A Summary of The Nova Scotia Herbicide Trial

by

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In May of this year a court case commenced in Sydney, Nova Scotia which eventually was to command world-wide attention. Appearing before the Honourable Mr. Justice D. Merlin Nunn, Trial Division, Supreme Court of Nova Scotia were fifteen plaintiffs and one defendant. Twelve of the plaintiffs were male; three were female. The defendant was Nova Scotia Forest Industries (NSFI) a branch of Stora Kopparbergs. The plaintiffs in their individual capacities and as representatives of others sought an injunction to restrain NSFI from spraying certain areas with herbicides — in particular 2, 4-D and 2, 4, 5-T. This action followed an earlier one in the late summer of 1982 when the plaintiffs obtained an interim injunction restraining NSFI from carrying out any spraying in accordance with a license to spray during 1982 issued by the Nova Scotia Department of the Environment. The case covered the period May 3 to June 1 inclusive and June 6. The decision was handed down on September 15. The plaintiffs brought forth 35 witnesses, the defendants 14. As Justice Nunn wrote, "aside from most of the named plaintiffs, all the rest of the witnesses with but a few exceptions were experts . . ."

Issue Number One

At the outset the Court had to determine whether or not the action was a proper representative action as contemplated by Rule 5.09 (1), which states: *When numerous persons have the same interest in a proceeding, . . . the proceeding may be begun and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.* The Court found that the action was properly representative.

Issue Number Two

The second issue related to whether the native Indians represented in this action — and there were two — have aboriginal rights on lands owned by the defendant or by the Crown and leased to the defendant. The Court found that the MicMac Indians in Nova Scotia do not have any aboriginal rights extending to the lands of the defendant or the lands leased to the defendant. In this case the Court was concerned with one particular aboriginal right — the right of usufruct. (The right of using the property of another and of drawing the profits it produces without wasting its substance).

Issue Number Three

This issue — the principal issue — whether or not the plaintiffs were entitled to injunctive relief, involved four thrusts as set out in the statement of claim: (1) a permanent injunction enjoining the defendant from spraying 2, 4-D and 2, 4, 5-T at the sites; (2) a declaration that the plaintiffs have the right to be free from exposure to these phenoxy herbicides; (3) the costs of the action; (4) such other relief as the Court thought just.

The legal causes of action on which the relief was claimed were alleged to arise from the proposed spraying by the defendant and fall within the following categories:

- A. Private nuisance
- B. Trespass to land
- C. The rule in *Rylands vs. Fletcher*
- D. The right of riparian owners to water undiminished in quality
- E. The right of landowners to groundwater free of chemical contamination

Concerning claim number two, above — the right to be free from exposure — the Court ruled that it was not within the power of the Court (and presumably any Court) to grant. Justice Nunn stated: *what is being sought is not justiciable between these parties. What the plaintiffs are seeking here is a societal matter and therefore a matter for government or regulatory agency.* And he went on to quote Justice MacKeigan² who set forth the function of a court as follows: *A court of law is exactly that, a court of law, to administer the law, to adjudicate on legal rights, and to determine justiciable questions. It has no power to act as a sort of ombudsman, or general overseer of political or administrative bodies or officials, or to act as a commission of inquiry into economic, social or ecological matters.*

The rule in *Rylands vs Fletcher* (1868), L.R. 3 is simple and long standing, and is described in *Salmond and Heuston on the Law of Torts*, 18th Ed., *supra*, at p. 297 as follows: *The principle is one of the most important examples of absolute or strict liability recognized by our law — one of the chief instances in which a man acts at his peril and is responsible for accidental harm, independently of the existence of either wrongful intent or negligence. The rule may be formulated thus: The occupier of land who brings and keeps upon it anything likely to do damage if it escapes is bound at his peril to prevent its escape, and is liable for all the direct consequences of its escape, even if he has been guilty of no negligence.*

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²MacKeigan, C.J.N.S. in *Bedford Service Commission vs Attorney General of Nova Scotia* (1976), 18 N.S.R. (2d) 132 at pp 147-48.

The five legal causes of action were addressed by the court and can best be described by quoting from the judgement as follows:

I am satisfied that the overwhelming currently accepted view of responsible scientists is that there is little evidence that, for humans either 2, 4-D or 2, 4, 5-T is mutagenic or carcinogenic and the TCDD is not an effective carcinogen, and further, that there are no-effects levels and safe levels for humans and wildlife for each of these substances.

To my mind, after hearing all the evidence and reading all the exhibits, there is no doubt that the weight of current responsible scientific opinion does not support the allegations of the plaintiffs. I feel it is my responsibility, in view of the nature of this matter, to add that, while I do not doubt the zeal of many of the plaintiffs' scientific witnesses or their ability, some seemed at many times to be protagonists defending a position, thereby losing some of their objectivity. There was a noticeable selection of studies which supported their view and a refusal to accept any criticism of them or contrary studies. Where the study was by anyone remotely connected with industry there was a tendency to leap to the "fox in the chicken coop" philosophy, thereby ruling out the value of the study as biased. In my view a true scientific approach does not permit such self-serving selectivity, nor does it so readily decry a study on the basis of bias.

I had the opposite impression of the scientific witnesses offered by the defendant. I did not detect any sense of partisanship. They related their work, their involvement with the substances, the results of their studies and their considerations of other studies in a professional, scientific manner and I therefore found their opinions to be reliable and, indeed, I accepted them as such.

*It would be a Herculean task to go through the evidence of each witness indicating which particular facts were accepted or rejected. However, it is not necessary, for reasons already stated. I will say though, as a general point, that I accept the evidence of the defendant's witnesses as representing the generally accepted view of responsible scientists, and also as indicative of the risks involved. Each of them categorically states that neither 2,4-D nor 2,4,5-T, nor the concentration of TCDD presently in 2,4,5-T, nor the mixture of 2,4-D and 2,4,5-T in the concentrations to be sprayed on Nova Scotia forests pose any health hazard whatsoever. I am unable to accept that the plaintiffs have proved any strong probability or a sufficient degree of probability of risk to health to warrant the granting of the remedy sought, a **quia timet** injunction. ("quia timet" — "which he fears").*

Having made this finding, it is unnecessary for me to consider the matter of riparian rights or groundwater rights. Since I have accepted that no risk to health has been proved, I need not consider these areas. Were I required to do so, and perhaps to allay public fears, I will add that the strongest evidence indicates that these substances sprayed in the Nova Scotia environment will not get into or travel through the rivers or streams, nor will they travel via groundwater to any lands of the plaintiffs who are adjacent to or near the sites to be sprayed.

Further, if any did the amount would be so insignificant that there would be no risk... the answer to the single remaining question I posed earlier which has two parts — have the plaintiffs offered sufficient proof that there is a serious risk of

health and that such serious risk of health will occur if the spraying of the substances here is permitted to take place — is, for each part, in the negative... all the evidence available has been presented by the parties, and that, based on this evidence, fully weighed and considered, this court is of the opinion that these spraying operations can be carried out in safety and without risk to the health of the citizens of this province.

The 182-page judgement, ends as follows:

The plaintiffs, therefore, fail in this action and the defendant is entitled to its costs, to be taxed.

Since the defendant has claimed damages and the parties agreed to set aside the matter of damages until after the decision on the main issue, I shall hear the parties as to damages at their convenience.

Author's note: This land-mark decision, was commented on by George T.H. Cooper, Q.C., Counsel for NSF, as follows: "The decision should not be seen as a defeat for the environmental movement, but a victory for responsible environmentalism". For those persons wishing to read the total version, the New Brunswick Forest Products Association will make photo copies available at ten dollars each. Address: 500 Beaverbrook Court, Fredericton, NB E3B 5X4, Telephone: (506) 455-0998; telex: 014-46208.

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