



# Implications of Inco Class Action Decision

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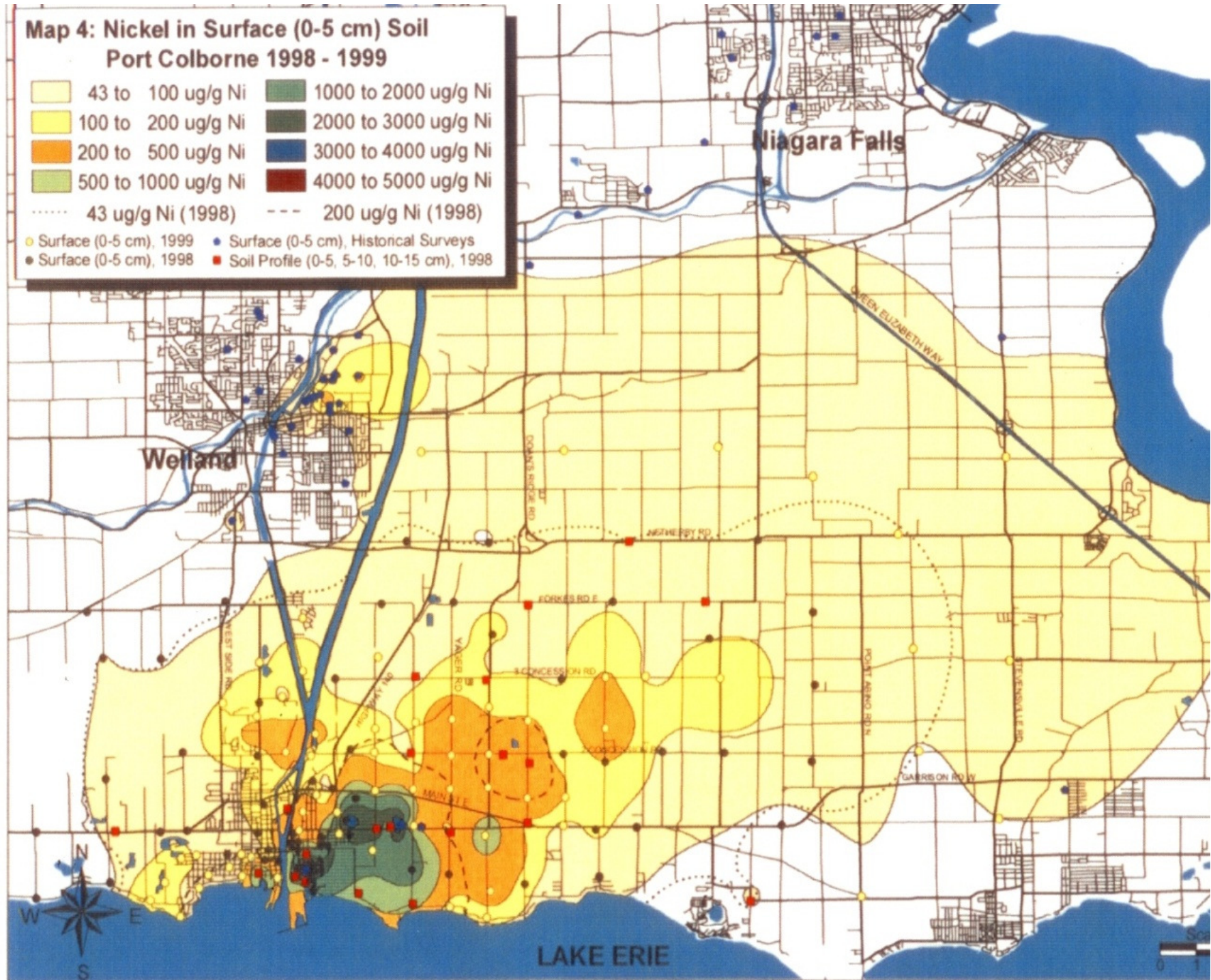


# Inco Port Colborne Refinery

- ✦ 1918: Refinery Opened
- ✦ 1984: Refining Ceased
- ✦ Nickel emissions during entire period
- ✦ 95% to 97% of emissions before 1960
- ✦ Alleged 20,000 tonnes of nickel emitted into Port Colborne
- ✦ No non-compliance with any regulations

**Map 4: Nickel in Surface (0-5 cm) Soil  
Port Colborne 1998 - 1999**

 43 to 100 ug/g Ni	 1000 to 2000 ug/g Ni
 100 to 200 ug/g Ni	 2000 to 3000 ug/g Ni
 200 to 500 ug/g Ni	 3000 to 4000 ug/g Ni
 500 to 1000 ug/g Ni	 4000 to 5000 ug/g Ni
..... 43 ug/g Ni (1998)	--- 200 ug/g Ni (1998)
 Surface (0-5 cm), 1999	 Surface (0-5 cm), Historical Surveys
 Surface (0-5 cm), 1998	 Soil Profile (0-5, 5-10, 10-15 cm), 1998



# Reports of Contamination

- ✦ Numerous complaints from residents over the years
- ✦ In 1972, MOE adopted operational practice of investigating all residents' complaints
- ✦ Between 1980 to 2000, 55 newspaper stories on the contamination
- ✦ In 1990s, MOE adopted 200 ppm guideline for nickel in soil, based on level at which most sensitive plant life could be affected.

# Headlines of pre-2000 reports

- ★ 1985: “High nickel contamination in soil”
- ★ 1990: MOE study released showing high levels of nickel in area around site
- ★ 1991: “Study confirms soil 10 cm deep ‘severely contaminated’ with nickel”
- ★ 1999: over 61 years, 11 million pounds of nickel settled in 10 km area

The background is a dark blue field with several semi-transparent gears of various sizes and shades of blue. On the left side, there is a vertical strip with a colorful, abstract, and somewhat pixelated pattern in shades of orange, yellow, and brown.

# January 2000 MOE Report

- ✦ In January 2000 MOE released its most comprehensive report on soil sampling.
- ✦ Report was tabled at City Council Public Forum in January 2000
- ✦ Inco proposed and began carrying out a Community Based Risk Assessment (CBRA) to assess risks to community

# Testing on Plaintiff's Property

- ✦ In January 2000, Inco class action plaintiff requested sampling on Rodney St. property.
- ✦ Testing done in June 2000, reported in September 2000. Levels of nickel ranged from 4,300 to 14,000 ppm.
- ✦ September 20, 2000 Disclosure formed basis for definition of class and damages alleged
- ✦ Led to widespread investigations and remediation over next months and years

# Health Impacts?

- ★ 1998 MOE Study: No adverse health risks
- ★ 2000 Statements attributed to Plaintiffs' Counsel:
  - ★ “Cancer risks 8 to 40X higher than standards”
  - ★ “Serious health risks”
  - ★ “Houses may need to be demolished”
- ★ Medical Officer of Health: “no signs city has higher cancer rate than rest of province”





# 2002 MOE Consent Order

- ☀ Consent order that Inco clean up any properties with levels 8000 ppm or higher
- ☀ "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." MOE

# Remediation Program

- ★ 25 properties identified for remediation  
(of 6500 properties in Port Colborne)
- ★ 24 remediated
- ★ Only property not remediated belonged to representative plaintiff, who refused
- ★ CBRA established intervention level of 21,000 ppm for residential/parkland property

# Original Class Action Lawsuit

- ✦ Initial Claim against Inco, MOE, Region, City and School Boards
- ✦ Included claims for negligence, nuisance, trespass and strict liability
- ✦ Negligence claims included inadequate safety equipment & procedures, failure to warn and non-compliance with law
- ✦ Alleged damages included personal injuries, health effects, property damage and lost property value claims

# Certification Proceedings

- ★ 2002: Certification Denied by Motions Judge and Divisional Court
- ★ 2005: Court of Appeal overturns lower courts, orders certification on narrowed issues
- ★ includes only
  - ★ claims for lost property value of entire city compared to other communities
  - ★ Caused by September 2000 disclosure of contamination
- ★ Health Hazards and Negligence claims deleted
- ★ June 2009: Class limited to residential property owners

# Definition of Class at Trial

(c) "Class" or "Class Members" means:

All persons owning property, excluding commercial and agricultural property, since September 20, 2000 within the area of the City of Port Colborne bounded by Lake Erie to the south, Neff Road/Michael Road to the east, Third Concession to the north and Cement Road/Main Street West/Hwy 58 to the west, or where such a person is deceased, the heir(s), executor(s), administrator(s), assign(s) or personal representative(s) of the estate of the deceased person;

# Common Issues for the Class

- (a) Is Inco the source of the elevated levels of nickel found on class members' lands?
- (b) Did nickel contamination (from atmospheric deposition or fill) in the Rodney Street Area originate from Inco?
- (c) 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?
- (d) Did Inco owe a duty of care to the class to prevent the ongoing discharge of nickel and, if so, what duty was owed?
- (e) What was the appropriate standard of care that Inco had to meet with respect to preventing the ongoing discharge of nickel?
- (f) Did Inco breach the standard of care referred to in issue (e) above?

# More Common Issues for Class

- (g) Did the ongoing discharge of nickel by Inco amount to a public nuisance?
- (h) Did the ongoing discharge of nickel by Inco amount to a trespass?
- (i) Is Inco strictly liable to the class for the ongoing discharge of nickel as a result of a failure to prevent the escape of a dangerous substance (*Rylands v. Fletcher*)?
- (j) If Inco's liability is established, can class members' claims for property damages be assessed by group or area and, if so, what is the quantum of damages?
- (k) If Inco's liability is established, did Inco's conduct justify an award of punitive damages to the class, and if so, what amount of punitive damages is appropriate?

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# Issues Remaining at Trial

- ✦ At trial, the only issues remaining related to nuisance for property value damage.
- ✦ Allegation was that disclosure of soil sample results led to widespread concerns about health and negative publicity which affected property values



# Trial and Appeals

- ✦ October 2009 to January 2010: Trial
- ✦ July 2010: Trial Judgment for Plaintiffs
- ✦ \$36 million liability for private nuisance and under strict liability imposed under rule in Rylands v. Fletcher
- ✦ October 2011: Court of Appeal Order overturns Trial Judgment and dismisses action
- ✦ Plaintiffs seeking leave to appeal to Supreme Court of Canada

# Summary of Court of Appeal Decision

- ✦ No physical damage to property because no realistic risk to human health
- ✦ No liability under private nuisance or *Rylands v. Fletcher*
- ✦ No real effect on property values in Port Colborne compared to Welland



# Nuisance – Basic Principles

☀ “It is, I think, a universal principle that a man may do what he likes with his own, provided that in so doing he does not interfere with some legal right of his neighbour.”

McBryan v. CPR (1899), 29 S.C.R. 359

The background is a dark blue field with several large, semi-transparent gears of various shades of blue. On the left side, there is a vertical strip with a colorful, abstract, and somewhat pixelated pattern in shades of orange, yellow, and brown. The title 'Private v. Public Nuisance' is written in a bold, yellow, sans-serif font at the top left.

# Private v. Public Nuisance

- ✦ private nuisance: interference with a *private right* over or in connection with land
- ✦ public nuisance: interference with a *public right* shared equally with every member of the community e.g. right to travel on highways and rivers
- ✦ can only sue in public nuisance if “special damage” different from other members of public or under Environmental Bill of Rights

# Immunity from the damage

- ★ “nuisance involves damage but damage alone is not sufficient to give rise to a right of action. There must be some right in the person damaged to immunity from the damage complained of.”

*Grandel v Mason*, [1953] 1 S.C.R 459

# Focus is on Harm, not Conduct

- ☀ “nuisance is a field of liability that focuses on the harm suffered rather than on prohibited conduct.”

*Supreme Court of Canada in St. Lawrence  
Cement Inc v Barrette, [2008] 3 S.C.R 392*

# Balance Competing Uses

- ✱ “Give and take, live and let live”
  - ✱ *Tock v St. John’s Metropolitan Area Board*, [1989] 2 SCR 1181
- ✱ Balance competing uses of property owners
- ✱ Ensure all have some use of their land
- ✱ No unilateral damage to another’s property
- ✱ not a balance between social utility of uses



# Don't Balance Social Utility against Interference to Land

✱ “there is no requirement that substantial interference and reasonableness be balanced, one against the other, to determine which has the greater weight. It would be ludicrous, for example, to argue against the reasonableness of the St. Lawrence Seaway in *Loiselle*, the overpass over the rail line in *Jesperson's Brake & Muffler* or the highway realignment to an expanding airport in a growing city in *Gerry's Food Mart*.”

● *Airport Realty Ltd v Newfoundland (Minister of Works, Services, and Transportation)*, Nfld. Court of Appeal



# Don't Balance Physical Damage

- ✦ social utility irrelevant when nuisance is physical damage to land
- ✦ where the conduct of the defendant has caused actual physical injury to the plaintiffs' land the mere fact that such conduct may be of great social utility, for example construction and maintenance of a sewer, will not attract greater licence or immunity.

B.C. Court of Appeal: *Royal Anne Hotel Co v Ashcroft (Village)*: (1979), 95 DLR (3d) 756 (BCCA) ¶ 14.

# Court of Appeal in Inco

- ★ Two different forms of interference with plaintiff's property rights:
  - Physical injury to land
  - Substantial interference with use or enjoyment of land ("amenity nuisance")
- ★ Where amenity nuisance alleged, balance competing factors. Where physical damage, unreasonable in all cases.
- ★ Plaintiffs alleged physical injury to land, not interference with use or enjoyment

# Requirements for Physical Damage

- ★ Court of Appeal in Inco said physical damage means damage to land that is
  - Material (i.e. more than trivial)
  - Actual (not just potential)
  - Readily Ascertainable
    - Means observable and measurable
    - Not so minimal or incremental as to be unnoticeable as it occurs



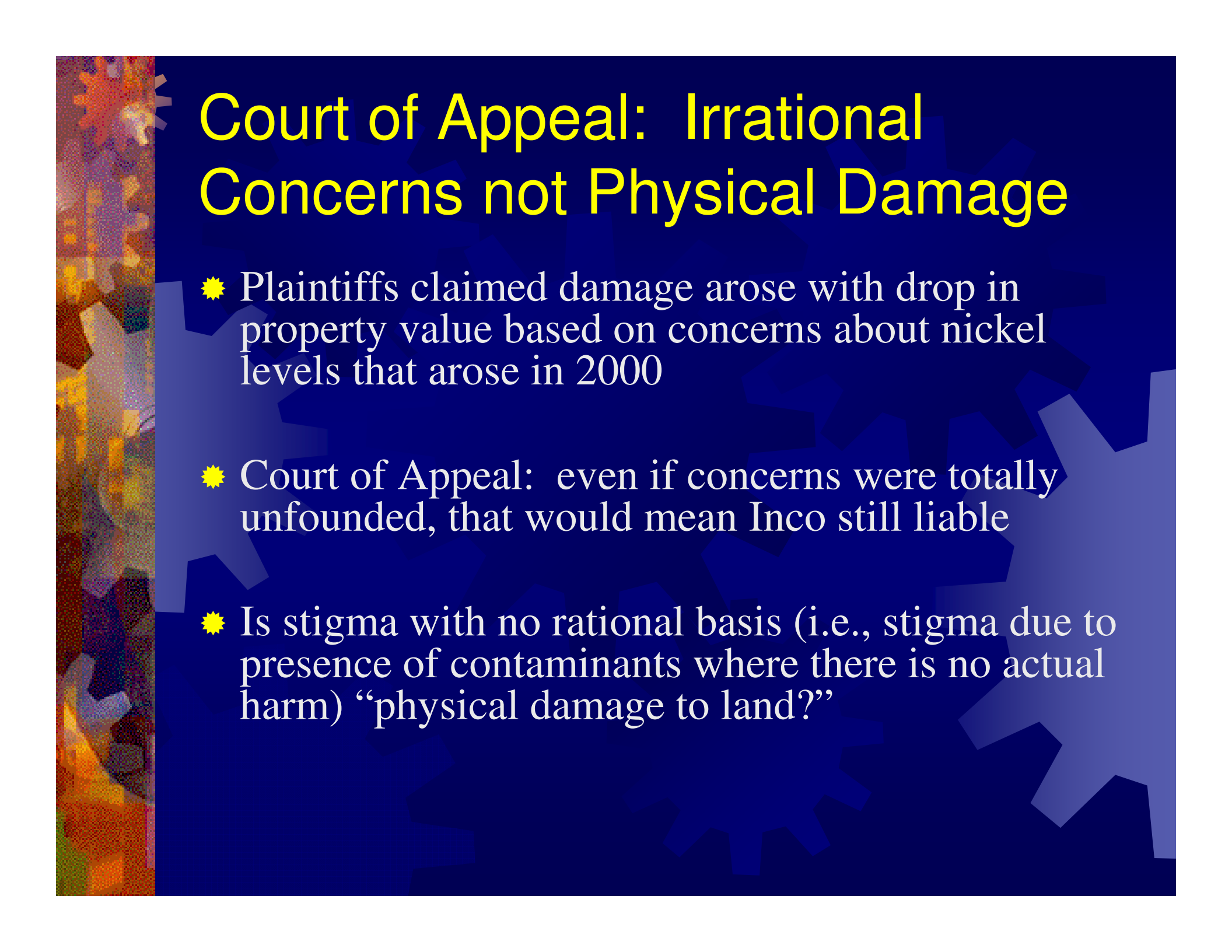
# Mere Chemical Alteration is not Physical Damage to Property

- ✦ Court of Appeal held mere chemical alteration to property without more is not physical damage.
  - **Example: fertilizer**
- ✦ Must be some **detrimental effect** on the land itself or rights associated with the use of land
- ✦ CA: No impact of nickel particles on ability to use the Port Colborne land for any purpose



# What are Detrimental Effects

- ✦ Court of Appeal said in this case claimants would have had to show “realistic risk of actual harm to human health”
- ✦ BUT:
  - ✦ What about harm to family pets?
  - ✦ What about harm to sensitive plant life?
  - ✦ There is realistic risk of actual harm to plant life at 200 ppm, as per MOE guideline/standard



# Court of Appeal: Irrational Concerns not Physical Damage

- ★ Plaintiffs claimed damage arose with drop in property value based on concerns about nickel levels that arose in 2000
- ★ Court of Appeal: even if concerns were totally unfounded, that would mean Inco still liable
- ★ Is stigma with no rational basis (i.e., stigma due to presence of contaminants where there is no actual harm) “physical damage to land?”

# Disclosure of Physical Harm is not Physical Harm

- ★ Court of Appeal pointed out there was no finding that physical damage occurred when nickel deposited in the soil, but a finding physical damage occurred when claimants learned of it in 2000
- ★ Court of Appeal: on trial judge's reasoning, no basis to stop the refinery pre-1985, but only in 2000.
- ★ Is it one or the other?

# Strict Liability (Rylands v. Fletcher)

- ☀ Two competing views of principle:
  - ☀ **Inappropriate use theory:** If you bring something onto your land that is not appropriate for the location and it has unintended consequences, you are liable for those consequences. Don't bring a pig into a parlour
  - ☀ **Extraordinary danger theory:** If you bring something onto your land that is extraordinarily dangerous then you are liable for any consequences.





## Court of Appeal Chooses Narrow Scope of Strict Liability

- ★ Court of Appeal said there may well be good policy reasons for the ‘Extraordinary Danger’ theory, but only the Legislature can/should adopt it.
- ★ In any event, nickel is not extraordinarily dangerous and use was not inappropriate but an ordinary industrial use

# Damages

- ★ **Court of Appeal said usual to apply deference on damages findings except where errors in principle.**
- ★ **Found numerous errors in principle**
  - **Reliance on unreliable data sets (Teranet & MPAC) as rough indicators of general trends**
  - **Compared apples to oranges in failing to correct data sets for vacant building lots**
  - **Wrong base-line measurement**
  - **Wrong time frame**
  - **Arbitrarily averaged one expert's 2.8% with another's 5.9%**
  - **Relied on losses for entire City, not just the class**
  - **Selective reference to data: Welland ahead 2000-4, behind 2004-8. Overall Port Colborne outperformed Welland**

# Questions

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