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Case Comment

Environmental Class Actions for Historical Contamination: Smith v. Inco Limited

Peter Bowal^{a1}

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People do not live in splendid isolation from one another. One person's lawful and reasonable use of his or her property may indirectly harm the property of another or interfere with that person's ability to fully use and enjoy his or her property. The common law of nuisance developed as a means by which those competing interests could be addressed, and one given legal priority over the other ... sometimes the person whose property suffered the adverse effects is expected to tolerate those effects as the price of membership in the larger community.

--*Smith v. Inco Ltd.*, 2011 CarswellOnt 10141, 2011 ONCA 628 at para 39,; leave to appeal refused 2012 CarswellOnt 4932, 2012 CarswellOnt 4933 (S.C.C.)

INTRODUCTION

*Smith v. Inco Limited*¹ is a noteworthy environmental law case for several reasons, not the least of which it is that it is the first environmental class action lawsuit to proceed through a trial and appeal in a common law province in Canada.² The case, which took more than a decade to be decided, alleged that continuous tortious behaviour on the part of mining giant Inco Limited commencing almost a century earlier had adversely affected a large class of landowners' property values. The case evolved through several styles of cause and claims that led to many trips to the courthouse on a wide assortment of intractably contested legal issues. These mostly pre-trial matters involved procedural issues relating to class action proceedings, the class, certified common issues,³ limitations, decertification,⁴ admissibility and *296 compellability of evidence⁵ (even in costs proceedings),⁶ the Ontario Court of Appeal revising its previous reasons "to correct certain slips,"⁷ intervenor status,⁸ leave to the Supreme Court of Canada⁹ and costs at various stages of the extensive litigation.¹⁰ The principal substantive issues were nuisance, trespass, the rule in *Rylands v. Fletcher*¹¹ and convincing proof of actual damages.¹² Although the various procedural issues contribute in their own ways to the development of the law, particularly in respect of class action proceedings, this Comment is focused on analysis of the substantive issues in the case.

FACTS

Inco (now Vale)¹³ refined nickel near the small southern Ontario city of Port Colborne on the north shore of Lake Erie from 1918 to 1984. It was for many years the major employer in the area, employing as many as 2,000 people at a time. Inco emitted nickel oxide particles into the air from its 500-foot smoke stack. Most of these emissions occurred before 1960.¹⁴ The refinery closed in 1984.¹⁵ Inco acknowledged *297 that over the refining years its smoke stack was

the source of the nickel particulates found in the residents' soil but the company asserted the limitations defence¹⁶ and refused to concede both liability and the existence of provable damages.

A major component of both judicial decisions was the review of the numerous soil assessments and the prolonged public discussion and negative publicity that convinced residents, despite assurances to the contrary,¹⁷ that their health was seriously endangered by these nickel oxide particles on their land. The Ontario Ministry of Environment (MOE) conducted five soil analyses from 1972 to 1998. The last test, not publicly released until 2000, showed that in many parts of Port Colborne the level of nickel in the soil far exceeded the MOE guideline. Due to these high readings, the MOE embarked upon a Human Health Risk Assessment (HHRA)¹⁸ and multi-party Community Based Risk Assessment of the neighbourhood that resulted in several highly publicized meetings, technical disclosures, media reports and notifications of safety precautions across the community.¹⁹

The HHRA report concluded “that it was unlikely that the levels of nickel in the soil in Port Colborne constituted any risk to human health.”²⁰ Further testing was done and the results released at the beginning of 2000 were largely the same; but this time the property owners were alarmed at the variance between the highest contamination levels of 4000 ppm to 5000 ppm and an historical MOE guideline level of 200 ppm.²¹ The local media focused on the variance and fanned the concern.²² Real estate agents were asked to insert nickel contamination disclosures in residential land sale agreements.

In September 2000, the representative plaintiff, Ellen Smith (Smith), learned that the nickel levels on her property, located very near to the old Inco refinery, ranged from 4,300 ppm to 14,000 ppm, far above the MOE guideline and more than the MOE had known existed in Port Colborne. Although presumably no one *298 knew whether that level was unsafe, Smith was advised to take precautions and stated at the same time that “she was stunned by the advice that there was no need for her to move out of her home.”²³ The trial judge seemed to suggest that Smith was more alarmed at *not* being told to quit her land than she would have been if she had been advised to move.²⁴ No one explained how the current round of testing was yielding sporadic and higher results than similar testing had revealed a few years earlier because the refinery, after all, had been shuttered 16 years earlier. Faced with “tremendous variability between the levels of nickel in the soil on adjacent properties”, the MOE embarked upon more soil testing.²⁵ Ongoing testing of thousands of sites, health questionnaires and studies, public meetings, media coverage with jarring headlines,²⁶ door to door canvassing, and volatility in ensuing results created the impression of a clear, present and major danger that fanned the public alarm.

Notwithstanding several fact sheets distributed to the public advising that there were no adverse health effects caused by nickel in the soil,²⁷ when bombarded with the unrelenting negative publicity, their own anxieties, inconsistent messages from regulators and other experts and the power of suggestion of deleterious health impacts, the residential landowners chose to believe otherwise. They were skeptical and distrustful.

In March 2001, approximately 7,040 residents brought a class action to recover what are known as “stigma” damages from Inco for what they perceived was a decline, or at least a loss of increase, in their real estate values attributed to Inco's earlier nickel refining operations that deposited nickel particulates in their soil. Class members were found to be those who owned this residential property since September 20, 2000, or their successors or representatives.²⁸ The class was further divided into three sub-classes according to the severity of contamination, as determined by their proximity to the Inco refinery. Essentially all of Port Colborne, with a population of approximately 18,000,²⁹ was affected as well as some rural land east of the Welland Canal.

The plaintiffs' originally sought certification of the common issues of adverse health effects and personal injury, but certification was denied on those claims.³⁰ Certification was only granted on the ground of economic loss of residential

property value, which is the basis upon which the class action proceeded. However, if the human health impact of the nickel deposits on the land was not the proverbial *299 “elephant in the room” throughout this litigation, at least it can be said to have cast a very large shadow over it.

The final draft of the Human Health Risk Assessment in March 2002 led to an MOE order to Inco to remediate the 25 most contaminated properties (over 8,000 ppm) although the MOE reported again at that time that it was unlikely the nickel levels posed any risks to human health.³¹ By 2004, all properties were remediated except the Smith property that refused remediation.

DISPOSITION AT TRIAL

Henderson, J. addressed the plaintiffs' tort claims in trespass to land,³² the doctrine in *Rylands v. Fletcher*,³³ and public and private nuisance.³⁴

Trespass, actionable without proof of damage, is any direct,³⁵ physical and voluntary intrusion onto the plaintiff's land, including the discharge of some substance on that land.³⁶ The judge found that Inco permitted nickel particles to migrate from Inco's property onto the class members' lands in the same way as “allowing stones from a ruinous chimney to fall onto neighbouring properties as opposed to the defendant throwing stones onto the properties.”³⁷ Inco's intrusion onto neighbouring properties was indirect, not direct and the trespass claim was dismissed.³⁸

The *Rylands* doctrine, a strict liability tort, is summarized by the dictum of Blackburn J. at page 279 of the Exchequer Chamber decision, and was approved by Lord Cairns in the House of Lords:³⁹

We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.

*300 The modern embodiment of the *Rylands* doctrine focuses on a non-natural use of land,⁴⁰ and an isolated, deleterious escape.⁴¹ Inco had argued that its nickel refinery in an industrial city such as Port Colborne, in compliance with all environmental and zoning regulations, was a natural use of the land. The company relied on *Tock v. St. John's (City) Metropolitan Area Board* in support that its use of the land was a natural use of the land.⁴² Henderson, J. distinguished *Tock* on the basis that an urban sewer system was “necessary to support urban life” whereas a nickel refinery was a “private, for-profit, corporation” and:

The nickel was not naturally on the land, and the nickel particulates were not naturally on the land or in the air over the land. Further, the refining of nickel was not an ordinary use of the land; it was a special use bringing with it increased danger to others.

The trial judge concluded that Inco may have engaged in a *reasonable* use of its land, but the refinery operations did not constitute a *natural* use of its land.⁴³ Further, or alternatively, to quote Lord Moulton in *Rickards v. Lothian* from 1913, Inco's use of the land was not “ordinary”—it was “special”⁴⁴ and the nickel particulates were not “damag(ing)” if they were not “dangerous” where the substance was “not naturally there”.⁴⁵ This would presumably implicate all Canadian natural *301 resource extractive economic activity as Henderson J. applied it to the present case:⁴⁶

Inco brought nickel onto the land for the purpose of refining it. Moreover, once the nickel was brought onto the land, Inco processed or refined it, thereby creating airborne nickel particles. The nickel was not naturally on the land, and the nickel particles were not naturally on the land or in the air over the land. Further, the refining of nickel was not an ordinary use of the land; it was a special use bringing with it increased danger to others.

With respect to the second element, escape from the land of something likely to do mischief, the trial judge found “that the nickel and nickel particles escaped from the Inco property by emission into the air and migration onto neighbouring properties. The nickel and the nickel particles are not dangerous *per se*, but an escape of these elements from the Inco lands has the potential to cause damage to neighbouring properties.”⁴⁷ One notes the “potential to cause damage” language is all-encompassing and would include every natural and ordinarily healthy substance.

While some Commonwealth scholars and even the House of Lords⁴⁸ are of the view that a single, isolated escape is required to ground a *Rylands* claim,⁴⁹ consistent with the 1868 *Rylands* decision itself, Canadian textbook authors do not limit the principle to single, isolated escapes⁵⁰ although Canadian judges have done so.⁵¹ English law relatively recently⁵² added reasonable foreseeability to the checklist for liability, although there is doubt also whether the Canadian common law has *302 chosen to follow.⁵³ Henderson J., considering the purpose of the tort and no limiting language in the original 1868 decision to this effect, found “no logical reason to restrict the doctrine to circumstances of a single isolated escape from land”⁵⁴ because “both in Ontario and in England the strict liability principle of *Rylands v. Fletcher* has been stated in broad terms, without being restricted to circumstances of single isolated escapes from land.”⁵⁵ Otherwise, “an absurdity”⁵⁶ would attain if the law treated single and multiple escapes of dangerous substances differently where one escape leads to liability but two or more is unactionable. Justice Henderson found the number and duration of escapes “of no consequence”⁵⁷ and the *Rylands* claim valid in this case.

The public nuisance claim was quickly disposed of as this conduct clearly did not interfere “with public health, public morals or public comfort, or the use of a public place.”⁵⁸ Private nuisance harm may be physical (relied upon by the plaintiff class here) or in the nature of significant interference with use.⁵⁹ It may be caused indirectly and unintentionally but, unlike trespass, there must be proof of actual damage. Henderson J. readily accepted that the plaintiffs had suffered physical harm to their properties, which harm did not need to be balanced or reconciled in light of external factors, such as seriousness of the harm, the neighborhood, the social utility of the conduct, and plaintiff sensitivities.⁶⁰

In any event, Henderson J. decided to cover the bases.⁶¹ He concluded that if he was wrong on the need to balance interests, he summarily considered the emission of these “nickel particles as a byproduct of a private, profit-oriented business, [to] far outweigh the utility to the community of Inco's business operations.”⁶² *303 There were no rational or economic analysis for this cursory, yet momentous “far outweigh” conclusion, although it would foreshadow the trial outcome. The objective economic and social value of tens of thousands of jobs over 66 years (“including many of those who are members of the class in this action”),⁶³ immeasurable corporate beneficence to the community, hundreds of millions of dollars in tax revenue, and the production of substantial quantities of nickel for daily use in countless productive and life-enhancing applications--these all comprise an immense social utility to outweigh. The trial judge, who referred to this part of his decision as “the only sensible conclusion”,⁶⁴ could not mean to reasonably imply by this that any measurable collective loss in property values would “far outweigh” the social and economic or benefit of that Inco refinery.

Despite proof of actual damage for private nuisance being a prerequisite to recovery, the trial judge said these plaintiffs did not have to actually incur any loss or make any attempts to sell their properties.⁶⁵ It is not clear what evidence of permanent physical damage (or permanent loss of resale value) was before the court. The trial judge concluded:⁶⁶

... even if the soil is remediated, all of the nickel will not be removed from the soil. The nickel particles will remain in the soil to some degree forever. Thus, I find that the damage to the class members' properties is permanent.

If he was in error on this proof of damages issue, he would still make an exception to the substantive law for procedural expedience of class proceedings on the ground that “it is inconceivable that this court should compel more than 7,000 property owners to sell or attempt to sell their property in order to establish a cause of action.”⁶⁷ In other words, procedural expedience would drive the substantive law.

*304 In the end, Henderson J. concluded that the plaintiffs had no case for trespass or public nuisance, but they did have a good case for recovery under the *Rylands* doctrine of strict liability and the tort of private nuisance, subject to proof of causation and damages corresponding to depressed property values caused by the nickel particles in the soil.

The trial judge determined that Inco had caused losses in these plaintiffs' property values “based on two common sense principles.”⁶⁸ The first common sense principle was that the value of any residential property is reduced if that property is located close to a large industrial operation, referred to as a “baked-in discount,” presumably because all of them are known to pollute. The second common sense principle was “that environmental contamination in a community will negatively affect residential property values in that community”,⁶⁹ described as a “disamenity” that justifies “stigma damages”.⁷⁰ On the basis of these two self-described common sense principles and evidence of stagnant residential real estate values, the trial judge found on a balance of probabilities that the plaintiffs had “proved a general causal connection between the negative publicity and public disclosures that started in the year 2000 and a negative effect on the values of the class members' properties.”⁷¹ The plaintiffs did not claim that their properties declined in value, only that they did not increase as fast or as much as they would have without the nickel particles in the soil and public flap that ensued.

To arrive at damages, each party produced its own expert evidence and statistical analyses on the mass valuation of real property, based on different complex data sets, hybridized sets and models. Experts gave evidence to rank the reliability of the data sets although all models and data sets were problematic.⁷²

Even though Welland has more than twice the population of Port Colborne, its housing market and demographics were found to be comparable and the court used it to serve as the benchmark on housing values. The trial judge found property values to have appreciated in Welland 4.35% more than in Port Colborne. He multiplied that percentage by the average Port Colborne home price and then by the number of affected homes, to reach a total loss of property value to the plaintiffs of \$36 million:⁷³

Thus, I find that Port Colborne residential property values would have increased from 1999 to 2008 by 59.5% plus 4.35%, or 63.85%. The average residential property assessment in Port Colborne in 1999 was \$103,395, and therefore if Port Colborne had kept pace with Welland the average residential property value in Port Colborne would be \$169,412 as of 2008. This equates to a loss on average of \$4,514 per property for 7,965 residential properties or a total of \$35,954,010, which I will round off to \$36,000,000.

This \$36 million was allocated according to the degrees of contamination across the three zones closest to the refinery. The average allocation to the most *305 affected homes was \$23,000 in damages for this eight year period 2000 to 2008. Punitive damages were not awarded.

DISPOSITION ON APPEAL

Inco appealed to the Ontario Court of Appeal on the grounds that the trial judge had erred on the issues of nuisance, the *Rylands* rule, proof of damages and the limitations period. That appellate decision was rendered 15 months after the trial decision.⁷⁴ The appeal was allowed and the action dismissed in its entirety. The unanimous three member Court of Appeal found the claimants failed to establish Inco's liability under private nuisance or *Rylands*. In any event, they had also failed to prove damages. As a result of these conclusions, the causation and limitations issues were not addressed by the appellate court.

On the nuisance issue, the Court of Appeal chose to adopt a more “balancing of competing factors” approach even in cases of actual physical damage to land.⁷⁵ Moreover this damage was not material in that it was not substantial⁷⁶ or even actual and readily ascertainable versus merely potential.⁷⁷ Put in the words of the Court:⁷⁸

[the inquiry is] what did the nickel particles do to the soil? And not by asking--what did someone some 15 years after the refinery was closed think that the nickel particles might or might not have done to the soil?

The Court of Appeal concluded that the trial judge erred by finding that the nickel particles in the soil caused actual, substantial, physical damage to the residents' lands. In other words, “evidence that the existence of the nickel particles in the soil generated concerns about potential health risks does not ... amount to evidence that the presence of the particles in the soil caused actual, substantial harm or damage to the property.”⁷⁹ In a statement that will grieve environmentalists, the Court of Appeal added: “mere chemical alteration in the content of soil, without more, does not amount to physical harm or damage to the property”.⁸⁰ For actual harm or damage to have occurred, the metal deposits in the soil must have either had a detrimental impact on the soil itself or on the rights that related to the plaintiffs' use of the land. Accordingly, nuisance was not proven.⁸¹

*306 On the *Rylands* claim, the Court of Appeal noted that the nickel particle emissions could not have “escaped” from the Inco refinery if these continuous emissions were an integral part of Inco's refinery operation, known to regulators and the community, and were released intentionally on a daily basis for 66 years, “in a heavily industrialized part of the city.”⁸² The Court said, as a matter of common law, strict liability under *Rylands* was not based exclusively on the “extra hazardous” or “ultra hazardous” nature⁸³ of a defendant's conduct. To extend the tort in this way was a policy decision “best introduced by legislative action and not judicial fiat.” In any event, there was “no basis in the evidence upon which Inco's refinery operations or its emissions of nickel particles could properly be described as ‘extra hazardous’”.⁸⁴ A refinery is an “independent use” and a “*Rylands* inquiry must be directed is its use as a refinery.”⁸⁵ In other words, [t]he question 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?”⁸⁶ The Court of Appeal reset the new standard for unnatural and hazardous use of land to a subjective reference of the lawful use the occupier is making of the land. Factories and refineries will be evaluated in their own light and not as inherently unnatural operations. It is not clear this is the best frame of reference as it imports a serious new dimension of relativity that is not even present in the original *Rylands* ruling. The Court of Appeal left open the possibility that *Rylands* might apply in similar circumstances but on slightly different facts. An example is where, as here, the enterprise brings significant economic benefit to the community even if it cannot be considered to be operated

“for the general benefit of the community.”⁸⁷ This latter qualification encompasses governmental operations taking place under statutory authority.⁸⁸

*307 The Court of Appeal, having overturned the trial judge's conclusions on liability in nuisance and *Rylands*,⁸⁹ went further and determined that, in any event of the legal and factual basis for these causes of action, these claimants had failed to prove damages. The several data sets purporting to show a slowing of property value increases in Port Colborne were flawed,⁹⁰ inconsistent and too unreliable. Inco relied on MLS data that showed that Port Colborne to outperform or match Welland over the material time period of 1999 to 2008.⁹¹ The Court of Appeal found that whether one used this data or “properly corrected”⁹² data presented by the plaintiffs, “the result is the same. The record conclusively demonstrates that the claimants have suffered no loss.”⁹³ In fact, the Court of Appeal continued:⁹⁴

When all of the data is considered together, it is clear that overall, the houses in Port Colborne appreciated by 53.9% to Welland's 44.8%, a difference of 9.1% in favour of Port Colborne.

The Ontario Court of Appeal allowed the appeal on all grounds, set aside the trial judgment, and confirmed appeal costs to Inco at \$100,000.⁹⁵ An application for leave to appeal to the Supreme Court of Canada was dismissed with costs on April 26, 2012.⁹⁶ On September 10, 2012, Justice Henderson rendered his costs decision awarding Inco a total of \$1,766,000 in costs covering the last four and a *308 half years of pre-trial and trial related post-certification litigation.⁹⁷ The severely discounted costs award⁹⁸ was payable from the Class Proceedings Fund,⁹⁹ an account maintained and administered¹⁰⁰ by the Law Foundation of Ontario pursuant to section 59.1 of the Ontario *Law Society Act*.¹⁰¹ This costs decision disclosed that the plaintiff landowners had offered to settle with Inco for \$37,500,000 plus costs of \$2,500,000 about 2½ years before trial.¹⁰² This offer was not accepted by Inco but 2 years later, a half year before the trial commenced, Inco offered the plaintiffs \$2,000,000 plus costs.¹⁰³ The landowners did not accept this but made a final offer to settle to Inco a week or two before the 45-day trial started in October 2009,¹⁰⁴ for \$10,000,000 plus costs of \$3,000,000.¹⁰⁵ That also was not accepted.

ANALYSIS

This case has been the subject of only scant critical academic commentary,¹⁰⁶ although it was widely followed and reported by the popular and legal media¹⁰⁷ *309 and the private bar to the business¹⁰⁸ and environmental justice communities; and the substantive law on its various issues has been integrated into relevant practice updates.¹⁰⁹ This case is of significant interest to both environmental and class action *310 practitioners because it is one of the few class proceedings to go through both the common issues trial and appeal processes.¹¹⁰

The restrictive Court of Appeal approach might discourage both class and individual actions. At least one recent case has already applied the conservative principles of *Inco* in an individual lawsuit.¹¹¹ It has been suggested that the Supreme Court of Canada denied leave on the basis that damages were not proven in this case and the result, even under more liberal substantive legal doctrine, could not change.¹¹² On the other hand, others view this case, which followed *Hollick*,¹¹³ where the Supreme Court of Canada's refused to certify an Ontario environmental class proceeding a decade earlier, as a discouraging portent for environmental class actions in general and especially those which seek civil redress for historical contamination in Canadian common law. The applicable civil law of Quebec¹¹⁴ and related judicial decisions coming out of that province¹¹⁵ would seem to provide more promise of recourse.¹¹⁶

I am of the view that the Ontario Court of Appeal correctly disposed of the case; but concede that this decision does not settle the law of environmental class actions. What strikes the reader of both trial and appellate decisions is how divided *311 the judiciary remains on these issues. The unanimous Court of Appeal found errors in every important substantive principle and conclusion of the trial judge in this case, including the law and application of nuisance law, the reach of *Rylands*, causation, limitations, the interpretation of an “escape”, what is “non-natural”, what is “material”, and the proof of damages. The two levels of court disagreed on the interpretation of the same venerable judicial decisions.¹¹⁷ The trial judge, after discarding trespass and public nuisance, found for the plaintiffs in every procedural and substantive issue. The Court of Appeal disagreed with the trial judge on virtually every legal point.¹¹⁸

This analysis pulls together some further observations of these two judicial decisions. Environmental litigants will continue to consider the applicability of trespass, private and public nuisance, *Rylands v Fletcher*, negligence and statutory liability in terms of the facts and evidence applicable to the case. However, *Inco* is now the leading Ontario case on environmental class actions for common law remedies. As one of the most expensive and protracted litigations in Ontario to date that has served as a test case for environmental class actions in Ontario, it offers us several important lessons.

Environmental Class Actions Narrow the Common Issues

Class actions offer a procedural advantage that comes at a remedial cost. The certification process winnows the substantive common issues that get to trial. This point was well described by Weintraub in the context of *Inco*:¹¹⁹

To understand and appreciate the Court of Appeal decision, it is important to keep in mind that the class action case which eventually found its way to the Court of Appeal was significantly narrower than the original allegations included in the statement of claim, due to the narrowing of the issues to get it past the hurdles of the certification procedures set out in the *Class Proceedings Act, 1992*. To forget the class action context of the case is to misunderstand it entirely. The Court of Appeal did make broad ranging statements about nuisance and strict liability under the rule in *Rylands v. Fletcher*, but it did so in the context of an amended statement of claim that narrowed the lawsuit significantly from the original claim and from what one would normally expect in a typical environmental case. What remained at the end was a mere shadow of the original claim. Given the available facts, the ones which remained at trial were less compelling than the overall *312 case as a result of the facts that were dropped from the case in the course of obtaining certification ... the case that went to court was an unfortunate product of the limitations of the class action process as a legal format for addressing the issues which the facts of this case presented.

... it is less than ideal to make significant changes to common law environmental torts in the context of a class action case where recognizable causes of action were stretched to the limit simply to accommodate the requirements of the *Class Proceedings Act, 1992* for certification as a class action. There is a real danger that the nature of the allegations in the class action skewed the results and that future nuisance and strict liability claimants may pay the price.

Future class claimants must be focused on winning what emerge as the common issues for trial because the certification process almost certainly will confiscate some precious ones. Plaintiffs must consider whether the issues that emerge from the confiscation are outweighed by the streamlined, aggregated class process or whether a fuller range of legal issues and arguments might be better tested in an individual case.

Substantive Common Law Environmental Doctrines Are Narrowed

The Ontario Court of Appeal considered and rejected academic arguments for the expansion of the *Rylands* doctrine and instead chose to narrow it, as it did with the law of environmental nuisance. It interpreted liability under the rule in *Rylands* narrowly so that it does not apply to inherently dangerous activities by saying that any further changes in that direction would have to be made by provincial legislatures. It restricted the law of nuisance as it relates to physical damage to property requiring direct material interference or real risk of harm to human health so as to render it applicable only in exceptional environmental contamination claims cases.¹²⁰

While the Ontario Court of Appeal restricted nuisance and *Rylands* concepts, one observes that we still have a long way to go in clarifying these torts. For example, in *Inco*, both levels of court were heavily invested in definitions and analyses of terms such as natural, reasonable, non-natural, ordinary, and special (relating to uses) and extra, unusual, ultra and special (danger), as well as material, substantial, actual, readily ascertainable and potential (damage).¹²¹ Do these qualitative, subjective distinctions really advance the law?

***313** We continue to be short on theory about constituent elements of these torts such as uses, escapes, the need to balance interests, dangers, and damages or whether foreseeability is required--elements which can bear all-or-nothing effect on liability. *Inco* does little to theorize or rationalize those distinctions. One presumes that this kind of case was not envisioned when the original *Rylands* decision was released. We might wish to re-visit the original purpose and nature of these torts which were developed long ago to determine how they apply to effects of modern industrial development and resource extraction. All vague thresholds and legal standards call for reasoned limiting principles.

Resource Extraction and Industrial Development Are Natural Activities

The trial judge referred to *Inco's* operations as “these abnormally dangerous activities” in the absence of any evidence that the smelting activities in Port Colborne were abnormally dangerous.¹²² The Court of Appeal, however, demonstrates that judges now may be less hasty to characterize all industrial activity as dangerous, non-natural use of land. Some environmentalists, social theorists and jurists in the past may have held to the view that mining, oil and gas development, manufacturing plants, utility generation installations and the like are inherently dangerous, non-natural uses of the property upon which they are operating. It follows from this presumption that any spillover or fugitive effects resulting in material harm give rise to liability under the escape principle.

More attention and gravity will be given to ordinary commercial reality, along the lines of *Tock*, where LaForest J. wrote that the rule in *Rylands* cannot be invoked where a municipality, acting under statute and pursuant to a planning decision made in good faith, constructs and operates an urban sewer system that was necessary to support urban life. The operation of a nickel refinery by a private, for-profit, corporation does not fall into the same category of land use but it is not alien to the Canadian landscape either. Natural resources and their extraction and harvest will be natural uses of land.

Inco puts the claimant to the specific proof that the economic activity is non-natural in each case. Business, industrial and resource activity-- especially that which operates in the community for a long time under the zoning and regulatory law-- appear now to be *prima facie* natural activities. The *Rylands* issue of “naturalness” of economic activity and use of land will be judged by the how (and not that) they are conducted.¹²³ One might even argue that the associated downstream activities such as transportation of oil, for example, by pipeline, rail or ship ought ***314** to be extended as natural in the same way. It is even more difficult to succeed on a claim for historical contamination, such as diminution of land values near wind farms¹²⁴ and longstanding sites yet to be fully reclaimed.¹²⁵

Environmental Class Actions Require Robust Proof of Loss

As *Inco* illustrates, plaintiff classes will need to produce rigorous scientific and statistically-controlled evidence. Legally-compensable injury will not be presumed or grounded in emotional or ideological positions. Historical or longitudinal claims are particularly challenging because it is difficult to aggregate and verify data over a longer period of time and simultaneously control for other variables to establish causation. Emissions and particulates on one's land or person, or discharged into the air or water, are not actionable *per se*, but must be clearly shown to be physically harmful in some direct way in order to win damages.

A judge's reference to the language of "common sense principles" often signals that the judge is indulging in judicial notice or personal opinion and departing from evidence or legal principles. These conclusions should have been tested even on a balance of probabilities standard. It was speculation or presumption and not a causation analysis at all because it said that property owners near industrial operations have a *prima facie* cause of action in tort for being located next to those plants. Some property values might increase merely by being in the town or neighbourhood of a large industrial or economic enterprise. These were damages for slowed property appreciation, an elusive concept. The trial judge said that all property appreciates over time, but this was only a 9 year period and real property can cycle down for more than a decade due to general economic factors or other causes. Legal causation deserves a more robust analysis than presumption or what appears to be common sense to the judge. Even if one assumed property values did decline in Port Colborne, those decreases would not necessarily have been caused by Inco's discharge of nickel particles on their land. The residents had failed to prove that any damages they suffered were caused by Inco.

Businesses that exceed government guidelines for emissions do not suffer automatic civil liability. Mere chemical alterations to the content of soil, water and air do not necessarily constitute physical harm or damage to the property. Pollution does not automatically equate to physical damage to land for legal purposes.¹²⁶ *315 Widespread public concern, adverse publicity and controversy will not furnish a legal remedy without further legal or causal foundation.¹²⁷ Data sets must be accurate, complete and defensible. In these loss-of-property-value cases, it is particularly difficult to statistically prove loss over a period of time because the market and property values change constantly for various reasons. Moreover, judges must not be biased or selective in their use of such statistics. As the Court of Appeal admonished, "[o]ne cannot simply look to one portion of the data and ignore the rest in order to justify a conclusion."¹²⁸

"Bad Fact" Cases

The outcomes in some cases are ultimately driven by "bad facts." The concept of "bad facts" is both a catchy one, and one known to law. In this case and in this section of the commentary, the concept of "bad facts" encompasses aspects of this overall litigation, more than mere technical facts. In that way, the notion of a "bad case" might apply to also describe this final part of the analysis. That is to say that some of the "facts" are not facts from the case in the technical sense but conjecture "about the case" in its context.

One must be aware of the impressions created and embedded in a large class action lawsuit. In the Ontario Court of Appeal outcome and application for leave to the Supreme Court of Canada, was *Inco* less a case of legal principle and more just a case of bad facts? Facts determine outcomes in certification, class actions and environmental cases. The outcome might come down to the difference between good facts and bad facts.¹²⁹ While there were "good facts" in *Alcan* and *St. Lawrence Cement* and some good facts in *Hollick* (but arguably not enough), the Court of Appeal found no good facts in *Smith v. Inco* but instead found too many bad facts there.¹³⁰

Let us take a look at the *Inco* backstory and impressions, and how they may have influenced the outcome. The Inco emissions ceased in 1984. The lawsuit was commenced in March 2001, some 17 years later and the Court of Appeal

received the case 27 years after emissions ceased. The claim pursued by essentially every residential property owner in the city was for a lagging of residential property values for a decade for many owners who did not sell or even try to sell their land. The case could be seen as an attempt by a community--still resentful that Inco, a large, powerful multinational mining company, had closed operations in Port Colborne and moved out--to wring more concessions and benefits from the company. This bad fact relates to how the plaintiffs' motivation might be viewed in this case. One might see these plaintiffs as disgruntled residents still unhappy with the closure of the refinery and loss of jobs. They know of heightened modern sensitivities to all aspects of the environment and to human health. Class proceedings that *316 can be financed by a third party source can confer considerable power on plaintiffs, which power is acknowledged in the certification requirement. With little real downside risk, they now seek to seize an opportunity to extract as much windfall from a large international resource company for what today can be cast as questionable historical activity that might be parlayed into a large scale health issue and a large cheque. It could have paid off handsomely for the plaintiffs.

Fear and irrationality about modern health impacts, particularly when collectivized in a class proceeding encompassing essentially a whole city, are not encouraging signs for a large mining company that has closed local operations and finds itself defending itself in class litigation against that community. The trial judge appeared to be receptive of the community panic in ways that were difficult to justify in a rational objective judicial decision.¹³¹ The concern was perhaps more puzzling in light of the fact that the refinery had been closed for 17 years when the litigation was commenced, most of the nickel was in the soil for over 40 years and there was neither any recorded and verified incident of nickel-related poisoning nor any scientific thresholds for adverse health effects. The judicial decisions do not identify anyone moving or abandoning their property at this time. The concerns, while presumably genuinely felt, were irrational. Yet courts do not make their decisions on the basis of panic or widely-publicized concerns that precede a trial. The trial judge had extended private nuisance beyond claims rooted in actual injury to claims based on the perception of injury, regardless of the validity of that perception. The Court of Appeal pointed out that this approach could impose liability even if the concerns were ultimately found to be baseless. Damages do not flow from public perceptions or fears but from actual harm proved.

Another bad fact was that the plaintiffs and their lawyers publicly stoked their own fears in the face of litigation. The Court of Appeal noted in its decision¹³² that several public statements were reportedly made by the plaintiffs' counsel early in the process, ostensibly to increase public anxiety about the nickel contamination issue. These included statements that the cancer risks in Port Colborne were 8 to 40 times higher than provincial standards, that there were "serious health risks," and that some houses might need to be demolished.¹³³

While not articulated explicitly, and dealt with tangentially in dicta about limitations periods and non-natural use, the Court of Appeal may have not been sympathetic to the use of the class proceeding by a town population to retroactively apply or leverage current environmental principles and sensitivities to historical industrial behaviour that was legal and substantially beneficial at the time. This speaks to concerns about abiding private litigation to impose another round of taxation on lawful economic activity. Moreover, it is unfair to judge events in an era that is distant to the time, context and popular sentiment in which those events occurred.

*317 That Inco should be held responsible after so many years for mere public disquiet was another bad fact. Should Inco be responsible for third party-generated public angst which may have caused private land prices to stagnate or decline? The real causation question is whether third parties such as community activists, media, regulators and plaintiffs' counsel can effectively impose liability on others merely by the unfettered expression of their anxieties and uncertainties. This is where the legal causation analysis should have occurred.

The Ontario Court of Appeal noted--and must have been influenced by this bad fact--that the Inco remediated 24 of the 25 properties with nickel levels exceeding 8,000 ppm, under order from the MOE and one property owner refused

remediation. Smith, the owner of the last property named in the MOE order, did not grant access to Inco to remediate her property, which was her right to do as a matter of law. She and her family continued to live on the property in its unremediated, contaminated state through this legal process more than a decade after learning about the high levels of nickel contamination on her property for which she sought a legal remedy. She never permitted remediation as ordered by the MOE and never moved from it. This conveyed inconsistent messages to the court and the representative plaintiff's motives and credibility of her claims of danger and risk may have been implicitly undermined by her actions. There may have been trust issues leading to the remediation refusal, even with the MOE's intervention, but this decision was difficult to understand from a tactical point of view. After all, this was a class action, not an individual one. The remediation refusal did not provide stronger evidence of the claim being advanced. The remediation could have been completed without prejudice to the lawsuit. In the end, Smith lost both.

Smith and presumably many other class plaintiffs never sold their property, or even attempted to do so, and therefore never actually suffered any actual loss of value. The evidence at trial, set out in documents filed by Inco in the Supreme Court of Canada the leave to appeal application, showed that Smith not only refused remediation and remained on her contaminated property, but she also obtained a mortgage on that contaminated property in 2009 from a major bank, which may have suggested that the stigma damages in the marketplace may have been little more than an illusion. The mortgage money allegedly was applied to buy another Port Colborne property, presumably without soil testing that new property for nickel levels. She, along with her fellow class members, knew for years "that some of the contaminants, including nickel, would eventually find their way into the soil of the properties around the refinery."¹³⁴ As the lead plaintiff in this class action, Smith's own claim did not appear particularly strong.

A final, related bad fact was the sense that this was a manufactured crisis.¹³⁵ What may have caused Port Colborne residential property values to suffer compared to Welland was ostensibly the incessant public hand-wringing that fed a community neurosis about a health problem that was not even confirmed. An analogy here might be that someone creates and spreads alarm about a sex offender X who has moved into a certain house in a community. The media get involved and run stories about the perceived recent increase in sex crimes and how people are feeling *318 more afraid. Town hall meetings are held and people express concern for their family members. The local property market becomes stagnant as no one wants to move into a community with a reputation for being the location of the sex offender. If it turns out there was no demonstrable foundation to the concern that X was a sex offender as imagined or at all, the loss of residents' property values could not be reasonably foisted on X. Surely the agitated residents who fed and publicized their own fears about their own neighbourhood must accept some of the economic, if not legal, responsibility for diminution of their own property values. Their own unwise and unfounded escalation has to be considered a serious legal cause for the loss of property value and the "pay me because I have worked myself up into a worrisome knot" is untenable. It was the public disclosures and negative publicity that caused this stagnation in property values, not an actual adverse health effect of the nickel oxide particles: "The disclosure from and after September 2000 of information concerning nickel contamination in the Rodney Street area and elsewhere in Port Colborne had a negative effect on property values in the Port Colborne area."¹³⁶ Their alleged losses could be perceived as largely self-inflicted.

CONCLUSION

This class action brought by a large group of private landowners against a powerful international mining company received much publicity in Ontario and across Canada. Environmentalists hoped it would be the first of many similar environmental class actions prosecuted against large corporate polluters. It shows how difficult it is even for judges to extricate and isolate legal issues in highly charged, politicized cases.¹³⁷

The Ontario Court of Appeal's decision restricts liability for hazardous activities, especially in light of dubious or speculative damage claims. Some speculate that the increasing volume of environmental regulatory legislation dealing

with such issues played a role in this case although private compensation for environmental damage has not been widely addressed by legislation.

There are a few clues that the Court of Appeal wanted to send a strong message that these class proceedings for historical environmental harms will be difficult to win in the future. The court was unwilling to accept the disconnect between the time of the emissions and the alleged materiality of the harm arising in the early 2000s. Also, given its disposition on the liability issues, it did not need to address the causation, damages and limitations issues. The court decisively disregarded the judicial conservation principle.

Inco will have an effect on future litigation, but not likely the effect that some environmentalists had hoped for. The question overall is whether the ultimate impact of *Inco* will be to discourage environmental class actions. As one commentator said:¹³⁸

It took 10 years to take the case to trial. The trial itself took months. And the plaintiffs came out of the process with nothing. Against this background, there will undoubtedly be some who will prefer more low-hanging fruit rather than take on the risk of an environmental class action and its unique challenges ...

To the extent that these class action lawsuits are prosecuted by the plaintiff bar on a contingency fee basis, the challenges laid down in the way of substantive and procedural law will call for careful assessment in each new case.

Footnotes

a1 *Professor of Law, University of Calgary*

1 2011 CarswellOnt 10141, 2011 ONCA 628 at para 39; leave to appeal refused 2012 CarswellOnt 4932, 2012 CarswellOnt 4933 (S.C.C.)

2 D. Michael Brown and Michael Kotrly, "Ontario Court of Appeal Overturns Trial Decision in *Smith v Inco*" (Norton Rose, October 2011) <http://www.nortonrose.com/knowledge/publications/57226/ontario-court-of-appealoverturns-trial-decision-in-smith-v-inco>

3 The reported decisions include: *Pearson v. Inco Ltd.*, 2001 CarswellOnt 4340 (S.C.J.); additional reasons 2002 CarswellOnt 52 (S.C.J.); *Pearson v. Inco Ltd.*, 2002 Carswell-Ont 3303, 27 C.P.C. (5th) 171 (S.C.); affirmed 2004 CarswellOnt 557, 183 O.A.C. 168 (Div. Ct.); reversed (2005), 78 O.R. (3d) 641 (C.A.)

4 *Pearson v. Inco Ltd.*, 2001 CarswellOnt 4340 (S.C.); *Smith v. Inco Ltd.*, 2009 Carswell-Ont 8019 (S.C.J.) (a "decision on a motion for directions regarding a proposed motion")

5 *Augustine v. Inco Ltd.*, 2003 CarswellOnt 3413 (Master); reversed 2003 CarswellOnt 5915 (S.C.J.); affirmed 2004 CarswellOnt 4545 (Div. Ct.); *Augustine v. Inco Ltd.*, 2004 CanLII 35012 (ON SCDC); *Augustine v. Inco Ltd.*, 2004 CanLII 18660 (ON SC); *Augustine v. Inco Ltd.*, 2004 CarswellOnt 637 (S.C.J.); *Pearson v. Inco Ltd.*, 2001 CarswellOnt 4340 (S.C.J.); *Smith v. Inco Ltd.*, 2009 CarswellOnt 7095 (S.C.J.); *Pearson v. Inco Ltd.*, 2008 CarswellOnt 5408 (S.C.J.)

6 *Smith v. Inco Ltd.*, 2012 ONSC 4749, 2012 CarswellOnt 10712 (S.C.J.)

7 *Pearson v. Inco Ltd.*, 2005 CarswellOnt 6598 (C.A.); additional reasons 2006 CarswellOnt 1527 (C.A.); leave to appeal refused 2006 CarswellOnt 4020, 2006 Carswell-Ont 4021 (S.C.C.) (preamble to decision, although the result did not change)

8 *Pearson v. Inco Ltd.*, 2005 CarswellOnt 826 (CA.)

- 9 *Smith v. Inco Ltd.*, 2012 CarswellOnt 4932, 2012 CarswellOnt 4933 (S.C.C.)
- 10 *Pearson v. Inco Ltd.*, 2004 CarswellOnt 3018 (Div. Ct.); reversed 2005 CarswellOnt 6598 (C.A.); additional reasons 2006 CarswellOnt 1527 (C.A.); leave to appeal refused 2006 CarswellOnt 4020, 2006 CarswellOnt 4021 (S.C.C.); *Augustine v. Inco Ltd.*, 2005 CarswellOnt 1636 (S.C.J.); *Pearson v. Inco Ltd.*, 2006 CarswellOnt 1527 (C.A.); *Smith v. Inco Ltd.*, 2012 ONSC 4749, 2012 CarswellOnt 10712; *Smith v. Inco Ltd.*, 2012 ONSC 5094, 2012 CarswellOnt 11223 (S.C.J.)
- 11 (1866), L.R. 7 Ex. 265 (Eng. Exch.); affirmed (1868), L.R. 3 H.L. 330 (U.K. H.L.)
- 12 *Smith v. Inco Ltd.*, 2010 ONSC 3790, 76 C.C.L.T. (3d) 92, 52 C.E.L.R. (3d) 74, 2010 CarswellOnt 4735 (S.C.J.); reversed 2011 CarswellOnt 10141 (C.A.); leave to appeal refused 2012 CarswellOnt 4932, 2012 CarswellOnt 4933 (S.C.C.) (trial decision); *Smith v. Inco Ltd.*, 2011 ONCA 628; leave to appeal refused 2012 CarswellOnt 4932, 2012 CarswellOnt 4933 (S.C.C.) (appeal decision).
- 13 Inco Limited was acquired by Vale in 2007.
- 14 *Ibid*, appeal decision at para 7; trial decision at para 333: “Inco reduced emissions of nickel from its refinery over time.”
- 15 *Ibid*, at para 24. The trial judge disposed of this defence in paragraphs 110 to 119. He found, by applying the discoverability principle, that the cause of action arose as of February 15, 2000. The material fact that the nickel in the soil could negatively affect the values of the class members' properties was not reasonably known, nor ought to have been known, through reasonable diligence, until then when real estate agents in the area became aware of the potential effect on property values.
- 16 Six years by section 45(1)(g) of the Ontario *Limitations Act* in force during the material time.
- 17 In the trial decision alone, the learned judge refers often to MOE and HHRA conclusions released publicly that there were no human health concerns. See paras 127, 133, 140, 153, 164, 167, 172-76, 206 and 209. The judge said, in para 140, for example: “... the scientists at the MOE believed that it was unlikely that the nickel in the soil in Port Colborne caused any risk to human health.”
- 18 *Ibid*, para 31.
- 19 *Ibid*, paras 33 - 34.
- 20 *Ibid* at para 134.
- 21 The Court of Appeal wrote at para 11 that this MOE guideline: “had no connection to any potential health risk posed by the nickel, and was based on levels at which nickel deposits in the soil could possibly adversely affect the most sensitive plant life (ecotoxicity).”
- 22 See trial judgment paras 112 to 220 inclusive where the disclosures and public reactions are detailed.
- 23 *Ibid* at para 165.
- 24 *Ibid*, para 165.
- 25 *Ibid* at para 158.
- 26 The national sensational headlines contained phrases such as “Massive Contamination”, “Fears for Children”, “Inco Must Clean Up”, “Cancer Risk”, and “Tests Raise Fears”. See ??citation missing??. para 197.
- 27 *Supra*, note 22.

- 28 Trial decision: *Smith v. Inco Ltd.*, 2010 ONSC 3790, 76 C.C.L.T. (3d) 92, 2010 CarswellOnt 4735 (S.C.J.) at para. 5.; reversed 2011 CarswellOnt 10141 (C.A.); leave to appeal refused 2012 CarswellOnt 4932, 2012 CarswellOnt 4933 (S.C.C.)
- 29 Ibid, para 22.
- 30 Ibid, para 11.
- 31 Ibid at para 180.
- 32 Ibid, paras 37-42.
- 33 Ibid, paras 43-69.
- 34 Ibid, paras 70-103.
- 35 "... whereas a nuisance may be an indirect intrusion": Ibid, para 38
- 36 Henderson, J. adopted the criteria set out in *Grace v. Fort Erie (Town)*, 2003 Carswell-Ont 3366, [2003] O.J. No. 3475 (S.C.J.) at para. 86, and in *R. & G. Realty Management Inc. v. Toronto (City)*, 2005 CarswellOnt 7857, [2005] O.J. No. 6093 (S.C.J.) at para. 40. See also, R.V.F. Heuston & R.A. Buckley, *Salmond and Heuston on the Law of Torts*, 21st ed., (London: Sweet & Maxwell, 1996), at p. 44. Ibid, paras 37 - 38.
- 37 Ibid, para 39.
- 38 Ibid, para 42.
- 39 Supra, at note 11.
- 40 The phrase "non-natural use of the land" arises from the original *Rylands* decision. In the Exchequer Chamber, Blackburn J. referred to a defendant bringing onto his property something "*which was not naturally there*". In the House of Lords, Lord Cairns referred to the use of a substance "*for any purpose which I may term a non-natural use for the purpose of introducing into the close that which in its natural condition was not in or upon it*"
- 41 See *Storms v. M. G. Henniger Ltd.*, 1953 CarswellOnt 81, [1953] O.R. 717 (C.A.) at para. 17, and Allen M. Linden & Bruce Feldthusen, *Canadian Tort Law*, 8 ed., (Markham: LexisNexis, 2006) at p. 531.
- 42 1989 CarswellNfld 21, 1989 CarswellNfld 217, [1989] 2 S.C.R. 1181. In that case, the basement of the Tock home was flooded following a heavy rain due to blockage in the storm sewer. The Court considered the provisioning of an indispensable service such as a water and sewer system as a natural use. Justice La Forest said:
- I would hold that [non-natural use] cannot be invoked where a municipality or regional authority, acting under the warrant of statute and pursuant to a planning decision taken in good faith, constructs and operates a sewer and storm drain system in a given locality.
- 43 Ibid, paras 48-49.
- 44 Ibid, para 51, citing *Rickards v. Lothian*, [1913] A.C. 263 (Aust. P.C.), at page 280, as follows: "It is not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land."

- 45 Ibid, para 52, citing *R. & G. Realty Management* case, at para. 39, which referred to the OCA decision in *Tridan Developments Ltd. v. Shell Canada Products Ltd.*, 2002 CarswellOnt 1, 57 O.R. (3d) 503 (C.A.); leave to appeal refused 2002 CarswellOnt 3960, 2002 CarswellOnt 3961 (S.C.C.).
- 46 Ibid, para 53.
- 47 Ibid, para 54.
- 48 *Transco Plc v. Stockport Metropolitan Borough Council*, [2004] 1 All E.R. 589 (U.K. H.L.) at para. 27
- 49 See R.V.F. Heuston, *Salmond on the Law of Torts*, 16th ed. (London: Sweet & Maxwell, 1973) at page 322, and see John G. Fleming, *The Law on Torts*, 2nd ed. (Sydney: Law Book Co., 1961) at page 285. However, a footnote found at page 375 of Fleming, (9th ed., 1998) reads in part, “*Rylands v. Fletcher* cases often involve conditions of some duration.”
- 50 See Fridman, (2nd ed., 2002), and Linden & Feldthusen, (8th ed., 2006).
- 51 See, for example, *Anmore Development Corp. v. Burnaby (City)*, 2005 CarswellBC 2491, 2005 BCSC 1477 (S.C.) at para. 149.; additional reasons 2006 CarswellBC 2944 (S.C.): “While a single escape can be a nuisance, I have seen no authority that suggests that the *Rylands v. Fletcher* doctrine applies to a continuous nuisance, which is what happened here.” The House of Lords itself in the case of *Cambridge Water Co. v. Eastern Counties Leather Plc.*, [1994] 2 A.C. 264 (U.K. H.L.) at least implied, if not determined, that the rule in *Rylands v. Fletcher* applies to long term escapes. Lord Goff wrote at p. 307 “the rule as established is not limited to escapes which are in fact isolated.” The factual scenario was similar to the Inco case. In *Cambridge Water* a chemical (PCE) slowly leaked from a tannery, eventually contaminating a private water supply located over one mile from the tannery. The House of Lords said, “storage of substantial quantities of chemicals on industrial premises should be regarded as an almost classic case of non-natural use.”
- 52 *Cambridge Water Co. v. Eastern Counties Leather Plc.*, [1994] 2 A.C. 264 (U.K. H.L.). For a discussion of this case, see Peter Bowal and Nicole Koroluk, “Closing the Floodgates: Environmental Implications of Revisiting *Rylands v. Fletcher*” (1994) 4 *J. Env. Law & Practice* 310-326.
- 53 Henderson J. was of the view that foreseeability was not required in Canadian law--see para 58. The Ontario Court of Appeal agreed in para 108: “[t]o our knowledge, neither the Supreme Court of Canada nor any provincial appellate court has examined whether foreseeability of damages is an element of liability under *Rylands v. Fletcher*. We do not propose to decide the issue in the absence of full argument.”
- 54 Ibid at para 60.
- 55 Ibid at para 64.
- 56 Ibid at para 67.
- 57 Ibid at para 68.
- 58 Ibid at para 70.
- 59 *Barrette c. Ciment du St-Laurent inc.*, 2008 CarswellQue 11070, 2008 CarswellQue 11071, 2008 SCC 64, (sub nom. *St. Lawrence Cement Inc. v. Barrette*) [2008] 3 S.C.R. 392, where the Supreme Court upheld a Quebec class action brought by neighbours of a St. Lawrence Cement facility for causing odour, noise and dust annoyance to neighbours.
- 60 Ibid at paras 77 and 82.

- 61 The law of Quebec does not require this balancing of interests. The Court decides if the interference is abnormal in the neighbourhood. See: Luc Gratton, "St. Lawrence Cement Inc. v. Barrette: A Case Comment," *EnviroNotes!* (Miller Thomson, Winter 2008).
- 62 Ibid at para 83.
- 63 Ibid at para 333
- 64 Ibid at para 88.
- 65 At trial, Inco made the novel argument on the private nuisance issue that since all the most serious properties were remediated that the government regulators had considered unacceptable, except Smith who refused, there is no physical property damage that is material, and thus the plaintiff is unable to prove nuisance. Henderson J. (at para 86) answered this claim:
- In my view the MOE did not set a standard for civil liability when it set the intervention level for nickel in the soil at 8,000 ppm. The MOE merely set the standard for mandatory cleanup of the property, presumably because a cleanup to the level of 8,000 ppm reduces or eliminates the risk of interference with human health. The reduction or elimination of the effect of nickel contamination on property values was not a consideration in the decision of the MOE.
- This is ironic because the MOE testing and actions were precisely caused the panic that gave rise to this lawsuit. The public alarm generated by the MOE's test results was sufficient to ground liability and damages, but somehow the MOE's standards and regulatory decisions (regarding remediation) were completely inadequate and irrelevant.
- 66 Ibid at para 101.
- 67 Ibid at para 102.
- 68 Ibid at para 261.
- 69 Ibid at para 264.
- 70 Ibid at para 268.
- 71 Ibid at para 271.
- 72 Ibid at paras 17 ("each of the data sets suffers from some frailties") and 244 *et seq*
- 73 Ibid, para 298.
- 74 *Smith v. Inco Ltd.*, 2011 ONCA 628, 2011 CarswellOnt 10141, Doherty, MacFarland JJ.A. and Hoy J. (ad hoc) (C.A.); leave to appeal refused 2012 CarswellOnt 4932, 2012 CarswellOnt 4933 (S.C.C.)
- 75 Ibid, para 48.
- 76 Citing *Barrette c. Ciment du St-Laurent inc.*, 2008 CarswellQue 11070, 2008 CarswellQue 11071, 2008 SCC 64, (sub nom. *St. Lawrence Cement Inc. v. Barrette*) [2008] 3 S.C.R. 392, at para. 77.
- 77 Citing *Walker v. McKinnon Industries Ltd.* at pp. 558-59.
- 78 Court of Appeal at para 52.
- 79 Ibid at para 67.

- 80 Ibid at para 55
- 81 This result was similar to the contemporary American judicial decision of *Cook v. Rockwell International Corp.*, Nos. 08-1224, 08-1226 and 08-1239, FindLaw (US 10th Cir., Sept. 3, 2010). In that Colorado case, property owners near the decommissioned Rocky Flats Nuclear Weapons Plant brought a class action in nuisance against the large multinational operator. The Plant had showered plutonium particles onto their lands. The jury found for the class of plaintiffs at trial to \$929 million in damages. This award was reversed on appeal on the basis that a nuisance claim must show interference with the use and enjoyment of land that is both “substantial” (offensive, inconvenient or annoying to a reasonable person) and “unreasonable” (considering the seriousness of the harm and social utility of the activity). Anxiety about negative health impacts calls for scientific support to be substantial and reasonable.
- 82 Ibid at para 103.
- 83 The Court also used the phrase “fraught with danger” to describe this standard. See para 78.
- 84 Ibid. See also para 94.
- 85 Ibid at para 95.
- 86 Ibid, citing *Gertsen v. Toronto (Metropolitan)*, 1973 CarswellOnt 360, 2 O.R. (2d) 1 (H.C.), at pp. 19-20; David W. Williams, “Non-Natural Use of Land” (1973) 32 Cambridge L.J. 310, at pp. 314-21.
- 87 Ibid at para 104. See also *Richards v. Lothian* at p. 280
- 88 The Court of Appeal addressed the role of foreseeability of damages under *Rylands*. After noting that “neither the Supreme Court of Canada nor any provincial appellate court has examined whether foreseeability of damages is an element of liability under *Rylands v. Fletcher*, and promising “not ... to decide the issue in the absence of full argument” (para 109), the Court of Appeal added that “[t]here are, however, compelling reasons to require foreseeability of the kind of damages alleged to have been suffered by the plaintiffs” such that “the foreseeability of a diminution in the appreciation of the value of the claimants’ properties some 15 years after the refinery closed, would be a live issue.” (para 110)
- 89 *Rylands* has been analyzed and relied upon by American courts for well over a century the rule is incorporated in the *Restatement of Torts*, Restat 2d of Torts, §519, §520
- 90 Ibid at para 122
- 91 Ibid at para 127
- 92 The MPAC data set had characterized some building lots as residential properties, which had the effect of lowering the average residential property value for Port Colborne. These undeveloped lots had a low value compared to developed residential lots with buildings. This was an “apples to oranges” comparison. When the vacant lots were removed from the calculation, the average residential property value increased in Port Colborne, virtually eliminating the 5.9% gap between the growth of housing values in Port Colborne and Welland. As the Court of Appeal said, “[w]hen an “apples to apples” comparison is made--with the building lots either included or not included on both sides of the comparison--any difference in appreciation rates between the two comparator communities disappears, or accrues in Port Colborne’s favour.” (para 147). See generally, the Court’s discussion of this statistical analysis at paras 131 to 148.
- 93 Ibid at para 128
- 94 Ibid at para 158
- 95 Ibid at para 168

- 96 <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-l-csc/en/item/11180/index.do?r=AAAAAQAKaW5jbyBzbW10aAAAAAAAEE>; Coram: McLachlin C.J. and Rothstein and Moldaver JJ. See analysis at *Big Suits: SCC Refuses Leave to Appeal in Smith v. Inco*, <http://lexpertblog.com/2012/04/26/big-suits-scc-refuses-leave-to-appeal-in-smith-v-inco/> and Gatlin Smeijers, Supreme Court Will Not Hear Appeal of Smith v. Inco (May 2012, Cowlings) <http://www.gowlings.com/KnowledgeCentre/article.asp?pubID=2673>
- 97 *Smith v. Inco*, 2012 ONSC 5094, 2012 CarswellOnt 11223 (S.C.J.)
- 98 Inco's disbursements alone were \$1.532 million plus GST & HST, which is the approximate amount recovered, including taxes. The company produced a \$5.34 million Bill of Costs: Julius Melnitzer, "Bottom of FormInco nets meagre costs recovery in successful environmental claim," December 09, 2011, *Financial Post (Legal Post)*, <http://business.financialpost.com/2012/09/11/inco-nets-meagre-costs-recovery-in-successful-environmental-claim/> and Julius Melnitzer, "Does Inco costs award mask fiscal management issues at Class Proceedings Fund?" *Financial Post (Legal Post)*, December 09, 2012, <http://business.financialpost.com/2012/09/12/does-inco-costs-awardmask-fiscal-management-issues-at-law-society-foundation/>
- 99 Ibid at paras 3 and 110
- 100 John Chapman and Adam Stephens, "Uncertain future for class fund", *The Lawyers Weekly*, March 09 2012, <http://www.lawyersweekly.ca/index.php?section=article&articleid=1611>
- 101 R.S.O. 1990, c. L.8
- 102 Ibid at para 11
- 103 Ibid at para 12
- 104 The trial took place over a period of 101 days, and concluded on January 21, 2010.
- 105 Ibid at para 11
- 106 Barry Weintraub, "Ontario Court of Appeal Narrows Environmental Torts in Inco Class Action," (December 2011) *EnviroNews* 21: 2, <http://instruct.uwo.ca/geog/3415/EnvtlTorts.pdf>; Michael S. Hebert and Cheryl Gerhardt McLuckie, "Court of Appeal on *Smith v. Inco: Rylands v. Fletcher Revisited*," December 2011, Volume 21, No. 2, Canadian Bar Association--Ontario, Environmental Law Section, <http://instruct.uwo.ca/geog/3415/RylFletch.pdf>; Michael Rosenberg, "Vale Vindicated: Ontario Court of Appeal Finds no Liability in Toxic Tort Class Action; Plaintiffs Seek Leave to Appeal to the SCC," (December 12th, 2011), <http://www.canadianappeals.com/2011/12/12/vale-vindicated-ontario-court-of-appealfinds-no-liability-in-toxic-tort-class-action-plaintiffs-seek-leave-to-appeal-to-the-scc/>
- 107 See, eg., (Jan 2012) 36 *Can Lawyer* No. 1, 20-23; 30 *Leg. Alert* 73 (3); Kramer, G., *Polluter Must Pay Landowners \$36M*, *Lawyers Weekly*, August 27, 2010, at p. 14 and 31 *Lawyers Weekly* No.23 1 (2). The trial decision was referred to in Michael Hebert, *Tridan v. Shell is Alive and Well* (Sept. 2010) 20 OBA Environews (Online) No. 1. [Retrieved April 21, 2011 from <http://www.oba.org>]. See also, Peter Bowal and Sean Keown, "Smith v. Inco Ltd. (Case Comment)" (2013) *LawNow* (in press).
- 108 See, eg., Tamara Farber, "No Harm, No Nuisance--The Ontario Court of Appeal Lays Out What Will, and Will Not, Fly in Proving Nuisance: *Smith v. Inco Limited*", *EnviroNotes!* (Miller Thomson, October 2011); Case Comment-- *Smith v. Inco*, *Environment @ Cowlings* (August 16, 2010, Volume 7, Number 6), http://www.gowlings.com/KnowledgeCentre/enewsletters/environ/HtmFiles/V7N06_20100816.en.html; D. Michael Brown and Michael Kotrly, "Ontario Court of Appeal Overturns Trial Decision in *Smith v Inco*" (Norton Rose, October 2011) <http://www.nortonrose.com/knowledge/publications/57226/ontario-court-of-appeal-overturms-trial-decision-in-smith-v-inco>; Kristi Collins, *Case Law Update: Smith v Inco Limited*, (WeirFoulds, October 20, 2011) <http://www.weirfoulds.com/case-law-update-smith-v-inco-limited>; Ralph Cuervo-Lorens, "Smith v Inco Limited--Limitation Periods in Class Actions an Individual and Not a Common Issue", (November

21, 2011, Blaneys), <http://www.blaney.com/articles/smith-v-inco-limited-limitation-periods-class-actions-individual-and-not-common-issue>; Nalin Sahni, "Appeal court dismisses C\$36 million environmental class action award," (November 22 2011, Fraser Milner Casgrain), <http://www.internationallawoffice.com/newsletters/detail.aspx?g=5811f573-2085-4cb5-befb-e8e372bf6b4c>; Torys on Environmental, Health and Safety, "Ontario Court overturns \$36 million award in Smith v. Inco Limited" (Vol. 18, No. 10, October 2011), <http://www.torys.com/Publications/Documents/Publication%20PDFs/EHS2011-10.pdf>; Douglas F. Harrison, "Damages for stigma awarded in environmental class action *Smith v. Inco Limited*," (July 28, 2010, Stikeman), <http://www.stikeman.com/cps/rde/xchg/se-en/hs.xml/14231.htm>; "Has the door just opened for Canadian toxic tort litigation?" 8 July, 2010, <http://wcel.org/resources/environmental-law-alert/has-door-just-opened-canadian-toxic-tort-litigation>; Barry Glaspell, "Canada: Death Of Environmental Class Actions Post-'Inco'--Well, Maybe Not Quite Yet ..." (January 02, 2013, Borden Ladner Gervais), <http://www.mondaq.com/canada/x/214096/Environmental+Law/Death+Of+Environmental+Class+Actions+PostInco+Well+Maybe+Not+Quite+Yet>; "Class Action Award Reversed," (October 2011, Litigation Notes), <http://www.lexcanada.com/lib-dr-1110-01.html>; Douglas F. Harrison and Vanessa Voakes, "Court of Appeal for Ontario overturns \$36 million damages award in environmental class action," (October 07, 2011), http://www.canadianclass_actionslaw.com/environmental/court-of-appeal-for-ontariooverturns-36-million-damages-award-in-environmental-class-action/; Michael C. Barbero, "Stop the smelter" (May 2 2012, McLennan Ross), <http://www.lexology.com/library/detail.aspx?g=3e4643c6-8d46-4e01-9fad-cfce713ea779>.

- 109 The Court of Appeal decision is referred to under 3 headings in Carswell's Words & Phrases: Actual Damage, Material Damage and Readily Ascertainable Damage. Carswell also lists 30 secondary sources: Annual Review of Civil Litigation; several dozen references between 2011-2013 in Kim Orr's Class Action Monitor; and references in Watson & McGowan's Ontario Civil Practice (Costs and Case Law).
- 110 This Comment does not address procedural issues, but the Court of Appeal's disposition of *Inco* it has potentially important implications regarding limitations legislation in the context of environmental class proceedings.
- 111 In *Midwest Properties v. Thordarson*, 2013 CarswellOnt 2183, 2013 ONSC 775 (S.C.J.); additional reasons 2013 CarswellOnt 3571 (S.C.J.), a landowner claimed damages for remediation costs relating to migration of contaminants from a neighbouring site. The Ontario Superior Court of Justice dismissed the private nuisance action, holding that proof that contaminants *can* pass or even *have* passed from one contaminated property to another, even if the contamination exceeds MOE guidelines, fails to establish liability. One who purchases already-contaminated land must show that the offending neighbour's actions increased the contamination during the period of actual ownership.
- 112 See, for example: <http://envirolaw.com/thinking-smith-inco/>; <http://envirolaw.com/scc-grant-leave-smith-inco/>; http://envirolaw.com/wp-content/uploads/ENV12_saxe_slides.pdf
- 113 *Hollick v. Metropolitan Toronto (Municipality)*, 2001 CarswellOnt 3578, (sub nom. *Hollick v. Toronto (City)*) 2001 SCC 68, [2001] 3 S.C.R. 158 refusing certification of a class action brought by 30,000 claimants living near a noisy and air polluted landfill. The Supreme Court, in its first application of the Ontario class proceedings legislation encountered challenges in defining the "classes" of plaintiffs as everyone in the area was differently affected.
- 114 Article 976 of the *Civil Code of Quebec* reads: "Neighbours shall suffer the normal neighbourhood annoyances that are not beyond the limit of tolerance they owe each other, according to the nature or location of their land or local custom."
- 115 Eg. *Comité d'environnement de La Baie Inc. c. Société D'electrolyse et de chimie Alcan Ltée*, 1990 CarswellQue 44, [1990] R.J.Q. 655 (C.A.); leave to appeal refused (1990), 114 N.R. 160 (note) (S.C.C.) and *St. Lawrence Cement v. Barrette*, *supra*
- 116 André Durocher and Marisa E. Victor, "Environmental Class Actions in Ontario and Quebec: A Tale of Two Solitudes?", (November 2011, CBA Ontario: Class Act Volume 1, No. 1), http://www.oba.org/en/pdf/sec_news_cla_nov11_dur_env.pdf
- 117 Including, specifically, *Rylands v. Fletcher* (1866), L.R. 7 Ex. 265 (Exch.); affirmed (1868), L.R. 3 H.L. 330; *St. Helen's Smelting Co. v. Tipping* (1865), 11 H.L.C. 642 (U.K. H.L.); *Tock and Tock v. St. John's (City) Metropolitan Area Board*, 1989

CarswellNfld 21, 1989 CarswellNfld 217, [1989] 2 S.C.R. 1181, 104 N.R. 241, 82 Nfld. & P.E.I.R. 181, 257 A.P.R. 181; *Richards v. Lothian*, [1913] A.C. 263 (Aust. P.C.) and *Tridan Developments Ltd. v. Shell Canada Products Ltd.*, 2002 CarswellOnt 1 (C.A.); leave to appeal refused 2002 CarswellOnt 3960 (S.C.C.).

118 except isolated versus continuous escapes and whether Inco was engaged in activity for the general benefit of the community

119 Barry Weintraub, "Ontario Court of Appeal Narrows Environmental Torts in Inco Class Action," (December 2011) *EnviroNews* 21: 2, <http://instruct.uwo.ca/geog/3415/EnvvtlTorts.pdf>

120 *Supra*, note 12 at para. 57

121 See Lord Moulton in *Richards v. Lothian*, [1913] A.C. 263 (Aust. P.C.) at page 280, as follows: "It is not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land." Re: "danger versus damage", Wilton-Siegel J. in the *R. & G. Realty Management* case, at para. 39, referring to the OCA decision in *Tridan Developments Ltd. v. Shell Canada Products Ltd.*, 2002 CarswellOnt 1 (C.A.); leave to appeal refused 2002 CarswellOnt 3960 (S.C.C.) wrote:

... [I]t is clear, however, that the plaintiff is not required to demonstrate that the escaping substance is dangerous per se--only that, in escaping or migrating to an adjoining property, it causes damage to that property. It is, however, necessary that the confining of the substance to the defendant's property entailed a "non-natural" use of that property in the sense that the substance was "not naturally there".

122 para 66

123 Applying this logic, one factory in a row of ten would be immune from liability under *Rylands v. Fletcher* because of the fact that it didn't create an unusual risk over and above those of its nine neighbours: Michael S. Hebert and Cheryl Gerhardt McLuckie, "Court of Appeal on *Smith v. Inco: Rylands v. Fletcher Revisited*," December 2011, Volume 21, No. 2, Canadian Bar Association--Ontario, Environmental Law Section, <http://instruct.uwo.ca/geog/3415/RylFletch.pdf>

124 Patrick Duffy, "Ontario Court ruling an important precedent for wind farm developers," (October 12, 2011, Stikeman Elliott), <http://www.canadianenergylaw.com/2011/10/articles/electricity/ontario-court-ruling-an-important-precedent-for-wind-farm-developers/> Ontario wind farm developers are threatened with litigation from neighbouring residents who claim property values are suffering because of the perceived health concerns associated with wind turbines.

125 For example, the Sydney Tar Ponds present virtually identical issues as *Inco*: Dianne Saxe and Jackie Campbell, "Class actions for historic contamination: Sydney Tar Ponds and *Smith v. Inco*," January 30, 2012, <http://envirolaw.com/class-actions-historic-contamination/>

126 Henderson J. at para 332 took a simplistic approach to this: "[c]learly, Inco's conduct was wrong in law and has caused widespread damage that has affected several thousand people."

127 For example, ecotoxicity--such as where plants might be affected by nickel--will not create any automatic health risk for human beings.

128 Para 159

129 André Durocher and Marisa E. Victor, "Environmental Class Actions in Ontario and Quebec: A Tale of Two Solitudes?," (November 2011, CBA Ontario: Class Act Volume 1, No. 1), http://www.oba.org/en/pdf/sec_news_cla_nov11_dur_env.pdf

130 *Ibid.*

- 131 For example, the two highest concentrations of nickel particles were recorded on public land in a 1975 phytotoxicological study, but they were readily disregarded by the trial judge as “irrelevant” and more emphasis was placed upon more recent results that were lower.
- 132 *Supra*, note 12 at para. 20
- 133 Eric Gillepsie, Barrister & Solicitor, Press Release June 4, 2003, *Inco Test Results Confirm High Cancer Risks Inside Port Colborne Homes*
- 134 Court of Appeal decision, para 24
- 135 See Court of Appeal decision, paras 20 to 25
- 136 Trial decision, para 337
- 137 For example, it was suggested in the Court of Appeal decision (para 9) that the plaintiffs were trying to do an end run around the health issue which turned out to be the main driver of the trial outcome, although they did not allege the “presence of the nickel in the soil on their properties posed any immediate or long-term threat to human health.”
- 138 “Big Suits: SCC Refuses Leave to Appeal in *Smith v. Inco*”, <http://lexpertblog.com/2012/04/26/big-suits-scc-refuses-leave-to-appeal-in-smith-vinco/>

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