

Blakes Bulletin

Litigation & Dispute Resolution/ Environmental Law

Ontario Court Awards C\$36-Million in Damages in Environmental Class Action

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On July 6, 2010, The Honourable Mr. Justice J. R. Henderson of the Ontario Superior Court of Justice awarded C\$36-million to a class of residents against Inco Limited (now Vale) for having contaminated their lands with airborne metals, particularly nickel. This is one of the first class actions to have gone to trial and the trial judge had to deal with several novel issues, such as how to calculate damages on a class-wide basis and how to apply a limitation period to the entire class. Further, it demonstrates the potential viability of environmental class actions.

The class action arose as a result of allegations of nickel-soil contamination in the city of Port Colborne, Ontario (near Niagara Falls), where Inco had operated a nickel refinery between 1918 and 1984. The class was defined as:

all persons owning residential property since September 20, 2000, within the area of the City of Port Colborne bounded by Lake Erie to the north, Neff Road/Michael Road to the east, Third Concession to the north, Cement Road/Main Street West/Highway 58 to the west, or where such a person is deceased, their heir(s), executor(s), administrator(s), assign(s) or personal representative(s) of the estate of the deceased person.

The court estimated that the class was comprised of the owners of approximately 7,000 residential properties or their representatives. The defined area encompassed almost all of the urban area of Port Colborne and some of the rural area located east of the Welland Canal.

The plaintiffs claimed damages for the diminution of their property values arising from contamination caused by the Inco refinery based upon the civil causes of action of trespass, nuisance and the strict liability doctrine set out in *Rylands v. Fletcher*, which concerns

the escape of dangerous things. The plaintiffs had initially included additional claims for personal injury and adverse health effects. However, it was only after the plaintiff class members had limited their claim to the diminution in value of their properties that the action was certified as a class action (see *Pearson v. Inco Limited*, 78 O.R. (3d) 278 (Ont. C.A.)). Hence, the action was concerned solely with the alleged negative effect of the contamination, if any, on property values and a corresponding claim for punitive damages.

Although Inco acknowledged that its refinery was the source of the vast majority of elevated levels of nickel found on the class members' lands, it denied that it was liable for any of the causes of action. Inco also raised limitation defences to the class' claims.

BACKGROUND

Port Colborne is a city of approximately 18,000 residents, located on the north shore of Lake Erie bisected by the Welland Canal. The Inco facility is located in the southeast portion of the city near Lake Erie, and between 1918 and 1984, when the nickel refinery ceased operation, nickel and other metal particles were released into the air and eventually settled onto the soil of neighbouring properties. In 1998, the Ontario Ministry of the Environment conducted soil testing in Port Colborne as part of a phytotoxicological study and, in January 2000, released a report containing the results. This publication resulted in public disclosure that nickel-soil contamination existed in a widespread area of the city. The plaintiffs alleged that the negative publicity and public disclosure concerning the nickel-soil contamination negatively affected the property values of the class members. The date of September 20, 2000, which was used in the class definition, arose from the date the representative plaintiff received soil test results for its property, following the release of the Ministry of the Environment report.

Inco disputed that the negative publicity caused diminution in the property values and claimed that it was well known prior to 2000 that there was a property

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with nickel-soil contamination in the Port Colborne area and that there was no significant difference between the publicity before and after the report was released in 2000. Inco also denied it was responsible for any punitive damages.

Liability

The trial judge found that because there was no intentional intrusion onto the class members' property, the class members' claim of trespass was dismissed. However, the trial judge found that the continued deposit of nickel onto the class members' property by Inco did fall within the strict liability requirements of a claim in *Rylands v. Fletcher* and also in private nuisance as a consequence of material physical damage to the class members' properties.

Did the Limitation Period Apply?

Inco ceased refining nickel in Port Colborne in 1984, and the parties agreed there was no relevant nickel emissions from Inco after that date. Therefore, Inco argued that the cause of action arose in 1984, and hence the limitation period had expired by the end of 1990. As the statement of claim was issued in March 2001, Inco argued that the plaintiff class was statute barred from maintaining the action.

The plaintiff relied upon the discoverability principle and said that the cause of action did not arise until sometime after the year 2000, when the class members first acquired knowledge that Inco's conduct had caused damage to the value of their property. The discoverability principle sets out that the limitation period will not commence until all of the material facts upon which the action is based have been discovered by the plaintiff or when they ought to have been discovered by the exercise of reasonable diligence.

When considering the discoverability issue, the trial judge considered the fact that the Ministry of the Environment's phytotoxicological study was publicly released on January 26, 2000, and that after a meeting of real estate board members on February 15, 2000, most real estate agents in the Port Colborne area started to insert clauses concerning nickel-soil contaminations into agreements of purchase and sale. The trial judge concluded that it was only after the Ministry of the Environment's phytotoxicological study was released that the general public became aware of the potential impact of nickel-soil contamination on property values.

The trial judge noted that if real estate agents were not aware until January 2000 of the potential effect of nickel-soil contamination on property values, it is extremely unlikely that most members of the public knew or ought to have known the effect of nickel-soil contamination on property values until at least that time.

The trial judge went on to consider whether the limitation period in a class action started to run when all of the class members knew or ought to have known of the material facts or only when one of the class members knew or ought to have known of the material facts. The trial judge held that even if there were a few class members who knew or ought to have known the material facts upon which the claims were based prior to February 15, 2000, those class members would constitute only an insignificant minority of the members of the class. The trial judge found that the overwhelming majority of the class members did not know, and ought not to have known, of the material facts until approximately February 15, 2000. Therefore, in the context of the class proceeding, the trial judge held that the cause of action arose as of February 15, 2000, and therefore that the action was not barred by the limitation period.

Calculation of Damages

Both the plaintiff and Inco called expert evidence on the mass valuation of real property. They also tendered statistical analyses of the mass valuation evidence. The trial judge considered the expert evidence when determining whether the negative publicity concerning nickel contamination on the real property in Port Colborne had a negative effect on the property values. He followed expert evidence that recommended that Welland, Ontario, was a comparative city for the purposes of analyzing the changes in property values in Port Colborne. Ultimately, the trial judge found that there had been a downward drop in property values in Port Colborne starting in the year 2000. This was evidenced by a decrease in sales volume and a decrease in property values. The trial judge calculated the loss of the value of the properties to average C\$4,514 per property for the 7,165 residential properties impacted for a total of C\$35,954,010, which he rounded up to C\$36-million.

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Punitive Damages

The court held that Inco's conduct in the case did not justify an award of punitive damages. While Inco's conduct had caused widespread damage to the class and effected several thousand people, its conduct could not be seen as so malicious or oppressive that it offended the court's sense of decency and warranted an award of punitive damages.

CONCLUSION

This is one of the first class actions in Canada to go through a full common-issues trial. The reasons for judgment, which are lengthy (97 pages), indicate the difficulty of calculating damages on a class-wide basis. The award of significant damages arising from operations that ceased in 1984 will be of concern for any current or past commercial operation. Given the novel issues determined in this class action trial, it is likely that it will be appealed.

Historically, it has been difficult to certify environmental class actions in any province, other than Quebec. This decision will undoubtedly embolden plaintiffs' counsel to bring more environmental class-action claims.

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