ENVIRONMENTAL CAUSES OF ACTION AND STIGMA DAMAGES

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1. Stigma - Definition and Conceptual Framework

A clear understanding of what stigma is, and how it interacts with land values to result in compensable damages which can be the subject matter of damage claims, if properly framed, presented, and supported by appropriate evidence, is absolutely critical to the successful prosecution or defence of these difficult claims.

In Canada, The Appraisal Institute of Canada has published numerous articles and held many programs concerning the concept of stigma and its effect on land value. The Institute specifically advises its member that in the context of contaminated land, remediation costs alone may not adequately deal with the effect on value of the contamination of land.

The Appraisal Institute, in the context of environmental claims, defines stigma as a negative value that may attach to land that is or has been contaminated. Classical appraisal treatment of contaminated sites would hold that the proper valuation of a contaminated site is equal to the fair market value of the site as if it had never been impacted by environmental contamination issues, less the costs to remediate the site, less the resulting stigma.

There are many factors that can influence whether and to what extent stigma will be present on any particular piece of land. The root of the problem is the natural tendency of people to fear the unknown. While a large stack of environmental engineering papers may demonstrate that a site has been remediated to this or that standard, individuals naturally treat such reports with some reluctance and are hesitant to completely rely on them. In our practices we see many different view points of different engineering firms studying the same site at the same time. Fear of the unknown and what might happen in the future, in spite of the sophisticated nature of present day environmental assessment technology, remains a persistent problem. The frequent amendment of generic criteria certainly doesn't help alleviate this uncertainty.

The Appraisal Institute of Canada provides guidelines and prescribes details on how to deal with stigma in the context of an evaluation. The Institute prescribes that its members must provide, or at least describe the concept, or possibility that stigma could exist, where appropriate.

The concept is well known to those in the real estate industry but is extremely difficult to prove. This difficulty arises from the following factors:

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[1] With contribution from Cheryl Gerhardt McLuckie, Beament Green.

a. All sites are different, have different soil compositions, sensitivities and susceptibility to greater or lesser damage from the same type of contaminant.

b. Different locations will have different amounts of stigma depending upon the overall demand for real estate in any given location. In some cases, a commercial site in a very popular and fast selling area, if remediated to generic criteria, may well suffer little or no stigma damages whereas a residential property cleaned up to generic criteria may suffer as much as a 20% reduction in value. This depends in part on the sophistication of the end user and the tolerance and appetite of that user for risk.

c. The effect of different contaminants is difficult to assess. Does PHC provide a greater or lesser degree of stigma than say, PERC contamination?

d. The level of contamination after remediation will control the degree of any stigma that may attach to the site.

e. The use which the site presently enjoys or which the site might reasonably enjoy impacts on not only the level of remediation that must be accomplished, but the effect that contamination will have on the site. This is another variable factor in looking at stigma.

Not only do each of the above noted factors individually vary the impact that contamination on any given site will have, but they all interact together to result in different properties suffering different degrees of stigma. In the context of environmental litigation, no two sites are the same.

2. Tridan v. Shell

In Chapter 8 of this paper, I will discuss the difficulty of obtaining proper evidence of stigma. In this chapter, I will review the decision of *Tridan v. Shell*, in which stigma was a key issue.

Prior to the 2000 trial decision of *Tridan Developments Ltd. v. Shell Canada Products Ltd.*[2], caselaw in Canada had not dealt with the concept of stigma in any appreciable fashion. Going into that trial, there was great debate as to whether the Courts would consider it as a compensable damages claim or not. Then, as now, the success of your stigma claim depended not only on the quality of evidence that you obtained for your client, but the manner in which that evidence was presented at trial and how it was used to your client's advantage.

In *Tridan v. Shell*, the author was lead counsel at trial, on appeal before the Court of Appeal of Ontario and also on the leave application to the Supreme Court of Canada. The facts of the case are well known, but briefly, the Court was faced with evidence demonstrating substantial contamination of the Tridan site which had migrated from the adjacent Shell Oil Service Station. The concepts of level of clean up and stigma were dealt with at trial before Binks, J. The plaintiff presented evidence as to the cost of clean up to generic criteria and the cost of clean up to "pristine" levels, which was taken to be to background levels present on any given site. Shell contended that because the Ministry of the Environment had propounded generic criteria, the plaintiff must accept a clean up to that level. The plaintiff contended that this was incorrect, and that while Shell could rely on generic criteria in choosing how clean to make its own site, it was not entitled to visit that level of residual contamination on the plaintiff, particularly where the differential cost between clean up to pristine versus generic criteria was not unreasonable given the value of the land and the circumstances of the case.

The trial judge awarded damages for clean up to pristine levels as well as damages for stigma based on the evidence that the site would suffer stigma after remediation. The Court of Appeal disagreed with the trial judge's finding on that point and felt that the stigma evidence presented at trial substantiated the fact that stigma damages could exist where a site was cleaned up to guidelines or generic levels, but did not apply where a site would be cleaned up to pristine or background levels.

Given the rudimentary nature in 2000 of the link between stigma and its negative impact on property values, the Court was reluctant to accept that a site with a pristine clean up would suffer any damages. However, and with respect to the Court of Appeal, depending upon the evidence, the site and the particular situation, it is entirely possible that a site cleaned up to pristine could still suffer a diminution in value or stigma. Please note that the Court of Appeal refused the claim for diminution in value based on the fact that the plaintiff obtained damages sufficient to clean the site

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[2] (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*].

up to pristine, and the evidence that was lead contemplated a stigma resulting from a clean up to guidelines.

In *Tridan v. Shell*, there was substantial evidence put forward of damage to the land which was not put forward in the case of *Smith v. Inco Limited* [3] that will be discussed later in this paper. Determining what evidence needs to be obtained and presented at trial has become and will continue to be critically important in the pursuit of damage claims in the future given the recent comments of the Court of Appeal in *Smith v. Inco*.

[3] 2011 ONCA 628 (C.A.)("Court of Appeal Decision"), rev'g 2010 ONSC 3790 ("Trial Decision") [*Smith v. Inco*].

3. Rylands v. Fletcher

Rylands v. Fletcher [4] is a very old British decision that visited strict liability on land owners who had brought onto their land something which was allowed to escape, and which caused damage to their neighbour's land. It was thought that the case had become dormant. However, the plaintiff in *Tridan v. Shell* raised this case and it was accepted not only by the trial judge but by the Court of Appeal as good law, and remains good law to this day, subject to the potential modification of it resulting from the recent comments of the Court of Appeal in *Smith v. Inco*. The requirements for the application of the rule are *Rylands v. Fletcher* can be stated as follows:

a) a non-natural or special use of the defendant's property;

b) that the defendant brought onto his or her land something likely to do mischief if it escaped;

c) that there was in fact an escape of the substance; and

d) that damage was caused.[5]

One challenge in the application of the rule resulted from the comments of Lord Cairns, who raised the concept of "non-natural use". How to determine what constitutes a "non-natural use" has proven difficult, given the vagueness of the concept. The Supreme Court of Canada provided some guidance on the interpretation of "non-natural user" in the case of *Tock v. St. John's Metropolitan Area Board.*[6] Various descriptions were referred to by Justice La Forest, including "a user inappropriate to the place where it is maintained" and the following statement of Moulton L.J. in *Richards v. Lothian*, [1913] A.C. 263, at p. 280:

> It is not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community.[7]

The comments of the Supreme Court of Canada in *Tock,* although not definitive, provided the Court of Appeal in *Smith v. Inco* with considerable fodder with which to tighten up the use of the rule in future cases.

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[4] (1866), L.R. 1 Ex. 265, aff'd (1968), L.R. 3 H.L. 330 [*Rylands v. Fletcher*].

[5] *Smith v. Inco*, *supra*, Note 2, Court of Appeal Decision, para. 71.

[6] [1989] 2 S.C.R. 1181 [*Tock*].

[7] *Tock*, *supra,* Note 5.

This issue will be a continual challenge for the foreseeable future, given the emphasis placed by the Court of Appeal in *Smith v. Inco* on the concept of non-natural user.[8]

[8] Refer to Chapter 7.

4. Nuisance Law

Two types of nuisance have been distinguished in the jurisprudence to date. Private nuisance exists where a defendant does something on its land which results in an interference with the private right enjoyed by the plaintiff with respect to its land. A public nuisance, on the other hand, involves an interference with a right that is shared publically by the community. Private nuisance was defined by McIntyre J. in *St. Pierre v. Ontario (Minister of Transportation and Communication)* as follows, at paragraph 10:

> 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.[9]

However, the Court of Appeal in *Smith v. Inco* substantially broadened the concept of what is unreasonable, relying on the decision of the British Columbia Court of Appeal in *Royal Anne Hotel Co. Ltd. v. Village of Ashcroft.*[10] As stated by the Court at paragraph 39:

> People do not live in splendid isolation from one another. One person's lawful and reasonable use of his or her property may indirectly harm the property of another or interfere with that person's ability to fully use and enjoy his or her property. The common law of nuisance developed as a means by which those competing interests could be addressed, and one given legal priority over the other. Under the common law of nuisance, sometimes the person whose property suffered the adverse effects is expected to tolerate those effects as the price of membership in the larger community. Sometimes, however, the party causing the adverse effect can be compelled, even if his or her conduct is lawful and reasonable, to desist from engaging in that conduct and to compensate the other party for any harm caused to that person's property. In essence, the common law of nuisance decided which party's interest must give way. That determination is made by asking whether in all the circumstance the harm caused or the interference done to one person's property by the other person's use of his or her property is unreasonable.[11]

Please refer to Chapter 7 for my analysis of *Smith v. Inco* and its impact on *Rylands v. Fletcher* and nuisance.

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[9] [1989] 1 S.C.R. 906, para. 10.

[10] (1979), 95 D.L.R. (3d) 756 (B.C. C.A.).

[11] *Smith v. Inco*, *supra*, Note 2, Court of Appeal Decision, para. 39.

Nuisance remains a valuable tool in the environmental claims toolbox, because it does not require that the plaintiff prove a negligent act, but merely the creation of an actionable effect on the plaintiff's land or the plaintiff's use of its land.

5. Strict Liability

Unlike many other areas of civil litigation, environmental litigation involves many legal concepts and causes of action, many of which provide for strict liability. Causes of action which attract strict liability do not require negligence or lack of attention to be proven, but merely the existence of a state of affairs which invite automatic liability. Strict liability is a central tenet to:

a. Liability under the doctrine of *Rylands v. Fletcher*;

b. Nuisance; and

c. Statutory liability under the provisions of Ontario's *Environmental Protection Act*, R.S.O. 1990, c. E.19

In many environmental actions, the issue of liability is often not the most significant issue to be dealt with. That is not to say that negligence does not have its place in an appropriate environmental case, but the subject matter of this paper and the causes of action discussed herein all have as their common thread the concept of strict liability. Chapter 7 of this paper, however, casts some doubt as to the role served by strict liability and its future in light of the recent Court of Appeal decision in *Smith v. Inco*[12].

[12] *Smith v. Inco*, *supra*, Note 2, Court of Appeal Decision

6. Concept of Reasonableness in the Assessment of Statutory Damages v. Remediation Requirements in the Environmental Protect Act

Tridan v. Shell dealt with the concept of recoverable damages and the requirement for reasonableness in framing them. In that case, the Court was agreeable to allowing the plaintiff damages to clean up its site to pristine because the additional cost over and above the clean up to generic criteria was not unreasonable in light of the value of the land. This concept becomes blurred when the concepts of statutory remediation requirements and alternative damage assessment theories are applied to any given property.

It is easy to see that where remediation costs are less than the value of a property, it is not unreasonable to insist that they be paid, particularly where the remediation of a property will restore all or significantly all of its value. A much more difficult analysis arises in a scenario where the cost of remediation may greatly exceed the value of the land. Should the plaintiff simply be awarded the costs of remediation? What impact does the fact that the contamination exceeds guidelines and that the owner may therefore be required to remediate the site to guidelines have on this issue? Many cases ignore this latter issue but it is a very real concern. If a Court assesses damages on a loss of investment value as in *Cousins v. McColl-Frontenac Inc.*,[13] what happens when the plaintiff may subsequently be ordered to remediate its lands by the Ministry of the Environment? The Court in *Cousins v. McColl-Frontenac Inc.* refused to award damages for remediation costs because remediation costs were several times more than the value of the site in question. The Court performed a somewhat tortuous assessment of damages based on the loss of what the plaintiff's net investment and carrying costs might have been. With respect, the facts of this case are not particularly helpful for the advancement of this jurisprudence nor is either the trial judgments or the decision of the Court of Appeal in terms of analysis of why one would revert to one type of damage assessment over another.

The problem that presents itself when the site remediation costs approach the value of the land remains a very real problem that counsel will have to grapple with in dealing with environmental claims. A thorough understanding of possible settlement strategies, presented elsewhere in this conference will be of great assistance.

[13] 2006 NBQB 255 and 2006 NBQB 406, upheld on appeal 2007 NBCA 83

7. Smith v. Inco and its Impact on Stigma Claims

In October 2011, the Ontario Court of Appeal released its much anticipated decision in *Smith v. Inco.*[14] The court, in its 70 page unanimous ruling, examined a number of fundamental issues commonplace in virtually all contaminated land litigation.

In the trial decision of *Smith v. Inco*, Justice Henderson awarded a series of class action claimants $36 million for stigma damage to their property. 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*, 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 v. Shell.*

A full discussion of all the issues raised in the Court of Appeal decision in *Smith v. Inco* is beyond the scope of this Chapter. This Chapter 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.

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*.[15] 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.[16] Briefly, Linden and Feldthusen had favoured an "emerging" strict liability theory of damages for abnormally risky or extra-hazardous activities that

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[14] *Smith v. Inco*, *supra*, Note 2.

[15] *Tock*, *supra*, Note 5.

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

cause damage to other properties.[17] 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.[18]

The Court of Appeal was critical of the trial judge's adoption of Linden and Feldthusen's theory of strict liability.[19] 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"[20] in the absence of any evidence that the smelting activities in Port Colborne were abnormally 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. [21]

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

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[17] *Smith v. Inco, Supra,* note 2, at para. 76 (Court of Appeal).

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

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

[20] *Smith v. Inco, supra,* Note 2, at para. 66 (Trial Decision).

[21] *Smith v. Inco, supra,* Note 2, paragraph 71 (Court of Appeal).

didn't create an unusual risk 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 author's opinion, the concept of non-natural use raised by the Supreme Court of Canada in *Tock*[22] 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*) [23]. 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.[24] 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.[25] 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.[26] This, in the author's opinion, is a 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

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[22] *Tock*, *supra*, Note 5.

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

[24] *Smith v. Inco*, *supra*, Note 2, para. 108 (Court of Appeal).

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

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

undertaken by the defendant.[27] 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,[28] and nor, in the opinion of the author, 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 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 v. Shell*, 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.[29] 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 this 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 property was "damaged." Litigators will have to be careful

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

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

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

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[30] – *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.

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

8. Presentation of Appropriate Stigma Damage Evidence

Chapter 1 of this paper dealt with the conceptual framework and definition of stigma and its impact on contaminated sites.

While the academic theory and legal framework of stigma damages may be well known, presenting the proper type of evidence to substantiate that a particular site does suffer stigma, and why that is so, is critical.

Often the plaintiff will rely on the evidence of appraisers who deal with the dogma dictated by The Appraisal Institute in terms of the way in which they deal with stigma. While academically, appraisers may be in a position to deal with this issue, because of the difficulty of claiming stigma as set out in Chapter 1 of this paper, appraisers are reluctant to get involved in attempting to quantify the resulting stigma of any given site. The ability to do so is very much becoming a speciality within the appraisal field and it is therefore critical that in attempting to obtain evidence of stigma, that resort be had to not only an experienced appraiser generally, but to an appraiser with substantial experience in valuing stigmatized sites.

In spite of the academic background available to appraisers, too few understand the concept fully and even fewer are prepared to take the time that is necessary to undertake the analysis required to quantify the effect on value that stigma causes to a property.

While the evidence of an appraiser is helpful in terms of proving stigma claims, that evidence should be coupled with evidence from a real estate broker. A broker will be able to provide evidence to the Court that theoretical stigma concepts are actually experienced in the market. The broker will need to support this evidence with an analysis of the market and underlying data to show the impact that stigma can have on the marketability of the property. Due to the difficulties of comparing one site with another, as set out in Chapter 1 of this paper, such a task is not an easy one. However, given the ever increasing frequency with which contaminated sites are being purchased and sold, such evidence is not beyond the realm of possibility.

In addition to evidence of appraisers and brokers, evidence as to value and impacts on value may be able to be obtained on a larger scale from MCAP Assessments, particularly where wide spread environmental contamination is present. Counsel in *Smith v. Inco* employed this methodology. The difficulty in that case was that no other type of evidence was presented in support of the stigma damages claims, and the Court of Appeal found that the evidence was incorrect and too speculative, and given the small variance (albeit resulting in a large number due to the number of affected properties), the Court of Appeal was not prepared to accept the methodology put forth by counsel. It remains an open question whether this type of evidence will be helpful in the future. Certainly it could be helpful if combined with other types of evidence on diminution in property value.

9. Presentation of Evidence to Support Environmental Contamination Damages

As can be seen from Chapter 7 of this paper, it will no longer be sufficient to simply lead evidence on stigma and then request damages in the amount supported by such evidence without also establishing physical damage to land or risk to human health in a nuisance action. Where *Rylands v. Fletcher* is applicable, it may now be necessary for a plaintiff to establish that the presence of the substance damaged the property before moving to the conclusion that the damage in fact caused stigma. No longer will we be able to take for granted that once we establish a negative reception of a property, we can automatically move on to succeed in a claim for stigma damages.

The task is not as difficult as it seems. The claimant will simply have to first present evidence as to what negative effect the land has experienced and the cost of correcting that negative effect, before presenting evidence that the perception of the negative effect by the public has resulted in stigma to the site. Evidence of all of the necessary elements will be required to successfully advance a claim for damages for stigma. The area of stigma damages requires careful attention by counsel. Where there is valuable land at stake, a decrease in value of a small percentage can result in very large stigma claim.