

**GOWLINGS****ENVIRONMENTAL  
BULLETIN****FEBRUARY 2004*****PEARSON v. INCO LIMITED ET AL.***

This case is another instalment in the efforts to certify a class action against Inco Limited and other defendants, with respect to damages suffered by residents of Port Colborne, Ontario as a result of the operation of a nickel ore refinery. As reported in the *Gowlings Environmental Bulletin*, in July 2002, Mr. Justice Nordheimer of the Superior Court dismissed the plaintiff's motion for certification of the action as a class proceeding under ss. 5(1) of the *Class Proceedings Act*. The judge subsequently awarded costs against the plaintiff in favour of the defendants Inco and the Crown. The plaintiff appealed the order dismissing the certification of the action and the costs award to the Divisional Court.

At the Divisional Court the representative plaintiff indicated that he was amending his claim to delete the claims on behalf of the proposed class in respect of health hazards. As such, the proposed class was reduced from approximately 20,000 to 8,000 and the claims were limited to damages for the devaluation of their real property arising from contamination of the soil from Inco's operations. The Divisional Court, over the objection of the defendants, agreed that the appeal of Nordheimer J.'s decisions could proceed as applied to the narrowed claims for relief.

The Divisional Court noted that the appropriate standard of review was whether the decisions of Nordheimer, J. were "clearly wrong." The Court concluded that the claims of the proposed class, even if restricted to impairment in property value, would involve individual proof of causation of damage and could entail individual defences,

including limitation period defences. The plaintiff had not satisfied the Court that losses could be established on a class wide basis. The Court agreed with Nordheimer, J., that the process of determining whether a causal link exists for any given class member with respect to any given allegation of harm would be extensive and very much individualized, and therefore a class proceeding would not be expedient. The Court agreed with the Crown's observation that the presence of contaminants exceeding background levels under the Guideline for Use at Contaminated Sites in Ontario would be insufficient to establish an effect on property value. Accordingly, even if the class were certified, there would have to be multiple trials to determine whether the property interests of individual members of the class had been affected. The Divisional Court found that Nordheimer, J. had not erred in finding the common issues were overwhelmed by the individual claims and defences, and he had not erred in his conclusion that a class action was not the "preferable procedure" for advancing the claims.

Finally, the Divisional Court upheld the decision of the court below awarding costs to the successful parties, holding that there was no reason to depart from the usual rule respecting costs. While there were broad interests involved in the proceedings, it could not be said that the action involved the "public interest."

The full text of the decision of the Divisional Court can be found at:  
<http://www.canlii.org/on/cas/onscdc/2004/>

*For additional information regarding these topics, you may wish to contact any of the following members of the:*  
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