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Ontario Court of Appeal Dismisses \$36 Million Environmental Class Action Award Against Inco

By Nalin Sahní

In a 3-0 decision, the Ontario Court of Appeal has reversed a \$36 million trial award to members of an environmental class action. Thousands of Port Colborne, Ontario's residents had sued Inco for property devaluation caused by soil contamination arising from 66 years of nickel refining emissions.

Smith v. Inco Ltd. (formerly *Pearson v. Inco Ltd.*) is notable as one of the first environmental class actions to go to a full trial on the common issues. The Ontario Court of Appeal decision makes it much more difficult to pursue claims of private nuisance and *Rylands v. Fletcher* strict liability and also clarifies the application of limitation periods for class actions.

Summary

The Ontario Court of Appeal found that Inco was not liable in either private nuisance or under the strict liability rule in *Rylands v. Fletcher*. The Court found that a "mere chemical alteration" in the soil was insufficient to make out a claim of nuisance without establishing a risk of harm to the plaintiffs. Strict liability cannot be imposed solely because an activity is "extra-hazardous" or a "non-natural" use of land and, in any event, there was no reason to conclude that Inco's refinery met this standard. Further, there was no evidence of damages as the data relied upon at trial was flawed. The limitation period was not a common issue for all class members and should have been determined on an individual basis.

The plaintiffs have indicated that they intend to file an application for leave to appeal to the Supreme Court of Canada. The application is due December 6, 2011 and a decision on the leave

application is expected in approximately six months time. This may not be the last word on this matter.

Background

From 1918 to 1984, the Inco nickel refinery in Port Colborne emitted airborne waste products (including nickel oxide) from a 500-foot high smoke stack on a daily basis. Though the overwhelming majority of nickel emissions occurred before 1960, a 2000 Ministry of the Environment study found nickel contamination in widely varying concentrations on properties within several miles of the Inco refinery.

In 2001, the claimants launched a class action alleging that widespread public concern over the potential health effects of the nickel contamination had devalued their properties and that Inco, as the alleged source of the contamination, was liable for their reduction in property values. Though the claim originally included adverse health impacts, this allegation was dropped and the class action was certified on the basis of property devaluation alone (See *Pearson v. Inco Ltd.*, 2005 CanLII 42474 (ONCA)). There was no allegation that Inco had been negligent or failed to comply with any applicable laws.

Trial Decision

After a four-month common issues trial, Inco was found liable in private nuisance and *Rylands v. Fletcher* strict liability for devaluing the class members' property relative to other similarly situated communities (namely Welland, Ontario). The Ontario Superior Court of Justice awarded \$36 million in damages or \$4,514 per property. Inco appealed.

Ontario Court of Appeal Decision

The Ontario Court of Appeal allowed the appeal and dismissed the action, negating the \$36 million damage award. Justice Doherty writing for the Court found that the trial judge had erred in finding Inco liable in either private nuisance or the strict liability rule in *Rylands v. Fletcher*. Even if

the claim had been established, the plaintiffs had failed to prove any damages. Also, it was not appropriate for the limitation period to be treated as a common issue.

Private Nuisance

The only nuisance alleged by the plaintiffs was that the nickel emitted by Inco had contaminated their soil and thus produced a "material injury". The Court of Appeal rejected their claim holding that a "mere chemical alteration in the content of soil did not amount to physical harm or damage to the property without establishment of some detrimental effect." No actual risk of harm to the plaintiffs was established (though the 2000 Ministry of the Environment risk assessment found that 200 ppm could adversely affect sensitive plant life and nickel levels on the property ranged up to 14,000 ppm). "Potential health concerns" were insufficient to establish a nuisance without proof of "actual, substantial, physical harm" or interference with the normal use of that property.

Strict Liability Under the Rule from *Rylands v. Fletcher*

The *Rylands v. Fletcher* strict liability rule is based on the rationale that a party who chooses to undertake a potentially dangerous activity is liable for damages caused by that activity.

To establish the tort of strict liability in *Rylands v. Fletcher*, the claimant has to establish four elements:

1. A "non-natural" or "extra-hazardous" use of the defendant's property (e.g. the storage of a dangerous substance on the property),
2. Escape of a substance likely to cause mischief,
3. Harm caused by the substance that escaped from the defendant's property,
4. Foreseeability of the harm.

The Court of Appeal held that the trial judge erred in finding Inco liable on the basis of strict liability. The Court rejected that strict liability could be imposed simply because an activity is “extra hazardous”. Even if this were the case, there was no basis to conclude that bringing nickel onto Inco’s property to be refined was an “extra-hazardous” or “non-natural” use of land. Further, the rule from *Rylands v. Fletcher* only imposes strict liability for mishaps not “for the intended consequence of an activity that is carried out in a reasonable manner and in accordance with all applicable rules and regulations.”

Damages

Though not necessary to the disposition of the appeal, the Court also found that claimants failed to prove any damages and that the data relied upon by the trial judge was flawed and unreliable. When comparable groups of properties in Port Colborne and Welland were assessed, the evidence showed that the claimants did not suffer a loss.

Limitations Period

The Court of Appeal found that the limitation period should not have run from the date when a majority of the class knew (or ought to have known) that the nickel contamination could affect their property values. For the limitation period to be a common issue, **ALL** class members would have to have been unaware of the potential impact of the nickel contamination no more than two years prior to the commencement of the action. This was an individual issue that would have to be adjudicated on a case-by-case basis.

Conclusion – For Now

The *Smith v. Inco* decision limits claims of private nuisance and *Rylands v. Fletcher* strict liability and clarifies the application of limitation periods for class actions. It is also notable that the plaintiff’s decision to remove adverse health impacts from its pleadings eased its certification as a class action but also played a large role in the Court of Appeal’s decision to dismiss the action. Class

Counsel for the plaintiffs have indicated that they will be filing an application for leave to appeal to the Supreme Court of Canada – this may not be the last word on this matter.

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