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 APPELLANT
ELLEN SMITH

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

TEAM #09-2013

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

1 "The context of this appeal includes the realization that our common future, that of every Canadian community, depends on a healthy environment." Specifically, the appeal concerns availability of tort remedies to compensate for environmental contamination and resultant damage.

> *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, [2001] SCR 241, 2001 SCC 40 at para 1.

2 At trial, the judge found in the complainants' favour, held Inco to be liable in private nuisance and *Rylands v Fletcher*, and awarded damages in compensation for the complainants' losses. The Court of Appeal reversed the trial court decision, holding that Inco was not liable in either cause of action.

> *Rylands v Fletcher* (1866), LR 1 Ex 265, aff'd (1868), LR 3 HL 330 [*Rylands*].

3 The Supreme Environmental Moot Court of Canada granted leave to appeal on the following questions:

1. Did the Court of Appeal err in holding that the Appellants did not make out a claim under the existing causes of action pleaded?
2. Should the Supreme Environmental Moot Court of Canada recognize a new cause of action for environmental claims or are existing causes of action adequate?

A. Overview of the Appellant's Position

4 The Appellant respectfully submits that the Ontario Court of Appeal erred on two accounts. Firstly, the Court of Appeal erred in determining that the failure of property values in the Rodney Street Area to appreciate at the same rate as other comparable communities did not amount to a material damage to property. Secondly, the Court of Appeal erred in holing that Inco's activity did not amount to a non-natural use of the land, consequently erring in holding that Inco was not liable under the rule in *Rylands v Fletcher*.

> *Rylands, supra* at para 2.

5 Additionally, the appellants submit that the Supreme Environmental Moot Court of Canada should give consideration to two newly pleaded argument. The Appellants submit in the alternative that Inco should be found liable in nuisance with regards to injury to health. Inco should also be found liable under the statutory regime of the Environmental Protection Act (EPA), which gives private citizens a right of compensation when damages are suffered as a

direct result of a spill of pollutants unless the defendant takes all reasonable measures to prevent the spill. The Appellant submits that Inco has violated the Environmental Protection Act and did not take all reasonable measures to prevent the violation.

B. Statement of the Facts

6 The issue arises in the City of Port Colborne which has a population of approximately 18 000 people and is found on the northern shore of Lake Erie. The Welland Canal runs through the city and divides it into an east and west portion.

Smith v Inco, 2010 ONSC 3790 (CanLII) at para 22 [*Trial Decision*].

7 Inco's refinery is found on property in the south-east portion of the city near Lake Erie, approximately one kilometer east of the Welland Canal. Inco owns the land on which the refinery is found.

Trial Decision, *supra* at para 6 at para 23.

8 Inco began operating in Port Colborne in 1918 and was primarily engaged in the refining of nickel until 1984 when it no longer engaged in such business. Inco does, however, continue to engage in other business activities in Port Colborne.

Trial Decision, *supra* at para 6 at para 24.

9 Rodney Street, a residential street, abuts the Inco property on its easterly terminus. Rodney Street is the southern boundary of the Rodney Street Area (RSA).

Trial Decision, *supra* at para 6 at para 25.

10 The RSA contains roughly 340 properties, which are located between the Inco property and the Welland Canal. These properties are primarily inexpensive single-family homes, and are found in an area that is slightly smaller than the area occupied by the Inco property.

Trial Decision, *supra* at para 6 at para 26.

11 The Inco refinery is located on the western portion of the Inco property, which abuts the RSA. Smokestacks have spewed various pollutants, which contained nickel particles amongst them. These particles were later found to have settled in the soil of neighbouring properties, but in greater concentration in the properties on the east side of Port Colborne.

Trial Decision, *supra* at para 6 at para 27.

12 The Ministry of the Environment (MOE) has been in charge of regulating Inco's emissions for many years, and their testing has included air, vegetation and soil testing near the Inco refinery from time-to-time from the 1970's. Specific tests for nickel levels in Port Colborne's soil were taken in 1972, 1975, 1983, 1991, and 1998.

Trial Decision, *supra* at para 6 at para 28.

13 In 1998, the soil testing was part of a phytotoxicological study in which the MOE attempted to determine the concentration of, among other things, nickel levels in the soil near the Inco Refinery. The study was released to the public on January 26, 2000 and showed that nickel levels in many parts of Port Colborne greatly exceeded the MOE guideline of 200 parts per million (ppm). The area affected to the greatest degree was the RSA and the area north and east of the refinery.

Trial Decision, *supra* at para 6 at para 29.

14 On February 9, 2000 at Port Colborne's City Hall, there was a public meeting, whereby Smith's husband Craig Edwards (Edwards), asked an MOE representative to test the nickel levels present in the soil on the property owned by him and Smith at 91 Rodney Street. Actual sampling of the property took place on June 8, 2000.

Trial Decision, *supra* at para 6 at para 30.

15 Smith and Edwards received the results of the soil testing on September 20, 2000. It was revealed that the nickel levels were between 4 300 ppm and 14 000ppm, which exceeded the MOE guideline of 200 drastically. The high readings initiated a Human Health Risk Assessment (HHRA) for the RSA.

Trial Decision, *supra* at para 6 at para 31.

16 In earlier portion of the year 2000, Inco, the Regional Niagara Public Health Department (PHD), and the City of Port Colborne agreed to undergo a Community Based Risk Assessment (CBRA) which is regulated by the government and determines the quantum of risk posed to human and plant life.

Trial Decision, *supra* at para 6 at para 32.

17 As part of the CBRA and the HHRA for the RSA, the MOE tested soil in the RSA in the fall of the year 2000, and followed up with some additional sampling the next year which totalled approximately 2000 soil samples from 200 properties located in the RSA.

Trial Decision, *supra* at para 6 at para 33.

18 After September 2000, there was a great deal of publicity pertaining to the distressing magnitude of soil contamination. This information was distributed in the local newspapers and/or delivered to local residents including potential side effects and health concerns involved with the excessive concentrations of nickel in the soil. The public disclosures were mainly initiated from the MOE but also were distributed by Inco and the PHD. Three drafts of the

HHRA of the RSA were distributed to the public in March 2001, October 2001, and March 2002. All disclosures of any information included received a great deal of public attention and were highly publicized.

Trial Decision, *supra* at para 6 at para 34.

19 In March 2002, the HHRA for the RSA declared that the intervention level for soil should be set at 8000 ppm, which was the level indicated "to protect toddler aged children". Inco received an order to replace the soil on properties with contamination levels over 8000 ppm, and this process was referred to as remediation. Twenty-five properties were designated for remediation and 5 were remediated in 2002. An additional 19 properties were remediated between August and December 2004, with the only property not having been remediated being the Smith property.

Trial Decision, *supra* at para 6 at para 35.

20 Since January 2000, there has been several public meetings, discussions about nickel contamination, media coverage, local newspapers and other informational outlets. The fact that the City of Port Colborne experienced concerning levels of contamination across portions of its city were well known and well publicized, including national media coverage during 2001 and 2002.

Trial Decision, *supra* at para 6 at para 36.

21 In December 2003, a study was released that compared the hospitalization of those in Port Colborne to 35 other communities in Ontario. In particular, 19 medical conditions related to toxins that Inco has admitted to releasing were examined. Port Colborne tested much higher for five of the tested ailments, and also had marginally high rates of other acute respiratory infections, asthma, kidney, bladder and genital problems. For some diseases, Port Colborne came in around 50 percent higher than the rest of the province.

CBC News "Disease rates higher, Port Colborne study shows" *CBC News* (12 December 2003) online: CBC News Toronto <http:///www.cbc.ca/news/canada/story/2003/12/12/to_inco20031212.html> [*CBC News*].

QUESTIONS IN ISSUE

22 Did the Ontario Court of Appeal err in holding that Inco was not liable in private nuisance for material physical damage. In the alternative, is Inco liable for private nuisance for private nuisance for personal inconvenience and injury to health.

23 Did the Ontario Court of Appeal err in holding that Inco was not liable under the rule in *Rylands v Fletcher*.

24 Is Inco liable for "loss or damage" for personal injury, enjoyment of property, and pecuniary loss under s. 99(2) of the Environmental Protection Act.

PART II -- ARGUMENT

25 Damages were incurred through material damage to property as well as injury to health, resulting in an infringement on property rights and a loss of reasonable enjoyment.

26 Inco is liable for such damages in private nuisance and under the rule in *Rylands v Fletcher*. In the alternative, Inco should be held liable for damages as a result of its violation of the Environmental Protection Act.

A. The Court of Appeal erred in holding that Inco is not liable in private nuisance for material damage to property

(i) Inco is liable for any material damage caused to the complainants' property resulting from it's actions

27 Private nuisance law is meant to protect people from interference with the use, enjoyment and comfort of their land, and is frequently used to deal with odour, fumes, noise, and smoke emanating from the defendant's land. It is similarly appropriate to used private nuisance law to deal with chemical seepage emanating from the defendant's land.

Philip H. Osborne, *Law of* Torts, 4th ed (Winnipeg, Manitoba: Irwin Law, 2011) at 377-378 [*Law of Torts*].

28 There are elevated levels of nickel on the class members' land which amount to a contamination. It is uncontested that Inco is the source of the vast majority of this contamination.

Trial Decision, *supra* para 6 at para 19.

29 Liability for private nuisance is still predominantly a tort of strict liability. Unlike in trespass law, there is no requirement for the interference with the land to be intentional or even foreseeable.

Law of Torts, *supra* at para 29 at 378.

30 Taking "all possible care and skill ... to prevent the operation complained of", specifically complying with MOE regulations regarding emission levels, is not a defence to private nuisance. Moreover, such care does not prevent the operation from amounting to a nuisance. Any material damage done to the claimants' property is therefore within the scope of liability, despite Inco's compliance with all MOE regulations in place at the time its refinery was operational.

Russell Transport Ltd v Ontario Malleable Iron Co Ltd, [1952] OR 621 (HC) at para 628 [*Russell Transport*].

(ii) Material damage was caused to the complainants' property

31 In *St Helen's Smelting Co*, the Lord Chancellor refers to "material injury" or "sensible injury to the property", of which interference affecting the value of property is referenced as an example. The claimants' property has had an atypical increase in value when compared to similar properties in similar towns; effectively amounting to a decrease in property value. This decrease in property value is a direct result of the nickel contamination and is therefore an appropriate interference to constitute material injury.

St Helen's Smelting Co v Tipping (1865), 11 HLC 642 at para 650-51 [*St Helen's*].

32 Damage that amounts to a material injury must be material, actual and readily ascertainable. A change may be readily ascertainable without a noticeably visible change to the property if it is such a change that is measurable through established scientific techniques.

Smith v Inco, 2011 ONCA 628 (CanLII) at para 50 referencing *Gaunt v Fynney* (1872), LR 8 Ch App [*Appeal Decision*].

33 The Ministry of the Environment ("MOE") conducted a scientific study, completed in 2002, indicating a significant change in the chemical composition in the soil; specifically an increase in the nickel content of the soil in varying degrees. Nickel is considered one of the most dangerous chemicals, having a negative effect on soil enzymes and the tendency to cause permanent soil contamination. Nickel, copper and zinc compounds have been found to increase soil acidity to the highest degree. Under acidic conditions, contaminants become more mobile and have an increased risk of making their way into groundwater, compounding the risk of human exposure to nickel.

Appeal Decision, *supra* at para 32 at paras 52-53.

Russell Transport, *supra* para 30 at paras 625-26.

"Public Health Statement Nickel" Department of Health and Human Services (August 2005), online: Agency of Toxic Substances and Disease Registry <http://www.atsdr.cdc.gov/toxprofiles/tp15-c1-b.pdf> [*Public Health Statement*].

J Kucharski, E Boros & J Wyszkowska, "Biochemical Activity of Nickel-Contaminated Soil" [2009] 18 Polish J of Environ Stud 1039 [*Biochemical Activity of Nickel-Contaminated Soil*].

34 Mere chemical alteration of the content of soil can amount to physical harm or damage to property. It is the submission of the appellant that while small additional of specific nutrients may temporarily enhance the composition of soil, excess amounts of chemical substances can,

and in this case did, cause irreparable damage. ‘Fertilizer’ refers to “any compound that contains one or more chemical elements ... that is placed on or incorporated into the soil ... to achieve normal growth”. Nickel is not known to be essential for plant growth, nor has is been shown to have any beneficial effects of plant growth. Adversely, while nickel does exist naturally in small amounts in soil, the accumulation of excess nickel has been found to disrupt enzymatic activity and microbial counts.

> Dr Ross McKenzie “Crop Nutrition and Fertilizer Requirements” (1998), online: Government of Alberta <http://www1.agric.gov.ab.ca/$department/deptdocs.nsf/all/agdex3791/$file/540-1.pdf?OpenElement> [*Crop Nutrition*].
>
> *Biochemical Activity of Nickel-Contaminated Soil*, *supra* para 33.

(iii) The material damage caused to the complainants’ property constitutes a loss of property rights for which damages are an appropriate remedy.

35 The real estate bundle of rights includes the right to use, enjoy, control, and dispose of property. The right to dispose of property is encompassed in the right to sell, when the property owner wants to sell, at fair market value. The property owner’s right to dispose is diminished or lost when they cannot sell at full market value at a time of their choosing.

> Robert A Simons & Ron Throupe, “Debundling Property Rights for Contaminated Properties: Valuing the Opportunity Cost of the Right to Sell, Using Cumulative Options” online: (2012) International Real Estate Review at 2-4 <http://burns.daniels.du.edu/papers%5CIR1145%20debundling_prop_rights%20(Simons%20&%20Throupe).pdf> [*Debundling Property Rights*].

36 The claimants’ homes failed to appreciate at a similar rate as homes in comparable communities. Specifically, property values in Welland, Ontario, the most comparable community to Port Colborne, appreciated at a rate significantly higher than that of the complainants’ properties. The valuation of property value is most accurately measured on a large-scale model that incorporates the values both of properties sold and properties not sold in a given year. Valuating property based on any other model effectively ignores the fact that property owners can recognize a loss without a sale. This loss can come as a result of unrealized capital loss, diminished income or other rights.

> *Appeal Decision*, *supra* at para 32 at paras 118 – 121.
>
> *Debundling Property Rights*, *supra* at para 35 at 3.

37 To exclude the valuation of the 314 vacant building lots on the west side of Port Colborne from the calculation of the average residential property value assumes that all other comparable

communities contain no un-assumed properties; and assumption that the appellant submits in an error in principle. Any calculation of an average residential property value must take into consideration the value of all properties for which an occupant holds a bundle of rights, and which is classified as a residential property. During the period before 1999 and after 2003, these 314 lots were classified as residential properties. The data suggests that in comparison of property values in 1999 and 2001, even with these properties included in the analysis, Port Colborne outperformed Welland in property value. It can therefore be concluded that the inclusion of these lots does not unfavourably skew the data, as the Court of Appeal would suggest. Additionally, while 2001 was the year immediately following the discovery of contamination, it is not the most critical year. The most critical years are 1999, prior to the announcement of nickel contamination, and 2008, the most current year on record. To argue that a loss of property rights that exist current should be dismissed because it may not have existed, even to the same extent, in the past is inherently flawed.

Appeal Decision, *supra* at para 32 at paras 130-138.

38 The appropriate remedy for diminished property rights resulting from soil contamination is damages. Although remediation was ordered by the MOE for certain properties with the highest levels of nickel contamination, this remedy did not serve to address the loss of property rights, nor did it have an effect on property values. The only instance in which the complainant seems not to be able to recover the diminished value of the land is when damage is not permanent. When dealing with soil contamination, even when remediation takes place, all of the contaminant is not removed, leaving the soil contaminated to some degree forever. The only reasonable remedy is damages.

Butt v Oshawa (City) (1926), 59 OLR 520, [1926] 4 DLR 138 (Ont CA) at 526.

Trial Decision, *supra* at para 6 at para 101.

Huston v Lloyd Refineries Ltd (1937), 1937 CarswellOnt 120, [1937] OWN 53 (Ont HC).

Beckette v Midland Railway Company (1867), LR 2 CP 82.

B. Inco should be held liable in private nuisance under the branch of personal inconvenience and injury to health.

(i) Personal inconvenience and adverse health effects resulted from the nickel contamination of the complainants' property.

39 Adverse health effects of exposure to nickel depend upon the exposure period (acute, subchronic, or chronic) as well as the route of exposure (inhalation, oral, or dermal). The dangers of exposure in the RSA are predominantly through oral or dermal routes; however, inhalation is not entirely impossible. There is a risk of exposure to nickel in soil through skin contact, as well as a risk of oral exposure in children through soil. Moreover, nickel has been known to accumulate in plants, putting property owners who use a portion of their property for gardening at a higher risk of exposure.

> *Public Health Statement, supra* at para 33 at 4.
>
> KK Das, SN Das & SA Dhundasi, "Nickel, its adverse health effects & oxidative stress" (2008) 128 Indian J Med Res 412 at 414 [*Nickel*].

40 The risk of exposure to nickel through inhalation is significantly less than the risk of exposure through other routes as a result of the nickel refinery plant no longer being active. However, this does not mean that there is no risk to exposure through inhalation. Contaminants, once they are in soil, can move downward through soil by gravity and water percolation. These contaminants can be brought back to the surface through plant uptake and tunnelling by ants and earthworms. Through the water cycle, contamination at the surface of soluble nickel compounds can be released back into the atmosphere and pose a risk to human health.

> U.S. Department of Housing and Urban Development, "Soil Investigation and Human Health Risk Assessment for the Rodney Street Community, Port Colborne: March 2002" (2001) *National Survey of Lead and Allergens in Housing Final Report, Volume I: Analysis of Lead Hazards.* HUD Contract Number C-OPC-21356 U.S. Department of Housing and Urban Development at 30 [*Soil Investigation*].

41 In a residential neighbourhood, exposure to nickel due to soil contamination would be most commonly classified as chronic (100 days or more). Chronic exposure to any harmful substance has a greater effect on human health than acute or one time exposure.

> *Nickel, supra* at para 39 at 414.

42 The most common harmful effect of nickel exposure is an allergic reaction, usually in the form of a skin rash. The metal is however also a potential immonomodulatory and immunotoxic agent in humans, and all nickel compounds, except metallic nickel, are human carcinogens.

Exposure to high concentrations of nickel through inhalation have resulted in chronic bronchitis and lung fibrosis. Exposure through contact can allow nickel to enter into the bloodstream. Once nickel enters your body it can travel through the bloodstream to all organs. In case studies involving animals and women exposed to high concentrations of nickel, increased rates of spontaneous abortion have also been observed.

> *Nickel*, *supra* at para 39.
>
> *Public Health Statement*, *supra* at para 33.
>
> Kasprazak KS, Sunderman FW Jr & Sainikow K, "Nickel Carcinogenesis" (2003) 533 Mutation Research / Fundamental and Molecular Mechanisms of Mutagenesis, 65 at 67-69.

(ii) Inco is liable for any personal inconvenience and injury to health on a balance of external factors.

43 The law of nuisance is divided into two branches; (1) material physical damage to property, as set out above, and (2) significant interference with beneficial use of the property, considered to be personal inconvenience or injury to health. When nuisance is pursued under this second branch, courts have concluded that external factors should be balanced in order to determine the culpability of the defendant. In the present case, this balance amounts to a weighing of Inco's apparently compliance with MOE regulations against the dangers of human exposure to nickel, particularly in high concentrations.

> *Trial Decision*, *supra* at para 6 at paras 77-80.
>
> *St Helen's*, *supra* at para 31.
>
> *Kent v Dominion Steel & Coal Corp.* (1963), 50 MPR 221, 49 DLR (2d) 241, at para 20.

44 The danger presented by human exposure to nickel far outweighs Inco's compliance with MOE regulations. The MOE regulates stack emissions; however, the elevated metals in the soil in the RSA occurred by a combination of stack emissions, fugitive emissions, and aggregate process waste landfilling.

> Inco had fugitive emission that escaped from windows, doors, roof vents and from on-site contamination that was re-entrained and dispersed by traffic. Fugitive emissions were uncontrolled, can be as great or greater in magnitude then stack emissions, and tend to have the most significant impact on the local environment adjacent to the industry. In addition, it was not uncommon in the past for process waste to get placed locally to fill low areas or level land for subsequent building, or for employees to take aggregate-like waste for home construction projects.

The hazards of human exposure to high concentrations of nickel are severe, and in order to outweigh the risk, severe measures must have been taken to prevent the escape of nickel emissions. The combination of fugitive emissions and aggregate process waste landfilling indicates that Inco did not take severe action to prevent contamination, and therefore have a greater culpability.

Soil Investigation, *supra* at para 40 at 30.

(iii) Damages are the only appropriate remedy for injury to health

45 Injury to health is a long-term effect that has a vast impact on an individual's life. Even where other forms of remedy, such as injunction, are available, a remedy short of damages cannot adequately compensate for the injury caused. An injunction may force a defendant to cease the activity, but a mere stoppage of the detrimental activity cannot erase the injury that has already been done. Damages, in contrast, can compensate the complainant for injury that has been suffered, and must also be included. No injunction is required where the harmful activity has long since been abandoned; however, in order to properly compensate for injury to health caused by that activity, damages are still a necessary remedy.

C. Inco should be held liable under the rule in Rylands v Fletcher

(i) Both elements for establishing the strict liability set out in *Rylands v Fletcher* are met

46 In *Rylands v. Fletcher* (1866), L.R. 1 Ex. 265, aff'd (1868), L.R. 3 H.L. 330, the court had determined that,

> "the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of vis major, or the Act of God."
>
> *Rylands*, *supra* at para 2 at 279-280.

47 In his decision, Lord Cairns held that the two primary elements for establishing the strict liability are a) the non-natural use of land, and b) the escape of a substance likely to cause mischief. The first prong of this test was Lord Cairns declared that, "no liability could be imposed for the *natural* run off of water from higher land to the lower land...however, the defendant had collected water artificially, and a strict liability claim was appropriate for this *non-natural* use of the land." Thus, "non-natural use" was broadly defined, but was narrowed by the court in *Rickards v. Lothian.* Here, the Privy Council held that a non-natural use of the land was

a, “special use [of land] 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.”

Law of Torts, *supra* at para 27 at 343.

Rickards v Lothian [1913] AC 263 (PC) at para 280.

48 The type of case that may qualify as an appropriate case for the application of the rule from *Rylands v. Fletcher* in a Canadian context can be found in *Mihalchuk v. Ratke*. In this case the defendant’s aerial spraying of pesticides was found not to be a natural use of the land because of the method that was deplored, since the aerial procedure was not commonplace at the time. In *Gertsen v. Metropolitan Toronto (Municipality of)*, the defendant municipality put garbage in a landfill next to a residential area. The end result was the accumulation of methane gas in the plaintiff’s garage which ignited when he started his car causing injuries to him. “The court found that this was a non-natural use of the land. Special emphasis was placed upon the time, place, and circumstances of the land use. The landfill was located in a small ravine in a residential neighbourhood, and there was no compelling public need to have used this particular area ”.

Mihalchuk v Ratke (1966), 57 DLR (2d) 269 (Sask QB).

Gertsen v Metropolitan Toronto (Municipality of) (1973), 2 OR (2d) 1 (HCJ).

Law of Torts, *supra* at para 27 at 345.

Rylands, *supra* at para 2.

49 The case at bar did not involve a mine, but rather a refinery. There was no compelling reason for having the refinery in a residential area as it was. The property bordered the easterly terminus of Rodney Street, which was a residential area, and obviously in too close in proximity since the nickel contamination of the soil occurred. This refinery could have easily been located elsewhere in a location where the contamination would have been in a more remote area where human and plant life would not have been harmed. Thus, premised on the jurisprudence, the use of the land by Inco was a non-natural use of the land.

Trial Decision, *supra* at para 6.

50 The second prong of the test for the rule in *Rylands v Fletcher*, the escape of a substance likely to cause mischief, was satisfied by the escape of a nickel compound in any form other than its metallic version. Nickel is a known hazardous contaminant and carcinogen It was evident that the escape occurred because of the visible smoke billowing out of the top of the factory, and

the high nickel concentrations present in the soil. Inco also accepted responsibility that the concentration in the soil was primarily caused by their operations.

Public Health Statement, *supra* at para 33.
Nickel, *supra* at para 39.
Soil Investigation, *supra* at para 40 at 30.

Rylands, *supra* at para 2.

(ii) Inco could reasonably foresee the adverse effects of nickel emissions on surrounding properties

51 Additional considerations may include treatment in England of the subject matter, namely in the form of a foreseeability element as per *Cambridge Water Co. Ltd. v. Eastern Counties Leather plc*. In this case, a tannery seeped perchloroethene (PCE) into a water table owned by the plaintiff, who was a water bottling company. The court held that the ensuing damages were unforeseeable and ultimately declared it an invalid application of the rule in *Rylands v. Fletcher*. In assessing this case, it is important to consider that no case in Ontario has adopted such a requirement for the application of the rule.

Cambridge Water Co Ltd v Eastern Counties Leather plc, [1994] 2 AC 263 (PC) [*Cambridge Water*].
Appeal Decision, *supra* at para 32 at para 58.
Rylands, *supra* at para 2.

52 The escape of pollutants from Inco was visible to the naked eye, consequently placing liability on Inco even if a foreseeability element were adopted. Furthermore, in *Cambridge*, knowledge of the harmful of PCE were unknown prior to 1980, and the action was brought in 1982, which would have given the defendant no notice of the potential harm caused by its actions. In the case at bar, emission regulations by the MOE commenced in the 1970's, yet nickel refining activities continued through 1984. This would imply that Inco was aware of the potentially harmful environmental effects of its activities, but nonetheless proceeded to emit its pollutants into the environment for over a decade. Thus if an interpretation of the Ontario laws were made to include a foreseeability element to the test from *Rylands v. Fletcher,* then that element would be satisfied. Pollutants emitted can be reasonably foreseen to have harmful effects on adjacent and other properties within close proximity of the source of the emissions, namely the Inco refinery.

Trial Decision, *supra* at para 6.

Cambridge Water, *supra* at para 51.

Rylands, *supra* at para 2.

(iii) Exposure to pollutants caused harm to the complainants for which damages are an adequate remedy

53 The damages of the case at bar can be adequately stated as the increased exposure to the pollutants emitted from the refinery, coupled with the increased adverse health effects, manifested in the "higher than average" hospitalization rates present in Port Colborne for illnesses related to the excess absorption of toxic particles which Inco has admitted to emitting from their refining operations. Additionally, or in the alternative if the prior grounds for damages is denied, the diminution in property value which was ascertained will give rise to damages equal to the compensation of the lost appreciation of properties as was stated in the trial court decision of the case at bar.

CBC News, *supra* at para 21.

D. The complainants have a right to compensation under s. 99(2) of the Environmental Protection Act

54 The Environmental Protection Act provides a right to compensation to any person for the spill of a pollutant that causes, or is likely to cause an adverse effect. A pollutant, for purposes of the act, means a contaminant other that heat, sound, vibration or radiation, inclusive of any substance from which a pollutant is derived. Nickel is a pollutant within the meaning of the act. A spill, for purposed of the act, means a discharge (a) into the natural environment, (b) from or out of a structure, vehicle or other container, and (c) that is abnormal in quantity in light of all circumstances of the discharge. The soil contained in the complainants' properties falls into the category of 'natural environment'. Therefore, a discharge of nickel into the soil contained in the complainants' properties constitutes a spill of a pollutant that caused an adverse effect.

Environmental Protection Act, RSO 1990, c E-9 s 90(1) and s 99(2) [*EPA*].

(i) The complainants suffered damage incurred as a direct result of the spill of a pollutant

55 For purposes of the act, loss or damage "includes personal injury, loss of life, loss of use or enjoyment of property and pecuniary loss, including loss of income". It stands to reason that loss or damage would hence be inclusive of injury to health as well as loss of property rights. The complainants suffered adverse effects as a direct result of the nickel contamination in the

form of decreased property value, amounting to a loss of property rights, as well as loss of enjoyment due to adverse health effects.

EPA, *supra* at para 54 at s 99(1).

56 The chemical alteration of the soil, caused by nickel contamination, amounts to a material, permanent damage to property. As a direct result of the pollution, the complainants' property rights were diminished in the sense that they no longer held the right to dispose of their property at fair market value at a time of their choosing.

(ii) Inco failed to take all reasonable steps to prevent the spill of the pollutant. Additionally, the spill was not caused by any act of war, natural phenomenon or omission by another.

57 Thus, as indicated by the MOE report, Inco's failure comply with this provision of the EPA would support the establishment of prima facie liability, and would give rise to damages amounting to the figure awarded by the trial judge which adequately reflected the diminution in property value, and damages adequate for the compensation of personal injury to those hospitalized as a result of illnesses arising from overexposure to the toxins emitted by Inco.

Soil Investigation, *supra* at para 40.

PART III -- SUBMISSIONS IN SUPPORT OF COSTS

58 The Appellant makes no submissions with respect to costs.

PART IV -- ORDER SOUGHT

59 The Appellant respectfully requests that the Order of the Court of Appeal allowing the appeal be set aside. The Appellant requests that the Order for damages be restored.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of January, 2013.

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Denise Junkin

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Matthew Patullo

Counsel for the Appellant
Ellen Smith

PART V -- TABLE OF AUTHORITIES

Paragraph No.

Legislation

Jurisprudence

Secondary Sources

Dr Ross McKenzie “Crop Nutrition and Fertilizer Requirements” (1998), online: Government of Alberta <http://www1.agric.gov.ab.ca/$department/deptdocs.nsf/all/agdex3791/$file/540-1.pdf?OpenElement>.....34

J Kucharski, E Boros & J Wyszkowska, “Biochemical Activity of Nickel-Contaminated Soil” [2009] 18 Polish J of Environ Stud 1039.....33, 34

Kasprazak KS, Sunderman FW Jr & Sainikow K, “Nickel Carcinogenesis” (2003) 533 Mutation Research / Fundamental and Molecular Mechanisms of Mutagenesis, 65.....42

KK Das, SN Das & SA Dhundasi, “Nickel, its adverse health effects & oxidative stress” (2008) 128 Indian J Med Res 412 at 414.....39, 41, 42, 50

Philip H. Osborne, *Law of* Torts, 4th ed (Winnipeg, Manitoba: Irwin Law, 2011).....27, 29, 47, 48

“Public Health Statement Nickel” Department of Health and Human Services (August 2005), online: Agency of Toxic Substances and Disease Registry <http://www.atsdr.cdc.gov/toxprofiles/tp15-c1-b.pdf>.....33, 39, 42, 50

Robert A Simons & Ron Throupe, “Debundling Property Rights for Contaminated Properties: Valuing the Opportunity Cost of the Right to Sell, Using Cumulative Options” online: (2012) International Real Estate Review <http://burns.daniels.du.edu/papers%5CIR1145%20debundling_prop_rights%20(Simons%20&%20Throupe).pdf>.....35, 36

U.S. Department of Housing and Urban Development, “Soil Investigation and Human Health Risk Assessment for the Rodney Street Community, Port Colborne: March 2002” (2001) *National Survey of Lead and Allergens in Housing Final Report, Volume I: Analysis of Lead Hazards*. HUD Contract Number C-OPC-21356 U.S. Department of Housing and Urban Development.....39, 44, 50, 57

LEGISLATION AT ISSUE

Environmental Protection Act
R.S.O. 1990, c.E.9

Interpretation and application, Part X

91. (1) In this Part,

"pollutant" means a contaminant other than heat, sound, vibration or radiation, and includes any substance from which a pollutant is derived;

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

(a) into the natural environment,

(b) from our out of a structure, vehicle or other container, and

(c) 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;

Compensation, spills

99. (1) In this section,

"loss or damage" includes personal injury, loss of life, loss of use or enjoyment of property and pecuniary loss, including loss of income.

Right to compensation

(2) Her Majesty in the right of Ontario or in right of Canada or any other person has the right to compensation,

(a) for loss or damage incurred as a direct result of,

(i) the spill of a pollutant that causes or is likely to cause an adverse effect,

(ii) the exercise of any authority under subsection 100(1) or the carrying out or attempting to carry out a duty imposed or an order or direction made under this Part, or

(iii) neglect or default in carrying out a duty imposed or an order or direction made under this Part;

(b) for all reasonable cost and expense incurred in respect of carrying out or attempting to carry out an order or direction under this Part,

from the owner of the pollutant and the person having control of the pollutant.

Exception

(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 or if they establish that the spill of the pollutant was wholly caused by,

(a) an act of war, civil war, insurrection, an act or 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.

Qualification

(4) Subsection (3) does not relieve the owner of the pollutant or the person having control of the pollutant,

(a) from liability for loss or damage that is a direct result of neglect or default of the owner of the pollutant or the person having control of the pollutant in carrying out a duty imposed or an order or direction made under this Part; or

(b) from liability, under clause (2)(a), for cost and expense incurred or, under clause (2)(b), for all reasonable cost and expense incurred,

(i) to do everything practicable to prevent, eliminate and ameliorate the adverse effect, or

(ii) to do everything practicable to restore the natural environment,

or both.

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 APPELLANT ELLEN SMITH

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