



On December 14, 2005, the Environmental Protection Commission made 10 recommendations to the province when it delivered its final report to Alberta Environment Minister Guy Boutilier and Alberta Municipal Affairs Minister Rob Renner. For more information please see: <http://www.gov.ab.ca/acn/200512/192002AFDEDED43-9E4D-8B97-9C76B17704898295.html>.

On November 23, 2005, the Pembina Institute released a report on the untold story of Alberta's oil sands development. For more information please see: <http://www.pembina.org/newsitemasp?newsid=162&section=>.

## **Ontario**

On January 18, 2006, the Minister of the Environment announced that plans for developing five city parks along Toronto's waterfront can proceed without an environmental assessment. The parks are part of the Toronto Waterfront Revitalization Corporation's 20-year plan to revitalize the waterfront. For more information please see: <http://www.ene.gov.on.ca/envision/news/2006/011801.htm>.

On November 25, 2005, the Ministry of the Environment posted a notice of proposal for a regulation to harmonize Ontario and Federal air emissions reporting systems. For more information please see: <http://www.ene.gov.on.ca/envregistry/026576er.htm>.

On November 21, 2005, the Ontario government approved nine clean, renewable energy projects that will provide enough power for more than 250,000 homes. For more information please see: [http://ogov.newswire.ca/ontario/GPOE/2005/11/21/c7645.html?lmatch=&lang=\\_e.html](http://ogov.newswire.ca/ontario/GPOE/2005/11/21/c7645.html?lmatch=&lang=_e.html).

On November 10, 2005, the Ministry of the Environment posted notices of proposal for environmental guides in the following areas:

- Noise (<http://www.ene.gov.on.ca/envregistry/026564ep.htm>);
- Patrol yard design (<http://www.ene.gov.on.ca/envregistry/026567ep.htm>); and
- Built heritage and cultural heritage landscapes (<http://www.ene.gov.on.ca/envregistry/026566ep.htm>).

On November 1, 2005, Gord Miller, Environmental Commissioner of Ontario, released his 2004/2005 annual report. Commissioner Miller cautioned that because "infrastructure" is exempted from the environmental restrictions of the Provincial Policy Statement, critical elements of Ontario's natural environment are not protected from aggregate extraction, utility corridors, or highway construction. For more information please see: <http://www.eco.on.ca/english/newsrel/05nov01.htm>.

## **Québec**

On December 14, 2005, Québec Premier, Jean Charest, announced the signing of the *Great Lakes - St. Lawrence River Basin Sustainable Water Resources Agreement* with the province of Ontario and the eight Great Lakes States. Under this agreement, all ten governments agree to act collectively to protect the Great Lakes and St. Lawrence River Basin. For more information please see: [http://www.mddep.gouv.qc.ca/communiqués\\_en/c20051214-ententeGL.htm](http://www.mddep.gouv.qc.ca/communiqués_en/c20051214-ententeGL.htm).

## **LEGISLATION**

### **Canada**

On December 17, 2005, the *Exclusion List Regulations, 2005* was published in the *Canada Gazette, Part I* which includes 21 additions to the Regulation and 36 modifications to existing provisions. For more information please see: <http://canadagazette.gc.ca/partI/2005/20051217/html/regle2-e.html>.

On December 14, 2005, the *Assessable Activities, Exceptions, and Executive Committee Projects Regulations*, under the *Yukon Environmental and Socio-Economic Assessment Act*, were published in the *Canada Gazette, Part II*. The Regulation lists activities that are assessable and those that are excepted from assessment. For more information please see: <http://canadagazette.gc.ca/partII/2005/20051214/html/sor379-e.html>.

On November 30, 2005, the Minister of the Environment published the annexed *Regulations Amending the Comprehensive Study List Regulations*. The amendment changes the type of environmental assessment required for the first exploratory drilling project in an offshore area from the comprehensive study type to the screening type. For more information please see: <http://canadagazette.gc.ca/partII/2005/20051130/html/sor335-e.html>.

On November 30, 2005, the *List of Pest Control Product Formulants and Contaminants of Health or Environmental Concern* was published in the *Canada Gazette, Part II*. For more information please see: <http://canadagazette.gc.ca/partII/2005/20051130/html/si114-e.html>.

### **British Columbia**

On December 8, 2005, the *Drinking Water Protection Regulation* was revised. For more information please see: [http://www.qp.gov.bc.ca/statreg/reg/D/200\\_2003.htm](http://www.qp.gov.bc.ca/statreg/reg/D/200_2003.htm).

### **Ontario**

On December 22, 2005, the Ministry of the Environment posted on the Environmental Registry a document that describes proposed regulations in respect of various aspects of the source protection planning process set out in the proposed *Clean Water Act*. For more information please see: <http://www.ene.gov.on.ca/envregistry/026965er.htm>.

On December 17, 2005, Ontario Regulation 605/05, amending Ontario Regulation 419/05 (Air Pollution - Local Air Quality) was published in the *Ontario Gazette*. For more information please see: [http://www.e-laws.gov.on.ca/DBLaws/Source/Regs/English/2005/R05605\\_e.htm](http://www.e-laws.gov.on.ca/DBLaws/Source/Regs/English/2005/R05605_e.htm).

On December 14, 2005, Bill 53, the *Stronger City of Toronto for a Stronger Ontario Act*, received First Reading. For more information please see: [http://www.ontla.on.ca/documents/Bills/38\\_Parliament/session2/b053.pdf](http://www.ontla.on.ca/documents/Bills/38_Parliament/session2/b053.pdf).

On December 12, 2005, Bill 51, the *Planning and Conservation Land Statute Law Amendment Act*, received First Reading. The Bill amends the *Planning Act* to modify aspects of the land use planning process, provide additional tools for implementation of provincial policies and give further support to sustainable development, intensification and brownfield redevelopment. For more information please see: [http://www.ontla.on.ca/documents/Bills/38\\_Parliament/session2/b051.pdf](http://www.ontla.on.ca/documents/Bills/38_Parliament/session2/b051.pdf).

On December 5, 2003, Bill 43, the *Clean Water Act*, received First Reading. The proposed Act would establish Ontario as a leader in the delivery of safe drinking water by:

- Requiring municipalities and conservation authorities to map the sources of municipal drinking water supply, and especially the vulnerable areas that need protection, to prevent the supply from being depleted or contaminated;
- Directing local communities to monitor any activity that could potentially threaten water quality or quantity and take action to reduce or remove that threat; and
- Empowering local authorities to take preventative measures before a threat to water can cause harm.

For more information please see: [http://www.ontla.on.ca/documents/Bills/38\\_Parliament/session2/b043.pdf](http://www.ontla.on.ca/documents/Bills/38_Parliament/session2/b043.pdf).

On November 18, 2005, the Ministry of the Environment announced that effective January 1, 2006, Drive Clean, Ontario's vehicle testing and repair program, would be revised to focus on vehicles most likely to pollute. For more information please see: <http://www.ene.gov.on.ca/envision/news/2005/111801.htm> and <http://www.ene.gov.on.ca/envregistry/026516ep.htm>.

### **Québec**

On November 9, 2005, the Ministry of Sustainable Development, Environment and Parks announced that the draft *Air Quality Regulation*, which would replace the *Regulation Respecting the Quality of the Atmosphere*, would be submitted for public comment. The draft regulation aims to reduce and control contaminants with a view to further protecting the quality of the atmosphere. For more information please see: [http://www.mddep.gouv.qc.ca/communiqués\\_en/c20051109-atmosphere.htm](http://www.mddep.gouv.qc.ca/communiqués_en/c20051109-atmosphere.htm).

## COURT DECISIONS

### Canada

In *Sumas Energy 2, Inc. v. Canada (National Energy Board)*, Sumas appealed the National Energy Board's dismissal of its application for a certificate of public convenience and necessity to construct an international power line. The Board considered the fact that the plant was expected to emit over 800 tons of pollutants annually into the Fraser Valley airshed. The Board decided that the power line did not meet the test of public convenience and necessity. The Federal Court held that the Board did not err in considering the environmental impact in Canada of the power plant in the United States in its assessment of the public convenience and necessity. For more information please see: [2005] F.C.J. No. 1895 (F.C.A.).

### Ontario

In *Pearson v. Inco Ltd.*, [2005] O.J. No. 4918 a class action pertaining to an environmental claim was certified. Please see the article by Michelle Fernando for more information.

## IN DEPTH

### INABILITY TO CHALLENGE APPROVAL OF REMEDIATION PLAN

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#### **427958 B.C. Ltd. (dba Super Save Group of Companies) v. B.C. Hydro and Power Authority (Appeal No. 2004-WAS-007(a), November 2, 2004)**

This was a preliminary matter on an appeal of the April 30, 2004 decision of the Deputy Director of Waste Management, Ministry of Water, Land and Air Protection (the "Deputy Director" of MWLAP) to issue an approval in principle ("AIP") for a remediation plan to the BC Hydro and Power Authority ("BC Hydro"). MWLAP (now Ministry of Environment) issued an AIP to BC Hydro in respect of the remediation of a contaminated site located on Rock Bay, Victoria, adjacent to property owned by the federal government and administered by Transport Canada. The BC Hydro property and adjacent lands were contaminated with coal tar and other contaminants as a result of the operation of a coal gas manufacturing plant from 1862 to the late 1940's. The AIP applied only to the BC Hydro property and not any off-site properties. The remedial action plan was developed jointly by BC Hydro and Transport Canada who had been working together since 1996 on the remediation strategy. The estimated cost of the remediation plan under the AIP was \$30.5 million.

427958 B.C. Ltd. ("Super Save") owned adjacent lands that Super Save alleged had been contaminated by the migration of contaminants from the lands subject to the AIP. Super Save opposed the issuance of the AIP on the basis MWLAP failed to ensure adequate investigation of off-site impacts of the remediation plan and that MWLAP did not provide sufficient notice to neighbours or permit neighbours sufficient opportunity to provide input on the application.

At issue in this application was whether the Board had jurisdiction to hear the appeal. The Applicant, BC Hydro, submitted that Super Save lacked standing to bring the appeal as it was not a "person aggrieved" by the AIP, and that the AIP did not constitute a "decision" under section 43 of the *Waste Management Act* (the "Act").

In deciding whether Super Save was an "aggrieved person" for the purposes of section 44 of the *Act*, the Board applied the test of "whether the person has a genuine grievance because an order has been made which prejudicially affects his or her interests."

The Board found that, in issuing the AIP, the Deputy Director did not make a decision that prejudicially affected Super Save's interests. The Board found that Super Save was not aggrieved by anything in the AIP, nor did it provide evidence that it would be prejudicially affected by the proposed remediation work. In addition, the Board noted that allowing persons who are not party to a remediation plan to appeal an AIP may unreasonably delay the remediation of contaminated sites; therefore the power to issue an AIP must be considered in light of the objectives of the legislation, which include the expeditious remediation of contaminated sites. The Board stated that MWLAP's role is as follows:

...to review the remediation proposal and decide whether it should be implemented, bearing in mind that the proposal should be consistent with the purposes of Part 4 of the *Act*, including the protection of the environment and human health, as well as the expeditious remediation of contaminated sites. In cases such as this, where AIP endorses a remediation plan that is the product of years of negotiations with government and amongst the owners of contaminated lands, appeals by persons who are not subject to the AIP or are not party to the remediation proposal may unreasonably delay the remediation of contaminated sites, and may discourage private parties from negotiating ways to remediate contaminated sites. Legitimate AIPs should not be frustrated by persons who have grievances that go beyond the terms and requirements of the AIP.

The Board also noted that section 27(4) of the *Act* may allow Super Save to recover its remediation costs from BC Hydro if Super Save's property has been contaminated as a result of contaminant migration from the BC Hydro property. Super Save may remediate its property and sue BC Hydro for recovery of its reasonably incurred remediation costs under the now *Environmental Protection Act*. Additionally, nothing in the AIP prevents BC Hydro, Transport Canada, Super Save and other interested parties from negotiating methods to manage the remediation of their lands.

The Board found that Super Save could not be properly considered a "person aggrieved" by the decision to issue the AIP and therefore had no standing to bring the appeal. The appeal was dismissed for lack of jurisdiction. Accordingly, the application was allowed.

***Squamish Terminals Ltd. v. Director of Waste Management (Appeal No. 2004-EMA-002(a), March 22, 2005).***

This case involved a preliminary matter regarding whether Squamish Terminals Ltd. ("Squamish Terminals") had standing to appeal a decision of the Deputy Director to issue an approval in principle ("AIP") to the District of Squamish. The AIP authorized the District to implement a remediation plan on certain contaminated properties adjacent to lands owned by Squamish Terminals. The site in question was one on which Nexen Inc. and others operated a chlor-alkali plant from 1964 to 1991. The contamination on the site had been the subject of a remediation order since 1999. Squamish Terminals had been on the list of stakeholders to be distributed information regarding the remediation under the remediation order.

In deciding whether Squamish Terminals was an "aggrieved person" with standing to appeal the decision under section 100(1) of the *Environmental Management Act* ("the Act"), the Board applied the test of "whether the person has a genuine grievance because an order has been made which prejudicially affects his or her interest".

The Board found that there was no compelling reason to deviate from the approach taken in the *Super Save* case as noted above. Squamish Terminals argued that without adequate monitoring of the site it would not be able to determine the extent of the current migration of the contamination, or whether there will be further migration as a result of the activities under the AIP. The Board noted that the prejudice claimed by Squamish Terminals was based on what was not included in the AIP, i.e., what is not being done to protect its financial and other interests arising from any remaining off-site contamination.

The Board emphasized the fact that the Act places responsibility on the Minister to set its priorities and determine whether or not to exercise its powers to ensure the protection of human health and the environment. There are numerous contaminated sites in the province that may create negative financial impacts for property owners. However, a balance must be found when determining which owners will suffer harm or prejudice as a result of the decision to approve an AIP. Although Squamish Terminals could be said to have a grievance, the Board was not convinced that it was one directly associated with the issuance of the AIP. The Board concluded that there was no evidence that indicated the AIP or the remediation plan would cause additional costs to Squamish Terminals or would cause the contamination to

migrate and adversely affect Squamish Terminal's interests. Therefore, the Board found that Squamish Terminals had not demonstrated that there was anything in the AIP that would prejudicially affect it; Squamish Terminals did not have standing to challenge the issuance of the AIP.

### **Implications**

These cases will adversely affect the options available to innocent neighbours to require polluting parties to remediate migrating contamination. The decisions by the Board confirm that the expeditious remediation of contaminated sites is vital and should not be delayed by neighbour disputes unless those neighbours can prove that the requirements of the AIP or the remediation plan prejudicially affect their interests or their property. This is a difficult standard to meet. Therefore, in order to protect their interests, neighbours may consider the following options:

1. immediately raise concerns in the approval and remediation process with the polluting owner, the Ministry of Environment (formerly the MWLAP), the municipality and the approved professional under the roster;
2. actively respond to any communication with government authorities and others concerning the remediation and/or investigation of nearby properties;
3. having the Ministry of Environment issue a remediation order, keeping in mind that they will be reluctant to become involved in private disputes unless there is serious harm to fish habitat, fish, human health or an issue of public concern;
4. perform the remediation and then pursue the polluter for the reasonably incurred costs of remediation; and
5. rely on sections 57 and 60.1 of the Contaminated Sites Regulation to insist on rights of notice of migrating contamination; it is an offence for a polluter not to provide such notice.

In the event of remediation, neighbours should seek to obtain a separate certificate of compliance of their lands given section 53(5) of the Act. To obtain a separate AIP or certificate the Ministry of Environment requires separate environmental reports and submission fees, which will increase costs. The benefits and costs of obtaining a separate AIP or certificate will have to be weighed. However, given the implications of section 53(5) and these decisions, the extra cost will generally be worthwhile in the long term.

### **BILL 43 - THE CLEAN WATER ACT**

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In response to 22 recommendations of Part II in the Walkerton Inquiry relating to the protection of drinking water sources, the McGuinty government tabled new legislation that will place municipalities at the forefront of source protection.

Bill 43, the *Clean Water Act*, was introduced in the legislature on December 5, 2005. It follows the February 2004 release of the Province's *White Paper on Water Shed-Base Source Protection Planning* and the subsequent extensive stakeholder consultation.

In sum, Bill 43 proposes the following:

- Ontario's 36 conservation authorities would be designated as source protection authorities which would have the responsibility of striking drinking water source protection committees to prepare assessment reports to identify all watersheds in each authority's area and to prepare a budget for each watershed.
- The assessment reports would identify vulnerable areas and threats to drinking water in those areas. The assessment reports would be submitted to the Ministry of the Environment for approval after which the source protection committee would be required to prepare a source protection plan.

- The plan would likely include policies to deal with existing significant threats to drinking water and possible future threats. The plan would also identify activities and land uses that should be subject to regulation pursuant to Part IV of the legislation.
- Municipalities responsible for providing drinking water would also be responsible for enforcement. Municipalities would have the authority to regulate activities that threaten drinking water sources by requiring risk assessments for the activity, permits or compliance with a risk management plan. Some land uses could be restricted and require a municipal permit permitting the restricted use.
- For the parts of the province without a conservation authority, the province may enter into agreements with municipalities to enable them to assume the role of the conservation authority and thereby generate a source protection plan.

Other Canadian jurisdictions have introduced, or are in the process of introducing, legislation and policies to deal with drinking water source protection. British Columbia enacted its *Drinking Water Protection Act* in 2001. Manitoba's *Water Protection Act* was passed in June 2005, but is not yet in force.

Unlike the existing scenarios in other jurisdictions, Bill 43 places municipalities at the forefront of source protection as the regulator. Municipalities will be empowered to pass by-laws which are necessary to develop and implement the permitting regime which will be required for activities that may endanger a drinking water source. They will have authority to conduct inspections to ensure land use in accordance with permits, where issued. Permit inspectors will be empowered with a number of inspection powers comparable to those presently held by provincial officers. Inspectors would also be authorized to issue enforcement orders to companies that were not operating in compliance with a risk management plan, a permit or were undertaking activities prohibited by a source protection plan.

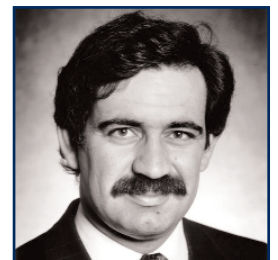
The Bill would also amend the *Planning Act* to permit municipalities to pass zoning by-laws for areas where sensitive ground or surface water features exist. Municipalities would be required to amend their official plans when necessary to comply with source protection plans. They would not be permitted to undertake any work or undertaking that would conflict with a source protection plan nor pass any by-law that would conflict with the operative plan.

The Bill provides municipalities with the option of transferring the enforcement responsibility to a local board of health, a planning board or a source protection authority yet the municipality would continue to be responsible for either all or part of the cost.

Coincident with the Bill, the province also announced funding for conservation authorities and municipalities to assist with the implementation of the legislation. This may point to the province's intention to fast track the legislation for enactment early in 2006.

## **NEW ENVIRONMENTAL REVIEW TRIBUNAL RULES ALLOW COSTS AWARDS AGAINST PARTIES**

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New Rules of Practice and Practice Directions of the Environmental Review

Tribunal reverse a long standing tribunal policy of refusing to allow costs against a party in appeals of Director's Orders under the *Environmental Protection Act*. The Rules formally signal a change in policy that had been urged on the Tribunal several times before but had not, until very recently, received any support in Tribunal decisions.

Over the years the Tribunal and its predecessor the Environmental Appeal Board had consistently held that it did not have the jurisdiction to award costs against a party involved in an appeal of a Director's Order under the EPA even where a party had been alleged to have behaved unreasonably or in a manner that would be considered to be abusive of the Tribunal's process. The only potential exception was suggested in a 1993 decision (*Re Pamour*) in the case where a costs order might "prevent" an abuse of process. However the Tribunal did not appear to have ever found such a circumstance in subsequent hearings before it over the next 11 years.

The Tribunal first signalled its change in approach in a decision issued in March of 2004 (*The Becker Milk Company of Canada and Petro-Canada v Minister of the Environment*). In that decision the Tribunal was faced with a question as to whether it had any power to sanction conduct of the Director that it felt had acted in an unreasonable manner before it. The Director in that case, was the respondent in an Appeal of a Director's Order and had vigorously opposed the Appeal. On a motion by the Director to adjourn the hearing, he was ordered by the Tribunal to present himself for cross-examination at a time and place which the Director confirmed would be satisfactory. Almost immediately following this order the Director revoked the EPA Order that was the subject of the Appeal. In effect the substantive Appeal was brought to an end and the cross-examination order of the Tribunal became moot.

The Tribunal found that the Director's conduct was unreasonable in these unusual circumstances and for the first time, despite several previous decisions to the contrary, the Tribunal found that it did have the jurisdiction to award costs. The Director was ordered to pay costs to the Appellants.

The Director appealed arguing that the tribunal did not have the jurisdiction to make such an Order even in circumstances where it found the conduct of a party to have been unreasonable.

On October 24 2005 the Divisional Court reversed the Tribunal's ruling on the grounds that the Tribunal's Rules did not comply with the requirements of s.17.1 (2)(b) of the SPPA and were thus insufficient to create jurisdiction in the Tribunal to make the costs award.

It would appear that the decision of the Divisional Court may have been anticipated by the Tribunal as four days later, on October 28, 2005, the Tribunal issued new Rules of Practice and Practice Directions that specifically include the power to award costs pursuant to s17.1 of the SPPA and now appear to satisfy all the criteria necessary for the Tribunal to make costs awards in the vast majority of cases before it (including appeals of Director's Orders) in those cases where the Tribunal finds that the conduct of a party has been unreasonable, frivolous or vexatious or if a party has acted in bad faith.

Section 193 of the Tribunal Rules now sets out several criteria the Tribunal may consider in making such an award, including whether the Party has failed to attend a hearing without contacting the Tribunal, failed to co-operate during preliminary proceedings, failed to comply with the Tribunal's Rules or procedural orders, failed to act in a timely manner or changed a position without notice. Section 194 adds that the Tribunal is not bound to order costs when any of the "examples" listed in s.193 are met nor is it required to find that any of the examples occurred in order to find that the conduct of a party has been "frivolous or vexatious or has acted in bad faith".

While the Tribunal anticipates that these provisions will only be used in rare cases, the new provisions clearly signal a more active interest in the Tribunal to control the conduct of parties before it and to not allow a party to act in an unreasonable manner without running a clear risk of a cost sanction against it. This is a welcome move by the Tribunal and simply brings proceeding before it in line with the long standing common law practice that a decision maker should not only have the power to control abuses of its own process but should be able to do so through the mechanism of a cost sanction. The language used in sections 193 and 194 also makes it clear that common law case law will be useful in assisting parties before the Tribunal to determine whether conduct would qualify as acting in bad faith or in an unreasonable, frivolous or vexatious manner.

## **PEARSON V. INCO: USHERING IN A NEW ERA IN ENVIRONMENTAL LITIGATION?**

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On November 18, 2005, the Ontario Court of Appeal released its decision in *Pearson v. Inco Ltd.*, [2005] O.J. No. 4918 to overturn the decisions of two lower courts and to approve certification of an environmental class proceeding against Inco.

## Class Proceedings

A class proceeding is one which is brought by a representative plaintiff on behalf of him or herself and all others similarly situated. An order certifying the action as a class proceeding and appointing a representative plaintiff must be obtained. Under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 the court must certify a class proceeding if the following criteria are met:

- (a) a cause of action is disclosed;
- (b) there is an identifiable class of persons;
- (c) the claims of the class members raise common issues;
- (d) a class proceeding would be the preferable procedure; and
- (e) there is a representative plaintiff who,
  - (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 of notifying class members of the proceeding, and
  - (iii) does not have an interest in conflict with the interests of other class members.

Numerous courts, including the Supreme Court of Canada, agree that class proceedings can be important vehicles in pursuing environmental claims but have been reluctant to certify such proceedings in the past. Most notably, the Supreme Court of Canada refused to certify a class proceeding in *Hollick v. Toronto* (2001), 205 D.L.R. (4th) 19, a case involving persons living in close proximity to the Keele Valley Landfill who complained of a variety of environmental and health effects.

### ***Pearson v. Inco***

Inco operated a nickel processing refinery in Port Colborne that released nickel oxide, a known carcinogen, over more than a half century into the Port Colborne environment. In 2000, the Ministry of the Environment released a report ("2000 MOE Report") in which it stated that Inco had discharged contaminants into the natural environment that posed a risk to the natural environment and to human health. The plaintiffs allege that the report had a serious impact on property values in the Port Colborne area.

Two previous courts refused to certify the class for a number of reasons. The Court of Appeal stated that although significant deference should be granted to the lower courts' decisions, two important developments arose in the meantime. First, the plaintiffs narrowed their claim significantly to include only damages for the devaluation of real property values arising from the release of the 2000 MOE Report. Second, the Court of Appeal decision in *Cloud v. The Attorney General of Canada* (2002), 247 D.L.R. (4th) 667, released in December 2004, suggested that a more liberal approach to the certification of class proceedings was warranted.

In addition, the Court of Appeal re-visited the criteria for certification of the class of plaintiffs and concluded that:

1. A cause of action, framed in nuisance, negligence, trespass and strict liability in accordance with the doctrine in *Rylands v. Fletcher*, is disclosed.
2. Once the claim was narrowed to the decrease in property values, a class of persons was identifiable. The class consists of those who owned property within a specific area of Port Colborne when the 2000 MOE Report was released.
3. The claims of the class members raise common issues, a fact with which Inco did not disagree.
4. A class proceeding is preferable because:
  - (a) *Judicial economy* is achieved because the claim involves common issues, which was the case when the claim was narrowed to exclude claims of injury to health.

- (b) *Access to justice* is achieved because many of the people whose property values were most seriously impacted would otherwise be unable to seek redress.
- (c) *Behaviour modification* is achieved because similar industries may be influenced to modify their behaviour to ensure no harm is caused to the community.

5. The plaintiff met the representative plaintiff requirements as set out above.

#### **Implications of *Pearson v. Inco***

The Ontario Court of Appeal's decision is significant. It signals a more liberal approach to class certifications under the *Class Proceedings Act*. The likely consequence is that environmental claims will become certified more readily than in the past, as least when they relate to property damage. Claims involving human health effects on the other hand, appear to remain unlikely candidates for certification.

Inco is in the process of seeking leave to the Supreme Court of Canada to appeal the decision of the Ontario Court of Appeal.

#### **WHAT'S HAPPENING AROUND MILLER THOMSON**

The Ontario Good Road Association/Rural Ontario Municipal Association Conferences will be held between February 20th and 23rd at the Royal York Hotel in Toronto. **Bryan Buttigieg, Robin-Lee Norris** and **Bruce McMeekin** will be speakers at the conference.

Miller Thomson LLP invites you to join us for our **2006 York Region Executive Seminar Series**. This complimentary series is designed to offer practical information to key decision makers on timely legal and business issues. There will be four sessions, one on the last Thursday of each month from February to May inclusive. Topics include: **Environmental Update; Owner-Managed Businesses; Labour and Employment Issues;** and **M&A for Tech Companies**. You may participate in any or all of the sessions, based on your availability and interest. Please visit our website at [www.millerthomson.com](http://www.millerthomson.com) for more information.

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