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 #03-2013

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 Seven thousand innocent landowners in the town of Port Colborne are the victims of contaminated property that has sustained diminution in value and will suffer stigma in the years to come.

2 The Appellant respectfully submits that the Court below erred in determining that the proven diminution of property values, resulting from pollution that Respondent Inco emitted during its 66 years of nickel refining, does not constitute an actionable tort. It is requested that the Honourable Supreme Environmental Moot Court of Canada ("SEMCC") restores the order of the Ontario Superior Court of Justice ("Trial Court") and orders the Respondent to pay damages for the diminution of property values in Port Colborne.

3 The evidence clearly supports liability under private nuisance for an unreasonable interference resulting from material damage to the property and interference with its use and enjoyment. The Ontario Court of Appeal ("Court of Appeal") erred in applying the rigid and outdated bifurcated approach to private nuisance. Rather, the Court should have proceeded under a unified approach, in which all factors can be balanced and considered under the broad and foundational question of private nuisance: whether or not an unreasonable interference has occurred.

4 Such balancing favours the Appellant, whose soil has been contaminated, who has had to live through years of uncertainty and altered living patterns, and whose property has now been rendered stigmatized and devalued. An unreasonable interference has occurred and the law of private nuisance can and must respond to it.

5 The evidence further substantiates liability under the rule in *Rylands v Fletcher*. The Respondent's use of the land for refining nickel is a non-natural use, the nickel brought to the land by Inco was likely to do mischief if it escaped, the nickel in fact escaped, and the resulting damage to the Appellant's property is recoverable. Finally, the strict liability rule in *Rylands* applies equally to an activity undertaken in conformity with relevant regulations. A legal, reasonable activity is not automatically a natural use of land and cannot always be considered a natural use.

6 Therefore, the Court of Appeal erred in subsuming the *Rylands* doctrine within a regulatory regime and relieving Inco of liability. The trial judge's correct determination of liability under this rule should be restored by the SEMCC.

7 In the alternative, the Appellant submits this case provides an opportunity to re-align the common law with the growing societal imperative to protect environmental values and achieve environmental justice. Tort law has not modernized sufficiently to enable it to respond to long-standing environmental harms and societal concerns. An incremental change to the rule in *Rylands* to provide strict liability for hazardous uses of land would effectively achieve this realignment.

8 The proposed change fulfills the principle of environmental justice, tort law principles of fairness, compensation, and deterrence, and sustainable development principles including the precautionary principle, the polluter pays principle, intergenerational equity, intragenerational equity, and access to justice. Moreover, this reform reflects the complementary relationship that exists between the common law and the legislature. Pursuant to this modification, Inco's use of land was hazardous. It increased the risk of widespread harm to the environment and other landholders and was undertaken without precautions.

9 Landholders in Port Colborne should not be unjustly burdened with the cost of industrial pollution. The SEMCC has been given the opportunity to ensure that the law responds to environmental tort issues and provides just remedies to wronged parties. Thereby, the Court can safeguard the continued efficacy of the common law in combatting environmental harms by finding liability under private nuisance, the rule in *Rylands,* or the newly proposed revision to *Rylands*.

10 The citizens of Port Colborne have suffered an actionable wrong and deserve compensatory damages for their losses. The Respondent must pay for the adverse consequences that flowed from its profitable operation onto Port Colborne residents' hard-earned properties.

B. Statement Of The Facts

(i) Introduction

11 This tragic case involves the harmful effects of industrial pollution on the town of Port Colborne, located in southern Ontario. The story of nickel contamination in Port Colborne began in 1918 when the Respondent Inco, established the town's only nickel refinery, which operated until 1984 (*Inco 1*).

Smith v Inco, 2010 ONSC 3790 at para 24, 52 CELR (3d) 74 [*Inco 1*].

12 For over six decades nickel oxide pollution was emitted from the smokestacks of the refinery, landed on the surrounding properties and mixed with the soil. Eventually, this contamination negatively affected the values of those properties (*Inco 2*).

Smith v Inco, 2011 ONCA 628 at para 8, 63 CELR (3d) 93 [*Inco 2*].

(ii) Ministry of the Environment investigation and results

13 Belatedly, beginning in the 1970s, the Ontario Ministry of the Environment ("MOE") conducted numerous air, soil, and vegetation studies in the areas surrounding the Inco refinery (*Inco 1*). By the late 1990s, the MOE had adopted a guideline of 200 parts per million ("ppm") for nickel content in the soil, a standard based on potential adverse effect on plant life (*Inco 2*).

Inco 1, *supra* para 11 at para 28.

Inco 2, *supra* para 12 at para 11.

14 On January 26, 2000, the MOE released the results of a routine phytotoxicological study showing that nickel levels in the soil of many areas of Port Colborne greatly exceeded 200 ppm. Testing of the representative Appellant Ellen Smith's property occurred on February 9, 2000 and revealed nickel contamination that ranged from 4,300 to 14,000 ppm (*Inco 1*).

Inco 1, *supra* para 11 at paras 29, 31, 33, 156.

15 On the same day, a representative from the Regional Niagara Public Health Department ("PHD") visited Ellen Smith and informed her that she should take certain safety precautions, such as restricting her children from playing in their yard, not letting her children ingest dirt, wiping her dog's feet when it entered the house and cleaning the floors of her home more often (*Inco 1*).

Inco 1, *supra* para 11 at para 157.

16 Owing to the high nickel readings, numerous follow-up studies were undertaken, the most substantial being the Community Based Risk Assessment and the Human Health Risk Assessment ("HHRA"), which involved the gathering and evaluation of approximately 2000 soil samples taken from approximately 200 properties (*Inco 1*). The trial judge found that government authorities were very visible in the Port Colborne area from September 20, 2000 until at least spring of 2002.

Inco 1, *supra* para 11 at paras 33, 159.

17 Starting in February 2000, real estate agents in Port Colborne began to insert clauses about nickel soil contamination into agreements of purchase and sale. On February 15, 2000, Bill Berkhout, a leading real estate broker, sent a memo to real estate agents explaining that financing and closings may be affected (*Inco 1*).

Inco 1, *supra* para 11 at paras 113, 114.

(iii) The atmosphere of concern

18 Beginning in September 2000, more information was made public on the extent of the nickel contamination and its potential negative effects. During this time, Port Colborne's contamination problems were the subject of significant local and even national media coverage.

19 As a result of this media exposure, the trial judge made the finding of fact that:

> By the fall of 2000, because of public disclosures, the public mood was one of extreme concern about nickel levels in the soil that could affect everything from vegetation to human health to real estate values (*Inco 1*).

Inco 1, *supra* para 11 at paras 34, 159, 26, 220.

20 In the fall of 2000, members of the public were requested to bring their garden fruits, vegetables, and well water to the MOE for testing. On November 30, 2000, the PHD distributed a fact sheet to residents, which contained a list of precautions they should take to reduce exposure to nickel. The fact sheet did note that there was no evidence that produce grown in their gardens was harmful to their health (*Inco 1*).

Inco 1, *supra* para 11 at paras 166, 162-164.

21 The final HHRA, released in March 2002, set a soil intervention level of 8,000 ppm. The trial judge accepted that this standard reflected the threshold below which the risk of interference with human health was significantly reduced or eliminated (*Inco 1*).

Inco 1, supra para 11 at paras 35, 86.

22 Twenty-five properties were found to require remediation based on the 8,000 ppm standard. Inco remediated 24 of the 25 properties. Ellen Smith, the representative plaintiff, refused permission to remediate her property (*Inco 1*).

Inco 1, supra para 11 at para 35.

23 The class and common issues were certified by the Ontario Court of Appeal in *Pearson v Inco*. Original claims for health effects were dropped in order to achieve standing and the only claims remaining were for diminution of property values (*Pearson*). The Appellant is seeking damages on behalf of a class of approximately 7,000 Port Colborne landowners for the diminution in property value resulting from the contamination of their land.

Pearson v Inco Limited (2005), 18 CPC (6th) 77 at paras 51, 64, 71, 205 OAC 30 (Ont CA).

(iv) The Courts below

24 At trial, Henderson J. found Inco liable in private nuisance and *Rylands v Fletcher*. He awarded the plaintiffs approximately $36 million in damages. Henderson J. found that the nickel accumulation resulted in a diminution of property values, thereby substantiating the unreasonable material harm to property required for a private nuisance claim. With regard to the rule in *Rylands*, he found the emissions amounted to an escape, that Inco's nickel refinery was a "non-natural use," and that the escape caused damage to the neighbouring properties (*Inco 1*).

Inco 1, supra para 11 at paras 43-69.

25 The Court of Appeal overturned this decision, concluding that the claimants had failed to establish Inco's liability under private nuisance or *Rylands* (*Inco 2*). Leave to appeal that decision to the SEMCC was granted on the issues of nuisance, *Rylands*, and the possibility of advancing a new environmental tort.

Inco 2, supra para 12 at paras 67, 103.

PART II -- QUESTIONS IN ISSUE

26 The Appellant submits:

a) that the Ontario Court of Appeal erred in law in finding that Inco was not liable under private nuisance; and

b) that the Ontario Court of Appeal erred in law in finding that Inco was not liable under the rule in *Rylands v Fletcher*.

27 In the alternative, the Appellant submits that the circumstances of this case demonstrate that existing causes of action are not congruent with prevailing social values. This Court could infuse the common law with environmental values by adopting an incremental change to the rule in *Rylands v Fletcher*.

PART III -- ARGUMENT

A. The Ontario Court Of Appeal Erred In Holding That The Discharge Of Nickel By Inco Did Not Constitute An Actionable Nuisance

(i) Introduction: a bifurcated approach to private nuisance is inappropriate

28 The tort of nuisance developed as a means of balancing and addressing competing proprietary interests (*Inco 2*). It does so by focusing on the effect of the prohibited conduct rather than the prohibited conduct itself (*Linden*). The working definition of private nuisance has been upheld by the Supreme Court of Canada ("SCC") in *St. Pierre* as:

> 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 light of the all the surrounding circumstances, this injury or interference is held to be unreasonable.
>
> *Inco 2, supra* para 12 at para 39.
>
> Allen M. Linden & Bruce Feldthusen, *Canadian Tort Law*, 8th ed (Markham: LexisNexis Butterworths, 2006) at 55.
>
> *St. Pierre v Ontario Minister of Transportation and Communication*, [1987] 1 SCR 906 at para 10, 39 DLR (4th) 10.

29 The inclusion of the word "or" in the working test for nuisance has led to separate tests for each branch of interference. *St. Helen's Smelting* held that physical damage to property is *prima facie* unreasonable, and that the surrounding circumstances need not be considered.

Conversely, in situations of interference with use and enjoyment, unreasonableness is determined by weighing the surrounding circumstances (*St. Helen's*).

> *St. Helen's Smelting Co. v Tipping* (1865), 11 HLC 642 at 650-651 [*St. Helen's*].

30 The Court below acknowledged that the distinction between the two branches of nuisance is not always clear (*Inco 2*) and that recent case law suggests that a unified approach may be preferable (*Tock*). Unfortunately, while hinting at the advantages of a new approach, the Court of Appeal determined that a decision on the nature of the test was not before it (*Inco 2*).

> *Inco 2, supra* para 12 at para 48.
>
> *Tock v St. John's Metropolitan Area Board*, [1989] 2 SCR 1181 at 1192, 64 DLR (4th) 620 [*Tock*].

31 The Appellant respectfully submits that the issue on the proper application of the test for private nuisance was in fact before the Court of Appeal.

(ii) The Court should proceed under a unified approach

32 Despite Canadian courts largely following a bifurcated approach, it is important to respect private nuisance as a unitary tort. Essentially, nuisance serves to address unreasonable interference to property, whether in the form of physical damage or interference with amenity rights.

33 Upholding what may have been a plausible distinction at the time of *St. Helen's* has resulted in a categorically constrained application of the tort of private nuisance. To remedy this situation, Courts should look at the test broadly, as suggested by Justice La Forest in Canada's leading case:

> The assessment whether a given interference should be characterized as a nuisance turns on the question, simple to state but difficult to resolve, whether in the circumstances it is reasonable to deny compensation to the aggrieved party (*Tock*).
>
> *Tock, supra* para 30 at 1191.

34 The SEMCC is asked to fill the void left by the Court of Appeal's decision and consider the proper direction for the future of the tort of private nuisance. Recent trends in the area, such as the SCC's suggestion of a unified approach in *Tock*, allow this Court to respond by removing the pedantic and unworkable requirements of a bifurcated approach. Doing so will allow the tort

to effectively respond to the array of potential nuisances, including complex issues like environmental contamination.

35 Accepting a unified approach will also allow Canadian courts to incorporate and weigh broader policy considerations. One such valuable consideration in cases of environmental contamination is the polluter pays principle. The SCC acknowledged its importance in *Imperial Oil* where it found the principle was "firmly entrenched in environmental law in Canada." Writing for the Court in *Imperial Oil,* Justice Lebel explained that:

> To encourage sustainable development, the [polluter pays] principle assigns polluters the responsibility for remedying contamination for which they are responsible and imposes on them the direct and immediate costs of pollution.
>
> *Imperial Oil v Quebec (Minister of Environment),* 2003 SCC 58 at para 23, [2003] 2 SCR 624.

36 In this case, the polluter pays principle could be applied to help assess the reasonableness of the interference. It would allow courts to reach a decision that holds the polluter accountable and prevents companies like Inco, the generators of the environmental harm, from passing pollution costs to others.

37 Another relevant environmental norm is the precautionary principle, which supports judicial intervention despite scientific uncertainty. As emphasized by the SCC in *Spray-Tech*, "[e]nvironmental measures must anticipate, prevent and attack the causes of environmental degradation… lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation."

> *Spray–Tech v Hudson (Village),* 2001 SCC 40 at paras 31-32, [2001] 2 SCR 241 [*Spray-Tech*].

38 The precautionary principle is of particular value in addressing inherent evidentiary weakness in cases of contamination. This is applicable in the case at bar, when present injury is not immediately obvious and the damages sought relate to consequential harms. The fact that pollution is invisible and its effects are often latent should not serve to deny compensation.

39 If the SEMCC rejects the suggested unified approach, the Appellant nonetheless submits that both interference with use and enjoyment and physical damage to land have been demonstrated. A finding of liability under these alternative approaches in turn provides support for a finding of liability under the unified approach.

(iii) An unreasonable interference with use and enjoyment has occurred

40 Interference with use and enjoyment, often referred to as amenity nuisance, involves the analysis and careful balancing of several factors, including the utility of the defendant's conduct, the nature of the locality, the severity of the harm, and the sensitivity of the plaintiff (Hall). However, the list is not closed, and other factors are often considered (*Tock*). Trivial interferences are not actionable, and the generally accepted threshold for unreasonableness is that the interference must cause inconvenience beyond what others in the vicinity can be reasonably expected to bear, having regard to the prevailing standard of comfort at the time and place (Fleming).

> Margaret Hall & Gregory Pun, *The Law of Nuisance in Canada* (Markham: LexisNexis Canada, 2010) at 72 [Hall].
>
> *Tock*, *supra* para 30 at 1191.
>
> John Fleming, *The Law of Torts*, 4th ed (Sydney: Law Book Company, 1971) at 346.

41 The trial judge's findings of fact clearly support the presence of an interference with use and enjoyment beyond the reasonable give and take necessitated by living in an industrial, mixed-use town. During the uncertainty of the testing period, Port Colborne landholders suffered unpleasant interference in several ways. The chemical contamination on the class members' lands resulted in intrusive disruptions in daily living habits in the form of constant testing and assessments, media scrutiny, and the continued presence of government officials, paired with the psychological uncertainty of the danger of the nickel (*Inco 1*).

> *Inco 1*, *supra* para 11 at paras 157-166.

42 Another example of amenity impact is the contamination stigma left on Port Colborne. Stigma damages have been increasingly prevalent in Canada and other common law jurisdictions and are awarded when remediation does not entirely restore the value of the land (Hall).

> Hall, *supra* para 40 at 241.

43 The leading Canadian case on stigma damages is *Tridan v Shell*, in which Justice Brinks of the Ontario Superior Court of Justice acknowledged that a residual loss of value often attaches to a contaminated site based on the knowledge that it was once polluted, and that the plaintiff in such situations should be entitled to the cost of repairing the property and an additional sum to compensate for any residual deficiencies (*Tridan*).

Tridan Developments Ltd v Shell Canada Products Ltd, [2000] OJ No 1741 at para 68, 35 RPR (3d) 141 (Ont Sup Ct), rev'd on other grounds (2002), 57 O.R. (3d) 503 at para 12 (Ont CA).

44 The stigma of the Port Colborne properties began after 2000 with the fluctuating views of the MOE and others concerning the danger of the presence of nickel in the properties, which resulted in fear and uncertainty in the community. It was then strengthened by the decision of realtors to include disclosure clauses in purchase and sale agreements to deal with the possible nickel contamination (*Inco 1*). This stigma led to a diminution of property values in Port Colborne. Furthermore, it adversely affected the residents' use of their properties by impacting their ability to dispose of the land as they desired.

Inco 1, *supra* para 11 at para 148.

45 Based on this evidence of interference, it is submitted that this Court should weigh the competing interests, having regard for all material circumstances. Henderson J.'s analysis at trial considered the potential outcome of such balancing:

> …I find that in the present case the severity of the damage, the extent of the damage, the number of residents affected by the damage, the residential character of the surrounding neighbourhood, and the fact that Inco emitted nickel particles as a byproduct of a private, profit-oriented business, far outweigh the utility to the community of Inco's business operations (*Inco 1*).

Inco 1, *supra* para 11 at para 83.

46 In striking an appropriate balance, Canadian courts have noted that the weight given to various factors is a contextual consideration, made in light of the acceptable thresholds of the day (*Royal Anne*). Relevant case law has evolved significantly over the last century, and now protects a wide range of property rights. In fact, nuisance has served to protect such capacious property rights as interference with television signals (*Nor-Video*).

Royal Anne Hotel Co. Ltd v Village of Ashcroft, [1979] 95 DLR (3d) 756 at para 12, 8 CCLT 179 (BC CA).

Nor-Video Services Ltd v Ontario Hydro, [1978] OJ No 3287 at para 26, 19 O.R. (2d) 107.

47 If the right to enjoy uninterrupted television is within the acceptable ambit of nuisance, then certainly freedom from contamination on one's property and resulting lifestyle alterations should be at least equally safeguarded. Increasing the scope of protection under nuisance to include rights against contamination dovetails with recent increasing support for the role of

courts in addressing environmental issues. As the SCC has consistently emphasized, the "question of compensation for environmental damage is of great importance" (*CanFor*).

> *British Columbia v Canadian Forest Products Ltd*, 2004 SCC 38 at para 7, 240 DLR (4th) 1 [*CanFor*].

48 While arguments can be made for the previous utility of Inco's conduct, the widespread severity of the harm, supported by evidence of daily interferences and permanent stigma, far outweighs any such utility. Further, the analysis must be done at the time of the interference, when Inco's refinery was no longer supplying Port Colborne with economic benefits and employment opportunities.

49 The evidence strongly corroborates a finding that Port Colborne property owners, through daily interference with their amenity rights over two years, and by the residual stigma inflicted on their properties, have suffered an unreasonable interference with the use and enjoyment of their land.

(iv) The nickel contamination constitutes material harm to land

50 In the alternative to an unreasonable interference with use and enjoyment, the trial judge's determination on the existence of material harm to land should be upheld. Henderson J. found that, "…if nickel has accumulated on the class members' properties in such amounts so as to negatively affect the values of the properties, then the physical damage to the properties is material" (*Inco 1*). In the Court below, Dougherty J.A. enumerated a new checklist for successful proof of physical damage to land, noting that the damage must be characterized as material, actual, and readily ascertainable (*Inco 2*).

> *Inco 1, supra* para 11 at para 88.
>
> *Inco 2, supra* para 12 at para 49.

51 In applying the aforementioned test, the Court below believed that a mere chemical alteration of the soil, without more, does not amount to physical damage to the property (*Inco 2*). The Court held that the nickel levels had to at least pose some risk to the health or well-being of the residents of those properties and that evidence of concerns about potential health risks was insufficient to meet this threshold (*Inco 2*).

> *Inco 2, supra* para 12 at paras 55, 67.

52 The threshold for liability set by Dougherty J.A. is overly restrictive and, if upheld, will create undesirable consequences. As noted *supra*, the goal of the tort of private nuisance is to provide protection from actions resulting in unreasonable effects to land or the use and enjoyment of land. Using the definition provided by the Court of Appeal allows protection only where the damage occurs to the landowner. What if nickel oxide at levels below 8,000 ppm created significant adverse reactions for plants or pets? Would the threshold still not be met? If not, the reliance on human health leads to unreasonable results.

53 To explain why it was incumbent on the claimants to show that the nickel particles cause either a realistic risk of, or actual harm to the health of the claimants, Dougherty J.A. cited a passage stating that, "Private nuisance vindicates the bundle of rights associated with one's property, and the right to live on one's land without risk to life or health must be a right in that bundle" (*Inco 2*, Hall). However, Dougherty J.A's reasoning mistakenly relies on health as the *only* right of consequence in that bundle, and thereby he negates the foundational concept of a bundle of rights in the first place.

Inco 2, *supra* para 12 at para 57.

Hall, *supra* para 40 at 85.

54 The Appellant understands that concerns about indeterminate liability demand proof of more than a mere change in the soil's chemical composition, and accepts Dougherty J.A.'s suggestion that the nickel must have had some detrimental effect on the land itself or the rights associated with its use (*Inco 2*). However, a more responsive interpretation would include harm to health while also considering other adverse effects, such as diminution in property value.

Inco 2, *supra* para 12 at para 55.

55 The SEMCC is therefore asked to support a broad and flexible definition of "detrimental effect" in determining whether the material harm threshold is met. Such an interpretation would consider all adverse consequences of the chemical alteration and not rely on a standard of harm to physical health or wellbeing. By this yardstick, the Port Colborne residents have suffered physical damage and detrimental affects to their property; damage that was material, actual, and readily ascertainable.

(v) Conclusion: unified or bifurcated, the interference is unreasonable

56 Whether Inco's environmental contamination is analysed under the compelling unified approach, as amenity nuisance, or as physical damage, a common thread runs throughout: Port Colborne's residents have suffered an unreasonable interference with their land.

57 Canadian courts have emphasized that the categories of nuisance are not closed and the principles must be "sufficiently elastic" (*Foster*) to address less typical cases of nuisance (Hall). Environmental contamination is such a category, and it is submitted that the SEMCC should take a flexible and active approach in its interpretation of private nuisance; an approach that aligns the policies of environmental protection with the compensatory nature of the law of nuisance, and an approach the provides relief and justice for the innocent property owners of Port Colborne.

Foster v McCoy, [1998] NBJ No. 281 at para 45, 203 NBR (2d) 252.

Hall, *supra* para 40 at 63.

B. The Ontario Court Of Appeal Erred In Holding That Inco Was Not Liable Under The Strict Liability Rule In *Rylands v Fletcher*.

(i) Introduction

58 The Appellant submits that the Court of Appeal erred in reversing the trial judge's finding of a valid claim against Inco pursuant to the doctrine in *Rylands v. Fletcher*.

59 The prerequisites of a strict liability claim under *Rylands* are:

1. the defendant made a "non-natural" or "special" use of his land;
2. the defendant brought on to his or her land something that was likely to do mischief if it escaped;
3. the substance in question escaped; and
4. the plaintiff's property was damaged because of the escape (*Inco 2*).

Inco 2, *supra* para 12 at para 71.

60 The trial judge correctly found that the claim satisfied these prerequisites, consequently imposing liability on Inco. In contrast, the Court of Appeal erred in overly expanding the original prerequisites to reverse this decision by finding that Inco was not liable on these grounds as Inco's operation did not represent an unnatural use of the land and the escape of the nickel particles was an intended consequence of the operation, "carried out in a reasonable manner and

in accordance with all applicable rules and regulations" (*Inco 2*). The alteration of the prerequisites to this rule are not supported by law and, in creating them, the Court of Appeal erred in principle. Therefore, the Appellant respectively submits that the trial judge's finding of liability should be restored.

Inco 2, *supra* para 12 at para 113.

(ii) The Appellant's claim meets the relevant prerequisites of the rule under Rylands

a. Non-natural use of the land

61 The concept of non-natural use has changed since *Rylands* and has been the source of many problems. It no longer means foreign, and has taken on the meanings of dangerous, extraordinary, special, or of no general benefit to the community (*Rickards*). Courts in Canada and other Commonwealth jurisdictions have attempted to differentiate indicia of regular everyday use of the land, such as farming and maintaining a house, from special, more dangerous uses that are riskier, such as operating a factory that handles radioactive material (*Fridman*). Further, the concept is interpreted in a flexible manner and considered with regard to contemporary standards (*Tock*).

Rickards v Lothian, [1913] UKPC 1.

Gerald Fridman, *Introduction to the Canadian Law of Torts*, 2nd ed (Markham: LexisNexis Canada Inc, 2003) at 112.

Tock, *supra* para 30 at 1189.

62 In *Gertsen*, methane gas from decomposing organic material in the defendant municipality's landfill drifted into the plaintiff's garage and ignited when he started his car, causing injury. The use of the land as a landfill site was found to be a non-natural use because of its proximity to a residential neighbourhood. This example is similar to the case at bar in that the offending substance is not in itself necessarily dangerous, but can be harmful when it contaminates property.

Gertsen v Metropolitan Toronto (1973), 2 OR (2d) 1, 41 DLR (3d) 646 (Ont SC).

63 The Court of Appeal gave excessive weight to the planning legislation and environmental regulations in determining that Inco's use of the land for refining nickel was "natural". These laws do not determine the naturalness of a particular land use. This approach would confuse

natural use of land with reasonable use of land, and the reasonable use of land for a lawful purpose is not an automatic defence to a claim under the rule in *Rylands*. The Court in *Transco* specifically affirmed that reasonableness is an insufficient standard in determining use. Further, the SCC confirmed that though an activity may be legal, such as the refining of nickel, this does not, in itself, constitute a defence against a *Rylands* claim (*St. Lawrence Cement*).

Transco plc v Stockport Metropolitan Borough Council, [2003] UKHL 61 at para 11 [*Transco*].

St. Lawrence Cement v Barrette, 2008 SCR 392 at para 97, [2008] 3 SCR 392 [*St. Lawrence Cement*].

64 Further, the House of Lords in *Cambridge Water* found storing chemicals for leather tanning to be a non-natural use even though it was common in the industry at the time of the decision. Therefore, Inco's placement in an industrialized part of the town is insufficient in itself to classify its use of the land as natural. The latter standard requires more than simply a use that is common in the area.

Cambridge Water Company v Eastern Counties Leather, [1993] UKHL 12 [*Cambridge Water*].

65 Furthermore, the need to remediate neighbouring properties because of the damage caused by Inco's nickel emissions as well as the precautionary measures taken by residents of Port Colborne to reduce exposure, both indicate that the use of the land in question is beyond natural. It is incongruous that an activity that necessitates remediation could be considered natural and, therefore, the Court of Appeal erred in so determining.

Inco 1, *supra* para 11 at paras 162-166.

66 The trial judge correctly established that the refining of nickel was not a natural use of the land and that, though it may be considered a reasonable use since Inco complied with environmental and planning regulations, neither compliance with regulations nor reasonableness of the use is, in itself, a defence to a *Rylands* claim. The Court of Appeal erred in finding this requirement not to have been satisfied, and the trial judge's determination of the use of the land as non-natural should be restored.

b. Mischief

67 The second requirement of the *Rylands* doctrine is that the defendant brought on to his or her land something that was likely to cause mischief if it escaped. This requirement is clearly

met in this instance. That Inco brought nickel onto the site is not contested. The trial judge found that Inco's special use of the land to refine nickel brought increased danger and that the chemical had the potential to cause damage (*Inco 1*). The Court of Appeal erred in overturning this decision and trivializing the danger posed by nickel refining.

Inco 1, *supra* para 11 at para 53-54.

68 The Court of Appeal inflated the importance of Inco's compliance with the relevant regulations and concluded that because of this compliance, the "mischief" requirement was not satisfied. The very existence of a regulatory regime governing use of this substance indicates its potential for misuse and harm if it were to escape. If the substance were entirely safe, there would be no concern with regulating it. The trial judge correctly determined the decrease in value of the Appellant's property as a result of the escape of the nickel to constitute a sufficient harm to satisfy this mischief requirement and that determination should be upheld by this Court.

c. Escape

69 The escape of the nickel from Inco's refinery has been clearly established and is not contested. Both of the Courts below correctly found that the rule should not be limited to a single isolated escape and this determination is uncontested.

Inco 2, *supra* para 12 at para 111.

70 The contentious aspect of the escape requirement stems from the nature of the risk involved. The Court of Appeal erred in holding that strict liability should not be imposed because the harm suffered is the intended result of an activity undertaken in a reasonable manner and in compliance with relevant regulations (*Inco 2*). As previously outlined, mere compliance with regulation and lawful operation of a commercial enterprise is not a defence to a *Rylands* claim (*St. Lawrence Cement*). The Court of Appeal unpersuasively narrowed the scope of the rule by increasing the threshold to meet the escape requirement. The rule in *Rylands* does not require that the escape be unintended, accidental, or isolated. It would bring the law into disrepute to absolve a defendant of liability for the escape of a substance simply because it was released intentionally and not accidentally. The legal prerequisite is simply that the substance in question escaped, as occurred in this case.

Inco 2, *supra* para 12 at para 113.

St. Lawrence Cement, *supra* para 63 at para 97.

d. Damage

71 The trial judge accurately determined that the nickel particles contaminated the soil, which constitutes permanent physical damage to the land that is recoverable and meets the requirement, and this determination should be upheld (*Inco 1*). Inco accepted and admitted that nickel contaminated the soil, and evidence demonstrates that the affected lands consequently suffered quantifiable loss in value.

Inco 1, *supra* para 11 at para 76.

72 However, the Court of Appeal erred in overturning the trial judge's decision by narrowing the scope of this rule and making personal injury a prerequisite for liability. *Rylands* does not require the damage to affect the plaintiff personally, but simply to damage the property. There does not seem to be any authority conclusively indicating that economic loss suffered from damage to property should be excluded from this rule. Further, the Court's determination cannot be reconciled with *Berendsen,* where the same Court held that property owners, under Ontario's *Environmental Protection Act*, are responsible for what they bring on to their properties regardless of whether that thing has the potential to cause a health risk. Harm to health is simply not a requirement under this rule and should not be used to preclude a finding of damage.

Berendsen v Ontario, [2009] OJ No. 5101 at para 65 (CA).

73 In addition, the learned Court of Appeal altered the law by finding that the chemical levels in this case did not constitute damage to satisfy this criterion as it was below the level tolerated by regulatory standards. That same Court came to the opposite conclusion in *Tridan*, where the stigma and damage from a chemical presence below regulated levels were recognized as a possibility. Therefore, this Court should maintain this position and uphold the trial judge's determination that the altered composition of the soil caused by the dissemination of the nickel particles constituted material physical damage that is a recoverable harm under this rule.

Tridan Developments Ltd v Shell Canada Products Ltd (2002), 57 O.R. (3d) 503 at para 12, 154 OAC 1 (Ont CA).

(iii) Conclusion

74 The evidence overwhelmingly supports a finding that Inco is strictly liable for the nickel contamination under the rule in *Rylands v. Fletcher*. All four prerequisites to the rule as elaborated above have been met and none of the possible defences to the rule is sufficiently relevant to this case. The Respondent's use of the land for refining nickel is a non-natural use, the nickel brought to the land by the Respondent was likely to do mischief if it escaped, the nickel did in fact escape, and the damage caused to the properties in question due to the escape is recoverable. Finally, the strict liability rule remains applicable to an activity carried out in compliance with relevant regulations. A legal, reasonable activity is not automatically a natural use of land and cannot be considered as such. Canada's legal system provides an alternate mechanism to legally shield regulated polluting activities from liability, and that is through the doctrine of statutory authority (*Heyes*). That doctrine, however, is not applicable on the facts of this case. Therefore, the Court of Appeal erred in subsuming the rule within a regulatory regime and thereby relieving Inco of liability. The trial judge's determination of liability under this rule was correct and should be restored by this Court.

> *Susan Heyes Inc v Vancouver (City)*, [2011] BCCA 77, 329 DLR (4th) 92, leave to appeal to SCC refused, 34224 (October 20, 2011) [*Heyes*].

C. A Cause Of Action That Safeguards Environmental Values

(i) Introduction

75 The Appellant submits that this case provides the opportunity to align the common law with societal values by modifying the rule in *Rylands v Fletcher* to provide strict liability for hazardous uses of land.

76 This incremental change in the common law:

1. reflects the inadequacy of current causes of action;
2. aligns tort law with changing societal goals;
3. infuses the common law with the principles of sustainable development and environmental justice;
4. is consistent with the core tort principles of compensation, deterrence, and fairness; and
5. recognizes the complementary approach between the legislature and the common law.

77 The facts found at trial support a finding of strict liability based on Inco's hazardous use of land. The Court of Appeal failed to consider the need to modernize the common law and erred by finding that Inco's use of land was not hazardous. These errors undermine the importance of environmental principles and stifle the common law's potential to effectively address environmental claims. Therefore, the Appellant respectfully submits that the need to modernize the common law be recognized and that the trial finding of liability be restored.

(ii) Existing causes of action are inadequate

78 The evolution of tort law mirrors societal development (Kay): urbanization brought the need for a nuisance cause of action, the industrial revolution prompted the emergence of the rule in *Rylands*, and the changes to the manufacturer-consumer relationship required the evolution of negligence. This flexibility is a seminal feature of the common law and the SCC has ruled it "can and should make incremental changes to the common law to bring legal rules into step with a changing society" (*Salituro*).

> Melanie Kay, "Environmental Negligence: A Proposal for a New Cause of Action for the Forgotten Innocent Owners of Contaminated Land" (2006) 94:1 Cal L Rev 149 at 161.
>
> *R v Salituro*, [1991] 3 SCR 654 at para 31, 50 OAC 125 [*Salituro*].

79 Society recognizes the pressing importance of environmental stewardship (*Hydro-Quebec*) and governments have embraced sustainable development (*Brundtland Report*, *CEPA*). Yet current common law tests are tailored to noxious smells, a flood of water, or an unhygienic ginger beer. They cannot adequately address the pervasive uncertainties characteristic of contaminated land, air, and water. The case at bar provides a seminal opportunity to use environmental principles to align the common law with societal values.

> *Canada (Procurer générale) v Hydro-Quebec*, [1997] 3 SCR 213 at para 127, 24 CELR (NS) 167.
>
> World Commission on Environment and Development, "From One Earth to One World" in *Report of the World Commission on Environment and Development: Our Common Future* (Oxford: Oxford University Press, 1987) at para 27 [*Brundtland Report*].
>
> *Canadian Environmental Protection Act*, RSC 1999, c 33 preamble [*CEPA*].

(iii) An incremental change to reflect a changing society

80 It is possible to ensure that the common law reflects the imperative of environmental protection in two ways. The first could involve a unified approach to private nuisance as

discussed *supra*. In the alternative, the rule in *Rylands* could be incrementally modified so as to impose strict liability for hazardous uses of land.

81 Incremental changes are those that are necessary to align the common law with social values (*Salituro*). Since "[t]he protection of our environment has become one of the major challenges of our time" (*Oldman*), the recognition of a tort focused on hazardous activities is necessary to meet that challenge. This proposed modernization is consistent with other recent changes to the common law including the policy driven expansion of negligence to cover economic losses arising from dangerous construction (*Winnipeg*), the acceptance of a new defamation defence better suited to the context of modern journalism (*Torstar*), and the creation of a new intrusion upon seclusion tort in response to technological change (*Jones*).

Salituro, supra para 78 at para 39.

Oldman River Society v Canada (Minister of Transport), [1992] 1 SCR 3 at para 1, 7 CELR (NS) 1.

Winnipeg Condominium Corp No 36 v Bird Construction Co, [1995] 1 SCR 85 at para 12, 121 DLR (4th) 193.

Grant v Torstar Corp, 2009 SCC 61 at para 39, [2009] 3 SCR 640.

Jones v Tsige, 2012 ONCA 32 at paras 67-68, 108 OR (3d) 241.

82 Furthermore, the change is consistent with past interpretations of the elements of the *Rylands* doctrine, since the shifting non-natural use concept "is capable of adjustment to the changing patterns of social existence" (*Tock*). Current patterns of social existence require robust environmental protection. This imperative can be best achieved by recognizing that any hazardous use is intrinsically non-natural.

Tock, supra para 30 at 1189.

83 Ultimately, this change would maximize protection of environmental values whenever a choice is made to put those values at increased risk. Nuisance would continue to protect property rights against unreasonable, but not necessarily hazardous, infringements, such as noises and odours. Negligence would be available as a remedy for instances of fault, such as illegal dumping. However, the modified rule in *Rylands* would require that property owners engaged in hazardous activities take responsibility for any resulting harms.

(iv) "Hazardous" defined in relation to sustainable development and environmental justice

84 A modification of the *Rylands* doctrine should reflect principles that aim to correct environmental harms. Firstly, any modification should speak to the ethical requirement for environmental justice. In particular, society does not believe that wealth or income should determine the level of protection granted to an individual's life and health (Wenz). Secondly, sustainable development requires conformity with the precautionary and polluter pays principles, as well as the principles of intergenerational equity, intragenerational equity, and access to justice. The SCC has explicitly recognized the importance of these environmental principles in cases involving the calculation of damages (*CanFor*), the growth of class action suits (*Western*), and the enhanced jurisdiction of municipalities (*Spray-Tech*).

Peter Wenz, *Environmental Justice* (Albany: State University of New York Press, 1988) at 218.

CanFor, *supra* para 47 at para 155.

Western Canadian Shopping Centres Inc v Dutton, 2001 SCC 46 at para 26, [2001] 2 SCR 534.

Spray–Tech, *supra* para 37 at paras 31-32.

85 Consistency with environmental principles can be achieved by establishing a precautionary standard. Traditional torts assume that injuries are concrete and observable, and ineffectively address the fact that environmental injuries involve invisible chemicals, scientific uncertainty, synergistic effects, latent harms, and stigma damages (Collins, Hughes). The proposed modified tort can address this incongruity by defining "hazardous" in relation to the precautionary principle. The dictionary definition of "hazardous" captures activities that are "risky or dangerous" (Barner), and the precautionary principle prompts action not only where that risk or danger is posed to human health, but also to the environment. This precautionary approach recognizes that substances can no longer be "presumed innocent until proven guilty" particularly where the contamination is widespread and the contaminant has received minimal scientific study (Collins). So hazardous uses would be those uses that are risky or dangerous, have the potential for widespread effects, and are undertaken in the absence of precautionary research. This standard prompts courts to determine whether a use carries innate environmental risks and whether a precautionary approach was applied.

Lynda M. Collins, "Strange Bedfellows? The Precautionary Principle and Toxic Tort: A Tort Paradigm for the 21st Century" (2005) 35 Environmental Law Reporter 10361 at 10362, 10364, 10366, 10369, 10371.

Elaine Hughes, Alastair Lucas & Willaim Tilleman, *Environmental Law and Policy*, 3rd ed (Toronto: Emond Montgomery, 2003) at 109-110.

Bryan A. Barner, ed, *Black's Law Dictionary*, 9th ed (United States: West Publishing Co, 2009) at 786.

86 This modification also aligns with the other environmental principles. It dovetails with the polluter pays principle and equity since it requires that polluters, like Inco, internalize quantifiable social costs where they have not taken a precautionary approach, rather then shifting the burden to future generations or innocent neighbours. It also improves upon the former "non-natural" *Rylands* requirement since, as occurred at the Court of Appeal, that criterion may inequitably increase protection for non-industrialized, and likely higher income areas, and reduce protection for industrialized, poorer communities. By explicitly severing the tie between the nature of a neighbourhood and liability, low-income claimants, such as those represented by Smith, are not barred from seeking environmental protection due merely to the nature of their neighbourhood. This is consistent with environmental justice and access to justice.

(v) The proposed modification is consistent with fundamental tort law principles

87 The proposed modification furthers the compensatory goal of tort law and respects the fundamental principle underlying the rule in *Rylands*. "A primary object of the law of tort is to provide compensation to persons who are injured as a result of the actions of others" (*Hebert*), and the *Rylands* doctrine reflects the appropriateness of increased liability where unilateral choices are made to substantially increase the risks of harm to another party (Linden). The proposed modification does not aim to alter these fundamental principles, but rather provide additional certainty in light of modern realities.

Hall v Hebert, [1993] 2 SCR 159 at para 58, 101 DLR (4th) 129.

Linden, *supra* para 28 at 540.

88 In this case, Inco and the 7000 residents represented by Smith have been engaged in over a decade of litigation due in part to the subjectivity inherent in the judicial determination of "non-natural". The Australian decision to abolish the *Rylands* doctrine (*Burnie*) was motivated in part by this very subjectivity, but it has received strong academic critiques (Murphy) and was

rejected by English Courts (*Transco*). A principled modification of the rule in *Rylands* avoids these critiques while promoting legal certainty.

Burnie Port Authority v General Jones Pty Ltd, [1994] HCA 13 at paras 23-24.

John Murphy, "The Merits of *Rylands v Fletcher*" (2004) 24:4 Oxford J of Legal Stud 643 at 659-668.

Transco, *supra* para 63 at para 6.

89 Both certainty and deterrence are achieved by refocusing the tort on a precautionary standard. It does not ask the Court to engage in a rigid, and possibly inequitable, analysis of the nature of the neighbourhood, but rather requires land users to actively investigate when their chosen use of land creates a potential for harm and to abstain from that use should the investigation unveil a risk of serious or irreversible harm (Collins). This requires more then merely adhering to regulatory standards, but rather imposes a higher duty consistent with the importance of protecting environmental values and reflecting an international trend towards imposing overarching duties of environmental care (see e.g. *QEPA*). This approach has two effects. Firstly, environmental harms will be deterred since land users will take a precautionary approach and act to avoid strict liability. Secondly, where a land user chooses to act despite that risk, perhaps because it has determined that it is profitable to do so, the costs of that activity will be allocated to that actor.

Collins, *supra* note 85 at 10371.

Environmental Protection Act 1994 (Qld), s 319 [QEPA].

90 The Appellant recognizes that strict liability is unwelcome for many industries (*Inco 2*); however, a strict liability tort for hazardous uses of land acknowledges that environmental harms must be made right and that there is a lack of fundamental environmental justice in leaving the cost with the innocent landowners, future generations, or the public at large. The National Round Table on the Environment and the Economy (NRTEE) stated that "[u]nfairness is frequently impossible to escape in contaminated site situations. Therefore, the goal of the allocation processes must be to minimize the unfairness. This most often means sharing the unfairness as much as possible *among those responsible*."

Inco 2, *supra* para 12 at paras 85-87.

National Round Table on the Environment and the Economy, *Backgrounder: Contaminated Site Issues in Canada* (Ottawa: Renouf, 2007) at 8 [emphasis added].

91 Moreover, the proposed modification respects the current protections embodied in the statute of limitations and the traditional tort law defences to the rule in *Rylands*. For instance, the defence of statutory authority shields any defendant where harms are an "inevitable result'" of exercising statutory authority (*Heyes*). This defence respects the fact that the legislature may have determined that economic infrastructure or other specific project is justified despite its hazards.

Heyes, *supra* para 74 at para 57.

92 Similarly, the Appellant submits that while regulatory compliance is not a defence to a claim under *Rylands* (*St. Lawrence Cement*), this Court could accept the English position advanced by Lord Justice Gibson to provide for a regulatory defence in cases where the regulator undertook an explicit policy based consideration of public interest, environmental harms, and the impact on common law rights (*Wheeler*).

St. Lawrence Cement, *supra* para 63 at para 98.

Wheeler v Saunders, [1994] EWCA Civ 8.

(vi) There is a complementary relationship between the common law and legislative approaches

93 The Court of Appeal had the opportunity to align the common law with environmental values, but erred in finding that any recognition of strict liability for hazardous uses should be left to the legislature (*Inco 2*). This finding neglects to consider that the common law should develop in response to shifts in societal values (*Salituro*), and that the common law has a role to play when regulation fails to remedy environmental problems due to political pressure, mistake, or inertia (Collins). Moreover, the majority of the SCC in *CanFor* specifically stated that the existence of a statutory scheme "is no reason to neglect the potential of the common law, if developed in a principled and incremental fashion, to assist in the realization of the fundamental value of environmental protection."

Inco 2, *supra* para 12 at para 93.

Salituro, *supra* para 78 at para 31.

Collins, *supra* para 85 at 10362.

CanFor, *supra* para 47 at para 155.

94 United States law demonstrates that the common law can and does effectively complement one of the world's broadest regulatory schemes for contaminated lands. This complementary framework is effective since it allows legislation to function in its traditional forward looking role while the common law looks backwards to make right the environmental harms of the past (Kanner). That the *Comprehensive Environmental Response, Compensation, and Liability Act* or "*Superfund"* legislation contains a savings clause that explicitly leaves room for claimants to use the common law shows that this complementary approach was both foreseen and welcomed by the legislature (*CERCLA*, Kay). In particular, strict liability has a clear place in the jurisprudence since "[t]hough there are still many hazardous activities that are socially desirable, it now seems reasonable that they pay their own way. It is too much to ask an innocent neighbor to bear the burden thrust upon him as the consequence of an abnormal use of the land next door" (*Cities*).

Allan Kanner, "Toxic Tort Litigation in a Regulatory World" (2001-2002) 41 Washburn LJ 535 at 548.

Comprehensive Environmental Response, Compensation, and Liability Act, 42 USC § 9614a (2000) [*CERCLA*].

Kay, *supra* para 78 at 159.

Cities Service Company v State, 312 So (2d) 799 at 801 (1975).

95 Compared to the extensive remediation framework in the United States, Canada's regulatory framework provides even more opportunity for a cooperative approach. Federally, the *Canadian Environmental Protection Act* is not aimed at the remediation of contaminated lands and its effectiveness and enforcement has been criticized (*CEPA*, Girard). In Ontario, the *Environmental Protection Act* creates a statutory duty of care; however, it does not provide for a civil action in and of itself (*OEPA*). Finally, the *Ontario Environmental Bill of Rights* provides some access to justice, but this is limited to cases involving harm to public resources (*OEBR*). So rather then providing a scheme from which private property owners can seek compensation, both levels of government have chosen to include a clause explicitly permitting civil suit (*CEPA*, *OEPA*). Overall, this is further evidence that the potential of the common law to provide a remedy where one does not otherwise exist cannot be dismissed.

CEPA, *supra* note 79 at s 40.

April L Girard, Suzanne Day & Lauren Snider, "Tracking Environmental Crime Through CEPA: Canada's Environmental Cops or Industry's Best Friend" (2010) 35:2 Canadian Journal of Sociology 219 at 228-229.

Ontario Environmental Protection Act, RSO 1990, c35 ss 93, 190.1(10).

Ontario Environmental Bill of Rights, RSO 1993, c 28 s 84(1).

96 The Court of Appeal also erred by failing to consider the Canadian context when accepting the English House of Lords conclusion that "given that so much well-informed and carefully structured legislation is now being put in place for this [environmental protection] purpose, there is less need for the Courts to develop a common law principle to achieve the same end" (*Cambridge Water*). While trends in other jurisdictions may be informative, the SCC has recently stressed that in some areas "other courts have not gone far enough" (*Mabior*). Unlike in the United States and Europe, stakeholders in Canada have given the issue of contaminated lands only modest attention (De Sousa). For example, the United Kingdom ranks ninth on a 2012 assessment of Environmental Performance Indicators (Emerson), and future legislative trends will impose higher levels of strict liability in accordance with the polluter pays principle (European Community Directive). In contrast, Canada's environmental performance ranks thirty-seventh (Emerson), and changes to key federal environmental statutes have weakened environmental protections (May). Moreover, funding for the independent bodies best placed to inform legislative reform has been discontinued: the Law Commission of Canada in 2006 and the NRTEE in 2012. Therefore the *Cambridge Water* conclusion is distinguishable.

Cambridge Water, *supra* para 64 at 17.

R v Mabior, 2012 SCC 47 at paras 55, 58, 96 CR (6th) 1.

Christopher De Sousa, "Contaminated sites: The Canadian situation in an international context" (2001) 62 Journal of Environmental Management 131 at 134, 137, 147-148.

John W Emerson et al., *EPI 2012* (New Haven: Yale Centre for Environmental Law and Policy, 2012) at 10, online: Yale <http://epi.yale.edu/sites/default/files/downloads/2012-epi-full-report.pdf>.

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Elizabeth May, "Bill C-38: The Environmental Destruction Act", Editorial, *The Tyee* (10 May 2012) online: The Tyee <http://thetyee.ca/Opinion/2012/05/10/Bill-C38/>.

(vii) Summary and application to the case at bar

97 The Appellant proposes a principled modification to the rule in *Rylands* to provide for strict liability where a landholder engages in hazardous activities. Hazardousness will be determined in reference to whether the use of land carries innate environmental risks and whether a precautionary approach was used. Compliance with regulatory standards is only a defence in instances where the regulator has clearly considered impacts on social values, environmental harm, and common law rights.

98 Applied to the findings of fact in this case, Inco's activities meet the requirements for liability. The use of land involved environmental risks caused by the large-scale release of an industrial by-product over decades. The refinery created "an increased danger to others" (*Inco 1*), caused widespread measurable damage to an entire town, and prompted extensive measures to minimize contact with a potentially harmful contaminant. Moreover, there is no evidence of any precautionary attempt to ascertain the possible impacts of the emitted waste despite that "common sense would… tell anyone that some of the contaminants … would eventually find their way into the soil" (*Inco 2*). There is also no evidence that the permitting process involved the requisite considerations. Therefore, Inco's refinery was a hazardous use of land and the Appellant submits that the trial award should be reinstated pursuant to the proposed modification of the rule in *Rylands*.

Inco 1, *supra* para 11 at paras 53, 332.

Inco 2, *supra* para 12 at para 24.

(viii) Conclusion

99 A shift in societal values supports an incremental modification of the rule in *Rylands* by providing for strict liability where land use is hazardous. Pursuant to this change, the evidence substantiates Inco's liability for the damages suffered by the Appellant. This modification furthers the tort goals of compensation, deterrence, fairness, and judicial economy and modernizes the common law to reflect the principles of sustainable development and environmental justice. It is consistent with the complementary relationship between the common law and the legislature, and is necessary given Canada's reluctance to legislate robust standards

to meet international environmental goals (see e.g. Agenda 21). Moreover, it provides the opportunity for the common law to play a seminal role in meeting one of our greatest challenges.

> United Nations Conference on Environment and Development, *Agenda 21: Program of Action for Sustainable Development*, UNGAOR, 46th Sess, Annex, Agenda Item 21, UN Doc A/Conf151/26 (1992) [Agenda 21].

PART IV -- SUBMISSIONS IN SUPPORT OF COSTS

100 The Appellant acknowledges that the successful party is generally entitled to the costs of the appeal (*Ouellet*). However, the Appellant respectfully requests costs from this appeal regardless of the outcome on two grounds.

> *Ouellet, Re*, 2004 SCC 64, 244 DLR (4th) 532.

101 As the first environmental contamination class action in Canada to be heard and tried on its merits, this case addresses issues that are of national and public importance. The threshold for tort liability in the context of contamination and whether the stigma attaching to private contaminated lands is compensable are issues in need of judicial clarification.

102 Moreover, the Appellant respectfully submits that the obvious and substantial inequality in resources between the parties should be recognized through an award of costs to the Appellant given the significant financial and temporal demands associated with this appeal.

PART V -- ORDER SOUGHT

103 The Appellant respectfully requests:

a. an order by this Honourable Court allowing the appeal and restoring the decision of the Ontario Superior Court of Justice with respect to both liability and quantification of damages; and

b. costs of this appeal and from the Courts below

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

_____
Jessica Todd

_____
Meghan Trepanier

_____
Sarah McCalla

Counsel for the Appellant
Ellen Smith

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APPELLANT
(Appellant)

RESPONDENT
(Respondent)

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SUPREME ENVIRONMENTAL MOOT
COURT OF CANADA

FACTUM OF THE APPELLANT ELLEN SMITH

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