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# DIMINISHING STRICTNESS: THE GROWING GAP IN ONTARIO'S PRIVATE LAW ENVIRONMENTAL LIABILITY REGIME

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The Ontario Court of Appeal's decision in *Smith v Inco Ltd* illustrates the degree to which private nuisance liability has evolved over the last hundred and fifty years from a tort of relatively strict liability into an increasingly fault-based source of liability. *Inco* also offers an opportunity to consider whether this evolution has left some wronged landowners behind.

This work considers the evolution of private nuisance into the tort it is today, and illustrates Ontario's previous statutory attempt to extend private liability to all instances of wrongful environmental contamination. The justifiability of Ontario's combined common law and statutory private law environmental liability regime is then evaluated against an understanding of private law liability as existing for the purpose of vindicating reciprocal equal freedom. Where Ontario's private law environmental liability regime is found to permit wrongful loss without opportunity for private redress, statutory changes are proposed to extend rights of compensation to all landowners suffering unjustifiable losses.

## INTRODUCTION

There has, in recent decades, been a pronounced shift in the nature and extent of interference which a landowner must tolerate as a reasonable cost of life in society. The tort doctrine which has historically regulated such interferences, private nuisance, today offers

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far less protection from interference with land or the use and enjoyment thereof than it did a century ago. The shifting scope of private nuisance liability is particularly noteworthy in the context of Ontario's private law environmental liability regime, in which private nuisance plays a central role. As the scope of private nuisance liability has constricted over time, so too has the capacity of Ontario landowners to obtain private redress for contamination events causing harm to their land. This paper argues that the effect of narrowing private nuisance liability has been, in some circumstances, to leave Ontario landowners bearing the burden of unjustifiable losses. Structural and jurisprudential limitations pertaining to a supplemental statutory cause of action, which were intended to extend and clarify the scope of private liability available at common law, have prevented it from meeting the challenge posed by narrowing private nuisance liability.

Demonstrating the existence of the liability gap described above requires consideration of a specific factual context in which Ontario's private law environmental liability regime has determined that no liability arises. For several reasons, the factual context considered by the Ontario Court of Appeal in *Smith v Inco Ltd*<sup>2</sup> is attractive for this purpose. First, on the facts, it is a striking example of the kind of interference with land which would have been compensable in private nuisance a century ago, but for which no private redress is available today. Second, *Inco* remains one of the leading authorities in Canadian jurisprudence as to the scope and content of the doctrine of private nuisance, making it an important source of guidance as to the kinds of interference that will (and will not) be seen as compensable in future cases. Third, the Court of Appeal's reformulation of the "substantiality" test in *Inco* represents an important narrowing of private nuisance liability, making *Inco*, more than merely an authority on the narrowed scope of private nuisance liability in the twenty-first century, an active component of that jurisprudential evolution.

The argument presented in this paper proceeds as follows: first, the historical status of private nuisance as a tort of strict liability and the jurisprudential process that has constricted private nuisance liability over the past six decades, of which *Inco* is a component, are briefly summarized. Second, the paper considers the scope and limitations of the statutory cause of action set out in Ontario's *Environmental Protection Act*.<sup>3</sup> Together, these first two sections provide a workable picture of Ontario's private law environmental liability regime,<sup>4</sup> which, at bottom, determines what kind of contamination events will give rise to liability. Next, the paper offers an analysis of the degree to which Ontario's private law environmental liability regime permits the misidentification of wrongful loss as fortuitous (and therefore non-compensable) loss. The third section sketches out an equality-based view of private law to serve, for the purposes of this analysis, as an objective basis for distinguishing between wrongful and fortuitous loss. The fourth section of this paper, using this sketch of private law, analyzes the theoretical justifiability of the distinction between wrongful and fortuitous loss presently reflected in Ontario's private law environmental liability regime. In other words, using the facts in *Inco* as a case study, this section seeks to identify factual circumstances in which Ontario landowners must bear wrongful losses without avenues of private redress.

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<sup>2</sup> *Smith v Inco Ltd*, 2011 ONCA 628, 107 OR (3d) 321 [*Inco*].

<sup>3</sup> *Environmental Protection Act*, RSO 1990, c E19 [the *Act*].

<sup>4</sup> It should be noted that this picture of Ontario's private law environmental liability regime does not consider the roles played by either the law of negligence or *Rylands* liability. For reasons that will, it is hoped, become clear, the omission of these bases of liability does not diminish the validity of the argument presented.

Fifth, to the extent that the potential for non-compensable wrongful loss is identified, statutory amendments are suggested to close any liability gaps.

## I PRIVATE NUISANCE

Private nuisance has traditionally been categorized as a tort of “strict liability”, such that a successful claim could be established without demonstrating that the defendant had misconducted himself in causing loss. In a fault-based tort, such as negligence, the absence of markers of fault (i.e. recklessness or neglect as to the reasonably foreseeable impact of one’s conduct on others) is generally fatal to a claim for compensation. Absent fault, losses otherwise compensable in negligence (that is, losses not caused intentionally by the defendant) are merely fortuitous, and cannot, therefore, produce liability.

Strict liability torts, on the other hand, have historically operated differently. In the real property context, those who, through their conduct on their own land, interfered unreasonably with the use and enjoyment of their neighbour’s land were liable regardless of their ignorance, recklessness, or diligence in causing that interference. The nature of the defendant’s conduct had no bearing on whether private nuisance was established; what mattered to the assignment of liability was simply that the plaintiff’s use and enjoyment of land had been unreasonably interfered with as a result of the defendant’s conduct. Even the determination of whether an interference was or was not unreasonable was, historically, made without reference to the reasonableness of the defendant’s conduct, focussing instead on the nature of the interference suffered by the plaintiff and the factual context in which it took place.

In *St Helen’s Smelting Co Ltd v Tipping*,<sup>5</sup> the House of Lords provided an excellent example of the strictness of Victorian private nuisance doctrine. In *St Helen’s Smelting*, Tipping had purchased land adjacent to the defendant’s copper smelter. Though he had previously been made aware of the smelter’s existence, Tipping did not know that it was active. Tipping subsequently discovered that the smelter, when operating, emitted “large quantities of noxious gases, vapours, and other noxious matter”<sup>6</sup> causing injury to vegetation, livestock, and, exceptionally, people who were present on Tipping’s land.<sup>7</sup> Tipping claimed that the smelter’s emissions both interfered with the use and enjoyment of the estate and diminished its value.<sup>8</sup>

Lord Westbury LC, finding in Tipping’s favour, distinguished between interference producing sensible<sup>9</sup> personal discomfort and interference causing material injury to land,<sup>10</sup> recognizing that personal discomfort and inconvenience must be tolerated to a reasonable extent as the cost of life in society.<sup>11</sup> However, a material injury to land would never be reasonably tolerable, such that liability in private nuisance would arise in relation to any

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<sup>5</sup> (1865), [1861-73] All ER Rep Ext 1389 (HL) [*St Helen’s Smelting*].

<sup>6</sup> *Ibid* at 1390.

<sup>7</sup> *Ibid*.

<sup>8</sup> *Ibid*.

<sup>9</sup> As opposed to “trifling” personal discomfort or inconvenience. See *ibid* at 1397 per Lord Wensleydale.

<sup>10</sup> *St Helen’s Smelting*, *supra* note 5 at 1395 – 1396.

<sup>11</sup> *Ibid*.

“sensible injury to the value of the property”.<sup>12</sup> In determining the issue, Lord Westbury LC specifically rejected any contention that, because the locality in which the copper smelter was located was a reasonable one for its operation (and was, in fact, the location of many other similar industrial undertakings), it could be operated with impunity.<sup>13</sup>

The House of Lords painted a very different picture of the strictness of private nuisance over a century later in *Cambridge Water Co v Eastern Counties Leather plc*.<sup>14</sup> In *Cambridge Water*, the plaintiff, a statutory supplier of municipal drinking water, had purchased land for the purpose of expanding its groundwater supply. The defendant’s tannery, operating above the aquifer accessed by Cambridge Water’s new groundwater supply, had for decades been using degreasing agents in its leather production activities.<sup>15</sup> Spillage onto the floor of the defendant’s facility was commonplace, and a substantial amount of spilled degreasing agent seeped through the floor and into the aquifer below.<sup>16</sup> Degreasing agent was subsequently detected at Cambridge Water’s new groundwater supply, which was removed from service in compliance with standards regulating drinking water quality.<sup>17</sup> Cambridge Water, claiming in negligence, private nuisance, and *Rylands* liability, sought compensation for costs incurred in acquiring and developing a replacement groundwater supply.<sup>18</sup>

On the eventual appeal, the House of Lords concluded on the basis of *Overseas Tankship (UK) Ltd v The Miller Steamship Co (Wagon Mound (No 2))*<sup>19</sup> that reasonable foreseeability of loss constituted an essential prerequisite for private nuisance liability.<sup>20</sup> In the course of finding that Eastern Counties Leather was not liable for what was identified as unforeseeable loss, *Cambridge Water* rendered private nuisance substantially more fault-oriented and, as such, a substantially less strict basis of liability.

The Court of Appeal for Ontario, in its decision in *Inco*, continued this narrowing of private nuisance liability. Over many years, Inco’s refinery had emitted substantial quantities of nickel particulate, which subsequently settled on nearby residential properties.<sup>21</sup> The owners of land thus contaminated commenced a class proceeding seeking “stigma damages” for diminished land value caused by environmental contamination.<sup>22</sup> The trial considered claims in private nuisance, public nuisance, *Rylands* liability, and trespass.<sup>23</sup>

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<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> [1994] 2 AC 264 [*Cambridge Water*].

<sup>15</sup> *Ibid* at 291.

<sup>16</sup> *Ibid* at 292.

<sup>17</sup> *Ibid* at 294.

<sup>18</sup> *Ibid.*

<sup>19</sup> [1967] 1 AC 617 (PC).

<sup>20</sup> The prior decision in *Wagon Mound (No 2)* had identified reasonable foreseeability of loss as an essential component of private liability in public nuisance. *Cambridge Water*, *supra* note 13 at 301.

<sup>21</sup> *Inco*, *supra* note 1 at paras 7 – 8.

<sup>22</sup> *Ibid* at para 21.

<sup>23</sup> *Ibid* at para 22.

The trial judge accepted that nickel contamination constituted material injury of the sort referred to by Lord Westbury LC in *St Helen's Smelting*.<sup>24</sup> Had the trial judge been required to engage in the reasonableness analysis required for interferences with use and enjoyment of land, he indicated that the presence in the soil of nickel particulate at levels sufficient to diminish the land's value would have, in his judgment, constituted an unreasonable interference with use and enjoyment.<sup>25</sup> On either of the branches of private nuisance described in *St Helen's Smelting*, therefore, the trial judge would have found Inco liable.

The Court of Appeal for Ontario, however, disagreed with the conclusion that the mere presence of nickel contamination in the soil constituted material injury.<sup>26</sup> Rejecting the *St Helen's Smelting* formulation as "outdated and inappropriate," the Court of Appeal adopted a new standard, which required interferences to be "material, actual and readily ascertainable"<sup>27</sup> in order to benefit from the deemed unreasonableness described by Lord Westbury LC as attaching to material injuries to land. The reformulated standard required material injury nuisance claims to be more than trivial, crystallized, and not so "minimal or incremental as to be unnoticeable as it occurs" in order to give rise to liability absent an express finding of unreasonableness.<sup>28</sup>

Applying this new standard, the Court of Appeal concluded that the nickel contamination in issue could not constitute material injury absent some consequent detrimental effect to the land or to a right associated with the land, indicating that a detrimental effect of this sort arises only where the interference complained of diminishes the suitability of the land for its intended use.<sup>29</sup> As the land in issue was used for residential dwellings, the Court of Appeal determined that no claim in private nuisance would arise in *Inco* absent contamination at levels posing a substantial threat to human health,<sup>30</sup> attaching no significance to the fact that some of the properties in issue had been contaminated to a level harmful to vegetation.<sup>31</sup>

The Court of Appeal's decision in *Inco*, considered against *St Helen's Smelting*, sets in stark relief the extent to which private nuisance has evolved over the past hundred and fifty years. There is little doubt that, had Lord Westbury LC considered the facts in *Inco*, a claim in private nuisance would have succeeded; indeed, it seems that the *St Helen's Smelting* material injury threshold was far lower than the *Inco* standard, as the former assigned liability on the basis of injury to vegetation, a loss which seems incapable of satisfying the *Inco* test in relation to residential land. *Inco*'s heightened standard for material injury is, therefore, a further example of the drift of private nuisance away from strict liability.

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<sup>24</sup> *Ibid* at para 34.

<sup>25</sup> *Ibid* at para 35.

<sup>26</sup> *Ibid* at para 55.

<sup>27</sup> *Ibid* at para 49.

<sup>28</sup> *Ibid* at para 50.

<sup>29</sup> *Ibid* at para 57.

<sup>30</sup> *Ibid* at para 58.

<sup>31</sup> *Ibid* at para 58.

## II ONTARIO'S 'SPILLS BILL'

On December 14, 1978, Harry Parrott, Ontario's Minister of the Environment, introduced amendments to the *Environmental Protection Act*<sup>32</sup> which would, in time, become section 99.<sup>33</sup> Introducing the draft amendments, Dr Parrott noted that they were intended to "create liability [...] for damage resulting from a spill which clarifies and extends the right to compensation at common law."<sup>34</sup> In explaining the function of the statutory cause of action, Dr Parrott left no doubt as to the nature of the problem he confronted. Echoing Bramwell B's reasons in *Bamford v Turnley*,<sup>35</sup> Dr Parrott stated as follows:

I believe those who create the risk should pay for restoration as a reasonable condition of doing business; it is not up to an innocent party whose land or property has been damaged. At present, persons manufacturing and handling contaminants are not legally responsible in the absence of fault or other legal ground of liability. Common law and the existing provisions of the *Environmental Protection Act* are inadequate in spelling out the necessary procedures to control and clean up spills and restore the natural environment.<sup>36</sup> (Emphasis added)

After consultations, Dr Parrott introduced revised amendments on March 27, 1979, noting that they would still "impose clear responsibility for control, cleanup and restoration [of spilled pollutants]"<sup>37</sup> and establish contamination liability "which clarifies and extends the right to compensation at common law."<sup>38</sup> These amendments received royal assent on December 20, 1979,<sup>39</sup> but were not proclaimed into force until November 29, 1985.<sup>40</sup>

The private law aspect of section 99 provides a right of action in relation to loss or damage incurred as a direct result of a spill.<sup>41</sup> The *Act* defines a 'spill' as a discharge of a pollutant abnormal in quality or quantity into the natural environment.<sup>42</sup> The descriptor "abnormal" has been the subject of some jurisprudential disagreement, particularly in relation to the emission of pollutants over a period of time in the ordinary course of business. In the context

<sup>32.</sup> *Supra* note 2.

<sup>33.</sup> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Legis, 2nd Sess, No 151 (14 December 1978) at 6178 – 6179 (Hon Harry Parrott).

<sup>34.</sup> *Ibid.*

<sup>35.</sup> (1860), 3 B&S 62, 122 ER 25.

<sup>36.</sup> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Legis, 2nd Sess, No 151 (14 December 1978) at 6178 (Hon Harry Parrott).

<sup>37.</sup> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Legis, 3rd Sess, No 8 (27 March 1979) at 255 – 266 (Hon Harry Parrott).

<sup>38.</sup> *Ibid.*

<sup>39.</sup> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Legis, 3rd Sess, No 145 (20 December 1979) at 5867.

<sup>40.</sup> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Parl, 3rd Sess, No 55 (29 November 1985) at 1946 – 1947 (Hon Jim Bradley).

<sup>41.</sup> *Environmental Protection Act*, *supra* note 2 at s 99.

<sup>42.</sup> *Ibid* at s 91(1).

of landfills, both ordinary (odour, debris and vibrations<sup>43</sup>) and extraordinary (leachate<sup>44</sup>) emissions have been found to be actionable pursuant to the *Act*; in the latter context, the emission of leachate was found to constitute, for the purposes of the *Act*, a ‘fresh’ spill on each day in which leachate emissions continued.<sup>45</sup> On the other hand, however, Nordheimer J’s subsequent decision in *Pearson v Inco Ltd*,<sup>46</sup> an early iteration of *Inco*, concluded that the plain meaning of the word ‘abnormal’ could not encompass the cumulative effects of long-term, ordinary operating emissions.<sup>47</sup> As a result, the plaintiffs’ statutory claim in *Pearson* (and, consequently, in *Inco*) was struck.

A second limitation on the *Act*’s capacity to assign liability arises from its adoption of two apparently contradictory statements on the role of fault, expressly stipulating that liability pursuant to section 99 is not dependent upon a finding of fault, while simultaneously providing the defendants with a complete due diligence defence.<sup>48</sup> As such, although fault plays no role in assigning liability pursuant to the *Act*, liability is nonetheless barred in circumstances in which faultlessness (in the form of due diligence) can be demonstrated. It is not clear how, if at all, the due diligence defence was intended to interact with the disclaimer of wrongfulness, in the form of fault, as a prerequisite of liability. While there has been no jurisprudential clarification of this relationship to date, it goes without saying that the due diligence defence and the judicial treatment of “abnormal” emissions each substantially restrict the usefulness of the statutory cause of action.

### III RIGHTS AND WRONGFULNESS

Theoretical accounts of private law liability seek to provide a reasoned basis with which fortuitous loss may be distinguished from wrongful loss, the significance thereof being that the former produces no liability, while the latter, by virtue of its wrongful nature, does. Rather than merely accepting the existing statutory and common law regime as dictating, by its operation, whether any particular loss is or is not wrongful, it is important that those losses for which compensation is not available in Ontario are revealed/interrogated in the context of some external framework of justification.

For the purposes of this work, an equality-oriented rights-based approach is presented as a useful framework against which Ontario’s system of environmental liability may be measured. A rights-based approach conceives of the boundary between rightful and wrongful conduct as structured by the private rights of individual legal actors. This conception of wrongfulness and liability offers a foundation for two of the primary features of private liability; first, wrongfulness, on a private law basis, is entirely relational, such that there can be no conduct identifiable as “wrongful” absent an intersection with, and violation of, the rights of another. Second, and consequentially, a rights-based approach structures the essential relationship of

<sup>43</sup> *Hollick v Toronto (Metropolitan)*, (1998), 63 OTC 163, [1998] OJ No 1288 (Gen Div).

<sup>44</sup> *Mortgage Insurance Co of Canada v Innisfil Landfill Corp* (1996), 20 CELR (NS) 37, [1996] OJ No 1760 (Gen Div).

<sup>45</sup> *Ibid* at para 18.

<sup>46</sup> [2001] OTC 918, [2008] OJ No 4950 (Sup Ct Jus) [*Pearson*].

<sup>47</sup> *Ibid* at paras 22 – 23.

<sup>48</sup> *Environmental Protection Act*, *supra* note 2 at s 99(3).

liability between the wrongdoer and the injured party, offering an explanation for the fact that it is the former who is liable to make good the latter's losses, inasmuch as they are united as the wrongdoer and sufferer of the same act.<sup>49</sup>

There is, by necessity, an element of prescription in the analysis offered here. In order to assess the degree by which Ontario's private law environmental liability regime justifiably distinguishes wrongful loss from fortuitous loss from a right-based perspective, some alternative description of the scope and content of individual rights must be used as the metric against which the rights presently provided by that regime may be evaluated. The rights presently provided for are, in essence, the rights currently protected by the common law of private nuisance, supplemented by the statutory cause of action described above; the present limits of private law liability, as such, exactly coincide with the limits of an Ontario landowner's enforceable rights to protect his land from interference by others. The question this work seeks to address is whether those limits are objectively justifiable as presently constituted.

To provide a standard against which the present delineation between wrongful and fortuitous loss (and, by extension, wrongful and rightful conduct) may be evaluated, this work takes as a starting point a conceptual entitlement of each member of society held to a standard of conduct shared in common equally with all other members. From this standpoint of juristic equality, a structure of reciprocal rights and obligations among individuals can be outlined, deviation from which triggers obligations of compensation, the satisfaction of which returns the parties to the *ex ante* state of juristic equality existing prior to the initial violation.<sup>50</sup> On this analysis of private law, it is the necessarily-reciprocal standard of conduct which provides the metric against which the nature of any particular loss may be assessed. Losses which arise from conduct which undermines the foundational normative equality of the parties to any particular transaction are readily identifiable as wrongful (and, therefore, justifiably compensable) by virtue of the fact that they arise from wrongful conduct. On this understanding, therefore, the extent of losses or their impact on the person suffering them is irrelevant in determining whether they should be compensable; the defining characteristic of compensable loss is that it arises from wrongful conduct.

In *Philosophy of Right*,<sup>51</sup> GWF Hegel offered one view of a private law system predicated on the reciprocal rights and obligations of juristic equals in a pre-political (that is, non-legislative) state. The foundational normative equality that underpins Hegel's conception of private law arises from the common possession by all legal actors ("persons", in Hegelian terms) of the capacity for free will.<sup>52</sup> The private law structure sketched below will be readily and correctly identifiable as drawing significantly on Hegel's theory of abstract right. It is intended to offer a simplified model of private law and private law rights shaped by a core theoretical commitment to the juristic equality of all legally-significant actors.

Given a fundamental and normatively-significant equality of status, it follows that all such persons must be equally free of limitations upon their conduct imposed by their peers. In this context, rights are understood as both the means by which one is, and remains, free

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<sup>49</sup>. See Ernest Weinrib, *Corrective Justice*, (Oxford: Oxford University Press, 2012) at 10.

<sup>50</sup>. See generally Ernest Weinrib, "The Gains and Losses of Corrective Justice," (1994) 44 *Duke LJ* 277.

<sup>51</sup>. Translated by TM Knox (Oxford: Clarendon Press, 1952).

<sup>52</sup>. *Ibid* at para 29.

of external compulsion, as well as the substance and scope of freedom itself. A system of private law founded on reciprocal free equality has no regard for characteristics other than that free equality; as such, it expresses and vindicates the equal legal status of individuals notwithstanding any material or social distinction between them.<sup>53</sup> Under this framework, freedom, actualized through rights, and restriction, imposed by obligations, can only be distributed in a fashion justifiable in a society of free equals.

Rights and obligations are, therefore, related through reciprocity, and the only justifiable limitations on the rightful conduct of a free individual are those required to accommodate the rightful conduct of others. As such, in order to express one's own freedom through the exercise of rights, one must by necessity recognize both that all others share an equal right to express their own freedom in an identical fashion, and that one's own freedom (expressed through rightful conduct) is inherently and justifiably limited by the freedom (expressed through rightful conduct) of others. To be free from external compulsion in making one's own choices, therefore, is to accept that the scope of one's own freedom is legitimately limited by the free choices of others, though only to the extent to which one's own freedom simultaneously and legitimately limits that of others. In this way, individual freedom is limited only to the extent required to permit the broadest sphere of freedom amenable to co-existence with normative equals sharing identical entitlements to, and limitations upon, free conduct. In this conception, infringing the rightful conduct (that is, freedom) of another effectively undermines the capacity of all persons to conduct themselves in that way. Wrong, therefore, is not solely to do with the rights of the wronged party and the obligations of the wrongdoer; in addition, wrongs, by bringing the freedom-enabling capacity of rights into question, challenge the underlying system of right itself.

Conceptually, this structure of rights begins with the acquisition of material things not already the property of someone else, an act which need not involve any other person. When a person asserts control over an unowned thing, that thing is converted into personal property, and it remains in that relationship to its owner until it is wilfully destroyed, abandoned or alienated, and only then does it become available to become another's property. The property relationship between person and thing permits an owner to put property to any use desired (or to no use at all), and any such use, as an expression of the owner's freedom, is also a rightful act which must be respected by all other persons.

Once appropriated, the ownership of things can be abandoned or transferred to others. The mutually-willed transfer of property between persons simultaneously asserts the status of each party as free equals, each of whom is posited by the act of transfer as having equal legal capacity to both appropriate and alienate things, while also asserting the transferred thing's status as entirely and exclusively subject to its owner's will, whosoever that owner is from time to time. As such, by exchanging property, the parties to the transfer create a contractual relationship, wherein the parties submit themselves to each other as equals by accepting the terms of exchange as legitimate limitations upon their own freedom of action in relation to the contract's subject matter, thereby establishing their own law by which the rightness of their future conduct may be evaluated.

There must also, however, be a principle that governs relationships between free equals which are defined by property alone, where the parties have not by their mutual consent established a basis upon which the rightness of their conduct can be evaluated. In such

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<sup>53</sup>. *Ibid* at para 37.

circumstances, there can be no measure of rightness but for the fundamental requirements of equality itself; as a result, the only obligation of persons to each other in relationships defined by property is to respect each other's rights by refraining from impairing the expression of freedom embodied in the creation, use, and maintenance of a thing as property. The assertion of control or a right of control over the possessions of another is wrongful inasmuch as it undermines the basis of the property relationship itself, that is, the exercise of freedom which created the property relationship. As such, in order to vindicate the status of the wronged owner as the wrongful party's equal, there must be an entitlement to redress in favour of the wronged owner. This, I suggest, is the basis upon which private nuisance liability is justifiably assigned in a society committed to reciprocal free equality.

#### IV ASSESSING ONTARIO'S LIABILITY REGIME

Having outlined the scope of private liability provided by Ontario's environmental regime, it remains to determine the degree to which that regime ensures that liability attaches to environmental losses in all appropriate circumstances. The previous section, in reviewing one possible external basis for the objective identification of legal wrongs, provides a metric against which Ontario's regime for the private redress of environmental harm may be assessed.

The structure of private rights outlined above emphasizes that wrongful conduct is conduct which undermines the capacity of any legally-significant actor to exercise the fullest range of free self-determination compatible with the capacity of all others to do the same. In the context of the exercise of rights in relation to possessions, it is clear that any limitation thereby imposed on the ability of others to exercise their own rights in relation to their own possessions is recognizable as incompatible with a system of reciprocal rights. This conception of wrongfulness accords well with the historical strictness of private nuisance, which held landowners liable for interference despite the absence of ordinary indicia of fault, so long as the interfering action was itself an intentional act of the owner of the land from which the nuisance emanated,<sup>54</sup> or was continued or adopted by the owner as her own.<sup>55</sup>

The balance struck by private nuisance at the intersection of two spheres of freedom focuses on the degree to which the limitations placed on the plaintiff are reasonable under circumstances in which neither plaintiff nor defendant have conducted themselves in a manner fundamentally incompatible with reciprocal free equality. Rather, in the context of conflicting land uses, the incompatibility with reciprocal free equality is merely contingent, crystallizing only where the burden imposed by the defendant's conduct transcends the boundary of reasonableness. Where the interference limits the plaintiff's freedom unreasonably, the law of private nuisance has recognized that interference as wrongful, assigning liability (and, possibly, enjoining future interferences of the same sort) in order to vindicate the position of the plaintiff as equal to the defendant.

An understanding of private nuisance as assigning liability in the context of unreasonable burdens imposed in circumstances of competing claims of right also offers an explanation for the fact that a landowner cannot be liable for emissions emanating from her land when they

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<sup>54.</sup> Consider, for instance, the "unknown third party or trespasser" defence to private nuisance: *Crown Diamond Paint Co v Acadia Holding Realty Ltd*, [1952] 2 SCR 161.

<sup>55.</sup> *Sedleigh-Denfield v O'Callaghan*, [1940] AC 880 at 894.

are caused by the conduct of an unknown third party. Inasmuch as the defendant does not, in such circumstances, advance a claim that the activity in issue is rightful (to the contrary, she claims that it is the wrongful conduct of another), there are no competing claims of right. The plaintiff's action in private nuisance cannot succeed in such circumstances, but not because no burden has been imposed upon him; rather, the plaintiff cannot recover *from the defendant* because the defendant has not, through her conduct, imposed the burden of which the plaintiff complains. In keeping with this understanding, the plaintiff can succeed against the defendant in such circumstances only if the defendant has assumed the conduct of the unknown third party as her own, claiming it to have been rightful. This establishes a competing claim of right between the plaintiff and the defendant in relation to the assumed conduct, such that liability can be assigned if the burden was, in fact, unreasonable for the plaintiff to bear.

It is clear, on this understanding of private nuisance, that fault (meaning conduct which disregards the fundamental equality of the parties to any particular interaction) need not be present for private nuisance liability to arise. It should not, therefore, be surprising that the evolution of private nuisance liability into a more fault-oriented tort over the last five decades has diminished its capacity to vindicate a system of reciprocal freedom, particularly in circumstances in which no indicia of fault are present. If the function of fault-based indicia of wrongfulness in the context of negligence liability, for instance, is to indicate conduct which fails to demonstrate due regard for the physical integrity or possessions of one's free equals, those indicia should not be necessary in the context of competing claims of rightful conduct, which has been the traditional focus of private nuisance. As outlined above, inasmuch as there can be no right to unilaterally impose an unreasonable burden on one's equal, any conduct which would result in such an imposition can be recognized as wrongful (that is, inconsistent with a reciprocal free equality of legal persons), even absent further indicia of wrongfulness.

If indicia of fault actually function to delineate fortuitous loss from wrongful loss in circumstances where no tenable competing claims of right can be asserted (i.e. the defendant cannot purport to have had a right to cause the loss complained of by the plaintiff, as would be the case in the personal injury context), it would be predictable that grafting indicia of fault onto a strict liability tort would substantially narrow the circumstances in which that conduct would give rise to an obligation of compensation. As an example, the effect of *Cambridge Water* was to confirm a higher standard of liability, such that it was no longer sufficient (as it had been for centuries previous) for a defendant to merely cause loss to a neighbouring landowner in the course of exercising its rights in relation to property. As a result, losses have become compensable in private nuisance only when both reasonably foreseeable to the defendant and when unreasonably imposed in the context of competing claims of right.

This, then, brings the analysis back to *Inco*. The doctrine of private nuisance applied in *Inco* had been developed in *Cambridge Water*, and was further restricted by the Court of Appeal for Ontario to circumstances in which contamination does not rise to levels which actually interfere with the presently intended use of the contaminated property. In the case of residential property, therefore, Ontario's law of private nuisance after *Inco* imposes liability only for threats to human health reasonably foreseeable to the polluter at the time of the contamination event. In the case of long-term contamination events, such as that in issue in *Inco*, it would seem that this definition of private nuisance would likely render most contamination non-compensable, given the fact that most of the contaminant in question was likely emitted at a point in the past (i.e. prior to the installation of modern emission control measures) when the potential adverse effects of many contaminants would have been largely

unknown (as was the case, in most respects, in *Cambridge Water*). Even if potential adverse effects were reasonably foreseeable, no liability would arise in the absence of a finding of unreasonableness or a demonstrable hazard to human health.

The Court of Appeal for Ontario concluded that the losses suffered by the homeowners of Port Colborne were not wrongful, and therefore were not compensable. It does not appear, however, that this conclusion is justifiable in the context of the structure of private rights outlined above. The Court of Appeal's decision was framed very much on the basis of the existing uses to which the residential properties in issue were put at the time the nickel particulate accrued thereon, and was narrowly drawn even in that context. It may surprise Ontario landowners to discover that private nuisance law relating to material injuries to land will not, in light of *Inco*, impose liability for the long-term cumulative effect of emissions which, for example, render their land incompatible with the cultivation of a vegetable garden. Limited thusly, the conclusion that no actionable interference took place in *Inco* was a cogent one. However, the unavoidable effect of this conclusion is that the owners of those properties are, in essence, frozen in their existing uses, and, perhaps, are limited even within the present scope of those uses. More precisely, by limiting the inquiry to existing uses, the Court of Appeal permitted all possible future uses of the residential properties in issue to be limited by Inco's unilateral conduct to those compatible with the contamination Inco placed upon them.

This confiscation of future incompatible uses clearly imposes an external limitation on the freedom of landowners to choose, in the future, the uses to which their land is put.<sup>56</sup> The individual spheres of freedom of each plaintiff landowner in relation to their own property was diminished by Inco's conduct to the extent that their future capacity to freely exercise their rights of property in ways different from the current uses at the time of contamination was limited by Inco's unilateral acts. In a system characterized by free equality, only voluntary self-determination is permissible, such that legally-significant limitations on the future acts of persons can only be secured by mutual assent. As such, while Inco could have purchased the plaintiffs' rights to undertake future uses incompatible with the presence of nickel contamination, it was not within the scope of Inco's freedom to unilaterally impose such a limitation. In so doing, Inco undermined the system guaranteeing its own freedom in relation to its land. To the extent that it operated to permit Inco to engage in this (wrongful) conduct without incurring liability, the private nuisance doctrine applied in *Inco* cannot be reconciled with an understanding of private law founded on free equality. If free equality is accepted as a reasonable metric for the justifiable assignment of liability, this situation cannot be permitted to persist.

## V A NEW STATUTORY FRAMEWORK

As the analysis above suggests, Ontario's existing environmental liability framework fails to ensure recovery for some landowners, specifically those who find themselves in circumstances analogous to the facts in *Inco*, suffering wrongful loss at the hands of their neighbours. The most practical way to ensure that such injustice is prevented is through statutory change, specifically in the form of amendments to the *Act's* statutory cause of action.

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<sup>56</sup> Ignoring, for the purposes of this analysis, any public law limitations as to the future uses of the land, which are not germane to the private law analysis undertaken here.

The standard of liability set out in the *Act* is, as it stands, well-suited for adaptation to this role. But for the statutory defence of due diligence, the *Act*'s rejection of indicia of fault as prerequisites for recovery shares much with earlier, stricter versions of private nuisance liability. As such, it would not be difficult to codify a strict liability version of private nuisance liability for the purposes of extending liability to all wrongful instances of environmental contamination. However, as discussed above, the statutory cause of action has its own limitation which must be addressed, specifically the "abnormality" threshold, which operates to obstruct recovery in unjustifiable circumstances.

As such, the following two minor amendments, indicated with underlining, are suggested as one way in which the *Act*'s statutory cause of action could extend to capture, on a strict liability basis, all damage to land resulting from contamination events which is unjustifiable on a standard of equality such as that set out above:

91. (1) In this Part,

[...]

"spill", when used with reference to a pollutant, means a discharge,

- (a) into the natural environment,
- (b) from or out of a structure, vehicle or other container, and
- (c) except in relation to damage to land or interests in land, that is abnormal in quality or quantity in light of all the circumstances of the discharge,

and when used as a verb has a corresponding meaning;<sup>57</sup>

[...]

99. (3) An owner of a pollutant or a person having control of a pollutant is not liable under subsection (2) if they establish that they took all reasonable steps to prevent the spill of the pollutant except in relation to damage to land or interests in land or if they establish that the spill of the pollutant was wholly caused by,

- (a) an act of war, civil war, insurrection, an act of terrorism or an act of hostility by the government of a foreign country;
- (b) a natural phenomenon of an exceptional, inevitable and irresistible character; or
- (c) an act or omission with intent to cause harm by a person other than a person for whose wrongful act or omission the owner of the pollutant or the person having control of the pollutant is by law responsible,

or any combination thereof.<sup>58</sup>

These amendments would, in the limited context of discharges of pollutants causing damage to land or to an interest in land, overcome the limitations arising from both the "abnormality" threshold and the due diligence defence. The cause of action thus amended would impose a standard of liability very much like that which animated the doctrine of private nuisance until recent decades, to the effect that damage to land arising from pollutant

<sup>57.</sup> *Environmental Protection Act*, *supra* note 3 at s 91(1).

<sup>58.</sup> *Ibid* at s 99(3).

spills would always give rise to liability in the environmental loss context. Combined with a damages-only remedy such as that provided for in the *Act*, an amended statutory cause of action would offer an attractive balancing of the competing legal and economic interests of polluters and their neighbours, inasmuch as it would compel polluters to internalize the full environmental costs associated with both incidental and unavoidable emissions, while simultaneously protecting them from the disruption of injunctive relief.

## VI CONCLUSION

Owning land is a riskier proposition in the 21<sup>st</sup> century than it was in the 19<sup>th</sup> century. Contemporary landowners are clearly required to endure far more interference with both the use and enjoyment and the physical integrity of their land than at any previous time in common law history. Indeed, the Supreme Court of Canada's recent decision in *Antrim Truck Centre Ltd v Ontario*<sup>59</sup> has, since the decision in *Inco*, expressly abolished the privileged position previously occupied by material injuries, which has shaped Anglo-Canadian private nuisance jurisprudence since *St Helen's Smelting*;<sup>60</sup> further narrowing the scope of private nuisance liability by requiring even material injury to land to be assessed on the basis of unreasonableness before liability will arise. Accommodation and forbearance seems to be the new normal in the paradigm of conflicting property rights.

If private law is to be more than an arbitrary patchwork, circumstances of objective injustice which leaves wrongful loss to lie where it falls must not be ignored. Statutory change of the sort suggested above offers an opportunity for targeted reform without exposing the environmental liability regime itself to unpredictable further jurisprudential modification in the future. Although returning the common law doctrine of private nuisance to its historical degree of strictness may arguably be neither practicable nor desirable in contemporary society, there is ample justification for doing so in the specific context of environmental contamination arising from the industrial production, transportation and storage of pollutants. A regime which ensures that industrial undertakings internalize the entire tangible cost of their emissions would protect the interests of neighbouring landowners while simultaneously aligning the interests of emitters with the contamination-reduction interests of society as a whole.

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<sup>59.</sup> 2013 SCC 13, [2013] 1 SCR 594.

<sup>60.</sup> *Ibid* at paras 46 – 48.