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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

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Proceeding under the Class Proceedings Act, 1992

\*\*\*\* ROUGH DRAFT \*\*\*\*

PROCEEDINGS AT TRIAL (DAY 31)

--- Before the Honourable Justice J. Henderson in  
WELLAND, Ontario, on Thursday, December 10, 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.,

Alan J. Lenczner, Q.C.       for the Defendant.  
& Larry P. Lowenstein, Esq.,  
& Laura K. Fric, Ms.,

Reported By: Deana Santedicola, RPR, CSR, CRR



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I N D E X

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NO. DESCRIPTION

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(No Exhibits Marked)



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UNCERTIFIED ROUGH DRAFT TRANSCRIPT

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

REPORTER'S NOTE: Since this trial has been realtimed and you may be in possession of a rough draft form, please be aware that there may be a discrepancy regarding page and line numbers when comparing the realtime screen, the rough draft, rough ASCII and the final transcript.

Also, please be aware that the realtime screen and the unedited, uncertified rough draft transcript may contain untranslated steno, an occasional [RPTR'S NOTE], a misspelled proper name, and/or nonsensical English word combinations. These are not "mistakes" made by the reporter but are caused by the limitations of writing the English language stenographically. All such entries are corrected on the final certified transcript.

COUNSEL'S AGREEMENTS: By accepting a rough draft transcript or a rough ASCII diskette/CD am hereby agreeing to the terms as specified below. I also acknowledge that I am releasing the court reporter, and any agents thereof, from liability for any lost data or damage to my computer as a result of my use of the realtime software.

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1                   I, the party working with realtime,  
2                   understand that if I choose to use the realtime  
3                   rough draft screen or printout, that I am doing so  
4                   with the understanding that the rough draft is  
5                   uncertified. The realtime rough draft may be used  
6                   in place of or in addition to my notes taken during  
7                   testimony.

8                   Specifically, if I choose to  
9                   cross-examine or prepare a witness by using a rough  
10                  draft, I am doing so with full knowledge that the  
11                  rough draft is uncertified, and that I am doing so  
12                  at my own risk. I further agree not to share,  
13                  give, copy, scan, fax, or in any way distribute the  
14                  realtime rough draft in any form (written or  
15                  computerized) to any party. However, my own  
16                  experts, co-counsel, and staff may have limited  
17                  internal use of same with the understanding that I  
18                  agree to destroy all realtime rough drafts and/or  
19                  computerized forms, if any, and replace same with  
20                  the final transcript and/or final computerized  
21                  form, upon its completion.

22                  I further agree that I will pay for  
23                  this extra service as set forth in the reporter's  
24                  rate structure.

\*\*\*\*\*

1 -- Upon commencing at 2:03 p.m.

2

3

4 THE COURT: I barely recognize the  
5 place.

6 Does this mean the action is settled  
7 and everyone is taking their boxes and going home?  
8 No?

9 MR. LOWENSTEIN: Not quite.

10 THE COURT: Just cleaning out for  
11 Christmas, I guess.

12 As I suspected, I do not have a written  
13 decision for you and I do not have reasons that I  
14 am prepared to put on the record. I am working on  
15 a draft written decision for you that will be faxed  
16 to your respective offices I hope next week.

17 But I do have a bottom line, and what I  
18 will do is, referring to my draft, read you the  
19 bottom line. This may not be the exact wording of  
20 the bottom line from the decision that you receive,  
21 but it will be of the same nature.

22 So the bottom line decision is as  
23 follows.

24 I find that Inco may be bring a



1 prior to a final resolution of this action.  
2 However, if Inco brings a decertification motion at  
3 this stage, I will defer argument on that motion  
4 until all of the evidence has been received.  
5 Argument on the decertification motion will be made  
6 at the same time and in conjunction with final  
7 argument on the trial of the common issues.

8 Therefore, if Inco brings a motion to  
9 decertify, Inco will be called upon to elect  
10 whether to call evidence prior to the argument of  
11 the decertification motion.

12 And that really is the bottom line as  
13 far as the argument we heard yesterday. I can tell  
14 you my draft so far is about 15 pages long, and I  
15 hope it is not nearly that long by the time I send  
16 it to you. I intend to edit it considerably, but I  
17 appreciate the argument. We are obviously dealing  
18 with some novel ground, and I am going to attempt  
19 to draft a decision that at least makes some  
20 logical sense. But I am convinced that the  
21 decision I gave you is the decision that logic will  
22 lead me to.

23 So having said that, Mr. Lowenstein,  
24 you and your client need to make some decisions.



1 management by way of a conference call. Is that  
2 still the best way to deal with this?

3 MR. LOWENSTEIN: That would be fine  
4 from our perspective, Your Honour.

5 THE COURT: All right. Mr. Baert?

6 MR. BAERT: Yes, I believe we said  
7 Tuesday at 9:00.

8 Either my friend or my office can  
9 circulate the call-in numbers, and I know that --

10 THE COURT: Let's get a date and time,  
11 because I wanted to have the trial coordinator  
12 available, and I realize there is an assignment  
13 Court on Tuesday and she is in Court as of 9:15 on  
14 Tuesday.

15 So is there a problem doing it at 10  
16 o'clock, Mr. Baert? Do I remember that from  
17 yesterday?

18 MR. BAERT: Well, I am in Court in  
19 Toronto starting at 10:00, and I am responding. We  
20 could do it during the lunch break of Court that  
21 day. We usually break for lunch at 1:00.

22 THE COURT: That is not going to work,  
23 I can tell you that right now.

24 We could do it at 11:30, if you could

25

get a long break.

8



1                   MR. BAERT: Why don't we do that. I  
2 think it would be better if I'm there at 10:00, and  
3 then I hear the first hour and a half of the  
4 Crown's argument in that case and then I can step  
5 out and Ms. Poltak can fill in for me during the  
6 call.

7                   THE COURT: All right. 11:30 on  
8 Tuesday, that would work from my perspective, and  
9 the trial coordinator will be available.

10                   Does it work for everyone else?

11                   MR. LOWENSTEIN: Yes, Your Honour.

12                   THE COURT: 11:30 Tuesday.

13                   I don't expect that it will be  
14 exceptionally long, because I think maybe some  
15 decisions will be made before then and counsel can  
16 speak to one another.

17                   I think you were volunteering to set  
18 this up, Mr. Baert?

19                   MR. BAERT: Yes, I can circulate the  
20 call-in number. Who should I contact here --

21                   THE COURT: The trial coordinator, Ms.  
22 Benven, and we stay in contact every day regardless  
23 of where I am, so if you get the information to her  
24 by late Monday or even early Tuesday, whatever you

25

ask to do, call-in or somebody will be calling us,

9

1           whatever.

2                       MR. BAERT:  It will probably be calling  
3           -- the three of us calling into a number that we'll  
4           distribute.

5                       THE COURT:  That is fine.  Whatever way  
6           you set it up, if you let Ms. Benven know, that  
7           would be fine.  In the alternative, if we can't get  
8           her, the judicial secretary here will convey the  
9           message.

10                      MR. LOWENSTEIN:  One thing that occurs  
11           to us, Your Honour, we should put on as an agenda  
12           item when we have our call is, depending on the way  
13           we are going to go with this, whether we are  
14           commencing the week of January 11th --

15                      MR. BAERT:  18th or 25th.

16                      THE COURT:  That is already on my  
17           agenda.  We need to talk about that.  And I know,  
18           was it, Mr. Baert, you had a problem with the  
19           January 11th.

20                      MR. BAERT:  The week of the 11th was  
21           the week that I had another motion in front of  
22           Justice Parel, but given what we have just heard  
23           now, by Tuesday at 11:30 on the call, I will  
24           certainly have my schedule finalized and we can

25

firm up the January dates then.

10

1                   I take it that is a potential week from  
2                   Your Honour's perspective?

3                   THE COURT: It is a potential, although  
4                   that is why I need the trial coordinator there,  
5                   because things happen and I know that if we don't  
6                   use that week, she has other things that she wants  
7                   to do that week.

8                   So we can talk about that next week.

9                   MR. BAERT: Yes.

10                  THE COURT: In any event, let me mark  
11                  down that we'll have a case management meeting by  
12                  conference call Tuesday, December 15th, 11:30 a.m.,  
13                  and at that point we will set a date for the  
14                  continuation of the trial and the remaining  
15                  procedures that we need to go through for this  
16                  trial.

17                  Is there anything else that we can do  
18                  today? Any other issues, procedural issues that we  
19                  need to talk about?

20                  MR. BAERT: Not from our side. I think  
21                  we are ready to get on the highway.

22                  MR. LOWENSTEIN: I think it just  
23                  remains on behalf of both counsel to wish Your  
24                  Honour and the staff a wonderful holiday season,

25

compliments of the season, and we will talk to you

11

1 next week and look forward to reconvening in  
2 January.

3 THE COURT: Thank you.

4 All right, we will adjourn then until  
5 the conference call next week.

6

7 -- Adjourned at 2:11 p.m.

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