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 #08-2013

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. This appeal concerns the proper application of the tort of private nuisance and the rule in *Rylands v Fletcher*. Between 1918 and 1984, the Respondent, Inco Limited, operated a nickel refinery in Port Colborne, Ontario. As a necessary result of this business, Inco emitted nickel into the air which came to rest in the soil of the Appellants. The Appellant does not allege that the actions of Inco or the nickel in the soil give rise to damages. Instead, the Appellant submits that the cause of action arises from decreased property values caused by public concern over health effects, which were triggered by the nickel deposits that resulted from the refinery's emissions. The Appellant's claim must fail under private nuisance and the rule in *Rylands v Fletcher*.

2. The Appellant has failed to establish breach under the tort of nuisance. It its simplest form, private nuisance requires material damage to real property. The Appellant has failed to establish that any damage has occurred to the property, let alone any material damage.

3. Further, the Appellant has misapplied the rule in *Rylands v Fletcher*. The determination of what constitutes a "non-natural" use of land is a contextual analysis. When the context is appropriately considered, the nickel emissions are clearly a natural use of the land. As such, the strict liability doctrine under *Rylands v Fletcher* cannot apply.

PART II: QUESTIONS IN ISSUE

4. Accordingly, in response to the Appellant's statement of questions in issue, the Respondent contends that:
    a. The Court of Appeal was correct in its application of the law of nuisance;
    b. The Court of Appeal was correct in its application of the law of *Rylands v Fletcher*; and
    c. The Appellant has failed to establish any basis for a new cause of action.

PART III: ARGUMENT

A. Amenity Nuisance Is Not and Should Not Be At Issue

(i) Amenity Nuisance Was Not Pled at Trial or Appeal

5. In attempting to recast the cause of action according to a unified theory of nuisance, the appellant goes beyond the four corners of this case.

6. At both trial and appeal, only "physical injury" nuisance was alleged; "amenity" nuisance was explicitly not pleaded or considered.

> ***Smith v Inco,*** **(2011), ONCA 628, 76 CCLT (3d) 92 at paras 43 and 44. [*Smith v Inco,* ONCA]**
> ***Smith v Inco,*** **2010 ONSC 3790, 52 CELR (3d) 74 at para 76. [*Smith v Inco,* ONSC]**

7. According to the rules of procedure, this portion of the appeal "is limited to those causes of action denied by the appellant court."

> **Willms & Shier LLP. "Clarifications", (20 January 2013), online: environmentallawmoot <http://www.willmsshier.com/moot/>.**

(ii) The Added Complication of Class Certification

8. The *Class Proceedings Act* requires that prospective class members share common issues that disclose a valid cause of action.

> ***Class Proceedings Act,*** **SO 1992, c 6, s 5.**

9. In order to overcome this hurdle, "the appellant's theory of liability has evolved" since the inception of the claim in the *Pearson v Inco* case, "in an attempt to make the action more amenable to certification." As noted, this evolution has led to a claim in private nuisance that explicitly avoids the question of "amenity" nuisance.

> ***Pearson v Inco Ltd.,*** **[2005], 2005 CarswellOnt 6598, 205 OAC 30 (ONCA) at para 51. [*Pearson*]**

10. Any attempt to recast the cause of action to include amenity nuisance, then, calls for a reconsideration of the certification question itself. This is of significant concern, given that certification is such a "critical step in a class proceeding." The hurdle of certification is so

important and complex as to require adjudication by motions judges with “special expertise” in the area.

> **Eizenga, Peerless, Wright and Callaghan, *Class Actions Law and Practice, 2d Ed* (LexisNexis Canada, 2010).**
> ***Pearson, supra* para 9 at para 43.**

11. Moreover, the class-based nature of this action also speaks against a unified approach to nuisance in that “use and enjoyment” (the barometer by which harm is judged in “amenity” nuisance) is a necessarily quasi-subjective metric; a “harm” that affects the enjoyment of one party may be benign to another. The requirement of common issues among class members found in s.5 of the *Class Proceedings Act* could not be satisfied under such a rubric.

> ***Hollick v Toronto (City),* [2001] 3 SCR 158 at para 18 and 19.**
> ***Class Proceedings Act, supra* para 8.**

(iii) A Unified Approach to Nuisance Lacks Judicial Approval

12. The appellant points to the judgment of LaForest J. in *Tock v St. John’s Metropolitan Area Board* when suggesting a unified approach to nuisance.

> ***Tock v St. John’s Metropolitan Area Board,* [1989] 2 SCR 1181. [*Tock*]**

13. It is not clear that LaForest J. intended to collapse the tests for nuisance. He only goes as far to suggest that every evaluation of nuisance liability must involve a consideration of whether it "is *reasonable* to deny compensation to the aggrieved party." [Emphasis Added]

> ***Tock, supra* para 12 at para 63.**

14. In the category of "amenity" nuisance, where guarding against the "excessive 'delicacy and fastidiousness'" of plaintiffs is a real concern, considerations of reasonableness are necessarily live and pivotal. For cases of "physical injury" nuisance, however, courts across the commonwealth have recognized for over 150 years - since the case of *St. Helen's Smelting Co v Tipping*, itself cited with approval by LaForest J. in *Tock* - that the reasonableness inquiry is present but perfunctory: “[i]n the presence of actual physical damage to property, the Courts have been quick to conclude that the interference does indeed constitute a substantial and unreasonable interference.” That is why at paragraph 65

of *Tock* LaForest J. explicitly identifies his concern as not for cases "of material damage to property but rather interference with tranquility and amenity."

> ***St Helen's Smelting Co v Tipping*, (1865) 11 H.L.C. 642, at para 651. [*St Helen's*]**
> ***Tock, supra* para 12 at paras 63 and 65.**

15. The two branches of nuisance, then, need not be collapsed in order for Justice LaForest's dicta to be respected or for reasonableness to govern liability. Indeed neither of the other two opinions issued in *Tock* address the concept of a unified approach to nuisance, and nor has such an approach been adopted in any subsequent SCC decision.

> ***Smith v Inco*, ONCA *supra* para 6 at para 48.**

(iv) A Unified Approach to Nuisance Would Not Strengthen this Appeal

16. A unified approach to nuisance – if one were to be mistakenly adopted – would require a balancing of competing factors that has hitherto been left out of the analysis.

17. Many of these factors suggest a basic reasonableness to the respondent's conduct.
    a. For most of its operation, the Inco nickel refinery was "the major employer in the Port Colborne area."
    b. There are no allegations of negligent or unlawful conduct in the operation of the refinery. Nor did the nickel emissions contravene any regulation.
    c. The emissions were released in plain view of all Port Colborne, from a 500-foot smoke stack.
    d. The respondent has already remediated nearly all of the affected properties on a "no questions asked" basis. Only one property is yet to be remediated, at the request of its owner.

> ***Smith v Inco*, ONCA *supra* para 6 at paras 6, 9 and 7.**
> ***Pearson, supra* para 9 at para 17.**

18. Ultimately, the Inco refinery was the key economic driver of Port Colborne while it was in operation, all the while operating in harmony with the law. A unified approach to nuisance serves to emphasize this value to the community and respect for the rule of law.

B. The Appellant has not Established Private Nuisance

19. The definition of private nuisance adopted by the Supreme Court was outlined in *St Pierre v Ontario (Minister of Transportation and Communication)*. The Court stated, "A person, then, may be said to have committed the tort of private nuisance when he is held to be responsible for an act indirectly causing physical injury to land or substantially interfering with the use or enjoyment of land or of an interest in land, where in the light of all the surrounding circumstances this injury or interference is held to be unreasonable." As noted, the Appellant, at trial, only alleged nuisance as it related to the "physical injury to land."

> ***St Pierre v Ontario (Minister of Transportation and Communication),* [1987] 1 SCR 906 at para 10. [*St Pierre*]**
> ***Smith v Inco,* ONSC *supra* para 6 at para 76.**

20. The Respondent submits four arguments with respect to private nuisance in the nature of physical injury to land.
    a. First, there is no damage to the property, and as such, the Appellant is unable to establish private nuisance.
    b. Second, even if there is damage to the land, that damage is insufficient to be actionable under the common law.
    c. Third, this is not the type of case for which stigma damages are recoverable.

(i) There is no damage to the property of the Plaintiff

21. Private nuisance's origins in real property militates that the Respondent is only responsible for damage to land. The Court below correctly observed from *St Helen's Smelting Co.* that the rationale for the tort of nuisance is based on "the priority and status attached by the common law to land ownership and one's right to physical dominion over one's land." Thus, in order to establish the tort of nuisance, the complainant must establish that their land was actually damaged.

> ***Smith v Inco,* ONCA *supra* para 6 at para 46.**
> ***St Helen's, supra* para 14 at pp 650-651.**

22. The Appellant is unable to establish any damage to property. The mere presence of nickel in the Appellant's soil does not constitute "damage" just because it can be quantified. An imposition on land will only be considered an injury to that land where the interference in unreasonable.

***St Pierre, supra* para 19 at para 10.**

23. The Respondent acknowledges that the nickel deposits amount to a change in the chemical composition of the soil. This change, however, does not amount to physical damage to the property. The Court of Appeal correctly observed that the trial judge incorrectly equated a physical change with physical damage. Mere change is not enough; it is the Appellant's onus to establish that this change constitutes a material damage. They have failed to discharge this onus, and as such have not established any damages to property.

***Smith v Inco*, ONCA *supra* para 6 at para 50, 55.**
Appellant's Factum at para 50.

24. Consider the analogy brought by the Ontario Court of Appeal. When a farmer adds fertilizer to their land, they are changing the composition of that soil. But farmers will often change the chemical composition of their soil, for fertilization purposes. Nickel deposits are not fertilizer, but the point remains that unless the Appellant can demonstrate that the change in question actually damages the land, the tort of nuisance is not made out.

***Smith v Inco*, ONCA *supra* para 6 at para 55.**

25. This is not a case like *Russell Transport* where damages flowed from the presence of a substance in the soil. In that case the Plaintiff was not awarded damages because of the mere presence of iron oxide particles on their property. Instead, the damage was found to be based on the fact that the iron oxide rendered the property unfit for the purpose for which it was purchased and developed.

***Smith v Inco*, ONCA *supra* para 6 at para 55.**
***Russell Transport Limited v Ontario Malleable Iron Co Ltd*, [1952] OR 621 (HC) at para 16. [*Russell Transport*]**

26. In its simplest form, the tort of nuisance requires that the property be harmed in some respect. The Appellant has not met the burden of demonstrating true harm, and has not made out the tort of private nuisance.

(ii) Even if there is damage, it is not sufficient to be actionable under private nuisance

27. Notwithstanding the above, even if this Honourable Court were to find that the presence of nickel in the Appellant's soil constitutes damage, this damage cannot qualify as "material," as the test for "physical injury" nuisance necessitates.

28. Not every change to property will constitute damage for the purposes of private nuisance. In *St Helen's Smelting Co.*, material injury to property was found to require that the damage be characterized as material, actual, and readily ascertainable. Establishing material damage demands that the damage be substantial, in the sense that it is more than trivial.

> ***St Helen's, supra* para 14 at pp 650-651.**
> ***St Lawrence Cement Inc v Barrette,* [2008] 3 SCR 392 at para 77.**

29. Material damage requires that the physical harm to the property be substantial. A change in soil composition whereby nickel harmlessly blends into the soil is not substantial. The presence of a substance is not enough to constitute substantial damage; something more is required. The onus was on the Appellant to establish that the change amounts to a material physical injury to the property, as was the case in *Russell Transport*. The Court of Appeal correctly found that the Appellant in this case failed to discharge this obligation.

> ***Russell Transport, supra* para 27 at pp 625-6.**

30. Analyzing the damage from a rights-based perspective leads to the same conclusion. The Appellant has not established that the nickel particles in the soil have hindered class members' use of property for any of its intended purposes. This is not a case where land has become unsellable or otherwise incapable of transfer, as the bundle of rights vested in real property ownership would preclude. The Appellant has simply asserted that if it were to be sold, they would not make as much money. There is thus no substantial interference with the intended purpose of the land, and as such no actionable nuisance.

> ***Ibid*.**

Appellant's Factum at para 54.

C. The Appellant cannot recover for stigma damages

(i) **Jurisprudence does not support the Appellant's claim**

31. The Appellant claims that stigma damages are available in this case. Stigma is not a robust area of damages law in Canada and courts have been cautious in its application. The Appellant relies on *Tridan v Shell*, an Ontario case where the Appeal Court ruled that stigma could not attach to properties remediated to pristine condition, thus suggesting stigma might exist after partial remediation, but made no further observations. *Tridan* is distinguishable from the case at bar because in *Tridan*, the damage was incontestable and fulfilled the evidentiary requirements of the *Rylands v Fletcher* test.

***Tridan Developments Ltd v Shell Canada Products Ltd*, (2002) 57 OR (3d) 503 (ONCA). [*Tridan*]**

32. Canadian courts have not necessarily followed *Tridan*. The common thread in existing jurisprudence is that calculating damages to a level of pristine remediation is not always reasonable. In *Église Vie et Réveil v Sunoco* the court accepted lower regulatory remediation standards as reasonable and sufficient and denied that stigma would result. In *Cousins v McColl-Frontenac*, where costs of remediation of undeveloped land were speculative due to its unknown its future use and zoning, the court awarded damages at a level consistent with less-than pristine standards. In the case at bar, Inco has remediated 24 of the 25 properties affected to regulatory standards determined to be safe to human health, that is, applicable to the area's zoning. The only property that has not been remediated is that of Mrs. Smith who has refused Inco's efforts to clean up the land. The current and future use of land is not uncertain. Moreover, the Appellant does not claim that the remediation is insufficient or unreasonable. Thus, the Appellant cannot show any basis for stigma of the property.

***Église Vie et Réveil Inc, Les Ministères d'Alberto Carbone v Sunoco Inc*, [2003] JQ 13025 at para 30-37, aff'd [2002] JQ 3056.**
***Cousins v McColl-Frontenac Inc*, 2006 NBQB 406, [2006] NBJ No 504 at para 14-21, aff'd 2007 NBCA 83.**
***Smith v Inco*, ONCA *supra* para 6 at paras 16-17.**

(ii) **Public perception is not, on its own, a basis for stigma damages**

33. Stigma damages are entirely dependent on public perception and are in no way dependent on the actual condition of the property. A practical problem arises: public perception is subjective and variable over time. This leads to damages being unrepresentative of actual diminution in value. For this reason, courts have demanded proof of diminution of value by, for instance, attempting to sell the property.

> **Katherine M van Rensburg, "Deconstructing Tridan: A litigator's perspective" (2006) 24 Advocates' Soc J 4 paras 38-9.**
> ***Butt v Oshawa (City),* (1926), 50 OLR 520 (CA).**
> ***Godfrey v Good Rich Refining Co,* [1939] OJ 451 (Ont HC).**

34. It is instructive to look at the development of jurisprudence in the United States, where litigation over stigma damages is more common. U.S. courts generally do not allow allegations of property depreciation to constitute a cognizable claim in nuisance based on bad publicity. For instance, in *Adkins v Thomas Solvent Company*, the court ruled out publicity about ground water contamination that caused decreased home prices as a proper basis for recovery.

> ***Adkins v Thomas Solvent Company*, [1992] 440 Mich. 293.**

(iii) **The nexus between the nickel oxide deposits and publicity is too remote**

35. For publicity to be a credible basis for a nuisance claim and subsequent stigma damages, it must be evaluated on a contextual basis. First, any stigma in Port Colborne arose in the context of litigation and fear mongering. Second, any stigma arose 15 years after the factory had been operating for 66 years. Residents of Port Colborne were aware of the emissions and potential deposits on surrounding land but do not allege stigma until after the fear mongering began.

> ***Smith v Inco*, ONCA *supra* para 6 at para 28.**

(iv) **Stigma does not obviate the need to prove the nuisance**

36. American courts are aware that absent a clear nexus with substantiated injury, they open the door to spurious claims. In the result, American courts demand a demonstrable impact on

property. In *Cook v Rockwell*, an appellate level court held that mere interference - in this case, deposits of radioactive pollution on land - cannot constitute a nuisance; it must be substantial and unreasonable. Further, if the interference is fear it must be substantiated by scientific evidence. This is the same reasoning that the Court of Appeal used in the case at bar. The Appellant has not shown any demonstrable impact on the property nor any adverse health effects to justify the alleged fear.

> ***Cook v Rockwell International Corporation,* [2010] Nos. 08-1224, 08-1226, 08-1239, available on caselaw.findlaw.com.**
> ***Smith v Inco,* ONCA *supra* para 6 at para 116.**

37. Therefore, the Respondent submits that there is no legal or factual basis for the alleged stigma; and should the court finds there is, the context of this case and policy reasons militate against a finding for stigma damages.

D. The Requirements of *Rylands v Fletcher* are Not Made Out

38. The Court below was correct in its application of the doctrine in *Rylands v Fletcher*, and in determining that the claim ought to be dismissed. The Court of Appeal set out the major characteristics of the doctrine as such:
    a. The Defendant made a “non-natural” or “special” use of his land;
    b. The Defendant brought on to his land something that was likely to do mischief if it escaped;
    c. The substance in question in fact escaped; and
    d. The damage was caused to the Plaintiff’s property as a result of the escape.

39. This test is a simple deconstruction of the rule formulated by Blackburn J. in *Rylands*. Interpretation of the individual factors has varied, especially non-natural use and escape, as discussed in the following paragraphs.

> ***Smith v Inco,* ONCA *supra* para 6 at para 71.**

40. The factors articulated and applied by the Court of Appeal represent a legal test. If the Appellant fails to meet any of the four branches of the test, then it fails to make out a claim according to *Rylands*. The Respondent submits that the Appellant has failed to establish that the use of land was not natural, and that there was an escape.

***Smith v Inco*, ONCA *supra* para 6 at para 105.**

41. This rule has a very narrow application. The strict liability consequences of such a rule require that they only apply in the most egregious of cases. In *Canadian Tort Law, 8th Ed,* Allen M. Linden and Bruce Feldhusen state, "pursuant to the principle, there are a limited number of activities so fraught with abnormal risk for the community that the negligence standard is felt to provide insufficient protection against them." The Appellant agrees that the emissions of the nickel itself, without more, is not a source of damages. This rule, intended to catch egregious action, has no application in this case.

***Smith v Inco*, ONCA *supra* para 6 at para 65**
Allen M Linden and Bruce Feldhusen, *Canadian Tort Law, 8th ed.*, (Markham, ON: LexisNexis, 2006). [Linden and Feldhusen]

(i) The Respondent's Use of Land was Natural

42. It has been held that the inquiry into a *Rylands v Fletcher* claim must be contextual. In determining whether a use is inordinate or non-natural, the Court must consider more than simply the origin of the materials or whether they are hazardous. As the Court below stated, the Court must also have regard to the place where the use is made, the time when the use is made, and the manner of the use.

***Smith v Inco*, ONCA *supra* para 6 at paras 78 and 97.**
***Tock, supra* para 12 at paras 10-13.**

43. The Supreme Court stated that the term "natural use" must be flexible to embrace societal change. It recognized that land use planning puts the use of land into a completely different context than the time when the *Rylands* rule was developed. In *Tock,* the Supreme Court articulated the test is whether the "user is inappropriate to the place". Even before *Tock,* Ontario courts ruled that industrial uses in an industrial subdivision may be natural uses of land, presumably in recognition of the complex zoning required in a modern industrialized society. Inco complied with land use statutes and government regulations. While compliance with statutory requirements is not determinative of natural use, it is a relevant factor that must be given appropriate weight in determination of natural use.

***Tock, supra* para 12 at paras 10-13.**

***North York (City) v Kert Chemical Industries Inc*, [1985] OJ No 510, at para 28. [Kert Chemical]**
***Smith v Inco*, ONCA *supra* para 6 at para 100.**

44. Taking these factors into account, it is clear that the Court of Appeal was correct in holding that the use that the Respondent made of the land was both natural and ordinary in the context of the town of Port Colborne. The people of Port Colborne lived in conjunction with the refinery and witnessed its emissions for 60 years. Mrs. Smith conceded at trial that the residents of Port Colborne could see the refinery emitting materials and that as a matter of common sense those materials may affect those who lived around Inco. The fact that the Appellant did not bring action against Inco until 15 years after the refinery closed indicates that she did not regard the refinery's operation, per se, as something which was out of the ordinary or unnatural in the community.

***Smith v Inco*, ONCA *supra* para 6 at para 24.**

45. Accordingly, it is the Respondent's submission that the Court of Appeal was correct in its assessment of Inco's use of the refinery as "ordinary and usual", and that the Appellant had failed to establish this branch of *Rylands v Fletcher*.

***Smith v Inco*, ONCA *supra* para 6 at para 103.**

(ii) Intended Emissions are not an "Escape"

46. The rationale of *Rylands v Fletcher* is to establish liability for damage to another's property as the result of an accident not caused by negligence. The rule was developed by Blackburn J. during the Industrial Revolution specifically to capture unintentional consequences of industrial activities. *Rylands* is not triggered when damage is caused as a result of the operating processes of "ordinary, apparently reasonable commercial and industrial activities."

Tom Clearwater, "Cambridge Water Co Ltd v Eastern Counties Leather plc: A Case Comment", Saskatchewan Law Review, (1994) 58 Sask LJ Rev 333 at 9-10.
***Halsbury's Laws of Canada - Environment* (Lucas and Cotton), current to April 20, 2012, available on lexisnexis.com.**

47. In *Kert Chemical*, the court noted that *Rylands* may not apply when discharges are intentional, particularly since the torts of negligence and nuisance are available. In that case, chemicals used in manufacture and processing operations were pumped through a sewage system, causing the pipes to corrode. The court held that this was not an escape of a substance likely to do mischief, given the context. Similarly, Inco intended the release of emissions into the air through a smokestack as a consequence of its industrial activity.

***Kert Chemical, supra* para 32 at para 28.**

48. The Appellants cannot avail themselves of the *Rylands v Fletcher* doctrine because it does not apply to the emission of nickel, which was an intended consequence of a natural use of the land. Furthermore, it would be illogical for courts to apply strict liability to an intentional activity contemplated, regulated and approved by government regulators.

(iii) Damages under *Rylands* are not barred by injury to health

49. The Appellant cites *Berendsen v Ontario,* a negligence case, in support of its proposition that injury to health should not preclude damages under *Rylands*. The Appeal Court in the case at bar did not suggest that health injury had to be proved under *Rylands* (only in physical nuisance). *Berendsen* does not assist the Appellant; in that case, the court mentions an *Environmental Protection Act* ("EPA") provision, that makes property owners responsible for the items brought onto their land, as part of one witness's testimony and not as a reason for its finding against the claimants (the Berendsens). The court's point in that case was that EPA standards were not in effect at the time of the act in question and the court therefore found that Ontario was not negligent. Furthermore, it found that since Ontario investigated the problem and found that there was no danger to human health, it was not required to remove the waste material or remedy the allegedly tainted well water.

***Berendsen v Ontario,* [2009] OJ 5101 (CA) at para 65.**

E. Existing Causes of Action are Sufficient

50. The Appellant submits that the current scope of the common law related to contamination is insufficient. Several "ineffective" areas are highlighted as evidence that a new tort is

required. In particular, the Appellant argues that existing torts are ill-equipped to address harm that is: invisible and uncertain, synergistic and incremental or stigma and discrimination related. In fact, however, the Appellant mischaracterizes the problem. The existing causes of action are adequate; it is the Appellant's case that is lacking.

Appellant's Factum at para 85.

51. The common law is much more comprehensive than the Appellant recognizes; individuals that may have been affected by pollution have multiple remedies. Since the 19th century, common law courts have demonstrated adaptability in this area – continually recognizing intangible and non-quantifiable forms of harm. Ontario Courts continue to embrace a flexible approach to nuisance: the court below notes that "...damage may be readily ascertainable even if it is not visible to the naked eye and does not produce some visibly noticeable change in the property."

***Gaunt v Fynney* (1872), LR 8 Ch App 8 (CA in Ch).**
***Thompson-Schwab v Costaki*, [1956] 1 All ER 652.**
***Smith v Inco*, ONCA *supra* para 6 at para 50.**

52. Uncertain and latent forms of harm are now also increasingly recoverable. Emerging principles, such as material contribution to risk and *res ipsa loquitur*, offer remedies to plaintiffs – notwithstanding a lack of proof showing conventional causation or readily measurable harm.

***Fontaine v British Columbia (Official Administrator)*, [1998] 1 SCR 424.**
***Snell v Farrell*, [1990] 2 SCR. 311.**
***Fairchild v Glenhaven Funeral Services Ltd*, [2002] UKHL 22.**
***Walker Estate v York Finch General Hospital*, [2001] 1 SCR 647.**

53. The Appellant's specific examples of tort law gaps (stigma and eco-justice) are equally misguided. Stigma damages – properly plead – are acknowledged by Canadian courts: a diminution in property value due to stigma is a recognizable head of damages under contract law, nuisance and strict liability.

Appellant's Factum at para 86.
***Tridan*, *supra* para 31.**
***McAlpine v Woodbine Place Inc* (1998), 37 CLR (2d) 38 (Ont Ct Gen Div); varied on appeal (2001), 7 CLR (3d) 155.**
***Cousins*, *supra* para 32.**

54. Claimants living in "environmental hotspots" can also find some protection under existing common law. Contamination is no longer routinely ignored simply because it occurs in industrial neighbourhoods. In Ontario today, there is one standard for the level of pollution a given community is expected to tolerate.

> ***Tock, supra* para 12 at p 1192.**
> ***LaFarge Canada Inc v Ontario (Environmental Review Tribunal),* [2008] OJ No 2460 at paras 66-67.**

55. Rather than creating a new tort with unwieldy dimensions and uncertain scope, the courts should work within the ample common law protections that already exist. The dearth of remedies for the Appellant under any of the existing torts does not reveal a basic flaw in the law; it exposes a fundamental weakness in the Appellant's case.

F. In the Alternative, Changes to Strict Liability should be Left to the Legislature

(i) The Appellant's Change is Not Incremental

56. The Respondent agrees with the Appellant that incremental changes to the common law can and should be addressed by the Courts.

> ***British Columbia v Canadian Forest Products Ltd*, [2004] 2 SCR 74 at para 155.**
> ***R v Mann*, 2004 SCC 52 at paras 17-18.**

57. However, the change proposed by the Appellant is not an incremental change to the common law. Rather, the suggested change represents an upheaval of the rule and strays from the doctrine's original purpose. For this reason, any change such as the one proposed by the Appellant ought to be left to the legislative branch of government.

(ii) Moving the Standard to "Hazardous Use" is a Drastic Change

58. The Appellant submits that the best way to improve upon the "non-natural use" requirement of *Rylands* is to replace it with a "hazardous use" element. Their definition of "hazardous" is

as follows: "…those uses which are risky or dangerous, have the potential for widespread effects, and are undertaken in the absence of precautionary research."

Appellant's Factum at para 85.

59. It is difficult to conceive of a substance that is not risky when there is too much of it, or a substance that does not interact with other substances around it to produce a cumulative consequence. Indeed, it could be said that the Appellant's definition includes all substances.

60. The Respondent submits that in removing "non-natural use" of land and replacing it with "hazardous use" – with no consideration for how that area is typically used and no requirement for escape – is a proposal that imposes liability for the use of virtually any substance, if that use carries risk that is not fully understood and has the capability of combining with other substances to have a synergistic or accumulated effect. Most importantly, parties using land in this way will not only be liable, they will be strictly liable.

61. The escape requirement has long performed a crucial gatekeeping function, which no common law court has seen fit to set aside. Removing it now, and adding a "hazardous use" criterion, would be a drastic departure.

***Kert Chemic*al, *supra* para 32 at para 77.**
***Rigby v Chief Constable of Northamptonshire*, [1985] 2 All ER 986.**

62. While the Supreme Court of Canada has discussed that Courts can engage in incremental changes to the common law, the Court has also clearly stated that where the change is far-reaching or complex, reforms are better left to the legislature. Justice Iacobucci has stated:

> "*The court has before it a single case; major changes in the law should be predicated on a wider view of how the rule will operate in the broad generality of cases* … Major changes to the law often involve devising subsidiary rules and procedures relevant to their implementation, a task which is better accomplished through consultation between courts and practitioners than by judicial decree. Finally, and perhaps most importantly, there is the long-established principle that in a constitutional democracy it is the legislature … which should assume the major responsibility for law reform." [Emphasis added]

***Winnipeg Child and Family Services v DFG*, [1997] 3 SCR 925, para 19.**
[*Winnipeg Child and Family*]

63. The Respondent submits that the changes advocated by the Appellant raise precisely these issues. As discussed above, the change sought here is not discrete. The Court may be able to predict how changing *Rylands* will affect Inco Ltd., but there can be no way to know how such a dramatic change to the law of strict liability will affect the common law landscape for many other Canadians and industries.

64. Justice Iacobucci observed above that one of the hallmarks of a major change to a common law is when rule makers go beyond extending principles to new situations and begin "devising subsidiary rules" to go with their new principles. The Appellant's new articulation of *Rylands* bears such a hallmark: the fact that the Appellant has included a suggestion for a new "regulatory" defence to go along with the updated *Rylands* rule is evidence that this change is in fact a new cause of action that requires multi-faceted considerations of its implications.

***Winnipeg Child and Family, supra* para 61 at para 19.**

65. This change is too severe to be considered an incremental evolution. If the rule in *Rylands v Fletcher* is going to be changed to close whatever gap in the law is perceived by the Appellant, then it must be done through full and comprehensive procedures that can only be done in a legislative context. The Court below was correct in refusing to take this step.

(iii) **Lord Justice Gibson's Judgment Does Not Support a Change to *Rylands***

66. The Appellant's attempt to offset the transformative nature of its proposal by including a "regulatory" defence – based on the judgment of Lord Justice Gibson in the English case of *Wheeler v Saunders* – is unsuccessful. The defence of statutory authority is widely accepted and the Respondent does not take issue with the existence of that defence. However, there are several problems with the formulation of the Appellant's "regulatory" defence. In the Respondent's submission, these problems are fatal not only to the existence of the defence but to the cause of action which it is attempting to support.

67. *Wheeler* concerned the construction of two "Trowbridge" houses, which are farm buildings for the containment of pigs. In total the two buildings contained about 40 pigs. The buildings were constructed within 12 meters of one of the cottage houses of the Wheelers, and the Trowbridges were a source of considerable noise and smell from the pigs.

***Wheeler v Saunders*, [1994] EWCA Civ 8 (BAILII). [*Wheeler*]**

68. The entirety of Lord Justice Gibson's judgment deals with the question of nuisance. The Defendants claimed that they had planning approval for the construction of both buildings and therefore were not liable to the Wheelers. The Lord Justice addresses the possibility that, although a planning authority cannot authorize a party to engage in a nuisance, it is possible that a planning authority (through permits or rezoning) could change the nature of an area and render something no longer a nuisance when it otherwise would have been.

***Wheeler, supra* para 66.**

69. The problem with this approach lies in the fact that the Lord Justice does not at any point turn his mind to the rule in *Rylands*, or to the question of strict liability. His comments on this possible "regulatory" claim come entirely in the context of an action for nuisance. Accordingly, is it the Respondent's submission that this case cannot be taken as authority for the Appellant's proposed defence. Further, as it is the only support offered, this proposal is therefore unsupported by authority and cannot be established. Finally, as this proposed defence cannot be taken as support for the proposed changes to the rule in *Rylands*, it follows that their broader proposed change to *Rylands* is entirely unsupported and this Court should dismiss it.

(iv) The Appellant's Proposal Does not Respect the Purpose or Dimensions of *Rylands*

70. First, replacing "non-natural use" in the *Rylands* doctrine does not respect the underlying rationale of the rule. Indeed, Justice LaForest has stated that the inquiry into the appropriateness of land use is the defining "touchstone" of the rule. As the Court below observed, the original purpose of the *Rylands* rule was not to protect people from hazards *per*

se, but was meant to protect communities from accidents and the "unintended consequences of engaging in an activity."

***Smith v Inco*, ONCA *supra* para 6 paras 82-83, 91.**

71. Similarly, by abandoning the escape requirement, the Appellant's proposal ignores the rule's basic scope and also ensnares a number of responsible industrial actors. As noted by the court below, imposing strict liability "...for the intended consequence of an activity that is carried out in a reasonable manner and in accordance with all applicable rules and regulations" could lead to unjust and indeterminate standards of liability.

***Smith v Inco*, ONCA *supra* para 6 at para 113.**

72. Second, the Appellant's emphasis on hazardous uses that "are undertaken in the absence of precautionary research" is also aberrant. This definition runs contrary to another purpose of *Rylands*: it imports a standard of reasonableness and allows polluters to immunize their activities from potential claims.

Appellant's Factum at para 85.

73. The *Rylands* rule, unlike negligence, is not supposed to evaluate or characterize the defendant's conduct. The proposed cause of action is designed to ensure that polluters pay. In reality, though, the Appellant provides industrial actors with a loophole not available under the existing approach: it excuses parties who can cite research that the risk of harm was *de minimis*.

***Antrim Truck Centre Ltd v Ontario (Ministry of Transportation)* (2011), 106 OR (3d).**

74. Third, by placing emphasis on uses that are "abnormally dangerous" and harms that are "synergistic and latent", the Appellant's tort would also excuse from scrutiny a range of more conventional activities. It is unclear how undertakings such as herding cattle or accumulating water, let alone raising flag poles or installing decorations – activities traditionally within the scope of *Rylands* – could be construed as "abnormally dangerous", or be shown to have "uncertain" or "intergenerational effects."

Appellant's Factum at para 84-85.
***Shiffman v Order of St. John*, [1936] 1 All ER 557, 80 Sol Jo 346 (KB).**

***Saccardo v Hamilton*, [1971] 2 OR 579, 18 DLR (3d) 271 (Ont HCJ).**
***Calgary (city) v Yellow Submarine Deli Inc* (1994), 158, AR 239 (Prov Ct).**

75. The Respondent submits that a change cannot be truly "incremental" where the change turns the legal test into something which is incongruous with the doctrine's original purpose. For this reason, the Court of Appeal correctly refused to add the "hazardous" and "precautionary" elements and remove the escape requirement. This court should decline to do so as well.

***Smith v Inco*, ONCA *supra* para 6 at paras 83 and 84.**

76. Further, although *Rylands* has been modified several times by the Courts in various countries over the course of its history, the appellate Courts have refused to make the amendment which the Appellant is advocating. The UK House of Lords has refused to do so. It is true that the High Court of Australia abandoned the "non-natural use" element of *Rylands*, but then it also went on to replace strict liability with a negligence standard.

***Smith v Inco*, ONCA *supra* para 6 at para 70, 86-87.**

77. In sum, the Appellant's proposed change is too drastic in scope and does not accord with either the core principles of the rule or the previous common law modifications. The change is not incremental and should be rejected.

(v) Even if Found to be Incremental, The Appellant's Change is not Practical: There are no Frames of Reference

78. A strict liability standard based on "hazardous activity" is less objective than the conventional test under *Rylands v Fletcher*. The appellant submits that a revised cause of action is required to provide legal certainty; the existing standard – non-natural or inordinate use – is too subjective. The proposed transformation based on the American model, however, would create even more conceptual ambiguity.

Appellant's Factum at para 87.

79. If this court embraces a version of the American approach – strict liability for "abnormally risky" activities – it would do so without the benefit of that jurisdiction's frames of reference. In defining unusually dangerous operations, courts in the United States can refer to *Comprehensive Environmental Response, Compensation, and Liability Act* (CERCLA) and

the *2nd and 3rd Restatement of Torts*. The former provides a statutory framework for assessing and compensating those who are affected by industrial contamination, and the latter offers decision-makers a common set of indicia for defining unusually dangerous activities. The absence of comparable reference points in Canada would result in highly subjective interpretations of "abnormally risky".

80. Even if complementary references were developed, "dangerousness" would be an evasive standard by which to impose strict liability. In the United States, interpretations have been inconsistent. For example, chemical processing operations, which are facially hazardous in nature, have been found by American courts to be both within and outside the proper scope of strict liability. If this court embraces the American approach similar inconsistency and unpredictability will ensue.

> ***Sterling v Velsicol Chem Corp* (1986), 647 F Supp 303, at p 312–13 (WD Tenn).**
> ***Avemco Ins Co v Rooto Corp* (1992), 967 F 2d, at 1108 (6th Cir).**

(vi) The Effect of the "Regulatory" Defence is to Turn Tort Actions into Judicial Review

81. The proposed tort is also impractical because it conflates tort and administrative law. Additionally, in circumstances such as the instant case, in which there is a significant gap between the date of regulation and the time of trial, it requires the court to reconcile temporarily discrete understandings of "public interest" and "environmental harm".

82. The Appellant's "regulatory" defence, as the Respondent understands it, is essentially as follows: a Defendant will not be liable under the rule of *Rylands v Fletcher* where they can show that the regulator (the State) engaged in a full consideration of the effect of the regulated action on the public, the environment, and the common law, and gave the Defendant permission to proceed.

> **Appellant's Factum at para 92.**

83. The Respondent submits that the logistics of applying such a defence would unnecessarily blur the lines between tort actions and judicial review. For instance, assuming that such a defence was adopted, how could it be applied in the context of strict liability?

84. Once a Plaintiff has shown that a Defendant has violated the *Rylands* rule, strict liability requires that the Defendant's liability is inevitable unless the Defendant can show due diligence or this new "regulatory" defence. Presumably, the Defendant would do this by presenting proof of permission from the regulator to engage in that activity. Also presumably, the Plaintiff would get an opportunity to challenge that permission.

85. The problem with this approach lies in the fact that the Legislature, Ministers, and decision making bodies appointed by elected officials all benefit from a presumption that they follow the law and act without bias. Provincial Legislatures and federal Parliament are always presumed to have acted within their constitutional bounds, unless there is evidence to the contrary. Similarly, those institutions which are delegated to make decisions by the Legislature are also presumed to follow the law, unless the contrary can be shown. This 'benefit of the doubt' would be even greater when much earlier legislative process is evaluated through a modern lens.

> ***R v Lenart*, [1998] OJ No 1105 para 27 and 33.**
> ***Ellis-Don Ltd v Ontario*, 2001 SCC 4 para 55.**
> ***Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038 at para 90.**

86. The result of these presumptions is that the "regulatory" defence proposed by the Appellant cannot be properly advanced by the Defendant or properly challenged by the Plaintiff without second-guessing the decision making process of the regulator – sometimes conducted many decades earlier. This is the proper realm of administrative law and judicial review, not tort law. This change would refocus a tort action onto a collateral issue of the legality of a regulator's decision, rather than the question of the defendant's liability.

87. Contrary to the Appellant's submissions at paragraph 91 of the Appellant's Factum, this approach does not respect the traditions of tort law: this conflation of bodies of law and procedures represents a dramatic and impractical upheaval of tort law.

88. In sum, the Appellant's approach is untenable both in theory and practice. It would operate without adequate frames of reference and exist in a legal space properly reserved for administrative law. For these reasons, it was rightly dismissed by the court below.

Appellant's Factum at para 91.

(vii) The Legislature has Already Addressed the Principles Suggested by the Appellant

89. That this question ought to be left to the Legislature is bolstered by the fact that both Federal and Provincial governments have turned their mind toward the Precautionary Principle advocated by the Appellant into Canada's environmental regimes.

90. Part of the *Jobs, Growth, and Long-Term Prosperity Act* amended Section 35 of the *Fisheries Act* to prohibit serious harm to Canadian fisheries. Although this amendment is a prohibition on pollution, it is not as strict as the previous prohibition. Similarly, Section 36(3) of the *Fisheries Act* bans the deposit of a deleterious substance into water, and the Courts have upheld this ban as being a true "zero-tolerance" stance on pollution.

***Jobs, Growth, Long-Term Act,* SC 2012, c 19, s 133.**
***Fisheries Act,* RSC 1985, c F-14, s 36(3).**
***R v Kingston*, [2004] OJ No 1940 at para 78.**

91. It could fairly be said that the amendments to the *Fisheries Act* made by the *Jobs, Growth, and Long-Term Prosperity Act* are in fact not effective steps for protection of the environment. However, this argument overlooks Canada's basic principles regarding separation of powers. As Professor Hutchinson observes, "… democracy is not so much about getting the right answers, insofar as they can ever be said to exist, but about *who gets to make difficult decisions*." [Emphasis added] We as citizens and observers of government are free to disagree, but the fact remains that Parliament has considered the principles of environmental protection and decided to take a more permissive approach. Unless the Applicant can show that this decision was illegal, the Respondent submits that the Courts must respect Parliament's democratic prerogative.

Allan Hutchinson, "'In the Public Interest': The Responsibility and Rights of Government Lawyers" (2008) 46 Osgoode Hall LJ 105 at 123.

92. The Ontario Legislature also has turned its mind to strict liability within the EPA. Section 99 of the *Act* allows for the right of compensation in a spill on strict liability from the owner of the pollutant or the person who had control of the pollutant at the time. Further, statutory nuisance claims are available under the *Act*.

> ***Smith v Inco,* ONCA *supra* para 6 at para 85.**
> ***Environmental Protection Act,* RSO 1990, c E.19, s 99. [*EPA*]**
> **John Murphy, *Street on Torts, 12th Ed* (Oxford: Oxford University Press), pg 422.**

93. This clearly indicates that the respective legislative branches of government are capable of responding to environmental issues, and that the Applicant's suggestion represents a redundancy. In fact, Parliament has turned its mind to the environment and the Precautionary Principle in the time since this litigation began and chose not to address the issues which this case raises. Whether or not one agrees with Parliament's choices, for this Court to do anything other than respect the will of the elected branches of government would be to overstep its bounds. Indeed, the Court below quoted Lord Goff in *Cambridge Water* where he said:

> "The protection and preservation of the environment is now perceived as being of crucial importance … [b]ut it does not follow from these developments that a common law principle … should be developed or rendered more strict to provide for liability in respect of such pollution. *On the contrary, given that so much well-informed and carefully structured legislation is now being put in place for this purpose, there is less need for the courts to develop a common law principle … and indeed it may well be undesirable that they should do so*." [Emphasis added]

> ***Smith v Inco,* ONCA *supra* para 6 at para 87.**

94. The Court below was correct in adopting Lord Goff's comments, and this Court ought to also affirm this view.

95. Finally, in relying on the Polluter Pays Principle it is important to remember that in this case the polluter did pay: Inco has remediated 24 of the 25 homes in Port Colborne. The only property which has not been remediated is that of Ellen Smith, who continues to refuse the offer. In this sense, the Respondent has paid for any cumulative effects of its pollution.

> ***Smith v Inco,* ONCA *supra* para 6 at para 17.**

G. If this court accepts the Appellant's proposed Cause of Action, Inco is not liable.

(i) The Conduct is Not Abnormally Dangerous

96. The Respondent's activities cannot be considered "abnormally dangerous". In fact, the events in the instant case seem incompatible with the Appellant's proposed tort. The Appellant advocates Allen Linden's theory of strict liability for "...a limited number of activities so fraught with abnormal risk for the community that the negligence standard is felt to provide insufficient protection against them." However, the Respondent's nickel-emitting activities do not qualify as "inherently risky". The nickel in the soil did not pose any immediate or long-term threat to human health. It did not harm the soil or undermine the claimants' ability to use their properties and no such allegations were made in this case.

Appellant's Factum at para 87.
Linden and Feldhusen, *supra* para 40 at pp 540-41.
***Smith v Inco*, ONCA *supra* para 6 at para 79.**

97. An industrial activity that causes a diminution of property value is also not easily reconciled with the "inherent danger" concept. Stigma is not actionable because it creates danger; it is recoverable because it causes land to be less sellable.

98. As noted by the court below, "a relatively small decrease in the appreciation of the value of the claimants' properties over a ten-year period beginning in 2000" does not establish that Inco's activities were inherently dangerous. Were activities deemed dangerous on such a basis, any number of innocuous operations – such as group homes or subway stations – could be considered abnormally dangerous.

***Smith v Inco*, ONCA *supra* para 6 at para 80.**

(ii) There is No Obligation to Investigate

99. Moreover, Inco would not have been required to actively investigate its use of land. Even with today's knowledge, nickel oxide emission does not involve "an obvious risk of serious or irreversible harm" – the Appellant's proposed trigger for investigation. But at the time of

Inco's refining activity, such a risk was unfathomable: most of the nickel emissions occurred before 1960 and none occurred after the 1984.

***Smith v Inco*, ONCA *supra* para 6 at para 7.**

(iii) If this Court were to Apply the Appellant's New Test, then the Respondent Has a Defence

100. Finally, notwithstanding the submissions *supra* at paragraphs 57 through 87, if this Court accepts the Appellant's conception of an updated *Rylands* rule and the defences which come along with it, then the Respondent submits that an application of the Applicant's proposed "regulatory" defence will show that the Respondent is not liable. The permit was granted after due consideration of the competing factors based on the standard of the day.

101. The Appellant's test for a "regulatory" defence calls for the regulator to undertake an "explicit policy-based consideration of public interest, environmental harms, and the impact of common law rights". Both federal and provincial environmental legislation mandates that the regulators of those statutes consider exactly these requirements when administering those Acts. For instance, the federal *Canadian Environmental Protection Act* ("CEPA") dictates that its application take into account, inter alia, the best way to protect the environment and human health when making social and economic decisions; to apply the "precautionary principle"; to protect human health and biological diversity from adverse effects; and to take preventative and remedial measures to protect the environment where called for.

***Canadian Environmental Protection Act*, 1999, SC 1999, c 33, ss 2(1)(a), (a.1), (b), (j.1).**
Appellant's Factum at para 92.

102. Similarly, the Ontario EPA states its purpose as the "protection and conservation of the natural environment". It defines substances that may have an "adverse effect", *inter alia*, as anything that could impair the quality or use of the environment; that could damage property, plant or human life; or interfere with business. The EPA also starts from the presumption that exposure of the environment to contaminants is prohibited, and no one can expel a contaminant or something that may have an adverse effect into the environment without the permission of the Director. Both statutes aspire to broad goals which encompass human

health, economic rights, and environmental harms. These are precisely the considerations for which the Appellant's defence calls.

***EPA, supra* at para 91, ss 3, 6, 9, 14, 20.2, 20.3.**

103. Most importantly, every indication in the record from the two courts below is that the Respondent has complied with the regulations throughout the operation of the refinery in Port Colborne. As such, the only real question for the application of the Appellant's defence is whether those permissions to operate were properly issued in the spirit of an "explicit policy-based consideration of public interest, environmental harms, and the impact of common law rights".

***Smith v Inco*, ONCA *supra* para 6 at para 9, 99-100, 113.**
***Smith v Inco*, ONSC *supra* para 6 at para 47 and 333.**
Appellant's Factum at para 92.

104. As discussed *supra* at paragraphs 84 through 85, the regulators in the federal and provincial governments benefit from the presumption that, in the absence of evidence to the contrary, the Director exercised discretion in accordance with the statutes and without bias. The Appellant has not advanced any evidence to suggest that the existing regulations or licenses to operate were illegally issued, and so the presumptions of regularity and legality remain in place.

105. Statutes from both levels of government contemplate the very considerations that the Appellant has suggested. There is no evidence to disturb the presumption that the state regulators considered those very factors when they gave the Respondent permission to operate its refinery in Port Colborne. The Respondent has diligently complied with those regulations. Therefore, even if this Court were to accept the Appellant's new cause of action and its attendant defences, this Court ought to still dismiss this appeal because the Respondent complies with this new "regulatory" defence.

PART IV - SUBMISSIONS IN SUPPORT OF COSTS

105. The Respondent makes no submissions with respect to costs.

PART V - ORDER SOUGHT

106. The Respondent seeks an order dismissing this appeal.

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

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Matthew Giovinazzo

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Areta Lloyd

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Preston MacNeil

Counsel for the Respondent
Inco Ltd.

PART VI: TABLE OF AUTHORITIES

B. Statutes

C. Secondary Material

Willms & Shier LLP. “Clarifications” (20 January 2013), online: environmentallawmoot <http://www.willmsshier.com/moot/>.

ELLEN SMITH **-and-** **INCO LTD.**

APPELLANT
(Appellant)

RESPONDENT
(Respondent)

SUPREME ENVIRONMENTAL MOOT
COURT OF CANADA

FACTUM OF THE RESPONDENT
INCO LTD.

TEAM #08-2013

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