IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Neila Catherine MacQueen et al v. Ispat Sidbec Inc. et al, 2006 NSSC 208

Date: 20060630
Docket: SH 218010
Registry: Halifax

Between:

Neila Catherine MacQueen , Joseph M. Pettipas, Ann Marie Ross, and Kathleen Iris Crawford

Plaintiffs

v.

Ispat Sidbec Inc., a body corporate, Hawker Siddeley Canada Inc., a body corporate, The Attorney General of Nova Scotia, representing Her Majesty the Queen in right of the Province of Nova Scotia, Canadian National Railway Company, a body corporate, The Attorney General of Canada, representing Her Majesty the Queen in right of Canada; and Domtar Inc., a body corporate

Defendants

Judge:	The Honourable Justice A. David MacAdam
Heard:	May 15 and 16, 2006 in Halifax, Nova Scotia
Counsel:	Raymond F. Wagner, Fiona M. Imrie, Q.C., Scott Ritchie, Q.C., Michael G. Robb for the plaintiffs Dennis James, for Canadian National Railway Company David G. Coles, Q.C., Robert M. Macleod, Q.C. , Jan C. Murray, for Ispat Sidbec Inc. Agnes E. MacNeil and Johathan T. Kenyon, for the Attorney General of Nova Scotia and Sydney Steel Corporation Harry Glinter, Melissa R. Cameron, Angela J. Green, for Attorney General of Canada

By the Court:

[1] The plaintiffs have commenced this proceeding seeking redress for the alleged contamination of their persons and homes. They say they have lived in the area of a steel plant, coke ovens, tar ponds and related by-products operations, some of which have been carried on since 1900, located in the city of Sydney, Nova Scotia.

[2] In the statement of claim, Ispat Sidbec Inc., (herein "Ispat") is alleged to have owned and operated the steel works, defined to include the steel plant and coke ovens, from 1928 until December 31, 1967. Apparently in October 1967 Ispat, and its principal Hawker Siddeley, then known as A.V. Row Ltd., announced the intended closure of the steel plant for April 1968. Shortly following this announcement they agreed to the sell the assets used in the steel works to the Province of Nova Scotia. By the *Sydney Steel Corporation Act*, 1967 (2nd) SESS., c.1 the Nova Scotia Legislature created Sysco to operate the steel works. The plaintiffs allege in the statement of claim that Sysco was at all times an agent or instrument of the Province of Nova Scotia (herein "Nova Scotia"). As such, they further allege Nova Scotia is liable for all of the acts, omissions and liabilities of Sysco as "owner or occupier of the lands on which the steel works were operated". Sysco operated the steel works, with three exceptions in respect to the coke ovens, from 1967 until the steel plant was finally closed in 2000.

[3] The plaintiffs say during six of the years the steel plant was operated by Sysco, the coke ovens were owned and operated by Her Majesty the Queen in right of Canada, (herein "Canada"). The plaintiffs say the coke ovens were sold to the Cape Breton Development Corporation, (herein "Devco") in July 1968. Devco, the statement of claim alleges, was a federal Crown Corporation statutorily created in 1965 pursuant to the *Cape Breton Development Act*, 1985, c.25, as amended. It was dissolved in June 2000, pursuant to the *Cape Breton Development Corporation Divestiture Authorization and Dissolution Act*, R.S.C. 2000, c-23. As such, the plaintiffs allege, Canada is the legal successor to the dissolved Devco.

[4] The statement of claim alleges Devco owned and operated the coke ovens from July 1968 until in and about 1974 when they were sold back to Nova Scotia and Sysco. Apart from a temporary closure between 1983 and 1985, they were again owned and operated by Sysco and Nova Scotia until permanently closed in 1988.

[5] In the statement of claim the plaintiffs allege Nova Scotia, "...through its various representatives, was at all material times environmental regulator and the regulator of public health and safety matters in the province."

[6] The plaintiffs also claim against the remaining named defendants, excepting only Hawker Siddeley Canada Inc., in respect to their involvement in the ownership or operation of the steel works and/or the Sydney tar ponds, where, it is alleged, contaminants created in the steel making process were dumped.

[7] Each of the defendants, Ispat, Canada and Nova Scotia seek to strike portions of the statement of claim as it relates to all or some of the allegations made against each of them by the plaintiffs.

[8] Ispat seeks to strike paras. 78 and 79, to the extent the plaintiffs allege the "intentional tort of battery" by Ispat and as well paras. 126 and 127 to the extent the plaintiffs allege the breach of a fiduciary duty by Ispat.

[9] Canada seeks to strike a number of paragraphs on the basis they fail to disclose a reasonable cause of action against Canada. Among the paragraphs that Canada suggests should be struck, are those relating to a cause of action founded on regulatory negligence, those alleging a claim in negligence in respect to the operation of the coke ovens, those alleging a breach of fiduciary duty by Canada and those asserting a cause of action founded on the creation of an increased health risk. During the course of oral submissions, the plaintiffs acknowledged that the paragraphs of the statement of claim alleging a claim founded on an increased health risk were no longer being advanced as a cause of action, but were to be considered in the context of the remedy and relief sought from Canada.

[10] Nova Scotia applies to strike out portions of the statement of claim on the basis they fail to disclose a reasonable cause of action and in particular, the paragraphs alleging a cause of action founded on regulatory negligence by Nova

Scotia and those paragraphs alleging a cause of action founded on the breach of a fiduciary duty by Nova Scotia.

[11] Each of the applications is made pursuant to *Nova Scotia Civil Procedure Rule* 14.25, which reads:

> (1) The court may at any stage of a proceeding order any pleading, affidavit or statement of facts, or anything therein, to be struck out or amended on the ground that,
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> (a) it discloses no reasonable cause of action or defence;
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> (b) it is false, scandalous, frivolous or vaxatious;
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> (c) it may prejudice, embarrass or delay the fair trial of the proceeding;
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> (d) it is otherwise an abuse of the process of the court;
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> and may order the proceeding to be stayed or dismissed or judgment to be entered accordingly.
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> (2) Unless the court otherwise orders, no evidence shall be admissible by affidavit or otherwise on an application under paragraph (1)(a).

[12] The parties are not in dispute as to the burden resting on the defendants with respect to their respective applications to strike portions of the plaintiffs' statement of claim. Each of the defendants acknowledges the onus on them is to establish it is "plain and obvious" the plaintiffs' statement of claim discloses no reasonable cause of action, citing *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959. Also acknowledged by the defendants is that a court, in considering an application to strike, is to assume the facts contained in the statement of claim are true and then to assess whether, assuming those facts to be true, a claim may be made out. The applications will only succeed if, on the facts as pleaded, the action is "obviously unsustainable". Also, in considering applications to strike, counsel for Ispat references *Vladi Private Islands Ltd. v. Haase et al.* (1990), 96 N.S.R. (2d) 323, (N.S.C.A.), where at p. 325, J. MacDonald, on behalf of the court, commented:

> ... it is not the court's function to try the issues but rather to decide if there are issues to be tried.

[13] The plaintiffs, citing *Williams v. Canada (Attorney General),* [2005] O.J. No. 3508, at paras. 15 -17, say the pleadings are to be read generously, with a view to compensating for any minor defects, and, as well, the pleadings are to be evaluated as a whole and particular paragraphs are not be viewed in isolation from the claims as a whole.

[14] Counsel, in oral submissions, refers to the observations of Justice Tysoe in *Minnes v. Minnes* (1962), 39 W.W.R. 112 at p. 122:

> In my respectful view it is only in plain and obvious cases that recourse should be had to the summary process under 0.25, R.4, and the power given by the Rule should be exercised only where the case is absolutely beyond doubt. So long as the statement of claim, as it stands or as it may be amended, discloses some question fit to be tried by a judge or jury, the mere fact that the case is weak or not likely to succeed is no ground for striking it out. If the action involves investigation of serious questions of law or questions of general importance, or if facts are to be known before rights are definitely decided, the Rule ought not to be applied.

[15] In his written submission plaintiffs' counsel suggests the onus is not satisfied even if the pleading is "dubious, novel, unlikely to succeed, or subject to valid defences on the part of the defendants". Counsel says the circumstances in which the plaintiffs should be "driven from the judgment seat" are limited, citing again from *Hunt v. Carrey Canada Inc, supra*, at para 33:

> ...As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia *Rules of Court* should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

[16] The plaintiffs' written submission, on the issue of the onus resting on the defendants, concludes by referencing *Hunt v. Carrey Canada Inc, supra*, at para. 52 and the observation by Justice Wilson, on behalf of the court:

> The fact that a pleading reveals "an arguable, difficult or important point of law" cannot justify striking out part of the statement of claim. Indeed, I would

> go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society.

[17] During the course of oral submissions the court brought to the attention of counsel the reasons of Justice Roscoe, on behalf of the court, in *Sherman v. Giles* (1994), 137 N.S.R. (2d) 52. In *Sherman v. Giles* a Crown prosecutor was sued on the basis he gave advice which resulted in the plaintiff being wrongfully arrested, charged and imprisoned. The prosecutor applied to set aside the statement of claim. Justice Roscoe, in noting the respondent had suggested the statement of claim disclosed no reasonable cause of action, with the main argument on this issue, appearing to be a failure to plead "malice" then, at para 17 - 18, observed:

> ...However, the appellant sought leave to amend his Statement of Claim to add an allegation of malice, but leave was summarily denied by the Chambers judge without reasons. In **Hunt v. Carey**, supra, Madam Justice Wilson adopted the statement of the British Columbia Court of Appeal in **Minnes v. Minnes** (1962), 39 W.W.R. (N.S.) 112, that:
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> > ... So long as the statement of claim, as it stands or as it may be amended, discloses some question fit to be tried by a judge or jury, the mere fact that the case is weak or not likely to succeed is no ground for striking it out. (emphasis added)
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> Although the claim of malicious prosecution is flawed, because malice has not been pled, it cannot be said that the claim is beyond a doubt, unsustainable, however improbable that It will succeed.

1. The Allegation of Battery

[18] Counsel for Ispat, noting paragraph 78 refers to the "intentional tort of battery", references the definition of La Forest J. in *Norberg v. Wynrib*, [1992] 2 S.C.R. 226. Intentional battery is the "intentional infliction of unlawful force on another person". Counsel says there is no allegation that Ispat intentionally inflicted force on any of the plaintiffs. As such, counsel says, the claim must fail.

[19] In *Non-Marine Underwriters, Lloyd's of London v. Sclaera,* [2000] 1 S.C.R. 551, Justice Iacobucci, at para. 98, commented:

> Technically, however, the concept of "intention" in the intentional torts does not require defendants to know that their acts will result in harm to the plaintiffs. Defendants must know only that their acts will result in certain consequences. It is not necessary for defendants to realize that these intended consequences are in fact an infringement of the legal rights of others. Intention, in other words, focusses on physical consequences.
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> To similar effect is Linden, *supra*, at p. 33: "Conduct is intentional if the actor desires to produce the consequences that follow from an act."
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> Moreover, if a tort is intended, it will not matter that the result was more harmful than the actor should, or even could have foreseen. Linden, *supra*, at p. 45, quotes Borins Co. Ct. J. (as he then was) in Bettel v. Yim (1978), 20 O.R. (2d) 617, at p. 628:
>
> If physical contact was intended, the fact that its magnitude exceeded all reasonable or intended expectations should make no difference. To hold otherwise ... would unduly narrow recovery where one deliberately invades the bodily interests of another with the result that the totally innocent plaintiff would be deprived of full recovery for the totality of the injuries suffered as a result of the deliberate invasion of his bodily interests.

[20] It is evident the plaintiffs have not plead that Ispat intended to touch or contact the plaintiffs by the emissions released during the course of steel production. As such, there has not been plead the necessary element of "intention" in respect to the tort of intentional battery.

[21] The tort of "negligent battery", counsel says , arises when "the defendant causes a direct, offensive, physical contact with the plaintiff as a result of negligent conduct." Counsel notes "...negligence consists of unreasonably disregarding a foreseeable risk of contact, even though the contact was neither desired nor substantially certain to occur." Counsel references *Non-Marine Underwriters, Lloyd's of London v. Sclaera*, supra, at para. 127:

> ...A negligent battery is properly pleaded only if the plaintiff alleges that the appellant was negligent as to the physical consequences of his actions; ... Therefore negligent battery will only be relevant if the pleadings allege that the appellant negligently harmed the plaintiff by disregarding a foreseeable risk of physical contact. No such allegation has been made.

> appellant negligently harmed the plaintiff by disregarding a foreseeable risk of physical contact. No such allegation has been made.

[22] It is also evident the plaintiffs have not made an allegation of negligent battery as against the defendant Ispat.

[23] Having failed to plead one of the essential elements of the tort of intentional battery, and having failed to allege the tort of negligent battery, the pleading of battery, as against the defendant Ispat, is flawed.

[24] However, as in *Sherman v. Giles*, *supra,* the plaintiffs have indicated an intention to apply to further amend the statement of claim in respect to the allegation of battery as against the defendant Ispat. Pursuant to the comments of Justice Roscoe, it is evident the statement of claim, in respect to the allegation of battery should not be struck in the circumstance of the plaintiffs amending the statement of claim to incorporate either the necessary element of "intention" in respect to the intentional tort of battery or an allegation of negligent battery, together with the particulars of the negligence. In the circumstance I will not, for the present, strike this pleading; rather, I will permit the plaintiffs to apply to seek to have the statement of claim amended. However, in the absence of such an amendment, the provisions of paragraph 78 and 79, as far as they relate to an allegation of battery as against the defendant Ispat, will be struck.

2. Regulatory Negligence by Canada

[25] In the written submission of the plaintiffs, it states the "core of Canada's liability in this action flows from its operation of the coke ovens between 1968 - 1974". However, in the application to strike, Canada distinguishes between the allegations arising out of its regulatory responsibilities and those relating to its ownership of the coke ovens.

(A) Regulatory Negligence by Canada

[26] Canada says, in effect, that in this regard the plaintiffs have not established a duty of care on the part of Canada. The plaintiffs, on the other hand, restate the question, for purposes of this application, as not whether the plaintiffs have established the existence of such a duty, but rather, whether Canada has established they did not owe a duty of care to the plaintiffs.

[27] Canada's submission refers to the decision of the Supreme Court of Canada in *Cooper v. Hobart* [2001], 3 S.C.R. 537 and the judgment of McLachlin C.J. and Major J., on behalf of the court. At issue was whether the Registrar of Mortgage Brokers in British Columbia, a statutory regulator, owed a private law duty of care to members of the investing public for negligence in failing to properly oversee the conduct of an investment company licensed by the regulator. The initial analysis by the court is interesting, in the context of the present application. At paras. 21 - 23 the court reviews the development of the "negligence principle":

> Canadian courts have not thus far recognized the duty of care that the appellants allege in this case. The question is therefore whether the law of negligence should be extended to reach this situation. While the particular extension sought is novel, the more general issue of how far the principles of liability for negligence should be extended is a familiar one, and one with which this Court and others have repeatedly grappled since Lord Atkin enunciated the negligence principle in *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.), almost 70 years ago. That case introduced the principle that a person could be held liable only for reasonably foreseeable harm. But it is also anticipated that not all reasonably foreseeable harm might be caught. This posed the issue with which courts still struggle today: to what situations does the law of negligence extend? This case, like so many of its predecessors, may thus be seen as but a gloss on the case of *Donoghue v. Stevenson*.
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> In *Donoghue v. Stevenson* the House of Lords revolutionized the common law by replacing the old categories of tort recovery with a single comprehensive principle – the negligence principle. Henceforward, liability would lie for negligence in circumstances where a reasonable person would have viewed the harm as foreseeable. However, foreseeability alone was not enough; there must also be a close and direct relationship of proximity of neighbourhood.
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> But what is proximity? For the most part, lawyers apply the law of negligence on the basis of categories as to which proximity has been recognized in the past. However, as Lord Atkin declared in *Donoghue v. Stevenson*, the categories of negligence are not closed. Where new cases arise, we must search elsewhere for assistance in determining whether, in addition to disclosing foreseeability, the circumstances disclose sufficient proximity to justify the imposition of liability for negligence.

[28] The court reiterates the two-step test for establishing the existence of a duty of care first articulated by the House of Lords in *Anns v. Merton London Borough Council*, [1978] A.C. 728, at 751 - 752, (herein "Anns"). The two stage analysis

outlined by Lord Wilberforce for establishing a duty of care is summarized by Chief Justice McLachlin J. and Justice Major, at para. 30, as follows:

> ... At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the Anns test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a prima facie duty of care arises. At the second stage of the Anns test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of case. It may be, as the Privy Council suggests in Yuen Kun Yeu, that such considerations will not often prevail. However, we think it useful expressly to ask, before imposing a new duty of care, whether despite foreseeability and proximity of relationship, there are other policy reasons why the duty should not be imposed.

[29] At para. 31 they continue:

> On the first branch of the *Anns* test, reasonable foreseeability of the harm must be supplemented by proximity. The question is what is meant by proximity. Two things may be said. The first is that "proximity" is generally used in the authorities to characterize the type of relationship in which a duty of care may arise. The second is that sufficiently proximate relationships are identified through the use of categories. The categories are not closed and new categories of negligence may be introduced. But generally, proximity is established by reference to these categories. This provides certainty to the law of negligence, while still permitting it to evolve to meet the needs of new circumstances.

[30] As to when proximity arises, at paras. 33 - 34 they observe:

> As this Court stated in *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 24, *per* La Forest J.:
>
> > The label 'proximity", as it was used by Lord Wilberforce in *Anns*, *supra*, was clearly intended to connote that the circumstances of the relationship inhering between the plaintiff and the defendant are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs. [Emphasis Added]

> Defining the relationship may involve looking at expectations, representations, reliance, and the property or other interests involved. Essentially, these are factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant.

[31] In *Cooper v. Hobart, supra,* the court noted the factors that may satisfy the requirement of proximity are diverse and depend on the circumstance of the case. They cite, with apparent approval, the statement by Lord Goff in *Davis v. Radcliffe*, [1990] 2 All E.R. 536 (P.C.), at p. 540, to the effect that "... the law should develop categories of negligence incrementally and by analogy with established categories". The established categories for which proximity has been recognized are outlined by Chief Justice McLachlin and Justice Major:

1. ...where the defendant's act foreseeably causes harm to the plaintiff or the plaintiff's property.

2. They observe that foreseeability has been extended to nervous shock citing *Alcock v. Chief Constable of South Police*, [1991] 4 All E.R. 907 (H.L.)). *Hedley Byrne & Co. v. Partners Ltd.*, [1963] 2 All E.R. 575 (H.L.)

3. Misfeasance in public office.

4. A duty to warn of the risk of danger has been recognized: *Rivtow Marine Ltd. v. Washington Iron Works,* [1974] S.C.R. 1189.

5. The duty of a municipality to prospective purchasers of real estate to inspect housing developments without negligence (Anns),

6. Government authorities who have undertaken a policy of road maintenance have been held to a duty of care to execute the maintenance in a non-negligent manner (*Just v. British Columbia,* [1989] 2 S.C.R. 1228, *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445)

7. In certain circumstances relational economic loss, related to contract performance, may give rise to a tort duty of care in certain situations, as where the claimant has a possessory or proprietary interest in the property, the general average cases and cases where the relationship between the claimant and the

property owner constitutes a joint venture (*Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.,* [1997] 3 S.C.R. 1210).

[32] As noted, when a case falls within one of these situations, or an analogous circumstance, there is reasonable foreseeability and a prima facie duty of care may be posited. This brings the analysis to the second stage of the Anns test and a consideration of whether there are residual policy considerations that would suggest a duty of care should not be recognized. Chief Justice McLachlin and Justice Major observed:

> It is at this second stage of the analysis that the distinction between government policy and execution of policy falls to be considered. It is established that government actors are not liable in negligence for policy decisions, but only operational decisions. The basis of this immunity is that policy is the prerogative of the of the elected Legislature. It is inappropriate for courts to impose liability for the consequences of a particular policy decision. On the other hand, a government actor may be liable in negligence for the manner in which it executes or carries out the policy. In our view, the exclusion of liability for policy decisions is properly regarded as an application of the second stage of the *Anns* test. The exclusion does not relate to the relationship between the parties. Apart from the legal characterization of the government duty as a matter of policy, plaintiffs can and do recover. The exclusion of liability is better viewed as an immunity imposed because of considerations outside the relationship for policy reasons -- more precisely, because it is inappropriate for courts to second-guess elected legislators on policy matters. Similar considerations may arise where the decision in question is quasi-judicial (see *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, 2001 SCC 80).

[33] In the circumstances in *Cooper v. Hobart, supra,* the court held the factors given rise to proximity, if they existed, would have to arise from the statute under which the registrar had been appointed. The statute represented the only source of his duties, private or public, and apart from the statute he was in no different position than the ordinary person. "If a duty to investors with regulated mortgage brokers is to be found, it must be in the statute." In *Cooper* the court determined the statute did not impose a duty of care on the registrar to investors, but rather to the public as a whole.

[34] To similar effect, in *Edwards v. Law Society of Upper Canada* (2001), 206 D.L.R. (4th) 211 the Supreme Court of Canada, having regard to the *Law Society Act*, R.S.O. 1990, c.L.8, considered whether a private law duty of care was owed by the law society to persons who deposited monies in a solicitors trust account.

Chief Justice McLachlin and Justice Major, on behalf of the court, concluded there was no prima facie duty of care between the law society and the plaintiff as the *Act* did not reveal any legislative intent to impose a private law duty on the law society in the circumstance.

[35] To the extent the plaintiffs plead a cause of action, based on regulatory negligence, the question of proximity must be determined from a review of the statute under which the duties are alleged to have been created. The plaintiffs allege seven federal statutes, and regulations made under five federal statutes, are legislation, regulations and guidelines under which Canada failed to take appropriate action resulting in extensive and severe damage to the plaintiffs health and property.

[36] The federal statutes on which the plaintiffs rely, are:

- *Fisheries Act,* R.S.C. 1952, c.119, as amended
- *Navigable Waters Protection Act*, R.S.C. 1952, c.193, as amended
- *Canada Water Act,* S.C. 1969/70, c.52, as amended
- *Clean Air Act,* S.C. 1970/71/72, c.47, as amended
- *Environmental Contaminants Act,* S.C. 1974/75/76, c.72, as amended
- *Canadian Environmental Protection Act*, R.S.C. 1985, c.16 (4th Supplement)
- *Canadian Environmental Protection Act, 1999*, S.C. 1999, c.33

[37] The regulations listed by the plaintiffs include:

- Public Harbours Regulations (Regs to the *Canada Shipping Act*), C.R.C., c.45 (1955), as amended
- Public Harbours Regulations (Regs to the *Public Harbours and Port Facilities Act*, S.O.R. /83-654

- Public Harbours Regulations (Regs to the *Canada Marine Act*), S.O.R. /83-654

- Chlorobiphenyls Regulations (Regs to the Cdn. EPA), S.O.R. /91-152

- Storage of PCB Material Regulations (Regs to the Cdn. EPA), S.O.R. /92-507

[38] Canada says, on the other hand, there is no claim based on a duty of care owed to the plaintiffs, because there is no "sufficient proximity" arising out of the relationship between the federal Crown and the plaintiffs under any of the statutes or regulations referenced. Canada says the circumstances do not fall into any previously recognized proximity categories, and, therefore, at issue, is whether a new duty of care should be recognized.

[39] In respect to the category involving municipalities' duties to prospective purchasers of real estate, to inspect housing developments without negligence and the circumstance where government has agreed to undertake road maintenance in a non negligent manner, these are activities undertaken by government where liability may arise because they are carried out in a negligent manner. This does not apply in the present circumstance. The plaintiffs do not plead the Crown exercised its statutory powers in a negligent manner, rather that they failed to take action under the relevant legislation.

[40] As observed by Justice Nordheimer, in *Pearson v. Inco Ltd.* (2001), 0.J. No. 4990, at para 23:

> The fifth and sixth categories do not, as I understand them, lay down any broad duty of care owed by government to members of the public with respect to all matters that fall under their legislative or regulatory control. Much of what government does, or does not do, is a matter of policy and does not give rise to any private duty of care the breach of which would confer a cause of action on members of the public. Essentially, it is only when the government decides to undertake something in an operational sense that the duty of care arises. Madam Justice McLachlin put the point this way in Swinamer v. Nova Scotia (Attorney General), [1994] 1 S.C.R. 445 at para. 5:
>
> > There is no private law duty on the public authority until it makes a policy decision to do something. Then, and only then, does a duty arise at the operational level to use due care in carrying out the policy. On this view, a

> policy decision is not an exception to a general duty, but a precondition to the finding of a duty at the operational level.

[41] In respect to the remaining categories, and as also considered by Justice Nordheimer in *Pearson v. Inco Ltd., supra*, the allegation here is not that an act of the regulator caused harm but rather that the federal Crown failed to act. Similarly the second, third and seventh categories do not apply in these circumstances, nor does the fourth category which generally involves manufacturers who put products into the market place and fail to warn of the risks associated with their use.

[42] The issue is whether a new duty of care should be recognized. As noted the factors given rise to proximity must, if they exist in the present instance, arise from the statutes or regulations, as they are the sole source of the public authorities' duties, both private and public. As earlier noted, apart from statute, the public authority is in no different position than the ordinary person on the street. In *A.O. Farms Inc. v. Canada*, [2000] F.C.J. No. 1771 Justice Hugessen, at para. 11, observed:

> ... The relationship between the government and the governed is not one of individual proximity. Any, perhaps most, government actions are likely to cause harm to some members of the public. That is why government is not an easy matter. Of course, the government owes a duty to the public but it is a duty owed to the public collectively and not individually. The remedy for those who think that duty has not been fulfilled is at the polls and before the Courts.

[43] Similarly, in *Kamloops v. Nielsen*, [1984] 2 S.C.R. 2, Justice Wilson observed:

> ... In order to obtain recovery for economic loss the statute has to create a private law duty to the plaintiff alongside the public law duty. The plaintiff has to belong to the limited class of owners or occupiers of the property at the time the damage manifests itself. Loss caused as a result of policy decisions made by the public authority in the *bona fide* exercise of discretion will not be compensable. Loss caused in the implementation of policy decisions will not be compensable if the operational decision includes a policy element. Loss caused in the implementation of policy decisions, *i.e.* operational negligence will be compensable. Loss will also be compensable if the implementation involves policy considerations and the discretion exercised by the public authority is not exercised in good faith. Finally, and perhaps this merits some emphasis, economic loss will only be recoverable if as a matter of statutory interpretation it is a type of loss the statute intended to guard against.

[44] As submitted by Canada, none of the federal statutes or regulations suggest the creation of a private law duty of care to the plaintiffs. They are statutes and regulations of general application. They relate to the public at large rather than to any individually identifiable group or groups.

[45] In *Williams v. Canada (Attorney General), supra,* at para. 76, Justice McCullity observed:

> It is clear that, to the extent that the provisions of section 4 purport to impose duties, they are owed "to the people of Canada". They are not expressed to create private law duties and they are, in my opinion, by themselves, insufficient to create a relationship of proximity between the Minister, or Ministry, and any members of the public who may foreseeably be harmed by an exercise, or failure to exercise, the statutory powers or duties created...

[46] In *Kripps v. Touche Ross & Co.* [1992], B.C. J. No. 1550: 94 D.L.R. (4th) 284. Justice Taylor on behalf of the British Columbia Court of Appeal in respect to the *Securities Act*, R.S.B.C. 1979, c. 380 creating a private law duty of care to the plaintiffs, at p. 308, stated:

> I say this because that principle comes into play only when it can be said that the purpose of the statutory scheme is to benefit individual members of an identifiable class or group. The principle cannot be invoked where the purpose of the legislative scheme is simply to accomplish whatever the implementing authority thinks best in the interests of the public in general. Here, as I have said, the statutory scheme seeks to maintain, or improve, the standard of offerings in the market generally, and the function discharged by the implementing authority involves no accompanying "private law duty of care" to individual lenders or investors who choose to take up a particular offering. This view is consistent with the analysis of statutory duties in such cases as *Yuen Kun-Yeu v. A.G. (Hong Kong)*, [1987] 2 All E.R. 705 (P.C.); *Davis v. Radcliffe*, [1990] J.C.J. No. 19, [1990] 2 All E.R. 536 (P.C.) and *Wirth v. Vancouver* (City) (1990), 47 B.C.L.R. (2d) 340 (C.A.).

[47] In *Pearson v. Inco Ltd., supra*, Justice Nordheimer considered a motion by the Crown to strike out a paragraph in a statement of claim. The plaintiff was alleging a refinery emitted "toxic, noxious, dangerous and hazardous substance in the air, water and soil which caused damages to the physical and emotional well being of the proposed class members, their lands, homes and businesses." The

proceeding was a "proposed class action", as indeed is the present proceeding, and the allegations mirror many of the allegations, by the plaintiffs in this proceeding. In respect to the claims involving the operations of the Ministry of the Environment, (MOE) Justice Nordheimer, at paras. 30 - 31 commented:

> In Cooper, the Supreme Court of Canada noted that the Registrar's duty of care was not owed to the investors but to the public as a whole. Similarly here, absent the pleading of specific facts which would dictate a contrary conclusion, in the normal course the MOE's duties were to the public as whole and not to the individual members of the proposed class. By specific facts, I mean that hypothetically, if the MOE had undertaken an inspection process of the properties of the members of the proposed class had then provided the results of their inspections to the members of the proposed class knowing that the members of the proposed class would rely upon those results then, if the inspections had been done negligently, that would presumably establish a close relationship that would in turn give rise to the necessary finding of proximity. However, that is not this case. Taken at its highest, the plaintiffs only assert that the MOE, or other Ministries, undertook studies and then failed to reveal to the members of the proposed class the result of those studies. There is nothing in that factual matrix which places the MOE, and therefore HMQ, in any different position vis-a-vis the members of the proposed class than they would stand the relation to members of the public generally. There is therefore an insufficient proximity to give rise to the duty of care.
>
> As Madam Justice Newbury said in the British Columbia Court of Appeal's decision in Cooper (2000), 184 D.L.R. (4th) 287 at p. 315, and expressly adopted by McLachlin C.J. and Major J. At para. 50:
>
> > even though the Registrar might reasonably have foreseen that losses to investors in Eron would result if he was careless in carrying out his duties under the Act, there was insufficient proximity between the Registrar and the investors to ground a prima facie duty of care.
>
> The former point could be said of the MOE in this case and the latter conclusion would still apply.

[48] The plaintiffs response is that Pearson v. Inco Ltd., supra, was wrongly decided. I do not agree. In all of the authorities, it is clear there is no sufficient proximity in the circumstance of a regulatory failure to enforce a statute or regulation of public rather than private interest. Similarly there is a distinction between a failure to act and acting negligently. In the former, absent a private duty of care, there would not be liability to individuals such as the plaintiffs,

whereas in the latter there may be liability, suggested by the fifth and sixth categories of proximity. There may be a private duty of care where a municipality has negligently inspected, pursuant to an obligation to inspect or a government ministry, having determined to carry out its duty under a statute or regulation, does so negligently. The plaintiffs allege neither of these circumstances and as a result the application by Canada to strike those paragraphs alleging regulatory negligence as a cause of action is granted. However, the paragraphs are only struck to the extent they relate to the allegation of regulatory negligence and are not struck to the extent they may relate to any other cause of action pleaded by the plaintiffs.

(B) Regulatory Negligence by Nova Scotia

[49] In respect to Nova Scotia, the legislation and regulations suggested by the plaintiffs as creating the regulatory negligence are:

- *Dangerous Goods and Hazardous-waste Management Act*, S.N.S. 1986, c.7
- *Environment Act,* S.N.S. 1994/95, c.1
- *Environmental Assessment Act,* S.N.S. 1988, c.11
- *Environmental Protection Act,* S.N.S. 1973, c.6
- *Smelting and Refining Encouragement Act,* R.S.N.S. 1954, c. 267
- *Sydney Steel Corporation Act,* S.N.S. 1967 (2nd Sess.), c.1, as amended
- *Water Act,* R.S.N.S. 1967, c.335, as amended

[50] The provincial regulations advanced as creating the foundation for the claim of regulatory negligence are:

- Dangerous Goods Management Regulations (Regs to the s. 84 of the *Nova Scotia Environment Act)*, N.S. Reg. 56/95

- PCB Management Regulations (Regs to s. 84 of the *Nova Scotia Environment Act)*, N.S. Reg. 52/95

[51] A review of these statutes and regulations also indicates they are of public rather than private interest, intended to relate to the public at large rather than to any identifiable class or group. There is nothing in this legislation or regulations to suggest the legislature intended to provide a private remedy in the form of compensation to individuals such as the plaintiffs. Nova Scotia's application to strike is, therefore, granted to the extent the paragraphs to be struck relate solely to the allegation of regulatory negligence.

(C) Negligence by Canada

[52] Canada also seeks to strike paragraphs alleging negligence against Canada, as owner of the coke ovens. Reference is made, in the pre-hearing submission, to *Just v. British Columbia*, *supra* at paras. 28 - 29 where it is suggested Justice Cory established the principle that government policy decisions are exempt from tortious liability:

> ... As a general rule, the traditional tort law duty of care will apply to a government agency in the same way that it will apply to an individual. In determining whether a duty of care exists the first question to be resolved is whether the parties are in a relationship of sufficient proximity to warrant the imposition of such a duty. In the case of a government agency, exemption from this imposition of duty may occur as a result of an explicit statutory exemption. Alternatively, the exemption may arise as a result of the nature of the decision made by the government agency. That is, a government agency will be exempt from the imposition of a duty of care in situations which arise from its pure policy decisions.
>
> In determining what constitutes such a policy decision, it should be borne in mind that such decisions are generally made by persons of a high level of authority in the agency, but may also properly be made by persons of a lower level of authority. The characterization of such a decision rests on the nature of the decision and not on the identity of the actors. As a general rule, decisions concerning budgetary allotments for departments or government agencies will be classified as policy decisions...

[53] Also cited by Canada, in this regard, is the decision of the Supreme Court of Canada in *Swinamer v. Nova Scotia (Attorney General), supra* . Counsel suggests, quite accurately, that it is well established that government policy decisions are

not actionable. However, the conduct by Canada, as alleged by the plaintiffs, in respect to the ownership and operation of the coke ovens involves, arguably at least, operational and not exclusively policy decisions. In his pre-hearing submission, the plaintiffs allege "the core of Canada's liability" flows from its operation of the coke ovens between 1968 - 1974. It is alleged that they knew, in 1959, that toxic emissions from the steel plant were impacting the plaintiffs and their property and imposed a risk to their health and property. They allege Canada made no effort to reduce these emission levels nor to warn the persons affected of the danger to which they were being exposed. Canada, the plaintiffs suggest, concealed this information from the residents and they further allege that, in fact, Canada told the residents of Sydney it was a safe place to live. They allege the coke ovens were operated without any emission controls, and, consequently, Canada negligently caused the migration of contaminates into the neighbourhoods where the plaintiffs resided.

[54] Whether these are matters of policy or operation is a matter of argument, and as such, it cannot be said it is "plain and obvious" the plaintiffs cannot succeed in their claim against the Canada in respect to its ownership and operation of the coke ovens. The application to strike the paragraphs in relation to the allegation of negligence in the ownership and operation of the coke ovens is, therefore, denied.

3. Fiduciary Duty

[55] Each of Ispat, Canada and Nova Scotia deny their involvement in the ownership and/or operation of the steel plant and/or coke ovens at Sydney created a fiduciary relationship with the plaintiffs.

[56] In respect to Ispat, the plaintiffs say they were unaware of the nature of the toxic emissions from the operation of the steel works and were, therefore, vulnerable to the exercise of discretion by Ispat, as well as the other defendants. They say there were vulnerable in respect to the lack of dissemination of information about the nature of the toxic emissions from the steel works, as well as operational decisions at the steel works which impacted the levels of the toxic emissions. The plaintiffs allege Ispat knowingly subjected them to the toxic emissions, and made decisions, in the course of operations, which impacted the direct interests of the plaintiffs, such as (1) decisions whether to install emission controls or take other steps to reduce or contain the steel work emissions, and (2)

whether to share information about the contaminants being emitted from the steel works. Counsel references the decision of the Nova Scotia Supreme Court - Appeal Division in *Austin v. Habitat Development Ltd.*, [1992] N.S.J. No. 315 at pp. 2 - 3; 114 N.S.R. (2d) 379 at p. 382:

> In **Fiduciary Duties in Canada** 1988, de Boo, (1990 Cumulative Supplement), Mark Vincent Ellis quotes the judgment of Sopinka J., in **International Corona Resources Ltd. v. LAC Minerals Ltd.**, [1989] 2 S.C.R. 574; 101 N.R. 239; 36 O.A.C. 57; 61 D.L.R. (4th) 14, at pp. 62-63 (D.L.R.) for a definition of the fiduciary relationship:
>
> Relationships in which a fiduciary obligation has been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.
>
> Sopinka J., said the one indispensable feature of a fiduciary relationship is that one party be in a position of dependency or vulnerability with respect to the other. On pp. 62 - 63 (D.L.R.) He cited **Guerin v. Canada**, [1984] 2 S.C.R. 335; 55 N.R. 161, at 340:
>
> > ... the hallmark of a fiduciary relationship is that the relative legal positions are such that one party is at the mercy of the other's discretion.

[57] On the other hand, counsel for Ispat cites the decision of the Supreme Court of Canada in Gladstone v. Canada (Attorney General), [2005] S.C.J. No. 20, at paras. 24 - 26; [2005] 1 S.C.R. 325 at pp. 335-336:

> The concept of fiduciary duty is not an invitation to engage in "results oriented" reasoning. It is a principled analysis. At its core is the obligation of one party to act for the benefit of another. This obligation may derive from various sources such as statute, agreement, or unilateral undertaking. In *Guerin v. The Queen*, [1984] 2 S.C.R. 335, Dickson J. (as he then was) stated at p. 384:

> ... Indeed, fiduciary duties are frequently imposed on those who are capable of affecting not only the legal interests of the beneficiary but also the beneficiary's vital non-legal or "practical" interests...

[63] The third characteristic is the element of vulnerability. At para. 63, Justice Wilson amplifies:

> ... This vulnerability arises from the inability of the beneficiary (despite his or her best efforts) to prevent the injurious exercise of the power or discretion combined with the grave inadequacy or absence of other legal or practical remedies to redress the wrongful exercise of the discretion or power...

[64] Canada and Nova Scotia, citing *Guerin v. Canada*, [1984] 2 S.C.R. 335 suggest fiduciary duties generally only arise with regard to obligations in a private law context. At p. 385, Justice Dickson, as he then was, observed:

> It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship. As the "political trust" cases indicate, the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative function...

[65] Canada also references the observation by Justice Cullity in *Laroza Estate v. Ontario*, [2005] O.J. No. 3507, at para. 16:

> A conclusion that a fiduciary relationship existed between the Crown and the plaintiffs because of a duty of the Ministry to protect the health of Ontarians would not distinguish the position of the plaintiffs from any other residents in the Province, or the position of the Crown and residents under any other statutes conferring powers, or imposing duties, to be exercised in the public interest. Although the importance of the concept of vulnerability has been emphasised by some learned judges in the Supreme Court of Canada (as, for example, per Sopinka and McLachlin JJ. in Hodgkinson, at paras. 128 - 31) and downplayed by others (as, for example, per La Forest, J., ibid, at para. 25) every member of the public is in a sense vulnerable to the exercise, or failure to exercise, statutory powers and duties conferred, or imposed, on Ministers in the public interest. By itself this is insufficient to create a fiduciary relationship - giving rise to enforceable fiduciary rights and duties - between the Crown, or Ministers, and residents of the Province.

[66] The plaintiffs suggest the existence of a fiduciary duty because of a conflict of interest, arising from Canada's and Nova Scotia's responsibilities as regulators and as operators. The allegation is without merit and is not a consideration in determining whether or not it is "plain and obvious" the causes of action based on alleged breaches of fiduciary duty cannot be sustained. A similar allegation of conflict of interest between the Province of Ontario's Health Protection Mandate and its concern regarding the economic impact of SARS was struck as an inadequate basis to establish a breach of fiduciary duty in *Laroza Estate v. Ontario, supra.*

[67] The submission of Canada focusses on the issue of whether public law duties can give rise to a fiduciary relationship, while the plaintiffs' allegation is that the alleged fiduciary duty arises primarily from the "private sphere functions" Canada took on as the operator of the coke ovens. As already noted, to the extent the allegations are based on either a statutory or regulatory duty or as a result of an alleged conflict of interest, the application to strike is without merit. It is clear that neither, in the circumstances of Canada, would constitute the basis for a fiduciary duty as between Canada and persons in the position of the plaintiffs. However, the allegations also relate to its operation and ownership of the coke ovens. In this regard it is not dependent on a statutory duty nor on the existence of a conflict of interest. Allan J. in *Brogaard v. Canada (Attorney General)*, [2002] B.C.J. No. 1775, while dealing with the issue of certification of a class proceeding, at para. 49 made the following observation:

> In **M.(K.) v. M.(H.)**, [1992] 3 S.C.R. 6, LaForest J. considered the development of the scope of fiduciary obligations, commencing in **Guerin v. the Queen**, [1984] 2 S.C.R. 335. After adopting Dickson J.'s statements that it is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty, and that the categories of fiduciary obligations should not be considered closed, LaForest J. stated at p. 63:
>
> > I would go one step further, and suggest that fiduciary obligations are imposed in some situations even in the absence of any unilateral undertaking by the fiduciary.

[68] The plaintiffs, in effect, say the defendants who operated or owned the steel works and/or coke ovens conducted their operations so as to emit toxic substances which, by 1959, they knew were causing harm and damage to the property and persons of the plaintiffs. The allegation goes further and says not only did none of these defendants disclose to the plaintiffs the harm they were causing to their

property and person but in some instances actually mislead the plaintiffs as to the effect of the omissions on their health and well being. Counsel for some of the defendants have asserted the plaintiffs are not without remedy and that the other causes of action alleged in the statement of claim, will, if proven, provide the necessary redress. However, this is no reason to refuse an additional alternative cause of action, if the circumstances warrant, and the pleadings contain alleged facts and allegations on which such claim can be asserted.

[69] A review of the most recent cases confirms the significant evolution and development in the law relating to the obligations of persons who carry out activities that, unknown to other parties, may cause them injury or harm. In *Brogaard v. Canada (Attorney General)*, *supra*, Justice Allan, at para. 101, concluded:

> In my opinion, it is clear that unjust enrichment and breach of fiduciary duty are developing areas of the law, as are issues relating to the constitutional validity of legislation and available remedies. I cannot conclude at this stage that it is plain and obvious that the plaintiffs cannot succeed on these issues...

[70] Chief Justice Glube, on behalf of the Court of Appeal, in *Lamey v. Wentworth Valley Developments Ltd. et al.* (1999), 175 N.S.R. (2d) 356 at para. 16 commented:

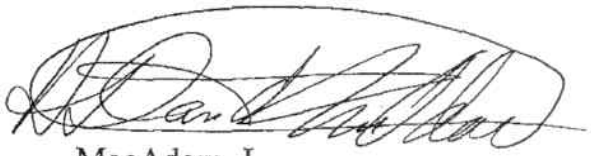
> ... The Chambers judge was presented with arguable and interesting interpretations of case law and statutes which should have been left to a trial judge to reach a decision based on the full merits and arguments of the case. There were clearly arguments for and against the proposed claim. This should have resulted in a bare finding, which is all that is necessary, that the proposed amendment raised a justiciable issue...

[71] Justice Wright in *Joudrey v. Swissair Transport Co.*, [2001] N.S.J. No. 388, at para. 8; 197 N.S.R. (2d), 312 at p. 314, after referencing the foregoing passage from *Lamey v. Wentworth Valley Developments Ltd. et al., supra,* at para. 8 added:

> The question of law raised in the present case is whether or not the defendant owed a duty of care to this plaintiff in this fact situation. However novel the claim is in this case, as was ultimately decided in **Lamey** it cannot be said, solely on the face of the pleadings, to be obviously and absolutely unsustainable, especially where the tort law in respect of nervous shock/rescuer cases is in a continuing state of evolution and development.

[72] Like Justice Allan in *Brogaard v. Canada (Attorney General), supra,* I am satisfied the law is evolving in respect to fiduciary duties, particularly as to the circumstances in which they may be found to exist. Whether the law has now evolved to the extent a plaintiff, injured by activities of a defendant, is owed a fiduciary duty by that defendant to at least disclose the nature of the risk and/or harm being occasioned, may be "dubious, novel, unlikely to succeed or subject to valid defences." It is unnecessary for me, on this application, to decide whether the law has so evolved. I am satisfied, however, there is, at least an arguable or justiciable issue. As noted by the plaintiffs, in reviewing the law relating to the onus on the defendants on an application to strike portions or all of a statement of claim, it is only necessary for the plaintiffs to resist the defendants' assertion the impugned provisions are "absolutely unsustainable" and it is "plain and obvious" they will fail. The defendants, in this instance, have not satisfied me a cause of action, based on a fiduciary duty arising from the ownership and/or operation of the steel works and/or coke ovens, is "absolutely unsustainable" and it is "plain and obvious" they will fail.

[73] Judgment accordingly.



MacAdam, J.