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Pollution case under appeal; Port Colborne action first to go all the way to trial

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The first Ontario environmental class action to make it through a full trial before a judge is now heading to the province's Court of Appeal.

Smith v. Inco has piqued interest in the legal community after a 101-day trial in the Ontario Superior Court. In July, Justice Joseph Henderson awarded \$36-million.

The plaintiffs alleged that an Inco Inc. nickel refinery, which operated between 1916 and 1984, caused contamination and reduced property values for almost 8,000 residents living near Port Colborne and Welland in southern Ontario. Vale later purchased Inco.

Alan Lenczner, of Lenczner Slaght Royce Smith Griffin along with Larry Lowenstein of Osler, Hoskin & Harcourt, represent Inco. Mr. Lenczner said they have appealed several aspects of Justice Henderson's ruling.

Mr. Lenczner noted the judge found that "Inco engaged in a lawful business operation in Port Colborne for many years," had complied with Ministry of Environment regulations and "reduced emissions of nickel from its refinery over time and eventually ceased nickel emissions altogether in 1984."

Mr. Lenczner said "where the nickel particles have blended into the soil and become invisible without creating toxicity, there cannot be any physical damage to property, let alone material physical damage."

The trial judge found liability against Inco on the basis of Rylands v. Fletcher, a landmark 1868 English tort case dealing with the legal responsibilities a commercial business has to its neighbors.

In refering to the case, Justice Henderson wrote, "the nickel and nickel particles are not dangerous per se, but an escape of these elements from the Inco lands has the potential to cause damage to neighboring properties. This satisfies the second element of a Rylands claim."

In his appeal, Mr. Lenczner argues that legal test set out in Rylands should not apply to a "permitted, regulated, industrial activity where there is no escape of a dangerous substance and where the emissions occurred over a period of 66 years."

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The trial judge also found that between 1999 and 2008, house prices on average rose by 63.85% in Welland and by 59.5% in Port Colborne, a difference of 4.35% over a decade. The trial judge compensated the class by that percentage, or \$4,514 per property, for 7,965 residential properties.

Mr. Lenczner said "this small variation between comparable communities over 10 years, which constitutes a difference of less than one-half of a per cent per year, does not imply the consequence of nickel emissions."

Kirk Baert from Koskie Minsky in Toronto, along with Eric Gillespie of Cunningham & Gillespie, represented the plaintiffs. Mr. Baert said the case is significant because most reach a settlement long before going to trial.

He said it took six years just to get the case certified in Ontario. The first two levels of courts declined certification, but the Ontario Court of Appeal gave it the green light. The Supreme Court of Canada denied any further appeal.

"The trial decision shows that these cases are do-able," Mr. Baert said. "They will be long and complicated, but you have to persevere."

He said the case exemplifies the benefits of class actions. "This really shows that the [Ontario Class Proceedings] Act is doing what it's supposed to do and allowing hard, but meritorious, cases to be litigated successfully," he said.

Gabrielle Kramer of Borden Ladner Gervais and colleague Barry Glaspell wrote a paper about the court's decision.

They noted "The trial judge specifically rejected Inco's argument that Rylands v. Fletcher is restricted to an isolated escape. The judge concluded that if an unnatural substance is brought onto a property which creates a potential danger for a neighbour, and the substance escapes and causes damage, then there is no reason to restrict Rylands v. Fletcher to a single isolated escape."

They noted also that Inco "unsuccessfully argued that a class member is not entitled to make a claim for diminution of property value unless they had sold or attempted to sell the property. On an alternative analysis, the court could have found that property was damaged when it was 'severely contaminated;' however, this analysis would have likely resulted in the claims being out of time."

In an interview, Ms. Kramer said the case is a "front-runner" and she expected it would be appealed. She said since no other environmental class actions have reached trial in Ontario -- there have been several in Quebec -- ascertaining damages is challenging.

"It's difficult to find market evidence because there are very few cases to look at," she said. "It's something that environmental lawyers are all struggling with, so it will be very interesting and helpful to get an appeal decision on this case."

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Photo: Carlo Allegri, National Post Files; Alan Lenczner, representing Inco, is appealing an Ontario Superior Court ruling.;