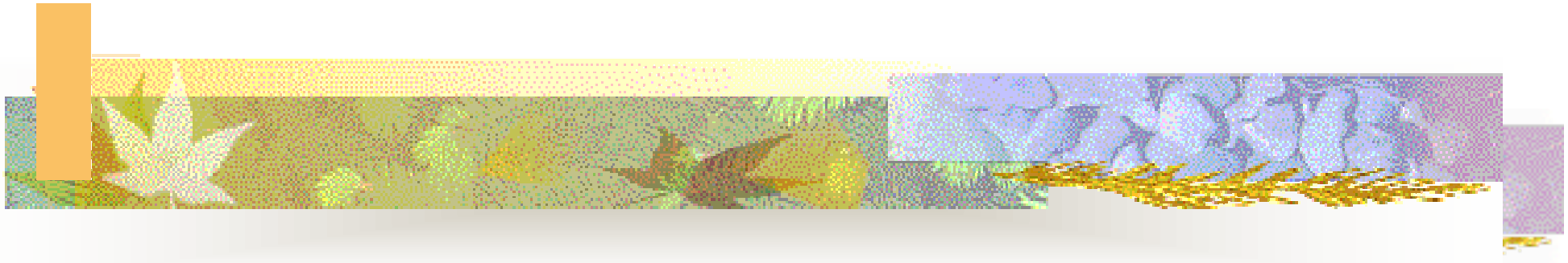
Civil Cases, 2011 to 2012



Crossroads in Environmental Law
OBA Institute 2012

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Overview

- Tort Law
  - **Nuisance**
  - ***Rylands v. Fletcher***
  - Negligence
- Environmental Class Actions
- Insurance Law
- Municipal Law

Smith v Inco

- Facts
  - Port Colburne Nickel refinery owned by Inco in operation for 66 years, closed in 1985.
    - Lawful emissions
    - Carcinogen?
  - In 2000, found some homes nickel > 8,000 ppm
    - MOE warning. Cleanup order and CBRA
    - Crescendo of public concern
    - Real estate warnings

Smith v Inco

- Trial
  - Neighbours' class action
  - Certified despite limitations issue
    - Claim for health damage not certified
  - Awarded $36 M for lag in increase in property values 2000-2008

Smith v Inco

- Trial
  - Inco liable in:
    - Nuisance - Nickel oxide deposition = material physical injury to land, completed when property values affected after 2000
    - *Rylands v. Fletcher* - refinery = non-natural use of land
  - Not liable in trespass
    - Intrusion on plaintiff's land indirect, rather than direct

Smith v Inco

- Appeal, 2011 ONCA 628
  - **Nuisance** limited to "current interference"
    - Nuisance is not about retroactive compensation for activities that stopped long before and which were not a nuisance at the time
    - The primary raison d'etre of nuisance is to equip a party who is suffering damage to his land or interference with his use of land with a means of forcing the party causing that damage to stop doing so.

Smith v Inco Appeal

- *Nuisance*
  - Public concern is not harm or interference
    - Mere presence of contaminants without actual risk to human health or interference with use does not constitute harm.
    - Criticized class counsel for raising concern

Smith v Inco Appeal

- *Rylands v. Fletcher*
- Dramatic narrowing, applies only to:
  - Accidental releases, not to normal emissions
  - "Non-natural" uses of land, defined as uses that are inappropriate for its locations
    - Industrial operation in industrially zoned area, in compliance with all laws is not "non-natural"

Rylands v. Fletcher

- *Smith v. Inco* - Appeal
- Possible additional element: Foreseeability of harm
  - Court declined to decide this point but made two observations:
    - Foreseeability of damage, rather than foreseeability of escape
    - There are compelling reasons to require such foreseeability

Smith v Inco Appeal

- Damages
  - Failed to establish decrease in property values
    - vacant lot issue
- Leave application pending

Heyes v. South Coast B.C.

- 2011 BCCA 77
  - Local business disrupted by the open cut construction of a Vancouver transit line
  - Significant decline in business income
  - Trial judge found construction was a nuisance
  - Awarded $600,000 in damages

Heyes v. South Coast B.C.

- Appeal Court upheld finding of nuisance, but found that defendants had established the defence of statutory authority
  - Affirmed traditional view of defence
    - Limited applicability of *St. Lawrence Cement*
  - Common sense approach to assessing alternatives includes wide range of factors, including cost

Nuisance

- *Strand Theatre v. Prince Albert (City)*, 2011 SKQB 209
  - Drive in theatre next to landfill (1965-1997).
  - Owner claimed that landfill leachate blocked financing for sale
  - Dismissed

Nuisance

- *Strand Theatre v. Prince Albert (City)*
  - chemicals not proven from landfill
  - low concentrations below provincial criteria
  - unrealistic amount of financing sought
  - flaws in plaintiff's expert report

Nuisance

- *Yates v. Fedirchuk*, 2011 ONSC 5549
  - 2001 - Plaintiff constructed pool
  - 2009 - damage to pool liner
  - 2010 - cause was neighbour's tree roots
  - Plaintiff sued in nuisance
    - Plaintiff's motion for summary judgment refused

Nuisance

- *Yates v. Fedirchuk*, 2011 ONSC 5549
  - Plaintiff must address self-help remedy
    - Could she have installed a root barrier in 2001?
    - Was damage to the pool reasonably foreseeable in 2001?

Negligence

- *Enviro West Inc. v. Copper Mountain Mining Corp.*, 2012 BCCA 23
  - Plaintiff hired to remove waste oil, later discovered to be contaminated with PCBs
  - Issue on appeal: was plaintiff contributorily negligent
  - BCCA found that trial judge focused on driver's behaviour, and failed to address corporate behaviour

Negligence

- *Enviro West Inc. v. Copper Mountain Mining Corp.*, 2012 BCCA 23
  - Remitted to trial court to consider:
    - Managing office did not ensure that drivers were aware of implications of transporting PCBs and understood PCB labelling
    - Lack of guidelines/policies on statutory obligations re: PCBs
    - Comments of plaintiff company's founder and CEO advocating for testing

Overview

- Tort Law
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  - Negligence
- **Environmental Class Actions**
- Insurance Law
- Municipal Law

Carrier c. Québec, QueCA

- CA certified action by neighbours of highway
- Equivalent to nuisance
- Deafening noise since 1985
- Prov/ Munic squabble about cost-share for noise barrier = no action
- Ideal for collective remedy?

Plaunt v. Renfrew Power

- 2011 ONSC 4087
  - Cottage owners around a lake certified to bring an action against a dam owner (power company) for flooding
  - Intentional and continuous trespass on their lands, causing water to erode and cover part of their lands

Overview

- Tort Law
  - Nuisance
  - *Rylands v. Fletcher*
  - Negligence
- Environmental Class Actions
- **Insurance**
- Municipal

Insurance

- *ING Insurance v. Miracle (Mohawk),* 2011 ONCA 321
  - Gas station sued for leakage into neighbour property
  - Insurer refused to defend due to pollution exclusion
    - Excluded losses "arising out of the actual, alleged, potential or threatened spill, discharge, emission, dispersal, seepage, leakage, migration, release or escape of pollutants" from the lands or premises of Miracle

Insurance Law

- *ING Insurance v. Miracle (Mohawk)*
  - Trial judge found that the exclusion did not apply - gas station was not "active industrial polluter" and claim was based on alleged negligence

Insurance Law

- *ING Insurance v. Miracle (Mohawk):* ONCA
  - Exclusion not limited to activity that necessarily results in pollution
  - Pollution exclusion applicable, unambiguous and not contrary to parties' expectations

Overview

- Tort Law
  - Nuisance
  - *Rylands v. Fletcher*
  - Negligence
- Environmental Class Actions
- Insurance
- **Municipal**

Zoning

- *St. Mary's Cement v. Clarington (Municipality)*, 2011 ONSC 4631
  - Cement company proposed to burn alternative fuel derived from recycled materials
  - Municipality argued this would constitute operating a waste disposal area, which was not permitted by bylaw

Zoning

- *St. Mary's Cement v. Clarington (Municipality)*, 2011 ONSC 4631
  - Court found that the introduction of fuel that fell within the *EPA* definition of waste (not defined in the bylaw) = introduction of new and additional use on site
    - *i.e.* disposing of industrial waste
    - Not permissible under doctrine of legal non-conforming use
  - Although are used as fuel extensively in US and UK, not typical in Ontario

Expropriation

- *Windsor (City) v. Paciorka*, 2011 ONSC 2876
  - City expropriated 267 lots to preserve an environmentally sensitive area
  - Issue: valuation
  - Court upheld the OMB decision directing the City to pay the respondents over $3 M for the market value of the lands expropriated and $767,000 for injurious affection (plus interest).

Expropriation

- *Windsor (City) v. Paciorka*, 2011 ONSC 2876
  - The natural features on the land did not make it unsuitable for residential development until the government took steps to protect it
  - Injurious affection - OMB required to calculate loss of value due to expropriation, not loss due to scheme as a whole
    - development and servicing of remaining lands would be more costly

On the horizon...

- Plaintiffs in *Smith v. Inco* have sought leave to appeal to the Supreme Court
- National importance:
  - The scope and limits on environmental damages;
  - The threshold for tort liability in the context of historic contamination;
  - Whether contamination and concomitant property devaluation constitutes physical damage to land; and
  - Whether the stigma attaching to private contaminated lands is compensable based on a regulatory level or pristine levels.

On the horizon...

- Issues:
  - What is the threshold effect for liability in nuisance in the context of environmental pollution or contamination?
  - Should the notion of "non-natural" usage of land continue to occupy a place in a common law strict liability analysis?
  - Should the common law be subordinate to the environmental statutory standard for liability for contamination? and
  - Is stigma a recognizable head of damage to land in Canadian law?

Questions?

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