

COURT OF APPEAL FOR ONTARIO

ST HONOURABLE *v* *ST*,

THE CHIEF JUSTICE OF ONTARIO)

)

THE HONOURABLE)

JUSTICE ROSENBERG)

)

THE HONOURABLE)

JUSTICE GILLESSE)

FRIDAY, THE 18TH
DAY OF NOVEMBER, 2005

B E T W E E N:

WILFRED ROBERT PEARSON

Plaintiff
(Appellant)

- and -

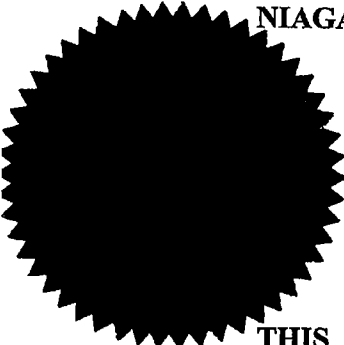
INCO LIMITED, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, THE CORPORATION OF THE CITY OF PORT COLBORNE, THE REGIONAL MUNICIPALITY OF NIAGARA, THE DISTRICT OF THE SCHOOL BOARD OF NIAGARA and THE NIAGARA CATHOLIC DISTRICT SCHOOL BOARD

Defendants
(Respondent)

Proceeding under the *Class Proceedings Act, 1992*

ORDER

THIS APPEAL, from the orders of the Divisional Court dated February 6, 2004 and costs order dated July 19, 2004, which dismissed an appeal from the orders of the Honourable Mr. Justice Nordheimer dated July 16, 2002 and September 9, 2002, which dismissed the plaintiffs' motion for certification of the action as a class proceeding, was heard at Osgoode Hall, 130 Queen Street West, Toronto, Ontario on May 30, 2005 and June 3, 2005, judgment having been reserved until this day.



ON READING the pleadings and proceedings herein, and the orders of the Divisional Court dated February 6, 2004 and July 19, 2004, and the reasons given thereof, and the orders of the Honourable Mr. Justice Nordheimer dated July 16, 2002 and September 9, 2002, and the reasons given thereof, and for written reasons delivered this day,

1. **THIS COURT ORDERS** that the orders of the Divisional Court dated February 6, 2004 and July 19, 2004, be and hereby are set aside.

2. **THIS COURT ORDERS** that the orders of the Honourable Mr. Justice Nordheimer dated July 16, 2002 and September 9, 2002, be and hereby are set aside.

3. **THIS COURT ORDERS** that this action be and hereby is certified as a class proceeding.

4. **THIS COURT ORDERS** that this action be and hereby is certified on behalf of the following class (collectively "the class"):

All persons owning property since September 20, 2000 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.

5. **THIS COURT ORDERS** that the following claims be and hereby are asserted on behalf of the class in the class proceeding against the defendant Inco Limited ("Inco"):

- (a) the claims for nuisance of Inco;
- (b) the claims for negligence of Inco;
- (c) the claims for trespass by Inco;

- (d) the claims for strict liability of Inco in accordance with strict liability in accordance with the doctrine in *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330.

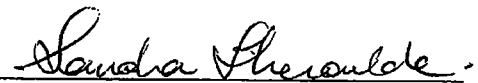
6. **THIS COURT ORDERS** that the following issues be and hereby are certified as common issues for the class in the class proceeding:

- (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?
- (c) Did the disclosure from and after September 2000 of information concerning nickel contamination in the Rodney Street area and elsewhere in Port Colborne negatively affect property values in the Port Colborne area?
- (d) Did Inco owe a duty of care to the class to prevent the ongoing discharge of nickel and, if so, what duty was owed?
- (e) What was the appropriate standard of care that Inco had to meet with respect to preventing the ongoing discharge of nickel?
- (f) Did Inco breach the standard of care referred to in issue (e) above?
- (g) Did the ongoing discharge of nickel by Inco amount to a public nuisance?
- (h) Did the ongoing discharge of nickel by Inco amount to a trespass?
- (i) 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*)?
- (j) If Inco's liability is established, can class members' claims for property damages be assessed by group or area and, if so, what is the quantum of damages?
- (k) If Inco's liability is established, did Inco's conduct justify an award of punitive damages to the class, and if so, what amount of punitive damages is appropriate?

7. **THIS COURT ORDERS** that the class proceeding be remitted to the supervision of the Regional Senior Justice or to such judge as he directs to manage the action.

8. **THIS COURT ORDERS** that the parties may exchange and file written submissions regarding costs within three (3) weeks of the release of the court's reasons or by no later than December 9, 2005 . Within a further two weeks, or by no later than December 23, 2005, each party may file a written reply.

9. **THIS COURT ORDERS** that there shall be no costs order in favour of or against the intervenors.



SAUDRA THROULDE
DEPUTY REGISTRAR
COURT OF APPEAL FOR ONTARIO

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PER/PAR: ST

PEARSON
Plaintiff (Appellant)

and

INCO LIMITED et al
Defendants (Respondents)

Court File No: C42414

COURT OF APPEAL FOR ONTARIO
Proceeding commenced at **TORONTO**

ORDER

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