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Much Ado About Nothing or a Comedy of Errors: The Post – *Smith v. Inco* *Environmental Tor Landscape*

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Much Ado About Nothing or a Comedy of Errors: The Post-Smith v. Inco Environmental Tor Landscape

The 2011 Ontario Court of Appeal Decision in *Smith v. Inco* ("*Inco*") contains no fewer than seventy-five, often lengthy, paragraphs of detailed legal analysis in respect of liability for environmental contamination. Approximately four of those paragraphs have caused, or at least created the impression they have caused, a dramatic redefinition of environmental law's most coveted torts: strict liability and private nuisance.

While it's not clear to the author that such a significant shift in the law was intended by Ontario's Highest Court, it is apparent that judges, commentators, and lawyers across the country certainly interpret *Inco* as eviscerating the common law principles historically relied on by plaintiffs in most environmental lawsuits. As we approach the third anniversary of the decision, and in light of the Supreme Court of Canada's refusal to reconsider an appeal, it is a worthy time to take stock of the current environmental tort landscape.

You seem'd of late to make the law a tyrant

In short, *Inco* is a case about a permitted industrial activity that altered the chemical composition of neighbouring lands. Inco operated a nickel refinery in Port Colbourn, Ontario from 1918 through 1984, during which time the refinery emitted waste products into the air, including nickel oxide. The refinery operations, including the release of nickel oxide into the atmosphere, were permitted by a Certificate of Approval issued by the Province, at least during the time period where such approval was required by law. Soil sampling, conducted in 1998 and 1999, revealed that nickel levels in soil throughout many parts of Port Colborne far exceeded the Ministry of the Environment ("MOE") guideline of 200 parts per million. In September of 2000, the MOE decided to commence a Human Health Risk Assessment (HHRA) for the residential area between the Inco property and the Welland Canal. Information regarding the extent of the nickel contamination, the potential health effects of nickel in soil, and information regarding safety precautions was subsequently distributed to the public.

With a certified class of approximately 7,000 individuals, Ellen Smith as the representative plaintiff, asserted a claim against Inco for diminution in property value on the basis of trespass, private nuisance and strict liability. Attempts to certify the action for personal injury where unsuccessful due to such claims requiring individualized causal inquiries.

At trial, the plaintiffs were successful is establishing Inco's liability in both strict liability and nuisance, garnering a substantial $36 million award of damages. The decision of Superior Court Justice Henderson, provided a liability analysis which, for most members of the environmental law bar, was completely uncontroversial. Specifically,

- The fact that Inco brought a substance onto its lands (ie. nickel), made a special use of that land which engendered increased danger to others, and allowed that substance to escape, thereby

causing injury, established Inco's liability under the strict liability doctrine described in the English case of *Rylands v. Fletcher*.

- The accumulation of nickel on the plaintiffs' properties at such a level as to result in demonstrable diminution in value constitutes a substantial and material physical harm to the land attracting liability in private nuisance, notwithstanding any other impact.

While the analysis on other issues (eg. the limitation period and damages) in the trial and appeal decisions are worthy of their own articles, it is the Court of Appeal's reversal on the issue of liability that has attracted the attention of commentators. In concluding that neither strict liability nor private nuisance applied in the circumstances, the Court of Appeal made the following key findings:

- The strict liability doctrine does not apply to discharges of contaminants into the natural environment that are the intended consequence of an activity that is approved and carried out in accordance with all rules and regulations. Strict liability, in the environmental context, is limited to "mishaps" that occur in the course of the conduct of an non-natural or unusual activity.

- Strict liability does not apply unless the defendant has made an non-natural use of its land. The act of bringing a foreign substance onto the land does not alone constitute an non-natural use. In order to establish strict liability, the plaintiff must show that the defendant's use of the land was "not an ordinary or usual use" in light of "the degree of dangerousness posed by the activity and the circumstances surrounding the activity". While compliance with environmental and zoning laws is not determinative, it is "an important consideration" which in this case weighed favourably for Inco.

- In order for liability in nuisance to arise as a result of environmental contamination, something more than a "mere chemical alteration in the content of soil" is necessary. To constitute physical harm, a change in chemical composition must have a detrimental effect on the land itself or the rights associated with the use of land. In the residential context, such detrimental effects include negative health effects, but property devaluation due to a perceived risk of negative health effects is not sufficient to establish liability in nuisance.

As a result of the Court of Appeal's reversal on liability, its lengthy review of the common law, and its final application to the facts of the case, much confusion has been created in the world of environmental tort law. Issues that were rarely fought over during the course of environmental litigation have now become battlegrounds where the viability of claims are questioned at their outset. In some cases, courts have prevented class actions from proceeding solely on the basis of the law as set-out in *Inco*.

Almost all claims in respect of contaminant migration from neighbouring lands are asserted through a combination of negligence, trespass, private nuisance, and strict liability. The widely held perception has been that the latter two torts have all but been eviscerated by *Inco*, except in certain rare circumstances. Given the substantial difficulty in asserting negligence in a historical contamination context, and given the requirement that a trespass must be both intentional and direct, the question remains whether plaintiffs have any common law basis to seek recovery for historical contaminant migration?

For pity is the virtue of the law, and none but tyrants use it cruelly

The most notable post-*Inco* decisions are those of *Canada (Attorney General) v. MacQueen* ("*MacQueen*") and *Windsor v. Canadian Pacific Railway* ("*Windsor*"). They are appellate court decisions in respect of class-action claims arising out of historical contaminant migration. In both cases, claims asserted through private nuisance and/or strict liability were not permitted to proceed, by way of summary dismissal or lack of certification.

In *MacQueen*, the plaintiffs alleged that the emissions of hazardous substances from the defendants steel plants and coke ovens "caused damage to and constitut[ed] an interference with their property rights and integrity of their persons." The plaintiffs asserted multiple causes of action including battery, negligent battery, strict liability, nuisance, negligence and breach of fiduciary duty. Amongst other remedies, the plaintiffs sought recovery of diminution in property value. In citing *Inco*, the Nova Scotia Court of Appeal concluded that:

- The releases of contaminants from the defendant's operations were an "ordinary and natural by-product" of those operations. As such, the requirement that the defendant allowed the contaminants to "escape" could not be met, given that such releases were not entirely unintentional. Accordingly, the Court denied certification of the strict liability claim.

- The claim in nuisance lacked sufficient common issues to certify. Specifically, because a liability in private nuisance only arises where there is more than a mere chemical alternation, as set-out in *Inco*, each class members claim would necessarily require an individualized inquiry.

Similarly, in *Windsor*, the Alberta Court of Appeal summarily dismissed, in part, a strict liability claim brought on behalf of residential property owners whose lands had allegedly been contaminated with the industrial solvent trichloroethylene ("TCE") as a result of CPR's historical use and disposal practices The Court's dismissal was largely premised on a finding that the defendant's use of its land, and its associated discharge of TCE into the natural environment, failed to satisfy the "non-natural use" and "escape" requirements of the strict liability tort established in the 1868 English case of *Rylands v. Fletcher*. Additionally, the private nuisance claim asserted by the plaintiffs was pared down to include only those residential properties where it was necessary to install systems to mitigate the risks to human health created by the presence of the TCE. The rationale being, that without the need to mitigate, the contamination constituted only a mere chemical alteration.

The *MacQueen* and *Windsor* decisions illustrate two challenges courts are now faced with in determining liability for environmental contamination in the context of strict liability and private nuisance claims:

1. How do we evaluate what constitutes a "non-natural use" and what constitutes an "escape"? Is the inquiry to focus merely on the nature of the activity, in a general sense? Or are we to focus on how that activity was conducted with specific reference to how the substances were handled, used, and contained? When we refer to a release being a natural consequence of an activity, does it matter whether or not it was an expected consequence?

2. Where does contamination constitute more than a "mere chemical alteration"? How key is the risk to human health? What role do provincial standards, which are presumptively protective of human health, play? Do statutory restrictions of property use render certain levels of contamination physical harm?

In both *MacQueen* and *Windsor*, the appeal courts conducted a somewhat shallow analysis of "non-natural use", with little to no consideration of the specifics of how the use was carried out. To an extent, this may have been driven by the courts' not being directed toward such an inquiry. Likewise, the appeal courts' analysis on the issue of physical harm to property in the context of nuisance assumes that there is no generic threshold at which liability can be established. This is particularly the case in *Windsor,* where the court dismissed all nuisance claims where contamination levels did not specifically require mitigation.

In most cases to date, including those discussed above, these uncertainties in the law have resulted in plaintiffs being unsuccessful in asserting claims for contamination that may have legitimately and substantially reduced the value of their lands. Likewise, these threshold issues have become the subject of much argument, and debate, during the course of the litigation process.

The controversial reversal in the *Inco* case, as well as the perceived harsh outcome of both *Windsor* and *MacQueen*, are indicative of courts struggling to apply legal forms not well constructed for the particular factual circumstances. It should be remembered that both strict liability and private nuisance emerged from 19th century English common law and were part of a larger movement away from intentionality as the primary element necessary to establish liability for interference with real property (ie. expanding liability outside of the writ of trespass). During this time period of rapid industrialization, such legal forms were a natural means of ensuring property owners could realize on their right to exclude the impact of others and provide a mechanism for the internalization of negative economic externalities. These policy aims, in additional to others, are largely still relevant today.

What has significantly changed since the 19th century is our understanding of the impact industrial and commercial activities have on human health and the natural environment. In particular, our concern over such impacts has expanded beyond those very tangible intrusions (eg. noise, dust, smoke, fire) to include very intangible intrusions (eg. an increase in nickel oxide concentration in soil measured in parts per million). The ever evolving scientific understanding of how chemicals impact human health and the environment, even at miniscule concentrations, has been challenging to reconcile with discretionary thresholds (eg. unreasonable, substantial, etc) historically developed to address acute impacts on the use and enjoyment of property. This is further complicated by the fact that the existence of risk, particularly in a human health context, is defined with reference to what are essential arbitrary thresholds (eg. a 1/million lifetime cancer risk – why not 1/100 thousand or 1/billion?).

Likewise, the common place use of manufactured chemical substances, such as the gas station on every suburban corner or the strip-mall drycleaner, has rendered such activities to be perceived as normal, unexceptional and expected in most neighbourhoods. Our expanded use of chemical substances not typically found in the natural environment has frustrated the application of such concepts as the "non-natural use" of real property. The courts and common law will ultimately adapt, and it is the role of counsel to craft the arguments that will facilitate these changes.

Given that judges, courts, and the common law, in general, seek to reach a just result in the cases before them, the uncertainty created by the *Inco* decision has by necessity given plaintiffs' counsel two options:

1. Learn to work within the seventy five pages of common law analysis provided for in *Inco* to craft viable arguments in respect of strict liability and private nuisance; or

2. Creatively seek to expand the reach of the other causes of actions, specifically, negligence and trespass.

How viable these approaches will be, and what changes to the common law they will precipitate, are just beginning to be seen.

Once more unto the breach

As a point of contrast to *Windsor* and *MacQueen*, the recent trial in *Canadian Tire Real Estate Ltd. v. Huron Concrete Supply Ltd.* ("*Canadian Tire*") engaged the issues and strategies discussed above. In *Canadian Tire*, the defendant owned and operated concrete forming business on lands adjacent to those of the plaintiff, where a retail store was located. The plaintiff discovered gasoline contamination, including a substantial quantity of separate phase gasoline, in the soil and groundwater on its property. The plaintiff alleged, with supporting expert evidence, that the contamination originated from underground storage tanks, which were part of a private fuel outlet, on the defendant's lands.

The plaintiff was successful in establishing liability in negligence, strict liability, private nuisance, and trespass and was awarded approximately $4 million in damages.

What is most interesting about the *Canadian Tire* case, is that the plaintiff did not seek to argue that the Ontario Court of Appeal got it wrong in *Inco,* but rather substantially relied on *Inco* in making the case that it was entitled to recovery under both strict liability and private nuisance. On the issue of non-natural use, the plaintiff argued that, while using the land for concrete forming, including the presence of underground storage tanks, was not a non-natural use per se, the failure of the defendant to comply with laws and regulations applicable to that use rendered it non-natural. This argument, expressly relied on the statement in *Inco* that:

> "To decide whether a use is a non-natural one, the court must have regard to the place where the use is made, the time when the use is made and **the manner of the use**. Planning legislation and other government regulations controlling where, when and **how activities** can be carried out will be relevant considerations in assessing whether a particular use is a non-natural use in the sense that it is a use that is not ordinary."

In this case, the plaintiff argued that the evidence indicated that the defendant had failed to comply with the Code applicable to the use of underground fuel storage tanks, and thus, its use was in part illegal and could therefore not be considered natural or ordinary.

In respect to the threshold issue of physical harm versus mere chemical alteration in the context of private nuisance, the plaintiff argued that:

- the contamination was present at concentrations exceeding health protective standards established by the province, necessitating further investigation and mitigation, and therefore was more than a mere chemical alteration;

- the presence of the contamination above provincial standards triggered land use restrictions under provincial legislation and thus had "detrimental effect" on the "rights associated with the use of the land" as set-out in *Inco;* and

- the contamination was in fact a risk to human health based on expert evidence.

It was therefore on the basis of the law set-out in *Inco* that the plaintiff asserted its argument for liability under strict liability and nuisance.

While the success in negligence is not particularly notable given the defendant's aforementioned failure to comply with the Code applicable to underground storage tanks, what is notable is the plaintiff's success in trespass. The latter has consistently been viewed as inapplicable to contaminant migration cases due to the lack of both intentionality and directness. In this case however, the plaintiff did not argue that the initial migration constituted a trespass. Rather, the argument was made that the free phase gasoline present on the plaintiff's property continued to be the personal property of the defendant. Under the doctrine of continuing trespass, objects left to remain on the real property of another person, notwithstanding how they initially got there, constitute a trespass once a request has been made to remove the objects, and the defendant fails to do so within a reasonable time.

In this case, the evidence was that the plaintiff had in fact requested that the defendant remove the gasoline and that the defendant failed to do so. As such, it was the failure to remove the gasoline within a reasonable time which established liability in trespass, not the indirect migration.

What the *Canadian Tire* case demonstrates is that working inside of the law provided by *Inco* can yield viable claims for plaintiffs in contaminant migration cases. It also shows that previously neglected causes of action can be an alternative means assisting courts in reaching a just result.

In Closing

The *Canadian Tire* decision illustrates how strict liability and nuisance can be viable mechanisms for the recovery of damages arising from the migration of contaminants released in less than unusual circumstances (ie. an underground fuel storage tank at an industrial operation). It also illustrates how often ignored torts (eg. trespass) may be given new life in the environment context through innovative arguments. As is mentioned above, courts will seek to award plaintiffs where the facts demonstrate that someone has been legitimately and unjustly injured. The *Inco* decision has certainly made it more challenging for plaintiffs to provide courts the legal rationale for making such awards. It has thus shifted the burden to plaintiffs' counsel to find innovative arguments within the framework of *Inco*, and to look elsewhere within the common law, to find the necessary legal basis for recovery.

About the Author

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Prior to becoming a lawyer, Gatlin worked in the field of environmental engineering on a variety of projects for the diversified manufacturing, pharmaceutical, aerospace and defence industries. His engineering experience includes the design and installation of remediation systems for the in-situ treatment of recalcitrant compounds, vapour intrusion assessment and mitigation, and contaminant transport modelling.

Gatlin has appeared as counsel before various boards and tribunals and the Ontario Court of Justice.