Court of Appeal on *Smith v. Inco*: *Rylands v. Fletcher Revisited*

*By Michael S. Hebert and Cheryl Gerhardt McLuckie**

In October 2011, the Ontario Court of Appeal released its much anticipated decision in *Smith v. Inco Limited.*[1] The court, in its 70 page unanimous ruling, examined a number of fundamental issues commonplace in virtually all contaminated land litigation.

We reported in a previous edition of *Environews* on the trial decision of *Smith v. Inco*, wherein Justice Henderson awarded a series of class action claimants $36 million for stigma damage to their property.[2] The Ontario Court of Appeal reversed his decision, and in doing so revisited and substantially altered several fundamental areas of law dealing with contaminated lands litigation such as nuisance, the doctrine of *Rylands v. Fletcher*,[3] causation and damages.

The impact of this ruling will be widespread and immediate on claims for environmental property damage, particularly on claims for damages for diminution in property value (or "stigma"). Such claims have become commonplace after the release of the 2002 Ontario Court of Appeal decision in *Tridan Developments Ltd. v. Shell Canada Products Ltd.*[4] (in which the first-named writer was counsel for the plaintiff).

A full discussion of all the issues raised in the Court of Appeal decision in *Smith v. Inco* is beyond the scope of this paper. This article focuses on the court's treatment of the rule in *Rylands v. Fletcher* (also known as "strict liability") as a tort remedy. Also considered is whether the Court of Appeal has effectively limited the availability of damages for stigma to cases to where there is actual damage to a property.

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[1] 2011 ONCA 628 (C.A.), rev'g 2010 ONSC 3790 [*Smith v. Inco*].

[2] http://www.oba.org/En/Environmental/newsletter_en/v20n1.aspx#Article_3.

[3] (1866), L.R. 1 Ex. 265, aff'd (1968), L.R. 3 H.L. 330.

[4] (2002), 57 O.R. (3d) 503, 154 O.A.C. 1 (C.A.), varying [2000] O.J. No. 1741, 35 R.P.R. (3d) 141 (S.C.J.) (2002), 57 O.R. (3d) 503, 154 O.A.C. 1 (C.A.) [*Tridan v. Shell*].

The Court of Appeal's Treatment of the *Rylands v. Fletcher* Doctrine

The Court of Appeal accepted that *Rylands v. Fletcher,* at least for the time being, is here to stay, following the Supreme Court's statement of the doctrine in *Tock v. St. John's Metropolitan Area Board.*[5] However, the Ontario Court of Appeal changed a number of parameters required to make out the cause of action, and most certainly altered the way in which it can be used to support claims for diminution in value caused by contamination.

The decision rejects a relaxed standard of strict liability for ultra hazardous activities espoused by tort textbook authors Linden and Feldthusen.[6] Briefly, Linden and Feldthusen had favoured an "emerging" strict liability theory of damages for abnormally risky or extra-hazardous activities that cause damage to other properties.[7] Under their theory, it is not necessary that the dangerous substance "escape" from the defendant's property or that the use of the defendant's land be characterized as "special" or "non-natural" – liability flows from the nature of the activity itself.[8]

The Court of Appeal was critical of the trial judge's adoption of Linden and Feldthusen's theory of strict liability.[9] The trial judge's treatment of this emerging theory was unfortunate because the theory is just that. It is not yet the law in this province and the Court of Appeal so held. The trial judge's decision was clearly open to reversal when he discussed the theory and then applied it to "these abnormally dangerous activities"[10] in the absence of any evidence that the smelting activities in Port Colborne were abnormally

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[5] [1989] 2 S.C.R. 1181 [*Tock*].

[6] Allen M. Linden and Bruce Feldthusen, *Canada Tort Law,* 8th ed. (Markham, Ont.: LexisNexis Butterworths, 2006), at pp. 540-541.

[7] *Smith v. Inco, supra* note 1, at para. 76.

[8] *Ibid*. at para. 77.

[9] *Ibid.* at para. 84.

[10] *Smith v. Inco* trial decision*, supra* note 1, at para. 66.

dangerous. Even if the Court of Appeal had entertained the theory, there was no evidence to support it.

The difficulty in applying the doctrine in *Rylands v. Fletcher* arises out of the evolution of the tort since it was first articulated in 1866. Continual modifications of the elements of the tort in different factual contexts had made its application more uncertain.

The Court of Appeal set out the four prerequisites of the operation of the rule in *Rylands v. Fletcher* to reflect current jurisprudential thinking:

1. the defendant made a "non-natural" or "special" use of his land;
2. the defendant brought onto his land something that was likely to do mischief if it escaped;
3. the substance in question in fact escaped; and
4. damage was caused to the plaintiff's property as a result of the escape. [11]

From the time the tort was introduced, claimants were required to establish both that a substance likely to do mischief had escaped from the land and that there be a "non-natural use of the land." This latter concept has developed through the years with various descriptions and reaches its pinnacle in the Court of Appeal decision in *Smith v. Inco.* The concept required that the defendant's use of its land is non-natural, or, as described in other cases, "special," "unusual" or "extraordinary."

While the trial judge strayed a little further than the evidence suggested in characterizing the use of the land as ultra hazardous when there was no evidence to support such a finding, the Court of Appeal went further in the opposite direction by suggesting that a non-natural use has to relate to the ordinary use of lands in the vicinity of the subject property. Applying their logic, one factory in a row of ten would be immune from liability under *Rylands v. Fletcher* because of the fact that it didn't create an unusual risk

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[11] *Smith v. Inco*, *supra*, Note 3, paragraph 71.

over and above those of its nine neighbours. This is troubling and will provide a great deal of difficulty for litigators in the future.

In the writers' opinion, the concept of non-natural use raised by the Supreme Court of Canada in *Tock* was given greater consideration than was necessary to decide the matter. Once again we see the classic illustration that the facts make the case. In *Tock* (a Newfoundland and Labrador case), the issue before the court was whether a municipality could rely on the defence of statutory authority in a claim for nuisance arising from an escape from a sewer system. There was no statutory provision limiting liability. In other jurisdictions, such as Ontario, this issue would not have arisen as a result of statutory provisions which preclude claims against the operators of sewage systems (such as s. 449 of Ontario's *Municipal Act*) [12]. In *Tock*, to achieve a result whereby the sewer operator would avoid liability, which common sense would dictate is appropriate, the court may have inadvertently restricted the doctrine of *Rylands v. Fletcher*, and specifically, what may constitute a "non-natural use."

In *obiter dicta*, the Court of Appeal in *Smith v. Inco* considered two other issues related to *Rylands v. Fletcher*.

Firstly, the court examined the role of foreseeability in *Rylands v. Fletcher* claims.[13] It quite correctly concluded that requiring foreseeability of escape would be the end of *Rylands v. Fletcher* as a strict liability tort and would transport it into the realm of a garden variety negligence claim.[14] The court did, however, state that there are "compelling reasons to require foreseeability of the kind of damages alleged to have been suffered by the plaintiffs" by reason of the escape.[15] This, in the writers' opinion, is a

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[12] S.O. 2001, c. 25, s. 449.

[13] *Smith v. Inco*, *supra* note 1, para. 108.

[14] *Ibid*. at para. 109.

[15] *Ibid*. at para. 110.

very dangerous avenue to embark on as it will invite debate over whether the actual damage suffered by the plaintiff was foreseeable or not. The tort is clear. It is sufficient that something likely to cause mischief is brought onto land, it escapes, and it was a non-natural use. Surely a plaintiff need not go further and prove that the kind of damage it suffered is foreseeable. If such were the case, a defendant who may not be able to foresee the consequences of a new technology (or even an existing technology in a new context) may escape liability because the damages suffered by a plaintiff are novel or not anticipated.

The second issue the Court of Appeal considers (but ultimately leaves open) is whether liability should be imposed where a plaintiff suffers damages that are "the intended result" of the activity undertaken by the defendant.[16] Applying such a rule may imply that if a neighbour embarks on an activity which carries with it consequences that could damage a plaintiff's land, he or she is immune from liability simply because a permit was obtained to carry on the activity and the result was anticipated. Entertaining such a rule would be unfortunate as the court in the same decision has already accepted the proposition that carrying on in accordance with all applicable rules, bylaws and permits is not a defence to a *Rylands v. Fletcher* claim,[17] and nor, in the opinion of the writer, should it be.

Has the Court of Appeal Limited Damages for Stigma?

The claimants' nuisance claim was based solely on material physical damage to the claimants' properties. While the trial judge accepted the submission that nickel in the soil on the claimants' properties constituted physical damage, the Court of Appeal was not prepared to allow claimants to simply jump from the fact that their property has been impacted by a potentially harmful substance to an automatic finding of liability. It held that there must be physical damage to the land in the sense that there is a risk to human

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[16] *Ibid*. at para. 112.

[17] *Ibid*. at para.100.

health or that the property is rendered unfit for its usual purpose. Only then is the concept of stigma caused by that damage considered.

The Court of Appeal specifically found that nothing in *Tridan*, which was about the quantification of damages, lends support to the trial judge's holding that public concerns about the potential harm done to the properties affecting the value of the properties could constitute substantial physical harm to the land for the purposes of a nuisance claim.[18] It is clear that a perception of harm will be insufficient, and actual harm must be demonstrated by a plaintiff.

While the court did not discuss the requirement for actual damage in the context of its *Rylands v. Fletcher* analysis, there is no academic reason why it would not be required. We will all have to re-think the factual basis of stigma claims because, on a strict interpretation of the Court of Appeal's ruling, it will no longer be sufficient to show that there is an impact in excess of Ministry of the Environment generic guidelines of a substance on the plaintiff's property and that there is a *perception* that this substance could be harmful, resulting in diminution in value. It seems certain that a plaintiff will now have to take the intermediate step of establishing that somehow the presence of the substance damaged the property before it can move to the next step of establishing the fact that that damage caused stigma.

This remains a very difficult problem for many plaintiffs. On the one hand, it could be argued that contamination of a site by hydrocarbons, for example, at levels only two or three times guidelines and at considerable depth wouldn't interfere with the use or enjoyment of the property where the property is serviced by municipal sewer and water. Clearly the *knowledge* that there are these substances on the land will drive down the value, but leading that evidence directly will be insufficient if you can't show that the

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[18] *Ibid*. at para. 66.

property was "damaged." Litigators will have to be careful in framing their cases. For example, even where the residual contamination remains after remediation meets the applicable guideline limit, it can be argued that the land is still damaged because, when the property is re-developed, the excavated soils which are impacted (albeit below guidelines) will have to go to a waste management facility under present regulations, thus incurring substantial tipping fees.

The court's decision may also be viewed as a reluctance to expand any tort liability for hazardous activities, perhaps because of the increasing amount of legislation dealing with such issues. This needs to be looked at carefully, given the limited range of claimants, wrongs and defendants dealt with in provincial legislation.

The court did not examine the issue of the effect of the Ministry of the Environment Guidelines and the scientific basis for setting them (levels beyond which the risk to public health becomes unreasonable). Is this alone a risk of health sufficient to trigger the property damage? The court does not appear to have dealt with this issue, except to say that the guidelines are not conclusive on this issue, as was the case in *Tridan v. Shell*.

Since a claim under nuisance or *Rylands v. Fletcher* was not made out, the Court of Appeal specifically stated that it did not have to address the causation issue with respect to diminution in property value[19] – *i.e.*, whether the trial judge erred in finding that the diminution in property value was caused by the discharge of nickel particles into the land. Therefore the future of the fourth step in the approach set forth in this paper will require further jurisprudence for clarification.

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[19] *Ibid*. at para. 4.