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 #02

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 main issue in this case is whether the respondent is liable for the mere addition of a substance to a property without causing material harm. The respondent, Inco Ltd. ("**Inco**"), ran a nickel refinery in Port Colborne from 1918 until 1984, employing up to 2000 people at the height of its operations. Despite meeting or exceeding all applicable regulations, nickel particles accumulated in the surrounding properties over 66 years of the refinery's operation.

2 The Ministry of the Environment ("MOE") conducted several well-publicized studies of the area. After some properties were found to have elevated nickel concentrations, the MOE recommended remediation to a level well below one where potential health effects could arise. Inco voluntarily remediated 24 of the 25 properties. Ms. Ellen Smith ("**appellant**") did not consent to remediation. Despite the remediations, substantial media coverage of the matter caused public concern.

3 The central dispute in this case is whether Inco is liable for a diminution in property values as a result of concern over regulated emissions from decades prior. The appellant, a group of local residents represented by Ms. Smith, argues that public concern over elevated concentrations of nickel in the soil caused their property values to decline. Inco submits that no existing legal principle can support liability absent either a wrongdoing or a material harm.

4 The trial judge found for the appellant under both nuisance and strict liability. The Court of Appeal reversed this decision, dismissing the nuisance claim on the basis that material physical injury did not occur. The Court of Appeal correctly applied a narrow interpretation of strict liability under *Rylands v Fletcher* to determine that Inco made ordinary use of the land.

5 Inco respectfully submits that public concern does not on its own support an action in nuisance. Additionally, the test for liability under *Rylands v Fletcher* is narrow and cannot apply where substances that are not dangerous are intentionally released. Allowing the plaintiff to recover for harm that has not occurred is inconsistent with tort law principles and would unduly expand the scope of nuisance liability. The need for certainty within the law militates against introducing new causes of action other than through the legislature.

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

6 We concede paragraphs 6-20 of the appellant's statement of facts.

> Appellant's Factum, Team #9-2013, moot materials [Appellant's Factum].

7 The studies referred to in paragraph 21 were never adduced at trial, and Inco was never given a chance to evaluate and respond to them. We would add the following:

- The appellant's property has not been remediated only because she has elected not to allow Inco's agents to proceed with the relevant operations.

  > *Smith v Inco Ltd*, 2011 ONCA 628, 107 OR (3d) 321 leave to appeal to SCC refused, 34561 (April 26, 2012), at para 17 [*Inco 2011*].

- Throughout the refinery's operations, Inco consistently complied with or exceeded all environmental and other applicable regulations.

  > *Inco 2011*, at paras 6-9.

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

8 Inco submits that:

1) the Ontario Court of Appeal was correct in finding Inco not liable under private nuisance;
2) the Ontario Court of Appeal was correct in finding Inco not liable under strict liability as formulated in *Rylands v Fletcher*;
3) no other cause of action advanced by the appellants is a desirable addition to Canadian nuisance law; and,
4) no other cause of action advanced by the appellant succeeds in supporting their claim.

PART III -- ARGUMENT

A. Material Physical Damage to the Appellant's Land Has Not Been Established

9 The Court of Appeal was correct in holding that material physical damage has not occurred. Inco acknowledges that elevated concentrations of nickel on the appellant's property are the result of its nickel refining operation. However, a mere increase of a naturally-occurring substance does not constitute material physical damage under Canadian law.

Inco 2011, *supra* para 7 at para 27.

(i) *Physical Damage Must be Material, Actual and Readily Ascertainable*

10 To be compensable under a claim for material physical damage, harm to a plaintiff's land must: (a) be more than trivial, (b) have already occurred and (c) be measurable. A principal rationale of tort law is to provide compensation for an observable wrong which has taken place. The Court of Appeal held that damage amounting to a material injury must be "material, actual and readily ascertainable." Phrased similarly by the court in *McKinnon Industries v Walker*, the damage must be "sensible, visible and material."

Inco 2011, *supra* para 7 at para 49.

McKinnon Industries v Walker, [1951] 3 DLR 577, WN 401 (PC).

(ii) *The Requirement of Actual Damage Has Not Been Met*

11 Theoretical and potential risk does not equate to actual physical damage. As established in *Walker* and upheld by the Court of Appeal in the present case, the damage complained of must be 'actual' in the sense of having already occurred. This approach is supported by general legal principles. Tort law is intended to provide compensation for past actions which caused the plaintiff harm. Compensation under material physical damage cannot be provided for potential future harm in the absence of any known physical damage to the appellant's property.

Inco 2011, *supra* para 7

Philip Osborne, *The Law of Torts*, 3rd ed (Toronto: Irwin Law, 2007), at 362. [*Osborne*]

12 Actual damage to the appellant's land has not occurred. Altered chemical composition of the soil does not equate to detrimental effect on the land. The appellant asserts that "mere chemical alteration of the content of soil can amount to physical harm or damage to property." Inco submits that a mere alteration cannot be considered material physical damage, absent an actual negative effect. Additionally, the "risks" mentioned by the appellant are possibilities of future harm; no actual harm has occurred. The appellant translates these risks into an assumption that "irreparable damage" to the soil has occurred. This is not an appropriate legal standard.

Appellant's Factum, *supra* para 6 at paras 33-34.

Inco 2011, *supra* para 7 at para 57.

(iii) *A Loss in Property Value Does Not in Itself Indicate Actual Damage to the Land*

13 The Court of Appeal correctly engaged in a two-stage analysis of material damage to land. The appellant must show: (a) an actual, physical and ascertainable damage to the land, and (b) a corresponding economic loss in property value. The appellant bases a substantial portion of their argument on the loss in property value due to public concern over the effects of nickel exposure. Yet as the Court of Appeal correctly pointed out, physical injury to the land itself has not been established.

Inco 2011, *supra* para 7 at para 56.

14 The trial judge erred in adopting a circular causation argument, bypassing the requirement of actual physical damage within a claim for material physical damage. According to Justice Henderson, "if nickel has accumulated on the class members' properties in such amounts so as to negatively affect the values of the properties, then the physical damage to the properties is material." The Court of Appeal correctly asked whether the elevated nickel concentrations caused physical harm to the land. Since this was not established, the property value diminution was not compensable.

Smith v Inco Ltd, 2010 ONSC 3970, 52 CELR (3d) 74, rev'd 2011 ONCA 628 at paras 87-88 [*Inco 2010*].

Inco 2011, *supra* para 7 at para 56.

15 The Court of Appeal's line of reasoning is consistent with the approach taken in *Shuttleworth*, which dealt with a loss in property value through concerns of a possible spread of infection from the construction of a nearby hospital. The court in *Shuttleworth* stated that the plaintiff must prove "not only widespread belief but that such belief…[is] well founded in fact." A depreciation in property value was considered merely evidence of a fear, not actual damage. The court in *Shuttleworth* declined to compensate for a loss in property values caused by concern which had not "been occasioned by any legal wrong." The court held that the act in question must have been both tortious and hurtful. The appellant in the present case has failed to demonstrate that actual damage to the land has in fact taken place, and should not recover for mere public concern.

Shuttleworth v Vancouver General Hospital, [1927] 2 DLR 573 (BCSC), 1 WWR 476 at paras 8-9.

Inco 2011, *supra* para 7 at para 67.

(iv) *The Established Tests are Necessary Guards Against Potentially Unlimited Liability*

16 A decision in favour of the appellant would establish a dangerous precedent allowing for recovery on the basis of economic loss suffered from concern alone, absent any actual physical harm done by a defendant. According to the reasoning of the trial judge, the respondent would be liable for physical damage by adding "even one particle of any substance to a neighbour's property." This would unduly expand the scope of civil liability in nuisance claims.

> *Smith v Inco Ltd*, leave to appeal to SCC refused, 34561 (April 26, 2012), "Inco's Memorandum of Argument in Response to the Plaintiff's Application for Leave to Appeal" at para 28.

17 A finding of material damage to property without the presence of actual physical damage unduly prioritizes the interest of the plaintiff property owner over the defendant's interest in making fair use of his own land. As noted by the Supreme Court in *St. Pierre v Ontario*, the fundamental tension running through the law of nuisance is:

> to strike a tolerable balance between conflicting claims of landowners, each invoking the privilege to exploit the resources and enjoy the amenities of his property without undue subordination to the reciprocal interests of the other.

Holding Inco liable in this instance would lead to an unjustifiable imbalance between the rights of the two property owners. The appellant argues for compensation for a loss sustained due to public concern. That analysis directs all attention to the interests of the plaintiff while distracting from the central feature of this case: Inco's actions did not result in material physical harm to the appellant's land. The first stage of the Court of Appeal's analysis explicitly examines the relationship between the negative effect experienced by the appellant and the actions of the respondent. The court's reasoning sustains the principle that the actions of a defendant which fail to result in any material harm to the plaintiff should not lead to liability.

> *St. Pierre v Ontario (Minister of Transportation and Communications)*, [1987] 1 SCR 906, 45 RPR 298 at para 7.

B. The Appellant's Novel Claim of Personal Inconvenience and Injury to Health Cannot be Considered

(i) *The Court Does Not Have the Jurisdiction to Consider this Claim*

18 The appellant has advanced a newly pleaded argument that the health risks of nickel render Inco liable through personal inconvenience and injury to health. However, this Court is unable to consider this claim as it was not asserted by the appellants at the trial or appellate level.

> *Inco 2010, supra* para 14 at para 76.

(ii) *The Factual Record Cannot Support this Novel Claim Being Advanced at an Appellate Level*

19 The trial judge did not make any findings on the health risks or effects of nickel. Inco is unable to properly address this claim given the lack of factual evidence on the record. If the Court were to make factual findings on this issue, it would distort the mandate of an appellate court to consider questions of law and not of fact. The only claim available to the appellant should be the properly pleaded one of material physical damage to property.

Appellant's Factum, *supra* para 6 at para 5.

Inco 2010, supra para 14 at para 12.

(iii) *In the Alternative, if this Claim were Considered, External Factors Support the Respondent*

20 The presence of elevated levels of a naturally occurring substance does not constitute a significant inconvenience to the appellant. The Court is required to consider the circumstances and utility of the respondent's conduct within a claim for personal inconvenience. As noted by Osborne, Canadian courts have generally taken a "robust approach to the extent of give and take that is required, particularly in an urban environment." As stated by Lord Westbury in *St. Helen's Smelting Co*:

> If a man lives in a town, of necessity he should submit himself to the consequences of his obligations of trade which may be carried on his immediate locality, which are actually necessary for trade and commerce…and for the benefit of the inhabitants of the town and of the public at large.

As the major employer in the Port Colborne area for years, Inco's actions provided a significant benefit to the town. Inco produced a valuable commodity while complying with all relevant environmental and governmental regulatory schemes.

Tock v St. John's Metropolitan Area Board, [1989] 2 SCR 1181, 64 D.L.R. (4th) 620[*Tock*].

Osborne, *supra* para 11.

St Helen's Smelting Co v Tipping, (1865) 11 HLC 642, [1865] UKHL J81 at para 108.

Inco 2011, supra para 7 at paras 6, 9.

C. Strict Liability under *Rylands v Fletcher* is Not Made Out

21 The Court of Appeal for Ontario properly concluded that Inco is not liable under the rule from *Rylands v Fletcher*. This rule imposes strict liability for damage when two conditions are

met: the defendant uses their land in a way that is "non-natural" and a dangerous substance escapes. If both are made out, the user will be liable regardless of negligence. In this test, the phrase "non-natural use" is a term of art meaning not ordinary or appropriate to the circumstances.

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

Inco 2011, *supra* para 7.

22 Since its inception, courts and commentators have sought to clarify the rule in *Rylands v Fletcher* by narrowing its application. Persistent concerns about the boundaries of the rule and its relation to nuisance and negligence have led to its repudiation in Australia (*Burnie*), and thorough narrowing in the United Kingdom (*Transco*). The rule has received relatively little treatment in Canadian appellate courts.

John Murphy, "The Merits of *Rylands v Fletcher*" (2004) 24 Oxford JLS 643.

Burnie Port Authority v General Jones Pty Ltd, (1994) 179 CLR 520 (Aust HC), [1994] HCA 13 [*Burnie*].

Transco plc v Stockport Metropolitan Borough Council, [2003] UKHL 61, [2003] 2 AC 1 [*Transco*].

Inco 2011, *supra* para 7 at paras 68, 70, and 108.

23 In order to succeed on a claim under the rule in *Rylands v Fletcher*, a plaintiff must demonstrate the presence of two broad elements:

(a) a "non-natural" use of the land, meaning a use that is not ordinary (*Rickards*) or appropriate to the time, place and manner of that use (*Tock*); and

(b) an escape of a substance likely to do mischief, meaning an unintentional release of something that is likely to be dangerous if it is escapes (Pun & Hall).

Rylands v Fletcher, *supra* para 21.

Rickards v Lothian, [1913] UKPC 1, [1913] AC 263 [*Rickards*].

Tock v St. John's Metropolitan Area Board, [1989] 2 SCR 1181, 64 D.L.R. (4th) 620 per La Forest [*Tock*].

Gregory S Pun & Margaret I Hall, *The Law of Nuisance in Canada* (Toronto: LexisNexis, 2010) at 132, 137 [Pun & Hall].

Inco 2011, *supra* para 7 at paras 71, 74, 112.

24 Neither of these two broad elements are made out in this case. Inco's refinery was an ordinary use of the land, operating in and benefitting an industrial community for 66 years. It met

or exceeded the relevant regulations and land use plans. The Court of Appeal rightly held that Inco's refinery was an ordinary use of the land because it operated in an industrialized neighbourhood in an appropriate way without creating risks unusual to industrial operations. Additionally, the emission of nickel particles is not an escape of a dangerous substance. Nickel emissions are not dangerous *per se*, and the emissions were intentional rather than accidental.

Inco 2011, supra para 7 *at paras 3, 69, 93, 105, and 114.*

Rylands v Fletcher, supra para 21.

(i) *Inco's Use of its Land was Ordinary, and Not "Non-natural"*

25 The Court of Appeal rightly held that Inco's use of its refinery was ordinary and appropriate to its context. Port Colborne is an industrial town on a major shipping channel. The Inco refinery was a major employer thoroughly engrained in the fabric of the town; the two evolved together. The refinery met or exceeded the standards set by relevant government agencies. The Inco refinery was not "non-natural". To the residents of this town it was "normal, common, everyday, or ordinary" (Linden).

Allen M Linden & Bruce Feldthusen, *Canadian Tort Law*, 8th ed, (Markham: LexisNexis Butterworths, 2006) at 532 [Linden].

26 The guiding statement on the term "non-natural use" in Canadian law comes from the Supreme Court of Canada in *Tock*. After a major rainfall, a blockage in a storm sewer led to flooding of the plaintiff's basement. The Court held that the defendant municipal board was not liable under *Rylands v Fletcher* because the use of the land for a sewer was appropriate to the place. The Court adopted the reasoning of *Rickards* that a "non-natural use" is a special use that brings increased danger to others, rather than an ordinary use or a use for the general benefit of the community. The Court also acknowledged that the increased prominence of governments in land use planning marked a significant departure from the context of *Rylands v Fletcher*.

Tock, supra para 23 at 1189.

Rickards, supra para 23 at 280.

27 The determination of ordinary use must evolve with social context, such as increased urbanization and greater government involvement in regulation and land use planning. The challenge in determining non-natural use is to distinguish between uses the community should tolerate and those where the user should shoulder the burden for accidental or unintended

consequences (*Inco 2011*). Non-natural use also considers the degree of dangerousness and the circumstances of the activity (*Inco 2011*).

Inco 2011, *supra* para 7 at paras 98 and 102.

28 In *Gertsen v Metropolitan Toronto,* the court considered the time, place, manner, and purpose of the land use in determining whether strict liability applied. The Court held it was inappropriate to use the land for a landfill because it was placed in close proximity to residences, and alternative locations were better suited for a landfill. The purpose of the use of that property for a landfill was self-serving and not grounded in logic. In the case at bar, Inco's refinery was located for sound reasons in an industrial area of Port Colborne and near shipping lanes. The refinery and the town evolved and benefitted each other over decades. Unlike *Gertsen,* the character of the neighbourhood was different when this location was chosen.

Gertsen v Metropolitan Toronto (Municipality of), [1973] 2 OR (2d) 1 (HCJ), 43 DLR (3d) 504 at 19-20 [*Gertsen*].

29 Inco's use of the land is consistent with the definitions of ordinary use adopted in *Tock* and *Gertsen*, which considered the time, place, manner, and purpose of the use. Port Colborne is an industrial town. Inco was a well-established component of the community, contributing greatly to the economic and social fabric of Port Colborne. It was a major employer of up to 2,000 people. At the time most nickel particles were released, predominantly before 1960, the public was more accepting of such emissions. The refinery operated in total compliance with all applicable regulations. Finally, the fact that Inco operated for a private purpose does not diminish the community benefits that it generated, and is not dispositive.

Gertsen, *supra* para 28.

Tock, *supra* para 23.

30 When land use involving seemingly dangerous substances becomes ordinary, and its risks are known and regulated, strict liability is no longer appropriate. Inco embraced standards set by the government and the local community, operating beyond compliance and in close conjunction with regulators. The Court of Appeal endorsed the importance of compliance in assessing a non-natural use. The use embodied by these facts does not amount to the dangerous and unusual use that strict liability under *Rylands v. Fletcher* aims to rein in.

Pun & Hall, *supra* 23 at 115.

Inco 2011, *supra* para 7 at para 100.

(ii) *Emission of Nickel Particles is Not an Escape of a Substance Likely to Cause Mischief*

31 Even if this Court holds that the refinery constitutes a non-natural use, the emission of nickel particles is not an escape of a substance likely to cause mischief. Strict liability is not made out for two reasons. First, intentional emissions made in the ordinary course of business are beyond the ambit of the risk envisioned by the *Rylands v Fletcher* rule. Second, emissions are not likely to cause mischief because nickel is naturally occurring and not dangerous *per se*, and because it was emitted within all regulatory requirements.

32 Intentional emissions that are a direct result of everyday business operations are inconsistent with the type of risk *Rylands v Fletcher* addresses because they are not accidental. Strict liability under *Rylands v Fletcher* does not apply to all risks associated with an activity, only to situations where damage flows from mishaps and accidents. These cases have predominantly involved accidents such as floods (*Tock*), overflows (*Rickard*), and spills (*Cambridge*).

Tock, *supra* para 23.

Rickards, *supra* para 23.

Cambridge Water Co Ltd v Eastern Counties Leather plc, [1994] 2 AC 263 (PC), 1 All ER 53 [*Cambridge*].

33 The Court of Appeal rightly suggested the principle is restricted to mishaps or misadventures related to the defendant's activity (*Inco 2011*). The escape component of *Rylands v Fletcher* connotes something unintended, a theme picked up on by commentators (Klar) and courts (*Kert*). Emissions that are intentional, monitored, and within regulated levels are outside the ambit of the rule. They are best considered under other causes of action because associated liability is best determined through questions of duty and standard of care.

Inco 2011, *supra* para 7 at paras 82 and 112-113.

Lewis N. Klar, *Tort Law*, 5th ed (Toronto: Carswell, 2012), at p 653.

North York (City) v Kert Chemical Industries Inc, [1985] OJ No 510, 33 CCLT 184 (HCJ).

Pun & Hall, *supra* 23 at 132, 137.

34 A naturally occurring substance that is not dangerous *per se*, is released in compliance with all applicable regulatory requirements, and has consistently been found below levels that would pose a risk to human health is not a substance that is likely to cause mischief. The trial court held that nickel particles are not dangerous *per se*. Nickel accumulations have not physically damaged the properties. Mischief has been taken to refer to increased danger, not merely the risk of mischief or hypothetical harm (Linden). It is not consistent with this understanding to position a diminution in property value due to perception as an appropriate mischief.

Inco 2010, *supra* para 14 at para 54.

Linden, *supra* para 25 at 532.

(iii) *Foreseeability is Neither an Applicable Prerequisite, Nor Established in this Case*

35 The appellant asks this Court to consider foreseeability as a necessary component of the rule in *Rylands v Fletcher*. The Court should resist this effort. To include it would introduce a substantial reformation of the rule without the benefit of full argument and evidence in the lower courts. The Court of Appeal made brief comments on the matter merely to identify the issue for future litigants.

Inco 2011, *supra* para 7 at para 109.

36 Foreseeability as a unifying element of strict liability under *Rylands v Fletcher* is an additional confusion that would unnecessarily clutter the law in Canada. Its adoption by the UK House of Lords in *Cambridge* marks a departure from well-established lines of cases related to ordinary use of the land. Introducing foreseeability would also diminish the importance of the established tests for ordinary use and escape. As well, to require foreseeability for the kind of damages alleged, as the Court of Appeal proposes, would narrow the distinction between *Rylands v Fletcher* and other causes of action.

Cambridge, *supra* para 32.

Inco 2011, *supra* para 7 at paras 109 and 110.

37 Even if this Court should decide to include foreseeability, the diminution in property values was not a foreseeable result of Inco's operations. The kind of damage, rather than harm in general, must have been foreseeable (*Inco 2011*). Decreased property values as a result of public

perception from media coverage of preliminary government reports were not foreseeable to Inco during the refinery's operation many decades earlier. Inco met or exceeded all applicable regulations. While the presence of a regulatory standard does not establish foreseeability of harm, it does provide guidance to the appropriate way to operate without harming the community. The Supreme Court indicated that regulatory compliance is one factor to consider in determining liability (*Saskatchewan Wheat Pool*).

Inco 2011, *supra* para 7 at para 110.

R v Saskatchewan Wheat Pool, [1983] 1 SCR 205, 143 D.L.R. (3d) 9 [*Saskatchewan Wheat Pool*].

(iv) *Strict Liability under Rylands v Fletcher is Sufficient in its Current Form*

38 This Court should not recognize an emerging strict liability cause of action for environmental claims. The Court of Appeal rightly found no convincing jurisprudential or policy reasons to read the rule broadly and impose strict liability for "ultra-hazardous" activities without adequate regard for non-natural use, mischief, or escape. This Court should not stretch strict liability beyond the established confines of *Rylands v Fletcher* to include all damages that result from an "ultra-hazardous" use for four reasons: (a) legislatures are better positioned to establish rules in this important policy area, (b) a broader rule would be so difficult to interpret as to create great uncertainty for those potentially affected, (c) the laws of negligence and nuisance have evolved to provide sufficient bases for recovery, and (d) it is inconsistent with the focus of the rule in *Rylands v Fletcher* on mishaps and accidents.

Inco 2011, *supra* para 7 at para 78.

Andrew Waite, "Deconstructing the Rule in *Rylands v Fletcher*" (2006) 18 J Envtl L 423.

D. Novel Causes of Harm are Unnecessary and Inapplicable.

39 A sub-issue on this appeal is whether novel causes of action can help determine the case at bar. The inapplicability of the recovery regime of the Environmental Protection Act to the present case will be discussed. Four novel causes will be considered: breach of statutory duty, waiver of tort, the precautionary principle, and the polluter pays principle. None of these causes merit recognition by this Court. Even if these causes of action were worthy of adoption into Canadian jurisprudence, none would apply to the case at bar.

(i) *The Environmental Protection Act Provides Immunity for pre-1988 Offences*

40 The appellant submits that the specific compensation regime in the *Environmental Protection Act* (*EPA*) would assist their claim. However, the legislature specifically introduced a time limitation on pre-1988 offences in s. 195 of the *EPA.* All emissions in the case at bar occurred prior to 1984, and the majority of those emissions occurred prior to 1960. Applying any part of the EPA to the present case would defeat the clear intentions of Ontario's legislature and upset public expectations. Such a result should be resisted by this Court.

Appellant's Factum, supra para 6 at paras 54-57.

Environmental Protection Act, R.S.O. 1990, c E-19, at s 195 [*EPA*]

Inco 2011, *supra* para 7 at para 7.

(ii) *The Nickel Emissions Were Not a Compensable Spill Under the EPA*

41 Even if the appellant's claims are not statute barred by s. 195, s. 99 of the *EPA* only allows compensation for a spill of a pollutant. A spill is defined in s. 91 as "a discharge …that is abnormal in quality or quantity in light of all the circumstances of the discharge." As argued in preceding sections, steady emissions from a smokestack in an industrial area are not abnormal. These emissions should not be classified as a spill under the *EPA,* and therefore should not be held compensable under s. 99.

EPA, *supra* para 40 at ss 91, 99.

(iii) *Breach of Statutory Duty was Rejected by the SCC and Should Only be Reintroduced by the Legislature*

42 The doctrine of "breach of statutory duty" allows a plaintiff to claim damages where a statute imposes upon the defendant a duty to do something, where that duty is imposed in order to protect persons such as the plaintiff, and where the defendant's breach of that duty caused the plaintiff's injuries. While the doctrine still exists in England, the Supreme Court of Canada has banished it in *Saskatchewan Wheat Pool*, holding that while a statutory duty can provide some evidence of the appropriate standard of care, it does not in itself ground a tort claim.

Donaghey v Boulton and Paul, [1968] AC 1 (HL), [1967] 2 All ER 1014.

Saskatchewan Wheat Pool, *supra* para 37.

43 As the Supreme Court's set out in *Saskatchewan Wheat Pool,* "the crucial test is whether the duty created by the statute is owed primarily to the State[.]" A typical statute exists to create duties and liabilities between the government and the regulated party. These duties and liabilities exist within a complex legal framework. While it is open to legislators to extend the benefits of these duties to third parties, this court should resist such a general extension by judicial fiat. Such an extension would defeat the intentions of the Canadian legislature and subvert the complex regulatory framework that many of the relevant statutes seek to create. The introduction of limited statutory duties to third parties should be left to the legislature.

R v Saskatchewan Wheat Pool, *supra* para 37.

(iv) *No Statutory Duty Applied in this Case*

44 Even if the doctrine were reintroduced into Canadian law, breach of statutory duty would be inapplicable to the facts of the present case. Inco's actions were not in breach of any statutory regulations during the operation of the refinery. Inco complied with or surpassed all MOE remediation orders to the best of its ability. No damage to appellant's health or material physical damage to appellant's land has been established. There was neither a breach of a duty nor any material damages. The breach of statutory duty doctrine does not help the appellants here.

(v) *Waiver of Tort is a Redundant Doctrine that Should not be Recognized in Canada*

45 Appellant's Factum #1 claims that the waiver of tort doctrine should decide the present case. The waiver of tort doctrine is a disgorgement-based doctrine that allows plaintiffs to recover the defendant's wrongfully acquired profits even in absence of any damages to the plaintiffs. Canadian law already has several well-settled disgorgement doctrines, which are already capable of punishing wrongdoers. In *Strother*, the Supreme Court enforced disgorgement damages against a lawyer who breached his fiduciary duty. Likewise, in *NTI v Canada (Attorney General)*, the Nunavut Court of Justice granted disgorgement damages against the Federal Government after it breached a treaty obligation. Since neither of these cases relied on the waiver of tort doctrine, the addition of such disgorgement doctrine into Canadian law would be redundant and would only serve to create confusion.

Strother v 3464920 Canada Inc, 2007 SCC 24, 2 SCR 117 [*Strother*].

NTI v Canada (Attorney General), 2012 NUCJ 11, 3 CNLR 210.

Appellant's Factum, Team #1-2013, moot materials, at paras 55-74 [Appellant's Factum #1].

46 Inco submits that there is considerable judicial recognition of the concepts of "efficient breach" and "efficient tort." For example, in *Evergreen Building Ltd. v IBI Leaseholds Ltd.* The BC Court of Appeal used the concept of efficient breach to allow a departure from ordinary property law where such departure would create a better overall outcome. We submit that disgorgement remedies should operate only in a punitive function to punish flagrant wrongdoings. Good faith actions should not be the target of disgorgement doctrines.

Evergreen Building Ltd v IBI Leaseholds Ltd, 2005 BCCA 583, 50 BCLR (4th) 250.

(vi) *Waiver of Tort is Inapplicable to a Case with no Wrongdoing*

47 Even if the waiver of tort doctrine is adopted into Canadian law, the doctrine requires the defendant to have engaged in a wrongdoing which had the elements of a "tort absent harm". As argued in the previous sections, there was no wrongdoing in the case at bar: Inco's operations were a legitimate commercial enterprise that created 2000 jobs in the community. Inco's actions did not result in material physical damage to the appellant's land. Indeed, the appellant's difficulty stems largely from their failure to identify any recognized wrongdoing that Inco could have been guilty of. Since waiver of tort is mainly a disgorgement doctrine, it should not be applied to a case where no wrongdoing can be shown.

(vii) *The Precautionary Principle is Not Applicable to Nuisance Actions*

48 Appellant's Factum #1 claims that the precautionary principle should decide the present case. The precautionary principle is nothing more than an exhortation to take additional precautions where the risk of an activity is unclear. In its strongest form, it is an imperative to refrain from any activity whose consequences are the slightest bit uncertain. This is impractical in everyday operations.

Appellant's Factum #1, *supra* para 45 at 80-81.

Cass R Sunstein, "Beyond The Precautionary Principle", U Chicago Law & Economics, Olin Working Paper No. 149 [*Sunstein*].

49 Inco respectfully submits that while the precautionary principle may offer guidance to legislators drafting environmental statutes, it is unhelpful in private nuisance actions. A nuisance action is concerned with actual material physical damage to the land; not with the amount of potential damage and the precautions that need to be taken against it. While the imperative to

take precautions could be relevant to a discussion of appropriate standard of care, it is irrelevant to a discussion of actual material physical damage. By proceeding in nuisance instead of negligence, the appellants have set aside debates about standards of care or the precautionary imperatives applicable to those standards.

50 Further, Inco respectfully submits that the complexity of most practical problems renders the precautionary principle unhelpful to a search for acceptable solutions. In the words of Cass Sunstein:

> in [its] strong form, the precautionary principle … is literally paralyzing— forbidding inaction, stringent regulation, and everything in between. … [I]n the relevant cases, every step, including inaction, creates a risk to health, the environment, or both… [because any action] might well deprive society of significant … "opportunity benefits" of a process or activity.

Because of its irrelevance in assessing actual interference with a neighbour's property, as well as its paralyzing nature in other discussions, we respectfully submit that the precautionary principle should not be a part of nuisance law in Canada.

Sunstein, supra para 48.

(viii) *Inco's Actions Were Precautionary*

51 Even if the precautionary principle is to apply, Inco's actions were in accordance with such a principle. The voluntary upgrades to the refinery in 1960 and the voluntary closure of the refinery in 1984 were precautionary measures to limit emissions. Inco's voluntary remediation of MOE-specified properties was another precaution aimed at avoiding even the most minute risks. It is unclear what additional precautions Inco could have taken short of ceasing all industrial operations. Since Inco's activities provided Canada with significant stockpiles of building materials and saleable resources, it is not at all clear that the avoidance of those activities would have been of net benefit to Canada.

(ix) *The Polluter Pays Principle is a Statutory Doctrine that is not Available in Ontario*

52 Appellant's Factum # 7 claims that the polluter pays principle should determine the present case. In support, they cite *Imperial Oil Ltd. v Quebec (Minister of the Environment).* However, that case was decided on the basis of Quebec's *Environmental Quality Act*, which specifically allowed retroactive compensation of environmental contamination. The first paragraph of that case specifically calls polluter pays a "statutory principle." While a statutory

polluter-pays regime can be seen in the *EPA*, this statutory regime does not apply to the present case for reasons addressed earlier. Courts have refrained from implementing this principle outside of the context of statutory interpretation. Since this is an area of law amply covered by existing legislation, this court should defer to the legislature's implementation of the polluter pays doctrine.

> *Imperial Oil Ltd v Quebec (Minister of the Environment)*, 2003 SCC 58, 2 SCR 624 at paras 1, 25 [*Imperial Oil*].
>
> *Environmental Quality Act*, RSQ, c Q-2, ss 31.43-31.50.
>
> Appellant's Factum, Team #7-2013, moot materials, at paras 68-74.

(x) *It is Unfair to Apply the Polluter Pays Principle to Compensate for Public Concern*

53 Even if the polluter pays principle is adopted into the common law, fairness demands that the principle be restricted to compensating the direct results of the defendant's actions. In *Imperial Oil*, the property in question required two rounds of costly remediation as a direct result of the defendant's pollution. In the case at bar, the properties in question are just as fit for residential use as they would have been absent Inco's activities. The only damages arise from public concern not directly caused by the defendant. Making Inco pay for the results of such public concern would introduce excessive uncertainty into the law and would give rise to potentially unlimited liability.

PART IV -- SUBMISSIONS IN SUPPORT OF COSTS

54 Inco requests costs from the Appellant here and in the courts below.

PART V -- ORDER SOUGHT

55 Inco respectfully requests that the Court dismiss the appeal and uphold the judgment of the Ontario Court of Appeal.

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

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Sara Elcombe

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Paul Mitassov

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Sean Tyler

Counsel for the Respondent
Inco Ltd.

PART VI -- TABLE OF AUTHORITIES

Paragraph No.

A. Jurisprudence

Paragraph No.

B. Legislation

C. Secondary Materials

Pun, Gregory S & Margaret I Hall, *The Law of Nuisance in Canada* (Toronto: LexisNexis, 2010). 23, 30, 33

Sunstein, Cass R. "Beyond the Precautionary Principle", U Chicago Law & Economics, Olin Working Paper No. 149. 48, 50

Waite, Andrew. "Deconstructing the Rule in *Rylands v. Fletcher*" (2006) 18 J Envtl L 423. 38

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.

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Document #: 590561