CITATION: Smith v. Inco Limited, 2011 ONCA 628
DATE: 20111007
DOCKET: C52491

COURT OF APPEAL FOR ONTARIO

Doherty, MacFarland JJ.A. and Hoy J. (*ad hoc*)

BETWEEN

Ellen Smith

Plaintiff (Respondent)

and

Inco Limited

Defendant (Appellant)

Proceedings under the *Class Proceedings Act, 1992*

Alan J. Lenczner, Q.C., Larry P. Lowenstein, Laura K. Fric and Lauren Tomasich, for the defendant (appellant)

Kirk M. Baert, Celeste Poltak, Eric K. Gillespie, David Rosenfeld and Julia Croome, for the plaintiff (respondent)

Heard: May 9-12, 2011

On appeal from the judgment of Justice J.R. Henderson of the Superior Court of Justice dated July 6, 2010, with reasons reported at (2010), 76 C.C.L.T. (3d) 92.

By the Court:

I

OVERVIEW

[1] Inco Limited ("Inco") appeals from a judgment rendered after a trial of common issues in a class proceeding. The trial judge found that the soil on the properties of the class members ("claimants"), as represented by the plaintiff, Ms. Ellen Smith, contained nickel particles placed in the soil as a result of emissions generated by Inco's nickel refinery in Port Colborne, Ontario over a 66-year period prior to 1985. The trial judge further held that beginning in 2000 concerns about the levels of nickel in the soil caused widespread public concern and adversely affected the appreciation in the value of the properties after September 2000. The trial judge held that Inco was liable in private nuisance and under strict liability imposed by the rule set down in *Rylands v. Fletcher* (1866), L.R. 1 Ex. 265, aff'd (1868), L.R. 3 H.L. 330 for that loss. He fixed damages at $36 million. He rejected a claim for punitive damages and there is no appeal from that part of his disposition.

[2] Inco appeals, raising the following issues:

i. Did the trial judge err in holding that the discharge of the nickel particles by Inco on to the property of the class members constituted an actionable nuisance?

ii. Did the trial judge err in holding that Inco was liable for the discharge of the nickel particles under the rule established in *Rylands v. Fletcher*?

iii. Did the trial judge err in holding that the claimants had established a diminution in value of their properties after September 2000?

iv. Did the trial judge err in holding that assuming there was a diminution in the value of the properties after September 2000, that diminution was caused by the discharge of nickel particles on to the land?

v. Did the trial judge err in failing to hold that the claim was time barred under s. 45(1)(g) of the *Limitations Act*?

[3] The appeal must be allowed and the action dismissed. In our view, the claimants failed to establish Inco's liability under either private nuisance or the rule in *Rylands v. Fletcher*. Alternatively, and assuming the elements of either or both causes of action were made out, the claimants failed to establish any damages.

[4] Given our disposition on issues i, ii and iii, we need not address the causation issue or the limitation period argument. We will, however, consider one aspect of the trial judge's analysis of the applicability of the limitation period as it has potential application to other class action claims in which limitation period defences are raised.

II

THE NICKEL EMISSIONS

[5] Port Colborne is a small city located on the north shore of Lake Erie in southern Ontario. The Welland Canal linking Lake Erie and Lake Ontario cuts through the city.

[6] Inco opened a nickel refinery in Port Colborne in 1918. The refinery lies to the east of the Welland Canal. Inco was for many years the major employer in the Port Colborne area, employing as many as 2,000 people. The refinery closed in 1984.

[7] Between 1918 and 1984, Inco emitted waste products including nickel, mostly in the form of nickel oxide, into the air from the 500-foot smoke stack located on its property. The vast majority of the nickel emissions occurred before 1960. None occurred after the closure of the refinery in 1984.

[8] Nickel, consisting mostly of nickel oxide, has been found in widely varying amounts in the soil on many of the properties located within several miles around the Inco refinery. Inco accepts that its refinery is the source of the vast majority of the nickel found in the soil.

[9] It was not alleged that Inco operated its refinery unlawfully or negligently at any time. To the contrary, the evidence indicated that Inco complied with the various environmental and other governmental regulatory schemes applicable to its refinery operation. There was no evidence that the emission levels from the refinery contravened any regulations. Nor did the claimants allege at trial that the presence of the nickel in the soil on their properties posed any immediate or long-term threat to human health.

[10] The Ministry of the Environment ("MOE") has tested the soil on properties in the vicinity of the refinery for nickel and other metals from time to time since the 1970s. The

early testing examined the effect of the nickel particles on some kinds of plant life. Many of the tests were conducted in response to complaints primarily from farmers about the effects the emissions had on certain particularly sensitive crops and trees. The early samples revealed widely varying levels of nickel in the soil. There was no suggestion of any threat to human health.

[11] By the late 1990s, MOE had adopted a guideline of 200 parts per million (ppm) for nickel content in soil. That guideline, however, had no connection to any potential health risk posed by the nickel, and was based on levels at which nickel deposits in the soil could possibly adversely affect the most sensitive plant life (ecotoxicity).

[12] In 1997 MOE carried out a Human Health Risk Assessment ("HHRA") based on soil samples taken in 1991. The HHRA Report was published in August 1998. The test results showed levels up to 9,750 ppm. MOE reported that it was unlikely that the nickel levels posed any risks to human health.

[13] In January 2000, MOE released the results of a phytotoxicological study of soil samples taken from 89 different sites. The study showed nickel levels up to 5,000 ppm. The study also showed what were described as "two hot spots" where nickel levels were much higher. One was near the Smith property. MOE took samples from the Smith property and in September 2000, reported that nickel levels found on the property ranged from 4,300 ppm to 14,000 ppm.

[14] The MOE decided that extensive testing should be done in the area immediately to the west of the Inco refinery and the east of the Welland Canal (referred to as the Rodney Street area ("RSA")).

[15] In the fall of 2000 and the spring of 2001, MOE employees took some 2,000 samples from about 200 residential properties in the RSA. They tested for a variety of metals including nickel. In March 2002, MOE released an exhaustive and extensively peer reviewed report. Those test results revealed nickel levels that were higher than those reported in earlier testing. Other metals were also found in the soil at higher than anticipated levels.

[16] Based on the findings in the 2002 report, MOE ordered Inco to remediate the 25 properties, among the 200 properties sampled, where one or more of the soil samples from the property had yielded nickel levels above 8,000 ppm. Remediation involved the removal of soil to a specified level and its replacement with new soil. In its 2002 report, MOE explained the selection of 8,000 ppm as the appropriate level for remediation in these words:

> In this Human Health Risk Assessment, the Ministry considered contaminant exposures from a variety of sources including: indoor and outdoor air; soil and dust; food from the supermarket and home gardens; and, the municipal drinking water supply. *To protect residents, and especially toddlers, the soil nickel intervention level was developed to ensure that all of these nickel exposures did not exceed a value that is well below any potential health risk.* [Emphasis added.]

[17] Inco complied with the MOE order and, by the end of 2004, had remediated 24 of the 25 properties. Ms. Smith, the owner of the remaining property subject to the MOE order, would not allow Inco to remediate her property. As of the date of the trial, she and her family continued to live on the property in its unremediated state.

III

THE CLASS AND THE NATURE OF THE CLAIMS

[18] The class on whose behalf the action is brought consists of all persons who have, since September 2000, owned residential property within an area that takes up most of the city of Port Colborne. There are approximately 7,000 properties, most of which are in the urban part of Port Colborne, but some of which are in the rural area east of the Inco property.

[19] The trial judge divided the class into three subsections based on the geographical location of their property:

- The Rodney Street area ("RSA") consisting of some 340 residences bordered by the Welland Canal to the west, Rodney Street to the south, Davis Street to the east and Durham Street to the north. The Inco refinery is located immediately east of the RSA. The RSA properties are primarily single unit, relatively inexpensive family homes. The highest concentration of nickel particles was found on

properties located in the RSA. Samples from this area precipitated the 2000-2001 HHRA.

- The east side area ("ESA") consisting of approximately 1,500 residences situated east of the Welland Canal, but not included in the RSA.
- The west side area ("WSA") consisting of approximately 5,200 properties located west of the Welland Canal.

[20] This lawsuit was commenced in March 2001 shortly after public concerns about the nickel levels emerged. The claims initially advanced on behalf of the class included claims for personal injuries and adverse health effects based on the emission of a wide variety of pollutants including nickel particles. The claims were made against multiple defendants and set out numerous causes of action including negligence. In the months following the commencement of the lawsuit, many statements appeared in the press attributed to counsel for the claimants asserting that MOE studies had established conclusively that the nickel deposits in the soil were carcinogenic and exposed local residents to "serious health risks", including a risk of cancer "at least eight and possibly 40 times higher than the standards set by the Ontario government".

[21] By the time the action reached trial, Inco was the only defendant and the only claim left related exclusively to property values. Allegations that the nickel deposits

were carcinogenic or in any way harmful to the health of the residents had been abandoned.

[22] The claimants alleged that their property values had not increased at the same rate as comparable property values in other small cities located nearby. The class contended that the failure to keep up with increases in comparable properties was caused by the reasonable, widespread public health concerns over the nickel deposits in the soil on their properties. According to the claimants, these concerns became prominent and widespread beginning in the fall of 2000 when soil samples taken from properties in the RSA revealed higher than expected levels of nickel in the soil. The claimants alleged that the facts gave rise to claims in nuisance, both public and private, trespass and under the strict liability doctrine in *Rylands v. Fletcher*.

[23] The trial judge found against the claimants on the trespass claim and the public nuisance claim. There is no cross-appeal from those findings and we need not address those claims in these reasons.

[24] It is important to emphasize the exact nature of the claim advanced at trial. It was not about contamination in the sense that it was alleged that the nickel emissions actually posed any threat to human health or otherwise adversely affected the claimants' use of their properties. The emissions had streamed from Inco's refinery for over 60 years. Everyone could see the smoke coming from the 500-foot stack on a daily basis. Common

sense told everyone that nickel in some form must have been among the contaminants in the smoke. As Mrs. Smith testified, common sense would also tell anyone that some of the contaminants, including nickel, would eventually find their way into the soil of the properties around the refinery. On the claimants' case as it was ultimately presented, however, the emissions from the refinery did not give rise to any cause of action. The claims first arose long after the smoke stopped blowing from the Inco refinery.

[25] On the claims as advanced at trial, it was concerns about the possible adverse health effects of the nickel in the soil that developed some 15 years after the refinery closed that gave rise to several causes of action against Inco. Ironically, those concerns that began with MOE's report of higher than previously recorded levels of nickel in the soil, were fuelled in part by the very serious, but subsequently abandoned, allegations made by the claimants' counsel in the months following the commencement of this lawsuit in March 2001. In those allegations, the nickel particles in the soil were said by counsel to have been shown by MOE to be carcinogenic and to pose serious health risks to the residents.

[26] The claims rested on six assertions:

(1) The refinery emitted nickel particles for 66 years.

(2) Over the 66 years, nickel particles, primarily in the form of nickel oxide, made their way into the soil on the claimants' properties and became part of that soil. The vast majority of the nickel in the soil came from the refinery.

(3) Until 2000, while there were isolated complaints mostly about plant life contamination, there were no significant public health concerns associated with the nickel levels in the soil on the properties around the refinery.

(4) Beginning in early 2000 and continuing thereafter, as soil samplings revealed higher levels of nickel in the soil of many properties than had previously been recorded, widespread concerns about the potential health effects of those nickel deposits developed in the community and became a matter of widespread public concern and controversy.

(5) Those concerns caused a measurable negative effect on the value of properties owned by the claimants. After 2000, property values increased less than they would have but for the negative publicity surrounding the potential nickel contamination of the properties.

(6) The negative effect on the values of the properties could be quantified by comparing the increase in the property values on the claimants' properties with the larger increases in the values of similar properties in the nearby city of Welland during the same time period (1997 – 2008).

[27] Inco conceded assertions (1) and (2).

[28] The trial judge accepted that widespread public concerns about the potential adverse health effects associated with the level of nickel particles in the soil developed in early 2000 and continued thereafter. He did so after a thorough review of the evidence (paras. 120-220). He concluded, at para. 220:

> Therefore, in summary, as a result of the many aforementioned public disclosures and the consequent negative publicity, I find that the message to the public regarding the nickel problems in Port Colborne started to change in January 2000. The public perception of the problems gradually changed as more information was disseminated throughout 2000. As the year progressed the public mood changed from tranquility to uncertainty to great concern. *By the fall of 2000, because of the public disclosures, I find that 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.* [Emphasis added.]

[29] We are not persuaded we should interfere with the trial judge's findings of fact. On those findings, the reaction to the higher nickel levels by various governmental agencies and Inco itself, as extensively reported in the media, caused widespread concern in the public about the potential adverse health effects of the nickel levels in the soil on their properties. We take assertions (3) and (4) as established for the purposes of the appeal.

[30] The trial judge next considered whether the aforementioned public concerns had an adverse effect on the property values of the claimants' properties. He accepted as a common sense inference that proximity to a large industrial operation apart from any

contamination concerns would inevitably have an adverse effect on property values (para. 261). The trial judge further accepted as a matter of common sense that "environmental contamination" would also have an adverse effect on property values (para. 264). He concluded, at para. 278:

> On the basis of all of this evidence and the two common sense principles, *I find on a balance of probabilities that the plaintiff has proved a general causal connection between the negative publicity and public disclosures that started in the year 2000 and a negative effect on the values of the class members' properties.* [Emphasis added.]

[31] In the above-quoted finding, the trial judge accepted the causation argument underlying assertion (5). He also accepted the approach to the quantification of damages advanced by the claimants in assertion (6). He ultimately found that the comparable properties in Welland, Ontario had increased in value by 4.35% more than the Port Colborne properties during the ten-year period from 1999 to 2008. This difference yielded a loss of $4,514 per property, which when multiplied by the number of properties owned by the claimants resulted in a damage award of $36 million (paras. 297-298).

[32] The appellant challenged both the causation finding and the damage assessment. In light of the conclusions we have come to on the substantive causes of action and damages, we need not address causation. We will review the evidence relevant to damages when addressing the submission that the claimants failed to prove damages.

IV

THE GROUNDS OF APPEAL

(A) Did the trial judge err in holding Inco liable in nuisance?

(i) The trial judge's analysis

[33] The trial judge observed, at para. 76, that while private nuisance claims can be based on either material physical damage to the claimants' properties, or interference with the beneficial use of the claimants' properties, the claimants relied exclusively on the contention that Inco's actions had caused material physical damage to their properties. The trial judge accepted this submission, at para. 76:

> The nickel particles, primarily in the form of nickel oxide, have become part of the soil on these properties. I accept the submission that this constitutes physical damage to the class members' properties.

[34] The trial judge determined that the physical damage to the properties caused by the presence of nickel particles in the soil was permanent and existed regardless of the levels of nickel in the soil. He further held that it was irrelevant to the question of physical damage whether the nickel produced any adverse effects on the soil or the health of those residing on the properties (paras. 100-101).

[35] The trial judge next held that because he had determined that the nickel particles in the soil constituted physical damage to the properties he was not required to consider

other factors such as the character of the neighbourhood or the social utility of Inco's conduct in determining whether the conduct constituted a nuisance (para. 82). He did, however, indicate that had he been required to consider those other factors, he would have reached the same conclusion. He said, at para. 83:

> [I]f I am required to consider these external factors, 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 by-product of a private, profit oriented business, far outweigh the utility to the community of Inco's business operations.

[36] Having found that the presence of the nickel particles in and of itself constituted physical damage to the claimants' properties, the trial judge turned to the further requirement that physical damage must be material, meaning significant. He held, at paras. 88 and 90:

> *In my opinion, 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. This is the only sensible conclusion. Objectively, even if the nickel accumulation in the soil does not affect human health, the accumulation of a foreign substance on a property owner's land that causes a loss of property value is material.*
>
> ...
>
> I specifically reject Inco's argument that by tying the cause of action to the establishment of a loss of property value is "putting the cart before the horse". Nuisance claims are based on the effect of the defendant's conduct, not on the

> nature of the conduct. *Therefore, if the effect of Inco's conduct is to damage property so as to negatively affect property values, then nuisance is established.* [Emphasis added.]

[37] As we understand the trial judge's reasons, he found that an actionable nuisance arose at some point after the fall of 2000 when public concerns about potential health risks associated with the nickel levels in the soil began to adversely affect the appreciation in the value of the properties. On his analysis, the actual physical damage said to be caused when the nickel particles became part of the soil between 1918 and 1984 only became material physical damage more than 15 years later when public concerns about the potential health risks associated with the nickel particles emerged and negatively affected the value of the properties.

[38] Also on the trial judge's analysis, the levels of nickel in the soil and the actual effects, if any, of that nickel on the property or its occupiers were irrelevant to Inco's liability. Any amount of nickel in the soil attributable to Inco's refinery, even if it posed no risk to the residents and did not interfere with the use of their properties, constituted a nuisance if at some point in time public concern about the potential harm caused by the nickel could be shown to have adversely affected the market values of the properties.

(ii) Analysis

[39] People do not live in splendid isolation from one another. One person's lawful and reasonable use of his or her property may indirectly harm the property of another or

interfere with that person's ability to fully use and enjoy his or her property. The common law of nuisance developed as a means by which those competing interests could be addressed, and one given legal priority over the other. Under the common law of nuisance, sometimes the person whose property suffered the adverse effects is expected to tolerate those effects as the price of membership in the larger community. Sometimes, however, the party causing the adverse effect can be compelled, even if his or her conduct is lawful and reasonable, to desist from engaging in that conduct and to compensate the other party for any harm caused to that person's property. In essence, the common law of nuisance decided which party's interest must give way. That determination is made by asking whether in all the circumstances the harm caused or the interference done to one person's property by the other person's use of his or her property is unreasonable: *Royal Anne Hotel Co. Ltd. v. Village of Ashcroft* (1979), 95 D.L.R. (3d) 756 (B.C.C.A.), at pp. 760-61.

[40] The reasonableness inquiry focuses on the effect of the defendant's conduct on the property rights of the plaintiff. Nuisance, unlike negligence, does not focus on or characterize the defendant's conduct. The defendant's conduct may be reasonable and yet result in an unreasonable interference with the plaintiff's property rights. The characterization of the defendant's conduct is relevant only to the extent that it impacts on the proper characterization of the nature of the interference with the plaintiff's property rights: *Antrim Truck Centre Ltd. v. Ontario (Ministry of Transportation)*

(2011), 106 O.R. (3d) 81 (C.A.), at para. 77; John Murphy, *Street on Torts*, 12th ed. (Oxford: Oxford University Press, 2007), at pp. 420, 431, 435.

[41] Scholars and judges agree that the uncertain origins and the protean nature of the tort of private nuisance make it difficult to provide an exhaustive definition of the tort: *Antrim Truck Centre Ltd.* at paras. 78-79; *Walker v. McKinnon Industries Ltd.*, [1949] O.R. 549 (H.C.), at pp. 555-56; aff'd without reference to this point, [1950] 3 D.L.R. 159 (Ont. C.A.); aff'd without reference to this point, [1951] 3 D.L.R. 577 (P.C.); *Hunter v. Canary Wharf Ltd.*, [1997] 2 All E.R. 426 (H.L.), per Lord Cooke at p. 456; *Street on Torts* at pp. 419-21; Gregory S. Pun and Margaret I. Hall, *The Law of Nuisance in Canada* (Markham, Ontario: LexisNexis Canada, 2010), at pp. 55-57; F.H. Newark, "The Boundaries of Nuisance" (1949) 65 Law Q. Rev. 480.

[42] In *St. Pierre v. Ontario (Minister of Transportation and Communication)*, [1987] 1 S.C.R. 906, at para. 10, McIntyre J. for the court, accepted as a working definition of private nuisance, the definition found in an earlier edition of *Street on Torts*:

> A person, then, may be said to have committed the tort of private nuisance when *he is held to be responsible for an act indirectly causing physical injury to land or substantially interfering with the use or enjoyment of land or of an interest in land, where, in the light of all the surrounding circumstances, this injury or interference is held to be unreasonable.* [Emphasis added.]

[43] As evident from the definition relied on in *St. Pierre,* while all nuisance is a tort against land predicated on an indirect interference with the plaintiff's property rights, that interference can take two quite different forms. The interference may be in the nature of "physical injury to land" or it may take the form of substantial interference with the plaintiff's use or enjoyment of his or her land. The latter form of nuisance, sometimes described as "amenity nuisance" is not alleged here: see *Street on Torts* at p. 429; *The Law of Nuisance in Canada* at pp. 69-71; Conor Gearty, "The Place of Private Nuisance in a Modern Law of Torts" [1989] Cambridge L.J. 214.

[44] The claimants do not argue that the nickel particles in the soil caused any interference with their use or enjoyment of their property. Instead, they claim that the nickel particles caused "physical injury" to their property. That physical injury was the product of the nickel particles becoming part of the soil and the subsequent adverse effect on the value of the property because of the public concerns over the potential health consequences of those particles being in the soil.

[45] The courts have taken a somewhat different approach to nuisance claims predicated on physical damage to property and those claims based on amenity or non-physical nuisance. Where amenity nuisance is alleged, the reasonableness of the interference with the plaintiff's property is measured by balancing certain competing factors, including the nature of the interference and the character of the locale in which that interference occurred. Where the nuisance is said to have produced physical damage

to land, that damage is taken as an unreasonable interference without the balancing of competing factors. The distinction first appeared some 150 years ago in *St. Helen's Smelting Co. v. Tipping* (1865), 11 H.L.C. 642, at pp. 650-51:

> My Lords, in matters of this description it appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. *With regard to the latter, namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs.* If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop. *But when an occupation is carried on by one person in a neighbourhood of another, and the result of that trade, or occupation, or business, is a material injury to property, then there unquestionably arises a very different consideration. I think, my Lords, that in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to circumstances the*

> *immediate result of which is sensible injury to the value of the property.* [Emphasis added.]

[46] The distinction drawn in *St. Helen's Smelting Co.* perhaps reflects the real property origins of the tort of nuisance and the priority and status attached by the common law to land ownership and one's right to physical dominion over one's land: see John Murphy, "The Merits of *Rylands v. Fletcher*" (2004) 24 Oxford J. Legal Stud. 643, at p. 649. The give and take required between neighbours called for the balancing of potentially competing factors where the actions of one interfered with another's enjoyment of his or her property. The spirit of give and take could not, however, go so far as to require one to countenance actual and material physical harm to his or her property.

[47] The distinction between physical damage nuisance and amenity nuisance described in the passage from *St. Helen's Smelting Co.* quoted above has been repeatedly applied by courts in this province: see *Walker v. McKinnon Industries Ltd.* at pp. 556-57; *Russell Transport Limited v. Ontario Malleable Iron Co. Ltd.*, [1952] O.R. 621 (H.C.), at pp. 628-29; *Walker v. Pioneer Construction Co. (1967) Ltd.* (1975), 8 O.R. (2d) 35 (H.C.), at p. 38; *Schenck v. The Queen in Right of Ontario* (1981), 34 O.R. (2d) 595 (H.C.), at p. 604, aff'd (1984), 49 O.R. (2d) 556 (C.A.), aff'd [1987] 2 S.C.R. 289. See also *Kent v. Dominion Steel and Coal Corp. Ltd.* (1964), 49 D.L.R. (2d) 241 (Nfld. C.A.), at p. 248; *Hunter v. Canary Wharf Ltd.*, per Lord Hoffmann at pp. 450-51; *The Law of*

Nuisance in Canada at p. 71, fn. 55; Maria Lee, "What is Private Nuisance" (2003) 119 Law Q. Rev. 298, at p. 311.

[48] There is, however, relatively recent *dicta* suggesting that there may be some role for the balancing of competing factors even where the nuisance takes the form of actual physical damage to land: see *Tock v. St. John's Metropolitan Area Board,* [1989] 2 S.C.R. 1181, at p. 1192; *Royal Anne Hotel Co. Ltd.* at p. 761. The difficulty that sometimes arises in distinguishing between what constitutes amenity nuisance and nuisance based on physical damage to land suggests that a uniform approach to nuisance claims allowing a court to balance competing factors, although perhaps weighing them differently depending on the nature of the interference alleged, may be preferable. We need not decide that issue. We approach this ground of appeal on the basis that the claimants are correct in contending that competing factors cannot be balanced where the nuisance involves actual physical damage to the claimants' lands.

[49] In *St. Helen's Smelting Co.*, the Lord Chancellor used different phrases to describe the kind of harm to land that would suffice to establish nuisance. He referred to "material injury to the property" and to "circumstances the immediate result of which is sensible injury to the value of the property". Subsequent cases have used somewhat different terminology, some of which now seems outdated and inappropriate: *e.g.* see *Salvin v. North Brancepeth Coal Company* (1874), L.R. 9 Ch. App. 705, at p. 709. In our view, the requirement of "material injury to property" referred to in *St. Helen's Smelting Co.* 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.

[50] Material damage refers to damage that is substantial in the sense that it is more than trivial: *St. Lawrence Cement Inc. v. Barrette*, [2008] 3 S.C.R. 392, at para. 77. Actual damage refers to damage that has occurred and is not merely potential damage that may or may not occur at some future point: *Walker v. McKinnon Industries Ltd.* at pp. 558-59. Damage that is readily ascertainable refers to damage that can be observed or measured and is not so minimal or incremental as to be unnoticeable as it occurs. We do agree, however, with counsel for the claimants that the damage may be readily ascertainable even if it is not visible to the naked eye and does not produce some visibly noticeable change in the property. In our view, a change in the chemical composition of the soil measurable through established scientific techniques would constitute a readily ascertainable change in the soil: see *Gaunt v. Fynney* (1872), L.R. 8 Ch. App. 8. For the reasons we will develop below, the claimants' problem is not with the ascertainability of the change caused by the nickel particles, but with the characterization of that change as damage or harm to the property.

[51] Mr. Lenczner, with his usual force and clarity, submits that there was no damage caused to the claimants' land by the nickel particles, much less substantial damage that was both actual and readily ascertainable. He argues that the trial judge wrongly equated any physical change in the land with physical damage to the land. In his submission, to

describe nickel particles that blended harmlessly into the soil without any adverse impact on the property as physical damage is to denude the phrase of its most obvious requirement that the land somehow be harmed by the change that is said to constitute the nuisance.

[52] Mr. Lenczner next takes issue with the trial judge's finding that he could look to the diminution of property values some 15 years after the emissions from the refinery had ceased to conclude that those emissions caused material physical damage to the claimants' land. He submits that the trial judge's reasoning confuses the requirement that the claimants establish actual, substantial, physical harm to their land as a constituent element of private nuisance with the potential measure of damages available to the claimants had they been able to establish that they suffered actual, substantial, physical damage to their land. 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: see *Hunter v. Canary Wharf Ltd.*, per Lord Hoffmann at pp. 451-52. Counsel maintains, however, that the question of whether Inco's conduct caused actual substantial physical damage to the claimants' land must be answered by asking the question – what did the nickel particles do to the soil? And not by asking – what did

someone some 15 years after the refinery was closed think that the nickel particles might or might not have done to the soil?

[53] Mr. Baert, for the claimants, in his able and helpful submissions, adopts the analysis of the trial judge. He submits that when the nickel particles landed on the claimants' properties and became part of the soil, those particles "interfered" with the claimants' properties and thereby caused physical damage to those properties. He relies on *Russell Transport Limited* at pp. 625-26 to support this contention.

[54] Mr. Baert accepts that physical damage to property must be tangible and substantial. He submits, however, that the trial judge was entitled to look at all of the adverse effects flowing from the nickel particles in the soil, including diminished property values some 15 years later, in determining whether the physical damage was substantial. He relies on *Tridan Developments Ltd. v. Shell Canada Products Ltd.* (2002), 57 O.R. (3d) 503 (C.A.).

[55] With respect to the trial judge's reasons and Mr. Baert's submissions, we think the trial judge erred in finding that the nickel particles in the soil caused actual, substantial, physical damage to the claimants' lands. 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. 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. For example, in *Russell Transport Limited*, the authority relied on by the claimants, it was not the mere emission of the iron oxide particles onto the plaintiff's property that constituted the nuisance. McRuer C.J.H.C. said, at pp. 625-26:

> The irresistible conclusion on the evidence is, and *I so find, that the defendant emits from its plant particles of iron and iron oxide together with other matters which settle on the plaintiffs' lands, rendering the plaintiffs' property unfit for the purpose for which it was purchased and developed.* The plaintiffs have therefore suffered and will continue to suffer material and substantial damage to their property unless the emission of injurious substances is abated. [Emphasis added.]

[56] The Chief Justice's finding that the particles rendered "the plaintiffs' property unfit for the purpose for which it was purchased and developed" clearly distinguishes *Russell Transport Limited* from this case. The claimants cannot show, and indeed did not attempt to show, that the nickel particles in the soil had any impact on their ability to use their properties for any purpose.

[57] Where the nuisance is said to flow from the physical harm to land caused by the contamination of that land, the claimants must show that the alleged contaminant in the soil had some detrimental effect on the land or its use by its owners. In this case, potential health concerns were the only basis upon which it could be said that the nickel particles harmed the land of the claimants. 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. The authors of *The Law of Nuisance in Canada*, at p. 85, although in a somewhat different context, aptly describe the nature of the harm the claimants had to prove:

> It is true that private nuisance is predicated on harm to the plaintiff's property rights; but surely *one of those rights must be the right to occupy the property without harm to one's health or even at the risk of one's life.* This is particularly necessary for residential property, where the heart of the property interest stems from the desire to live on the property. *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.* Additionally, the 'health' aspect of the bundle of rights that are protected by nuisance law has been noted in several cases. [Emphasis added.]

[58] Had the claimants shown that the nickel levels in the properties posed a risk to health, they would have established that those particles caused actual, substantial, physical damage to their properties. However, the claims as advanced and as accepted by the trial judge were not predicated on any actual risk to health or wellbeing arising from the particles in the soil. The result at trial would presumably have been the same had it been established beyond peradventure that nickel particles at any level had no possible effect on human health.

[59] The approach followed by the trial judge effectively removes any need to show that Inco's operation of its refinery caused any harm of any kind to the claimants' land. It

extends the tort of private nuisance beyond claims based on substantial actual injury to another's land to claims based on concerns, no matter when they develop and no matter how valid, that there may have been substantial actual injury caused to another's land. On this approach, nuisance operates as an inchoate tort hanging over a property to become actionable, not by virtue of anything done to the property by the defendant, but because of public concerns generated many years after the relevant events about the possible effect of the defendant's conduct on the property.

[60] In holding that actual, substantial, physical damage to the claimants' land required proof that the nickel particles posed at least some risk to the claimants' health and wellbeing, we do not mean that the trial judge was obliged to accept the MOE finding as to the level of nickel in the soil that required remediation as the applicable standard. The trial judge said, at para. 86:

> MOE did not set a standard for civil liability when it set the intervention level for nickel in the soil at 8,000 ppm.

[61] We agree with this observation: see *Tridan Developments Ltd.* at paras. 10-12. However, the claimants had to show either that nickel at any level posed a risk, or that the nickel levels present in the soil were above levels at which there was a risk to human health and wellbeing. The MOE standard of 8,000 ppm said by MOE to be "well below any potential health risk" was the only post-2000 standard offered in the evidence.

[62] The claimants did not join issue on the level at which nickel particles could be said to pose a risk to human health and wellbeing, but instead argued that concerns about potential risks were in and of themselves sufficient to make Inco's conduct an actionable nuisance if those concerns affected property values. This strategy no doubt reflected the reality that the level of nickel particles in the soil of the vast majority of the 7,000 properties covered by the class action were well below anything that could possibly be regarded as posing a health risk.

[63] The extent to which the trial judge divorced actual, substantial, physical damage to the land from liability for nuisance is evident by considering a variation in the facts as actually found at trial. On the trial judge's analysis, even if the concerns which arose after 2000 were totally unfounded and were ultimately shown to be based on "junk science", Inco would still be liable in nuisance assuming those totally unfounded public concerns generated the same impact on property values.

[64] The trial judge's analysis of nuisance raises a further anomaly. The primary *raison d'être* of nuisance is to equip a party who is suffering damage to his land or interference with his use of the land with a means of forcing the party causing that damage to stop doing so. However, on the trial judge's reasoning, the claimants would have had no basis upon which to gain any injunctive relief against Inco when it was operating the refinery up to 1985. As the trial judge analyzes the claim, a person seeking an injunction prior to 1985 would have no basis upon which to argue that Inco's actions

caused any actual, substantial, physical damage to the land. It is inconsistent with the essential nature of nuisance as an interference with property to hold that Inco was not engaged in any interference with property when it operated the refinery and emitted the particles, but that it was engaged in an actionable nuisance 15 years after it stopped operating the refinery, when concerns were raised from a variety of sources about the potential health effects of the nickel in the soil and the property values were negatively affected as a result of those concerns.

[65] This conceptual anomaly cannot be explained by reference to discoverability principles. The trial judge did not find that the nuisance occurred when the particles were deposited in the soil, but was only discovered when the claimants learned of the levels of nickel particles in the soil in 2000: *e.g.* see *Cambridge Water Co. v. Eastern Counties Leather Plc.*, [1994] 2 A.C. 264 (H.L.), at pp. 291-94. As outlined above, the levels of nickel deposits in the soil had nothing to do with the trial judge's finding that Inco was liable in nuisance. The trial judge made it clear that the significant damage to the claimants' properties relied on by him to establish the cause of action in nuisance did not occur until after 2000, and occurred then because of the public concerns about potential health issues that arose and not because of the actual levels of nickel in the soil. Discovery principles had nothing to do with the trial judge's finding that the claimants could rely on public concerns generated in 2000 and beyond to render substantial the physical damage to the property said to have occurred 15 years earlier when the particles

worked their way into the claimants' lands. On his analysis, the material physical damage to the land was not merely discovered after 2000. It occurred after 2000.

[66] *Tridan Developments Ltd.* does not assist the claimants. In *Tridan*, the defendants admitted liability for nuisance when a gas spill on their property contaminated the property of the neighbour. *Tridan* was about the quantification of the damages suffered by the plaintiff. Nothing in *Tridan* lends support to the trial judge's holding that public concerns about the potential harm done to the properties affecting the value of the properties could constitute substantial physical harm to the land for the purposes of a nuisance claim.

[67] In our view, actual, substantial, physical damage to the land in the context of this case refers to nickel levels that at least posed some risk to the health or wellbeing of the residents of those properties. Evidence that the existence of the nickel particles in the soil generated concerns about potential health risks does not, in our view, amount to evidence that the presence of the particles in the soil caused actual, substantial harm or damage to the property. The claimants failed to establish actual, substantial, physical damage to their properties as a result of the nickel particles becoming part of the soil. Without actual, substantial, physical harm, the nuisance claim as framed by the claimants could not succeed.

(B) Did the trial judge err in holding Inco liable under *Rylands v. Fletcher*?

(i) Introduction

[68] The rule in *Rylands v. Fletcher* imposes strict liability for damages caused to a plaintiff's property (and probably, in Canada, for personal damages) by the escape from the defendant's property of a substance "likely to cause mischief". The exact reach of the rule and the justification for its continued existence as a basis of liability apart from negligence, private nuisance and statutory liability have been matters of controversy in some jurisdictions: see *Transco plc v. Stockport Metropolitan Borough Council*, [2004] 2 A.C. 1 (H.L.); *Burnie Port Authority v. General Jones Pty. Ltd.* (1994), 179 C.L.R. 520 (Aust. H.C.); Murphy, "The Merits of *Rylands v. Fletcher*". In Canada, *Rylands v. Fletcher* has gone largely unnoticed in appellate courts in recent years. However, in 1989 in *Tock*, the Supreme Court of Canada unanimously recognized *Rylands v. Fletcher* as continuing to provide a basis for liability distinct from liability for private nuisance or negligence.

[69] The language used by Mr. Justice Blackburn in *Rylands v. Fletcher* at pp. 279-80 (Ex. Ch.) suggested a broad basis for the imposition of strict liability. His Lordship spoke of strict liability for any damages caused as a result of the escape from the defendant's land of something brought on to that land by the defendant, for his or her own purposes, that was likely to do damage if it escaped from the defendant's property: see also the comments of Lord Cranworth at p. 340 (H.L.). Subsequent descriptions of

the scope of the strict liability rule described in *Rylands v. Fletcher*, including that provided by Lord Cairns in *Rylands v. Fletcher* at p. 339 (H.L.), describe a narrower basis for the imposition of strict liability. Lord Cairns introduced the concept of "non-natural use" of property as a precondition to the imposition of strict liability. Later cases used words like "special", "unusual" or "extraordinary" to describe the use of the property: see *Transco plc v. Stockport Metropolitan Borough Council*, per Lord Bingham at para. 11, per Lord Hoffmann at paras. 44-45, per Lord Scott at paras. 81-85; *Rickards v. Lothian*, [1913] A.C. 263 (H.L.), at p. 280; Andrew Waite, "Deconstructing the Rule in *Rylands v. Fletcher*" (2006) 18 J. Envtl. L. 423.

[70] The meaning of "non-natural use" of property has vexed lawyers and judges since the phrase was penned by Lord Cairns. Its uncertainty and vagueness led the High Court of Australia to abandon the rule entirely in favour of a negligence standard that took into account the dangerous nature of the activity in issue: *Burnie Port Authority v. General Jones Pty. Ltd.* at p. 540. In Canada, apart from some description of the "non-natural use" requirement found in *Tock*, appellate courts have paid no attention to the details of the rule much less the more fundamental question of the need for its continued existence. Inco does not suggest that the rule should be abrogated. It does, however, argue that it was misapplied in this case.

[71] There are various formulations of the rule found in the case law and the academic commentary. The authors of *The Law of Nuisance in Canada* suggest different potential

formulations, including one, at p. 113, that requires four prerequisites to the operation of the rule:

- the defendant made a "non-natural" or "special" use of his land;
- the defendant brought on to his land something that was likely to do mischief if it escaped;
- the substance in question in fact escaped; and
- damage was caused to the plaintiff's property as a result of the escape.

(ii) The trial judge's reasons

[72] The trial judge addressed the application of *Rylands v. Fletcher* in some detail (paras. 43-69). He began by considering whether Inco's operation of the refinery was a "non-natural" use of the property. He reasoned, at para. 53, that since the nickel had been brought on to the land by Inco and was not naturally found on the land, the refining of the nickel constituted a non-natural use of the land. He held:

> [T]he refining of nickel was not an ordinary use of the land; it was a special use bringing with it increased danger to others.

[73] The trial judge next held that Inco, in bringing nickel on to the property and refining that nickel on the property, had brought something on to its property that was likely to cause mischief if it escaped. He said, at para. 54:

> The nickel and the nickel particles are not dangerous *per se*, but an escape of these elements from the Inco lands has the potential to cause damage to neighbouring properties.

[74] The trial judge was also satisfied that the emissions from the Inco refinery amounted to "an escape" of the nickel particles from Inco's property on to the claimants' properties. While the trial judge recognized that some authorities limited the application of *Rylands v. Fletcher* to a single escape, he concluded that it would be absurd to impose liability for damages caused by a single escape, but to hold the defendant harmless for damages caused by repeated escapes (paras. 55-67). In finding that the nickel particle emissions "escaped" from the Inco refinery, the trial judge did not refer to the fact that the emissions were an integral part of Inco's refinery operation and were released by Inco intentionally on a daily basis for 60 odd years.

(iii) Strict liability for ultra hazardous activities

[75] The trial judge's assessment of the *Rylands v. Fletcher* claim was driven by his understanding that strict liability under *Rylands v. Fletcher* was premised on the rationale that an entity who chooses to engage in potentially hazardous activity assumes the risk of any damages caused by that activity. The trial judge said, at para. 60:

> [H]e who creates an abnormal risk of harm to his neighbour will be responsible for any harm that actually occurs as a consequence of that risk.

[76] The trial judge, at para. 65, also adopted a portion of the following passage from Allen M. Linden and Bruce Feldthusen, *Canadian Tort Law*, 8th ed. (Markham, Ont.: LexisNexis Butterworths, 2006), at pp. 540-41:

> Occasionally, language appears in a *Rylands v. Fletcher* decision that furnishes a glimpse of a *new basis of strict liability, free of the historic restraints of non-natural use, escape and mischief.* This emerging theory can be termed strict liability for abnormally dangerous activities. *Pursuant to this principle, there are a limited number of activities so fraught with abnormal risk for the community that the negligence standard is felt to provide insufficient protection against them.* Consequently, these abnormally risky or extra-hazardous activities should be governed by a stricter form of liability that insists on compensation for all losses they generate, even when they are conducted with reasonable care. ...
>
> In other words, there are two general types of activities which are regulated by two different theories of tort liability. Firstly, there are ordinary pursuits that create normal risks, which are controlled by negligence law. Secondly, there are *other "types of conduct which, although they cannot be styled wrongful, are either so fraught with danger, or so unusual in a given community, that it is felt that the risk of loss should be shifted from the person injured to the person who merely by engaging in such conduct, created the risk which resulted in harm"*. [Emphasis added.]

[77] The strict liability theory favoured by Linden and Feldthusen (and others, for example, see *Restatement of Torts* (2d), ss. 519, 520) is considerably broader than the strict liability rule under *Rylands v. Fletcher*. Under their theory, it is not necessary that the dangerous substance "escape" from the defendant's property or that the use of the defendant's land be characterized as "special" or "non-natural". Strict liability flows entirely from the nature of the activity conducted by the defendant. Linden and Feldthusen acknowledge that the theory of strict liability they present goes beyond *Rylands v. Fletcher*. According to them, support for their theory "lies hidden in the cases

waiting to be openly embraced by Canadian courts": *Canadian Tort Law*, 9th ed. at p. 556.

[78] We do not accept that strict liability based exclusively on the "extra hazardous" nature of the defendant's conduct is or should be part of the common law in this province. Before we explain why we reach that conclusion, we will, however, examine Inco's liability on the assumption that the trial judge was correct in viewing *Rylands v. Fletcher* as imposing strict liability for damages caused by "extra hazardous" activities. In our view, there is no basis in the evidence upon which Inco's refinery operations or its emissions of nickel particles could properly be described as "extra hazardous" or "fraught with danger".

[79] The trial judge did not explain why he concluded that Inco's refinery operation fell within the category of "extra hazardous" activities that should attract strict liability. Nor did he explain why the nickel particle emissions posed "an abnormal risk of harm" to others' properties. The trial judge acknowledged that the nickel emissions were not *per se* dangerous (para. 54). On the evidence, the emissions posed no health risk to anyone (except perhaps in those relatively few instances where there was a small risk of harm to health before the soil was remediated). Nor did the nickel particles cause any damage to the soil or have any effect on the claimants' ability to use their properties. We see no evidence that Inco, in operating a refinery in accordance with the various regulatory regimes, presented an "abnormal risk" to its neighbours.

[80] It may be that the trial judge inferred that the operation of the refinery presented "an abnormal risk of harm" because, in his view, that operation ultimately led to a diminution in property values. Putting the claimants' case at its highest, they alleged that the nickel particles placed in the soil up to 1984, combined with public health concerns, ultimately not validated, that arose in 2000 and beyond, caused a relatively small decrease in the appreciation of the value of the claimants' properties over a 10-year period beginning in 2000. Even if this harm is causally related to the refinery operation and the nickel particle emissions, it could not justify describing the refinery operation or the emissions as so inherently dangerous as to merit the imposition of strict liability based exclusively on the hazardous nature of the operation and the abnormal risk presented to others by that operation.

[81] Even if strict liability for ultra hazardous activities, either as a freestanding basis for liability or a modification of *Rylands v. Fletcher*, were part of the law in Ontario, the claimants failed to prove that Inco's refinery constituted an "extra hazardous" activity.

[82] Returning to the merits of the strict liability theory adopted by the trial judge, we begin by distinguishing the risk that is targeted by that theory from the risk targeted by the rule in *Rylands v. Fletcher*. Strict liability under *Rylands v. Fletcher* aims not at all risks associated with carrying out an activity, but rather with the risk associated with the accidental and unintended consequences of engaging in an activity. The *Rylands v. Fletcher* cases are about floods, gas leaks, chemical spills, sewage overflows, fires and

the like. They hold that where the defendant engages in certain kinds of activities, the defendant will be held strictly liable for damages that flow from mishaps or misadventures that occur in the course of that activity. The escape requirement in *Rylands v. Fletcher* connotes something unintended and speaks to the nature of the risk to which the strict liability in *Rylands v. Fletcher* attaches: see *The Law of Nuisance in Canada* at pp. 132, 137.

[83] The "extra hazardous" risk-based strict liability theory employed by the trial judge holds a defendant strictly liable for all damages associated with the activity. The defendant is liable for damages even if they are not the product of any accident or misadventure, but are instead the product of the intended consequences of the activity.

[84] The two risks described above are quite different. The risk addressed in *Rylands v. Fletcher* is a more limited one, imposing strict liability for things that go wrong and produce unintended consequences that damage the property (or perhaps the person) of another. The trial judge overstated the rationale for *Rylands v. Fletcher* strict liability when he described it as applicable to damages caused by activities which create "an abnormal risk of harm".

[85] There are, of course, policy arguments in favour of the imposition of strict liability where activities create "extra hazardous" risks. Examples of that kind of liability can be found in various statutes, such as the *Environmental Protection Act*, R.S.O. 1990, c.E.19,

s. 99. The question is whether the courts, through a modification of the common law and in particular the rule in *Rylands v. Fletcher*, should impose that strict liability on all activities that are found to fit within a necessarily broad and generic description, or leave it to the various Legislatures to make that decision through appropriate statutory enactments applicable to specific activities.

[86] The House of Lords has rejected any attempt to judicially extend *Rylands v. Fletcher* strict liability to all hazardous activities: see *Read v. J. Lyons and Co. Limited*, [1947] A.C. 156 (H.L.), per Lord Macmillan at pp. 172-73, per Lord Simonds at pp. 181-82; *Transco plc*, per Lord Bingham at para. 7; Donal Nolan, "The Distinctiveness of *Rylands v. Fletcher*" (2005) 121 Law Q. Rev. 421, at pp. 447-449.

[87] In *Cambridge Water Co.* at p. 305, Lord Goff offered a compelling argument, which we accept, in favour of leaving to Parliament the decision to impose strict liability based exclusively on the nature of the activity:

> Like the judge in the present case, I incline to the opinion that, *as a general rule, it is more appropriate for strict liability in respect of operations of high risk to be imposed by Parliament, than by the courts.* If such liability is imposed by statute, the relevant activities can be identified, and those concerned can know where they stand. Furthermore, statute can where appropriate lay down precise criteria establishing the incidents and scope of such liability.
>
> *It is of particular relevance that the present case is concerned with environmental pollution.* The protection and preservation of the environment is now perceived as being of

> crucial importance to the future of mankind; and public bodies, both national and international, are taking significant steps toward the establishment of legislation which will promote the protection of the environment and make the polluter pay for damage to the environment for which he is responsible – as can be seen from the W.H.O., E.E.C. and national regulations to which I have previously referred. *But it does not follow from these developments that a common principle, such as the rule in Rylands v. Fletcher, should be developed or rendered more strict to provide for liability in respect of such pollution. On the contrary, given that so much well-informed and carefully structured legislation is now being put in place for this purpose, there is less need for the courts to develop a common law principle to achieve the same end, and indeed it may well be undesirable that they should do so.* [Emphasis added.]

[88] More importantly, the expansion of strict liability under the banner of *Rylands v. Fletcher* to damages flowing from all hazardous activities is inconsistent with the description of the rule in *Rylands v. Fletcher* found in *Tock*. In *Tock*, a sewage system operated by the defendant failed after an exceptionally heavy rainfall. A large amount of water flooded the plaintiff's basement causing extensive damage. The flooding was caused by a blockage in the sewage system.

[89] La Forest J., speaking for the entire court on this point, found that the operation of a sewage system under statutory authority was not a land use that could possibly give rise to strict liability for damages under *Rylands v. Fletcher*. Counsel for the claimants correctly point out that the *ratio* of *Tock* is narrow and does not assist Inco. Inco was not

acting under any statutory authority. Nor was Inco engaged in an enterprise intended for the general benefit of the community.

[90] However, Justice La Forest's description of the nature of the liability contemplated under *Rylands v. Fletcher* does assist Inco in that it forecloses any notion of strict liability based exclusively on whether the activity carried out by the defendant was abnormally hazardous. At para. 10 of *Tock*, La Forest J. adopted the language of Moulton L.J. in *Rickards v. Lothien* at p. 280:

> It is not every use to which land is put that brings into play that principle [*Rylands v. Fletcher*]. It must be some special use bringing with it increased danger to others and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community.

[91] La Forest J. viewed the "non-natural user" component of the *Rylands v. Fletcher* rule as providing flexibility that would allow the rule to adjust to changing patterns in society. Those patterns were reflected in various levels of government regulation designed to control how and where various activities could be conducted: *Tock* at paras. 11-12. *Tock* does not measure the reach of strict liability under *Rylands v. Fletcher* exclusively by reference to the risk presented by the activity. As La Forest J. said, at para. 13:

> [T]he touchstone for the application of the rule in *Rylands v. Fletcher* is *to be damage occurring from a user inappropriate to the place where it is maintained* (Prosser cites the example of the pig in the parlour). [Emphasis added.]

[92] The judgment in *Tock* forecloses treating strict liability under *Rylands v. Fletcher* as referable to all "ultra hazardous" activities. As explained in *Tock*, the rule is triggered by "a user inappropriate to the place". The appropriateness of a use depends on factors that include, but are not limited to, the risk posed by the use.

[93] There are no doubt strong arguments for imposing strict liability on certain inherently dangerous activities. In our view, however, that is fundamentally a policy decision that is best introduced by legislative action and not judicial fiat. In declining to take the bold step advocated by Linden and Feldthusen, we observe that those who engage in dangerous activities are, of course, subject to negligence actions under which the dangerousness of the activity would be reflected in the standard of care required, nuisance actions, and in ever increasing situations, detailed and sometimes punitive statutory regimes.

(iv) Was the *Rylands v. Fletcher* claim made out?

[94] Having concluded there is no common law rule imposing strict liability on those whose activities are said to be "ultra hazardous" and that even if there were, Inco's refinery was not shown to be an ultra hazardous activity, we turn to a measure of the claim against the specific criteria that have been developed in the *Rylands v. Fletcher* case law.

[95] Inco operated a refinery on its property. The nickel emissions were part and parcel of that refinery operation and were not in any sense an independent use of the property. The use of the property to which the *Rylands v. Fletcher* inquiry must be directed is its use as a refinery. The nickel emissions are a feature or facet of the use of the property as a refinery. The question must be – was the operation of the refinery at the time and place and in the manner that it was operated a non-natural use of Inco's property?: see *Gertsen v. Municipality of Metropolitan Toronto* (1973), 2 O.R. (2d) 1 (H.C.), at pp. 19-20; David W. Williams, "Non-Natural Use of Land" (1973) 32 Cambridge L.J. 310, at pp. 314-21.

[96] The trial judge found that Inco's use of the property was a non-natural use because it brought the nickel on to the property. If the characterization of a use as a non-natural one was ever tied solely to whether the substance was found naturally on the property, it has long since ceased to depend on the answer to that single question. It may be that something found naturally on the property cannot attract liability under *Rylands v. Fletcher*. It is not, however, the law that anything that is not found naturally on the property can be subject to strict liability under *Rylands v. Fletcher* if it escapes and causes damage. The disconnect between things found in nature on the property and the potential application of *Rylands v. Fletcher* is so complete that the House of Lords has abandoned the use of the phrase "non-natural use" as misleading in favour of the phrase "ordinary use": *Transco plc* at paras. 11-12.

[97] The emphasis in *Tock* at para. 13 on a "user inappropriate to the place" and, at para. 10, to "changing patterns of existence" demonstrate that the distinction between natural and non-natural use cannot be made exclusively by reference to the origin of the substance in issue. To decide whether a use is a non-natural one, the court must have regard to the place where the use is made, the time when the use is made, and the manner of the use. Planning legislation and other government regulations controlling where, when and how activities can be carried out will be relevant considerations in assessing whether a particular use is a non-natural use in the sense that it is a use that is not ordinary.

[98] The approach to non-natural user taken in *Tock* and in *Cambridge Water Co.* restricts those situations in which *Rylands v. Fletcher* applies. The non-natural use requirement of the *Rylands v. Fletcher* rule serves a similar role to the "give and take between neighbours" principle that is applied when determining whether one person's interference with another person's use and enjoyment of his property constitutes an actionable nuisance. Like the reasonable user inquiry in cases involving amenity nuisance, the non-natural user inquiry seeks to distinguish between those uses of property that the community as a whole should accept and tolerate and those uses where the burden associated with accidental and unintended consequences of the use should fall on the user. The nature and degree of the risk inherent in the use is obviously an important

feature of this inquiry, but as *Tock* demonstrates, it is not the entire inquiry: see *Cambridge Water Co.* at pp. 299-300.

[99] In addition to finding that Inco's use of the property was a non-natural use because it brought the nickel on to the property, the trial judge described the refinery "as bringing with it increased danger to others". He did not identify that danger. Finally, although the trial judge referred to Inco's argument that it complied with all environmental and zoning regulations, he dismissed that argument on the basis that a use could be reasonable and lawful and still not constitute a natural use.

[100] We agree that compliance with various environmental and zoning regulations is not a defence to a *Rylands v. Fletcher* claim. In our view, however, compliance is an important consideration in light of the approach to non-natural user taken in *Tock*. The trial judge appears to have dismissed entirely Inco's compliance with the relevant regulations and zoning laws once he concluded that Inco's compliance was not determinative of the *Rylands v. Fletcher* claim in Inco's favour.

[101] The claimants bore the onus of showing that the operation of the refinery was a non-natural use of the property in the sense that it was not an ordinary or usual use. In *Transco plc*, Lord Bingham, at para. 11, suggests the following inquiry:

> An occupier of land who can show that another occupier of land has brought or kept on his land an exceptionally dangerous or mischievous thing in extraordinary or unusual circumstances is in my opinion entitled to recover

> compensation from that occupier for any damage caused to his property interest by the escape of that thing subject to defences ...

[102] Lord Bingham's inquiry is directed both at the degree of dangerousness posed by the activity and the circumstances surrounding the activity. We think that approach is consistent with the "user appropriate" approach in *Tock*.

[103] 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. The claimants did not, however, in our view, demonstrate that Inco's operation of its refinery for over 60 years presented "an exceptionally dangerous or mischievous thing" or that the circumstances were "extraordinary or unusual". To the contrary, the evidence suggests that Inco operated a refinery in a heavily industrialized part of the city in a manner that was ordinary and usual and did not create risks beyond those incidental to virtually any industrial operation. In our view, the claimants failed to establish that Inco's operation of its refinery was a non-natural use of its property.

[104] Although we have accepted Inco's submission that the refinery was not a non-natural use, we would not want to be taken as agreeing with its submission that the refinery operated "for the general benefit of the community" and could not, therefore, be subject to strict liability under *Rylands v. Fletcher*: see *Rickards v. Lothian* at p. 280. While Inco's refinery no doubt brought significant economic benefit to Port Colborne, Inco did not operate its refinery for the general benefit of the community. That phrase

refers to entities, usually governmental ones, acting under statutory authority and engaged in activities that benefit the community or at least a significant segment of the community at large. The incidental benefit to the community flowing from the operation of the Inco refinery does not bring it within the phrase "for the general benefit of the community": see *Transco plc*, per Lord Bingham at para. 11.

[105] Our conclusion that the trial judge erred in finding that Inco's operation of its refinery constituted a non-natural use of its property is sufficient to find in Inco's favour on this ground of appeal. We will, however, briefly consider two other issues that arise under the *Rylands v. Fletcher* claim.

[106] The trial judge, at para. 58, observed:

> In England, unlike Ontario, the courts have added a foreseeability element to the rule in *Rylands v. Fletcher*.

[107] Inco, in its factum, asserts, albeit by way of a footnote only, that foreseeability is a requirement under *Rylands v. Fletcher*. Neither the trial judge nor Inco explained what they meant by foreseeability in this context.

[108] The role, if any, of foreseeability of damages under the rule in *Rylands v. Fletcher* is an important jurisprudential question. To our knowledge, neither the Supreme Court of Canada nor any provincial appellate court has examined whether foreseeability of damages is an element of liability under *Rylands v. Fletcher*. We do not propose to decide the issue in the absence of full argument.

[109] We will, however, make two observations that may be of assistance in future cases. First, foreseeability can refer to objective foreseeability of the escape from the defendant's land of the thing that causes damage or it can refer to objective foreseeability of the kind of damage said to have been caused. We see no reason to require foreseeability of the escape. To impose that requirement would all but merge the rule in *Rylands v. Fletcher* with liability in negligence.

[110] There are, however, compelling reasons to require foreseeability of the kind of damages alleged to have been suffered by the plaintiffs. The arguments in favour of requiring foreseeability in that sense are fully articulated by Lord Goff in *Cambridge Water Co.* at pp. 301-306. If Lord Goff's views were applied to this case, the foreseeability of a diminution in the appreciation of the value of the claimants' properties some 15 years after the refinery closed, would be a live issue.

[111] The second issue, which we will address briefly, concerns the escape component of the rule in *Rylands v. Fletcher*. That component raises two questions. First, we agree with the trial judge that *Rylands v. Fletcher* should not be limited to a single isolated escape. In some situations, the danger posed by the escape rests in the repeated and cumulative effect of the movement of a substance from the defendant's property to the property of others. The escape may go on for months or even years and the damage may not be caused until the accumulation of the escaping substance reaches certain destinations or accumulations. Assuming the other *Rylands v. Fletcher* requirements are

established, we see no reason to distinguish between a one-time escape and continuous or multiple event escapes which produce the same kind of damages: see *Cambridge Water Co.* at p. 306.

[112] The second issue pertaining to the escape requirement arises from the nature of the risk to which strict liability under *Rylands v. Fletcher* applies. As explained earlier (see paras. 83-84, 96-97), the *Rylands v. Fletcher* paradigm involves an unnatural use of the defendant's property and some kind of mishap or accident that results in damage. The application of *Rylands v. Fletcher* to consequences that are the intended result of the activity undertaken by the defendant has been doubted: *North York (City) v. Kert Chemical Industries Inc.* (1985), 33 C.C.L.T. 184 (Ont. H.C.); Lewis N. Klar, *Tort Law*, 4th ed. (Toronto: Carswell, 2008), at p. 628; *The Law of Nuisance in Canada* at pp. 132, 137.

[113] We, too, doubt its application. It is one thing to impose strict liability for mishaps that occur in the course of the conduct of an unnatural or unusual activity. It is quite another to impose strict liability for the intended consequence of an activity that is carried out in a reasonable manner and in accordance with all applicable rules and regulations.

(C) Conclusions on liability

[114] With respect to the careful and thoughtful reasons of the trial judge, we hold that he erred in finding Inco liable under either private nuisance or the rule in *Rylands v.*

Fletcher. In any event, for the reasons we will develop in the next part of these reasons, even if either or both causes of action survive, the claimants failed to prove damages, an essential component of both causes of action.

(D) Damages

[115] The trial judge awarded judgment in favour of the claimants in the aggregate amount of $36 million. The award was divided as follows:

- $9 million aggregate for the RSA (approximately 340 homes);
- $15 million aggregate for the ESA (approximately 1,500 homes); and
- $12 million aggregate for the WSA (approximately 5,200 homes).

[116] The alleged harm in this action was not related to the levels of nickel in the soil or the actual effects, if any, of that nickel on the property or its occupiers. Rather, as the trial judge stated at para. 12, "the alleged harm in this action is restricted to the negative effect, if any, on property values." For the claimants to succeed, they had to prove that their properties failed to appreciate in value, as they otherwise would have, because of adverse publicity generated by MOE's findings and reports that nickel from Inco had contaminated the soil on their properties.

[117] To prove their damages, the claimants relied on a market comparison approach. Inco's expert, Dr. Frank Clayton, described this technique as follows:

> The market comparison approach is a well-accepted approach used by economists to examine whether a particular incident, such as air, water or land pollution from a polluting industrial user, has impacted property values in a particular area over a particular time period. The approach consists of identifying one or more areas that are similar to the area with the incident, except they are not impacted by the incident. Based on the comparison of price patterns in the areas covered by the relevant time period and allowing for differences in the macro-economic, demographic and property market environment, conclusions can be reached about an incident's impact on property values.

[118] In simple terms, it was the claimants' position that their homes had failed to appreciate at a rate similar to homes in the comparable community of Welland, Ontario.

[119] The expert witnesses on both sides agreed that Welland was the best comparator city and the trial judge accordingly concluded, at para. 260, that it was "reasonable to use Welland as a comparator city for the purposes of analyzing any changes in property values in Port Colborne."

[120] Three main data sets, each purporting to value a large number of individual properties, were put before the trial judge.

1. The AVM-Teranet data

The Teranet data sets used two methodologies (ASP and reavs AVM, described below) to calculate and compare property value changes from 1997-2008. These two sets were then combined to create the Teranet ASP Hybrid data set.

- Teranet ASP (Average Sale Price) – This data set contained the average sale prices for properties sold from 1997-2002. Teranet supplemented sales data from Ontario's Land Registry Information System ("LRS") with MLS records to ensure completeness.
- Teranet reavs AVM (Automated Valuation Model) – This data set contained property value estimates for the years 2003-2008. The reavs system monitors actual registered sales transactions, and, using what Teranet calls "relevant" and "consistent" sales, computes a theoretical value for each property registered in the LRS as at specific dates. The reavs system creates and maintains a database of current values for all properties registered in the LRS. The actual mathematic formula used to generate this data was not put before the trial judge.
- Teranet ASP Hybrid – This was a combination of the above two methodologies to make up a data set that spanned from 1997-2008. The data contains a mixture of MLS sales data, LRS sales data, and AVM data. All sales for the earlier years, and sales selected by the reavs AVM system for the later years, were included in this set.
- The Teranet data sets are described in more detail at paras. 229-235 of the trial judge's reasons.

2. The Municipal Property Assessment Corporation (MPAC) data

The MPAC data set is an estimate of property values on a mass scale, based on data obtained from the LRS. This data set imputes value not only to properties that are sold in any given year, but to all properties in the data set.

3. The Multiple Listing Service (MLS) data

The MLS data represents all properties sold at arm's length between willing buyers and sellers. MLS data does not capture transactions made between family members or related parties.

[121] The trial judge accepted the evidence of Dr. Peter Tomlinson that the Teranet ASP and the MPAC data sets were the most reliable indicators of property values on a mass scale. He found the Teranet hybrid and Teranet AVM data sets to be less reliable because of the inconsistency of the information within these sets and, while not excluding them completely, the trial judge was only prepared to treat these data sets as rough indicators of general trends.

[122] We reject the Teranet data sets as unreliable, and we find, respectfully, that when the trial judge used these data sets to bolster his conclusions on damages, he did so in error. On his own findings, at paras. 236-244, these data sets were hopelessly flawed.

[123] With respect to the MLS data set, the trial judge also found it to be less reliable "because [it] only value[s] properties that are sold in any given year, not the entire universe of properties … [and does] not include all sales in any given year" (para. 224).

[124] Inco makes three main submissions on damages:

1) The trial judge erred in both fact and law in preferring the MPAC data over the MLS data.
2) The 4.35% differential between property value appreciation in Welland versus Port Colborne that the trial judge found on the MPAC data disappears entirely when the MPAC data is corrected for 314 vacant building lots that were redesignated.
3) Even accepting the trial judge's calculation on the MPAC data, and assuming there in fact is a difference of 4.35% in appreciation rates over ten years between Welland and Port Colborne, this difference is within the range of variance to be expected in comparable but not identical communities.

(i) Analysis

[125] In reviewing damage calculations, appellate courts generally defer to trial judges, and, absent an error in principle, are reluctant to interfere. Respectfully, we find that the trial judge in this case did make errors in principle in his analysis of the damages claim. For the following reasons, we must reject his findings.

1. Did the trial judge err in preferring the MPAC data over the MLS data?

[126] Inco argues that the trial judge erred in fact and in law in preferring the MPAC data over the MLS data. Inco submits that the MLS data is the "best evidence" as it

represents true market value – what a willing purchaser will pay a willing vendor in an arm's length transaction. The MPAC data on the other hand represents artificially derived values assigned to all properties in Ontario by applying arithmetic forumulae to the value of actual sales in specific areas. Further, in the appeal process available to property owners who are dissatisfied with their MPAC assessments, the review board first looks to available and relevant MLS data with a view to resolving such disputes. This, Inco argues, demonstrates that MLS data is the best evidence of property values.

[127] Inco presented MLS data showing that Port Colborne had outperformed or kept pace with Welland between the years 1999-2008.

[128] In our view, for the present purposes, it is unnecessary to resolve this dispute. As will be seen, whether one uses the MLS data or the MPAC data, properly corrected, the result is the same. The record conclusively demonstrates that the claimants have suffered no loss.

2. Did the trial judge err in failing to correct the MPAC data?

[129] The MPAC data that the trial judge relied on in finding that the claimants suffered damages contained an anomaly relating to 314 vacant building lots on the west side of Port Colborne. These lots resulted from the subdivision of a large farm property into building lots. In 1996, MPAC classified these building lots as residential properties, but in 1999 and 2001 these same lots were classified as agricultural properties. Then, in

2003, 2005 and 2008 these lots were reclassified as residential properties. As stated by the trial judge, at para. 287:

> Because the value of a vacant building lot is on average lower than the value of other residential properties, these vacant building lots lowered the average MPAC residential property assessment in Port Colborne in the years in which these lots were classified as residential properties.

[130] The trial judge was aware of this "problem" with the MPAC data. He noted at para. 255:

> The only real issue with the MPAC data set in this case relates to the classification of 314 building lots in Port Colborne. The classification of these lots changed from residential in the 1996 MPAC assessment to agricultural in the 1999 and 2001 MPAC assessments, and then back to residential in the 2003 MPAC assessment. Therefore, comparisons of the value of residential properties over these periods of time need to take into account this change in classification. Otherwise, I accept the MPAC data set as the most reliable.

[131] There is no question on the evidence that the inclusion of these building lots as residential properties had the effect of lowering the average residential property value for Port Colborne. The reason is a simple one - the lots are not developed and there were no buildings on the land, so the values were low, yet they were counted as residential properties. When the lots are removed from the calculation, the average residential property value increases.

[132] The claimants' expert Dr. Tomlinson, upon whose evidence the trial judge relied, compared the MPAC data for 1999 to the MPAC data for 2008 and concluded that Port Colborne property values lagged behind those in Welland by 5.9%. The difficulty of course is that in 1999 the data values recorded did not include the building lots, while in 2008 they did. As Inco put it, this was an apples to oranges comparison. Either the building lots are included or excluded in both data sets, or there cannot be a meaningful comparison.

[133] Exhibit 77 filed at trial summarized the MPAC data and made comparisons between Welland and Port Colborne for various years, beginning in 1996 and ending in 2008. In all of the comparisons save one, Port Colborne either outperforms or almost equals Welland in terms of property appreciation – even on apples to oranges comparisons. The first comparison is between 1999 and 2003 data:

	P.C.	**Welland**
June 1999 (lots out)	**$103, 395**	**$104,940**
June 2003 (lots in)	**$120,444**	**$120,131**
Percentage Change	**16.5%**	**14.5%**

[134] In June 1999, the 314 building lots were not included in the calculation of average home values for Port Colborne, while in 2003 they were. The result of including the building lots in the calculation is that the average value for a Port Colborne property in 2003 was lower. Even then, Port Colborne outperformed Welland by 2%, in terms of property appreciation.

[135] The next comparison is between the 1999 and 2001 data:

	P.C.	**Welland**
June 1999 (lots out)	**$103, 395**	**$104,940**
June 2001 (lots out)	**$110,426**	**$112,314**
Percentage Change	**6.8%**	**7%**

[136] The 314 building lots were excluded in the residential property valuations for Port Colborne for both 1999 and 2001. Nevertheless, the percentage difference in growth is only 0.2%. Moreover, this measurement captures the two most critical years – 1999, the year prior to any announcement about nickel contamination, and 2001, the year immediately following the public announcement on September 20, 2000, which is the proposed date from which damages are to be calculated.

[137] In four other comparisons, set out in Exhibit 77, Port Colborne outperformed Welland:

a. from 1996 to 2001, where the lots were included for 1996 but excluded in 2001, Port Colborne outperformed Welland by 6.4%;
b. when June 1996 data is compared to June 2003 data, with the residential lots included in both years, Port Colborne again outperformed Welland by 9.4%;
c. comparing June 1996 to January 2005, Port Colborne outperformed Welland by 5.2%, with the building lots included in both years; and
d. comparing June 1996 and January 2008 data, where both years included the building lots, Port Colborne outperformed Welland by 3.8%.

[138] The *only* comparison in which Welland outperformed Port Colborne is between June 1999 and January 2008 data. Once again, the building lots were not included in calculating the 1999 data, but were included in calculating the 2008 numbers. The 2008 numbers are necessarily lower due to the inclusion of the 281 lower-valued vacant building lots (by 2008, homes had been constructed on 33 of the original 314 lots). The result is that Welland outperformed Port Colborne by 5.9%. The evidence disclosed, however, that if the 2008 assessment for Port Colborne is adjusted by the removal of the building lots, the percentage change for Port Colborne increases from 59.5% to 65.2% – leaving only a difference of .2% between Port Colborne and Welland.

[139] There was disagreement among the expert witnesses as to whether or not it was appropriate to remove the building lots from the Port Colborne numbers when comparing the two municipalities.

[140] The trial judge appeared to accept that comparisons of the values of residential properties needed to take into account the change in classification of the building lots. At para. 287 of his reasons, he noted that the inclusion of the building lots "lowered the average MPAC residential property assessment in Port Colborne in the years in which these lots were classified as residential properties." Except for that factor, the trial judge considered the MPAC data the most reliable.

[141] While the claimants' expert, Dr. Tomlinson, conceded that if the building lots were excluded from the 2008 MPAC numbers for Port Colborne, any difference in appreciation rates between Welland and Port Colborne disappeared, he nevertheless maintained that it would be inappropriate to simply remove the lots from the calculation.

[142] His reasons for taking this position do not bear close scrutiny. The first difficulty is that the 1999 figures are calculated without the building lots while the 2008 numbers do include the lots. Surely, as a matter of pure logic, if the lots are *not* to be removed from the 2008 data they should be added into the 1999 data for a proper and fair comparison – apples to apples.

[143] Dr. Tomlinson speculated that there could have been other reclassifications in both Port Colborne and Welland that affected the results. The difficulty with this position is that it is entirely speculative and without evidentiary foundation. There is nothing speculative about the effect of the building lots on the MPAC assessment values. None of the claimants' experts made any effort to see what if anything may have affected the results other than the nickel contamination. The second phase of the market comparison approach is a check for differences in the "macro-economic, demographic and property market environment". The claimants' expert simply assumed, without more, that the difference in property values was the result of alleged nickel contamination.

[144] Dr. Tomlinson's second reason for including the building lots in the 2008 assessment was that he had based his calculations on the assumptions made by Frank Clayton on behalf of Inco. Clayton did not remove the building lots from the 2005 data when he compared it to the 1999 data. As a result, Dr. Tomlinson assumed it was appropriate to keep the lots in the 2008 data when it later became available. In doing so, Dr. Tomlinson lost sight of the fact that his role as an "expert" witness was to examine the data and come to an independent opinion. He should not have assumed that where others appeared to have made errors, it was appropriate for him to do so as well.

[145] The role of the building lots was crucial to the analysis. The very fact that the removal of the building lots from the 2008 data virtually eliminates the 5.9% gap between the growth of housing values in Port Colborne and Welland means that the

building lots cannot be ignored. When an "apples to apples" comparison is made – with the building lots either included or not included on both sides of the comparison – any difference in appreciation rates between the two comparator communities disappears, or accrues in Port Colborne's favour.

[146] Only an "apples to oranges" comparison in the appreciation of housing values, and this applies only when comparing the 1999 to 2008 data – results in Welland outperforming Port Colborne. On these facts, we must question the cause for the difference in values. One cannot attribute the difference to Inco where the result is dictated by a policy change on the part of MPAC.

[147] The trial judge did not entirely accept Dr. Tomlinson's evidence. As he put it, at para. 293:

> In a general way I accept Tomlinson's testimony on this point. I find that it is inappropriate to completely remove the vacant building lots from the MPAC data for the two reasons enunciated by Tomlinson. However, I also find that the inclusion of the building lots in the 2008 MPAC data set will require some adjustment or discount to the calculations.

[148] In our view, on this evidence, the trial judge ought to have either left the lots in for both years being compared or removed them entirely. Only by doing so could he legitimately compare the data for the two communities.

[149] The common issue for the trial judge's determination was:

> Did the disclosure from and after September 2000 of information concerning nickel contamination in the Rodney Street area and elsewhere in Port Colborne negatively affect property values in the Port Colborne area?

[150] The question required that property values be established as at September 2000 and that any depreciation be measured from that point forward to the trial.

[151] The trial judge accepted Dr. Tomlinson's calculations as a "good starting point" and concluded that a 5.9% depreciation in 2008 was the "maximum amount of the loss". He then took Clayton's measure of a 2.8% depreciation between 1999 to 2005 (based on uncorrected data) and considered that number to be the "minimum amount of the loss of property value as at 2008". This conclusion was simply wrong. The measure that Clayton performed was based on the uncorrected MPAC data and measured only to 2005. It was a palpable error for the trial judge to have taken a measure from one period in time and simply applied it to a measure from another period in time. The error was further compounded by his failure to adjust the numbers for the building lots.

[152] The trial judge then added the two numbers together, Clayton's 2.8% and Dr. Tomlinson's 5.9%, and divided the sum in half to reach his figure of 4.35%. He concluded that this figure was the rate by which the Welland properties outperformed Port Colborne over a 10 year period, from 1999 to 2008. This calculation was an arbitrary one and was without evidentiary foundation. None of the expert witnesses suggested the calculations could be 'mix and matched' in this manner.

[153] On the basis of his calculations, the trial judge then determined the loss per household based on the 1999 average value for residential property of $103,395. He concluded that if Port Colborne had kept pace with Welland, the average residential property in Port Colborne as at 2008 should have been $169,412 as opposed to $164,898 – a loss of $4,514 per property. He then multiplied $4,514 by 7,965, the number of residential properties Dr. Tomlinson had included in his study. The evidence, however, was that Dr. Tomlinson's numbers included properties *not* defined as part of the class. At para. 299 of his reasons, the trial judge noted:

> I note that Tomlinson's calculations included all of the residential properties in the City of Port Colborne, and therefore covered an area larger than the class defined in this proceeding. However, there is no evidence that there was any loss in property values in the parts of Port Colborne that are not included in the class. Therefore, I find that the loss of property values for the entire City, as calculated above, is the aggregate loss to the class.

[154] Respectfully, we say that this conclusion is wrong. Dr. Tomlinson's calculation included all residential properties in Port Colborne including those within the class and those not within the defined class. The trial judge's statement that there was no evidence of any loss in property values in the parts of Port Colborne not included in the class is reflected in Dr. Tomlinson's evidence, which the trial judge accepted. To attribute to the class a loss attributable to the entire population is to give the class a windfall to which it is not legally entitled.

[155] The evidence was that there were 6,057 single family residential properties within the area defined by the class. Had this number been used, it would have reduced the trial judge's "total" loss to $27,341,298 from $35,954,010.

[156] The trial judge proceeded to check his calculations, by referencing the flawed Teranet data and Dr. Skaburskis' evidence in relation thereto. For reasons given earlier, it was inappropriate to rely on the Teranet data for any purpose. It was demonstrably flawed in many ways, so as to be of no assistance. Dr. Skaburskis' evidence, which was based entirely on that data, was necessarily equally flawed.

[157] The trial judge next turned to the MLS data to check his calculation, but was selective in the years and the data that he used. The MLS data is set out in the chart entered as Exhibit 46 at trial. This chart provides the average sale prices of MLS residential properties sold in Port Colborne and Welland for the years 1997-1998 through to and including 2007-2008. It indicates that the average sale prices for homes during the three years before 2000 were $95,470 for Port Colborne and $106,856 for Welland. The chart then provides the changes in average sale prices and the percentage change over this period for residential homes.

[158] The trial judge focused his attention only on the last block of measurements in this chart, which reflected the percent change in sale prices in a given year from the average of the three years between September 1997 and August 2000. He directed his attention

only to the first four years, during which Welland slightly outperformed Port Colborne, yet he ignored the last four years, where Port Colborne outperformed Welland. When all of the data is considered together, it is clear that overall, the houses in Port Colborne appreciated by 53.9% to Welland's 44.8%, a difference of 9.1% in favour of Port Colborne.

[159] One cannot simply look to one portion of the data and ignore the rest in order to justify a conclusion. The data clearly shows that while Welland was a little ahead in the early 2000's, by 2008 Port Colborne had not only caught up, but in fact surpassed Welland in property appreciation rates. Again, the data demonstrates no loss to Port Colborne's property appreciation rates when considered fully and fairly.

3. Did the trial judge err in failing to treat Port Colborne and Welland as comparable but not identical communities?

[160] Inco argues that even if the trial judge had been correct in finding a 4.35% differential over the 10 year period between Port Colborne and Welland – and we have found that he was not - this is well within the range of variance in comparable but not identical communities over a 10 year period.

[161] Given our conclusion that a 4.35% differential between the two communities is not supported by the evidence, we need not address the merits of this submission.

(E) *Limitations Act*

[162] At para. 111, the trial judge said:

> Prior to 1990, I find that most property owners would not have been aware, and ought not to have been aware, of the fact that nickel in the soil could affect the value of their properties. Thus, the court must determine when the class knew or ought to have known that nickel in the soil could affect the values of their properties.

[163] Assuming that the trial judge properly framed the question for the purpose of the *Limitations Act* analysis, his finding that "most property owners" would not have been aware of the potential effect of the nickel implicitly constitutes a finding that some would have been aware of the potential effect of the nickel. Despite this, the trial judge went on to find in favour of the claimants as a class on the applicability of the *Limitations Act* to their claims.

[164] A class action is a procedural vehicle. Its use does not have the effect of changing the substantive law applicable to individual actions: see *Bou Malhab v. Diffusion Métromédia CMR inc.*, [2011] 1 S.C.R. 214, at para. 52; *Hislop v. Canada (Attorney General)* (2009), 95 O.R. (3d) 81, at para. 57. If, as the trial judge found in this case, the evidence does not establish that all class members were not aware of and ought not to have been aware of the material facts, then the application of the *Limitations Act* to the claims is an individual and not a common issue. It is an error to treat the limitation

period as running from the date when a majority, even an overwhelming majority, of the class members knew or ought to have known the material facts in issue.

[165] Other certification decisions have recognized that discoverability is often an individual issue that will require individual adjudication after the common issues are determined. Indeed, when this court certified this action, Rosenberg J.A. referred to the possibility of individual limitation defences: see *Pearson v. Inco Limited* (2005), 78 O.R. (3d) 641, at para. 63. On the trial judge's findings, the applicability of the *Limitations Act* as he characterized its applicability was not a common issue.

(F) Costs

[166] Counsel agreed that this court should fix costs in the amount of $100,000, payable to the successful party on the appeal. Inco is entitled to costs in that amount. Those costs include disbursements and applicable taxes.

[167] The court was advised in oral argument that were it to allow the appeal, there were certain issues that should be addressed before the court made any order as to the costs of the trial. Counsel should arrange to speak to the president of the panel to determine how best to approach the question of what order, if any, this court should make as to the costs of the trial.

(G) Conclusion

[168] The appeal is allowed. The judgment is set aside. Inco is entitled to judgment dismissing the action with costs of the appeal fixed at $100,000. Counsel may make further submissions as to the order that should be made with respect to the trial costs.

RELEASED: "DD" "OCT 07 2011"

"Doherty J.A."
"J. MacFarland J.A."
"Alexandra Hoy J."