THE CLASS ACTION AND PUBLIC AUTHORITY LIABILITY: "PREFERABILITY" RE-EXAMINED

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INTRODUCTION

When are class actions against the government "preferable"? Perhaps more to the point, when is a class action that might be appropriate against a private firm *not* an effective way of resolving a claim where the government acts as the defendant?

This question is of more than academic interest. Since the advent of the class action in Canada, governments have become a preferred – if not *the* preferred – target.[1] This is not terribly surprising, as government acts or omissions by their nature, frequently affect large numbers of people. Governments are also static targets: while the provincial and federal governments have the power to sweep away claims against them through legislative fiat, it is a right rarely exercised.[2] In addition, governments do not go bankrupt, hide their money offshore, or engage in the myriad of other judgment-proofing strategies available to private concerns. They tend to litigate fairly and economically; and they usually follow court directions, declarations, and orders. They are sensitive to public opinion and easily embarrassed by revelations made through the litigation process. Most important of all, they can access practically unlimited wealth through taxation. Governments are, in short, perfect defendants.

In order for a class action to be certified, the court must determine that an aggregation of claims is the "preferable procedure". This in turn usually requires an

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1 Branch and MacMaster noted in 2002 that over one-third of class actions filed in British Columbia since the advent of the *Class Proceeding Act* had been against government entities: See Ward K. Branch & James M. MacMaster, "A Quest for Fairness: Class Actions Against the Government" in *Suing and Defending the Government* (Vancouver: Continuing Legal Education Society, December 2002). The authors also point out that similar trends existed in the United States since the enactment of the first modern class action law, Federal Rule 23, in 1966. In the following article, Paul Vickery cites no fewer than 48 actions in which the Federal Government was at that time involved: Paul Vickery "Mass Litigation Against Government" in *Suing and Defending the Government, ibid.* at 2.2.01.

2 But not never; the Federal Government enacted legislation to retroactively deprive disabled war veterans of their right to sue, and this was upheld by the Supreme Court of Canada in *Authorson v. Canada (Attorney General)*, [2003] 2 S.C.R. 40, 2003 SCC 39. Legislation aimed at defeating a collective action against the government was similarly approved in *Bacon v. Saskatchewan Crop Insurance Corp.* (1999), 180 Sask. R. 20 (C.A.).

examination of whether the class action will further the three objectives of class actions: access to justice, judicial economy, and behaviour modification.[3]

This paper assumes that a claim against the government will satisfy the first two criteria (which are plaintiff- and court-focused) in much the same way as would an equivalent claim against a private entity. That is to say, class actions against the government serve compensation and system efficiency goals regardless of the identity of the defendant.

What is of immediate interest, however, is whether behaviour modification – i.e. deterrence – will be the same in both contexts. If so, then there is no need for a court to take into account the identity of a government defendant in assessing certification. However, if there are differences, then it would follow that in some cases a class action which might be "preferable" when the defendant is a private company would not be "preferable" when the defendant is the government.

That is in fact a conclusion that we urge. In this paper, we suggest that the deterrence effects on government in almost any tort action based on past misbehaviour are so uncertain as to be virtually moot, and that at any rate the theoretical basis for deterrence applied to market participants has little or no application to most government activity. This observation might be irrelevant with respect to an individual action, as governments have, for whatever reason, bound themselves to the same rules as ordinary litigants. Only class actions require that the court consider deterrence effects before permitting a claim to proceed. When the courts do so, we believe they will conclude that class actions against the government are often ineffective at behaviour modification. In such circumstances, class proceedings will only be "preferable" to the extent that the benefits they afford with respect to access to justice or judicial economy outweigh the costs of the action.

So are these two criteria, the promotion of judicial economy and access to justice, sufficient to justify aggregate actions? It seems self-evident that judicial economy in government claims, as in claims against private entities, is really only furthered when the claims are significant enough to be individually viable.[4] Access to justice is primarily a question of access to compensation, and should generally be weighed as such. Sometimes class actions are a good way to compensate claimants; often they are not. The one remaining issue is whether the *non*-compensatory aspects of access to justice are of sufficient importance to justify the public investment in the proceeding.[5] But again, these considerations weigh differently when the government is the defendant, and the public thereby the insurer.

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[3] The various sources of these three accepted objectives are discussed in detail *infra*.

[4] Because there is no efficiency advantage *per se* in hearing together a number of claims if those claims would otherwise not have been adjudicated.

[5] While we discuss this as an aspect of the access to justice analysis, (and it is), claims to stop ongoing government wrongdoing are inherently regulatory devices and thus a form of behaviour modification as well.

On this last point – access to justice – we point out an important countervailing consideration also unique to claims against the government. That is, there may be a particular advantage in the restraint of ongoing wrongful governmental activity that will weigh in favour of certification, even despite the muted deterrence effects and even in the absence of strong compensation-based justification. Where government activity would go unrestrained without legal intervention, and where that intervention would not occur absent the scale economy (and perhaps – in some jurisdictions anyway – the costs rules advantages) of the class action, this might weigh *in favour* of certification where the government is a defendant.

These observations do not lead to a series of easy conclusions. However, they do speak to the necessity of viewing class actions in a considerably different light in most cases where the government is the defendant.

UNDERSTANDING THE REGULATORY ROLE OF CLASS ACTIONS

1. Overview of the Deterrence-Centred Premises of this Paper

There are four premises underlying the first main theme of this paper, which is that courts ought to assess deterrence effects differently (and carefully) when considering the certification of class actions against the government.

The first premise is that deterrence, or "behaviour modification", has always been considered an important objective of class actions and one to be weighed when determining whether a class action is the "preferable procedure" at the time of certification. The second is the expectation that tort law effects deterrence through the internalization of the costs of harm in defendants. The third premise is a recognition that class actions work by more efficiently internalizing the cost of harm. Our view of this is consistent with a strong "public law model" or "regulatory approach" to class actions, but is not dependent on such a model. Finally, at this stage, we propose the fourth premise that the government possesses unique characteristics that make traditional models of internalization-based tort deterrence inapt.

2. Discussion

(A) *Behaviour Modification is an Element of the Preferability Analysis*

Although specific provisions vary somewhat among provincial class action statutes, one of the common criteria which must be satisfied in order to certify a class action in Canada is that the class action be the "preferable procedure" for resolution of the common issues.[6]

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[6] Ontario *Class Proceedings Act*, 1992, S.O. 1992, c.6, s.5(1)(d); British Columbia *Class Proceedings Act*, R.S.B.C. 1996, c.50, s.4(1)(d); Saskatchewan *Class Actions Act*, S.S. 2001, c.12.01, s.6(d); Newfoundland and Labrador *Class Actions Act*, S.N.L. 2001, c.18.1, s.5(1)(d); Manitoba *Class Proceedings Act*, C.C.S.M. c. C130, s.4(d); Alberta *Class Proceedings Act*, S.A. 2003, c. C-16.5, s.5(1)(d); and *Federal Court Rules*, 1998, SOR/98-106, R. 299.18(1)(d).

Some class action statutes, those in Ontario, Manitoba and Saskatchewan, do not provide specific guidance in assessing the preferability of class actions. In the leading case of *Hollick v. Metropolitan Toronto*, the Supreme Court of Canada found that in the absence of legislative guidance, "the preferability inquiry should be conducted through the lens of the three principal advantages of class actions – judicial economy, access to justice, and behaviour modification."[7]

The first purpose, judicial economy, refers to the efficient handling of potentially complex cases of mass wrongs. The second objective is to provide improved access to the courts for those whose actions might not be asserted without the economy of scale afforded by class actions. The third objective of class action litigation is to modify the behaviour (or deter) actual or potential wrongdoers who might otherwise be tempted to ignore their public obligations.[8] "Behaviour modification" in this context thus has both specific and general deterrence ambitions. The criteria were not invented by the Supreme Court in *Hollick*; they have their Canadian origin in the Ontario Law Reform Commission report of 1982, which originally posited class proceedings legislation in that Province and remains the seminal work on class proceedings in the Canadian context.[9]

In those jurisdictions that have not enacted class proceedings legislation, the Maritime provinces and the Territories (known as "*Dutton* jurisdictions"[10]), the same objectives will be considered by the Court when deciding whether to certify a representative action under the Rules of Court.[11]

In contrast to the statutes in Ontario, Manitoba and Saskatchewan, and to the approach taken in *Dutton* jurisdictions, the British Columbia, Newfoundland, Alberta and Federal Court legislation provides a list of factors that must be considered, along with any other relevant factors, when considering the "preferability" of the class action.[12] These specific factors are:

(a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;

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[7] *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 at para. 27 [*Hollick*].

[8] The description of the three purposes underlying class proceedings legislation was set out by Allen J. in *Auton (Guardian ad Litem) v. British Columbia (Minister of Health)* (1999), 32 C.P.C. (4th) 305 (B.C.S.C.) at para. 36 [*Auton*].

[9] Ontario Law Reform Commission, *Report on Class Actions* (Ontario: Ministry of the Attorney General, 1982).

[10] Named after *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 [*Dutton*], where the Supreme Court held that courts may design their own class proceedings in the absence of legislative authorization or direction.

[11] *Dutton, ibid* at paras. 27-29.

[12] British Columbia *Class Proceedings Act*, R.S.B.C. 1996, c.50, s.4(2); Newfoundland and Labrador *Class Actions Act*, S.N.L. 2001, c.18.1, s.5(2); Alberta *Class Proceedings Act*, S.A. 2003, c. C-16.5, s.5(2); and *Federal Court Rules*, 1998, SOR/98-106, R.299.18(2).

(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 proceedings 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; and
(e) whether the administration of the class proceedings would create greater difficulties than those likely to be experienced if relief were sought by other means.

In these provinces where class proceedings *Acts* set out specific provisions to guide the preferability assessment, it remains open to the courts to also make reference to the three objectives of class actions identified by the Supreme Court of Canada (i.e. judicial economy, access to justice, and behaviour modification) in addition to the criteria set out in the respective statutes. The three criteria have been repeatedly referenced as underlying the *Acts* of all Provinces, and, as noted, the "common law class action" designed in *Dutton*.[13] In British Columbia, at least, it appears that the Supreme Court has considered the three general objectives in its analysis of whether or not a class action was the preferable procedure, in addition to the factors listed in the British Columbian statute.[14]

So regardless of the scheme in effect in any particular Canadian jurisdiction, it would appear that a class action is more likely to be certified where the three criteria are met, and less likely to be certified where they are not. This paper focuses on the third of these objectives, behaviour modification, and its role in assessing the preferability of claims against the government.

(B) *The Standard Model of Tort Deterrence*

The standard model of tort deterrence is premised on the idea that individuals in a competitive market will attempt to maximize their wealth by rationally weighing the economic costs and benefits of their activity. In this paradigm tort damages, expressed always in monetary terms, are a cost factored in.[15]

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[13] M.A. Eizenga, M.J. Peerless & C.M. Wright, *Class Actions: Law and Practice* (Toronto: Butterworths, 1999) at 1.2.

[14] See the B.C. Supreme Court decisions in *Endean v. Canadian Red Cross Society* (1997), 148 D.L.R. (4th) 158, rev'd on other grounds in (1998), 157 D.L.R. (4th) 465 (B.C.C.A.); and *Auton supra* at note 8.

[15] The foundations of the economic analysis of tort law rules are well articulated in a series of seminal publications by Calabresi, Posner, and Kaplow & Shavell: See Guido Calabresi, "Some Thoughts on Risk Distribution and the Law of Torts" (1961) 70 Yale L. J. 499; Guido Calbresi, *The Costs of Accidents: A Legal and Economic Analysis* (New Haven: Yale University Press, 1970); A. Mitchell Polinsky, *An Introduction to Law and Economics* (2d.) (Boston: Little Brown, 1989); Richard A. Posner, *Economic Analysis of Law* (5th) (Boston: Little Brown, 1998); Steven Shavell, *Economic Analysis of Accident Law* (London: Harvard University Press, 1987); Steven Shavell, "The Level of Litigation: Private Versus Social Optimality of Suit and of Settlement" (1999) 19 Int'l Rev. L. & Econ. 99; and Louis Kaplow & Steven Shavell, "Fairness vs. Welfare" (2001) 114 Harv. L. Rev. 961.

In the standard model, the firm internalizes the benefits of risky behaviour through increased profits. That is, the fewer precautions taken with respect to the manufacture of a product or provision of a service, the more money the firm makes. The firm likewise benefits from the unconstrained use of its product or service. The more widespread the use, the more profit to the firm.

These benefits are weighed by the firm against the expected costs, to be internalized through effective tort recovery and, at least in theory, a socially-optimum standard of care is reached.

The firm will not generally consider the "externalized" social costs (or social benefits) of its product, although tort law, through various mechanisms, attempts to incorporate such considerations into its calculation of what level of risky behaviour is "reasonable".

(C) *The Role of Class Actions in Behaviour Modification*

In our previous writings, we have endorsed a view that we refer to as the "public law model" of the class action. [16]

The public law approach holds that aggregate litigation is best thought of, not simply as a procedural device in the sphere of private obligations, but rather as a regulatory device to enforce standards (common law and statutory) in the production of goods and services, thereby protecting the public from patterns of widespread wrongful harm. In the public law model, maximizing post-wrong individual recovery is not the singular objective. Instead, an individual benefits from a system that contributes to his or her wealth and welfare through avoidance of harm, with tort compensation playing a secondary role and patterns of risk-spreading through insurance – heretofore ignored by the courts – weighed along with other economic factors in considering tort system policy.

In the public law model it is the regulatory effect - deterrence – that is of central importance. This is based on the recognition that the main innovation of aggregate litigation is the scale economy it affords to plaintiffs in large-scale claims – one that approaches the efficiency enjoyed by defendants in such actions as a matter of

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[16] See Craig Jones and Angela Baxter, "Fumbling Toward Efficacy: Interjurisdictional Class Actions After *Currie v. McDonanld's Canada*" (2006) 3 Can. Class Act. Rev. 86; Craig Jones, *Theory of Class Actions* (Toronto: Irwin Law, 2003); Jamie Cassels & Craig Jones, *The Law of Large-Scale Claims* (Toronto: Irwin Law, 2005); and Craig Jones, "The Case for the National Class" (2004) 1 Can. Class Act. Rev. 29. The "public law model" had its earliest and most persuasive articulation in a series of articles by David Rosenberg: See David Rosenberg, "A 'Public Law' Vision of the Tort System" (1984) 97 Harv. L. Rev. 849; David Rosenberg, "Class Actions for Mass Torts: Doing Individual Justice by Collective Means" (1987) 62 Ind. L. J. 561; David Rosenberg, "Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master" (1989) 69 B.U.L. Rev. 695; and David Rosenberg, "Individual Justice and Collectivizing Risk-Based Claims in Mass-Exposure Cases" (1996) 71 N.Y.U. L. Rev. 210.

course. Reduced per-claim litigation costs lead to higher recovery, not just for the claimants, but for the class as a whole. This means that the defendant in a class action will be forced to internalize more fully the costs of the harm it causes.

If one accepts the public law approach to class actions, with deterrence as the central feature of that model, then one will be more likely to conclude that courts should weigh certification differently depending upon the defendant and the wrong alleged, based on the prospects for deterrence effects. As will be discussed in the following sections, deterrence considerations might be different when dealing with a government defendant than when dealing with a corporate one.

However, it is not necessary to accept the pre-eminent position of deterrence that features in the public law model of class actions in order to accept the central idea advocated in this paper - that class actions against government will often have no deterrent effect and that this might affect a court's decision on whether to certify. One must only recognize that class actions possess a uniquely efficient harm-internalization mechanism, and that this aspect is appropriately considered by Courts when determining whether a class proceeding is "preferable" in any given case.

(D) *Deterrence of Government Wrongdoing*

i. Is the Government a Rational Actor?

It is widely assumed that damages awards have a deterrence effect on government misbehaviour in the same way as in the private marketplace.[17] But is this truly so? Academic commentary tends to gloss over the mechanism of deterring government wrongs[18] or rely perhaps too heavily on Diceyan notions of "equality" as between

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[17] See for example *City of Riverside v. Rivera*, 477 U.S. 561 at 575 (1986) ("the damages a plaintiff recovers contributes significantly to the deterrence of civil rights violations in the future."); and *Hollick, supra* note 7 at para. 34 ("behaviour modification will be effected in a (municipal) government if "the respondent will be forced to internalize the cost of its conduct.").

[18] The most comprehensive works on the subject either tend to downplay the deterrence effect of tort law generally or treat governments as being in the same position as private defendants: see for instance Carol Harlow, *State Liability: Tort Liability and Beyond* (London: Oxford University Press, 2004) at 25. Liability in such cases is often discussed in the rather vague terms of an Aristotelian idea of corrective justice: see for instance Jim Bell, "Governmental Liability in Tort" (1996) 40 N.J.C.L. 85 at 98 ("my approach to liability is based on principles of justice, rather than principles of deterrence (specific or general)"). In a later article, Harlow takes a subtler view of tort law in the government context, stating that she does not "hint at the deterrent use of tort law nor to develop a deterrent theory of state liability": Carol Harlow, "State Liability: Problem Without a Solution" (1996) 40 U.T.L.J. 67 at 75. Harlow's endorsement of applying normal liability rules to state action was premised, at least in part, on her view of the role of tort as "ombudsman" (citing at A.M. Linden, "Tort Law as Ombudsman" (1973) 51 Can. Bar Rev. 155), "a substitute for public law, or alternative pathway for complaints..." to fulfil an "appeasement function" and avoid the social unrest that would be caused by officials being regarded as "beyond the reach of the law". While we are sympathetic to this view of one purpose of tort liability, we would point out that (as Linden recognized), this "ombudsman" or "appeasement" function applies equally to private and public wrongdoers. It does not, therefore, serve as a substitute for, or answer to, the absence of tort deterrence in the government context.

citizen and state.[19] Yet there are a number of reasons to believe that the deterrence effect of damages awards are considerably different in the context of claims against government.

Institutions, of course, are collections of individuals, not individuals in themselves. Economists have been able to attribute a rationality to corporate decision-making, but only to the extent that the firm, constrained by rules of corporate law and shareholder accountability, is designed as a quasi-person, with a host of systems established to ensure that rational profit-maximization remains its governing principle. The incentives of individuals within a firm are meticulously aligned with this single-minded pursuit, and it is only this that permits economists to treat the business enterprise as a single rational actor.[20]

Governments are not corporations. Even if one were to analogize them as such, with voters standing in for shareholders, politicians for directors, and so forth, the fact remains that an individual shareholder's interests are not aligned with maximizing the wealth of the government – because government has a principally redistributive function with respect to public wealth, voters' interests will diverge radically even if their individual interests were those of rational self-interested wealth maximizers.

Similarly, the directors' (i.e. the politicians') incentives also diverge from maximizing the wealth of the corporation (i.e. government), and indeed, to the extent that such individuals could be said to be the agents of their diverse constituents, even this relationship is tenuous, as Levinson notes:

> [B]ecause control and selection mechanisms are much weaker in the political sphere than in economic markets, we should expect the actions of public agents as compared to private agents to diverge from their principals' interests to a much greater extent. The control mechanism undermined in politics by higher monitoring costs resulting from the diverse and difficult to quantify goals which government legitimately pursues. There is no single benchmark, equivalent to firm value, for evaluating the performance of government. Effective control is further hindered by the weak incentives for individual voters to invest in monitoring. In contrast to corporate law, which correlates voting power with economic stake and thereby creates incentives for the most interested shareholders to invest in monitoring, democratic equality norms such as one person, one vote ensure that no individual voter has more than a trivial self-interested incentive to seek information about the behavior of government officials. The selection mechanism is also less effective in the

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[19] Dicey's "idea of equality" was one aspect of his famously articulated definition of the "rule of law": see A.V. Dicey, *The Law of the Constitution*, 10th ed. by E.C.S. Wade (London: MacMillan & Co., 1959) at 193.

[20] For a fuller discussion of the alignment of incentives in the market context see: Edward Rubin, "Rational States?" 83 Va. L. Rev. 1433 at 1437-38 (1997); and Daniel J. Levinson, "Making Government Pay: Markets, Politics and the Allocation of Constitutional Costs" 67 U. Chi. L. Rev. 345 (2000).

> political sphere. While it is true that bad politicians, like bad managers, can be removed from office, there is no equivalent to the corporate takeover market for wholesale displacement of a government that fails to maximize the interest of its principals. Nor are there close equivalents to market competition or the threat of bankruptcy for selectively eliminating inefficient government entities. In sum, government officials enjoy substantial freedom to maximize their own self-interest in various ways at the expense of the interests of their principals. And, as we have seen, insofar as they do further the interests of their principals, those interests will not be congruent with maximizing social wealth or welfare. There is simply no basis, then, for assuming that government, as a collective entity, will rationally pursue any particular goal, let alone rationally maximize wealth or any other single variable.
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> In short, we cannot assume that government will behave like a private, profit-maximizing firm. [21]

Arguably, the dilution of deterrence that we describe here will be more pronounced the larger the polity. That is, deterrence effects may be visible at the local or municipal level where they would be obscured in larger bodies. Certainly this is suggested by the rich literature on deterrence principles in cases concerning compensation for takings, by the writings of Posner, and by the recent decision of Calabresi J., where punitive damages were proposed as a method of internalizing the harm of constitutional torts committed by a municipality.[22]

The distinctions we propose here with respect to government deterrence are not new. The lack of such deterrence was one reason cited in a pair of articles by Cohen in 1990 to support his proposal for a fundamental reanalysis of principles of government liability.[23] In his analysis of the deterrence effects upon the federal government, Cohen later wrote:

> [W]hat, if anything, is the impact of legal liability on the activities of federal bureaucracies? An important aspect of tort law is its effect on the activities of the individuals it regulates; an effective liability regime deters individuals and private firms from engaging in harm-causing behaviour. The economic signals represented by private tort law will induce private actors, operating in competitive markets, to reduce their exposure to potential legal liability risks. It is the tort system that ensures the losses associated with torts are internalized to the individual tortfeasors...

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[21] Levinson, *ibid.* at 355.

[22] *Ciraolo v. City of New York*, 216 F.3d 236 (2d Cir. 2000). See Marilyn L. Pilkington, "Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms" (1984) 62 Can. Bar. Rev. 517 at 574. Pilkington proposes, without analysis, that governments "may be held accountable to an electorate concerned about the tax increases which are required in order to pay substantial damage awards."

[23] David S. Cohen, "Suing the State" (1990) 40 U.T.L.J. 630; and D.S. Cohen, "Regulating Regulators: The Legal Environment and the State" (1990) 40 U.T.L.J. 213.

> However, the assumption that central governments act in competitive markets is rarely, if ever, true.[24]

Hogg disagreed with Cohen's solution (i.e. restricting tort liability of governments) while perhaps grudgingly accepting that Cohen had a point about deterrence. Instead Hogg preferred Bishop's suggestion that, if governments were indeed indifferent to damages awards, tort liability "should be strengthened – for example, with punitive damages – to bring forth the appropriate response."[25] For the reasons we discuss later in this paper, we do not accept that the solution to government indifference is to punish taxpayers until their burden is so unbearable that they lash out against the government. Such an approach seems to us haphazard and unfair. But even if such an approach should be adopted, it must be conceded that its wholesale abandonment of internalization principles means that aggregate litigation is unnecessary. Large punitive awards could be assessed as easily in individual actions, and thus such a proposal adds no support to the "preferability" analysis at the certification stage.

ii. Governments Can Externalize the Costs of Tort Through Delay

The traditional model of optimal tort deterrence also assumes that delay, in and of itself, will not permit a firm or individual to externalize the costs of harm. Obviously, firms often can use delay strategies – by this we mean exploiting the difference in time between when a wrong is committed (and the benefits of committing the wrong accrue) and when damages must be paid – to increase overall wealth (by permitting the defendant, for instance, to continue a wrongful activity if it is sufficiently profitable to offset any increase in the damages to be paid in the future). But governments can actually externalize any costs of harm wholesale, because governments change over time. A government actor at the point of making a wrongful decision (for instance by failing to put in place adequate mechanisms or oversight over bureaucratic processes) knows that the consequences of the decision are unlikely to be visited upon him, as any court case would likely be resolved years in the future.

Governments trade in political capital, not dollars and cents, and this is a crucial distinction when considering the effect of delay. When the incoming Liberal government cancelled a $5.5 billion helicopter deal in 1993, the various parties involved in the decision must have considered the cost (often estimated at $500 million in penalties and cancellation fees), and the inevitability of having to purchase new helicopters in any event within a few years.[26] Had the government been interested in wealth maximization, such a decision might have seemed bizarre. But

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[24] David S. Cohen, "Responding to Government Failure" (1996) 6 N.J.C.L. 23 at 27-28.

[25] Peter W. Hogg, "Compensation for Damage Caused by the Government" (1996) 6 N.J.C.L. 7 at 14, citing W. Bishop, "The Rational Strength of the Private Law Model" (1990) 40 U.T.L.J. 663 at 664.

[26] The incident is recounted in Joseph T. Jockel, *The Canadian Forces: Hard Choices, Soft Power* (Toronto: Canadian Institute of Strategic Studies, 1999) at 75.

the costs to the public treasury of the move were delayed, and were of no real consequence to those who made the decision. The government thus *temporally* externalized the cancellation costs.

This observation regarding delay and the nature of political capital is of course not relevant to all types of claims. However, it provides some further support for the notion that at least one class of damage claims, claims premised on "wrongful legislation" or even "wrongful failure to legislate" in a constitutional sense, have even less potential for behaviour modification than other claims against the government. The government reaps the political benefit from its act immediately. For example, consider the enactment of a popular but unconstitutional piece of legislation. By the time the legislation's invalidity has been established, there may or may not be a consequence in terms of political capital (depending on, for instance, whether the government at the time of the decision is politically invested in the legislation).

There may be every reason to encourage suits by citizens to strike down unconstitutional legislation and challenge illegal activities, and to the extent that the prospect of monetary recovery can spur such legitimate suits, so much the better (this is discussed below as an aspect of access to justice). But there is no reason to think that making the present government internalize the dollar costs of the harm caused by the previous government will deter future unconstitutional legislation.

Externalization through delay also means that any deterrence which may exist will necessarily diminish with time. Absent ongoing misbehaviour, specific deterrence slips away as governments change, indeed as the public mood changes. There may be strong compensation reasons, for instance, to permit a claim by Chinese immigrants who paid a racist (and, it is argued, unlawful) "head tax" many decades ago; there may also be strong socio-political reasons to do so. But it is very difficult to argue that such an action has any meaningful deterrence effect upon either voters or politicians.

iii. The Taxpayer as Insurer

Most bureaucratic actors are shielded from personal liability through legislation, making the government – and ergo the public – the insurer of negligent acts that do not rise to the level of truly egregious behaviour sufficient to trigger personal liability. Unlike a normal insurance relationship, however, there is generally no premium increase based on experience; that is to say, if a particular area of government activity proves to be particularly costly, the operations do not become more expensive, either through direct internalization of costs nor through increased insurance premiums.[27]

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[27] We say generally because there are areas of government activity, such as the provision of medical services or education, where subordinate entities (hospitals, regional boards, etc.) are discretely insured and thus might be said to compete for lower insurance premiums in the same way as corporations.

Monetary awards, when measured for their deterrent effect, must be paid by the wrongdoer, or at the least by an insurer who feels the full impact of the damage award and is incentivized to force the wrongdoer and other insureds to change their ways. This has long been recognized in the jurisprudence surrounding the question of punitive damage awards against government. In *Newport v. Fact Concerts* the majority of the United States Supreme Court refused to permit punitive damages against a municipality for the fault of an officer, saying:

> In general, courts viewed punitive damages as contrary to sound public policy, because such awards would burden the very taxpayers and citizens for whose benefit the wrongdoer was being chastised.[28]

We find the *Newport* court's reasoning a persuasive rebuttal to Hogg's and Bishop's suggestion that punitive damages might be imposed to overcome government indifference to deterrence incentives.[29] Indeed, the same argument could be made to the same extent as any award that was being made against the government for deterrence, as opposed to compensatory, purposes. Cohen wrote:

> Insurance will only marginally attenuate the incentive effects of tort law if one assumes that insurance firms, through premium pricing and insurance contracting arrangements, will take appropriate measures to reduce to a minimum the moral hazard and adverse selection associated with their insuring the relevant risks...[30]

Even a large and successful claim against the government might have no measurable effect on the government's insurer, the taxpayer. Let us consider, for instance, the award of a massive (say $10 million) judgment against the government of British Columbia. With two million taxpayers, each will stand to lose only $5. While this might be momentarily irritating, it is in no way a sufficient loss to ensure that the taxpayer make an effort to more aggressively monitor a particularly costly government activity. In the case of a single private insurer of a corporation, on the other hand, the prospects of a similar loss would provide an incentive to invest up to $10 million in its avoidance.

3. Can There Be an "Optimal" Level of Deterrence of Government?

There is of course also the question of whether deterrence of government activities is desirable in the same way as the deterrence of private wrongdoing. Since there is no profit motive to increase the provision of government services, bureaucrats who do feel deterrence effects will likely seek to do less, rather than more; particularly in activities with a high potential for harm, for instance policing: see *Scheuer v. Rhodes*, 416 U.S. 232 at 240 (1974), where the court identified the threat that "liability would

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[28] *Newport v. Fact Concerts, Inc.* 453 U.S. 247 (1981) at 263 [*Newport*].

[29] See references *supra* note 25 and accompanying main body text.

[30] Cohen, "Responding to Government Failure" *supra* note 24 at 28.

deter [the officer's] willingness to execute his office with the decisiveness and judgement required by the public good."[31]

In fact it may not be at all desirable that government decisions should be subject to optimal deterrence. Levels of precaution and activity are, on this view, matters to be decided by society through political accountability mechanisms, not through the Hand formula or other tort mechanisms. That is, the way governments resolve distributive challenges may be quite different from the way that the courts otherwise would, and that is the prerogative of government and, presumably, the will of the citizenry.[32]

There have of course evolved over time many mechanisms to shield the government and its agents from liability precisely for the reasons alluded to here. There are traditional Crown immunities, the use of the policy/operational distinction, statutes expressly limiting liability or phrasing causes of action so as to effectively do so, and (as already noted) Acts which retroactively defeat particular suits against the government. Each of course comes with political benefits and costs, but cumulatively they support the view that it is the government which determines its overall exposure to suit, and it does so in many ways unrelated to the traditional options open to defendants, who are limited to trying to control the level of dangerous activity or investing in precautions to prevent unreasonable harm.

Thus the idea that governments will be optimally cautious or careful if faced with unrestrained liability on the traditional model cannot survive, because even if it were a rational, wealth maximizing "person" in the traditional paradigm, it retains control over the overall level of liability.

4. The Cases: Do Courts View Government Differently?

Having proposed that there are good reasons to treat behaviour modification differently when the defendant is a government entity, it behooves us to briefly review the extent to which the courts have, thus far, recognized that this is necessary.

The leading case regarding behaviour modification and preferability in government torts is *Hollick v. Metropolitan Toronto (Municipality)*. There, a group of citizens sought certification of a class action against the City of Toronto, complaining of noise and physical pollution from landfill owned and operated by the

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[31] We are conscious, however, that this "overdeterrence" argument may be inconsistent with our previous assertion that governments will tend to be indifferent to tort damages (the point is made by Hogg, *supra* note 25 at 15, observing that "the indifference theory seems inconsistent with the chill theory"). We do not believe them to be mutually exclusive. In most cases, we believe that governments will be more indifferent than private citizens to traditional cost-internalization incentives, but in cases where liability is visited upon individuals or particular competitive government entities (school boards, hospitals, etc.), the overdeterrence or "chill" principle may well govern.

[32] See for instance Cohen, "Suing the State" *supra* note 23 at 646 (given the state's interest in welfare, rather than wealth maximization, "liability rules are both unnecessary and inappropriate regulatory instruments.")

City. The citizens were initially granted certification, but the Divisional Court overturned that decision. The citizens appealed, but the Supreme Court of Canada upheld the decision to deny certification.

The Court addressed the issue of behaviour modification as follows:

> ¶ 34 For similar reasons I would reject the argument that behaviour modification is a significant concern in this case. Behavioural modification may be relevant to determining whether a class action should proceed. ... I am not persuaded, however, that allowing a class action here would serve that end. If individual class members have substantial claims against the respondent, we should expect that they will be willing to prosecute those claims individually; on the other hand if their claims are small, they will be able to obtain compensation through the Small Claims Trust Fund. In either case, the respondent will be forced to internalize the costs of its conduct.[33]

Here, the Court appears to be treating the defendant City as deterred in the same way and to the same extent as a private corporation. This observation is supported by the passage immediately following, where the Court considers that existing environmental regulations could themselves provide an avenue for deterrence. In short, *Hollick* breezes by the question of deterrence, apparently assuming that all defendants, government and private, are the same.

Some lower court decisions, though, do appear to view deterrence somewhat differently when the government is defendant, and have cited the lack of deterrent effect in the preferability analysis.

Cloud v. Canada (Attorney General) and *WJR v. British Columbia* were both cases of alleged institutional abuse.[34] In each case, the institutions in question (Aboriginal residential schools and a psychiatric facility, respectively) were no longer in operation. Due to that fact, the Courts found that behaviour modification was not a factor to be considered in the preferability analysis. Certification was granted in each case because the Courts found that the efficiency and access considerations were sufficient to make the class actions preferable.[35]

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[33] *Hollick, supra* note 7 at para 34 [emphasis added].

[34] *Cloud v. Canada (Attorney General)*, [2004] 73 O.R. (3d) 401 (C.A.) [*Cloud*]; and *WJR v. British Columbia*, [2005] B.C.J. No. 561 [*WJR*].

[35] In a similar "'historical abuse'" case, *White v. Canada (Attorney General)* (2004), 24 B.C.L.R. (4th) 347, the British Columbia Supreme Court considered the application for certification of a class proceeding brought by a group of Canadian sea cadets against the government, claiming negligence in breach of the government's obligation to take reasonable measures in the operation or management of the cadet program to protect cadets from misconduct of a sexual nature by employees, agents or other cadets. The defendant submitted that the need for deterrence or behaviour modification which were advanced by the plaintiff in its submissions in support of certification were not issues in the present case because it related to historical activity under different regulations and orders than currently existed and the culture of the organization had significantly changed. The Court did not comment on the defendant's submission in this regard, and went on to grant certification to the plaintiff class.

There are a number of important points that can be gleaned by the *Cloud* and *WJR* decisions. When considering deterrence, it appears that the courts are reluctant to view governments as being susceptible to general – as opposed to specific – deterrence effects.[36] That is, the concern is whether the government will breach its duties in the same way through the same institutions again. There doesn't seem to be a weighing of whether general deterrence (the idea that a government which is punished for, say, breach of fiduciary duties through one institution would be chary of breaching other duties through another) has any effect upon the government.[37]

In our view, the cases focusing on specific deterrence fit well with the analysis we offer in this paper. Other cases that suggest that general deterrence is at work are not, in our view, as easily supportable. But in both cases it is apparent that courts are not (or at least are not sufficiently explicitly) analyzing the deterrent effect when deciding whether a class proceeding is "preferable" in the unique circumstances of government claims.

ACCESS TO JUSTICE AS A COUNTERVAILING CONSIDERATION

1. In Theory

When assessing the preferability of class actions against the government based on activity that is wrongful and ongoing, there are compelling reasons to endorse the class action notwithstanding that it may have little or no deterrence effect, based on one of the other accepted objectives of class proceedings - access to justice.

Class actions in many jurisdictions benefit from two central advantages over individual actions as a platform to challenge government behaviour. First, they permit an economy of scale that might make small, individually unviable claims worthwhile in the aggregate. A lawyer would be unlikely to invest in an attack on a government wrong that had caused widespread (but individually minimal) harm without the comfort of knowing that an aggregate award would, in the end, generate

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[36] To similar effect see *Antoniali v. Coquitlam (City)*, 2005 BCSC 1310. There, the British Columbia Supreme Court considered an application for certification of a proposed class action against the City, where citizens claimed that the requirement they each pay $6000 under a bylaw was *ultra vires* the City's legislative power and damages for unjust enrichment. The City repealed the bylaw in 1999; the action was commenced in 2002. The Court found that behaviour modification was not a significant factor, but access to justice and judicial economy were key considerations. On that basis the court certified the class action.

[37] This might be contrasted with *May v. Saskatchewan* (2006), 277 Sask. R. 21 (Q.B.) [*May*], where the Court considered an application for certification from a group of members of a public service superannuating plan, claiming damages against the defendant government that was responsible for the administration and operation of the plan. The plaintiffs asserted that behaviour modification was a significant consideration, especially in relation to claims of breach of fiduciary duty. The Court considered that the law of fiduciary duty is premised, at least in part, on deterrence, quoting La Forest J. in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at para. 95: "The law of fiduciary duty has always contained within it an element of deterrence...In this way the law is able to monitor a given relationship society views as socially useful while avoiding the necessity of formal regulation that may tend to hamper its social utility." The Court in *May* stated that behaviour modification had, at the very least, some relevance and that a class action proceeding was the preferable procedure.

sufficient fees. Second, in many jurisdictions (for instance British Columbia, Manitoba, Newfoundland, Saskatchewan, and Quebec) there is a statutory exemption to (or in the case of Quebec a plaintiff-friendly modification of) the traditional costs rules. Thus a plaintiff need not be as wary of taking on the government through a class action.

Canadian courts, in a series of decisions, have stressed the increasing importance of restraining government misbehaviour through citizen action. Beginning with the *Borowski* trilogy, the Supreme Court of Canada broadened the rules of public interest standing to permit citizens to challenge the constitutionality of statutes; [38] this was later expanded in *Finlay v. Canada (Minister of Finance)* [1986] 2 S.C.R. 607 to include challenges to the legality of administrative and executive acts more generally. The purposes for this expansion of the traditional rules for standing were articulated by Cory J. in *Canadian Council of Churches*:

> The state has been required to intervene in an ever more extensive manner in the affairs of its citizens. The increase of state activism has led to the growth of the concept of public rights. The validity of government intervention must be reviewed by courts.[39]

Cory J. said later: "The whole purpose of granting status is to prevent the immunization of legislation or public acts from any challenge."[40]

In *Borowski*, the majority considered three factors to determine that public interest standing should be granted:

(1) there is a serious issue as to the invalidity of legislation;

(2) the plaintiff has a genuine interest; and

(3) there is no other reasonable and effective manner to bring the issue before the court.

Certification requires a valid cause of action, and a class action can only be brought by a person with a genuine interest in the outcome.[41] Thus, the first two *Borowski* criteria will always be satisfied in the course of certification of a class action against the government. Furthermore, where a class action is the only cost-effective way to bring unlawful government activity to the attention of the Court, the

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[38] The criteria for "public interest standing" were developed through a trilogy of cases in the Supreme Court of Canada: *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138; *McNeil v. Nova Scotia Board of Directors*, [1976] 2 S.C.R. 265; and *Borowski v. Canada (Minister of Justice)*, [1981] 2 S.C.R. 575 [*Borowski*].

[39] *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236 at 249 (imposing the *Borowski* test in a *Charter* challenge).

[40] *Ibid.* at 252.

[41] Either a legal interest (where the representative plaintiff is a member of the class) or an ideological interest, as when the claim is brought by a non-class member as permitted, for instance, in British Columbia's *Class Proceedings Act* s. 2(4).

third and last is likewise arguably fulfilled. While these criteria were developed in a different context, they provide some support for the idea that policy favours adapting procedural and substantive rules governing access so that such wrongs do not go unchecked.

2. In Practice

Class actions can enhance the ability of the citizenry to appropriately restrain ongoing unlawful activity of governments. In *Nanaimo Immigrant Settlement Society v. British Columbia*, the government argued that a constitutional class action was unnecessary, as the same goals could be pursued through a simple action for a declaration by any one of the class members. The British Columbia Court of Appeal rejected this contention and certified the class, identifying access to justice issues as weighing heavily in its consideration:

> [T]he question is not whether the class action is necessary – i.e., whether there are other alternatives – but whether it is the "preferable procedure" for resolving the plaintiffs' claims. Section 4(2) of the *Act* states that that question involves a consideration of 'all relevant matters' – a phrase that includes the practical realities of this method of resolving the claims in comparison to other methods... [I]f the claims are aggregated, contingency fee arrangements are likely to be available for the plaintiffs. The claims can be pursued by one counsel or a few counsel rather than by many. A formal notification procedure is available. Generally, it is more likely that those charities that have paid provincial license fees in connection with bingo and casino games can pursue the matter to completion – something very few individual charities could do on their own...
>
> In my view, these factors militate strongly in favour of certification, and are obviously consistent with the stated objectives of the *Act*.[42]

This discussion, like much of the debate surrounding the effect of class actions against the government, has analogies in the older, richer debate regarding constitutional claims against government. Virtually since the advent of the *Charter*,[43] for instance, it was recognized that it is sometimes appropriate to award punitive damages for *Charter* breaches, particularly in cases of egregious police misconduct. Though sometimes discussed in terms of the deterrence effect of the award itself (which for the reasons outlined in this paper is a questionable proposition), it is also noted that such awards provide incentives for members of the public to pursue such claims, as a method of controlling the worst abuses of

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[42] *Nanaimo Immigrant Settlement Society v. British Columbia* (2001), 84 B.C.L.R. (3d) 208, 2001 BCCA 75 at paras. 20-21.

[43] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

government in the public interest.[44] Such a principle is entirely consistent with the analysis of class actions here.

Access to justice has another component, of course, and that is compensation *per se*. Because class actions reduce per-claim litigation costs, they can in many cases provide a reasonably efficient method of compensation. It is perhaps for this reason that, when governments have accepted that compensation is necessary, it has sometimes chosen to effect it through consensual certification of class actions.[45] However, these arguments would be considerably diminished in cases, like *Hollick* itself, where the government had established other avenues for plaintiffs to seek compensation.

TENTATIVE CONCLUSIONS: A PROPOSED FRAMEWORK FOR ASSESSING THE PREFERABILITY OF CLASS ACTIONS AGAINST GOVERNMENT

Our analysis here leads to many more questions than answers. However, we believe some tentative conclusions – perhaps guiding principles might be a better term – can be asserted.

First, courts should not generally expect class actions to produce markedly more specific deterrence than would individual actions in claims against the government.

Second, the more ancient the wrongs, the less specific deterrence could possibly be advanced by harm-internalization.

Third, general deterrence should be assessed on the basis of whether the government activity has any private law equivalent. If the claim is premised on an activity that is unique to government, general deterrence is largely irrelevant.[46]

Perhaps it is best at this stage to emphasize the positive: to describe when class actions are most likely to be the "preferable" procedure for claiming against the government. The most obvious case is where the action complained of is ongoing. In such cases, behaviour modification strongly favours court intervention, and class actions can provide the financial incentive for plaintiffs' counsel to fulfill their role as watchdogs of government wrongdoing. However, this particular advantage diminishes to an extent when individual claims are viable and likely.

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[44] Ken Cooper-Stephenson, *Charter Damages Claims* (Toronto: Carswell, 1990) at p. 367; see also Pilkington, *supra* note 22, particularly at 571 to 574.

[45] Branch & MacMaster, *supra* note 1 at p. 2.1.09.

[46] We say "largely" irrelevant because in some cases it could be argued that forcing one government entity to pay might conceivably deter another government entity. This is perhaps especially true of municipalities and semi-market subordinate bodies, such as school boards. If such an argument were to be made in the context of a uniquely governmental activity, it should include a consideration of the likely effect upon similarly-situated governments elsewhere, if any.

In historical claims[47] for individually unviable amounts, there will be little deterrence effect and no access to justice advantages from a regulatory standpoint. The questions then become whether it is preferable that compensation be provided at the expense of present and future taxpayers. From a policy point of view, such claims are difficult to justify as anything but modest redistributions of public wealth, chiefly benefiting plaintiffs' counsel with no regulatory effect. In most cases, we would say, a strong argument could be made against certification of such claims.

In historical claims for individually viable amounts, there is still no deterrence or regulatory advantage to the class action, for the reasons we have set out. Such actions have been certified, most notoriously in the Jericho Hills School case of *Rumley v. British Columbia*.[48] The court should strongly weigh the redistributive effects of such claims absent deterrence – is the activity complained of one in which the public should be the effective insurer, or should the risks remain with the plaintiff?[49] On the other hand, the effect of the class action's ability to enhance compensation through lower per-claim litigation costs should be considered when determining whether a class action is the preferable procedure. Because such claims would (or under the principles of modern Crown liability should) be pursued individually, the analysis here would support the use of class actions in such cases.

As we have said, it is in cases of ongoing government wrongdoing where class actions are most easily justifiable, even in cases involving individually unviable claims. The economy of scale afforded class actions (and in some provinces, the "own costs" rules) permits the courts to become more effective tools for the restraint of government behaviour in cases involving anything from simple negligence to unconstitutional activities or legislation.

Whether or not the tentative conclusions we have drawn are found to be useful, one thing can be said with certainty: the "preferability" of class actions against the government require an analysis that is fundamentally different from that in cases where private firms are defendants. Thus far, by largely ignoring this difference when considering the certification of class actions, courts are, in our submission, failing to fully consider whether the class action proposed before them is truly the "preferable procedure" for the resolution of the dispute.

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[47] By this we mean claims that do not allege ongoing wrongdoing.

[48] *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, 2001 CSC 69.

[49] Such risk-distribution considerations were weighed in the decision of *Cooper v. Hobart*, 2001 SCC 79 [*Cooper*]. In *Cooper* the Court's decision was on whether the claim disclosed a cause of action (another requirement for certification) – i.e. a finding that the government was not liable to the plaintiffs. However, it would not have been inapt, in our view, for the certifying Court to consider the question of risk distribution at the preferability phase as part of the "behaviour modification" analysis.