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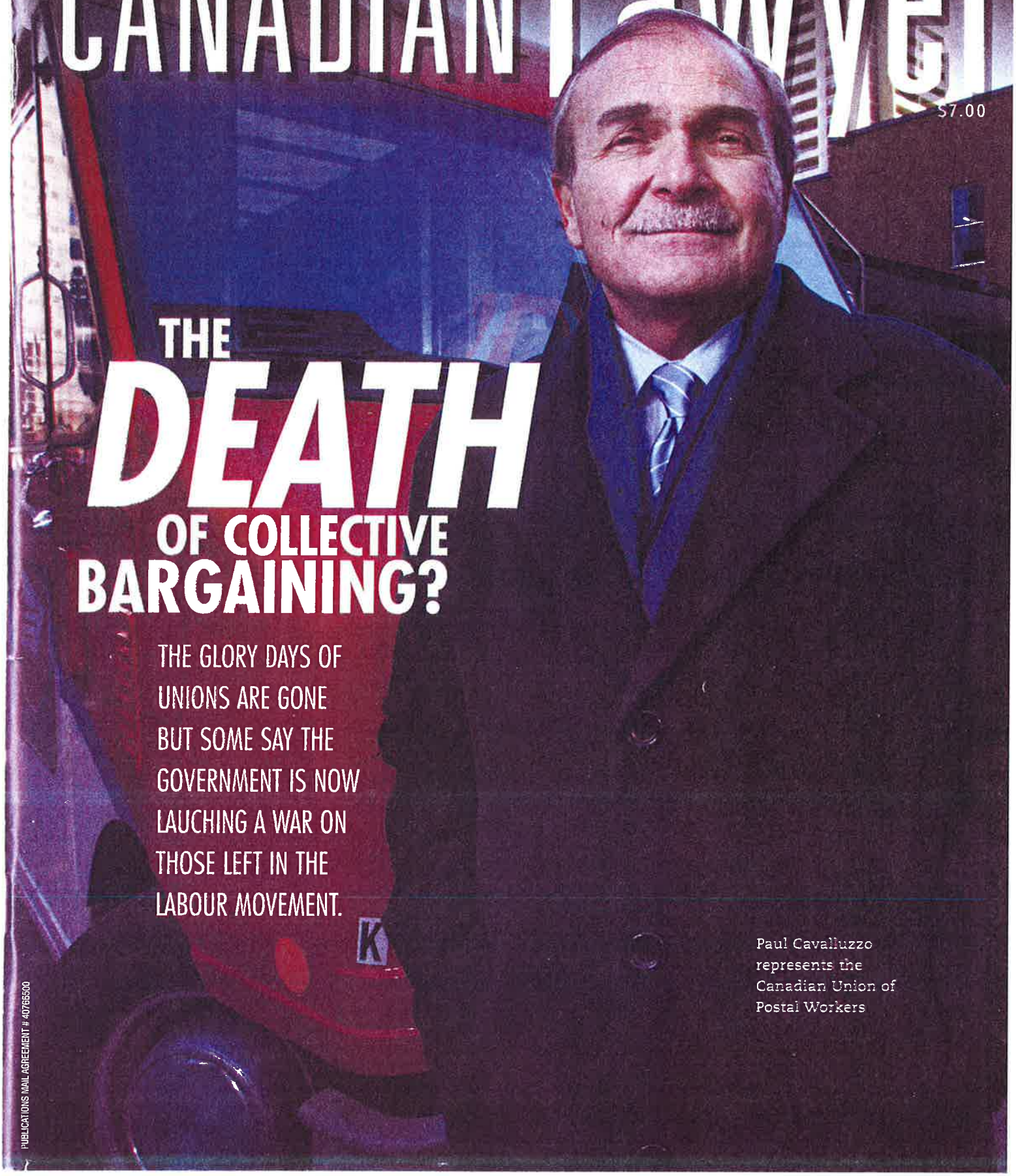

THE DEATH OF COLLECTIVE BARGAINING?

THE GLORY DAYS OF UNIONS ARE GONE BUT SOME SAY THE GOVERNMENT IS NOW LAUCHING A WAR ON THOSE LEFT IN THE LABOUR MOVEMENT.

Paul Cavalluzzo represents the Canadian Union of Postal Workers

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Clearing the air

Dismissal of *Inco* class action will likely head to the Supreme Court and provide more clarity on strict liability in environmental damage cases.

BY KEVIN MARRON

Owners of properties contaminated by neighbouring industry may find it more difficult to press their claims in court in light of an Ontario Court of Appeal ruling overturning a $36-million award to residents of Port Colborne, Ont., for property devaluation attributed to nickel oxide emissions from an Inco refinery. "If you're a polluter, your likelihood of not having to address a civil claim just went up," says Marc McAree, a partner with Willms & Shier Environmental Lawyers LLP in Toronto.

McAree says he is hoping the Supreme Court of Canada will consider the appeal court's decision in the class action *Smith v. Inco,* which will, he says, "have huge and far-reaching implications for many other cases." The plaintiffs filed their leave to appeal to the SCC in early December.

It's a complicated case that has had a tortuous roller coaster ride through the courts ending with the appeal court's ruling that the class action, brought on behalf of almost every homeowner in Port Colborne, had failed to establish Inco's liability under private nuisance or the rule of strict liability as formulated in the 140-year-old British case *Rylands v. Fletcher.* While many lawyers agree that the appeal court provided cogent reasons for overturning the $36-million award, McAree says his prime concern is that there should be a review of the court's rulings on the law of strict liability, which he says "will be used by long-time highly profitable industrial polluters to try to obfuscate liability."

"We need the Supreme Court of Canada to take a good hard look at what this really means from a public policy perspective," McAree says.

In the plaintiff's leave to appeal to the Supreme Court, counsel argue: "This court's clarification of whether

human health is the new actionable threshold for contamination and final resolution as to the correct meaning of 'non-natural' use is required to provide landowners, regulators, and industrial actors across Canada with certainty around their obligations and liabilities. What is the appropriate threshold for actionable nuisance or strict liability in the context of contaminated lands? What should become of the entrenched triangulation of environmental no-fault liability, the inviolability of personal property, and the polluter pays principle."

Inco's base metal refinery was Port Colborne's major employer during its 66 years of operation from 1918 until its closure in 1984. As the appeal court judges observed, it should not have come as a surprise to local residents that nickel was a component of the emissions that they could see streaming every day from its 500-foot stack. But homeowners did not begin voicing serious concerns about the impact on their properties until the late 1990s and early 2000s, when Ontario Ministry of Environment tests revealed that the soil on many properties contained concentrations of nickel oxide deposits that were high enough to cause a risk to plant life, though not to human health. The ministry ordered Inco to take remedial action by removing the soil from 25 properties and the company complied with this order, except for the fact that one homeowner, Ellen Smith — who would later become the representative plaintiff in the class action suit — did not allow them to clean up her property.

Even though ministry reports did not indicate there was a health hazard, reports about possible health risks circulated widely in the community and in local media. One consequence of this was that homeowners maintained that they were trapped in their contaminated homes because their property values had declined and no one wanted to buy their properties anyway.

The class action initially claimed that the emissions caused personal injury and adverse health effects, but the health claims — notoriously difficult to advance in a class action because each person's health issues are different — were dropped and the suit focused instead on the claim that homeowners' properties had become devalued as a result of the public concern about the contaminated soil. In 2005, the Ontario Court of Appeal overturned a lower court order and approved certification of the class action, noting that a key factor in its decision was that the plaintiffs had narrowed the scope of the case by leaving out the health and injury claims that would be hard to consider as common issues. In 2010, Ontario's Superior Court of Justice found in favour of the plaintiffs, a decision overturned by the appeal court last October.

Ironically, given the fact that the class action had been certified only after the health claims were abandoned, the appeal ruling was based partly on the fact that the plaintiffs had failed to provide any evidence of actual injury or harm to health, so that the only evidence before the court in this regard

was the Ministry of Health guidelines, according to which the nickel deposits did not pose a health risk. The plaintiffs argued Inco had caused harm because health concerns about the emissions had affected property values, a claim the court rejected, noting Inco was not to blame for public concerns that surfaced years after the plant was closed.

Michael Brown, a partner with Norton Rose OR LLP in Toronto, says a key lesson to be drawn from this ruling is that plaintiffs who narrow their claims to make them more amenable for class action certification "have to be careful that they don't narrow them so far they end up with a claim that isn't really provable. If you're claiming that the loss of property value is based on an environmental contaminate which you say is a risk to human health, you've got to prove the risk."

Furthermore, Brown observes, the claim that property values slumped because of the community's belief there was a health hazard could turn out to be a self-fulfilling prophecy, particularly when — as the appeal court observed — many of the claims in the press about serious health risks were attributed to the plaintiffs' lawyers.

Co-counsel for the plaintiffs Eric Gillespie, principal of Eric K. Gillespie Professional Corp. in Toronto, says it's hard for any plaintiff to prove harm to human health arising from environmental contamination and, if this proof is required, claims will likely be decided on the basis of whatever standard has been set by a regulatory body such as the Ontario Ministry of the Environment. But he argues this could leave property owners without recourse in the face of intrusive actions by industry. "If one considers that historically a person's home was their castle, now industry appears to be able to deposit their waste products on private land without the consent of the owner. The owner, then, in order to have it removed or be compensated has the onus of showing actual harm. That is, in many people's view, a very onerous

burden that very few private property owners are going to be able to undertake," says Gillespie.

McAree says the key element in the Court of Appeal decision that will create problems for plaintiffs across Canada is the court's interpretation of the *Rylands* concept of strict liability. *Rylands* was a suit launched by the owner of a mine that was flooded by water escaping from a reservoir constructed by a neighbouring property owner. This case led the House of Lords in 1868 to develop a rule of strict liability whereby a plaintiff does not have to prove culpability or negligence, only that the tort occurred and the defendant was responsible for it. The law lords' reasoning was that "the neighbour who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property."

This rule has been elucidated and modified by British and Canadian courts over the years. But McAree says the Court of Appeal in *Inco* takes it too far away from its original intent. "The court reasoned that where a heavy industrial operation is situated in an industrialized area and did not create risks beyond that which one would expect from the operation, then the plaintiff fails to establish that the operation was a non-natural use of the property." He notes that the court defined strict liability as being aimed not at all risks associated with an activity but with risks associated with accidental and unintended consequences of engaging in an activity. On this basis, he notes, the Court of Appeal found that "because the discharge from Inco's stack was intended as part of an industrial operation in an industrial area and given Inco's compliance with all regulations during its operation, the claim in strict liability could not be made out."

In the plaintiff's leave to appeal application, they make clear that: "Canadian homeowners, residents, industry, regulators, and appellate courts really do need certainty on the following key issues:

"(i) the threshold effect for liability in nuisance in the context of environmental or contamination;

"(ii) the requirements of 'non-natural' use of land;

"(iii) whether environmental statutory regimes are a complete code of liability; and

"(iv) whether property devaluation should be a recognized claim in nuisance."

Brown says the Ontario appeal decision "closes the door very significantly to environmental class action claims that are based on risk to human health caused by an environmental contaminant." But, McAree says, "I'm not entirely discouraged because I believe the Supreme Court is going to take a look at it."

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