

CASE LAW UPDATE

Kristi J. Collins, Associate, WeirFoulds LLP

Smith v Inco Limited

2011 ONCA 628 (Released October 7, 2011)

Environmental Contamination – Nuisance – Strict Liability – Application of Limitation Period in Class Actions

This appeal reversed a 2010 trial judgment awarding \$36 million against Inco Limited (“**Inco**”) in a class action stemming from particle emissions from the operation of Inco’s Port Colborne nickel refinery from 1918 to 1984.

It is undisputed that the refinery emitted nickel oxide into the air and, as a result, nickel has been found in the soil on many nearby properties. In 2001, 7,000 surrounding property owners brought a class action against Inco and others alleging a variety of claims, although by trial the case had been reduced to one claim against Inco.

On appeal, the Court emphasized the importance of recognizing the exact nature of the claim advanced at trial. Rather than allege that the emissions violated environmental regulations, posed a threat to human health, or interfered with the claimants’ use of their property, the claimants alleged the emissions were ultimately to blame for their property values in the early 2000s not appreciating at the same rate as comparable property values in similar nearby cities.

According to the claimants, reports released by the Ministry of the Environment (“**MOE**”) in the early 2000s regarding nickel contamination in the soil led to widespread public health concerns about their properties, which in turn negatively affected the increase in their property values. The health concerns turned out to be unfounded.

Although claims for trespass, public nuisance and punitive damages were dismissed, the trial judge found that the property values were diminished because of the public concern, and that Inco was liable for this loss under the theories of private nuisance and strict liability imposed under the rule in *Rylands v Fletcher*.

The Court of Appeal reversed this decision, finding that the claimants had failed to establish liability under either private nuisance or the rule in *Rylands v Fletcher*, and, in any event, had not proved damages.

First, the Court disagreed with the trial judge's reasoning that the emissions constituted "material physical damage" to the claimants' properties sufficient to constitute a private nuisance. The Court held that a mere change in the chemical composition of the land, absent evidence of a detrimental effect on the land or its use by its owners, does not constitute physical damage. Moreover, the Court was unwilling to accept the disconnect between the time of the emissions and the alleged materiality of the harm arising in the early 2000s. Public concerns about potential health risks alone did not amount to evidence that the nickel in the soil constituted actual, substantial, physical damage to their properties; therefore, the claim for nuisance failed.

The Court of Appeal also rejected the trial judge's finding of strict liability under the rule in *Rylands v Fletcher*. This rule imposes strict liability for damages caused to property by the escape from the defendant's property of a substance "likely to cause mischief".

Specifically, the Court disagreed with the trial judge's findings regarding the two main elements of the rule: a "non-natural" use of the property and the "escape" component. Because the refinery was operated in a heavily industrialized area in a usual and ordinary manner, it did not constitute a "non-natural" use of the property. Moreover, the emissions were not an "escape" because they were the intended result of an activity reasonably and lawfully conducted on Inco's property and not the type of mishap or accident contemplated by the rule.

Although declining to decide the "important jurisprudential question" of whether foreseeability of damages is a requirement for liability under *Rylands v Fletcher*, the Court warned against imposing a requirement of foreseeability of escape as this would effectively merge the rule in *Rylands v Fletcher* with liability in negligence.

The Court also expressly rejected any expansion of the rule that would impose strict liability based solely on the "extra hazardous" nature of the defendant's conduct, stating that to do so was a policy decision "best introduced by legislative action and not judicial fiat". In any event, the Court found no evidence that Inco's operation of the refinery constituted an extra hazardous activity.

Finally, the Court held that the claimants had failed to prove damages. Specifically, the claimants had not demonstrated that their properties failed to appreciate in value as they otherwise would have but for the adverse publicity arising from the MOE reports on the nickel contamination.

The Court found that the market comparison data presented by the claimants' experts and accepted by the trial judge was flawed in several ways, including, among others: (1) the data compared "apples to oranges" in the types of properties included in the analysis and when this

was corrected, any difference in appreciation rates disappeared; and (2) the experts had merely assumed that any difference in property values was attributable to the nickel contamination without making any efforts to see what other factors may have contributed. The trial judge also erred in focusing his attention on certain data and not others. According to the Court of Appeal, when the data was considered “fully and fairly” it demonstrated no loss to the claimants’ property appreciation rates.

Although the Court of Appeal had disposed of any basis for liability, thereby allowing the appeal and dismissing the action, it went on to address the trial judge’s treatment of the applicability of the limitation period to class actions.

The trial judge had found that, because an “overwhelming majority” of the class members did not know and ought not to have known about the material facts giving rise to their claim until February 2000, the claim on behalf of the class members was not statute-barred.

The Court of Appeal held that the trial judge erred in treating the discoverability question as a common issue in this case. The Court explained if the evidence did not establish that *all* class members did not discover the claim until February 2000, then the application of the limitation period is an individual, and not a common issue. “A class action is a procedural vehicle. Its use does not have the effect of changing the substantive law applicable to individual actions.”