S.C.C. File No. 34561

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N :

ELLEN SMITH

APPLICANT
(Respondent)

-and –

INCO LIMITED

RESPONDENT
(Appellant)

REPLY OF THE APPLICANT, ELLEN SMITH

(Pursuant to Section 28 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, as amended)

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REPLY OF THE APPLICANT

A. Admitted Contamination – Sufficient Effect on Land in Nuisance?

1. Inco's Response on this application for leave ably parrots the findings of the Court of Appeal by stating that there is no effect resulting from its nickel emissions on lands in Port Colborne. By doing so, Inco's Response fails to squarely confront the very issue underpinning this case: who is responsible in law for damage to property precipitated by reasonable regulatory intervention, extensive health studies, risk, uncertainty and widespread media coverage caused by discovered pollution?

2. By baldly asserting that its nickel contamination had no effect on the class' lands, Inco discards a decade of events in Port Colborne following the discovery of excessive nickel levels and the 100 paragraphs of factual findings made by the trial judge.[1] It does so in an attempt to neutralize any stigma or damage to land. None of these factual findings were contested nor disturbed on appeal. Instead they were ignored by the Court of Appeal despite ample evidence of a cascade of events between January 2000 and the time of trial, not least of which included:

- commencement of a decade long Community Based Risk Assessment
- visible government authorities conducting soil sampling
- the issuance by the Public Health Department of health precautions to residents
- the testing of fruits and vegetable for safety
- national media reporting on nickel in Port Colborne
- public health nurses delivering health fact sheets to residents
- the introduction of a mandatory contamination disclosure clause in agreements for purchase and sale
- Inco's Property Valuation Study regarding the effect of stigma on homes

These events lead to a time of great uncertainty and concern with the intensity of the message increasing at an accelerating rate as the media coverage intensified and more information was released.[2] All this while Inco admitted it was responsible for the nickel deposits and contamination.[3]

3. Should such a state of affairs remain an insufficient effect on property by which to ground a claim for nuisance? If so, what would be a sufficient effect? Missing from Inco's

[1] Trial Decision, paras. 120 – 220, Leave Application, Vol. 1, Tab 3(A), p.40 - 68.
[2] Trial Decision, at paras. 150, 151, 159, 160, 162, 169, 166, 170, 147, 185, 182, 196, 217 (respectively), Leave Application, Vol. 1, Tab 3(A), p. 49 – 54, 58 - 67
[3] Judgment on Common Issues (a) and (b), October 13, 2009, Leave Application, Vol. 1, Tab 3(B), p. 103.

Response is a rationale for why tort law ought not respond to the shadow imposed on contaminated residential lands. Are homeowners to bear all the burden, risk and uncertainty grafted upon their properties by industry's conduct which causes a decade's worth of very public environmental scrutiny, risk assessment, scientific testing, community health studies, regulatory intervention and unprecedented media attention? The fact that a legal operation visits random damage on unfortunate individuals "does not tell us why those individuals should be responsible for paying that damage."[4]

4. Merely repeating the holding of the Court of Appeal that contamination does not constitute damage to land ignores the very question submitted to this Court by the Applicant: at what point do chemical emissions and admitted contamination become actionable by landowners? When is chemical contamination of soil legally deemed to be damage to land so as to invoke the law of nuisance? As acknowledged by Inco, no appellate decision in Canada has ever addressed the liability issue "of the actionable threshold in nuisance when contamination is alleged, or whether diminished property value is physical damage to land."[5]

5. Inco's insistence that chemical depositions on neighbouring lands do not ground a claim in nuisance also fails to recognize a fundamental underpinning of Canadian property and tort law: the unfettered right of a residential homeowner to exclude chemical emanations or depositions on his property. If Inco is correct, Canada's highest court ought to unequivocally state that admitted contamination (along with its corollary spectre of remediation, risk, scientific study and uncertainty) is now a reasonable intrusion to be borne by residential landowners and that the landowners have no remedy.

B. Should strict liability in *Rylands* only apply to illegal escapes or activities?

6. Is the refining of precious metals ever a natural use of land in a residential neighbourhood? Inco says it is and that it always was. Inco relies on the holding of the very decision it seeks to sustain to suggest a complete overhaul of *Rylands*: "the *Rylands* rule does not apply to 'escapes' that are permitted by regulation and made in the ordinary course of business."[6] While Inco claims that this interpretation of the law is "consistent with decades of precedent

[4] *Tock v. St. John's Metropolitan Area Bd.*, [1989] 2 S.C.R. 1181 at 1199, Applicant's Book of Authorities, Tab DD.
[5] Inco Response, dated January 19, 2012, at para. 68(1), p. 23.
[6] Inco Response, dated January 19, 2012, at para. 54, p. 20; Court of Appeal Reasons, para 112, Leave Application, Vol. 1, Tab 3(D), p. 159.

regarding the application of *Rylands*,"[7] this assertion in fact represents a fundamental re-ordering of Canadian property law. Inco cites no authority in support of the Court of Appeal's reasoning in this respect and ignores this Court's holding in *St. Lawrence Cement* to the contrary. In *St. Lawrence*, this court clearly stated that lawfulness of an activity provides no basis for a defence to an interference with land.[8]

7. Inco and the Court of Appeal have conflated the natural use of land with the reasonable use of land.[9] *Rylands* is not a branch of negligence but a strict liability tort. Reasonableness is irrelevant. The "use of lands for a lawful commercial purpose is not necessarily a defence to a *Rylands* claim."[10] Inco's reasoning cannot be reconciled with:

- the holding in *Rylands* itself which stated that "though the act was in itself lawful [escape of water], yet if the doing of it occasions an injury to any one, the person injured has a right of action;"[11]

- the House of Lords decision in *Cambridge Water* which held that "the storage of substantial quantities of chemicals on industrial premises should be regarded as an almost classic case of non-natural use;"[12]

- the findings of strict liability for non-natural, albeit lawful, uses of land by making a water reservoir, operating a mine or excavating fill from a ravine;[13] or

- the preservation of civil remedies in provincial environmental protection legislation in Canada for actions against entities that may nevertheless be statutorily compliant.

8. At certification, the Court of Appeal stated that despite the lawfulness of Inco's enterprise, "if nickel escaped from its property, and it clearly did, the only real issues would be causation and damages"[14] not liability. Six years later, the same court, differently constituted, disregarded Canadian jurisprudence, its previous decision in this very case and its own decision

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[7] Inco Response, dated January 19, 2012, at para. 55, p. 20
[8] *St. Lawrence Cement Inc. v. Barrette*, [2008] 3 S.C.R. 392 at paras. 77 and 97, Applicant's Book of Authorities, Tab Z.
[9] Court of Appeal Reasons, Leave Application, Vol. 1, Tab 3(D), paras. 79, 97, 103, pp. 146, 154, 156.
[10] Trial Decision, para. 48, Leave Application, Vol. 1, Tab 3(A), p. 19.
[11] *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330 at 336, 340, Applicant's Book of Authorities, Tab X.
[12] *Cambridge Water Company v. Eastern Counties Leather plc*, [1994] 2 A.C. 264 (H.L.) at 20, Applicant's Book of Authorities, Tab H.
[13] *Rylands; Backhouse v. Bonomi* (1858), El. Bl. & El. 622, Applicant's Book of Authorities, Tab B; *Chu v. North Vancouver* (1982), 139 D.L.R. (3d) 201 (B.C.S.C.), Applicant's Book of Authorities, Tab I.
[14] Court of Appeal for Ontario Reasons (Certification), dated November 18, 2005, at para. 47, Leave Application, Vol. 2, Tab 5(B), p. 28.

in *Tridan*.[15]

9. The decision below eviscerates *Rylands* and leaves it as a tort which adds nothing beyond what provincial environmental regimes already regulate. Many provincial jurisdictions have reduced environmental budgets, agencies, departments and approval requirements, leaving Canadians increasingly reliant on private common law causes of action.[16]

C. Damages

10. Inco asserts that damages were determined by the Court of Appeal, "solely by the realities of the real estate evidence,"[17] pitting only one of the Applicant's damages experts (Tomlinson/MPAC) against the only Inco witness (MLS).[18] This is the same mistake the Court of Appeal made in that it fundamentally misapprehended the evidence and interfered with factual findings made by the trial judge in support of the damages assessment.

11. Inco would have this court believe that the lengthy trial revolved around a battle of two competing data sets. On the contrary, the expert evidence tendered to the\ trial judge by the Applicant was based on a variety of data sets, statistical analyses, economic theories, anecdotal evidence and remediation costs.[19] While all of this expert evidence was ignored by the Court of Appeal in its Reasons, it should not be disregarded by this Court. The Court of Appeal re-tried this case and then re-tried it incorrectly. Without clarification, the decision will serve as a forceful precedent for bold appellate interference in factual and credibility matters across Canada.

12. Painting the picture of a trial judge forced to choose one expert over another as the only means to support his damages calculation makes it disingenuously easy for Inco and the Court of Appeal to state the trial judge's damages finding was erroneous. However, this approach ignores the very basis of the trial judge's calculations. To support the integrity of his calculations, made

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[15] In *Tridan v. Shell Canada Products Ltd*. (2002), 57 O.R. (3d) 503 (C.A.) at para. 12, the Court of Appeal for Ontario stated that: "where a product that may cause mischief escapes to a neighbour's property, there is responsibility for all the damage which is the natural consequence of its escape", Applicant's Book of Authorities, Tab EE.
[16] Lindgren Affidavit, November 30, 2011, paras. 28, 29, Leave Application Vol. 2, Tab 5(A), p. 6-7.
[17] Inco Response, dated January 19, 2012, at para. 13. p. 9.
[18] Inco Response, dated January 19, 2012, at paras. 36 – 42, p. 15-16.
[19] Damages Chart, Leave Application, Vol. 2, Tab 5(D)(ii), p. 67; Exhibits 30, 31, 55, 69, 70, 82, 83, Leave Application, Vol. 2, Tab 5(F), pp. 231 – 301.

on the basis of (a) MPAC data; (b) average selling price data; (c) a stigma discount; (d) constriction of sales data; (e) remediation costs data; and (f) statistical evidence, Justice Henderson was able to "cross-check" each calculation against the other methods advanced by the Applicant.[20] The Court of Appeal ignored this evidence.

13. The resurrection of the vacant lots issue by Inco,[21] relied on by the Court of Appeal, is a red herring and distraction from the true damages matrix tendered at trial. The evidence at trial (entirely missing from the appeal Reasons) specifically demonstrated that: (a) these 281 lots (of 25,0000 properties assessed) represented .01% of the data set; (b) these lots could not be removed without undertaking the same reclassification in the comparator communities (which Inco failed to do); and (c) the assessment rolls cannot be 'cherry picked' from a statistical perspective as the random inclusion of such miniscule data naturally ensures consistency of results across all communities examined. The decision below violates long-standing law forbidding appellate interference with complicated, calibrated expert and factual evidence on damages, which is best left to trial judges.

D. Undeniable National and Public Importance of this Proposed Appeal

14. The national and public interest in the legal raised by this precedent-setting case is borne out by the degree of attention both the trial and appeal decisions attracted.[22] Even the costs decision in this matter has been held by the Court of Appeal to pose "legal issues of considerable public importance."[23] This appeal raises one central question: are nuisance and *Rylands* relics of a bygone era, or will they continue to provide private citizens with a means of redress?

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of January 2012.

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[20] Trial Decision, Leave Application, Vol. 1, Tab 3(A), paras. 294 – 321, pp. 88 – 96.
[21] Inco Response, dated January 19, 2012, paras. 39, 40, p. 16; Court of Appeal Reasons, Leave Application, Vol. 1, Tab 3(D), paras. 130-131, 159, pp. 166, 176.
[22] List of Key Articles following Trial and Appeal Judgments, Schedule A.
[23] Endorsement on Costs, Court of Appeal for Ontario, November 18, 2011, para. 5 [Tab 2A]

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"Case of the month: Court overturns $36 million award in ON Environmental Class Action Lawsuit", (January 2012) 7:1 Environmental Compliance Insider, online: <http://www.environmentalcomplianceinsider.com/wp-content/uploads/2012/01/EVC-Issue-1-

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Kevin Marron, "Clearing the air: Dismissal of *Inco* class action will likely head to the Supreme Court and provide more clarity on strict liability in environmental damages cases", *Canadian Lawyer Magazine* (January 2012), online: <http://digital.canadianlawyermag.com/issue/51655/19>.

CBA and OBA Seminars and Conferences

Ontario Bar Association, "Environmental Class Actions Involving Contaminated Land: The Aftermath of the Ontario Court of Appeal Decision in the Inco Class Action" presented via teleconference on November 29, 2011 from 12-1 pm EST, online: < http://www.cba.org/pd/details_en.aspx?id=na_envt11>.

SCHEDULE "B"

ORIGINAL

DATE: 20111118
DOCKET: C52491

COURT OF APPEAL FOR ONTARIO

Doherty J.A.

BETWEEN

Ellen Smith

Plaintiff (Respondent)

and

Inco Limited

Defendant (Appellant)

Proceedings under the *Class Proceedings Act, 1992*

Alan J. Lenczner, Q.C., Larry P. Lowenstein, Laura K. Fric and Lauren Tomasich, for the defendant (appellant)

Scott Hutchison, for the Law Foundation of Ontario, plaintiff (respondent), and for the purposes of this motion.

TELECONFERENCE ENDORSEMENT

[1] In the reasons for judgment in this matter, the court directed the parties to make arrangements to speak to me to determine the procedure to be followed in determining the order to be made as to the costs of the trial. A conference call was held on November 10, 2011. Mr. Hutchison represented the Law Foundation of Ontario, and also spoke on behalf of Mr. Baert, who represents the plaintiff/respondent. Mr. Lenczner and Ms. Fric represented Inco.

[2] Mr. Hutchison, for the Foundation, takes the position that the assessment of the trial costs should be remitted to the trial judge. Mr. Lenczner, for Inco, argues that the panel can determine the costs at trial. Both counsel agree that I can determine the appropriate forum in which the costs question should be decided.

[3] There are benefits to having the trial judge deal with the question of costs. The trial judge is in a better position to deal with costs submissions that relate to the conduct of the trial. That advantage cannot, however, be overstated. The trial occurred years ago. No doubt, the trial judge will have little, if any, recollection of many of the details.

[4] Both counsel are satisfied that appropriate procedures could be worked out to allow both sides to fully and fairly present its case on costs if I were to order the matter determined by the panel.

[5] I was initially inclined to order that the trial costs be determined by the panel. However, I have concluded that the matter should be remitted to the trial judge. In many ways, this is like a separate piece of litigation in which a wide variety of factual and legal issues may arise. There is a great deal of money at stake. The parties may want to lead evidence on various issues. There is a very real potential that legal issues of considerable public importance may be raised in the course of the costs proceedings. I think it is best to follow the usual litigation format. All relevant matters can be fully vetted before the trial judge in the trial forum with ready access to a full appeal to this court if either party is so inclined. This court will have the benefit of a full record and the reasons of the trial judge.

[6] This matter is remitted to the trial judge to determine, having regard to the reasons of this court, the costs at trial.