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 APPELLANT
ELLEN SMITH

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

TEAM #05-2013

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 Appellant's Position

1 The Appellant submits that the Court of Appeal erred in rejecting her claims under the strictly liability rule in *Rylands v Fletcher* and private nuisance.

2 The Respondent should be held liable under the rule in *Rylands v. Fletcher*. All four prerequisites of the rule have been established in this case. The Court of Appeal erred in finding that the Respondent's refinery was a natural use of the property. The Court of Appeal also erred in holding that the rule in *Rylands v. Fletcher* can only apply when the escape of the substance is the accidental or unintended consequence of a particular activity.

3 The Court of Appeal erred by rejecting the Appellant's private nuisance claim by conflating amenity nuisance with the claim for physical harm to land. The absence of adverse effects to health is not a proper consideration in claims for physical harm to land.

4 The Court of Appeal also mischaracterized the physical harm to land alleged and thereby held the Appellant's action to be inconsistent with the nature of private nuisance. Diminution of property value is only a manifestation of the actual harm, it does not constitute the harm itself.

5 The Appellant submits in closing that it is neither necessary nor within the purview of the judiciary to recognize a new common law cause of action for environmental claims.

B. Statement of the Facts

6 Inco Limited, ("the Respondent") operated a nickel refinery in Port Colborne from 1918 to 1980.

Smith v. Inco Ltd., 2010 ONSC 3790 at para 24 [*Smith v Inco 1*].

7 The Respondent's refinery was located immediately west of a residential district known as the "Rodney Street Area" (RSA). The RSA is one of the subsections of the class certified in the action and contains 340 residences.

Smith v. Inco Limited, 2011 ONCA 628 at para 19 [*Smith v Inco 2*].

8 The Respondent acknowledged that the nickel particles emitted into the air by its refinery was the source of the vast majority of the nickel found in the soil of the adjacent residential properties.

Smith v. Inco 1, *supra* para 6 at para 13.

9 The vast majority of the nickel emissions occurred before 1960.

Smith v. Inco 2, supra para 7 at para 7.

10 The first *Environmental Protection Act* governing air and waste management in Ontario was enacted in 1971.

Environmental Protection Act S.O 1971 c. 86 [*EPA 1*].

11 After the refinery closed, many different parties raised concerns regarding whether the refinery's emissions had contaminated nearby residential properties.

12 In the late 1990's, the Ontario Ministry of the Environment ("the MOE") established 200 parts per million (ppm) as the ecotoxicity level at which nickel deposits in the soil could have an adverse effect on the most sensitive plant life.

Smith v. Inco 2, supra para 7 at para 11.

13 In 1997, nickel levels up to 9,750 ppm were found in soil samples from properties in the vicinity of the Inco refinery that had been collected in 1991. The MOE reported it was unlikely these levels posed a risk to human health.

Smith v. Inco 2, supra para 7 at para 12.

14 In January 2000, an MOE phytotoxicological study of soil samples taken from 89 properties in the vicinity of the Inco refinery found nickel levels as high as 5,000 ppm.

Smith v. Inco 2, supra para 7 at para 13.

15 In September 2000, the MOE reported that nickel levels varying from 4,300 ppm to 14,000 ppm had been found in samples from the property of the Appellant.

Smith v. Inco 2, supra para 7 at para 13.

16 The MOE extensively tested soil in the area immediately to the west of the Inco refinery between the fall of 2000 and spring of 2001.

Smith v. Inco 2, supra para 7 at para 14.

17 The MOE reported the results of these tests in 2002. Testing revealed nickel levels higher than anticipated in the soil of many residential properties. Nickel levels greater than 8,000 ppm were found on 25 properties.

Smith v. Inco 2, supra para 7 at para 15.

18 The MOE established 8,000 ppm as a soil intervention standard for remediation, based on minimizing risk to the health of residents and especially toddlers.

Smith v. Inco 2, supra para 7 at para 16.

19 The Appellant's property suffered a diminution of value caused by the large quantity of nickel particles emitted by the Inco refinery and deposited into the soil of the Appellant's property.

20 In December of 2009, in the trial of class members represented by the Appellant against the Respondent, the Ontario Superior Court found the Respondent liable for private nuisance and strict liability under the rule in *Rylands v Fletcher*.

Smith v. Inco 1, supra para 6.

21 The Respondent appealed to the Ontario Court of Appeal ("the Court"). The Court granted the appeal and dismissed the Appellant's action. The Court found the Appellant failed to establish liability under both private nuisance and the rule in *Rylands v Fletcher*.

Smith v Inco 2, supra para 7 at para 2.

22 The Appellant was granted leave to appeal by the Supreme Environmental Moot Court of Canada.

PART II -- QUESTIONS IN ISSUE

23 Did the Court err in holding that the Appellant did not make out a claim under the rule in *Rylands v. Fletcher* or the doctrine of private nuisance?

24 Should the Supreme Environmental Moot Court of Canada recognize a new cause of action for environmental claims?

PART III -- ARGUMENT

25 The Court erred in holding that the Respondent was not liable for the discharge of nickel particles under the rule in *Rylands v. Fletcher*. The Appellant has established the four required elements for a successful claim. The Respondent made a non-natural use of land by operating a refinery immediately adjacent to a residential community for profit and not for the general benefit of the community. The Respondent brought nickel onto the land for the purpose of refining it and the nickel particles were likely to do mischief if they escaped. The nickel particles did in fact escape from Inco's property. The Appellant's property suffered a diminution of value

because of the elevated levels of nickel in the soil. Therefore, the Respondent should be held liable under the rule in *Rylands v. Fletcher*.

26 The Court erred in holding that the Respondent's discharge of nickel on to the Appellant's property was not a private nuisance. The Appellant's claim is for physical harm to land, not amenity nuisance. Harm to human health was not alleged by the Appellant, nor is it a valid consideration in claim brought for physical harm to land. The chemical alteration of the composition of soil on the Appellant's property alone satisfies the requirement of material, actual and ascertainable physical harm to land. A claim for damages from the chemical alteration of the soil, as manifested by a diminution in property value, is consistent with the objectives of private nuisance and tort law.

27 The Supreme Environmental Moot Court of Canada does not need to recognize a new cause of action for environmental claims. Rather, Canadian courts should give greater effect to international principles when applying existing causes of action to address environmental claims. The precautionary principle and the polluter pays principle have both been incorporated into Canadian environmental legislation and are good examples of international principles that deserve more attention by the courts in Canadian common law.

A. The Court erred in holding that the Respondent was not liable for the discharge of nickel particles under the rule in *Rylands v. Fletcher*.

28 In order to establish liability under *Rylands v. Fletcher* the Appellant must establish four prerequisites:

1. the Respondent made a "non-natural" or "special" use of his land;
2. the Respondent brought on to his land something that was likely to do mischief if it escaped;
3. the substance in question in fact escaped; and
4. damage was caused to the Appellant's property as a result of the escape.

Rylands v. Fletcher, (1868), LR 3 HL 330, 37 LJ Ex 161 [*Rylands v Fletcher*].

29 The Appellant submits that the Respondent is liable under the rule in *Rylands v. Fletcher* because all four prerequisites have been met. Prerequisite 4 is not at issue in this appeal. A

finding of liability in this case rests on whether the Appellant has established non-natural use of the land (prerequisite 1) and escape (prerequisites 2 and 3).

(i) **Non-Natural Use of the Land**

30 The Court erred in holding that the operation of the Respondent's refinery was a natural use of the Respondent's property.

31 The Court determined that the operation of the Respondent's refinery was a natural use of the land because the Respondent operated the refinery in an industrial part of the city and the refinery only created risks that were incidental to any industrial operation.

> *Smith v. Inco 2, supra* para 7 at para 103.

32 The Court expressly relied on and cited *Gertsen v. Municipality of Metropolitan Toronto (Gertsen)* to conclude that the question to determine non-natural use must be:

> "Was the operation of the refinery at the time and place and in the manner that it was operated a non-natural use of Inco's property?"
>
> *Gertsen v. Municipality of Metropolitan Toronto*, (1973), 2 OR (2d) 1 HC at paras 19 and 20 [*Gertsen*].

33 The Appellant respectfully submits that the Court misapplied *Gertsen*. The Ontario High Court of Justice in that case said that, taking into account the time, place, manner and *purpose* of the operation, the operation of a garbage and waste disposal area next to a heavily population urban area was a selfish and self-serving opportunity for the municipality that amounted to a non-natural use of the land [emphasis added].

> *Gertsen, supra* para 32 at paras 19 to 20.

34 In this case, the Court incorrectly stated the test to determine non-natural use of the land in failing to have regard for the purpose of the activity. The Court erred in finding the Respondent's refinery to be a natural use of the land because they did not take into account the purpose of the activity.

> *Gertsen, supra* para 32 at paras 19 to 20.

35 The Respondent's refinery was operated in a similar time, place and manner and for the same purpose (private profit) as the garbage and waste disposal area in *Gertsen* and therefore should also be found to be a non-natural use of the land.

> *Smith v. Inco 2, supra* para 7 at para 104.

36 In *Danku v Town of Fort Frances et al.* (*Danku*), the Court discussed the distinction between the public defendant, a municipality, that operates a sewage system for the general benefit of society and the private defendant that operates a sewage system for private purposes and stated that the private system:

> …is operated as part of a scheme devoted to private profit and is therefore not within the exception to the rule in *Rylands v. Fletcher* relating to the general benefit of the community. If the effect is to impose a heavier burden on such a commercial enterprise than upon the municipality one may reconcile it in the words of Lord Wright…that the result is "reasonable according to the ordinary usages of mankind living in…a particular society."

Danku v Town of Fort Frances et al., [1976] OJ No 2316, 73 DLR (3d) 377 at para 39 [*Danku*].

37 In *Canadian Tort Law,* the authors also state that a non-natural use can be found where the purpose of the activity is a selfish and self-serving opportunity that is not for the general benefit of the community. As another example, in *Wei's Western Wear Ltd. v. Yui Holdings Ltd.* (*Wei's Western*), the use of large quantities of water for a profit-making enterprise was found to be a special use bringing with it increased danger to others and therefore a non-natural use of the land.

Allan M. Linden, Lewis N. Klar & Bruce Feldthusen, *Canadian Tort Law: Cases, Notes and Materials,* 13th ed (Markham, Lexis Nexis Canada Inc, 2009) at 537 [*Canadian Tort Law*].

Wei's Western Wear Ltd. v. Yui Holdings Ltd., (1984), 5 DLR (4th) 681 at para 16 [*Wei's Western*].

38 The Court relied on *Tock v. St. John's Metropolitan Area Board* (*Tock*) to support its finding that the Respondent's nickel refinery does not constitute a non-natural use of the land.

39 The Court failed to acknowledge that *Tock* is completely distinguishable on the facts. Unlike the public sewage and drainage systems in *Tock*, a nickel refinery is not an "indispensable part of the infrastructures necessary to support urban life" for the general benefit of the community. The Respondent's refinery was a private, for-profit enterprise.

Tock v. St. John's Metropolitan Area Board, [1989] 2 SCR 1181, 1 CCLT (2d) 113 at para 13 [*Tock*].

40 The Appellant submits that the Respondent's refinery was a special use of the land that brought with it an increased danger to others to which liability under *Rylands v. Fletcher* may attach:

> It is not every use to which land is put that brings in that principle [*Rylands v Fletcher*]. 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 the community.
>
> *Tock, supra* para 39 at para 10.
>
> *Rickards v. Lothian*, [1913] AC 263, Privy Council [*Rickards*].

41 The normal operation of a nickel refinery that emits high levels of nickel particles into the air and onto the properties of an adjacent residential area is a use of land that may bring increased danger to others. The danger in this case is not physical danger in terms of physical harm to area residents, it is the danger of the community having to bear the risk of damage as a result of a for-profit operation.

42 In *Tock* and *Rickards*, the normal use of a sewage or plumbing system does not bring any increased danger to others. The use of the land in both cases was found to be natural because the successful operation of the sewage or plumbing system (*i.e.*, the movement of sewage/water through the pipes) provides general benefit to the community.

> *Tock, supra* para 39.
>
> *Rickards, supra* para 40.

43 The operation of a nickel refinery by a private corporation for profit should not fall into the same category of land use as a public sewage or plumbing system.

> *Rickards, supra* para 40.

44 The Court in *Tock* held that the flooding in that case would have been compensable if the case had been between private individuals. The Respondent is a private corporation operating the nickel refinery for profit and the case is between private individuals, therefore the damage should be compensable.

> *Tock, supra* para 39.

45 The Court erred in ignoring the distinction in *Tock* between a private and public entity and its implications on the requirement of establishing "non-natural" use. The normal operation of the Respondent's refinery is a special use of land bringing with it an increased danger to others because the purpose of its operation is to create a profit and it does not create a general benefit to the community.

Wei's Western, supra para 37 at para 16.

46 The Respondent's refinery was a non-natural use of the land. Like in *Danku,* the Respondent is a private entity operating for profit and not for the general benefit of the community and should attract liability under *Rylands v. Fletcher*.

Danku, supra para 36 at para 40.

47 The Appellant agrees with the Court where they stated that the non-natural use requirement serves a similar role as the "give and take between neighbours":

> …the non-natural user inquiry seeks to distinguish between those uses of property that the community as a whole should accept and tolerate and those uses where the burden associated with accidental and unintended consequences of the use should fall on the user.

Smith v Inco 2, supra para 7 at para 98.

48 The use of the Respondent's property for a refinery was not a use of property that the community as a whole should accept and tolerate. It is a use where the burden associated with the consequences of the use should fall on the Respondent. The residents should not have to bear the risks associated with the for-profit refinery operating next door:

> …it is only just that if the loss must fall somewhere it be upon the person conducting the enterprise for the purpose of profit rather than upon its completely innocent neighbour.

Danku, supra para 36 at para 40.

49 The Appellant agrees with the Court that the Respondent's compliance with regulations does not make the operation of the refinery an ordinary use of land.

Smith v Inco 2, supra para 7 at para 100.

50 Operation in an industrial area in compliance with regulations does not preclude the refinery from being considered a "non-natural" use of the land. As an example, in *Cambridge Water Co Ltd .v Eastern Counties Leather plc* (*Cambridge Water*), the English House of Lords found the storage of substantial quantities of chemicals and their use in an industrial process to be a non-natural use of the land.

> *Cambridge Water Co Ltd .v Eastern Counties Leather plc*, [1994] 1 All ER 53 [*Cambridge Water*].

51 Contrary to the Court's suggestion, the Respondent's Refinery was not approved or regulated. The first Ontario *Environmental Protection Act* was enacted in 1971. Prior to this enactment, there was no environmental legislation governing air and waste management. The majority of the nickel deposits occurred before 1960.

> *EPA 1, supra* para 10.
>
> D. Paul Emond, "Are We There Yet? Reflections on the Success of the Environmental Law Movement in Ontario" (2008) 46 Osgoode Hall LJ at 220.

52 The Respondent's refinery meets the first prerequisite of the rule in *Rylands v. Fletcher*. The Respondent's refinery does not belong in the same category of land use as the public sewage system in *Tock*. The risk of operating the refinery adjacent to a residential area should fall to the Respondent. The refinery is a special use of land bringing with it an increased danger to others because the purpose of its operation is to create profit and it does not create a general benefit to the community. Therefore, the Respondent's refinery is a non-natural use of the land.

(ii) **Escape**

53 The Court erred in holding that the rule in *Rylands v. Fletcher* can only apply when the escape of the substance is due to accidental or unintended consequences of a particular activity.

54 Liability may attach to the Respondent where something likely to cause mischief escapes from the Respondent's property. The rule in *Rylands v. Fletcher* contains no requirement of intention. Lord Blackburn makes this clear when he stated:

> The person whose grass or corn is eaten down by escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or *his habitation is made unhealthy by the fumes and vapours of his neighbour's alkali works*, is damnified without fault of his own.
>
> *Rylands v. Fletcher, supra* para 28.

55 Clearly, *Rylands v Fletcher* contemplates “escapes” that are the byproduct of industrial use of land (*i.e.* that are intended). Therefore the Court erred in finding that intention was a relevant consideration in determining whether or not the release of nickel particles by the Respondent would meet the escape requirement under *Rylands v. Fletcher*.

Smith v. Inco 2, supra para 7 at paras 82 to 84 and 112.

56 The Court noted that the application of *Rylands v. Fletcher* to the intended results of an activity has been doubted in *North York (City) v. Kert Chemical Industries Inc.* (*North York*).

Smith v. Inco 2, supra para 7 at para 112.

57 The Appellant respectfully submits that in *North York*, the Court did not say that *Rylands v. Fletcher* could not apply to intended discharges. Rather, the judge dismissed the application of *Rylands v. Fletcher* because it should be used as a last resort and the issue in that case was adequately dealt with under negligence law.

North York (City) v. Kert Chemical Industries Inc. (1985), 3 CCLT 184 (Ont HC) at para 28 [*North York*].

58 The Appellant submits that strict liability under *Rylands v. Fletcher* is applicable to situations where there are intended releases. It is not only aimed at the risks associated with the accidental and unintended consequences of engaging in an activity. The escape component is broad and can include the intended release of a substance when the consequences of the intended release could cause damage to the plaintiff neighbour.

59 In the House of Lords judgment of *Rylands v. Fletcher*, Lord Cairns entirely concurred with the lower court judgment of Judge Blackburn. Judge Blackburn provided examples of where the rule could apply above at paragraph 40, including an intended release where “habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works". The fumes and noisome vapours from the alkali works example in *Rylands v. Fletcher* were emitted intentionally as part of the operation. The Respondent’s refinery, just like the alkali works, is still subject to the rule in *Rylands v. Fletcher* for the accidental or unintended consequences of the intended emissions.

Rylands v. Fletcher, supra para 28.

60 The escape component of *Rylands v. Fletcher* can be satisfied by the intended release of nickel particles over an extended period of time and the Respondent is responsible for the damage that is a natural consequence of its escape.

Rylands v. Fletcher, supra para 28.

61 The Appellant submits the Respondent should be held liable under the rule in *Rylands v. Fletcher*. All four prerequisites to the rule have been established by the Appellant. The Respondent made a non-natural use of its land by operating a refinery for profit immediately adjacent to a residential community and not for the benefit of the community. The Respondent brought nickel onto its land for the purpose of refining it. The nickel particles were likely to do mischief if they escaped. The nickel particles did escape from the Respondent's land and were deposited on the Appellant's property. The Appellant's property suffered harm as a result of the deposit of these nickel particles. This harm is evidenced by the diminution of value in the Appellant's property attributable to the elevated levels of nickel found in the soil on the Appellant's property.

62 The Court devoted on section of its reasons (paragraphs 75 to 93) to a discussion of "strict liability to ultra hazardous activities". This Court's analysis of strict liability for ultra hazardous activities was unnecessary because the trial judge's reasons show that he conducted the standard analysis of the rule in *Rylands v. Fletcher* to find the Respondent liable. Its finding was not based on an expanded concept of strict liability. The Court's treatment of this issue contributed to their error that intention on the part of the Respondent, both in the operation of the refinery and in the release of the nickel particles, precluded the Respondent from being held liable under the rule in *Rylands v. Fletcher*.

B. The Court erred in holding that the discharge of nickel particles by Inco onto the property of the Appellant was not actionable under private nuisance.

63 The tort of private nuisance has been defined as an act or omission that is an interference with a person's ownership or occupation of land or of some easement, profit or other right used or enjoyed in connection with land.

Anthony M. Dugdale & Michael A. Jones, *Clerk & Lindsell on Torts*, 19th ed, Ant, (London: Sweet & Maxwell, 2006) at s.20-01.

64 Nuisance is divided into two distinct branches, according to the damage that is suffered. These two branches are physical damage to land and significant interference with the beneficial use of the premises or personal inconvenience, otherwise known as amenity nuisance.

Canadian Tort Law, *supra* para 37) at 568.

St. Helen's Smelting Co. v Tipping, [1865] 11 HLC 642 (HL) at page 650 [*St. Helen's Smelting*].

65 Whether physical damage to land is actionable under private nuisance is informed by case law. In order to give rise to an action in private nuisance, the applicable test is whether the physical damage caused is material, actual and ascertainable.

Smith v Inco 2, *supra* para 7 at para 49.

66 In *St. Lawrence Cement Inc. v Barrette* (*St. Lawrence Cement*), material damage is explained by the Supreme Court of Canada as damage that is substantial in the sense that it is more than trivial. In *Walker v McKinnon*, actual damage is defined as damage that has occurred and is not merely potential damage that may or may not occur at some future point. In *Gaunt v Fynney*, the ascertainability of damage refers to the ability to observe or measure damage. Damage that is scientifically measurable, though it does not produce a visible change in the property, is ascertainable.

St. Lawrence Cement Inc. v. Barrette, 2008 SCC 64 at para 77 [*St. Lawrence Cement*].

Gaunt v. Fynney, (1872) LR 8 Ch. App. 8.

Walker v. McKinnon Industries Ltd., [1949] OR 549 (HC) at 558.

(i) **The Distinction between Physical Harm to Land and Amenity Nuisance**

67 The Appellant's initial claim included claims for personal injury, adverse health effects and diminution of property value.

Smith v. Inco 2, *supra* para 7 at para 20.

68 When the action progressed to trial, the damages claimed by the Appellant had been narrowed to the diminution of their property values, in light of widespread public concern over the nickel deposits in the soil on their properties.

Smith v. Inco 1, *supra* para 6 at para 11.

69 At trial and on appeal, the Appellant's claim was characterized as an action under the physical damage to land branch of private nuisance.

70 The Court recognized the two branches of private nuisance set out in *St. Helen's Smelting Co*, stating:

> The claimants do not argue that the nickel particles in the soil caused any interference with their use or enjoyment of their property. Instead they claim that the nickel particles caused "physical injury" to their property.
>
> *Smith v. Inco 2, supra* para 7 at para 44.

71 The Appellant submits that Court erred in the application of the common law test for physical damage to land under private nuisance when it asserted that:

> …the claimants must show that the alleged contaminant in the soil had some detrimental effect on the land *or its use by its owners*. [Emphasis Added]
>
> *Smith v. Inco 2, supra* para 7 at para 57.

72 Inclusion of detrimental effect on the use of land by its owners as a consideration constitutes a conflation of claims brought under the physical injury to land and amenity nuisance branches of private nuisance.

73 The Court provided no authority to support the assertion found in paragraph 71 above.

(ii) **Adverse Effect to Health**

74 The courts approach private nuisance claims predicated on physical damage to land differently than those predicated on amenity nuisance. The branches of private nuisance are distinct. Impact on the use or enjoyment of the land by its owner and the reasonableness analysis associated with it has no bearing in a claim for physical harm to land.

> *Smith v. Inco 2, supra* para 7 at para 43.

75 The Appellant submits the Court further conflated the two branches of harm under private nuisance by stating that it was:

> …incumbent on the claimants to show that the nickel particles deposited by Inco caused actual harm to the health of the claimants or at least posed some realistic risk of actual harm to their health and wellbeing.
>
> *Smith v. Inco 2, supra* para 7 at para 57

76 The Appellant's action at trial did not allege any adverse health effects. The physical harm to land alleged was strictly the deposition of nickel particles onto their property and its manifestation as a decrease in the value of their property.

77 The Court cited *The Law of Nuisance in Canada* as support for the inclusion of the right to occupy one's property without harm to one's health as one of the property rights upon which private nuisance harm is predicated.

> Gregory S. Pun & Margaret I. Hall, *The Law of Nuisance in Canada* (Markham: LexisNexis, 2010) at 85 [*The Law of Nuisance in Canada*].

78 The Appellant respectfully submits this excerpt of *The Law of Nuisance in Canada* was taken out of context. The authors' affirmation of the right to occupy property without harm to one's health took place within the context of a discussion of the factors considered when establishing the reasonableness of interference with the use or enjoyment of land.

> *The Law of Nuisance in Canada*, *supra* para 77 at 66.

79 Consideration of whether or not actual injury to the Appellant's health occurred as a result of the deposition of nickel onto the land is consistent with the definition of amenity nuisance as an interference with every person's entitlement to the *comfortable and healthful enjoyment* of the premises owned or occupied. [Emphasis added]

> *Halsbury's Laws of England*, 3d ed, vol 28 (London: Butterworths, 1969) "General Statements of Principle", para 175.

80 The connection between adverse health effects and amenity nuisance is further laid out by Linden and Klar, who state that damages for injury to health may be recovered in a nuisance action where there is also interference with the use and enjoyment of the land.

> Allen M. Linden & Lewis N. Klar, *Canadian Tort Law: Cases, Notes & Materials*, 8th ed (Markham: LexisNexis, 2006) at 570.

81 The absence of interference with the use of property and adverse health effects from nickel in the soil are not relevant considerations in nuisance actions alleging physical harm to land. The Court erroneously relied on these considerations as grounds for its rejection of the Appellant's nuisance claim.

(iii) **Material Physical Damage to Land**

82 The Appellant submits that the nickel particles' alteration of the chemical composition of the soil alone satisfies the material, actual and ascertainable physical damage to land element of private nuisance.

83 Between 1997 and 2000, MOE testing of soil samples taken from properties in the vicinity of the Respondent's refinery yielded nickel levels ranging from 4,300 ppm to 14,000 ppm.

Smith v. Inco 2, supra para 7 at paras 12 and 13.

84 The oldest samples tested by the MOE were collected in 1991 and contained up to 9,750 ppm of nickel.

Smith v. Inco 2, supra para 7 at para 12.

85 200 ppm of nickel was established by the MOE as the ecotoxicity level at which nickel deposits in the soil could have an adverse effect on the most sensitive plant life.

Smith v. Inco 2, supra para 7 at para 11.

86 8,000 ppm was also established by the MOE as the soil nickel intervention level beyond which remediation was deemed appropriate in order to protect human health. 25 properties were found to have nickel concentrations exceeding this level.

Smith v. Inco 2, supra para 7 at para 16.

87 The Appellant submits that the foregoing MOE findings establish physical damage to the Appellant's land, in the form of chemical alteration of the composition of the soil.

88 The Court was of the opinion that chemical alteration in the content of soil cannot alone constitute physical harm or damage to the property.

Smith v. Inco 2, supra para 7 at para 55.

89 The Court did not provide any authorities to support the assertion made in paragraph 88 above.

Smith v. Inco 2, supra para 7 at para 57.

90 Under s.1(1) of the Ontario *Environmental Protection Act*, adverse effect on the health of any person is only one of several possible manifestations of adverse effect. Injury or damage to property or to plant or animal life also constitutes an adverse effect.

Environmental Protection Act RSO 1990 c E.19 s 1(1) [*EPA 2*].

91 Under s.1(1) of the *EPA 2*, a solid, liquid or gas resulting directly or indirectly from human activities that causes or has the potential to cause an adverse effect is considered a contaminant for the purpose of the Act.

EPA 2, *supra* para 90 at s 1(1).

92 The discharge of contaminants is prohibited under the *EPA 2* and is capable of eliciting a remedial order from the Director to prevent, decrease or eliminate the resulting adverse effects.

EPA 2, *supra* para 90 at ss 14 and 17

93 Soil testing completed on the Appellant's property from 1998 and onward found nickel levels at least twenty times greater than the level at which the most sensitive plant could be adversely affected. The Appellant submits nickel levels so far in excess of the MOE standard demonstrates adverse effects on plant life, including those less sensitive to nickel.

94 Consistent with the definition in the *EPA 2*, the nickel found in this concentration could be considered a contaminant capable of causing an adverse effect on plant life.

95 The Appellant submits that while she agrees with the observation that MOE standards do not by themselves constitute a minimum level for finding civil liability, the Court erred in not giving sufficient weight to the MOE and the *EPA 2* when making its findings on physical harm to land.

Smith v. Inco 2, *supra* para 7 at para 60.

96 It would be a strange result if nickel at levels sufficient to constitute a contaminant with adverse effects under the *EPA 2* were not found to have an adverse affect on land for the purposes of a civil suit.

97 It would be a truly strange result if nickel levels that exceeded the 8,000 ppm soil intervention standard at which remediation was deemed appropriate in order to protect human health were not found to adversely affect land. 25 properties in the vicinity of the Respondent's refinery were found to have nickel concentrations exceeding this level.

Smith v. Inco 2, supra para 7 at para 16.

98 In *R. v. Saskatchewan Wheat Pool*, the Supreme Court of Canada stated that, although statutory breach does not constitute, *prima facie,* a nuisance, it is useful in providing a standard of conduct in determining whether, at common law, an actionable nuisance exists.

R. v. Saskatchewan Wheat Pool, [1983] 1 SCR 205.

99 This reasoning was applied under similar facts in *Execotel Hotel Corp. v E.B. Eddy Forest Products Ltd.* (*Execotel*) where the plaintiff brought a nuisance claim for physical damage to his hotel as a result of the defendant's industrial activities, which discharged sawdust in the air of the surrounding area.

Execotel Hotel Corp. v. E.B. Eddy Forest Products Ltd.[1988] OJ No 1905 [*Execotel*].

100 In *Execotel*, the plaintiff successfully relied on the *EPA 2* to argue that the release of sawdust, as a contaminant causing or likely to cause injury or damage to property or to plant or animal life, constituted a statutory breach indicative of actionable nuisance.

Execotel, supra para 99.

101 The court held that statutory breach may be used as a standard for actionable nuisance. However, mere proof of the breach is not conclusive of a right to damages, the injury at issue must also substantial enough to warrant legal intervention.

Execotel, supra para 99.

102 Relative to the standards set by the MOE, the alteration of the composition of the Appellant's soil by the deposition of nickel is a substantial injury. It is consistent with the case law cited in paragraph 66 above that deposit of nickel in concentrations so far in excess of regulatory guidelines are material in the eyes of the public and constitutes material, actual and ascertainable physical harm to land.

103 The standards set by the MOE, in conjunction with the provisions of the *EPA 2*, establish that the Respondent's deposit of nickel particles in the concentrations measured constitutes a

statutory breach. Using statutory breach as a standard for actionable nuisance, the nickel particles' chemical alteration of the soil should therefore be considered material, actual and ascertainable physical harm to land.

104 The substantial injury inflicted is further evidenced by the diminution of the market value of the Appellant's property.

(iv) Alleged Inconsistency of the Appellant's Claim with the Doctrine of Private Nuisance

105 The Appellant's action was initiated over 15 years after the Respondent ceased operation, of its refinery when widespread public concern was raised in response to the MOE's discovery of nickel levels in excess of its 200 ppm on land in the vicinity of the refinery.

106 The Appellant alleged that the properties failed to increase in value due to the public concern regarding the effects of the nickel found in their soil.

107 In its decision, the Court characterized the essential nature or *raison d'etre* of private nuisance as being to equip an injured party with the means of forcing the party causing that injury to stop doing so.

108 The Court further held that it was inconsistent with the essential nature of nuisance to find the Respondent engaged in actionable nuisance 15 years after it had ceased operations, when concerns for potential effects of the nickel were raised and negatively affected property values, but not when it first emitted the nickel.

Smith v Inco 2, supra para 7 at para 64.

109 Under this characterization, parties seeking damages would have had no basis upon which to obtain injunctive relief while the Respondent was operating the refinery because the harm took place 15 years after the refinery closed.

110 Discoverability principles, in turn, were deemed inapplicable because the harm alleged was not a latent historic injury.

Smith v Inco 2, supra para 7 at para 64.

111 The inconsistency perceived by the Court demonstrates a fundamental mischaracterization of the physical harm suffered by the Appellant as the diminution of the value of the property.

112 The Appellant submits that the decrease in property value alleged is a *manifestation* of the actual physical harm to land. The actual harm claimed by the Appellant is the alteration in chemical composition of the Appellant's soil. This harm occurred when nickel was discharged from the Respondent's refinery.

113 The harm alleged by the Appellant occurred during the operation of the Respondent's refinery and remained latent until 2000 when the MOE's soil tests revealed nickel levels in excess of the 200 ppm baseline. At this point the harm alleged by the Appellant became patent. As a result, discoverability principles are applicable in this situation.

114 The gradual nature of environmental contamination is well recognized. In *R v Inco Ltd.*, the Ontario Court acknowledged that environmental damage caused by discharging materials into Ontario waters may not be immediately apparent after the discharge. As well, impairment may be caused by the accumulation of materials over time.

R v. Inco Ltd. [2001] OJ No. 2098 at para 54.

115 This understanding has been extended to all environmental media by the Ontario Environmental Review Tribunal in *Marshall v Ontario (Ministry of the Environment*).

Marshall v Ontario (Ministry of the Environment) [2008] OERTD No. 39 at para 82.

116 The MOE conducted soil tests of land in the vicinity of the Respondent's refinery since the 1970's, with generally unremarkable results.

Smith v Inco 2, *supra* para 7 at para 10.

117 Given the advancement in technology and contaminant testing methodology since 1970, it is not unusual that concentrations of nickel consistent with a chemical alteration of the content of the soil that has potential adverse effects were not discovered in the Appellant's soil until 2000.

118 It is well established that the primary reason for tort law as a whole is to provide damages to victims as compensation for losses stemming from the injurious actions of others. The assessment of damages, in turn, is directed at placing the complainant in as good a position as it would have been if the wrong had not been done.

Lewis N. Klar, *Tort Law*, 4th ed, (Toronto: Thomson Carswell, 2008).

119 The Court's reasoning appears to frustrate this primary purpose. It effectively denies victims compensation for their losses simply because the perpetrator ceased their injurious activity prior to discovery of the injury and the initiation of legal action. The importance of compensating victims for the damage done is undiminished by the cessation of the injurious activity.

120 When the principles of discoverability are applied, the Appellant's action for damages stemming from the nickel deposited by the Respondent onto their soil is consistent with the primary objective of tort law. The Court's concerns regarding inchoate, indeterminate liability are resolved by the fact that once material alteration of the chemical composition of their soil is discovered, time will begin to run on any landowner's potential claim.

121 The Court erred in finding that absent demonstrate adverse effects to health, the appellant could not establish physical harm to land actionable under private nuisance. The necessity of harm to health is unsupportable in a nuisance claim based on physical damage to land and stems from the conflation of the two distinct branches of private nuisance claims. The chemical alteration of the composition of the soil caused by concentrations of nickel far in excess of the MOE's ecotoxicity and human health standards constitutes material, actual and ascertainable physical harm to land. A private nuisance claim grounded in this physical harm to land is consistent with the principles of tort law and discoverability.

C. The Court does not need to recognize a new cause of action for environmental claims.

122 There is no need for a new cause of action for environmental claims. Rather, Canadian courts should apply accepted principles of international law such as the precautionary principle and the polluter pays principle to the existing causes of action. Had the Court done so in this case, they would have been bound to find the Respondent liable under both private nuisance and the rule in *Rylands v. Fletcher*.

(i) **Enhance Existing Causes of Action to Give Effect to International Principles**

123 The Appellant submits that the enhancement of existing causes of action by Canadian Courts to give effect to international principles will provide a good basis on which to address environmental claims.

124 The object of the common law is to resolve conflicts and govern relations in social and commercial life. It must grow to face and deal with changing or novel situations or fail in its function.

Prager v Blatspiel, Stamp and Heacock Ltd., [1924] 1 KB 566 at para 57.

125 It is moreover the Court's responsibility to ensure that the common law evolves and develops in a manner that reflects contemporary social reality.

Halpern v Canada (Attorney General), [2002] OJ No. 2714 at para 303.

126 However, the Court must be mindful of its proper role vis-à-vis the legislature and be sure not to venture into public policy debates.

127 Environmental issues are polycentric in that they involve multiple, competing interests and their resolution produces varying socio-economic consequences. In a democracy such as Canada, it is the elected legislature that makes decisions on polycentric matters such as environmental issues. The extensive array of federal and provincial environmental legislation is a testimony to the supremacy of the legislature on environmental matters. In *Cambridge Water*, Lord Goff went so far as to state that given such an extensive array of environmental legislation, courts should resist the development of new common law principles to address environmental problems.

128 It is not within the jurisdiction of the judiciary to create and recognize a new cause of action for environmental claims. It is within the authority of the judiciary to enhance the efficacy of the common law causes of action currently available to parties bringing environmental claims.

Cambridge Water, *supra* para 50.

129 In *Western Canadian Shopping Centres Inc. v Dutton*, the Supreme Court of Canada noted that class actions, in particular, play an important role in today's world in relation to environmental pollution, which may have widespread consequences. Common law class actions offer a means of efficiently resolving disputes in a manner fair to all parties.

Western Canadian Shopping Centres Inc. v Dutton, [2000] SCJ No 63 at para 26.

130 The Appellant respectfully submits that this Court should resist any urge to create a new common law cause of action to address environmental concerns. Instead, the Appellant urges this Court to direct the Canadian judiciary to give a more liberal application of norms found in customary international environmental law.

131 In *Trendtex Trading Corp. v Central Bank of Nigeria*, Lord Denning summarized the "adoptionist" approach to the application of international customary law in domestic courts, stating that the rules of international law are incorporated into English law automatically and considered to be part of English law unless they are in conflict with an Act of Parliament.

Trendtex Trading Corp. v Central Bank of Nigeria, [1977] 2 WLR 356 at page 553.

132 In *R v. Hape* (*Hape*), the Supreme Court of Canada found the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation.

R v Hape, [2007] 2 SCR 292 at para 36 [*Hape*].

133 The Supreme Court further held the automatic incorporation of such rules to aid in the interpretation of Canadian law and the development of the common law is justified on the basis that international customary law, as law governing nations, applies in Canada absent express derogation in a valid exercise of parliamentary sovereignty.

Hape, *supra* para 136 at para 39.

(ii) **The Precautionary Principle and the Polluter Pays Principle**

134 Should this Court be inclined to follow the Appellant's suggestion that international environmental norms be applied more regularly in the common law, the Appellant submits this Court should direct its attention to the precautionary principle and the polluter pays principle.

135 The precautionary principle and polluter pays principles are expressly incorporated into several Canadian environmental statutes, including the *Canadian Environmental Protection Act*, and *Canadian Environmental Assessment Act*, as well as the Ontario *Endangered Species Act*.

Canadian Environmental Protection Act, SC 1999 c. 33, preamble.

Canadian Environmental Assessment Act, SC 2012 c. 19 at s 52 and s 4(1).

Endangered Species Act, SO 2007 c.6, preamble.

136 Principle 15 of the Rio Declaration on Environment and Development states that

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.
>
> *Rio Declaration on Environment and Development*, UNEP, UN Doc A/CONF 151/26 (1992) [*Rio Declaration*].

137 The precautionary principle has been included in almost every recently adopted treaty and policy document that relates to the environment. As a result, there may be enough state practice to suggest the precautionary principle has attained the status of customary international law.

> *114597 Canada Ltee. (Spray-tech, v. Societe d'arrosage) v. Hudson (Ville),* 2001 SCC 40 at para 31 [*Spray-tech*].

138 The precautionary principle has been recognized by the Supreme Court of Canada as a principle of international law in *Spray-tech.* The Court does not find that the precautionary principle is a principle of customary law. However, it is used as an aid to interpreting the Hudson by-law and as justification for the preventative action taken by the town of Hudson.

> *Spray-tech, supra* para 137 at para 31.

139 In Australia, the use of the precautionary principle by common law courts and its acceptance as a necessary consideration in environmental cases demonstrates that it is emerging as a common law doctrine.

> Charmain Barton, "The Statutes of the Precautionary Principle in Australia: Its Emergence in Legislation and as a Common Law Doctrine" (1998) 22 Harv Envtl L Rev 509 at 535.

140 The recognition of the precautionary principle in the common law is a small step for the Court to take.

141 The Appellant submits that the Court should also recognize a common law polluter pays principle in Canada.

142 Principle 16 of Rio Declaration on Environment and Sustainability states that:

> National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.
>
> *Rio Declaration, supra* para 136.

143 The polluter pays principle has been incorporated into Quebec statute. In *St. Lawrence Cement Inc*, the Supreme Court of Canada recognized that no-fault liability, as incorporated in *Article 976* of the *Code Civil du Quebec*, reinforces the application of the polluter pays principle and furthers environmental protection objectives.

> *St. Lawrence Cement, supra* para 66 at para 80.

144 No-fault liability in the Quebec Civil Code functions for the same purpose as strict liability in the common law. Therefore, the polluter pays principle should also apply under the common law.

145 The polluter pays principle was discussed in *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*:

> To encourage sustainable development, that principle assigns polluters the responsibility for remedying contamination for which they are responsible and imposes on them the direct and immediate costs of pollution. At the same time, polluters are asked to pay more attention to the need to protect ecosystems in the course of their economic activities.
>
> *Imperial Oil Ltd. V Quebec (Minister of the Environment)* [2003] SCJ No 59 at para 24.

146 Consideration of the polluter pays principle in determining environmental claims under the common law will serve to further environmental protection objectives and advance the interests of claimants suffering environmental damage.

(iii) **The Application of International Law Principles to Nuisance and the Rule in *Rylands v. Fletcher***

147 Within the context of environmental common law private nuisance claims, the precautionary principle has the ability to inform judicial findings regarding actionable physical harm to land.

148 The limitations of scientific ability to detect and measure latent alterations in the environment places claimants at a disadvantage when the judiciary adopts a narrow approach to the actual occurrence, materiality and ascertainability of harm.

149 Under the precautionary principle, courts are given the flexibility to presume environmental risk absent scientific certainty. The burden of proof placed on claimants is lessened, and lack of scientific detection of the harm alleged by claimants becomes less of a bar to their claim.

> Bruce Pardy, "Applying the Precautionary Principle to Private Persons: Should it Affect Civil and Criminal Liability?" (2002) 43 Les Cahiers de Droit 63 at 64.

150 Insofar as its application gives the judiciary greater flexibility in light of scientific uncertainty and limitations in establishing and detecting environmental degradation, the precautionary principle facilitates the overall compensatory objectives of private nuisance claims.

151 The polluter pays principle can be applied to environmental claims brought under the rule in *Rylands v. Fletcher*.

152 The Court should hold polluters strictly liable for the damage caused by their pollution rather than softening the application of strict liability (by adding the requirement of foreseeability) as is suggested in *Cambridge Water Co*. v. Eastern Counties Leather plc.

> *Cambridge Water, supra* para 50.
>
> Sue Elworthy & Jane Holder, *Environmental Protection: Texts and Materials*, (Cambridge University Press: 1997) at 76.

153 This is not a big step for the court to take. The appellant submits that where an environmental claim is brought under the rule in *Rylands v. Fletcher*, the court must only consider the polluter pays principle when deciding whether the risk created in bringing a substance onto the land that has the potential to escape and cause damage should rest with the owners of the neighbouring properties. Considering the polluter pays principle at this point would allow for the consequences of that environmental risk to lie with the defendant. The allocation of the risk to the defendant polluter is appropriate.

154 The precautionary principle and the polluter pays principle have both been incorporated into Canadian environmental legislation. It would be a small step for this Court to take to apply both principles to the common law. The application of these principles will assist the Court in addressing environmental claims within the existing causes of action and does not require the Court to consider the introduction of a new cause of action.

PART IV -- ORDER SOUGHT

155 The Appellant respectfully requests that the Court grant the appeal and restore the trial judgment and cost award. The Appellant requests that the costs of both appeals be awarded to the successful party, and such further and other relief as this Honourable court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21 day of January, 2013.

_____
Leah Volkers

_____
Christina Lam

Counsel for the Appellant
Ellen Smith

PART V -- TABLE OF AUTHORITIES

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 APPELLANT ELLEN SMITH

TEAM #05-2013

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