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Class Actions and Contaminated Land: *Smith v. Inco Limited, ONCA 628*

by
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Class Actions in the Contaminated Land Context:
***Smith v. Inco Limited,* 2011 ONCA 628**

Residents of a small town in Northern Ontario launched a class action, seeking damages for diminished residential property value due to the stigma of nickel contaminants found in soil. The case evolved over 10 years, the Ontario Court of Appeal ultimately set aside a $36 million award to the claimants.

The reasons? Environmental damages need to be proven with concrete evidence – the inability to produce hard, scientific evidence of harmful effects, to prove that land was not used in an exceptionally dangerous manner while the refinery was in operation and to gauge public perception based on facts, not hearsay, all worked against the claimants in the end.

Case Summary

Inco Limited ("Inco") operated a nickel refinery in Port Colborne, Ontario from 1918 to 1984, during which time, the refinery emitted nickel particles. No emissions occurred after f the refinery closed in 1984.

The Ministry of the Environment ("MOE") tested for nickel and other metals in the soil on the properties near Inco's refinery periodically since the 1970s. Inco complied with environmental and other applicable regulatory schemes between 1918-1984. In 2000, MOE conducted further testing; the results revealed nickel and other metal levels higher than those reported in earlier results.

Ultimately, the MOE ordered Inco to remediate 25 properties neighbouring the refinery. Inco complied with the order with the exception of one property, whose would not grant access to remediate.

The plaintiffs, owners of residential properties within a defined area in the City of Port Colborne, Ontario (the "claimants"), commenced an action against Inco Limited and other parties in March 2001, shortly after public concerns about nickel levels emerged.

Initially, they advanced claims for personal injury and adverse health effects based on the emission of pollutants. Claims were made against multiple defendants and set out numerous causes of action, including negligence.

By the time the action reached trial however, Inco was the only defendant and the claim against it related exclusively to property values; the claimants alleged that public concern in or around 2000 over the nickel levels and possible adverse health effects resulted in a diminution in the value of their properties. They argued that the facts gave rise to claims in public and private nuisance, trespass, and under the strict liability doctrine in *Rylands v. Fletcher.*

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The trial judge held that Inco was liable to the claimants both in private nuisance and under strict liability. Damages were fixed $36 million dollars. Inco appealed. The Ontario Court of Appeal allowed the appeal and dismissed the action. The Appeal Court held that the claimants failed to establish Inco's liability under private nuisance and the rule in *Rylands v. Fletcher*. Alternatively, even if Inco could be held liable for the type of harm as alleged, the Appeal Court held that the claimants failed to establish any damages.

Class Action: Certification Proceedings

When the action was commenced in 2001, the class of claimants and the claims advanced were wide ranging. The class of claimants included almost all of the residents in Port Colborne who had owned property in the city since September 2000. The claims advanced included damages for adverse health effects suffered by class members. Nonetheless, the claimants requested certification. The motions judge however refused certification as a class proceeding under the *Class Proceedings Act*, 1992 ("CPA") for reasons including that: (1) there was no identifiable class; (2) there was no common issue; and (3) a class proceeding would not be the preferable procedure for the resolution of the issues.

The claimants appealed the decision and substantially narrowed the scope of the claim and reducing the size of the proposed class; the claim was now restricted to the effect the nickel emissions had on the value of their real properties. The case was ultimately certified by the Court of Appeal as a class action because, in part, newer case law since 2001 indicated a wider and more liberal interpretation of the CPA.

The Issues

The claimants alleged that after 2000, there were widespread public concern about the levels of nickel in soil on their properties and that this concern adversely affected the appreciation in the value of the properties. The trial judge agreed, and awarded the claimants $36 million in damages. Inco appealed the decision. The issues before the Court of Appeal were if the trial judge erred in holding:

1. That the discharge of the nickel particles by Inco onto the property of the class members constituted an actionable nuisance

2. That Inco was liable for the discharge of nickel under the rule established in *Rylands v Fletcher*

3. That that the plaintiffs established a diminution in value of their properties after 2000

4. Assuming the point above, that the diminution was caused by the discharge of nickel particles onto the land; and

5. Did the trial judge err in failing to hold that the claim was time barred under the *Limitations Act?*

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The Court of Appeal held that the trial judge did err with respect to the issues outlined at 1-3. As such, there was no need for the Court to consider the issues outlined at 4 and 5.

1. Private Nuisance

Citing an earlier Supreme Court of Canada decision, the Ontario Court of Appeal summarized the definition of "private nuisance" as follows:

> "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 an interest in land, where, in the light of all the surrounding circumstances, this injury or interference is held to be unreasonable."
>
> [Emphasis Added]

In this case, the claimants argued that that the nickel particles in the soil caused physical injury to their land. They did not argue that the nickel particles caused any interference with their use or enjoyment of their property.

The Court of Appeal held that where the nuisance is said to flow from the physical harm to land caused by the contamination of that land, the claimants must show "actual, substantial, physical damage" to the land. A mere chemical alteration in the content of the soil, without having some detrimental effect on the land itself or rights associated with the use of the land, does not amount to physical harm or damage to the property. In this case, "potential" health concerns were the only basis upon which it could be said that the nickel particles harmed the land of the claimants.

Simply put, the Appeal Court held that a reduction in property values, resulting from the public perception of potential health risks associated with nickel contamination and not based on any scientific evidence, did not constitute actual, substantial, physical damage or injury to the land for the purposes of a nuisance claim.

2. Strict Liability: The Rule in Rylands v. Fletcher

The rule in *Rylands v. Fletcher* imposes strict liability on a defendant who, in the "non-natural" or "special" use of his land, lets a substance "likely to cause mischief escape" causing damage to a plaintiff's property as a result of the escape.

The trial judge held that the refining of nickel was not an ordinary use of the land; rather, it was a special use brought onto the land which brought an increased danger to others. The trial judge held that Inco,

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by choosing to engage in potentially hazardous activity – the refining of nickel, had to assume the risk of any damages, caused by that activity such as the emissions from the Inco refinery.

The Court of Appeal disagreed. It held that strict liability, based exclusively on the "extra hazardous" nature of the defendants conduct, is not part of the common law in Ontario, noting that even though there are strong arguments for imposing strict liability on certain inherently dangerous activities, such an expansion to the law is best introduced by legislative action and not judicial fiat. It further opined that even if it was a part of the law of Ontario, the claimants failed to prove that Inco's refinery constituted an "extra hazardous" activity in any event.

Applying the specific criteria developed in the *Rylands v. Fletcher* case law, the Court of Appeal phrased the relevant question as follows:

> "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".

The Court held that the evidence suggested that Inco operated its refinery in a heavily industrialized part of the city in a manner that was ordinary and usual and that Inco did not create risks beyond those that are incidental to virtually any industrial operation. Any industrial activity carries with it the potential to do significant damage to surrounding properties if something goes awry, but the claimants did not demonstrate that Inco's operation of its refinery over 60 years presented an exceptionally dangerous or mischievous thing or that the circumstances were extraordinary or unusual.

Additionally, Inco's compliance with various environmental and zoning regulations during the material time, although not a defense to a *Rylands v. Fletcher* claim, is an important consideration in light of the approach to the "non-natural" user analysis.

3. Damages

The claimants relied on a market comparison approach to prove that their properties failed to appreciate in value because of adverse publicity generated by the MOE's findings and reports that nickel from Inco had contaminated the soil on their properties. The market comparison approach examines whether a particular incident has impacted property values in a particular area over a particular period. The claimants' believed that their homes failed to appreciate at a rate similar to homes in comparable communities.

Three data sets, each purporting to calculate and compare property value changes were put before the trial judge, who accepted the claimant's approach to the quantification of damages, which indicated that the comparable property appreciated in value 4.35% more so than the Port Colborne properties. This quantified a loss of $36 million, the amount the trial judge assessed the claimants' damages. The

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Court of Appeal, however, found the trial judge erred in his analysis of the damages claim. It held the evidence did not support the allegation that the plaintiffs' values had been adversely affected and thus held that the plaintiffs failed to prove any damages.

Conclusion

The Ontario Court of Appeal decision is helpful in discussing private nuisance and strict liability causes of action in the contaminated land context. From an environmental class action perspective, the case is an important reminder that where class members allege they have suffered a depressed market value in their land due to stigma effects associated with perceived or real contamination, they nonetheless are obligated to prove their damages with concrete evidence. It is insufficient to assume that stigma is automatically established just because a substance has exceeded the regulatory allowance(s).

Some commentators have not viewed the decision in a positive light. For example, in regard to proving strict liability, the Court of Appeal may have implied that people who live in historic industrial areas will not be able to seek relief under *Rylands v. Fletcher* on the basis that industrial operations are an ordinary and usual use of the property. Such an interpretation has led some to find the decision disappointing from an environmental justice viewpoint because it directly affects only those who live in industrial areas.

Right or wrong, unless the decision is altered by the Supreme Court of Canada, Canada's highest Court, this decision remains the most recent and authoritative decision governing environmental class actions.

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