* note 11, called for an "environmental perspective" in interpreting the substantive law of nuisance.

For example, in its 2001 *Spraytech*[79] decision, dealing with a challenge to the power of a Montreal area municipality to regulate pesticide use, the first words of the majority decision were, "The *context* of this appeal includes the realization that our common future, that of every Canadian community, depends on a healthy environment."[80] The case went on to recognize the utility and appropriateness of using the international environmental law 'precautionary principle' to guide the discretion granted to the municipalities to regulate pesticide use.[81]

The precautionary principle is particularly important where there is risk or doubt. It is therefore especially relevant at the pre-trial stage, where the court is acting on an incomplete record and dealing with uncertainty. Applied to the class action certification motion specifically, the contextual and precautionary approach taken in *Spraytech* would encourage certification in the face of doubt. Risks, particularly of permanent harm, to environmental resources could be (rebuttably) presumed to be more serious than risks of financial harm or social inconvenience. Awareness that environmental harm is often irreparable, by

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79. *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town of)*, [2001] 2 S.C.R. 241, 200 D.L.R. (4th) 219 [*Spraytech* cited to S.C.R.].

80. *Ibid.* at para 1 [emphasis added]. Indeed, the approach of the Supreme Court in *Spraytech*, in which the majority decision began by explicitly positioning the case within its environmental context, is part of a larger movement in the Supreme Court to take a "contextual" approach. In Shalin M. Sugunasiri "Contextualism: The Supreme Court's New Standard of Judicial Analysis and Accountability" (1999) 22 Dal. L.J. 126 at 127–128, Professor Sugunasiri argues that contextualism is "the Supreme Court's new standard of judicial analysis and accountability". He argues that this approach, mainly the work of Justice Wilson, mandates that law be interpreted and applied in its linguistic, historical and social context, with an awareness that different rights, laws, terms and tests have different meanings in different contexts. Most importantly, this approach requires that inherent biases and attitudes and the consideration of competing views, be clearly enunciated. It also requires that because of the necessary generality of legislation, the courts must play their role as interpreters and even persuaders when undertaking to interpret and apply vague laws. He argues that the contextual approach is equally if not more constraining than other approaches to judicial analysis and favours this development in Supreme Court jurisprudence.

81. *Spraytech, ibid.* at paras. 31 and 32 of the majority's reasons:

> The interpretation of By-law 270 contained in these reasons respects international law's "precautionary principle," which is defined as follows at paras. 7 of the *Bergen Ministerial Declaration on Sustainable Development* (1990):
>
> > In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.
>
> Canada "advocated inclusion of the precautionary principle" during the Bergen Conference negotiations. The principle is codified in several items of domestic legislation. Scholars have documented the precautionary principle's inclusion "in virtually every recently adopted treaty and policy document related to the protection and preservation of the environment". As a result, there may be "currently sufficient state practice to allow a good argument that the precautionary principle is a principle of customary international law." The Supreme Court of India considers the precautionary principle to be "part of the Customary International Law". In the context of the precautionary principle's tenets, the Town's concerns about pesticides fit well under their rubric of preventive action [footnotes omitted].
>
> There are many other environmental principles and concepts found in the ecology and environmental philosophy literature and in domestic and international legislation and caselaw, such as the polluter pays principle, the emphasis on no net loss, the long term view, acknowledgement of the limits of our understanding and control of the environment and its complex processes, and a holisitic approach reflecting the unity and interconnectedness of the environment, etc. See *e.g.* Eric T. Freyfogle, "The Ethical Strands of Environmental Law" (1994) 4 U. Ill. L.Rev. 819.

financial or other means, would lead to favouring prevention and deterrence rather than compensation. The nature of environmental harm would be central to the analysis: in *Hollick*, this would have placed the focus on the public nuisance claims, the commonality of the private nuisance claim, and the permanent injunction sought. It would lead to a more accurate assessment of the risks of leaving redress to other approaches, such as the Trust Fund or individual litigation in this case. Thus, class action certification decisions should not be treated as 'solely procedural.' Yet unfortunately, even if looked at as a 'solely procedural' decision, *Hollick* is still flawed as a ruling on class action certification requirements.

III. *Hollick* as a Class Action Certification Decision

THE ENTHUSIASM OF ENVIRONMENTAL GROUPS[82] for the *Hollick* decision may be due to the Court's generous approach to several of the certification requirements. It reaffirmed that the cause of action test in section 5(1)(a) *CPA* is not a review of the merits.[83] Its test for an identifiable class in section 5(1)(b) simply requires objective criteria and must result in a class that "is bounded (that is, not unlimited)."[84]

It also set fairly simple requirements for basic commonality.[85] An issue is common if it is both "necessary to [and] 'a substantial...ingredient' of each of the class members' claims."[86] The court should certify if this "will avoid duplication in

82. Sierra Legal Defence Fund intervened on behalf of the Friends of the Earth, the West Coast Environmental Law Association and the Canadian Association of Physicians for the Environment. See Friends of the Earth, News Release, "Friends of the Earth Welcomes Supreme Court Decision on Keele Dump Class Action Despite Dismissal" (18 October2001), online: <http://www.foecanada.org/media/011018.htm>: "The Supreme Court lays out a clear road map for using a powerful legal tool in protecting the environment and public health. We welcome their decision on this appeal because it opens the door for environmental class actions....The decision is timely in the face of federal and provincial governments' refusal to enforce their pollution laws and their growing reluctance to make new laws to protect the environment and citizens. Organizations like Friends of the Earth and all Canadians need this road map for environmental class actions to hold corporations and governments accountable for local and widespread environmental damage." This identifies an instrumental role for courts as stopgaps when other branches of government are failing in their "traditional" duties. See also Sierra Legal Defence Fund, News Release, "Supreme Court Leaves Door Open to Environmental Class Actions" (18 October 2001), online: <http://www.sierralegal.org/m_archive/pr01_10_18.html>.

83. *Hollick*, *supra* note 1 at para. 16.

84. *Ibid.* at para. 17. The Divisional Court found identification of a class to be the barrier in this case (*Hollick* (Ont. Div. Crt.) *supra* note 1 at 480).

85. The Court of Appeal found this to be the barrier in this case: *Hollick* (C.A.), *supra* note 1 at para. 34.

86. *Hollick*, *supra* note 1 at para 18.

fact-finding or legal analysis,"[87] achieving judicial economy.[88] In *Hollick*, the Court concluded that "if each of the class members has a claim against the respondent, some aspect of the issue of liability is common."[89] Every member would at least have to show that the landfill emitted the pollutants.[90] There was a "rational connection" between this common issue and the class definition.[91] The Court separated the question of whether there are common issues from whether they predominate. However, the promise of this generous approach to commonality was negated by the Court's approach to predominance and preferability, which allowed the common issues to be swamped by the individual ones.

One of the most significant implications of *Hollick* as a general certification decision is that the Court effectively amended the *CPA* by interpretation, reintroducing the 'predominance' test, and overriding the express intentions of the Ontario legislature that common issues need not predominate. The *CPA* intentionally differs from the American and British Columbian approaches in order to

87. *Ibid.*

88. *Ibid.* at para. 14. Disagreeing with the Court of Appeal, the Court also helpfully confirmed that class actions are not intended solely for single incident or single product cases. The Court of Appeal was of the view that "[w]e are not dealing with a plume that enveloped a neighbourhood for a defined period where, upon proof of the event, it can be assumed that everyone was similarly affected by a legal nuisance," (*Hollick* (C.A.), *supra* note 1 at para. 21). Since the interferences varied over time and place, and were affected by the weather, proximity and the subjectivity of odour complaints, "[e]very incident complained of would have to be separately examined together with its impact upon every household and a conclusion reached as to whether each owner or occupier had been impacted sufficiently that a finding of nuisance is justified" (*ibid.* at para. 22). Yet the main difference between *Hollick* and single incident cases is that in the latter, *causation* is clearer and more certain. The causation problems of multiple sources and causes of harm and the accompanying uncertainty have been factors in refusing certification, possibly explaining the difference between certifying actions for breast implants (see *Bendall*, *supra* note 37) or hepatitis B infection from blood, (see *Anderson*, *supra* note 1) while refusing certification in the cases of HIV from blood transfusion (see *Sutherland*, *supra* note 73). The causation issue in environmental torts has been canvassed in Boodman, *supra* note 73. Yet the Supreme Court states in *Hollick* that the former rules were adequate to deal with simple group actions and the *CPA* was necessary to allow the courts to deal with the increasingly complex cases of the modern world, expressly including environmental harm. This suggests that the class action procedure should stretch to deal with cases that are not the usual ones where causation and the definition of the class are obvious. Even if this view is not adopted, from a practical point of view, causation would have been greatly simplified in *Hollick* if the Court had certified in order to determine whether all of the pollution did originate from the landfill. The case would then be a single cause case, simplifying causation and liability.

89. *Hollick*, *supra* note 1 at para 19.

90. *Ibid.*

91. *Ibid.* at para. 20.The Supreme Court in *Hollick* did say that in cases where the relationship between the common issue and the class definition is not clear, this will not bar certification because the plaintiff can attempt to *prove* commonality. Indeed, the complaints record in *Hollick* was held to satisfy this requirement, suggesting the Court believed the class had shown causation in fact. The Court's comment that "[s]ometimes the complainants are identically situated vis-à-vis the defendants. In other cases, an important aspect of their claim is common to all complainants," indicates it was aware that the class action was intended to cover cases where only "an important aspect" is common, not identical (*ibid.* at para. 26).

make class actions more readily available.[92] Although the Chief Justice acknowledged this, admitting that "the Act contemplates that class actions will be allowable even where there are substantial individual issues"[93] and "requires only that a class action [is] the preferable procedure for 'the resolution of common issues,'"[94] she "would not place undue weight"[95] on the use of this phrase. She found that, because "I cannot conclude...that the drafters intended the preferability analysis to take place in a vacuum,"[96] therefore "[t]he question of preferability... must take into account the importance of the common issues in relation to the claims as a whole. ...There must be a consideration of the common issues in context."[97]

Having reintroduced the predominance requirement to Ontario, however, the Court's decision really turns on its finding that available alternative procedures to the class action were adequate to achieve access, judicial economy and behaviour modification.[98] In achieving access to justice, class actions are often found useful where complexity and expert scientific evidence make conflicting findings likely and individual litigation virtually impossible to afford, such as in medical malpractice or defective products cases.[99] While these barriers also plague environmental litigation, the Court in *Hollick* found that small claims would be covered by the Trust Fund, and those larger than the Fund's $5,000

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92. As seen in footnote 18, *supra*, and accompanying text, predominance is required in damage class actions under American Rule 23(a)(2), 28 U.S.C.A. § 23 (West 1992). The B.C. Act makes predominance *one* consideration in deciding preferability: (para 27). Subsection 4(2) of the B.C. *CPA*, *supra* note 54 provides:

> In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> (a) whether questions of fact or law common to the members of the class *predominate* over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means. [Emphasis added].

93. *Hollick*, *supra* note 1 at para. 30.
94. *Ibid.* at para 29.
95. *Ibid.*
96. *Ibid.* at para. 30.
97. *Ibid.* The Chief Justice simply quoted and expressly endorsed Branch's interpretation that a cost-benefit analysis is necessary to determine whether the class action is the preferable procedure in a given case. The Court also followed the view of the Attorney General's Advisory Committee that "preferability" has two meanings: "whether or not the class proceeding [would be] a fair, efficient and manageable method of advancing the claim", and whether the class action is "preferable to other procedures such as joinder, test cases, consolidation and so on." (*Ibid.* at paras. 28 and 29).
98. In *Hollick*, the existence of the Small Claims Trust Fund coloured the Court's findings on all three of these goals, as did the nature of the harm in this case, as will be seen in the section dealing with the Trust Fund below.
99. See *e.g. Nantais*, *supra* note 19 and *Bendall*, *supra* note 37.

individual recovery cap could be "sufficient incentive for individual action."[100] The availability of the Fund was also central to the analysis of the goal of behaviour modification, since whether a claim is made through the Fund or by way of individual action, the landfill "will be forced to internalize the costs of its conduct,"[101] making a class action unnecessary.

The reasoning regarding the preferability of class actions to achieve judicial economy is where the predominance test becomes truly active. This is also the most damaging part of the decision because it is less specific to the unique facts of this case and suggests that private nuisance claims will rarely be certified. Since the noise and pollution were not evenly distributed over time or space, and since some members were closer to other sources of pollution, the Court found that "[o]nce 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."[102] Yet if the case had been certified in order to determine causation and liability, this might have led to findings that would justify the requested injunction, and might also have simplified the damage claims if the landfill was found to be the cause of all the pollution.[103] Failing to certify necessitates rehearing the evidence of causation and liability in each case. Thus, by reintroducing predominance into the Ontario preferability test, the decision is questionable even as a 'solely procedural' decision, setting an unfortunate precedent for class actions in various substantive areas.[104]

But the real difficulty with *Hollick* as a certification decision, and perhaps the real reason for emphasizing the individual issues throughout, is that the Court still seems to see the class as a kind of legal fiction: simply a device to facilitate individual compensation, not really an entity seeking environmental protection, nor as a legal procedure appropriate to adequately reflect and vindicate shared interests. This affected the Court's approach to all aspects of the certification decision.

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100. *Hollick*, *supra* note 1 at para. 33. The provincial compensation scheme was viewed as providing adequate access in *Sutherland*, *supra* note 73, yet a similar programme in *Rumley*, *supra* note 2 did not prevent certification. The motions judge in *Hollick* found that relegation of claims to the Fund would thwart both access and judicial economy (*Hollick* (Motions Court), *supra* note 1). For a discussion of recovery funds as alternatives to class actions, see James Sullivan, "Preferable Procedure: What do *Hollick* and *Jericho* tell us about Alternative Compensation Programs?" (Paper presented to the The Litigators' Conference, Toronto, January 24–25, 2002). See also *supra* note 56; *infra* notes 147 and 174.

101. *Hollick*, *supra* note 1 at para. 34

102. *Ibid.* at para. 32.

103. If other sources or particular plaintiff sensitivities were found in some cases, the class could be redefined more restrictively. In *Western*, *supra* note 2, while the existence of a fiduciary duty to the investors was shared, the class was certified notwithstanding the fact that the individual reliance by each member, and the amount of financial loss suffered, varied.

104. The Supreme Court's emphasis on preferability is also problematic because this is the certification element with the greatest scope for discretion. The three disparate goals allow for so much flexibility that courts can use the procedure to innovate or to stifle progress in the substantive law. Extensive discretion also puts the focus on the philosophies and predispositions of judges. This is particularly important in environmental law which requires balancing environmental values with competing social and economic interests. This discretion must be structured by the principles and doctrines of substantive environmental law, as argued in Part II above. A contextual environmental approach would help alert the court to the relevant values and competing interests, and encourage it to enunciate any views or predispositions affecting the exercise of the considerable discretion on the certification motion.

Despite the low threshold for identifiable class and commonality, for example, the Court's tests for these factors focus on the connections between what are still perceived as primarily individual claims. Approaching the case as an environmental decision, rather than as a simple procedural motion, might have enhanced the perception of the class as an entity with a united purpose.[105]

IV. The Decision as an Environmental Action

HAD THE COURT APPROACHED *HOLLICK* primarily as an environmental action, it would also have focused more on the intended connection between the class action procedure and the environmental legislation, specifically the public nuisance action in section 103 of the *EBR*. It would also have been inclined to refer to environmental case law. It might also have focused more on prevention than on compensation, resulting in a very different decision.

A. STATUTORY ACTION: THE PUBLIC NUISANCE ACTION IN THE EBR

The section 103(1) *EBR* action for public nuisance permits individuals who have suffered "a direct economic loss or direct personal injury as a result of a public nuisance" to bring an action without requiring the consent of the Attorney General or having to show special damage different from that suffered by others.[106] The

105. While details on the nature of the class in *Hollick* are not made clear in the decisions, it seems that there were several overlapping groups of local residents who opposed the landfill, including the Vaughan CARES group. There would also doubtlessly have been a range of plaintiff interests. First, concern would likely have varied according to physical proximity to the landfill site. In addition, there would have been concern over reduced land values because of the landfill, and this would have been partly relevant to the claim for compensatory financial damages. However, the claim for punitive damages and an injunction suggest that there was also a strong interest in stopping the pollution (personal communication with David McRobert, Counsel for the Intervenor, Ontario Environment Commissioner, Feb. 18, 2003). Apart from the specific nature and interests of the class in *Hollick*, however, my more general point is that the Supreme Court's excessive focus on individual damage claims to the exclusion of the more collective punitive damage and injunction remedies unduly restricts the potential of environmental class actions to vindicate shared environmental concerns and interests. While many class actions are simply to recover financial damages for past harm, in the environmental context the court should at least inquire as to whether the broader goal of behaviour modification is the most important, or at least an equally important, concern of the plaintiff class.

106. In *Hollick* (C.A.), *supra* note 1 at para. 30, the Court of Appeal refers to *EBR* s. 103(1) as having "eliminated the need to proceed by way of relator proceedings for a claim based on public nuisance." *EBR* s. 84 permits an action for existing or imminent "significant harm to a public resource of Ontario." Saxe notes that it is "designed to remedy injuries to the general public welfare and not to protect any private interests" (individuals cannot receive compensation), yet this suit cannot be brought by way of class action. She calls this "a new civil cause of action of illegal environmental harm". Dianne Saxe, *Ontario Environmental Protection Act Annotated*, looseleaf (Aurora, Ont.: Canada Law Book, 2003) at *EBR*-64, *EBR*-84. Faieta *et al.* argue that the Ontario Law Reform Commission suggested that actions under *EBR* s. 84 should be open to the class action procedure (Cochrane agrees that this was the view of the Attorney General's Advisory Committee on Class Action Reform as well), and that it is likely that the business lobby succeeded in persuading the government to add this restriction due to fear of the power it would give to environmentalists and the consequent threat to corporate interests. Yet if this is true, it strengthens the argument that courts have a role to play in this area, both in terms of permitting the common law to fill gaps left by regulation, and allowing individuals and groups to counteract this inequality in political influence, in the arguably more neutral forum of the court. It also reveals the view that the class action is a powerful weapon in the hands of environmentalists and explains in part why the class in *Hollick* chose to proceed in this way. Faieta, *supra* note 27 at 360–61.

Supreme Court made no reference to the public nuisance action in section 103 of the *EBR*, even when summarizing the reasons of the Court of Appeal, which dealt with this issue at some length.[107]

The Court of Appeal said the action could and perhaps should be brought as a public nuisance action, but by Mr. Hollick alone:

> [T]he plaintiff may prove that there are a sufficient number of private nuisances to justify a finding of public nuisance. This would presumably lead to some form of injunctive relief and, perhaps, damages to the plaintiff for his private nuisance claim. If the emissions are as troublesome as the plaintiff alleges, it should not be too difficult to call witnesses in his neighbourhood to prove a "sufficiently large collection of private nuisances" to justify relief.[108]

This was not the same as bringing a class action for private nuisance. Private and public nuisance were

> alternative avenue[s] for relief. ... [C]hanging the label from private to public nuisance doesn't provide an alternative justification for a class action. If the individual claims for liability to damages of the members of the class are to be asserted then there must be a common issue which will advance the litigation and, as stated, I do not see one.[109]

By refusing certification of the statutory public nuisance action, the Supreme Court effectively denied the plaintiffs this environmental right of action which the legislature intended them to have and to be able to enforce by way of class proceedings. The Supreme Court granted the request of the Environmental Commissioner of Ontario for intervenor status to address the "interrelationship between s. 103 of the *Environmental Bill of Rights* and the *Class Proceedings Act, 1992*."[110] The Commissioner emphasized that the Task Force on the *EBR* saw "the class proceedings reform as an integral part of an Environmental Bill of Rights."[111] He noted that "[t]he Ontario Government recognized that class action reform was an integral part of environmental reform, given the very nature of environmental claims,"[112] emphasizing their scope, complexity and resultant cost. He asked the Supreme Court to address the Court of Appeal's decision in *Hollick*, which divorced the public nuisance action from the class action procedure.[113] However, these submissions were not included in the Supreme Court's reasons. Class counsel indicates that:

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107. *Hollick*, *supra* note 1 at paras. 9–10.
108. *Hollick* (C.A.), *supra* note 1 at para. 32.
109. *Ibid.* at paras. 32–33. Yet are the existence of "troublesome emissions" and the "largeness" of their collection not common issues that would benefit from class treatment?
110. ECO Factum, *supra* note 8 at para. 3.
111. *Ibid.* at para. 20, citing Ontario, Environment Ministry, *Report of the Task Force on the Ontario Environmental Bill of Rights* (Queen's Printer for Ontario, 1992) at 90. The ECO Factum, at para 31 cited as evidence the fact that *EBR* s. 84(7) expressly prohibits the action for harm to a public resource permitted by that section to be brought as a class proceeding.
112. *Ibid.* at para. 25. At para. 39, the ECO Factum also recognizes that not all *EBR* s. 103 claims will meet the certification requirements, but that if they do, the fact that they could be brought individually under s. 103 should not preclude certification.
113. *Ibid.* at paras. 35–40.

> The court ... confused the character of the plaintiff's action, which was one for public nuisance under environmental statutes, and not private nuisance. By refusing the plaintiffs access to their remedy, ... the court effectively denied the group something for which the environmental statute was precisely designed – giving aggrieved groups a remedy for public nuisance using the wide ambit and relaxed costs rules of the *CPA*.[114]

It is puzzling that the Court would grant leave to intervene on this issue and then fail to refer to the submissions in any way.[115] While courts often argue in the environmental context that policy is for other branches of government, this decision suggests that courts can frustrate legislative intent by means of a restrictive approach to class actions for toxic torts. While the legislature did assign waste management to a detailed administrative system, justifying reasonable curial deference, it also enacted class action procedures, suggesting that this waste management system is subject to judicial challenge, and by means of the powerful tool of group proceedings.

B. ENVIRONMENTAL PRECEDENTS

The view that *Hollick* was not treated as an environmental decision is reinforced by the fact that the Supreme Court did not identify or investigate the environmental harm alleged. In particular, it did not look at the cumulative harm, preferring to see this as an amalgamation of individual claims for compensation. Lack of environmental consciousness also led the Court to restrict its precedents to non-environmental class action certification decisions, and to ignore environmental nuisance or landfill cases.[116] These precedents would have demonstrated options to the Court that were not seized upon.

Although there have been few environmental class actions in Canada, there are cases in Quebec[117] and there have been recent decisions in Ontario;[118] yet the Court referred to none of these. Quebec courts were reluctant to certify

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114. Michael Fitz-James, "Using Common Law Nuisance in Environmental Class Actions" *Law Times* (12 June 2000) 15. This was written prior to the Supreme Court decision.
115. Interview of Kirk Baert, *supra* note 55.
116. *Hollick*, *supra* note 1 at paras. 21, 23–24. There are few Canadian environmental class action precedents (see Branch, *supra* note 3), although there is a significant body of American ones (see generally Newberg, *supra* note 18; Roger Cotton, Adam R. Brebner & Clara L. Clairman, "Environmental Class Actions: The Revenge of the Neighbourhoods" in *Mass Tort Litigation* (Toronto: Insight Press, 1998) 95 at 100; Simon Chester, "Class Actions to Protect the Environment: A Real Weapon or Another Lawyer's Word Game?" in John Swaigen, ed., *Environmental Rights in Canada* (Toronto: Butterworths, 1981) 60 at 78–92).
117. Again, while the Supreme Court may have felt there were significant differences between the Ontario and Quebec legislation, it did not cite this as a reason for failing to refer to this body of particularly relevant precedent.
118. See the Walkerton case, *supra* note 32; *Cotter v. Levy*, [2000] O.J. No. 1086 (Sup. Ct.), Crane J. (QL) (certification refused with leave to bring amended certification motion) [*Cotter*]; [2000] O.J. No. 3287 (Sup. Ct.), Crane J. (QL) (certification granted) [*Cotter* (Crane J.)]; *Pearson v. Inco Ltd.*, [2002] O.J. No. 2764 (Sup. Ct.), Nordheimer J. (QL) [*Pearson*] (and prior rulings in case: (2001), 57 O.R. (3d) 278, [2001] O.J. No. 4877 (Sup. Ct.) (QL); (2002), 42 C.E.L.R. (N.S.) 273, [2001] O.J. No. 4950 (Sup. Ct.) (QL); (2002) 16 C.P.C. (5th) 151, [2001] O.J. No. 4990 (Sup Ct) (QL); [2002] O.J. No. 73 (Sup. Ct.) (QL); [2002] O.J. 1842 (Sup. Ct.) (QL); [2002] O.J. 2134 (Sup. Ct.) (QL); [2002] O.J. 2123 (QL)).

environmental cases in the early days of the class action law in that province,[119] but this changed as a result of the groundbreaking decision in *Alcan*.[120] In that case, 2,400 local residents sued Alcan for air pollution from one of its port installations, based on the civil law claims of fault, abuse of rights and negligence. Only compensatory damages were sought. The Court held that:

> [T]he basis of responsibility of all of the claims of the members is the same—the port operations operated by respondent. Many of the questions of fact would appear to be the same, as are many of the issues of law.
>
> Doubtless, there are differences in the consequences caused by pollution to the individual members and their houses and the damages may vary from case to case. But surely the proof of responsibility would be similar in each case, as would many of the grounds of defence.
>
> The principal differences between the claims would relate to the damages suffered by the individual members, although even here, there may be some categories of damages that are similar.[121]

The often-quoted finding from this case heralds the view that class actions for damages are particularly well-suited to environmental law:

> The class action recourse seems to me a particularly useful remedy in appropriate cases of environmental damage. Air or water pollution rarely affects just one individual or one piece of property. They often cause harm to many individuals over a large geographic area. The issues involved may be similar in each claim but they may be complex and expensive to litigate, while the amount involved in each case may be relatively modest. The class action, in these cases, seems an obvious means for dealing with claims for compensation for the harm done when compared to numerous individual law suits, each raising many of the same issues of fact and law.[122]

Since *Alcan*, Quebec courts have been very amenable to certifying environmental class actions.[123] There has also been some recent progress in environ-

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119. Art. 1003 C.C.P.:
> The court authorizes the bringing of the class action and ascribes the status of representative to the member it designates if of opinion that:
> (a) the recourses of the members raise identical, similar or related questions of law or fact;
> (b) the facts alleged seem to justify the conclusions sought;
> (c) the composition of the group makes the application of article 59 or 67 difficult or impracticable; and
> (d) the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately.

120. *Comité d'environnement de la Baie Inc. v. Société d'electrolyse et de chimie Alcan Ltée*, [1990] R.J.Q. 655, 6 C.E.L.R. (N.S.) 150 (C.A.) [*Alcan* cited to R.J.Q.]. On environmental class actions in Quebec, see generally Jutta Brunnée, "Individual and Group Enforcement of Environmental Law in Quebec" (1992) 41 U.N.B.L.J. 107; Cotton *et al.*, *supra* note 116.

121. *Alcan*, *ibid.* at 660.

122. *Ibid.* at 661. The last sentence suggests that this approach may be limited to damage class actions for past harm, although this may not have been the intention, and may have resulted from the facts of that case.

123. Cotton *et al.* indicate that, "Since the *Alcan* judgment...certification of environmental class actions in Quebec has become almost a matter of course." *Supra* note 116 at 103.

mental class actions in Ontario. In addition to the class action settlement in the Walkerton case,[124] an environmental mass tort case arising from an industrial fire was certified in *Cotter v. Levy*.[125] Air and water pollution were alleged, and the claims were in "negligence, nuisance and breach of statutory duty, pursuant to section 99 of the Environmental Protection Act."[126] Certification was initially refused because the class was too large and vague, and the claims required fine-tuning, but leave was granted to bring an amended certification motion. The class was subsequently certified, despite what were in the judge's view "the serious difficulties in conforming a mass action tort to class proceedings," with three subclasses, geographically defined.[127] The common issue was "whether the defendants or any of them are liable to the plaintiffs or any of them upon the causes of action and the material facts pleaded."[128] Again, complex facts, multiple defendants and causes of action, and varying individual harm did not preclude certification.[129]

Thus, an 'environmental perspective' in *Hollick* may have caused the Supreme Court to consider and perhaps be influenced by the reasoning of other courts in environmental class actions. Another benefit of seeing the case in its environmental context would have been to put the emphasis on the shared nature of environmental harm, and focus on the more common or public aspects of the case, particularly the injunction remedy sought.

C. REMEDIES

The Supreme Court in *Hollick* also did not consider the case law dealing with environmental nuisance cases, and landfill precedents specifically. This affected its assessment of remedies. While ongoing nuisance is commonly remedied by both an injunction to prevent further harm, and damages to compensate for past harm, neither of these remedies was awarded in *Hollick*. Indeed, the Court made virtually no mention of the injunction sought and left compensation to the Small Claims Trust Fund or individual actions.[130]

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124. *Supra* note 32.
125. *Cotter* (Crane J.), *supra* note 118.
126. *Ibid.* at para. 14.
127. Cotter, *supra* note 118 at paras. 10, 14.
128. The public notice to the class summarized the action as follows: "This lawsuit is to determine whether any of the named defendants can be held legally liable for the Plastimet fire and for any damage that can be proven to have arisen as a result of it. If any of the named defendants is held liable for any damages as a result of the Plastimet fire, then individual class members will have to come forward and provide proof supporting their individual claim." *Cotter* (Crane J.), *supra* note 118 at paras. 17, 30.
129. The Court suggested to counsel how to structure a claim in nuisance in any amended certification motion: *Cotter*, *supra* note 118 at paras. 26–30. Unfortunately, in *Pearson*, *supra* note 118 (decided since this article was written), certification of a damages class action was refused. The Inco refinery in Port Colborne was alleged to have produced toxic and hazardous emissions on a continuous and long-term basis. The class based its claims on negligence, *EPA* s. 99 and *EBR* s. 103, and sought an injunction as well as compensatory and punitive damages. The Court referred to the Supreme Court's decision in *Hollick* on several occasions and refused certification primarily because a class action was not the preferred means of resolving the matter.
130. *Hollick*, *supra* note 1 at paras. 33–34.

1) Injunction Remedy

> [T]here is inherent in the action for private nuisance a flexibility of concepts which allows for the injection of the environmental perspective. *The cardinal question, however, in determining whether this cause of action is a viable means of bringing an environmental suit is whether the courts will be willing to utilize the injunctive remedy.* In most instances the purpose of environmental litigation will be to seek an improvement in the environment in which the plaintiff and his neighbours live. The most satisfactory way of achieving this is to persuade the court to restrain the defendant from conducting his operations in such a way as to cause pollution. By grant of a perpetual prohibitory injunction direct pressure is brought upon the offender to seek ways of obviating the pollution which he is causing, and if he fails to comply his enterprise may be curtailed entirely. It may be argued that the same result can be achieved, albeit indirectly, through the award of damages. This assumes, however, that the damages awarded are high enough to cause the industrialist to consider changing his *modus operandi*. If the damages are modest he may look upon them as a licence to continue pollution. If this is allowed to happen then the environmental interest is effectively subverted.[131]

The fact that the Court viewed this as a collection of individual claims for compensatory damages, rather than as a shared interest in protecting the environment, is seen most clearly in its cursory treatment of the claim for an injunction. The decision did not assess and clarify the role of this powerful tool in pollution prevention, and its treatment of this remedy was not only cursory, but doctrinally incorrect.

In *Hollick*, the decision on the injunction remedy was made in the Motions Court. The motions judge merely cited the 1886 case of *London & Blackhall Railway v. Cross*[132] to find that "[t]he tradition[al] rule is that an injunction will be granted only where damages would provide an inadequate remedy."[133] Given that the injunction "is a flexible and drastic remedy" and given the "extensive environmental hearings, followed by a Certificate of Approval which was restrictive, and involved considerable supervision" in *Hollick*, an injunction was refused because "[a] more appropriate remedy may be in the form of an application to set aside the Certificate of Approval or cancellation of the licence."[134] The Supreme Court's only reference to the injunction was to state that the motions judge

131. McLaren, *supra* note 11 at 547 [emphasis added].
132. (1886), 31 Ch. D. 354 at 369 (C.A.) [*London & Blackhall Railway*].
133. *Hollick* (Motions Court), *supra* note 1 at 61.
134. *Ibid.*

"struck out the appellant's claim for injunctive relief on the ground that damages would be a sufficient remedy."[135]

2) Injunction Principles

The single case of *London & Blackhall Railway* is a poor precedent for the *Hollick* situation on several levels. It dealt with whether to enjoin an individual from going to arbitration in the name of a ferry company where his authority to act for it was doubted, or allow him to proceed and pay costs if his authority was found lacking. This is neither an environmental nor a nuisance case, nor one where any harm other than financial was even at risk. It also dealt with an anticipatory wrong, and a single, rather than a continuing, wrong. More broadly, the rule in support of which it is cited–that there will be no injunction if damages are an adequate remedy–is only a partial statement of the law of injunctions. In fact, "if the wrong is of a continuing or recurring nature then damages alone will not be viewed as the proper remedy."[136]

Exceptions to the rule that an injunction lies to prevent future harm involve cases where *equitable* damages *in lieu of* an injunction are warranted on the facts.[137] In the well-known case of *Shelfer v. City of London Electric Lighting Co.*, Smith L.J. set out the four requirements for when equitable damages can be substituted for an injunction, namely:

(1) if the injury to the plaintiff's legal rights is small,
(2) and is one which is capable of being estimated in money,
(3) and is one which can be adequately compensated by a small money payment,
(4) and the case is one in which it would be oppressive to the defendant to grant an injunction.[138]

In that case, the injunction was granted, as the facts did not meet the test. Lindley L.J. also set out the kinds of circumstances in which damages should be substituted, which include vexatious cases, cases where the wrong is not continu-

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135. *Hollick*, *supra* note 1 at para. 7. The plaintiff also claimed $100 million in punitive damages, which are another mechanism of punishment or behaviour modification relating to callous and deliberate behaviour: see Faieta, *supra* note 27 at 298. They were granted in the landfill case of *Nippa*, *infra* note 140, where the operator's behaviour was particularly objectionable. In *Hollick* (Motions Court), *supra* note 1 the motions judge held that liability for punitive damages was a common issue. The Supreme Court did not address it. The details of punitive damages law are beyond the scope of this paper, and the record of the Keele Valley landfill site suggests that punitive damages might not be appropriate. However, it is interesting that the motions judge found that there had been pollution which might even warrant punitive damages, but did not warrant being stopped, at least not by means of judicial decision in a common law case, a contradictory position on the role of courts in environmental law.

136. Faieta, *supra* note 27 at 270.

137. See *Chancery Amendment Act, 1858* (U.K.), 21 & 22 Vict., c. 27, s. 2 [*Lord Cairns' Act*], which permitted the Court to grant damages in addition to, or in lieu of, an injunction. McLaren, *supra* note 11 at 549, explains that the Act's effect "was to extend the notion of damages in nuisance to cover *prospective* loss" [emphasis added].

138. [1895] 1 Ch. 287 at 322-23, [1891-4] All E.R. 838 (C.A.) [*Shelfer* cited to Ch.].

ing, "trivial and occasional nuisances," or cases where the plaintiff only wants money or has conducted himself or herself improperly.[139]

However, *Hollick* made no reference to *Shelfer* or to *McKie v. K.V.P. Co. Ltd.*,[140] a case involving pollution of the Spanish River in Ontario by a pulp and paper mill, interfering with riparian rights. Several plaintiffs had slightly differing interests in the water, and each received different amounts of damages, but an injunction was also granted, all based on the finding that the defendant did commit the nuisance of polluting the river. Upon appeal, the Supreme Court held that, in cases of pollution, damages are not an adequate substitute for an injunction. This recourse to the *unique nature* of environmental issues to justify particular approaches to substantive and procedural law is echoed by McLaren. He argues that restrictive approaches to injunctions, based on the "judicial mercantilism" of the early twentieth century decisions, are no longer appropriate in the *context* of environmental law, since "[t]he dangers of unabated pollution are only too apparent, the technological aids to control are available, and social values today increasingly reflect the desire to compensate for the tragic excesses of rampant industrialization by restoring the quality of the environment."[141]

3) Injunction Precedents in Landfill Cases

Injunctions for nuisance have been granted in many pollution cases, several involving landfills, yet none were referred to in *Hollick*. In *Still v. St. Vital (Rural Municipality of)*,[142] the municipality heaped garbage beside a river in a residential area, causing local odours and pest problems. Accepting evidence of nuisance, the

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139. *Ibid.* at 317. The *Shelfer* test created debate as to whether harm to the defendant and community should be considered when choosing between an injunction or equitable damages. *Canada Paper Co. v. Brown* (1922), 63 S.C.R. 243, 66 D.L.R. 287, highlights this debate most clearly, as Idlington J. indicated that the courts must protect individual property rights against encroachment, even for community interests, while Duff C.J.C. believed the impact of an injunction on the defendant and community was relevant. See case law cited in Faieta, *supra* note 27 at 269–78; William Charles & David VanderZwaag, "Common Law and Environmental Protection: Legal Realities and Judicial Challenges" in Elaine L. Hughes, Alastair R. Lucas & William A. Tilleman, eds., *Environmental Law and Policy*, 2nd ed. (Toronto: Emond Montgomery Publications, 1998) 79; McLaren, *supra* note 11 at 554–560. In *A.G. v. Birmingham*, which predated *Lord Cairns' Act*, municipal sewers, required by Act of Parliament, were found to be a continuing nuisance, and an injunction was ordered so that affected landowners would not have to bring repeated suits for damages after each harm. If the public works could not be performed without committing nuisance, Parliament would have to be approached to permit the interference with private rights: *United Kingdom (A.G.) v. Birmingham (Council of the Borough of)* (1858), 70 E.R. 220 (Ch.) at 225-26. McLaren, *supra* note 11 at 548, cites this as one of the leading examples of "[t]he English tradition in granting injunctive relief [which] reflects very clearly a nineteenth century socio-economic philosophy which stressed the sanctity of individual rights." See generally McLaren's analysis of the competing approaches to injunctions at 547–60. The irony of this reliance on individual private rights to foster public interests in environmental law will be dealt with below.

140. [1948] O.R. 398, 3 D.L.R. 201 (H.C.), aff'd [1948] O.W.N. 812, [1949] 1 D.L.R. 39 (C.A.), aff'd [1949] S.C.R. 698, 4 D.L.R. 497.

141. McLaren, *supra* note 11 at 556.

142. [1925] 2 W.W.R. 780 (Man. K.B.).

court granted nominal damages[143] and a mandatory injunction, with little analysis, suggesting this was not a surprising or innovative result. In *Plater v. Collingwood (Town) et al.*,[144] a resident in a primarily rural and agricultural area suffered damage from the nuisance caused by the burning of garbage at a new local dump. He was granted an injunction[145] even though the court expressly recognized that the odours and fumes were intermittent due to changing weather conditions, and that some residents were more affected than others.[146] In *Wiebe*,[147] an injunction against continuing nuisance from a landfill was granted. The court used graduated analytical steps, first assessing whether there was a nuisance; then any defences; and only then the appropriate remedy, starting first with an injunction before considering damages.[148] This approach in *Hollick* would have facilitated a finding that a class action was the preferable approach for assessing nuisance, defences, and the injunction. Only the last consideration, damages, might be better determined by individual actions, which would be greatly simplified by the findings on the other issues.[149]

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143. There is no indication as to why this action was brought by a single plaintiff, or the extent of the interference with others in the residential neighbourhood, though the court makes reference to "what many of the other witnesses have said." However, the award of the mandatory injunction provided a remedy, though not damages for past harm, to the entire neighbourhood. The court also says that "the plaintiff has not proven special damages," suggesting that this was a private, not a public, nuisance action (*ibid.* at 781).
144. [1968] 1 O.R. 81, 65 D.L.R. (2d) 492 (H.C.J.).
145. To prevent this method of waste management and damages for injury to his crops and interference with enjoyment.
146. See also *Nippa v. Centre Hospitalier Lewis (Lucan) Ltd.* (1991), 7 C.E.L.R. (N.S.) 149 (Ont. Crt. Gen. Div.); supp. reasons at (1991), 7 C.E.L.R. (N.S.) 160, (1991) 82 D.L.R. (4th) 417 at 431 (Ont. Crt. Gen. Div.), which was unique in that the landfill site was operated with significant neglect for over 13 years, despite repeated complaints and adverse findings, distinguishing it from *Hollick*. The plaintiff was awarded an injunction as well as both compensatory and punitive damages despite the intermittent but ongoing nature of the interference. At 426: "Without question the plaintiffs are entitled to relief. They are entitled to injunctive relief because damages alone are not adequate and they are entitled to damages." In *Godfrey v. Good Rich Refining Co.*, [1940] O.R. 190, 2 D.L.R. 164, an injunction was granted against an oil refinery near the plaintiff's summer residence to stop releasing odours. Compensation for 'general damages' was not appropriate *in addition to* an injunction, as the odours were not dangerous and caused only temporary interference each separate time they passed by. Again, an isolated and sporadic, but ongoing, nuisance was enjoined. The limited evidence, such as lack of detailed records of dates, times and weather conditions when the odour was offensive, and the subjectivity of odours, made evaluation of damages very difficult, and none were granted in this case.
147. *Supra* note 33.
148. *Ibid.* At 102, the court held that there is a "public interest involved which, although not providing a defence, should not be totally ignored." It also looked at detailed facts in the case to find that it was not the landfill but how it was operated that was causing the nuisance, and held that even if improved management imposed costs on the municipality, this was no excuse for putting the cost on the individual plaintiff.
149. In terms of remedy, it was found that "[t]he plaintiff will not find a complete and adequate remedy in damages alone as long as the existing conditions continue," and an injunction was granted to stop this method of waste management and to force the government to comply with existing regulations. The injunction was suspended for sixty days to allow the municipality to make operating changes. Injunctions are often suspended for a period to allow defendants to make changes. This is another area where the effect on the defendant or community is relevant in exercising discretion on injunctions. McLaren, *supra* note 11 states at 558 that longer than average suspension periods often occur "where pollution results from community waste disposal where both technical and political considerations demand greater leeway for the polluter." Again, if the nature of the operation in *Hollick* was unique, this was not discussed as a substantive reason for decision. The plaintiffs also received damages of $2,500 for two years of past interference with enjoyment.

Thus the political nature of landfills and the intermittency of some kinds of pollution are not absolute bars to injunctions or compensatory damages. Again, had the Court in *Hollick* considered this area of precedent, the analysis and outcome would probably have changed.

4) Substituting Damages

As we have seen, sometimes injunctions are refused where equitable damages are found to be adequate substitutes. "The typical situation for the substitution of equitable damage for an injunction arises where the defendant will be put to great expense to remedy a trivial or insignificant wrong caused to the plaintiff."[150] For example, in *Daechert v. Regina (City)*,[151] the municipality's sanitary landfill and "nuisance ground"[152] resulted in escape of materials onto the plaintiffs' residential property. While the Court found that this "very real problem" did constitute a nuisance, an interim injunction was refused because the harm, having gone on for 20 years, was not irreparable;[153] the balance of convenience favoured the interests of citizens in the dump over the inconvenience to the two individual plaintiffs; and alternative statutory remedies were available, such as charging the city under provincial environmental legislation, which would result in fines.[154]

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150. Faieta, *supra* note 27 at 273. Again, if the Court's view was that the nature and severity of the harm in *Hollick* did not warrant interference, this substantive rationale should have been expressed.
151. (1984), 34 Sask L.R. 112 (Q.B.).
152. This term suggests that landfill sites are often nuisances by definition, and although much will depend on their individual methods, this should be a *substantive* contextual factor in the mind of the court. However, this admission that harm *must* result from these *necessary* waste management activities does not mean that we should cease to question this balancing of interests, or at least question the level of accepted harm and whether this accepted level should change as new technology, social norms and the state of the environment continue to change. This view that the harm in *Hollick* and in many environmental cases is a necessary or inevitable result of more important social activities is also reflected in the very existence of the Trust Fund which *anticipates* infliction of harm, as discussed at *infra* note 182.
153. Even though a previous action was stayed by settlement when the city agreed to change its operations.
154. In *Morris v. Dominion Foundries & Steel Ltd.* (1947), 2 D.L.R. 840, O.W.N. 413 (Ont. H.C.J. cited to O.W.N), equitable damages were granted for continuing interference with enjoyment of property by an iron works. The abnormally sensitive plaintiff was unique, but the case met the *Shelfer* test as the interference was not serious, could be estimated in money and compensated with a small amount thereof, while the inconvenience to the defendant of moving would be costly and the plaintiff would still suffer interference from other undertakings in the fairly industrial neighbourhood. $1,000 would therefore constitute "adequate compensation to the plaintiff" (*ibid.* at 418). See also *Manicom et al. v. Oxford (County) et al.* (1985), 21 D.L.R. (4th) 611, 52 OR (2d)137 (Ont. Div. Ct. cited to D.L.R.) in which the Joint Board's refusal to grant an application by Oxford County for a Certificate of Approval of a proposed municipal landfill was overturned by Order in Council, leaving the town and several neighbouring landowners to bring separate actions for declarations and injunctions to reverse the Order and to obtain injunctions to prevent the landfill. On appeal of a decision refusing motions to strike the actions, the majority held that an injunction was premature, and therefore granted a stay which could be lifted if the harm occurred, at 625. The dissent, finding that the decision of the Joint Board was adequate evidence of the likelihood of harm, at 626, was of the view that an injunction for anticipatory harm was available and a stay should not be granted because the harm to the landowners would be greater than the harm of delay to the county. If the landfill was allowed to proceed, the action would become one for damages for past harm, "a different kind of case" (*ibid.* at 630). As to the role of courts, the dissent stated, at 626, "[i]t is important that the county consider the welfare of the community at large, but it is the duty of the court to protect individuals from unauthorized and serious encroachments on their rights."

Equitable damages are viewed by some as buying a licence to pollute,[155] but by others as a balancing of competing interests. Where equitable damages are found *not* to be adequate substitutes for injunctions, a frequent rationale is that the role of the courts is to protect individual rights. For example, in *Stephens v. The Village of Richmond Hill* it was held that "[i]t is for the Government to protect the general welfare by wise and benevolent enactment. It is for me, or so I think, to interpret the law, determine the rights of the individual and to invoke the remedy required for their enforcement."[156] Yet there seems to be an irony in returning to the individual private rights paradigm to accomplish public environmental protection. This is necessitated by the traditional inclination of courts to equate the public interest with development and economic prosperity. Indeed, in many older cases where equitable damages were substituted, the court was claiming that the *public* interest (in economic well-being) could override *individual* property rights that would block development.[157]

By contrast, in environmental cases such as *Hollick*, the plaintiffs are trying to use their *private* property rights to protect another *public* interest—that of environmental protection—against competing public interests such as waste management. The fact that the efforts by legislatures and courts to protect the public interest in economic welfare lead to the neglect of *both* individual property rights *and* environmental protection[158] shows that what needs to change is the *definition* of the public interest, at least in the environmental context. McLaren argues that an 'environmental perspective' would allow the 'balancing of equities' approach to include the environmental public interest:

> Thus, two apparently opposing community interests must be balanced against each other, rather than matching the economic livelihood of the populace against the purely individual concern of the particular plaintiff for a more acceptable life style....[159]

Such a perspective would relieve environmentalists from having to call on individual property rights to protect shared interests in the environment.

The class action mechanism can assist the remedies analysis, whether the approach taken is that of individual property rights or the balancing of equities.

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155. See *e.g.* cases cited in Justine Thornton & Silas Beckwith, *Environmental Law* (London: Sweet & Maxwell, 1997).

156. [1955] O.R. 806 at 813 (H.C.), aff'd with variation as to damages [1956] O.R. 88. McLaren, *supra* note 11 at 556, calls on the approach of that line of cases, with its "strain of individualism," as a persuasive technique to encourage courts to use injunctions against the harms caused by industry and public works. He prefers this approach because proof of harm to private property requires no balancing and makes no allowance for the social utility of the defendant's conduct. He states that this approach can be strengthened in environmental cases "by suggesting that modern conditions and in particular the gravity of contemporary pollution problems provide a compelling policy rationale for an old dogma."

157. This is relevant in cases such as *Hollick* where the defendant is providing waste management, and even more so where the process has been officially sanctioned by government permitting and public consultation processes.

158. Faieta, *supra* note 27 at 275 states: "Both to the detriment of individual property rights and protection of the environment, some courts have taken Duff J.'s approach [in *McKie*] and have expanded the considerations set out in *Shelfer* to include the economic consequences an injunction would have for the whole community."

159. McLaren, *supra* note 11 at 556.

Where reliance is placed on individuals to enforce their private property rights, the class action can enhance access. In balancing equities, if a court cannot be persuaded that the public interest in the environment is a relevant factor, the presence of a multitude of individual plaintiffs rebalances the interests of the defendant and community, not against one individual's comfort, but the comfort and environmental concerns of tens or, as in *Hollick*, possibly tens of thousands, whole neighbourhoods and communities. Class actions are particularly useful in seeking to redefine the relevant interests in order to rebalance the scales.[160]

Since the Court in *Hollick* never determined the facts relating to the pollution, it missed the opportunity offered by *Shelfer* of finding that, while an injunction was warranted simply because there was a continuing nuisance, equitable damages should be substituted due to the relatively small nature of the harm and the public importance of the landfill. Such an analysis would have enunciated the competing interests and balanced them in a principled way. In finding that the alternative remedies of the Trust Fund or large individual damage suits are adequate to internalize costs and compel pollution reduction, the Court suggests that the effects of an injunction, i.e. stopping pollution, are necessary. In *Hollick*, even if the plaintiffs obtain damages from the Fund or individual litigation, the effect will be compensatory, not prohibitory,[161] and will constitute buying a right to pollute—a tax on environmentally harmful activity—unless they achieve full cost internalization.

This is why, as held in *McKie*, where there is pollution, damages will not be an adequate remedy, and why the decision on injunctive relief in *Hollick* requires reconsideration. The opportunity to clarify and even expand the role of injunctions in pollution abatement, with the help of class actions, was foregone without adequate analysis or explanation. Since the Court found that damages would be an adequate remedy, they have probably barred an injunction in this case, even in any individual actions. Since such actions would only recover damages, and these would likely be small, the odds of the landfill being impacted sufficiently to induce pollution reduction are as good as gone, without the Court ever having deter-

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160. *Ibid.* See also Laycock, *supra* note 77. The notion that injunctions should only be granted where damages are inadequate is also one branch of the three part test for *pre-trial* injunctions. In essence, this question is akin to asking whether the harm is irreparable, a crucial consideration in environmental cases. The third branch of the pre-trial injunction test also incorporates balancing between the harm to the plaintiff and defendant, and sometimes to the public interest. The idea that injunctions should only be granted where the harm is irreparable seems more warranted at the pre-trial stage, since the decision is preliminary and temporary, rather than in decisions as to permanent injunctions, such as the one sought here. Perhaps it is because the class action certification motion is also preliminary, and deals with the distribution of the risks, that this attitude is adopted here. However, this sense of temporariness is inappropriate in environmental cases, where decisions regarding injunctions and certifications have many final implications. Analysis of the pre-trial injunction procedure in the environmental context is part of the author's larger research agenda assessing the failures of civil procedure to grapple with the fundamental dynamics of environmental law.

161. Elizabeth J. Swanson & Elaine L. Hughes, *The Price of Pollution: Environmental Litigation in Canada* (Edmonton: Environmental Law Centre, 1990). However, "[i]njunctions are used to prohibit further wrongdoing to prevent future injury. Where damages are substituted for an injunction, the focus remains the same—that is on future harm notwithstanding that the purpose is slightly different (compensation rather than prohibition)." (*Ibid.* at 37).

mined whether the landfill was causing significant pollution and should be stopped. So, for a decision determined on 'merely procedural' grounds, the doctrinal and environmental impact is harsh and significant.

5) Compensatory Damages

By refusing the injunction, this multi-claim class action became a simple damage class action, which was not its original intention.[162] Indeed, the American rule completely separates equitable and damage class actions, and their statutory requirements for certification differ considerably.[163] In environmental cases particularly, McLaren argues that damages are less adequate because:

> [A]n injunction shows clearly that the court is serious about dealing with the root of the problem which has given rise to the plaintiff's claim. Moreover, when a court grants injunctive relief it undertakes a supervisory role in seeing that the terms of the injunction are satisfied, and thus can guarantee that the polluter takes appropriate action.[164]

Damage class actions also focus on compensation rather than behaviour modification, usually the more important factor for most environmental litigants.

Approaching *Hollick* as an environmental case would also have made it clear that damage class actions are doctrinally not ideal for environmental cases. This is primarily because they *monetarize* a kind of harm which is not only difficult to value, but which many view as irreparable by any means. McLaren claims that in balancing economic and environmental harm, the latter should be given precedence as the consequences, for example, of an operation being put out of business "...are remediable. However, pollution, by definition, has no other solution than to restrict or remove its sources. If it continues, then the sure result is further and perhaps irremediable corruption of the environment."[165] In the *Shelfer* test,[166] one of the factors is whether the injury is one which is capable of being estimated in money. In *Hollick* there was no analysis of the nature of environmental injury, or the difficulty of quantifying it.

More practically, while the class did choose to claim compensatory damages as well as the injunction, and the Court did make it clear that it believes there is merit in financial incentives as tools of environmental protection, the Court in *Hollick* put too much faith in the idea that the Trust Fund or individual actions will ensure both cost internalization and adequate compensation.[167] In addition, one

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162. The two other "trilogy" cases of *Western* and *Rumley*, *supra* note 2, both of which were certified, claimed only damages, presumably because all of the harm was past, not continuing. It is interesting to speculate whether the treatment of the three cases so close together in time played a role in downplaying the treatment of *Hollick* as a class action for an injunction. However, it is also puzzling why in those two cases where the common remedy of an injunction was not sought, the Court was more inclined to certify than in *Hollick*, where this single remedy was sought, since it is often the emphasis on quantification of individual damages that increases the individual issues in a case, possibly to the point of overwhelming the common issues.

163. See *e.g.* Newberg, *supra* note 18; Branch, *supra* note 3, c. 4.

164. McLaren, *supra* note 11 at 557.

165. *Ibid.* at 559.

166. *Supra* note 140.

167. I am grateful to Prof. Kent Roach for this suggestion.

of the main benefits of damage class actions is to allow the *combining* of economic claims. Large lump sum awards ensure publicity and permit the very powerful outcome of a symbolic community victory. They illustrate the scope of the harm, which can lead to changed environmental standards and cause financial harm significant enough to induce behaviour modification in the polluter. Leaving recovery to the initiative, skill and resources of individuals makes the achievement of these benefits unlikely.[168]

The focus on damages also limited analysis to interference with individual enjoyment, discounting almost entirely the damage to the environment:[169]

> [T]he assessment of damages caused by a spill or other incident that also does damage to the environment does not take into account that generalized environmental harm. Such injury is beyond the realm of the normal assessment of damages intended to vindicate the interference with personal rights and not public resources of which the Crown is the guardian.[170]

This indicates that damages alone are not an adequate remedy, precisely because they do not consider the 'generalized environmental harm.' In all environmental cases, courts should assess whether an injunction is warranted, precisely in order to ensure that such harm, and the shared community interest in environmental protection, is adequately considered. Alternatively, by demonstrating the scope of the harm, a grouped damage claim can also call attention to the fact that this issue is a shared and public one, calling for a collective procedure and a collective remedy. But even this alternative was denied in *Hollick*.

D. ASSESSING THE ADEQUACY OF THE ALTERNATIVES TO THE CLASS ACTION

1) Challenging the Certificate of Approval or Licence

The Court found that the class action was not the preferable means to achieve the behaviour modification of pollution prevention because this should be done through the available alternative procedures in provincial environmental legislation. However, the Court failed to assess whether the five provisions it referred to would in fact provide an adequate alternative in this case. Most are simply rights

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168. See Stanton & Willmore, *supra* note 27. In addition, the Trust Fund is administered by the provincial Ministry of the Environment, which may not be viewed as an impartial arbiter. This administrative process has many drawbacks, and the Court should ensure that the process is performing adequately before being comfortable with deferring to its expertise.

169. See *Desrosiers v. Sullivan* (1985), 66 N.B.R. (2d) 243, 14 C.E.L.R. 135 (Q.B. cited to C.E.L.R.), aff'd (1986), 76 N.B.R. (2d) 271 (C.A.) leave to S.C.C. refused, (1987) 40 C.C.L.T. 66. Here, the court suggests that damage must not always be assessed individually. Odours from a pig farm resulted in damages: "[t]o each of the plaintiffs who resided in the area throughout the period from 1981 to 1985, and lesser amounts to three plaintiffs who lived there only part of that time." (*Ibid.* at para. 25). At para. 19, the court said it would have granted an injunction, but the activity had stopped. At paras 7, 8, 10: Twenty-five neighbours brought the action together, making it similar to a class action in the sense of embodying a collective harm. The court had no trouble finding that those in the neighbourhood were similarly affected without going into the details of the specific impact and reaction of each person to the odours, and admitting that the odour was worse at different dates, times, and weather conditions and that some neighbourhood witnesses said the odour was not offensive. The court found, at para. 17, that complying with applicable rules and regulations does not permit nuisance.

170. Faieta, *supra* note 27 at 296, see also 290–292.

to request Ministerial investigations of licences,[171] contaminant discharges,[172] or statutory infringements,[173] while others require physical damage causing economic loss.[174] Recourse to Ministerial action may only ensure the landfill is operating according to regulated standards (although even this inquiry would have been useful here), and cannot help to challenge these standards. The Court does not refer to the two statutory causes of action actually alleged by the class,[175] despite the fact that the motions judge accepted that these causes of action were properly raised. In addition, the Court's approach lacks realism in that even judicial review or statutory rights of action cases generally require representation, and in environmental cases will still require the complex evidence that makes this litigation so costly.[176] While these alternatives exist, their practical adequacy was not addressed by the Court.[177]

Hollick leaves victims no recourse but to go back to the system that permitted the harm. If the landfill is complying with the conditions of its permits and licences, these actions will provide no satisfaction. If the permitted pollution is causing unacceptable levels of harm, those affected may want these levels changed, and a class action demonstrating the extent and scope of the harm, and obtaining an injunction or large damage award, may be the only effective way to achieve this. Refusing certification reduces the power of common law actions to challenge the *status quo*[178] and act as a voice of individual or group dissent.

Referring the plaintiffs to the regulatory system might indicate that the Court believes the consultative and detailed permitting system for landfill sites can be likened to legislative approval for expropriation or limitation of individual property rights. This might explain why the Court felt comfortable allowing damages to rectify any of the 'necessary' pollution from the landfill, and left pollution control to the administrative sphere. However, the need for public services or works has rarely legalized nuisance. If the Court's opinion was that the regulatory waste management system is a democratic balancing of competing public and private interests, suggesting courts should not grant injunctions and thereby second-guess this more specific and expert process, this rationale that these inconveniences were necessary should have been articulated. Instead, the Court left the balancing of social values, as well as the role of courts and legislatures in environmental law, to be decided as a side issue, with limited reasons or analysis, on a pretrial motion.

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171. *EBR*, *supra* note 4, s. 61.
172. *EPA*, *supra* note 6, s. 14(1).
173. *EBR*, *supra* note 4, s. 74(1) *EBR*.
174. *EPA*, *supra* note 6, s. 172(1).
175. *EPA*, *supra* note 6, s. 99 (right to compensation for a "spill"), s. 103(1) (public nuisance).
176. Interview of Kirk Baert, *supra* note 55; interview of D. McRobert, Counsel and Senior Policy Analyst, ECO (18 April 2002) who also notes that the Court did not consider the success rate of claims under the EBR, which is not encouraging.
177. Interview of Kirk Baert, *ibid.*
178. See Stanton & Willmore, *supra* note 27.

2) The Small Claims Trust Fund and Individual Actions

The Small Claims Trust Fund is a condition "[n]ow found in most certificates of approval for waste disposal sites."[179] Their purpose is "[t]o ensure that persons who live in the vicinity of a waste disposal site, and who have suffered loss as a result of a nuisance arising from the operation of the waste site, receive compensation for their loss quickly and at little cost."[180] The creation of such funds demonstrates another way in which environmental law is *sui generis*. It would be rare in other fields for proponents of a project to admit in advance that harm will almost certainly be caused, and to make provisions not for its prevention, but only for its compensation. Unlike insurance to prevent *accidental* or *negligent* infliction of harm, these funds anticipate that harm *will* be caused by the undertaking.[181]

The Court's reliance on the effectiveness of this alternative is optimistic. This Fund would not provide "redress" for the continuing pollution and inconvenience, unless all class members successfully pursued individual actions so that the magnitude of the damages resulted in behaviour modification. The caps on individual recovery make this exceedingly unlikely, apart from the usual barriers to individual claimants pursuing their claims. The class claimed $500 million in compensatory damages alone,[182] and the Fund contains a mere $100,000.[183] The Court held that "[i]f ... the Small Claims Trust Fund is not sufficiently large to handle the class members' claims ... it is likely that they will find it worthwhile to bring individual actions."[184] However, this still looks at each claim individually. The very launching of this class action suggests that the class *as a whole* did in fact 'find it worthwhile' to bring their individual actions *together*, not only because of the cost and fee benefits, but because their cumulative claim is 'substantial.'

In addition, these funds are often based on a 'no-fault scheme,'[185] and are therefore expressly designed not to apportion blame or induce operational changes. This may be a benefit in terms of access to 'redress,' but paying off those affected by pollution, without analyzing and remediating polluting practices, is not 'redress' to those concerned about the individual, community and global

179. Faieta, *supra* note 27 at 447.

180. *Ibid* at 446. These conditions are generally approved by the Environmental Assessment Board pursuant to the provincial *Environmental Protection Act* (*ibid.* at 443). This administrative oversight strengthens the Court's view that these issues should be left to the waste management process, but it is arguable that the Court should at least have determined whether the class's allegations that the emissions were illegal were true, as a judicial finding of illegality would have helped the group in its subsequent administrative proceedings. Again, civil actions are often useful and necessary to challenge existing administrative rules when these are not achieving acceptable levels of protection. See generally Stanton & Willmore, *supra* note 27 at 93. For a discussion of compensation funds more generally, see Sullivan, *supra* note 100, and for the Trust Fund itself, see *supra* notes 56, 100 and 152.

181. I am grateful to Prof. Lorne Sossin for this suggestion.

182. *Hollick*, *supra* note 1 at para. 5.

183. *Ibid.* at para. 3. Kirk Baert notes that the $100,000 total Fund, divided by the 30,000 members of the class, would result in approximately $3 each as a best case scenario where all members recovered from the Fund: Interview of Kirk Baert, *supra* note 55. I note also that since this money has been put aside for this purpose, even such full recovery by the individual class members would impose no financial hardship on the city, therefore inducing no behaviour modification.

184. *Hollick*, *supra* note 1 at para. 33.

185. *Ibid.*

effects of pollution. Even from the individual perspective, obtaining redress for past harm without preventing future harm is inadequate, and repeated recourse to the Fund for each subsequent harm is asking too much of individuals.

It is cause for concern that alternative recovery schemes can be used as shields to prevent class actions. This may be positive if the possibility of class actions encourages actors to plan for risks. However, the effect is negative if it helps polluters more successfully circumvent the powerful device of the class action as a tool for voicing collective interests and creating countervailing power. Indeed, such schemes deny access to justice to the affected group *as a group*.

This emphasis on the value and power of collected damage claims is not unique. As a follow-up to its report on standing, the Ontario Law Reform Commission recommended "a new civil statutory remedy" of damages for environmental harm which would "compensate the public for harm done to the environment, entirely independent of any damages payable for injury caused to individuals or corporations" and would be "for the benefit of the public in the larger interest of protecting the environment."[186] Litigation seeking reparations for systemic injustice such as the Holocaust has also claimed damages for large groups, and had both compensatory and deterrent goals.[187] The remedy for environmental harm should also be approached holistically. Individual actions should not be lightly substituted for the power, both financial and symbolic, of seeking compensation for the group *as a group*. Had the Court viewed *Hollick* in its substantive context, as an environmental protection case, at least in part, this factor may have played a larger role in its decision.

v. As a Nuisance Action

ALTHOUGH THE MOTIONS JUDGE CERTIFIED causes of action in public nuisance under the *Environmental Bill of Rights*,[188] the 'Spills Bill' in the *Environmental Protection Act*,[189] negligence, the rule in *Rylands v. Fletcher* and private nuisance, the appellate courts seized almost exclusively on the private nuisance claim.[190] The only rationale was the Court of Appeal's finding that all of the claims required proof of private nuisance.[191] The Supreme Court's finding that individual issues predominate over common issues implies that individual damages for private nui-

186. Ontario Law Reform Commission, *Report on Damages for Environmental Harm* (Toronto: Ontario Law Reform Commission, 1990) at 2.

187. See *e.g. In re Holocaust Victim Assets Litigation*, 105 F. Supp. 2d 139 at 141-42 (E.D.N.Y. 2000).

188. *Supra* note 4, s. 103(1).

189. *Supra* note 6, s. 99.

190. *Hollick* (Ont. Div. Crt.), *supra* note 1 at 479. The Divisional Court's frequent use of the term "interference with their use and enjoyment of property" suggests that it also viewed nuisance as the primary issue. However, it found that private nuisance *could* be suffered by an entire class, but here the evidence was insufficient to prove that all class members had suffered the alleged interference.

191. *Hollick* (C.A), *supra* note 1 at para 18: "The statement of claim alleges negligence, nuisance, a claim based on *Rylands v. Fletcher*... and on s. 99 of the *Environmental Protection Act*.... [None] of these claims can be established unless a nuisance is proved and thus the search for a common issue can be confined to the claim of nuisance." The Court dealt with the claim in public nuisance later, at 268-69, as will be discussed below.

sance is also the main claim in the mind of that Court. Thus, the relationship between these various causes of action in the environmental area was not clarified.[192] Yet even if we focus solely on private nuisance, this should not have precluded certification because it is inaccurate to say that nuisance involves only the individual.

Private nuisance has been defined as "the unreasonable interference with the use and enjoyment of another person's land or interest in land."[193] While its focus on property owners suggests it is unsuitable for shared environmental concerns, and while decisions such as *Hollick* indicate that nuisance focuses on the individual's subjective experience, in fact private nuisance has been one of the leading common law actions in the service of environmental protection.[194] McLaren argues that tort law has always been responsive to changes in social values, and that the uncertainties in evolving nuisance law lend it to "creativity and inventiveness in developing an environmental perspective."[195] Some of the factors relevant to interference with enjoyment of property involve considerations of the neighbourhood and experience of the community, and depend on relative harm, indicating that the class action could be a useful tool in proving private nuisance.

There are two aspects of private nuisance: actual harm to property or persons and unreasonable interference with the enjoyment of land.[196] Actual harm to property or persons often results in liability, while unreasonable interference with enjoyment of land is subject to a 'balancing' of factors, including the severity of the interference; its duration; the character of the neighbourhood; the sensitivity of the plaintiff; and the utility of the defendant's conduct.[197]

Proof of each can be helped, not hindered, by the class action procedure. With regard to severity, the rule is that "[i]nterferences affecting only the use and enjoyment of land will be actionable only if they interfere with the ordinary comfort of human existence, not merely according to elegant and dainty modes and habits of living, but according to plain and sober notions."[198] In *Hollick*, there was an assumption that the harm alleged was mild, but the troubling finding was the suggestion that severity is always an individual issue.[199]

The issue of duration of the interference must also be considered. Class counsel suggested:

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192. See *e.g.* McLaren, *supra* note 11; Faieta, *supra* note 27; Charles & VanderZwaag, *supra* note 139.
193. Faieta, *ibid.* at 3.
194. *Ibid.* at 4: "It is not surprising that the tort of private nuisance has been described as the common law's contribution to environmental protection."
195. McLaren, *supra* note 11 at 516.
196. For a recent, general description of nuisance in environmental law, see Faieta, *supra* note 27 at 4–5.
197. *Ibid.* at 4–9.
198. *Ibid.* at 5–6.
199. The class alleged that toxic gases were emitted in "large quantities," *Hollick*, *supra* note 1 at para. 5, but the Court focused mainly on the odour complaints. The Court of Appeal suggested that the parties stated that odours were the prime complaint (*Hollick* (C.A.), *supra* note 1 at para. 1).

> [T]he Appeal Court's ruling restricts class actions based on nuisance 'to a specific, a one-off, or a catastrophic event. According to the court, if I can dump garbage into the river a little bit at a time for five years, I won't get sued, but if I dump all of it at once I will.'[200]

The Court's approach was not in keeping with general principle.[201] As stated above, nuisance focuses on ongoing interference:

> [I]solated incidents can give rise to nuisance only where the use which gives rise to the risk of that isolated nuisance is of itself a continuing use. For example, a factory which produces fumes does not necessarily have to produce those fumes continuously over a period of years for there to be a nuisance. However, where there are isolated incidents occurring regularly then the use of the land for that purpose is of itself a nuisance.[202]

This approach would have helped in *Hollick* to identify the nuisance not as the occasional odour complaints, but as the landfill itself.[203] It also re-emphasizes that the *collected* evidence of a class action will help, not hinder, proof of private nuisance.

The factor of the sensitivity of the plaintiff is relevant in that "[t]he tort of private nuisance affords protection only for objectively unreasonable interferences as measured by the reaction of normal persons in the particular locality and not by the idiosyncrasies of the plaintiff. The standard to be applied is that of the reasonable person."[204] In *Adams v. Nova Scotia (Grain Commission)*,[205] the plaintiff was awarded damages for discomfort from dust blowing from the road leading to the defendant's grain facility only to the extent that did not result from her partic-

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200. Fitz-James, *supra* note 114 at 15, written before the Supreme Court decision. Fitz-James indicates that the defendant City's lawyer, Graham Rempe, argued the case was just about the legislated certification test, and he focused on the issue of commonality. This approach was favoured by the Supreme Court.

201. Thornton & Beckwith, *supra* note 155 at 4.

202. Simon Ball & Stuart Bell, *Environmental Law: The Law and Policy Relating to the Protection of the Environment*, 5th ed. (London: Blackstone Press, 2000) at 174. See discussion of intermittent nuisance in analysis of landfill injunction cases, *supra* note 135 and accompanying text. See also *Coxe v. H.T. Warne, Limited* (1939), 1 D.L.R. 718 at 722, 13 M.P.R. 570 (N.S.S.C.) in which two property owners sued a mill, and witnesses gave conflicting evidence as to smoke, soot and cinders. It was held that:

> [T]he defendant's witnesses were speaking of a condition, which was general in the immediate locality of the mill. The wind in Nova Scotia blows from all points of the compass; and persons, who lived or worked in approximately the same situation as the plaintiffs, must have experienced substantially the same smoke conditions, that plaintiffs did. The condition in life of these witnesses did not so much differ from plaintiffs' witnesses as to differentiate the quality of their perceptions or evidence; and the jury were entitled to consider what the average person in that locality must see and know and what the average person thought about the quantity of smoke and the inconvenience, if any, it caused.

Excessive specificity can often preclude nuisance since wind direction and other factors can change over a matter of minutes. Must plaintiffs bring separate cases for each day or hour of shifting pollution? The harmful conduct will be the same, and will be unreasonable for all similarly situated victims (i.e. liability will be the same, as will the general *nature* of the damage suffered, even though the precise *quantity* of damage suffered by each individual may differ).

203. Or at least encouraged the Court to make a determination as to the source of all or most of the complaints.

204. Faieta, *supra* note 27 at 7.

205. (1990), 97 N.S.R. (2d) 411, 258 A.P.R. 411 (S.C.).

ularly allergic condition; additional damages for her unique susceptibility were not recoverable. The standard of the 'reasonable person' again demonstrates the benefits of class actions in bringing evidence of various comparably situated people.

Similar is the factor of the character of the neighbourhood.[206] In *Gillingham Borough Council v. Medway Dock Co. Ltd.*,[207] planning permission had changed the affected area into an industrial one, so that its use as dock and the noise of transport vehicles to and fro were no longer unreasonable because the character of the neighbourhood had changed.[208] Therefore, what is unreasonable interference in a particular neighbourhood can be established without reference to the specific circumstances of each broadly similar individual affected. Again, the notion of the neighbourhood and what is acceptable within it requires evidence of commonality. The class action procedure embodies this commonality.[209]

In addition, notions of reasonableness and neighbourhood both highlight the necessity of balancing competing interests.[210] This is also revealed in the factor of the utility of the defendant's conduct.[211] In *Mandrake Management Consultants Ltd. v. Toronto Transit Commission*, it was held that "[u]tility...is an important consideration in the balancing process inherent in a private nuisance action."[212] Yet if nuisance is about balancing, then it is important to have the right parties on either side. In *Hollick*, it may be that the Court believed the public interest in waste management was important. Yet an individual action would require balancing *Hollick*'s use of land against the waste management needs of Toronto. By contrast, if the needs of 30,000 homeowners are considered, this may tip the scales in a different way. Again, the unreasonableness requirement in nuisance is similar to the commonality requirement in class actions. Class actions and private nuisance, at least in this sense, seem to go together. In fact, class actions are *better* tools for claiming private nuisance, in some circumstances, than individual actions, as they demonstrate factors of unreasonableness and the interests to be balanced.

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206. Faieta, *supra* note 27 at 6.
207. [1993] Q.B. 343.
208. Thorton & Beckwith, *supra* note 155 at 74: "Buckley J. was influenced by the fact that, before granting planning permission, a local planning authority would balance the interests of the community against those of individuals and took the view that, this having been done, the environmental controls imposed through planning law must prevail over those available in private law." They believe Buckley J. is suggesting that planning permission is like statutory authority, and they think he is wrong; the government should not be able to 'licence nuisance' (citing *Wheeler v. JJ Saunders*, [1995] 2 All E.R. 697 (C.A.) that although Parliament can licence nuisance, planning authorities cannot). This could be relevant in *Hollick* in that the courts keep referring the class to administrative law remedies and to environmental legislation to resolve the pollution problem, and only look at the nuisance action as an issue of compensating individuals; i.e. the government should balance public and private interests, not the courts. Again, if this is the reasoning, it should be made explicit. In addition, the result in *Hollick* seems to run contrary to the very enactment of environmental protection legislation and class action legislation, suggesting that the courts are readjusting the balancing of interests done by the legislature.
209. The class action can also be useful to challenge government decisions such as planning permission or licences and approvals by showing that the government got the 'balancing' wrong, by showing that the use in question is in fact not reasonable to a large group of those actually affected.
210. See *e.g.* Thornton & Beckwith, *supra* note 155 at 4.
211. Faieta, *supra* note 27 at 9.
212. (1993), 102 D.L.R. (4th) 12 (Ont. C.A.) [*Mandrake*].

As seen in the landfill injunction precedents discussed above, the variations in frequency and degree of interference preclude neither a finding of nuisance nor class certification. Yet these precedents were not referred to. Rather, the Court confined itself to the certification precedents in various other substantive areas, emphasizing that single cause or incident cases have greater commonality. However, there is no reason to think that smoke was distributed evenly through the TTC fire in *Bywater*,[213] that bacteria were spread evenly through the water supply in *Walkerton*, or that breast implant patients had identical reactions, physiologies, lengths of ownership or quality of medical care. As seen in these cases and in *Coxe* above, it is possible to find liability despite these variations. Indeed, in finding that the record of complaints was "a sufficient basis in fact to satisfy the commonality requirement," the Supreme Court also allowed that "...while some areas within the geographical area specified by the class definition appear to have been the source of a disproportionate number of complaints, complaints were registered from many different areas within the specified boundaries."[214] Lack of uniformity in the nature and effect of the pollution did not prevent the Court from finding that the motions record suggested an ongoing and widespread pollution problem, so it did get further than the Court of Appeal in this regard. Yet this common problem was not certified because the focus on damages prevented a finding of sufficient commonality to predominate the individual issues. A contextual approach to the requested remedies of injunctions and damages, based on environmental precedent, may have led to different results.

VI. Conclusion

THE NATURE OF THE HARM and the existence of the Small Claims Trust Fund were very significant to the Court's interpretation of the certification requirements in *Hollick*. It was surely also significant that waste management is a crucial public service, is politically charged, and is at a crisis point in Toronto. The legislature must play the leading role in this area. Yet the decision to deny certification in *Hollick* refused aggrieved citizens a neutral forum permitting them to fight the powerful vested interests of government and service providers on a relatively equal footing, and denied them the recourse that both the statutory causes of action and the private common law could provide.

The divorcing of the statutory public nuisance action from the class action mechanism was the most evident failure to maximize the potential of this powerful procedural tool. The class action could also enhance the potential of the other substantive legal options, particularly if the case was appropriately situated in its substantive environmental context.

If the Court in *Hollick* had taken an environmental approach to a detailed analysis of nuisance law and its remedies, a very useful and innovative synthesis may have been possible. The presence of both public and private interests in envi-

213. *Bywater v. Toronto Transit Commission*, [2001] O.J. No. 2384 (QL).
214. *Hollick*, *supra* note 1 at para. 26.

ronmental law may have encouraged the Court to address these separately,[215] which would have dovetailed with this same separation in nuisance between the reasonableness of the defendant's action and the harm to particular individuals. This would have allowed an analysis of the common and public aspects of the case, highlighting the utility of the class action in determining causation and reasonableness, and may have led to a different conclusion on the injunction issue. The then separated individual and private aspects of the experience of the interference, and of quantifying individual damages, could have been addressed in subclasses or by means of individual hearings. Contrary to the Court's finding that nuisance claims are particularly unsuitable for class actions, this innovative procedure could have been shown to help overcome some of the barriers to the effectiveness of nuisance actions in environmental law.

At minimum, the environmental presumption that doubt and uncertainty should be resolved in favour of the environment would have led the court to err on the side of certification, at least to allow a full record to be brought. The Court seems to have decided that any penalty or remediation should be left to the economics of cost internalization or to the legislative and administrative structure. Yet the Court did not turn its mind to the practical effectiveness of these alternative remedies, and any such policy rationale was hidden behind procedural technicalities.

If procedures such as class actions are to have a significant and useful role, they must be interpreted according to the unique properties of the substantive area of law they are called upon to serve. If the certification test had been applied within the context of environmental law, both the class action procedure and substantive environmental law would have been clarified, and improved, as a result of this decision. It is hoped that the courts will approach future environmental class actions from an environmental perspective that will allow this procedural tool to achieve the environmental purposes the legislature designed it for. Maybe this will allow the promise of the Supreme Court, that *Hollick* is not intended to preclude class actions for environmental torts, to be realized.

215. See recent article suggesting that deterrence and compensation functions should be treated separately in some mass tort class actions: David Rosenberg "Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss" (2002) 88 Virginia L. Rev. 1871 and comments on this paper in George Rutherglen "Future Claims in Mass Tort Cases: Deterrence, Compensation and Necessity" (2002) 88 Virginia L. Rev. 1989.