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COURT OF APPEAL FOR ONTARIO

McMURTRY, C.J.O., ROSENBERG and GILLESE JJ.A.

B E T W E E N :	)	
	)	
WILFRED ROBERT PEARSON	)	Kirk M. Baert, Eric Gillespie
	)	and Celeste B. Poltak
	)	for the appellant
Plaintiff	)	
(Appellant)	)	
	)	Alan Lenczner, Larry P.
- and -	)	Lowenstein and Mahmud Jamal
	)	for the Respondent, Inco Limited
INCO LIMITED, HER MAJESTY	)	
THE QUEEN IN RIGHT OF	)	David Estrin and David McRobert
ONTARIO, THE CORPORATION OF	)	for the intervener, The
THE CITY OF PORT COLBORNE,	)	Environmental Commissioner of
THE REGIONAL MUNICIPALITY	)	Ontario
OF NIAGARA, THE DISTRICT	)	
SCHOOL BOARD OF NIAGARA and	)	Paul Muldoon
THE NIAGARA CATHOLIC	)	for the intervener, the Canadian
DISTRICT SCHOOL BOARD	)	Environmental Law Association
	)	
Defendants	)	Robert V. Wright
(Respondent)	)	for the intervener, Friends of the
	)	Earth
	)	
	)	Heard: May 30, and June 3, 2005

On appeal from the order of the Divisional Court dated February 6, 2004 and costs order dated July 19, 2004 (O'Driscoll, Then and MacKenzie JJ.), dismissing an appeal from the orders of Nordheimer J. dated July 16, 2002 and September 9, 2002.

ROSENBERG J.A.:

[1] In this appeal, the court is called upon to consider whether a class proceeding is a suitable vehicle in an environmental case. In *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere* (2000), 201 D.L.R. (4th) 385 (S.C.C.) at para. 26, McLachlin C.J.C. wrote that the class action plays an important role in today's world. She noted that pollution cases may be especially suited to class proceedings. As she said, "Environmental pollution may have consequences for citizens all over the country." But, in *Hollick v. Toronto* (2001), 205 D.L.R. (4th) 19, the Supreme Court of Canada upheld the dismissal of an application to certify an environmental action as a class proceeding under the *Class Proceedings Act,* S.O. 1992, c. 6, the "*CPA*"). Speaking for the Court at para. 37, McLachlin C.J.C. reiterated that in a proper case an environmental claim could be pursued through a class proceeding:

> While the appellant has not met the certification requirements here, it does not follow that those requirements could never be met in an environmental tort case. The question of whether an action should be permitted to be prosecuted as a class action is necessarily one that turns on the facts of the case. In this case there were serious questions about preferability. Other environmental tort cases may not raise the same questions. Those cases should be decided on their facts.

[2] From 1918 to 1984 Inco operated a refinery in Port Colborne that processed nickel. Over that 66-year period the refinery spewed tons of nickel oxide into the environment. It is alleged that this nickel oxide contaminated the Port Colborne environment, especially a low-income area adjacent to and downwind from the refinery

known as the Rodney Street area. Mr. Pearson, the proposed representative plaintiff, lives in the Rodney Street area. In September 2000, the provincial Ministry of the Environment released a report stating that Inco had discharged contaminants into the natural environment that posed a risk to the natural environment and to human health for some of the residents of Port Colborne. The appellant says that the release of this report had a serious impact upon property values in the Port Colborne area. He seeks to have this action certified as a class proceeding on behalf of the former and present property owners of much of Port Colborne. He says that this is the kind of case that falls within the words of McLachlin C.J.C. in *Hollick*. I agree. I would, therefore, allow the appeal.

[3] Nordheimer J. case managed this action and is an experienced class proceedings judge. His reasons for decision can now be found at [2002] O.J. No. 2764, 33 C.P.C. (5th) 264. I will make frequent reference to his thorough reasons. His decision refusing to certify this action as a class proceeding is entitled to considerable deference. However, there have been two important developments since his decision that in my view dictate that the decision be overturned. First, the appellant has significantly narrowed his claim to damages for the devaluation of real property values arising from soil contamination. The claim before the motion judge was much broader and included sweeping claims for damages from the alleged adverse health effects from nickel oxide contamination. Second, in December of 2004, this court released its decision in *Cloud v. The Attorney General of Canada* (2004), 247 D.L.R. (4th) 667. That decision suggests a somewhat more liberal approach should be taken to certification of class proceedings. These two

developments drive my decision to find that this action should be certified as a class proceeding.

THE FACTS

[4] As the appellant's claim was originally framed, this was a wide-ranging action that alleged various forms of damage. The appellant also named many other defendants besides Inco, including Her Majesty the Queen in right of Ontario, the Corporation of the City of Port Colborne, the Regional Municipality of Niagara, the District School Board of Niagara and the Niagara Catholic District School Board. The appellant and the school board reached a resolution of the matter prior to the certification motion and they did not participate in the motion. The motion judge found that there was no reasonable cause of action against the City or the Region and the appellant did not appeal that finding. The appellant settled the case against the Crown prior to the hearing of this appeal. As a result, only Inco responded in this court and I will limit my discussion of the facts to those that concern the claim against Inco.

[5] For 66 years the Port Colborne refinery operated by Inco emitted nickel oxide into the natural environment until the refinery ceased producing nickel in 1984. The appellant asserts that this substance is toxic and has affected the physical and emotional health and well being of the residents of Port Colborne. The appellant also asserts that the nickel oxide has caused widespread damage to the lands, homes and businesses in Port

Colborne. The impact is said to be particularly severe for the residents of the Rodney Street area.

[6] The appellant asserts that the nickel contamination in Port Colborne is significantly higher than elsewhere in Ontario and soil sampling in some locations shows extremely high levels of contamination. The appellant claims that the Inco Refinery in Port Colborne is the source of this nickel contamination. While Inco appears to accept responsibility for release of nickel oxide into the environment, the appellant claims that the company denies responsibility for high levels of contamination found inside the homes and five centimetres below the ground surface (where most of the contamination is now found). The appellant's and Inco's experts agree that at least 20,000 tonnes of nickel have been deposited by Inco across Port Colborne and that most, if not all, of the nickel is likely nickel oxide. Nickel oxide is classified by the federal government as a Group One-Carcinogenic to Humans toxic substance, meaning that there is a direct causal relationship between exposure to nickel oxide and cancer in humans, and that the risk of cancer exists at any level of exposure.

[7] In the original claim, the plaintiff also alleged that subsurface operations by Inco involved the taking of water for refining operations. Inco's attempts to control the migration of contaminants from its property have led to settling and subsidence, causing damage to homes and related structures.

[8] The event that triggered this lawsuit was an announcement in September 2000 by the Ministry of the Environment ("MOE") informing the public of high levels of contamination in Port Colborne. The appellant claims that house sales in the Rodney Street neighbourhood have dropped, that mortgage financing has become difficult and that house prices have dropped compared to other areas in the Niagara Peninsula. The appellant attributes the impact on property values to the 2000 MOE announcement.

[9] Approximately 1,000 people live in the Rodney Street area and approximately 18,500 people live in Port Colborne. The homes in the Rodney Street area are very modestly priced and the owners tend have limited incomes; many are elderly and on fixed incomes or are unemployed or underemployed.

[10] The appellant claims that since the 2000 MOE announcement, "house prices in the Rodney Street area have declined by approximately forty-five percent when compared to those in other parts of Port Colborne, Fort Erie and Welland. House prices across the balance of the east side of Port Colborne have also declined by more than ten percent" and on the west side by two to three percent. (Reasons of motion judge at para. 23).

[11] As I mentioned, the appellant's action as originally framed, and for which he sought certification, embraced the whole spectrum of potential losses, including health effects. The original claim also concerned contamination by other substances that the appellant claimed were emitted from the Inco refinery. A brief excerpt from the statement of claim will show the breadth of these complaints:

(a) short term and long term exposure to substances including but not limited to the carcinogen oxidic nickel, copper, cobalt, chlorine, arsenic, zinc and lead, leading to irritation and inflammation of the skin, eyes, nasal passages and lungs, coughing, choking, inability to breathe, burning sensations in the chest and abdomen, nausea, vomiting, headaches, dizziness, collapse, loss of consciousness, loss of impairment of the senses of smell and taste, loss of appetite, swelling of exposed areas, pain and suffering, loss of income, impairment of earning ability, future care costs, medical costs, loss of amenities and enjoyment of life, anxiety, nervous shock, mental distress, emotional upset, and out of pocket expenses, and;

(b) short term and long term exposure to, but not limited to, oxidic nickel, copper, cobalt, chlorine, arsenic, zinc and lead, which exposure has led and will continue to lead to long term health consequences, including but not limited to increased risks of cancer and lung disease. As a result of this exposure, some Class members have already, and others will continue to experience needless illness, loss of amenities and enjoyment of life, and will die premature deaths.

[12] The appellant also pleaded damages for *Family Law Act*, R.S.O. 1990, c. F-3 claims because of the effects of the contaminants on the relatives of the Port Colborne residents. The appellant has since modified the claim, limiting it to the decrease in property values that followed the 2000 MOE announcement.

[13] As indicated, Inco does not deny that its refinery is the source, or at least the primary source, of the nickel oxide. It disputes that it has any responsibility for many of the other contaminants such as arsenic and lead. It claims that most of the nickel emissions occurred before 1960 and emissions since 1984 have been negligible. It points

out that the MOE has been monitoring the facility for many years and has been doing tests of air and soil in the area since the 1970's. In 1999, the MOE undertook a study designed to augment earlier samplings of nickel and other contaminants in Port Colborne area surface soils. The study produced a map showing approximate areas and patterns of contamination. There is considerable variation in contaminant levels as they exist at the various locations within the geographical boundaries proposed for the class.

[14] While Inco accepts responsibility for nickel oxide contamination in the Port Colborne area, it disputes the fundamental claim by the appellant as to the impact of the contamination on property values. To quote from the respondent's factum, "The issue of Inco's emissions in Port Colborne is an old and very public one." It therefore disputes the appellant's claim that the 2000 MOE announcement caused the decline in property values. In fact, Inco has produced expert evidence suggesting no impact on property values from the announcement. It adduced expert evidence showing that the largest increase in Port Colborne average sale prices occurred after September 2000; even in the Rodney Street area there was a positive impact on sale prices. Inco criticizes the methodology used by the appellant's expert who reached the opposite conclusion.

[15] Inco denies that there is proof of any adverse health effects in Port Colborne attributable to nickel and it denies that there is any scientific evidence that nickel in any form in the levels found in Port Colborne has ever caused cancer.

[16] Inco takes the position that the existence and extent of impacts on residential property values can only be determined through a case-by-case assessment. It says that property values are affected by a myriad of factors. Further, even if a causal link could be established between any one environmental factor and property values, the impact on any one property would have to be determined by an individual assessment. It submits that the largest claims would be expected to come from agricultural property. It would be extremely difficult to prove any effect on crops from any particular contaminant.

[17] Inco points out that it has agreed to participate in the Community Based Risk Assessment process that was initiated before the appellant made his claim. To benefit from the CBRA a resident of Port Colborne does not have to establish legal liability, show that the contaminants originated with Inco, show any harm or damage or meet judicial standards of proof. Rather, Inco will perform the necessary remediation on a "no questions asked" basis depending on the results from the scientific model and individual property characteristics. According to Inco's experts, such remediation efforts have been very effective in the United States in eliminating property value impacts caused by environmental contamination or the publicity surrounding it.

[18] Inco submits that the appellant has entirely recast his case to make it suitable for certification as a class proceeding. It submits that while the appellant's focus is now on property values rather than the actual level of contamination, this claim was not to be found in the statement of claim that was before the motion judge. It also submits that the

attempt to tie the diminution in value of the properties to the 2000 MOE announcement is simply an attempt to avoid limitation period problems that would otherwise arise from the fact that pollution from the Inco facility was well known for decades.

THE FINDING OF THE MOTION JUDGE

[19] Section 5(1) of the *CPA* sets out the prerequisites for certification of a class action. They may be summarized as follows:

(a) the pleadings disclose a cause of action;

(b) there is an identifiable class;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for resolution of the common issues; and

(e) there is a representative plaintiff.

(a) Cause of Action

[20] The motion judge noted that Inco conceded that the Fresh as Amended Statement of Claim disclosed reasonable causes of action against it. All the other prerequisites were in issue on the certification motion.

(b) Identifiable Class

[21] Before the motion judge, the identifiable class was defined as "all persons owning or occupying property since March 26, 1995 within the area of the City of Port Colborne bounded by Lake Erie to the south, Neff Road/Michael Road to the east, Third Concession to the north and Cement Road/Main Street West/Hwy 58 to the west." The boundaries were marked on a map of Port Colborne. The motion judge found, at para. 100, that this geographic definition of the proposed class had the effect of "arbitrarily both including and excluding areas where the soil contains the same level of nickel of which the plaintiff complains". He also found, at para. 101, that the temporal component was arbitrary since it could exclude persons who had suffered harm but had moved away before 1995. The appellant chose the temporal requirement to avoid problems of limitation periods. However, this merely highlighted the arbitrary nature of the class definition since a person who only recently discovered the facts necessary to found a claim could have a valid claim despite the *Limitations Act*, S.O. 2002, c. 24, Sch. 8. Accordingly, the appellant failed to meet the identifiable class requirement.

(c) Common Issues

[22] The appellant identified ten common issues relating to Inco. The motion judge found that the appellant had met the common issues requirement in relation to Inco. The common issues as framed before the motion judge that applied to Inco were as follows:

(i) Were the contaminants arsenic, chlorine, cobalt, copper, lead, nickel and zinc (the "Contaminants of Concern) discharged by Inco?

(ii) How widespread is the distribution of the Contaminants of Concern?

(iii) At what level do the Contaminants of Concern pose risks to the natural environment or to human health, or both?

(iv) Did Inco owe a duty of care to the class to prevent the ongoing discharge of the Contaminants of Concern, and if so, what duty was owed?

(v) What was the appropriate standard of care that Inco had to meet with respect to preventing the ongoing discharge of the Contaminants of Concern?

(vi) Did Inco breach the standard of care referred to in [(v)] above?

(vii) Did the ongoing discharge of the Contaminants of Concern by Inco amount to a public nuisance?

(viii) Did the ongoing discharge of the Contaminants of Concern by Inco amount to a trespass?

(ix) Is Inco strictly liable to the class for ongoing discharge of Contaminants of Concern as a result of failure to prevent the escape of dangerous substances (*Rylands v. Fletcher*)?

(x) Does the defendants' conduct justify an award of punitive damages to the class, and if so, what amounts of punitive damages is appropriate?

[23] Although the motion judge found that as against Inco the appellant had met the common issue requirement, he added a caveat at para. 108 because of the complexity of the issues:

> It would be fair to say that the proposed common issues relating to Inco would still pass the test as common issues, that is, they are all issues that would be common to each class member's claim and whose determination in favour of the representative plaintiffs would mark success for each member of the class. As I will point out later when I deal with the issue of preferable procedure, the fact that these issues are common does not in any way reduce the extreme complexity that will be involved in resolving those issues.

[24] Although the appellant succeeded before the motion judge on the question of common issues, I will revisit that question below. It is necessary to do so because the appellant has so significantly narrowed his claim. By doing so, the appellant stripped out some of the complexity but he has also reduced the number of common issues. For example, (iii) obviously is no longer in issue. It is not possible to reach a conclusion on preferable procedure without having a clear understanding of the common issues.

(d) Preferable Procedure

[25] The motion judge analyzed the question of preferable procedure by reference to the three accepted goals of a class proceeding: judicial economy, access to justice and behaviour modification.

(i) Judicial economy

[26] The motion judge found that a class proceeding would not advance the goal of judicial economy because the answer to the common issues would be "of no more than theoretical interest until the particular factual circumstances of each individual claimant is examined" (at para. 118). This is because

> the process of determining whether a causal link exists for any given class member with respect to any given allegation of harm is extensive and very much individualized. Given the wide variety of harm alleged and the size of the proposed class, [the] class proceeding [would] quickly become unmanageable because it would inevitably disintegrate into the need for thousands of individual trials with potentially tens, if not hundreds, of thousands of individual issues to be resolved (para. 119).

For example, each of the 20,000 members of the class would have to be examined for discovery. The motion judge noted that the exposure of the claimants to the contaminants was central to the claims but this could only be determined on an individual basis. Further, there would need to be an examination of each person's health history, occupation, habits and so on. It would be necessary to know the degree of concentration of any contaminants found in the person's yard and home. The evidence demonstrated that there was considerable variation in contaminant levels. The motion judge found that, accordingly, this case was similar to *Hollick*, where the Supreme Court of Canada held that an environmental claim should not be certified as a class proceeding.

[27] The motion judge dealt directly with the question of property value, which is now central to the appellant's application for certification, at paras. 122 and 123:

> In addition, individual issues would manifest themselves as to whether the presence of any contaminants affect property value and prices and, if so, to what extent. The plaintiff put forward evidence from certain real estate agents regarding a downward trend in housing prices in Port Colborne over the past few years. Inco put forward the opinion of a real estate economist who detailed the different factors that go into the value of any given house. He also reviewed recent sales information for the Port Colborne and surrounding areas and concluded that the data did not support a view that overall property values were adversely affected by the public announcement concerning contaminants that occurred in September 2000. In addition, he observed that, even if a property value impact can be shown and causally linked to a particular environmental factor to the exclusion of all others, a further individualized analysis is required to determine the actual economic effect such an impact had on the individual property owner. The existence of any gain or loss depends upon, among other things, when a property owner bought, sold, and/or refinanced his home and the knowledge or perception of the parties at the time of the various transactions.
>
> I do not propose to review the evidence that was offered by both sides regarding the impact on property values in any greater detail. It is sufficient to say that property values are impacted by a wide variety of factors. For example, they may be affected by the quality of schools available, the presence of criminal activity, heavy traffic, other industrial pollution, proximity to transit, restaurants, shopping malls, entertainment, and so on. Further, even if environmental concerns can be demonstrated to have adversely affected property values, whether that translates into an actual economic impact on any given home owner can only be determined on a case-by-case analysis given the myriad of other factors that go into determining actual property value. The issue of lost property value, which may form the bulk of

> the smaller claims advanced, alone demonstrates the enormous complexity and individualized nature of the inquiries that would be left once any common issues are determined.

[28] The motion judge noted that this was a particular problem in considering the agricultural-related losses. The appellant presented no evidence as to how those claims might be valued. Inco's evidence demonstrated that the process would be extremely complex and highly idiosyncratic.

[29] In the result, the motion judge concluded that if "[the] action were certified as a class proceeding, it would quickly become unmanageable" (at para. 128).

(ii) Access to justice

[30] The motion judge reached a similar conclusion with respect to the goal of access to justice. He agreed with the appellant that the CBRA programme "standing alone" would not be a viable alternative to a class proceeding since the CBRA does not provide compensation. However, the CBRA had to be seen "as part of the available alternative procedures, in conjunction with other alternatives such as joinder, test cases and the like" (at para. 131). The motion judge was also concerned about the premature or precipitous determination of claims. Since the individual class members would be required to prove their own individual claims, the trial of these claims would present substantial issues of risk and expense. Some members of the class might not be prepared to pursue their claims at the time dictated by the class proceeding timetable. This could be unfair for

claimants whose disease and condition might not manifest until some time in the future. As the motion judge said at para. 132:

> In other words, given the nature of the claims and the substantial individual commitment required of class member to prosecute them to conclusion, some of the proposed class members would appear to have a substantial interest in controlling their own litigation.

(iii) Behaviour modification

[31] Finally, the motion judge concluded that certifying the action as a class proceeding would not achieve the goal of behaviour modification. Inco's activities in Port Colborne were the object of active involvement by the MOE and its operations were subject to orders from the MOE and might well be in the future. Furthermore, Inco had made commitments to remedy some of the problems caused by the refinery and had funded the CBRA. According to the motion judge at para. 133:

> In other words, the modification of behaviour, insofar as that can occur, has already begun. Certification of this action as a class proceeding will not materially add to it. Indeed, it might have the opposite effect in that it might cause Inco to become less co-operative which in turn would only prolong the process towards an overall remedy.

[32] The motion judge also noted that in *Hollick*, the Supreme Court held that when dealing with environmental concerns other statutory avenues of redress are available and should be taken into account. These other avenues not only included the CBRA process

and the MOE involvement but access to the regulatory regime under the *Environmental Protection Act*, R.S.O. 1990, c. E-19, and the Environmental Review Tribunal.

[33] Thus, the motion judge concluded that a class proceeding is not the preferable procedure for the resolution of the identifiable common issues.

(e) Representative Plaintiff

[34] Section 5(1)(e) of the *CPA* provides that it must be shown that the representative plaintiff:

> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of the other class members.

The motion judge held that the appellant had not satisfied any of these requirements.

[35] The motion judge found that the ability of the representative plaintiff to bear the costs that would be necessary for the proper prosecution of the class action was an important consideration. The motion judge was also concerned that various cost orders had not been paid until the eve of the certification motion. He said, at para. 141, that this "raises a concern about the financial resources which the representative can bring to bear

in the prosecution of this action especially given that this litigation will be complicated, time consuming and expensive". The motion judge considered the appellant's description of his financial arrangements, such as seeking funding through public donations, private contributions, corporate donations and through legal counsel, to be vague. In his view, absent a commitment from the Class Proceedings Committee to provide funding, the representative plaintiff must have "concrete and specific alternative funding arrangements in place and [must] provide the specifics of those arrangements in the certification material" (at para. 143). The motion judge did note the "Catch 22" problem with this position in that the Committee will only consider an application for funding after a statement of defence has been filed despite the fact that defendants often withhold filing a statement of defence until after the issue of certification is resolved.

[36] The motion judge was also of the view that the litigation plan was not sufficient as it was "long on generalities and short on specifics" (at para. 144). In particular, he stated:

> It does not address issues such as the experts that will be used, what investigations have been or are to be undertaken, witness interviews to be conducted, how documents are to be managed and, most importantly, how the myriad of individual issues that will remain, after the common issues are resolved, are going to be addressed. While some of the elements that are missing from the actual plan, such as the experts to be used, can be found from a review of the affidavit of Wolfgang Kaufman, filed on behalf of the plaintiff, I believe that a proper litigation plan should incorporate all of the required elements within the four corners of the plan itself.

[37] The motion judge was also concerned that the appellant might have a conflict with other members of the proposed class. The appellant was a resident of the Rodney Street area and likely had an interest in pursuing the claims "in a much more aggressive fashion" than other residents less affected by the contamination. Or as he said at para. 146:

> Put another way, those individuals who live in areas where the level of contamination is much lower, and who would, as a result, more likely have very small claims, might well be amendable to a resolution of those claims of a much different character than would the individuals with the larger claims. It seems to me, therefore that there is an obvious potential for conflict between these two groups.

[38] The motion judge pointed out that this was not simply a hypothetical concern. The appellant filed an affidavit that was highly critical of the Public Liaison Committee. The City of Port Colborne established the PLC as part of the CBRA process. It is composed of residents of the city and "[i]ts role is to solicit public input, inform the public, monitor the progress of the CBRA and provide input to Inco and the MOE" (at para. 79). A resident of Port Colborne who supported the work of the PLC came forward to dispute the allegations in the affidavit filed on behalf of the appellant but was rebuffed by the appellant's counsel. He therefore went to the City, which was then a defendant, and the City filed his affidavit as part of its material. The motion judge was of the view that the divergence in views expressed in the two affidavits "amply demonstrate[d] the potential for conflict among members of the proposed class going forward" (at para. 147).

[39] The motion judge did not believe that the problems with the litigation and potential for conflict could be dealt with after certification. He adopted a principle from *Southwestern Refining Co. v. Bernard*, 22 S.W.3d 425 (Tex. 2000) at 435: "we reject this approach of certify now and worry later."

[40] Accordingly, the motion judge dismissed the motion for certification. The appellant appealed to the Divisional Court.

REASONS OF THE DIVISIONAL COURT

[41] Writing for the Divisional Court, in reasons now reported at 183 O.A.C. 168, 6 C.E.L.R. (3d) 117, 44 C.P.C. (5th) 276, Mackenzie J. noted that the appellant was putting forward a very different case than the case that faced the motion judge. He had deleted the allegations respecting health hazards and limited the claim for damages to the devaluation of real property arising from contamination of the soil as a result of Inco's nickel refining operation. While Inco objected to the recasting of the certification motion, the Court was satisfied that there was no prejudice and that the appeal should be considered on its merits.

[42] The Divisional Court held, however, that the change in the nature of the claim did not detract from the thrust of the observations made by the motion judge about the identifiable class and preferable procedure requirements. It took the view that grounding the class in a geographic definition based on a guideline for background levels of nickel

oxide was irrational and arbitrary (at para. 31). It held, in effect, that even when the claim was limited to diminution of property values, individual issues would overwhelm any common issues. The Court was also of the view that the appellant had not put forward any methodology appropriate to establish loss on a class wide basis. In summary, the Court found no error by the motion judge "on the criteria dealing with the class definition, regarding the common issues being overwhelmed by the individual claims and defences, and considering the preferable procedure requirement and advancing the ... objectives of the *CPA*" (at para. 36), nor was there a reversible error in the motion judge's reasons as they applied to the narrowed claims put before the Court.

ANALYSIS

[43] The decision of the motion judge on a certification motion is entitled to substantial deference. The judges hearing these motions have developed a special expertise. Furthermore, the judges have often case-managed the proceedings and are therefore especially familiar with the factual context, as was the motion judge in this case. The decision as to preferable procedure is, in my view, entitled to special deference because it involves weighing and balancing a number of factors. In *Caputo v. Imperial Tobacco Ltd.*, [2005] O.J. No. 842 (Sup. Ct. J.) at para. 29, Winkler J. described the consideration of whether a class proceeding is the preferable procedure for determining the common issues as "a matter of broad discretion". As such, the reviewing court will intervene

where the judge has made a palpable and overriding error of fact or otherwise erred in principle. Any errors of law are, however, reviewable on the correctness standard.

[44] However, in my view, less deference is owed to the decision of the motion judge in this case for the two reasons previously identified. The factual context has changed dramatically because the appellant has substantially narrowed the claim and there has been a shift in the legal landscape as a result of this court's decision in *Cloud*.

(a) Causes of Action

[45] While the cause of action requirement for certification is not directly in issue, it is important to properly identify the appellant's claim against Inco. The appellant has framed his claim in nuisance, negligence, trespass and strict liability in accordance with the doctrine in *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330.

[46] With respect to negligence, the appellant claims at para. 31 of the Fresh as Amended Statement of Claim that Inco owed a duty of care to the persons living within close proximity of the refinery because it knew or ought to have known that a lack of sufficient care would cause damage to the class members. The claim sets out the various acts of negligence, such as the failure to provide adequate safety equipment or procedures to prevent the release of contaminants from the refinery and detect the release of contaminants, failure to warn class members of known hazardous emissions and failure to comply with specific statutory obligations under s. 14 of the *Environmental Protection*

Act by causing contaminants to be discharged into the natural environment that have resulted in adverse effects.

[47] Inco takes the position that in framing the causes of action in the way that he did, the appellant is attempting to complicate the basis of liability. In this way, the appellant has artificially inflated the number and complexity of the common issues to make the action appear ripe for certification as a class proceeding. Inco submits in this court that its basis of liability is simple and straightforward given the doctrine in *Rylands v. Fletcher*. Inco appeared to concede that if nickel escaped from its property, and it clearly did, it is liable and the only real issue is damages, which will require individual assessments.

[48] In effect, the appellant has done the opposite of what the plaintiff did in *Rumley v. British Columbia* (2001), 205 D.L.R. (4th) 39 (S.C.C.) where the plaintiffs elected to limit their allegations to systemic negligence without reference to the circumstances of any individual class member. The election to limit the allegations may have made the individual component of the proceedings more difficult in *Rumley*. It would be easier for any given complainant to show causation if the established breach were that the defendant residential school had failed to address her own complaint of abuse. However, McLachlin C.J.C. agreed at para. 30 with the British Columbia Court of Appeal that the plaintiffs in *Rumley* were "entitled to restrict the grounds of negligence they wish to advance to make the case more amenable to class proceedings if they choose to do so".

[49] Inco's point is well taken. The appellant cannot broaden the grounds of liability to make a simple case appear complex to give the illusion that the case is suitable for certification. However, it is not clear that the appellant has done so in this case. The appellant is entitled to plead bases for negligence in the alternative. Inco has not yet pleaded to the claim. The appellant had no reason to assume that Inco would admit liability in accordance with the *Rylands v. Fletcher* doctrine.[1] In considering whether the appellant has met the preferable procedure requirement, the court must look to what is really in issue in the case. If based on what is truly in dispute the common issues are relatively unimportant, a class action will not be the preferable procedure and the action should not be certified.

[50] Inco also strongly contests the basis for the cause of action. It says that the evidence fails to demonstrate any connection between the 2000 MOE announcement of elevated nickel contamination and property values. Inco also says that this damage theory was advanced for the first time in this court; that the appellant is recasting its case and that this theory of liability was not pleaded anywhere in the appellant's statement of claim.

[51] There is no doubt that the appellant's theory of liability has evolved in an attempt to make the action more amenable to certification. I do not think it is correct, however, to

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[1] I assume, as appears to be the case, that the *Rylands v. Fletcher* doctrine has not been totally subsumed in Canada by negligence or nuisance. See G.H.L. Fridman, *The Law of Torts in Canada* 2d 3d. (Scarborough: Carswell, 2002) at 218.

say that this theory has not been pleaded. It seems to me that paragraph 24 of the Fresh as Amended Statement of Claim adequately captures the theory presented to this court:

> 24. The ongoing discharge of contaminants (including known carcinogens) and other activities at the Refinery, and the failure of the defendants to take proper or appropriate steps to prevent or minimize the effects of these contaminants and activities, has resulted in (but is not limited to) the following types of losses or injuries to property:
>
> ...
>
> (b) loss of value of property owned, occupied or used by Class Members, including the complete devaluation of certain properties, and loss of the ability to sell, finance or mortgage numerous properties.

[52] The appellant was only required to plead the facts upon which he relies, not the evidence, such as the 2000 announcement by the Ministry. There is no question that there is a conflict in the evidence about whether the 2000 MOE announcement did have an effect on property values. Inco says that its superior expert evidence shows that there is no connection. That is an issue for trial. Evidence is not admissible on the question of whether there is a cause of action pleaded within the meaning of s. 5(1)(a) of the *CPA*. See *Gariepy v. Shell Oil Co.* (2002), 23 C.P.C. (5th) 360 (Ont. Sup. Ct. J.) at paras. 34 – 37, *Markson v. MBNA Canada Bank* (2004), 71 O.R. (3d) 741 (Sup. Ct. J.) at para. 27, and *Macleod v. Viacom Entertainment Canada Inc.* (2003), 28 C.P.C. (5th) 160 (Ont. Sup. Ct. J.) at para. 5.

(b) Identifiable Class

[53] The motion judge and the Divisional Court held that the proposed class was arbitrary, both geographically and temporally. The main concern was that the proposed class was under inclusive; I will deal first with the motion judge's treatment of this issue and then treatment by the Divisional Court.

[54] The approach by the motion judge was largely a product of the nature of the claim as it was presented to him. He pointed out that using geographic boundaries to define the class had the effect of "arbitrarily both including and excluding areas where the soil contains the same levels of nickel of which the plaintiff complains" (at para. 100). Now that the claim has been limited to the decrease in property values, irrespective of actual levels of nickel oxide, the basis for a finding of geographical arbitrariness disappears. In light of *Hollick*, as discussed below, it is open to a plaintiff to define the class by using geographical boundaries notwithstanding that of necessity there will always be an element of arbitrariness in doing so.

[55] At the appeal before the Divisional Court, the appellant had narrowed his claim. The Divisional Court, however, did not take this change into account in their reasons. Rather, they adopted the position of the Crown, which was still a party before the Divisional Court, that "grounding of a class definition upon a MOE guideline number for background levels of nickel is itself irrational and arbitrary" (at para. 31). As reconfigured, the claim does not depend on nickel concentrations on the property of the

proposed class members, but whether their property values decreased because of the 2000 MOE announcement. In view of this error, it is open to this court to determine whether the identifiable class requirement has been met.

[56] In my view, the appellant has met the identifiable class requirement. The appellant has defined the class by objective criteria. As in *Hollick* at para. 17, "a person is a member of the class if he or she owned ... property inside a specified area within a specified period of time. Whether a given person is a member of the class can be determined without reference to the merits of the action." Again, to use the words of *Hollick* at para. 17, "while the appellant has not named every member of the class, it is clear that the class is bounded (that is, not unlimited)." The class definition was slightly refined before this court as follows:

> All persons owning property since March 26, 1995 within the area of the City of Port Colborne bounded by Lake Erie to the south, Neff Road/Michael Road to the east, Third Concession to the north and Cement Road/Main Street West/Hwy 58 to the west, or where such person is deceased, the heir(s), executor(s), administrator(s), assign(s) or personal representative(s) of the estate of the deceased persons.

[57] That the class can be defined by objective criteria does not fully determine the identifiable class issue. The appellant must also show a rational relationship between the class and the common issues. In *Hollick*, at para. 21, McLachlin C.J.C. held that this requirement is not an onerous one, all that is required is "some showing" that the class is not "unnecessarily broad".

[58] *Hollick* involved an environmental claim arising from the operation of the Keele Valley landfill. The plaintiff claimed damages for noise and physical pollution and defined a geographical area comprising 30,000 people. In that case, the Court found that the fact that there were several hundred complaints from different parts of the area over a ten-year period satisfied the requirement of showing some rational relationship between the class and the common issues. It is apparent that the Court did not apply the unnecessarily broad requirement very strictly if all that was required was a showing that approximately two percent of the proposed class had complained.

[59] In this case, the appellant has produced evidence that property values in the defined area have declined after the 2000 MOE announcement. That is sufficient to show that the class is not unnecessarily broad. While Inco disputes the value of the appellant's evidence, and has provided evidence to show that property values have not declined and indeed have kept pace with property values in other parts of the Niagara region, that factual dispute is a matter for trial. It is not to be resolved at the certification stage where all that is required is some showing of a relationship between the proposed class and the common issues.

[60] I am also satisfied that the identifiable class requirement was met despite the finding by the motion judge that the proposed class definition was under inclusive. The motion judge reasoned that just as the class should not be unnecessarily broad, "the corollary is also true and that is that the class should not be defined in a manner that

includes individuals with claims while at the same time arbitrarily excluding others who have the same claims" (at para. 100). The motion judge found the class was under inclusive because the evidence showed comparable amounts of contamination outside the defined area. With the change in the nature of the claim this rationale no longer applies. The Divisional Court did not specifically address this issue.

[61] The principle that a proposed class should not be under inclusive must be approached with considerable caution. If this principle were applied too strictly, few environmental claims could ever be certified as class proceedings. The very nature of pollution is that its effects are often widespread and diffuse. Air and water contamination rarely, if ever, stop at fixed boundaries. It seems counterintuitive that Inco can defend against the certification motion by showing that it managed to contaminate an even wider area than that proposed by the appellant. The appellant submits that as a result of the 2000 MOE announcement that Port Colborne properties had higher than expected nickel oxide contamination, property values in Port Colborne declined. Limiting the class to Port Colborne is logical and reasonable. I note that there was no suggestion in *Hollick* that the identifiable class in that case was under inclusive despite the obvious point that the noise and air pollution could not have stopped at any precise boundary.

[62] Finally, the identifiable class requirement was met despite the temporal limitation. In this case, the appellant has chosen a date to avoid limitation period issues. The motion judge was concerned that this definition was arbitrary because individuals who formerly

lived in Port Colborne prior to March 1995, but who only discovered the facts necessary to found a claim after that date, might have a valid claim but would be excluded from the proposed class. However, since the complaint has been refined to the reduction in property values, the temporal limitation is no longer a concern. There is now a logical connection between the claim and the definition of the class since the appellant now seeks to certify a class of owners whose property values appear to have been directly impacted by the 2000 MOE announcement of high levels of nickel on their lands. People no longer owning the land when the announcement was made can have no claim. It follows, of course, that the class definition must be further refined to limit the class to persons owning property since September 20, 2000 when the announcement was made. That announcement and the damage to property values resulting from the disclosure of Inco's contamination of the Port Colborne property has become the sole focus of the claim. People who owned lands before this date might well have a claim against Inco from the alleged contamination, but that is not the claim encompassed by this proposed class action. As indicated, it is not a legitimate complaint that the appellant has chosen to define the class in a way that makes the claim more amenable to certification. See *Rumley, supra* at para. 30.

[63] Finally, in any event, it is now clear as a result of this court's decision in *Cloud, supra* at paras. 61, 81-82 and 95, that the possibility of individual limitation defences and discoverability issues does not necessarily negate a finding that the case is suitable for certification.

(c) Common Issues

[64] By the time the case reached the Divisional Court, the appellant had recast the common issues in the following manner:

> **A. COMMON ISSUES OF FACT**
>
> 1. (a) Is Inco the source of the elevated levels of nickel found on class members' lands?
>
> (b) Did nickel contamination (from atmospheric deposition or fill) in the Rodney Street Area originate from Inco?
>
> 2. Is there sufficient evidence to establish, without individual testing, that all class members' lands have been contaminated with nickel in excess of 43 ppm?
>
> 3. Is there sufficient evidence to establish, without individual testing, that class members' lands initially contained levels of nickel below or at 43 ppm and that no source other than Inco has significantly added to this level of nickel?
>
> 4. Can class members' claims for property damages be assessed by group or area and, if so, what is the quantum of damages?

B. COMMON ISSUES OF LAW REGARDING INCO

5. Did Inco owe a duty of care to the class to prevent the ongoing discharge of nickel and, if so, what duty was owed?

6. What was the appropriate standard of care that Inco had to meet with respect to preventing the ongoing discharge of nickel?

7. Did Inco breach the standard of care referred to in issue 6 above?

8. Did the ongoing discharge of nickel by Inco amount to a public nuisance?

9. Did the ongoing discharge of nickel by Inco amount to a trespass?

10. Is Inco strictly liable to the class for the ongoing discharge of nickel as a result of a failure to prevent the escape of a dangerous substance (*Rylands v. Fletcher*)?

...

C. PUNITIVE DAMAGES

14. Did the defendants' breach of conduct justify an award of punitive damages to the class, and if so, what amount of punitive damages is appropriate?

[65] I did not understand Inco to dispute that there remained common issues despite the recasting of the claim. Inco does, as noted above, take the position that many of the common issues are of no real moment to the litigation because the case will stand or fall

on the *Rylands v. Fletcher* claim. That is a matter to be considered in discussing the preferable procedure. The common issue requirement is a "low bar" to certification: *Cloud, supra* para. 52. As Goudge J.A. wrote in *Cloud* at para. 53, "an issue can constitute a substantial ingredient of the claims and satisfy s. 5(1)(c) even if it makes up a very limited aspect of the liability question and event though many individual issues remain to be decided after its resolution". Further, as he wrote at para. 58, "the fact that beyond the common issues there are numerous issues that require individual resolution does not undermine the commonality conclusion. Rather, that is to be considered in the assessment of whether a class action would be the preferable procedure."

[66] In my view, despite the fact that the claim is now much narrower, the appellant has met the common issue requirement.

(d) Preferable Procedure

[67] In *Cloud*, at paras. 73-75 Goudge J.A. identified a number of principles that apply in determining whether the plaintiff has met the preferable procedure requirement. I would summarize them as follows:

> 1. The preferability requirement has two concepts at its core: first, whether the class action would be a fair, efficient and manageable method of advancing the claim; second, whether the class action would be preferable to other reasonably available means of resolving the claims of class members.

> 2. The analysis must keep in mind the three principle advantages of class actions: judicial economy, access to justice, and behaviour modification.
>
> 3. This determination requires an examination of the common issues in their context, taking into account the importance of the common issues in relation to the claim as a whole.
>
> 4. The preferability requirement can be met even where there are substantial individual issues; the common issues need not predominate over the individual issues.

[68] I will consider the three aspects of the preferable procedure requirement bearing in mind these principles.

(i) Judicial economy

[69] Inco submits that the resolution of this case is determined by the result in *Hollick* where the Supreme Court found that a similar environmental claim did not meet the preferable procedure requirement. In *Hollick, supra* at para. 32 McLachlin C.J.C. found that any common issues were "negligible in relation to the individual issues". This finding turned on the fact that "there [was] no reason to think that any pollution was distributed evenly across the geographical area or time period specified in the class definition". Thus, the plaintiff could not meet the judicial economy advantage of a class proceeding. It appears that the claim in *Hollick* was broadly framed, alleging that the air and noise pollution unreasonably interfered with the use and enjoyment of the class members' land. See the reasons of the Divisional Court in *Hollick* reported at (1998),

168 D.L.R. (4th) 760 para. 10 and reasons of this court reported at (1999), 181 D.L.R. (4th) 426. At paras. 22 and 23 of the reasons of the Court of Appeal in *Hollick*, Carthy J.A. said the following:

> This group of 30,000 people is not comparable to patients with implants, the occupants of a wrecked train or those who have been drinking polluted water. They are individuals whose lives have each been affected, or not affected, in a different manner and degree and each may or may not be able to hold the respondent liable for a nuisance. A trial judge dealing with liability as a common issue would immediately discover that there was no economy in the proceedings and that the trial would be unmanageable. Every incident complained of would have to be separately examined together with its impact upon every household and a conclusion reached as to whether each owner or occupier had been impacted sufficiently that a finding of nuisance is justified. To add to the already impossible task, complaints of odours are by their nature subjective and thus would have to be individually assessed in order to ascertain whether emissions from the respondent's site had materially affected each class member's enjoyment of property or caused personal discomfort justifying compensation.
>
> No common issue other than liability was suggested and I cannot devise one that would advance the litigation. An issue such as "Did the defendant emit pollutants into the atmosphere over a six-year period, and if so, when, and to what extent?" would result in a virtual Royal Commission into the operation of this landfill site without any measurable advance in the litigation. One could assume from the evidence of complaints that odours have escaped this site from time to time over the years. The issue is whether these odours caused sensible personal discomfort or interfered with the enjoyment of property to such an extent that the individuals affected are deserving of compensation.

[70] As the claim was originally framed in this case, a class proceeding would also not have the advantage of judicial economy. The individual claims of injury to health and related claims would dwarf the resolution of the common issues. With the narrowing of the claim that is no longer the case. The claim now concerns the single issue of reduction in property values. Inco argues, however, that even the resolution of this claim will require individual assessments since property values are highly idiosyncratic. But, that submission fails to meet the fundamental point of the appellant's claim. The appellant has staked his claim on the propositions that public knowledge of nickel contamination in the Port Colborne area has had a detectable impact on property values in that area and that as the source of the contamination, Inco must pay damages to owners whose property values have fallen. As the appellant put the issue in para. 22 of his factum, "what has been 'overlaid' on each property's value is a decline associated with the announcement of high levels of contamination". The appellant may or may not be able to demonstrate these propositions, but they constitute a substantial element of each class member's claim. If the appellant is able to demonstrate this effect, the only individual issue remaining will be for each class member to show the amount of the effect on his or her property. If the appellant is unable to demonstrate this connection, it would be open to the trial judge to decertify the action pursuant to s. 10 of the *CPA*.

[71] Framed in this way, the appellant's case resembles *Rumley* and *Cloud* rather than *Hollick*. Resolution of the common issues will determine the question of Inco's liability for the nickel oxide pollution and whether knowledge of that pollution impacted on

property values in the defined area. I would not describe resolution of these issues as negligible in relation to the individual issues. Even if Inco is right and the case does depend upon resolution of the *Rylands v. Fletcher* issue, that is not an inconsequential matter. To make out the strict liability claim based on that doctrine any plaintiff would have to show a non-natural use of land, the escape of something (here, nickel oxide) likely to cause mischief, and damage. As Goudge J.A. said in *Cloud*, at para. 86: "Without a common trial, these issues would have to be dealt with in each individual action at an obvious cost in judicial time possibly resulting in inconsistent outcomes."

[72] The result in *Rumley* is also instructive. *Rumley* involved alleged sexual, physical and emotional abuse at a residential school for children with disabilities. In *Rumley,* the court found that the preferable procedure requirement was met even though under the British Columbia legislation the common issues must predominate over those affecting only individual class members. As McLachlin C.J.C. said in *Rumley, supra* at para. 36:

> While the issues of injury and causation will have to be litigated in individual proceedings following resolution of the common issue (assuming the common issue is decided in favour of the class, or at least in favour of some segment of the class), in my view the individual issues will be a relatively minor aspect of this case. There is no dispute that abuse occurred at the school. The essential question is whether the school should have prevented the abuse or responded to it differently. I would conclude that the common issues predominate over those affecting only individual class members.

[73] The same can be said here. There is no dispute that the refinery emitted nickel oxide. The essential question is whether Inco is liable in tort for those emissions and whether the emissions affected property values of the class members. Just as injury and causation would have to be litigated in individual proceedings following resolution of the common issues in *Rumley*, so too will there have to be individual litigation of the relatively narrow issue of quantifying the effect on particular properties. Furthermore, the individual issues of injury and causation in *Rumley* would seem to me to be much more substantial than the individual issues that would remain in this case.

[74] As was said in *Cloud* at para. 84, "[t]his assessment is not quantitative so much as qualitative. It is not driven by the mere number of individual adjudications that may remain after the common trial."

[75] Inco also relies upon this court's decision in *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22. In *Chadha*, the plaintiff alleged that the manufacturers of iron oxide pigments had entered into an unlawful conspiracy to fix the price of the pigments, thus illegally increasing the price of bricks and paving stones that use the pigments. The plaintiff alleged that this increase in price had been passed through to purchasers of new homes. On the certification motion, a crucial issue was whether the loss component of liability could be proved on a class-wide basis. The plaintiff's expert simply assumed that increased cost had been passed on to consumers. There was no evidence to support that theory and no methodology suggested for proving it or dealing with the variables that

affect the end price. Therefore, proof of loss as a component of liability could not be a common issue. The only remaining common issues in the case were not sufficient to justify a finding that a class proceeding was the preferable procedure.

[76] There are clearly some similarities between *Chadha* and this case. Inco disputes that the 2000 MOE announcement concerning nickel contamination caused any loss to Port Colborne property owners and submits that property valuation is an idiosyncratic exercise dependent upon a large number of variables. Unlike *Chadha*, however, the appellant has adduced expert evidence to show a link between the 2000 MOE announcement and the decline in property values. That evidence purports to demonstrate a decline in property values in Port Colborne as compared to other comparable communities in the Niagara Region during the relevant time, and shows that the only relevant event during the time was the announcement about nickel contamination. While Inco disputes the value of this evidence, the certification motion is not the place for resolving that controversy. Contrary to the holdings by the motion judge and the Divisional Court this is not an example of "certify now and worry later." (See reasons of the motion judge at para. 148 and the Divisional Court at para. 34).

[77] If the appellant can prove that Inco is liable for the loss in value of the property there would then have to be individual assessments. But, this is not unusual in class proceedings. See *Cloud*, at para. 90. Alternatively, this may be a case for an aggregate assessment of damages as contemplated by s. 24 of the Act if the appellant can show that

every member of the class was adversely affected by the disclosure of the nickel pollution by Inco. See *Kranjcec v. Ontario* (2004), 69 O.R. (3d) 231 (Sup. Ct. J.) at paras. 63 and 64.

(ii) Access to justice

[78] In *Hollick*, the Supreme Court of Canada also found at para. 33 that allowing a class proceeding in that case would not serve the interests of access to justice in relation to the alleged pollution arising from the Keele Valley landfill site. The City of Toronto operated the site under a Certificate of Approval issued by the Ministry of the Environment. The Certificate required the City to establish a Small Claims Trust Fund of $100,000, administered by the Ministry of the Environment, to cover individual claims of up to $5,000 arising out of "offsite impact". See reasons of the Supreme Court of Canada in *Hollick* at para. 3. McLachlin C.J.C. described the Trust Fund as "an ideal avenue of redress" (at para. 33) for the many small claims that would be superior to full-blown litigation. She noted that no claims had been made against the Fund which suggested to her that the claims are "either so small as to be non-existent or so large as to provide sufficient incentive for individual action" (at para. 33). She did, however, point out that "the existence of a compensatory scheme under which class members can pursue relief is not [in] itself grounds for denying a class action -- even if the compensatory scheme promises to provide redress more quickly." The existence of such a scheme is, however, one consideration to take into account when assessing concerns of access to justice.

[79] Inco makes the same point here relying, as did the motion judge, on the existence of the CBRA. The CBRA provides for remediation but does not provide any kind of monetary compensation. The motion judge recognized that "standing alone" the CBRA was not a viable alternative but it should be considered as part of the "available alternative procedures, in conjunction with other alternatives such as joinder, tests cases and the like" (at para. 131). Now that the appellant has limited his claim to loss of property value, the argument that the CBRA provides an adequate alternative is even stronger in some respects. The purpose of remediation is to alleviate the effects of the pollution by the addition of substances to existing soil to stabilize soil conditions, the use of certain vegetation that naturally absorb nickel from soil or the removal of contaminated soil. In theory, remediation should remove the impact of the pollution, including the impact on property values.

[80] Despite the strong argument supporting the alternative of the CBRA, I am satisfied that it does not address the access to justice concerns. The CBRA does not address the core issue of this lawsuit: the alleged widespread damage to land values throughout Port Colborne caused by the past pollution. Remediation is limited to qualifying individual properties with significant contamination. It is open to the class members to argue that it does not address the injury already caused. Inco may be able to show that land values may rebound after remediation, but that is an issue for the trial.

[81] The motion judge was also concerned with the possibility for the premature or precipitous determination of claims because of "the possibility that diseases and conditions will manifest themselves at some future times" (at para. 132). The premature determination of claims is no longer a concern since the health claims have been dropped from the proposed class proceeding.

[82] The motion judge also took into account at para. 130 that "the entire situation in Port Colborne is currently under the watchful eye of the MOE". He noted that the MOE had "already made orders requiring Inco to take certain remedial steps". I do not see that the continued involvement of the Ministry is a serious factor in addressing access to justice concerns. The Ministry's involvement is prospective. It may prevent further contamination in this one location but there is no suggestion that the Ministry's involvement can address monetary losses from the past pollution.

[83] Finally, the motion judge took into account that there may be many very large claims and that those claimants could band together to pursue their claims, presumably through joinder or a test case. The motion judge suggested that the smaller claimants might well benefit from findings made in these large lawsuits. The large claims would appear to fit into two classes. Claimants, such as people within the Rodney Street area who allegedly suffered the most serious health effects and owners of agricultural lands who might have large claims for damage to crops. The large health claims are no longer part of the class proceeding. There is mention in the record of one lawsuit involving the

Augustine family, but that action, which was launched in the mid-90's and relates to agricultural land, appears to be stalled at the discovery stage. The evidence is conflicting as to the reason for the delay. It is far from clear that this action or any like it could provide any alternative to the class proceeding for the vast majority of the members of the class. These claims involve entirely different and much more complex issues.

[84] On the other hand, it may well be the case that many of the people whose property values were most seriously impacted, such as the Rodney Street owners, are also the most vulnerable and least able to prosecute their individual claims. Many of them are "elderly persons and others on fixed incomes, as well as partially employed or unemployed persons, persons with disabilities and recipients of social assistance" (reasons of motion judge at para. 22). Obviously, not all of these people would be property owners and would therefore not fall within the class in any event. However, those who do would find it extremely difficult to mount an action against Inco. In *Cloud*, at para. 88 Goudge J.A. quoted a passage from *Rumley* at para. 39 that has some application to this case:

> Litigation is always a difficult process but I am convinced that it will be extraordinarily so for the class members here. Allowing the suit to proceed as a class action may go some way toward mitigating the difficulties that will be faced by the class members.

(iii) Behaviour modification

[85] The motion judge also found that certifying the class action would not achieve the goal of behaviour modification since the MOE was already involved and Inco had

established the CBRA. I have concerns with two aspects of the motion judge's reasoning in coming to this conclusion.

[86] First, according to the motion judge, Inco had "begun to take account of the costs arising from the operations of the Refinery....In other words, the modification of behaviour, insofar as that can occur, ha[d] already begun" (at para. 133). The motion judge also noted that in *Hollick*, McLachlin C.J.C. at para. 35 took into account the other avenues by which the complainant could ensure that the defendant City took full account of the costs of its actions, outside the City's Small Claims Court Trust Fund, through procedures under Ontario environmental legislation. The same avenues are available to the plaintiffs in this case outside the CBRA. In particular, under the *Environmental Protection Act*, citizens affected by a cleanup order have a statutory right to appeal the order to the Environmental Review Tribunal, and from there, to the Divisional Court on a question of law and to the Minister on a question of fact or policy.

[87] In my view, the motion judge took too narrow a view of the goal of behaviour modification. In *Abdool v. Anaheim Management Ltd.* (1995), 121 D.L.R. (4th) 496 (Ont. Div. Ct.) at 514, Moldaver J. adopted the following description of this goal: "modifying the defendants' behaviour so as to inhibit misconduct by those who might ignore their obligations to the public". In a similar vein, McLachlin C.J.C. at para. 29 of *Western Canadian Shopping Centres, supra* described how

> class actions serve efficiency and justice by ensuring that actual and *potential* wrongdoers do not ignore their obligations to the public. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery. [Emphasis added].

[88] Thus, modification of behaviour does not only look at the particular defendant but looks more broadly at similar defendants, such as the other operators of refineries who are able to avoid the full costs and consequences of their polluting activities because the impact is diverse and often has minimal impact on any one individual. This is why environmental claims are well suited to class proceedings. To repeat what McLachlin C.J.C. said in *Western Canadian Shopping Centres, supra* at para. 26 "Environmental pollution may have consequences for citizens all over the country."

[89] Second, the motion judge speculated that certification might have the effect of making Inco less co-operative. In my view, it was an error in principle for the motion judge to take into account the possibility that Inco might become less co-operative if the action were certified, thus delaying the implementation of the CBRA. I do not agree with the proposition that property owners must abandon their legal rights and their right to be made whole in order to buy the co-operation of a defendant they say has caused widespread harm to the community. Furthermore, there is little evidence to support this suggestion and it seems inconsistent with Inco's approach to its responsibilities in Port Colborne. The following is drawn from para. 13 of Inco's factum in this court:

> The appellant did not dispute that since the creation of the MOE, Inco has scrupulously complied with environmental standards and voluntary abatement measures. One of the appellant's own witnesses—a former MOE employee assigned to monitor Inco's facility in the 1970s and 80s—testified that Inco actively pursued voluntary abatement efforts, never installed anything without proper regulatory approval, never failed to install anything which had been approved, and never violated any conditions of approval.

In any event, even though the CBRA is a voluntary program, the motion judge noted the Ministry's indication that, "if Inco were to attempt to withdraw from the CBRA the MOE would use its regulatory authority to require Inco's continued participation" (at para. 130).

[90] While the impact of the narrower action will be more restrained, I am satisfied that a class proceeding can achieve the goal of behaviour modification in view of the other inadequate alternatives.

[91] To conclude, I am satisfied that the narrower claim meets the preferable procedure requirement.

(e) Representative Plaintiff

[92] The motion judge held that the appellant failed all three requirements for a representative plaintiff. Those requirements are fair and adequate representation, a workable litigation plan, and no conflict of interest on the common issues. The

Divisional Court did not consider this issue. In my view, the motion judge erred in principle in his approach to this question.

[93] In *Western Canadian Shopping Centres, supra* at para. 41 McLachlin C.J.C. explained the concept of adequate representation as involving factors such as

> the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class.

[94] In this case, the motion judge unreasonably emphasized the appellant's ability to pay any costs incurred. As the motion judge recognized, the appellant was unable to access funding through the Class Proceedings Committee because Inco and the other [then] defendants had not filed a statement of defence. Nevertheless, the appellant had paid significant cost orders made against him, albeit somewhat tardily. It was an error in principle to hold, as the motion judge did, that it was incumbent on the appellant to have "concrete and specific alternative funding arrangements in place and to provide the specifics of those arrangements in the certification material" (at para. 143). There is nothing in the legislation itself that imposes such a rigorous requirement on the plaintiff. The capacity of the representative plaintiff to fund the litigation is merely one factor in determining whether the plaintiff can adequately represent the class.

[95] I agree with the comments of Cullity J. in *Mortson v. Ontario Municipal Employees Retirement Board*, [2004] O.J. No. 4338 (Sup. Ct. J.). In referring to the reasons of the motion judge in this case and the statement from *Western Canadian Shopping Centres* about the capacity of the representative plaintiff to bear costs orders, Cullity J. said the following at paras. 91 and 94:

> The statements in [*Western Canadian Shopping Centres*] and *Pearson* are routinely relied on by defendants' counsel on motions for certification under the CPA. The interpretation placed on them by defendant's counsel in this case would have a result of defeating, or frustrating, the legislative objective of access to justice. It would, in effect, limit recourse to class proceedings to cases where the proposed representative plaintiffs were either wealthy or could demonstrate that a commitment for funding assistance was in place -- a sort of halfway house towards requiring security for costs. Until further authoritative guidance is provided, I do not believe I am compelled to accept such an interpretation of section 5(1)(e) of the CPA.
>
> ...
>
> If the plaintiffs were suing as individuals they would not be compelled to demonstrate that they have concrete and specific funding arrangements in place to satisfy an award of costs that might be awarded against them in the future and, in the circumstances of this case, I do not believe the fact that they seek to represent a class -- or the specific terms of section 5(1)(e) -- should be considered to require them to demonstrate this.

[96] If there are large costs orders outstanding when the certification motion is heard they can be taken into account by the motion judge. However, in this case the outstanding orders had been paid. I agree with Cullity J. that there is no requirement

under our legislation for the plaintiffs to demonstrate that they have concrete and specific funding arrangements.

[97] The motion judge was also not satisfied with the litigation plan. In my view, the motion judge took an unreasonably rigid view by requiring that all the details for the litigation be "within the four corners of the plan itself" (at para. 144). The elements of the litigation plan, especially for litigating the narrower issues with which we are now concerned, can be found in the litigation plan and in the affidavit of Mr. Kaufmann. Obviously, it would be easier for the judge hearing the certification motion to have all the elements of the plan in one place, but it would not be consistent with the generous approach required by the cases, especially *Cloud*, to defeat a motion for certification because there are two sources for the litigation plan.

[98] The motion judge also erred in principle in finding that the appellant had a conflict of interest. This finding was based in part on the possibility that as a resident of the Rodney Street Area the appellant was likely to be more aggressive than other residents of Port Colborne who were less affected by the pollution and who may have suffered less injury. In *Western Canadian Shopping Centres*, at para. 41 McLachlin C.J.C. held that the court should be satisfied that the representative plaintiff "will vigorously and capably prosecute" the claim. It would be an odd result if this appellant's obvious interest in vigorously prosecuting the claim was seen as disqualifying him as the representative plaintiff. I think the court should be more concerned with a "straw man" plaintiff who

has no particular interest in the litigation. In any event, it was mere speculation that the appellant's keen interest in pursuing the litigation would lead to a conflict of interest. If it turns out that the appellant is not properly representing the interests of the class, the court can take steps at that point. For example, s. 14 of the *CPA* provides that to "ensure the fair and adequate representation of the interests of the class ... the court may, at any time in a class proceeding, permit one or more class members to participate in the proceeding."

[99] The motion judge also relied upon the fact that an interested citizen and supporter of the CBRA was unable to obtain assistance from the appellant's counsel in putting his position before the court. It is not surprising that residents of Port Colborne will have different views about the efficacy of the CBRA and similarly different views about proceeding by way of a class proceeding. However, the conflict of interest with which the *CPA* is concerned in s. 5(1)(e)(iii) is "an interest in conflict with the interests of other class members" "on the common issues". There was no evidence to suggest that the difference of opinion about the efficacy of the CBRA represented a conflict of interest on the common issues. Any residents of Port Colborne who disagree with pursuing this litigation may opt out of the class proceeding.

[100] In my view, the appellant has met the representative plaintiff requirements in s. 5(1)(e).

COSTS

[101] The motion judge awarded significant costs against the appellant and there was considerable argument in this court about the principles that should apply to the awarding of costs against the proposed representative plaintiff on certification motions. While the court received very helpful submissions from the appellant, the respondents and the intervenors, in light of my conclusion on the certification motion, I need not address those issues.

DISPOSITION

[102] In my view, the appellant has shown that the action satisfies the requirements for certification under s. 5(1) of the *CPA*. Accordingly, I would allow the appeal, set aside the orders of the Divisional Court and the motion judge, and substitute an order certifying the action consistent with these reasons. The case should be remitted to the supervision of the Regional Senior Justice or to such judge as he directs to manage the action.

[103] The parties may make written submissions as to costs here and below. Those submissions are to be exchanged and filed within three weeks of the release of these reasons. Within a further two weeks, each party may then file a written reply. There will be no costs order for or against the intervenors.

RELEASED: NOV 1 8 2005

I agree Mr. Rosenberg J.A.

I agree M. Gillese J.A.