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The Sydney Tar Ponds Case: Shutting the door on Environmental Class Action Suits in Nova Scotia?

*Meinhard Doelle**

With the recent refusal of the SCC to grant leave to review the decision of the NSCA,¹ the Sydney Tar Ponds class action suit has now completed its journey through the court system.² The case had been making its way through the courts for a decade against the backdrop of close to 100 years of steel making in Sydney, NS, leading to one of the most notorious contaminated sites in Canada. The operations at the site consisted of an initially privately owned steel plant and coke oven. From 1967 until its permanent closure in 2000, however, the operations owned and operated by provincial (Sysco) and federal (DEVCO) crown corporations.

In 2004, a number of residents and property owners in the vicinity of the site started a court action against the various private and public owners of the plants. The action against the private owners has since been settled. As a result, the claim was eventually limited to the federal and provincial crown, and to the time period from 1967–2000. The ultimate claim was largely about airborne emissions from plant that the plaintiffs claim contaminated their properties and pose a risk to their health. The plaintiffs advanced claims in nuisance, trespass, battery, strict liability, breach of fiduciary duty, and negligence. After the entry into force of the Nova Scotia *Class Proceedings Act (CPA)* in 2007, the plaintiffs sought certification under the Act to have the matter proceed as a class action.³

The plaintiffs claimed that the defendants spewed hundreds of thousands of tonnes of contaminants, including heavy metals, polycyclic aromatic hydrocarbons and dangerous respirable particulates into the air, water and soil of Sydney, including their properties. The remedies sought include:

1. cessation of exposure by removal of contaminants from the properties or relocation of the residents;
2. the implementation of a medical monitoring program consisting of a large-scale epidemiological study and an education program;
3. damages for nuisance for the exposure and substantial interference to the enjoyment of their properties; and

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¹ Leave to appeal was refused by the SCC on January 15, 2015.

² *MacQueen v. Sydney Steel Corp.*, 2013 NSCA 143; additional reasons 2014 CarswellNS 787 (C.A.); leave to appeal refused 2015 CarswellNS 259 (S.C.C.), leave to appeal refused.

³ *Ibid* at para 5–7.

4. damages for the intentional tort of battery or alternatively, for negligent battery.⁴

After numerous hearings and preliminary motions over the course of three years with respect to the scope of the claim, the geographic area covered, and the remedies sought, all of which collectively resulted in the scope of the claim being significantly narrowed, Justice Murphy of the Supreme Court of Nova Scotia granted certification in 2012.⁵ The province of NS and Canada appealed on the grounds that the trial judge erred in finding that:

- the pleadings disclosed a cause of action pursuant to s. 7(1)(a) of the *CPA*;
- the claims of proposed class members raise common issues, pursuant to s. 7(1)(c) of the *CPA*; and
- a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute, pursuant to s. 7(1)(d) of the *CPA*.⁶

The Nova Scotia Court of Appeal (NSCA) rendered its decision on the appeal in December 2013. The NSCA concluded that the pleadings did not disclose a cause of action in trespass, battery or under *Rylands v. Fletcher*. The court went on to conclude that there were not enough common issues to conclude that a class action suit would be the preferable procedure, largely because it considered the critical elements of nuisance (substantial and unreasonable interference) to require determinations on an individual plaintiff basis.

In July, 2014, the NSCA declined to reconsider its decision in light of a recent decisions of the SCC on class actions.⁷ The plaintiffs sought leave to appeal to the SCC. In January, 2015, the SCC denied leave to appeal the NSCA decision.⁸ In this case comment, the implications of the NSCA Sydney Tar Ponds decision for the application of key tort law principles to environmental contamination, and its implications for the future of environmental class action suits in Nova Scotia are explored.

I. IMPLICATIONS FOR ENVIRONMENTAL TORT CASES

(a) *Ryland v. Fletcher*⁹

With respect to strict liability under *Rylands v. Fletcher*,¹⁰ the court's focus was on two elements of the rule: 1. that the defendant's use of its property has to be

⁴ *Ibid* at para 14.

⁵ *MacQueen v. Sydney Steel Corp.*, 2011 NSSC 484; additional reasons (2012), 2012 CarswellNS 1072 (S.C.); reversed 2013 CarswellNS 918 (C.A.); additional reasons 2014 CarswellNS 787 (C.A.); leave to appeal refused 2015 CarswellNS 259 (S.C.C.).

⁶ *Supra* note 2 at para 25.

⁷ *Fischer v. IG Investment Management Ltd.*, 2013 SCC 69, (sub nom. *AIC Limited v. Fischer*) [2013] 3 S.C.R. 949, and *Dell'Aniello c. Vivendi Canada inc.*, 2014 SCC 1, (sub nom. *Vivendi Canada Inc. v. Dell'Aniello*) [2014] 1 S.C.R. 1.

⁸ *Supra* note 1.

⁹ *Supra* note 2 at para 57.

¹⁰ *Rylands v. Fletcher* (1866), L.R. 7 Ex. 265; affirmed (1868), L.R. 3 H.L. 330.

“non-natural”, and 2. that the substance must “escape” from its property. On both aspects, the court relied heavily on the 2011 Ontario Court of Appeal decision in *Smith v. Inco Ltd.*¹¹ With respect to the non-natural use requirement, the NSCA adopted a contextual approach, concluding that what constitutes a non-natural use depends on “*the place where the use is made, the time when the use is made, and the manner of the use*”. Of course, *Smith v. Inco* was not binding on the NSCA, and it is disappointing that the NSCA did not discuss the diversity of views on this point, including leading cases such as the House of Lords decision in *Cambridge Water*.¹² An opportunity to carefully consider the implications of the *Smith v. Inco* approach, and whether to adopt it in Nova Scotia, was missed.

With respect to the meaning of “escape”, the NSCA similarly relied on *Smith v. Inco* to conclude that an escape cannot be an intentional release as part of the regular operation of the business in question. The court seemed to assume that the ordinary meaning of escape includes an element of lack of intention. Interestingly, there is an acknowledgement in the judgment that *Rylands v. Fletcher* has been applied to intentional releases, but the court accepted, without any apparent analysis, the suggestion in *Smith v. Inco* that these cases were wrong.

Yet again, therefore, the NSCA appeared to accept the conclusion in *Smith v. Inco* without careful analysis, and without considering contrary views expressed in the broader case law. Furthermore, contrary to the view expressed in *Smith v. Inco* and in the Sydney Tar Ponds case, the term “escape” is actually used in common language to include intentional releases. We talk of prisoners escaping, for example, without this suggesting anything other than that they took intentional steps to get out of prison. The fact that the escape was not intended by the prison officials, seems quite similar to the fact, in this case, that the release of toxins was not intended by the plaintiffs in the Sydney Tar Ponds case. In short, it is difficult to follow the reasoning that led the NSCA to conclude that an intentional release could not be an escape.

The NSCA decision offers a list of the releases the plaintiff had claimed as escapes, including releases from the smoke stacks of the Coke Ovens, and Steel Plant, dust blown from the Steel Works, effluent escaping from the Coke Ovens washing into the soil and water into adjoining neighbourhoods.¹³ While the plaintiff may not have specifically pleaded that some of these releases were unintended, it seems clear from the list of claimed releases that they actually involve a mix of intended and unintended releases. The court does not engage on this issue.

Oddly, the NSCA decision leaves Nova Scotia with strict liability for accidental releases, but no strict liability for intentional releases. The NSCA suggests in its reasons that strict liability under *Rylands v. Fletcher* attaches to the unintended consequences of dangerous activities, and not to their intended consequences. This seems to suggest a focus on whether the consequence was intentional rather than

¹¹ *Smith v. Inco Ltd.*, 2011 ONCA 628; leave to appeal refused 2012 CarswellOnt 4932 (S.C.C.); reconsideration / rehearing refused 2014 CarswellOnt 12113 (S.C.C.); reversing 2010 ONSC 3790 (S.C.J.).

¹² *Cambridge Water Co. v. Eastern Counties Leather Plc* (1993), [1994] 2 A.C. 264 (U.K. H.L.).

¹³ *Supra* note 2 at para 81.

whether release was intentional, as did *Smith v. Inco*. It does not address, however, whether the releases of the substances listed in the previous paragraph, even if they were all intentionally released (which is far from clear), resulted in intended consequences. Rather, the NSCA simply concludes, without addressing these issues, that the plaintiffs' statement of claim fails to plead facts sufficient to establish an escape as required under *Rylands v. Fletcher*.

(b) Trespass to Land¹⁴

The issue of trespass was not considered by the Ontario Court of Appeal in *Smith v. Inco*, other than to endorse the trial decision on this point. In concluding that the plaintiffs did not adequately plead the directness requirement, the NSCA similarly relied heavily on the trial decision in *Smith v. Inco*. Of course, the trial judge in *Smith v. Inco* took a very different position on other torts (particularly on *Rylands v. Fletcher* and nuisance), which in turn made it easy for the trial judge to reject trespass without an in depth analysis of the directness requirement.

The NSCA essentially concluded that directness is what distinguishes trespass from nuisance. In other words, trespass has to be direct, nuisance has to be indirect. Of course, this does not end the matter, as it is not necessarily self-evident where the line between direct and indirect interference with the possession or enjoyment of property is. To illustrate the difference, the court refers to an example of someone throwing a rock on a neighbour's property, versus a rock falling off a collapsing chimney from the defendant's house onto the plaintiff's property. The suggestion is that the former is direct, whereas the latter is indirect.¹⁵

Less clear is how the courts view that the deposit was not direct fit with the courts view, as discussed above, that the release was intentional and therefore not an escape under *Rylands v. Fletcher*. A key difference between the rock falling from the chimney and the rock being thrown seems to be the intent of the defendant. There may be an element of intervening events resulting from the neglect of the chimney, but the neglect would have been caused by the same defendant. It would have been helpful to have a more clear statement of what constitutes sufficient directness and how the test adopted results in an appropriate role for trespass in environmental contamination cases.

In the end, is unclear from the decision whether anything less than the defendant personally carrying something onto the plaintiff's property would be enough to meet the directness test. The NSCA clearly suggests throwing something onto property is sufficiently direct, but releasing air emissions intentionally that you know will land on a plaintiff's property does not appear to be sufficiently direct.

(c) Battery¹⁶

Relying on the 2000 SCC decision in *Non-Marine Underwriters, Lloyd's London v. Scalera*,¹⁷ the NSCA concluded that directness is a requirement for per-

¹⁴ *Supra* note 2 at para 84.

¹⁵ *Supra* note 2 at para 88.

¹⁶ *Supra* note 2 at para 94.

¹⁷ 2000 SCC 24.

sonal trespass or battery. There are cases that seem to take a different approach that were not considered by the court. In *MacDonald v. Sebastian*,¹⁸ for example, the court concluded that a landlord's failure to inform his tenants of the presence of arsenic in the well water, which the landlord knew to be a health risk, constituted a battery. It is not clear whether the NSCA would consider MacDonald to have been overturned by the SCC, or whether MacDonald could be argued to have met the test for battery in *Non-Marine Underwriters*.

As with directness in the context of trespass to land, it is not clear from the decision where the line is, and whether anything short of direct physical contact between the parties is sufficient to meet the directness requirement imposed by the court. What if the defendant throws a knife? What if the defendant sends poison in a letter? What if the defendant intentionally releases a harmful substance into the air, knowing it will blow onto the plaintiff's property?

(d) Nuisance¹⁹

The NSCA adopted the following test from *Smith v. Inco*:

*A person, then, may be said to have committed the tort of private nuisance when he is held to be responsible for an act indirectly causing physical injury to land or substantially interfering with the use or enjoyment of land or of an interest in land, where, in the light of all the surrounding circumstances, this injury or interference is held to be unreasonable.*²⁰

Based on this test, the court concluded that the tort of nuisance was adequately pleaded. The significance of the court's approach to nuisance only becomes clear in the analysis of the certification test, with respect to the common issues related to the critical parts of the test, "substantial" and "unreasonable" interference with the use of enjoyment of land. This issue is discussed below.

(e) Final Thoughts on Common Law Treatment

The limitations of the decision go beyond its treatment of individual torts. Also missing in the decision is any serious analysis of the role of the common law in dealing with environmental contamination, the appropriate role of each of the torts under consideration, and any discussion of whether the significant gaps left as a result of the application of the available torts are due to an appropriate constraint of the role of the common law as a whole in dealing with environmental contamination. Instead, the justification for the findings on individual torts is based on selective reliance on precedents, most notably the Ontario CA decision in *Smith v. Inco*, often without full engagement with alternative approaches applied in other cases. Interactions between torts are only considered to avoid overlap, such as the direct, indirect distinction between nuisance and torts, without regard to the significant gaps created by the narrow interpretations of the Rule in *Rylands v. Fletcher*, trespass and battery.

¹⁸ (1987), 81 N.S.R. (2d) 189 (T.D.).

¹⁹ *Supra* note 2 at para 101.

²⁰ *Ibid.*

It is important to keep in mind that the NSCA's discussion of these tort principles took place in the context of whether the plaintiffs had pleaded essential elements of each tort, not on whether there was evidence to support the claims. This distinction will be critical for future tort litigation, because it does provide an opportunity to limit the damage this case would otherwise do to environmental tort claims in Nova Scotia and beyond.

II. IMPLICATIONS FOR ENVIRONMENTAL CLASS ACTION CERTIFICATIONS IN NS

(a) Common Issue²¹

Having reduced the claims to nuisance, negligence and breach of fiduciary duty, the latter two of which were not directly challenged in the appeal, the court then turned to the question whether each of these causes of action involved common issues as required under the *Class Proceedings Act*.²² Given the finding of the NSCA that nuisance is the main remaining claim resulting from its assessment of the various tort claims advanced, nuisance is the focus here. The following are the key provisions of the NS *Class Proceedings Act*:

7. (1) The court shall certify a proceeding as a class proceeding on an application under Section 4, 5 or 6 if, in the opinion of the court,

...

(c) the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members;

2. In this Act,

...

(e) common issues means:

(i) common but not necessarily identical issues of fact, or

(ii) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

The NSCA cites with approval the following excerpt from the Western Canadian Shopping Centres Test (SCC):

*Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues.*²³

The court also cited with approval the SCC in *Hollick*,²⁴ which suggests that class certification decisions should seek to void duplication of factual findings or legal analysis that is a substantial ingredient of each member's claim. Clearly there were common issues of fact in the Sydney Tar Ponds case (such as what substances

²¹ *Supra* note 2 at para 111.

²² *Class Proceedings Act*, SNS 2007, c 28.

²³ *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46.

²⁴ *Hollick v. Metropolitan Toronto (Municipality)*, (sub nom. *Hollick v. Toronto (City)*) 2001 SCC 68.

were released at what time during the operation of the plants). The court concluded, however, that the two key elements of private nuisance, “substantial” and “unreasonable” interference with the plaintiffs’ properties, could not be determined on a class basis, but required consideration of how the pollution affects each individual. The decision does not engage in a detailed analysis of which aspects of substantial and unreasonable interference may have common elements (particularly in terms of factual findings), and where the balance of individual and common issues was. Instead, the NSCA seemed to conclude generically that a class action based on private nuisance is not possible because private nuisance in the end requires some judgment about how the interference affects the particular plaintiff.²⁵ The resulting message appears to be that in Nova Scotia, private nuisance cases for environmental contamination cannot proceed by way of a class action.

(b) Preferable Procedure²⁶

In light of the court’s conclusion on which claims were adequately pleaded and what common issues existed with the remaining claims, the conclusion that a class action was not the preferred procedure was not a difficult one to reach. It seems, however, that the court did not base its decision on preferred procedure on the alternative of each property owner or resident that is part of this class bringing an individual action. Rather, the court seems concerned about the complexity of the class action suit, and implicitly seems to be using the no action alternative as a comparator, rather than considering whether a class action suit would be preferable to individual lawsuits for each plaintiff. Given the practical challenges involved in bringing individual claims, the court may have been right to assume the alternative would be no claim, however, it may also mean no justice for many Sydney residents who have been harmed by the operation of these plants.

III. CONCLUSION

It is not surprising that the plaintiffs sought leave to appeal the decision to the Supreme Court of Canada. Given the devastating effect of this decision on environmental class actions and tort claims, and the many questions, areas of uncertainty and inconsistencies in the law in this area in Canada, this was an important case for the SCC to consider. Unfortunately, in January, 2015, the SCC denied leave to appeal the NSCA decision.

What is perhaps most striking is that the NSCA concluded the plaintiffs had not properly pleaded a number of their tort claims based on a specific approach to the legal test to the tort (in the face of conflicting case law), without giving the plaintiffs the opportunity to have a full hearing on what the appropriate legal test would be. The court’s approach to directness in trespass and battery, and to escape in *Rylands v. Fletcher* are perhaps the most striking examples. Significantly, in *Smith v. Inco*, these claims were allowed at the certification stage, and only rejected at trial after a full hearing on the facts and on what the appropriate legal test would be.

²⁵ *Supra* note 2 at para 143.

²⁶ *Supra* note 2 at para 164.

