COURT FILE NO.: 12023/01
DATE: 2009-11-17

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Ellen Smith v. Inco Limited

BEFORE: Justice J. R. Henderson

COUNSEL: K. Baert, E. Gillespie, C. Poltak, for the Plaintiff

A. Lenczner, L. Lowenstein, L. Fric, for the Defendant

RULING
(Opinion Evidence of Peter Tomlinson)

[1] During the plaintiff's case, the plaintiff requests leave to permit an expert witness, Peter Tomlinson [hereinafter called "Tomlinson"], to testify with respect to information contained in a one-page update to his previous reports.

[2] The one-page update was served on the defendant on November 11, 2009, approximately 4 weeks after this trial began. Service is therefore well in default of the time limits set out in Rule 53.03 (1) and the case management order of Justice Cullity.

[3] Tomlinson's update contains calculations as to the plaintiff's damages set out in three different tables. Table 1 calculates damages by comparing property values in Port Colborne to those in Fort Erie; table 2 calculates damages by comparing Port Colborne to Welland; and table 3 is a combination of table 1 and table 2.

[4] Tomlinson served two earlier written reports dated September 2008 and September 2009. The difficulty for the plaintiff now is that both previous reports referred to Welland as the most comparable community to Port Colborne. Nowhere in either of the first two reports did Tomlinson

suggest that Fort Erie should be used as a comparable community for the purposes of calculating the plaintiff's damages.

[5] Therefore, I accept the defendant's submission that Tomlinson's update is an attempt to introduce an issue that Tomlinson had never previously addressed; namely, the calculation of damages based on a comparison of Port Colborne property values to those in Fort Erie.

[6] At the start of the trial, if not well before, the defendant is entitled to know the case it has to meet. As part of that concept the defendant is entitled to written notice of all expert opinion evidence that the plaintiff intends to rely upon at trial. In this case, at the start of the trial the defendant would have properly assumed that Tomlinson would be giving opinion evidence based upon his comparison of property values in Port Colborne and Welland.

[7] At this point, four weeks have gone by since the start of the trial. The plaintiff has called five witnesses, including four expert witnesses. Those witnesses have been cross-examined, and their testimony has been completed. Cross-examination of those witnesses was conducted by counsel for the defendant knowing that Tomlinson would testify as to the opinions contained in his written reports.

[8] In my view it would be grossly unfair to permit the plaintiff to introduce expert evidence from Tomlinson now that would radically change the opinions set out in Tomlinson's previous written reports. Defendant's counsel relied on Tomlinson's previous reports for the purpose of organizing and preparing his cross-examination of the plaintiff's witnesses. If I were to permit the plaintiff to introduce this new evidence, there would be no way to cure the prejudice to the defendant without starting the trial over again.

[9] I disagree with the plaintiff's submission that the present situation is similar to the one that occurred with respect to another plaintiff expert witness, Robert Maughan, who delivered an updated damages calculation approximately five days before the start of the trial. In that situation I permitted Maughan to testify as to his update, but I created a process of examinations and productions that I felt cured any possible prejudice to the defendant. Moreover, Maughan's new evidence was delivered before any witness was called to the witness stand and before the defendant engaged in any cross-examination.

[10] I also disagree with the plaintiff's submission that Tomlinson's update is a response to a late report delivered by the defendant's expert, Frank Clayton [hereinafter called "Clayton"]. In fact, it was Tomlinson who delivered the first late report on September 25, 2009, and it was Clayton's report of October 8, 2009 that responded to Tomlinson's late report.

[11] I also disagree that Clayton's report makes a comparison between Port Colborne and Fort Erie, thus opening the door for Tomlinson's response. Clayton's report only compares Port Colborne to Welland, as did Clayton's earlier report. If the plaintiff believes that the data in Clayton's report can be used to make a case for using Fort Erie as a comparator, the plaintiff can cross-examine Clayton on this point if and when he testifies.

[12] In summary, I find that Tomlinson's proposed evidence has been served very late and raises a new issue. It would be highly prejudicial to the defendant to permit Tomlinson to testify as to this new proposed evidence.

[13] The defendant does not object to receiving Tomlinson's updated calculations comparing Port Colborne to Welland, and therefore I will allow Tomlinson to testify as to table 2 in his updated report. I will not permit Tomlinson to testify as to tables 1 or 3.

[14] Further, the plaintiff has requested leave to permit Tomlinson to give *viva voce* evidence commenting on the contents of Clayton's most recent report. In my view that request is governed by the case of *Marchand v. Public General Hospital Society of Chatham*, 51 O.R. (3rd) 97. That is, Tomlinson may give *viva voce* evidence with respect to matters that he set out in his previous reports, and he may amplify or explain those matters that are latent in or touched on by his earlier reports.

[15] That completes my ruling.

Henderson, J.

Date: November 17, 2009