Contaminated Site Lawsuits after Inco

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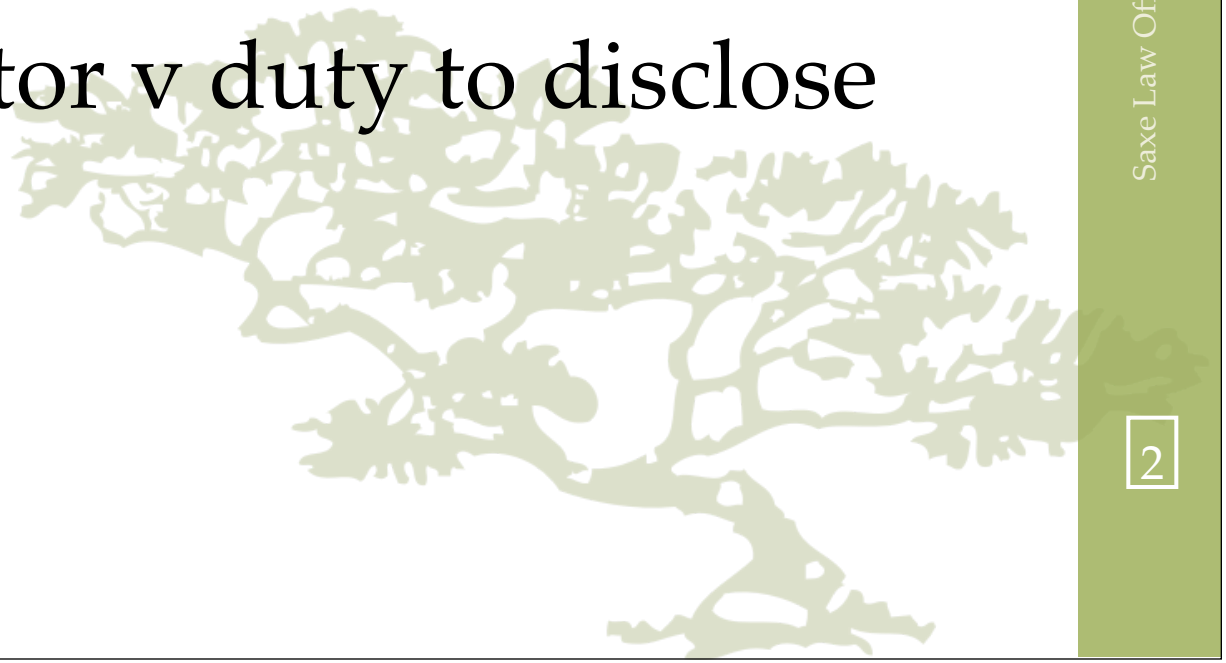
Overview

- Offsite contamination
  - Typical cases
- Seeking compensation after Inco
- Caveat emptor v duty to disclose



Offsite contamination

- How did it get there?
  - Air
  - Dumping solids
  - Surface water
  - Groundwater
- Routine v spills
- Past or present?

Cottage v cottage

- 2 old cottages
- A installed unsafe oil tank, no roof, no containment, at ppty line
- B's healthy tree fell on A's tank
- Both contaminated

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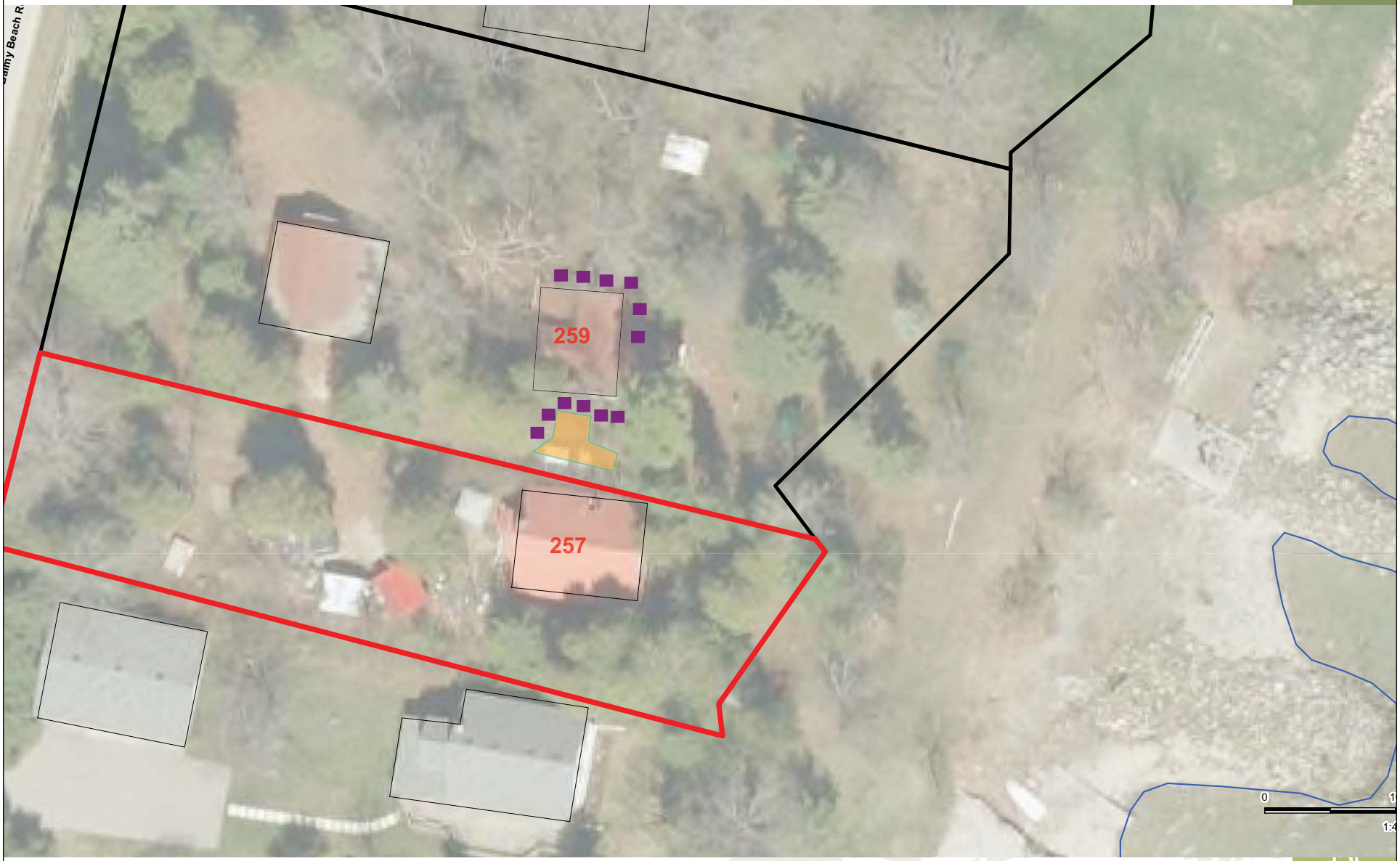
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Plaza

- Apartment building v. plaza and dry cleaner
  - trespass
  - nuisance
  - negligence
  - Rylands
  - statutory liability

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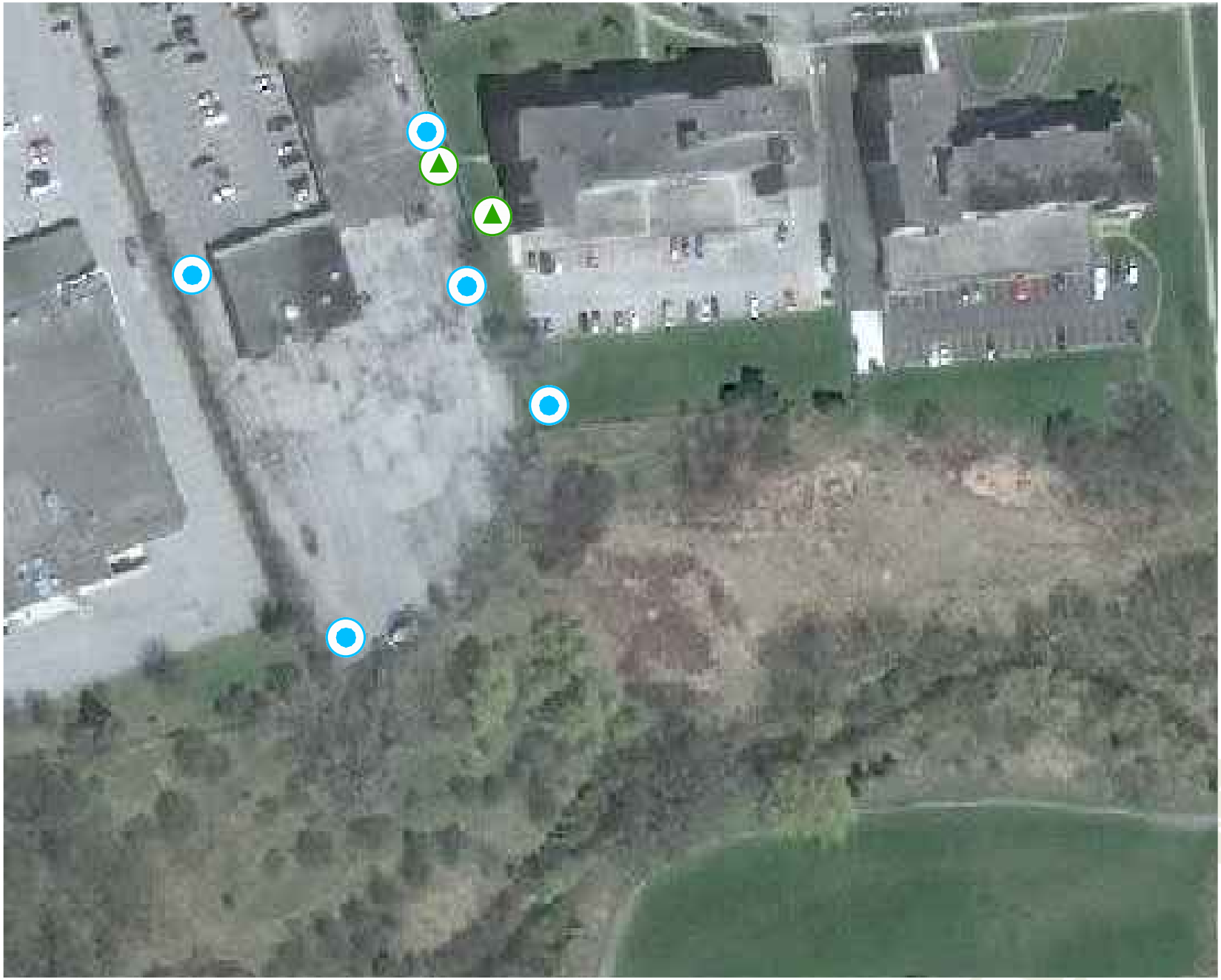

Not as simple as it looks

- Co. bought apt. in 2004 w/o due diligence
- Was it contaminated then?
- Was it contaminated at all?
- If so, from where?
  - basement under dry cleaner
  - contam much worse on apt. land

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Bankrupt plating tenant

- Plater bankrupt years ago
- Landlord sells, buyer to clean, mortgage back
- Long mortgage battle
- Neighbour suffers

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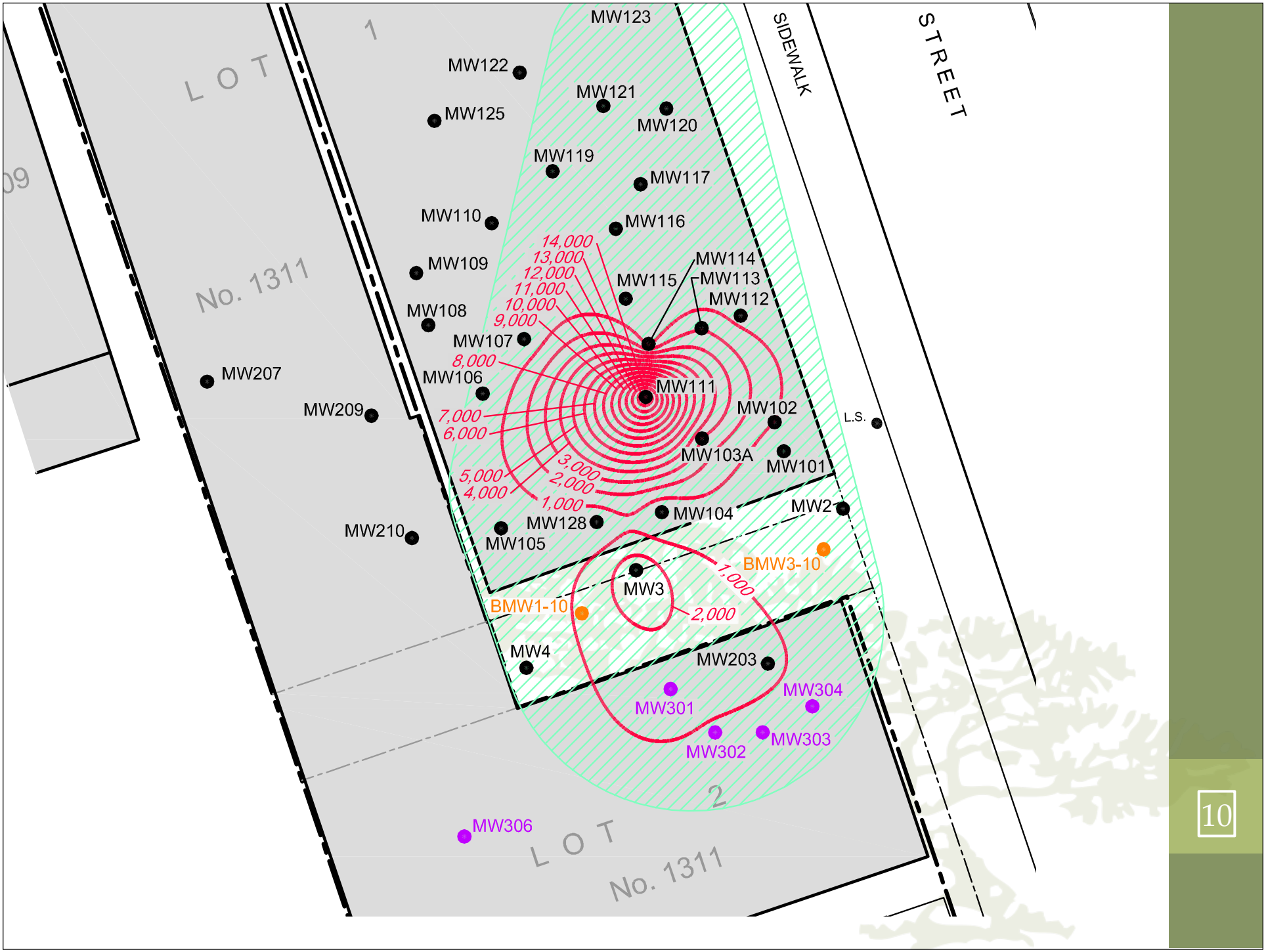
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Causes of action narrower

- Most environmental claims:
  - Negligence (*Berendsen*)
  - Nuisance (*Inco*)
  - *Rylands v. Fletcher* (*Inco, MacQueen*)
  - Trespass (*Inco*)
  - Statutory breach

Berendsen v. Ontario

- 1960s - Ministry of Transportation dumps asphalt, concrete on dairy farm, near well
  - OWRA: don't deposit material in a place that may impair water quality
- 1981 - Berendsens buy farm
  - Cows won't drink, little milk
- 1989 - Berendsens discover the waste

Berendsen v. Ontario

- 1990 - Province supplies clean water
  - Healthy cows
  - But: Well meets ODWO
- 1993 - Province stops supplying water
  - Cows won't drink

Trial

- 1994 - Berendsens sue Ontario in negligence
  - Depositing waste
  - Failing to remove it
- Trial Judge: damages > $1.7 million

Appeal narrows Negligence

- A reasonable person in the 1960's would not have foreseen that buried road waste would later harm cows

Law of Negligence:

- Duty of Care
- **Standard of Care**
- Harm
- Causation

Standard of Care

- In the 1960s:
  - No scientific studies showing harm
  - Deposit of waste not regulated
  - Toxicology developed in 1970s
  - Soil geologists didn't know chemicals could migrate underground
  - Vets didn't know chemicals in asphalt

Standard of Care

- So, the harm was not foreseeable at the time of dumping
- Not enough:
  - "common sense"
  - statutory prohibition OWRA

Standard of Care

- "Although this result may seem harsh in the light of what we now know about the environment, it is inappropriate to use our current knowledge to measure conduct occurring more than 30 years ago."
  - Court of Appeal at para. 72

Smith v. Inco

- Inco Port Colborne nickel refinery
- 66 years to 1985
  - No negligence
  - Lawful air emissions
  - Everyone knew
  - (probably toxic then, esp in plant)

15 years later...

- 2000: nickel in soil> 8,000 ppm at 25 homes
- Crescendo of public concern
  - MOH warning
  - Cleanup order and CBRA
  - Real estate warnings
- Neighbours' class action

Certification and Trial

- Property damage claim certified (despite limitations issue)
- Health damage claim *not* certified
- Awarded $36 M for lag in increase in property values 2000-2008

Trial: Inco liable

- **Nuisance**
  - Nickel oxide deposition = material physical injury to land, when property values affected after 2000
- ***Rylands v. Fletcher***
  - Refinery = non-natural use of land; nickel from elsewhere

Trial: Inco not liable

- **Trespass**
  - Intrusion on plaintiff's land indirect, rather than direct
- Negligence: no serious claim

Appeal

- Award overturned
- No cause of action
  - No nuisance
  - No *Rylands* AND
- No damages
- SCC denied leave to appeal

Appeal narrows Nuisance

- Nuisance is for "current interference"
  - Primary "raison d'etre" of nuisance is to force the party causing damage / interference to stop
  - Not about retroactive compensation for activities that were not a nuisance at the time

Appeal narrows Nuisance

- No "harm" or "interference"
  - No "harm" without *actual* risk to health
    - Exceeding generic standards is not "harm"
    - Public concern is not "harm"
  - No interference with use (at least after cleanup)
  - Criticized class counsel for raising health concern

Appeal narrows Rylands

- Classic elements of *Rylands v. Fletcher:*
  - Non-natural use of defendant's land
  - Storage of a substance likely to do mischief
  - Escape of the substance
  - Harm caused

Appeal narrows Rylands

- "Non-natural" use of land
  - Inappropriate for its location
  - Pig in china shop
  - Not refinery in industrially zoned area, in compliance with all laws
- Only accidental releases, not routine emissions

Appeal narrows Rylands

- If the harm isn't foreseeable?
  - *Cambridge Water Co. v. Eastern Counties Leather Plc.*
- Not decided in *Smith v. Inco* but:
  - Compelling reasons to require foreseeability
  - Foreseeable damage, not foreseeable escape

Ultra hazardous activities?

- Proposed by Linden
- Leave it to the Legislature
- Not role of *Rylands*

Appeal: Result

- Damages
  - Failed to establish decrease in property values
  - Vacant lots
- Inco awarded $1,766,000 in legal costs, less than ¼ of actual
  - From LFO's Class Proceedings Fund

MacQueen

- Sydney Tar Ponds class action certified
- Against federal / prov govts
  - private claims settled
- Routine air, water and waste contamination for decades
- Sydney Steel plant and coke ovens

MacQueen

- Alleged health and property damage
- Can't certify health damage claims
- Tried battery, medical studies/help instead of money
- Accepted at certification stage

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MacQueen: NSCA

- Follows Inco
- Dismissed claims of:
  - battery
  - fiduciary duty
  - Rylands
    - steel mill/ coke ovens not "non-natural use"
    - but maybe dangerous emissions enough
    - if "escape", not routine emissions

MacQueen NSCA

- No trespass, statutory breach
- What's left?
  - Nuisance
  - Negligence
- Struck out certification
  - individual issues predominate
  - *would be hard to prove*

So what's left?

- **Nuisance** if *actual*:
  - interference with use or
  - threat to health
- From current activities
- Not for:
  - exceedence of standards
  - due to past activities

Negligence?

- If harm was foreseeable at the time
- Expensive to prove
- Closely tied to statutory breach
  - Excused if complied with emission limits?

Trespass?

- Almost never. Requires direct intentional intrusion, e.g. intentionally dumping waste on neighbour's land

Rylands?

- Only in very unusual cases in ON
  - Pig in china shop
- NSCA maybe more generous than OnCA on "non-natural use"
- Must be "escape", e.g. spill

Practical Effect?

- Many cases, no remedy without government intervention
- Everything turns on gov't discretion
- Limited oversight

Caveat Emptor?

- Leading case *Tony's Broadloom*
  - see case list
- Vendor:
  - is liable for reps and warranties
  - need not disclose patent defects
  - must not lie/ actively conceal truth

Caveat emptor

- "As is" means "caveat emptor"
  - esp on east coast
- Vendor must sometimes disclose latent defects
  - esp if dangerous
  - cases not entirely consistent

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Caveat emptor

- Buyer should ask, not assume
  - read the reports!
- Vendor should give no reps
  - how sure that they are true?
- Do it in writing

Questions?

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