

GREENMAIL

NEWSLETTER

*A Report On Developments
in Environmental
Regulation*

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WELCOME TO THE CLUB - COURT OF APPEAL CERTIFIES FIRST ONTARIO ENVIRONMENTAL CLASS ACTION

The Ontario Court of Appeal broke new ground recently by certifying a class action based on damages caused by decades of environmental pollution. Will the decision in *Pearson v. Inco Ltd.* open the door to a landslide of environmental class actions? The answer is likely “no”, but businesses dealing with industrial pollutants and activities that may adversely affect private land still ought to pay heed. *Pearson* shows that courts will certify environmental class actions if the claims are drafted narrowly enough.

BACKGROUND

The story stretches back to 1918, when Inco Limited set up a nickel processing refinery that spewed “tons” of nickel into the environment in the City of Port Colborne over a 66-year period. In 2000, the Ontario Ministry of the Environment released a report showing higher-than-expected nickel levels in the soil of the Rodney Street area of the city.

The timing of this discovery coincided roughly with the Supreme Court of Canada’s ruling in *Hollick v. Toronto*. This 2001 decision rejected an environmental certification application, but explicitly recognized that on the right facts, an environmental claim could be pursued through a class proceeding. Despite this invitation, no Canadian court outside of Quebec had yet certified a class action for long-term environmental harm.

Pearson, a resident of Rodney Street, brought a certification application against Inco and a host of other Crown and Municipal defendants in the Ontario Superior Court of Justice. Pearson’s statement of claim was very broad, including damages for all illnesses, health care costs, losses of income, emotional losses, family losses and decreases in property values. The proposed class was also very large, capturing some 20,000 people who owned or occupied property within certain geographic boundaries after 1995.

Justice Nordheimer, an experienced class proceedings judge, rejected the application in 2002. He found that the proposed class of plaintiffs was too arbitrary in both space and time, and that the proceeding would quickly become “unmanageable” due to the size of the class and the individualized nature of the harms alleged.

Pearson appealed to the Divisional Court with a more focused claim. He left out all health and injury-related allegations, and instead limited the claim to the decrease in property values resulting from the soil contamination. The Court rejected the appeal, echoing Justice Nordheimer’s concerns that the geographic class boundaries were “irrational and arbitrary” and that the individual issues would overwhelm the common issues even when narrowed down to a question of property values.

THE COURT OF APPEAL DECISION

Pearson appealed again. This time, he was successful. Although the decisions of class proceedings motion judges are given considerable deference, the Court of Appeal overturned Justice Nordheimer’s ruling on the basis of two significant changes. First, Pearson’s narrowed claim for decreased property values had changed the factual context “dramatically”. Second, the Court of Appeal’s 2004 decision in *Cloud v. The Attorney*

General of Canada represented a “shift in the legal landscape” towards a more liberal certification process.

(a) The Narrowed Claim: Decrease in Property Values

Although the Court admitted that Pearson’s argument had “evolved in an attempt to make the action more amenable to certification”, the change in tactic was allowed, as Pearson had pleaded property devaluation in his original statement of claim.

Narrowing the claim allowed the Court of Appeal to re-assess the factors in the class certification test. Justice Rosenberg held that limiting the common issues provided a rational connection between the claim and the proposed class. Since Pearson was able to show that some expert evidence existed suggesting that property values had decreased across the entire proposed area, the arbitrariness of the original class boundary was eliminated, and the “identifiable class” test was satisfied.

Although Justice Nordheimer found the proposed class to be under-inclusive for excluding contaminated land outside the class boundaries, the Court of Appeal identified policy issues underlying environmental actions that mitigated this problem. Justice Rosenberg commented, “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.”

(b) The Shift in the Legal Landscape

The bigger obstacle was the requirement that a class action be the “preferable procedure” for advancing the claims. Both lower court decisions found that even the sole issue of property value was too individualized to try in a class proceeding, since property values are determined by a wide range of factors.

To overcome this, Justice Rosenberg took the more liberal approach called for in *Cloud*, finding that the bulk of each plaintiff’s claim is based on the same set of actions by Inco. “Judicial economy” would be achieved most efficiently by dealing with these issues in a common trial, with the quantification of the property devaluation being the only remaining individual issue.

The Court also examined an alternative scheme voluntarily set up by Inco to rehabilitate affected land to determine if “access to justice” would be better served through Inco’s scheme, or a class proceeding. In *Hollick*, the City of Toronto had established a fund to compensate for the “offsite impact” of a landfill site. The Supreme Court of Canada found that this was the “ideal avenue of redress” for the problem, and denied certification on this basis. Here, however, the Court of Appeal found that Inco’s remediation scheme was not a viable alternative, as it was not compensatory and thus did not address the “core issue” of widespread damage to land values caused by past pollution.

CONCLUSIONS

As the first case outside of Quebec to certify an environmental class action, *Pearson* is a landmark case for environmental law. *Pearson’s* greater significance, however, is that it makes it easier for plaintiffs to have many types of class action certified. In continuing on the path of liberalization that it started in *Cloud*, the Court of Appeal has stretched the parameters of the certification test to ensure that plaintiffs’ rights aren’t so easily extinguished in the certification stage. It also implicitly approves a “trial and error” approach, where a willing plaintiff can essentially submit a new claim by narrowing down the grounds of its application on appeal.

Companies with large environmental footprints are now more vulnerable to narrowly targeted class action lawsuits and should also take care to structure voluntary environmental remediation programs in light of *Pearson* to satisfy any potential claims that might arise.

The authors thank Geoff Moysa, Student-at-Law, for his assistance with this article.

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

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