

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**ELLEN SMITH**

Plaintiff

- and -

**INCO LIMITED**

Defendant

Proceeding under the *Class Proceedings Act, 1992*

**PLAINTIFF'S CLOSING ARGUMENT**

**ERIC K. GILLESPIE PROFESSIONAL  
CORPORATION**

Suite 600  
10 King Street East  
Toronto, ON  
M5C 1C3

**Eric K. Gillespie**  
Tel: 416-703-5400  
Fax: 416-703-9111

**Lawyers for the Plaintiff**

**KOSKIE MINSKY LLP**

20 Queen Street West  
Suite 900, Box 52  
Toronto, ON  
M5H 3R3

**Kirk M. Baert**  
Tel: 416-595-2117  
Fax: 416-595-2889

**Celeste Poltak**  
Tel: 416-595-2701  
Fax: 416-204-2909

**Counsel for the Plaintiff**

**TO: LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP**  
Suite 2600  
130 Adelaide Street West  
Toronto, ON M5H 3P5

**Alan J. Lenczner, Q.C.**  
Tel: 416-865-3090  
Fax: 416-865-9010

**OSLER, HOSKIN & HARCOURT LLP**  
P. O. Box 50  
1 First Canadian Place  
Toronto, ON M5X 1B8

**Larry P. Lowenstein**  
Tel: 416-862-6454  
Fax: 416-862-6666

**Laura K. Fric**  
Tel: 416-862-5899  
Fax: 416-862-6666

**Solicitors for the Defendant**

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**PART I - INTRODUCTION**

1. For 66 years, the Port Colborne refinery operated by Inco emitted nickel into the natural environment until the refinery ceased producing nickel in 1984. The nickel has caused widespread damage to the lands, homes and properties in Port Colborne. The impact is particularly severe for the residents of the Rodney Street area. Ellen Smith, the representative plaintiff, lives in the Rodney Street area.
2. In September 2000, the provincial Ministry of the Environment ("MOE") released test results showing that Inco had discharged contaminants at a much higher level than previously thought. The plaintiff says that the release of these test results had a serious impact upon property values in the Port Colborne area.
3. The plaintiff asserts that the nickel contamination in Port Colborne is significantly higher than elsewhere in Ontario and soil sampling in many locations shows extremely high

levels of contamination. The Inco refinery in Port Colborne is the source of this nickel contamination.

4. As stated above, the event that triggered this lawsuit was an announcement in September 2000 by the MOE informing the public of high levels of contamination in Port Colborne. The plaintiff claims that house sales in the Rodney Street neighbourhood have dropped, that mortgage financing has become difficult and that house prices in Port Colborne have been negatively impacted compared to other areas in the Niagara Peninsula. The plaintiff attributes the impact on property values to the 2000 MOE disclosures.

5. Approximately 1,000 people live in the Rodney Street area and approximately 18,500 people live in Port Colborne. The homes in the Rodney Street area are very modestly priced and the owners tend to have limited incomes; many are elderly and on fixed incomes, or are unemployed or underemployed.

6. Inco does not deny that its refinery is the source, or at least the primary source, of the nickel contamination.

7. While Inco accepts responsibility for nickel contamination in the Port Colborne area, it disputes the fundamental claim by the plaintiff as to the impact of the contamination on property values in Port Colborne.

## **PART II - THE FACTS**

8. This action was commenced in March 2001. It was certified by the Court of Appeal on November 18, 2005. Leave to appeal to the Supreme Court of Canada was refused. The trial of the common issues began on October 13, 2009 in Welland, Ontario, before the

Honourable Justice Henderson. The evidence of the parties was completed on January 14, 2010.

Order of the Court of Appeal for Ontario, November 18, 2005, Amended Trial Record, Tab 4.

9. During the prosecution of her case, the plaintiff tendered the evidence of eleven (11) witnesses<sup>1</sup>, while the defendant tendered the evidence of one (1) witness in the defence of its case.<sup>2</sup>
10. As a result, the evidence of the plaintiff largely remains uncontradicted in so far as the following key elements are concerned:
- (a) Inco is the primary source of elevated levels of nickel on class members' lands;
  - (b) nickel can pose a risk to human health depending on the nature of exposure;
  - (c) in September 2000, the MOE informed Port Colborne residents, Craig Edwards and Ellen Smith, that their property had high nickel levels of up to 14, 000 ppm;
  - (d) as a result of those site specific findings, the Medical Officer of Health requested that the MOE conduct further sampling of other properties in Port Colborne;
  - (e) beginning October 2000 and continuing through 2001, the MOE conducted extensive investigations of: residences; playgrounds; schools; and air monitoring;
  - (f) in December 2000, the MOH announced that it would organize a health study for residents; the MOE equally conducted a Human Health Risk Assessment;
  - (g) that same year, Inco established the CBRA, proposed to involve a Human Health Risk Assessment and Socio-Economic Assessment;
  - (h) while the MOE and the MOH conducted their respective studies, Inco's own consultant investigated: locally grown food, including from kitchen gardens; indoor air sampling; greenhouse experiments; beaches; and residential soils;

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<sup>1</sup> Ms. Ellen Smith, Mr. Robert Maughan, Dr. Marion Steele, Mr. William Berkhout, Dr. Mark Thayer, Dr. Peter Tomlinson, Dr. Andrek Skaburskis, Mr. Geoff Dobilas, Mr. Dave McLaughlin, Mr. Tim Hu and Mr. Troy Austrin.

<sup>2</sup> Mr. David Atlin.

- (i) in March 2001, the MOE broadly announced the results of its Human Health Risk Assessment and issued its first draft order for Inco to clean up certain properties in Port Colborne;
- (j) prompted by the MOE draft control order, Inco representatives undertook further sampling of hundreds of properties, requiring months to complete;
- (k) throughout these various investigations, Port Colborne residents were continuously advised to take detailed health precautions, by government officials such as the MOH;
- (l) from September 2000 onwards, the investigations of nickel contamination in residential Port Colborne were highly publicized and overwhelmingly evident to the surrounding community;
- (m) in February 2001, Inco publicly announced a property valuation study to determine the degree of stigmatization in Port Colborne, and resulting negative impact;
- (n) class members have experienced diminished ability to sell, finance and mortgage their properties;
- (o) class members' lands are still contaminated with extremely high levels of nickel.

Fresh as Amended Statement of Claim, amended July 9, 2009, paras. 9, 13,-14, 18-38, Amended Trial Record, Tab 1.

Plaintiff's Request to Admit, dated July 21, 2009, paras. 43, 74, 80, 84-90, 91-94, 96-97, 100, 102-102, 107-110, 112-116, 118-119, 162, 170, 174, 176, 218, 227, 232, 234, 238, 241, Amended Trial Record, Tab 9.

Defendant's Response to Plaintiff's Request to Admit, dated August 10, 2009, paras. 43, 74, 80, 84-90, 91-94, 96-97, 100, 102-102, 107-110, 112-116, 118-119, 162, 170, 174, 176, 218, 227, 232, 234, 238, 241, Amended Trial Record, Tab 10.

11. Inco has tendered no evidence in support of the following alleged defences:

- (a) nothing of significance occurred within the Port Colborne community in September 2000;
- (b) class members have known of Inco's nickel contamination in and around Port Colborne for decades;
- (c) that public media disclosures prior to 2000 were similar in nature and kind to those which were released after September 2000;
- (d) that the value of lands in Port Colborne is affected by external demographic and economic factors which are in no way related to nickel contamination;
- (e) that the plaintiff, her counsel and other Rodney Street residents caused the devaluation of their own properties by making certain public statements in 2000 and 2001;

- (f) that any decline in property values has been ameliorated by Inco's remediation of 24 properties, the Community Based Risk Assessment, health studies or public authority assurances;
- (g) that the class members' claims are statute barred pursuant to the *Limitations Act*, R.S.O. 1990, c.L.15;
- (h) that Inco complied with all statutory regulatory requirements of the *Environmental Protection Act*, R.S.O.1990, c.E.19; or
- (i) that the class has failed to mitigate its damages.

Amended Statement of Defence, July 2009, paras. 4, 8, 17, 30, 41-45, 52-55, 59-61, 64-66, 70-71, 74, 75, Amended Trial Record, Tab 2.

12. In October 2009, the defendant consented to judgment on common issues 6(a) and 6(b) thereby admitting liability for: (a) the vast majority of elevated nickel levels in Port Colborne; (b) and for the vast majority of nickel contamination within the Rodney Street community. These admissions were made 8½ years after the action was commenced.

Order of Justice Henderson, dated October 14, 2009, Plaintiff's Closing Argument, Tab C.

13. Inco's consent to judgment on common issues 6(a) and 6(b) has important ramifications for this case. As a matter of law, Inco has thereby (a) unreasonably interfered with the use and enjoyment of the class members' lands; (b) committed an intrusion onto class members' lands; and (c) caused an escape of a substance which caused damage to the plaintiff and the class. By so doing, Inco has materially caused and contributed to the devaluation of residential properties in Port Colborne, inflicting damages upon the class members. Inco is therefore liable in nuisance, trespass and *Rylands*.

14. The plaintiff has provided this court with various damage calculation methodologies, coupled with evidence of Mr. Berkhout, Dr. Thayer and Dr. Steele, all which confirm that damages were suffered during the relevant time period.

**A. Overview of the plaintiff's evidence at trial**

15. Prior to 2000, the MOE conducted surveys and investigations in and around the City of Port Colborne which were restricted only to areas that the MOE believed were impacted based on the presence of vegetation injury as a result of Inco's operation of its refinery. Those "special investigations were concentrated on a few specific agricultural properties that had experienced chronic pollution damage".

Affidavit of Dave McLaughlin, sworn March 2002, para. 14, Exhibit 55.

16. During that time, prior to 2000, the MOE undertook certain studies regarding levels of nickel in the Port Colborne vicinity<sup>3</sup> but those were limited government print runs, typically circulated to the MOE District and Regional Office or MOE Public Information Centre in Toronto, with no distribution to the public at large. Those studies generated minimal media coverage; few, if any, interviews were given by the MOE in respect of such reports and "although most of these reports were officially published by the MOE, their distribution was not always the same". This evidence is uncontradicted.

Affidavit of Dave McLaughlin, sworn March 2002, para. 46-48, Exhibit 55.

17. It was not until after September 2000 that the MOE drastically changed its method of disseminating information to the Port Colborne community. It then began distributing, for the

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<sup>3</sup> "Technical Report: Assessment of Potential Health Risks of Reported Soil Levels of Nickel, Copper, and Cobalt in Port Colborne and Vicinity, May 1997": Exhibit 4, Tab 206., "Phytoxicology Soil Investigation: Inco – Port Colborne (1998)": Exhibit 4, Tab 233; "Phytoxicology Soil Investigation: Port Colborne, 1999": Exhibit 4, Tab 409; Technical Report – Assessment of Potential Health Risks of Reported Soil Levels of Nickel, Copper and Cobalt in Port Colborne and Vicinity", May 1997, Revised January 2000: Exhibit 4, Tab 205; "Soil Contamination in Selected Port Colborne Woodlots" 2000; Exhibit 4, Tab 293; Phytoxicology Soil Investigation: School Yards and Beaches Port Colborne, (April 2000), Exhibit 4, Tab 519.

first time, information directly to every household in the Rodney Street area.<sup>4</sup> In some cases, it disseminated reports to all households in Port Colborne, concerning Inco's nickel contamination of lands in the community.<sup>5</sup>

Affidavit of Dave McLaughlin, sworn March 2002, para. 46-48, Exhibit 55.

18. In January 2000, the MOE released the, the *Phytotoxicology Soil Investigation INCO Port Colborne 1998* ("MOE 1998 Report") most extensive soil sampling campaign it had undertaken to date in Port Colborne. In anticipation of the MOE 1998 Report, local newspapers published articles concerning its conduct and release. Inco knew that the area of its soil contamination was more extensive than originally believed.

Memorandum from Conard, Bruce R. [Inco] to Sopko, M.D., January 19, 2001, p. 2, para. A(1) and A(8) Exhibit 4, Tab 549.

Phytotoxicology Soil Investigation INCO Port Colborne 1998 from Ministry of the Environment, January 2000, Exhibit 4, Tab 257.

"Access denied to nickel-soil study - Something's in survey of 140 sites in south Niagara that province, Inco, city don't want us to see: 'too sensitive'"; Port Colborne Leader, December 8, 1999, Exhibit 4, Tab 246.

"Property severance denied - City report cites soil contamination to oppose retirement bungalow on Weaver Road - Hudak presses to see nickel study" Port Colborne Leader, January 12, 2000, Exhibit 4, Tab 2A.

Evidence of Dave McLaughlin, December 2, 2009, p. 25.

19. The MOE 1998 Report was tabled during a Port Colborne City Council public forum in January 2000. The MOE 1998 Report concluded that soil to a depth of at least 15 cm in the Port Colborne area was contaminated with nickel, in some locations exceeding the MOE

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<sup>4</sup> "Soil Investigation and Human Health Risk Assessment for the Rodney Street Community Port Colborne", March 2001; Exhibit 4, Tab 567; Letter to Rodney Street Community Residents, May 2, 2001; Exhibit 4, Tab 596; Letter to Rodney Street Community Residents, June 6, 2001; Exhibit 4, Tab 605.

<sup>5</sup> "Letter to Port Colborne Residents and Frequently Asked Questions", July 16, 2001; Exhibit 4, Tab 621.

generic effects-based soil remediation criterion of 200 ppm. Referencing a previous study conducted by the MOE<sup>6</sup> and based on a multi-media assessment of potential risks, it concluded that "the soil contamination in Port Colborne is unquestionably source-oriented, resulting from 66 years of atmospheric deposition from the [Refinery]."

Phytotoxicology Soil Investigation INCO Port Colborne 1998, Ministry of the Environment, January 2000, Executive Summary, p.1, at para 1 and 2, Exhibit 4, Tab 257.

E-Mail from McLaughlin, David to KUJAAL JONESRA, January 13, 2000, Exhibit 4, Tab 269.

20. During the same January 2000 Port Colborne City Council public forum, Inco proposed the Community Based Risk Assessment ("CBRA"). The CBRA was intended to involve the construction of computer models for calculating risk in the Port Colborne area. Future site specific assessment and remediation would then devolve from the calculations. Despite the passage of ten years, the CBRA is still not finished.

Memorandum from Conard, Bruce R. [Inco] to Sopko, M.D., January 19, 2001, p. 2, at para. A(6) and A(8), Exhibit 4, Tab 549.

21. Subsequently, Inco began briefing its employees on the CBRA in monthly meetings. Media releases following the Port Colborne City Council public forum conveyed selected results of the MOE 1999 Report, the proposed CBRA, and a future public liaison process.

"Dirty dirt stalls Port development: It will take two years to assess contamination of soil across city from Inco", Welland Tribune, January 25, 2000, Exhibit 4, Tab 279.

"You'll shut our city down' says mayor to Inco plan", "Nickel on both sides of canal", "Inco promises to pay for clean-up", "10-million pounds of nickel settled on Port lands", Port Colborne Leader, January 26, 2000, Exhibit 4, Tab 282.

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<sup>6</sup> "Technical Report; Assessment of Potential Health Risks of Reported Soil Levels of Nickel, Copper, and Cobalt in Port Colborne and Vicinity, May 1997: Exhibit 4, Tab 221.

Plaintiff's Request to Admit, July 21, 2009, question 70, 147, Amended Trial Record, Tab 9.

Defendant's Response to Plaintiff's Request to Admit, August 10, 2009, question 70, 147, Amended Trial Record, Tab 10.

22. The CBRA remains incomplete today and its total cost has exceeded \$30 million, grossly in excess of its initial cost projections. The CBRA's final reports for the (a) two ecological risk assessments; (b) the Human Health Risk Assessment; and (c) risk management strategies remain to be reviewed and finalized, waiting for the MOE's review approval to determine if the reports are consistent with the regulatory regime and that the science is sound.

Examination for discovery of Delwyn Fraipont, February 29, 2008, question 2195-2199, p. 28-29.

Evidence of Dave McLaughlin, December 1, 2009, p. 75-77.

23. By letter dated February 16, 2000, addressed to then Port Colborne Mayor Badawey, the MOE confirmed that Inco has "acknowledged that historic emissions from [the refinery] have resulted in elevated nickel [...] in the City of Port Colborne." The letter stated that Inco would be responsible for a "remediation plan" based on the future CBRA process and requested the City create a Public Liaison Committee (the "PLC"). However, that remediation plan is still not complete and may be totally revamped and re-considered depending on the results of the CBRA recommendations with respect to an appropriate intervention level. The lack of a final remediation plan has contributed to uncertainty in Port Colborne.

Letter from Haniff, Kal [Ontario Ministry of the Environment] to Badawey, Vance M. [City of Port Colborne], February 16, 2000, Exhibit 4, Tab 312.

Evidence of Dave McLaughlin, December 1, 2009, p. 79.

24. Uncertainty which accompanies news of contamination detrimentally affects real property values.

Evidence of Dr. Mark Thayer, November 12, 2009, p. 76, 102-103.

25. Local newspapers announced the establishment of the CBRA and the PLC. The announcement of the CBRA, itself, raised the spectre to the community of a variety of implications and a multitude of studies. For the first time, at a very general level, questions began to surface as to how these activities might affect property values in Port Colborne and how it might change real estate practices in a manner that could require vendors and purchasers to be informed of these issues. This evidence is uncontradicted.

Evidence of William Berkhout, November 5, 2009, p. 122-123.

"Members Assigned to Nickel PLC," Port Colborne Leader, April 12, 2000, Exhibit 4, Tab 356.

"Who will Pay to Clean Up Nickel? Farmers just can't Pack Up, Leave",  
"Will a Site-Specific Risk Assessment do if Farmers Dump Manure?  
Compare to Inco Nickel", Port Colborne Leader, February 9, 2000, Exhibit  
4, Tab 308.

26. In July 2000, Inco authorized the environment consulting companies, Viridian and Jaques Whitford Environmental Limited ("JWEL"), to commence a field study program. The scope of the CBRA was considered at a forum held thereafter. Media releases reported that the PLC would hold drop-in meetings to discuss the CBRA process.

E-Mail from James Higgins to Bruce Conard, July 6, 2000, Exhibit 4, Tab 413.

"Soil-contamination issue needs more public input: Consultant suggests an all day drop-in-centre style meeting", Welland Tribune, July 14, 2000, Exhibit 4, Tab 419.

“Badaway urges public to attend meeting Inco soil contamination”, Welland Tribune, July 18, 2000, Exhibit 4, Tab 421.

Plaintiff's Request to Admit, July 21, 2009, questions 162-163, Amended Trial Record, Tab 9.

Defendant's Response to Plaintiff's Request to Admit, August 10, 2009, questions 162-163, Amended Trial Record, Tab 10.

27. During one such PLC meeting in August 2000, results of MOE testing in 1999 and 2000 pertaining to a Port Colborne woodlot were discussed. The woodlot had metal concentrations that were substantially higher than expected based on previous testing. Consequently, the MOE agreed to conduct soil investigations of other selected woodlots in Port Colborne, the results of which were published at a later date.

“Woodlots in Port Colborne Contaminated with Nickel at Levels Higher than Surrounding Community”, Ministry of the Environment, August 16, 2000, p. 2, Exhibit 4, Tab 427.

Evidence of Dave McLaughlin, November 30, 2009, p. 30-31.

28. During a public forum held at the Port Colborne City Hall in February 2000, Port Colborne resident, Craig Edwards, had requested that the MOE sample his residential property in the Rodney Street area for contamination. The MOE fulfilled this request in June 2000, but did not release its findings until September 2000.

Evidence of Ellen Smith, October 15, 2009, p. 200-206.

Results of Soil Samples Collected from Craig Edwards Residence, 91 Rodney Street, Port Colborne June 8, 2000, Exhibit 2.

Note from Bob Slattery (MOE) with Smith Test Results , Exhibit 3.

“Soil Investigation and Human Health Risk Assessment for the Rodney Street Community: Port Colborne (2001)”, Ministry of the Environment, March 2001, p.ii, Exhibit 4, Tab 567.

29. Mr. Al Kuja, a representative from the Standards Development Branch of the MOE, left a written message for Edwards and Smith as they were not home at the time. Mr. Kuja's message stated that "the Niagara Medical Officer of Health will be coming to see you about HIGH metal levels in your front lawn" (emphasis in original).

Mr. Al Kuja's Card, Exhibit 1.

Evidence of Ellen Smith, October 15, 2009, p. 201-204.

30. Later that same day, Mr. Dave Young, from the Niagara Regional Public Health Department, informed Edwards and Smith of the high levels of contamination which were discovered by the MOE on the front yard of their property. The MOE had discovered nickel levels of 14,000 ppm. These levels were grossly in excess of acceptable levels previously predicted or known by the MOE. Mr. Young provided Edwards and Smith with a chart showing the levels and depths of contamination. He also advised Smith and Edwards that they should take precautions to protect their health and that of their young children.

Evidence of Ellen Smith, October 15, 2009, p. 204-209.

Results of Soil Samples Collected from Craig Edwards Residence, 91 Rodney Street, Port Colborne, June 8, 2000, Exhibit 2.

31. As a result of the findings for this single Rodney Street property, the MOE immediately directed the sampling of additional residential properties in the Rodney Street area and the MOH for the Niagara Region suggested the sampling of the entire east side of Port Colborne. From and after that time, the MOE conducted increased and widespread investigations for nickel contamination by sampling front and backyards in the class members' homes.

Evidence of Dave McLaughlin, November 30, 2009, p. 38 - 41, 47, 48, 56.

32. Thus began a sense of urgency within the community during that fall of 2000, particularly within the east side community, as levels were proving to be much higher than anyone, including the MOE, had expected or anticipated. This heightened anxiety prompted the MOE to undertake a human health risk assessment for the east side of the city. Although another human health study had been proposed as part of the CBRA, residents could not wait the expected four to five years for its completion.

Evidence of Dave McLaughlin, November 30, 2009, p. 38-41.

33. The MOE's investigations were unprecedented in frequency, location and scale. The testing was also extremely well-publicized. Hundreds of properties were tested, encompassing almost all properties in the Rodney Street area, extending beyond to other residential areas. The MOE undertook the extensive soil sampling program with great dispatch. The collection of approximately 1,500 soil samples was completed by November 17, 2000. The highest levels of soil contamination were 17,000 ppm and many properties tested far in excess of the levels previously predicted.

Evidence of Dave McLaughlin, November 30, 2009, p. 38-41.

"Soil Investigation and Human Health Risk Assessment for the Rodney Street Community: Port Colborne (2001); Ministry of the Environment, March 2001, p. i-ii, Exhibit 4, Tab 567.

"Contaminated Soil Found – Rodney Street Residents Worry about Health of Families", Welland Tribune, October 27, 2000, Exhibit 6, Tab 5.

"Inco Cleaning Up Its Own Backyard", Port Colborne Leader, November 22, 2000, Exhibit 4, Tab 506.

"Ministry steps up soil analysis in Port Colborne", Welland Tribune, December 12, 2000, Exhibit 84, Tab 80.

34. Accordingly, it was not until September 2000 that class members were informed of any of the nature, extent and effect of the damage caused to their properties by Inco. The presence and investigatory activities of the MOE and Inco representatives in Port Colborne from and after September 2000 were overwhelmingly evident to the community and the public at large. The results of the investigations substantiated extremely high levels of nickel contamination in residential parts of Port Colborne for the first time.

Evidence of Ellen Smith, October 15, 2009, p. 219-223.

Evidence of Dave McLaughlin, November 30, 2009, p. 30, 38-39, 50-57.

35. Additional investigations of contamination and human health risk assessments, including soil and air quality testing, continued into 2001. In March 2001, a draft control order was issued by the MOE, requiring Inco to undertake significant sampling in the community and remediate certain properties. In July 2001, the MOE installed air quality sampling stations at a neighbourhood baseball diamond and at local schools. In the fall of 2001, as directed by the MOE, Inco undertook extended sampling to almost 200 additional residential properties.

News Release - "Inco Ordered to Clean Up Nickel Contaminated Soil from 16 Residences in Rodney Street Area", MOE, March 30, 2001, Exhibit 4, Tab 575.

Letter from Nieweglowski, P. MOE to Port Colborne Residents, October 30, 2001, Exhibit 4, Tab 659.

Evidence of Dave McLaughlin, November 30, 2009, p. 45-55.

Evidence of Ellen Smith, October 16, 2009, p. 279-281, 334-336, 339.

Plaintiff's Read-in of the transcript of the examination for discovery of Delwyn Fraipont, February 28, 2008, question 1438-1453, 1528-1569, 1874-1896, 1909-1911.

Plaintiff's Request to Admit, July 21, 2009, question 92-94, 241, Amended Trial Record, Tab 9.

Defendant's Response to Plaintiff's Request to Admit, August 10, 2009, question 92-94, 241, Amended Trial Record, Tab 10.

36. The fact of this continuous, widespread testing and results thereof were disclosed to the public by the MOE and by other disclosures from and after September 20, 2000. This was accompanied by yet other disclosures to the public as to the severe nature, extent and effects of contamination including its impact on the environment, human health and socio-economic impact on the community at large, as set out below.

37. In early September 2000, numerous letters, memoranda and public meetings disclosed the JWEL proposed investigations of the food, properties and health of Port Colborne residents.

E-Mail from Veska, Eric [JWEL] to Bishop, Jim [Beak], September 5, 2000, Exhibit 4, Tab 441.

Plaintiff's Request to Admit, July 21, 2009, question 91, 97, 174, Amended Trial Record, Tab 9..

Defendant's Response to Plaintiff's Request to Admit, August 10, 2009, question 91, 97, 174, Amended Trial Record, Tab 10.

38. On September 27, 2000, the CBRA Technical Sub-Committee ("TSC") met to discuss the socio-economic impact of contamination on Port Colborne. It was suggested that several roundtables be organized with representatives of the banking and real estate professions in order to obtain information about stigmatization and property devaluation. At that time, JWEL was actively conducting greenhouse experiments, community produce surveys, air sampling and ecosystem assessments. Moreover, the TSC noted that the "community is pressuring the CBRA process to include a human health study."

Minutes of Technical Sub-Committee meeting, September 27, 2000, p. 5, Exhibit 4, Tab 464.

Plaintiff's Request to Admit, July 21, 2009, question 91, 97, 174-176, 218, Amended Trial Record, Tab 9.

Defendant's Response to Plaintiff's Request to Admit, August 10, 2009, question 91, 97, 174-176, 218, Amended Trial Record, Tab 10.

39. On September 28, 2000, the CBRA held a public "Drop-in-Centre for the CBRA Process to Address Inco's Contamination" to provide an explanation of the CBRA and recent MOE investigations. The CBRA requested community members voluntarily share the results of testing on their respective properties and personhood: soils, groundwater, animals, garden vegetables, plants and human health.

Slides of Presentation - "Welcome to the September 28th Drop-In-Centre for the CBRA Process to Address INCO's Contamination, Beak, September 28, 2000, Exhibit 4, Tab 45.

40. On October 3, 2000, in the presence of Craig Edwards, the MOE indicated to Inco that the MOE and the MOH were investigating each residential property on Rodney Street, independent of the CBRA. The MOE representative stated that the MOH for the Niagara Region was concerned by investigation results, and that the MOE might issue a control order against Inco.

E-Mail from Reed, David to Conard, Bruce, October 3, 2000, Exhibit 4, Tab 469.

41. In its October 4, 2000 draft scope of work for the CBRA, JWEL described that part of the mandate of the CBRA was to focus on the socio-economic analysis on potential property devaluation and stigmatization. It held a subsequent public drop-in-centre, wherein residents of Port Colborne were described in visual presentation slides as "people exposed to contaminants of concern in environmental media" for whom potential risk to human health

should be considered. An organizational chart presented at the same meeting identified a total of seven agencies then involved in community risk assessment activities.

“Draft 3 - Revised Scope of Work - Community Based Risk Assessment Plan for Port Colborne, Ontario - Project No. 33826”, JWEL to Inco Limited, October 4, 2000, Exhibit 4, Tab 473.

Slides of Presentation - “Welcome to the October 26th Drop-In-Center for the CBRA Process to Address Soil Contamination Resulting from Inco's Historical Operations”, JWEL and Beak, October 26, 2000, p. 7, Exhibit 4, Tab 47.

Plaintiff's Request to Admit, July 21, 2009, question 100, 102, Amended Trial Record, Tab 9.

Defendant's Response to Request to Admit, August 10, 2009, question 100, 102, Amended Trial Record, Tab 10.

42. On or about December 11, 2000, the MOH announced that a health study would be conducted on Rodney Street residents. The announcement detailed the MOE sampling of residential properties from June 2000 to November 2000 showing much higher than expected nickel levels, as well as lead and arsenic, in the soils.

Media Release - “Health Study Announced for Rodney Street Area Residents, Port Colborne”, Regional Municipality of Niagara, December 12, 2000, Exhibit 4, Tab 528.

Evidence of Ellen Smith, October 15, 2009, p. 240-242.

43. In December 2000, Inco itself issued an open letter to the residents of Port Colborne to acknowledge its responsibility for nickel contamination and to explain the CBRA process. Delwyn Fraipont, former Manager of the Port Colborne refinery, began the letter, "I am sure you are aware of community-wide discussion concerning nickel, cobalt and copper found in surface soil in and around Port Colborne." He proposed that Inco was making efforts to "understand and remove any potential health or environmental risks." In so doing, he detailed

the various "extensive" studies that would ensue from 2000 to 2002, including a "detailed human health risk...assessment" and a "socioeconomic study and human health study."

An Open Letter to the Residents of Port Colborne from Fraipont, D.[Inco Limited], December 2000, Exhibit 4, Tab 523.

44. In February 2001, in an open letter to the public, Inco again, advised the community that a socio-economic study would be conducted to address community concerns. To this end, Inco retained Deloitte and Touche to commission an extensive property valuation analysis to determine the degree and extent of stigmatization, given the MOE's September 2000 findings. Inco subsequently cancelled the study.

Letter from Fraipont, Del [Inco Limited] to Residents of Port Colborne, February 2001, Exhibit 4, Tab 553.

Draft Memorandum from Deloitte & Touche [Corporate Real Estate Advisory Services] to PLC, December 14, 2001, Exhibit 4, Tab 686.

Plaintiff's Request to Admit, July 21, 2009, question 100, 102, Amended Trial Record, Tab 9.

Defendant's Response to Request to Admit, August 10, 2009, question 100, 102, 107-110, Amended Trial Record, Tab 10.

Examination for discovery of Delwyn Fraipont, March 3, 2008, question 2362-2365.

45. In March 2001, the MOE released the *Soil Investigation and Human Health Risk Assessment for the Rodney Street Community: Port Colborne (2001)* ("MOE 2000 Report") report on contamination in the Rodney Street area in conjunction with a draft control order requiring Inco conduct extended investigations. In furtherance of the control order, representatives of Inco contacted residents of Port Colborne by canvassing every home in the communities extending beyond Rodney Street. The ensuing sampling program required months to complete.

News Release – “Inco Ordered to Clean Up Nickel Contaminated Soil from 16 Residences in Rodney Street Area”, MOE, March 30, 2001, Exhibit 4, Tab 575.

Letter from Nieweglowski, P. MOE to Port Colborne Residents, October 30, 2001, Exhibit 4, Tab 659.

Examination for discovery of Delwyn Fraipont, February 28, 2008, question 1698-1715, 2362-2365. [QQ 1351-1386, 1438-1453, 1480-1482, 1619-1637, 1874-1895, 1909-1911, 2381-2389.

Evidence of Ellen Smith, October 16, 2009, p. 279-281.

46. The MOE 2000 Report concluded that, while the MOE 1998 Report had been more extensive than its predecessors, it had not found "more serious soil contamination." Nor had it identified any adverse health effects resulting from environmental exposures. By contrast, the MOE 2000 Report revealed surface soil nickel levels ranging up to 17,000 ppm in Port Colborne.

“Soil Investigation and Human Health Risk Assessment for the Rodney Street Community: Port Colborne (2001)”, MOE, March 2001, “Summary”, p. ii, Exhibit 4, Tab 567.

47. The public announcement of the MOE 2000 Report advised class members that Inco had been ordered to remediate sixteen (16) properties found to have nickel levels in excess of 10,000 ppm, thereby warranting action under the human health risk assessment. The results of the MOE 2000 Report were so severe that they were provided to the Niagara Regional Public Health Department for yet another proposed study. Further investigations, analysis, reports, assessments and studies persisted for years to come and are still ongoing, ten years after the fact.

“Soil Investigation and Human Health Risk Assessment for the Rodney Street Community: Port Colborne (2001)”, MOE, March 2001, “Summary”, p. i, Exhibit 4, Tab 567.

“Public Health Advice for Rodney Street Area Residents, Port Colborne;, Regional Municipality of Niagara, March 30, 2001, Exhibit 4, Tab 571.

“Soil Investigation and Human Health Risk Assessment for the Rodney Street Community, Port Colborne;, Ministry of the Environment Ontario Ministry of the Environment, October 2001, Exhibit 4, Tab 653.

Media Release – “Participation Urged in Eastside Health Study”, Regional Municipality of Niagara, November 14, 2001, Exhibit 4, Tab 672.

Port Colborne Community Update - February 2002, Inco, Welland Tribune, February 13, 2002, Exhibit 4, Tab 702.

“Soil Investigation and Human Health Risk Assessment for the Rodney Street Community Port Colborne;, Ministry of the Environment, March 2002, Exhibit 4, Tab 709.

Slides of Presentation - “CBRA Integration Report - Open House Presentation;, Conard, B. [Inco Limited], June 5, 2008, Exhibit 4, Tab 866.

Plaintiff’s Request to Admit, July 21, 2009, question 92-94, 96-97, Amended Trial Record, Tab 9.

Defendant’s Response to Plaintiff’s Request to Admit, August 10, 2009, question 92-94, 96-97, Amended Trial Record, Tab 10.

Evidence of Dave McLaughlin, December 2, 2009, p. 68-71.

48. As a consequence of disclosures in the class period, including but not limited to the above, the nature, scope, high levels and, generally, the severity of nickel contamination in Port Colborne gained unprecedented public appreciation and attention.

**B. September 2000 Soil Sampling Results**

49. In September 2000, soil-nickel levels from the first property in Port Colborne, 91 Rodney Street, were found to grossly exceed the soil nickel level used in the 1997 Health Risk Assessment of 9,750 ppm. This property was owned by the plaintiff, Smith. The testing showed that Smith’s soil contained nickel in the amount of 14,000 ppm at 5-10 cm of depth.

Results of Soil Samples Collected from Craig Edwards Residence, 91 Rodney Street, Port Colborne on June 8, 2000, Exhibit 2.

“Soil Investigation and Human Health Risk Assessment for the Rodney Street Community”, Port Colborne, MOE, March 2002, Executive Summary, p. 6, Exhibit 4, Tab 709.

50. The predominant form of nickel discovered in the soil in the Rodney Street community was nickel oxide: 80 percent of the total nickel on average. This characterization is consistent with known emissions from the metallurgical process employed by Inco, especially in its historic operations. Inco acknowledges that nickel constitutes a pollutant for which it must report emissions to the federal government for the purposes of the National Pollutant Release Inventory.

“Soil Investigation and Human Health Risk Assessment for the Rodney Street Community”, Port Colborne, MOE, March 2002, Executive Summary, p. 3, Exhibit 4, Tab 709.

Examination for discovery of Delwyn Fraipont, February 28, 2008, p. 4-5, question 1280-1290.

51. In fact, the MOE speciation work in the fall of 2000, the results of which were received in January 2001, confirmed that most of the nickel in the soil in the Rodney Street area was nickel oxide. As a result, from March 2001 onwards, “the MOE reports state that the species of nickel in question is nickel oxide and make clear that inhalation of nickel oxide can be carcinogenic”.

Affidavit of Dave McLaughlin, sworn March 2002, para. 61, Exhibit 55.

52. When the MOE received the results from the sampling of the plaintiff's property in the fall of 2000, significant health concerns arose. As the nickel levels were discovered to be greatly in excess of previously capped health risk assessments, the Regional MOH requested the MOE to continue and widen its residential soil sampling campaign.

Evidence of Dave McLaughlin, November 30, 2009, p. 37 – 39.

53. The fall of 2000 also marked the first time that the real estate industry in Port Colborne had seen the precise extent, scope and degree of contamination confirmed. It was only at that time that knowledge of nickel contamination became site specific. After the release of the site-specific test results of the plaintiff's property, information from a variety of sources, both official (MOE/MOH) and unofficial (media releases/public information meetings) began to permeate the community. At the time, "[i]t [was] all new, it was coming out fast and furious." All of a sudden, there was a "known entity which we never had before". This evidence was not contradicted.

Evidence of William Berkhout, November 9, 2009, p. 75, 122, 123.

Evidence of William Berkhout, November 5, 2009, p. 122-123, 126, 127.

54. At the same time, there were letters to residents from the different levels of government. Both the Port Colborne Mayor and the local MP publicly urged people to fill out health surveys. A local community group, Neighbours Helping Neighbours, was formed to assist other residents in answering questions and concerns about the flow of information regarding contamination. At the same time, local interest and participation in PLC meetings reached a heightened level.

Evidence of Ellen Smith, October 19, 2009, p. 417-419.

**C. MOE Testing, Sampling and Public Information Campaign: 2000 - 2001**

55. Beginning in October 2000, the MOE undertook an intensive sampling program to analyze soils from all properties in the Rodney Street area. Preliminary results indicated that surface soil nickel levels ranged up to 17,000 ppm, and that the soil metal levels were

variable. In November 2000, the MOE sampled the soils from residential properties extending south of Louis Street to Rodney Street and east of the Welland Canal to Davis Street to determine the extent of this contamination. Between April 25th and May 5th, 2001, the MOE continued to sample surface soil from additional residential properties as requested by the residents. In all, almost 2,000 soil samples were collected from approximately 200 properties.

“Soil Investigation and Human Health Risk Assessment for the Rodney Street Community, Port Colborne”, Ministry of the Environment, March 2002, Executive Summary, p. 6, Exhibit 4, Tab 709.

Map of an area of Port Colborne, including Rodney Street and surrounding streets, Exhibit 7.

56. Later on, as part of the MOE control order in 2001, Inco was required to, and did complete, the testing of approximately 170 properties north of Louis Street. In order to obtain residents’ consent, Inco’s consultants canvassed the community, by knocking on every door.

Examination for discovery of Delwyn Fraipont, February 28, 2008, question 1438-1452 and 1894.

57. During its own sampling in the fall of 2000, the MOE conducted a door to door strategy, before going out into the community to test properties. Once the MOE neared a particular site, it then assessed opportunities for sampling. This often led to information exchanges as inquiring residents approached MOE representatives with questions.

Evidence of Dave McLaughlin, November 30, 2009, p. 55-56.

58. As a result of the concern in the community, the intrusive nature of the work, and uncertain intervention levels, the MOE obtained prior consent from each of the residents of the sampling sites. When the MOE approached residents for permission:

