WILLMS & SHIER ENVIRONMENTAL LAW MOOT COURT COMPETITION 2013

S.E.M.C.C. File Number: 03-09-2013

IN THE SUPREME ENVIRONMENTAL MOOT COURT OF CANADA

(ON APPEAL FROM THE ONTARIO COURT OF APPEAL)

B E T W E E N:

ELLEN SMITH

APPELLANT
(Appellant)

- and -

INCO LTD.

RESPONDENT
(Respondent)

FACTUM OF THE RESPONDENT
INCO LTD.

Pursuant to Rule 12 of the
Willms & Shier Environmental Law Moot Official Competition Rules 2013

TEAM #6-2013

TO: **THE REGISTRAR OF THE**
SUPREME ENVIRONMENTAL MOOT COURT OF CANADA

AND TO: **ALL REGISTERED TEAMS**

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PART I -- OVERVIEW AND STATEMENT OF FACTS

A. Overview of the Respondent's Position

1 The Respondent, Inco Limited ("Inco"), submits that the Appellant has failed to make out claims under the rule in *Rylands v Fletcher* and private nuisance.

2 Contrary to the Appellant's submission, the Ontario Court of Appeal (the "Court of Appeal") was correct in rejecting the plaintiff's claim under the rule in *Rylands v Fletcher*. None of the prerequisites of the strict liability rule have been met. The use of the land as a nickel refinery in an industrial area was not a non-natural use of the land. The nickel emissions from the refinery were neither an accidental nor unintended escape, as the rule requires. Rather, the emissions were part of the normal legal operations of the refinery and complied with all existing environmental and other regulation.

3 The Court of Appeal was also correct in rejecting the plaintiff's private nuisance claim. There was no material physical injury to the land. The nickel particles are not dangerous, *per se*. There has to be some harm suffered to establish a claim of physical injury in private nuisance. The nickel particles caused neither adverse effects to the land or to the rights associated with its use. In fact, the nickel in the soil was an entirely reasonable outcome from living in a community where there is a nickel refinery that brings economic benefits.

4 The Appellant has tried to argue that the diminution of property value is a manifestation of the harm suffered. However, the diminution in property value was a market fluctuation caused by a temporal change in public perception decades after the emissions stopped. The Respondent is not liable for market fluctuations it does not control.

5 For these reasons, the Respondent submits that the Court of Appeal's decision upheld justice. Since the Court of Appeal's judgement, which was based on existing causes of action, was just, there is no reason to create a new cause of action or modify the existing causes of action in this case. The Court should not distort private tort law as the Appellant submits, without broader political consultation. And even if the Court adopts the Appellant's submission and incorporates the precautionary principle and the polluter pays principle into the existing causes of action, the Respondent submits that Inco will not be liable under the modified law.

B. Respondent's Position with Respect to the Appellant's Statement of the Facts

6 The Respondent submits that the following facts were either omitted in the Appellant's factum or need clarification.

7 The Respondent operated the refinery until 1984, not 1980, as the Appellant submits.

> Factum of the Appellant (Team 05-2013), Ellen Smith to the Supreme Environmental Moot Court, at para 6 [Appellant's Factum].
> *Smith v Inco,* 2010 ONSC 3790 at para 24, 2010 CarswellOnt 4735 (WL Can) [*Smith1*].

8 Ninety-seven percent of the emissions from the refinery were emitted before 1960. Only three percent of total emissions were emitted between 1960 and 1984. Nickel emissions stopped after 1984. Only three percent of total emissions were emitted between 1960 and 1984. Nickel emissions from the refinery stopped after 1984.

> "March 2002 HHRA", McLaughlin Chief cited in Memorandum of Argument of Inco in Application to Leave to Appeal to the Supreme Court of Canada [Inco Factum *Smith3*] at para 4.

9 The Respondent would like to acknowledge that the refinery was located to the east of the Rodney Street Area, not to the west as stated in the Appellant's factum.

> Appellant's Factum, *supra* para 7 at para 7.
> *Smith v Inco,* 2011 ONCA 628 at paras 6, 19, 2011 CarswellOnt 10141 (WL Can) [*Smith2*].

10 "For many years [Inco was] the major employer in the Port Colborne area, employing as many as 2,000 people."

> *Smith2, supra* para 9 at para 6.

11 The refinery always complied with all applicable environmental and other regulatory standards. Nickel emissions were part of normal daily operations of the refinery and not an accidental release.

> *Smith1, supra* para 7 at para 333.

12 The trial judge held that nickel is not dangerous, *per se.* In fact, the nickel particles are not noticeable and "have become part of the soil" on the Appellant's lands. The Appellant has not alleged that the nickel emissions have negatively impacted human health or wellbeing.

> *Smith1, supra* para 7 at paras 76.

13 The water quality and the air quality in Port Colborne have not been affected by the emissions. There have been no submissions that the nickel has impacted water quality in Port Colborne. The Ministry of Environment (the "MOE") has confirmed after air sampling in schools that there are no adverse health effects from nickel in the soil.

> Inco Factum *Smith3, supra* para 8 at para 4(f).
> *Smith1, supra* para 7 at paras 174.

14 The MOE set 8,000 parts per million ("ppm") of nickel as the intervention level for nickel. The 8,000 ppm was determined to be fit for toddlers in a residential setting. This level was established after a government regulated Human-Health Risk-Assessment for the RSA and a Community-Based Risk-Assessment for the entire City of Port Colborne, both of which included technical analysis and significant stakeholder consultation.

Smith1, supra para 7 at paras 31-35.

15 Residents of Port Colborne consented to Order of the Environmental Review panel that held that 8,000 ppm was the appropriate intervention level.

"Order of the ERT" dated March 28, 2002, cited in Factum of the Appellant, Inco Limited in *Smith2* (*supra*, para9) [Inco Factum *Smith2*] at para 31, [ERT].

16 Only 25 properties were identified as having nickel levels over 8,000 ppm. Inco has remediated 24 of these 25 properties. The Smith property is the only property that has not been remediated.

Smith1, supra para 7 at paras 35.

17 Diminution of property value occurred only after 2000, even though the majority of emissions occurred before 1960, and all emissions stopped by 1984. Nickel levels in the soil actually reduced between 1960 and the current time, due to government ordered remediation conducted by Inco. The trial judge identified temporal "public mood" as affecting the "real estate values." Therefore the immediate cause of the diminution of property values was a change in public perception of nickel in the soil, not by any changes in the levels of nickel.

Smith1, supra para 7 at paras 220, 271.

PART II -- THE RESPONDENT'S POSITION WITH RESPECT TO THE APPELLANT'S QUESTIONS

18 The Court of Appeal was correct in holding that the Appellant did not make out a claim under the rule in *Rylands v Fletcher* nor pursuant to the doctrine of private nuisance.

19 The Respondent respectfully submits that the Court does not need to recognize a new cause of action for environmental claims and these are not the facts on which this matter needs to be decided.

PART III -- ARGUMENT

A. The Respondent is not Liable under the Rule in *Rylands v Fletcher*

20 The Court of Appeal correctly held that the nickel refinery, contextualized in time and place, was a natural use of the land. The appellant incorrectly emphasises profit-making as a factor to undermine the naturalness of the use of the land.

> *Smith2, supra* para 9 at paras 103-104.

21 The Court of Appeal was correct in holding that the imposition of strict liability for legally compliant intended releases would change the nature of the rule in *Rylands v Fletcher*, which was created to address accidental escapes. The refinery's emissions of nickel were conducted in accordance with the relevant statutory regimes of the day. Imposition of strict liability would therefore be contrary to the "escape" requirement in the rule and would be unjust.

> *Smith2, supra* para 9 at para 112.

22 The Respondent submits that this Court follow the House of Lords in explicitly recognizing that foreseeability of the particular form of harm is a required element of liability under the rule in *Rylands v Fletcher* and submits that the diminution of value was not a foreseeable result of nickel emissions.

> *Transco plc (formerly BG plc and BG Transco plc) v Stockport Metropolitan Borough Council* [2003] UKHL 61, [2004] AC 1 at para 26 (available on QL) [*Transco*].
> *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264 at 306 (available on QL) [*Cambridge Water*].

(i) The Rule in *Rylands v Fletcher*

23 Blackburn J. first articulated the rule in *Rylands v Fletcher* as follows:

> ..the person who for his own purposes brings on his lands and collected and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so, is prima facie answerable for all the damage which is a natural consequence of its escape.

> *Rylands v Fletcher* (1868), LR 3 HL 330, 37 LJ Ex 161 at 280 (available on QL) [*Rylands v Fletcher*].

24 The Court of Appeal used the correct test to determine liability under the rule in *Rylands v Fletcher*. Inco submits that the test should be applied to this appeal while explicitly including foreseeability, which has always implicitly been a part of the rule. The test is:

a) Whether the defendant's use of the land was a non-natural use, in the context of the time place, and general use of the land?

b) Whether the substance did in fact escape?

c) If there was escape, was the damage a foreseeable result of the escape?

25 The Respondent will address each of these factors in this factum.

(ii) <u>The nickel refinery was natural in the context of time and place</u>

26 When contextualized in time and place, Inco's operation of the refinery was a natural use of the land, while balancing competing interests of the community, under the rule in *Rylands v Fletcher*.

27 As the Privy Council reasoned in *Rickards*, the context of the defendant's activities must be considered when evaluating whether the use of the land is "non-natural". *Rickards* was quoted with approval by LaForest J., writing for the majority on this point, in *Tock*:

> 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 or such a use as is proper for the general benefit of the community.

Tock v St John's Metropolitan Area Board, [1989] 2 SCR 1181 at 1189 [*Tock*].
Rickards v Lotham, [1914] 16 CLR 387 at 268, [1913] AC 263 (PC) (available on QL) [*Rickards*].

28 In *Tock*, LaForest J. specifies that the rule in *Rylands v Fletcher* is only applicable where the damage has been caused by a "user inappropriate to the place where it is maintained." He uses the analogy of "the pig in the parlour". As Lord Porter stated in *Read*:

> all the circumstances of the time and place and practice of mankind must be taken into consideration so that what might be regarded as dangerous or non-natural may vary according to those circumstances.

Tock, supra para 28 at 1090.
Read v J Lyons & Co Ltd Speech of Lord Porter, [1946] UKHL 2 at 176, [1947] AC 156 (available on QL) [*Read*].

29 The term 'non-natural' cannot be applied in its literal sense; rather, it must be understood as being what is expected to be natural in the context of the time and place.

30 The Appellant argues that *Tock* is distinguishable and Inco should be held liable because in that case the defendant was a public entity rather than a private entity like in this case. However, the mere fact that something is for-profit, rather than public, does not qualify it as a non-natural use.

Read, supra para 28 at 176.
Tock, supra para 28 at 1190

31 With respect, Inco submits that regardless of whether it is a public or a private entity, the Court of Appeal's application of the principle from *Tock* and *Read* is still the applicable law. In *Rickards*, Moulton L.J. expressed the concept of non-natural use of land 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 *or* such a use as is proper for the general benefit of the community. [Emphasis added].

Rickards, supra para 27 at 400-401.

32 This passage was later cited with approval in *Tock*. The use of the word "or" clarifies that "ordinary use" (or natural use) and "general benefit of the community" are two distinct concepts. While a refinery may not be a use of general benefit to the community, it may still qualify as an ordinary use of the land. An evaluation of the context of the use is still a necessary component of an assessment of whether a particular use of land qualifies as "non-natural", under the *Rylands v Fletcher* rule.

Tock, supra para 28 at 1189-1190.

33 The Appellant's submission that *Gertsen* stands for the rule that profit-based enterprises are a non-natural use, is incorrect. The Court in that case found the use of the land was both non-natural and also not for general benefit of the community. Indeed in *Modern Livestock*, it was held that raising hogs for profit, even diseased ones, was a natural use of the land. All factors must be considered and profit motive is not the sole question, nor is it determinative.

Gertsen v Toronto (Metro), 1973 2 OR (2d), 1973 CarswellOnt 360 (WL Can) at para 69 [*Gertsen*].
Modern Livestock v Elgersma, 97 AR 161, [1989] AJ No 650 (QL) (QB) [*Modern Livestock*].

34 The Appellant further contends that *Danku* stands for the principle that public and private works are to be treated differently. Inco agrees that public and private uses have different implications for the general benefit of the community. However, in *Danku* the Court held that the private defendant was only liable if its use of the land was non-natural.

Appellant's Factum, *supra* para 7 at para 36.
Danku v Town of Fort Frances, [1976] OJ No 2316 at para 36, 39 (QL), 73 DLR (3d) 377 (DC) [*Danku*].

35 Inco submits that the Court of Appeal was correct in holding that the trial judge failed to contextualize the use of the land as a refinery in the location, time and manner of operation, regardless of the fact that Inco is a private for-profit entity.

Smith2, supra para 9 at paras 96-97.

36 The timing of the use is a key consideration. In *Read*, the House of Lords held that in the context of World War II, an ammunition plant was a natural use of land.

Read, supra para 28 at 169-170.

37 Similar to a war-time ammunition plant, the context of the time in which the plant began operation must be considered. In 1918, when the refinery was built, few people owned cars. Transportation to work was largely human-powered and people generally lived close to work. Projecting modern sensibilities on the world of 1918, as the Appellant seeks to do, by stating that something is non-natural in 1918 because it non-natural now, is inconsistent with the requirement to contextualize the use of the land by time.

38 Contrary to the Appellant's assertion, there is no evidence before the Court that the community ever expressed a lack of tolerance of the refinery. Indeed, it was an integral part of the community and was at one time the major employer in the area with up to 2,000 employees.

Smith2, supra para 9 at para 6.

39 Inco's operations were consistent with community norms and social patterns. The Appellant, in moving to the location, implicitly accepted those norms. The refinery complied with all applicable regulations and has been a fixture in the community for years.

Tock, supra para 28 at 1089-1090.

40 In the context of the refinery, Inco's use of the land was natural, which as noted above, has a special meaning in relation to the rule. The refinery operated in Port Colborne, an industrial city, and in an industrial zone. It was ordinary to operate a nickel refinery in that place and time.

Smith2, supra para 9 at para 103.

41 The Appellant relies on *Cambridge Water* to assert that a nickel refinery is a non-natural use of the land even in the context of an industrial operation. In *Cambridge Water* the defendant's activities involved the collection of large quantities of chemicals in an industrial area. It was held that these activities constituted a non-natural use. However, the Court in *Cambridge Water* acknowledged that someone could be "overcome by the fumes" and that the chemicals were dangerous, *per se*. In contrast, as the trial judge noted, nickel is not dangerous, *per se*.

Cambridge Water, supra para 22 at 284.
Smith1, supra para 7 at paras 54.

42 The rule in *Rylands v Fletcher* ensures that land is being used in accordance with the nature or context of the area. Therefore it would be inconsistent with this rationale to hold a defendant liable for activities that were, at the time, ordinary and natural.

43 Considering the context of time, place, and manner of operations, Inco's nickel refinery was a natural use of the land throughout the time it released the nickel particles. Therefore, no liability under the rule in *Rylands v Fletcher* should follow.

(iii) Escape

44 Inco submits that the Appellant is incorrect in attempting to extend *Rylands v Fletcher* to cover intentional discharges.

45 The Court of Appeal correctly held that an intentional discharge is not an escape. In *North York* the Ontario High Court reasoned that courts must distinguish between intentional discharges and fortuitous escapes. The authors of *Law of Nuisance in Canada* note that actions regarding intentional discharges rightly fall under different causes of action.

> Gregory S. Pun & Margaret I. Hall, *The Law of Nuisance in Canada* (Markham: LexisNexis Canada Inc, 2010) at 132, 137 [*Law of Nuisance in Canada*].
> *North York City v Kert Chemical*, 1985 CarswellOnt 818 (WL Can) at para 28, 33 CCLT 184 [*North York*].
> *Smith2*, *supra* para 9 at para 104.

46 In support of her argument that the intentional emission of nickel particles constitutes an "escape", the Appellant cites Blackburn J. in *Rylands v Fletcher*. As an example of the types of situations where the rule might apply, Blackburn J. cited a situation where: "habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works." The Appellant asserts that this dictum implies that the original doctrine was intended to cover the intentional discharge of substances from alkali works.

> *Rylands v Fletcher*, *supra* para 1.
> Appellant's Factum, *supra* para 7 at para 53.

47 However, the facts of *Rylands v Fletcher* are distinguishable. In Blackburn's time, alkali works, were extremely toxic and dangerous. Intentional discharges of effluent from alkali works were prohibited by statute. Even if the Court were to hold that escape includes intentional discharges, the current case is distinguishable based on the fact that nickel is not dangerous, *per se*. Further, as Professor Murphy has noted, Blackburn J.'s example of alkali works was a clear example of nuisance, rather then the distinct *Rylands v Fletcher* doctrine that has developed.

> John Murphy, "The Merits of Rylands v Fletcher" (2004) 24:4 Oxford J Legal Studies 643 at 645.
> *An Act for the more effectual condensation of Muriatic Acid Gas in Alkali Works* (UK), 26 &27 Vict C 124 ss 4-5.

48 Considering the rationale for the rule in *Rylands v Fletcher*, lawful intentional discharges cannot qualify as "escapes". The purpose of the doctrine is to shift the loss caused by industrial accidents from the innocent neighbour to the person or entity that was responsible for creating the risk of the accident. It would be contrary to the principle's rationale if the doctrine was extended to apply to intentional discharges. To expand the doctrine's application to intentional emissions would create an uncontrollable and overly broad rule, which both the House of Lords and the Court of Appeal have declined to do.

Transco, supra para 22 at para 7.
Smith2, supra para 9 at para 93.

49 If the Appellant's argument was to be followed, absolute liability would be imposed for authorized and intentional emissions of not only ultra-hazardous substances, but non-hazardous substances, such as nickel, as well. With respect, Inco submits that such expansion of the doctrine would have serious and far-reaching consequences.

50 If imposition of strict or absolute liability for industrial activities is a desirable policy, it is best left to the legislature. The legislature is answerable to the public and is best equipped to balancing societal goals of environmental protection with industrial economic development.

(iv) The Element of Foreseeability

51 Consistent with the House of Lords, Inco submits that the Court should explicitly recognize that the rule in *Rylands v Fletcher* has an element of foreseeability that the type of damage suffered would result from the escape of the particular product. This requirement has not been met on the facts.

Transco, supra para 22 at para 10.
Cambridge Water, supra para 22.

52 Appellant courts in Canada have not yet directly addressed whether foreseeability is part of the rule in *Rylands v Fletcher*. However, foreseeability has been recognized implicitly. In *Crown Paint*, Rand J. reasoned that the non-natural use must carry with it a situation of enhanced risk. Implicitly, this suggests that the use of the land must create a greater likelihood of causing harm, or that it must be foreseeable that the use can cause the particular harm to the land.

Crown Paint Co Ltd v Acadia Holding Realty Ltd [1952] 2 SCR 161 at 174-175 [*Crown Paint*].

53 Foreseeability of a particular harm must also be considered contextually at the time of the escape. This is in line with the contextual evaluation of whether the use of the land is non-

natural. Doing otherwise would also be inconsistent with the common law fairness principle against retroactive application of laws, absent explicit legislative intent. Thus foreseeability must be considered at the time of the discharge.

Tock, supra para 28 at 1089.

54 In *Cambridge Water* the House of Lords reasoned that to remain reasonable *Rylands v Fletcher* requires foreseeability of the particular harm.

> a "strict" liability rule such as *Rylands v. Fletcher* … is reasonable when the degree or magnitude of risk, namely, the nature or certainty of harm, if there is an escape, justifies it. By the same token or principle (a) the risk must be foreseeable and (b) the harm which ensues must fall within the risk which provided the reason for imposing "strict" liability in the first place

Cambridge Water clearly stands for the rule that not only must the risk be "foreseeable" but the harm that is caused must be "within the risk" that was contemplated. In fact, the case actually turned on the fact that rendering the water undrinkable was not foreseeable at the time of the escape and thus the defendant was held not to be liable under the rule in *Rylands v Fletcher*.

Cambridge Water, supra para 22 at 290

55 The harm suffered by the Appellant, which was diminution in the value of her property (due to public concerns over the level of nickel in the soil on her land) could not have been foreseen. The immediate cause of the diminution in value was public concern over media reports of unsubstantiated claims that the presence of the nickel particles posed risks to health. This chain of events could not have been foreseen at the time of the nickel particles' release.

56 Since the MOE only started conducting studies of soil contamination in the 1970s, before that time it could not have been foreseen that the public would have concerns over nickel emissions and that housing values might have been affected by public concerns. Emission regulations and restrictions started only in the 1970s, or shortly prior to that, by which time 97% of the emissions were already released. It is not possible that the indirect effect the presence of nickel particles had on the Appellant's property could have been foreseen before the introduction of MOE studies concerning the level of nickel in the soil. Based on this, even if the Court should hold Inco liable for market fluctuations, damages should be apportioned to only that part of emissions that occurred after the 1970s.

Smith2, supra para 9 at paras 7-10.
Environmental Protection Act SO 1971 c 86.

57 It is the Respondent's submission that the Appellant has not shown that the Court of Appeal erred in relation to the rule in *Rylands v Fletcher*. First, the use of nickel in a refinery is a natural use of land. Second, the intentional discharge of nickel does not constitute an escape.

58 The Court should also explicitly recognize foreseeability of the harm of the escape as being part of the rule in *Rylands v Fletcher*, like the House of Lords has. Foreseeability of harm has always implicitly been part of the rule in Canada and the Appellant has failed to show foreseeability of harm on these facts.

B. The Respondent is not Liable for Nuisance

59 The Appellant argues that the Respondent is liable under the law of private nuisance. She asserts that the presence of the nickel particles in the soil on her land caused material physical injury to her property and that this is sufficient to establish a legal nuisance.

> Appellant's Factum, *supra* para 7 at paras 26, 74.

60 The law of private nuisance protects one's interest in the beneficial use of land from unreasonable interferences. Co-existence in communities is dependent on the principle of "give and take, live and let live". A balance must be struck between the competing interests of landowners. Not every interference with the land of another rises to the level of a legal nuisance.

> John G Fleming, *The Law of Torts* 9th ed (Sidney: The Law Book Company Limited, 1998) at 465-467.
> *Tock*, *supra* para 28 at 1191 citing *Bamford v Turnley* (1862), 122 ER 127 at 32-33 (available on QL).
> *Royal Anne Hotel Co v Village of Ashcroft*, [1979] BCJ No 2068 (QL) at para 12, 95 DLR (3d) 756 (CA) [*Royal Anne Hotel*].
> *Smith2*, *supra* para 9 at para 43.

61 The Respondent disputes the Appellant's assertion that the presence of the nickel particles in the soil constitutes material physical injury to the land. The Court of Appeal applied the correct test for assessing whether the nickel particles caused material physical injury. The Appellant has failed to establish that the nickel emissions caused an adverse affect on her land or on the rights associated with the use of her property.

> Appellant's Factum, *supra* para 7 at paras 71, 82.

62 In the alternative, if the presence of the nickel particles does constitute material physical injury to the Appellant's property, the interference of the nickel particles was not unreasonable. Contrary to the Appellant's assertion, the Appellant must also establish that the Respondent's activities caused an unreasonable interference with her property. Considering the surrounding

circumstances, the presence of the nickel particles on the Appellant's property was not an unreasonable interference.

(i) The Correct Test for Assessing Physical Injury to Land

63 The Appellant argues that the Court of Appeal applied the incorrect test in its assessment of whether the presence of the nickel particles caused material physical injury to the Appellant's property. The Court of Appeal reasoned that in order to establish that the nickel particles caused a physical injury:

> ...the claimants must show that the alleged contaminant in the soil had some detrimental effect on the land or its use by its owners.

Appellant's Factum, *supra* para 7 at paras 71.
Smith2, *supra* para 9 at para 57.

64 The Court of Appeal was correctly reasoned that a change in the chemical composition of soil is not automatically an injury to land. Although certain interferences, such as activities that caused physical destruction of a building for example, can be intuitively categorized as physical injury to property, a change in the chemical composition of soil is not necessarily an "injury".

Smith2, *supra* para 9 at para 55.

65 A measurable change in the soil is not sufficient to establish that there has been material physical damage. The change must be a substantial interference with the land. Furthermore, the damage must be actual and not merely perspective. Changes in the chemical composition of soil are often harmless or beneficial. In an urban setting, the chemical composition of a landowner's soil changes constantly as emissions from vehicular traffic, fertilizers, smoke and other particles migrate onto the property. Therefore the inference that a change in chemical composition of soil is automatically an injury to the land cannot be drawn.

Walker v McKinnon Industries Ltd [1949] OR 549, [1949] CarswellOnt 262 (WL Can) at paras 66, 76 (HC) [*McKinnon Industries*].
Smith2, *supra* para 9 at para 55.

66 With respect, the trial judge did not recognize the logical leap he was making when he assumed that the migration of nickel particles into the soil automatically constituted physical damage. The presence of nickel particles is not enough. To be characterized as an "injury" there must be something more than a simple change in chemical composition.

Smith1, *supra* para 7 at paras 76.

67 The settling of foreign particles on a plaintiff's land, even if the settling indirectly results in the diminished value of the property, is not a physical injury unless there is an injury to the land itself or to the property rights associated with its use. In *Execotel* the plaintiff asserted that the migration of dust onto the plaintiff's property caused material physical injury to its hotel and diminished the hotel's value. Although Donnelly J. characterized the wood dust as "an unrelenting, repetitive deposit of a contaminant", he held that it did not physically injure the land. Similar reasoning was applied in *Pioneer Construction.* The settling of foreign particles does not in itself constitute material physical injury to land.

> *Execotel Hotel Corp v EB Eddy Forest Products Ltd*, [1988] OJ No 1905 (QL) at 20, 25 (SC)[*Execotel*].
> *Walker v Pioneer Construction Co*, 8 OR (2d) 35, 1975 CarswellOnt 336 (WL Can) at paras 31-34 (SC) [*Pioneer Construction*].

68 In contrast, the accumulation of foreign particles can be considered a material physical injury to a property if the particles are detrimental to the property rights associated with the land's use. In *Russell Transport*, the defendant's emissions of iron oxide particles made the plaintiff's business of storing vehicles untenable. Since the particles had rendered "the plaintiff's property unfit for the purpose for which it was purchased and developed" McRuer C.J.H.C reasoned that the land had suffered material physical damage.

> *Smith2*, *supra* para 9 at para 55.
> *Russell Transport Ltd v Ontario Malleable Iron Co* [1952] OR 621, [1952] OJ No 451 (QL) at paras 16 [*Russell Transport*].

69 In *Kent*, so much dust from the neighboring iron ore mine settled on the plaintiff's property that the house became "virtually uninhabitable". Like in *Russell Transport*, it was held that the plaintiff's land had suffered a material physical injury since the accumulation of the foreign particles made the property unfit for its intended purpose.

> *Kent v Dominion Steel*, [1964] NJ No 2 (QL) at paras 48, 50, 49 DLR (2d) 241 (CA) [*Kent*].

70 Clearly, the settling of foreign particles on one's property may only be considered material physical injury to the land if there has been material and actual injurious affects on either the proprietary rights associated with use of the land or on the land itself.

71 In the present case, there has been no interference with the class members' abilities to use their properties as residences. The case at bar is much more analogous to *Execotel* or *Pioneer Construction* than to *Russell Transport* or *Kent*. None of the property rights associated with the use of residential properties have been interfered with. The Appellant has refused Inco's effort to

remediate her property and she continues to reside there with her young family. Ms. Smith admitted at trial that her community remains an attractive location for a young couple to purchase their first home. All the properties, other than the land owned by the Appellant, have been remediated to the agreed upon standard of 8,000 ppm. The class members agreed that this was the appropriate standard for remediation and the standard was confirmed by the Environmental Review Tribunal, a tribunal with a high degree of expertise in this field. The harmless settling of the nickel particles on the Appellant's property does not amount to an interference with the rights associated with the use of the land.

Smith Cross, cited in Inco Factum *Smith2* (*supra* para 15) at para 55.
Smith1, *supra* para 7 at para 7.
ERT, *supra* para 15.

(ii) The Appellant's Reliance on Statutory Standards

72 The Appellant asserts that the presence of the nickel particles constitutes an injury to the land itself since she claims that the nickel emissions are a contaminant, pursuant to the Ontario *Environmental Protection Act*.

Environmental Protection Act, RSO 1990, c E.19 [*EPA*].

73 The Respondent disputes the Appellant's claim that the nickel particles constitute a contaminant with adverse effects pursuant to the *EPA*. Under s 1(1) of the *EPA*:

> "contaminant" means any solid, liquid, gas, odour, heat, sound, vibration, radiation or combination of any of them resulting directly or indirectly from human activities that causes or may cause an adverse effect;
>
> "Adverse effect" means one or more of,…
> (b) injury or damage to property or to plant or animal life….

Appellant's Factum, *supra* para 7 at para 96.

74 The Respondent submits that the effect of the nickel in the soil does not constitute an "adverse effect" according to the *EPA*. Although there may be sufficient nickel in the soil to "possibly adversely affect the most sensitive plant life" there is no evidence that the presence of the nickel did, or even could have caused, injury or damage to any plant life on any of the class members' properties. The Appellant assumes that the presence of nickel in excess of the MOE guideline standard "demonstrates adverse effects on plant life, including those less sensitive to nickel." With respect, there is no evidence in the record to support this assumption.

Appellant's Factum, *supra* para 7 at para 93.

75 Furthermore, even if the nickel particles could be characterized as a "contaminant" under the *EPA*, the statutory standard is not evidence that a nuisance premised on material physical injury to land has occurred. In *Saskatchewan Wheat Pool* the Supreme Court of Canada held that evidence of a statutory breach may be evidence of negligence. Contrary to the Appellant's assertion, the Supreme Court of Canada did not reason that a statutory breach is "useful in providing a standard of conduct in determining whether, at common law, an actionable nuisance exists." While liability in negligence is dependent on the nature of the defendant's actions, liability in nuisance is determined by an evaluation of the effect that the defendant's activities have on the plaintiff's land. Therefore *Saskatchewan Wheat Pool* does not assist the Appellant.

> *Canada v Saskatchewan Wheat Pool*, [1983] 1 SCR 205 at 226, 143 DLR (3d) 9 [*Saskatchewan Wheat Pool*].
> Appellant's Factum, *supra* para 7 at para 98.

76 In addition, there is no evidence that Inco actually breached any statutory provision of the *EPA*. Even if the nickel particles qualify as a contaminant under the *EPA*, liability does not automatically follow. Inco complied with all applicable government regulatory schemes and as the Court of Appeal recognized, "[t]here was no evidence that the emission levels from the refinery contravened any regulations."

> *EPA*, *supra* para 72 at ss 14, 17.
> *Smith2*, *supra* para 9 at para 9.

77 In conclusion, in order to show that a change in chemical composition constitutes material physical injury there must be proof of a detrimental effect on the land itself or on the property rights associated with the use of the property. The plaintiffs' properties are all residential properties. There is no evidence of adverse effects on the property itself. As referred to above, in order for an interference to constitute material physical injury, the damage must be actual, and not merely potential. Without evidence that any plant life on the class members' land was actually damaged by the presence of the nickel particles, evidence of potential effects on very sensitive forms of plant life does not assist the Appellant.

> *McKinnon Industries*, *supra* para 65 at para 77.

(iii) Diminution in Market Value is not Evidence of Material Injury

78 The Appellant argues that the diminution in market value of her property is evidence of the injury she alleges the nickel particles caused to her land. The Appellant is unable to cite any cases that support this proposition.

Appellant's Factum, *supra* para 7 at para 104.

79 Diminution of property values is not evidence of physical damage to the land. The law recognizes that a person is entitled to engage in activities that may depreciate the value of another's property, so long as the activity has not unreasonably interfered with the use or enjoyment of the property or has physically damaged it.

Shuttleworth v Hospital, 1927 CarswellBC 5 (WL Can) at para 9, [1927] 1 WWR 476 (SC) [*Shuttleworth*].

80 In this case, the direct cause of the depreciation of property values was public concern over unsubstantiated claims of risks to health. Public or individual concerns or fears, absent proof of real risk, are not actionable grounds for claims in nuisance. Public concern that results from unfounded claims are also unpredictable and fleeting and therefore cannot be considered material injury to the land.

Shuttleworth, supra para 79 at para 8.
Wiebe v De Salaberry (Rural Municipality), 1979 CarswellMan 58 (WL Can) at para 31, 11 CCLT 82.
Fleming, *supra* para 60 at 468 citing *Benjamin v Storr* (1874) LR CP 400 at 407.

(iv) Adverse Effects to Health

81 The Appellant argues that the Court of Appeal erroneously relied on the fact that the nickel particles had no adverse effects on health in its rejection of the Appellant's claim. This argument misconstrues the reasoning of the Court of Appeal. The Court only recognized that the property rights associated with a residential property extend to protect one's interest in occupying one's residence without the risk of harmful health effects.

Appellant's Factum, *supra* para 7 at paras 81.
Smith2, *supra* para 9 at para 55.

82 Previously, it had not been explicitly recognized in the jurisprudence that damages due to personal injury were compensable under the law of nuisance, unless the injury was also accompanied with an interference with the use and enjoyment of property. The authors of *Law of Nuisance in Canada* had advocated for this recognition. Therefore, the Court of Appeal's dicta on this point represents an expansion rather than a contraction in the law. The Court of Appeal

recognized that activities affecting land and which pose a real risk to the health of the occupier of that land could rise to the level of being classified as material physical injury to the land.

> Allen M. Linden & Bruce Feldthusen, *Canadian Tort Law* 9th ed (Markham: LexisNexis, 2011) at 580.
> *Law of Nuisance in Canada*, *supra* para 45 at 85.

83 Furthermore, the Court of Appeal's dicta on this point did not affect its rejection of the Appellant's claim that there was a material, physical injury to the land itself. The test articulated by the Court of Appeal was that since a change in chemical composition of the soil is not *per se* injurious, the change "must have had some detrimental effect on the land itself *or* rights associated with the use of the land." [Emphasis added]. The use of the word "or" indicates that the Court of Appeal considered and rejected any argument that the nickel particles had either an adverse effect on the land or the proprietary rights associated with the use of that land.

> *Smith2*, *supra* para 9 at para 55.

84 Since there has been neither physical injury to the land itself nor any adverse effects on the property rights associated with the land's use, the Court of Appeal correctly held that the nickel particles have not caused material physical damage to the Appellant's property.

(v) <u>The Interference must be Unreasonable in the Context of the Surrounding Circumstances</u>

85 In the alternative, even if Inco did cause material physical injury to the Appellant's property, the Respondent submits that the injury was not unreasonable in the context of the surrounding circumstances.

86 The Appellant asserts that the requirement that the interference be unreasonable is not an element of private nuisance if material physical injury to the plaintiff's land has been established.

> Appellant's Factum, *supra* para 7 at para 74.

87 With respect, the case law does not support this assertion. In *St Lawrence Cement* the Supreme Court of Canada defined nuisance as an "unreasonable interference with the use of land." In *Tock*, La Forest J. also reasoned that the question of reasonableness was central to the test for nuisance. Clearly, an essential element of nuisance is the requirement that the interference be unreasonable.

> *St Lawrence Cement v Barrette*, 2008 SCC 64 at para 77, [2008] 3 SCR 392 [*St. Lawrence Cement*].
> *Tock*, *supra* para 28 at 1191.

88 When assessing whether an interference with the plaintiff's land is unreasonable the courts assess a number of criteria, which are often referred to as the "competing factors". These

factors include “the severity of the harm, the character of the neighbourhood, the utility of the defendant’s conduct, and the question of whether the plaintiff displayed abnormal sensitivity.”

Smith2, supra para 9 at para 48.
Tock, supra para 28 at 1191.

89 However, when the harm alleged is material physical injury to land it is unclear in the jurisprudence to what degree the competing factors may be considered. Both the trial judge and the Court of Appeal recognized the lack of clarity on this point. In *Tock* the Supreme Court of Canada implied that the competing factors are to be considered when the harm that is alleged is material physical injury, although the Court stated that they were only to be applied “with great circumspection”. In *Royal Anne Hotel* the British Columbia Court of Appeal has also implied that the competing factors are to be assessed where alleged harm is physical injury to property.

Smith1, supra para 7 at para 81.
Smith2, supra para 9 at para 48.
Tock, supra para 28 at 1192.
Royal Anne Hotel, supra para 59 at para 14.

90 However, there is an earlier line of cases that hold that a material physical injury to land is automatically unreasonable, and there is no need to assess the competing factors. These cases draw a clear distinction between physical damage nuisance and nuisance based on unreasonable interference with the use and enjoyment of land.

St Helen’s Smelting Co v Tipping (1865), [1861-73] All ER Rep Ext 1389 at 1395, 11 HLC 642 (available on QL).
McKinnon Industries, supra para 65 at 59-62.
Russell Transport, supra para 68 at paras 16, 33.

91 The Respondent asks that the Court clarify the law on this point. As the Respondent submits that the Appellant has failed to establish material physical injury, an assessment of the competing factors may not be relevant in this appeal. However, the Respondent asks that the Court rule on this point for the benefit of clarity in future cases.

92 Inco submits that the surrounding circumstances of the case are relevant when the harm alleged is a material physical injury to land. As the Court of Appeal indicated, the merits of distinguishing between the two branches are questionable. The distinction is “counterintuitive to modern sensibilities” as the distinction has its roots in 19th Century values, when the private property interests of large landowners were prioritized over occupiers’ interests in the quiet enjoyment and use of land. Professor Bilson states that a failure by courts to consider the competing factors in nuisance claims involving physical damage may have a “harsh effect on the

defendant". This is particularly so in cases such as the present one, where the defendant's activities are legal and are consistent with the character of the neighbourhood.

Smith2, supra para 9 at paras 46, 48
Fleming, *supra* para 60 at 468.
Beth Bilson, *The Canadian Law of Nuisance*, (Toronto: Butterworths, 1991) at 38.

93 Inco submits that policy factors and dicta from relatively recent Supreme Court of Canada decisions dictate that the surrounding circumstances are relevant to an assessment of whether an interference caused by physical damage to the land is unreasonable.

(vi) Application of the Competing Factors

94 Clearly, the interference is not severe. There is no evidence that the nickel particles caused the daily lives of the class members to change in any way, nor is there evidence of health risks. Inco has remediated the properties (other than the Appellant's) to a level that the MOE recognizes as being "well below any potential health risk".

Smith2, supra para 9 at para 61.

95 Considering the characteristics of the neighbourhood, the interference of the nickel particles is not unreasonable. The refinery is part of the neighborhood and was operating before any members of the class acquired their properties. Indeed, common sense would have led the residents to recognize that the nickel emissions would infiltrate their lands. When the Appellant purchased her property the market value presumably reflected this knowledge. Although the extent of the nickel contamination might not have been known until relatively recently, the refinery and its emissions were part of the established character of the neighborhood. It is unreasonable for the Appellant to expect that she is now entitled to a property free from this higher level of nickel in the soil, as compared to other communities.

Smith2, supra para 9 at paras 24, 31.

96 Although Inco is a private corporation, its nickel refinery had real utility to the residents of Port Colborne. At one time it employed 2,000 people and was the major employer in the area. By allowing Inco to operate and emit nickel particles the Government recognized that the refinery was valuable to the residents of Port Colborne. The increased levels of nickel in the soil were a reasonable consequence of the refinery's beneficial presence in the community.

Smith2, supra para 9 at para 6.

97 Considering the utility of the defendant's operations, the lack of substantial harm and the character of the neighborhood, the nickel contamination is a reasonable consequence of the defendant's valuable operation.

98 The Respondent submits that the Appellant has failed to establish liability pursuant to the tort of private nuisance. As the Court of Appeal held, the presence of the nickel particles in the soil on the Appellant's property does not constitute material physical injury to the land. The nickel particles do not cause adverse effects to the land nor are they detrimental to any rights associated with the land's use. Furthermore, the presence of the nickel particles is not an unreasonable interference. Considering the relevant circumstances, the benign settling of the nickel particles does not constitute an unreasonable interference with the Appellant's land.

C. The Court Does Not Need to Recognize a New Cause of Action for Environmental Claims

99 The Respondent respectfully submits that this is not the case to decide whether the Court should recognize a new cause of action for environmental claims.

100 In the alternative, there is no need for a new cause of action for environmental claims.

101 Further, the Court should not incorporate the precautionary principles and the polluter pays principle into the existing causes of action.

102 Finally, even if these principles were incorporated into the existing causes of action, the Respondent will not be liable under the rule in *Rylands v Fletcher* or in private nuisance.

(i) <u>This is Not the Case to Decide Whether The Court Should Recognize a New Cause of Action</u>

103 The Respondent submits that (i) justice prevailed in the Court of Appeal's decision, and (ii) the scope of environmental protection for emissions that have the potential to cause physical harm has not been reduced. Thus the Court does not need to consider on these facts whether a new cause of action for environmental claims is necessary.

104 The Respondent respectfully submits that justice prevailed in the Court of Appeal's decision, which was based on the existing causes of action. The Respondent requests the Court to consider an analogous hypothetical situation to demonstrate that justice prevailed. What if instead of a nickel plant, Inco had legally planted a plum tree on their property? Inco certainly got fruits from the plum tree but so did many of the neighbours and the public. Over the years, some fruit and the leaves from the plum tree fell on to the neighbours' properties and innocuously became part of their soil. What if suddenly the public should perceive, without any

substantive evidence that ghosts live in the remains of those plum tree leaves and fruit? And as a result, the property values of Inco's neighbours were to diminish. Would Inco still be forced to pay compensation through tort action? It holds intuitively that Inco would not be liable in such a situation. While heavy metals are not ghosts, the fears surrounding the presence of nickel in the soil have not been substantiated, and are thus analogous to the scientifically unsubstantiated fears surrounding ghosts.

105 Analogous to the plum tree hypothesis, from an overall justice perspective, there is no reason to hold Inco liable in this situation. The Respondent's actions have not caused the harm suffered by the Appellant. To reiterate, the nickel particles did not pose a substantiated danger to residents. The harm suffered by the plaintiff is the diminution in her property value. This harm was suffered nearly 40 years after the majority of the nickel was released from the refinery. The diminution in market price of her property was caused by a change in public perception of the presence of nickel particles.

Smith1, supra para 7 at paras 220, 271, 274.
Smith2, supra para 9 at para 6.

106 The Court of Appeal's decision that Inco is not liable for mere presence of nickel does not have negative implications for environmental protection in the future because nickel (i) is not dangerous, (ii) does not have a negative impact on the health and wellbeing of human beings, (iii) has not caused material physical injury to the land and (iv) has not impacted air quality and water quality in the area. Further, the nickel emission were lawful and in compliance with all environmental and other statutory obligations. Should any of these factors have proved to be otherwise, it is possible that the Respondent may have been held to be liable within the scope of the existing causes of action. However, there is no need to create a new cause of action when all these factors demonstrate that there was not any damage to the land or its use and enjoyment as residential property.

Smith1, supra para 7 at paras 54,76, 174, 333.
Smith2, supra para 9 at para 67.
Inco Factum *Smith3, supra* para 6 at para 4.

(ii) <u>Adding a New Cause of Action for Environmental Claims or Changing the Existing Causes of Action to Meet Environmental Goals is not Appropriate.</u>

107 The Respondent agrees with the Appellant that environmental issues are polycentric in nature. They involve multiple, competing interest and their resolution produces varying socioeconomic consequences. For this reason the Court must be mindful of the role of the

judiciary *vis-a-vis* the legislature and should not introduce a new cause of action for environmental claims. The Appellant is also correct to point out that there has been a proliferation of "well-informed and carefully structured legislation" to address environmental pollution. These factors do away with the need for judicial intervention in this area of law.

> Appellant's Factum, *supra* para 7 at para 126-128

108 Further, there may be real conflict between tort law causes of action and public environmental goals. The purpose of tort law is corrective justice. If tort law is moulded to prevent environmental harms in the future, or to compensate for them in the present, "it would create unpredictable and unwieldy liability." The literature cautions that "common law nuisance lawsuits could spring up alleging that any person or business is not "doing enough" to conserve and protect the environment, and that this lack of action constitutes a nuisance and entitles a person to tort damages."

> Mark Latham, Victor E. Schwartz, and Christopher E. Appel, "The Intersection of Tort and Environmental Law: Where the Twains Should Meet and Depart" (2011) 80 Fordham L Rev 737 at 798-769 [Latham et al].

109 Latham et al's cautionary example is remarkably similar to the current case. The Appellant is suggesting that Inco has not done enough, even though Inco's activities have always been legal and in compliance with all environmental and statutory obligations. In fact, Inco has even remediated affected properties but the Appellant still alleges that Inco has not done enough. If the Court expands the scope of tort actions to hold the Respondent liable, it could create indeterminate private liability and negatively impact business. For this reason the Respondent "counsels against courts distorting traditional tort law principles to address environmental harms."

> Latham et al, *supra* para 108 at 740.

110 The Appellant argues that the presence of the precautionary principle and polluter pays principle in Canadian statutory law justifies the incorporation of these principles into Canadian common law causes of action. However, "regulatory law serves a prophylactic function to require specific conduct based on a deliberative democratic process that requires the opportunity for public notice and comment; it is distinct from the tort system, which serves to compensate a party for personal injury or property damage." Incorporating the precautionary principle and polluter pay principles without consultation would be an inappropriate appropriation of

regulatory environmental law principles into a personal injury and property damage framework without adequate consultation.

Latham et al, *supra* para 108 at 770.

111 The Appellant also suggests that the precautionary and polluter pays principles are prevalent in international law and have been applied by Canadian courts as well and so it is a small step to incorporate them into the common law. However, in the Canadian cases that the Appellant cites, these principles are either specifically indicated in the legislation or the Court is using the principles to provide context in statutory interpretation exercises. For example, in *Imperial Oil*, s 31.42 of the *Environmental Quality Act* specifically incorporated the polluter pays principle. In *Spray-tech*, the Court held that the town's By-law 270 were within their authority under the Quebec *Cities and Town Act* and consistent with the precautionary principle from international law. Applying the precautionary and polluter pays principles generally, when not explicitly stated in the legislation, or outside the context of interpreting specific legislation, to common law causes of action, without any deliberative democratic process, would distort tort law in a manner that is unduly harmful for business.

Imperial Oil Ltd v Quebec (Minister of the Environment), 2003 SCC 58 [*Imperial Oil*].
114597 Canada Ltee (Spray-tech, v Societe d'arrosage) v Hudson (Ville), 2001 SCC 40 [*Spray-tech*].
Latham et al, *supra* para108 at 770.

(iii) Caution Must be Exercised Before Incorporating the Precautionary and Polluter Pays Principles

112 The Respondent submits the Court should exercise caution before incorporating the precautionary principle into existing causes of action.

113 There are strong critics of the precautionary principles and it is not as widely accepted as the Appellants have tried to argue. Professor Cass Sunstein is critical of universally accepting the precautionary principle. He argues that the 'better safe than sorry' approach espoused by the precautionary principle is intuitively appealing, but that when it is used to avoid actions that carry a small risk, it actually can "be paralyzing." He suggests that restricting a particular action, due to a small unsubstantiated risk "eliminates the "opportunity benefits" of a process or activity."

Cass Sunstein, *Law of Fear: Beyond the Precautionary Principle* (Cambridge: Cambridge University Press, 2005) at 29-31.

114 Professor Sunstein's criticism is particularly relevant in this fact pattern. Nickel from the refinery is not dangerous, *per se*. At soil concentrations below 8,000 ppm, nickel has been deemed safe in residential setting, including for toddlers. The health, physical and environmental risks of nickel are *de minimis*. Applying the precautionary principle to the nickel refinery would have the perverse effect of precluding economic (employment) and social benefits such an activity would bring to a community.

115 The Respondent submits the Court should exercise caution before incorporating the polluter pays principle into existing causes of action. Some critics argue that the retroactive application of polluter pays is unfair and inequitable to businesses when they did not foresee that a particular emission would be harmful. This sort of *ex post* compensation also does not help in preventing future pollution. It is backward looking rather than forward looking, especially in situations where a firm operated legally and fulfilled their environmental obligations. Further, on the current facts, punishing Inco for non-injurious legal non-harmful emissions when decades have passed since the emissions ended, would be retroactive application of liability. Canadian courts have been resistant to the retroactive application of law in the absence of express legislation.

> Boris N Mamlyuk, "Analyzing the Polluter Pays Principle through Law and Economics" (2009-2010) 18 Se Envtl LJ 39 at 59-60.
> *MacKenzie v British Columbia (Commissioner of Teachers' Pensions)* (1992), 69 BCLR (2d) 227.

(iv) <u>Even if Precautionary Principle and Polluter Pays Principles are Added to Existing Causes of Action The Respondent is not Liable Under Nuisance and the Rule in *Rylands v Fletcher*</u>

116 As the Appellant indicated, incorporating the precautionary principle will lessen the burden of proof on claimants. The precautionary principle would allow claimants to establish a cause of action where there is scientific uncertainty. However in this case multiple studies and consultations have been conducted and the Environmental Review Tribunal and the Court have held that the nickel is not dangerous.

117 With regards to the polluter pay principle, the question to ask in this case is: Where is the pollution? Doesn't the concept of pollution imply some kind of damage? This case can be clearly differentiated from *Imperial Oil* where the polluter pays principle was applied. In that case the contaminant hydrocarbons prevented the property from being used for residential purposes. Whereas in this case the property has been deemed fit for residential purposes, including for the use of toddlers and for vegetable gardening, and there was no material damage to the soil.

Imperial Oil, supra para 111 at para 4.

118 Further, in *Imperial Oil*, Lebel J. noted responsibility was only for the "direct and immediate cost of pollution." The diminution in value of the Appellant's property has not been direct or immediate. There has been a passage of nearly 40 years between the end of the highest period of release and the decline in value. Also, the diminution in value has not been caused by the contamination directly but rather by public opinion of the contamination.

Imperial Oil, supra para 111 at para 24.

119 For the reasons submitted, incorporating the precautionary principle and polluter pays principle would be a significant step for the Court to take. It would be an act of judicial intervention that could have unfair and negative impacts on businesses and have limited positive results.

PART IV -- ORDER SOUGHT

120 The Respondent respectfully asks the Court to dismiss the Appellant's appeal and uphold the judgment of the Court of Appeal. The Respondent requests that costs be awarded to the successful party.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4 day of February, 2013.

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Benjamin Warnsby

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Kathryn Duke

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Siddharth M. Akali

Counsel for the Respondent

Inco Ltd.

PART V -- TABLE OF AUTHORITIES

#	Authority	Paragraph No. Where Cited
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ELLEN SMITH **-and-** **INCO LTD.**

APPELLANT
(Appellant)

RESPONDENT
(Respondent)

S.E.M.C.C. File Number: 03-09-2013

SUPREME ENVIRONMENTAL MOOT
COURT OF CANADA

FACTUM OF THE RESPONDENT
INCO LTD.

TEAM #6-2013

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