**No Harm, No Nuisance – The Ontario Court of Appeal Lays Out What Will, and Will Not, Fly in Proving Nuisance: *Smith v. Inco Limited***

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**Introduction**

On October 7, 2011 the Ontario Court of Appeal released its decision in *Smith v. Inco Limited*, 2011 ONCA 628.  The case was brought as a class proceeding by a number of residents of Port Colborne, Ontario who sought compensation for the alleged pollution of their lands by the defendant, Inco.  Inco had operated a nickel refinery in the area for over 6 decades.  It was not alleged that Inco had operated negligently or unlawfully.  Initially, the claims advanced on behalf of the class included claims for personal injuries and adverse health effects due to the emission of a wide variety of pollutants, including nickel particles.  By the time the action reached trial, the health claims had been dropped and the only claim left related exclusively to property values. The plaintiffs argued that Inco’s everyday operations constituted an actionable nuisance which entitled them to damages. The appeal decision overturned a trial ruling ordering Inco to pay $36 million to the class members. The unanimous decision of the Court of Appeal represents the most recent statement of the law of nuisance by an appellate Court in Ontario and its reasons likely provide considerable precedential guidance on the subject across Canada.

When the matter first proceeded to trial at the Ontario Superior Court of Justice, the trial judge found that soil on the properties of the plaintiffs (within various distances from Inco’s operations) had indeed been contaminated with nickel as a result of emissions from Inco’s nickel refinery.  The trial judge found that concerns about the levels of nickel “caused widespread public concern and adversely affected the appreciation in the value of the properties after September, 2000”.  These findings resulted in the trial judge holding Inco liable in private nuisance and strictly liable under the rule in *Rylands v. Fletcher*.  The rule in *Rylands v. Fletcher* provides strict liability for the release of dangerous substances resulting from an “unnatural use of the land”.  The trial judge held that the process of nickel refining was an unnatural use of the land and the emission of nickel particles constituted the release of a dangerous substance.  Damages were fixed at $36 million.  Inco appealed, arguing that the presence of nickel in the plaintiffs’ soil did not amount to actual harm or property damage, and more significantly, that the operations on the Inco site did not amount to an “unnatural use of land”.

**Nuisance**

The Court of Appeal first addressed the trial judge’s finding that Inco was liable to the plaintiffs for damages in nuisance.  The Court noted that the “*raison d’etre* of nuisance is to equip a party who is suffering damage to his land *or*interference with his use of the land with a means of forcing the party causing the damage to stop doing so”. Nuisance may take the form of *physical injury to land* or *substantial interference with the plaintiff’s use or enjoyment of his or her land*, (the latter sometimes described as “amenity nuisance”).  The claimants did not argue “amenity nuisance”, only that the nickel particles caused physical injury to their property.  Nuisance provides a remedy to a party who has suffered harm as the result of the action of another party, even if that action was performed legally and without negligence.  However, it requires the Court to conduct a balancing act between one party’s right to use its property as it desires against another party’s right to be free from damage to the property which stems from the other party’s conduct.1

Inco argued that the simple existence of nickel particles in the soil did not itself adversely impact or damage the plaintiffs’ property.  It argued that the key question to be answered on appeal was the following: what did the nickel particles actually do to the soil?  The Court of Appeal considered this question and found that while Inco was indisputably responsible for increased metal deposits in the plaintiffs’ soil, the pollution did not interfere with the use of the plaintiffs’ lands.  The Court held that the trial judge had erred by ruling in favour of the plaintiffs in that regard.  A mere alteration in the chemical content of the soil did not itself constitute property damage.  For actual harm or damage to have occurred, the metal deposits in the soil must have either had a detrimental impact on the soil/land itself or on the rights that related to the plaintiffs’ use of the land.

The appellate Court noted that the trial judge’s statement of the law of nuisance essentially negated the requirement of the plaintiffs to prove that they suffered actual harm or injury as a result of the defendant’s conduct.  The trial judge extended the tort of private nuisance beyond claims rooted in actual injury to claims based on the perception of injury, regardless of the validity of that perception.  The Court of Appeal rightly noted that if the trial judge’s statement of the law of nuisance was correct, a defendant in similar circumstances would be liable in nuisance even if the public concerns relating to injury or property damage were ultimately found to be baseless and without merit.  The Court held that for the plaintiffs to have been successful, they would have needed to show either that the nickel deposits in their soil at any level posed a risk, or that the nickel levels were above healthy levels and therefore constituted a risk to human health.  The Court of Appeal overturned the trial judge’s finding of nuisance as the plaintiffs were unable to demonstrate that either of these risks existed. The Court entertained the possibility that property values in the city had dropped as a result of the public’s concerns about nickel contamination, but it was not willing to extend the tort of nuisance to include damages that resulted from public perception as opposed to actual harm.  While there may have been a claim for health risks, those claims were abandoned early on in the life of the claim.  Perceptions of damage were insufficient. Actual damage was required.2

**The Rule in *Rylands v. Fletcher***

The Court also considered whether Inco was liable under the rule in *Rylands v. Fletcher*.  The rule imposes strict liability for damages caused to a plaintiff’s property by the escape of a substance “likely to cause mischief” from the defendant’s property.  The Court of Appeal raised ongoing debate on whether there is a need for the continued existence of the rule in *Ryland v. Fletcher*distinct from negligence, nuisance and statutory liability3.  The rule functions to provide protection from activities of others that present an abnormal risk to its neighbours.  To be captured by the rule, a defendant must be held to have made a non-natural or special use of his land involving a dangerous substance that he brought onto his land.  The substance must have escaped and the plaintiffs must have suffered damage to their property as a result of the escape.

The trial judge noted that Inco had brought nickel onto land where it was not naturally found.  He also noted that nickel particles had escaped during refinement, a process which he held to be a non-natural and unordinary use of the land. As a result of these findings, the trial judge held that Inco was liable to the plaintiffs under the rule in *Rylands v. Fletcher*.

However, the Court of Appeal held that the trial judge had erred in applying *Rylands v. Fletcher*.  The Court found that there was nothing “non-natural” about the refinement of nickel by the defendants.  The characterization of the refinery operation as natural or unnatural must be considered with regards to the “time and place” and the manner in which it was operated. Inco’s refinery was located in a heavily industrialized part of the city and it was operated in a manner that did not create risks beyond those that are incidental to most industrial operations. The Court of Appeal confirmed that it was not the purpose of the rule to impose liability for the intended consequence of activities that are carried out in a reasonable manner and in compliance with all applicable rules and regulations.

**Conclusion**

This case sets the current tone for nuisance, requiring that actual harm have occurred for a nuisance claim to succeed.  Public perception of harm will not itself create a cause of action in nuisance.  Such an extension would result in afundamental principle of the doctrine being of no effect – namely, that the plaintiff suffer harm.  Whether the Court of Appeal has the last word on the subject remains to be seen – the plaintiffs are seeking leave to appeal to the Supreme Court of Canada.

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1 In *Quebec,*the Court is not required to conduct a balancing act between each party’s rights.  Rather, the Court must decide if the annoyance suffered is an abnormal neighbourhood annoyance according to the nature or location of his land or local custom.  For more information on the law of nuisance in Québec please refer to the Winter 2008 edition of EnviroNotes!, an article entitled “*St. Lawrence Cement Inc. v. Barrette*: A Case Comment” by Luc Gratton.

2 In a similar US decision, *Cook*v. *Rockwell International Corp.*, Nos. 08-1224, 08-1226 and 08-1239, FindLaw (US 10th Cir., Sept. 3, 2010), the owners of property near the former Rocky Flats Nuclear Weapons Plant filed a class action against the facility’s operators alleging nuisance arising from the release of plutonium particles onto their properties.  The plaintiff class was successful at trial and was awarded $929 million.  The defendants in turn appealed the judgment successfully. The appeal court held that under Colorado law, a plaintiff asserting a nuisance claim must establish an “interference” with the use and enjoyment of his property that is “substantial” and “unreasonable”.  While the court held that the jury was entitled to find “interference” due to the presence of radioactive contamination, the inquiry does not end there. To establish a nuisance, interference must be both “substantial” and “unreasonable”.  It is “substantial” if it would have been offensive or caused inconvenience or annoyance to a reasonable person in the community.  It is “unreasonable” when the jury determines so, having weighed the gravity of the harm and the utility of the conduct causing that harm.  The appeal court concluded that where the interference is in the form of anxiety or fear of health risks, it is neither “substantial” nor “unreasonable”, unless that anxiety is supported by some scientific evidence.

3 In 1989 the Supreme Court of Canada unanimously recognized *Ryland v. Fletcher*in *Tock v. St. John’s Metropolitan Area Board*, [1989 CanLII 15 (SCC)](http://www.canlii.org/en/ca/scc/doc/1989/1989canlii15/1989canlii15.html).  This was acknowledged by the Court of Appeal in the Smith v Inco case, but issues remain as to its real application as a distinct tort.

Questions:

1. Explain the result of the case. Do you agree or disagree with the findings?
2. What is harm to you? Explain.
3. Why was case law important in this case? What cases were used to influence the judgement?
4. Do you think other arguments could have been made that would have changed the outcome? If not, what circumstance do you think would have been needed to be different for a different outcome to have happened?
5. Can you think of something that could happen in your community that would constitute nuisance? Explain.