WILLMS & SHIER ENVIRONMENTAL LAW MOOT COURT COMPETITION 2013

S.E.M.C.C. File Number: 03-09-2013

IN THE SUPREME ENVIRONMENTAL MOOT COURT OF CANADA

(ON APPEAL FROM THE ONTARIO COURT OF APPEAL)

B E T W E E N:

ELLEN SMITH

APPELLANT
(Appellant)

- and -

INCO LTD.

RESPONDENT
(Respondent)

FACTUM OF THE RESPONDENT
INCO LTD.

Pursuant to Rule 12 of the
Willms & Shier Environmental Law Moot Official Competition Rules 2013

TEAM #04-2013

TO: **THE REGISTRAR OF THE**
SUPREME ENVIRONMENTAL MOOT COURT OF CANADA

AND TO: **ALL REGISTERED TEAMS**

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PART I - OVERVIEW AND STATEMENT OF FACTS

A. Overview of the Respondent's Position

1 What constitutes damage to property? This is the question at the heart of this appeal.

2 The Appellant, Ellen Smith (the Representative Plaintiff), asks this Court to accept that, without any injury to property or person, the mere presence of a naturally-occurring substance amounts to property damage. For this, an award of $36 million is sought.

3 The Appellant claims that such an award is warranted by referring to environmental justice and protection. However, this case is not about environmental protection, but about property values that have been negatively affected by the power of misguided public perception.

4 The Respondent, Inco Ltd., asks this Court to resist imposing liability either in nuisance or under the doctrine of *Rylands v Fletcher*, without some proof of actual damage. Furthermore, the common law should not be forced to transform in order to give life to the Appellant's claim.

5 The Respondent respectfully requests that this Court dismiss the Appellant's appeal.

B. The Respondent's Position with Respect to the Appellant's Statement of Facts

6 The Respondent generally agrees with how the facts and the decisions of the lower courts were set out by the Appellant in her factum. However, some relevant facts were omitted or require further clarification.

(i) *Inco's nickel refinery and nickel emissions*

7 Inco's refinery was located in a heavily industrialized part of Port Colborne, zoned for such use. At the height of its 66 year operation, Inco helped employ up to 2,000 people in this small community.

Smith v Inco Ltd, 2011 ONCA 628 at paras 5-6, 103, 107 OR (3d) 321[*Smith*].

Smith v Inco Ltd, 2010 ONSC 3790 at para 47, 76 CCLT (3d) 92.

8 Evidence demonstrates that Inco was consistently in compliance with environmental and regulatory schemes, including those governing emission levels.

Smith, *supra* para 7 at para 9.

9 Unsurprisingly, by virtue of Inco's activities, widely varying levels of nickel were found in the soil of nearby properties.

Smith, *supra* para 7 at para 8, 24.

(ii) *Public concern and commencement of the lawsuit*

10 A lawsuit was filed after public concerns arose about the nickel levels 15 years after the refinery closed.

Smith, *supra* para 7 at para 25.

11 Following commencement of this suit, the Appellant's counsel made claims that Ministry of the Environment ("MOE") studies conclusively proved that the nickel was carcinogenic and posed serious health risks.

Smith, *supra* para 7 at para 20.

12 These claims played a part in fuelling the public concern that initiated the suit to begin with. The unfounded allegations were subsequently dropped.

Smith, *supra* para 7 at paras 20, 25.

13 This class action stems from the claim that the property values in question appreciated 4.35% less than properties in the neighbouring city of Welland.

Smith, *supra* para 7 at para 31.

(iii) *The Ministry of the Environment's findings*

14 Extensive testing by the MOE adduced no evidence that the nickel particles in the soil either adversely affected plant life or posed a threat to human health.

Smith, *supra* para 7 at paras 11-12.

15 Nevertheless, the MOE developed a soil intervention level for the properties. This level was created by taking into consideration potential nickel sources that people are commonly exposed to. These included food and drinking water and were not limited to nickel in the soil. The chosen level was well below any potential health risks that could arise from all of these sources combined.

Smith, *supra* para 7 at para 16.

16 Inco remediated 24 out of 25 properties to comply with the soil intervention level. The Appellant refused to allow Inco to remediate her property.

Smith, *supra* para 7 at paras 16-17.

PART II - THE RESPONDENT'S POSITION WITH RESPECT TO THE APPELLANT'S QUESTIONS

17 The issues on appeal are:

(a) whether the Appellant has established physical damage such that a claim in nuisance has been made out;

(b) whether the Appellant has established a claim under the doctrine of *Rylands v Fletcher* as it currently stands in Canadian law; and

(c) whether the court is the appropriate forum to transform the doctrine of *Rylands v Fletcher* so as to essentially create a new cause of action.

PART III -ARGUMENT

A. The Standard of Review is Correctness

18 The issues on appeal are questions of law. The appropriate standard of review is correctness.

Housen v Nikolaisen, 2002 SCC 33 at para 8, [2002] 2 SCR 235.

B. Inco is not Liable in Nuisance

19 The Appellant bases her claim in nuisance solely on the physical damage branch of the tort. This branch was correctly characterized by the Court of Appeal as requiring a material

injury to property that has "some detrimental effect on the land itself or rights associated with the use of the land".

Smith, *supra* para 7 at para 55.

(i) ***The nickel does not have a detrimental effect on the land itself***

20 The Appellant does not demonstrate how the nickel caused a detrimental effect on the land or how it amounts to anything beyond harmless, benign deposits. The Court of Appeal was correct to conclude that the deposits are nothing more than a mere chemical alteration in the content of the soil.

Appellant Factum at paras 20-22.

Smith, *supra* para 7 at para 55.

21 A mere change, without some associated physical effect, does not justify imposing liability. Individual interests, particularly those in urban communities, will unavoidably interfere with one another from time to time. The physical injury branch of nuisance is not about shifting the loss in every single case but rather, about imposing liability where physical damage is clearly established.

John G Fleming, *The Law of Torts*, 8th ed (Sydney: Law Book, 1992) at 418.

22 Case law in Canada and the UK provides a helpful illustration of the kinds of alteration that may or may not amount to physical damage. Physical damage was made out where the presence of dust rendered land unfit for cultivation and where foreign material from fumes detrimentally affected plant growth. It was also found where effluent caused erosion of land and where salt affected the growth and production of peach and apple trees. However, where the presence of radioactive particles did not result in any adverse effects, physical damage was <u>not</u> established. Thus, physical damage is only made out where a change has some deleterious physical effect. Such an adverse effect is lacking in the circumstances of this case.

Kent v Dominion Steel & Coal Corporation Ltd (1964), 49 DLR (2d) 241 at para 48, 50 MPR 221 (Nfld SC).

Walker v McKinnon Industries Ltd, [1949] OR 549 at para 35, 4 DLR 739 (HCJ) [*Walker*].

Smed v Green's Golf and Country Club, 2011 ABQB 5 at para 96, [2011] AWLD 2314.

Schenck v R (1981), 34 OR (2d) 595 at para 9, 131 DLR (3d) 310 (HCJ), aff'd (1984), 49 OR (2d) 556 (CA), aff'd [1987] 2 SCR 289 [*Schenck*].

Gaunt v Finney (1870), LR 8 Ch App 8.

Merlin and Others v British Nuclear Fuels Ltd (1990), 2 QB 557, 3 WLR 383 (Eng).

23 The Appellant errs in stating that the remediation is proof that the deposits constitute damage. Both courts below agreed that the MOE did not define a threshold for civil liability in setting the soil intervention level. The level did not establish a standard for physical damage to land and was only set to ensure nickel levels were well below any possible health risk.

Appellant Factum at para 22.

Smith, *supra* para 7 at paras 16, 60.

(ii) ***The nickel does not affect rights associated with the use of the land***

24 The Appellant overstates the breadth of the right to alienate and accordingly, there has been no detrimental effect on this right. The Appellant is free to sell her land and is not prevented by the nickel from doing so.

Appellant Factum at paras 25-27.

25 The Appellant correctly points out that the right of alienation is not a "right to profit, or to realize a specific return". However, this is precisely the infringement that is the basis of her claim. She seeks compensation because the properties in question have failed to garner a profit consistent with neighbouring communities.

Appellant Factum at para 27.

26 The Appellant argues that alienation is the right to own "an economic asset free of outside human-made influences that unduly affect price". However, alienation is merely the right to transfer ownership of property. It does not involve shielding one's property value from the market, which is dictated by human perception. On the Appellant's reasoning, an individual who paints his or her house florescent pink, driving down the market price of a neighbouring property, would be impeding that neighbour's right of alienation.

Appellant Factum at para 27.

Bruce Ziff, *Principles of Property Law*, 5th ed (Toronto: Carswell, 2010) at 262.

(iii) ***Diminution of property value is not an actionable legal wrong***

27 A diminution in property value does not, in and of itself, establish a cause of action. Rather, it goes to the measure of compensation. To obtain a remedy for depreciation of property value (caused by stigma or otherwise), liability must first be made out.

> *Appellant Factum* at paras 28-30.

28 Where stigma arising from fear of infection from a nearby hospital lowered property values, the Court held that, "[t]he mere fact of depreciation cannot found an action". Likewise, where gas vapours caused no physical damage to property, the Court denied compensation for the associated diminution in property value.

> *Shuttleworth v Hospital*, [1927] 1 WWR 476 at para 9, 1927 CarswellBC 5 (WL Can) (SC).
>
> *Sturge v Imperial Oil Ltd*, 1 Nfld & PEIR 279, 1970 CarswellNfld 21 (WL Can) (SC).

29 The Appellant relies on *Tridan Developments Ltd v Shell Canada Products Ltd* in claiming that stigma causing depreciation in property value requires compensation. However, the Court of Appeal was correct to conclude that *Tridan Developments Ltd* does not assist the Appellant, stating:

> In *Tridan Developments Ltd.*, the defendants admitted liability for nuisance when a gas spill on their property contaminated the property of the neighbour. *Tridan Developments Ltd.* was about the quantification of the damages suffered by the plaintiff. Nothing in *Tridan Developments Ltd.* lends support to the trial judge's holding that public concerns about the potential harm done to the properties affecting the value of the properties could constitute substantial physical harm to the land for the purposes of a nuisance claim.
>
> *Appellant Factum* at para 30.
>
> *Tridan Developments Ltd v Shell Canada Products Ltd* (2002), 57 OR (3d) 503, 110 ACWS (3d) 1045 (CA) [*Tridan Developments Ltd*].
>
> *Smith*, *supra* para 7 at para 66.

(iv) ***The Appellant's approach to nuisance is unfounded and unjustifiable***

30 The Appellant misconstrues *St Helen's Smelting Co v Tipping* in her analysis. The case does not stand for the proposition that a court should "err on the side of homeowners". *St Helen's*

merely serves to establish the distinction between the two branches of nuisance, providing that "special considerations" need not be taken into account where an interference results in material injury to property. Canadian courts have consistently relied on *St Helen's* for this proposition, not the Appellant's.

Appellant Factum at para 36.

St Helen's Smelting Co v Tipping (1865), 11 ER 1483, 11 HLC 642 [*St Helen's*].

See *Fuller v Pearson*, 23 NSR 263, 1891 CarswellNS 19 (WL Can) (SC); *Russell Transport Ltd v Ontario Malleable Iron Co*, [1952] OR 621, [1952] 4 DLR 719 (SC); *Schenck*, *supra* para 22 at para 26; *Walker*, *supra* para 22.

31 Having failed to establish physical damage, the Appellant has not satisfied the requisite elements of nuisance.

C. Inco is not Liable under the Doctrine of *Rylands v Fletcher*

32 Failing to establish damage under nuisance, the Appellant cannot now do so under *Rylands.* The Appellant also does not demonstrate how Inco's use of the land was non-natural or that the escaped nickel was likely to cause mischief.

33 The Court of Appeal correctly stated that establishing liability under *Rylands* requires that:

(a) the defendant made a non-natural use of his/her land;

(b) the defendant brought onto his/her land something likely to cause mischief if it were to escape;

(c) the substance in question did in fact escape; and

(d) damage was caused to the plaintiff's property as a result of the escape.

Appellant Factum at para 40.

Smith, *supra* para 7 at para 71.

Rylands v Fletcher (1868), LR 3 HL 330 [*Rylands*].

See *Brooks v Canadian Pacific Railway*, 2007 SKQB 247 at para 98, 283 DLR (4th) 540 [*Brooks*]; *Durling v Sunrise Propane Energy Group Inc*, 2012 ONSC 6570 at para 69, 2012 CarswellOnt 14583 (WL Can); *Hoffman v Monsanto Canada Inc*, 2005 SKQB 225 at para 91,

[2005] 7 WWR 665; *John Campbell Law Corp v Strata Plan 1350*, 2001 BCSC 1342 at paras 21-22, 8 CCLT (3d) 226.

(i) *The Appellant fails to satisfy the damage requirement under* Rylands

34 For precisely the same reasons as in nuisance, the Appellant fails to make out damage under *Rylands.*

35 The only "damage" that the Appellant seeks compensation for is pure economic loss. The Appellant offers no authority supporting her contention that *Rylands* compensates for such damage, nor has she provided any arguments why this should be the case.

Appellant Factum at paras 54-55.

36 Canadian courts have consistently rejected claims under *Rylands* for pure economic loss. In *Cuff v Canadian National Railway*, the Court stated: “Claims based on the case of *Rylands* involve claims for actual property damage sustained by adjacent property owners and have no application to claims involving individuals with no actual property damage claims to advance”.

Cuff v Canadian National Railway Co, 2007 ABQB 761 at paras 31-32, 162 ACWS (3d) 887.

See *Brooks*, *supra* para 33 at paras 104-105.

(ii) *Inco's nickel refinery did not constitute a non-natural use of land*

37 The Court of Appeal adopted the Supreme Court’s approach to the “non-natural use” inquiry and correctly concluded that Inco's use of the land was natural. The Appellant’s characterization of non-natural use is inconsistent with how the term has evolved in the common law.

Smith, *supra* para 7 at para 97.

Appellant Factum at para 41.

38 In *Rylands*, Justice Blackburn originally referred to a substance, “which was not naturally there.” In the House of Lords' decision, Lord Cairns then imported the phrase “non-natural use”. Though subtle, this distinction subsequently opened the door to different interpretations of what was required for liability.

Rylands, supra para 33.

39 In *Rickards v Lothian*, Lord Moulton clarified the meaning of "non-natural use" by stating:

> It is not every use to which land is put, that brings into play that principle. It must be some special use bringing with it increased danger to others and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of community.
>
> *Rickards v Lothian*, [1913] AC 263 (Australia PC).

40 Canadian courts have followed an approach based on *Rickards'* "ordinary or special use". In keeping with this approach, the Supreme Court described non-natural use as "user inappropriate to the place where it is maintained". This demonstrates that the non-natural inquiry places emphasis on the use of the land rather than on the substance at issue.

> See *Alfarano v Regina*, 2010 ONSC 1538 at para 60, 92 RPR (4th) 53; *Ivall v Aguiar*, 86 OR (3d) 111 at paras 24-25, 2007 CarswellOnt 3140 (WL Can) (Sup Ct J); *Vaughn v Halifax-Dartmouth Bridge Commission* (1961), 29 DLR (2d) 523 at paras 23-24, 46 MPR 14 (NSSC).
>
> *Tock v St John's (City) Metropolitan Area Board*, [1989] 2 SCR 1181 at paras 10-13, 82 Nfld & PEIR 181 [*Tock*].

41 English courts have taken a similar approach in adopting the *Rickards* formulation:

> I think it clear that ordinary user is a preferable test to natural user, making it clear that the rule in *Rylands v Fletcher* is engaged only where the defendant's use is shown to be extraordinary and unusual. This is not a test to be inflexibly applied: a use may be extraordinary and unusual at one time or in one place but not so at another time or in another place...
>
> *Transco plc v Stockport Metropolitan Borough Council*, [2003] UKHL 61, [2004] 2 AC 1, Lord Bingham of Cornhill.

42 In determining whether a use is non-natural, both Canadian and UK courts correctly take into account the time, place, and manner of the use.

> *Smith*, *supra* para 7 at paras 95, 97.
>
> *Tock*, *supra* para 40.
>
> *Gertsen v Metropolitan Toronto (Municipality)* (1973), 2 OR (2d) 1, 41 DLR (3d) 646 (SC).

43 Contrary to the Appellant's assertion, the Court of Appeal correctly considered the time and locale of Inco's operations. In *North York v Kert Chemical Industries Inc*, the Court noted

that it was natural for an industrial operation to conduct its business in an area intended for industrial use. The place where Inco operated was an area zoned for industry; one would only expect to find industrial operations in such a location. It is an error to state that an activity is unnatural simply because it is industrial in nature. Furthermore, Inco's activities occurred at a time when industrial operations were commonplace.

Appellant Factum at paras 45-46.

Smith, *supra* para 7 at para 103.

North York (City) v Kert Chemical Industries Inc (1985), 33 CCLT 184 at para 28, 32 ACWS (2d) 27 (Ont HCJ).

44 Inco also operated in a manner that was ordinary. No evidence suggested that Inco's operations were inconsistent with industry norms, that the nickel itself is toxic, or that the activities were specialized. The Appellant provides no indication of what a "specialized venture" entails or why one would be non-natural. Rather, the only facts found on trial were that Inco's activities were in compliance with environmental and zoning regulations and it was not alleged that Inco was negligent. Although Inco was a profit-making enterprise, this fact is not determinative, nor is relying on it consistent with the post-*Tock* approach to the non-natural use inquiry.

Smith, *supra* para 7 at para 9.

Appellant Factum at para 41.

45 Finally, the Appellant relies on *Cambridge Water Co Ltd v Eastern Counties Leather plc* to argue that the accumulation of a chemical is a non-natural use of land *per se*. However, the statement relied upon must be considered in the context of the entire case. Lord Goff made this comment in *obiter* after finding that the harm in question was not foreseeable. This addition of foreseeability served to limit the scope of liability under *Rylands* and to shift the focus away from the non-natural use inquiry. However, Canadian courts have not imported foreseeability into *Rylands*, nor have they applied Lord Goff's *obiter* statement as binding law.

Appellant Factum at para 43.

Cambridge Water Co Ltd v Eastern Counties Leather plc (1993), [1994] 2 AC 264, [1994] 1 All ER 53 HL [*Cambridge Water*].

(iii) *The release of nickel was not likely to cause mischief*

46 A further element in *Rylands* addresses whether the activity in question involved a substance that was likely to cause mischief if it were to escape.

Rylands, *supra* para 33.

47 The Appellant errs in submitting that the mere presence of a refinery operating near a residential area for a significant period of time satisfies this element. It is not the activity that must cause mischief. Rather, mischief must stem from the substance if it were to escape.

Appellant Factum at para 48

48 To use the Appellant's example, it is not the activity of putting up a Christmas decoration that satisfies this element. Instead, the inquiry involves asking whether the Christmas decoration is likely to cause mischief if it were to fall from a hydro pole to the street below.

Appellant Factum at para 49.

Saccardo v Hamilton, [1971] 2 OR 579, 18 DLR (3d) 271 (HCJ).

49 Given that Inco's use of the land was natural and that the nickel did not cause mischief or damage, the Respondent is not liable under *Rylands.*

D. The Court Should Defer to the Legislature

50 The Appellant is seeking a transformation of the common law. The appropriate body to deal with such a change is the legislature.

(i) *The legislature is better suited to regulate the environment*

51 The Appellant contends that, in the pursuit of environmental justice, this Court should recognize a new cause of action to hold profit-making entities strictly liable. She submits that *Cambridge Water* implicitly affirmed the importance of environmental protection, justifying the expansion of *Rylands*. However, the Court in that case explicitly dismissed any expansion of strict liability to address environmental pollution, stating:

> It is of particular relevance that the present case is concerned with environmental pollution...But it does not follow from these developments that a common law principle, such as the rule in *Rylands v Fletcher*, should be developed or rendered more strict to provide for liability in respect of such pollution. On the contrary, given that so much well-informed and carefully structured legislation is now being put in place for this purpose, there is less need for the courts to develop a common law principle to achieve the same end, and indeed it may well be undesirable that they should do so.
>
> *Appellant Factum* at paras 91-92.
>
> *Cambridge Water*, *supra* para 45.
>
> See also *66295 Manitoba Ltd v Imperial Oil Ltd*, 2000 MBQB 145 at paras 39-41, 165 Man R (2d) 29.

52 Environmental protection involves the type of complex and policy-driven considerations the legislature is meant to address. All human activity will impact the environment to some degree. This creates a need to balance development with environmental preservation, requiring decision-makers to take into account economic, social, technological, and scientific considerations. The legislature has the expertise to set and accomplish environmental goals while balancing these underlying policy issues.

53 The Appellant submits that *Rylands* should be expanded to play a role in environmental protection through the regulation of industrial enterprises. The Appellant's justifications for this stem from supposed laxly granted licenses, inadequate policing, and threats that are difficult to proactively regulate. The Appellant fails to demonstrate why courts, instead of the legislature, are in a better position to regulate industry. Courts are restricted to resolving disputes only after a harm has materialized, whereas the legislature has the ability to proactively deal with environmental risks arising from industry.

> *Appellant Factum* at paras 96-97.
>
> Lucas Bergkamp, *Liability and Environment: Private and Public Law Aspects of Civil Liability* (The Hague: Kluwer Law International, 2001) at 206.

54 In the circumstances of this case, the legislature had in place environmental regulations. Short of a constitutional issue, courts generally do not interfere with how legislatures choose to regulate. If the Appellant takes issue with the government's environmental decision-making, her dispute should be with the legislature, not Inco.

(ii) ***Drastic changes to the law should be left to the legislature***

55 The Appellant incorrectly submits that courts should not wait for the legislature to act because the legislature has the power to respond to any law it finds "offensive." Courts do have the important role of making incremental changes to the common law. However, the legislature is responsible for the vast majority of law-making. A court does not replace the legislature when it feels legislators are not living up to their obligation.

Appellant Factum at paras 61-62.

56 In *R v Salituro*, the Supreme Court concluded that the judiciary should be limited to making necessary incremental changes to the common law to reflect modern society:

> [I]n a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform; and for any changes to the law which may have complex ramifications, however necessary or desirable such changes may be, they should be left to the legislature [emphasis added].

R v Salituro, [1991] 3 SCR 654 at para 39, 131 NR 161.

See also *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 at paras 51-52, [2005] 2 SCR 473.

57 The case law provided by the Appellant does not oppose this view but supports it. In *British Columbia v Canadian Forest Products Ltd*, Justice Binnie stated: "[t]he Court cannot act on generalizations and unsupported assertions. In the absence of statutory intervention, the Court must proceed cautiously." The Court went on to refuse to amend the law and dismissed the cross-appeal for economic loss arising from environmental damage.

British Columbia v Canadian Forest Products Ltd, 2004 SCC 38 at para 155, [2004] 2 SCR 74.

58 In *R v Mann*, the Supreme Court stated:

> [T]his Court must tread softly where complex legal developments are best left to the experience and expertise of legislators...major changes requiring the development of subsidiary rules and procedures relevant to their implementation are better accomplished through legislative deliberation than by judicial decree.

R v Mann, 2004 SCC 52 at para 17, [2004] 3 SCR 59.

59 The Appellant's proposed amendment is not an incremental change, nor is it a natural evolution of existing law, for the reasons that follow.

The Appellant's use of enterprise liability is not the law in Canada

60 In Canadian law, enterprise liability has not been used to hold a corporation liable for its actions simply because it has a profit-making purpose. Its use has been limited to determining whether an employer should be vicariously liable for the independent torts of an employee. To create a law that imposes strict liability on a person or company solely because they were acting in pursuit of profit would radically alter the principles upon which tort law is based.

> See *Bazley v Curry*, [1999] 2 SCR 534, 174 DLR (4th) 45; *B(E) v Order of the Oblates of Mary Immaculate (British Columbia)*, 2005 SCC 60 at para 61, [2005] 3 SCR 4; *London Drugs Ltd v Kuehne & Nagel International Ltd*, [1992] 3 SCR 299 at paras 193-196, 97 DLR (4th) 261.

61 Although there has been no judicial consideration of enterprise liability in the environmental realm, courts have discussed and consistently rejected it with respect to product liability. In the common law, if a product harms a consumer, negligence on the part of the manufacturer must be established in order for the consumer to be compensated. Courts have refused to accept arguments that they should extend the scope of liability simply because manufacturers are pursuing profit. Courts have also emphasized that, regardless, such a policy-laden decision is better suited for the legislature.

> See *Andersen v St Jude Medical Inc*, [2002] OTC 53 at paras 27-40, 2002 CarswellOnt 150 (WL Can) (Sup Ct J); *Goodridge v Pfizer Canada*, 2010 ONSC 1095, 101 OR (3d) 202; *Neptune Bulk Terminals Ltd v Intertec Internationale Technische Assistenz*, [1984] BCWLD 2450, 1984 CarswellBC 2415 (WL Can) (SC); *Phillips et al v Ford Motor Company of Canada Inc*, [1971] 2 OR 637, 18 DLR (3d) 641 (CA).

62 Incorporating enterprise liability into *Rylands* would have the effect of supplanting the law of negligence. There would be no reason for a plaintiff to seek a claim under negligence where he or she could impose strict liability on a profit-making entity for any foreseeable harm. This is especially true given the Appellant's argument that "escape" should be interpreted broadly and even apply to legal activities.

> *Appellant Factum* at paras 93-99.

63 The proposed expansion would significantly widen the scope of activities typically governed by tort law. Profit-making entities are not confined to nickel refineries. They could even include homeowners who seek to use their properties as investments to obtain a profit.

The common law does not recognize the Appellant's loss

64 To recognize a cause of action that provides compensation for economic loss without physical damage, personal injury, or negligence would be a large leap in the common law.

65 Tort law has been resistant to compensating plaintiffs for pure economic losses. In *Martel Building Ltd v R*, the Supreme Court of Canada reaffirmed that the common law "traditionally did not allow recovery of economic loss where a plaintiff had suffered neither physical harm or property damage." The Court then identified five categories of cases which could allow for compensable pure economic loss: independent liability of statutory public authorities, negligent misrepresentation, negligent performance of a service, negligent supply of shoddy goods or structures, and relational economic loss.

> *Martel Building Ltd v R*, 2000 SCC 60 at para 36, [2000] 2 SCR 860 [*Martel Building*].

66 The Appellant's claim does not fall within any of these five accepted categories of cases for pure economic loss. All five categories allow recovery based on some negligent act committed by a defendant. The Appellant concedes that the Respondent's conduct was not negligent. Adding strict liability to this list would be a marked departure from the categories recognized by common law.

E. The Doctrine of *Rylands* Should Not be Amended

67 In the alternative, should this Court choose not to defer to the legislature, there are compelling reasons not to accept the Appellant's new cause of action.

(i) *The Appellant's proposed expansion would create indeterminate liability*

68 In *Martel Building*, the Supreme Court's reasons for constraining recovery for pure economic loss were:

> (a) economic interests are viewed as less compelling of protection than bodily security or proprietary interests;
>
> (b) an unbridled recognition of economic loss raises the spectre of indeterminate liability;

> (c) economic losses often arise in a commercial context, where they are often an inherent business risk best guarded against by the party on whom they fall through such means as insurance; and
>
> (d) allowing the recovery of economic loss through tort has been seen to encourage a multiplicity of inappropriate lawsuits.
>
> *Martel Building*, *supra* para 65 at paras 36-38.

69 The Appellant's proposed expansion of *Rylands* would create indeterminate liability and a multiplicity of inappropriate lawsuits. There are thousands of law-abiding refineries, factories, and industrial operations that release emissions everyday. Recognizing the Appellant's expansion would allow compensation for any economic loss resulting from these emissions, even without damage to property or persons.

70 Profit-making enterprises across the country would be forced to question the viability of their operations given the implications of the new rule. They would be unable to determine the extent of conceivable liabilities and thus, be unable to insure against potential losses. It is reasonable to conclude that any new or expanding business would be hesitant to enter a market where it could be exposed to such liability, particularly for legal activities.

71 The Appellant attempts to address this issue of indeterminate liability by importing a foreseeability component into her new cause of action. However, foreseeability does not resolve the problem considering the Appellant alleges that her loss was foreseeable in the following circumstances:

> a) a company released nickel emissions into the air;
>
> b) the company was in compliance with all applicable environmental regulations;
>
> c) 15 years after the company ceased emitting, unfounded public concerns arose about the nickel;
>
> d) the nickel was found to cause no physical damage or injury;
>
> e) the property values appreciated 4.35% less than properties in another city.

72 If the Appellant can successfully establish that her loss was foreseeable from this course of events, it is difficult to imagine harms that would not be foreseeable.

73 In light of the potential for indeterminate liability, the Appellant's proposed cause of action should not be recognized.

(ii) ***Imposing liability in this case is not just***

74 The Appellant has failed to establish liability in trespass, in nuisance, or under *Rylands.* She has conceded that the Respondent's conduct was not negligent. Now, she attempts to persuade the Court to impose liability by masking her claim with reference to environmental justice. Yet, the Appellant has neither proved harm to the environment, nor allowed remediation of her property.

75 This case is not about environmental justice, but about a civil dispute that can and should be resolved with existing legal principles. It does not justify resorting to a transformation of the common law in order to find liability where liability is not due.

PART IV - SUBMISSIONS IN SUPPORT OF COSTS

76 The Respondent requests that this Court award costs on a partial indemnity basis, taking into consideration the amount agreed upon in the previous proceeding and additional costs incurred through this appeal.

PART V - ORDER SOUGHT

77 The Respondent requests that this Court deny the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of February, 2013.

_____
Meryl Rodrigues

_____
Sarah Willis

_____
Robert Woon

Counsel for the Respondent
Inco Ltd.

PART VI -TABLE OF AUTHORITIES

A. Jurisprudence	Paragraph No.
66295 Manitoba Ltd v Imperial Oil Ltd, 2000 MBQB 145, 165 Man R (2d) 29.	51
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B. Secondary Sources

Paragraph No.

ELLEN SMITH **-and-** **INCO LTD.**

APPELLANT
(Appellant)

RESPONDENT
(Respondent)

S.E.M.C.C. File Number: 03-09-2013

SUPREME ENVIRONMENTAL MOOT
COURT OF CANADA

FACTUM OF THE RESPONDENT
INCO LTD.

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