NOVA SCOTIA COURT OF APPEAL

Citation: ***Canada (Attorney General) v. MacQueen***, 2013 NSCA 143

Date: 20131204
Docket: CA 392560
Registry: Halifax

Between:

The Attorney General of Canada, representing
Her Majesty the Queen in right of Canada

Appellant

v.

Neila Catherine MacQueen, Joseph M. Petitpas, Ann Marie Ross, Kathleen Iris Crawford, Sydney Steel Corporation, a body corporate, and The Attorney General of Nova Scotia, representing Her Majesty the Queen in right of the Province of Nova Scotia

Respondents

Docket: CA 393200
Registry: Halifax

Between:

Sydney Steel Corporation, a body corporate, and
The Attorney General of Nova Scotia, representing
Her Majesty the Queen in right of the Province of Nova Scotia

Appellants

v.

Neila Catherine MacQueen, Joseph M. Petitpas, Ann Marie Ross, and Kathleen Iris Crawford, and The Attorney General of Canada representing Her Majesty the Queen in right of Canada

Respondents

Judges: The Court (Oland, Farrar and Bryson, JJ.A.)

Appeal Heard: March 19, 20 and 21, 2013, in Halifax, Nova Scotia

Subject: Class Actions – Certification – *Class Proceedings Act*, S.N.S. 2007, c. 28, s. 7(1) and 15

Summary: The lawsuit by certain property owners and residents of Sydney against Canada, Nova Scotia and Sysco pursuant to their operation of the Sydney steel works was certified as a class proceeding. The appellants appeal the Certification Order, arguing that the requirements of s. 7(1) of the *Class Proceedings Act* that must be met before a proceeding can be so certified were not satisfied. They also say the judge erred in regard to the scope of his jurisdiction under s. 15 of the *Act*.

Issues: Whether the certification judge erred in finding that: (1) the pleadings disclosed causes of action under trespass, battery, negligent battery, liability under the rule in *Rylands v. Fletcher*, and nuisance; (2) the claims of the proposed class members raise common issues; (3) a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute. Whether he erred in determining the scope of his jurisdiction.

Result: The appeals are allowed. The Order certifying the lawsuit as a class action is overturned.

The facts as set out in the pleadings do not support the cause of action of strict liability as based on the rule in *Rylands v. Fletcher*. They also do not support the causes of action of trespass, battery, and negligent battery.

The remaining causes of action, namely, nuisance, negligence, and breach of fiduciary duty, are not sufficiently common to all the prospective class members to justify certification as class actions.

A class action lawsuit is not the preferable procedure in this case because it would not provide the expected benefits. For example, it would not save judicial resources nor give claimants easier and less expensive access to justice.

Finally, whether, in re-drawing the class boundaries on his own motion, the certification judge exceeded his jurisdiction pursuant to s. 15, is moot and need not be addressed by the court.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 54 pages.

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Ann Marie Ross, Kathleen Iris Crawford, Sydney Steel
Corporation, a body corporate, and The Attorney General of
Nova Scotia, representing Her Majesty the Queen in right of the Province of Nova Scotia

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Her Majesty the Queen in right of the Province of Nova Scotia

Appellants

v.

Neila Catherine MacQueen, Joseph M. Petitpas, Ann Marie Ross,
and Kathleen Iris Crawford, and The Attorney General of
Canada representing Her Majesty the Queen in right of Canada

Respondents

Judges: Oland, Farrar and Bryson, JJ.A.

Appeal Heard:	March 19, 20 and 21, 2013, in Halifax, Nova Scotia
Held:	Appeals allowed and the Certification Order is set aside, per reasons for judgment of the Court.
Counsel:	Paul Evraire, Q.C., Angela Green and Melissa Chan, for the Attorney General of Canada Agnes MacNeil and Alison Campbell, for the Attorney General of Nova Scotia and Sydney Steel Corporation Raymond F. Wagner Q.C., C. Scott Ritchie, Q.C., Michael Robb and Michael Dull for Neila Catherine MacQueen, Joseph M. Petitpas, Ann Marie Ross and Kathleen Iris Crawford

By the Court:

[1] For close to a century, steel was produced in the heart of Sydney, Cape Breton. The steel works which opened in 1903 consisted of two different facilities: (a) a steel plant, and (b) coke ovens where coke was produced for use in the plant. The coke ovens closed in 1998 and the steel plant in 2000. With that closure ended the history of steel-making in industrial Cape Breton.

[2] These appeals arise from a lawsuit by the respondent individuals, who are landowners and residents of Sydney. They allege that the emission of hazardous contaminants from the steel works caused damage to and constitutes an interference with their property rights and the integrity of their persons. They brought an action against various entities who had been involved with the steel works, including Canada and the Province of Nova Scotia.

[3] In the course of their litigation, the respondents asked that their claim be certified as a class proceeding. In his decision dated January 19, 2012, Justice John D. Murphy of the Nova Scotia Supreme Court ordered that certification. He also established the class boundaries. His decision is reported as 2011 NSSC 484.

[4] Canada and Nova Scotia appeal the certification judge's order dated May 1, 2012. For the reasons which follow, we would allow the appeals.

Background:

[5] For the first several decades after the steel works opened in 1903, they were privately owned. In 1967, when the owner planned to close it, the Province of Nova Scotia enacted the *Sydney Steel Corporation Act*, 1967 (2nd Sess.), c. 1 which authorized its purchase and created the Sydney Steel Corporation ("Sysco") to operate the steel works.

[6] Sysco operated the coke ovens until their closure in 1998, except for a temporary closure between 1983 and 1985, and except for the six years between 1968 until 1974 when a federal Crown corporation (Devco) owned and operated them. Devco, which was created pursuant to the *Cape Breton Development Corporation Act*, R.S.C., 1967, c. C-6, was dissolved pursuant to the *Cape Breton Development Corporation Divestiture Authorization and Dissolution Act,* S.C. 2000, c. 23. Its legal successor is the Attorney General of Canada representing Her

Majesty the Queen in right of Canada which we call "Canada" throughout this decision.

[7] Sysco operated the steel plant for all thirty-three years from 1967 until its closure in 2000.

[8] When the respondents started their lawsuit in 2004, they named as defendants several private entities and operators, as well as the public owners and operators of the steel works. In the intervening years, the proceedings against the private interests settled, leaving Canada, Nova Scotia and Sysco as the remaining defendants. The present allegations are limited to the period between 1967 and 2000, when Devco owned and operated the coke ovens for six years and Sysco operated either or both of the steel plant and coke ovens.

[9] In their 2004 statement of claim, the respondents alleged that airborne emissions from the operation of the steel works caused personal injury and created a nuisance, and residues from those emissions constituted an ongoing nuisance and health risk. They cited multiple causes of action, including battery, strict liability and nuisance, trespass, negligent operation of the steel works, regulatory negligence and breach of fiduciary duty.

[10] In the years since the initial filing, the statement of claim has been amended several times. The Nova Scotia Supreme Court struck out certain allegations against Canada and Nova Scotia for negligence, and breach of fiduciary duty only in relation to their regulation of the steel works: *MacQueen v. Ispat Sidbec Inc.*, 2006 NSSC 208. The respondents changed other aspects.

[11] The respondents first sought certification as a common law class action proceeding in September 2007. By order granted September 30, 2008, their action was continued pursuant to the *Class Proceedings Act*, S.N.S. 2007, c. 28 (the "*CPA*"), which came into force in June 2008.

[12] The current statement of claim is the Fourth Amended Consolidated Statement of Claim ("Statement of Claim"). By Consent Order dated January 8, 2013, the Statement of Claim was accepted in substitution for its predecessor. Among other things it sought an order certifying the proceeding as a class proceeding and appointing the respondents as representative plaintiffs for class members described as the owners of real property and the residents who have lived, for a minimum of seven years, within class boundaries which were provisionally described in an appendix to the Statement of Claim.

[13] The Statement of Claim alleges that the operations of the steel plant and coke ovens spewed hundreds of thousands of tonnes of contaminants, including heavy metals, polycyclic aromatic hydrocarbons and dangerous respirable particulates into the air, water and soil of Sydney; such contaminants and others accumulated in the former tidal flats adjacent to Sydney Harbour at the mouth of Muggah Creek, known as the Sydney Tar Ponds; the remediation plan proposed by Canada and Nova Scotia fails to address the impacts of the contamination on its residents and their property; and the exposure to the contaminants continues. According to the Statement of Claim, Canada, Nova Scotia and Sysco knew or were substantially certain from various studies conducted over the years that the respondents and class members would inhale, ingest and have dermal contact with the contaminants directly resulting from their operations of the steel plant and coke ovens. It says that they suppressed that information or deliberately presented misinformation in order to deny or conceal the harm to the environment, property and the risk to the health of the respondents and class members.

[14] In the Statement of Claim, the respondents specify that they do not seek recovery of damages for the individual personal injuries and health problems they and other class members have allegedly suffered. The remedies they seek include cessation of exposure by either remediation by removal of contaminants from the properties or relocation of residents; the implementation of a medical monitoring program consisting of a large-scale epidemiological study and an education program; damages for nuisance for the exposure and substantial interference to the enjoyment of their properties; and damages for the intentional tort of battery or alternatively, for negligent battery. In addition to battery and nuisance, the Statement of Claim alleges that Canada, Nova Scotia and Sysco are liable to the respondents and class members for trespass, negligence and breach of fiduciary duty based on their ownership and operation of the steel works.

[15] The hearing of the motion to have the proceeding certified as a class action was lengthy. It began with seven days in December 2009, then two days in each of January and April 2010, followed by eight days scattered through June, September, October and December 2010, for a total of nineteen days to receive evidence and submissions. The sixteen affiants included the individual respondents. Other affiants included experts in the fields of toxicology, epidemiology, environmental engineering, hydrogeology and environmental health risk assessment. Most of the affiants were cross-examined. Almost four dozen exhibits, including various reports and assessments by experts, were presented. The parties filed briefs and supplemental briefs, and made oral submissions.

[16] On June 24, 2010 and July 6, 2011 the certification judge rendered oral decisions. He issued his written decision on January 19, 2012.

[17] The *CPA* specifies when the court is required to certify a proceeding as a class proceeding. According to its s. 7(1), several requirements must be satisfied.

[18] The Court must be of the opinion that the pleadings disclose a cause of action and that the claims of the class members raise a common issue. When the certification judge heard the respondents' motion, Canada and Nova Scotia acknowledged the adequacy of the cause of action for breach of fiduciary duty. They claimed that the pleadings did not support causes of action in trespass, battery and negligent battery. However, they did not agree as to the sufficiency of the pleadings in negligence, nuisance and strict liability – Nova Scotia conceded those, Canada did not.

[19] The certification judge was satisfied (¶29 of his decision) that the pleadings contained allegations of fact in support of each cause of action for which the respondents sought to have the claim certified as a class proceeding. He further determined (¶52) that the claim raised common issues and that the proposed common issues were consistent with the causes of action pleaded.

[20] The *CPA* also stipulates that certification as a class proceeding is only available if it would be the preferable procedure for the fair and efficient resolution of the dispute. The judge concluded (¶60) that the respondents had satisfied their burden to establish that the statutory considerations favoured a class proceeding.

[21] The certification judge went on to deal with whether there was an identifiable class of claimants and the geographical boundaries for the classes. He was satisfied (¶78) with the respondents' proposals to establish two classes of claimants - property owner and residential - and the same geographic boundaries for both classes (¶79). After reviewing submissions on his authority to fix the boundaries other than as proposed by the respondents, the judge concluded (¶97) that he could make adjustments within reasonable limits, provided those revisions were supported by the evidence. He then defined the property boundaries.

[22] The *CPA* also requires the court to be satisfied that there is a representative party who has provided a plan for the class proceeding that, among other things, establishes a workable method of advancing the proceeding on behalf of the class. The certification judge reviewed the respondents' most recent proposed litigation

plan. He had no hesitation (¶127) approving its format and its general content in principle.

[23] In summary, the certification judge granted (¶129) the respondents' amended motion for certification with the revisions reflected in his reasons.

[24] By Notices of Application for Leave to Appeal and Notices of Appeal (Interlocutory), Canada, Sysco and Nova Scotia appeal from the decision and order certifying the proceeding as a class proceeding. Farrar, J.A. granted the motion for leave to appeal in *Sydney Steel Corporation v. MacQueen*, 2013 NSCA 5.

Issues:

[25] The appellants argue that the certification judge erred in finding that:

> (1) the pleadings disclosed a cause of action pursuant to s. 7(1)(a) of the *CPA*;
>
> (2) the claims of proposed class members raise common issues, pursuant to s. 7(1)(c) of the *CPA*; and
>
> (3) a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute, pursuant to s. 7(1)(d) of the *CPA*.

[26] In addition to these grounds, Nova Scotia submits that the certification judge erred in determining the scope of his jurisdiction under s. 15 of the *CPA*. It submits that his interpretation of s. 15, which allowed the judge to re-draw the class boundaries on his own motion, is an error of law. However, it is not contesting those boundaries as defined by the certification judge. In these circumstances, the issue is moot. We are not persuaded that there is any reason why it should nevertheless be considered, and decline to do so. This is, of course, not to be construed as accepting or endorsing any of the judge's reasoning with regard to s. 15 of the *CPA*.

[27] In the result, our analysis will deal with whether the pleadings disclose a cause of action, whether the claims raise common issues, and whether a class proceeding is the preferable procedure. In considering each of these issues, we will determine the applicable standard of review. We begin with an overview of class proceedings.

Overview of Class Proceedings:

[28] In 1982 the Ontario Law Reform Commission recommended that class proceedings legislation be passed specifically to deter wrongful corporate and government behaviour, (Ontario Law Reform Commission, *Report on Class Actions*, vol.1 (Toronto: Ministry of the Attorney General, 1982)). The report concluded that class actions facilitate a voice for mass grievances in an orderly fashion, within the framework of the judicial system. In 1992 Ontario enacted the *Class Proceedings Act*, 1992, S.O. 1992, c. 6 implementing the recommendations of the 1982 Commission report. Since then all common law provinces, other than Prince Edward Island, have passed similar legislation.

[29] A useful history and overview of class action proceedings and their predecessors is provided by the Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at ¶19 to 29, where class actions are described as having:

> 26 … an important role in today's world. The rise of mass production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of environmental wrongs have all contributed to its growth. A faulty product may be sold to numerous consumers. Corporate mismanagement may bring loss to a large number of shareholders. Discriminatory policies may affect entire categories of employees. Environmental pollution may have consequences for citizens all over the country. Conflicts like these pit a large group of complainants against the alleged wrongdoer. Sometimes, the complainants are identically situated *vis-à-vis* the defendants. In other cases, an important aspect of their claim is common to all complainants. The class action offers a means of efficiently resolving such disputes in a manner that is fair to all parties.
>
> 27 ***Class actions offer three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis***. The efficiencies thus generated free judicial resources that can be directed at resolving other conflicts, and can also reduce the costs of litigation both for plaintiffs (who can share litigation costs) and for defendants (who need litigate the disputed issue only once, rather than numerous times): ...
>
> 28 ***Second, by allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to***

> ***prosecute individually***. Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied: ...
>
> 29 ***Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public***. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery. Cost-sharing decreases the expense of pursuing legal recourse and accordingly deters potential defendants who might otherwise assume that minor wrongs would not result in litigation: ...
>
> [Emphasis added, citations omitted]

[30] The foregoing advantages of class proceedings were reiterated by the Supreme Court in *Hollick v. Toronto (City)*, 2001 SCC 68 at ¶15:

> The Act reflects an increasing recognition of the important advantages that the class action offers as a ***procedural tool***. … In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters.
>
> [16] It is particularly important to keep this principle in mind at the certification stage. … ***The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action***: … [Emphasis added]

[31] As previously noted, the *CPA* came into force in June 2008. It is similar to class proceeding legislation in Ontario and elsewhere. Section 7 addresses certification:

> 7(1) The court shall certify a proceeding as a class proceeding on an application under Section 4, 5 or 6 if, in the opinion of the court,
>
> (a) the pleadings disclose or the notice of application discloses a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by a representative party;

(c) the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members;

(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute; and

(e) there is a representative party who

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the class and of notifying class members of the class proceeding, and

(iii) does not have, with respect to the common issues, an interest that is in conflict with the interests of other class members.

(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute, the court shall consider

(a) whether questions of fact or law common to the class members predominate over any questions affecting only individual members;

(b) whether a significant number of the class members have a valid interest in individually controlling the prosecution of separate proceedings;

(c) whether the class proceeding would involve claims or defences that are or have been the subject of any other proceedings;

(d) whether other means of resolving the claims are less practical or less efficient;

(e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means; and

> (f) any other matter the court considers relevant.
>
> (3) Notwithstanding subsection (1), where an application is made to certify a proceeding as a class proceeding in order that a settlement will bind the members of a settlement class, the court shall not certify the proceeding as a class proceeding unless the court approves the settlement.

[32] There can be no question that class actions have had a significant impact on the legal landscape. They permit potentially massive reallocations of resources by courts, invite confusion between public (punitive) and private (compensatory) remedial regimes, affect matters as diverse as the adequacy of insurance coverage, the nature, extent and timing of settlements, counsels' compensation, ethical challenges created by the potential conflict between counsel and claimants, and inter-jurisdictional disputes about which courts should hear which case or cases. For a useful discussion of some of these issues: Shaun Finn, "Summoning Leviathan: A Critical Analysis of Class Action Theory and the Ethics of Group Litigation" (2007) 4:1 Can. Class Action Rev. 119.

[33] While none of the foregoing informs how the courts should apply the law, they emphasise the effects of failing to do so accurately.

Causes of Action:

[34] Section 7(1) of the *CPA* requires the court to certify a class proceeding if satisfied that all five enumerated conditions are met. The first of those conditions is that the pleadings (or notice of application) disclose a cause of action.

[35] A cause of action has been defined as:

> … every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved. (*Read v. Brown* (1888), 22 Q.B.D. 128 per Lord Esher, M.R. at 131)
>
> and
>
> … simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person. (*Letang v. Cooper*, [1965] 1 Q.B. 232, per Diplock, L.J. at 242).

[36] The appellants attack the certification judge's determination that the respondents have properly pleaded their causes of action.

[37] In his decision, the certification judge correctly described the test for ascertaining whether a cause of action is made out:

> [16] ***The requirement under section 7(1)(a) of the Act that pleadings disclose a cause of action is assessed strictly on the pleadings***, assuming all facts pleaded to be true and reading the claim generously realizing that drafting deficiencies can be addressed by amending the pleadings (Ward Branch, *Class Actions in Canada*, Aurora, ON, Canada Law Book, 2009 para 4.80).
>
> [Emphasis added]

[38] He then went on to discuss the causes of action:

> [24] The written and oral submissions by the defendants (especially Nova Scotia) and the plaintiffs' response at the June 2010 motion hearing included intensive examination of the allegations in the statement of claim in the context of authorities which prescribe requirements for and components of the causes of action pleaded. ***These reasons will neither dissect the way every cause of action has been framed, nor analyze the scientific evidence and opinions advanced in affidavits filed by expert witnesses who underwent extensive cross examination***. In my view, to do so would be to exceed the assessment contemplated by section 7(1)(a) of the Act. ***I will, however, refer generally to some of the allegations and testimony, including from the four representative plaintiffs***, which disclose the causes of action for which I have found a class proceeding will be certified. Some of the background relevant to my determining which causes of action should be certified will also be found later in these reasons when I address the common issues proposed for inclusion in the certification order.
>
> [25] The plaintiffs maintain that during the approximately 33 years when one or both defendants operated a facility[sic] the Steel Works:
>
> (a) They spread contaminants which are known to be harmful to the environment and human health into the air, water and soil;
>
> (b) The plaintiffs did not consent to discharge of the contaminants;
>
> (c) Release of the contaminants from the defendants' properties resulted in damage to the health and lands of persons to be included within class boundaries;
>
> (d) The presence and the consequences of the contaminants remain, and their escape from the Steel Works facility continues;
>
> (e) The defendants have not taken steps to clean up the contaminants;
>
> (f) Scientific studies available to the defendants disclosed the presence and effect of the contaminants, and the defendants misrepresented the

> conclusions of the studies and the effects of the contaminants to the plaintiffs.
>
> [26] ***The defendants raised particular concerns about some causes of action – for example, they argued the claims for trespass, battery and negligent battery could not succeed because the facts pleaded cannot establish requisite elements such as directness or physical interference. Nevertheless, I have determined that the statement of claim and evidence at the certification hearing disclose sufficient information to support certifying the causes of action which are challenged by the defendants***. The distinctions among nuisance, trespass and negligent or intentional battery and the mental element required for each can be subtle (see G.H.L. Fridman, The Law of Torts in Canada 2d ed., (Toronto: Carswell, 2002), at pp. 37-8 and *Philips v. California Standard Co.*, [1960] 31 W.W.R. 331 (Alta.S.C.) at para. 7). In this case, there is no indication to date of any independent or intervening agency interrupting "direct" deposit of contaminants, and it is debatable whether material emitted may be deemed non-physical because it consisted of small particles.
>
> …
>
> [29] ***I am satisfied that the current pleading, which is detailed, contains allegations of fact in support of each cause of action for which the plaintiffs now seek to have the claim certified as a class proceeding*** – breach of fiduciary duty, nuisance, strict liability, trespass, battery and negligent battery for both a Property Owner Class and Residential Class of plaintiffs, and negligence *simpliciter* for a property class only. All causes of action advanced include arguable claims. ***Testimony at the motion hearing provided some evidentiary basis for each cause of action*** – it is not plain or obvious that any will not succeed. Each raises an issue to be tried and should be certified. My conclusion does not preclude either re-evaluation of causes of action being advanced or pleading amendment if additional information is developed as the claim progresses; however, progress of the case should not be delayed by more inquiry at this stage. [Emphasis added]

[39] The certification judge did not discuss in detail each alleged cause of action. Moreover, he appears to have taken into account evidence when assessing the viability of the causes of action – something the law proscribes, which he had earlier acknowledged. It may be that here the certification judge was really summarizing his overall approach to certification, without confining himself to causes of action. Evidence is admissible when assessing other criteria in s. 7, including commonality of issues, (e.g. *Hollick*, at ¶25).

[40] The appellants argue that these passages reveal two errors of law. The first is the judge's consideration of evidence when deciding whether the causes of action were made out. The second is that the judge failed to analyse the pleadings to determine if the causes of action were made out.

[41] The appellants are correct that the validity of pleaded causes of action cannot be augmented or diminished by reference to evidence. The court is to assume that the facts pleaded are true and decide if a cause of action is made out, (*R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at ¶22 and 23).

[42] Whether a pleading discloses a cause of action is a question of law (*Nova Scotia (Health) v. Morrison Estate,* 2011 NSCA 68 at ¶11; *Ring v. Canada (Attorney General),* 2010 NLCA 20 at ¶34; *Fresco v. Canadian Imperial Bank of Commerce,* 2012 ONCA 444 at ¶68). Even if the certification judge did not intend to consider evidence when determining the validity of the pleadings, the appellants argue that he should have analyzed each cause of action, citing *Morrison Estate* at ¶23–40.

Standard of Review:

[43] The standard of review for questions of law is correctness. The respondents argue that the standard of review is not correctness. They say that whether pleadings disclose a cause of action is a matter of "discretion" to which deference is owed, citing *Chrysler Canada Inc. v. Eastwood Chrysler Dodge Ltd.*, 2010 MBCA 75 and *Campbell v. Flexwatt Corp.* (1997), 98 B.C.A.C. 22 (BCCA), leave to appeal ref'd, [1998] S.C.C.A. No. 13, amongst others. Most of the cases to which the respondents refer do not support this submission. For example, the respondents quote from *Flexwatt:*

> [25] … Of course, whether to certify a class proceeding is not a matter of discretion, strictly speaking, because s. 4(1) of the Act mandates certification if the criteria are met. The discretion resides in the assessment of the circumstances.

This quotation appears in a paragraph in which s. 4 of the *British Columbia Class Proceedings Act* is discussed generally. The "circumstances" include questions of whether or not a class proceeding is the preferable procedure and whether there are common triable issues. The "circumstances" in this context are not relevant in determining whether a pleading on its face discloses a cause of action.

[44] Likewise the respondents rely on *Eastwood*:

> [24] … Although the question whether the pleading discloses a cause of action is one of law, the question whether it was plain and obvious that the pleading disclosed no reasonable cause of action is essentially a matter of discretion. As a result, the standard of review on the motions judge's decision on whether to strike out the counterclaim for disclosing no reasonable cause of action can be expressed as follows: absent an error in law or a palpable and overriding error on a question of fact, the decision of the motions judge is entitled to deference and this court will not intervene unless the decision is so clearly wrong as to amount to an injustice. See *Towers Ltd. v. Quinton's Cleaners Ltd. et al*., 2009 MBCA 81, 245 Man. R. (2d) 70 at paras. 24-28.

[45] In *Eastwood*, the Manitoba Court of Appeal relies on *Towers Ltd. v. Quinton's Cleaners Ltd. et al.*, 2009 MBCA 81 at ¶24 to 28. That case discusses the standard of review for a summary judgment application on the evidence. In *Towers*, the court rightly noted the highly deferential standard accorded such a decision. But that standard has no application to the pure question of law about whether or not a cause of action is made out on the face of a pleading.

[46] The respondents also rely upon the Alberta Court of Appeal decision on *Elder Advocates of Alberta Society v. Alberta*, 2009 ABCA 403, rev'd 2011 SCC 24 which counsels a deferential standard, absent an error of law:

> [24] In certifying a class action, the certification judge is guided by the *Class Proceedings Act*. Applying the legislated tests to the evidence involves questions of mixed fact and law. The certification judge is uniquely familiar with the factual context: *Ayrton v. PRL Financial (Alta.) Ltd*., 2006 ABCA 88, 384 A.R. 1 at para. 3, and the court must be reluctant to interfere with the exercise of judicial discretion on the part of a case management judge in the context of complex litigation: *Halvorson v. British Columbia (Medical Services Commission)*, 2008 BCCA 501, B.C.J. No. 2364 (B.C.C.A.) at para. 17. ***Thus, absent an extricable error of law which attracts a correctness standard,*** substantial deference is accorded to a judge certifying a class proceeding***: Ayrton*** at para. 3, citing *Campbell v. Flexwatt* (1997), 44 B.C.L.R. (3d) 343 (B.C.C.A.) and *Pearson v. Inco Ltd*., [2005] O.J. No. 4918 (Ont. C.A.).
>
> [Emphasis added]

[47] The deference referred to here does not extend to the extricable legal question of whether a cause of action is disclosed on the face of the pleadings, but to non-pleading issues.

[48] What is confusing about *Elder Advocates* is the following:

> [45] … our role at this stage is not to weigh all the relevant evidence or determine who is right or wrong, but to determine ***whether the certification judge committed a palpable and overriding error in concluding that the respondents showed some basis in fact that there exists a cause of action:*** *Windso*r at paras. 42 and 50. [Emphasis added]

[49] The Alberta Court of Appeal here refers to *Windsor v. Canadian Pacific Railway Ltd.*, 2006 ABQB 348, aff'd 2007 ABCA 294. *Windsor* was not a case involving an attack on pleadings, but rather whether the evidence met the applicable criteria of the Alberta *Class Proceedings Act*. This quotation could be read as suggesting a palpable and overriding error standard for assessing the existence of a cause of action, which would be wrong in law. But it is not obvious that the court intended such a meaning. Certainly the Supreme Court of Canada's review of *Elder Advocates* did not assume that interpretation because the court accorded no deference on the question of whether causes of action were made out. As Chief Justice McLachlin said:

> [4] ***This is not a decision on the merits of the action, but on whether the causes of action pleaded are supportable at law. The question is whether the pleadings, assuming the facts pleaded to be true, disclose a supportable cause of action***. If it is plain and obvious that the claim cannot succeed, it should be struck out.
>
> [5] ***I conclude that the pleas of fiduciary duty, negligence and bad faith in the exercise of discretion disclose no cause of action and should be struck out in their entirety***, but that the claim of unjust enrichment should survive. It follows that the certification of the class is upheld, and the unjust enrichment claim may proceed to trial, together with the claim for discrimination under s. 15(1) of the *Charter*. [Emphasis added]

No deference to the certification judge appears here.

[50] Likewise in *Hollick*, Chief Justice McLachlin said:

> 25 I agree that the representative of the asserted class must show some basis in fact to support the certification order. As the court in *Taub* held, that is not to say that there must be affidavits from members of the class or that there should be any assessment of the merits of the claims of other class members. However, the *Report of the Attorney General's Advisory Committee on Class Action Reform* clearly contemplates that the class representative will have to establish an evidentiary basis for certification: see Report, at p. 31 ("evidence on the motion for certification should be confined to the [certification] criteria"). The Act, too,

> obviously contemplates the same thing: see s. 5(4) ("[t]he court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence"). In my view, the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, ***other than the requirement that the pleadings disclose a cause of action. That latter requirement is of course governed by the rule that a pleading should not be struck for failure to disclose a cause of action unless it is "plain and obvious" that no claim exists***: see Branch, *supra*, at para. 4.60. [Emphasis added]

The court then went on to analyze the issues assuming the facts and the pleading to be true and determined whether the causes of action pleaded were sustained in law.

[51] The correctness standard of review has also been applied in *Anderson v. Canada (Attorney General)*, 2011 NLCA 82 at ¶38; *Ring* at ¶34; and *Fresco* at ¶65 and 68.

[52] It is clear from most of the cases on which the respondents rely that any deference accorded to a certification motions judge does not extend to the question of whether a cause of action is made out on the pleadings. To the extent that a deferential standard may be intended by any of the authorities, we would respectfully decline to follow them.

[53] The *CPA* is procedural not substantive. It does not relax the standard that pleadings must disclose a cause of action on their face. The test is not onerous. Pleadings are adequate provided that it is not "plain and obvious" that the cause of action will fail, *Elder Advocates* (SCC) at ¶20; *Hollick*, at ¶25; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at p. 980. Canada submits that compliance with the need for pleadings to disclose a cause of action is especially important in class actions, because:

1. A defendant should not be subjected to any claim that does not disclose a proper cause of action, particularly one asserted on behalf of an entire class;
2. The claims asserted in the pleadings have an impact on the question of common issues, as common issues cannot be established based on causes of action that are not properly pled; and

   The nature of the claim advanced determines the proper members of the class.

> (Citing *Pearson v. Inco Ltd.*, [2002] O.J. No. 2764 (S.C.J.) at ¶84; also *Morrison Estate*, at ¶28 and 40)

[54] The respondents rightly argue that pleadings must be read generously to allow for inadequacies owing to drafting frailties and the respondents' lack of access to documents and discovery, citing *Hunt*, and *Anderson v. Wilson*, [1999] O.J. No. 2494 (Ont. C.A.), leave to appeal ref'd, [1999] S.C.C.A. No. 476. But two cautionary notes warrant mention here. First, the Statement of Claim has already been amended numerous times and ample opportunity has been afforded the respondents to plead correctly. Second, the generosity of interpretation counselled by *Hunt* does not overcome pleaded facts inconsistent with the underlying cause of action and cannot supply factual omissions in such pleadings. For example, in *Imperial Tobacco*, Chief Justice McLachlin emphasised the need to plead facts necessary to a cause of action:

> [24] This is not unfair to the claimant. The presumption that the facts pleaded are true operates in the claimant's favour. The claimant chooses what facts to plead, with a view to the cause of action it is asserting. If new developments raise new possibilities – as they sometimes do – the remedy is to amend the pleadings to plead new facts at that time.

[55] The failure to plead all facts material to a cause of action will usually result in a striking out of the pleading. In *3021386 Nova Scotia Ltd. v. Barrington (District)*, 2010 NSSC 173, Justice Duncan cited English and Canadian authorities:

> [15] The defendants have submitted legal authority as to the consequences of the failure to plead a material fact, which is central to certain of their arguments. In *Bruce v. Odhams Press Ltd*., [1936] 1 K.B. 697, at pp. 712-713, 1 All E.R. 287 at pp. 294-295, Scott, L. J. wrote:
>
>> The cardinal provision in rule 4 is that the statement of claim must state the material facts. ***The word "material" means necessary for the purpose of formulating a complete cause of action; and if any one "material" statement is omitted, the statement of claim is bad***; it is "demurrable" in the old phraseology, and in the new is liable to be "struck out" under RSC Ord XXV, r 4 (see *Philipps v Philipps*); or a further and better statement of claim may be ordered under rule 7.
>
> …

> [16] The defendants rely on the decision of Rosenberg J. in *Region Plaza Inc. v. Hamilton-Wentworth (Regional Municipality)* (1990), 12 O. R. (3d) 750, at para. 5, where he held that:
>
> > Under rule 25.06, the plaintiff must plead all material facts on which it relies and must plead all of the facts which it must prove to establish a cause of action which is legally complete. ***If any material fact is omitted, the statement of claim is bad and the remedy is the motion to strike the pleading, not a motion for particulars.*** [Emphasis added]

[56] Collectively the appellants assert that the Statement of Claim does not disclose good causes of action for:

1. Strict liability (*Rylands v. Fletcher*)
2. Trespass
3. Battery
4. Nuisance

Each will be addressed in turn.

***Rylands v. Fletcher*:**

[57] The rule in *Rylands v. Fletcher* ((1866), L.R. 1 Ex. 265 (Ex. Ch.) aff'd (1868), L.R. 3 H.L. 330) emerges from 19th century jurisprudence which imposes strict liability on a land occupier who brings something on his land which subsequently escapes causing damage to his neighbour. Lord Cranworth put it this way:

> If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage.

Other descriptions emphasise the potentially dangerous character of that which is accumulated by a defendant, implying the likelihood of damage if it escapes from a defendant's property, (e.g. Justice Blackburn's "anything likely to do mischief" description in the Exchequer Chamber in *Rylands v. Fletcher*).

[58] In *Smith v. Inco Ltd.* (2011 ONCA 628), rev'd 2010 ONSC 3790 (Ont. S.C.J.), leave to appeal denied, [2011] S.C.C.A. No. 539, the Ontario Court of Appeal describes the rule's status in Canada:

> [68] The rule in *Rylands v. Fletcher* imposes strict liability for damages caused to a plaintiff's property (and probably, in Canada, for personal damages) by the escape from the defendant's property of a substance "likely to cause mischief". The exact reach of the rule and the justification for its continued existence as a basis of liability apart from negligence, private nuisance and statutory liability have been matters of controversy in some jurisdictions: see *Transco plc v. Stockport Metropolitan Borough Council*, [2004] 2 A.C. 1 (H.L.); *Burnie Port Authority v. General Jones Pty. Ltd.* (1994), 179 C.L.R. 520 (Aust. H.C.); Murphy, "The Merits of *Rylands v. Fletcher"*. In Canada, *Rylands v. Fletcher* has gone largely unnoticed in appellate courts in recent years. However, in 1989 in *Tock*, the Supreme Court of Canada unanimously recognized *Rylands v. Fletcher* as continuing to provide a basis for liability distinct from liability for private nuisance or negligence.

[59] Liability for breach of the rule in *Rylands v. Fletcher* is usually described as strict; that is to say it is no defence that what escaped and caused damage did so without a defendant's neglect. But some defences may be available, (e.g. act of a stranger; "act of God"; acquiescence of the plaintiff, to name some).

[60] In *Smith v. Inco*, the Ontario Court of Appeal refers to four pre-requisites for establishing liability under the rule in *Rylands v. Fletcher*. In doing so they incorporate the criteria set out by Gregory S. Pun and Margaret I. Hall, in *The Law of Nuisance in Canada* (Markham, Ontario: LexisNexis Canada Inc., 2010) at p. 113:

> a) the defendant made a non-natural use of his land;
>
> b) the defendant brought onto his land something which was likely to do mischief if it escaped [the requirement of dangerousness];
>
> c) the substance in question escaped; and
>
> d) damage was caused to the plaintiff's property (or person) as a result of the escape.

[61] All formulations of the tort involve at least two elements: there must be an escape from property occupied by the appellant; and the use of land by the appellant must be "non-natural", "out of the ordinary" or "special". Recently in the United Kingdom the House of Lords has replaced "non-natural use" with "quite out of the ordinary in the place and at the time when [the defendant] does it", (*Transco plc v. Stockport Metropolitan Borough Council*, [2004] 2 A.C. 1 (H.L.), [2004] 1 All E.R. 589, hereafter, all citations are from the All E.R.s). Also see: Lewis N. Klar, Q.C., *Tort Law*, 5th ed (Toronto: Carswell, 2012) at 646 to 653).

Non-Natural Use:

[62] The appellants complain that the respondents have not adequately pleaded "non-natural or unusual" use of the property by the appellants. The respondents plead that storage and release of contaminants from the property constituted a "non-natural use of the lands", (¶66 of the Statement of Claim). The appellants object that this conclusory allegation of "non-natural" use is unsupported by explanatory facts, or indeed, the other facts alleged by the respondents.

[63] The "non-natural" or "special use" requirement of strict liability has attracted some debate in the jurisprudence. But the authorities do not support the argument that operating a steel mill or coke ovens alone constitutes an unnatural use of land. In *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181, La Forest, J. observed at p. 1189:

> The definitive statement of the meaning to be ascribed to Lord Cairn's qualification in *Rylands v. Fletcher*, at pp. 338-39, that strict liability would only attach in respect of "non-natural user" of land is generally agreed to be that of Moulton L.J. in *Rickards v. Lothian*, [1913] A.C. 263, at p. 280. Moulton L.J. thus expressed himself:
>
> > 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.***
>
> The courts, as noted by Fleming, *The Law of Torts*, 6th ed., at p. 308, have, on the basis of this qualification, interpreted the notion of non-natural user as a flexible concept that is capable of adjustment to the changing patterns of social existence. [Emphasis added]

[64] Justice La Forest concluded (at p. 1190) that construction and operation of a sewer system was not a "non-natural" use of land:

> In summary, if, as argued by Prosser at p. 147 of his essay "The Principle of *Rylands v. Fletcher*," in *Selected Topics on the Law of Torts*, the touchstone for the application of the rule in *Rylands v. Fletcher* is to be damage occurring from a user inappropriate to the place where it is maintained (Prosser cites the example of the pig in the parlour), I would hold that the rule cannot be invoked where a municipality or regional authority, acting under the warrant of statute and pursuant to a planning decision taken in good faith, constructs and operates a sewer and storm drain system in a given locality.

[65] This view was generally taken up by the Ontario Court of Appeal in *Smith v. Inco*:

> [95] Inco operated a refinery on its property. The nickel emissions were part and parcel of that refinery operation and were not in any sense an independent use of the property. The use of the property to which the *Rylands v. Fletcher* inquiry must be directed is its use as a refinery. ***The nickel emissions are a feature or facet of the use of the property as a refinery. The question must be – was the operation of the refinery at the time and place and in the manner that it was operated a non-natural use of Inco's property?***: see *Gertsen v. Municipality of Metropolitan Toronto* (1973), 2 O.R. (2d) 1 (H.C.), at pp. 19-20; David W. Williams, "Non-Natural Use of Land" (1973) 32 Cambridge L.J. 310, at pp. 314-21.
>
> [96] The trial judge found that Inco's use of the property was a non-natural use because it brought the nickel on to the property. If the characterization of a use as a non-natural one was ever tied solely to whether the substance was found naturally on the property, it has long since ceased to depend on the answer to that single question. It may be that something found naturally on the property cannot attract liability under *Rylands v. Fletcher*. It is not, however, the law that anything that is not found naturally on the property can be subject to strict liability under *Rylands v. Fletcher* if it escapes and causes damage. The disconnect between things found in nature on the property and the potential application of *Rylands v. Fletcher* is so complete that the House of Lords has abandoned the use of the phrase "non-natural use" as misleading in favour of the phrase "ordinary use": *Transco* p*lc* at paras. 11-12.
>
> [97] The emphasis in *Tock* at para. 13 on a "user inappropriate to the place" and, at para. 10, to "changing patterns of existence" demonstrate that the distinction between natural and non-natural use cannot be made exclusively by reference to the origin of the substance in issue. ***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. [Emphasis added]

[66] The Ontario Court of Appeal went on to endorse Lord Bingham's description of the inquiry that needs to be made:

> [101] The claimants bore the onus of showing that the operation of the refinery was a non-natural use of the property in the sense that it was not an ordinary or usual use. In *Transco plc*, Lord Bingham, at para. 11, suggests the following inquiry:
>
> > An occupier of land who can show that another occupier of land has brought or kept on his land an exceptionally dangerous or mischievous thing in extraordinary or unusual circumstances is in my opinion entitled to recover compensation from that occupier for any damage caused to his property interest by the escape of that thing subject to defences ...

[67] We are not at the stage of the inquiry referred to by the Ontario Court of Appeal in *Smith v. Inco*. But the appellants assert that none of the facts pleaded sustain the allegation that their use of their lands was "non-natural", in the manner understood by the jurisprudence. As the respondents plead in ¶12 and elsewhere in the Statement of Claim, the steel works and coke ovens operated in the community for almost 100 years. As in *Smith v. Inco*, the emissions produced were a natural and ordinary consequence of the activities lawfully carried on during that time by the appellants and their predecessors.

[68] In effect, the Statement of Claim alleges that what was really the ordinary operation of a steel mill and coke ovens constitutes "non-natural" use within the *Rylands v. Fletcher* rule. The appellants are correct that a bare allegation of "non-natural" use will not do, particularly when the other facts pleaded, as here, may suggest otherwise. The respondents have not pleaded that the operation of the steel mill or coke ovens was non-natural in the context of the time, place and manner that it was operated (*Smith v. Inco*, ¶95 and 97). Nor do they say that the industrial uses of the lands by the appellants constituted a "special use bringing with it increased danger to others", (*Rickards*, ¶280; *Tock*, p. 1189; *Smith v. Inco*, ¶72, 90 and 99). But they do plead in ¶72 of the Statement of Claim that the "release of Contaminants [created] an abnormally dangerous and pervasive risk …". Accordingly, certification of *Rylands v. Fletcher* as a cause of action should not be refused based solely on this aspect of the respondents' pleadings. That brings us to the escape criterion.

Escape:

[69] Escape is essential to liability under *Rylands v. Fletcher*. As Klar in *Tort Law* puts it:

> Escape is thus essential to this concept, one which is narrow and not capable of extension to a wider principle of strict liability for ultrahazardous activities (citing English authorities).

[70] Klar argues that the escape requirement is somewhat more relaxed in the Canadian context where an "escape of gas or water, running through pipes under public streets, or stored in underground tanks, for example, has frequently been satisfactory for the application of the *Rylands* principle", (pp. 652 and 653).

[71] However characterized, the appellants assert that "escape" is an essential element of the tort and must be pleaded. Canada acknowledges that the word "escape" is used in the Statement of Claim, but says that facts necessary to support that allegation are lacking. Indeed, Canada argues that the underlying facts pleaded are inconsistent with an allegation or plea of escape.

[72] In *Smith v. Inco*, the Ontario Court of Appeal contrasted escape with the regular and intended use of land:

> [74] … In finding that the nickel particle emissions "escaped" from the Inco refinery, the trial judge did not refer to the fact that the emissions were an integral part of Inco's refinery operation and were released by Inco intentionally on a daily basis for 60 odd years.

[73] Later the court elaborated on the escape criterion:

> [112] The second issue pertaining to the escape requirement arises from the nature of the risk to which strict liability under *Rylands v. Fletcher* applies. As explained earlier (see paras. 83-84, 96-97), the *Rylands v. Fletcher* paradigm involves an unnatural use of the defendant's property and some kind of mishap or accident that results in damage. ***The application of Rylands v. Fletcher to consequences that are the intended result of the activity undertaken by the defendant has been doubted***: *North York (City) v. Kert Chemical Industries Inc*. (1985), 33 C.C.L.T. 184 (Ont. H.C.); Lewis N. Klar, *Tort Law*, 4th ed. (Toronto: Carswell, 2008), at p. 628; *The Law of Nuisance in Canada*, at pp. 132, 137.
>
> [113] We, too, doubt its application. It is one thing to impose strict liability for mishaps that occur in the course of the conduct of an unnatural or unusual activity. ***It is quite another to impose strict liability for the intended consequence of an activity that is carried out in a reasonable manner and in accordance with all applicable rules and regulations***. [Emphasis added]

[74] Canadian law does not recognize strict liability for engaging in dangerous activities, *per se*. This is clear from the judgment of Justice La Forest, in *Tock*, as

the Ontario Court of Appeal emphasises in *Smith v. Inco*, (at ¶89-90). If it were otherwise, there would be no need to constrain strict liability by limiting it to an "unusual" or "special" use bringing increased danger to others. Similarly, it would be unnecessary to limit recovery to cases of unintended "escapes", if the law embraced strict liability for hazardous activities *simpliciter*. As Klar observes on this point: "… As a narrow principle of strict liability for innocent but damaging uses of land by neighbours, the requirement of an accidental release is explicable. As a wider principle of strict liability for dangerous activities, it is not." (p. 653).

[75] The escape requirement is explicit in the original decision of *Rylands v. Fletcher*. The authors of *The Law of Nuisance in Canada* explain the relation between the "escape" criterion and strict liability, at pp. 131-132:

> Creation of extraordinary risk is not, in and of itself, sufficient to establish liability under *Rylands*; escape, from property under the control of the defendant to a place outside of his or her control, is also required. The requirement of escape distinguishes *Rylands v. Fletcher* from the American doctrine of ultrahazardous activities and situates *Rylands* as, like nuisance, a land tort.
>
> ***Rylands liability is "strict" because the escape, the proximate, factual cause of the plaintiff's damage, is not directly effected by the defendant's intentional or negligent act***. The necessary causal connection between the defendant's conduct and the plaintiff's damage lies in the creation of extraordinary risk which precedes that escape. In this respect, *Rylands* is consistent with other strict liability torts, in which the proximate cause of damage (the wild animal, or the conduct of an employee in vicarious liability) is also outside, and separated from, the immediate conduct of the defendant. ***Where the escape is the direct result of the defendant's conduct (an intentional or negligent discharge or release), negligence, trespass, or possibly nuisance, will be the appropriate cause of action (although Rylands has, inappropriately, been applied to an intentional release).***
>
> [Emphasis added]

[76] The foregoing found favour with the Ontario Court of Appeal in *Smith v. Inco*:

> [82] Returning to the merits of the strict liability theory adopted by the trial judge, we begin by distinguishing the risk that is targeted by that theory from the risk targeted by the rule in *Rylands v. Fletcher*. Strict liability under ***Rylands v. Fletcher aims not at all risks associated with carrying out an activity, but rather with the risk associated with the accidental and unintended consequences of engaging in an activity***. The *Rylands v. Fletcher* cases are about floods, gas leaks, chemical spills, sewage overflows, fires and the like. They hold that where the

> defendant engages in certain kinds of activities, the defendant will be held strictly liable for damages that flow from mishaps or misadventures that occur in the course of that activity. ***The escape requirement in Rylands v. Fletcher connotes something unintended*** and speaks to the nature of the risk to which the strict liability in *Rylands v. Fletcher* attaches: see *The Law of Nuisance in Canada* at pp. 132, 137.
>
> [Emphasis added]

[77] It is apparent that concepts such as "escape" and "non-natural" or "special" use have been employed by the courts as a means of limiting strict liability for dangerous activities. The word "escape" implies that the defendant had custody, possession, care or control of whatever causes the plaintiff damage and that the defendant's loss of control was inadvertent. This loss of control is not described as intentional; verbs suggesting intent such as "released", "issued", "loosed", "discharged", "transmitted" or "expelled" do not appear in the cases. This makes sense because the rule in *Rylands v. Fletcher* emerged in the context of compensating a plaintiff for the unintended consequences of otherwise intended activities of the defendant on his own property. Mr. Rylands did not intend to flood Mr. Fletcher's mines with his reservoir.

[78] Moreover, the word "escape" also implies that escape is not the ordinary or usual consequence of the defendant's conduct. Again the authors of *The Law of Nuisance in Canada* describe the normal application of the rule at p. 132:

> The "essence of the *Rylands v. Fletcher* principle is that compensation is given for a single disastrous escape", and there is a general consensus that the *Rylands v. Fletcher* doctrine does not apply in cases involving a continuing or continuous escape or interference (for which the appropriate cause of action is nuisance). Nevertheless, there have been cases in which single escape incidents were held to fall under nuisance and, conversely, situations involving continuous escapes have been dealt with under *Rylands*.

[79] While it is clear that liability under the rule in *Rylands v. Fletcher* has been imposed where there has been more than one "escape", the traditional understanding of the rule as a discrete event is also consistent with escape being unintentional.

[80] In our view the requirement of escape is inconsistent with the intentional release of something which causes damage. Such an intentional act more properly belongs to cases of trespass or nuisance – or possibly negligence where there is carelessness about the damaging consequences of an intentional release.

[81] The respondents' allegations in nuisance and strict liability (i.e. *Rylands v. Fletcher*) are set out at ¶66-73 of the Statement of Claim. In ¶66 they allege that the release of contaminants is a non-natural use of the lands and that the appellants failed to "prevent the escape of these Contaminants". They go on to allege that the contaminants "escaped" in several ways including, "… [f]rom the smoke stacks at the Coke Ovens and Steel Plant"; as "dust blown from the Steel Works on the wind"; "[a]s effluent escaping from the Coke Ovens washing into the soil" and "migrating in the air, soil and water into the adjoining Neighbourhoods".

[82] Despite repeated use of the word "escape", the facts alleged by the respondents do not sustain this plea. It is plain that their supportive language describes contaminants as the ordinary and regular by-product of the industrial activities carried on by the appellants over the years in question. These allegations are not consistent with an unintentional release of these contaminants. The pleadings do not properly describe an escape. This criterion of the rule in *Rylands v. Fletcher* is not met.

[83] We agree with the appellants that the pleadings do not reveal a good cause of action based on the rule in *Rylands v. Fletcher*.

Trespass to Land:

[84] The appellants point out that directness has been a required element of trespass, battery and negligent battery because these torts were designed to restrain breaches of the King's peace which were most likely to provoke retaliation. That is why these torts are actionable without proof of damage. The conduct itself was so serious that the law needed to proscribe it irrespective of injury, to avoid civil unrest, (Allen M. Linden & Bruce Feldthusen, *Canadian Tort Law*, 8th ed (Markham, Ontario: LexisNexis Canada Inc., 2006), pp. 43-44; John G. Fleming, *The Law of Torts*, 9th ed (Sydney: LBC Information Services, 1998) at p. 21).

[85] The appellants say that the indirect nature of the interference with their land alleged by the respondents defeats any claim in trespass. Klar, at p. 110 describes trespass in this way:

> The tort of trespass to land protects a person's possession of land against wrongful interference. … ***It involves only direct interferences with the plaintiff's possession of land***, is actionable without proof of actual damage, and must be committed either intentionally or negligently in order to be actionable. [Emphasis added]

[86] The appellants emphasise that the quality of directness is paramount and distinguishes trespass from nuisance, citing this Court's decision in *W. Eric Whebby Ltd. v. Doug Boehner Trucking & Excavating Ltd.*, 2007 NSCA 92 at ¶127–130:

> [127] However, these submissions overlook a more fundamental point which, in my view, is fatal to United's position: nuisance is concerned with unreasonable interference with the enjoyment of land resulting from another's conduct elsewhere. ***The interference with the plaintiff's enjoyment of land must be indirect rather than direct: see, e.g.*** **Linden and Feldthusen** at 559 - 560; Beth Bilson, **The Canadian Law of Nuisance** (Toronto: Butterworths, 1991) at 14. As the editor of **Street on Torts** put it in a passage cited with approval in **Royal Anne Hotel Co. v. Ashcroft**, [1979] 2 W.W.R. 462 (B.C.C.A.), a person commits private nuisance when he or she "... 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 ....": Margaret Brazier, **Street on Torts**, 8th ed. (London, Edinburgh: Butterworths, 1988) at 314 - 315 (emphasis added). See also **Hunter v. Canary Wharf Ltd.**, [1997] A.C. 655 (H.L., Eng.). ***Here, the damage was direct, not indirect; Whebby dumped the soil on United's land.***
>
> [128] ***The requirement for indirect rather than direct interference is not dependent on the defendant's status in relation to the land where the nuisance originates.*** On the question of what that status must be, there is a division of opinion: does the defendant have to be an owner or an occupier, or may he or she be simply a user or even a trespasser? … Whatever the answer to that question may be, ***there is virtually no doubt that nuisance is concerned with indirect, not direct, interference with the plaintiff's enjoyment*** of his or her land in the sense that the interference must originate elsewhere than on the affected land itself. … [Citations omitted]
>
> …
>
> [130] This view is also consistent with first principles going back to the old forms of action. ***That nuisance deals with indirect interference may be traced to the distinction between an action in trespass and an action on the case. Trespass is direct entry on another's land while*** nuisance is the infringement of the plaintiff's property interest without direct entry by the defendant: see, for example, John G. Fleming, **The Law of Torts, supra** at 464 - 465; **Clerk and Lindsell on Tort, supra** at 20-02; John P. S. McLaren, "*Nuisance in Canada*" in Allen M. Linden, **Studies in Canadian Tort Law**, (Toronto: Butterworths, 1968) 320 - 377 at 338.
>
> [Emphasis in italics added, underlined emphasis in original]

[87] The distinction between trespass and nuisance was noted by the English Court of Appeal in *Southport Corporation v. Esso Petroleum Co. Ld*,, [1954] 2 Q.B. 182 (C.A.) at p. 195 where a deliberate discharge of oil into the sea by a vessel in distress amounted to nuisance, but not trespass. Lord Denning observed:

> ...Quite recently, in *Read v. J. Lyons & Co. Ld.*, Viscount Simon L.C. affirmed the same distinction when he observed that "the circumstances in *Fletcher v. Rylands* did "not constitute a case of trespass because the damage was con- "sequential, not direct." Applying this distinction, I am clearly of opinion that the Southport Corporation cannot here sue in trespass. This discharge of oil was not done directly on to their foreshore, but outside in the estuary. It was carried by the tide on to their land, but that was only consequential, not direct. Trespass, therefore, does not lie.

[88] The trial decision in *Smith v. Inco Ltd.*, 2010 ONSC 3790, supplies a useful summary of the trespass – nuisance distinction, emphasizing the need for directness in the former:

> [37] The essential characteristics of a trespass to land are concisely set out in *Grace v. Fort Erie (Town)*, [2003] O.J. No. 3475 (S.C.J.) at para. 86, and in *R. & G. Realty Management Inc. v. Toronto (City)*, [2005] O.J. No. 6093 (S.C.J.) at para. 40, as follows:
>
> 1. Any direct and physical intrusion onto land that is in the possession of the plaintiff;
> 2. The defendant's act need not be intentional, but it must be voluntary;
> 3. Trespass is actionable without proof of damage; and
> 4. While some form of physical entry onto, or contact with, the plaintiff's land is essential to constitute a trespass, the act may involve placing or propelling an object, or discharging some substance onto, the plaintiff's land.
>
> [38] Clearly, one distinction between nuisance and trespass is that a trespass must be a direct intrusion onto the plaintiff's lands, whereas a nuisance may be an indirect intrusion. In the present case, Inco submits that any intrusion onto the class members' lands has been indirect, and therefore does not constitute a trespass. A good statement of this distinction is set out in R.V.F. Heuston & R.A. Buckley, *Salmond and Heuston on the Law of Torts*, 21st ed., (London: Sweet & Maxwell, 1996), at page 44:
>
> > It is a trespass, and therefore actionable *per se*, to directly place material objects upon another's land; it is not a trespass, but at the most a nuisance

> or other wrong actionable only on proof of damage, to do an act which consequentially results in the entry of such objects. To throw stones upon one's neighbour's premises is the wrong of trespass; to allow stones from a ruinous chimney to fall upon those premises is the wrong of nuisance.

> [39] In my view the circumstances of the present case are closer to the defendant allowing stones from a ruinous chimney to fall onto neighbouring properties as opposed to the defendant throwing stones onto the properties.

> [40] Two other court decisions are useful. In *Eureka Oils Ltd. v. Colli*, 25 Man. R. (2d) 166 (Q.B.), salt water leaked from a metal tank that was owned by the defendant onto the plaintiff's land. The court held that this was an indirect intrusion onto the plaintiff's land. The claim was allowed in nuisance, but not in trespass.

> [41] Similarly in the case of *Southport Corporation v. Esso Petroleum Co*., [1954] 2 Q.B. 182 (Eng. C.A.), an oil tanker discharged oil into the sea and the oil eventually washed up on the plaintiff's land. Again, this was held to be an indirect intrusion onto the plaintiff's land, and a claim in trespass was not permitted.

> [42] In the present case, I find that Inco has permitted nickel particles to migrate from Inco's property onto the class members' lands. The circumstances in the present case are similar to those in the *Eureka Oils* case and the *Southport* case. Thus, I find that the intrusion onto neighbouring properties in this case is indirect, not direct. Therefore, I find that the class members do not have a claim in trespass against Inco.

The decision was overturned on other grounds, [2011 ONCA 628].

[89] As previously described, the certification judge declined to analyze the alleged causes of action in any detail. To repeat part of his comments more fully quoted above:

> [26] … The distinctions among nuisance, trespass and negligent or intentional battery and the mental element required for each can be subtle (see G.H.L. Fridman, The Law of Torts in Canada 2d ed., (Toronto: Carswell, 2002), at pp. 37-8 and **Philips v. California Standard Co.**, [1960] 31 W.W.R. 331 (Alta.S.C.) at para. 7). ***In this case, there is no indication to date of any independent or intervening agency interrupting "direct" deposit of***

> ***contaminants***, and it is debatable whether material emitted may be deemed non-physical because it consisted of small particles. [Emphasis added]

[90] Presumably the emphasised words respond to the appellants' submissions that the torts of trespass, battery or negligent battery which require "directness" are not made out on the pleadings. But the words "… no indication to date …" suggest that the judge treated this as a matter of evidence, not pleading. With respect, the respondents do not plead that the appellants directly placed anything anywhere.

[91] In their Statement of Claim, the respondents allege:

> 74 All of the Defendants are liable in trespass in that each of them has discharged Contaminants, without the Plaintiffs' and Class Members' consent, onto lands owned by the Plaintiffs and Class Members as further particularized below.

[92] The particulars which follow describe the contaminants as being "deposited" on the lands owned or occupied by the respondents. … "through the air in the form of vapour, particulate matter and dust, and through the earth and water migrating from the Coke Oven Lands and the Sydney Tar Ponds."

[93] The respondents do not allege that contaminants were directly placed on their lands. There is no pleaded assertion of directness which is a required element of the tort of trespass. Indeed the means by which the respondents say the alleged contaminants found their way to their lands are plainly indirect. To paraphrase *Southport* and some of the other jurisprudence, any accumulation of alleged contaminants on the respondents' property was indirect and consequential, not direct. It is clear that the facts pleaded do not sustain the tort that is alleged. The plea of trespass is bad in law.

Battery and Negligent Battery:

[94] The appellants say that the torts of battery and negligent battery have no place here and are also not properly pleaded because, like the tort of trespass, directness is required. In *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, ¶26 (cited in 1992 Carswell B.C. 155), the Supreme Court defined a battery as:

> … intentional infliction of unlawful force on another person.

[95] In contrast, Klar at p. 56 notes that negligent battery arises from a:

> … direct, offensive, physical contact with the plaintiff as a result of negligent conduct

[96] The respondents allege battery in this way:

> 63. The Steel Works Defendants are liable to the Plaintiffs and Class Members for having committed the intentional tort of battery. During the period that each of them operated the Steel Works or a portion thereof (as set out above), they knew or were substantially certain, as a result of
>
> (a) in the case of Canada, Nova Scotia and SYSCO the Katz Study, Choquette Study, and the Havelock Study, the Kilotat Study, the Hildebrand Study, the Atwell Study and the Furimsky Study
>
> that people living in the Neighbourhoods would inhale, ingest and have dermal exposure to the Operational Emissions and Tar Ponds Contaminants produced by the Steel Works. The Steel Works Defendants knew what these emissions contained, and that inhalation, ingestion and dermal exposure to the Operational Emissions and Tar Ponds Contaminants constituted a non-trivial interference with the bodily security of the Plaintiffs and Class Members. The Steel Works Defendants intentionally continued to emit the Operational Emissions and Tar Ponds Contaminants, with full knowledge and intention that the Plaintiffs and Class Members would be exposed to them.

[97] Alternatively, the respondents plead negligent battery arising from operation of the steel works which:

> [64] … caused the Contaminants to come into contact with the Plaintiffs and Class Members. Despite their knowledge that this contact would occur if they failed to take adequate steps to prevent it from occurring … the Steel Works Defendants continued to emit the Contaminants without regard to the fact that those Contaminants would come into contact with and cause harm to the Plaintiffs and Class Members as a direct result of their conduct.

[98] The respondents' pleading here and elsewhere in the Statement of Claim makes it plain that exposure to the contaminants alleged was not direct, but an indirect consequence of the industrial activities carried on by the appellants. Paragraph 64 of the Statement of Claim alleges that operation of the steel works itself caused negligent battery.

[99] The necessity that trespass to the person (battery) requires *direct* interference was confirmed by the Supreme Court of Canada in *Non-Marine*

Underwriters, Lloyd's of London v. Scalera, 2000 SCC 24 at ¶11 where Justice McLachlin (as she then was) said speaking for the majority:

> I agree with Sullivan's view that the traditional approach to trespass to the person [i.e., battery] remains appropriate in Canada's modern context for a number of reasons. First, unlike negligence, where the requirement of fault can be justified because the tortious sequence may be complicated, ***trespass to the person is confined to direct interferences*.** [Emphasis added]

[100] The respondents have not pleaded directness. Nor do the supporting facts on which they rely sustain such a plea.

Nuisance:

[101] In their Statement of Claim, the respondents plead nuisance and strict liability (*Rylands v. Fletcher*) together. For reasons already described *Rylands v. Fletcher* is not properly pleaded. But nuisance is broader.

[102] As Justice La Forest said in *Tock*, when summarizing liability on *Rylands v. Fletcher* principles:

> To characterize a given use of land as appropriate to that locality does not, however, provide an answer to the question whether damage occasioned by that activity constitutes a nuisance. It is to that question that I now turn.

[103] Klar at p. 757 cites the House of Lords judgment in *Hunter v. Canary Wharf Ltd.*, [1997] A.C. 655 (H.L.) which characterizes private nuisances as of three kinds:

> (1) nuisance by encroachment on a neighbour's land;
>
> (2) nuisance by direct physical injury to a neighbour's land; and
>
> (3) nuisance by interference with a neighbour's quiet enjoyment of his land.

[104] In *Smith v. Inco*, the Ontario Court of Appeal quoted the Supreme Court of Canada referring to two kinds of nuisance:

> [42] In *St. Pierre v. Ontario (Minister of Transportation and Communication)*, [1987] 1 S.C.R. 906, at para. 10, McIntyre J. for the court, accepted as a working definition of private nuisance, the definition found in an earlier edition of *Street on Torts*:

> 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.*
>
> [Emphasis added by the Ontario Court of Appeal in *Smith v. Inco*]

[105] In *Whebby*, Cromwell, J.A. (as he then was) rejected a nuisance claim arising from contaminated soil used as residential landfill on the basis that the interference had been direct and not indirect:

> … there is virtually no doubt that nuisance is concerned with indirect, not direct interference with the plaintiff's enjoyment of his or her land in the sense that the interference must originate elsewhere than on the affected land itself [128].

[106] Essentially the respondents plead that the industrial activities carried on by the appellants resulted in the release of what they describe as contaminants which then were carried on to the lands of the respondents through the air and by migration in the soil and water. They say that the contaminants substantially and unreasonably interfere with the use and enjoyment of the respondents' lands. This is more properly a classic plea in nuisance.

[107] Canada objects that the interference with the respondents' lands must be unreasonable and that the respondents' bald assertion of unreasonableness is not enough – they must go further and plead facts which show that the interference is unreasonable. In ¶73 of their Statement of Claim the respondents allege:

> … the past and ongoing release of Contaminants by all of the Defendants from lands they own and/or occupy or from lands which they owned and/or occupied in the past has substantially and unreasonably interfered with the Plaintiffs' and Class Members' use and enjoyment of their lands and premises. In addition to causing extensive property damage, exposure to the Contaminants has created widespread adverse health consequences and risks to the Plaintiffs and other Class Members. Accordingly, the Defendants are liable in nuisance.

[108] The respondents have pleaded that the appellants have "substantially and unreasonably interfered" with the use and enjoyment of their lands. They have set out in some detail the activities of the appellants of which they complain and the allegedly deleterious effects which have been produced by their industrial activities. To go further and demand a greater description of "unreasonable

interference" begins to encroach on the evidentiary basis by which the respondents may prove their case. It may well be that the activities of the appellants do not result in an unreasonable interference with the lands of the respondents when fully considered and weighed on the evidence at trial. But that is a matter of evidence, not pleading.

[109] The underlying facts pleaded by the respondents are adequate to sustain a claim in nuisance.

Conclusion on Causes of Action:

[110] It is plain and obvious that the pleadings alleging trespass, battery and negligent battery as well as liability under the rule in *Rylands v. Fletcher* cannot be sustained and should not be certified. The allegations of nuisance are sufficiently pleaded. The appellants have not challenged the adequacy of the pleadings which allege negligence in failing to reduce or eliminate the emission of contaminants. In their argument on common issues, the appellants indirectly attack the allegations of breach of fiduciary duty for failing to provide information regarding the contaminants and remediating the contamination. Alternatively the appellants say that breach of fiduciary duty is not a proper common issue. This will be addressed under the "common issues" section of this decision.

Common Issues:

Standard of Review

[111] Whether a common issue exists and whether a class action is the preferable procedure for the fair and efficient resolution of the dispute are questions of mixed fact and law. These questions are subject to a standard of review of palpable and overriding error unless the certification judge made some extricable error in principle with respect to the characterization of the standard or its application in which case it is an error of law reviewable on the standard of correctness (*Ring v. Canada (Attorney General)*, ¶6-7).

[112] As will be explained, in our view, the certification judge erred in principle in failing to perform the proper analysis in determining whether the common issues met the criteria to be certified.

Analysis:

[113] The only remaining causes of action are nuisance, negligence and breach of fiduciary duty. Do these actions raise common issues sufficient to certify this proceeding as a class action?

[114] Section 7(1)(c) provides:

> 7 (1) The court shall certify a proceeding as a class proceeding on an application under Section 4, 5 or 6 if, in the opinion of the court,
>
> ...
>
> (c) the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members;

[115] Section 2(e) of the *CPA* defines common issues as follows:

> 2 In this Act,
>
> ...
>
> (e) common issues means:
>
> (i) common but not necessarily identical issues of fact, or
>
> (ii) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

[116] The common issues must advance the litigation in the sense that they must be a "substantial common ingredient" of each of the class members' claims.

[117] The Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v. Dutton*, explained the commonality question as follows:

> [39] ... Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. ... . It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. ...

[118] Similarly, in *Hollick*, the Supreme Court elaborated on its reasoning in *Western Canadian Shopping Centres Inc.* finding that for an issue to be common it must be a "substantial ingredient" of each of the class members' claim:

> [18] A more difficult question is whether "the claims . . . of the class members raise common issues", as required by s. 5(1)(c) of the *Class Proceedings Act, 1992*. As I wrote in *Western Canadian Shopping Centres*, the underlying question is "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis". Thus an issue will be common "only where its resolution is necessary to the resolution of each class member's claim" (para. 39). Further, an issue will not be "common" in the requisite sense unless the issue is a "substantial . . . ingredient" of each of the class members' claims.

[119] The appellants argue that the certification judge erred in failing to do a proper analysis to determine whether the common issues are really common as between the respondents. We agree.

[120] The certification judge's conclusion on the common issues, in general, is as follows:

> [40] ... The extensive study (including investigations by the defendants) and controversy that has taken place over the last approximately 45 years with respect to industrial operations in Sydney and the impact of those activities on neighborhood residents and properties <u>lead to the conclusion that there is an arguable case with respect to the defendants' potential liability to the proposed classes of plaintiffs</u>. (Emphasis added)

[121] He continued at ¶44:

> [44] ... I am satisfied that there are common issues concerning the existence, source, and impact of emissions on the persons or properties of proposed class members, and whether remedies should be available. ...

And finally at ¶47:

> [47] In this case, the matters raised by the proposed common issues can be determined with respect to each class member without the direct participation of every class member, thereby substantially advancing each class member's claim. Resolving these questions once at a common issues trial may determine whether any of the plaintiffs has a claim, and will significantly advance the dispute as a whole. The potential, by addressing common issues, to avoid duplicate findings of

> fact and multiple determinations of legal questions, thereby likely reducing expenditure of time and money, are factors favoring certification (**Rumley v. British Columbia**, [2001] 3 S.C.R. 184 (S.C.C.) ["**Rumley**"], **Cloud**, *supra*, and **Hollick**, *supra*).

[122] With respect, whether there is an "arguable case with respect to the defendants' potential liability" is not the legal test for determining common issues. Further, although the certification judge said the determination of the common issues will advance the dispute as a whole and avoid duplicate findings of fact and determination of legal issues, he did not analyze the common issues to show how those determinations would advance the claim as a whole.

[123] The legal principles relating to common issues were summarized in *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443 at ¶81 as follows:

> 81 **There are a number of legal principles concerning the common issues requirement in s. 5(1)(c) that can be discerned from the case law. Strathy J. provided a helpful summary of these principles in Singer v. Schering-Plough Canada Inc.**, 2010 ONSC 42, 87 C.P.C. (6th) 276. Aside from the requirement just described that there must be a basis in the evidence to establish the existence of the common issues, the legal principles concerning the common issues requirement as described by Strathy J. in **Singer**, at para. 140, are as follows:
>
> > The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis: **Western Canadian Shopping Centres Inc. v. Dutton**, 2001 SCC 46, [2001] S.C.R. 534 at para. 39.
> >
> > An issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution: **Cloud**, at para. 53.
> >
> > There must be a rational relationship between the class identified by the plaintiff and the proposed common issues: **Cloud**, at para. 48.
> >
> > The proposed common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of that claim: **Hollick**, at para. 18.
> >
> > A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class: **Harrington v. Dow Corning Corp**., [1996] B.C.J. No. 734, 48 C.P.C. (3d) 28 (S.C.), aff'd 2000 BCCA 605, [2000] B.C.J. No. 2237, leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 21.

> With regard to the common issues, "success for one member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent." That is, the answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class: **Dutton**, at para. 40, **Ernewein v. General Motors of Canada Ltd.**, 2005 BCCA 540, 46 B.C.L.R. (4th) 234, at para. 32; **Merck Frosst Canada Ltd. v. Wuttunee**, 2009 SKCA 43, [2009] S.J. No. 179 (C.A.), at paras. 145-46 and 160.
>
> A common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant: **Williams v. Mutual Life Assurance Co. of Canada** (2000), 51 O.R. (3d) 54, at para. 39, aff'd (2001), 17 C.P.C. (5th) 103 (Div. Ct.), aff'd [2003] O.J. No. 1160 and [2003] O.J. No. 1161 (C.A.); **Fehringer v. Sun Media Corp.** (2002), 27 C.P.C. (5th) 155 (S.C.J.), aff'd (2003), 39 C.P.C. (5th) 151 (Div. Ct.).
>
> Where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis: **Chadha v. Bayer Inc.**, 2003 CanLII 35843 (C.A.), at para. 52, leave to appeal dismissed [2003] S.C.C.A. No. 106, and **Pro-Sys Consultants Ltd. v. Infineon Technologies AG**, 2008 BCSC 575, at para. 139.
>
> Common issues should not be framed in overly broad terms: "It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient": **Rumley v. British Columbia**, 2001 SCC 69, [2001] 3 S.C.R. 184, at para. 29.

[124] In our view, the certification judge erred by certifying in his Order all the common issues proposed by the respondents without considering the necessary legal principles to determine whether each of the common issues shared a substantial common ingredient that would advance the litigation. We will address the common issues as they relate to each certified cause which remains.

Nuisance - Common Issues (a), (b), (d) and (e):

[125] Had the certification judge done the proper analysis he would have concluded that the common issues certified for the nuisance cause of action (with

the exception of one which will be discussed below) are not common to all of the class members. Rather, these certified common issues rely upon findings of fact which must be made with respect to each individual claimant.

[126] As Cumming, J. stated in *Williams v. Mutual Insurance Life Ins. Co.* (2000), 51 O.R. (3d) 54:

> [39] The causes of action are asserted by all class members. But the fact of a common cause of action does not in itself give rise to a common issue. A common issue cannot be dependent upon findings of fact which have to be made with respect to each individual claimant. While the theories of liability can be phrased commonly, the actual determination of liability for each class member can only be made upon an examination of the unique circumstances with respect to each class member's purchase of a policy. (Emphasis added)

[127] Although the class members in this case may have a common cause of action in nuisance, that itself does not give rise to a common issue.

[128] There are four certified common issues relating to nuisance in the certification judge's Order:

> (a) Did the Defendants cause or permit the emission or escape of the Contaminants onto the properties and persons living within the Class Boundaries during the Class Period?
>
> (b) If the answer to (a) is yes, do the Contaminants emitted pose a risk to the use and enjoyment of properties contaminated by them?
>
> (d) Did the Defendants know, should they have known, or were they reckless or willfully blind when they were causing or permitting the emission or escape of the Contaminants that they created a risk to the use and enjoyment of properties contaminated by them? If so, when did they have or should they have had such knowledge?
>
> (e) Did the discharge of the Contaminants onto the properties and persons and the presence of the Contaminants on the lands and in the homes of persons living within the Class Boundaries during the Class Period, constitute a nuisance?

[129] We agree with Nova Scotia that common issue (a) breaks down into three separate questions. They are (worded differently than suggested by Nova Scotia):

(i) Did the appellants emit contaminants during the period they operated the steel works?

(ii) Did the contaminants go on to class members' properties?

(iii) Did the contaminants contact class members?

[130] The only common issue arising is whether the appellants emitted contaminants during the period they operated the steel plant and coke ovens.

[131] The other two questions require participation of the individual respondents to answer the questions.

Did the contaminants go on to class members' properties?

[132] Even if contaminants are found on a given property the source of those contaminants is still an individual issue. First, the evidence before the certification judge was that there are many common sources of the substances that make up the contaminants. The steel works were not the only source of the contaminants. Many of the substances at issue here occurred naturally at higher levels in Sydney because of geology and the presence of mineable ores. Again, the evidence before the certification judge was they also come from multiple sources including automobile exhausts, power plants, landfills, lead based paints and residential coal burning which was a heating source in the homes of all of the four representative plaintiffs (respondents on appeal). Lead and arsenic, two of the substances listed in the definition of contaminants, in particular, are naturally present.

[133] What appears to be a relatively simple question, whether the appellants permitted contaminants to go on to class members' properties, is actually quite complex and would require individual assessments on each property. In our view, this would not be a common issue.

Did the contaminants contact class members?

[134] Even if contaminants came into contact with class members it is not possible to reach a conclusion that will apply to every class member. Whether any individual had contact with the contaminants is an individual issue which would

include their individual exposure, the manner of contact, concentration, timeframe and the individual attributes of the person. Again this is not a common issue.

Did the discharge of contaminants cause a nuisance?

[135] Before addressing common issues (b) and (d), it is convenient to address common issue (e) which asks whether the appellants' conduct constitutes a nuisance.

[136] There are two branches of private nuisance: material, physical damage to another's property and an unreasonable and substantial interference with the use and enjoyment of land. The Ontario Court of Appeal explained the distinction in *Smith v. Inco Ltd*, ¶43:

> ... while all nuisance is a tort against land predicated on an indirect interference with the plaintiff's property rights, that interference can take two quite different forms. The interference may be in the nature of "physical injury to land" or it may take the form of substantial interference with the plaintiff's use or enjoyment of his or her land. ...

[137] Therefore, there are two ways to be successful in private nuisance. Firstly, each class member must demonstrate that the contaminants are present on their property and that they came from the steel plant and coke ovens while operated by the appellants. Each class member would also have to demonstrate contaminants caused material physical damage to their property. Mere chemical alteration in the context of the soil, without more does not amount to physical harm or damage to the property (*Smith*, ¶55).

[138] Alternatively, each individual will have to establish that there has been an unreasonable substantial interference with the use and enjoyment of their property. This branch of nuisance entails the balancing of rights and consideration of a variety of factors.

[139] The Supreme Court of Canada recently had occasion to comment on the second branch of the test for the tort of private nuisance. In *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13, Justice Cromwell first answered the question as to what are the elements of a private nuisance. He concluded:

> 18 The Court of Appeal concluded that a nuisance consists of an interference with the claimant's use or enjoyment of land that is both substantial and unreasonable: ... In my view, this conclusion is correct.

[140] He then went on to discuss the test to be applied in determining whether or not the tort of nuisance has been made out:

> 19 The elements of a claim in private nuisance have often been expressed in terms of a two-part test of this nature: to support a claim in private nuisance the interference with the owner's use or enjoyment of land must be both *substantial* and *unreasonable*. A substantial interference with property is one that is non-trivial. Where this threshold is met, the inquiry proceeds to the reasonableness analysis, which is concerned with whether the non-trivial interference was also unreasonable in all of the circumstances. ... (Emphasis in original)

[141] Justice Cromwell continued at ¶21:

> 21 ... Retaining a substantial interference threshold underlines the important point that not every interference, no matter how minor or transitory, is an actionable nuisance; some interferences must be accepted as part of the normal give and take of life. Finally, the threshold requirement of the two-part approach has a practical advantage: it provides a means of screening out weak claims before having to confront the more complex analysis of reasonableness.

[142] The Court then went on to consider what the threshold required:

> 22 What does this threshold require? In *St. Lawrence Cement*, the Court noted that the requirement of substantial harm "means that compensation will not be awarded for trivial annoyances": para. 77. In *St. Pierre*, while the Court was careful to say that the categories of nuisance are not closed, it also noted that only interferences that "<u>substantially</u> alte[r] the nature of the claimant's property itself" or interfere "to a significant extent with the actual use being made of the property" are sufficient to ground a claim in nuisance: p. 915 (emphasis added). One can ascertain from these authorities that a substantial injury to the complainant's property interest is one that amounts to more than a slight annoyance or trifling interference. ... (Emphasis in original)

[143] As explained in *Antrim*, to be successful in nuisance there must be a substantial interference with the plaintiff's actual use or enjoyment of the land. Thus, liability is an individual issue. It is not possible to answer common issue (e) without inquiring how each class member used their property and the extent to which contaminants interfered with their use and enjoyment of the property or

substantially caused physical injury to the property itself. Success for one class member on this issue in this case will not mean success for any other member because each class member's nuisance claim is unique.

[144] A similar common issue was rejected in *Paron v. Alberta (Environmental Protection)*, 2006 ABQB 375. In *Paron*, the heart of the plaintiffs' claim was that thermal pollution, attributed to Tran Alta Utility Corporation's lakeside electrical generating plant, affected the lake level, interfered with their water rights and caused loss of enjoyment and value of their properties. They sought damages in excess of $25M. The plaintiffs pleaded nuisance, *Rylands v. Fletcher*, interference with their riparian rights and negligence (¶38). After reviewing the common issues and the objectives of class litigation the Court concluded:

> [116] As with negligent misrepresentation cases where individual misrepresentations are alleged, nuisance cases are problematic for certification of a common issue because liability is dependent on the impact of the nuisance on each individual and his or her property. Consequently, the result of a trial for any one claimant cannot generally stand as proof of the cause of action of any other claimant.

[145] We now return to common issues (b) and (d), for convenience, they are:

> (b) If the answer to (a) is yes, do the Contaminants emitted pose a risk to the use and enjoyment of properties contaminated by them?
>
> (d) Did the Defendants know, should they have known, or were they reckless or willfully blind when they were causing or permitting the emission or escape of the Contaminants that they created a risk to the use and enjoyment of properties contaminated by them? If so, when did they have or should they have had such knowledge?

[146] In nuisance, the test is not whether the contaminants posed a risk to the use and enjoyment of the respondents' properties, but rather, whether they caused material physical damage to the property or unreasonable and substantial interference with the use and enjoyment of land (*Smith v. Inco*, ¶43).

[147] Whether the contaminants emitted posed a risk is irrelevant to the determination of whether the emissions constitute a nuisance. A similar conclusion follows from common issue (d). A finding of a creation of a risk does not advance the alleged causes of action of nuisance.

[148] The nuisance common issues ought not to have been certified as common issues. The only potential exception is whether the appellants emitted contaminants which, like *Hollick*, would be common to all class members. Should the class action be certified on the basis of this common issue alone? This will be discussed further when considering whether a class action is the preferable proceeding here.

Negligence – Common Issues (f) and (g):

[149] These certified common issues arise from the respondents' allegation that the appellants breached a duty of care with respect to reducing contaminants. They are:

> (f) did the Defendants owe the Class Members a duty of care to take steps to contain, reduce, minimize or eliminate the emission or escape of the Contaminants?
>
> (g) did the Defendants breach the duty of care owed to Class Members by failing to take available steps to contain, reduce, minimize or eliminate the emission or escape of Contaminants including but not limited to the implementation of emissions controls, the introduction of cleaner processes, and the use of cleaner raw materials?

[150] The common issues for negligence have been certified for the Property Owner Class only and not the Residential Class. It is difficult to envision how the negligence common issues differ in any material respect from the nuisance common issues other than there is a requirement that a standard and duty of care be proven by the class members. It must be remembered that the class members' claims are for damages to their property.

[151] The duty and standard of care are moving targets depending upon when the class member owned the property and when the alleged exposure took place. Negligence common issues were considered, and rejected by the Newfoundland Court of Appeal in *Ring*, dealing with allegations that exposure to Agent Orange between 1956 and the present, created a risk of harm to health. One of the proposed issues in that case was whether the defendant failed to take reasonable care. The Newfoundland Court of Appeal found the common issue "problematic" because of the large period of time covered by the action and the changes to the standard of care that had occurred over time. The Court distinguished long-standing environmental claims from those involving systemic negligence:

> [93] ... What might have been a failure to use reasonable care in the circumstances of the year 2000 may not have been in 1960. I recognize that there have been cases certified where the standard of care might have changed over the time period covered by the claim: **Cloud** and **Rumley** are examples. They dealt with "systemic negligence" in running schools. That, however, does not convert issue No. 3 [negligence] to a single question applicable to the whole of the class. That could only happen if the standard of care were the same for the approximately 50 years covered by the action. …
>
> [94] Once again, what is framed as one question seeking one answer for all members of the class is in fact several questions requiring several answers which are dependent upon the time of exposure of the individual members of the class.

[152] These comments are equally applicable here. The duty and standard of care could change from 1968 to 2004 in the context of operating the steel works. As well, although at first glance the common issues appear to be common to the class members, they are stated in the most general of terms and upon closer examination, like the nuisance claims, the negligence claims would involve individual findings of fact for each of the class members.

[153] In *Rumley*, the Court said:

> [29] … It would not serve the ends of either fairness of efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient.

[154] The negligence common issues would break down into individual proceedings; the common issues are not a substantial ingredient of each individual claim and would be dependent on individual determinations of the duty and standard to apply to each class member's property. Further, the determination of those issues does nothing to advance the litigation. All of the individual issues identified in the nuisance common issues remain. In our view these are not common issues.

Breach of Fiduciary Duty – Common Issue (k):

[155] This certified issue is:

> k) Did Canada and/or Nova Scotia either or both defendants owe the Class Members a fiduciary duty to act in the best interests of Class Members in dealing

> with the dissemination of information concerning the existence of contamination within the Class Boundaries and the remediation of the contamination within the Class Boundaries? If so, did they breach that duty by:
>
> (i) concealing the known nature and effects of the Contaminants;
>
> (ii) concealing the health risks associated with exposure to the Contaminants from the Plaintiffs and Class Members by, among other things, advising them that the Contaminants did not represent a risk to property and persons;
>
> (iii) continuing to spread the Contaminants within the Class Boundaries in spite of that knowledge; and
>
> (iv) declining to remediate the contamination now present on the lands within the Class Boundaries?

[156] The crux of this claim is that the appellants owed a fiduciary duty to the respondents because they possessed information about the contaminants and were the primary source for information about potential health implications.

[157] In 2007, this Court refused to strike the breach of fiduciary duty claim (2007 NSCA 33). Since then, the Supreme Court of Canada in *Elder Advocates*, has narrowed the scope of fiduciary duty that the governments will owe to citizens in special circumstances.

[158] As the Supreme Court of Canada subsequently noted in *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71:

> [124] It is now definitely a requirement of an *ad hoc* fiduciary relationship that the alleged fiduciary undertake, either expressly or impliedly, to act in accordance with a duty of loyalty. It is critical that the purported beneficiary be able to identify a forsaking of the interests of all others on the part of the fiduciary, in favour of the beneficiary, in relation to the specific interest at issue.

[159] The respondents' fiduciary claim does not fit within the limited scope defined by *Professional Institute*. Accordingly, this common issue has no reasonable chance of success at trial and, therefore, will not substantially advance the litigation.

[160] Moreover, this issue could not be resolved at a common issues trial due to the individual nature of the inquiries involved. Again, in *Elder Advocates* the Supreme Court said:

> [50] No fiduciary duty is owed to the public as a whole, and generally an individual determination is required to establish that the fiduciary duty is owed to a particular person or group. A fiduciary duty can exist toward a class — for example, adults in need of a guardian or trustee, or children in need of a guardian — but for a declaration that an individual is owed a duty, a person must bring himself within the class on the basis of his unique situation. Group duties have not often been found; thus far, only the Crown's duty toward Aboriginal peoples in respect of lands held in trust for them has been recognized on a collective basis.

[161] Each class member will have to prove that Canada and/or Nova Scotia undertook to act in their best interests. Furthermore, the claim appears to be based on public statements. Whether or not each class member heard the statements, and relied on them, will be an individual issue.

[162] The issue of whether a fiduciary duty is owed cannot be considered on a collective basis. To address this issue, the court must determine whether Canada and/or Nova Scotia undertook to act in the best interest of each class member which can only be determined with individual evidence of each person's knowledge and circumstances. It is not a common issue.

Common Issues – Remedies:

[163] The proposed remedies are dependent on the success of the earlier common issues. In this case, as we are of the view that the action does not raise common issues which allow it to be certified as a class action, the common issues relating to remedies must also fail.

Preferable Procedure:

Standard of Review

[164] The standard of review of the certification judge's conclusion that a class proceeding would be the preferable procedure for the fair and efficient resolution of the claim is the same as review of common issues. However, again as will be explained, in light of the errors found on the part of the certification judge in certifying the causes of action and the common issues, it is necessary for us to look at the issue of preferability afresh without deference to the certification judge.

Analysis:

[165] The *CPA* requires a certification judge to determine whether a class proceeding "... would be the preferable procedure for the fair and efficient resolution of the dispute" (7(1)(d)). Section 7(2) of the *CPA* sets out a number of factors the court must consider in determining whether a class proceeding is the preferable procedure. They are:

> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute, the court shall consider
>
> (a) whether questions of fact or law common to the class members predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the class members have a valid interest in individually controlling the prosecution of separate proceedings;
>
> (c) whether the class proceeding would involve claims or defences that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means; and
>
> (f) any other matter the court considers relevant.

[166] The certification judge cited *Carom v. Bre-X Minerals Ltd.*, [1999] O.J. No. 1662 (Q.L.), leave to appeal ref'd, [2000] S.C.C.A. No. 660:

> [59] In **Carom v. Bre-X Ltd.** (1999), 44 O.R. (3d) 173 at 239, Justice Winkler (then a member of the Superior Court of Justice) outlined the conditions present whenever a class proceeding is the preferable procedure:
>
> > A class proceeding is the preferable procedure where it presents a fair, efficient and manageable method of determining the common issues which arise from the claims of multiple Plaintiffs and where such determination will advance the proceeding in accordance with the goals of judicial economy, access to justice and the modification of behaviour of wrongdoers.
>
> The Court of Appeal did not express any disagreement with this statement in *Carom v. Bre-X Minerals Ltd.*, 51 O.R. (3d) 236, when it certified an additional claim. The test prescribed in Carom can be applied in Nova Scotia, particularly if "resolving the dispute" is substituted for "determining the common issues" in the passage quoted.

[167] The *Carom* "test" that the certification judge adopted is a restatement of the three oft-cited benefits of a class proceeding over other procedural options: judicial economy, access to justice, and behaviour modification. These were approved by the Supreme Court in *Hollick*, at ¶27. A class action will be the preferable procedure where it can promote these objectives better than another procedural method.

[168] The certification judge emphasised the importance of considering those three goals even though they are not explicitly spelled out in the *CPA*. On access to justice and judicial economy, he stated:

> [66] ... Even if some individual claims could be started, they would be repetitive, inefficient, and inconsistent with principles of broad access to justice and judicial economy, criteria which ought to be addressed when considering certification, even if they are not specified in Nova Scotia legislation....

[169] He found that behaviour modification was also relevant, for reasons bigger than this particular case:

> [67] The defendants say that behavior modification, a commonly-recognized goal which class actions are intended to advance, is not at play in this case because the Steel Works facilities no longer operate. In my view addressing behavior in a class action can have a broader focus than deterring particular defendants from repeat activity -- certification of class proceedings in pollution cases can highlight obligations which parties pursuing industrial activity have to the public, thus fostering behavior of general benefit to society.

[170] The certification judge felt that by their amendments to the Statement of Claim the issues that remained to be resolved had a greater commonality:

> [41] As this litigation has evolved, its thrust has become more directed toward community than individual focus. This is illustrated by the plaintiffs' amendments to the statement of claim, including by removing requests for compensation for individual personal injuries and diminution in property values, <u>which give the remaining issues</u> in this case greater commonality, distinguishing it from others, such as **Ring**, *supra*, and **Bryson**, *supra*, in which the common issues proposed did not warrant certification. (Emphasis added)

[171] When the certification judge performed his analysis of whether a class action was the preferred procedure, he was of the view that there were seven causes of action with seventeen common issues arising from those actions. We

have found that the certification judge was in error in certifying the actions, with the exception of nuisance, negligence and breach of fiduciary duty and that the only potential common issue remaining is the source of the contaminants. It is through this lens that we must determine whether class proceeding is the preferable procedure in this case.

[172] This case is similar to *Hollick*. In that case the plaintiff sought to certify an action against the City of Toronto for complaints of noise and physical pollution from the Keele Valley landfill.

[173] The certification judge certified the action as a class action; the Divisional Court of Ontario overturned that decision which was upheld by the Ontario Court of Appeal. The appellants appealed to the Supreme Court of Canada. Their appeal was dismissed. In the course of dismissing the appeal Chief Justice McLachlin, writing for the Court, observed:

> [19] In this case there is no doubt that, if each of the class members has a claim against the respondent, <u>some aspect of the issue of liability is common within the meaning of s. 5(1)(c)</u>. For any putative class member to prevail individually, he or she would have to show, among other things, that the respondent emitted pollutants into the air. At least this aspect of the liability issue (and perhaps other aspects as well) would be common to all those who have claims against the respondent. ... (Emphasis added)

[174] According to Chief Justice McLachlin, the proper interpretation of "preferable" requires a wider, contextualized view of the whole claim and not a narrow focus on the common issues alone:

> [27] I cannot conclude, however, that "a class proceeding would be the preferable procedure for the resolution of the common issues", as required by s. 5(1)(d). The parties agree that, in the absence of legislative guidance, the preferability inquiry should be conducted through the lens of the three principal advantages of class actions – judicial economy, access to justice, and behaviour modification: ...
>
> [28] ... In my view, it would be impossible to determine whether the class action is preferable in the sense of being a "fair, efficient and manageable method of advancing the claim" without looking at the common issues in their context.
>
> ...

> [30] The question of preferability, then, must take into account the importance of the common issues in relation to the claims as a whole. ... I cannot conclude, however, that the drafters intended the preferability analysis to take place in a vacuum. There must be a consideration of the common issues in context. ...

[175] Despite the generous approach advocated in *Hollick*, the claim fell on that ground: the applicant had not proven that a class action would be the preferable way to resolve the claims.

[176] Rosenberg, J.A. provides a helpful summary of the *Hollick* principles in *Markson v. MBNA Canada Bank*, 2007 ONCA 334, leave to appeal ref'd [2007] S.C.C.A. No. 346:

> [69] ... A succinct statement of the applicable principles is set out in *Hollick, supra*, at paras. 27 to 31. I would summarize those principles as follows:
>
> (1) The preferability inquiry should be conducted through the lens of the three principal advantages of a class proceeding: judicial economy, access to justice and behaviour modification;
>
> (2) "Preferable" is to be construed broadly and is meant to capture the two ideas of whether the class proceeding would be a fair, efficient and manageable method of advancing the claim and whether a class proceeding would be preferable to other procedures such as joinder, test cases, consolidation and any other means of resolving the dispute; and,
>
> (3) The preferability determination must be made by looking at the common issues in context, meaning, the importance of the common issues must be taken into account in relation to the claims as a whole.
>
> [70] As I read the cases from the Supreme Court of Canada and appellate and trial courts, these principles do not result in separate inquiries. Rather, the inquiry into the questions of judicial economy, access to justice and behaviour modification can only be answered by considering the context, the other available procedures and, in short, whether a class proceeding is a fair, efficient and manageable method of advancing the claim.

[177] The approach in *Hollick* was recently approved by the Supreme Court of Canada in its recently released trilogy of cases on class actions. In *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, Rothstein J. writing on behalf of the unanimous Court stated:

> [139] ... In *Hollick*, McLachlin C.J. was of the view that the plaintiff had not satisfied the certification requirements on the grounds that a class proceeding was not the preferable procedure. In that case, she found that the question of whether

> or not the defendant had unlawfully emitted methane gas and other pollutants was common to all class members. However, as to whether loss could be established on a class-wide basis, she found too many differences among the class members to consider loss a common issue. In other words, while she found that there was a common issue related to the existence of the cause of action, she did not consider the loss-related issues to be common to all the class members. She dismissed the class action on the basis that "[o]nce the common issue is seen in the context of the entire claim, it becomes difficult to say that the resolution of the common issue will significantly advance the action" (Hollick, at para. 32). (Emphasis added)

[178] In *Pro-Sys* the Supreme Court allowed the action to be certified because there were common issues related to the loss to the class members. The Court concluded:

> [140] In the present case, there are common issues related to the existence of the causes of action, but there are also common issues related to loss to the class members. Unlike *Hollick*, here the loss-related issues can be said to be common because there is an expert methodology that has been found to have a realistic prospect of establishing loss on a class-wide basis. If the common issues were to be resolved, they would be determinative of Microsoft's liability and of whether passing on of the overcharge to the indirect purchasers has occurred. Because such determinations will be essential in order for the class members to recover, it can be said, in this case, that a resolution of the common issues would significantly advance the action. (Emphasis added)

[179] Like *Hollick*, it is our view a class action is not the preferable proceeding in this case.

[180] The determination of the only potential common issue would not significantly advance the class members' claims at trial. Answering the question of whether the respondents emitted contaminants does not advance the claims of all the class members. There are too many differences among the class members to make the certified common issues common to all of the class members. There is no reason to believe any contaminants emitted by the appellants were distributed evenly across the geographical area or during the time period specified in the action (*Hollick*, ¶32).

[181] Unlike *Pro-Sys*, the determination of the common issues in nuisance will not be determinative of the appellants' liability.

[182] As indicated in our overview of class proceedings, such actions offer three advantages to a multiplicity of individual claims, namely, judicial economy, access to justice and behaviour modification.

[183] There would be no reductions in unnecessary duplication in the findings of facts that would result in significant judicial economy. Like *Hollick*, any common issue is negligible in relation to the individual issues (¶32). In order to recover, each of the individual class members would have to establish material physical damage to their property or a substantial interference with the use and enjoyment of their property. Each class proceeding would break down into individual claims for each of the class members.

[184] Turning now to access to justice; the respondents argue that the class members' claims, individually, are so small that it would not be worthwhile for them to pursue relief individually and their financial resources are such that they cannot afford to bring separate proceedings. We appreciate their position and have given their argument serious consideration. However, as we have explained, the determination of what constitutes a nuisance is so individualized that it would still be necessary for the individual claimants to pursue their own claims. Any costs they would incur in proving nuisance would not be significantly mitigated by certification of this proceeding. The individual claims, here, are not simply an assessment of liability following a finding of liability. Rather, liability is an issue for each and every claim.

[185] Finally, we agree, as the certification judge noted, that behaviour modification has a broader focus than this case. It has minimal, if any, application to these appellants. After all, neither of them has operated the coke ovens since 1998 or the steel plant since 2000. However, although it is a factor, it is but one factor to be taken into account when certifying the action. The courts' task is to determine whether a class action would be fair and efficient resolution of the dispute taking into account the factors in *CPA*'s 7(2)(a) to (e) and "any other matter the court considers relevant". In this case the individual issues overwhelm the only issue common to all class members and the resolution of that issue simply does not advance the litigation.

[186] Having examined the common and individual issues and taking into account that which each class member must prove to demonstrate liability, our conclusion is that a class action is not the preferable procedure for proceeding with these actions.

Disposition:

[187] We are satisfied that this proceeding should not have been certified as a class proceeding. We would allow the appeals and set aside the Certification Order.

[188] It appears that the costs of the motion before the certification judge were never finalized, and we did not receive full submissions from the parties on the matter of costs on the appeals. Accordingly, the appellants shall file their written submissions on costs both at the motion and on these appeals on or before January 17, 2014 and the respondents shall file theirs on or before February 7, 2014.

Oland, J.A.

Farrar, J.A.

Bryson, J.A.