WILLMS & SHIER ENVIRONMENTAL LAW MOOT COURT COMPETITION 2013

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

IN THE SUPREME ENVIRONMENTAL MOOT COURT OF CANADA

(ON APPEAL FROM THE ONTARIO COURT OF APPEAL)

B E T W E E N:

ELLEN SMITH

APPELLANT
(Appellant)

- and -

INCO LTD.

RESPONDENT
(Respondent)

FACTUM OF THE APPELLANT
ELLEN SMITH

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

TEAM # 01-2013

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

AND TO: **ALL REGISTERED TEAMS**

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PART I -- OVERVIEW AND STATEMENT OF FACTS

A. Overview of the Appellant's Position

1 This appeal asks whether our homes, and the rights attached to them, deserve protection from ongoing and widespread industrial pollution. The residents of Port Colborne seek compensation for the substantial contamination the Inco nickel refinery caused to their properties. By granting this appeal, this Honourable Court will correct this injustice and send a clear message to all Canadians that tort law will respond when land is polluted.

2 The Respondent, Inco Limited ("Inco"), operated the nickel refinery for over 60 years in Port Colborne. The Appellant includes the owners of 7,000 residential properties in Port Colborne located within several kilometres around the nickel refinery, including the representative plaintiff Ms. Ellen Smith. The residents should be compensated for the lost value to their land. Inco acknowledges that it discharged the nickel that caused the contamination. The only issue is whether Inco is legally liable for the harm it has inflicted.

3 The Appellant submits that Inco is liable under private nuisance because measurable nickel contamination beyond background levels constitutes material injury, and diminution in property value is a recoverable quantification of damages. In addition, Inco is liable under the rule in *Rylands v. Fletcher* because Inco's refinery falls within the meaning of a non-natural use of land and the refinery's emissions becoming engrained in the soil of neighbouring properties constitutes an escape.

4 Alternatively, if this Honorable Court adopts the Court of Appeal's restrictive interpretation of private nuisance and the rule in *Rylands v. Fletcher*, property owners will be left completely unprotected from widespread industrial pollution due to the shortcomings with the remaining toxic torts. To adequately protect Canadians, the Appellant further submits that waiver of tort should be recognized as an independent cause of action and, under this doctrine, Inco be liable for its wrongful pollution of the class members' properties. Finally, the Appellant's interpretation of each of these causes of action is most consistent with environmental law principles recognized in Canada.

5 The Appellant was successful at trial. However, the Court of Appeal set aside the judgement of Justice Henderson of the Ontario Superior Court of Justice and dismissed the action. It is requested that this Honourable Court overturn the Court of Appeal decision and reinstate the trial judgement.

B. Statement of Facts

(i) *The Inco refinery at Port Colborne*

6 Port Colborne is home to 18,000 residents and is located in southwestern Ontario on the north shore of Lake Erie. The Welland Canal divides the city into an east side and a west side. Many neighbourhoods in Port Colborne are composed of small inexpensive single family homes and are occupied by working class families. In 1918, Inco opened a nickel refinery on Port Colborne's east side. The refinery's 500-foot smokestack emitted waste product into the air over a 66 year period. The emissions included nickel particles that contaminated the soil of neighbouring properties. Inco discontinued its nickel refining in 1985; however, the refinery still exists today and Inco continues other business activities in Port Colborne.

Smith v Inco Ltd, 2010 ONSC 3790 at para 22-24 [*Smith v Inco ONSC*].
Smith v Inco Ltd, 2011 ONCA 628 at para 7-8 [*Smith v Inco ONCA*].

7 At trial the class members were divided into three subclasses: the Rodney Street Area, the East Side Area, and the West Side Area. The Rodney Street Area is located closest to the nickel refinery, in between the Inco property and the Welland Canal, and comprises approximately 340 residential properties, including the property of Ms. Smith. The East Side Area is also located on the east side of the Welland Canal and consists of approximately 1,500 residential properties. The West Side Area is furthest from the Inco refinery, located on the west side of the Welland Canal, and consists of approximately 5,200 properties.

Smith v Inco ONCA, *supra* para 6 at para 10.
Smith v Inco ONSC, *supra* para 6 at para 19.

(ii) *MOE reports reveal unexpectedly high levels of nickel contamination*

8 The Ministry of the Environment ("the MOE") released a report in 2000 after performing an extensive toxicology study based on soil samples from 89 different sites. The report revealed that the soil's nickel levels were significantly higher than had previously been recorded and far exceeded the MOE guideline of 200 parts-per-million ("ppm"). This guideline takes into account

the concentration at which sensitive plant life is affected. Nickel levels of up to 5,000 ppm were found in some areas, and up to 14,000 ppm were found in areas described as "hot spots." The highest concentrations of nickel were found in the Rodney Street Area, including on Ms. Smith's property that is located "immediately adjacent" to the refinery.

> *Smith v Inco ONCA, supra* para 6 at paras 11,13,26.
> *Smith v Inco ONSC, supra* para 6 at para 29.

9 The MOE established that the concentration of nickel embedded in Port Colborne's soil is well beyond background levels—*i.e.* the average or expected amount of a substance that occurs naturally in the environment. In Ontario, the background levels for nickel are typically around 43 ppm.

> Phytotoxicology and Soils Standards Section, Standards Development Branch, *Phytotoxicology Soil Investigation: Inco – Port Colborne*, (Port Colborne: Ontario Ministry of the Environment, January 2000) at 9.

10 The MOE released a second report in 2002 based on samples from about 200 residential properties in the Rodney Street Area. These test results revealed that a variety of metals, including nickel, were present at higher than anticipated levels. The highest level of nickel contamination reported was 17,000 ppm. The MOE then confirmed that the predominant form of nickel present in Port Colborne soil was nickel oxide, a known carcinogen.

> *Smith v Inco ONSC, supra* para 6 at para 15.
> *Smith v Inco Ltd*, 2011 ONCA 628 (Factum of the Respondent) at para 25, 30 [*Smith v Inco ONCA (FOR)*].

11 Based on the 2002 report findings, the MOE ordered Inco to remediate any property with a nickel level higher than 8,000 ppm "to protect residents" and "toddler aged children." By 2004, Inco complied with the MOE order by remediating 24 properties to an intervention level of less than 8,000 ppm. This intervention level was set to avoid any risk to human health and does not represent a revised MOE guideline for nickel. The Port Colborne properties continue to hold contamination significantly above the MOE guideline of 200 ppm.

> *Smith v Inco ONCA, supra* para 6 at paras 16-17.
> *Smith v Inco ONSC, supra* para 6 at para 35.
> *Smith v Inco ONCA (FOR), supra* para 10 at para 40.

(iii) ***Public concern for contamination causes property values to fall***

12 The MOE reports received significant local media attention and raised public concern about the effects of contamination. After 2000, the majority of Port Colborne real estate agents

began including a disclosure statement regarding contamination in sales contracts for residential properties. Residents began having difficulty obtaining financing or refinancing of a property, securing mortgages, or selling their properties.

Smith v Inco ONCA (FOR), *supra* para 10 at para 42, 44.

13 The Port Colborne properties suffered a diminution in value because of the elevated levels of nickel in the soil. At trial, Justice Henderson found that from 1998 to 2008 comparable properties in Welland, Ontario increased in value by 4.35% more than the Port Colborne properties. As a result, each property on average failed to increase in value by $4,514, and the Appellant class suffered a combined loss of $36,000,000.

Smith v Inco ONCA, *supra* para 6 at para 31.

(iv) ***History of the proceedings***

14 Port Colborne residents commenced this class proceeding in 2001 shortly after the first MOE report was released. Certification was granted because of public concern over the nickel contamination disclosures and the residents' properties failure to appreciate.

15 Justice Henderson heard the case between October 13, 2009 and January 21, 2010. He found that Inco's conduct constituted a private nuisance and that Inco was strictly liable under the rule in *Rylands v. Fletcher*. He awarded a judgment in the amount of $36,000,000 to account for the resident's property diminution. The Ontario Court of Appeal set aside this judgment on the basis that the evidence did not indicate that the nickel contamination posed any risk of harm to the Appellants' health and the action was dismissed.

PART II -- ISSUES

16 Whether the Court of Appeal erred in overturning Justice Henderson's finding that Inco is liable under private nuisance and the rule in *Rylands v. Fletcher*.

17 Alternatively, whether a new cause of action, waiver of tort, should be recognized for environmental claims and whether the Appellant's claim should succeed under this new cause of action.

PART III -- ARGUMENT

A. Inco is liable for private nuisance

18 The Appellant submits that Inco is liable in private nuisance for contaminating class members' properties with thousands of tonnes of nickel particles for over 60 years. The Court of Appeal erred in assessing materiality based only on adverse health effects. The Appellant submits that the nickel contamination constitutes a material injury to land, and the property value diminution constitutes recoverable damages.

19 Private nuisance applies to an indirect physical or intangible interference with property. It operates as a strict liability tort since liability depends on the nature and extent of the interference, not the defendant's negligent or intentional conduct. Nuisance claims can be brought on two grounds. On the first ground, the defendant must cause a "material injury" to the plaintiffs land. Material injury is also referred to as "material physical damage", "physical injury to land", and "actual damage to the property." Second, referred to as "amenity nuisance", the defendant must interfere with the plaintiffs' "use and enjoyment of the land." In this case, the class members only bring a claim based on the first ground; consequently they must only show that the Inco refinery caused material injury to their properties.

> Philip H Osborne, *The Law of Torts*, 4th ed (Toronto: Irwin Law Inc, 2011) at 378 [Osborne 2011].
> *Smith v Inco ONSC*, *supra* para 6 at para 75-76.
> *Smith v Inco ONCA*, *supra* para 6 at para 42.

20 It is important to distinguish material injury and the damages that flow from that injury, concepts are sometimes conflated in nuisance claims. While material injury is the harm caused by the defendant's interference to land, the damages claimed by the class members represent how they wish that interference to be quantified. At trial, although reaching the correct result, Justice Henderson failed to distinguish between these two concepts, characterizing both the material injury and the damages as the property value diminution. Nevertheless, the facts clearly demonstrate that the class members suffered a material injury as their properties have been grossly contaminated.

> *Smith v Inco ONSC*, *supra* para 6 at para 88.

(i) ***Proof of adverse health effects are not required***

21 The Court of Appeal incorrectly imposed a health-based standard to determine whether Inco caused a material injury:

> To constitute physical harm or damage, a change in the chemical composition must be shown to have had some detrimental effect on the land itself or rights associated with the use of the land….potential health concerns were the only basis upon which it could be said that the nickel particles harmed the land of the claimants…[and]…it was incumbent on the claimants to show that the nickel particles caused actual harm to the health of the claimants or at least posed some realistic risk of actual harm to their health and wellbeing [emphasis added].

This standard requires the class members to prove nickel contamination caused actual or a realistic harm to their health. However, the law of private nuisance maintains a person's interest in their land and protects a range of values including but far beyond human health.

> *Smith v Inco ONCA, supra* para 6 at para 55.
> GHL Friedman, *The Law of Torts,* vol 1 (Canada: Carswell, 1989) at 130.
> Gregory Pun & Margaret I Hall, *The Law of Nuisance in Canada* (Markham, ON: LexisNexis Canada, 2010).

22 Although this case does not require proof of adverse health effects, it may be relevant in other nuisance claims. For instance, amenity nuisance claims require adverse health effects where actual contamination is not substantiated. In *Palmer*, the court refused to award an injunction to stop the spraying of pesticides containing dioxin and Agent Orange chemicals because there was insufficient proof of risk of harm to health and it was not clear that the chemicals would settle on the plaintiffs' land.

> *Palmer et al v Nova Scotia Forest Industries,* [1983] NSJ no 534 at para 596 (NSSC).

23 Accepting the Court of Appeal's decision creates a gap between amenity nuisances and private nuisances causing material injury. Under amenity nuisance, a polluter may be liable for simply interfering with the use and enjoyment of a plaintiff's uncontaminated land. Conversely, a plaintiff claiming for material injury would be unsuccessful even if their lands are actually contaminated but they cannot demonstrably prove risk of adverse health effects. Requiring injury to human health for a successful nuisance claim would depend on whether concrete scientific evidence is available to predict the dangerousness of the contaminants at issue – this is manifestly unjust. Port Colborne residents are being forced to bear the risk of scientific uncertainty even though Inco has both created and benefited from this risk.

(ii) ***Nickel contamination constitutes material injury***

24 It is the Appellants position that the nickel contamination *per se* constitutes material injury to land. The material injury occurred when Inco afflicted the Port Colborne properties with measurable nickel contamination beyond background levels. A finding that nickel contamination constitutes material injury is consistent with the Court of Appeal's materiality requirement.

25 A clear definition of material injury to land has not been established in private nuisance jurisprudence. The Court of Appeal defined material injury in the follow way:

> [t]he requirement of "material injury to property"… is satisfied where the actions of the defendant indirectly cause damage to the plaintiff's land that can be properly characterized as material, actual and readily ascertainable.
>
> Material damage refers to damage that is substantial in the sense that it is more than trivial… Actual damage refers to damage that has occurred and is not merely potential damage that may or may not occur at some future point. Damage that is readily ascertainable refers to damage that can be observed or measured…even if it is not visible to the naked eye and does not produce some visibly noticeable change in the property [emphasis added].
>
> *Smith v Inco ONCA*, *supra* para 6 at para 49-50.

26 In this case, nickel contamination meets the Court of Appeal's materiality inquiry because it is measurable and the amount is more than trivial. Nickel oxide is a known environmental contaminant that became engrained in the Port Colborne properties' soil in amounts significantly above background levels (43 ppm). In fact, the nickel particles on many of the Appellant's properties are several hundred times the concentration of background levels (5,000-17,000 ppm). Inco already acknowledged the company's culpability for this material injury by admitting to causing the nickel contamination.

27 The nickel concentration required to find materiality must be based on a standard for civil liability; courts can ascertain this standard by examining ordinary values and scientific evidence. However, the nickel contamination would still be material if the courts based their decision on the regulatory standard. The MOE guideline of 200 ppm is easily surpassed by the concentration of nickel found in Appellant's properties. Inco has only remediated 24 properties to an interventionist level of 8,000 ppm, which is still significantly above the regulatory standard.

> *Smith v Inco ONSC*, *supra* para 6 at para 86.

28 Until the Court of Appeal's decision, Canadian nuisance law assumes that pollution of another's land is "always unlawful and, in itself, constitutes a nuisance" (*Groat).* A nuisance was found in the following cases: pesticides deposited on crops; flooding; roots and branches growing over the property line; particles of iron and iron oxides tarnishing car paint; chemical deposits *per se*; and falling stones from a chimney. The Court of Appeal's disregard for property rights to protect land from contamination is inconsistent with this case law.

> *Groat v City of Edmonton,* [1928] SCC 522 at 532.
> *Yates v Fedirchuk,* 2011 ONSC 5549.
> *Lemmon v Webb,* [1894] 3 Ch 1, Kay LJ at 24 (HL).
> *Russell Transport Limits v Ontario Malleable Iron Company,* [1952] OR 621 (HCJ).

29 Respectfully, the Court of Appeal made an analogy between fertilizer and nickel particles that illustrates their fundamental misunderstanding of the effect of contamination:

> In our view, a mere chemical alteration in the content of soil, without more, does not amount to physical harm or damage to the property. For instance, many farmers add fertilizer to their soil each year for the purpose of changing, and enhancing, the chemical composition of the soil.

Fertilizer (made of safe compounds if property applied) is added by a property owner to his or her land for the purpose of enhancing the chemical composition of his soil. This lies in stark contrast to the case at bar where a neighbour (Inco) has caused a known carcinogen (nickel oxide) to materially interfere with the soil.

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

30 Recognizing measurable contamination as a material injury supports individual property rights without encouraging frivolous claims. While few properties in the industrialized world are in a pristine state, Port Colborne residents should not be expected to accommodate a "contaminant of concern" on their land at levels 40 times above the regulatory standard. *Walker* illustrates this point: an occupied of land "retains his right to have the air that passes over his land pure and unpolluted, and the soil and produce of it uninjured by the passage of gases, by the deposit of deleterious substances, or by the flow of water." When an uncontaminated property becomes measurably contaminated, a landowner's rights have been violated. In addition, indeterminate and frivolous claims will not succeed under this materiality inquiry because the contamination must be both measurable and more than trivial. Canadians will still be able to

"have backyard barbeques or drive cars which emit exhaust" (containing nickel and other particles) without causing material injury to their neighbour's land.

Walker v McKinnon Industries Limited, [1949] OR 549 at para 34 (HCJ).
Smith v Inco ONCA (FOR), supra para 6 at para 24.
Smith v Inco Ltd, 2011 ONCA 628 (Factum of the Appellant) at para 28.

31 The Appellant's position is supported by Inco impliedly accepting that materiality can be established based on the level of contamination. At trial, Inco submitted that the nickel levels in any class member's property is only material if it exceeds the level of intervention set by MOE. The company's representatives reasoned that since Inco has remediated those properties where nickel exceeded this level, there is no material injury.

Smith v Inco ONSC, supra 6 at para 88.

32 Including measurable contamination within the meaning of material injury is consistent with the Supreme Court of Canada in *St. Pierre*: "[t]he category of interests covered by the tort of nuisance ought not to be and need not be closed…to new or changing developments associated from time to time with normal usage and enjoyment of land." Although *St. Pierre* is a case for amenity nuisance, it demonstrates that the law of torts is destined to evolve in order to address environmental harms, particularly as the problem of pollution grows more prominent in Canadian society.

St Pierre v Ontario (Minister of Transportation and Communications), [1987] 1 SCR 906 at para 10.

33 In this case, the Court of Appeal correctly maintained a distinction between material injury on the one hand and damages, including diminution in property value, on the other; however, it erred in requiring a health-based standard for materiality. It is the Appellant's position, clearly supported by the arguments set out above, that measurable contamination beyond background levels constitutes material injury and therefore Inco is liable in private nuisance.

(iii) *The diminution in property value constitutes recoverable damages*

34 The Appellants submit that diminution in the class member's properties constitutes recoverable damages and should not be used to characterize material injury to land. Although he conflated these concepts, Justice Henderson still correctly assessed the damages suffered by the

residents at $36,000,000 at trial, which amounts to roughly $4,500 per property owner in the class proceeding.

35 Inco has already accepted that the diminution in property values is recoverable:

> Mr. Lenczner acknowledges that had the claimants been able to show actual, substantial, physical damage to their land, a subsequent negative impact on the value of that property caused by concerns relating to that actual physical damage may have been compensable under the generally applicable rules governing damage assessments in tort actions.
>
> *Smith v Inco ONCA, supra* para 6 at para 52.

36 The law of private nuisance allows plaintiffs to recover damages based on a diminution in property value. In *Hunter*, the House of Lords states that a nuisance may be "injury to a neighbour's land," "but where [the plaintiff] claims damages, the measure of damage…will be diminution in the value of the land." In *White*, the defendant blocked the view from the plaintiff's property and prevented the house from being sold at market value. The plaintiff's claim in amenity nuisance succeeded, demonstrating that damages are recoverable where a landowner is unable to sell their home at market value. In *Tridan*, the court recognizes the availability of "stigma damages" following chemical contamination. A property's marketability may be negatively affected by the stigma of contamination, even where the site has been remediated to regulatory levels.

> *Hunter v Canary Wharf*, [1997] UKL 14, 3 LRC 424 at 442 (HL).
> *White v LeBlanc*, 2004 NBQB 360 at para 38.
> *Tridan Developments Ltd et al v Shell Canada* (2002), 57 OR (3d) 503, at para 17 (ONCA) [*Tridan*].

(iv) *The balancing of external factors is not required in this case*

37 It is the Appellant's position that the balancing of external factors often performed for amenity nuisance claims is not required in this case. For claims in private nuisance causing material injury, the analysis ends when material injury is found.

38 Material injury claims do not require external factors to be balanced since "the infliction of physical damage is, in almost all circumstances, regarded as an unreasonable interference." Although there is some suggestion by the Supreme Court of Canada in *Tock* that the external factors could apply to material injury claims, no court has followed suit. In his case, both the trial judge and Court of Appeal rejected the requirement to balance external factors. In any event,

Justice Henderson, with the benefit of a full trial record, also held that even if this inquiry applied, Inco was still liable.

> Osborne 2011, *supra* para 19 at 379.
> *Tock v St John's Metropolitan Area Board*, [1989] 2 SCR 1181 at para 18 [*Tock*].
> *Smith v Inco ONSC*, *supra* para 6 at paras 81, 45.

B. Inco is liable under the rule in *Rylands v. Fletcher*

39 The Appellant submits that Inco is liable under the rule in *Rylands v. Fletcher* ("*Rylands*"). Inco operated a refinery that emitted nickel particles, contaminated the class member's properties, and caused a diminution in property values. The elements to establish liability under *Rylands* have been met.

40 *Rylands* is a strict liability tort: the defendant may be liable without proof of wrongful conduct or negligence. Although the rule was established in 19th century England, Canadian tort law includes it as a distinct cause of action. To establish liability under *Rylands*, the plaintiff must show the defendant made a non-natural use of his or her land, and that there was an escape that caused damage. The Appellant submits that (i) Inco's nickel refinery constitutes a non-natural use of its land and (ii) Inco's nickel emissions constitute an escape that caused damage.

> Osborne 2011, supra para 19 at 341.
> *Tock*, *supra* para 38.
> *Rylands v Fletcher*, [1868] UKHL 1, [1861-73] All ER Rep 1 [*Rylands*].

(i) *Inco's nickel refinery constitutes a non-natural use*

41 Inco made a non-natural use of its land by establishing a refinery on its property that emitted nickel particles for several decades. The Appellant submits that Inco's use of its land was special, dangerous, and of no general benefit to the community.

42 "Non-natural use" was defined as an activity that is "artificial, foreign or not arising in the course of nature" by Lord Cairns when the original *Rylands v. Fletcher* decision reached the House of Lords. The Privy Council later found in *Rickards v. Lothian* that a non-natural use of land is "dangerous, extraordinary, special, and of no general benefit to the community." However, these factors have been given different degrees of emphasis from different judges at

different times. In Canada, the concept of non-natural use is primarily applied using the factors from *Rickards v. Lothian*, but the determination remains "highly fact specific."

> Osborne 2011, *supra* para 19 at 344-345.
> Philip Osborne, "A Comparative Analysis of the Rule in *Rylands v. Fletcher* and Article 1054(1) of the Civil Code of the Province of Quebec" (1972) LLM Thesis at McGill Institute of Comparative and Foreign Law [Osborne 1972].
> *Rickards v Lothian*, [1913] AC 263 (PC) at para 280.

43 It is the Appellant's respectful position that the Court of Appeal mischaracterized the non-natural use inquiry by focusing too heavily on what use is "inappropriate to the place." The Inco refinery does not become a natural use of land simply because it operated for many years and met regulatory requirements. Decisions made by government officials in municipal planning cannot be given disproportionate weight when the focus of *Rylands* should be on the persons impacted. In *Gertsen*, a municipality was held liable under *Rylands* when methane gas drifted from one of its landfills. The Inco refinery, like the landfill in *Gertsen*, cannot rely on its location in an industrialized part of Port Colborne. In fact, in this case the Court of Appeal decision states: "[w]e agree that compliance with various environmental and zoning regulations is not a defence to a *Rylands v. Fletcher* claim."

> *Gertsen v Metropolitan Toronto (Municipality of)* (1973), 2 OR (2d) 1 (HCJ).
> Osborne 1972, *supra* para 42 at p 22.
> *Smith v Inco ONCA*, *supra 6* at paras 92, 100.

44 Justice Henderson correctly found the refinery was a "special use" of Inco's land. In *Madder*, the court found that the storage of oats in a warehouse was a non-natural use of land because the oats were brought onto the land as opposed to occurring naturally. Inco began importing nickel from Northern Ontario when the refinery opened since there is no naturally occurring nickel in the Port Colborne area. While perhaps a nickel refinery cannot be characterized as "extraordinary", it is certainly "foreign", "artificial", and "a special use" within the meaning of *Rylands*.

> *Madder v McKenzie & Co* (1931), 2 DLR 552 (Man KB).
> *Smith v Inco ONSC*, *supra* para 6 at para 53.

45 Another factor determining whether an activity is a non-natural or special use is if it creates an increased danger. The Court of Appeal held there was no evidence Inco's refinery "presented an 'abnormal risk' to the neighbours." Respectfully, the Court of Appeal confused the element of non-natural use with the elements of escape and damage. The non-natural use

inquiry only requires that the use itself is dangerous, not that a particular risk is posed to those ultimately affected by the escape.

Osborne 2011, *supra* para 19 at 344-345.
Smith v Inco ONCA, supra para 6 at para 79.

46 It is the Appellant's position that a nickel refinery is an inherently dangerous activity. It involves heavy machinery, heating the metal to high temperatures, and the use of a variety of chemicals. Workers are required to wear safety equipment and emergency procedures are in place in case equipment malfunctions. The Court of Appeal decision itself states: "Any industrial activity, and perhaps even more so a refinery, certainly carries with it the potential to do significant damage to surrounding properties if something goes awry." In *Cruise*¸ the Manitoba Court of Appeal found spraying crops with pesticides from the air to be a non-natural use. Like the nickel particles, crop pesticides can be considered a dangerous substance without being dangerous to human health. The MOE found that the nickel particles from Inco's refinery, once airborne, are dangerous to the survival of plant life. It is not necessary to prove the specific risk of danger to humans, but to show that the activity is inherently dangerous.

Cruise v Neissen (1978), 82 DLR (3d) 190 (Man CA).
Smith v Inco ONCA, supra para 6 at para 11,103.

47 The final factor to consider in the non-natural use inquiry is whether the use provides a benefit to the community. The Court of Appeal does not contest the finding that Inco's refinery is not a benefit to the community within the meaning of *Rylands*. Nevertheless, the Supreme Court of Canada in *Crown Diamond Paint* interpreted the phrase to mean "direct benefits such as health, not arising remotely from industry."

Smith v Inco ONCA, supra para 6 at para 104.
Osborne 1972, *supra* para 42 at 28.
Crown Diamond Paint v Acadia Holding, [1952] 2 SCR 161 at 173.

(ii) ***Inco's nickel emissions constitute an escape that has caused damage***

48 The Appellant submits that the nickel emitted from the Inco refinery constitutes an escape. Inco had control over the nickel particles and when they were emitted they went outside Inco's control. The emission of nickel particles is a continuous escape that must be characterized as unintentional.

49 The concept of "escape" was established in *Rylands v. Fletcher* when a reservoir gave way causing water to flow and flood an old mine. The decision cites several examples of escape to show that the concept can be applied broadly. It specifically contemplates pollution when it included the example of a "person whose…habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works" as an escape. The House of Lords later defined escape for the purpose of *Rylands* in *Reads v. Lyons* as "escape from a place which the defendant has occupation of, or control over, to a place which is outside his occupation or control."

Rylands, *supra* para 40 at 6.
Allen M Linden, Lewis N Klar & Bruce Feldthusen, *Canadian Tort Law: Cases, Notes & Materials*, 13ed (Canada: LexisNexis Canada Inc, 2009) at 530, 541 [Linden et al].
Reads v Lyons, [1947] AC 156, 2 All ER 471 at 474 (HL).

50 Although many *Rylands* cases deal with an individual occurrence, modern authority extends to multiple or continuous escapes. Justice Henderson and the Court of Appeal accept that *Rylands* should not be limited to a "single isolated escape." In *Heard*, for example, the plaintiff made a successful *Rylands* claim when noxious fumes escaped from the defendant's business over time to rot the plaintiff's walls.

Osborne 2011, *supra* para 19 at 347.
Heard v Woodward, [1954], 12 WWR (NS) 312 (BCSC).
Smith v Inco ONSC, *supra* para 6 at paras 55, 60.
Smith v Inco ONCA, *supra* para 6 at para 111.

51 The Court of Appeal incorrectly found that Inco's escape was intentional in dismissing the *Rylands* claim. An escape within the meaning of *Rylands* is generally "an unintentional occurrence." While Inco emitting nickel particles was intentional, the particles escape into the class member's properties' soil was unintentional. Inco admitted that the level of nickel found in the soil was higher than expected, further demonstrating that while a discharge was intended, the actual concentration of nickel particles discharged was much higher than expected and therefore, not intended. These facts are similar to those in *Mihalchuk* where pesticides drifted onto neighbouring land and damaged the plaintiff's crops. While the defendant intended to place the pesticides on their own crops, the pesticides travelling through the air onto neighbouring crops was an unintentional occurrence and the plaintiff's claim under *Rylands* was successful.

Linden et al, *supra* para 49 at 543.
Mihalchuk v Ratke (1966), 57 DLR (2d) 269 (Sask QB).
Osborne 1972, *supra* para 42 at 345.
Smith v Inco ONCA, *supra* para 6 at paras 82, 112.

52 The final requirement to find liability under *Rylands* is proof of harm. The House of Lords defines proof of harm in *Rylands* as "any damage caused to [a person's] property interest." The Appellant submits that the harm in this case is the nickel contamination *per se* (with reference to the Appellant's earlier argument on material injury in nuisance) and the diminutions in property value are used to quantify damages.

> Osborne 2011, *supra* para 19 at 348.
> *Transco plc v Stockport Metropolitan Borough Council*, [2004] 1 All ER 589 (HL) at para 11.

53 For the above reasons, the Appellant's interpretation of private nuisance and *Rylands* are doctrinally sound and environmentally appropriate. Inco has materially contaminated the class members' land and is liable in private nuisance causing material injury. The nickel refinery also constitutes a non-natural use of the land and it has caused an unintentional escape of nickel particles that significantly harmed 7,000 Port Colborne properties. The Appellants are entitled to recover damages based on the property value diminution.

54 The Court of Appeal's interpretation of private nuisance and *Rylands*, on the other hand, drastically reduces each tort's application to environmental cases, leaving a statutory regime that fails to protect communities like Port Colborne and provides no compensation for citizens who are affected by ongoing pollution. Allowing the Court of Appeal's decision would eliminate civil liability for the majority of environmental harms caused by industrial polluters in communities across Canada.

C. Waiver of tort should be recognized as an independent cause of action for polluted land cases

55 If this Honourable Court still chooses to accept the Court of Appeal's decision as it applies to private nuisance and *Rylands*, waiver of tort must be recognized as an independent cause of action for cases involving polluted land for the following reasons:

1. The remaining toxic torts of public nuisance, trespass, amenity nuisance and negligence have significant shortcomings that leave Canadians completely unprotected and without adequate redress.

2. Even if these torts were modified, Canadians would still be left undercompensated because of the common law's struggle to calculate the economic loss and ecological damage caused by pollution;

3. Waiver of tort is the only cause of action that can properly address these issues in a way that (a) respects and protects private property rights, (b) fairly confronts the profitability of pollution and (c) conforms to existing environmental law principles and;

4. Under this doctrine, Inco is liable for its wrongful pollution of the class members' properties in the amount of a 66 year fair market rental fee.

(i) *The remaining toxic torts leave Canadians completely unprotected from industrial pollution*

56 If class members are unable to rely on private nuisance and *Rylands* in this case, few if any Canadians will be able to protect themselves from industrial pollution due to the shortcomings of each of the remaining toxic torts.

57 Justice Henderson's decision makes clear that public nuisance will rarely address the harms of ongoing pollution. The law of public nuisance does not apply to private property rights affected by ongoing pollution (*Smith*) and only protects against an unreasonable interference with "the public's interest in questions of health, safety, morality, comfort or convenience" (*Ryan*, Linden). Even where it might, individual landowners must still demonstrate a "special injury" that is "different in kind, rather than degree, from that suffered by the public at large" in order to have standing to bring an action (*Hickey*). This rule makes class actions grounded in public nuisance nearly impossible because it perversely narrows the range of possible plaintiffs as the degree and range of harm increases.

Smith v Inco ONSC, *supra* para 6 at para 70.
Ryan v Victoria, [1999] 1 SCR 201 at para 52 .
Linden et al, *supra* para 49 at 561.
Hickey v Electricity Reduction Co (1970), 21 DLR (3d) 368 at para 14 (Nfld SC).

58 Trespass is "not uncommon in cases involving pollution, *e.g.*, from oil or chemicals" because it is actionable *per se* (*Stachniakl*); a plaintiff need only prove that the defendant *intentionally* and *directly* caused the pollutant to enter his or her land (*Kerr*). However, in the past century only one landowner has been able to meet the tort's directness requirement because pollution (*i.e.*, industrial particles carried by the "intervening forces" of wind or air) is an *indirect*

consequence of a polluter's conduct (*Kerr*, *Smith*). Significantly, the Saskatchewan Court of Appeal has already refused to "liberalize" this requirement (*Hoffman*).

> *Stachniakl v Thorhild (County no 7)* (2001), 110 ACWS (3d) 750 at para 25 (RC).
> *Kerr v Revelstoke Building Materials Ltd*, [1978] AJ no 261 (Alta SC).
> *Smith v Inco ONSC, supra* para 6 at para 42.
> *Hoffman v Monsanto*, 2005 SKQB 225 at paras 125-130, aff`d in 2007 SKA 47.

59 Under a claim for amenity nuisance, a plaintiff's private property rights are not absolute; courts must assess the reasonableness of the plaintiff's use and enjoyment of his or her land by weighing all competing interests (*Antrim*). The "character of the neighbourhood" is a critical consideration under this industry-friendly analysis. In communities like Port Colborne that are surrounded by industry, families are expected to tolerate a number of pre-existing interferences and only "fresh" interferences beyond these background levels may constitute a nuisance. The utility of the defendant's conduct is also generally only relevant to the remedy that is awarded (*Wiebe*, *Royal Anne*); however, a court will rarely grant an injunction (the remedy of choice in amenity nuisance actions) against profitable industrial activities (*Bottom*).

> *Antrim Truck Centre Ltd v Ontario (Minister of Transportation)*, 2011 ONCA 419 at para 108.
> *Tock, supra* para 38 at para 17.
> *340909 Ontario Ltd v Huron Steel Products (Windsor) Ltd* (1990), 73 OR (2d) 641 at 655 (ONCA).
> *Wiebe v Rural Municipality of De Salaberry* (1979), 11 CCLT 82 at 94 (Man QB).
> *Royal Anne Hotel Co v Village of Ashcroft* (1979), 95 DLR (3d) 756 at 761 (BCCA).
> *Bottom v Ontario Leaf Tobacco Co Ltd*, [1935] OR 205 (CA).

60 Most negligence actions are unable to confront the harm caused by ongoing and historical pollution because of the court's application of a retroactive standard of care. The risk of harm caused by a once poorly understood chemical will never be reasonably foreseeable, and a polluter will also rarely breach his or her duty of care for failing to remediate a polluted property that does not exceed, in many cases, now defunct regulatory standards. Property owners will also have to overcome the almost insurmountable hurdle of proving that a chemical has caused the harm they have suffered.

> *Berendsen v Ontario*, 2009 ONCA 845 at paras 85-86.

61 The Court of Appeal's decision is responsible for the demise of tort law as a tool of environmental protection. The remaining toxic torts are not weapons for a better environment, but toxic to the very landowners who try to use them. Canadians deserve better protection.

(ii) ***Common law damages struggle to capture the ecological and economic losses caused by pollution***

62 It is the Appellant's position that even if existing toxic torts didn't suffer from these shortcomings, or this Honourable Court agrees to modify existing causes of action, landowners will still be left undercompensated because the common law struggles to calculate the economic loss and ecological damage caused by pollution.

63 At common law, damages for injury to land are assessed using one of two methods: diminution in value (i.e., the value of the property before and after the pollution) or restoration (i.e., the difference between the decontamination of a property to regulatory guidelines ("regulatory restoration") or the complete removal or the removal up to background levels of a pollutant from the land ("pristine restoration")) (Benidickson). Historically, a landowner was normally entitled to damages sufficient to compensate for the diminution in value to his land (Klar). Today, courts prefer restoration to regulatory guidelines where commercial properties, under-developed lands, or land that is unlikely to be used for residential purposes are polluted. Pristine restoration is rarely granted since the costs associated with full decontamination tend to far exceed the fair market value of the land and the cost of regulatory remediation (*Église, Cousins*).

> Jamie Benidickson, *Environmental Law*, 3ed (Irwin Law: Toronto, 2009) at 230 [Benidickson].
> Lewis Klar, *Remedies in Tort*, vol 4 (Carswell: Toronto, 1999) at 27.
> *Église Vie et Réveil Inc c Sunoco Inc*, [2003] JQ no 13025 (QCCS).
> *Cousins v McColl-Frontenac Inc*, [2007] NBCA 83 at para 11.

64 The Appellant submits that the current approach to damage to land does not make financial or ecological sense. Both diminution in value and regulatory restoration undercompensate property owners by undervaluing the full impact of pollution and ignoring the land's natural value. Pristine restoration better considers these impacts, but it is not always possible (practically or ecologically) and studies also suggest that even after extensive clean-up the value of polluted property remains depressed (Mundy). Stigma damages attempt to address this issue by compensating property owners for the decrease in their property's value as a result of the stigma that attaches to a polluted property, even after "full" clean-up, and regardless of whether an actual or potential environmental threat exists (Young). Unfortunately, stigma damages are only (and rarely) granted following remediation in accordance with MOE guidelines (*Tridan*). The Court of Appeal's decision in this case will likely further restrict the application of

stigma damages for private nuisance claims to situations where there is proof or risk of *physical* harm *to residents* (*i.e.* adverse health effects). More importantly, even if courts were to grant pristine restoration and stigma damages, private property owners would still rarely recover any losses to the "ecological value" of important environmental assets and services on their land (*Canfor, Kates*).

> Bill Mundy, "The Impact of Hazardous and Toxic Materials on Property Values" (1992) 60(2) Appraisal J 155.
> Jennifer Young, "Stigma Damages: Defining the Appropriate Balance Between Full Compensation and Reasonable Certainty" (2001) 52 SCLR 409 at 409.
> *Tridan, supra* para 36 at para 62.
> *Canfor Ltd v British Columbia (Minister of Finance),* [1978] 1 SCR 1047 at para 138.
> *Kates v Hall* (1991), 53 BCLR (2d) 322 (BCCA) (considering the ecological value of trees).

65 Because of these shortcomings, property owners have turned to equitable (*MacQueen*) and constitutional remedies (*Lockridge*) for protection. In this appeal, This Honourable Court has an opportunity to help Canadians better protect themselves from pollution. As discussed below, recognizing waiver of tort is a positive and reasonable step in this direction.

> *MacQueen v Canada, 2011 NSSC 484.*
> *Lockridge and Plain v Ministry of the Environment (Ontario)* (29 October 2010), Toronto 528/10 (ONSC) (Notice of Application).

(iii) *Waiver of tort protects past, present and future private property rights.*

66 In response to the shortcomings outlined above, the Appellant submits that this Honourable Court should recognize waiver of tort as an independent cause of action for claims involving polluted lands. Waiver of tort first appeared in the 17th century as a way to avoid "legal injustices" such as when a common law remedy was unsatisfactory or unavailable (Murray). The doctrine allowed a plaintiff to forgo his right to sue in tort (by treating the defendant as being authorized to act as his agent *ex post*) and then rely on the standard remedies available under agency law to recover the profits accrued to the defendant through its wrongful conduct (Archibald). It operated under the guiding principle that a defendant who unjustly enriches himself by "doing wrong to a plaintiff should not be [in equity and good conscience] permitted to retain that by which [he] has been enriched" (*Federal Refining*).

> Charles Murray, "An Old Snail in a New Bottle? Waiver of Tort as an Independent Cause of Action" (2010) 6(1) CCRA 1.
> Todd Archibald & Christian Vernon, "No Harm, No Foul? The Existence of Waiver of Tort as an Independent Cause of Action in Canadian Law" (2008) Ann Rev Civil Lit 409.
> *Federal Refining Sugar Co v United States Sugar Equalization Board* (1920), 268 F 575 at 582.

67 The Supreme Court of Canada has recognized waiver of tort since 1908 (*Greer*). More recently, it has surfaced in the consumer class actions context where there is debate over whether the doctrine **"**exists as an independent cause of action…or whether it is "parasitic" [and] requires proof of an underlying tort [i.e. proof of harm to the plaintiff]." In *Andersen*, the first consumer class action based on an independent cause of action in waiver of tort to be tried on its merits, the court held that this question is ultimately a policy decision.

> *Greer v Faulkner*, [1908] 40 SCR 399.
> *Andersen v St Jude Medical Inc*, 2012 ONSC 3360 at paras 587, 594 [*Anderson*].

68 Ontario courts are willing to certify waiver of tort as an independent cause of action. Maddaugh and McCamus, the leading experts on the law of restitution, also support the recognition of these claims, noting that "once its true nature and scope is fully appreciated, waiver of tort ranks as one of the most useful and innovative tools for achieving the goals of the law."

> *Serhan v Johnson & Johnson* (2006), 85 OR (3d) 665 (Ont Sup Ct) [*Serhan*].
> *Tiboni v Merck Frost Canada* (2008), 295 DLR (4th) (Ont Sup Ct).
> Peter Maddaugh & John McCamus, *The Law of Restitution*, 3ed (Aurora: Canada Law Book, 1990) at 529.

69 There is no principled reason why waiver of tort should not apply to intentional and accidental pollution. Most of the doctrinal issues surrounding waiver of tort stem from its application to the new legal landscape of consumer protection. For centuries, waiver of tort has been used to vindicate a landowner's right to be the ultimate decision-maker with respect to the use and control of his or her land. The doctrine applies to all situations where a defendant uses the plaintiff's property as a way of effectuating some kind of business profit including "outright occupation and the use by a trespasser, like the case of a polluter taking a pollution easement without consent" (Kanner). Defendants have been forced to disgorge profits when they unintentionally use the plaintiff's land or do not harm the economic or physical value of the land, and even where the landowner himself cannot enjoy or use the land (*Edwards*).

> Allan Kanner, "Unjust Enrichment in Environmental Litigation" (2005) 20 J Envtl L & Lit 111 at 117, citing Keeton W Page et al, *Prosser and Keeton on the Law of Torts*, 5ed (St Paul: West Publishing, 1984), at 672-673, § 94 [Kanner].
> *Edwards v Lee's Administrators*, 96 SW2d 1028, 1033 (Ky 1936).

70 In this context, an independent claim for waiver of tort would require property owners to prove that (1a) a defendant engaged in "wrongdoing" (i.e., pollution) or (1b) the elements of a

tort absent harm (if applicable), and (2) that the defendant's wrongful conduct led to the accrual of profits that would otherwise be unavailable to him or her. If these conditions are met, a disgorgement remedy would be available. Of course, in the unlikely event that proof of actual physical harm to land (or residents) is available, waiver of tort would function as a remedial election (*i.e.*, a disgorgement remedy) following proof of an underlying tort.

(iv) *Disgorgement remedies that are based on the defendant's wrongdoing can fairly confront the profitability of pollution*

71 Under an independent waiver of tort claim for pollution, the defendant could be ordered to disgorge: (a) all or part of the profits realized for local operations; (b) all or part of the profits realized from engaging in the wrongful conduct; (c) the money saved (or profits accrued) for failing to properly maintain, store or dispose of the pollutant(s); (d) the money saved (or profits accrued) for failing to install a device that could mitigate the degree or extent of the pollution; or (e) the money saved (or profits accrued) from avoiding a fair market rental fee for using the plaintiff's property without consent. Whether a property owner is entitled to any of these illicit gains would depend on the type and degree of the defendant's wrongdoing. For instance, where a corporation intentionally pollutes a property it may be forced to disgorge all of its operational profits per (a) above, while in cases involving accidental pollution, a disgorgement in the amount of the money saved from proper disposal may be more appropriate per (c) above. Since courts already have experience in quantifying illicit profits as part of the existing sentencing regime for statutory environmental offences, this methodology can be easily applied.

72 Calculating a disgorgement for polluted properties will be more difficult than in consumer class actions where it is easier to determine the profits per unit sold of a defective product. Courts nevertheless have the tools to make these complex calculations. For instance, in *Canadian General Electric*, the court calculated the profits realized from a conspiracy involving multiple defendants. Still, to ease this burden, the Appellant submits that the framework for determining a disgorgement under environmental statutes ought to apply in these cases. When determining the proper amount of a fine under an environmental statute, it is incumbent on the defendant to establish his or her legal gains because he or she is in the best position to do so (*Keno*). Where a defendant is unable or unwilling to provide this information, courts will look to the best available evidence or rely on reasonable estimates provided by the Crown (or plaintiff).

R v Canadian General Electric Co (1977), 2 DLR 230 (Ont HCJ) [*Canadian General Electric*].

R v United Keno Hill Mines (1980), 10 CELR 43 at para 32 (YTC) [*United Keno Hill Mines*].

73 A disgorgement remedy can be fairly distributed among class members; it does not create unresolvable individual issues or a multiplicity of individual trials. In many cases, a disgorgement can be apportioned based on the level of pollution in each class member's land or his or her proximity to the source of pollution. This approach is endorsed by the Supreme Court of Canada in *St. Lawrence Cement*. It is also possible to distribute a disgorgement for amenity nuisance claims. Courts in England and Wales have already successfully awarded profit-based damages for interruptions to environmental resources such as light (*Carr-Saunders, Tamares*). These cases fairly distribute "development profits" based on the factual context (the loss of light in the affected room or space) and what figure the defendant would realistically have been expected to pay in order to carry out the development.

St Lawrence Cement Inc v Barrette, 2008 SCC 64 at paras 111-116 [*St Lawrence Cement*].
Carr-Saunders v Dick McNeil Associates Ltd, [1986] 1 WLR 922 (Ch).
Tamares Ltd v Fairpoint Properties Ltd, [2007] EWHC 212 (Ch).

(v) *Waiver of tort claims promote uniformity within Canadian environmental law*

74 By recognizing an independent waiver of tort claim, this Honourable Court will promote internal consistency in Canadian environmental law. Federal and provincial environmental statutes already make substantial use of profit-stripping provisions which empower the courts to impose fines equaling the monetary benefit acquired by, or accrued through, pollution-generating activities. Above and beyond these measures, courts are generally sensitive to the profitability of corporate misconduct when sentencing an offender under any of the environmental protection statutes (*Keno*).

Fisheries Act, RSC 1985, c F-14, s 40(2) and 79.1-2.
Ontario Water Resources Act, RSO 1990, c O.40, s 111.
Environmental Protection Act, RSO 1990, c E.19, s 189.
United Keno Hill Mines, *supra* para 72 at paras 31-35.

D. Inco is liable under an independent waiver of tort claim

75 The Appellant submits that an independent waiver of tort claim appropriately applies in this case where Inco has wrongfully polluted 7,000 properties with thousands of tons of nickel particles over 66 years. The pollution from its refinery is certainly wrong because releasing this

substance allowed Inco to profit from using Port Colborne residents' land as a waste disposal site. As Professor Slawson explains:

> In a sense, all pollution comprises an unjust enrichment. By displacing the costs of storage and disposal to the environment and its members, a polluter is receiving a net benefit from the pollution. Anyone receiving a net benefit from pollution, therefore, is doing so in violation of the restitution principle...the person is being unjustly enriched. Thus, the interest of engaging in pollution activities without paying for the harms is not only not a public interest, it is not even a legitimate private interest. To the extent it exists for anyone, that person is being unjustly enriched at others' expense.
>
> W David Slawson, "The Right to Protection from Air Pollution" (1986) 59 SCLR 667 at p 672.

76 A disgorgement in the amount of a fair market rental fee for the duration of the pollution would adequately reimburse Port Colborne residents for Inco's wrongful conduct. Although Inco was engaged in an economically useful industrial activity, it must take responsibility for using class members' lands as if it had a *de facto* pollution easement. This award (and waiver of tort generally) is ideally suited to the industrial age and sensitive to the realities of the modern economy: it fairly vindicates class members' private property rights and ensures cost certainty for future industries like Inco who chose to wrongfully pollute. The fee would be distributed based on the level of pollution on class members' land.

E. The Appellant's position is consistent with environmental law principles

77 The Appellant submits that environmental law principles recognized in Canada are consistent with the Appellant's position to find Inco liable under private nuisance, *Rylands,* and an independent waiver of tort claim. It is the Appellant's position that this Honourable Court should adopt the analytical approach favoured by the Supreme Court of Canada in *St. Lawrence Cement*, in which environmental policy considerations animated their analysis of amenity nuisance under the *Civil Code of Quebec*. When determining the suitability of two competing interpretations of the torts at issue, this Court should favour the interpretation that best captures existing environmental law principles including the polluter-pays principle, the precautionary principle, and the principle of deterrence.

> *St Lawrence Cement, supra* para 73 at para 80.

(i) ***The Polluter Pays Principle***

78 The Supreme Court of Canada has recognized that the polluter pays principle:

> …has become firmly entrenched in environmental law in Canada. [It] assigns polluters the responsibility for remedying contamination for which they are responsible and imposes on them the direct and immediate costs of pollution. At the same time, polluters are asked to pay more attention to the need to protect ecosystems in the course of their economic activities.

Benidickson, *supra* para 63 at 24.
Imperial Oil Ltd v Quebec (Ministry of the Environment), 2003 SCC 58 at paras 23, 24.

79 Inco has discharged thousands of tons of nickel particles onto class members' lands and reduced their property values. As already stated, they have used class member's properties for ongoing waste disposal. The polluter pays principle would favour an interpretation of tort law that forces polluters like Inco to internalize the full cost of their business activities and encourages mitigation efforts by future polluters. The Appellant's interpretation of private nuisance based on measurable contamination (as opposed to adverse health effects), its application of *Rylands* to statutorily permitted facilities and chronic pollution, and its argument in favour of recognizing waiver of tort claims, achieve these goals.

(ii) ***The Precautionary Principle***

80 The precautionary principle acknowledges that scientific uncertainty affects decision making about adverse environmental impacts. It proposes that "early preventive action is appropriate even in the absence of scientifically document… [that are needed] when delay would impose increased costs and great risks of environmental harm." It shifts the risk of scientific uncertainty to those who carry out activities whose environmental impacts are not fully understood.

114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town), 2001 SCC 40 at para 31.
Canadian Environmental Protection Act, SC 1999, c 33, s 2(1)(a).
Benidickson, *supra* para 63 at 25.

81 A precautionary approach to environmental protection must include alternative avenues of redress when regulatory guidelines and environmental statutes fail to protect Canadians. Private nuisance, *Rylands* and waiver of tort have a unique and important role to play in this system. By not requiring proof of actual physical harm to land or residents, both private nuisance and waiver of tort encourage precaution in the face of environmentally risky conduct such as the

ongoing contamination of land with a "chemical of concern." The precautionary principle also supports a more inclusive definition of "non-natural use" under the *Rylands* doctrine since activities that were once thought to be safe may, with improvements in scientific knowledge, be later identified as dangerous.

(iii) *The Principle of Deterrence*

82 The principle of deterrence, or "pollution prevention", exists to "reduce or avoid the creation of environmental contaminants in the first instance rather than trying to control and contain their impact later." Despite deterrence being a major goal of environmental and tort law, the current system of civil liability in Canada has consistently failed to encourage the safe production and dissemination of synthetic chemicals.

> Benidickson, *supra* para 63 at 27.
> A Girard et al, "Tracking Environmental Crime Through CEPA: Canada's Environmental Cops or Industry's Best Friend?" (2010) 35(2) Canadian Journal of Sociology 219.

83 Strict liability torts such as private nuisance and *Rylands* have an important role to play since they better incentivize environmentally responsible activities than fault-based torts. Waiver of tort is also in a unique position to deter future environmental harms: it removes the incentive to engage in environmentally damaging behaviour by forcing corporations to disgorge the illicit profits generated by their wrongful conduct. It would allow this Honourable Court to send a strong message to manufacturers that they will no longer have the luxury of avoiding consequences, or externalizing the environmental costs of their misconduct, because they have succeeded in contaminating or polluting properties that are ecologically but not economically valuable. The potential of waiver of tort in this regard has been judicially and academically noted and must be put into effect by this Honourable Court.

> AJ Waite, "Deconstructing the rule in *Rylands v. Fletcher*" (2006) 18(3) J Environmental Law 423 at 18.
> *Serhan*, *supra* para 68 at para 245-247.
> Kanner, *supra* para 69.

84 Accordingly, the Appellant's interpretation of private nuisance, *Rylands,* and waiver of tort gives effect to these important environmental principles.

PART IV -- SUBMISSIONS IN SUPPORT OF COSTS

85 The Appellant requests costs from the Respondent here and in the two courts below.

PART V -- ORDER SOUGHT

86 The Appellant respectfully requests (a) that the appeal be allowed and (b) that the trial judgment in the amount of $36,000,000 be reinstated with costs in the amount of $100,000 payable forthwith by Inco for this appeal and (b) a declaration by this Honourable Court that which explicitly recognizes the existence of waiver of tort claims for litigation arising from polluted land disputes in Canada.

87 In the alternative, if this Honourable Court dismisses the appeal based on the two causes of action pleaded, the Appellant respectfully requests that this Honourable Court declare Inco liable under an independent waiver of tort claim and remit the matter of the calculation and disbursement of the fair market rental fee to Justice Henderson of the Ontario Superior Court.

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

_____
Charles Genest

_____
Claire Seaborn

_____
Brandon D. Stewart

Counsel for the Appellant
Ellen Smith

PART VI -- TABLE OF AUTHORITIES

Paragraph No.

CASES

STATUTES

BOOKS AND JOURNALS

OTHER AUTHORITIES

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

APPELLANT
(Appellant)

RESPONDENT
(Respondent)

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

SUPREME ENVIRONMENTAL MOOT
COURT OF CANADA

FACTUM OF THE APPELLANT ELLEN SMITH

TEAM #01-2013

Charles Genest
Claire Seaborn
Brandon Stewart

Counsel for the Appellant,
Ellen Smith

Document #: 585360