

CASE COMMENT:

***SMITH v. INCO* 2010 ON SC 3790**

Tridan v. Shell - Alive And Well

July 6, 2010 saw the release of the Decision of *Smith v. Inco*, a Class Action Case tried by Henderson, J. The Decision occupies 96 pages and is of large significance in revisiting and clarifying the issues first enunciated in *Tridan v. Shell*, 2002 Carswell Ont 1, 154 O.A.C. 1, 57 O.R. (3d) 503, in which the writer was counsel for the Plaintiff. The specific issues, which are well elaborated on, involve different causes of liability, the assessment of damages, the non-applicability of MOE mandated guidelines or assessment levels, limitation periods, and finally the legality of the operation causing the damages as a Defence.

BACKGROUND

The facts of the case are relatively straight forward. Inco owned and operated a refinery located on a property in the South East portion of Port Colborne between 1918 and 1984. Inco brought nickel ore onto its property and refined it.

All refining operations ceased in 1984. Air, vegetation and soil testing in the vicinity of the refinery was conducted under the auspices of the MOE since the early 1970s. Briefly, smoke stack emissions resulted in nickel contamination of the soil in many parts of Port Colborne to levels dramatically in excess of OME Guidelines. This situation continued to percolate along through the 1970s, 80s and 90s with more testing being conducted and more evaluation and assessments of the potential harm to health and safety, as a result of the presence of the nickel in the soils. The evidence presented suggests that publicity of these facts was sporadic until early 2000. At that time, a lengthy and complete report showing the extent of the contamination and commenting on possible health and safety issues as a result thereof, were circulated to the entire Municipality. Meeting after meeting at a public level ensued and the news quickly escalated to a national story, with local stories being reported on an ongoing basis, over several years. The problem became so notorious that disclosure statements were required with respect to the presence of the nickel contaminant in the soil, in areas affected. Inco had initially denied responsibility for the contamination, but close to the eve of trial admitted that the nickel contamination in the soils surrounding its facility emanated from its plant.

The Class Action got under way shortly after the releasing of the 2000 report, claiming initially a number of items, but the case eventually proceeded on only two issues. Firstly, did the disclosure of, and consequential notoriety, of the nickel contamination in the effected area, negatively affect property values? Secondly, was Inco responsible for it? In dealing with its Decision, the Court was required to navigate an elaborate

series of issues, both with respect to liability and damages. Given that the Claim was entirely for stigma damages, very clearly, the genesis of this claim, was the *Tridan v. Shell* Decision, where the possibility of such damages was discussed at length in both the Trial and the Court of Appeal Decisions.

Looking at the question of liability, the Court found liability under the principals of Private Nuisance and *Rylands v. Fletcher*. The Court examined the two components of a *Rylands* claim. Firstly, the non-natural use of land by the Defendant, and the escape from that land of something likely to do mischief. The Defendants unsuccessfully attempted to have the Court adopt the reasoning of the Supreme Court of Canada in *Tock v. St. John's Metropolitan Area Board* [1989] 2 S.C.R. 1181. Of significance, Justice Henderson held that nickel refining was not an ordinarily use of land, the nickel was not contained on the land in the first place. The Court also rejected the notion that the lawful use of the property somehow afforded a defence to a *Rylands v. Fletcher* Claim. The concept of the escape from land of something likely to do mischief was dealt with by the Court in its finding that while nickel and nickel particles are not dangerous in themselves, the escape of them from the land has the potential to damage neighboring properties and thus the second element of *Rylands* was met. The Defendants attempted a defence on a third and unusual ground, urging upon the Court that *Rylands* does not apply to a longterm escape, but rather should be restricted to a single, isolated escape. The Court concluded that such a result would be absurd and once again followed the *Tridan* decision at the Ontario Court of Appeal, finding that

where a product that may cause mischief escapes, liability will lie for all the damage which is a natural consequence of the escape.

Curiously, in this case, no claim appears to have been made for remediation of the subject properties, 7000 in all, likely because of the economical, if not physical impossibility, of conducting such a remediation. Although 24 properties had been remediated, it appears that the bulk of the 7000 affected properties will simply be left unremediated.

The Court went on to further find that the contamination of the Plaintiff's lands constituted a private nuisance. In making a finding under this head, the Court was required to find that material physical damage to the property had occurred. This was necessary because if the damage was found to be only interfering with the beneficial use of the property, difficulty can arise in claiming damages where the property has not been sold and the damages would continue to accumulate on a daily basis. The Court found that the stigma impact on the value constituted material physical damage to the property, allowing a claim in private nuisance.

Of interest in this case is the fact that there were two sets of guidelines that the Court was asked to deal with. The first set were the MOE Generic Guidelines for nickel contamination in soils, and the second was an HHRA conducted by the MOE in March, 2002, which set the clean up level at 8000 PPM, still well in excess of Generic Guidelines. The Court had no difficulty in finding that remediation to 8000 PPM does

not result in a lack of damage, and once again asserted, as in Tridan, that “it is for the Court, not the MOE, to determine in the nickel contamination is material”. (page 27).

One other extremely interesting issue under the liability umbrella was the question of the limitation of the actions. As discussed earlier, the smelting operations had ceased in 1984, and since at least the 1970s, it was known that nickel was present in the soils to at least some degree in the vicinity of the Inco smelting operation. The Court examined at length the amount and degree of publicity arising out of these disclosures and concluded that the real impact was only from and after 2000, when there was wide circulation of the problem, together with charts, maps and more importantly, comments on whether the presence of the contaminant was a concern to public health and safety, or saleability of the affected properties. This, the Court quite correctly found, in the writer’s opinion, was the beginning of the stigma, because once the issues began to be debated after 2000, with continually changing views of the MOE and others as to the danger of the presence of the nickel in the properties, together with a debate as to whether or not people ought to sell them, fear and uncertainty arose in the minds of the public. This is the genesis of a claim for stigma. It must be remembered that a claim for stigma itself, as distinct from remediation costs, arises out of the uncertainty arising out of the presence, or former presence of a contaminant, rather than any assessment as to the cost of remediating or otherwise dealing with abatement issues. The difficulty with stigma has always been in ascending order, to prove that it exists and then to quantify it. The Court concluded that the Plaintiff had established a causality between a reduction in the property values and the negative publicity and uncertainty

arising out of the 2000 disclosure and ensuing notoriety of the issue in the community. The constant presence of experts, testing, public meetings, and technical personnel knocking on at least every door in Port Colborne, took its toll on the public perception of the value of the effected properties. In reaching the conclusion, the Court relied on “two common sense principles” and expert evidence on the quantum of the stigma. The first “common sense principle” the Court relied on was the “baked in discount” that all of the properties in Port Colborne suffered by simply being next to a very large industrial operation. The second principle was that environmental contamination widespread in a community will negatively affect residential value as a “disamenity”. The Court quickly seized on to the fact that a debate over whether the nickel levels were so high as to cause toxicity to plants or humans, was not as relevant as the uncertainty this issue caused, and this uncertainty created an uncertainty in the minds of buyers as to the health risk, the affect on property values, and the future. Therefore the only way to sell these properties, is at a discount, hence the stigma. The Court accepted Tridan and other cases, that a quantifiable stigma attaches to properties that were contaminated, or were considered to be contaminated, at one point in time. The evidence in this case centered upon three mass data sets involving comparisons between Port Colborne and Welland, Ontario. The preponderance of the experts agreed that these two municipalities were entirely comparable and formed the basis of an analysis of the differentiation between the increase in property values in Port Colborne and those of Welland. The inquiry was made more difficult due to the fact that property values in both Welland and Port Colborne rose significantly between the disclosure in 2000 and the date of calculation of damages, for the purpose of the trial, being 2008. The Court

was assessing the amount by which the growth in prices was thwarted by virtue of the stigma arising out of the public disclosure and uncertainty. There does not appear to have been any individual examples of comparable properties in Welland, with those of Port Colborne, to see if individual differences might exist, which may or may not have bolstered the mass valuation evidence that was led. The Court sifted through complex MLS, MCAP and Teraview analyses of the movement of prices in Welland and Port Colborne, and ultimately concluded that the differential between the two warranted an assessment of damages in the amount of \$36 million. This evidence was extremely technical and no matter what version you chose, all theories of damage calculation were fraught with one level of difficulty or another.

Another issue unsuccessfully raised by the defence in *Tridan*, and again in *Smith* was the notion that until you sell the property, no compensable loss occurs.

CONCLUSION

While the liability of Inco for damages would seem to be difficult to overturn, the highly technical and complicated nature of the damages calculation, is problematical because all of the models are relatively close and the Court actually found the differential in growth to be as little as 5%. However, given the number of properties, this translated into a \$36 million damage award. *Tridan v. Shell* is alive and well.

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