

SUPERIOR COURT OF JUSTICE

B E T W E E N:

ELLEN SMITH

Plaintiff

- and -

INCO LIMITED

Defendant

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P R O C E E D I N G S A T T R I A L  
(Ruling - re: Exhibit "C" - "Teranet Brief")

BEFORE THE HONOURABLE JUSTICE J. R.  
HENDERSON on Monday, November 2, 2009, at  
Welland, Ontario.

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APPEARANCES:

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C. Poltak  
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Counsel for the plaintiff

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L. Lowenstein  
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Counsel for the defendant

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(i)  
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1.  
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MONDAY, NOVEMBER 2, 2009

5 This is my general ruling with respect to the manner in which the documents that we have called the "Teranet Brief" may be used to cross-examine the plaintiffs' expert witness, Robert Maughan.

10 The issue before me, in my view, is a result of two basic problems that have come up in this case. The first problem is that the plaintiff delivered its damages calculation by way of an updated report from Robert Maughan in early October 2009, only a short time before the start of the trial. Because that opinion evidence from Mr. Maughan was relevant to  
15 the damages calculation, I ruled that it was admissible, but I have tried to be fair to both sides by permitting the process to evolve so that Mr. Maughan's damages calculation could be fully canvassed and tested by both sides. Therefore, we  
20 have had to receive and test Mr. Maughan's evidence "on the fly".

25 The second problem that may be a little more obvious, is that the document brief that the defendant wishes to put to Mr. Maughan in cross-examination, consists of 26 different documents and/or calculations and the parties cannot agree as to how the documents in this brief should be characterized. That is, they cannot agree as to whether the documents constitute a new  
30 responding expert's report; or, simply a collection of data; or, perhaps a collection of Mr. Maughan's own data. There is no agreement.

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Because of these two problems, I need to ensure that the defendant has a fair opportunity to test Mr. Maughan's calculations; but, I cannot make a ruling on all 26 documents in the brief en masse, when the parties cannot agree as to the nature of these documents. I am prepared to go through each of the 26 documents and make a ruling on each one but, before I do that, I want to give the parties the rules that I will be using and perhaps give them a chance to agree as to what should be done with respect to these documents, prior to having contested argument on each document.

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The general rules that I will use with respect to the use of these documents in the Teranet Brief, in the cross-examination of Robert Maughan, are as follows:

1. If the document is a factual document only, [that is, a collection or list of facts, whether those facts are in Mr. Maughan's report, or in his data, or in some other collection of data] then Mr. Maughan may be asked as to the existence of those facts.

2. In that case, if Mr. Maughan agrees that those facts exist, that is some evidence of the existence of those facts.

3. If Mr. Maughan disagrees that those facts exist, then that would not be evidence of the existence of those facts;

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5 therefore, the defendant may be stuck with  
the answer they receive from Mr. Maughan,  
unless the defendant calls evidence to  
prove otherwise.

10 4. If Mr. Maughan agrees to the existence  
of certain facts, he may be asked to  
perform or confirm mathematical  
calculations using those facts.

15 5. If the document put to Mr. Maughan is  
in essence an opinion from another expert,  
or is a mix of fact and expert opinion, Mr.  
Maughan may be asked about that document  
only if the defendant undertakes to call  
the expert as a witness during the  
defendant's case.

20 6. If Mr. Maughan is asked about expert  
evidence and the defendant undertakes to  
call that expert, if Mr. Maughan needs time  
to read and review the material that is put  
before him on the witness stand, I will  
25 grant him some time to do that.

30 7. If the document is in essence a  
statement of Mr. Maughan's own opinion  
evidence, he can certainly be asked about  
that.

Those are the rules that I will be using to make a  
ruling on each of the 26 tabs in the Teranet Brief.

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I would hope that counsel could, using those rules,  
go through those 26 documents and agree as to which  
documents can be used and which cannot be used; or,  
which can be used for which purpose.

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FORM 2  
CERTIFICATE OF TRANSCRIPT (SUBSECTION 5(2))

15  
I, Heather L. Marceau, certify that this document is a true and  
accurate transcript of the recording of Smith v. Inco in the  
Superior Court of Justice held at 102 East Main Street,  
Welland, Ontario, taken from Recording No. 4521-1-0130-2009  
20  
which has been certified in Form 1.

25  
Date ..*Nov 3/09*.....

*H. Marceau*  
.....  
Heather L. Marceau,  
Certified Verbatim Court Reporter.