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 #07-2013

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, Ellen Smith, brings on behalf of her class this appeal for damages against the defendant, Inco Ltd., for damage done to real property values resulting from the defendant's operation of a nickel refinery.

2. The Ontario Court of Appeal, reversing the judgment of the Ontario Superior Court of Justice, found the defendant not liable for these harms.

3. Respectfully, the Court of Appeal erred in its consideration of the rule in *Rylands v Fletcher*; in its interpretation of the proper scope of private nuisance; and in its failure to amend the common law to address a clear injustice in this case.

B. Statement of the Facts

(i) The Nickel Emissions and Subsequent Soil Contamination

4. From 1918 to 1984, Inco owned and operated a nickel refinery in Port Colborne, Ontario. Nearby residential properties are owned by the Appellant and class members.

> ***Smith v Inco*, (2011), ONCA 628, 76 CCLT (3d) 92 at paras 6 & 18. [*Smith v Inco*]**

5. The Inco refinery emitted waste products, mostly nickel oxide, in various quantities through its smoke stack, up until the closing of the refinery.

> ***Smith v Inco, supra* para 4 at para 7.**

6. The soil of properties located within several miles around the refinery have been found to contain highly elevated levels of nickel oxide; Inco accepts that its refinery is the source of the vast majority of this chemical contamination.

> ***Smith v Inco, supra* para 4 at para 8.**

7. As early as the 1970s, Port Colborne farmers complained to the Ontario Ministry of Environment ["MOE"] of the effect of the nickel particles on plant life. From then until

2000, the MOE conducted several soil samples in the region, finding that the degree of nickel contamination exceeded levels safe for plant life, although not likely for human health.

***Smith v Inco, supra* para 4 at paras 11-12.**

8. Following a soil sampling, the MOE decided in 2000 that extensive testing of the properties immediately west of the refinery was necessary. A Human Health Risk Assessment ["HHRA"] resulted.

***Smith v Inco, supra* para 4 at paras 13-14.**

9. Based on this HHRA, the MOE in 2002 ordered Inco to remediate twenty-five properties – through the removal and replacement of contaminated soil – whose nickel oxide content exceeded the MOE's newly determined "soil intervention level".

***Smith v Inco, supra* para 4 at para 16.**

10. In March 2001, the class of property owners affected by the nickel oxide contamination commenced a lawsuit against Inco, as well as other defendants. The properties in question are residential.

***Smith v Inco, supra* para 4 at para 20.**

11. Following the commencement of this suit, many statements appeared in local media warning of "serious health risks" associated with the soil contamination.

***Smith v Inco, supra* para 4 at para 20.**

12. These statements incited "widespread concern in the public about the potential health effects of the nickel levels in the soil" on the properties in question, notwithstanding their questionable veracity.

***Smith v Inco, supra* para 4 at para 29.**

13. The respondent has conceded that the claimants' "properties suffered a diminution in value because of elevated levels of nickel in the soil" caused by the Inco refinery.

Willms & Shier LLP. "The Problem 2013", (20 September 2012), online: environmentallawmoot <http://www.willmsshier.com/moot/>.

PART II: QUESTIONS IN ISSUE

14. Accordingly, the proper disposition of this appeal requires the court to consider the following issues: a) the whole scope of private nuisance, especially as it relates to the right of alienability; b) the proper interpretation of the rule in *Rylands v Fletcher*; and c) the need to resolve the common law in the interests of justice.

PART III - ARGUMENT

A. The Claim in Private Nuisance: The Harm does Physical Damage, as Quantified by Property Value

(i) Defining Physical Damage Nuisance

15. There are two distinct forms of private nuisance at common law: material physical damage to property, and significant interference with the use and enjoyment of property.

> **Margaret Hall and Greg Pun, *The Law of Nuisance in Canada* (Markham: LexisNexis Canada, 2010) at 69-71. [Hall and Pun]**

16. In both forms of the tort, it is the effect of the defendant's conduct – rather than just the conduct itself – which is at issue.

> ***Tock v St John's Metro Area Bd*, [1989] 2 SCR 1181; 1 CCLT (2d) 133 at 1203. [*Tock*]**

17. This case is based entirely on the first branch, physical damage nuisance. In order to make out this tort, there must be a "material injury to property;" meaning damage that is material (i.e. substantial; beyond trivial), actual (i.e. that has actually occurred), and readily ascertainable (by scientific instrument and/or human senses).

> ***Smith v Inco, supra* para 4 at para 40.**

18. To constitute material injury to property, the damage in question "must be shown to have had some detrimental effect on the land itself *or rights associated with the use of the land*." [Emphasis Added]

> ***Smith v Inco, supra* para 4 at para 55.**

19. A balancing of external factors is not required under this first branch of private nuisance – "where material damages to the Appellant premises…occurs as a result of the activities of the defendant, the Appellant is entitled to redress irrespective of locality."

***Muirhead v Timbers Brothers Sand & Gravel Ltd.*, [1977] OJ 1748 (HCJ) at para 8.**

(ii) **The Nickel Deposits are Damage**

20. The contaminations of nickel are not a series of benign deposits, but indeed constitute damage.

21. The Court of Appeal, with respect, erred in stating that the deposits constitute "[a] mere chemical alteration in the content of soil," and thus do not qualify as true damage to property. This reasoning and the analogy drawn thereafter in paragraph 55 are incomplete. While it is true that a farmer might benefit from the chemical alteration of their soil, the class members in this case are not farmers. To treat them as such would be equally as unjust as denying the claim of a farmer whose cropland was paved over just because a residential homeowner would welcome this interference as a free parking surfacing.

***Smith v Inco, supra* para 4 at para 55.**

22. That MOE standards insisted on the remediation of the class members' properties is further proof that the deposits constitute damage.

(iii) The Damage from the Deposits is Both Actual and Ascertainable

23. This is not a case of hypothetical or potential damage, but of real deposits of foreign substances on land. The damage is clearly actual, then; and at no point do the respondents attempt to argue the contrary.

24. Nor is this a case of damage so minute or nebulous as to not be ascertainable – MOE investigations have clearly identified the quantum of damage.

(iv) Establishing the Damage as Material: Real Property Ownership and the Right to Alienate

25. The right of alienation is a foundational stick in the bundle of rights vested in real property ownership.

> **Anne Warner La Forest, *Anger and Honsberger Law of Real Property, 2nd ed*. (Toronto: Canada Law Book Inc, 1985) at 48, 51, 326.**

26. The purpose of this right, especially vis-à-vis others in the bundle, is objective: the property is an investment, available for occupation, rental, eventual sale, etc.

27. The right of alienation is not a right to profit, or to realize a specific return. Rather, it is the right to own an economic asset free of outside human-made influences that unduly affect price. The defendant has impeded the proprietary rights of the Plaintiff. As such, they are liable for damages under the tort of nuisance.

(v) Establishing the Damage as Material: Stigma Which Leads to Diminution of Property Value is a Legal Wrong

28. As it relates to sale especially, the ability to alienate one's property is in large part dependent on and determined by the real estate market.

29. The real estate market is a collection of individual buyers, and so public perception matters to price. Any stigma, such as the one caused by the nickel deposits, can affect property values.

30. Indeed, in a recent nuisance case, the Ontario Court of Appeal found that stigma that caused depreciation in real estate value was found to be a harm deserving of remediation and compensation. The depreciation in the real estate market in Port Colborne is a result of the defendant's nickel refinery. As such, the Plaintiff is able to recover for the decrease in value.

> ***Tridan Developments Ltd v Shell Canada Products Ltd* (2002), 57 OR (3d) 503 (CA). [*Tridan*]**

31. It is not relevant whether or not an actual or aborted sale of the property has occurred in order for a diminution of property value caused by stigma to be legally significant. Such a requirement – which in this case would require the attempted sale of thousands of properties,

crippling the local real estate market – would serve as a complete bar to any potential class action.

***BC Pea Growers Ltd v City of Portage la Prairie*, [1966] SCR 150.**

31. Nor is it relevant whether or not the properties have been remediated to levels mandated by the MOE – "damages would not be eliminated by reparations to the point of the MOE guidelines."

***Tridan, supra,* para 29 at para 12.**

(vi) Establishing the Damage as Material: The Harm Suffered by the Class Members is Sufficient

32. Any damage sufficient to render a property "unfit for the purpose" for which it was purchased must qualify as material damage.

***Russell Transport Limited v Ontario Malleable Iron Co Ltd,* [1952] OR 621 (HC) at paras 625-626. [*Russell*]**

33. It is certainly within a property owner's prerogative to claim any of the sticks in the bundle of real property rights as driving the purpose of their ownership. Therefore any damage that inhibits the owner's ability to exercise one or more of these rights beyond a *de minimis* range must qualify as material damage.

34. The Court of Appeal ultimately failed to consider the class member's properties as alienable assets. The values of these properties were negatively affected by the nickel deposits in question, through the vehicle of stigma. This is serious material damage; a violation of rights that is "more" than benign chemical alteration. Thus, the Plaintiff is able to recover under the tort of nuisance.

***Smith v Inco, supra* para 4 at para 55.**

(vii) This Approach to Private Nuisance is Just, and In Keeping with the Supreme Court's Approach to Liability for Environmental Harm

35. Land does not need to be unsellable in order for the right of alienation to be restricted in a material way.

36. Although the restriction on alienation here is not absolute, it is appropriate in this case to follow Lord Chancellor in *St. Helen's Smelting Co. v Tipping* and err on the side of the homeowners, recognizing the special considerations warranted by "circumstances the immediate result of which is sensible injury to the value of the property."

***St. Helen's Smelting Co v Tipping* (1865), 11 HLC 642, at paras 650-51.**

37. Following Lord Chancellor's approach of deferring to homeowners is especially just, considering that: a) home ownership is a "major stabilizing force" in society; b) homeowners typically have no comparable assets; and c) zoning by-laws prohibit residential properties from being converted into industrial sites, precluding any potential to profit from the harm done to the property.

Lee Anne Fennell, *The Unbounded Home* (New Haven: Yale University Press, 2009) at 174. [Fennell]

38. A holding for the Appellant would also be in keeping with the "polluter-pays" principle, which demands that polluters take account for their pollution, and not simply externalize it onto the public. The citizens of Port Colborne should not be left to pay all the costs of pollution in a way that essentially subsidizes the profits of the defendant. This is a "principle that has become firmly entrenched…[and] found in almost all federal and provincial environmental legislation" in Canada.

***Imperial Oil Ltd v Quebec (Minister of the Environment)*, [2003] 2 SCR 624 at para 23. [*Imperial*]**

(viii) The Claim for Physical Damage Nuisance is Made Out, and Is Just

39. The nickel deposits left by the respondent's refinery constitute actual, ascertainable, and material damage. The test for physical damage nuisance is met in full, and a finding of liability in this case is just.

B. In the Alternative, even if a Claim for Private Nuisance is not Made Out, Under the *Rylands v Fletcher* Rule, Inco is Nonetheless Responsible for the Contamination It Caused

40. Inco's contamination of the soil renders them liable under the doctrine of *Rylands v Fletcher*. This tort imposes strict liability for use of land that, while not negligent, nonetheless poses a special risk to neighboring properties. There are two broad requirements for this form strict liability: 1) non-natural or inordinate use of the land by the defendant 2) an escape from the land of something likely to do mischief. Inco's contaminating activity satisfies both of these aspects. Inco's actions satisfy both of these requirements, and as such, they are liable. The Court of Appeal erred in holding that Inco was not liable under *Rylands v Fletcher*.

***Storms v MG Henniger Ltd.*, [1953] OR 717 (OCA) at para 17.**

(i) Inco's Nickel Refining Activity was an Unnatural and Inordinate Use of the Land

41. An activity may be considered inordinate if 1) it involves accumulation of a dangerous substance; 2) it is typically conducted by specialists; and 3) it has a primarily profit-making purpose. Since Inco amassed toxic materials for a specialized commercial venture, its activities were both unnatural and inordinate.

***Rylands v Fletcher* [1868] UKHL 1 (BAILII). [*Rylands v Fletcher*]**
Hall and Pun, *supra* para 14 at 114.
Restatement (Second) of Torts, § s. 520 d (1977).
***Gerstein v Municipality of Metropolitan Toronto et al*. (1974), 2 OR (2d) 1; 41 DLR (3d) 646 (HCJ). [*Gerstein*]**
***Wei's Western Wear Ltd v Yui Holdings Ltd.* (1984), 5 DLR (4th) 681; 27 CCLT 292 (Alta QB). [*Wei's Western Wear*]**
***Chu v North Vancouver (District)*, [1982] BCJ 72 (BSSC).**

42. An exception to this tort may be made for conduct that has a general benefit to the community or involves a necessary feature of town life. Neither exception is appropriate in this case, and as such Inco's use of the land was inordinate.

***Tock, supra* para 15 at 1189.**
***Blake v Woolf*, [1898] 2 QB 426.**

43. Courts have tended to interpret non-natural use of land narrowly. Despite this, in *Cambridge Water*, Lord Goff clearly articulated that the storing of chemicals on industrial premises

should be regarded as an almost classic case of non-natural use. In the case at bar, Inco stored and refined nickel on their premises. This use of the land, pursuant to *Cambridge Water*, is per se a non-natural use of the land.

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

44. The Court of Appeal erred in holding that because the nickel emissions were incidental to the industrial operations, then they do not constitute a non-natural use of the land. The rule in *Rylands v Fletcher* does not examine whether the effects of the industrial operations were non-natural, but instead whether the operations themselves were non-natural. It is the very use of the land itself, not its incidental effects, that is in question. In this case, Inco's use of the land included storing and refining extraordinary amounts of nickel in the town of Colborne. This is a classic case of non-natural use articulated in *Cambridge Water*.

> ***Smith v Inco, supra*** **para 4 at para 103.**

45. The Court below further erred in relying on the fact that the refinery operated for 60 years in its determination of natural use. The length of time that an industrial factory is in operation is immaterial to a determination of whether that industrial factory is a natural use of land. Under this logic, any use of land would become natural so long as it was in operation for an extended period of time. This would render the “non-natural” use test useless.

> ***Smith v Inco, supra*** **para 4 at para 103.**

46. Further, the Court of Appeal erred in considering that Inco operated in an industrialized area in its determination that the nickel refinery was a natural use of land. A determination of non-natural use must not be decided on the basis of which side of the tracks a person lives on. Persons who live in industrial towns should not be estopped from recovering under the *Rylands* doctrine because nickel contamination is somehow “natural” for them. The *Rylands* doctrine must be applied equally to all communities. Moreover, the argument that industry is natural to land because that land is used for industry is a circular argument. A nickel refinery is a non-natural use of land, regardless of whether it is located in an industrial town or not.

> ***Smith v Inco, supra*** **para 4 at para 103.**

47. Any alleged economic and/or community benefits associated with Inco's actions do not exempt it from strict liability under *Rylands*. In *Cambridge Water*, Lord Goff notes that employment of many persons in the community does not make the processing of a contaminant "natural". Further, in *Transco*, Lord Bingham rejected the notion of considering whether the actions of the defendant were to the general benefit of the community. Thus, any alleged economic or social benefits to the community gained by Inco's presence are immaterial. This principle is even more applicable in the present case, where the supposed economic benefits stopped accruing twenty years before the harm materialized. And, the supposed benefits are heavily outweighed by the economic detriment that the nickel emissions has on home values.

> ***Cambridge, supra* para 43.**
> ***Transco v Stockport MBC*, [2004] 2 AC 1, at 11. [*Transco*]**

(ii) Inco's Nickel Refining Activity was Likely to Cause Mischief

48. The processing of a heavy industrial material next to a residential area falls within the scope of the second leg of the *Rylands* test: it was likely to do mischief. For several decades Inco's smokestacks released emissions next to the Appellant's property. The proximity of the refinery and the longevity of its use made a mischievous outcome likely.

49. In order to attract strict liability, the damage-triggering conduct does not need to be especially nefarious. The mischief-causing activity can, in fact, be far less threatening than nickel-refining. The *Rylands* doctrine has been applied to flagpoles, Christmas decorations and advertising balloons. As a result, Inco's claim that its business was not sufficiently perilous to warrant liability under *Rylands* is without merit.

> ***Shiffman v Order of St. John*, [1936] 1 All ER 557, 80 Sol Jo 346 (KB).**
> ***Saccardo v Hamilton*, [1971] 2 OR 579, 18 DLR (3d) 271 (Ont HCJ).**
> ***Calgary (city) v Yellow Submarine Deli Inc* (1994), 158, AR 239 (Prov Ct).**

(iii) The Accumulation of Nickel Contaminants on the Appellant's Property Satisfies the Escape Requirement of the *Rylands* Test

50. A third requirement under *Rylands* is that there must be an escape from the land of the defendants, which causes harm to the Appellant. Three aspects of escape will be discussed:

1) the nickel emissions constitute an escape; 2) intentional escape should be included under *Rylands*; and 3) this escape resulted in damage to the Appellant's property.

51. The constant escape of nickel from the Inco refinery constitutes an escape under *Rylands*. As the Court of Appeal held, for purposes of establishing escape, there is no difference between a one time escape and a repeated, cumulative escape.

> ***Smith v Inco, supra* para 4 at para 111.**
> ***Cambridge, supra* para 43.**

52. The Court of Appeal erred in holding that intentional escape is not covered under the *Rylands* doctrine. Strict liability should be applied even where the contaminant is released intentionally and incrementally rather than accidentally and in acutely. As noted in the lower court, it would be illogical to conclude that one-time polluters fall within the scope of the rule but chronic-contaminators do not.

> ***Smith v Inco, supra* para 4 at para 66-67 and 112-113.**

53. Moreover, it would be irrational and unfair to treat intentional polluters less seriously than accidental ones. The *Rylands* principle was established in order to give remedy to land owners whose rights, including the right to alienate, were compromised by the inordinate use of a neighbouring property. The fact that the inordinate use was state-sanctioned does not eliminate the Appellant's right to compensation. As noted in *Russell Transport,* quoting professor Salmond, "...he who causes a nuisance cannot avail himself of the defence that he is merely making a reasonable use of his own property. No use of property is reasonable which causes substantial discomfort to others or is a source of damage to their property." The *Rylands* rule provides broad remedy for the Appellant, who suffered as a result of non-negligent contamination. A narrow definition of escape runs contrary to this purpose.

> ***Russell, supra* para 32 at para 25.**

54. The accumulated escape of nickel from Inco's refinery has resulted in damage to the Appellant's property value. In determining whether damage is linked to the escape, the actual harm need not be immediately caused by the escaped substance. In *Kennard*, parts of a coal slag heap escaped, causing pressure on a third party's quarry spoil. This pressure caused the

spoil to damage the claimant's land. In this case, the escape requirement under *Rylands* was satisfied. In the case at bar, the escape of nickel caused health concerns which resulted in a decrease in property value. This damage, although not the immediate cause of the nickel accumulation, is covered under *Rylands*. As such, Inco is responsible for compensating the Appellant for this damage.

***Kennard v Cory Bros & Co*, [1921] AC 521, at para 538, per Viscount Finlay.**

55. In sum, Inco's nickel-refining activities were unnatural in character and led to an escape which, in turn, caused harm to the Appellant's property value. As a result, the defendant is liable under the traditional application of the *Ryland v Fletcher* principle.

C. In the Further Alternative, in this Case Justice Demands an Expansion of the Rule in *Rylands v Fletcher*

56. The Appellant recognizes that the Court may feel that expansion of the common law in this case by amending *Rylands* would be better left to the Legislature. The Appellant also acknowledges that the Respondents may suggest that an expansion of common law liability in this case may be too dramatic and should not be done by this Court. However, the Appellant submits that there is authority in contemporary environmental law and policy on which this Court can justify taking an expanded approach and ensuring just compensation for the Appellant.

(i) The Court does not Need to Defer to the Legislature on this Question

57. The Supreme Court of Canada has repeatedly held that, although the common law ought to evolve gradually, there can be little excuse for refusing to advance the common law where the advance is principled, where it will resolve an injustice, and where the rule to be modified is itself a common law rule. In the environmental context in particular, Justice Binnie has commented:

> "...there is no reason to neglect the potential of the common law, if developed in a principled and incremental fashion, to assist in the realization of the fundamental value of environmental protection."
>
> ***British Columbia v Canadian Forest Products Ltd*, [2004] 2 SCR 74 at para 155.**

58. Justice Iacobucci has acknowledged that Courts must be very sensitive to the possibility that a problem could be better solved by the Legislature. However, he has also observed that where the rule in question has its origins in the common law, the Courts may actually be better suited than the Legislature to advance the doctrine and should not avoid that responsibility:

> "The Court cannot, however, shy away from the task where common law rules are required to be incrementally adapted to reflect societal change. Courts, as its custodians, share responsibility for ensuring that the common law reflects current and emerging societal needs and values… Where, as in this case, the relevant common law rule has evolved gradually through jurisprudential treatment, the judiciary is the proper forum for the recognition and ordering of further legal developments, absent legislative intervention."
>
> ***R v Mann*, 2004 SCC 52 at paras 17-18.**

59. While *Mann* is a criminal case dealing with police powers of investigative detention, the Court's statement about the power of the Judiciary to advance the common law is broadly applicable and should be adopted by this Court.

60. Even if the Legislature did address this problem, a robust jurisprudence is still necessary. In the United States, for example, common law remains the preferred means to redress complex pollution costs in spite of a great deal of Legislative action; the *Comprehensive Environmental Response Compensation and Liability Act* ("CERCLA") is limited to recovery of immediate "response costs".

> **Andrea Klass, "From Resevoirs to Remediation: The Impact of CERCLA on Common Law Strict Liability Claims", 39 WFLR, at 942-943. [Klass]**

61. Finally, this Court does not need to automatically defer to the Legislature simply because the Legislature is the government's elected body. Professor Peter Hogg describes the relationship between the Courts and the Legislature as a dialogue in which just about any decision by the Judiciary is open to response or avoidance by the Legislature. If this or any Court attempts to advance the common law in a manner which offends the elected branches of government,

then the Legislative and Executive branches have full authority to respond and create a more suitable rule.

> **PW Hogg and AA Bushell, "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)" (1997), 35 Osgoode Hall LJ 75, at 79-80.**

62. The fact that another branch of government has the authority to respond to this case is sufficient to allay any fear that this Court may be overstepping its bounds by re-visiting *Rylands*. Whether or not the Legislature actually exercises that power is a question beyond the scope of this appeal: the Court cannot concern itself with whether or not another branch of government lives up to its obligations.

63. This Court is faced with an injustice resulting from a lapse in the common law, and there is ample legal and scholastic justification for this Court to take action to correct this oversight.

(ii) Developments in Environmental Justice Demand an Expanded Rule

64. The Supreme Court of Canada and academia have endorsed a more expanded view of what "the environment" entails and how the law should approach "the environment". In the past, Western legal systems have regarded land and property as a system in which there are discrete boundaries which demarcate one person's real assets from another's.

> **Robert Cutting, "'*One Man's Ceilin' is Another Man's Floor*': Property Rights as the Double-Edged Sword", (2005) 31 Envtl L 819 at 822. [Cutting]**

65. Yet this conception has changed dramatically over the last few decades. It has been recognized by scholars and the Supreme Court of Canada that Canadian law must take a more holistic view of property and environmental systems. Indeed, the Supreme Court of Canada has described this move as the major challenge of environmental law. Rather than see environment as isolated questions of tracts of land, Canadian law and policy has since re-calibrated itself to an emphasis on the reality that property and environmental rights exists in a complex system in which all rights are interconnected.

> ***Ontario v Canadian Pacific Ltd.*, [1995] 2 SCR 1031 at para 55.**
> ***R v Hydro Quebec*, [1997] 3 SCR 213 at para 86.**
> **Cutting, *supra* para 64, at 839.**

66. This new conception of environment has also coincided with an emergence of environmental justice as a substantive goal of the law. Environmental justice is the notion that the law ought to pursue a balanced distribution of the benefits and burdens of industry across all geographic and socioeconomic communities. It also demands that innocent parties have the right to be free from the invasion of their interests by polluters. This is especially the case where they are subjected to pollution which is disproportionate for no other reason than because of where they live.

> **Michael Gerrard et al. *The Law of Environmental Justice* (Chicago: American Bar Association, 2008) at 359.**
> **Diane Saxe, "Pollution, Hot Spots, and Environmental Justice." (December 5, 2011), online: Environmental Law and Litigation <envirolaw.com/pollution-hot-spots-environmental-justice/>. [Saxe]**

67. In *LaFarge Canada Inc v Ontario (Environmental Review Tribunal)*, the Court stated that it was reasonable for the Tribunal to reject as unjust the concentration of pollution in heavily industrialized communities was reasonable. This case is an example of a Court properly following the new vision of environment as articulated by the Supreme Court of Canada. The Court of Appeal below, in defending the over-industrialized nature of Port Colborne as "natural use" is not in accordance with these emerging views.

> ***LaFarge Canada Inc v Ontario (Environmental Review Tribunal)*, [2008] OJ No 2460 at paras 66-67.**
> **Saxe, *supra* para 66.**

(iii) The Polluter Pays Principle

68. One of the mechanisms by which environmental justice is expressed in Canadian law is the Polluter Pays Principle. The Supreme Court of Canada has noted that this principle has been widely used in Canadian law.

> ***Imperial, supra* para 38 at paras 20-24.**

69. The Polluter Pays Principle addresses the problem of "externalization" of costs by polluters onto other parties. For instance, where a factory deposits its waste into a river, those living downstream of the factory must bear the burden of the pollution in their water (i.e. they must find a way to pay to clean it up), while the factory can regard this "disposal" process as

essentially free. This is a problem because it makes the factory's operation appear more efficient than it is: they have downloaded the cost of disposal onto someone else. The Polluter Pays Principle seeks to force the polluter to account for all the costs of its pollution; the goal is to make the polluter be more efficient and thereby pollute less in the first place.

Nicholas Ashford et al. *Environmental Law, Policy, and Economics*. (Cambridge: The MIT Press, 2008) at 132. [Ashford]

70. Beyond being an economic or legal tool, Ashcroft observes that Polluter Pays also carries symbolic value as a moral judgment: it seeks to place responsibility for addressing pollution onto those who cause it, even in instances where it may be more economical for another party to account for the pollution.

Ashford, *supra* para 68.

71. In the present case, externalization takes the form of property value diminution; the Appellant is forced to bear the ongoing costs of Inco's pollution in Port Colborne. Even putting aside the question of whether nickel in one's soil is material damage, the fact that nickel from Inco's refinery came to rest in the land of the people of Port Colborne constitutes Inco externalizing the cost and the space required for properly storing the by-product of their operation onto the people around them.

72. The Respondents may retort, "The nickel is not damage". Or they may counter, "The land has been remediated." The Appellant submits that from the perspective of Polluter Pays, both of these objections are moot.

73. Consider a prospective purchaser of the Appellant's home. That purchaser may be concerned about nickel in the land, or they may be equally concerned that although the land has been remediated, they would be moving into a town where land required remediation in the first place.

***Tridan*, *supra* para 29.**

74. In short, the property of the Appellant has been stigmatized. The quality of the land in Port Colborne has been called into question as a result of Inco's business operations, yet Inco does not have to bear the consequences of those questions.

(iv) The Precautionary Principle

75. The courts have also affirmed the precautionary principle: where there are threats of harm, the lack of full scientific certainty should not excuse a failure by the polluter to account for a given risk. In its *Spraytech* decision, the Court noted that this principle was promoted by Canada internationally and is included in several pieces of federal legislation and as such, has become accepted international customary law in Canada.

> ***114957 Canada Ltee (Spraytech, Societe d'arrosage) v Hudson (Town),*** **[2001] 2 SCR 241 at paras 31-32.**

(v) Incremental Impact

76. Finally, the Supreme Court has recognized that pollution is no longer limited to observable, isolated and acute forms; incremental and cumulative risks to the environment are a grave concern. The Supreme Court has characterized environmental pollution as diffuse, difficult to control, and pervasive. It has recognized that impacts may be physically or temporally indirect, and that damage often is collateral. It has further recognized that such damage is compensable.

> ***Hydro Quebec, supra*** **para 65 at para 126.**
> ***Canadian Pacific, supra*** **para 65.**
> ***Canfor, supra*** **para 57.**

77. In short, the Supreme Court underscores the importance of the following principles: (1) polluters should pay, and (2) the precautionary principle should be embraced. Within these key principles two other subsidiary principles are supported: (a) pollution "hot spots" should be prevented, and (b) incremental and cumulative forms of pollution must be redressed.

> **Jerry V Demarco et al, "Opening the Door for Common Law Protection of the Environment in Canada" 15(2) J Env L & Prac 233. [Demarco]**
> ***Imperial Oil, supra*** **para 38 at para 24.**
> ***Canadian Pacific, supra*** **para 65.**
> ***Spraytech, supra*** **para 75.**

78. Expanded views of environmental justice as discussed all converge in this case and should therefore inform an evolution of the *Rylands* rule. The methods by which Canadian law thinks about how Canadian society should react to pollution have changed, yet the Appellant remains without remedy in this case. The Court below failed to adequately account for these

developments. This Court is justified in giving further meaning to these principles by taking an approach more in line with these evolutions in order to address the current failures of the law.

(vi) Amending *Rylands* is Both Just and Consistent with the Spirit of the Doctrine Itself

79. One of the doctrines which is at the heart of this case, that of *Rylands v Fletcher*, is an example of a Court recognizing an inconsistency in the law and responding to that issue in order to do justice to the injured party. In *Rylands*, the House of Lords observed that neither the Plaintiff nor the Defendant were aware that the Defendant's property was over old mine shafts at the time that the reservoir was built. Although the Plaintiff subsequently discovered the mine shafts, the Defendant was not connected to the construction of the reservoir which eventually burst.

***Rylands v Fletcher, supra* para 41 at paras 1-2.**

80. Tom Clearwater observes that, as the law existed at the time, the damage to the Plaintiff's property was actionable neither in trespass nor nuisance. What had happened was an accident. Yet the nature of the damage called out for compensation, and for a rule to ensure that this sort of damage could be prevented. For this reason, the House of Lords affirmed the rule of Blackburn J from the court below.

Tom Clearwater, "*Cambridge Water Co Ltd v Eastern Counties Leather plc*: A Case Comment" (1994) 58 Sask LJ Rev 333 at 8-9. [Clearwater]

81. The very case which created the rule of *Rylands v Fletcher* is an example of the common law shifting to address the law's inconsistencies. The rule in *Rylands v Fletcher* was created in response to the Industrial Revolution. Early *Rylands* cases focused on locomotion, electricity and hydraulics – forces which, for a society in transition, presented an unfamiliar risk. Moreover, the Court of Appeal in this case discusses how the rule in *Rylands* has further changed and been refined over time in order to reflect the realities and values of various societies.

***Smith v Inco, supra* para 4 paras 68-71.**
***Cambridge, supra* para 43.**
John Murphy, "The Merits of *Rylands v Fletcher*" (2004) 24 OJLS, at p 649. [Murphy]

82. This Court is similarly confronted with a lacuna in the law. Canadian law is equipped to address negligence, and equipped to address accidents. Yet the Respondents were neither negligent, nor was their action an accident. The Respondents reaped the benefits of refining nickel in Port Colborne and now the people of Port Colborne are left to deal with the consequences. One of the major reasons why *Rylands* was not applied in the court below is because the Respondent acted on purpose.

***Smith v Inco, supra* para 4 at para 113.**

83. It is the Appellant's position that amending the rule in *Rylands* is preferable to abandoning the rule or merging the doctrine with nuisance, as these options are inadequate. In England, the courts have made *Rylands* an offshoot of private nuisance; in the United States, the courts have focused strict liability on "abnormally dangerous activities"; and, in Australia, the courts have subsumed *Rylands* within negligence. These approaches, however, are inconsistent with the dimensions of *Rylands* and do not fully account for new environmental risks.

***Cambridge, supra* para 43.**
***Splendorio v Bilray Demolition Co,* 682 A.2d at para 466 (R.I. 1996).**
***Burnie Port Authority v General Jones,* [1991] Tas R 203.**

84. Negligence, nuisance and *Rylands* are distinct causes of action. There is a difference between wrongs caused to land and wrongs arising from land. The *Rylands* rule focuses on the use of land; the defendant's fault and the claimant's expectations are irrelevant. Neither the balancing of party interests (typical in private nuisance cases) nor the reasonableness of use (characteristic of negligence actions) can be reconciled with the rule in *Rylands v Fletcher*.

Donald Nolan, "The Distinctiveness of *Rylands and Fletcher*" (2005) 121 LQR, at p 427.

85. Moreover, if the rule is subsumed, the resulting common law regime will be more conservative than the traditional model. Requiring the Appellant to establish that Inco's use of land was unreasonable, imbalanced or abnormally dangerous would create a steep evidentiary burden in this case and a chill effect on environmental litigation in general.

Murphy, *supra* para 81 at 659-660.

86. Our society is again in transition and is being confronted with transitory and incremental environmental hazards. The industrial dimensions of the existing rule are ill-equipped to address these new risks. The fact that the Respondents would have been liable had there been negligence or an accident but not for purposeful action which they undertook over the course of decades is incongruous. Much like Justice Blackburn in *Rylands* and many Courts subsequent, this Court faces a dilemma in which strictly applying existing doctrine will endorse continued injustice for the Appellant. This Court would be justified by acting in the spirit of *Rylands* and taking the necessary steps to close this gap in the law.

D. The Following Amendments to the *Rylands* Rule are in Accordance with the Above Principles

(i) The Element of Unnatural / Inordinate Use should be Replaced with Enterprise Liability

87. For-profit use of land, which causes pollution-related mischief should automatically engage the rule in *Rylands v. Fletcher*. Enterprise liability is a practical application of the polluter pays principle. Courts have repeatedly designated profit-centred use of land as unnatural. Imposing comprehensive enterprise liability is a logical extension of this trend. While the unnatural criterion was appropriate in a post-agrarian society, enterprise liability is better-suited to today's global market reality.

***Gerstein, supra* para 41**
***Wei's Western Wear, supra* para 41**

88. Enterprise liability should be available where a defendant can readily internalize risk-related costs. An enterprise should not be able to take the benefit of an activity without accepting all of the attendant burdens.

AJ Waite, "Deconstructing the Rule in *Rylands v Fletcher*" (2006) JEL Vol 18 No 3, at 440.

89. Since *St. Helen's Smelting*, courts have gradually evolved strict liability in order to embrace the polluter pays principle. In *Hunter v Canary Wharf*, Lord Hoffman notes that *St. Helen's Smelting* "...affirmed that landowners did not have to accept the external costs imposed upon them by industrial pollution."

Hunter v Canary Wharf **[1998], 1 WLR 434 at para 74.**

90. To stubbornly retain the unnatural use requirement is to condone a principle under which the Appellant bears the actual burden of releases, while Inco, who trafficked in pollution, remains immune. Enterprise liability is a more contemporary and equitable alternative.

Klass, *supra* para 60 at 931-932.

91. Enterprise liability also should be available when a for-profit use of land creates an environmental "hot spot" – such as Port Colborne. In *Cambridge Water,* the court holds that the industrial character of a neighbourhood should not excuse the defendant from scrutiny under the *Rylands* rule. Implicitly, in refusing to draw a distinction between industrial and non-industrial neighbourhoods, the House of Lords affirms the importance of environmental justice.

Cambridge, supra **para 43.**

92. The *Rylands* rule should be evolved in a manner that promotes environmental justice: rather than being outside the scope of the rule, vulnerable communities like Port Colborne, which live in the shadow of a factory, should fall squarely within its protection.

(ii) The Escape Element should be Construed Broadly and, in Some Cases, include Continuous, Legal and Intentional Discharge

93. The definition of escape should be broadened to include continuous, legal and intentional enterprise-related emissions that contaminate other lands. For example, this revision is consistent with the Supreme Court's recognition of incremental and bio-accumulative environmental harms and in line with the traditionally flexible approach of Canadian courts to the escape criteria.

94. Prior to *Read v J Lyons & Co Ltd,* courts flexibly interpreted the escape requirement in order to ensure equitable outcomes. Movement within a single tract of land qualified as an escape within the meaning of the *Rylands* rule.

Brody's Ltd v CNR, **[1929] 2 DLR 549.**
Chamberlin v Speny, **[1934] 1 DLR 189 (Man).**
Read v J Lyons & Co Ltd, **[1947] AC 156.**

95. Escape should also apply to contaminations that are continuous. The evolved *Rylands* rule should not be limited to isolated escapes. Emissions and persistent toxicity are considered as dangerous today as the detonation of dynamite and impoundment of waters were in years past. U.S. courts have evolved strict liability in a manner that reflects this transition; Canadian courts should do the same.

    ***Schwartzman, Inc v Atchison, Topeka & Santa Fe Railway Co,* 479 (DNM 1993).**

96. Escape should include certain legal emissions. By expanding *Rylands* to encompass state-sanctioned uses of land, as has been done in other common law jurisdictions, the court can provide a helpful constraint on industrial enterprises which are sometimes laxly granted licenses or simply not adequately policed.

    Murphy, *supra* para 81 at 658-59.

97. The class of recently recognized environmental threats – including persistent toxicity and cumulative emissions – are difficult to proactively regulate. The rule in *Rylands*, applied progressively, is well-equipped to address new forms of environmental harm which flow from reasonable and intentional industrial activities.

    Katherine M. VanRensburg, "Deconstructing *Tridan*: A Litigator's Perspective" (Spring 2006) 24 Advocates' J, No 4 at 49.

98. Escape should encompass the class of emissions that are intentionally released but unintentionally redirected. This interpretation of escape is consistent with previous case law involving permits for use of public space and subsequent escape onto private lands. The courts have held that use of land which begins in the commons (water mains, electric cables or public highways), and subsequently interferes with private property, can engage the *Rylands* rule.

    ***Charring Cross Electric Supply Co v Hydraulic Power Co,* [1914] 3 KB 772.**
    ***Powell v Fall* (1880), 5 QBD 597 (CA).**

99. The air is a well-recognized part of the public commons. Emissions into the commons are necessary in a modern society. However, when intentional emissions result in unintentional accumulation of contaminants on private property, the *Rylands* rule should apply: defendant enterprises should be liable regardless of the legality or intentionality of their actions.

(iii) A Foreseeability of Harm Element should be Added to the Rule

100. Concerns about indeterminate liability could be resolved by adding an element of foreseeability to the evolved *Rylands* rule. While polluting enterprises should be required to internalize all costs reasonably associated with the risks they undertake, entirely unforeseeable damages should not be recoverable.

101. Defendants should be liable for any harm that could foreseeably occur following an escape. Foreseeability in this sense is consistent with the precautionary principle embraced by the Supreme Court: where there are threats of harm, lack of full scientific certainty should not excuse a failure to account for a given risk.

102. Foreseeability applies to any type of harm that could, in the event of an escape, flow from contaminating use of land. However, foreseeability should not apply to the likelihood of escape itself. To apply foreseeability to the chance of escape would undermine the strict liability purpose of the *Rylands* rule.

***Transco, supra* para 47at para 10.**

(iv) The Proposed Evolution of the *Rylands* Rule is Necessary to Close an Unjust Gap in the Common Law

103. If no evolution is implemented, then the gap in the common law will continue. It is the Claimant who, as a consequence of living in the shadow of a factory, suffers a diminution of property value and can currently find no remedy: they cannot claim under nuisance because the interference is insignificant; they cannot claim under trespass because the interference is indirect; and they cannot claim under *Rylands* (as currently constituted) because the interference is intentional. The current state of the common law is unjust; evolving the rule in line with principles of environmental harm articulated by the Supreme Court is the best way to correct this injustice.

PART IV - SUBMISSIONS IN SUPPORT OF COSTS

104. The Appellant makes no submissions with respect to costs.

PART V - ORDER SOUGHT

105. The Appellant seeks an order allowing this appeal, thereby upholding the Trial Court's judgment of liability on the part of the Respondent and awarding damages to the class members of Port Colborne.

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

_____
Jesse-Ross Cohen

_____
Luke Johnston

_____
Areta Lloyd

Counsel for the Appellant
Ellen Smith

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

APPELLANT
(Appellant)

RESPONDENT
(Respondent)

SUPREME ENVIRONMENTAL MOOT
COURT OF CANADA

FACTUM OF THE APPELLANT ELLEN SMITH

TEAM #07-2013

Jesse-Ross Cohen
Luke Johnston
Areta Lloyd

Counsel for the Appellant,
Ellen Smith

Document #: 585358