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## Ruling could flood polluters with lawsuits, observers say

*Jeff Gray*

Port Colborne, Ont., resident Ellen Smith was part of a suit against Inco. Sheryl Nadler for The Globe and Mail

Mining giant to appeal groundbreaking \$36-million award for residents of Port Colborne, Ont.

In 1991, pregnant with her first child, Ellen Smith and her husband bought a house on Rodney Street in Port Colborne, Ont., a stone's throw from the smokestacks of the Inco plant, where nickel was refined for the better part of the 20th century. The aptly named Nickel Street runs through her working-class neighbourhood.

It wasn't until a decade after she moved in that she learned of recent tests showing that her property, and others in the city of 18,000, were contaminated with high levels of nickel, in her case far in excess of government guidelines.

Neighbours were talking about rashes, asthmatic kids, and family histories of cancer. Ms. Smith threw herself into the battle, attending a never-ending series of community meetings and becoming the main plaintiff in a hard-fought class-action lawsuit against Inco.

Another decade later, an Ontario Superior Court judge has made a landmark ruling, ordering Inco, now owned by Brazilian mining giant Vale ([VALE-N26.870.431.62%](#)) to pay almost everyone who owns a home Port Colborne a total of \$36-million for the effects of nickel contamination on their property values. If upheld, Ms. Smith could receive \$23,400, while others farther from the plant would get less. Vale is appealing the decision.

"It's been a long nine years," said Ms. Smith, 42, now the mother of two teenagers. "... I started this, and I'm going to finish it."

A spokesman for Vale, Cory McPhee, said in an e-mail that the company believes it has "solid grounds" for its appeal of the ruling: "The decision concerns us and no doubt concerns others in industry and the broader business community who may face similar situations here in Ontario and elsewhere in Canada."

Some legal observers say the ruling, if it stands, could mean many more lawsuits against polluters across Canada, making possible what are known in the United States as “toxic torts” – David-and-Goliath-style class actions reminiscent of the fights dramatized by John Travolta in *A Civil Action* or Julia Roberts in *Erin Brockovich*.

Still, some warn that the precedents set in the ruling are simply too broad, and could expose every business involved in heavy industry – even those that follow environmental rules to the letter – to massive liabilities.

Eric Gillespie, one of the plaintiffs’ lawyers on the case – the first environmental class action to get to trial in Canada outside Quebec – said the ruling could blaze a trail for other similar court fights against polluters.

“Definitely, I think everybody sensed ... that we were breaking new ground,” Mr. Gillespie said. “While the outcome is still not known, if this ruling stands, it clearly will have created some opportunities for people in other communities to address environmental issues with class actions.”

The 97-page ruling, issued July 6 by Mr. Justice Joseph Henderson, has certainly raised eyebrows. One reason is the judge’s stretching of the limitation period for filing a claim. Inco stopped refining nickel at its Port Colborne plant in 1984, and normally, a claim of this kind must be made within six years.

The plaintiffs did not file their class action until 2001, long after the normal limitation period. Their move came after the results of nickel tests conducted by the Ontario Ministry of the Environment were publicized and started to be disclosed in real-estate deals. Judge Henderson sided with the residents, concluding that the limitation period should begin only when the nickel contamination became well-known.

This interpretation should be “terrifying” to any company that has engaged in heavy industry over the past century, said James Sullivan, a partner in Vancouver with Blake Cassels & Graydon LLP who defends corporations against class actions. Essentially, if the ruling stands, any future environmental study that reveals remnants of past pollution could potentially spark new class-action lawsuits, he argued.

“I think the [judge’s] ruling on limitation ... is absolutely awe-inspiring in its scope and its potential impact on industrial activity, anywhere in Canada at any time,” Mr. Sullivan said, adding that, whatever happens at the Ontario Court of Appeal, he believes the case will likely end up before the Supreme Court of Canada.

But Mr. Sullivan said Canada would still not necessarily see a rash of cases along the same lines as U.S. “toxic tort” class actions, since the Port Colborne

case explicitly avoids dealing with the issue of human health and sticks only to the effects on property values.

Plaintiffs dropped their claims about health effects in order to get the lawsuit certified as a class action, since the health problems were harder to prove and would affect each member of the class action differently. The health issues, still debated in Port Colborne, have been subject to studies, reviews, and community hearings, although one study concluded that cancer rates in the city were not unusual.

The ruling against Inco also does not find that the company violated any environmental rules, or was negligent. It relies on an 1868 decision by Britain's House of Lords called *Rylands v. Fletcher*, which faulted a landowner for building a water reservoir over a neighbour's mine, which was then flooded.

Using *Rylands*, Judge Henderson ruled that Inco was involved in a "non-natural" activity – refining nickel – and that the resulting pollution of neighbours' property gave them a basis for a claim.

Dianne Saxe, an environmental lawyer based in Toronto, said the Inco ruling, if upheld, could mean open season on anyone with a smokestack whose emissions can be shown to affect property values. She says the obvious next target for class action plaintiffs' lawyers would be Alberta's oil sands.

"For sure, if running a refinery when no one knew it was a problem, gives a *Rylands* claim to everybody in the vicinity, then running the tar sands, emitting things that we know are harmful, gives anyone downwind who's affected a claim," Ms. Saxe said. "... They should be able to do one hell of a class action."