NS Court Allows Class Action to Go Forward in Steel Works Lawsuit

Unlike in the US, class actions are still relatively rare in Canada. But they're becoming more common, especially for environmental claims. For example, an Ontario court permitted a class action in an environmental case and awarded the plaintiffs $36 million in damages. But that decision was overturned on appeal. Recently, another group in Nova Scotia successfully got their environmental lawsuit certified as a class action. Although the court made the decision last year, it didn't release the written decision until Jan. 2012. Here's a look at what that decision says.

THE CASE

What Happened: Property owners and residents of Sydney, NS sued the governments of Canada and Nova Scotia as operators of a steel works facility that included a steel mill, coke ovens and tar ponds. They claimed that the facilities emitted pollutants, including lead, arsenic and polycyclic aromatic hydrocarbons (PAHs), that contaminated their properties and posed risks to their health. They sought:

- Damages for loss of use and enjoyment of property and remediation;
- Compensation for exposure to pollutants; and
- Funding of a process to identify health risks and

illnesses resulting from their exposure to these contaminants.

They asked the court to certify their case as a class action lawsuit and to establish definitions for who's a member of the class. Both governments objected to class action certification.

What the Court Decided: The Nova Scotia Supreme Court certified the lawsuit as a class action.

The Court's Reasoning: The court ruled that it was appropriate for the lawsuit to proceed as a class action to achieve a "fair and efficient" resolution of the issues. The court certified
two related classes:

Property owners' class. This class primarily consists of current property owners in neighbourhoods within two miles of the steel works, whose properties are contaminated with lead in concentrations that exceed Canadian Council of Ministers of the Environment (CCME) standards. (The court rejected the plaintiffs' originally proposed border of 3.5 miles.) In certifying this class, the court relied on expert evidence that lead levels in the soil in these neighbourhoods were reliable proxies for other contaminants emitted by the steel works, including arsenic and PAHs.

Residential class. This class consists of individuals who lived in the affected neighbourhoods for at least seven years. The plaintiffs had originally proposed a two-year residency requirement. But the court pointed to expert evidence that at least seven years' exposure was required to assess the effects of chronic exposure to contaminants [*MacQueen v. Sydney Steel Corp.*, [2011] NSSC 484 (CanLII), Jan. 19, 2012].

ANALYSIS

The members of the class action in the *MacQueen* case shouldn't

count their chickens just yet. Yes, getting class certification was a victory, but they still have a long way to go before they win on their substantive claims and are awarded damages. As we saw in the *Smith v. Inco Ltd.* class action in Ontario last year, even a victory on the merits at the trial level may not withstand scrutiny on appeal.