Class Action as to Nova Scotia Tar Ponds Contamination Overturned

People who feel that they're the victims of pollution or some type of environmental violations have become more aggressive in suing the alleged polluters as a group in so-called 'class actions.' Although class actions can make sense in some environmental cases, such as when a large spill has impacted an easily identifiable group of property owners who were affected similarly, they've had limited success. There are two steps in the process where these lawsuits can fail: in getting the group certified as a class and on the underlying claims, such as negligence. Here's a look at a recent case from Nova Scotia in which the order certifying the group of alleged victims as a class was overturned on appeal.

THE CASE

What Happened: Property owners and residents of Sydney, NS sued the governments of Canada and Nova Scotia and a company over the operation of a steel works facility that included a steel mill, coke ovens and tar ponds. They claimed that the facility emitted pollutants, including lead, arsenic and polycyclic aromatic hydrocarbons (PAHs), that contaminated their properties and posed risks to their health. They asked the court to certify their case as a class action lawsuit, alleging various claims including trespass, strict liability under *Rylands v. Fletcher*, negligence and breach of fiduciary duty. The Nova Scotia Supreme Court certified the lawsuit as a class action with two related classes: one for current property owners in neighbourhoods within two miles of the steel works and the other for individuals who lived in the affected neighbourhoods for at least seven years. The defendants appealed.

What the Court Decided: The Nova Scotia Court of Appeal overturned the order certifying the lawsuit as a class action.

The Court's Reasoning: The Court began by examining the various claims alleged by the property owners and residents. It rejected the claim of strict liability as based on the rule in *Rylands v. Fletcher* because the facts didn't allege an unintentional 'escape' or release of contaminants but their discharge as an ordinary and regular by-product of the facility's activities. (For more information on such claims, see 'Liability: When Is Your Company 'Strictly Liable' for Environmental Damage'') The facts also didn't support the trespass, battery and negligent battery claims, which require the contaminants to be

placed directly on the victims' lands when here they clearly ended up there indirectly. The Court did find that the alleged facts supported the remaining causes of action (nuisance, negligence and breach of fiduciary duty.) However, these claims weren't sufficiently common to all the prospective class members to justify certification as class actions. The Court explained that a court must determine whether a class action 'would be the preferable procedure for the fair and efficient resolution of the dispute.' In this case, it concluded that a class action lawsuit *wasn't* the preferable procedure because it wouldn't provide the expected benefits. For example, each of the individual class members would have to prove material physical damage to their property or a substantial interference with the use and enjoyment of their property. So the class action would end up being broken down into individual claims for each of the class members, noted the Court [*Canada (Attorney General) v. MacQueen*, [2013] NSCA 143 (CanLII), Dec. 04, 2013].

ANALYSIS

The Court in *MacQueen* explained, 'There can be no question that class actions have had a significant impact on the legal landscape.' And this impact isn't always positive. For example, the Court noted that class actions can permit potentially massive reallocations of resources by courts and affect matters as diverse as the adequacy of insurance coverage; the nature, extent and timing of settlements; ethical challenges created by the potential conflict between lawyers and claimants; and inter-jurisdictional disputes about which courts should hear which case or cases. The *MacQueen* case appears to follow the lead of the decision in *Smith v. Inco* and continue the trend of courts exercising caution when considering the appropriateness of a class action for environmental claims.