Court of Appeal File No. C52491
Court File No. 12023/01

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

ELLEN SMITH

Plaintiff/Respondent

- and -

INCO LIMITED

Defendant/Appellant

Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF THE APPELLANT, INCO LIMITED

December 10, 2010

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Overview

1. Inco appeals from the Judgment of the Honourable Justice Henderson dated July 6, 2010 in which he answered the common issues that from and after September 2000:

> **6(c) The disclosure of information concerning nickel contamination in the Rodney Street area and elsewhere in Port Colborne had a negative effect on property values in the Port Colborne area.**
>
> **6(d) The discharge of nickel by Inco did not amount to a public nuisance, but did amount to a private nuisance.**
>
> **6(e) The discharge of nickel by Inco did not amount to a trespass.**
>
> **6(f) Inco is strictly liable to the class for the discharge of nickel as a result of a failure to prevent the escape of a dangerous substance (*Rylands v. Fletcher*).**
>
> **6(g) Class members' claims for property damages are assessed as follows:**
>
> **$9,000,000 aggregate for the RSA ("Rodney Street Area"),**
>
> **$15,000,000 aggregate for the ESA ("East Side Area"), and**
>
> **$12,000,000 aggregate for the WSA ("West Side Area").**
>
> **6(h) Inco's conduct does not justify an award of punitive damages.**
>
> **6(i) Class members' claims are not statute-barred by the provisions of the Ontario *Limitations Act*.**

2. The key facts are uncontested:

(a) Inco operated a nickel refinery in Port Colborne, Ontario, for 66 years from 1918 to 1984, always in accordance with contemporaneous industry and regulatory standards;

(b) As a result of its operations, Inco deposited nickel particles on residential properties in the areas surrounding its refinery;

(c) In March 2001, the plaintiff initiated a class action which, after considerable narrowing, claimed only that the residential properties in Port Colborne did not

appreciate in value to the same extent as residential properties in the "comparable communities" of Welland and Fort Erie. The plaintiff abandoned claims for personal injury or for adverse health effects,[1] and thus this case is solely concerned with property values in Port Colborne.

3. The Trial Judge found that in the 10 year period from 1999 to 2008, property values in Port Colborne appreciated by 59.5% whereas property values in Welland appreciated by 63.85%. Accordingly, he found that Port Colborne properties lagged the total appreciation achieved by Welland properties by a total of 4.35% over the entire 10 year period. He then multiplied $4,500 per residential property, representing the 4.35% lack of appreciation, by 7,965 properties.

Nuisance

4. There was no evidence of unreasonable interference with the use or enjoyment of property. Accordingly, the plaintiff abandoned the claim based on that branch of the tort of nuisance. The Trial Judge found Inco liable in nuisance on the branch of the tort that requires material physical damage to property. There was no physical damage to property. The deposition of nickel particles which were absorbed into the soil at harmless levels, becoming invisible and causing neither a depression nor a mound, is not physical damage.

5. Moreover, the deposition of nickel particles cannot be material physical damage. Material physical damage requires a substantial or severe physical alteration. None was found. Rather, in error, the Trial Judge found that the 4.35% lack of appreciation in property values over the 10 year period that he attributed to the deposition, represented the necessary material element of the physical damage. Economic loss is not the equivalent of material physical damage. Material physical damage requires a material, deleterious change to the physical characteristics of the land.

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[1] As recognized by the Trial Judge, para. 11, Inco Compendium, Tab 2, p. 11.

Rylands v. Fletcher

6. The Trial Judge also found Inco liable under the doctrine of *Rylands v. Fletcher*. The elements of that cause of action are: (1) the non-natural use of the land by the defendant; (2) an escape from the land of something likely to do mischief; and (3) a single escape or a series of related escapes that cause damage.

7. Significantly, the Trial Judge found that nickel and nickel particles were not dangerous *per se*.

8. The industrial use of property within accepted industry and regulatory standards is not a non-natural use of the land. Inco's plant formed the backbone of Port Colborne's growth over the 66 years of its active operation. At its height, Inco employed some 2,000 people.

9. The escape of nickel does not constitute the escape of a substance likely to cause mischief. As found by the Trial Judge, nickel is not dangerous *per se*. It is a common metal. Nickel, as it exists in Port Colborne, is not dangerous. In fact, the average Port Colborne resident, as with other Canadians, gets the majority of his or her exposure to nickel from supermarket food. The Ministry of the Environment has consistently found that the nickel in Port Colborne poses no danger to human health.

10. The daily emission of nickel particles from an approved industrial activity over 66 years is not a single escape or a related series of escapes that attracts strict liability under the doctrine of *Rylands v. Fletcher*.

Damages

11. The Trial Judge has made many fundamental errors in his assessment of damages. In determining whether Port Colborne property values failed to appreciate at the same rate as those in Welland, the Trial Judge proceeded on the assumption that the communities must behave in an identical manner, an impossible standard for communities which, while comparable, are not

identical in characteristics or behaviour. Moreover, the evidence demonstrated that there was, annually, a variation in real estate values between Port Colborne, Welland, and Fort Erie of between 1% and 7%. Accordingly, a 4.35% cumulative variation over 10 years is well within the observed annual variability.

12. The Trial Judge rejected the Multiple Listing Service ("MLS") data recording the actual property sales, prices and performance over 10 years in the two communities, even though more than 95% of all sales between arm's length purchasers and sellers were recorded in the MLS data. The objective, arm's length MLS data demonstrated that Port Colborne real estate values outperformed Welland over the 10 year period examined.

13. Instead of MLS, the Trial Judge preferred the Municipal Property Assessment Corporation ("MPAC") data which represents subjective estimates for realty tax purposes of every property value in both communities. Even if the subjective and imprecise methodology of MPAC data is used, the MPAC data also demonstrates that in the following critical time periods Port Colborne real estate values outperformed Welland: 1996 to 2008; 1996 to 2003; and 1999 to 2003.

14. Of special significance, for the years 1999 to 2003, which embrace both the September 2000 trigger date for this claim and its immediate aftermath, there is no difference in property value appreciation between Port Colborne and Welland.

15. The 4.35% figure is based on a refusal by the Trial Judge to make a single adjustment for an anomaly in the MPAC data, acknowledged by the plaintiff's expert, that fully accounts for the 4.35% differential. The 4.35% is a false figure.

16. Furthermore, as a matter of common sense, which is the Trial Judge's standard for finding liability, legal causation is not established by a 4.35% difference over a 10 year time span in the appreciation of property values between comparable but different communities.

Facts

17. In 1918, Inco established a nickel refinery in the city of Port Colborne, Ontario. The refinery operated until 1984 when nickel refining ceased.[2]

18. The vast majority of the nickel particles, 97%, were emitted prior to 1960. In 1960, a new air filter was used. The remaining 3% was emitted in the 24 year period ending in 1984.[3]

19. The industrial activity conducted by Inco was a permitted use, the Inco lands were appropriately zoned and Inco was regulated by the Ontario government, including the Ministry of the Environment (the "MOE").[4]

20. It has never been suggested that Inco fell below any industry standard or any regulatory standard. Indeed, the Trial Judge found:

> **[333] Inco engaged in a lawful business operation in Port Colborne for many years, and provided gainful employment to many people, including many of those who are members of the class in this action. Moreover, throughout its history Inco has generally complied with the MOE regulations that governed the Inco operations. In that regard, Inco reduced emissions of nickel from its refinery over time, and eventually ceased nickel emissions altogether in 1984.[5]**

21. For decades, Inco was the largest employer in Port Colborne, employing 2,000 people at its height.

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2 Exhibit 4, Tab 257, "Phytotoxicology Soil Investigation, INCO, Port Colborne (1998)" dated January 2000, Exhibit Book, pp. 2206-2305, Inco Appeal Book and Compendium ("Inco Compendium"), Tab 15, pp. 278-311; Trial Decision, para. 24, Inco Compendium, Tab 2, p. 15. See also, Ruling of Henderson J. on the Common Issues Amendment Motion, Trial Transcript, v. 7, May 20, 2010, p. 2134, ll. 18-26, Inco Compendium, Tab 52, p. 1031 – "It should not be a surprise to anyone that the discharge of nickel from the Inco refinery ceased in 1984. It was well known that Inco ceased refining nickel at the Port Colborne operations in 1984. The plaintiff and the defendant agree that no relevant or significant discharge was emitted into the air by Inco, by the plaintiff and by virtually all of the class members long before this trial commenced".

3 Exhibit 4, Tab 709, "Soil Investigation and Human Health Risk Assessment for the Rodney Street Community, Port Colborne" dated March 2002 ["March 2002 HHRA"], Part A, pp. 2-3, Exhibit Book, pp. 7549-7550, Inco Compendium, Tab. 20, pp. 350-351; McLaughlin Chief, v. 5, Nov. 30, 2009, p. 1389, l. 5 – l. 25, Inco Compendium, Tab 46, p. 812.

4 Trial Decision, para. 47, Inco Compendium, Tab 2, p. 21.

5 Trial Decision, para. 333, Inco Compendium, Tab 2, p. 101.

22. For decades, residents of the Port Colborne community have been aware of emissions from the refinery. Inco's 500 ft stack was the tallest structure in Port Colborne, described by the representative plaintiff as "a landmark in the region that dominated the landscape".[6]

23. According to Mr. Berkhout, the local realtor who testified for the plaintiff, it is common sense that in every city with industry, people are cognizant of stacks and things coming out of stacks.[7] The representative plaintiff herself described how neighbours told her about seeing smoke coming out of the stack back in the 1940s and 1950s.[8]

24. Since the mid-1970s, the MOE employed an array of environmental monitoring tools to obtain an understanding of the atmospheric deposition from the Inco refinery. A monitoring regime of this nature is standard practice.[9] The MOE's work in the Port Colborne community was readily visible to Port Colborne residents.

25. Mr. Dave McLaughlin of the MOE gave the following evidence of the MOE's complement of "survey investigations":[10]

(a) Beginning around 1980, the MOE began to monitor the air quality in Port Colborne by placing "moss bags" at 20, 30 or even 40 sites. MOE personnel suspended these moss bags from hydro poles around in the residential areas in the vicinity of the Inco refinery. These moss bags were intended to collect deposition from the Inco refinery in order to gauge the extent and scope of deposition. When MOE personnel were physically placing these moss bags, this would often generate inquires from Port

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6 Smith Cross, v. 1, Oct. 19, 2009, p. 219, l. 10 – p. 220, l. 4; Smith Chief, v. 1, Oct. 15, 2009, p. 12, ll. 6 – 9, Inco Compendium, Tab 48, pp. 933, 940-941. See also, Trial Decision, para. 27, Inco Compendium, Tab 2, p. 15.

7 Berkhout Cross, v. 3, Nov. 9, 2009, p. 800, ll. 8-11, Inco Compendium, Tab 43, p. 719.

8 Smith Cross, v. 1, Oct. 19, 2009, p. 219, ll. 10 – 14, Inco Compendium, Tab 48, pp. 940.

9 McLaughlin Chief, v. 5, Nov. 30, 2009, p. 1382, ll. 23-28. Inco Compendium, Tab 46, p. 807.

10 See also, Trial Decision, para. 28, Inco Compendium, Tab 2, p. 16, where the Trial Judge found that "The MOE has conducted air, vegetation and soil testing in the vicinity of the Inco refinery periodically since at least the 1970s. I accept that the MOE tested for nickel levels in the soil in Port Colborne by analyzing soil samples that were taken as parts of various studies in approximately 1972, 1975, 1983, 1991, and 1998."

Colborne residents, and the ongoing presence of such moss bags was a visible aspect of life in Port Colborne.[11]

(b) Throughout the 1970s and into the 1980s, the final study being after the Inco refinery was closed, the MOE would sample foliage from silver maple trees (urban street trees) to piece together the spatial distribution of the air chemistry for the growing season. Again, McLaughlin testified that it was common for residents to come out of their homes and ask what MOE personnel were doing when obtaining samples from street trees. The MOE would provide identification and describe the purpose of their activities.[12]

(c) During this same time frame, the MOE would conduct dust fall surveys by placing cones on telephone poles or other available places, so that the actual dust fall could be measured on an annual or seasonal basis. Again, this type of survey was a very public one, particularly because sample spots were chosen for being open and accessible.[13]

(d) High volume air monitors have been in place since at least the mid-1990s, if not before. Such devices (which are large, expensive pieces of equipment that require a secure site with power and security) are a common way of monitoring air quality in the vicinity of pollution sources.[14]

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[11] McLaughlin Cross, v. 5, Dec. 1, 2009, p. 1511, l. 21 – p. 1514, l. 10, Inco Compendium, Tab 46, pp. 820 - 823; Trial Decision, para. 121, Inco Compendium, Tab 2, p. 43.

[12] McLaughlin Chief, v. 5, Nov. 30, 2009, p. 1383, l. 11 – p. 1384, l. 4, Inco Compendium, Tab 46, pp. 808; McLaughlin Cross, v. 5, Dec. 1, 2009, p. 1514, l. 26 – p. 1516, l. 29, Inco Compendium, Tab 46, pp. 823 - 825; Trial Decision, para. 122, Inco Compendium, Tab 2, p. 43.

[13] McLaughlin Cross, v. 5, Dec. 1, 2009, p. 1516, l. 30 – p. 1517, l. 29, Inco Compendium, Tab 46, pp. 825 - 826.

[14] McLaughlin Cross, v. 5, Dec. 1, 2009, p. 1521, ll. 6-32, Inco Compendium, Tab 46, pp. 827.

26. 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".[15]

27. In addition, in 1997 the Public Health Department did a health study (updated in 2000) (the "1997 Health Study"). This study performed a risk assessment in respect of nickel, copper and cobalt levels in the soils in Port Colborne, and reviewed health statistics of Port Colborne residents. The 1997 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 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.**[16]

28. For decades local newspapers published stories about emissions and elevated metal levels in soils in Port Colborne. From 1980 to September 20, 2000, the trigger date for this action, there were at least 55 articles and editorials in newspapers discussing nickel issues in Port Colborne. Some of these articles reported as follows:

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15 Exhibit 4, Tab 145, "Health Study from Federal Government" dated 1981, p. 94, Exhibit Book, p. 707, Inco Compendium, Tab 11 , p. 239.

16 Exhibit 4, Tab 206, "Assessment of Potential Health Risks of Reported Soil Levels of Nickel, Copper and Cobalt in Port Colborne and Vicinity" dated May 1997, Exhibit Book, p. 1600, Inco Compendium, Tab 12, p. 243. McLaughlin also confirmed that the report concluded that there were no unusual health statistics from the Port Colborne community, with the possible exception of lung cancer which would have been related to occupational exposure and not exposure to nickel in soil (McLaughlin Cross, v. 5, Dec. 1, 2009, p. 1579, ll. 3-12, Inco Compendium, Tab 46, p. 836); See also, Trial Decision, para. 134, Inco Compendium, Tab 2, p. 47, where the Trial Judge found that this report concluded that it was unlikely the levels of the nickel in the soil in Port Colborne constituted any risk to human health.

(a) "For the past 20 years [MOE personnel] have done studies on vegetation surrounding the Inco plant. The advice we have received from the experts is elevated concentrations of nickel there have no adverse impact on humans…" (Welland *Tribune*, February 28, 1995).[17]

(b) "In an interview, Ruzycki [Frank Ruzycki, the top selling agent Real Estate Agent from Berkhout's brokerage[18]] said local buyers and sellers are familiar with the long-standing concerns of soil contamination which were illustrated long before the mayor recently called for a cleanup solution to be put in place."[19] (Welland *Tribune*, April 25, 2000).[20]

29. The Trial Judge found that nickel and nickel particles are not dangerous *per se*.[21] The Trial Judge found that the nickel emitted became invisible and part of the soil.[22] There is no suggestion that the current levels of nickel in the soil in Port Colborne adversely affect human health.[23]

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17 Exhibit 4, Tab 198, "Environment Ministry Monitors Local Sites from Mossman, B" dated February 28, 1995, Exhibit Book, p. 1343, Inco Compendium, Tab 13, p. 276.

18 Berkhout Cross, v. 3, Nov. 9, 2009, p. 822, l. 3 – p. 823, l. 32, Inco Compendium, Tab 43, p. 721.

19 Exhibit 4, Tab 367, "Newspaper Article: Inco fears fail to dampen Port home sales" dated April 25, 2000, Exhibit Book, p. 2856, Inco Compendium, Tab 14, p. 277 .

20 Exhibit 4, Tab 367, "Newspaper Article: Inco fears fail to dampen Port home sales" dated April 25, 2000, Exhibit Book, p. 2856, Inco Compendium, Tab 14, p. 277; See also, Berkhout Cross, v. 3, Nov. 9, 2009, v. 3, p. 822, l. 3 – p. 827, l. 3, Inco Compendium, Tab 43, p. 721.

21 Trial Decision, para. 54, Inco Compendium, Tab 2, p. 23.

22 Trial Decision, para. 76, Inco Compendium, Tab 2, p. 30.

23 See Trial Decision, para. 35, Inco Compendium, Tab 2, pp. 17-18, where the Trial Judge noted that the 8,000 ppm standard was set to protect toddler-aged children, and all properties in Port Colborne that had soil nickel levels above 8,000 ppm have been remediated, except for the property of Ms. Smith. See also, paras. 173-175 and 211, Inco Compendium, Tab 2, pp. 57-58, 67, where the Trial Judge noted communications from the MOE that specifically stated that there was no risk to health on account of the nickel in the soil in Port Colborne. McLaughlin testified that there is no-observable effect level ("NOEL") in respect of the effect of nickel on plant growth at 2,000 ppm of nickel in soil and the lowest-observable effect level ("LOEL") is at 3,000 ppm of nickel in soil (McLaughlin Chief, v. 5, Nov. 30, 2009, p. 1384, l. 31 – p. 1386, l. 11, Inco Compendium, Tab 46, pp. 809 - 811; McLaughlin Cross, v. 5, Dec. 1, 2009, p. 1531, l. 14 – p. 1533, l. 13, Inco Compendium, Tab 46, pp. 832-834). However, plants are more sensitive to nickel in soil than humans (McLaughlin Cross, v. 5, Dec. 1, 2009, p. 1532, l. 8 – p. 1533, l. 13, Inco Compendium, Tab 46, pp. 834-835. See also, Trial Decision, para. 131, Inco Compendium, Tab 2, p. 46), hence the 8,000 ppm standard in Port Colborne. The 8,000 ppm standard was set based on conservative assumptions to ensure that an individual's nickel exposures combined would not exceed a value that is "well below any potential health risk" (McLaughlin Cross, v. 5, Dec. 2, 2009, p. 1609, l. 8 – p. 1610, l. 26; p. 1611, l. 31 – p. 1613, l. 16, Inco Compendium, Tab 46, pp. 844-845, 846-848). McLaughlin confirmed that now that the MOE's March 2002 HHRA, discussed below, has been complete and all of the affected properties in Port Colborne have been remediated, the MOE is of the view that there are no health risks to the Rodney Street community or Port Colborne (McLaughlin Chief, v. 5, p. 1433, l. 27 – p. 1434, l. 17; Inco Compendium, Tab 46, pp. 815 - 816; McLaughlin Cross, v. 5, Dec. 2, 2009, p. 1605, l. 28 – p. 1606, l. 20, Inco Compendium, Tab 46, pp. 840-841).

30. Between the summer of 2000 and the spring of 2001, the Ministry of Environment took a number of soil samples from various properties in the east side of Port Colborne, which included the Rodney Street area.[24] The result of this sampling was that 25 individual properties had nickel concentrations above 8,000 ppm.[25] The city of Port Colborne has 6057 single family residential properties.[26]

31. The MOE ordered Inco to clean up those 25 properties. Inco agreed voluntarily to perform the required remedial work but appealed the MOE's order as being overly restrictive.[27] The residents of Port Colborne also appealed the order as being too lenient.[28] After the matter came before the Environmental Review Tribunal, both parties consented to an Order from that tribunal that the appropriate intervention level was 8,000 ppm and the tribunal issued that order.[29] The intervention level as between the parties for Port Colborne properties is *res judicata* and endorsed by the expert regulator.

32. Inco cleaned up 24 of the 25 properties but, ironically, was refused permission by Ellen Smith, the representative plaintiff, to clean up her property.[30] All other remediation was

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[24] McLaughlin Chief, v. 5, Nov. 30, 2009, p. 1405, l. 17 – p. 1406, l. 11, Inco Compendium, Tab 46, pp. 813 - 814. McLaughlin testified that by the Spring of 2001 the MOE had collected soil from every property that was identified by the municipality as a property.

[25] Trial Decision, para. 173, Inco Compendium, Tab 2, p. 57; McLaughlin Cross, v. 5, Dec. 2, 2009, p. 1594, ll. 13-18, Inco Compendium, Tab 46, p. 837; See also Exhibit 4, Tabs 656, "Letter to Port Colborne Residents" dated October 30, 2001, Exhibit Book p. 6046, Inco Compendium, Tab 18, p. 316 and 709, March 2002 HHRA, p. 1, Exhibit Book, p. 7534, Inco Compendium, Tab 20, p. 340.

[26] Exhibit 21, Tab K p. 1, "Average Sale Price of MLS and Sales Data for Single Family Detached Homes", Exhibit Book, p. 14406, Inco Compendium, Tab 30, p. 486. See also, Tomlinson Cross, Dec. 3, 2009, v. 6, p. 1720, ll. 4 – 20, Inco Compendium, Tab 51, p. 1720, where plaintiff's counsel agrees that this is the number Teranet's data is organized around.

[27] Exhibit 4, Tab 648, "Media Release: Inco Limited Announces Rodney Street Remediation Underway", and Tab 655, "Ministry of the Environment News Release: Ministry of the Environment Issues Draft Order To Inco Limited To Clean Up Soil in Port Colborne", Exhibit Book, pp. 5550-5551 and pp. 6044-6045 Inco Compendium, Tabs 16, 17, pp. 312-313, 314-315; McLaughlin Chief, v. 5, Dec. 1, 2009, p. 1501, ll. 19 –23, Inco Compendium, Tab 46, p. 819.

[28] Exhibit 4, Tab 785, "Environmental Review Tribunal ("ERT")" Decision" dated September 29, 2003, Exhibit Book, pp. 8489-8494, Inco Compendium, Tab 22, pp. 452-457, McLaughlin Chief, v. 5, Dec. 1, 2009, p. 1501, ll. 24-29, Inco Compendium, Tab 46, p. 819.

[29] Exhibit 4, Tab 722 "Order of the ERT" dated March 28, 2002, Exhibit Book, pp. 8160-8167, Inco Compendium, Tab 19, pp. 324-331; McLaughlin Cross, v. 6, Dec. 2, 2009, p. 1620, ll. 6-25, Inco Compendium, Tab 46, p. 849.

[30] McLaughlin Cross, v. 6, Dec. 2, 2009, p. 1630, l. 17 – p. 1631, l. 7, Inco Compendium, Tab 46, pp. 853-854; Smith Cross, v. 2, Oct. 20, 2009, p. 331, l. 23 – p. 332, l. 5; p. 354, l. 21 – p. 355, l. 26, Inco Compendium, Tab 48, pp. 964-965, 968-969.

completed by the end of 2004.[31] The trial judge accepted that the MOE set the 8,000 ppm standard because a cleanup to this level reduces or eliminates the risk of interference with human health.[32]

The First Issue – Nuisance

33. The Trial Judge addressed the issue of liability for the tort of private nuisance at paragraph 75-103 of his Reasons. He stated:

> **[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. The second branch has also been described as personal inconvenience, or sensible personal discomfort, or injury to the plaintiff's health, comfort, or convenience [citations omitted].**

34. Between the two distinct branches, all aspects of the tort of nuisance are covered. The second branch, *i.e.* significant interference with the beneficial use of the premises, protects persons from nuisances which do not cause material physical damage, such as noise and odour.

35. The plaintiff expressly disavowed any claim on the second branch of nuisance. Indeed, there was no evidence of any unreasonable interference. 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."[33]

36. Even though the second branch of nuisance is not in issue, it is helpful to analyze and understand its purpose as it assists in delineating the first branch: material physical damage. The primary function of the law of private nuisance is to strike an appropriate balance between the defendant's interest in using its property as it pleases and the plaintiff's interest in the use and enjoyment of her land. As stated by the Supreme Court of Canada:

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31 Trial Decision, para. 181, Inco Compendium, Tab 2, p. 59; McLaughlin confirmed that all remediation was done according to the MOE's protocols and were approved by the designated MOE personnel to the satisfaction of the MOE (McLaughlin Cross, v. 6, Dec. 2, 2009, p. 1638, ll. 17-21, Inco Compendium, Tab 46, p. 855.

32 Trial Decision, para. 86, Inco Compendium, Tab 2, p. 33.

33 Trial Decision, para. 76, Inco Compendium, Tab 2, p. 30.

> **… the very existence of organized society depended upon a generous application of the principle of 'give and take, live and let live'. It was therefore appropriate to interpret as actionable nuisances only those inconveniences that materially interfere with ordinary comfort as defined according to standards held by those of plain and sober tastes. In effect the law would only intervene to shield persons from interferences to their enjoyment of property that were unreasonable in light of all the circumstances.[34]**

37. As a result of striking the appropriate balance between uses of land by neighbours, not every interference with comfort and enjoyment of land is actionable.[35] To establish the tort of private nuisance, the plaintiff must demonstrate an unreasonable interference with use and enjoyment of land, in the sense that the interference is "material", "excessive" or "substantial".[36] An "unreasonable interference" must be "intolerable" to the ordinary person to constitute a nuisance in law.[37] Mere inconvenience and discomfort fall short of this level,[38] and compensation will not be awarded for immaterial or trivial annoyances.[39]

38. When determining whether an activity constitutes a nuisance,

> **...[T]he character of the locality in question is of importance in determining the standard of comfort which may reasonably be claimed by an occupier of land. Considerations that limit the ambit of the tort of nuisance include the severity of the harm, the duration of the harm, the intrusiveness of the harm, the character of the neighbourhood, the nature and utility of the defendant's conduct, and the question whether the plaintiff displayed abnormal sensitivity.[40]**

39. The Trial Judge found that the nickel particles emitted onto the residential properties "have become part of the soil on these properties".[41] This finding that the nickel became part of the

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34 *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181 at 1191; See also, *Walker v. Pioneer Construction Co.* (1975), 8 O.R. (2d) 35 at 38 (H.C.J.) [Emphasis added.]

35 *Grace v. Fort Erie (Town)*, [2003] O.J. No. 3475 per Crane J. at para. 65.

36 *Muirhead v. Timbers Brothers Sand & Gravel Ltd.*, [1977] O.J. No. 1748 (H.C.J.) at para. 26; *Walker, supra* at 48; *Argo v. Degagne*, [2006] O.J. No. 2595 at para. 20-24 (Sup. Ct. J.) ["Argo"].

37 *St. Lawrence Cement Inc. v. Barrette*, [2008] 3 S.C.R. 392 at para. 77 ["Barrette"].

38 *Muirhead, supra* at paras. 21.

39 *Barrette, supra* at para. 77.

40 *Walker, supra* at 38; *Tock, supra* at para. 1191; *Grace v. Fort Erie, supra* at para. 68.

41 Trial Decision, para. 76, Inco Compendium, Tab 2, p. 30.

soil is clear proof that there was no physical damage to anyone's property. Moreover, there was no suggestion that the levels of nickel in Port Colborne soil are toxic or have any deleterious effect on health.[42] Nevertheless, the Trial Judge concluded:

> **[76]...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 these properties. I accept the submission that this constitutes physical damage to the class members' properties.**[43]

40. It is respectfully submitted that the Trial Judge erred in law in finding that the mere presence of nickel that has become part of the soil, which he found was not a dangerous substance, can constitute physical damage. To accept such determination of physical damage is to determine that virtually every emitting industrial, commercial or everyday activity in Canada – from manufacturing plants to highways, buses, cars, fireplaces and campfires – constitute physical damage to someone's property.

41. The first branch of nuisance relied on by the Trial Judge requires that the physical damage be material physical damage. Material is an adjective that qualifies physical damage. According to the Oxford Dictionary, it means "important" or "essential".[44] The Trial Judge did not determine that the physical damage was material by finding that it caused a depression, or a mound, or rendered the soil toxic. He did not find, as Farley J. required in *Mortgage Insurance Co. v. Innisfil Landfill*,[45] that there be a material change to the physical characteristics of the property or premises. The Trial Judge found that there was material physical damage because over a 10 year

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42 As noted at footnote 23 above, the MOE has confirmed that there is no risk to health at nickel levels lower than 8,000 ppm, and there are no properties in Port Colborne (with the exception of the property of Ms. Smith) with nickel levels above 8,000 ppm. The 8,000 ppm standard is ultra-conservative and intended to protect toddler-aged children, and assumes one lives their entire life as a toddler.

43 *Ibid.* [Emphasis added.]

44 *Canadian Oxford Dictionary*, 2d ed., *s.v.* "material".

45 *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.* (1996), 2 C.P.C. (4th) 143 (Gen. Div.) at 155.

period Port Colborne property values failed to appreciate by 4.35% relative to Welland. In other words, the Trial Judge found material physical damage because of an insignificant comparative failure to appreciate. Material physical damage is not equivalent to economic loss. Material physical damage cannot be established by finding that there were immaterial economic damages.

42. One of the alternative arguments Inco raised at trial was that there may be material physical damage if the aggregate nickel deposit on any particular property exceeded 8,000 ppm, the MOE's intervention level:

> **[85] Inco submits that the damage to any class member's property is only material if more than 8,000 ppm of nickel is found in the soil on the property. This was the standard set by the MOE in the RSA HHRA, finalized in March 2002, and later confirmed on appeal to the Environmental Review Tribunal. Because 24 of the 25 properties with nickel levels exceeding 8,000 ppm have been remediated, and the remaining property owner has refused remediation, Inco submits that there is no physical property damage that is material, and thus the plaintiff is unable to prove nuisance.**

43. The Trial Judge rejected the MOE standard as applicable for civil liability. The Trial Judge misunderstood Inco's argument and made an error of law. The question is whether the application of the legal standard of materiality, which is a necessary element of a nuisance claim based on physical damage, can rest on a set of events which are in fact immaterial.

44. Nickel in soil in Port Colborne has not caused, nor will it cause any harm. The MOE has set a standard of 8,000 ppm for soil nickel levels in Port Colborne and there is no residential property in Port Colborne with a nickel level higher than 8,000 ppm (with the exception of the property of Ms. Smith).[46] The 8,000 ppm standard was derived from very conservative scientific

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[46] Exhibit 4, Tab 709, March 2002 HHRA confirms that the standard for soil nickel levels in Port Colborne is 8,000 ppm. The Trial Judge found that "the final RSA HHRA report set a soil intervention level for nickel at 8,000 ppm 'to protect toddler aged children' and concluded that the nickel in the soil should not be a risk to adults or other age groups", Trial Decision, para. 86, Inco Compendium, Tab 2, p. 33. The March 2002 HHRA also confirmed that residents of Port Colborne receive the majority of their nickel exposure from food. See March 2002 HHRA, part B, p. 51, Exhibit Book, p. 7790, Inco Compendium, Tab 20, p. 424; See also, McLaughlin Cross, v. 5, Dec. 2, 2009, p. 1604, ll. 8-10, Inco Compendium, Tab 46, p. 839. Testing done by Inco pursuant to the MOE's order confirmed that no properties north of the Rodney Street area had nickel levels higher than 8,000 ppm (McLaughlin Cross, v. 5, Dec. 2, 2009, p. 1602, ll. 8 - 4, Inco Compendium, Tab 46, p. 838) other than the property of Ms. Smith (McLaughlin Cross, v. 6, Dec. 2, 2009, p. 1630, l. 17 – p. 1631, l. 7, Inco Compendium, Tab 46, pp. 853-854).

assumptions designed to ensure that an individual's total lifetime nickel exposure would be well below any potential health risk.[47] The 2002 MOE Human Health Risk Assessment ("HHRA") which confirmed the 8,000 ppm standard has been peer reviewed by a panel of international experts[48] and is considered "leading-edge science".[49]

45. Not only did the MOE set the standard, but the residents accepted that standard and it was on that basis that Environmental Review Tribunal issued a remediation order which Inco had already complied with.[50] As between the parties, the Order is *res judicata*.

46. Furthermore, the Trial Judge stated "the MOE merely set the standard for mandatory cleanup of the property, presumably because a cleanup to the level of 8,000 ppm reduces or eliminates the risk of interference with human health."[51] If there is no risk of interference with human health, as the Trial Judge accepts, and if there is no visible nickel on anyone's property, there cannot be any physical damage let alone material physical damage.

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47 The 8,000 ppm standard is derived from ultra-conservative scientific assumptions designed to ensure that an individual's exposure to nickel is well below any potential health risk. It is based on a standard intended to protect toddlers who are most likely to ingest soil and assumes that the entire population continues with a toddler's exposure to nickel over a 70 year lifespan. McLaughlin Cross, v. 5, Dec. 2, 2009, p. 1609, ll. 8-15; p. 1612, l. 20 – p. 1613, l. 17, Inco Compendium, Tab 46, pp. 844, 847-848; Exhibit 4, Tab 709, March 2002 HHRA, Part A, p, 3 and Part B, p. 13, Exhibit Book, pp. 7536 and 7748, Inco Compendium, Tab 20 , pp. 352, 398. See also, Exhibit 4, Tab 660, "Letter to Port Colborne Residents", dated October 30, 2001 regarding the MOE HHRA, Exhibit Book, p. 6046, and Exhibit 63, "MOE Fact Sheet: Port Colborne Soil Investigation and Human Health Risk Assessment" dated March 28, 2002, Exhibit Book pp. 6046-6052 and 15219-15222 and Inco Compendium, Tabs 18, 21, p. 316, 448-451. See also, Smith Cross, v. 1, Oct. 19, 2009, p. 255, l. 29 – p. 256, l. 30, Inco Compendium, Tab 48, pp. 942-943, where Ms. Smith confirmed that she understands the standard to assume that an individual lives his or her entire life as a toddler, and that it assumes a 70-year lifetime exposure.

48 McLaughlin Cross, v. 5, Dec. 2, 2009, p. 1604, l. 23 – p. 1605, l. 27, Inco Compendium, Tab 46, pp. 839-840; Exhibit 4, Tab 655, MOE News Release dated October 30, 2001 – "Ministry of the Environment Issues Draft Order to Inco Ltd. to Clean Up Soil in Port Colborne", Exhibit Book, p. 6044, Inco Compendium, Tab 17, pp. 314-315.

49 McLaughlin Cross, v. 5, Dec. 2, 2009, p. 1607, l. 19 – p. 1609, l. 3, Inco Compendium, Tab 46, pp. 842-844. McLaughlin confirmed that he and his co-author published the March 2002 HHRA in a leading international journal, and presented the March 2002 HHRA at several international conferences, and received very favourable reaction. The Rodney Street HHRA is considered "leading edge science", and nothing from the worldwide presentation of the March 2002 HHRA has caused McLaughlin and his colleague to change the science or the protocols employed to produce the March 2002 HHRA, or the March 2002 HHRA's conclusion. Exhibit 4, Tab 660, "Letter to Port Colborne residents" dated October 30, 2001, Exhibit Book, p. 6064, Inco Compendium, Tab 18, p. 316.

50 Exhibit 4, Tab 722**,** "Order of the ERT" dated March 28, 2002, Inco Exhibit Book, pp. 8160-8167; Inco Compendium, Tab 19, pp. 324-331.

51 Trial Decision, para. 86, Inco Compendium, Tab 2, p. 33.

47. Ultimately, the Trial Judge states that, "it is for the court, not the MOE, to determine if the nickel contamination is material".[52] But the Trial Judge did not indicate what amount of nickel would constitute physical damage or the method for determining such an amount. It would therefore appear, as the Trial Judge stated at paragraph 76, that the very few nickel particles which have become part of the soil are sufficient to constitute physical damage for the purpose of the tort of nuisance.

48. As discussed below in relation to causation and damages, the Trial Judge's trivialization of the materiality standard directly led to erroneous and unreasonable outcomes.

Consideration of External Factors

49. While a failure to adhere to regulatory standards might have been evidence of negligence, the corollary is also true; namely, that compliance with the regulatory standard is acceptable community activity.[53]

50. In paragraphs 78 to 82 of his Reasons, the Trial Judge stated that a consideration of external factors and a balancing of those factors with the alleged nuisance is only required where the second branch of nuisance, unreasonable interference, is relied on. The Trial Judge indicated that since the sole reliance in this case was on the first branch, namely, material physical damage, external factors such as the character of the neighbourhood, the utility of the defendant's conduct and the plaintiff's sensitivity to the harm need not be balanced or considered.

51. If the Trial Judge is correct in his proposition, it is precisely because the first branch requires material physical damage, that external factors are irrelevant. Material physical damage must be established by showing a substantial change to the physical characteristics of the land or a substantial deleterious effect to the land requiring a prohibition of the activities of the neighbouring

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[52] Trial Decision, para. 87, Inco Compendium, Tab 2, pp. 33-34.

[53] The plaintiff abandoned any claim based on negligence. See Order of Cullity J. dated June 29, 2010, Inco Compendium, Tab 6, pp. 170-175.

property owner that damaged the land and requiring remediation to return the land to its former state.[54] No such characteristics were found in this case.

52. At paragraph 81 of his decision, the Trial Judge also acknowledged that the decision of the Supreme Court of Canada in *Tock*:

> **[81]… implies that a duty may still exist to consider these external factors in a nuisance claim based on material physical damage to property, although with great circumspection.**

The Trial Judge found that if he had to consider these external factors, the severity of the damage, the extent of the damage and the number of residents affected by the damage as a result of emissions from a private, profit-oriented business, far outweigh the utility to the community of Inco's business operations.[55]

53. It is respectfully submitted that the Trial Judge erred in law in his characterization and consideration of the external factors. The severity of the physical damage in Port Colborne consists solely of harmless invisible nickel particles that have blended harmlessly with the soil. The quantity that now exists in Port Colborne, accumulated over 66 years, is less than the intervention level set by the expert regulator. The Trial Judge does not suggest any other quantity or standard and must be taken to have equated severity with the mere deposition of a few particles. The Trial Judge appears to have been overly influenced by the fact that Inco conducted its operations as a nickel refinery for profit and to have forgotten or disregarded that some 2,000 persons worked at the refinery by choice, who received a pay cheque, bought and occupied houses in the city of Port Colborne, raised families and educated their children.

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[54] Any remediation that was required in Port Colborne has been completed and approved by the MOE. See Dave McLaughlin Cross, v. 6, Dec. 2, 2009, p. 1638, ll. 17-21, Inco Compendium, Tab 46, p. 855.

[55] Trial Decision, paras. 81 and 83, Inco Compendium, Tab 2, pp. 31-32.

54. There is no nuisance in this case. The nickel emissions have had no impact on the health of Port Colborne residents.[56] The nickel emissions have had no impact to the air quality in Port Colborne and the nickel in Port Colborne's air is currently at the same level as the rest of Ontario and Canada, and has been since at least 2001.[57] When she purchased her house at 91 Rodney Street, Ms. Smith, the plaintiff, was aware that she was moving next to an industry.[58] Ms. Smith also agreed that when she chose to live next to an industrial plant as her neighbour, she knew she was going to have to deal with valve noises, traffic noises and other consequences of such a facility.[59] Ms. Smith agreed that even today the Rodney Street area could be an attractive place for a young couple to buy a house just like it was for her and her husband when they were starting off.[60] No other class member testified.

55. The plaintiff introduced no evidence that other class members were subjected to an unreasonable interference to their land as a result of elevated nickel levels. To the contrary, Ms. Smith testified that prior to the year 2000, none of her neighbours had ever complained to her about any activities of the plant affecting their properties.[61]

Damages Not Available Absent a Sale or Attempted Sale of Property

56. As the Court of Appeal held in *Butt v. City of Oshawa*,[62] damages for loss of property value cannot be awarded in a nuisance case unless the plaintiff can prove, before the court

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[56] Exhibit 4, Tab 867, "Report titled: CHAP Studies A and C Integration: A Report to the Technical Subcommittee of the Public Liaison Committee for the City of Port Colborne" dated March 10, 2009, p. 29, Exhibit Book, p. 21632, Inco Compendium, Tab 23, p. 459; Smith Cross, v. 1, Oct. 20, 2009, p. 284, ll. 7-26; p. 288, l. 3 – p. 292, l. 15, Inco Compendium, Tab 48, pp. 944, 945-949. See also paras. 29-32 above.

[57] McLaughlin Chief, v. 5, Dec. 1, 2009, p. 1522, l. 26 – p. 1523, l. 30, Inco Compendium, Tab 46, pp. 828-829; Trial Decision, para. 178, Inco Compendium, Tab 2, p. 58.

[58] Smith Cross, v. 1, Oct. 19, 2009, p. 192, l. 17 – p. 194, l. 29, Inco Compendium, Tab 48, p. 934 – 936.

[59] Smith Cross, v. 1, Oct. 19, 2009, p. 193, l. 17 – p. 194, l. 29, Inco Compendium, Tab 48, pp. 935 – 936.

[60] Smith Cross, v. 1, Oct. 19, 2009, p. 197, ll. 6-9, Inco Compendium, Tab 48, p. 939.

[61] Smith Cross, v. 1, Oct. 19, 2009, p. 195, ll. 15-18, Inco Compendium, Tab 48, p. 937.

[62] (1926) 59 O.L.R. 520 (C.A.) ["Butt"]; *Godfrey v. Good Rich Refining Co.*, [1939] O.R. 106 (H.C.J) aff'd [1940] O.R. 190 (C.A.) ["Godfrey"].

assesses damages, an actual sale or an aborted attempt to sell the property. In *Pyke v. Tri Gro Enterprises*,[63] Ferguson J. articulated the rationale for this proposition as follows:

> **...[D]amage has not occurred unless one these two facts [namely, an actual sale or an aborted attempt to sell] exist and since nuisance is a continuing tort, it is not appropriate to assess damages until the tort causes the loss which might never happen if the plaintiffs never sell their land or attempt to sell it.[64]**

57. There have been approximately 1,800 sales of residential properties in Port Colborne since September 2000. For the former owners of these properties to establish a loss, they would have to come forward and demonstrate some diminution in value of their own homes at the time they sold the properties caused by the alleged announcement. This is consistent with the Reasons of the Court of Appeal certifying this action as a class proceeding:

> **The appellant has staked his claim on the propositions that public knowledge of nickel contamination in the Port Colborne area has had a detectable impact on property values in that area and that as the source of the contamination, Inco must pay damages to owners whose property values have fallen. As the appellant put the issue in para. 22 of his factum, "<u>what has been 'overlaid' on each property's value is a decline associated with the announcement of high levels of contamination</u>". The appellant may or may not be able to demonstrate these propositions, but they constitute a substantial element of each class member's claim. <u>If the appellant is able to demonstrate this effect, the only individual issue remaining will be for each class member to show the amount of the effect on his or her property</u>.[65]**

58. Canadian courts have rejected attempts to rely on the estimated market value of unsold properties as evidence of actual damages in cases where nuisance is alleged.[66] This principle is particularly applicable where, as in this case, there is no ongoing interference diminishing the value of the plaintiff's property.[67] As stated by Farley J. in *Mortgage Insurance Co. Of Canada v.*

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63 [1999] O.J. No. 5025 at para. 5 (Sup. Ct.) aff'd (2001), 55 O.R. (3d) 257 (C.A.) (on a statutory interpretation issue; question of damages not addressed) leave to appeal refused (2002) 169 O.A.C. 199 (S.C.C.).

64 *Ibid.* at para. 5.

65 *Pearson v. Inco* (2006), 78 O.R. (3d) 641 (C.A.) at para. 70. [Emphasis added.].

66 *Butt*, *supra*; *Godfrey*, *supra*.

67 *Godfrey* (C.A.), *supra* at 193; *Macievich v. Anderson (No. 2)*, [1952] 3 D.L.R. 204 (Man. K.B.). at 207-208 ["*Macievich*"].

Innisfil Landfill Corp., "[n]o special damages (for alleged devaluation of property) can be advanced on the basis of mere speculation that a prospective purchaser might be apprehensive about the impact of the alleged nuisance on the property".[68]

59. The Trial Judge purports to answer this proposition by stating that *Butt* and the cases that followed it have been misunderstood and misapplied for many years. He also suggests that the proposition in *Butt* and the cases that followed it refer only to the second branch of nuisance and, furthermore, that the proposition only applies where the nuisance is temporary not permanent.[69]

60. It is respectfully submitted that the Trial Judge is in error. It is not logical to accept that the *Butt* line of cases apply only to the second branch of nuisance and not to the first. If liability is established on either branch, the same principle must apply: namely, if the plaintiff wants money for the diminution in property value, she must first prove damages by selling her house.

61. Nor is it logical to draw a distinction between temporary and permanent damage. Indeed, if the damage is permanent, it makes for a more compelling requirement that the property be either remediated, in which case there is no loss to property value, or be sold, to establish the loss.

62. The best reflection of the Trial Judge's illogic is the plaintiff's own conduct which is inconsistent with any belief that nickel in soil gives rise to any environmental or health concern. The accumulation of nickel on Ms. Smith's property exceeds 8,000 ppm. Inco consented to an order to remediate her property by digging up the soil and replacing it with fresh soil. Since 2001, Inco has stood ready, willing and able to complete the remediation.[70] Had that occurred, she would have no compensable loss. Ms. Smith refused, despite her extensive knowledge about nickel on her

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68 *Mortgage Insurance*, *supra* at 155.

69 *Huston v. Lloyd Refineries Ltd.*, [1937] O.W.N. 53 (H.C.J.); *Beckett v. Midland Railway Company* (1867), L.R. 3 C.P. 82.

70 Inco committed to voluntarily clean up all affected properties in April 2001, and remediated the first properties in the Fall of 2001. Smith Cross, v. 1, Oct. 20, 2009, p. 320, l. 7 – p. 322, l. 19, Inco Compendium, Tab 48, pp. 961 – 963.

property. Rather than have her property remediated, she was content to live with an accumulation of nickel that exceeds the 8,000 ppm intervention level and not sell her home. Whether or when the property is to be sold or at what price is speculative. Her example exemplifies what is wrong with the Judgment – the first branch of the tort of nuisance requires material, physical harm. It is not logical that a family with small children would refuse remediation and continue to live on a property where there was a real environmental or health risk. Thus, there is no material, physical harm but nevertheless there is an award of damages.

63. The Trial Judge stated:

> **[101] In the present case, even if the soil is remediated, all of the nickel will not be removed from the soil. The nickel particles will remain in the soil to some degree forever. Thus, I find that the damage to the class members' properties is permanent.**

In fact, the remediation of the properties conducted by Inco removed all or substantially all of the nickel by replacing the topsoil from the front and back yards of the properties.[71] Because the Trial Judge has not addressed the standard of materiality, it is obvious that he views any nickel, whether two or three or fifteen or 200 ppm nickel, as material physical damage and material physical damage that is permanent. Of course, as the MOE's witness noted, this quantity of nickel particles is emitted onto the property by cars that drive by.[72] The Trial Judge apparently felt the need, wrongly, to find permanent damage in order to avoid the requirement that damages only flow from a sale of property.

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71 Trial Decision, para. 182, Inco Compendium, Tab 2, p. 59. The Trial Judge summarized the remediation process as follows: "Remediation involved removal of all of the soil in the front and back yards of the properties. Large excavators, dump trucks, many smaller machines, and many labourers were regularly on the scene. As the soil was removed the level of nickel in the remaining soil was tested at various depths. Once the nickel level in the remaining soil was less than 8,000 ppm, the contaminated soil was taken from the property and replaced with clean soil". As noted above, McLaughlin confirmed that all remediation was done in accordance with MOE standards and approved by the MOE (Dave McLaughlin Cross, v. 6, Dec. 2, 2009, p. 1638, ll. 17-21, Inco Compendium, Tab 46, p. 855).

72 McLaughlin Cross, v. 6, Dec. 2, 2009, p. 1628, ll. 3-16, Inco Compendium, Tab 46, p. 851.

The Second Issue -- Rylands v. Fletcher

64. The Trial Judge also addressed the issue of liability under the strict liability tort in *Rylands v. Fletcher* at paragraphs 43-69 of his Reasons for Judgment.

65. The elements of that cause of action are: (1) the non-natural use of the land by the defendant; (2) an escape from the land of something likely to do mischief; and (3) a single escape or a series of related escapes that cause damage.

66. The Trial Judge found that Inco's refining activities constituted a non-natural use of land because the nickel was not naturally there. The Trial Judge described Inco's refining activities as follows:

> **[53] In the present case, Inco brought nickel onto the land for the purpose of refining it. Moreover, once the nickel was brought onto the land, Inco processed or refined it, thereby creating airborne nickel particles. The nickel was not naturally on the land, and the nickel particles were not naturally on the land or in the air over the land.**

67. The Trial Judge misapplied the doctrine in *Rylands v. Fletcher* to the facts of this case and fundamentally misconstrued the policy reason behind imposing strict liability under this tort. Strict liability under the tort in *Rylands v. Fletcher* is sparingly applied and only when the plaintiff has firmly established all four of the following prerequisites:

(a) the activity on the defendant's land is non-natural and likely to do mischief if the materials escape; and

(b) the activity on the defendant's land is not proper for the general benefit of the community; and

(c) there is a single escape or related series of escapes of a dangerous substance; and

(d) the escape of the dangerous substance causes physical damage to the neighbouring plaintiff's land.

68. In this case, none of these prerequisites has been established.

69. The Trial Judge found that nickel particles are not dangerous *per se*.[73] The emission (escape) in regulated quantities was never likely to do mischief. The word "mischief" in the authorities means increased danger, as opposed to the mere possibility of mischief or harm being caused in the case of an escape.[74] Neither was present in Port Colborne. As the Trial Judge stated:

> **[333] … Moreover, throughout its history Inco has generally complied with the MOE regulations that governed the Inco operations. In that regard, Inco reduced emissions of nickel from its refinery over time, and eventually ceased nickel emissions altogether in 1984.**

70. Inco's use of its land was "a use as is proper for the general benefit of the community". Inco operated a refinery for a 66 year period in an industrial community where a large number of the residents of the community were employed by the refinery. Inco's nickel refining was a permitted and approved industrial activity. As the Trial Judge stated:

> **[333] Inco engaged in a lawful business operation in Port Colborne for many years, and provided gainful employment to many people, including many of those who are members of the class in this action.**

71. Operating a nickel refinery is <u>not</u> a "non-natural use" under the rule in *Rylands v. Fletcher* for the following reasons:

(a) Port Colborne is an industrial community: Operating a refinery in an industrial community is not a non-natural use. During its operation, the refinery was an accepted fact of life in Port Colborne. Port Colborne arguably would not exist in its current form but for the presence of the Inco refinery. The refinery pre-existed most of Port Colborne. Moreover, the refinery was surrounded by other industry and was located in the industrial section of the city.

(b) Inco operated its refinery in accordance with the accepted and regulatory standards applicable during its time of operation: Whether a use is "non-natural" is judged

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73 Trial Decision, para. 54, Inco Compendium, Tab 2, p. 23.

74 Allen M. Linden and Bruce Feldthusen, *Canadian Tort Law* (8th ed., 2006) at p. 532.

according to the time in which the use occurred. The refinery cannot be regarded as giving rise to "increased danger" when it consistently operated in accordance with accepted and applicable regulatory standards;[75]

(c) Nickel refining did not create any danger for the citizens of Port Colborne;

(d) The air quality in Port Colborne is well within accepted standards and is comparable to the air quality in the rest of Canada. In the ten years of air-monitoring data in Port Colborne obtained by the MOE, there has never been an exceedance of the applicable air quality standards;[76] and

(e) Inco's refinery has significantly benefitted the Port Colborne community: As the plaintiff acknowledged, Inco has always been the largest or a significant employer in Port Colborne and has been a substantial contributor to the community.[77]

72. The Trial Judge bases his finding of "non-natural use of the land" on a sentence by Lord Moulton in *Richards v. Lothian*, which he sets out at paragraph 51 of his Reasons. Regrettably, the Trial Judge does not set out the complete sentence even though he puts it in quotation marks. The complete sentences are below, with the words omitted by the Trial Judge underlined:

> **It is not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land <u>or such a use as is proper for the general benefit of the community</u>.[78]**

73. As the Supreme Court of Canada stated in *Tock*, the notion of non-natural user is a flexible concept that is capable of adjustment to the changing patterns of social existence. The Supreme Court of Canada stated:

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[75] McLaughlin Cross, v. 5, Dec. 1, 2009, p. 1523, l. 30 – p. 1525, l. 8, Inco Compendium, Tab 46, pp. 829-831.

[76] McLaughlin Chief, v. 5, Dec. 1, 2009, p. 1493, ll. 4-29, Inco Compendium, Tab 46, pp. 915-916; McLaughlin Cross, Dec. 1, p. 1523, ll. 23-28, Inco Compendium, Tab 46, pp. 829. 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.

[77] Smith Chief, v. 1, Oct. 15, 2009, p. 10, ll. 19 – 32, Inco Compendium, Tab 48, p. 932.

[78] *Rickards v. Lothian*, [1913] A.C. 263 (P.C.) at 280, quoted in *Tock* at 1189.

The Rule in Rylands v. Fletcher

> **As noted above, the Court of Appeal held that the trial judge erred in holding that the construction of a sewer system would trigger the application of the rule in *Rylands v. Fletcher* on the ground that the sewer constituted a non-natural user of land. I share the conclusion of the Court of Appeal.**
>
> **The definitive statement of the meaning to be ascribed to Lord Cairn's qualification in *Rylands v. Fletcher*, at pp. 338-39, that a strict liability would only attach in respect of 'non-natural user' of land is generally agreed to be that of Moulton, L.J. in *Rickards v. Lothian*, [1913] A.C. 263, at p. 280. Moulton L.J. thus expressed himself:**
>
> **It is not every use to which land is put that brings into play that principle. It must be some special use brining with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community.**
>
> **The courts, as noted by Fleming, *The Law of Torts*, 6th ed., at p. 308, have, on the basis of this qualification, interpreted the notion of non-natural user as a flexible concept that is capable of adjustment to the changing patterns of social existence.**[79]

74. It is respectfully submitted, that the operation of the refinery for 66 years, within industry and regulatory guidelines, and to the benefit of the community is not a non-natural use of the land. Otherwise, patterns of social existence, instead of changing, would have been arrested in the pre-industrial era.

75. Further, the indirect deposition of nickel in accumulations which are invisible on the neighbouring properties, which did not impair the air quality of the City of Port Colborne, which did not increase the risk to adverse health consequences, are affirmative statements that no damage was caused. The strict liability tort of *Rylands v. Fletcher* addresses dangerous activities that give

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[79] *Tock*, at 1189. [Emphasis added.] See also, *Read v. Lyons & Co.*, [1947] 1 A.C. 156 (H.L.) where Lord MacMillan stated at p. 174 "I have already pointed out that nothing escaped from the defendants' premises and were it necessary to decide this point I should hestitate to hold that in these days and in an industrial community it was a non-natural use of land to build a factory on it and conduct there the manufacture of explosives."

rise to disaster.[80] In this case, there was no physical damage to the neighbouring land nor any harm to the health of the neighbours.

76. The Trial Judge found Inco was strictly liable under the tort in *Rylands v. Fletcher* on the basis of daily, continued lawful escapes over a 66 year period. *Rylands v. Fletcher* only applies to a single disastrous escape or a series of related disastrous escapes. It does not apply to a continuing state of affairs, and particularly a state of affairs that was monitored and permitted by the regulatory authority.

77. The Trial Judge ignored the Canadian and English authorities stating that the *Rylands v. Fletcher* doctrine should be restricted to a single disastrous escape.[81] He stated that instead, he was turning to "first principles", but ignored the fundamental reason why strict liability is imposed under the doctrine in *Rylands v. Fletcher*.

78. Moreover, the Trial Judge confused the concept of "multiple escapes" with a "continued escape". It is true that *Rylands v. Fletcher* would impose liability for multiple, related disastrous escapes, as was the case in *Colour Quest Ltd. v. Total Downstream*,[82] the decision cited by the Trial Judge in support of liability for a continuous escape (a case that was not in either party's authorities).[83] That was not a case about an ongoing and permitted escape. *Colour Quest* involved a series of explosions, and liability under *Rylands v. Fletcher* was admitted. The issue in that case was whether an "isolated escape" such as the explosions that gave rise to liability under

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80 Accordingly, foreseebility is an element of the tort: *Cambridge Water Co. v. Eastern Counties Plc.*, [1994] 2 A.C. 264 (H.L.) at 304.

81 *Burnaby (City) v. Thandi*, [2005] B.C.J. No. 2284 (S.C.) at paras. 140-142, quoting *Salmond on the Law of Torts*; *Cambridge Water Co. v. Eastern Counties Plc.*, [1994] 2 A.C. 264 (H.L.) at 306; *Transco plc v. Stockport MBC*, [2004] 1 All E.R. 589 at para. 33 (H.L.) ["Transco"].

82 2009 WL635097, [2009] 2 Lloyd's Rep. 1 (U.K.H.C.) ["Colour Quest"].

83 Trial Decision, para. 63, Inco Compendium, Tab 2, p. 26.

Rylands v. Fletcher could also constitute a private nuisance, given that a nuisance typically arises from a "state of affairs".[84]

79. Ultimately, the Trial Judge imposed liability under what he termed "an emerging principle of strict liability for abnormally dangerous activities based on *Rylands v. Fletcher*".[85] To summarize this principle, the Trial Judge set out a passage from Linden & Feldthusen (8th ed., 2006) at page 540:

> **[65]...Pursuant to this principle, there are a limited number of activities so fraught with abnormal risk for the community that the negligence standard is felt to provide insufficient protection against them. Consequently, these extra-hazardous activities should be governed by a stricter form of liability that insists on compensation for all the losses they generate, even when they are conducted with reasonable care.**

80. The Trial Judge found that "this excerpt correctly summarizes the broad fundamental principle that was enunciated in the *Rylands* Case".[86] He found that a strict liability standard applies with respect to these "abnormally dangerous activities" and that this concept applies "whether there is an isolated escape or a long term escape of a *dangerous substance*".[87]

81. Accordingly, the Trial Judge erred in failing to apply his own articulation of *Rylands v. Fletcher* to the facts of this case. There is no evidence that Inco's permitted and approved industrial activities that continued for 66 years were "abnormally dangerous", and the Trial Judge specifically found that nickel is not a dangerous substance. The nickel that "escaped" was through a stack in regulated quantities, remains invisible and causes no harm to land and no increased risk to health.[88] Inco's industrial activities were neither one of those limited activities that was "so fraught

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84 *Colour Quest*, at pp 60-62.

85 Trial Decision, para. 65, Inco Compendium, Tab 2, p. 27.

86 *Ibid.* para. 66.

87 *Ibid.*

88 As noted at footnotes 23, 46 and 47 above, the MOE has confirmed that there is no risk to health in Port Colborne with soil nickel levels that are less than 8,000 ppm, and there is no property in Port Colborne with a nickel level that is higher, with the exception of the representative plaintiff, Ms. Smith.

with abnormal risk for the community that the negligence standard …" was insufficient protection nor was it an "extra-hazardous" activity.

The Third Issue – Damages

Overview

82. The Trial Judge made three fundamental and erroneous assumptions: that (i) any amount of nickel deposition causes material physical damage; (ii) that a small 4.35% difference over 10 years in real estate value appreciation between Welland and Port Colborne is material, despite the lapse of 26 years from the closure of the nickel refinery and 10 years after a full public study and discussion of the issues; and (iii) that this small difference is caused by Inco despite an absence of evidence. The consequences of these errors to Inco as manifested in the damages award are severe and their precedent value for modern society is alarming.

83. Three main sets of data were used to generate results in this case. The Trial Judge ranked them in order of reliability as follows:

(a) Municipal Property Assessment Corporation ("MPAC") data – this is the data upon which the Trial Judge based his damage award. The results from this data showed that Port Colborne outperformed or kept pace with Welland in all time periods except one. This one outlier time period is the one that the Trial Judge relied upon. Both of the plaintiff's experts agreed that the data for this time period had an obvious problem: MPAC had classified low-value vacant lots as residential properties at some times but not others. As one of the plaintiff's experts acknowledged, any failure to account for this problem would artificially depress Port Colborne's results.

(b) Multiple Listing Service ("MLS") data – this data showed that Port Colborne had outperformed or kept pace with Welland.

(c) Teranet's data sets – the Trial Judge found that this data consisted of less than 20% of property sales in Port Colborne, and was fundamentally flawed in many ways. It contained far too many low-value properties in later years (skewing results downwards) and many related party sales. The well-known common-sense principle of "garbage in-garbage out" applies – the error-riddled data was incapable of producing reliable results.

84. The Trial Judge found there was a 4.35% difference over the years 1999 to 2008 consisting of the difference in the appreciation of average residential property values between Welland and Port Colborne. As set out at paragraph 298:

> **[298] Thus, I find that Port Colborne residential property values would have increased from 1999 to 2008 by 59.5% plus 4.35%, or 63.85%. The average residential property assessment in Port Colborne in 1999 was $103,395, and therefore if Port Colborne had kept pace with Welland the average residential property value in Port Colborne would be $169,412 as of 2008. This equates to a loss on average of $4,514 per property for 7,965 residential properties or a total of $35,954,010, which I will round off to $36,000,000.**

85. The Trial Judge found a loss on average of $4,514 per property for 7,965 residential properties. In paragraph 299 of his Reasons, he noted that his calculation covered an area larger than the physical boundaries of the class defined by the plaintiff and included more residential properties than the class area defined in this proceeding. The Trial Judge not only made no adjustment but awarded the excess amounts to the class. The more accurate number of class members put forward by the plaintiff is **6057**.[89] Therefore, a more accurate quantification of damages based on the Judge's assessment is $27,341,298.

86. With respect to the Rodney Street area ("RSA"), it is not disputed that there are approximately 300 residential properties. Based upon the Trial Judge's assessment, the

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[89] This is the number of single family detached properties in Port Colborne considered by Teranet. See Exhibit 21, Tab K, p. 1 "Average Sale Price of MLS and Sales Data for Single Family Detached Homes", Exhibit Book, p. 14406, Inco Compendium, Tab 30, p. 486.

quantification for the RSA should be $1,354,200, not $9 million, as set out in paragraphs 324 and 337.

Comparability

87. Welland and Fort Erie were suggested by the plaintiff as comparable communities against which Port Colborne could be measured. As admitted by the plaintiff's experts, comparable does not mean identical. As the plaintiff's expert, Mr. Geoffrey Dobilas testified:

(a) Welland's population (about 50,000) and Fort Erie's population (about 30,000) are significantly greater than Port Colborne's population (about 18,600).[90]

(b) From 1996 to 2006, Port Colborne's population grew at the slowest rate of the three communities, and was essentially stagnant.[91] Port Colborne's population is in fact lower than it was in 1981 (before the nickel refinery shut down).[92] In contrast, Welland and Fort Erie's populations have grown steadily.[93] Dobilas acknowledged that the differences in population growth between Port Colborne and Welland and Fort Erie were "large".[94]

(c) Dobilas agreed that, "in general terms" "all else being equal, if one community's population is increasing and another community's population is decreasing or stagnant, that the community with the increasing population will have a greater demand for housing than the community with the decreasing population".[95] As such, it is common sense that Port Colborne's housing market would have had less demand and lower prices than Welland's or Fort Erie's housing markets;

(d) Welland and Fort Erie had more robust housing markets than Port Colborne prior to September 2000;[96]

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90 Dobilas Cross, Dec. 4, 2009, v. 6, p. 1834, l. 21 – p. 1836, l. 4, Inco Compendium, Tab 44, pp. 730-732.

91 Dobilas Cross, Dec. 4, 2009, v. 6, p. 1836, ll. 5 – 10; p. 1836, l. 28 – p. 1839, l. 8, Inco Compendium, Tab 44, pp. 732-735.

92 Dobilas Cross, Dec. 4, 2009, v. 6, p. 1840, ll. 5 – 30, Inco Compendium, Tab 44, p. 736.

93 Dobilas Cross, Dec. 4, 2009, v. 6, p. 1840, l. 31 – p. 1841, l. 18, Inco Compendium, Tab 44, p. 736-737.

94 Dobilas Cross, Dec. 4, 2009, v. 6, p. 1838, ll. 29 – 30, Inco Compendium, Tab 44, p. 734.

95 Dobilas Cross, Dec. 4, 2009, v. 6, p. 1842, ll. 9 – 14, Inco Compendium, Tab 44, p. 738.

96 From 1991 to 2001, Welland had four times as many dwellings built as Port Colborne, even though its population was not even three times as large as Port Colborne's population. (Dobilas Cross, Dec. 4, 2009, v. 6, p. 1842, l. 30 – p. 1843, l. 11, Inco

(e) While there are similarities between the economies of Port Colborne, Welland and Fort Erie there are also differences in their fundamental economic structure;[97]

(f) In 2000, Port Colborne's median income was lower than that of Welland and Fort Erie. As Dobilas stated "they are not identical. Implausible for one to expect they would be";[98]

(g) In 2000, Welland's median family income was 7% higher than that in Port Colborne, which Dobilas acknowledged was not a significant difference and he agreed was "within a range of difference that [he] would expect comparable communities might experience";[99]

(h) Welland and Fort Erie fared better than Port Colborne with respect to employment rates during the period 2001 to 2006.[100] Between 1996 and 2001, Port Colborne lost 200 jobs.[101]

88. In comparing Welland and Fort Erie, two comparable communities, with no suggestion in either community of an industry that emitted any contaminant, one observes that the rate of appreciation of real estate values between the two diverges more than the 4.35% that occurred between Port Colborne and Welland.[102]

89. No supportable inference or conclusion can be drawn from a difference of less than one half of one percent per annum over 10 years in the growth rate of real estate values between two comparable communities. Certainly no conclusion or inference can be drawn that Inco was the cause of a 4.35% difference in the 10 year rate of appreciation between Port Colborne and Welland.

Compendium, Tab 44, p. 738-739). Similarly, from 1991 to 2001, Fort Erie had 3½ times as many dwellings built as Port Colborne, even though its population was not even twice times as large as Port Colborne's population (Dobilas Cross, Dec. 4, 2009, v. 6, p. 1843, ll. 12 – 28, Inco Compendium, Tab 44, p. 739). Port Colborne also had a smaller proportion of dwellings built compared to the size of its population (Dobilas Cross, Dec. 4, 2009, v. 6, p. 1844, ll. 14 – 23, Inco Compendium, Tab 44, p. 740).

97 Dobilas Cross, Dec. 4, 2009, v. 6, p. 1853, l. 7 – p. 1854, l. 15, Inco Compendium, Tab 44, pp. 747-748.

98 Dobilas Cross, Dec. 4, 2009, v. 6, p. 1846, ll. 5 – 16, Inco Compendium, Tab 44, p. 742.

99 Dobilas Cross, Dec. 4, 2009, v. 6, p. 1846, l. 28 – p. 1847, l. 5, Inco Compendium, Tab 44, pp. 742-743.

100 Dobilas Cross, Dec. 4, 2009, v. 6, p. 1848, l. 6 – p. 1849, l. 11, Inco Compendium, Tab 44, pp. 744-745.

101 Dobilas Cross, Dec. 4, 2009, v. 6, p. 1850, ll. 3 – 9, Inco Compendium, Tab 44, pp. 746.

102 Exhibit 21, Tab K, p. 1, "Average Sale Price of MLS and Sales Data for Single Family Detached Homes", Exhibit Book, p. 14406, Appeal Book and Compendium, Tab 30, p. 486.

Dr. Peter Tomlinson

90. The Trial Judge's damage calculation of $4,514 per residential property was based on the MPAC data evidence as presented by Dr. Peter Tomlinson. The Trial Judge failed to appreciate two key aspects of Tomlinson's evidence:

(a) that the methodology applied by Tomlinson would not attribute any significance to the 4.35% differential over the period of 10 years between Port Colborne and Welland – which was well within the range of variance in the comparable but not identical communities studied; and

(b) that in any event, the 4.35% differential disappeared completely if one accounted for the fact that MPAC changed its classification of a large number of properties from residential properties to farm properties and back to residential properties within the relevant time frame. The plaintiff's experts acknowledged that this reclassification either had an artificial and distorting effect on the residential property results[103] or would have eliminated the 4.35% differential.[104] However, the Trial Judge failed to make this important correction.

91. The Trial Judge relied on the evidence of Tomlinson to conclude that there was a difference in the relative property appreciation rates between Welland and Port Colborne from 1996 to 2008. As his methodology, Tomlinson accepted and adopted the terms of Dr. Frank Clayton's 'market comparison' approach as filed on behalf of Inco.[105] Clayton used this approach to compare MPAC realty tax assessment values in Welland and Port Colborne, explaining the technique as follows:

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[103] Maughan Chief, Oct. 21, 2009, v. 2, p. 454, l. 9 – p. 455, l. 3, Inco Compendium, Tab 45, pp. 757-758.

[104] Tomlinson Cross, Dec. 4, 2009, v. 6, p. 1785, l. 27 – p. 1786, l. 15, Inco Compendium, Tab 51, pp. 1018-1019.

[105] Exhibit S, "Report titled *Property Values in the City of Port Colborne Before and After September 2000,* Altus Clayton" dated January 30, 2008, p. 10, ["2008 Altus/Clayton Report"], Exhibit Book, p. 19251.

> **The market comparison approach is a well accepted approach used by economists to examine whether a particular incident, such as air, water or land pollution from a polluting industrial user, has impacted property values in a particular area over a particular time period. The approach consists of identifying one or more areas that are similar to the area with the incident, except they are not impacted by the incident. Based on the comparison of price patterns in the areas covered by the relevant time period and allowing for differences in the macro-economic, demographic and property market environment, conclusions can be reached about an incident's impact on property values.**[106]

92. Tomlinson agreed that comparable communities are not identical communities.[107] He acknowledged that the market comparison approach which he was following gave only a "rough indication of the magnitude of average property value effects over time".[108] Tomlinson also agreed that under the market comparison approach, if there was an indication of an effect from an event in the market then it was necessary to proceed to a secondary phase of inquiry into the macro-economic, demographic and local property market environments.[109] Tomlinson made no such secondary inquiry. Significantly, Tomlinson was unable to say that the differences he relied upon between rates of MPAC growth appreciation, as between Welland and Port Colborne were statistically significant.[110]

93. The Trial Judge relied on Tomlinson's adoption of the market comparison approach which is, by definition, a "rough indication" of a change in property values over time to conclude that Port Colborne experienced a 4.35% loss over a ten year period. In other words, the Trial Judge used the 0.435% per annum difference between Port Colborne and Welland found by Tomlinson and attributed this difference solely to Inco. This cannot be a sufficient basis for either causation or

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106 Exhibit 69, "Report titled: MPAC Data Review" dated September 29, 2009, p. 2. ["2009 MPAC Data Review"] [Emphasis added.], Exhibit Book, p. 15786.

107 Tomlinson Cross, Dec. 4, 2009, v. 6, p. 1754, ll. 8 – 15, Inco Compendium, Tab 51, p. 1008.

108 Exhibit 69, "2009 MPAC Data Review", p. 2, Exhibit Book, p. 15786, Inco Compendium, Tab 28, p. 478; Exhibit S, "2008 Altus/Clayton Report", p. 10, Exhibit Book, p. 19251; Tomlinson Cross, Dec. 3, 2009, v. 6, p. 1742, ll. 25 – 30, p. 1755, 12 – 17, Inco Compendium, Tab 51, pp. 1003 and 1009.

109 Tomlinson Cross, Dec. 3, 2009, v. 6, p. 1740, ll. 7 – 13; Dec. 4, 2009, p. 1755, ll. 17 – 21, Inco Compendium, Tab 51, p. 1001 and 1009.

110 Tomlinson Cross, Dec. 3, 2009, v. 6, p. 1731, l. 21 – p. 1733, l. 3, Inco Compendium, Tab 51, pp. 998-1000.

damages, and therefore for liability. It is an error in methodology and in logic and an error of mixed fact and law, insofar as it entails the incorrect application of a legal standard.

Port Colborne Outperformed Welland

94. The Trial Judge's conclusion is further undermined by the fact that the MPAC data for June 1999 and June 2003 conclusively demonstrates that in that period Port Colborne property values increased by 2% more than did property values in Welland.[111] The trigger period for the damage assessment as determined by the common issues in the Court of Appeal begins in September 2000. Therefore the year prior, 1999, is unaffected by any announcement of nickel levels and the three years after the September 2000 trigger date are the most critical impact years. The MPAC data from June 1999 to June 2003 (the time before September 2000 and for three years after the events in question -- the critical period) belie the Trial Judge's conclusion.

95. At paragraphs 294 and 295, the Trial Judge observed, by performing his own calculations, that between 1996 and 2008 Port Colborne outperformed Welland by 3.8%. He chose the 1996 MPAC residential data because it included 314 vacant building lots in Port Colborne and 2008 because those same lots were also included.[112] The MPAC data in 1996 and 2008 are consistent in this respect and thus validly comparable; they are "apples to apples".

96. In the 1999 MPAC data, the 314 vacant building lots had been reclassified as farm properties and were thus left out of the residential category. By omitting the 314 vacant lots from the 1999 residential category, the effect is to raise the 1999 average residential values because the

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[111] As set out in Trial Exhibit 77, "Chart of Base and Comparison years – MPAC Assessment Average" ["Chart of Base and Comparison years"], Exhibit Book, p. 15839, Inco Compendium, Tab 24, p. 462. This exhibit was the chart setting out the relevant MPAC comparisons, the evidence from which the Trial Judge drew his conclusions, and is attached as Appendix "A".

[112] Exhibit S, "2008 Altus/Clayton Report" and Exhibit T, "Updated Residential Sales Price and Value Data for Port Colborne" dated Oct. 8, 2009, ["2009 Altus Group Report"], Exhibit Book, pp. 19285, 19310-19313, Inco Compendium, Tab 26, pp. 466-468, 470-475 indicated that in 1999, MPAC reclassified 314 building lots in a registered West Port Colborne subdivision (Meadow Heights) as farmland. In 1996, MPAC had classified them as residential properties and by 2003 MPAC had reinstated their farm property classification which continued until trial.

low value vacant lots, which would drag down the average, are missing. Thus a 1999 starting point commences at an artificially higher level than a 1996 starting point.

97. By 2003, the 314 building lots were reclassified as residential and were therefore included in the 2003 MPAC residential assessments. Nevertheless, comparing the percentage rate of appreciation between 1999 and 2003, Port Colborne again outperformed Welland.

98. A comparison between 1996 MPAC data and the 2003 MPAC data, where the vacant lots were in the residential category in both sets of data (a true "apples to apples" comparison), four years before the triggering event and three years after, again demonstrates that Port Colborne outperformed Welland.[113] The result is that the Trial Judge has chosen the one outlier MPAC comparison to find liability, using an "apples to oranges" comparison, while Port Colborne outperformed or kept pace with Welland by every other MPAC comparison.[114]

99. In the last two sentences of paragraph 295, the Trial Judge vainly and erroneously confronted these objective, inescapable facts. He did so by speculation. The fact that Port Colborne outperformed Welland in the following three periods, 1996 – 2003 by 9.4%; 1999 – 2003 by 2%; and 1996 – 2008 by 3.8%, does not, in the Trial Judge's opinion, enure to Port Colborne's benefit. Rather, the Trial Judge speculates that "the slowdown in the increase of property values in Port Colborne must have started around the year 2000". But the facts prove him wrong. According to MPAC's data, Port Colborne real estate values went up by 2% more than Welland in the period June 1999 to June 2003.[115] And this is despite 1999 being at an artificially high level.[116]

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[113] Exhibit 77, "Chart of Base and Comparison years", Exhibit Book, p. 15839, Inco Compendium, Tab 24 , p. 462; Tomlinson Cross, Dec. 4, 2009, v. 6, p. 1800, l. 13 – p. 1801, l. 10, Inco Compendium, Tab 51, pp. 1029-1030.

[114] See Exhibit 77, *ibid.*

[115] Exhibit 77, *ibid*; Tomlinson Cross, Dec. 4, 2009, v. 6, p. 1800, l. 13 – p. 1801, l. 10, Inco Compendium, Tab 51, pp. 1029-1030.

[116] As set out at paragraph 96.

100. Further, the Trial Judge does not respect the principle of comparability which recognizes that rates of appreciation in the two communities have leeway to vary annually by a few percentage points.

101. In arriving at his 4.35 % appreciation rate differential, the starting point for the Trial Judge was that there was a 5.9 % rate appreciation differential between Port Colborne and Welland between 1999 and 2008. The comparison between 1999 and 2008 is impermissible. For Port Colborne, the 1999 MPAC residential data did not include the 314 vacant building lots, whereas the 2008 MPAC residential data did. Thus, the starting point in 1999 was either too high or to look at it another way, the end point of 2008 is too low. It was an "apples to oranges" comparison. In either case, the rate of appreciation for Port Colborne is understated.

102. The Trial Judge then compounded this fundamental error in paragraph 297. He compares Clayton's calculation of 2.8% loss to Port Colborne as at 2005 to Tomlinson's calculation of loss of 5.9% as at 2008. This is impermissible.

103. Clayton's evidence was that in 2005, there was a 2.8% loss to Port Colborne vis-a-vis Welland, which Clayton considered insignificant.[117] This falls within a range one would expect of comparable but not identical communities. Clayton's evidence was that by 2008, the MPAC data, when properly corrected, showed no difference between property value appreciation in Port Colborne versus Welland. The exclusion of these lots in 1999 gave too high a starting figure and therefore the rate of appreciation to 2008 was less than it should have been. Clayton's evidence was that if the lots were excluded from both calculations the rate of increase of property values in Port Colborne was 65.2% compared to Welland at 65.4%, *i.e.* there is no difference.[118]

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[117] Exhibit S, "2008 Altus/Clayton Report", Exhibit Book, pp. 19246; Tomlinson Cross, Dec. 3, 2009, v. 6, p. 1730, ll. 11 – 18, Inco Compendium, Tab 51, p. 1730.

[118] Exhibit T, "2009 Altus Group Report", p. 10-15, Exhibit Book, pp. 19309-19314; Tomlinson Cross, Dec. 4, 2009, v. 6, p. 1782, l. 29 – p. 1783, l. 32; p. 1785, l. 27 – p. 1786, l. 15, Inco Compendium, Tab 51, pp. 1015-1016, 1018-1019.

104. Tomlinson acknowledged that if you accounted for the reclassification of the vacant lots, then there would be no difference between Welland and Port Colborne.[119]

105. Tomlinson expressed the view that you could not pick and choose which MPAC data to include and exclude as there may have been similar issues in Welland or other adjustments that would have the opposite effect.[120] Tomlinson conceded that he made no inquiry into property assessments in Welland or Port Colborne to support such an assertion.[121] Significantly, Tomlinson agreed that he had reviewed the Clayton report which contained the relevant data for farm and residential classifications in Port Colborne and Welland and this data revealed no anomaly in Welland like the one that existed in Port Colborne.[122]

106. The evidence was that the number of farm properties on the west side of Port Colborne increased dramatically from 16 to 275 between the years 1996 and 1999, remained essentially stable in 2001 (277) before resuming its prior level by 2003.[123] At the same time, there was a corresponding decrease of over two hundred residential properties on the west side of Port Colborne between 1996 and 1999.[124] Tomlinson conceded that the numbers of residential properties in Port Colborne reflect this reclassification of farm properties.[125]

107. In contrast, the Welland residential properties reflect no sudden decline in 1999 and equivalent increase by 2003:

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119 Tomlinson Cross, Dec. 4, 2009, v. 6, p. 1785, l. 27 – p. 1786, l. 15, Inco Compendium, Tab 51, pp. 1018-1019.

120 Tomlinson Cross, Dec. 4, 2009, v. 6, p. 1788, ll. 16 – 19; p. 1791, l. 10 – p. 1792, l. 17, Inco Compendium, Tab 51, p. 1021, 1024-1025.

121 Tomlinson Cross, Dec. 3, 2009, v. 6, p. 1741, l. 10 – p. 1742, l. 12, l. 18; Dec. 4, 2009, p. 1755, ll. 21 – 31; p. 1791, l. 10 – p. 1792, l. 17, Inco Compendium, Tab 51, pp. 1009, 1024-1025.

122 Tomlinson Cross, Dec. 3, 2009, v. 6, p. 1746, l. 8 – p. 1748, l. 6; Dec. 4, 2009, p. 1792, l. 23 – p. 1793, l. 6, Inco Compendium, Tab 51, pp. 1004-1006, 1025-1026.

123 Tomlinson Cross, Dec. 4, 2009, v. 6, p. 1762, l. 12 – p. 1763, l. 8; Inco Compendium, Tab 51, pp. 1010-1011; Exhibit S, "2008 Altus/Clayton Report", p. 54, Fig. 26. Exhibit Book, p. 19295.

124 Tomlinson Cross, Dec. 4, 2009, v. 6, p. 1764, l. 32 – p. 1765, l. 17, Inco Compendium, Tab 51, p. 1012-1013.

125 Tomlinson Cross, Dec. 4, 2009, v. 6, p. 1763, ll. 13 - 14, Inco Compendium, Tab 51, p. 1011.

Number of Residential Properties[126]			Number of Farm Properties		
Assessment Year	**Port Colborne**	**Welland**	**West Port Colborne[127]**	**Port Colborne[128]**	**Welland[129]**
1996	7,759	16,663	16	254	96
1999	**7,541**	17,007	**275**	**521**	98
2001	**7,546**	17,152	**277**	**529**	100
2003	7,876	17,356	24	278	97
2005	7,917	17,587	22	269	96

108. There is therefore no basis to suggest that the reclassification of farm properties to residential in Port Colborne in 1999 is anything but an isolated anomaly with no similar occurrence in Welland. The possibility that there are other anomalies in the data is speculative and in any event would be for the plaintiff to prove. This is the very task of exploring differences in the local "macro-economic demographic and property market" which Tomlinson conceded was integral to a market comparison methodology and which he failed to do, though he was fully aware of the reclassification anomaly. In the result, the Trial Judge was content to find liability on the basis of an outlier in the data which is fully explained by an anomaly in the evidence and is impermissible under Tomlinson's own methodology.

109. Robert Maughan, another of the plaintiff's experts, had independently concluded that these 314 vacant building lots should be removed from all calculations. As Maughan testified in chief:

> **They were sales essentially from the developer to what appeared to be a home building company . . . [O]bviously - there was a significant number of these low dollar transactions . . . [W]e removed those for the purpose of the study so that they didn't adversely influence the results.**

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126 Exhibit S, "2008 Altus/Clayton Report", p. 38, Figure 15, Exhibit Book, p. 19279, Inco Compendium, Tab 26, p. 466.

127 Exhibit S, "2008 Altus/Clayton Report", p. 54, Figure 26, Exhibit Book, p. 19295, Inco Compendium, Tab 26, p. 468.

128 Exhibit S, "2008 Altus/Clayton Report", p. 43, Figure 19, Exhibit Book, p. 19284, Inco Compendium, Tab 26, p. 467.

129 *Ibid.*

> **Q. If you would have left them in, what would they have done to Port Colborne Values?**
>
> **A. . . . <u>[I]t would have artificially deflated the overall average for Port Colborne because these sales would have been left in.</u>**[130]

110. It is indisputable logic that these lots ought either to be in the data at both ends of the comparison or out of the data at both ends of the comparison so that there is a consistent basis for an "apples to apples" comparison. Otherwise, the resulting measurement is only the impact of the inclusion or exclusion of the building lots. This is all the Trial Judge's calculations did.

MLS Data

111. Evidence of the values resulting from Multiple Listing Services ("MLS") data was presented to the court. MLS data represents all properties sold at arm's length between willing buyers and sellers. In the period between 1999 and 2008 there were approximately 200 sales annually through MLS in Port Colborne.[131] In Welland, there were approximately three times as many MLS sales each year.[132] MLS sales data reflected more than 95% of all sales but did not capture transactions made between family members or related parties.[133] As a result, MLS sales data is objective data of the prices obtained for residential property that has been sold in the market.

112. In paragraphs 253, 254, and 318 of his decision, the Trial Judge found that MLS data was not as reliable as MPAC data. In so doing, he was in error. The Trial Judge's reason for declining the MLS system was that it did not provide a value for property not sold through MLS. What he impermissibly overlooked was that MLS will not capture non-arm's length sales, which

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130 Maughan Chief, Oct. 21, 2009, v. 2, p. 454, l. 21 – p. 455, l. 3 [Emphasis added.], Inco Compendium, Tab 45, pp. 757-758.

131 Exhibit 46, Tab 3, "Teranet Brief with attached documents" dated November 1, 2009, ["November 2009 Teranet Brief"], Exhibit Book, p. 14643, (as confirmed by Atlin, see Atlin Chief, Jan. 11, 2010, v. 7, p. 1954, ll. 11-19, Inco Compendium, Tab 42, p. 706).

132 *Ibid.*

133 Atlin testified that MLS data is the "textbook definition of an open market transaction". Atlin Cross, v. 7, Jan. 12, 2010, p. 2037, ll. 11-14, Inco Compendium, Tab 42, p. 708.

logic would indicate (and the plaintiff's expert Skaburskis agreed)[134] should be excluded as non-representative. His other reasons for not accepting MLS are either speculation or commentary on the fact that less than 5% of sales that are not captured by MLS in both communities studied. Statistically, MLS is the most objective indicator of value.

113. The Trial Judge stated:

> **[319] Fourth, if one looks closely at the MLS data set it is clear that there was a negative effect on Port Colborne sales prices in the years 2000/01, 2001/02, 2002/03 and 2003/04, but thereafter Port Colborne sales prices started to outperform Welland sales prices. Using Atlin's base prices set out above, Welland outperformed Port Colborne by 5.1% in 2000/01, by 1.1% in 2001/02, by 0.9% in 2002/03, and by 2.4% in 2003/04.**

114. The Trial Judge erred in reading this data. He used a three-year average before 2000 and not a single base year. Additionally, in using the three year average 1997-2000, he failed to appreciate that a differential within the same range always existed between Port Colborne and Welland. In the fiscal periods set out by the Trial Judge, the MLS data does not support the Trial Judge's calculations. When the MLS data is read to the year 2008, which is the end yardstick against which damages are measured, Port Colborne outperformed Welland. Indeed in paragraph 315, the Trial Judge makes, but seems to have forgotten, the proper conclusion:

> **[315] The only calculations that were to the contrary were done by Atlin using the MLS data. Atlin looked at all of the MLS data from 1997 to 2008. He started with a base of the average residential sales price for Port Colborne and Welland in the three years leading up to September 2000. The base price for Port Colborne was $95,470 and the base price for Welland was $106,856. Atlin then calculated that, according to the MLS data, the average sales price in Port Colborne rose from the base price by 53.9% to September 2008, whereas it only rose by 44.8% in Welland for that same time period. This suggests that Port Colborne properties did not lose any value over this period.**

115. The MLS data demonstrated, between the years 1999 and 2008, no difference between the appreciation of property values in Port Colborne and Welland, and in fact Port

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[134] Skaburskis Cross, Nov. 25, 2009, v. 4, p. 1217, ll. 14-23, Inco Compendium, Tab 47, p. 862.

Colborne comes out slightly ahead.[135] Berkhout, the plaintiff's real estate broker witness testified that he used MLS sales to determine the price of comparable homes for the purpose of listing properties for sale and to indicate neighbourhood prices.[136] Mr. David Atlin, Inco's expert testified that "[…] when you are looking at residential properties, the MLS is the go-to source on a day-to-day basis."[137]

116. The Trial Judge preferred the MPAC data which is an imprecise mass estimate of valuation for every property for the purpose of municipal assessment taxes. The very definition of 'residential property' employed by MPAC illustrates obvious issues in applying MPAC results to the claims of Port Colborne residents and how easily the data for comparable communities can diverge. The residential property class for the purposes of MPAC includes the following properties: vacant land zoned for residential developments, condominiums, group homes, rooming houses, non-profit child care properties and golf courses & driving ranges.[138]

117. Tomlinson agreed that the purpose of MPAC's methodology is to replicate the results of actual sales in the open market and apply those results to unsold properties. It is submitted that there was no basis for relying on MPAC's imprecise model which seeks to replicate market values,[139] when the actual arm's length MLS sales were in evidence. Those sales over a 10 year

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135 Exhibit 21, Tab K, p. 1, "Average Sale Price of MLS and Sales Data for Single Family Detached Homes" Exhibit Book, p. 14406, Inco Compendium, Tab 30, p. 486.

136 Berkhout Cross, v. 3, Nov. 9, 2009, v. 3, p. 762, l. 7 – p. 763, l. 10; p. 764, ll. 6-17; p. 765, l. 27 – p. 766, l. 23, Inco Compendium, Tab 43, pp. 714-715, 716, 717 – 718.

137 Atlin Cross, Jan. 12, 2010, v. 7, p. 2072, ll. 7 – 8. See also, Atlin Chief, Jan. 11, 2010, v. 7, p. 1947, ll. 19 – 26; Atlin Cross, p. 2071, ll. 11 – 15, Inco Compendium, Tab 42, pp. 705, 709, 7010.

138 Exhibit 72, "Ontario Property Tax Assessment Handbook, Second Edition", dated August, 2009, Exhibit Book, pp. 15826-15831, Inco Compendium, Tab 29, pp. 480-485; Tomlinson Cross, Dec. 3, 2009, v. 6, p. 1713, l. 21 – p. 1715, l. 3; p. 1716, l. 32 – p. 1718, l. 16, Inco Compendium, Tab 51, pp. 990-992, 993-995. By Order of Cullity J. dated June 29, 2009, Inco Compendium, Tab 6, pp. 170-175, the plaintiff abandoned her claims on behalf of agricultural, commercial and industrial property owners.

139 Tomlinson Cross, Dec. 3, 2009, v. 6, p. 1713, ll. 5 – 21; Inco Compendium, Tab 51, p. 990.

period, reflecting the results of 2140 Port Colborne sales and 6725 Welland sales demonstrate that Port Colborne outperformed Welland.[140]

118. The Trial Judge gives no other explanation of why MPAC is the preferred methodology other than it is an estimate of property values on a mass scale. What this fails to recognize is that the MLS data for Port Colborne and Welland is a transparent, objective, long term, apples to apples comparison.

Teranet ASP Data

119. Mr. Robert Maughan of Teranet testified as the plaintiff's primary expert witness and the only plaintiffs' expert who generated data. His opinion evidence was restricted to the data and results produced by the systems and methodologies in his reports. Maughan was not qualified to provide opinion evidence in respect of real estate values or comparability in general.[141] He has no university or other post-secondary degree, no qualifications as a real estate appraiser, and no recognized computer systems expertise.[142] As a result of his answers on apparent errors in the data set, the Trial Judge did not accept him as an expert or his data as reliable:

> **[244] In my view, Maughan's responses to the apparent errors in the data sets generated by the reavs system did not meet the standard that I would expect of a witness who comes to court purporting to be an expert capable of providing the court with sophisticated damages calculations.**

120. The Teranet Reports[143] use two methodologies to calculate and compare property value changes in Port Colborne, Welland, and Fort Erie from 1997-2007: (1) ASP methodology

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140 Exhibit S, "2008 Altus/Clayton Report", p. 37, Exhibit Book, p. 19278 , Inco Compendium, Tab 26, p. 465. As confirmed by Atlin, as confirmed by Atlin, see Atlin Chief, Jan. 11, 2010, v. 7, p. 1954, ll. 11-19, Inco Compendium, Tab 42, p. 706.

141 Maughan was qualified to provide expert opinion evidence in the following areas: Ontario's Land Registry System; Real property sales (data and analysis), including: Land Registry System data; Multiple Listing Service ("MLS") data; and Assessment data; and Automated valuation modelling technologies (data and analysis). Maughan Chief (Re: Expert Qualifications), Oct. 20, 2009, v. 2, p. 360, l. 30 – p. 361, l. 8, ll. 10-22; Inco Compendium, Tab 45, p. 749-750.

142 Maughan Cross (Re: Expert Qualifications), Oct. 20, 2009, v. 2, p. 377, l. 29 – p. 379, l. 14, Inco Compendium, Tab 45, pp. 751-753.

143 Maughan authored two reports entered into evidence at trial: Report of Teranet Enterprises Inc., February 2008 made Exhibit 18 (Oct. 21, 2009, v. 2, p. 389, l. 27 – p. 390 – l. 7, Inco Compendium, Tab 45, pp. 755-756) ("Teranet Report"), and Report of

(Average Sales Prices from all properties sold between 1997-2002); and (2) reavs Automated Valuation Model ("reavs AVM") (2003-2007).[144]

121. Using 1997 as the base year (with zero value) is inconsistent with the Court of Appeal's decision. The base year should have been the fiscal year immediately before 2000, *i.e.* fiscal 1999, from September 1, 1999 to August 31, 2000, or the average of the three fiscal years before 2000.

122. Further, using another base year, for the reavs AVM methodology *i.e.* 2003, and starting afresh at zero is methodologically incorrect and a negation of a continuous measurement from 1997 to 2008. Maughan recognized this error, stating that the two methodologies were "incompatible" and akin to "mixing apples and oranges".[145]

123. The ASP methodology uses all available land transaction data. That is why for the period of 1997-2002, Teranet supplemented sales data from its POLARIS database[146] with MLS records, in order to ensure completeness.

124. It is important to note that in cross-examination, Maughan acknowledged missing 71 Port Colborne sales (40%) in the critical ASP methodology comparison year of 2002.[147] He admitted that this was "[…] a significant number of sales."[148] Teranet missed those sales because its supplier of MLS data, Mr. Danch, failed to obtain and provide them and Teranet did not notice the

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Teranet Enterprises Inc., June 2009 ("Revised Teranet Report") made Exhibit 20 (Nov. 2, 2009, v. 2, p. 502, l. 31 – p. 503, l. 7, Inco Compendium, Tab 45, pp. 762-763) (collectively, "Teranet Reports").

144 Exhibit 18, "Teranet Report: Port Colborne Property Value Analysis" dated February 2008, p. 25, para. 4, Exhibit Book, p. 14181; Exhibit 20, "Teranet Report: Port Colborne Property Value Analysis" dated February 2008, Revised June 2009, p. 25, para. 4, Exhibit Book, p. 14288.

145 Maughan Chief, Oct. 21, 2009, v. 2, p. 466, l. 31 – p. 467, l. 8, Inco Compendium, Tab 45, pp. 760-761.

146 Province of Ontario Land Registry Information System.

147 Exhibit 46, Tabs 2, 3 "November 2009 Teranet Brief", Exhibit Book, pp. 14642, 14643; Maughan Cross, v. 3, Nov. 10, 2009, p. 906, l. 30 p. 907, l. 7, Inco Compendium, Tab 45, p. 788-789.

148 Maughan Cross, Nov. 10, 2009, v. 3, p. 911, ll. 4-7, Inco Compendium, Tab 45, p. 793.

error.[149] When asked if he knew the impact of these 71 missing sales on his ASP values, Maughan answered, "[s]itting here, no."[150] Therefore, any comparison from 1997 to 2002 is flawed.

125. Moreover, for the critical period October 1, 2000 to September 30, 2001, immediately following the alleged announcement, Exhibit 48 shows that Maughan included 7 non-arm's length transactions (*i.e.* related party and vacant land) among 177 Port Colborne ASP records for that year. When these non-market transactions are removed (as shown on page 4 of Exhibit 48), Port Colborne average sales prices for that period increase by $2,000 (or just over 2%), from $91,214 to $93,293. Maughan admitted that when these non-arm's length transactions are removed, Port Colborne "property values went up in the year after the announcement" – as opposed to decreasing after the announcement, as Teranet's original results purported to demonstrate.[151] This admission on its face contradicts the assertion that Port Colborne's real estate was negatively affected by any event in 2000.

126. Maughan also missed 14 Port Colborne sales between October 1, 2000 and September 30, 2001. When these 14 missing sales are included (as shown on page 5 of Exhibit 48) Port Colborne's average property values increase further to $95,004 (or about 4% higher than originally reported). Maughan agreed that with these corrections made to his ASP data, Port Colborne property values kept pace with Welland in the year immediately following the alleged announcement (2.4% versus 3%, respectively)[152] (paragraph 308).

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149 Maughan Cross, Nov. 10, 2009, v. 3, p. 903, l. 4 – p. 904, l. 22; p. 905, ll. 7-17, Inco Compendium, Tab 45, pp. 785-786, 787.

150 Exhibit 18, "Teranet Report", p. 5 , Exhibit Book, p. 14161. Exhibit 20, "Revised Teranet Report" p. 5, Exhibit Book, p. 14268. Maughan Cross, v. 3, Nov. 10, 2009, p. 911, ll. 8-10, Inco Compendium, Tab 45, p. 793.

151 Exhibit 48, "Report titled: "Teranet 'ASP' Data Records – Oct. 2000 to Sep 2001", p. 4, Exhibit Book, p. 14836, Inco Compendium, Tab 33, p. 592; Maughan Cross, v. 3, Nov. 10, 2009, p. 896, l. 21 - p. 898, l. 22; p. 945, l. 30 – p. 946, l. 4, Inco Compendium, Tab 45, pp. 782-784, 801-802.

152 Exhibit 48, "Report titled: "Teranet 'ASP' Data Records – Oct. 2000 to Sep 2001" p. 5, Exhibit Book, p. 14837, Inco Compendium, Tab 33, p. 593; Maughan Cross, Nov. 10, 2009, v. 3, p. 945, ll. 6 - p. 946, l. 17, Inco Compendium, Tab 45, pp. 801-802.

Reavs System

127. The reavs AVM methodology generates property value estimates for 2003-2008 starting from a base of 2001 MPAC assessment data as modified over time by actual sales in specific neighbourhoods by an unknown and undisclosed mathematical formula that manipulates results for 90% of the arm's length sales in a specific neighbourhood.[153] Averages of these estimated values are then calculated and compared for 2003 and 2007.

128. In his evidence in chief, Maughan emphasized a fundamental incompatibility between the ASP methodology (used for 1997-2002) and the reavs AVM methodology (used for 2003-2007): "[w]hat we were unable to do is to actually bridge the gap, if I could phrase it that way, between 200[2] and 2003."[154] Maughan warned that "bridging the gap" between these two methodologies was akin to "mixing apples and oranges":

> **Because the data being used in each of the analyses is different; one is an average selling price and one is an average of AVM values, which is essentially every AVM in the system, inside these geographies, it wouldn't be reasonable to carry the 1997 base year forward past 2002. You would be mixing apples and oranges, essentially.[155]**

129. Therefore, the two methodology approach which was the only subject matter of the two Teranet Reports was stated by its author to be unacceptable. Teranet abandoned its two methodologies and its reports, relying instead on the 1997 to 2008 continuous "hybrid" ASP methodology.

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153 Maughan Cross, Nov. 2, 2009, v. 2, p. 537, ll. 3-12; Nov. 10, 2009, p. 947, ll. 8-11, Inco Compendium, Tab 45, pp. 770, 803.

154 Maughan Chief, Oct. 21, 2009, v. 2, p. 466, ll. 23-25, Inco Compendium, Tab 45, p. 760.

155 Maughan Chief, Oct. 21, 2009, v. 2, p. 467, ll. 3-8, Inco Compendium, Tab 45, p. 761; Maughan Cross, Nov. 3, 2009, v. 2, p. 598, l. 14 – p. 599, l. 15, Inco Compendium, Tab 45, p. 775-776.

Late Arrival of the Plaintiff's Damages Case

130. In late September and early October 2009, a few days before the commencement of the trial, and 8½ years after the Statement of Claim was issued, the plaintiff put forward her theory of damages. That theory asked the court to award more than $200 million to class members.[156]

131. The methodology employed purports to measure the percentage increase in average annual selling prices from October 1, 1997 to September 30, 2008. Although deceivingly titled an Average Sale Price (or ASP) methodology, it is not the same ASP methodology used originally. It is a "hybrid" methodology, which uses all sales for 1997-1998 and then only 16% of available Port Colborne sales (only 30 of at least 185 sales) in the final measurement year of 2007-2008.[157] In total, Maughan's $200 million damage calculations are driven by only **223** Port Colborne sales: 193 sales in 1997-1998, and the 30 "consistent sales" generated by the reavs AVM system for 2007-2008.

132. Maughan confirmed that he did not prepare any written text or report in connection with this new method. No mention was made that all available sales were not used, or that they had been "cut down for some other reason" as Maughan acknowledged during cross-examination.[158]

133. Maughan disclosed for the first time in his mid-trial examination for discovery that the new damages calculations relied only on sales purportedly identified by the reavs AVM system as "relevant and consistent sales".

134. Accordingly, the new methodology is a "hybrid", using all sales for early years and what were purported to be sales selected by the reavs AVM system for later years.

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156 Exhibit 21, Tab K, p. 1, "Average Sale Price of MLS and Sales Data for Single Family Detached Homes", Exhibit Book, p. 14406, Inco Compendium, Tab 30, p. 486; Maughan Cross, v. 2, Nov. 2, 2009, p. 535, l. 16 - p. 537, l. 19, Inco Compendium, Tab 45, pp. 768-770.

157 Exhibit 46, Tab 3, "November 2009 Teranet Brief", Exhibit Book, p. 14643; Maughan Cross, Nov. 3, p. 598, l. 14 – p. 599, l. 15, Nov. 10, 2009, p. 931, l. 32 – p. 932, l. 9; p. 946, l. 19 – p. 950, Inco Compendium, Tab 45, pp. 775-776, 797-798, 802-806.

158 Maughan Chief, Nov. 2, 2009, v. 2, p. 516, ll. 23 - 27, Inco Compendium, Tab 45, p. 764; Maughan Cross, Nov. 2, 2009, v. 2, p. 536, ll. 7 – 23, Inco Compendium, Tab 45, p. 769; Nov. 3, 2009, v. 2, p. 586, ll. 15-20: "[t]he sales that were used after 2003 are consistent sales pulled out of the reavs system and that's how we did the calculation", Inco Compendium, Tab 45, p. 773; Nov. 10, 2009, v. 3, p. 947, ll. 18-21, Inco Compendium, Tab 45, p. 803.

135. This new "hybrid" method is unreliable and ought not to have been accepted for the following reasons:

(a) It was not disclosed until Maughan was on the witness stand. An objective reader of Exhibit 21(h) would have believed all sales were included. No credible explanation has been put forward for why this hybrid method was used, as opposed to using all sales for the period 2003-2008 as well as for the period 1997-2002. All sales were available for later years as well as early years (MLS data used all available sales);

(b) It has never been validated as one that is scientifically sound or used on any other occasion;

(c) It suffers from the same "mixing of apples and oranges" that Maughan acknowledged and rejected during his evidence in chief as the reason why the ASP methodology and the reavs AVM methodology could not be combined. After all, the very few "consistent sales" are allegedly a product of the reavs AVM system;[159]

(d) Maughan could provide no answers about its workings. The reavs AVM methodology has as one of its critical design components (arguably the most critical) the use of 90% of arm's length sales;[160] the other two being the 2001 MPAC data as the starting point for each property's value, and the mathematical formula that manipulates the 90% of arm's length sales to update the starting values. During his cross-examination, Maughan could not explain:

(i) Why 155 of 185 (84%) of Port Colborne sales in the final year were excluded as not consistent when the reavs AVM methodology was designed and required to include as a "consistent" sale at least 90% of arm's length sales;

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159 As discussed above.

160 Exhibit 18, "Teranet Report", p. 32, Exhibit Book, p. 14188; Maughan Cross, Nov. 2, 2009, v. 2, p. 537, ll. 3-10; Nov. 10, 2009, p. 947, ll. 8-10, Inco Compendium, Tab 45, pp. 770, 803.

(ii) How the reavs AVM system determines "relevant" and "consistent" sales. In chief, Maughan testified that a relevant and consistent sale was one within a fixed percentage of the property's reavs AVM value. After having many days to look into the question of what the fixed percentage was, Maughan ultimately disavowed his evidence given a few days before. He could only state that "I now understand better that it's not actually a fixed number. […] The system uses a very complex series of algorithms in the code to do these tests."[161] When pressed further as to the specifics of this code, Maughan replied: "I can't tell you today because it doesn't actually start with a percentage, it starts with a computation;"[162] [Emphasis added.] and

(iii) As used by Maughan, the reavs AVM system produced absurd results by including lower-valued Port Colborne sales between related parties and excluding higher-valued arm's length sales. When confronted with the numerous examples of low value non-arm's length Port Colborne sales contained in Teranet's data as documented in Exhibit 46, Tab 6, Maughan's sole repeated answers were that the explanation was buried in "400 lines of code" that he was unable to explain or interpret, and that "the system is doing what the system does."[163] For example, Maughan included as "consistent" a Port Colborne related party sale of $19,319 on January 22, 2004, a sale price well below the reavs AVM estimated value of $92,080 for that property. When asked to explain how an arm's length sale for the same property of $145,000 (only $600 less than the previous AVM value established three weeks prior) was deemed "not consistent" by the reavs AVM system and

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161 Maughan Cross, Nov. 2, 2009, v. 2, p. 533, ll. 18-24, Inco Compendium, Tab 45, p. 766.

162 Maughan Cross, Nov. 2, 2009, v. 2, p. 533, ll. 28-30; p. 563, ll. 11-17, Inco Compendium, Tab 45, pp. 766, 771.

163 Exhibit 46, Tab 6, "November 2009 Teranet Brief", Exhibit Book, pp. 14646-14721, Inco Compendium, Tab 32, pp. 512-587; Maughan Cross, Nov. 2, 2009, v. 2, p. 535, ll. 11-15; Nov. 3, 2009, v. 2, p. 583, ll. 5-8; p. 586, ll. 26-29; p. 588, ll. 18-32; p. 609, l. 29 – p. 610, l. 22, Inco Compendium, Tab 45, pp. 768, 772, 773, 774, 780-781: Q. "And you don't understand the code, you can't explain it to me either?" A. "Verbatim, no"; Q. "And in respect of consistency, you're not able to tell us how the system determines what is consistent and what is not consistent?" A. "That's correct. Without actually watching the system work".

excluded from the Teranet data, Maughan simply stated "[…] I didn't write that code and I am not a computer programmer."[164]

(e) In the base year 1997-1998, Rodney Street area sales represented 5.7% of all Port Colborne sales. By contrast, of the 30 sales used in the final measurement year of 2007-2008, 26.7% were in the Rodney Street area.[165] Thus, of the 16% of sales used in the final years' measurement, they were skewed to the unrepresentative and lower priced homes in the Rodney Street area. As the Trial Judge found at paragraph 239, this "tended to skew" Port Colborne average property values lower in later years.

Other Data Errors

136. In addition to missing a substantial number of sales, Maughan was shown at trial to have made a number of other data errors in the Teranet Reports including:[166]

(a) Non-arm's length transactions in years 1997–2002 (just as with 2003-2008 when using the "hybrid" methodology);

(b) Location errors;

(c) Wrong Property Type sales; and

(d) Duplicate/triplicate values.

137. Maughan was advised of these errors as early as October 2008 when he received the reply report of Integris Real Estate Counsellors ("Integris").[167] Maughan admitted the existence of

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[164] Exhibit 46, Tab 6, "November 2009 Teranet Brief", p. 9 of 78, Exhibit Book, p. 14654, Inco Compendium, Tab 32, p. 520; Maughan Cross, Nov. 3, 2009, v. 2, p. 606, l. 19 – p. 610, l. 6, Inco Compendium, Tab 45, pp. 777-781.

[165] Exhibit 46, Tab 5, "November 2009 Teranet Brief", Exhibit Book, p. 14645; Maughan Cross, Nov. 10, 2009, v. 3, p. 932, l. 19 - p. 934, l. 18, Inco Compendium, Tab 45, pp. 798-800.

[166] Exhibit 41, Report titled: Teranet Reported as Excluded "Not a Sale in ELRS", Exhibit Book p. 14517-14530; Exhibit 46, "November 2009 Teranet Brief", Exhibit Book, pp. 14638-14819; Exhibit 47, "Report titled: Summary of Work Effort of Mr. Maughan Related to Tab 2 of "Teranet Brief", Exhibit Book, pp. 14820-14829; Exhibit 48, "Report titled: Teranet "ASP" Data Records – Oct. 2000 to Sep. 2001", Exhibit Book, pp. 14832-14876.

[167] Maughan Cross, Nov. 10, 2009, v. 3, p. 926, ll. 4 – 18, Inco Compendium, Tab 45, p. 794.

these errors during his evidence in chief, stating that "[w]e undertook, after we received the Integris report, to verify if, in fact, there were errors. There were."[168]

138. Despite this early warning, Maughan did not succeed in correcting the data errors. Nor did he add back into his analysis any of the missing sales pointed out to him by Integris. During his cross-examination, Maughan agreed with a sworn statement contained in his June 16, 2009 affidavit that "[a]ll of the transactions available to Teranet from its own systems have been provided. Teranet has not looked for or identified any missing transactions. As such, no transactions have been added to the revised data set."[169] In fact, 80% of all property sales were excluded.

139. Maughan's unwillingness to correct his data errors is especially significant given that the results in the Teranet Reports are very sensitive to data corrections. Maughan was shown at Tab 1 of Exhibit 46 that the removal of only 31 Port Colborne ASP records from the Revised Teranet Report resulted in an 11.4-fold change in ASP percentage change results—from 0.5% to 5.7% between 1997 and 2002.[170]

140. This complete disregard for any quality control fully undermines the methodologies and results in the Teranet Reports and conclusions of Dr. Andrejs Skaburskis ("Skaburskis") which were based on the same data (see below). Combined with the significant data integrity errors detailed above, Maughan has applied no reliable methodology for the calculation of damages or changes in property values in Port Colborne over the 1997-2008 period. There was no reliable evidence before the court upon which to base any claim for damages.

141. The Trial Judge gave a number of reasons why the data compiled by Maughan, the only plaintiffs' expert to compile data was flawed and unreliable.

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168 Maughan Chief, Oct. 21, 2009, v. 2, p. 383, ll. 19 – 24, Inco Compendium, Tab 45, p. 754.

169 Maughan Cross, Nov. 10, 2009, v. 3, p. 924, ll. 8 - 31.

170 Exhibit 46, Tab 1, "November 2009 Teranet Brief", Exhibit Book, p. 1464; Maughan Cross (Nov. 10, 2009, v. 3, p. 927, l. 11 – p. 928, l. 8, Inco Compendium, Tab 45, pp. 795-796); Exhibit 18, "Teranet Report", p. 5, Exhibit Book, p. 14161; Exhibit 20, "Revised Teranet Report" p. 5, Exhibit Book, p. 14268.

[236] The reavs system is an AVM system, which should be one of the most reliable indicators of property values. However, in my view, both the Teranet AVM data set and the Teranet hybrid data set, on close examination, have attributes that raise some concerns about their reliability. First, the Teranet hybrid data contains a mixture of MLS sales data, LRS sales data, and AVM data. Some of the sales data has been screened by the reavs system and some has not. It is difficult for the court to compare the property values before and after September 2000 if the data used in the calculations comes from different sources and is screened in different ways. That is, the inconsistency of the information within the data sets raises reliability concerns.

[237] Second, in the Teranet hybrid data set the number of data entries used after October 2002 is much lower than the number of data entries used prior to that date. For example, in the 1997/98 year 193 sales in Port Colborne were used, but in the 2007/08 year only 30 sales were used. Can any conclusions be drawn given this inconsistency in the number of data entries?

[238] Third, in the Teranet hybrid data set the reavs system excluded a large number of sales. In the later years, on average, approximately 80% of all sales were excluded from the database. Therefore, the experts who used the Teranet hybrid data set as the basis of their calculations were working with only a small number of the actual sales.

[239] Fourth, in the Teranet hybrid data set properties in the RSA constituted a much higher percentage of data entries in the later years as opposed to the earlier years. For example, RSA sales comprised 5.7% of the total number of data entries in the 1997/98 year, but RSA sales comprised 26.7% of all data entries in the 2007/08 year. Since the RSA properties generally have a lower value than properties in other parts of Port Colborne, this factor tended to skew the average value of the properties in the data set toward a lower number in the later years.

[240] Fifth, in both the Teranet AVM data set and the Teranet hybrid data set there were many instances in which it seemed that sales and properties that should have been included in Maughan's data were excluded, and sales and properties that should have been excluded were included. For example, Maughan included in both data sets some properties that were not single family residential properties, and some properties that were outside the relevant area. He also excluded from the Teranet hybrid data set some sales that appeared to be consistent sales.

[241] Sixth, in the Teranet AVM data set the reavs system imputed values to certain properties that appeared to be inconsistent with sales prices in actual arms length sales transactions. Given that the reavs system purports to use actual sales data to compute property values, the imputed values seemed to be inaccurate.

> **[242] Seventh, all of these reliability concerns raised questions about Maughan's expertise. Maughan was qualified as an expert in the LRS, real property sales data analysis, and AVM technologies. He is not a real estate appraiser; he does not have a university degree; and he is not a computer programmer. He joined Teranet in 1997, and has been the program manager of risk management services since about 2004. In summary, his expertise is restricted to the application of Teranet computer software to specific data sets.**
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> **[243] Despite his expertise, when Maughan was confronted with questions about the construction of his data sets he could not explain how the reavs system worked. For example, he could not explain why certain sales that would appear to be consistent sales had not been included in the data. He could not explain why some non-arms length sales, sales of business properties, or duplicate sales had been included in the data. He could not explain why the reavs system imputed a property value that was different than a recent actual sales price. He answered many questions about these apparent errors by referring to "400 lines of code" in the reavs computer software that did the calculations. He did not know how the software worked. At one point, when questioned about the reavs system, his answer was simply "the system is doing what the system does".**

Skaburskis's Evidence

142. Skaburskis is a statistician who performed calculations for the plaintiff using the "Teranet hybrid data" set provided to him by Robert Maughan.[171]

143. The Trial Judge found that the Teranet hybrid data set contained fundamental errors that "raise some concerns about [its] reliability".[172]

144. Nevertheless, the Trial Judge relied on Skaburskis's calculations. The Trial Judge failed to appreciate that Skaburskis's results were hostage to the error-riddled Teranet data. The Trial Judge failed to appreciate that the logical consequence of the errors in Teranet's hybrid data set meant that Skaburskis's results were necessarily inaccurate, biased and unreliable.

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[171] October 5, 2009 Rodney Street Report and October 6, 2009 Welland and Port Colborne Report, Exhibit 45, "Skaburskis Report and Statistical Analysis re: Port Colborne and Surrounding Municipalities", Exhibit Book, pp. 14588-14637; Trial Decision, para. 301, Inco Compendium, Tab 2, p. 92.

[172] Trial Decision, para. 236. Inco Compendium, Tab 2, pp. 73-74.

145. There are three main problems with the Teranet data set:

(a) It only contains 20% of all property sales for the years 2003-2008, and is missing most of the 2002 sales;[173]

(b) The 20% of sales that were used for 2002-2008 contain numerous related party transactions and cannot be relied upon to be representative of the market;[174]

(c) While Rodney Street Area properties only constitute 5% of all the properties in Port Colborne, they totalled 30% of the properties included in the 20% of sales that Teranet selected for the years 2003-2008. Because Rodney Street area properties are much lower in value than the average Port Colborne property, Port Colborne's results for 2003-2008 were skewed downwards.[175]

146. The Trial Judge failed to appreciate that Skaburskis's results were based solely on the uncorrected data which had house prices decreasing and not increasing following September 2000 (as discussed at paragraphs 125 and 126 above).[176] It defies probabilities, logic and common sense to say that Skaburskis would have found that Port Colborne property values had decreased by 3.95% a year following September 2000 even if the data he used had correctly shown that house prices increased, not decreased, following September 2000.

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173 Trial Decision, paras. 235, 237 and 238, Inco Compendium, Tab 2, pp. 73-74.

174 Trial Decision, paras. 240 and 308, Inco Compendium, Tab 2, pp. 74-75, 94; Inco Compendium, Tabs 32 and 39.

175 Trial Decision, para. 239, Inco Compendium, Tab 2, p. 74.

176 Skaburskis admitted that the data he used was based on an average price of $91,214 in 2001 versus corrected $95,004. Skaburskis Cross, Nov. 26, 2009, v. 5, p. 1300, l. 10 – p. 1305, l. 14; Nov. 27, 2009, v. 5, p. 1341, l. 12 – p. 1342, l. 10, Inco Compendium, Tab 47, pp. 903-908 and 930-931. Exhibit 48, "Report titled: Teranet "ASP" Data Records – Oct. 2000 to Sept. 2001", Exhibit Book, pp. 14832-14876; Trial Judge's Reasons, para. 308, Inco Compendium, Tab 2, p. 92.

(a) Errors in Teranet Data Set 2001-2002

147. The Trial Judge found that the "second problem" with the ASP data set and therefore with the hybrid data set, was that "approximately 70 sales for the period January 2002 to September 2002 were missing from the MLS data set."[177]

148. The Trial Judge then found that "there is no updated calculation as to how these 70 [missing MLS] sales might have affected the average sales price in Port Colborne in the 2001/02 year".[178] The Trial Judge failed to appreciate that Atlin, Inco's expert, provided an "apples to apples" comparison of all MLS sales in Welland and Port Colborne. When all MLS data is used, Atlin's evidence demonstrated that Port Colborne had outperformed Welland.[179]

149. Skaburskis had been unaware until his cross-examination that the Teranet data missed a large number of MLS sales in 2002.[180] If Skaburskis had used the same complete MLS data for all years as available to Atlin, then Skaburskis would surely have come to the same conclusion as Atlin and found that Port Colborne property values kept pace with those of Welland.

Errors in the reavs-Selected 2003-2008 Data Set

150. The data in the Teranet hybrid data set for 2003-2008 contained only about 20% of all Port Colborne sales for the years 2003-2008. The Trial Judge failed to appreciate that reliable conclusions could not be drawn from this sample. In this respect, the Trial Judge failed to understand and appreciate the evidence of Skaburskis and of the data itself.

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177 Trial Decision, para. 309, Inco Compendium, Tab 2, p. 94. In fact, as discussed above, all MLS sales from the period of 2002 were missing from the data set, because Teranet's real estate agent failed to provide Teranet with 2002 data, and Mr. Maughan did not notice that error until he testified.

178 Trial Decision, para. 309, Inco Compendium, Tab 2, pp. 94-95.

179 Exhibit 46, Tab 12, "November 2009 Teranet Brief", Exhibit Book, p. 14773.

180 Skaburskis understood that he had received data from Teranet for the period 1997-2002 containing "all available MLS and other sales Teranet had access to", subject only to the filters set out in the Teranet Report (e.g. a $250,000 sales price cap) (Skaburskis Cross Nov. 25, 2009, v. 4, pp. 1211 - 1218, Inco Compendium, Tab 47, pp. 856-863). Skaburskis was unaware until his cross-examination that the Teranet data was missing many MLS sales from the year 2002 (Skaburskis Cross Nov. 25, 2009, pp. 1211 - 1218, Inco Compendium, Tab 47, pp. 856-863; Nov. 26, 2009, v. 5, p. 1332, l. 32 – p. 1333, l. 6, Inco Compendium, Tab 47, pp. 928-929).

(a) The 20% Data Sample Was Not Representative

151. Skaburskis agreed that, in order to generate accurate and reliable results, the sample of transactions he received from Teranet had to be representative of the property market as a whole.

152. Skaburskis agreed that "the sample you're using has to be representative or reflective of the population of the universe you're trying to draw conclusions about, in order to generate accurate and reliable results".[181] Skaburskis did not review the data he received from Teranet, and said that he could not say whether it was representative or not.[182]

153. A familiar example shows how a sample must be representative of the population being measured in order to generate accurate results. Everyone knows that pollsters ask hundreds or thousands of voters about who they intend to vote for in order to make conclusions about whom the entire population will elect. As Skaburskis agreed, if one polled 1000 university graduates in Toronto about who they intended to vote for, one could say with a good degree of confidence who university graduates living in Toronto would elect, but you could not say with confidence who the entire voting population of Canada would elect.[183]

154. In order to generate the most reliable and accurate results, Skaburskis agreed that "the only way a small sample can be better than using a large sample is if you're assured that the small sample is somehow more representative of the entire population than the large sample".[184]

155. As such, the 2003-2008 Teranet data set, which excluded 80% of sales from 2003 and 84% of sales in the final measurement year of 2007-2008 would have to be demonstrated to be more representative of the Port Colborne housing market than MLS sales data in order for its results

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[181] Skaburskis Cross, Nov. 25, 2009, v. 4, p. 1227, l. 28 – p. 1228, l. 4, Inco Compendium, Tab 47, pp. 893-894.

[182] Skaburskis Cross, Nov. 25, 2009, v. 4, p. 1263, ll. 14 – 22, Inco Compendium, Tab 47, pp. 879.

[183] Skaburskis Cross, Nov. 25, 2009, v. 4, p. 1227, ll. 18 – 27, Inco Compendium, Tab 47, pp. 864.

[184] Skaburskis Cross, Nov. 25, 2009, v. 4, p. 1262, l. 16 – p. 1263, l. 13, Inco Compendium, Tab 47, pp. 878-879.

to be preferable. Not only was the Teranet data not "more" representative, it was in fact shown to be unrepresentative.

156. It was therefore unreasonable, and a palpable and overriding error, for the judge, at the end of the day, to use results generated by this hybrid Teranet data (as the judge did to support his conclusions regarding the MPAC results and to calculate Rodney Street damages), as opposed to the results generated by the larger and nearly complete MLS data set as testified to by Atlin.

(b) Teranet 20% Sample for 2003-2008 Was Skewed to Lower Priced Homes

157. The 2003-2008 sample data group from Teranet included too many homes from the Rodney Street area, with no reason as to why that was the case. The result of their inclusion depressed the calculation of Port Colborne's average property values in the years 2003-2008.[185]

158. There is no dispute that Rodney Street area homes are worth significantly less than other properties in Port Colborne (both long prior to September 2000 and following). Skaburskis's evidence was that Rodney Street area homes were worth on average worth 68% less than properties on the West Side of Port Colborne.

159. There was also no dispute that Rodney Street area properties comprised about 5% of all properties in Port Colborne. This is consistent with the Trial Judge's calculations (the Trial Judge found that there were about 340 properties in the Rodney Street area, out of a total of about 7000 properties in Port Colborne; in fact there are 300 RSA properties out of 6057).[186]

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[185] Trial Decision, para. 239, Inco Compendium, Tab 2, p. 74.

[186] As set out at paragraphs 85 and 86, above.

160. Teranet's sales data for the years 1997-2002 accurately reflected the proportion of Rodney Street area homes. Sales from the Rodney Street area comprised 3.9% of the data included in the Teranet sales data for the years 1997-2002.[187]

161. In stark contrast, sales from the Rodney Street area comprised 26.3% of the sales data in the Teranet data set for the years 2002-2008.[188]

162. Skaburskis and Maughan offered no explanation for why the data included such a 5-fold increase of Rodney Street area homes in the years 2003-2008.

163. When confronted in cross-examination with the fact that the Teranet data he had used was skewed to low-value Rodney Street properties in the later years, Skaburskis agreed that one could not say that the 2003-2008 Teranet data was representative: a precondition to generating reliable results. Skaburskis stated "whether it's representative or not in terms of the market I can't, I can't tell you...what we have agreed on is that the proportion of [Rodney Street] has gone up [over time]".[189]

164. Until he was cross-examined and shown the data (which he had never examined previously), Skaburskis had been unaware that Rodney Street properties comprised 26.3% of his data in the years 2002-2008. The Trial Judge (at paragraph 239) accepted all of these facts. The Trial Judge found that a problem with the hybrid data was that RSA properties generally have a lower value than other properties in other parts of Port Colborne.

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187 Exhibit 46, Tab 5, "November 2009 Teranet Brief", Exhibit Book, p. 14645; shows Teranet sales in Rodney Street for the period October 1997 – September 2008. The total number of sales in the Rodney Street Area for October 1997 – September 2002 is 34 (out of a total residential sales volume of 871).

188 Exhibit 46, Tab 5, "November 2009 Teranet Brief", p. 9 of 78, Exhibit Book, p. 14645 shows Teranet sales in Rodney Street for the period October 1997 – September 2008. The total number of sales in the Rodney Street Area for October 2002 – September 2008 is 71 (out of a total residential sales volume of 270).

189 Skaburskis Cross, Nov. 25, 2009, v. 4, p. 1254, ll. 18-21, Inco Compendium, Tab 47, p. 874. See also p. 1253, ll. 10 – 15, Inco Compendium, Tab 47, p. 873: "A. Well, the volume of sales [in the Rodney Street area] relative to West Side has gone up, as you can see in the data. Q. Oh, it has? A. Well the - the volume of sales on which I have information on has gone up".

165. Prior to being confronted with the fact that lower value sales were disproportionately represented in later years in his data, Skaburskis acknowledged that the inclusion of disproportionate sales from low value neighbourhoods would generate unreliable results.

166. Skaburskis stated that if the data contained a disproportionate number of sales from low value neighbourhoods in later years, then you would generate "biased" results and an "unfair comparison". Skaburskis stated that "your estimate [of property values] would be downward over time" and "you would be overstating the difference in the price trends."[190] The Trial Judge did not refer to this evidence.

167. Because the data Skaburskis received from Teranet is greatly skewed to sales from the Rodney Street area of Port Colborne in 2003-2008, growing from 5% to nearly 30% of sales with no explanation, Skaburskis generated "biased" and "unfair" results which: (1) cannot be fairly compared to years prior to 2003; and (2) cannot be fairly compared to other municipalities. The Trial Judge failed to understand or appreciate these basic facts, and his conclusions regarding the results generated by the Teranet hybrid data are therefore unsupported by the evidence.

(c) The Data Contained Related Party Transactions that Skaburskis Assumed Would Be Screened-Out by Teranet

168. Skaburskis testified that he had understood that the data sets he received and used had been screened by Teranet to exclude non-arm's length transactions because, in his words, "non-arm's length transactions are not representative of general property market forces".[191] He did not

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[190] Skaburskis Cross, Nov. 25, 2009, v. 4, pp. 1228, l. 27 – p. 1230, l. 6, Inco Compendium, Tab 47, pp. 865-867 [Emphasis added.] ("...If we are looking at changes over time and you have in one sample, systematically more low priced houses than you do in another sample, it would be true that for every year on average, if you take the price, then you have an unfair comparison, because the extra low houses would make that area, that component, have a lower average price"; "...you would get a biased, your estimate would be downward over time. It would be deflected downward, by the change in the proportions of low priced homes."; "...you would be overstating the difference in price trends". See also p. 1228, ll. 13-20, Inco Compendium, Tab 47, p. 865: "Q. And so your data set would have to be representative of the population? A. Yes. Q. And that would include, for example, ensuring that you don't have a disproportionate number of sales from a high-value or rich neighbourhood, as compared to a low-value neighbourhood? A. Correct.") [Emphasis added.].

[191] Skaburskis Cross, Nov. 25, 2009, v. 4, p. 1217, ll. 14-23, Inco Compendium, Tab 47, p. 862.

realize until his cross-examination that many such transactions had in fact been included in the data set he received from Teranet.[192]

169. Teranet's data in fact included low value non-arm's length transactions in Port Colborne, the type of transaction he had agreed was "not representative of general market forces."[193]

170. For example, in cross-examination Skaburskis agreed that his data included the transfer of the property at 8 Birch Court in Port Colborne for $99,260 on September 15, 2008.[194] This was one of the only 17 transactions Teranet selected for Port Colborne for 2008, even though its own AVM valued the property at more than twice that value, at $225,000 in 2007 and 2009.[195] The land registration deed for the transaction showed that the $99,000 transaction was in fact a transaction between spouses or former spouses in compliance with a written separation agreement.[196] Skaburskis was aware that sometime when spouses separate they divide their assets, and that one spouse will buy the other's one-half interest in the equity of the matrimonial home. When presented with the deed, Skaburskis agreed that it was a non-arm's length transaction "not

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192 Skaburkis Cross, Nov. 25, 2009, v. 4, p. 1216-1217, Inco Compendium, pp. 861-862. As discussed above, the Teranet hybrid data set was not comprised of any MLS data for the period October 1, 2003 to September 30, 2008, contrary to the findings of the Trial Judge. Instead, it was solely selected from land registry transactions, which unlike MLS data, contains non arm's length transactions as well as arm's length transactions (see discussion above). As a result, Teranet's data for 2003-2008 included many non arm's length transactions.

193 Skaburskis Cross, Nov. 25, 2009, v. 4, p. 1217, ll. 14-23, Inco Compendium, Tab 47, p. 862. It is also worthwhile noting that Skaburskis screened out transactions from his Repeat Sales analysis on the basis that they "may" not have been "indicative of the changing market forces". Repeat Sales Report, Exhibit 45, "Skaburskis Report and Statistical Analysis re: Port Colborne and Surrounding Municipalities", discussion on fourth page of report under "Step 3", Exhibit Book, p. 14622. The fact that non-arm's length sales are included in Teranet's Port Colborne data throughout the time 1997-2008 means that Port Colborne results cannot be fairly compared to other municipalities throughout this period. See also, Skaburskis Cross, Nov. 26, 2009, v. 5, p. 1330, l. 24 – p. 1331, l. 27, Inco Compendium, Tab 47, pp. 926-927.

194 Skaburskis Cross, Nov. 25, 2009, v. 4, p. 1266, ll. 7 - 29, Inco Compendium, Tab 47, p. 882 and Exhibit 50, "A Skaburskis Data Points for Period: October 1, 1997 to September 30, 2008" row 1139. Exhibit Book, p. 14901.

195 Skaburskis Cross, Nov. 25, 2009, v. 4, p. 1269, ll. 7 - 11, Inco Compendium, Tab 47, p. 885; Exhibit 50 "A Skaburskis Data Points for Period: October 1, 1997 to September 30, 2008" are in the range of about 200 per year, Exhibit Book, p. 14901. See Exhibit 46 "November 2009 Teranet Brief", Tab 3, see also Tab 6, pp. 1, 11-13, 14-17, Exhibit Book, pp. 14643, 14646, 14656-14658, 14659-14662.

196 Exhibit 46, Tab 6, "November 2009 Teranet Brief", pp. 11-13, Exhibit Book, pp. 14656-14658, Inco Compendium, Tab 32, pp. 522-524.

reflective of market forces".[197] As to why it was included in the data set he received from Teranet, he stated "it's certainly an error, looks like an error."[198] Many other examples of non-arm's length transactions at non–market values were also included in the data.[199]

171. Skaburskis did not know why Teranet selected the 8 Birch Court transaction of 2008 as one of its 17 selected "relevant and consistent sales." Skaburskis also did not know why higher value sales of similar properties in the same time period had been excluded from his data set by Teranet.[200]

172. Skaburskis acknowledged that if he had used data that had included more higher priced sales in the year 2008, that would have increased his estimates of property values for Port Colborne.[201]

173. Moreover, Skaburskis acknowledged that if you used a different data set, that Port Colborne values "could be as high as Welland".[202]

174. This evidence was not acknowledged by, and not appreciated by, the Trial Judge.

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197 Skaburkis Cross, Nov. 25, 2009, v. 4, p. 1268, l. 6 – p. 1269, l. 7, Inco Compendium, Tab 47, pp. 884-885.

198 Skaburskis Cross, Nov. 25, 2009, v. 4, p. 1269, ll. 10-11, Inco Compendium, Tab 47, p. 885.

199 See for example, Skaburskis Cross, Nov. 25, 2009, v. 4, pp. 1271, l. 21 – p. 1273, l. 25, Inco Compendium, Tab 47, pp. 887-889, re: the transfer of 625 Clarence Street in Port Colborne in February 2007 pursuant to a separation agreement between spouses documented at Exhibit 46, Tab 6, "November 2009 Teranet Brief", p. 2 and 18-20, Exhibit Book, pp. 14647, 14663-14665, Inco Compendium, Tab 32, p. 513; See also Skaburskis Cross, Nov. 26, 2009, v. 5, p. 1293, l. 23 – p. 1295, l. 18, Inco Compendium, Tab 47, pp. 900-902, regarding the property at 72 Highway Number 3 East, where a $10,000 related party transaction in 2002 was included in the Teranet set. The same property sold in 2005 for $180,000. Skaburskis accepted that the $10,000 transaction was "not reflective of market forces". See the examples of all other related party transactions set out in Exhibits 46 and Exhibit 48 (which Skaburskis confirmed were contained in his data – Skaburskis Cross, Nov. 27, 2009, v. 5, p. 1341, l. 12 – p. 1342, l. 10, Inco Compendium, Tab 47, pp. 930-931. Confirmation is also available by examination of Exhibit 50, "A Skaburskis Data Points for Period: October 1, 1997 to September 30, 2008", Exhibit Book, p. 14878-14901.

200 Skaburskis Cross, Nov. 25, 2009, v. 4, p. 1268, l. 31 – p. 1269, l. 12, Inco Compendium, Tab 47, pp. 884-885.

201 Skaburskis Cross, Nov. 25, 2009, v. 4, p. 1247, l. 20 – p. 1249, l. 19, Inco Compendium, Tab 47, pp. 870-872.

202 Skaburskis Cross, Nov. 25, 2009, v. 4, p. 1249, ll. 18-19, Inco Compendium, Tab 47, p. 872.

(d) Skaburskis's Erroneous and Unjustified Presumption of Representativeness of Teranet's Data

175. In his cross-examination, Skaburskis revealed that he had noticed that the number of sales Teranet had given him for each of the years 2003-2008 were much lower than prior years. He stated the he had attempted to obtain an explanation for this "puzzling" fact, but received none prior to submitting his reports.[203]

176. Sometime after Maughan was cross-examined at length on his selection of the 20% of sales in 2003-2008, but before Skaburskis testified in late November 2009, Skaburskis testified that he came to understand that the 20% of sales were selected by the reavs AVM system as being "relevant and consistent". However, Skaburskis did not know how the reavs AVM system worked, did not know how it generated property value estimates, did not know how it selected relevant and consistent sales, and had no greater knowledge of the system than Maughan (who as discussed above was unable to give any explanation).[204]

177. The Trial Judge's finding that Skaburskis's evidence regarding the reavs system could thereby rehabilitate the data that was produced at trial is unreasonable and unfounded in the evidence.

178. Skaburskis's conjecture that reavs AVM system would select a representative sample was based solely on the information presented in the Teranet Report about the general functioning of the reavs AVM system. Teranet explains to the public and to customers that the reavs AVM system must select 90% of arm's length sales in order to generate reliable results. In this case, Maughan only selected 20% of sales (including arm's length and non-arm's length transactions). No

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[203] Skaburskis Cross, Nov. 25, 2009, v. 4, p. 1264, l. 31 – p. 1265, l. 13, Inco Compendium, Tab 47, pp. 880-881.

[204] Skaburskis Cross, Nov. 25, 2009, v. 4, p. 1256, l. 27 – p. 1257, l. 8; p. 1263, ll. 25 – 28; p. 1264, ll. 14 – 30; Inco Compendium, Tab 47, pp. 876-877, 879, 880.

witness – not Maughan or Skaburskis – was able to provide any explanation for this gaping inconsistency and repudiation of the reavs system.

179. Accordingly, the Trial Judge's finding that Skaburskis gave "insight" as to why or how the reavs AVM system purportedly rejected 80% of Port Colborne sales is unreasonable and unsupported by the evidence. Skaburskis's evidence was not capable of supporting the selection of the 2003-2008 data on any basis or as being representative.

180. Similarly, the Trial Judge misunderstood the effect of the whole of Skaburskis's evidence regarding "confidence" intervals. Skaburskis's range of confidence was necessarily based on the data he had. The confidence intervals necessarily could not be based on data he did not have. Accordingly, Skaburskis acknowledged that correcting Teranet's data errors, and including the 80% of missing transactions, could change his calculated results beyond his reported confidence intervals.[205] Skaburskis agreed that, if one used all the available data, the results for Port Colborne could be as good as the results for Welland.[206]

181. When Skaburskis was confronted with the unrepresentative nature of Teranet's data, he noted that all data sets have errors. However, it cannot be assumed that the errors of the fundamental nature contained in the Teranet data may be ignored as mere "noise".

182. As Skaburskis testified, the only basis upon which one could presume that Skaburskis's Port Colborne results may be fairly compared to Welland is if the Welland data was similarly error-riddled and skewed to lower-value properties in lower end years. First, there was no evidence this was the case. Skaburskis acknowledged that he did not know whether Welland data

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[205] Skaburskis Cross, Nov. 26, 2009, v. 5, p. 1305, ll. 15 – 24; p. 1306, l. 21 – p. 1307, l. 29, Inco Compendium, Tab 47, pp. 908, 909-910.

[206] Skaburskis Cross, Nov. 25, 2009, v. 4, p. 1249, ll. 18-19, Inco Compendium, Tab 47, p. 872: Q. And so if your data set had included - the data set you got from Teranet, included more higher priced sales in Port Colborne, this line that's currently at 116, could have moved up to 120, 140; you just don't know - 160 - it could even be as high as Welland, theoretically? A. If you have a different data set, it could be as high as Welland."

was equally flawed or skewed to low-value properties, and acknowledged that he had not reviewed the data to test this theory.[207]

183. Second, to make such a leap amounts assuming that both Port Colborne data and Welland data are not representative and were equally skewed. In other words in order to compare Port Colborne's results to Welland's results, one would have to assume that, instead of having the type of representative data that Skaburskis testified was required to generate accurate and reliable results, that for some mysterious reason the very opposite type of data was used both in Port Colborne and in Welland. Moreover, such an assumption is inconsistent with the Skaburskis's stated reliance upon the fact that the reavs AVM selected the data and that the reavs AVM only uses representative data or "good input". It was therefore a palpable and overriding error of the Trial Judge to find the results generated by the Ternaet hybrid data could be relied upon.

Skaburskis's Rodney Street Analysis

(a) Rodney Street Properties Outperformed Port Colborne and Welland

184. In cross-examination, Skaburskis testified that his calculations showed that Rodney Street Area properties had outperformed the values of other properties in other areas of Port Colborne. He testified that after September 2000, Rodney Street area properties had increased at a rate of 10% annual compounding whereas properties across Port Colborne had increased at 4% annual compounding.[208]

185. Skaburskis failed to mention this fact in any one of his nine written reports. The Trial Judge failed to acknowledge this fact.

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[207] Skaburskis Cross, Nov. 25, 2009, v. 4, p. 1213, ll. 4 – 13; p. 1256, ll. 11-16; p. 1270, ll. 13 – 32, Inco Compendium, Tab 47, pp. 858, 876, 886. Skaburskis also theorized that the fact that Rodney Street properties had increased in price at a greater rate than properties in the rest of Port Colborne (10% compounded annually compared to 4%, see discussion below) might have a "countervailing" effect. However, he acknowledged that he had not done any calculations to test this theory, and admitted "I don't know the countervailing effect". Skaburskis Cross, Nov. 25, 2009, v. 4, p. 1255, ll. 8 - 32, Inco Compendium, Tab 47, p. 875.

[208] Skaburskis Cross, Nov. 25, 2009, v. 4, p. 1242, ll. 17 – 24, Inco Compendium, Tab 47, p. 868, "...we're getting roughly - a 10% increase – annual, compounding increase in value in Rodney Street, compared to in the other case, or an overall increase of about 4% across Port Colborne". See also Nov. 25, 2009, v. 4, p. 1255, Inco Compendium, Tab 47, p. 875.

186. Skaburskis's analysis, if accepted, therefore showed that Rodney Street Area properties performed 6% compounding per annum better than the rest of Port Colborne. In other words, the Rodney Street properties had increased at a rate greater than the 4.35% difference that Skaburskis found existed between Port Colborne and Welland. In fact, Skaburskis's conclusions, if accepted, would lead to the conclusion that Rodney Street area properties suffered no damages, and indeed, on the basis of his evidence, outperformed properties in Welland. Given Skaburskis's evidence in this regard, it was unreasonable to conclude that Rodney area properties suffered damages of any type.

187. As well, Skaburskis's calculations are inconsistent with the assertion that negative publicity in the Rodney Street area affected Port Colborne property values. Under the plaintiff's theory of the case, Rodney Street area property values would be affected more, not less, by the "announcements".

(b) Rodney Street Report Fundamentally Flawed and Unreliable

188. The Trial Judge based his damages for the Rodney Street Area on Skaburskis's written analysis of only 105 Rodney Street area transactions. These transactions were supplied to him by Teranet for the period 1997-2008, and Skaburskis did not review them for errors or omissions.

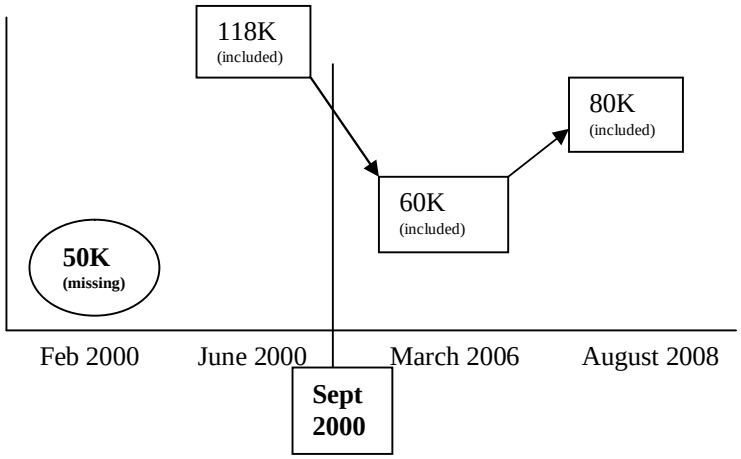
189. Again, the Teranet data missed 71 MLS sales from 2002, and 80% of the sales from 2003-2008.[209] Skaburskis acknowledged that he was missing a number of transactions from his data set for Rodney Street, stating "the data set after 2003 includes about 20% of the MLS listings, so I

[209] Skaburskis stated that he did not need to correct the 2003-2008 data used in his October 2009 reports because it was a larger sample than his repeat sales data. This statement is belied by the fact that his repeat sales data used 936 sales transactions (*i.e.* 468 "observations" or "pairs" of repeat sales), whereas his October 5, 2009 Rodney Street Report used only 105 sale transactions, a sample barely 1/10th the sample size used for his Repeat Sales Report. Similarly, although Skaburskis's October 6, 2009 Report comparing Port Colborne and Welland data had 2,805 transactions in total, the Port Colborne transactions comprised only 549 transactions, or about 50% less than his repeat sales data (Skaburskis Cross, Nov. 25, 2009, v. 4, p. 1278, ll. 12 – 25, Inco Compendium, Tab 47, p. 894; Nov. 26, 2009, v. 5, p. 1311, ll. 5-13; Inco Compendium, Tab 47, p. 914).

would expect that there will be quite a few sales that are not listed or included in the [Rodney Street] data set...".[210]

190. The effect of these missing transactions was strikingly illustrated in one example. A property on Mitchell Street in the Rodney Street area had the following transactions: (1) February 14, 2000 - $50,000, (2) June 28, 2000 - $118,000, (3) March 16, 2006 - $60,000, and (4) August 28, 2008 - $80,100. The Teranet data set (and therefore Skaburskis's Rodney Street data set) was missing transaction (1), making it appear as if the property had dramatically decreased in value post-September 2000. If transaction (1) is included as it should have been, it can be seen that transaction (2) is the outlier or anomaly. Skaburskis acknowledged that he would have removed transaction (2) as an anomaly if he had used the same screening methodology he had used in an earlier report. If transaction (2) is ignored it can be seen that the property actually steadily increased in value after September 2000.[211]

Missing Sale and Teranet Data



191. In addition to missing many representative transactions, the Rodney Street data included many low value non-arm's length sales post September 2000. Again, as with other Teranet

[210] Skaburskis Cross, Nov. 26, 2009, v. 5, p. 1325, ll. 9 – 19, Inco Compendium, Tab 47, p. 925. Examples of sales missing from his data set are included in the brief of deeds, Exhibit 51, Tabs 3, 7, 9, 10, 11, 12 and 13, Exhibit Book, pp. 14910-14920, 14928-14930, 14932-14946, Inco Compendium, Tab 39 at pp. 605-660.

[211] Skaburskis Cross, Nov. 26, 2009, v. 5, p. 1314, ll. 32 – p. 1319, l. 5, Inco Compendium, pp. 915-920.

selected sales data, arm's length sales of substantially higher value for the same properties were inexplicably not included in the data.[212]

192. When confronted with these facts, Skaburskis observed "Yes, if we start to pick and choose our data points, then I think we can probably get any kind of result we would like."[213]

193. Of course, this is precisely the main problem with Teranet's data. Low value transactions were picked and chosen on some unexplained basis for Port Colborne and Rodney Street, and 80% of high value sales were not picked, without rhyme, reason or explanation.

194. Skaburskis did not review the Rodney Street data, 105 transactions, for errors of this nature. In contrast, Skaburskis did review and correct anomalies for an earlier, different report. Skaburskis's evidence was the small sample size used for his other report – 936 transactions – "required" review and correction. Specifically, Skaburskis removed 128 transactions from the original 936 because they were unrepresentative.[214] Skaburskis testified that prior to these

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[212] Examples of non-arm's length sales included in the data are in the brief of deeds, Exhibit 51, "Brief of Land Registry Transfer/Deeds re: Skaburskis Reports", Tabs 1, 4, 5 and 6, Exhibit Book, pp 14904-14907, 14921-14922, 14923-14924, 14925-14927 and Inco Compendium, Tab 39, pp. 605-660. The transaction at Tab 6 is a transfer of 158 Davis St. in February 2002 for $45,610 involving a party with the same last name, which is included in the data. Missing from the data is the apparently arm's length transaction at Tab 7 for the same property which occurred in July 2004, for $93,000. Skaburskis agreed that the included transaction could have been another situation of one separating spouse purchasing the other's equity in the matrimonial home – Skaburskis Cross, Nov. 26, 2009, v. 5, p. 1321, l. 7 – p. 1323, l. 9, Inco Compendium, Tab 47, pp. 922-924. Moreover, the Teranet data had included a sale of this property in March 1999 for $90,000 – again making it appear as if the property's value had dramatically decreased post-September 2000. See, "A. Skaburskis Data Points for Period: October 1, 1997 to September 30, 2008", rows 276 and 999, Exhibit Book, p. 14878-14901 and Skaburskis Cross, Nov. 26, 2009, v. 5, p. 1321, ll. 7-30, Inco Compendium, Tab 47, pp. 922.

[213] Skaburskis Cross, Nov. 26, 2009, v. 5, p. 1318, ll. 22 – 24, Inco Compendium, Tab 47, p. 919. See also the deeds at Tabs 2 and 3 of Exhibit 51, "Brief of Land Registry Transfer/Deeds re: Skaburskis Reports", Exhibit Book pp. 14908-14909, 14910-14920, Inco Compendium, Tab 39, pp. 605-660, and rows 489, 1047, 1132 of Exhibit 50, "A. Skaburskis Data Points for Period: October 1, 1997 to September 30, 2008", Exhibit Book, pp. 14878-14901; Skaburskis did not know why Teranet had missed the $50,000 sale and included the other transactions.

[214] For example, in his Repeat Sales Report (Exhibit 45) Skaburskis removed 88 sales (44 pairs) where the properties had greater than 25% annual compounded change. He considered these "obvious errors that generated unreasonable results" and "ridiculous results". However, he did not apply that screen to the October 2009 data – See Skaburskis Cross, Nov. 25, 2009, v. 4, p. 1275, l. 9 – p. 1276, l. 19; p. 1281, ll. 6-8, Inco Compendium, Tab 47, p. 891-892, 897, Repeat Sales Report, Exhibit 45, "Skaburskis Report and Statistical Analysis re: Port Colborne and Surrounding Municipalities", "Step 1", Exhibit Book, p. 14621). One specific example is set out at Exhibit 46, November 2009 Teranet Brief, Tab 6, Exhibit Book, p. 14648, showing the transfer of a property for $50,000 (non-arm's length) less than 6 months following a sale of the same property for $165,000 in Port Colborne (property is at Exhibit 50, Skaburskis' data, rows 1075 and 1111, p. 22, Exhibit Book, p. 14900 and discussed at Skaburskis Cross, Nov. 25, 2009, v. 4, p. 1281, l. 14 – p. 1283, l. 29, Inco Compendium, Tab 47, pp. 897-899; Nov. 25, 2009, v. 4, p. 1274, l. 11 – p. 1275, l. 14, Inco Compendium, Tab 47, pp. 890-891).

corrections, the results he had generated from Teranet's unreviewed data had been "unreasonable" and "ridiculous".[215]

195. Accordingly, the Trial Judge erred in failing to appreciate that the fact that Skaburskis did not "correct" the much smaller Rodney Street Teranet data set to ensure that it was representative (105 transactions vs. 936 transactions) necessarily meant that his results could not be relied upon.

The Trial Judge's Attempt to Justify his Damages Conclusions

196. In paragraphs 310 to 314, the Trial Judge makes attempts to buttress his damages findings by using different calculations. There are common problems to each of these calculations and individual problems to each as well. The common problems are that the Trial Judge uses fiscal 1998 (i.e. fiscal years beginning October 1, 1998 and ending September 30) as a beginning date and fiscal 2001 as the end date. Neither of these dates is used in his final assessment of damages, which is from fiscal 1999 to fiscal 2007. Furthermore, his end date is fiscal 2001, whereas in his damages calculation, his end date for the measurement is fiscal 2007. In addition, the Trial Judge "grosses up" the period of time between September 2002 and September 2008 based on an investment rate of 2%. No witness spoke to this methodology. No witness indicated that 2% was an appropriate rate. No testimony validated this approach or indicated that it was appropriate. No opportunity was given to the defendant to provide evidence with respect to this approach or even to argue against it.

197. With respect to paragraph 310 of the Reasons, if the Trial Judge had used the 1999 fiscal base year, commencing October 1, 1999 and compared it to the 2001 – 2002 year, which is not a valid comparison, there would be no differential, and hence no damage between the average

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[215] Skaburskis Cross, Nov. 25, 2009, v. 4, p. 1275, l. 9 – p. 1276, l. 19; p. 1277, ll. 22-26; p. 1278, ll. 13 – 18 (468 "observations" or repeat sale pairs = 936 separate sales transactions); p. 1280, ll. 8 – 15; p. 1280, l. 28 – p. 1281, l. 6, Inco Compendium, Tab 47, pp. 890-891, 893, 894. See also, Skaburskis Cross, Nov. 26, 2009, v. 5, p. 1309, ll. 3 – 17; p. 1317, ll. 6 - 32, Inco Compendium, Tab 47, pp. 913, 918 and Repeat Sales Report, Exhibit 45, "Skaburskis Report and Statistical Analysis re: Port Colborne and Surrounding Municipalities", Steps 1, 3, and 4 (44, 17 and 3 pairs of sales transactions removed = 128 sales transactions removed), Exhibit Book, pp. 14621-14622.

sales price appreciation for Port Colborne and Welland. Thus the wrongful gross up of 2% applied to zero would still equal zero.

198. With respect to the calculations done in paragraph 312, the Trial Judge utilizes 1997-1998 as the base year. There is no justification for using that year as the base year. He found a 2.6% differential in property value appreciation over five years between Port Colborne and Welland. Surely a 2.6% differential is within an acceptable range for comparable communities. If it is not, as it appears not to be for the Trial Judge, comparable must mean identical. Then adding the "gross up" further distorts the truth. If the Trial Judge had compared 1997 to 2008, as he did 1996 to 1998, Port Colborne and Welland have no difference.

199. In paragraphs 315 to 317, the Trial Judge indicates that he does not rely upon the MLS calculations because the MLS calculations are different from the ones that he has just performed himself in the proceeding paragraphs. As demonstrated, the Trial Judge has been selective about his starting and ending measurement dates, ignoring and avoiding those that do not support his damages conclusions. Furthermore, the Trial Judge has compared the MLS data to 2008, which is a correct methodological approach, to his truncated approach with a gross up, an approach that is not correct and that is not validated.

Causation

200. The Trial Judge addressed causation at paragraphs 261 to 282. He determined that Inco's operations over 66 years from 1918 to 1984 caused the delayed lag in property value appreciation between Port Colborne and Welland some 16 years later, *i.e.* commencing in September 2000. The Trial Judge states that he came to this conclusion of causation based on two common sense principles. However, it is contrary to common sense that if there was contamination between 1918 and 1984 that it would only manifest in 2000 to slow property value appreciation. Why would nothing happen in the 16 year interval between the cessation of operations in 1984 and

2000? Thayer, the plaintiff's expert, testified that a "disamenity" will have an immediate effect on housing prices.[216] No evidence was led that there would be a 16 year delayed reaction. The Trial Judge's common sense principles are contrary to the evidence and contrary to common sense.

201. It must be remembered that 97% of the nickel was emitted between 1918 and 1960.[217] Only three percent was emitted between 1960 and 1984. Common sense would dictate that if there was any adverse effect, it would have manifested itself by 1960. Viewed through this lens, it is not realistic to suggest that the negative effect did not manifest itself until September 2000, 40 years later.

202. It must also be remembered that the emitted nickel was invisible and blended into the soil. Added to that fact, is the absence of any claim based on the first branch of nuisance, that is to say, an unreasonable interference with the use and enjoyment of one's property as a result of the nickel emissions. Nevertheless, the Trial Judge advanced his two common sense principles:

> **[261] The first common sense principle is that the value of any residential property is reduced if that property is located close to a large industrial operation.**
>
> **[264] The second common sense principle is that environmental contamination in a community will negatively affect residential property values in that community.**

203. Upon examination, there is no substantial distinction to be drawn between the first common sense principle and the second common sense principle. Both say exactly the same thing, namely environmental contamination will negatively affect residential property value. In this case, there is no evidence or effect of contamination. The nickel blended invisibly into the soil in amounts

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[216] Thayer Chief, v. 4, Nov. 12, 2009, p. 1024, l. 27 – p. 1025, l. 19, p. 1027, l. 27 – p. 1028, l. 4, Inco Compendium, Tab 50, pp. 971-972, 973-974; Thayer Cross, v. 4, Nov. 12, 2009, p. 1047, ll. 15 – 27; p. 1049, l. 15 – p. 1050, l. 18; p. 1051, ll. 17-24, Inco Compendium, Tab 50, pp. 979, 981-982, 983.

[217] McLaughlin Chief, v. 5, Nov. 30, 2009, p. 1389, l. 5 – l. 25, Inco Compendium, Tab 46, p. 812.

below regulated intervention level. Accordingly, the nickel present on residential properties in Port Colborne was not toxic, and caused no increase to health risk or to air quality.

Dr. Mark Thayer

204. For both common sense principles, the Trial Judge relied upon the evidence of Mark Thayer. Mark Thayer made no examination of the Port Colborne community.[218] The totality of his evidence was based upon a review of 30 years of literature.[219] His central proposition was that markets react quickly to negative information.[220] Applying that proposition to the situation in Port Colborne would mean that the real estate markets would have reacted to the emissions from Inco's stack before 1960 or within a year or two after 1960 or at the latest by 1984.

205. Thayer was initially retained to do a hedonic (price regression) study of the price effects, if any, on an alleged announcement of high levels of nickel in Port Colborne on September 20, 2000. He was unable to obtain satisfactory data for his study and therefore confined his opinion to a review of the relevant literature on the price effects of environmental disamenities on residential real estate.[221] As such, Thayer did not purport to measure or quantify damages. He did not examine the Port Colborne housing market to see whether it had been negatively impacted by information.[222]

206. Thayer acknowledged that in 15% of the studies he considered, there was no property value losses associated with local disamenities.[223]

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218 Thayer Cross, v. 4, Nov. 12, 2009, p. 1035, l. 32 – p. 1036, l. 3; p. 1037, ll. 11-27, Inco Compendium, Tab 50, pp. 976-977.

219 Exhibit 43, "Report titled: The Price Effects of Environmental Disamenities in Residential Real-Estate Markets" dated September 1, 2008, p. 11, Exhibit Book, p. 14554 , Inco Compendium, Tab 40, p. 671.

220 Thayer Chief, v. 4, Nov. 12, 2009, p. 1024, l. 27 – p. 1025, l. 19, p. 1027, l. 27 – p. 1028, l. 4, Inco Compendium, Tab 50, pp. 971-972; Thayer Cross, v. 4, Nov. 12, 2009, p. 1047, ll. 15 – 27; p. 1049, l. 15 – p. 1050, l. 18; p. 1051, ll. 17-24, Inco Compendium, Tab 50, pp. 979, 981 – 982, 983.

221 Thayer Chief, v. 4, Nov. 12, 2009, p. 1035, ll. 13-28, Inco Compendium, Tab 50, p. 976.

222 Thayer Cross, v. 4, Nov. 12, 2009, p. 1035, l. 32 – p. 1036, l. 3; p. 1037, ll. 11-27, Inco Compendium, Tab 50, p. 976 – 977, 978.

223 Thayer Cross, v. 4, Nov. 12, 2009, p. 1048, ll. 27-32, Inco Compendium, Tab 50, p. 980.

207. Thayer agreed that it was a perfectly plausible outcome to find that if the houses near the Inco refinery experienced a reduction in value when the need for remediation of 25 properties was publicised, property values rebounded after remediation.[224] This was what happened in the Dallas Smelter Study, where Thayer was one of the authors.[225]

208. The Trial Judge accepted the theory and concepts that Thayer addressed from his review of the literature but misapplied it to the facts of Port Colborne. The Trial Judge found that there was a "baked-in discount" for residential properties that are located close to an industrial operation, regardless of whether that operation is the cause of air, water or soil pollution.[226] Even Berkhout, the plaintiff's witness, believed that in 2004 the market in Port Colborne, as well as other parts of Niagara, "took off".[227] Thus, while Inco and the plaintiff vigorously disagreed as to the effect, if any, from 2000 to 2004 on the real estate market of the public discussion of nickel in the soils of Port Colborne, Atlin for Inco and Berkhout for the plaintiff agreed that as of trial there were no lasting effects.

209. There was no evidence led of any "baked-in discount" and certainly not for the whole of Port Colborne, which covers a very wide area.

210. If one accepts that there was a "baked-in discount" well before 2000, as a result of the nickel emissions, then one must also conclude that the market knew of the adverse effects of nickel contamination well before 2000 to give rise to that discount. Thus the year 2000 is a fiction. Either that or there was no "baked-in discount".

211. But the Trial Judge needs to find a "baked-in discount" in order to bridge the 40 year or 16 year gap and to be able to say that there was new information after September 2000. Without

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224 Thayer Cross, v. 4, Nov. 12, 2009, p. 1067, ll. 22-31, Inco Compendium, Tab 50, p. 987.

225 Exhibit 44, "Article titled: Do Property Values Rebound from Environmental Stigmas? Evidence from Dallas, Land Economics May 1999", p. 325, Exhibit Book, p. 14586, Inco Compendium, Tab 41, p. 703; Thayer Cross, v. 4, p. 1063, l. 13-17; p. 1064, ll. 3-7, Inco Compendium, Tab 50, pp. 985, 986.

226 Trial Decision, para. 261, Inco Compendium, Tab 2, p. 81.

227 Berkhout Chief, v. 3, Nov. 5, 2009, p. 742, ll. 6-9; p. 744, ll. 12-19; Inco Compendium, Tab 43, pp. 711, 713.

that bridge, which runs contrary to Thayer's evidence and to common sense, no impact would have manifested itself in the 40 years between 1960 and 2000 and have manifested itself only in 2000.

212. With respect to the second common sense principle, the Trial Judge misapplied Thayer's evidence. By 2002, the class knew that below the 8,000 ppm level, there was no risk to human health.[228] Indeed, peer studies by renowned physicians, the results of which were published in the community stated unequivocally that there was no increased health risk to the residents of Port Colborne and the community health risks were no higher than the health risks experienced by the population in Ontario in any community.[229] All of this information was known by the spring of 2004 and the 24 properties above 8,000 ppm had been remediated. As previously stated, a comparison of MPAC data between 1999 and 2003 (the year before September 2000 and three years after) reveals that Port Colborne outperformed Welland in property value appreciation by two percent. On this evidence, there was no disamenity causing a decrease in house prices or the market had fully rebounded from any temporary concern.

213. Even using the Trial Judge's flawed number of 4.35% over a 10 year period between 1999 and 2008, does not support his common sense principle of causation. A review of annual differences in property prices between the communities of Port Colborne, Welland and Fort Erie demonstrate annual variations of 1 to 7%, even before the alleged announcement of September 2000.

214. There was no evidence that any person had difficulty in selling his/her house in Port Colborne. The number of houses sold in the period between 1999 and 2008 varied slightly, annually, around the 200 house mark.[230] There was no evidence that any person in Port Colborne

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228 Exhibit 4, Tab 709, March 2002 HHRA, Part p. 3, Exhibit Book, p. 7536, Inco Compendium, Tab 20, p. 344.

229 Exhibit 4, Tab 867, "Report titled: CHAP Studies A and C Integration: A Report to the Technical Subcommittee of the Public Liaison Committee for the City of Port Colborne", p. 29, Exhibit Book, p. 21632, Inco Compendium, Tab 23, p. 459; Smith Cross, v. 1, Oct. 20, 2009, p. 288, l. 3 – p. 292, l. 15, Inco Compendium, Tab 48, pp. 945 – 949.

230 Exhibit 46, Tab 3, "November 2009 Teranet Brief", Exhibit Book, p. 14643.

was unable to obtain a mortgage from a financial institution once the alleged 2000 announcement was known in the community.[231]

215. To buttress his conclusions, the Trial Judge referred to the evidence of Marion Steele. She compared the volume of sales in Port Colborne and Welland between 1997 and 2005 and noted that sales volumes in Port Colborne dropped in the two years that started in October 2000 and October 2001. Steele's central proposition was that after a shock to the real estate market, prices fall and "the volume of sales greatly contracts".[232] However, Steele's theory was fundamentally inconsistent with the evidence of what actually happened in Port Colborne:

(a) Average real estate values in Port Colborne went up in the year following September 20, 2000, from approximately $104,999 to approximately $109,285.[233] In other words, Port Colborne values increased by approximately 4.6% in comparison to Welland, which increased by approximately 4.2%.[234]

(b) The decrease in sales in Port Colborne following 2000 reflected normal variability seen throughout the data.

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231 Atlin Chief, Jan. 11, 2010, v. 7, p. 1977, ll. 17 – 29, Inco Compendium, Tab 42 , p. 707. […] 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 more expensive 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 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 has accepted that the residential real estate market is dependent on the availability of financing. There is clearly an ongoing residential and real estate active market, therefore, one can assume from that that there is an ongoing availability of mortgage financing. This is consistent with the evidence of the fact witnesses. Ms. Smith confirmed that she has no personal knowledge of any class member being turned down for financing or loans because of nickel levels on their property. Smith Cross, v. 1, Oct. 20, 2009, p. 311, ll. 18-23, Inco Compendium, Tab 48, p. 952; In fact, Ms. Smith and her husband, Craig Edwards, obtained a line of credit secured against their unremediated property at 91 Rodney Street. (Smith Cross, v. 1, Oct. 20, 2009, p. 311, l. 24 - p. 320, l. 5, Inco Compendium, Tab 48, pp. 952-961 and Exhibit 12, "Document titled: Charge/Mortgage (Property of Ellen Smith and Craig Edwards)", Exhibit Book, pp. 14131-14132. Similarly, both Berkhout and McLaughlin were unaware of any resident being turned down for a mortgage or financing because of elevated nickel levels (McLaughlin Cross, v. 6, Dec. 2, 2009, p. 1629, ll. 13-22, Inco Compendium, Tab 46, p. 852; Berkhout Cross, v. 3, Nov. 9, 2009, p. 831, l. 20 – p. 832, l. 19, Inco Compendium, Tab 43, p. 728-729).

232 Steele Chief, v. 3, Nov. 5, 2009, p. 689, ll. 7-9, Inco Compendium, Tab 49, p. 970.

233 Exhibit 27, "Analysis of MLS House Sales as per the Original Steele-Tomlinson Report with MLS House Price Analysis Added", Exhibit Book, p. 14438, Inco Compendium, Tab 38, p. 604.

234 *Ibid.*

As can be seen, a similar trend of decreasing sales volumes occurred in Port Colborne in the year following September 2004, when it experienced a 17% drop.[235] A similar trend occurred in Fort Erie during the period of September 1998-August 2001.[236] From 2004-2005, the number of Fort Erie sales declined by 14%. All of these declines are notably larger than the 8% decline in the number of Port Colborne sales from 1999 to 2000, which Steele pointed to. No one suggested that any new event related to nickel or otherwise occurred in Port Colborne, Welland or Fort Erie in those time frames.

(c) Moreover, the area where one would expect the biggest "shock" and impact based the plaintiff's and Steele's theory, the Rodney Street Area, did not show any decrease in sales volumes. To the contrary, the number of Rodney Street area sales *increased* in the year immediately following September 2000.[237]

216. The Trial Judge also referred to the evidence of a lay witness, the real estate agent, Mr. Bill Berkhout. Berkhout did not do any calculations, but spoke of his "general perception". His "general perception" was completely undermined by sales volumes and prices in Port Colborne for the years following the announcement. The Trial Judge was not entitled to accept Berkhout's "general perception" in preference to objective, factual evidence.

Conclusion

217. The Trial Judge appealed to "common sense" to support his conclusion that soil nickel levels in Port Colborne had an effect on property values. However, a genuine "common

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[235] In the five years preceding the 16% decline in Port Colborne sales in fiscal 2005 (over double the 7% declined in fiscal 2000), there was a continuous increase in the number of sales in Port Colborne. See Exhibit 26, "Excerpt of Altus Clayton Report", Exhibit Book p. 14437.

[236] Sales rose in the first two years, followed by a dip in September 2000-August 2001 period.

[237] Exhibit 46, Tab 5, "November 2009 Teranet Brief", Exhibit Book, p. 14645, Teranet Results for Rodney St. Area showed that sales for the period October 2000-September 2001 increased to 8 from 5 in the period October 1999-September 2000; MLS Results for the Rodney St. Area showed that sales for the period September 2000-August 2001 increased to 5 from 4 in the period September 1999 - August 2000.

sense" view of the facts can only lead to the conclusion that there was no effect on property values in Port Colborne that can be attributable to Inco.

218. The alleged material damage is an invisible deposition of nickel, an element that is in all of our food categories. Canadians ingest nickel with their food on a daily basis. Nickel in the levels present in Port Colborne poses no health risk.

219. The nickel has not created a mound nor a depression, nor are there any air quality issues in Port Colborne. There is no harm and therefore no effect.

220. There is no evidence of anybody in Port Colborne experiencing difficulty selling their property or obtaining mortgage financing. There is no evidence of houses that are shuttered or that people are moving away. Life in Port Colborne continues as normal.

221. The Trial Judge erred in law as to the nature and application of the constituent elements of the torts of nuisance and *Rylands v. Fletcher*.

222. The Trial Judge's appreciation of the damages evidence defies fact, law and common sense:

(a) On a simple apples to apples comparison, from 1999-2008, the MLS data demonstrates that Port Colborne real estate values outperformed Welland.

(b) The MPAC data also shows that Port Colborne outperformed Welland on every measure but one. The one is an exception only if the recognized correction is not made. If one corrects for the anomaly there is simply no difference between Welland and Port Colborne. Even if one refuses to correct this anomaly, the difference is not a material difference or a statistically significant difference such as to establish causation and damages under the very terms of the market comparison methodology employed.

(c) Since Port Colborne's overall performance from 1998 to trial discloses no damages (MLS and corrected MPAC) or immaterial damages (uncorrected MPAC), there is no loss.

(d) The Trial Judge, after refusing to correct the anomaly in the MPAC data, calculated that each house sustained damages of $4,514. However, in the result, the Judge awarded each RSA homeowner approximately $26,500 in damages ($9 million divided by 340 residents). That is almost 6 times greater than the Trial Judge's starting point of $4,514.

(e) The evidence of Skaburskis is solely premised on the Teranet data which the Trial Judge himself rejected.

223. These outcomes are unreasonable, palpably erroneous, defy logic and common sense.

224. The appellant requests that the appeal be allowed, the common issues be answered in the negative and the action dismissed with costs to the defendant for the trial and for the appeal.

December 10, 2010

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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Lawyers for the Defendant/Appellant, Inco Limited.

SCHEDULE "A"

Argo v. Degagne, [2006] O.J. No. 2595 (Ont. Sup. Ct.).

Beckett v. Midland Railway Company (1867), L.R. 3 C.P. 82. (C.P.)

Burnaby (City) v. Thandi, [2005] B.C.J. No. 2284 (B.C.S.C.).

Butt v. Oshawa (City) (1926), 59 O.L.R. 520 (C.A.).

Cambridge Water Co. v. Eastern Counties Plc., [1994] 2 A.C. 264 (H.L.).

Colour Quest Ltd. v. Total Downstream, 2009 WL635097, [2009] 2 Lloyd's Rep. 1 (U.K.H.C.).

Godfrey v. Good Rich Refining Co., [1939] O.R. 106 (H.C.J.); [1940] O.R. 190 (C.A.).

Grace v. Fort Erie (Town), [2003] O.J. No. 3475 (Ont. Sup. Ct.).

Huston v. Lloyd Refineries Ltd., [1937] O.W.N. 53 (H.C.J.).

Macievich v. Anderson (No. 2), [1952] 3 D.L.R. 204 (Man. K.B.).

Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp. (1996), 2 CPC (4^{th}) 143 (Gen. Div.).

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ELLEN SMITH
Plaintiff/Respondent

and

INCO LIMITED
Defendant/Appellant

Court of Appeal File No. C52491
Court File No. 12023/01

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at TORONTO

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