JUDGMENT OVERTURNED IN MAJOR ONTARIO ENVIRONMENTAL CLASS ACTION

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On October 7, 2011, the Ontario Court of Appeal reversed a $36 million judgment issued in July of 2010 in connection with an environmental class action against Inco Limited (now Vale Canada Ltd., referred to here as "Inco"). This class action claimed damages suffered by residents of Port Colborne related to Inco's 66-year operation of a nickel refinery in that community (the facility closed in 1985). The claim against Inco was not advanced on the basis of human health effects or proven soil contamination. Rather, the claim was advanced based on allegations that property values in Port Colborne had not appreciated as quickly as in neighbouring, comparable communities. At trial, Inco was found liable in two respects:

1. Nuisance, which is an unreasonable interference with another's use and enjoyment of their property, or actual damage to their property; and

2. The rule in *Rylands v. Fletcher*, whereby a land user is strictly liable (that means there is no due diligence defence) for any damage caused by failing to prevent the escape of a dangerous substance brought onto the land or arising as a result of a non-natural use of the land.

As noted, the litigation was brought as a class action. Class actions differ from regular litigation in several important respects; including primarily that they permit designated representatives to pursue claims on behalf of a defined class, all of whom are bound by the outcome of the litigation unless (in Alberta, Ontario and other provinces) they opt out (some jurisdictions have "opt-in" regimes for non-residents, but Alberta and Ontario, among others, provide that even non-residents who meet the class definition are bound by the outcome barring an opt-out). The class consisted of all persons who owned residential property within a defined area, taking up most of the city of Port Colborne, since September of 2000, comprising approximately 7,000 properties. This timeline was set based on the publication of information from the Ontario Ministry of Environment as to the risks of nickel contamination in the area. The trial judge found that the publication of these concerns gave rise to a cause of action in both nuisance and *Rylands v. Fletcher*, and triggered the limitation period applicable to claims by the class members. As the refinery that had given rise to the nickel emissions in the first place had shut down in 1985, the appropriate limitation period under Ontario's legislation (6 years) would otherwise have been long past. This is one of the reasons that the lower court decision was of such interest to environmental law practitioners, because it suggested that actions for even very long-standing contamination might not be barred by limitations legislation, where evidence in relation to the contamination does not emerge for years after the shutdown of the appropriate facility.

However, the Court of Appeal found both that Inco was not liable under either nuisance or *Rylands v. Fletcher*, and that in any event there was no proof of any damages suffered by Port Colborne residents.

Dealing firstly with the nuisance allegations, the Court made the following observations:

> People do not live in splendid isolation from one another. One person's lawful and reasonable use of his or her property may indirectly harm the property of another or interfere with that person's ability to fully use and enjoy his or her property. The common law of nuisance developed as a means by which those competing interests could be addressed, and one given legal priority over the other. Under the common law of nuisance, sometimes the person whose property suffered the adverse effects is expected to tolerate those effects as the price of membership in a larger community. Sometimes, however, the party causing the adverse effect can be compelled, even if his or her conduct is lawful and reasonable, to desist from engaging in that conduct and to compensate the other party for any harm caused to that person's property.

The Court of Appeal reviewed the evidence and found that there was no evidence that the nickel particles, which were admitted to have been mixed in the soil in the Port Colborne area as a result of Inco's operation of its refinery, had caused actual harm or damage to the property in question. The only evidence was that this had generated concerns about potential health risks – potential health risks which were, in the main, eventually dismissed as being unfounded (indeed, the class members abandoned claims that the nickel contamination had given rise to carcinogenic effects). Without evidence of actual, physical harm to the property, or evidence of an impairment of the property owner's ability to use that property, the Court of Appeal found that nuisance could not be made out.

The Court then reviewed the *Rylands v. Fletcher* findings, and disagreed with the trial judge's approach. The trial judge had accepted academic arguments to the effect that *Rylands v. Fletcher* should be expanded such that any unusually or extraordinarily dangerous activities should automatically give rise to liability for any negative impact, going beyond the usual scope of the doctrine which applied to unintended results from a non-natural use of land. Under this expanded definition, there would be no requirement to prove non-natural use or unexpected effects. The Court of Appeal declined to expand the definition of *Rylands v. Fletcher* in Ontario in that fashion, and noted that in any event, Inco was operating a regulated refinery and there was no evidence of any non-compliance with the appropriate regulatory requirements of the day. Accordingly, there was no evidence of extraordinary or unusual risk in any event. Further, there was no evidence that the land had been used for any "non-natural" or unexpected purpose. The land was used for the purpose of operating a nickel refinery, precisely what Inco obtained regulatory approval for. While the Court stated that compliance with environmental or zoning regulations is not a defence to a civil claim, it is an important consideration in the context of determining whether an activity was "non-natural". In this case, operating a refinery in a heavily industrialized part of a city in an ordinary course of business manner, which did not create any risks beyond those incidental to virtually any industrial operation, did not constitute a "non-natural use" of the property and accordingly the *Rylands v. Fletcher* claim also failed.

The Court next reviewed the evidence of damages and found that, on a proper interpretation, the evidence showed that Port Colborne residential property values had actually appreciated at a higher rate than in comparable municipalities, contrary to the trial judge's findings. This is somewhat unusual, as generally Courts of Appeal will not interfere with specific findings of fact made by a trial judge.

Lastly, although it was not strictly necessary given the Court of Appeal's other findings, the Court of Appeal reviewed the trial judge's finding that a majority of the class members were not aware of the

material facts surrounding their claim until after September of 2000, when concerns of the potential for human health risks associated with nickel contamination began to emerge. The Court of Appeal commented that it was an error to treat a limitation period as running from the date when a majority of class members knew or ought to have known the material facts in issue. Where some class members might well have been aware of the material facts earlier, and might therefore face the possibility of their claims being barred by limitations legislation, then the application of that limitations legislation cannot be treated as a common issue in a class proceeding. In other words, the application of a limitations defence cannot be "certified" as a common issue and answered on behalf of the entire class. Rather, it must be addressed as an individual issue for each class member, separate from the common issues trial. This may be anticipated to make obtaining certification of environmental class actions for contaminated sites more difficult; certainly, it will make the successful prosecution of such actions more costly and problematic for representative plaintiffs and their counsel.

This litigation is of significant interest to both environmental and class action practitioners for a number of reasons. It is one of the few class proceedings to go through the common issues trial process, as opposed to settling after certification. It considers and rejects academic arguments for the expansion of the *Rylands v. Fletcher* doctrine. And it has potentially important implications regarding limitations legislation in the context of environmental class proceedings.

The Court of Appeal decision is more restrictive than the lower court decision. On a review of the lower court decision, which appeared to allow class actions for long-standing contamination to continue notwithstanding limitations legislation, one might have anticipated an increase in environmental class actions. The more restrictive approach taken by the Court of Appeal here may have a cooling effect on that. However, it is of note that the Court of Appeal does not expressly find that the limitation period findings of the trial judge were wrong. It simply concludes that on the facts of this case, the limitations defence should be treated as an individual issue because the evidence did not indicate that the entire class, without exception, was not aware of the material facts. Accordingly, on different facts, the trial judge's reasoning might have prevailed. There accordingly remains the risk of even long-standing contamination being the subject of modern class actions, where the particular circumstances so dictate.

As a final observation, the Court fixed significant costs payable to Inco in the amount of $100,000. Class action cost regimes in some jurisdictions such as BC are protective of representative Plaintiffs, but this is not the case in Ontario (nor in Alberta). The usual costs regime of the successful party being entitled to costs prevails. Accordingly, the representative Plaintiffs have not only lost their $36 million damages award, but they are now exposed to a significant costs penalty.

The Plaintiff class may seek leave to appeal to the Supreme Court of Canada from this decision, and we will continue to monitor how this matter unfolds and comment on future developments.