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Court File No. 12023/01

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

ELLEN SMITH
Plaintiff
- and -
INCO LIMITED
Defendant

Proceeding under the Class Proceedings Act, 1992

**** ROUGH DRAFT ****

PROCEEDINGS AT TRIAL (DAY 9)

--- Before the Honourable Justice J. Henderson in
WELLAND, Ontario, on Friday, October 23, 2009

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A P P E A R A N C E S:

Eric Gillespie, Esq., for the Plaintiff.

& Kirk Baert, Esq.,

& Celeste Poltak, Ms.,

Larry P. Lowenstein, Esq., for the Defendant.

& Laura K. Fric, Ms.,

& L. Tomasich, Ms.

Reported By: Bonnie van der Meer, CSR

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I N D E X

DESCRIPTION	PAGE
Submissions by Mr. Gillespie.....	***
Submissions by Mr. Lowenstein.....	***

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***** COUNSEL'S AGREEMENTS FOLLOW *****

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I will be referring this morning, Your

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1 Honour, to three decisions, if I might pass them
2 up. They have been provided to our friends.

3 THE COURT: Yes.

4 THE COURT: Sorry. Just before you go
5 to the cases, I want to get it clear definition as
6 to the area that we are talking about. Just tell
7 me again what you see as the area.

8 MR. GILLESPIE: His ability to provide
9 expert opinion evidence regarding the base year or
10 base years for the calculation of damages.

11 THE COURT: That's the phrase "for the
12 calculation of damages" I need a little explanation
13 about.

14 I understand damages, from the
15 Plaintiff's point of view, are to be calculated
16 based on the decrease or lack of increase in
17 property values from September 20th, 2000. Is that
18 correct?

19 MR. GILLESPIE: That is correct. And
20 then, as part of the methodology underlying that
21 process, in my submission, as we'll come to
22 shortly, both sets of experts have agreed, in fact,
23 that it is appropriate to use some form of base
24 year. As I say, you have got to start somewhere.

25

THE COURT: All right.

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trial. Accordingly, an expert

1 report cannot merely state a
2 conclusion. The report must set out
3 the expert's opinion, and the basis
4 for that opinion. Further, while
5 testifying, an expert may explain
6 and amplify what is in his or her
7 report but only on matters that are
8 "latent in" or "touched on" by the
9 report. An expert may not testify
10 about matters that open up a new
11 field not mentioned in the report.
12 The trial judge must be afforded a
13 certain amount of discretion in
14 applying Rule 53.03 with a view to
15 ensuring a party is not taken
16 unfairly by surprise by expert
17 evidence on a point that would have
18 not been anticipated from a reading
19 of an expert's report.

20 In my submission, that paragraph is
21 helpful in the determination Your Honour will be
22 asked to make.

23 The second reference is to the
24 Mountford and Toronto Transit Commission case, a

25

decision of Justice Brown from earlier this year.

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1 I would ask Your Honour to turn to page 4,
2 Paragraph 18, please:

3 As I emphasized to both parties
4 several times during the hearing of
5 the appeal, the expert witnesses are
6 not tactical weapons. Experts owe
7 their duty to the court, not to the
8 Parties, as the Rules of Civil
9 Procedure will make explicit January
10 1st, 2010.

11 There are certain references to the new
12 rules.

13 To advance the position that an
14 expert can opine on an issue, but
15 cannot explain all of the reasons
16 supporting that position, reflects a
17 tactical view of the role of experts
18 that is inconsistent with our law on
19 expert opinion evidence.

20 Third and final passage I would like to
21 refer Your Honour to is in the Adair and Hamilton
22 Health Sciences Corporation decision from 2005,
23 Justice Harris, and if we could turn to page 6
24 beginning at Paragraph 13 please.

1 the passage or reproduces the passage that we have
2 just referred to from Marchand. Looking at
3 Paragraph 14:

4 I stated when I reserved this
5 ruling that I wanted trial fairness
6 to be the primary concern where I
7 could not find good policy to
8 enforce a technical rule of
9 procedure in the context of this
10 case. One of the aims of rule 53.03
11 is to reduce the element of surprise
12 between the parties by forcing the
13 testimony of the experts to remain
14 focused on material that is already
15 known.

16 Then turning partway into Paragraph 15:

17 In medical malpractice cases,
18 expert opinion evidence must be
19 tendered to refute the evidence that
20 has been properly led by an opposing
21 expert. The Defendant will be
22 significantly prejudiced if this
23 testimony is struck. Allowing the
24 response to remain on the record

1 Plaintiffs, it merely gives the
2 Court an alternative expert opinion
3 on the question to be accepted or
4 rejected.

5 In my submission, all of these
6 principles come into play in terms of the ruling
7 Your Honour will be asked to make.

8 Your Honour heard, as the first part of
9 the objection yesterday, a concern about the
10 competence of the witness to be able to testify.
11 Your Honour will recall that Mr. Maughan was
12 qualified by the court to give expert opinion
13 evidence the day before.

14 Your Honour yesterday summarized the
15 scope of his qualifications by indicating:

16 He [being Mr. Maughan] has been
17 qualified to give expert evidence in
18 several fields. I will call these
19 fields the analysis of real property
20 sales data and valuation methods.
21 He is providing opinion evidence
22 regarding changes in values of real
23 properties in Port Colborne, Welland
24 and Fort Erie. In my view, this

1 Plaintiff's quantum of damages in
2 this case.

3 Your Honour also referred to evidence
4 that has already been accepted as part of the
5 record by way of exhibits and indicated:

6 Mr. Maughan provided one written
7 report in February 2008.

8 Thereafter, he made some corrections
9 to his calculations, providing some
10 updated charts in November 2008 and
11 then provided a second report in
12 June 2009.

13 In my respectful submission, the scope
14 of the qualifications that this court has seen fit
15 to recognize in this case, are more than sufficient
16 to allow Mr. Maughan to talk about the base year
17 concept, given that it is inherent within his
18 analysis of the change of the value of real
19 properties in the three communities in question,
20 and given as we will see momentarily that it is
21 expressly referred to in documents that have
22 already been in my submission accepted into
23 evidence as part of this trial.

24 Turning then to the factual record

25

that, in my submission, will be relevant to Your

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1 Honour's determination, the first item would be our
2 Exhibit 18 which is Mr. Maughan's original expert
3 report of February of 2008. If I could ask Your
4 Honour to turn up page 54 of that report, please.

5 Mr. Maughan indicates at the beginning
6 of Section 12 under Port Colborne and Area Value
7 Analysis:

8 This section will present the
9 results of the property value
10 analysis undertaken in this report.
11 The following charts, their
12 associated data tables and
13 calculated market indicators are
14 based on the data included in the
15 specific appendices listed. In
16 order to demonstrate the change in
17 the property market values over
18 time, which take into account the
19 market conditions in Port Colborne,
20 including its subset areas, Fort
21 Erie and Welland, the property value
22 data, ASP and AVM net of all
23 filtering described in Section 10 is
24 shown as the percentage change

1 method and subsequent chronological
2 periods.

3 And a table was set out below the words
4 "for example" and, as we can see, the first column
5 indicates the area; the second, the base year; the
6 third, base year plus one, base year plus 2, and
7 base year plus 3.

8 So clearly, the concept of base year
9 was engaged from the outset by Mr. Maughan and this
10 can be seen from, as well, the charts that follow
11 on the next pages of the report.

12 The Defendant, as Your Honour is now
13 aware, at the same time that Mr. Maughan and other
14 experts provided reports that were sent to the
15 defence, the Defendant also prepared and submitted
16 to the Plaintiff in an exchange process, expert
17 reports.

18 I would like to hand up to Your Honour
19 now a copy of the original Integris report. The
20 document is dated January 30th, 2008. Proof of the
21 document, in my submission, no doubt will follow.
22 As a result, it may be appropriate to mark it as an
23 exhibit for the purpose of being able to track it.

24 THE COURT: I take it that the author

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of this Integris report will be called at some

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1 point, Mr. -- Mr. Lowenstein?

2 MR. LOWENSTEIN: Not necessarily.

3 THE COURT: All right. Let's mark it
4 as Exhibit B for identification.

5 MR. LOWENSTEIN: I'm quite content for
6 it to be marked, but there's no undertaking that we
7 will be calling...

8 THE COURT: All right. That's fine.
9 We'll mark it as Exhibit B for identification.

10 ---EXHIBIT B: Original Integris
11 report, dated January 30, 2008, marked for purposes
12 of identification.

13 THE COURT: Go ahead.

14 MR. GILLESPIE: Thank you.

15 I would ask Your Honour to turn to page
16 12 of what is now our Exhibit B. As Your Honour
17 can see, here, in addition to Mr. Maughan
18 identifying the base year concept and applying it
19 to his work, Integris, the corresponding expert
20 retained on behalf of Inco also deals with the
21 concept of base year.

22 Just briefly reviewing the information
23 under the heading, Section 1 - Methodology, in the
24 right corner; the Selection of Base Years being the

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primary title. For the purposes of this year, we

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1 Accordingly, the time period from
2 1997 to 2007 was analyzed, with
3 sales in 1997 compared to re-sales
4 which occurred in each of the years
5 from 1998 to 2007.

6 Finally, under the heading, 2000 Base

7 Year:

8 We have also analyzed sales of
9 single family homes from September
10 2000 to December 2000 this
11 comparison to re-sales in subsequent
12 years. Expectedly, a smaller number
13 of re-sales were available relative
14 to the 1997 base year because there
15 are more years for sales to occur
16 after 1997 than after 2000. The
17 sale/resales analysis for base year
18 2000, although fewer, provide an
19 opportunity to compare the results
20 of the primary base year analysis
21 from 1997 as an independent test.

22 In my submission, Your Honour, that
23 makes it very clear that, again, the base year
24 concept and now the possibility of different base

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years being applied is very much a live issue in

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18

1 the minds of the Defendant and the Defendant's
2 experts.

3 From there, Your Honour, reply reports
4 were exchanged. We have not yet come to
5 Mr. Maughan as reply report in the course of his
6 evidence in-chief yet. And, Your Honour, I do not
7 propose to introduce it at this time because there
8 are certain aspects of that report that I think
9 will require the Court to have an understanding of
10 before we hand it up. So on that basis, I will
11 simply say that the concept of base year is dealt
12 with in that report in response to the direct issue
13 that is raised here in the Integris report,
14 Mr. Atlin's report in terms of sale/resale.

15 The concept is not expressly dealt with
16 in relation to either ASP or AVM because, in my
17 respectful submission, there appears to be a clear
18 consensus amongst the two experts that the use of
19 1997 as a base year; i.e., a year before the start
20 of the disclosures or announcements is something
21 that both experts are agreeing on. First
22 statement:

23 It was important to select a base
24 year prior to the date of the

1 announcement concerning nickel
2 contamination.

3 So as a result, I think we'll hear
4 directory from Mr. Maughan in evidence on this, but
5 he's going to say, 'Well, I saw no need to respond
6 to Mr. Atlin because he's agreeing with me, 1997
7 was a completely appropriate base year.' You don't
8 file a response report to something that there's a
9 consensus, agreement on.

10 Mr. Atlin also filed a response report
11 and Your Honour knows of this through the evidence
12 that was presented to the court yesterday by Mr.
13 Maughan and what he said was that he had been made
14 aware of a concern raised by Integris in their
15 reply report.

16 Both these reports came out in October
17 of 2008; that Mr. Maughan had not, in effect tested
18 his own calculations by applying different base
19 years. And that was the genesis of the exercise
20 that created what is now Tab H as in "hotel" in
21 what is now our Exhibit A. You will recall that's
22 the somewhat slimmer volume that we addressed
23 yesterday.

24 THE COURT: Just to back up there. Was

25

it criticism of Mr. Maughan with respect to testing

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1 the 1997 base year?

2 MR. GILLESPIE: Yes.

3 THE COURT: All right. Is that in the
4 Integris report?

5 MR. GILLESPIE: It is in the Integris
6 reply report, but you also heard about it in oral
7 evidence from Mr. Maughan yesterday and with
8 respect, Your Honour, I would hope it would be in
9 your notes because it was part of the --

10 THE COURT: I'm sure it is.

11 MR. GILLESPIE: -- the proceedings,
12 yes.

13 So on that basis, you already have
14 direct evidence from the witness as to his
15 rationale for preparing his response that there had
16 been this concern or criticism raised that he had
17 not tested his base year selection of 1997 against
18 alternative base years.

19 And again the response, as he indicated
20 in evidence yesterday, was the preparation of the
21 charts at Tab H in Exhibit A.

22 Turning, Your Honour, just very briefly
23 into that document, if Your Honour does have it at
24 hand.

25

THE COURT: Yes. Tab H.

21

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1 MR. GILLESPIE: Yes. Page 17 of this
2 volume. We see the first four charts and again, as
3 Your Honour will recall, these were updated charts.
4 Mr. Maughan gave you evidence on that yesterday.

5 The first four charts, the one on page
6 17 is the Port Colborne three neighbourhoods. Page
7 18 is a comparison of the three communities, again
8 using 1997. Both of those charts have used '97 as
9 the base year.

10 The AVM methodology is set out on page
11 19 or at least the results of applying it to the
12 East and West Side of the community. As Your
13 Honour heard in evidence, 2003 is the earliest base
14 year available simply because the technology
15 doesn't stretch further back in time.

16 And then page 20 shows the comparison
17 again not of the internal community of Port
18 Colborne, but the three communities, used as
19 comparators in this particular matter.

20 What we see then beginning on page 21
21 is a chart of the three Port Colborne discrete
22 communities that have been identified, but as the
23 header right on the chart itself indicates, this
24 shows the percentage change from 1998, so there has

25

been a change in the base year. Again, Mr. Maughan

22

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1 had testified that he did this in order to respond
2 to the issue raised in the Integris report.

3 Turning to page 22, we see that the
4 same exercise has been carried out, but using 1999
5 as the base year.

6 The following page, 23, the year 2000
7 has been used and then Mr. Maughan, on page 24,
8 carries on with that exercise of using a base year
9 of 1998 for all three communities.

10 On page 25, 1999 for all the three
11 communities; the year 2000, a base year of 2000 for
12 all three communities on page 26.

13 Again, Your Honour, I think it's fair
14 to say it ought to have been clear to anyone
15 reading these charts that Mr. Maughan has directly
16 responded to the issue raised in the Integris
17 report, as he said, about "testing" his data and
18 analyses against different base years.

19 As Your Honour, I believe, also heard
20 in evidence, these charts, the ones that we just
21 looked at were served on the 18th of November, the
22 day before the commencement of the first of the
23 series of Mr. Maughan's expert discoveries. Your
24 Honour, I would like to hand up an excerpt from the

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transcript of that discovery.

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23

1 MR. LOWENSTEIN: Your Honour, I'm
2 concerned about Mr. Gillespie's ability to rely on
3 a transcript from a discovery we took and unless he
4 lays some foundation for that, I am going to object
5 to it.

6 THE COURT: There's a general rule that
7 I think Mr. Lowenstein is referring to that the
8 discovery evidence of your own witness is for the
9 use of the opposing party, so I don't know if I can
10 use this evidence on this ruling.

11 MR. GILLESPIE: Your Honour, I have
12 three submissions on that point.

13 THE COURT: All right.

14 MR. GILLESPIE: The first is the
15 plenary submission, I guess we could call it. I'm
16 simply saying, under Rule 2 of the Rules of Civil
17 Procedure, Your Honour is given the discretion to
18 vary those rules as Your Honour sees fit at any
19 time. The Superior Court of Justice, Your Honour,
20 also has the ability to make rulings that comport
21 with the interests of justice at any time.

22 More importantly and more salient to
23 this particular objection, in my submission, the
24 rationale for that rule applies to matters raised

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at trial. In other words, somebody who is trying

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1 to get in evidence from their own witness at a
2 trial.

3 With great respect, we are not at trial
4 at this precise moment; we are are dealing with a
5 motion. We're dealing with an objection. That
6 takes us outside of the purview of trying to elicit
7 evidence to support a party's case through a means
8 that could otherwise be done through the witness
9 themselves.

10 So to put it simply, we are not
11 tendering this transcript to prove the truth of the
12 contents of the statements of the witness. We are
13 tendering it, quite frankly, to address the issue
14 that Your Honour will have to deal with on this
15 motion which is whether the opposing party was
16 taken by surprise and, in my respectful submission,
17 that's a different purpose than trying to prove
18 one's case at trial.

19 We're simply trying to deal with the
20 test that Your Honour in my submission will have to
21 apply to this case and one of those tests is
22 whether someone is taken by surprise.

23 THE COURT: Any comments on that, Mr.
24 Lowenstein?

25

MR. LOWENSTEIN: Yes, Your Honour.

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1 With great respect, my friend is begging the
2 question that's in front of you. And there's no --

3 MR. GILLESPIE: Actually, I apologize.
4 I have one more submission, I know my friend wants
5 to hear before he responds.

6 THE COURT: Sorry. I thought you were
7 finished. Go ahead.

8 MR. GILLESPIE: Yes. So you know, the
9 purpose, quite frankly, of putting this in front of
10 the Court is to say if a party has already Examined
11 on the very issue, they can't now claim surprise.

12 So I don't think it, with great
13 respect, lies with the Defendant to say, well, Your
14 Honour can't look at something that's directly
15 relevant on this motion outside of the scope of the
16 merits of the trial, just on the issue of surprise,
17 if the defence is able to -- if the Plaintiff is
18 aware of the fact that, in my submission, on the
19 very issue that Mr. Maughan now wishes to testify
20 to, that it has already been raised and therefore
21 there cannot be surprise.

22 The other thing I would say is simply
23 this, and I realize that this is potentially
24 parsing things on a fairly fine level, but

25

sometimes that's required.

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1 With the greatest of respect, we don't
2 even need to look at Mr. Maughan's evidence
3 particularly because the substance of the
4 submission that I will be making is that if we
5 simply read the questions, so to speak, without
6 reading Mr. Maughan's actual responses, that it
7 will be reasonably clear from the record that the
8 defence has been alert and alive to this issue and
9 has examined on this issue. And therefore, one of
10 the key test that, in my submission, Your Honour
11 will again have to consider on this motion will
12 have to be rejected in this case, simply because
13 it's not credible to say that somebody has been
14 caught by surprise after they have been Examined on
15 the question that's now in front of Your Honour.

16 Thank you. Those are my submissions.

17 I think Mr. Lowenstein wanted to arise.

18 THE COURT: Thanks.

19 Mr. Lowenstein.

20 SUBMISSIONS BY MR. LOWENSTEIN:

21 MR. LOWENSTEIN: Thank you, sir. I was
22 started to say that my friend begs the question by
23 introducing the Discovery transcript.

24 Our position is not surprise; the

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question is one of the competence of Mr. Maughan

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1 to -- as distinct from, for example the competence
2 of Integris.

3 When I get to my responses on the main
4 motion before you, I will elaborate on it. It
5 should be obvious, from the little excerpt that my
6 friend read from Integris, that it's part of the
7 substance and stuff of their expertise in real
8 estate valuation and the particular valuation they
9 were concerned with, which is repeat sales analysis
10 that required them to go far back, to 1997 to get a
11 sufficient number of sales.

12 The question in front of you is as to
13 whether what Mr. Maughan is being asked to do is
14 too vague a question in relation to the expertise
15 that he has been qualified to give and the opinion
16 evidence which Mr. Gillespie can elicit from him.

17 So the objection that you're dealing
18 with is precisely to prevent Mr. Maughan
19 entrenching on areas of real estate expertise in
20 addressing questions of propriety of base years
21 when he is not qualified to do that. He cannot
22 bootstrap himself to be qualified with reference to
23 an expert which he appears to concede is qualified,
24 for example, to look at repeat sales analysis.

1 transcript. We are not alleging surprise. There's
2 an issue as to what's a base year. The question is
3 as to whether Mr. Maughan has any expertise beyond
4 data analysis to venture into that question.

5 So on the mini motion, my position is,
6 you don't need to look at the transcript because we
7 are not alleging surprise. And I will amplify on
8 what I have alluded to as our main objections to
9 one of the competence of Mr. Maughan in respect of
10 which, with respect to Mr. Gillespie, we haven't
11 heard anything.

12 THE COURT: I can tell you,
13 Mr. Gillespie, I will give you a chance to respond
14 if you wish, but the general rule is the evidence
15 given on Examination for Discovery is not to be put
16 before the Court to support your own case, but I
17 would have allowed this in for the purpose of
18 showing that Inco's counsel would not be surprised
19 that this is a live issue, much in the way I have
20 let in letters between counsel.

21 Mr. Lowenstein is saying, 'We are not
22 alleging surprise,' which I take it is a concession
23 that they're aware this is a live issue, so if
24 that's a given, I don't need to see this.

1 that, but I think have you made your point on the
2 issue.

3 MR. GILLESPIE: No. Thank you, Your
4 Honour. And I appreciate my friend's
5 clarification.

6 THE COURT: I will give you your copy
7 of the transcript back.

8 MR. GILLESPIE: Thank you.

9 THE COURT: So now that we know you
10 have not surprised Inco's lawyers, where does that
11 leave you?

12 MR. GILLESPIE: Well, Your Honour, I
13 will just make, then, some submissions that I think
14 I can now focus a bit more, understanding exactly
15 what Inco's position is on this specific matter.

16 The Marchand decision specifically
17 deals with the issue of surprise and it's also
18 mentioned in the Adair decision. Given that that's
19 no longer on the table, there's no reason to make
20 some further submissions on that.

21 Turning then to the two other
22 principles that I think are going to be engaged and
23 do, in part, address what we now know to be Inco's
24 concern, the first - and I have already taken Your

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Honour to the passage in Paragraph 15, so we don't

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1 need to go back there in the Adair decision - but
2 what one of the issues and, in my submission, it's
3 going to still be at play, even with the now more
4 limited scope of the objection that we have just
5 learned is going to be the focus, is the issue of
6 prejudice.

7 Your Honour has not heard Mr. Maughan's
8 evidence on the point. Your Honour has, as I
9 mentioned at the outset, qualified this witness on
10 the specific grounds within the scope that I
11 addressed at the outset of my submissions.

12 In my submission, having not even heard
13 the evidence and having properly qualified
14 Mr. Maughan in the areas of data assessment, data
15 calculation, damage calculation, in my submission,
16 has to be clear to this court that that was part of
17 the foundation for his opinion.

18 If one were to take away the base year
19 concept, I guess the question is, what would be
20 left?

21 As I said, any analysis of that nature
22 has to start somewhere so in my submission, there
23 would be very real prejudice visited on the
24 Plaintiff to not even be permitted to adduce that

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evidence and ultimately given the scope of Your

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1 Honour's finding already on the scope and the
2 confidence of the witness, given that it's integral
3 to his report, given that it's integral to the
4 analysis of the opposing side's report there would
5 be a grave prejudice visited on the Plaintiff if
6 the Defence can take as much as they want about
7 base years, the Plaintiff can go through a
8 year-and-a-half worth of litigation, discovery,
9 presentation of reports, have the issue clearly a
10 live issue in his report, in his charts, and then
11 not be permitted, at all, to even say a word about
12 base year.

13 It really does, in my submission,
14 create a completely unequal playing field and given
15 that my friends are acknowledging they're not being
16 caught by surprise, in my submission, that only
17 adds to the unfairness of excluding the evidence at
18 this stage.

19 The second set of principles that in my
20 submission are directly engaged here are the scope
21 of oral testimony that an expert can provide after
22 appropriately con applying with the rules, which it
23 sounds like Inco has conceded that they haven't
24 been caught by surprise. There's no trial issue

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being alleged, it's just an issue of competence.

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1 And in my submission that brings us to the issue of
2 what is the appropriate scope.

3 I have already taken Your Honour in the
4 Mountford decision to the passage of the Court
5 there where it was stated:

6 To advance the position that an
7 expert can opine on an issue...

8 Which he clearly has; base year:

9 ...but cannot explain all the
10 reasons supporting that position,
11 reflects the tactical view of the
12 role of experts that is inconsistent
13 with our law on expert evidence.

14 In my submission, what Inco is now
15 seeking, having an allowed him to file reports,
16 they're now in evidence before you, Exhibit 18 was
17 not objected to. In fact, there was a consent
18 agreement between counsel that those reports could
19 be received.

20 We now have the charts which Mr.
21 Lenczner yesterday agreed was one of the aspects
22 of Exhibit A that Inco had no objection to coming
23 into evidence, so he's clearly opined on base year
24 both in his primary report and in the subsequent

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charts. He has also given "viva voce" evidence to

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1 Your Honour about why he prepared the additional
2 charts.

3 In my submission, that's directly
4 within the four corners of the court's view in
5 Mountford, that it would be unfair to have an
6 expert opine on an issue, put them in a position
7 where they can't explain all the reasons supporting
8 that position.

9 Similarly, in the Court of Appeal
10 decision in Marchand, the ability to explain and
11 amplify, and again have you the passage in
12 Paragraph 38:

13 ...[to] explain and amplify what
14 is in his or her report but only on
15 matters that are "latent in" or
16 "touched on" by the report...

17 In my submission, both of those
18 criteria, and it's a disjunctive test, either
19 "latent in" or "touched on". Both apply. He's
20 clearly touched on and it was sufficiently latent
21 that Discoveries arose around the issues.

22 Mr. Maughan testifying on base year
23 fits within the four corners of the Court of Appeal
24 ruling on this issue.

Similarly, the Court of Appeal went on

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1 to say:

2 An expert may not testify about
3 matters that open up a new field not
4 mentioned in the report.

5 In my submission, that clearly cannot
6 be the case here. It's been a live issue between
7 the parties all the way from the outset of the
8 filing of both parties' initial reports; how do we
9 look at this base year concept?

10 If I just might have been moment,
11 please, Your Honour.

12 THE COURT: Yes.

13 MR. GILLESPIE: Thank you.

14 --- (Discussion off the record.)

15 MR. GILLESPIE: Based on that, Your
16 Honour, I think both as a matter of first
17 principles, but as a result of the application of
18 the law that Your Honour has now been referred to
19 this morning, in my respectful submission it is
20 fair, necessary and in keeping with the principles
21 that have guided courts in the past to allow
22 Mr. Maughan to testify on the very issue that has
23 been clearly part of the record from the outset of
24 the expert review process that has taken place in

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this matter. Thank you.

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1 THE COURT: Thank you.

2 Mr. Lowenstein.

3 MR. LOWENSTEIN: Thank you, Your
4 Honour.

5 SUBMISSIONS BY MR. LOWENSTEIN:

6 MR. LOWENSTEIN: Your Honour, just to
7 start from the first principles, Your Honour
8 permitted expert opinion evidence from this witness
9 on the area of real property sales data and
10 analysis - that's the general rubric - including
11 subcategory, land registry system data, which I
12 don't think was engaged, analysis of that, MLS
13 listing service, which I don't think was engaged,
14 and assessment data.

15 And the third area is AVM technologies
16 data and analysis on which I take it that
17 Mr. Maughan was engaged in testifying because he
18 was talking about his charts.

19 The concern which brought, you might
20 have noticed, rarely, Mr. Lenczner, myself and Ms.
21 Fric to our feet was the following question:

22 And in your view, given that we
23 have now looked at a number of
24 different base years, in your

1 base year to use?

2 So given the limits of the Court's
3 qualification of the expertise, my friend asks a
4 very broad and vague question, eliciting an opinion
5 on propriety.

6 All the concerns which are inherent in
7 our rising to object have been amply played out by
8 Mr. Gillespie's submissions because what does
9 Mr. Gillespie do? He seeks the Court's approval to
10 license a debate between an expert of very limited
11 compass in terms of expertise, and one of the
12 Defendant's experts who has not yet been qualified,
13 but whom Mr. Gillespie is content, apparently, to
14 concede has brought up the question of a sufficient
15 database to consider repeat sales analysis.

16 That is the very question, in our
17 respectful submission, on which Mr. Maughan is not
18 entitled to enter into a debate.

19 I heard - and I hope I'm being fair - I
20 heard nothing since 10:00 a.m. which would provide
21 an answer to the following question:

22 Having regard to your expertise
23 as kept by the court, why is it
24 appropriate to look at a particular

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base year?

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1 And if there was something about
2 automatic valuation modeling technologies and its
3 analysis of the data that it generates which
4 elicits an opinion on propriety, that might be a
5 question which is legitimate.

6 But to invite this witness to debate a
7 broad question as to techniques and opinions of
8 real estate valuation is not a legitimate question
9 and not one that he can opine on. The question is
10 simply one of competence and to ground the exercise
11 of that competence in the opinion.

12 So Mr. Gillespie points to the page in
13 the main body of the opinion where the witness
14 talks about base years. One presumes that there's
15 something about data analysis, whether from ASP or
16 average sale price or AVM or automatic valuation
17 model techniques which drove the selection of a
18 base year.

19 That's a different question, but that
20 question is not before the Court and, on that
21 basis, we are maintaining our objection to the
22 question as phrased.

23 Well, I don't know that there's any
24 unfairness or prejudice. My friends have had

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months and months to select their experts. We have

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1 made it very clear, since Day One and certainly on
2 the Motion before regional senior Justice Glithero
3 that we regarded Mr. Maughan as a data gatherer and
4 there can be no surprise on the other side of the
5 aisle as to our position and, of course, we have
6 heard a lot in the trial so far as far as late
7 breaking new expertise arriving at the court and so
8 there can be no surprise and there has been ample
9 time to my friends to bring the expertise they need
10 to bring to bear to face a real estate economist
11 and a Re real estate valuation expert from Inco.
12 So in my respectful submission, there is nothing
13 about the equities or the prejudice of the case
14 which can amplify Mr. Maughan's expertise to an
15 area beyond that in which he has been qualified.

16 Those are my submissions.

17 THE COURT: Mr. Gillespie, any reply?

18 MR. GILLESPIE: If I might just have
19 one moment.

20 ---(Discussion off the record.)

21 MR. GILLESPIE: Your Honour, I think
22 you have already heard my submissions, so I respect
23 that the issue is focused. I would ask Your Honour
24 to take into account both the matters, and I know

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Your Honour will, that have been raised on behalf

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1 of the Plaintiff. But I don't think I have
2 anything additional to say. Thank you.

3 THE COURT: Thank you. I do want to
4 take some time with this issue. I think it's
5 certainly an issue that I have been aware of for a
6 while and I think it's something that the parties
7 deserve a thoughtful decision on, so I am going to
8 reserve on it.

9 I will -- may have an answer this
10 afternoon, I hope to, but I don't want to keep you
11 here for a few hours while I think about it, given
12 that we won't be doing anything else on this case,
13 at least in open court. So what I will do is I
14 will prepare what I hope is a succinct written
15 decision. I will have it faxed to your respective
16 offices. Now, I am assuming there are several fax
17 numbers. To whom should I be faxing the decision?

18 MR. GILLESPIE: Your Honour, if it's
19 not too much trouble, I believe the practice has
20 been to fax to Mr. Lenczner 's office, Mr.
21 Lowenstein's office, Mr. Baert's office and my
22 office. If that's acceptable to the Court, that
23 would be of great assistance to counsel, I believe.

24 THE COURT: That's fine.

25

MR. LOWENSTEIN: I can give you the

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1 numbers right now or through the Registrar;
2 whatever you prefer.

3 THE COURT: You can give them to the
4 Registrar so that they're recorded... If I try to
5 record them, I will probably get them -- (Laughter)

6 MR. LOWENSTEIN: And I can assure you
7 that given the very close and cordial collaboration
8 with Mr. Lenczner, who may not be as interested in
9 the technology as we are, we will get it, we will
10 get it to him.

11 THE COURT: In any event, I will have
12 the decision faxed to two numbers on each side and
13 if the counsel could assure that the Registrar has
14 those two numbers, I will get it to you.

15 If you don't get it this afternoon,
16 don't panic. Doesn't mean I have forgotten it
17 about it. You will have it, I would suspect at the
18 latest, early next week.

19 MR. GILLESPIE: Thank you.

20 THE COURT: Is there anything further
21 with respect to the trial or trial management that
22 needs to be dealt with before we adjourn until
23 November 2nd?

24 MR. BAERT: We don't think so.

25

THE COURT: Good.

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1 MR. LOWENSTEIN: We're continuing to
2 talk about dates, but I think that we are... If we
3 get into a problem, when we resume, we'll let you
4 know. I think it looks like we're intending to
5 get this train to the terminus on time.

6 THE COURT: All right. And do we still
7 expect the voir dire with Mr. Hilsee on November
8 4th?

9 MR. BAERT: Yes, we do. He has made
10 his travel plans.

11 THE COURT: Excellent. We'll adjourn
12 the trial formally until November 2nd, 10:00 a.m.,
13 and I will have a decision on this one issue for
14 you very shortly. Thank you.

15 THE COURT SERVICE OFFICER: All rise.

16 THE REGISTRAR: This court is now
17 adjourned.

18 --- [Ending time: 11:05 a.m.]

19 ROUGH DRAFT REPORTED AND PREPARED.

20 ON OCTOBER 23, 2009 BY:

21 BONNIE LYNN VAN DER MEER, CSR

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