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S.C.C. File No. 34561

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF ONTARIO)

B E T W E E N:

ELLEN SMITH

Applicant/(Appellant)

and

INCO LIMITED

Respondent/(Respondent)

RESPONSE OF INCO LIMITED ON THE APPLICATION FOR LEAVE TO APPEAL TO THE SUPREME COURT OF CANADA
(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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CERTIFICATE OF COUNSEL FOR THE RESPONDENT
(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

I, Larry Lowenstein, counsel for the Respondent, hereby certify that:

(a) there are no sealing or confidentiality orders in effect in the file from a lower court or the Court and no document filed includes information that is subject to a sealing or confidentiality order or that is classified as confidential by legislation;

(b) there are no bans on the publication of evidence or the names or identity of a party or witness and no document filed includes information that is subject to that ban; and

(c) there is no information that is subject to limitations on public access.

Dated at Toronto, Ontario this 19th day of January, 2012.

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B E T W E E N:

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MEMORANDUM OF ARGUMENT OF THE RESPONDENT
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INCO'S MEMORANDUM OF ARGUMENT IN RESPONSE TO THE PLAINTIFF'S APPLICATION FOR LEAVE TO APPEAL

PART I. OVERVIEW AND STATEMENT OF FACTS

1. In her Memorandum, the Applicant submits 39 questions for the Court's consideration. The affidavits tendered in support of the Applicant's application submit 11 more questions.

2. None of the submitted questions give rise to any issue of national or public importance, or any important issue of law.[1] Many of the submitted questions do not even arise in this case.

A. Facts

3. The Applicant's case against Inco was narrow and limited to a year 2000 announcement of higher than expected nickel levels found close to the Respondent Inco's refinery. The Applicant claimed that Port Colborne's residential property values were negatively affected by the announcement.[2] However, property values were not affected.

4. The factual context is important. The facts, never contested and as found by both Courts below, are incapable of establishing liability either for nuisance or under the strict liability doctrine of *Rylands v Fletcher* ("*Rylands*"):

(a) Inco operated a nickel refinery from 1918 to 1984, a period of 66 years. Inco emitted nickel in its daily operation. 97 percent of the nickel was emitted by 1960. From 1960 to 1984, a further 3 percent was emitted.[3]

(b) Inco always complied with relevant regulatory and environmental standards.[4]

(c) These nickel particles are not noticeable, and "have become part of the soil on these properties [in Port Colborne]";[5]

(d) Nickel is not dangerous *per se*;[6]

---

1 *Supreme Court Act*, R.S.C., 1985, c. S-26, s. 40(1).

2 Reasons of the Court of Appeal (Doherty, MacFarland JJ.A. and Hoy J.) at para. 22, Application for Leave to Appeal (Ellen Smith, Applicant) Materials ("Application") Tab 3D, p. 118.

3 Trial Exhibit 4, Tab 709, "Soil Investigation and Human Health Risk Assessment for the Rodney Street Community, Port Colborne" dated March 2002 ["March 2002 HHRA"], Response to Application for Leave to Appeal ("Response"), Tab 3B, pp. 38-39; McLaughlin Chief, p. 1389, l. 5 – l. 25, Response, Tab 3A, p. 59. Mr. Dave McLaughlin ("McLaughlin") is of the Ontario Ministry of Environment.

4 Trial Reasons at para. 333, Application, Tab 3A, p. 99.

5 Trial Reasons at para. 76, Application, Tab 3A, p. 28.

(e) The air quality in Port Colborne has not been affected;[7]

(f) The water quality in Port Colborne has not been affected;[8]

(g) The Applicant never alleged that the nickel in Port Colborne caused any risk to human health or well-being.[9] In any event, very extensive, peer-reviewed scientific study confirmed this repeatedly.[10]

5. In the lower Courts, the Applicant pursued two theories of liability: nuisance and *Rylands*.[11]

6. The common law as it has existed and continues to exist has well-settled principles regarding nuisance. Nuisance has two distinct branches, namely (1) material physical damage to the plaintiff's property, and (2) significant interference with the use and enjoyment of property by one's neighbour. As the Trial Judge put it,

> "[75] Legal scholars and jurists have historically divided nuisance into two distinct branches, namely (1) material physical damage to the plaintiff's property, and (2) significant interference with the beneficial use of the premises."

7. Again, as the Trial Judge stated: "In the present case, the plaintiff does not rely on the second branch of nuisance as set out above. Rather, the plaintiff makes a claim based on the first branch, material physical damage to property."[12]

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6 Trial Reasons at para. 54, Application, Tab 3A, p. 21.

7 McLaughlin Chief, p. 1493, ll. 4-29; McLaughlin Cross, p. 1523, ll. 23-28, Response, Tab 3C, pp. 65-66. McLaughlin testified that over ten years of air monitoring data confirms that regardless of which cancer risk standard is used (i.e. the standard of the World Health Organization, the United States Environmental Protection Agency or Environment Canada), the risk to residents from nickel in the air in Port Colborne is no greater than the risk to residents in virtually any other Ontario community or city in Canada that does not have a nickel refinery.

8 Absolutely no evidence was led that there was any effect on the water quality in the Town of Port Colborne.

9 Reasons of the Court of Appeal at paras. 9, 58 and 62, Application Tab 3D, pp. 113, 136 and 138.

10 March 2002 HHRA, Response, Tab 3B, pp. 36-37; McLaughlin Chief, p. 1433, l. 27 – p. 1434, l. 17; McLaughlin Cross, p. 1444, ll. 1-17; p. 1445, l. 20 – p. 1446, l. 12; p. 1604, l. 20 – p. 1606, l. 20, Response Tab 3C, pp. 60-64, 67-69. The Applicant implies that the nickel in the soil in Port Colborne is carcinogenic (paragraph 7 of her Memorandum). It has been conclusively determined that this is not the case. McLaughlin confirmed that nickel oxide is only suspected to be a carcinogen if inhaled over extended periods of time in high, workplace-type concentrations in industrial environments.

11 She abandoned her claim in negligence before trial. See Order of Cullity J. dated June 29, 2009, Response, Tab 3D.

8. The Applicant was unable to establish any harm to the land. The nickel as it exists in Port Colborne is harmless and not noticeable. The Applicant was not able to demonstrate that there was any physical damage - let alone material physical damage - to the class members' properties, as was required by the theory of liability advanced in both Courts below.

9. The Applicant asserted strict liability under *Rylands* as a second theory of liability. The same facts which caused the Applicant to fail to establish nuisance also pertained to her failure to establish strict liability under *Rylands*. The Trial Judge found that nickel was not dangerous *per se*. In addition, the Trial Judge found that Inco engaged in a lawful business operation in Port Colborne for many years and provided gainful employment to many people. That business operation regularly and lawfully emitted nickel as a consequence of its operations.[13]

10. These facts to do not meet the requirements of the *Rylands* strict liability test: non-natural user of land and sudden or unanticipated escape of a dangerous substance.

11. There is no issue of national public importance. There is no uncertainty about the principles that underpin nuisance and *Rylands*. These are adaptable principles which have served the Commonwealth well from the earliest days of industry in the 18th century to modern times, including their application by this Court in *Tock v. John's Metropolitan Area Board.*[14] These torts are flexible concepts that readily apply to modern environmental concerns, including contamination of land.[15] This Court has provided a remedy to plaintiffs who have suffered damages as a result of industrial emissions[16] and this Court has denied leave to appeal in cases involving these torts.[17]

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12 Trial Reasons at para. 76, Application Tab 3A, p. 28.

13 Trial Reasons at paras. 54 and 333, Application Tab 3A, pp. 21 and 99.

14 *Tock v. St. John's Metropolitan Area Bd.*, [1989] 2 S.C.R. 1181 ["Tock"], Respondent's Authorities, Tab L. To underscore that the principles of law engaged by the tort of nuisance are well established and flexible, passages from Justice McIntyre, as he then was, writing for the British Columbia Court of Appeal in *Royal Anne Hotel Co. Ltd. v. Village of Ashcroft*, [1979] B.C.J. No. 2068 (B.C.C.A.) at paras. 9-14, Applicant's Authorities, Tab V (referred to by this Court in *Tock* at pp. 1190 and 1192) are particularly illustrative.

15 Reasons of the Court of Appeal at paras. 57-58, Application Tab 3D, pp. 135 – 136.

16 *St. Lawrence Cement Inc. v. Barrette*, [2008] 3 S.C.R. 392 ["*St. Lawrence Cement*"], Applicant's Authorities, Tab Z.

17 For example, *Susan Heyes Inc. v. Vancouver (City)*, 2009 CarswellBC 1362, rev'd by 2011 BCCA 77, leave to appeal refused by (2011), B.C.A.C. 2010 ["*Heyes*"] (claim for nuisance allegedly caused by construction of Canada Line in Vancouver), Respondent's Authorities, Tab J; *Sutherland v. Canada (A-G)*,

12. There were also no damages in this case, as real estate values in Port Colborne are the same or better than comparable communities. As the Court of Appeal stated:

> "...the Claimants (Applicants) failed to establish any damages."[18]

13. The approach to damages of both lower Courts was driven solely by the realities of the real estate evidence, without any disagreement about applicable legal principles.

14. The Trial Judge found that there was a 4.35 percent differential in the rate of real estate price appreciation over 10 years (1999 – 2008) between the comparable communities of Port Colborne and Welland. However, the Trial Judge identified an underlying "problem" with the real estate data. When that "problem" is corrected, there is no differential in the rise of property values in Port Colborne as compared to Welland.[19] None of the submitted questions raise any new or important issue regarding the calculation of damages.

PART II. QUESTIONS IN ISSUE

15. Of the 50 questions submitted by the Applicant in her factum and supporting materials, the Applicant has put forward two broad overarching questions and four "key" legal issues.[20] The broad questions are:

2001 CarswellBC 1470 (S.C.), rev'd by 2002 CarswellBC 1531 (C.A.), leave to appeal refused by 2003 CarswellBC 1102 (S.C.C) (claim for damages for nuisance by property owners including diminution of the value of their land which was alleged to arise from the operation of a new runway at the Vancouver International Airport) Respondent's Authorities, Tab K; *Chessie v. J.D. Irving Ltd.*, 1982 CarswellNB 48 (C.A.), leave to appeal refused by (1983), 47 N.R. 79 (note) (S.C.C.) (claim that fishing wharf the plaintiff struck when snowmobiling on a frozen river was a nuisance), Respondent's Authorities, Tab D; *Desrosiers v. Sullivan*, 1986 CarswellNB 74 (C.A.), leave to appeal refused (1987), 80 N.R. 315 (note) (S.C.C.) (claim for nuisance resulting from the odour emanating from a pig farm), Respondent's Authorities, Tab F; *Oosthoek v. Thunder Bay (City)*, 1994 CarswellOnt 632 (Ont. Gen. Div.), aff'd 1996 CarswellOnt 5113 (C.A.), leave to appeal refused [1996] S.C.C.A. No. 577 (claim for nuisance in respect of sewer that flooded homes), Respondent's Authorities, Tab I; *Hoffman v. Monsanto Canada Inc.*, 2005 CarswellSask 572 (Sask. C.A. [In Chambers]), aff'd by 2007 CarswellSK 190 (C.A.), leave to appeal refused by 2007 CarswellSK 190, [2007] 3 S.C.R. x (note) (court declined to certify class action on the basis that the pleadings did not disclose a cause of action in nuisance or *Rylands* (among others)), Respondent's Authorities, Tab G.

18 Reasons of the Court of Appeal at para. 3, Application Tab 3D, p. 112.

19 Reasons of the Court of Appeal at paras. 130-131 and 159, Application Tab 3D, pp. 166 and 176.

20 Applicant's Memorandum of Argument at paras. 5 and 26, Application Tab 4, pp. 184 and 193.

> "--- Canadians need a clear answer: what is actionable in the context of chemical depositions on private lands?"[21] – para. 3

> "--- this appeal is the test case on which this Court can now opine on the priority of these interests – what degree of contamination or land interference must be tolerated and by whom?"[22] – para. 33 – [underlining in the original]

16. The Applicant's four key legal questions, which encompass other questions, are:

(i) the threshold effect for liability in nuisance in the context of environmental or contamination;

(ii) the requirements for a "non-natural" use of land;

(iii) whether environmental statutory regimes are a complete code of liability; and

(iv) whether property devaluation should be a recognized claim in nuisance.[23]

17. In specific response:

(a) On the facts of this case, there is no environmental "effect". The nickel existing in Port Colborne causes no harm to soil, air or water, and no harm or risk of harm to human health, and the Applicant never alleged otherwise. Further, on the facts of this case, there is no property devaluation. Accordingly, questions (i) and (iv) do not arise in this case.

(b) In *Tock* this Court provided a clear definition of what constitutes a "non-natural use" to establish strict liability under the rule in *Rylands*. That definition was applied by the Court of Appeal. There is no need for this Court to re-consider question (ii).

(c) No lower Court relied on environmental regulatory regimes to determine liability. Accordingly, question (iii) does not arise in this case.

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21 Applicant's Memorandum of Argument, Application Tab 4, p. 183.
22 Applicant's Memorandum of Argument, Application Tab 4, p. 196.
23 Applicant's Memorandum of Argument at para. 5, Application Tab 4, p. 184.

(d) On these facts, the Applicant's broad questions are academic and irrelevant.

18. In addition, in specific response to questions set out in the supporting affidavits:

(a) The requirement to prove "material physical damages" in nuisance is well-settled, and the lower Courts did not disagree on this point.

(b) In the absence of nickel adversely affecting the use of property (not claimed or proven) or health (not claimed or proven) the question of "stigma" does not arise, particularly where the Applicant failed to prove any difficulty in selling property, nor any difficulty in obtaining a mortgage and nor any property devaluation.

(c) Any consideration of how *Rylands* should apply to "extra-hazardous" activities is irrelevant to this case. The refining of nickel for 66 years is not an "extra-hazardous" activity. As well, neither Court confined *Rylands* to cases of single-isolated releases; therefore, the point does not arise on the facts.

(d) The issue of "foreseeability" of damages was not argued or addressed in evidence in the courts below.

19. There is no "trigometric" property/tort/environment test that needs delineation. There is no "juridical triangulation" of three discrete areas of law. There is no "juridical Richter Scale" that is engaged, and no need to assist the Court of Appeal for Ontario in looking through a "juridical pair of binoculars".

PART III. ARGUMENT

A. The Claim

20. The Applicant's case rests on the assertion that an announcement of higher than expected nickel levels found in the year 2000 generated public concern and controversy, which caused a measurable negative effect on class members' property values. The lawsuit was initiated in 2001.

21. Periodically over the decades, the MOE collected air and soil samples from Port Colborne. As a result of the MOE's finding in 2000 of higher than expected soil nickel levels, it decided that testing should be done in an area in Port Colborne immediately adjacent to the Inco

refinery, known as the Rodney Street Area. Ultimately, the MOE found that 25 of approximately 7,000 properties in Port Colborne had nickel levels exceeding 8,000 ppm (the intervention level at which Inco was required to clean up these properties). Inco removed the soil from 24 of the 25 properties and replaced it with fresh soil. Ironically, the class representative/Applicant refused to have her property remediated.[24]

22. The 8,000 ppm intervention level was determined by the MOE after extensive independent scientific study. It was set based on leading edge science which assumed an exposure to nickel as if a toddler below the age of five remained a toddler for 70 years and consumed nickel by playing in the backyard handling and eating soil on a daily basis.[25] In other words, it was set at a very precautionary level, well below any potential health risk.[26]

23. Several health studies have been done in Port Colborne. In 1981, the federal government commissioned a health study in which 1,000 homes were approached and over 300 residents participated. The study looked at, among other things, known health effects of nickel and found that Port Colborne residents "are generally healthy with no illnesses reaching abnormal levels".[27]

24. In addition, in 1997 the Public Health Department did a health study (updated in 2000). This updated study performed a risk assessment in respect of nickel levels in the soils in Port Colborne, and reviewed health statistics of Port Colborne residents. The Health Study came to the following conclusion:

> In conclusion, based on multimedia assessment of potential risks, no adverse health effects are anticipated to result from exposure to nickel, copper and cobalt, in the soils the Port Colborne area. Furthermore, the

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24 Reasons of the Court of Appeal at paras. 13-17, Application Tab 3D, pp. 114 – 116; McLaughlin Cross, p. 1630, l. 17 – p. 1631, l. 7; Smith Cross, p. 331, l. 23 – p. 332, l. 5; p. 354, l. 21 – p. 355, l. 26, Response, Tab 3C, pp. 70 – 71; 54 - 57.

25 March 2002 HHRA, Response, Tab 3B, p. 36.

26 The Court of Appeal found that the MOE explained that the 8,000 ppm intervention level was developed to ensure that all nickel exposure to residents and especially toddlers would not exceed a value that is "*well below any potential health risk*", Reasons of the Court of Appeal at para. 16, Application Tab 3D, p. 115.

27 Trial Exhibit 4, Tab 145, "Health Study from Federal Government" dated 1981, Response, Tab 3B, p. 33.

> review of population health data did not indicate any adverse health effects which may have resulted from environmental exposures.[28]

25. Following 2000, extensive further health studies of Port Colborne residents have been undertaken. In summary, they are as healthy as other Canadians, with no increase in any health risk due to nickel.[29]

26. The Applicant failed to establish that, from 2000 to 2008 any property owner in Port Colborne had any difficulty either selling their house or in obtaining a mortgage from any financial institution.[30]

B. The Trial Judgment

(a) *Nuisance*

27. The Trial Judge determined that the placing of nickel particles on a neighbour's property constitutes physical damage. He did so apparently without regard to the amount or effect of the particles:

> "In the present case, the plaintiff does not rely on the second branch of nuisance as set out above. Rather, the plaintiff makes a claim based on the first branch, material physical damage to property. The plaintiff submits that Inco has acted so as to permit nickel particles to flow from its operations onto class members' properties. The nickel particles, primarily in the form of nickel oxide, have become part of the soil on

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28 Trial Exhibit 4, Tab 209, MOE Information Sheet re. 1997 Health Report, Response, Tab 3B, p. 34; McLaughlin Cross, p. 1379, ll. 11-17, Response, Tab 3C, p. 58.

29 The CHAP Study, a component of the CBRA, first issued to the public in 2004 and finalized in 2009, confirmed that the residents of Port Colborne are as healthy as any other community in Ontario and Canada, Trial Exhibit 4, Tab 867, CHAP Studies A and C Integration: A Report to the Technical Subcommittee of the Public Liaison Committee for the City of Port Colborne, Final Report, March 10, 2009, Response, Tab 3B, p. 40 - 42.

30 Ms. Smith agreed that "despite being so involved with contamination issues and this proceeding, and despite speaking with hundreds of class members [over the prior eight years]" that "[she did] not have any knowledge or information about any specific residents having difficulty obtaining mortgages, loans or financing due to contamination on their properties". Ms. Smith had no problem obtaining a mortgage on her home to finance the purchase of another property in Port Colborne, Smith Cross, pp. 310 – 320, Response, Tab 3C, pp. 43-53; David Atlin was the only expert who studied mortgages in Port Colborne and he testified that there was no evidence of any changes in mortgage financing following the year 2000, Atlin Chief, pp. 1976, l. 16 – p. 1978, l. 6, Response, Tab 3C, p. 72-74.

> these properties. I accept the submission that this constitutes physical damage to the class members' properties."[31]

28. The logical consequence of the Trial Judge's reasoning is that a defendant would cause physical damage by depositing even one particle of any substance on a neighbour's property. Many normal activities would cause physical damage under such a test, including having backyard barbeques or driving cars which emit exhaust (containing nickel and other particles).

29. Although "material" is an adjective qualifying physical "damages", the Trial Judge stated that the physical damage was "material" because of its consequences, i.e. he found (erroneously) there was a 4.35 percent differential over 10 years in the rate of appreciation of the market prices in Port Colborne when compared to Welland. Between 1999 and 2008, Port Colborne's property values rose by 59.5 percent whereas Welland's property values rose by 63.85 percent. The Trial Judge failed to articulate any test for "materiality".

30. The Trial Judge erroneously used the 4.35 percent price appreciation differential on three separate occasions:

(i) as the adjective to qualify physical damage as "material physical damage";

(ii) as the basis for causation, to explain why Port Colborne and Welland did not have the same price appreciation over 10 years, even though he recognized that the communities were not identical but only comparable; and

(iii) as the basis for the damages.

(b) ***Rylands***

31. The Trial Judge found that the *Rylands* test was made out because nickel was a non-natural substance given its importation to the refinery from elsewhere. Thus, on this reasoning, nickel occurring naturally in Sudbury and being refined by Inco in Sudbury is not an "unnatural substance", but it is in Port Colborne.

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31 Trial Reasons at paras. 76 and 101, Application Tab 3A, pp. 28 and 35.

32. The Trial Judge also found that although nickel is not a "dangerous substance *per se*"; it has the potential to be dangerous.

33. The Trial Judge found that the 66-year daily, repeated, known emissions from the Inco refinery constituted an escape sufficient to meet the non-natural user and unanticipated escape elements of the strict liability test.

(c) ***Damages***

34. The Trial Judge found that Port Colborne and Welland were comparable communities for the purposes of measuring any difference in price appreciation of real estate.

35. He found that from 1999 to 2008 Port Colborne residential property values rose by 59.5 percent whereas Welland's property values rose by 63.85 percent, a differential of 4.35 percent. This equated to a loss on average of $4,514 per property which the Trial Judge multiplied by 7,965 residential properties for a total damage assessment of $36 million.[32]

36. In arriving at the figure, the Trial Judge relied on the Municipal Property Assessment Corporation ("MPAC") data set which he found ranked ahead of the multiple listing sales ("MLS") data set.[33] The MLS data set demonstrated that the Applicant failed to prove any damages.

37. The MLS data set captures all actual sales of properties in both communities between 1999 and 2008 that are transacted over the system. 95 percent of all sales, and virtually 100 percent of arms' length sales, are transacted over the MLS system. The other approximately 5 percent represent non-arms' length transactions such as sales between family members.

38. The MPAC data set represents a notional valuation of all properties in Ontario regardless of whether the property sold or did not sell. This MPAC data is derived through the application of an undisclosed mathematical algorithm that values properties based on similar properties. The

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32 Trial Reasons at para. 298, Application Tab 3A, p. 90.

33 Trial Reasons at para. 254, Application Tab 3A, p. 77.

MPAC data set was updated in 1996, 1999, 2001, 2003, 2005 and 2008. A property's MPAC value is the value used for property tax assessments in Ontario.[34]

39. In utilizing the MPAC data set, the Trial Judge noted a problem.[35] In the residential classification in Port Colborne in 1999, some 314 vacant building lots were reclassified as farm properties. Because vacant lots are of low value, removing them from the residential classification had the effect of raising the average value of the Port Colborne residential properties for 1999, the starting year for the measurement. By 2008 these vacant building lots were once again put into the residential category for Port Colborne, thus lowering the average property value for 2008, the end point of the measurement. This meant that the rate of property value increase between 1999 and 2008 was artificially depressed. This phenomenon was not present in Welland.

40. The Trial Judge averted to the problem regarding the exclusion of the building lots at the beginning of the measurement period and the inclusion of the building lots at the end of the measurement and accepted that a comparison would skew the results.[36]

41. The Trial Judge made an arbitrary partial adjustment that was not based on any expert evidence to reduce the pure differential of 5.9 percent to 4.35 percent. He acknowledged that if a full adjustment were made, even using the MPAC data, there was no difference in the rate of appreciation of real estate values from 1999 to 2008 between Port Colborne and Welland.

42. On the MLS data, there was also no difference for that 10 year period – in fact, Port Colborne outperformed Welland.

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34 Reasons of the Court of Appeal at para. 126, Application Tab 3D, p. 164 - 165.
35 Trial Reasons at para. 255, Application Tab 3A, p. 77.
36 Trial Reasons at paras. 255, 288 and 289, Application Tab 3A, pp. 77, 86-87.

C. The Reasons of the Court of Appeal for Ontario

(a) *Nuisance*

43. The Court of Appeal for Ontario began its discussion of the law by indicating that "the distinction between physical damage nuisance and amenity nuisance [i.e. interference with use and enjoyment] has been repeatedly applied by Courts in this Province".[37]

44. The Court of Appeal determined that the facts of the case did not permit the Trial Judge to find that nickel particles in the soil caused actual, substantial, physical damages 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."[38]

45. "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." [39]

46. "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."[40]

47. The Applicant argues at paragraphs 35 and 36 of her Memorandum that the Court of Appeal has introduced a personal injury requirement to the nuisance test. This argument misconstrues this aspect of the Court of Appeal's reasons. The Court of Appeal directed itself

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37 Reasons of the Court of Appeal at para. 47, Application, Tab 3D, pp. 130 - 131.
38 Reasons of the Court of Appeal at para. 55, Application, Tab 3D, pp. 134 - 135.
39 Reasons of the Court of Appeal at para. 59, Application, Tab 3D, pp. 136 - 137.
40 Reasons of the Court of Appeal at para. 62, Application, Tab 3D, p. 138.

only to the particular facts of this case. Having failed to prove material physical damage, the Applicant relied on concerns about potential health risks. The Court of Appeal found that mere concern, without evidence of actual risk to health was insufficient to establish actual, substantial, physical damage to land in the context of this case.

48. As stated by the Court of Appeal, "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."[41]

49. Thus, contrary to the Applicant's assertion,[42] the Court of Appeal did not say that adverse health effects are necessary to establish nuisance in a case where environmental contamination is alleged. Rather, the Court of Appeal said that as the Applicant framed her case, the only possible nuisance on the facts was adverse health effects, and this was not borne out on the facts.

50. Both courts below set out and applied the same well-settled legal principles regarding nuisance. They only differed on how that law applied to the facts.

(b) ***Rylands***

51. The Court of Appeal carefully addressed the existing law on the strict liability doctrine. In particular, it accepted the formulation of the test stated by this Court in *Tock*:

> "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

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41 Reasons of the Court of Appeal at para. 67 (emphasis added), Application Tab 3D, p. 140.

42 Applicant's Memorandum of Argument at paras. 13, 24, 35 & 36, Application Tab 4, pp. 187, 192 – 193 & 197.

> the land or such a use as is proper for the general benefit of the community."[43]
>
> "The 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)."[44]

52. The Court of Appeal also found that the Trial Judge misused the term "non-natural use" as a trigger to impose liability. "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 is not, however, the law that anything that is not found naturally on the property can be found subject to strict liability under *Rylands v. Fletcher* if it escapes and causes damage." "To decide whether a use is a non-natural one, the Court must have regard for the place where the use is made, the time when the use is made, and the manner of the use." The Court of Appeal further noted that in *Tock*, the non-natural use component was articulated as a "rule providing flexibility that would allow the rule to adjust to changing patterns in society".[45]

53. The Court of Appeal also addressed the degree of dangerousness posed by the activity and the circumstances surrounding the activity:

> "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."[46]

54. Finally, the Court of Appeal articulated the type of situation that *Rylands* is and has always been meant to address: "an unnatural use of the defendant's property and some kind of

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43 Reasons of the Court of Appeal at para. 90, Application Tab 3D, p. 151.

44 Reasons of the Court of Appeal at para. 91 (emphasis by the Court of Appeal for Ontario), Application Tab 3D, p. 151.

45 Reasons of the Court of Appeal at paras. 91 and 97, Application Tab 3D, p. 151 and 154.

46 Reasons of the Court of Appeal at para. 103, Application Tab 3D, p. 156.

mishap or accident that results in damage"...*not* the "intended result of the activity undertaken by the defendant". In other words, the *Rylands* rule does not apply to "escapes" that are permitted by regulation and made in the ordinary course of business.[47]

55. Accordingly, the Court of Appeal simply corrected errors by the Trial Judge in interpreting and applying the law to the facts of this case, in a manner consistent with decades of precedent regarding the application of *Rylands*.

(c) ***Damages***

56. No issue of public importance is raised on damages. The Court of Appeal applied the precedents of this Court, and recognized that "in reviewing damage calculations, appellate courts generally defer to trial judges and, absent an error in principle, are reluctant to interfere". The Court then went on to state that the Trial Judge in this instance made errors in principle in his analysis of the evidence of the damages claimed.[48]

57. The Court of Appeal indicated "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."[49]

58. Ultimately, the Court of Appeal found that the Trial Judge erred in principle in awarding damages based on an arbitrary adjustment to address a problem in the MPAC data that the Trial Judge acknowledged.[50]

59. The Trial Judge calculated damages by measuring the difference between the year 1999, which excluded 314 vacant building lots, and 2008, which included the vacant building lots. The Court of Appeal found that there was "no question" that "the inclusion of these building lots as

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47 Reasons of the Court of Appeal at para. 112. (emphasis added), Application Tab 3D, p. 159.
48 Reasons of the Court of Appeal at para. 125, Application Tab 3D, p. 164.
49 Reasons of the Court of Appeal at para. 128 (emphasis added), Application Tab 3D, p. 165.
50 See paragraphs 34 - 42 above.

residential properties had the effect of lowering the average residential property value for Port Colborne".[51]

60. The Court of Appeal's decision corrects this arbitrary adjustment, which was not based on any evidence. The Court pointed out that when one viewed all of the evidence, there is no appreciable difference in real estate values between Port Colborne and Welland:

> "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."[52]

61. "The role of 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."[53]

62. "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."[54]

63. In any event, a difference of 4.35 percent over 10 years between Port Colborne and Welland is well within the range of variance of comparable but not identical communities over a 10 year period.

64. In answer to the Applicant's allegation at paragraph 47 of her Memorandum, the Court of Appeal did not vacate the damage award "ignoring" evidence or in reliance on evidence not tendered at trial. Based on the Trial Judge's findings, the Court of Appeal rejected the plaintiff's

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51 Reasons of the Court of Appeal at paras. 130 and 131, Application Tab 3D, p. 166.
52 Reasons of the Court of Appeal at paras. 133 and 134, Application Tab 3D, pp. 167 – 168.
53 Reasons of the Court of Appeal at para. 145, Application Tab 3D, pp. 171 – 172.
54 Reasons of the Court of Appeal at para. 148, Application Tab 3D, p. 172.

statistical evidence and related data as hopelessly flawed.[55] For the purpose of correcting the error of the Trial Judge, the Court of Appeal did not rely on the defendant's expert, Frank Clayton, in any fashion. The only correction that the Court of Appeal made to the Trial Judge's MPAC damages calculation was to the Trial Judge's own partial, arbitrary adjustment to the MPAC data.[56]

D. Analysis

65. This case is not a "test case" about "a juridical triangulation of three discrete areas of law into a singly nationally important case with a class actions overlay". Neither property law nor environmental law was raised nor engaged. To the extent that the subject matter of the case touched on environmental or property issues, these were purely factual, not legal issues.

66. Indeed, the Applicant herself made this same point when opposing the motion by the Friends of the Earth (the "FOE") to intervene before the Court of Appeal. In opposing FOE's intervention, the Applicant stated in her factum: "This appeal is concerned solely with private property rights";[57] "The decision below was heavily fact-driven...";[58] "While the [the proposed intervener] the FOE states that the legal issues engaged on this appeal 'affect the interests of the public as a whole', such an assertion is misplaced";[59] "...[N]or does this appeal involve an inquiry into Canadian environmental law generally";[60] "While the FOE frames this appeal as one which 'includes the realization that our common future, that of every Canadian community, depends on a healthy environment', such assertions are irrelevant and unhelpful in disposing of an appeal of a factually driven trial decision".[61]

67. Among the 50 questions submitted by the Applicant and its supporters, a recurring theme is the interplay between a polluted community and the regulatory regime. This is not an issue raised in argument or by the facts of this case. Life has continued normally in Port Colborne.

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55 Reasons of the Court of Appeal at paras. 122 and 156, Application Tab 3D, pp. 163 and 175.
56 Reasons of the Court of Appeal at para. 152, Application Tab 3D, p. 173.
57 Factum of the Applicant on Friends of the Earth Motion for Intervener Status at the Ontario Court of Appeal dated March 16, 2011 (the "Applicant's Intervention Factum"), at para. 1, Response, Tab 3D, p. 76.
58 Applicant's Intervention Factum, at para. 3, Response, Tab 3D , p. 77.
59 Applicant's Intervention Factum, at para. 22, Response, Tab 3D , p. 78.
60 Applicant's Intervention Factum, at para. 26, Response, Tab 3D, p. 80.
61 Applicant's Intervention Factum, at para. 37, Response, Tab 3D, p. 81.

There were no findings that residents changed their ordinary activities, or had difficulty selling their houses or obtaining mortgages. No indulgence was granted to Inco because for 66 years it complied with all regulations. Indeed, the Court of Appeal did not agree that Inco operated "for the general benefit of the community" so as to absolve it from strict liability under the *Rylands* rule. The factual premise of many of the questions posed is fictional.

68. The Applicant suggests that there are five points of departure between six cases that the Applicant asserts are relevant, but none of these are correct.[62]

(a) None of *St. Lawrence Cement*, decided by this Court, *Heyes* in the Court of Appeal for British Columbia or *Berendsen* or *Antrim* in the Court of Appeal for Ontario addressed the liability issue of the actionable threshold in nuisance when contamination is alleged, or whether diminished property value is physical damage to land. None have similar facts and all were resolved on different theories of liability (being the other branch of nuisance, i.e. unreasonable interference,[63] and negligence[64]). In any event, these cases do not conflict, as they do not even deal with similar issues.

(b) None of these cases state that compliance with statute "immunizes" a defendant from liability. In any event, in this case neither the Trial Judge nor the Court of Appeal found that Inco was "immune" because it had complied with statutory regulations.

(c) *Tridan* and *Cousins* deal with damages issues, and have no bearing on the liability issues at hand. In *Tridan*, liability was admitted, including the responsibility for

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62 *Heyes*, Respondent's Authorities, Tab J; *Tridan Developments Ltd. v. Shell Canada Products*, [2000] O.J. No. 1741 (SCJ), Applicant's Authorities, Tab FF, rev'd by (2002), 57 O.R. (3d) 503 (C.A.), Applicant's Authorities, Tab EE; *Antrim Truck Centre Ltd. v. Ontario (Minister of Transportation)*, 2011 CarswellOnt 4064, 2011 O.N.C.A. 419 ["Antrim"], Respondent's Authorities, Tab A; *Berendsen v. Ontario*, 2009 CarswellOnt 7463,. 2009 O.N.C.A. 845 ["*Berendsen*"], Respondent's Authorities, Tab B; *St. Lawrence Cement*, Applicant's Authorities, Tab Z; and *Cousins v. McColl-Frontenac*, 2006 CarswellNB 652, 2006 N.B.Q.B. 406 ["*Cousins*"], Respondent's Authorities, Tab E.

63 In *St. Lawrence Cement*, *Heyes* and *Antrim*, the plaintiffs alleged that the defendant's activity was causing an unreasonable interference with the use and enjoyment of the plaintiff's property: See *St. Lawrence Cement*, at paras. 77-79, Applicant's Authorities, Tab Z; *Heyes*, at paras. 36, 40 and 49, Respondent's Authorities, Tab J; *Antrim*, at paras. 80-83, Respondent's Authorities, Tab A.

64 *Berendsen*, at para. 20, Respondent's Authorities, Tab B.

remediation and related costs.[65] In *Cousins*, the plaintiff sought damages in respect of a property that the Court found was contaminated beyond remediation.[66] These cases do not conflict on the appropriate level of remediation, and even if they did, it is irrelevant as remediation was not an issue in this case. Nor do the cases conflict on the proper way to quantify environmental damages, as they were quantifying different things: the cost of remediation and damages where a property could not be remediated.

69. A "class actions overlay" adds nothing to the analysis. As this Court has said, repeatedly, and most recently in 2011, a class action is a procedural vehicle. Its use does not have the effect of changing the substantive law applicable to individual actions.[67]

70. In any event, the law is clear that class action cases can be brought in tort for environmental harm caused by a defendant's emissions. This was exactly the situation in *St. Lawrence Cement*.[68]

E. Conclusion

71. The answers to both "key" questions (What is actionable? What degree of interference is tolerable?)[69] on which leave to appeal is sought are harm and damages. Tort law has since its inception focussed on providing a remedy for the damage caused by a defendant. In this case the Applicant staked her claim on the theory that there was material physical damage to her land. Harmless depositions of nickel causing no physical or other damage and causing no economic

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65 Reasons of the Court of Appeal at para. 66, Application Tab 3D, p. 140.

66 *Cousins*, at paras. 5 and 16, Respondent's Authorities, Tab E.

67 *Bou Malhab v. Diffusion Métromédia CMR Inc.*, 2011 CarswellQue 383, [2011] 1 S.C.R. 214 at para. 52, Respondent's Authorities, Tab C.

68 See also, *Hollick v. Toronto (City)*, 2001 CarswellOnt 3577, [2001] 3 S.C.R. 158 at paras. 33-37, Respondent's Authorities, Tab H where the Supreme Court of Canada found that the plaintiff's proposed claim in respect of emissions from a landfill met the identifiable class and common issues requirements of the test for certification under section 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 [the "*CPA*"], but that a class proceeding was not the preferable procedure, primarily because of the existence of a Small Claims Trust Fund that had been set up to address claims arising out of "off-site impact" of the landfill. The Supreme Court of Canada found that the case should not be certified, but specifically stated that this was not because the certification requirements could never be met in an environmental tort case, but because of the serious issues of preferability under section 5(1)(d) of the CPA.

69 See paragraph 16 above.

damages do not fall within the ambit of tort law. Absent any harm and any damages, all of the 50 questions posed for the Court to consider are academic and hypothetical.

PART IV. ORDER SOUGHT

72. The Respondent respectfully requests that the application for leave to appeal be dismissed with costs to the Respondent.

January 19, 2011

ALL OF WHICH IS RESPECTFULLY SUBMITTED

A Lenczner

Alan J. Lenczner

Larry P. Lowenstein

L Fric per

Laura K. Fric

Lawyers for the Respondent, Inco Limited.

PART V. TABLE OF AUTHORITIES

PART VI. RELEVANT LEGISLATIVE PROVISIONS

***Supreme Court Act*, R.S.C., 1985, c. S-26, s. 40**

Appeals with leave of Supreme Court

40. (1) Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court.

R.S., 1985, c. S-26, s. 40;R.S., 1985, c. 34 (3rd Supp.), s. 3;1990, c. 8, s. 37.

***Class Proceedings Act*, 1992, S.O. 1992, c. 6, s. 5(1)**

Certification

5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii)does not have, on the common issues for the class, an interest in conflict with the interests of other class members. 1992, c. 6, s. 5 (1).

Court File No. 12023/01

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE	) **MONDAY, THE 29th**
	)
MR. JUSTICE CULLITY	) **DAY OF JUNE, 2009**

BETWEEN:

WILFRED ROBERT PEARSON

Plaintiff
(Moving Party)

- and –

INCO LIMITED

Defendant
(Responding Party)

Proceeding under the *Class Proceedings Act, 1992*

ORDER

THESE MOTIONS made by the plaintiff for an order replacing the representative plaintiff, amending the certification order, leave to file a Fresh As Amended Statement of Claim and by the defendant to compel the plaintiff to answer certain questions either refused or taken under advisement, were read this day at the Court House, 361 University Avenue, Toronto, Ontario.

ON BEING ADVISED of the consent of the parties and upon hearing submissions of counsel for the plaintiff and the defendant,

1. **THIS COURT ORDERS** that Wilfred Pearson ("Pearson") shall be replaced by Ellen Smith ("Smith") as the representative plaintiff in this action and that the title of proceedings shall be amended to read as set out in Schedule "A" to this order.

2. **THIS COURT ORDERS** that Smith shall deliver her affidavit of documents by no later than June 30, 2009 and shall be examined for discovery no later than July 15, 2009.

3. **THIS COURT ORDERS** that the substitution of the representative plaintiff referred to above in paragraphs 1 and 2 shall continue to bind both Smith and the Class to the prior evidence given and admissions made by Pearson previously in this proceeding.

4. **THIS COURT ORDERS** that leave is granted to the plaintiff to file a Fresh as Amended Statement of Claim in the form attached as Schedule "A" to this order.

5. **THIS COURT ORDERS** that the certification order dated November 18, 2005 (the "Certification Order") is hereby amended to delete common issues 6(d), 6(e) and 6(f) from the Certification Order.

6. **THIS COURT ORDERS** that the plaintiff's withdrawal of all claims in negligence is on a without costs basis.

7. **THIS COURT ORDERS** that the class definition contained in the Certification Order is hereby amended to read:

> "Class" or "Class Members" means:
>
> All persons owning residential 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

15. **THIS COURT ORDERS** that the plaintiff shall answer the following question, arising out of the examination for discovery of Dr. Peter Tomlinson conducted on April 3, 2009, by no later than July 15, 2009: 51.

16. **THIS COURT ORDERS** that the plaintiff shall answer the following questions arising out of the examination for discovery of Bill Berkhout conducted on April 16, 2009, by no later than July 15, 2009: 489-492.

17. **THIS COURT ORDERS** that the plaintiff shall answer the following questions arising out of the examination for discovery of Dr. Mark Thayer conducted April 23, 2009, by no later than July 15, 2009: 25, 30 and 55.

18. **THIS COURT ORDERS** that the plaintiff shall answer the following questions arising out of the examination for discovery of Dr. Andrejs Skaburskis conducted on April 27, 2009, by no later than July 15, 2009: 157, 158, 159, 160, 161 and 162.

19. **THIS COURT ORDERS** that:

(a) there be no costs of the plaintiff's motion;

(b) costs of the defendant's motion on the matters set out above be reserved to the trial judge.

THE HEALTH STUDY
IN PORT COLBORNE

Barbara De Angelis
Kathy Bak
Sandra Grant
Jane Sheras
Janet Shanes

HEALTH STUDY IN PORT COLBORNE

Introduction

The Health Study in Port Colborne was a project which was funded by the federal government in the SUMMER CANADA 1981 student employment program. The purpose of the project was to study the health status of the citizens of Port Colborne who have lived in the city for at least ten years. The project also included an environmental study for the purpose of informing the public about the possible health effects of pollutants which are common in an industrial area.

The following report is a description of the activities undertaken by the project members as well as the results of the health survey which was administered by the students. Research which was completed throughout the summer may also be found on the following pages.

of deaths occurred between the ages of 74 to 66.

The largest percentage of the population we surveyed were employed at the International Nickel Company. The second largest group were retired. The remainder of our surveyed population held jobs distributed around the peninsula with the largest concentration in the Port Colborne-Welland area.

By viewing the previous charts and graphs one would probably come to the same decisions we have. Any further comparison would not be advisable since the errors of our survey and the differences of the two surveys we compared were quite great.

Conclusion

In the previous tables and figures we have found that the health of the people in Port Colborne is satisfactory as compared to the health of Canadians. Due to a lack of any comparable studies we are unable to make definite conclusions. The only statement we can make with some assurance is that when looking at the health problems of the residents of Port Colborne we see that they are generally healthy with no illnesses reaching abnormal levels.

Ontario Ministry of the Environment
1998 Port Colborne Soil Sampling Survey
Information Sheet

Introduction

Inco Ltd. (INCO) operated a base metal refinery from 1918 to 1984 in the City of Port Colborne. Atmospheric emissions associated with over 65 years of nickel refining have resulted in most of the predominate downwind area or areas northeast of the facility within the Port Colborne city limits having soil nickel concentrations that not only exceed the Ontario background soil nickel level but also exceed the current Ontario Ministry of the Environment soil remediation criterion for nickel. Smaller areas of the community also have elevated soil concentrations of cobalt and copper. This information has been determined through numerous soil and plant surveys conducted by the Ontario Ministry of the Environment between 1972 and 1998.

The soil remediation criterion for nickel, cobalt and copper, are based on phytotoxicity (plant effects). The growth of some plant species may be adversely affected by soil contamination that exceeds these criterion. Foliar injury, characteristic of nickel toxicity, was observed on silver maple trees in the immediate vicinity of INCO during a visual survey of vegetation in 1998. Currently INCO operates a precious metal refinery and cobalt refinery in Port Colborne, neither of which produce significant atmospheric emissions. Since refinery emissions have been greatly reduced this injury can only be related to uptake of nickel from contaminated soil.

In addition to the soil and plant surveys, the Ministry in conjunction with the Region of Niagara Health Services Department, conducted a health risk assessment to determine if exposure to elevated soil nickel, cobalt, and copper concentrations in Port Colborne may result in the potential for adverse health effects. The report from this 1997 study concluded with the following statements. ***In conclusion, based on a multi-media assessment of potential risks, no adverse health effects are anticipated to result from exposure to Nickel, Copper or Cobalt, in soils in the Port Colborne area. Furthermore, the review of population health data did not indicate any adverse health effects which may have resulted from environmental exposures.***

The 1998 soil survey did not find any new or more serious soil contamination than previous surveys. The 1998 study was simply a more intensive sampling program that resulted in a more accurate understanding of the extent of soil metal contamination in the Port Colborne area. Therefore, the environmental data on which the health risk study was conducted is sound, and the conclusions are applicable to the results of the 1998 soil investigation.

The attached series of questions and answers provide additional information on the most recent soil survey conducted in your community.

Soil Investigation and Human Health Risk Assessment for the Rodney Street Community, Port Colborne

March 2003

Ontario

Executive Summary

Conclusions

The Ministry of the Environment's soil investigation and human health risk assessment report for the Rodney Street community has determined that elevated nickel and lead soil contamination on some properties warrants action. This report is the ministry's final report and supercedes the two earlier versions (March 2001, October 2001). The report provides a comprehensive soil investigation and human health risk assessment that examined almost 2,000 soil samples from about 200 properties to determine the level of human health risk posed by metal and arsenic levels in surface soil in the Rodney Street community. The health risk assessment reviewed concentrations of seven metals and arsenic and makes the following final recommendations:

- an intervention level of 8,000 parts per million[1] be set for soil nickel. The intervention level for nickel requires action through remediation of soil.

- an intervention level of 1,000 ppm for lead for play areas on residential properties or in public areas *covered by sod or grass* to which children have access. *The bare soil* intervention level for lead is 400 ppm for these areas. The intervention levels for lead require action through follow-up by individual residents to reduce personal exposure to lead.

The assessment also concludes that no action for the remaining five metals (antimony, beryllium, cadmium, copper, cobalt) and arsenic in soil is required.

In carrying out the investigation and assessment, the Ministry of the Environment identified soil nickel levels in excess of 8,000 ppm, in at least one composite soil sample, in the first 30 cm of soil at 25 properties. The soil nickel results from historical emissions from Inco Limited (Inco). The ministry also found soil lead levels in excess of 1,000 ppm at 11 properties, including two of the 25 properties with elevated soil nickel levels. These soil lead levels are typical of older urban residential neighborhoods and result from the historical use of lead-based paints, leaded gasoline and discarded lead-acid batteries. The elevated lead levels found on some properties are not caused by either Inco or Algoma emissions.

The following summarizes the report's key findings for the Rodney Street community:

1. A soil nickel intervention level of 8,000 ppm has been established to protect toddler-aged children (7 months to less than 5 years).

2. Soil nickel levels in the community should not pose any immediate or long-term risks to other age groups.

---

[1] Also referred to as ppm, ug/g, micrograms per gram, or, millionths of a gram.

3. At least one composite soil sample from twenty-five properties had more than 8,000 ppm nickel;

4. Intervention levels for lead have been established to protect children;

5. Eleven properties have soil lead levels over 1,000 ppm; and

6. The soil levels of antimony, beryllium, cadmium, copper, cobalt and arsenic were below the level of concern and therefore no action is needed.

Human Health Risk Assessment

The Ministry of the Environment conducted a human health risk assessment for seven metals (antimony, beryllium, cadmium, cobalt, copper, lead, nickel) and arsenic because these elements were found in the surface soils of the Rodney Street community at concentrations that warranted further investigation. The health risk assessment was peer reviewed by an international panel of experts so the ministry could be assured that the best and most recent science was used in its Rodney Street study. The panel included recognized North American and European experts from the fields of: human health, nickel toxicology, risk assessment and metal bioaccessibility. The peer review experts were:

- Dr. Ambika Bathija (Washington, D.C.), affiliated with the United States Environmental Protection Agency
- Dr. Lynne Haber (Cincinnati, Ohio), affiliated with the Toxicology Excellence for Risk Assessment
- Dr. Robert Jin (Toronto, Ontario), affiliated with the Ontario Ministry of Health and Long-Term Care
- Dr. Tor Norseth (Oslo, Norway), affiliated with the Norwegian National Institute of Occupational Health
- Dr. Rosalind Schoof (Seattle, Washington), affiliated with Gradient Corporation
- Dr. John Wheeler (Atlanta, Georgia), affiliated with the Agency for Toxic Substances and Disease Registry

A human health risk assessment can be triggered when contaminants are found in a community at levels above the ministry's *Guideline for Use at Contaminated Sites in Ontario* (MOE, 1997). The ministry's health risk assessment examined total exposure to contaminants through a number of possible pathways, such as the air we breathe, the soil we may incidentally ingest, the water

determined by the ministry's health risk assessment in Part B of this report, the ministry may order the source of the contamination to conduct additional or more detailed sampling as part of a remediation strategy for the property. This sampling would be conducted according to the ministry's *Guideline for Use at Contaminated Sites in Ontario* (MOE 1997a).

3.0 Background

The ministry has been conducting environmental investigations in the Port Colborne area since the early 1970s. What led the ministry to conduct the intensive soil investigation in the Rodney Street community is explained in Section 3.3.

The Rodney Street community is one of the oldest residential areas in Port Colborne. Archival photographs show that the current road system in the Rodney Street community was in place in 1917. The Port Colborne municipal tax records obtained from the City of Port Colborne indicate that the date of home construction in this community ranges for the late 1800s to the 1970s, with about 40% of the homes built before 1920, about 54% of the homes built between 1920 and 1950, and roughly 6% of the homes built after 1950.

Historically, the Rodney Street community was situated between two large industries; Inco's nickel refinery situated to the east of Davis Street, and the Algoma Steel/Canada Furnace Company (Algoma) iron ore blast furnace situated west of the south end of Welland Street. Although metal deposition patterns in the Port Colborne area are strongly influenced by the predominant west-southwesterly winds, in the Rodney Street community the industries were so close that emissions from both facilities impacted the community. The histories of these two sources and a summary of their processes and possible emissions are briefly summarized in the following two Sections. The source of the information in Sections 3.1 and 3.2 regarding the operational histories of these two industries is largely derived from JWEL (2001a,b,c).

3.1 International Nickel Company Limited

From 1918 to 1984, the International Nickel Company Limited (Inco) operated a nickel refinery in the city of Port Colborne. Over this period of time, five operating periods are distinguishable, based on a report prepared for Inco (JWEL 2001c).

The first operating period from 1918 to 1930 was based on the Orford Process and electro-refining. The Orford Process separated the copper and nickel components of copper-nickel matte (impure copper-nickel sulphide) that was shipped to Port Colborne from Inco's facility in Copper Cliff. Once separated, the copper sulphide was oxidized to create SO_2 and blister copper and the nickel sulphide was roasted and reduced to create nickel oxide and fine refined nickel.

In the second operating period from 1931 to 1938, the Orford Process was discontinued and transferred to the Inco facility in Copper Cliff and nickel sulphide was shipped to the Port

Colborne facility for refining to produce nickel oxide. The crude oxide was further processed through a series of reverberatory-type anode furnaces that reduced the nickel oxide at high temperature to impure nickel metal. The impure nickel then went through electro-refining to produce nickel. The residue from the electro-refining was further processed to extract platinum, palladium, rhodium, ruthenium and iridium.

In the third operating period from 1939 to 1959, nickel sulphide concentrate was brought directly to the refinery where it initially went through a sintering process to aggregate fine particles and drive off the sulphur. Some of the sinter was sold and the rest was refined on site through the reverberatory-type anode furnaces. It was then further refined through a sulfate-chloride electrolyte process to produce nickel, cobalt oxide and residue. As in the second operating period, platinum, palladium, rhodium, ruthenium and iridium were extracted from the residue.

In the fourth operating period from 1960 to 1979, both nickel sulfide concentrate and nickel oxide concentrate were processed at the refinery. The nickel sulfide concentrate went directly to the anode casting, which produced a matte that was further processed by electro-refining. Along with nickel and cobalt oxide, sulphur was produced by the electro-refining process. The precious metals continued to be extracted from the electro-refining residue. In the 1960s, a Cottrell electrostatic precipitator was installed.

In the fifth operating period from 1980 to 1990, electro-cobalt refining started in 1983 and the nickel refinery was shut down in 1984.

Emissions were not monitored over the operational life of the Inco refinery and so actual emissions are unknown. However, it has been estimated that approximately 18,000 tonnes of nickel was emitted by Inco over the operational life of the refinery (JWEL, 2001c). Over 58% of the nickel released from the refinery was released prior to 1938 and over 97% of the total nickel emissions occurred before 1960. The highest rate of estimated annual nickel emissions, and likely the period during which the greatest amount of nickel deposition occurred, was 1939 to 1959 during which an estimated 11,466 tonnes of nickel was released to the surrounding environment (JWEL, 2001c). Figure 1 illustrates the estimated nickel emissions from Inco during the six operating process time periods.

3.2 Algoma / Canada Furnace Company

The only other large industry known to historically operate in the vicinity of the Rodney Street community that had the potential to impact soil quality across the community was the Algoma iron smelter. This smelter operated from 1913 to 1977 and was originally owned by the Canadian Furnace Company Limited. In 1950, the site was purchased by Algoma Steel Corporation Limited and operated as the Canada Furnace Division of Algoma until the facility was closed in 1977. The smelter was subsequently demolished. In this report this iron industry is referred to as Algoma.

FINAL REPORT

March 10, 2009

CHAP Studies A and C Integration: A Report to the Technical Subcommittee of the Public Liaison Committee for the City of Port Colborne

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3.8 Conclusions

In the CHAP C report, the main results of the tests of the null hypotheses - that the observed elevated ratios of hospital discharges in Port Colborne relative to two different comparison groups are simply due to sampling variation - were reported in Exhibits 22 to 39. These results are summarized in Exhibits 2 and 3.

In Exhibit 2, the comparison group CC consisted of the 35 communities that were considered statistically similar to Port Colborne. Among the 158 ratios, 86 were reported as being significantly less than 1.0 and 19 significantly greater than 1.0. These estimated ratios were adjusted for several socioeconomic variables such as the mean income of a community and the percentage of residents without a high school education. This adjustment reduced the potential bias in the comparison between Port Colborne and the 35 communities. A ratio less than 1.0 indicates that the percentage of Port Colborne residents who are discharged from a hospital is less than the percentage of residents from the comparison group. If the residents of Port Colborne were facing excess health risks due to their exposure to chemicals of concern (COCs), one would anticipate that they would be hospitalized for various diseases more frequently than residents not facing such exposures. That is, we would expect the ratios of hospital discharge rates to be greater than 1.0. Surprisingly, a much larger percentage of the significant ratios were negative. Even more surprising was the very large proportion of significant results (105 out of 158).

In Exhibit 3 of the CHAP C report, the comparison group NG consists of the 11 communities in the Niagara Peninsula. Among the 158 ratios, 19 were reported as being significantly less than 1.0 and 29 significantly greater than 1.0. If the null hypotheses were true, we would have expected about 8 significant findings (158 x 0.05 = 7.9). Not only did we find many more (48) but again the significant ratios were both greater than 1.0 (29) and less than 1.0 (19). This surprisingly large percentage of significant findings in both directions suggests that heterogeneity was not adequately accounted for in the analysis.

A dataset consisting of 338 CSDs (CG) became available to us. Because we were aware of the importance of these findings to Port Colborne residents we chose to re-analyze the hospital discharge data for cancer, acute respiratory infection, ischemic heart disease and asthma for the all age categories and for the four age categories used in the CHAP C report.

There were no significantly elevated ratios for respiratory cancer using either the comparison group of 338 communities or the comparison group of 11 communities. These results were corroborated by the analysis of cancer incidence rates using the Ontario cancer registry data. No statistically significant elevated discharge rates in Port Colborne relative to the mean discharge rates in the 338 comparison communities were found after adjustment for confounders. Not only was the asthma discharge rate in Port Colborne not significantly elevated relative to the CG, but the practical implication of the elevation would have been less than one extra hospital discharge per month in a population of over 4000 persons under 20 years of age.

There were no significant elevated ratios in Port Colborne IHD discharge rates when compared to CG. However, significant increases in the hospital discharge rate for IHD among persons in Port Colborne were found for residents 22-44 years of age, 65+ years of age, and people of all ages, when compared to the 11 communities in the Niagara Peninsula.

Hospital discharge rate ratios reported in Table 15 for Disease of the Circulatory System, extracted from Exhibits 28 to 29 in CHAP C, remind us that the ratio is not greater than 1.0 for the combined

category Diseases of the Circulatory System nor are they significantly elevated for any of the sub categories except IHD.

TABLE 15 Adjusted Discharge Rate Ratios Reported in CHAP C for Different Categorizations. Parts of the Circulatory Disease System Category

		CHAP C	
		CC	NG
Hospital Discharge Categories		(n=35)	(n=11)
Diseases of Circulatory System	390-459	0.88 *	0.99
Ischemic Heart Disease	410-414	1.18 *	1.34 *
Acute Myocardial Infarction	410	0.98	1.11
Heart Failure	428	0.88	1.01
Cerebrovascular Disease	430-438	0.84 *	1.09

This phenomenon is not unusual in the health field. A drug or dietary intervention may show no benefit in reducing total mortality while at the same time be associated with increased mortality from one disease and a reduction in mortality for another. Sometimes this may be explained by misclassification of categories within a combined category.

Welland was found to have a statistically significant elevated hospital discharge rate for asthma compared to the comparison group (CG), reminding us that even if the evidence had more strongly indicated an elevated ratio for hospital asthma discharges in Port Colborne, it still would not have been a result unique to Port Colborne.

The four highest asthma discharge rates among the 12 Niagara Peninsula communities occurred in Welland, Port Colborne, Niagara Falls, and Fort Erie. These four communities have a significantly higher percentage of smokers [27% vs 20% ($p = 0.02$)], a significantly lower percentage of post-high school education [37% vs 42%, ($p = 0.005$)], and a much lower mean income [$51,500 vs $60,500 per annum ($p = 0.06$)].

Table 16 contains the analysis of the ratios of hospital discharge rates for Port Colborne relative to the comparison groups CC and CG and relative to the NG comparison group. In summary, there were no statistically significant elevations in hospital discharge rates for any of the discharge categories when compared to the comparison group of 338 CSDs. The lack of an elevated hospital discharge rate for respiratory cancer was corroborated by an analysis of cancer incidence rates using the Ontario Cancer Registry. This lack of statistically significant results were corroborated by two further analyses, with two new comparison datasets created using regression methods, so as to be more similar to Port Colborne than the comparison group of 338 communities.

An intriguing elevation of the hospital discharge rate for asthma in the four neighbouring cities of Welland, Port Colborne, Niagara Falls, and Fort Erie is suggestive of an environmental effect. However, these four communities differed from another eight Niagara Peninsula communities in having a significantly higher percentage of smokers, a significantly lower percentage of persons with post high school education, and a much lower mean income. These large differences in three socioeconomic variables may provide a better explanation for their higher hospital discharge rates for asthma than does an air pollution hypothesis.

involved in the community group, Neighbours Helping Neighbours, with respect to contamination issues?

A. Yes.

Q. And you were part of the East Side Health Study Steering Committee, that was going to look into the health of Rodney Street residents?

A. Yes, I was asked to sit on that committee.

Q. And you were a member of the Lead Task Force, which was set up to explore how to address issues about elevated lead levels in the community?

A. Yes.

Q. And you told us you've given over 30 interviews to the press about contamination issues in Port Colborne?

A. Approximately yes.

Q. And you've told us you've been very active in this legal proceeding, since its inception, although more active in later years, correct?

A. Correct.

Q. And over the last eight years, you have spoken to hundreds of residents from all over Port Colborne, about issues arising from soil contamination?

A. Generally, yes.

Q. And despite being so involved with contamination issues and this legal proceeding, and despite speaking with hundreds of Class members, you don't have any personal knowledge of Class members specifically who had difficulty selling their houses?

A. Specifically, no.

Q. You are agreeing with me?

A. Yes.

Q. You do not have any knowledge - you do not have any knowledge or information respecting the ability or

difficulty of other class members to sell their homes, from the period of September 2000 forward, correct?

A. Correct, yes.

Q. And you have never contacted a real estate agent, or any professional about potentially selling your house?

A. No.

Q. You are agreeing with me?

A. Correct, yes.

Q. You have never listed your house for sale?

A. No.

Q. You agreeing with me again?

A. Yes.

Q. And you do not have any knowledge or information of specific residents being turned down for financing or loans, for the reason that there was nickel contamination on properties?

A. Specific residents, no, I have no knowledge.

Q. And you do not have any knowledge or information about any specific residents having difficulty obtaining mortgages, loans or financing, due to contamination on their properties?

A. No, nothing specific.

Q. And I want to ask you some questions about the loan secured against your property. You agree that there is a charge currently registered against the title to your property, 91 Rodney Street, in the principal amount of $86,000, that was registered in February of this year, 2009?

A. Correct.

Q. I'm going to pass up a copy of a printout of the Charge. And you can see on the top of this page that I've handed to you, it's a two page sheet, it says, "Charge" - "Name

- Edwards, Craig Victor, 91 Rodney Street", that's your husband, correct?

A. Yes.

Q. And then beneath that it says, "Name - Smith, Ellen Marian, 91 Rodney Street", that's obviously you?

A. Yes.

Q. And then under "Provisions" the heading - and you can see the line "Principal $86,000.00" correct?

A. Correct.

Q. And you agree that this is a printout of the Charge that's been registered against the title to your property?

A. First of all, I've never seen the actual Charge as it is, and two, this is not my property in reference to.

Q. The Charge is registered against the title to 91 Rodney Street, correct?

A. Right.

Q. And 91 Rodney Street is your property, correct?

A. Correct.

MS. FRIC: Okay, perhaps we could mark this for identification purposes.

THE COURT: The printout with respect to the Charge will be the next exhibit.

COURTROOM REGISTRAR: Exhibit Number 12 Your Honour.

THE COURT: Thank you.

EXHIBIT NUMBER 12 - Charge/Mortgage - 91 Rodney Street - Produced and marked.

MS. FRIC: Q. And this Charge relates to a line of credit that you and your husband took out in February of this year?

A. Not exactly, no.

Q. The Charge is security for an on-demand loan in

the amount of $86,000, correct?

A. That's what it states, yes.

Q. And that's a line of credit that you and your husband took out in February of this year?

A. Correct.

Q. And you are personally liable to pay back outstanding amounts under that line of credit?

A. Yes.

Q. You guaranteed the loan the bank made on the line of credit?

A. Yes.

Q. You stand to lose your family home at 91 Rodney Street, if the loan is not paid back?

A. Yes.

Q. The line of credit is from the TD Bank?

A. In Port Colborne, yes.

Q. And I believe you said in your evidence that that's the same branch of the TD Bank that was a previous one that you had dealt with? It was previously a Canada Trust Branch, is that correct?

A. Yes, that's correct.

Q. And a few years ago, you applied to that branch of the TD Canada Trust for a small loan of a couple thousand dollars, correct?

A. Correct.

Q. And that loan was to purchase a used vehicle?

A. At the time, yes.

Q. And the TD Bank would not loan you the money at that time, unless you and your husband took out a line of credit, secured against your house, correct?

A. The money was being asked for by Craig, my husband, it wasn't being asked for by me.

Q. So your husband, Craig Edwards, approached the bank for a small loan of a few thousand dollars?

A. Yes.

Q. And at that time he was receiving his disability pension, correct?

A. Correct.

Q. In roughly the same amount that he now receives it, correct?

A. At that time no, it was a bit lower.

Q. A bit lower. How much was it then?

A. There's been cost of living increases like less than one percent every year, so I don't know.

Q. Okay, so other than cost of living increases, the amount is roughly the same now as it was when he sought the small loan for the used car, correct?

A. It was close, yes.

Q. And the bank would not loan him that money, unless you and your husband took out a line of credit secured against your house, correct?

A. Not that I remember, no.

Q. Well the bank would not give you the money unless you and your husband took out a line of credit, correct?

A. They were going to give us a line of credit, yes.

Q. And to be clear, the loan was not refused because of contamination concerns?

A. I don't know what the loan was refused for.

Q. Well, you know it was not refused because of contamination concerns, correct?

A. No, I don't know that.

Q. Could we turn to volume one of the transcript of Ms. Smith's evidence of examination - from her examination for

discovery? Ms. Smith, do you recall being examined for discovery on July 8th, 2009?

A. Yes.

Q. Less than six months ago, correct?

A. Correct.

Q. And you recall being asked certain questions and giving certain answers?

A. Yes, I do.

Q. I'd like to read from the transcript of that examination, starting at page 120. Page 120, the question starts at - I guess we should start with the question, at page 119, line 25, question 515.

"515 Q. No, but I guess what I'm trying to get at is that if you say that it's a not true that you were turned down for a small loan, then that's fine. We just need to ask you about it. If it is true, let's hear about it. If it's not true, you have an opportunity to tell us. Whatever it is, we're happy with the answer.

A. I believe at the time we were looking to the bank to purchase a used vehicle and were looking for a small loan, which was less than a couple thousand dollars, and at that point they wouldn't give us -- they wouldn't give us any money unless we took out, like, a line of credit type and that's all it was.

MR. LOWENSTEIN: I see.

BY MS. FRIC:

516 Q. Which bank didyou apply to?

A. Canada Trust.

517 Q. Canada Trust. The same one that you sued for your mortgage and the recent one; is that right?

A. Correct.

518 Q. The same branch?

A. Correct.

BY MR. LOWENSTEIN:

519 Q. So the minutes are wrong ... And we were looking at minutes of a meeting, you might recall. ... to the extent that they imply that it had to do with contamination? 'It was nothing to do with contamination?

A. No, it was nothing to do with contamination.

MR. LOWENSTEIN: I see. All right. And I can take you to the minutes of the meeting if we need to do that as well, but this may help refresh your memory. Do you recall being asked those questions ...

A. Yes, I do.

Q. ... and giving those answers? And those answers were true when you gave them?

A. When I gave them, yes.

Q. And they're true today?

A. No, they're not.

Q. What's changed between July - a few months ago, July 8th, 2009 and today Ms. Smith?

A. In the discussions with my husband regarding the mortgage and the property on Chippawa Road, he was also explaining to me the fact of his line of credit and how it was initially got through the bank with him. I was not present when he negotiated any of the line of credit for this loan, for the property he bought. It's through his own personal bank

account. It's not - we're not joint owners on that bank account and he did the negotiations for his own personal bank account, not me.

Q. And that's the only thing that's changed between July 8th, 2009 and today?

A. Yes.

Q. And the monthly payments on the amounts that have been drawn under your February 2009 line of credit, were about $500 a month in July 2009, correct?

A. Around that, yes.

Q. And is it the same monthly amount today?

A. Yes.

Q. And your family's sole source of income is the about $3,500 that Craig Edwards receives from his disability pension, correct?

A. Correct.

Q. So, any risk to TD on this February 2009 loan, comes from the security the bank has on the 91 Rodney Street property, correct?

A. Correct.

Q. And before the TD Bank made the loan in February 2009, it did not obtain an appraisal of the property at 91 Rodney Street, correct?

A. Correct.

Q. Now Ms. Smith, I put it to you that you went with your husband, Craig Edwards, to the TD Bank in order to negotiate the personal line of credit which resulted in the purchase of the Chippawa Street property, correct?

A. I went with Craig to the bank, yes. Not to negotiate a line of credit.

Q. Could be go back to volume one of Ms. Smith's examination for discovery. I'm going to be reading from page

96, starting at question 421.

421. Q. You went with Craig to the bank in order to negotiate the personal line of credit which resulted in the purchase of the Chippawa Street property, correct?

A. Correct.

Do you recall being asked that question and giving that answer Ms. Smith?

A. Yes, I do.

Q. And was that answer true when you gave it?

A. In a fact of I went with him to the bank, yes. I didn't have any part in the negotiating.

Q. But the question said, you went to the bank in order to negotiate the personal line of credit, that's what the question asked, wasn't it?

A. Yes, it was.

Q. And in answer to that question, you answered "Correct". That's what the transcript states, yes?

A. Yes.

Q. And was that answer true?

A. At that point, to the best of my recollection, yes.

Q. And nothing has changed between July 8th, 2009 and today, correct?

A. Meaning? I didn't negotiate the loan. It was an extension on his line of credit.

Q. Okay, well you were there when he - what you're telling me now, is that you were there when he negotiated?

A. No, I wasn't.

Q. Okay, well let's go a little further in the transcript, so let's start again.

421 Q. You went with Craig to the bank in

order to negotiate the personal line of credit which resulted in the purchase of the Chippawa Street property, correct?

A. Correct.

422. Q. Didyou express any view to the bank or didyou give them any facts concerning the value of your house at 91 Rodney in relation to its suitability to be collateral for the loan?

A. From my recollection the bank never asked us to provide any documentation because we have dealt with Canada Trust for a number of years and whatever information they have on file they have.

So first, do you recall being asked those questions and giving those answers?

A. In discoveries, yes.

Q. And those answers were true, when you gave them?

A. Yes.

Q. And you understand that Mr. Edwards told the bank that he wanted the money from the line of credit, to purchase a piece of property on Chippawa Road, in Port Colborne?

A. Correct.

Q. And although you were guaranteeing the loan, you did not ask your husband if soil testing was done on that property?

A. No, we never talked about it.

Q. You did not ask him, correct?

A. No, I did not ask him.

Q. And you do not know if there was soil testing done on the property, prior to your husband purchasing it?

A. No.

Q. You don't know?

A. I don't know.

Q. Ms. Smith, I'm now turning to ask you questions about the MOE's orders. You told us in your evidence - well perhaps I'll put it this way; you would agree that the MOE released a draft order on March 30th, 2001, that stated the intention to order Inco to remediate properties with over 10,000 parts per million nickel in soils?

A. Correct.

Q. And at this level, there were 16 properties in the Rodney Street area that were found to require remediation?

A. Correct.

Q. And you agree that in the next month, April 2001, Inco announced that it would voluntarily remediate the 16 properties?

A. Correct.

Q. I'm going to volume eight of the joint book of documents. Sorry, Tab 589, Tab 589. And just very briefly on this document. It's dated April 24th, 2001?

A. Correct.

Q. Correct, and in the first paragraph it states - it is written to the Mayor and the Council of the City of Port Colborne. And the first paragraph states:

> This letter is intended to advise the Mayor, City Council and the residents in the Rodney Street area that Inco Limited plans to move forward to voluntarily remediate ...

And then it refers to the 16 properties, correct?

A. Correct.

Q. And then it says, in the second paragraph:

TUESDAY, OCTOBER 20, 2009

... CONTINUED FROM VOLUME ONE

R E C E S S

U P O N R E S U M I N G :

ELLEN SMITH

CROSS EXAMINATION BY MS. FRIC:

Q. Ms. Smith, you will recall that we left off and I was showing you a letter from December 2003 by the Ministry of the Environment that had approved Inco's remediation plan?

A. Correct.

Q. And ultimately, in the summer and fall of 2004, you will recall that Mr. Gillespie's other clients, the other property owners subject to the order, resolved any concerns they had and remediation began on their properties, correct?

A. I believe so, yes.

Q. And other than the five properties that were remediated in 2001, out of the 25 properties requiring remediation, all the others were remediated in the fall and winter of 2004?

A. I believe so, yes.

Q. And we know that out of the 25 properties subject to the order, they have all been remediated except for the property owned by you and Mr. Edwards. You don't dispute that the remediation work on those other 24 properties was done in accordance with the MOE's order?

A. No, I don't dispute that.

Q. And you agree that it's well known in the community that all properties with nickel levels over 8,000 parts per million in the soil, have been remediated, but for your property?

A. Correct.

Q. And you agree that the offer has made to you and Mr. Edwards to remediate your property, is essentially the same as what has been provided to the owners of the other 24 properties?

A. Essentially the same, yes.

Q. And if other clients of Mr. Gillespie had concerns about dirt being cleaned around their foundations, or about moving decks to get at soil underneath the deck, those types of concerns were being addressed to the property owners' satisfaction, by the time of the summer and fall of 2004, correct?

THE COURT: Just a second. Mr. Gillespie.

MR. GILLESPIE: Your Honour, I don't know that that's an appropriate question for this witness, simply because it's exploring, you know, communications - it sounds like, potentially, between counsel and other people who were represented by the same counsel. In other words, Ms. Smith may have knowledge because, as you know, there is a rule when you have a co-retainer, that there are no secrets between counsel and the clients in any way, shape or form. So whatever somebody else's concerns may have been, that they chose to discuss under the privilege of solicitor/client, ...

THE COURT: All right, I thought you were going to object on hearsay grounds, but you are objecting on the basis of solicitor/client privilege?

MR. GILLESPIE: Well yes, I mean, as Your Honour is aware, there is a huge amount of hearsay that's already been received ...

THE COURT: Right.

MR. GILLESPIE: ... because we've got thousands of examples of it. But no, I think if we rose on every hearsay, we wouldn't get the trial ever completed. But, I think this one does engage solicitor/client

conversation with Mr. Gillespie at the time. I had a general idea of what the concerns were.

Q. And if you move on to point three, Inco states:

> 3. The replacement soil will be appropriate material as would be obtained from any topsoil provider for residential yard work.

And you knew that was Inco's position, correct?

A. I knew their position was they didn't want to replace our soil with what we had, yes.

Q. They were willing to replace it with topsoil, that anyone would use for residential yard work, correct?

A. Correct.

Q. And number four, it states:

> 4. Consistent with all of the other property owners who have had their properties remediated in accordance with the MOE Order, Inco will warranty the remediation and soil removal/replacement work for a period of 18 months from the date of completion of the remediation for each applicable property.

So you knew that Inco was willing to give you an 18 month warranty, correct?

A. Yes.

Q. And Ms. Edwards - and you rejected this offer from Inco, correct?

A. We didn't agree with it, no.

Q. You didn't accept it, correct?

A. Correct.

Q. And I understand your evidence, that ultimately the two reasons that you did not accept this offer were first because the soil was not the type that you wanted and second, because the warranty was not as long as you wanted, correct?

A. Mainly, yes.

Q. You would agree that the 24 other property owners were not provided with a three year warranty?

A. I don't know what they were provided with.

Q. Well, you agree that the warranty provided to the other homeowners was satisfactory to the Ministry of the Environment?

A. To the Ministry, yes it was.

Q. So you wanted a term for a warranty that was in addition to the warranty that was satisfactory to the MOE, correct?

A. Yes.

Q. And you agree that the quality of the soil proposed by Inco, was acceptable to the other property owners?

A. Yes.

Q. And you agree that the soil proposed by Inco was satisfactory to the Ministry of the Environment?

A. Apparently it was, yes.

Q. And as matters stand, the Ministry of the Environment has stated that Inco's offer to remediate your property is satisfactory in compliance with its order and it has not asked Inco to comply with your demands, correct?

A. You're going to have to repeat that, I'm sorry.

Q. Okay. As matters stand, the Ministry of the Environment views Inco's offer as being satisfactory and in compliance with its order, correct?

A. Yes.

Q. And it has not forced Inco to comply with your demands, correct?

A. They haven't forced them, no.

MS. FRIC: Those are all the questions I have Your Honour.

THE COURT: Thank you. Re-examination? We can

comprehensive regional surveys in the Port Colborne area, in 1991, which was one of the first times we did a community wide soil sampling program. And at that time - as a result of that work done in 1991, soil nickel levels were found to be in the 9,000 to 10,000 range, as a maximum concentration. And that is what prompted the 1997 risk assessment. So that '97 risk assessment was done to study the potential for health impacts from the 1991 survey.

Q. And what was the bottom line finding of the 1997 HHRA?

A. That based on what we believed to be the highest nickel concentrations in the urban residential area of Port Colborne, of about 9,700 ppm, between 9,000 and 10,000 ppm, that there wasn't a health impact for any age group in Port Colborne.

Q. Okay, now prior to that time, as you detail in some of the subsequent paragraphs of your affidavit, there had been assessments done by what you reference as the phytotoxicology section, or PS, of the MOE. I am wondering if you could just generally discuss the type of work that had been done prior to the 1997 HHRA?

A. Now on Friday we talked a lot about our complaint investigations. Are you asking me to continue on that discussion, or discuss other activities that we were involved in?

A. Well, I believe that we had focused on complaint investigations in urban residential settings and you had given us your evidence in that area. And unless there was something you needed to add - and sorry, the answer to that is?

A. No, there was nothing further that was required to add to that. So, what I'll be talking about briefly then is, the other kinds of historical studies that the

consultant, Jacques Whitford Environmental Limited, that based on records that were being reviewed at the time, about 97 percent of the nickel that was present in the Port Colborne community, in about 2001, was there as a result of historical emissions, which occurred probably before about 1960. The implication being, of course, that had the Ministry come in, in 1970, when it was formed, and essentially worked with Inco to stop all atmospheric emissions at the time; everything coming out of the stack, everything coming off of the site from windows and doors and other fugitive emissions, if we were successful in completely abating all emissions from Inco in 1970 or 1971 when the Ministry was first formed, it wouldn't have made a measurable difference in the amount of nickel which was known to exist in Port Colborne, in the soil in Port Colborne in 2001, because the vast majority of that - in this case about 97 percent - was deposited before 1960, as a result of historical emissions from the refinery.

Q. And to the best of your knowledge what, if any, debate or controversy is there around that issue today?

A. I don't believe there's any debate at all around that. We accept that and Inco accepts that and Inco's consultants accept that and at discussions around the table with the members of the stakeholders in the Community Based Risk Assessment, which is still ongoing, that's an accepted fact.

Q. Now sir, I'm just going to touch on this again very briefly. But I am going to ask from your knowledge and experience, what Inco's record regarding regulatory compliance was like?

A. I can't fairly address that because regulatory compliance on a day-to-day basis would be the responsibility of the environmental officers in our operations division, in this

ot the public, to the effect that the MOE (and the Public Health Department) "did not believe there was any immediate risk to human health while further studies were being conducted".

Again, that's still correct information today?

A. That's correct. And that's based on our understanding if nickel toxicity and exposure. It's not - this is a threshold contaminant and it's based on a long time - usually modelled as a lifetime exposure. And even though we were reviewing the risk assessment at the time, because of these elevated soil levels, the conclusion from our toxicologists, senior scientists and concurred by the Health Department was that short term exposure to elevated soil nickel levels, as such that we found in the east side community, wouldn't pose an immediate risk; certainly not in the timeframe that were anticipating a revised health study to be done, which was in about the six month timeframe. And, in addition to that statement, we also produced and distributed broadly in the community, steps that one could take to reduce their exposure. So, even though we didn't believe at that time that there was an immediate risk to health, we were obviously taking steps to investigate that, to ensure that there wasn't a health risk. And, until that revised report was available, these are additional things that you and your family can do to reduce exposures.

Q. And paragraph 58 indicates:

> Contrary to what the plaintiff alleges, the MOE's statements have at all times been true, based on the information available at the time. Moreover, based on information provided by (Public Health) it appears that

> there has been an absence of any overt evidence of health impacts to this community related to current exposure to environmental soil contaminants. Even the MOE's latest HHRA (the October 2001 draft, finalized March 2002 HHRA) confirms that potential health risks are confined to a small number of Rodney Street Community properties (25), and that those risks will only continue to exist until the properties are cleaned up.

And is that still your understanding of matters in Port Colborne?

A. Yes, it is. And of course subsequent to that, 23 of the 24 residential properties and one of the park properties have been cleaned up.

Q. Then there is reference to nickel - being exposed to nickel and statements that had been made about whether or not that nickel was or was not nickel oxide. That's dealt with in paragraph 59. And then there's discussion on the next page, paragraph 60:

> Moreover, to the extent that the pre-2001 documents refer to nickel, they are referring to the total amount of nickel that can be identified using standard widely used chemical analysis protocols, most commonly ICP (Inductively Coupled Plasma) spectroscopy. This is an industry standard in which all nickel compounds that are present in the soil are dissolved by acid into elemental nickel. It yields a concentration which is commonly and

Q. So, what if any knowledge do you have about the conclusions that were reached in that document, about whether or not nickel oxide falls within one of the classifications of Health Canada's regime?

A. My understanding is that nickel oxide is potential carcinogen when breathed in for a longer period of time, and those studies were based on - as I understand them, were based on studies of industrial or occupationally exposed cohorts, of which they were exposed to a combination of nickel substances, of which nickel oxide would be one of them. And it wasn't possible, as I understand it, to confidently identify specifically which species of nickel was promoting the carcinogenic response, and so nickel oxide was included as part of, or one of, that series of nickel species that was part of the occupational exposure.

Q. Now sir, in your affidavit you refer to statements made by plaintiffs' counsel, and that's what you say in the affidavit. But, I'm going to ask you specifically, to the best of your knowledge, were those statements emanating from anyone else that you're aware of, that would have had a little more scientific knowledge than plaintiffs' counsel might?

A. You're referring to the statements in the affidavit about the known carcinogenic response to exposure to nickel oxide?

Q. Yes. And the ....

A. I'm sorry, can you rephrase your question please?

Q. Well, I'll direct you back into your affidavit and that may be the easiest. In paragraph 71, it says:

> Despite the release of the March 2001 HHRA and despite repeatedly misleading and

alarmist news released by plaintiff's counsel concerning the health impacts of nickel oxide on the people of Port Colborne, ...

So my question is simply, here you've identified in your affidavit the news releases by plaintiffs' counsel; I'm just asking if you have knowledge of anyone other than "plaintiffs' counsel", who might be in a position to comment more scientifically, having made those types of statements about the health impacts of nickel oxide on the people of Port Colborne?

A. I'm sorry, I'm still not sure what you're asking me. Are you asking, is there the - were there other statements about the carcinogenicity, or potential carcinogenicity of nickel oxide made by other people at that time?

Q. Yes.

A. Is that what you're asking?

Q. And specifically that emanated through, or in relation to the plaintiff.

A. Well there was an awful lot of media coverage at that time, after the release of the March 2001 and subsequent risk assessments that the Ministry produced. And there was a lot of discussion around potential for nickel - particularly nickel oxide, to be associated with cancer in the community. There was a lot of concern and anxiety in the community about that. And there were statements in the media, from the plaintiffs' counsel and I believe there may even have been some from Mark Richardson and a few other people that spoke to the media at the time. And, the implication was that if you say nickel oxide and cancer in the same sentence as soil contamination, the implication is that exposure to nickel in soil, even if it's nickel oxide, has the potential to cause cancer. And, as clearly identified in the risk assessment,

that was not the case. It's the potential carcinogenisticity of exposure to nickel oxide through the inhalation - excuse me, through the inhalation pathway only, that has the potential to cause cancer. And so there was a lot of, in my opinion, fairly reckless or misleading statements to the press that by implication would suggest that because there's nickel oxide in the soil - one being exposed to nickel in the soil, could lead to cancer. And that's not the conclusion of risk assessment and that's not my understanding of the science. I'm sorry, have I answered your question?

MR. GILLESPIE: Yes, if I might just have a moment Your Honour. Your Honour, we've remarkably made it to 2:30 in the afternoon before we've had to ask for the court's assistance on what we hope will a minor point of law.

THE COURT: All right.

MR. GILLESPIE: But, it might be appropriate to have Mr. McLaughlin stood down just for a moment, and excused.

THE COURT: You would like Mr. McLaughlin to leave the courtroom for a few moments?

MR. GILLESPIE: That I think would be appropriate Your Honour.

THE COURT: All right, would you just wait out in the corridor for a few moments sir.

... MR. MCLAUGHLIN EXCLUDED FROM THE COURTROOM

... SUBMISSIONS BY MR. GILLESPIE - REQUEST TO CROSS EXAMINE PLAINTIFFS' WITNESS

... SUBMISSIONS BY MR. LOWENSTEIN

... REPLY SUBMISSIONS BY MR. GILLESPIE

... FURTHER SUBMISSIONS BY MR. LOWENSTEIN

R E C E S S

'93, '94, '95 period of time, where we had a couple of years of data. Now, we know from looking at that historic data and the current information that we've obtained from the ongoing air monitoring that's still happening in Port Colborne, that ambient air levels now are lower than they would have been in 1993, 1994, 1995, upon which these calculations were based. And there's discussion around that in the risk assessment document that we're obligated to make a calculation. We made a calculation based on the best information we had and that calculation suggested a risk of somewhere between a few in a hundred thousand and one or two in a million, and that that was a guess, and that it could be updated at a later time. And this issue has been very controversial and we've kept the Rodney Street monitors, air monitors in place, since - I think they were put in there in 2001. And they're still going now. We have almost eight years of data. It's pretty clear from looking at that data that regardless of how you calculate the cancer risk and use the World Health Organization or the EPA's cancer risk, or Environment Canada's cancer risk, whichever one you decide to use, it really it a bit of a moot argument now, because you see that that longterm monitoring that we have under way in the Rodney Street community, that those air monitors would suggest very clearly that the average nickel levels in the air in Port Colborne are no different than the average nickel levels in communities across Ontario and in fact across Canada that don't have a nickel refinery. So, regardless of how you do the cancer calculations, the risk to residents from nickel in air in Port Colborne, is no greater than the risk to resident in virtually any other Ontario community or city in Canada, that don't have a nickel refinery.

Q. Now where is that data being dealt with? Where is it being assessed?

A. Again, you are not referring to the three hi-vols which are there now?

Q. I am referring to those, I just wanted to deal with it since you raised it. My understanding is that Inco committed to keeping them there for as long as the CBRA was going on, but as far as the MOE was concerned, there's no present concern as to air quality; indeed, you told us that air quality monitoring is well within Ministry guidelines?

A. That's right. The purpose of establishing those was to provide an idea of the current air quality in Port Colborne, particularly the east side community, so that we could be satisfied that our health risk assessment, done in 2001 and 2002, was correct in relation to our assumptions about the exposure to current air quality. And, we also felt that it would be a very useful longterm, relatively speaking - you know, several years, longterm data base that would be helpful for the Community Based Risk Assessment. They could then have current longterm ambient air data for use in the Human Health Risk Assessment for the CBRA and, at some time in the future, perhaps now, or some time around now, the need would no longer be there, because the Ministry had completed its work; because the CBRA has - that those science studies have been completed, and we have almost 10 years of data to look back on and we are satisfied that the concentrations of nickel in air, in the Rodney Street community now, haven't changed in the last 10 years and they are consistent in all ways with air quality in other communities across the Province - with communities that don't have a nickel refinery. And so, there would be no need to continue them much past today. We've already started to have those discussions with our Ministry colleagues.

Q. Thank you. The only other area I want to touch on by way of what I call the overall regulatory umbrella of the

March 2002 report was slightly revised from the October 2001, because we adjusted the final report to reflect comments received by stakeholders through that review period. The important thing is that even though the report looked a little different and you know, there was some text that was different, the result is the intervention level did not change. So, the March 2002 report reaffirmed the 8,000 ppm intervention level.

Q. All right, and you've said a number of important things here, so let me just stop you there. You told us yesterday that the error in the March 2001 report had occasioned some embarrassment to the Ministry of the Environment and some concern?

A. That's an understatement, yes. It was a very embarrassing issue for the Ministry.

Q. And in part, to address that concern, the Ministry, as I understand it, commissioned different and more sophisticated testing, according to this communique, which provided significant enhancements to the Human Health Risk Assessment?

A. Yes, we did a number of additional things that weren't done in the March 2001 report.

Q. In addition, you enlisted an expert international peer review panel, to ensure that the report was revised to include the most precise and leading edge science?

A. Correct.

Q. And that - those internationally known experts included, for example, Dr. Tor Norseth?

A. Yes, that's correct.

Q. And he is?

A. He was at that time a professor with the Oslo University in Norway. He was also - I don't recall his professional title, but he was a senior toxicologist in the

National Health - I'm sorry, I don't recall the exact association, but it's that National - Norway National Health Institute.

Q. The leading figure in the field?

A. He was. We chose him because he had extensive professional experience with nickel in the environment and the nickel refining industry generally. Norway and Russia share a big - a big - a long history of nickel refining.

Q. It included at least one American toxicologist of great repute, as I recall?

A. Actually had three. We had John Wheeler from the Centre for Disease Control. We had Ambika - I believe her last name is pronounced Bathija, from the US Environmental Protection Agency and we had Lynne Haber from Toxicological - oh, what's the name of that organization, TERA, T-E-R-A - Toxicological Excellence in Risk Assessment.

Q. Thank you. Any other members of the panel that you can recall?

A. Let's see - we had John Wheeler, we had Ambika, we had - we had Dr. Jin from the Ontario Ministry of Health and Longterm Care. And we also had on our panel, Rosalind Schoof - Dr. Rosalind Schoof, who was a toxicologist in a private consultant firm. She's currently with Integralin Environment at the time, and we had her joint the panel because she had internationally recognized expertise, not only in risk assessment but in arsenic, and arsenic was one of the contaminants that were evaluating in our risk assessment.

Q. So to the extent sir, that we now have it that even at the 8,000 ppm intervention, you had added another nine properties to the cleanup list, the MOE was now fully satisfied, I suggest, that as far as the Rodney Street Community - you sometimes refer to it as the east side

community, was concerned, any uncertainty as regards health risk which might have been occasioned from the finding of high levels in the Smith/Edwards property, was addressed and put to rest as of October 30, 2001?

A. Yes.

Q. And that uncertainty, to the extent that it existed, was geographically limited, I suggest to you, to that Rodney Street community, based on all the testing that you had done?

A. That was our belief at the time, yes. It still is our belief today.

Q. So, it was limited both geographically and temporarily to the six month period concluding October 30, 2001?

A. Yes.

Q. After which, as far as the Ministry of the Environment was concerned, there was no uncertainty as regards health consequences to the Rodney Street community?

A. Correct.

Q. To return you to your affidavit, which we marked yesterday as Exhibit 55, I will just - if you will bear with me, I will just read you what you had in that affidavit. It may not be necessary to actually turn it up. So essentially, from a risk - before I read you the paragraph - from a risk assessment perspective, there was no change in the October 2001 report which was posted on the EBR, and the March 2002 final Rodney Street risk assessment, as peer reviewed?

A. Yes, that's correct.

Q. And what you said in paragraph 58 of your affidavit, the last line:

> Even the MOE's latest HHRA (the October 2001 draft, finalized March 2002 HHRA)

you and your colleagues, or your Ministry being sued for seven hundred and fifty million dollars, with the basic allegation that you didn't know what you were doing and didn't understand cancer risks and hadn't warned the local residents. I take it that didn't assist matters?

A. That certainly heightened the concern in senior management.

Q. And I take it a stream of press releases and other communications concerning lead - it's not just nickel, it's lead, and other issues as to cancer risks and other things, certainly contributed to a climate of intense media scrutiny in this town at the time?

A. That certainly added to our challenges in managing that file and communicating information to the community.

Q. I take it sir that you would agree with me that as a litmus test of a resident's concern about nickel levels and property levels, the failure of the Smith/Edwards household to get their property remediated, does not exactly indicate an intense level of concern that they had about health?

A. I would respond to that question in two ways. I was disappointed that Craig and Ellen didn't elect to clean up their property. The Ministry does what it does in communities across the Province to ensure the health and safety of families and the protection of the natural environment. And they certainly would have fallen into that category. I think if I were in their position, I would have proceeded to clean up the property and the pursue Inco with their concerns after the fact. However, I would also add that these decisions are not easy decisions to be made and I'm sure it wasn't taken lightly by their family. And, the Ministry also provided, in the interim, a lot of public information on how to reduce one's

exposure and perhaps that helped them make that difficult decision - they felt that the information provided by the Ministry may provide the degree of protection required, until the issue could be resolved to their satisfaction.

Q. Fair enough, thank you. On the issue of indoor air quality, I also wanted to refer you to the treatment of that subject by the Jacques Whitford Environment report, the CBRA report by Inco's consultant. Are you familiar with that report?

A. Which report again, I'm sorry?

Q. The JWEL report.

A. For the Human Health Risk Assessment?

Q. Yes.

A. Yes.

MR. GILLESPIE: Your Honour, I just wonder, there has been consensus around certain reports coming before Your Honour, specifically the ones that are in the joint document book. I'm not sure whether this one is or isn't?

MS. FRIC: Yes, it is.

MR. GILLESPIE: It is? And ...

MS. FRIC: Tab 856.

THE COURT: I certainly looked at one maybe six weeks ago ...

MR. GILLESPIE: Yes, and ....

THE COURT: ... actually more than one from Jacques Whitford, all from about 2002 or thereafter.

MR. GILLESPIE: Right.

THE COURT: So, I know there is one there. So let's find out if it is the same one.

MR. GILLESPIE: We will have some submissions around some of the comments that you've heard so far about

was on consent of both parties. So if the concern is Mr. Cavallo didn't have his opportunity, with respect, I don't think that's the record.

THE COURT: Your concern, Mr. Lenczner, is to ensure that I know that the document - sorry, the notation on the document that Mr. Cavallo put on, that says "related parties", refers to a sale between related parties?

MR. LENCZNER: Correct.

THE COURT: I don't think I need to hear any more evidence on that. It does constitute a form of opinion, but we've already had Mr. Cavallo and his evidence has been accepted, so let's move on to something else.

MR. LENCZNER: All right, thank you.

Q. Mr. Atlin, in doing your work, did you investigate mortgages in Port Colborne?

A. I did make some mortgage investigations, yes.

Q. All right. And can you tell His Honour the nature of those investigations?

A. We investigated some sampling of properties, both within and outside of Rodney Street, both before and after the effective date and on a small sampling of properties, we considered the terms of the mortgage financing, where it could be analyzed. Certain types of financing can't be analyzed, but the more traditional financings can be.

Q. And what do you mean by the more traditional financing?

A. First mortgages that are standard first mortgages, where the terms are registered on title. So you know an interest rate, you know a term. Those can be analyzed. Sometimes you get financings, which are nothing more than the

registration of a demand loan without the actual terms. That type of financing cannot be analyzed, so we restrict ourselves to what we can look at.

Q. All right, and in respect of the traditional types of financing, where you have the term and the interest rate, what did you note?

A. We made a number of observations. We observed that the traditional lenders are in the marketplace. There are also what would be called alternative lenders, active in the marketplace, to include say private lenders. That mortgage interest rates relate very traditionally to posted bank rates. Mortgage rates change over time, because - well we all know that. Anybody that's owned a house knows that over time they change. So, the measure we did was to compare them to what the bank of Canada posts as the five year posted bank mortgage rate. So, we compared the analysis to that and discovered a consistency both before and after the alleged date. Within and outside of Rodney Street there was financing. The Rodney Street financings were generally a little bit more inside than outside. But there was no distinction as before and after the effect of the September pivotal date. So, what it amounted this was that on a micro research, the mortgage market is behaving normally; nothing unusual, nothing to speak to. On a more macro basis, to step back, we looked at the sales overall in the community, and everybody, I think commonly will accept, certainly by real estate experts is accepted, that the residential real estate market is dependant on the availability of financing. There is clearly an ongoing residential real estate active market, therefore one can assume from that, that there is an ongoing availability of mortgage financing.

Q. And when you talk about traditional lenders, can you just name a few, so that we have that clear?

A. Traditional lenders would be a bank. The Toronto Dominion Bank would be considered a traditional lender, by way of example.

MR. LENCZNER: All right, subject then Your Honour, to that looking up over lunch hour, those are all my questions on Mr. Atlin. So I will just have one or two after lunch.

THE COURT: All right. Let's come back for 2:15 please.

R E C E S S

U P O N R E S U M I N G :

THE COURT: Shall we bring out witness back Mr. Lenczner?

MR. LENCZNER: Sure. We have an agreement amongst counsel.

THE COURT: Well, let's hear what caveats there are to the agreement.

MR. LENCZNER: I have no caveats.

THE COURT: All right.

MR. LENCZNER: The agreement is that the raw data on MLS sales, produced by Ridley and Associates, is accepted as being correct. Equally, the defendant accepts as correct, the MLS data provided to Teranet by Mr. Danch. You will remember he provided from '97 to 2002. So, neither side is requiring - neither side is requiring the other to call either Mr. Danch or Ms. Campbell from their respective firms, to establish the correctness of each data point in the MLS data base.

THE COURT: All right, thank you. That is by agreement Mr. Gillespie?

Court of Appeal File No. C52491
Court of Appeal File No. (Motion) M39803

COURT OF APPEAL FOR ONTARIO

BETWEEN:

ELLEN SMITH

Plaintiff
(Respondent
on appeal;
Respondent
on motion)

- and -

INCO LIMITED

Defendant
(Appellant
on appeal;
Respondent
on motion)

Proceeding under the *Class Proceedings Act, 1992*

PLAINTIFF/RESPONDENT'S FACTUM
MOTION TO INTERVENE, RETURNABLE MARCH 22, 2011

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Court of Appeal File No. C52491
Court of Appeal File No. (Motion) M39803

COURT OF APPEAL FOR ONTARIO

BETWEEN:

ELLEN SMITH

Plaintiff
(Respondent
on appeal;
Respondent
on motion)

- and -

INCO LIMITED

Defendant
(Appellant
on appeal;
Respondent
on motion)

Proceeding under the *Class Proceedings Act, 1992*

RESPONDENT'S FACTUM (MOTION TO INTERVENE)

PART I - OVERVIEW OF THE MOTION

1. The appeal of this matter concerns a trial judgment rendered by the Honourable Justice Henderson in July 2010 for causes of action in private nuisance and *Rylands v. Fletcher*. This appeal is concerned solely with private property rights.

2. The focus of the appeal will be whether or not the trial judge made an error of law in his articulation of these legal tests or whether the trial judge made palpably unreasonable findings of fact. The dispute is between the citizens of Port Colborne and a private

corporation, Inco Limited. The proposed intervenor, Friends of the Earth ("FOE"), had no involvement, or expressed interest, in the conduct of the lengthy trial.

3. The FOE's proposed arguments virtually duplicate those of the respondent. Given the nature of the decision being appealed, the voluminous evidence tendered at trial and the lack of the FOE's involvement at the trial level, the FOE does not appear to be in a position to make helpful or unique arguments to this court which would assist in the disposition of the appeal. The decision below was heavily fact-driven and consists of a voluminous factual record with which the FOE at present has no familiarity or experience.

4. Given its unfamiliarity with the evidence filed at trial, it is extremely unlikely that the FOE would raise matters not already raised by the parties at trial or not considered by the trial judge in his reasons. Where the FOE's proposed submissions are not duplicative, they do not appear to be relevant as they concern broadly-based policy arguments that would need to be grounded in fact.

5. Not only does the proposed intervenor lack sufficient interest in this appeal to be granted leave to intervene at this time, it has also unreasonably delayed the bringing of this motion. While the notice of appeal was filed on August 3, 2010, the proposed intervenor waited until February 2011 to advise of its formal intention to intervene, well after the appellant had perfected its appeal and after the parties had set down the May 9, 2011 date for the hearing of the appeal.

6. Accordingly, the respondent respectfully requests that the motion for intervention be denied.

20. While the rules relating to interventions have been expanded in constitutional litigation recently, a "similar expansion has not taken place in private litigation". In fact, conventional litigation between private parties has, for the most part been narrowly construed "because the interests considered in such cases are usually financial and considerations of *stare decisis* and issue estoppel are of concern".

> *Peixeiro v. Haberman* (1994), 20 O.R. (3d) 666 (Gen. Div.) at 670, Respondent's Book of Authorities, Tab 5.
>
> *Adler v. Ontario* (1992), 8 O.R. (3d) 200 (Gen. Div.) at p. 205, Respondent's Book of Authorities, Tab 6.

21. At its core, the decision by the trial judge disposed of purely private rights between the parties. In essence, the dispute arose as between neighbours and the extent to which it was permissible for the appellant to emit and discharge nickel into the air and soil of its surrounding neighbours. The parties are private residential property owners and an industrial property owner. No constitutional issues are engaged.

22. While the FOE states that the legal issues engaged on this appeal "affect the interests of the public as a whole", such an assertion is misplaced. Public interest cases where intervention has been granted have pertained to matters such as Charter issues, same sex marriage or the fiduciary duties owed by parents to children, not cases involving private property rights where the proposed intervenor is not familiar with the evidence adduced at trial.

> *Notice of Motion, served March 1, 2011*, para. 1, FOE Motion Record, p. 2.
>
> *Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada* (1990), 74 O.R. (2d) 164 (C.A.), Respondent's Book of Authorities, Tab 2.
>
> *Halpern v. Canada (Attorney General)*, [2003] O.J. No. 730 (C.A.), Respondent's Book of Authorities, Tab 7.

Louie v. Lastman (2001), 208 D.L.R. (4th) 380 (C.A.), Respondent's Book of Authorities, Tab 8.

Layland v. Ontario (Minister of Consumer and Commercial Relations), [1992] O.J. No. 1963 (Gen. Div.), Respondent's Book of Authorities, Tab 9.

23. The FOE's reliance on this court's decision in *Authorson v. Canada (Attorney General)* is of no assistance to its argument that this case is closer to the public end of the spectrum. In *Authorson*, leave to intervene was denied even though that appeal concerned federal legislation and the Crown's fiduciary obligations to pay veterans certain statutory benefits.

Factum of the FOE, dated March 14, 2011, para. 14, p. 5.

Authorson (Litigation Guardian of) v. Canada (Attorney General), [2001] O.J. No. 2768 (C.A.), Respondent's Book of Authorities, Tab 4.

24. The FOE also erroneously relies on a passage from Linden & Feldthusen's *Canadian Tort Law*, claiming that its interest in this appeal is of "profound importance" because the learned authors have coined the law of nuisance "a citizen's weapon" and this appeal will therefore "affect the public as a whole". With respect, the claims advanced at trial in public nuisance were dismissed by the trial judge, no cross-appeal is extant in this respect and this appeal is therefore not concerned with the law of public nuisance.

Factum of the FOE, dated March 14, 2011, para. 13, p. 5.

25. Moreover, leave is rarely granted in such "private" cases where the determination at issue binds only the parties to the litigation. That an action is also a class proceeding does not change this fact. Justice Winkler (as he then was) denied leave to intervene in *Dabbs v. Sun Life Assurance Co. of Canada* on the basis that:

> In the present case, the action involves private litigants: the Sun Life Assurance Company of Canada and certain of its policyholders. ... While she [the applicant for intervention] is a policyholder with a different insurance company which may be involved in similar litigation, the possibility that a decision in an action may be used as a precedent in another action between other parties is not a sufficient interest to support intervention: see *Schofield v. Ontario (Ministry of Consumer & Commercial Relations)* (1980), 28 O.R. (2d) 663, 112 D.L.R. (3d) 132 (C.A.). [emphasis added]

Dabbs v. Sun Life Assurance Co. of Canada (1997), 35 O.R. (3d) 269 (Gen. Div.) at 272, Respondent's Book of Authorities, Tab 10.

26. Just as *Dabbs* was "not an inquiry into the insurance industry generally, nor [was] it the forum for such an inquiry", nor does this appeal involve an inquiry into Canadian environmental law generally.

> *Dabbs v. Sun Life Assurance Co. of Canada* (1997), 35 O.R. (3d) 269 (Gen. Div.) at 273, Respondent's Book of Authorities, Tab 10.

27. Even on the certification appeal, the FOE was denied leave to argue any substantive legal issues because its proposed submissions tracked the position of the plaintiff/appellant and there was "no suggestion that the appellant cannot forcefully and skilfully make the salient points". This reasoning applies with even greater force now. If the FOE was not in a position to offer a substantive legal contribution at the certification motion, which was based on a paper record, surely it is in even less of a position to offer a meaningful contribution now given the complicated and voluminous trial record in this case.

C. The FOE's Involvement in the Appeal would be Duplicative and Unnecessary

28. The jurisprudence firmly establishes that a proposed intervenor, regardless of its expertise, must establish that its involvement or argument will not be duplicative to that of the parties themselves:

(b) "speak for a great number of Canadians on environmental issues ... and the use of tort law as a mechanism for cost internalization in the environmental context";

(c) "the interaction of public and private laws in protecting the environment";

(d) "interpret private nuisance and *Rylands v. Fletcher* consistent with the precautionary principle of international environmental law and governance";

(e) "a broader appreciation of the architecture of public and private law established to protect the environment"; and

(f) "FOE brings a national perspective to the implications of the legal debates at issue".

Affidavit of Beatrice Olivastri, sworn February 28, 2011, paras. 14, 16, 19, 21, (respectively), FOE Motion Record, Tab 2.

37. The FOE's factum on this motion further asserts that it ought to be granted to leave to intervene on the basis that a certain legal interpretation of private nuisance and *Rylands* is "important to furthering the proposed Intervener's organizational objectives and safeguarding the interests of the constituencies it represents". An appeal before this honourable court is not the appropriate forum in which to advance such objectives, nor does such constitute helpful legal argument by which to dispose of the appeal. While the FOE frames this appeal as one which "includes the realization that our common future, that of every Canadian community, depends on a healthy environment", such assertions are irrelevant and unhelpful in disposing of an appeal of a factually driven trial decision.

Factum of the FOE, dated March 14, 2011, para. 18, p. 7.

Proposed Appeal Factum of FOE, para. 1, pg. 1, Appendix I to FOE Factum, dated March 14, 2011.

PART IV - ORDER REQUESTED

44. The respondent respectfully requests that the motion for leave to intervene in this appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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