

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 - Plaintiffs' Application to Cross)  
(Examine its own witness, Dave McLaughlin)  
BEFORE THE HONOURABLE JUSTICE J. R.  
HENDERSON, on Monday, November 30, 2009, at  
WELLAND, Ontario.

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APPEARANCES:

E. Gillespie  
J. Croome

Counsel for the plaintiff

L. Lowenstein  
L. Fric  
L. Tomasich  
S. Millar

Counsel for the defendant

(i)  
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Transcript Ordered: November 30, 2009  
Transcript Completed: November 30, 2009  
Ordering Party Notified: December 1, 2009

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MONDAY, NOVEMBER 30, 2009

(Application by Plaintiffs' Counsel to Cross Examine  
Plaintiffs' Witness Dave McLaughlin)

R U L I N G

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HENDERSON, J. (Orally):

Counsel for the plaintiff asks for permission to cross examine Dave McLaughlin, a witness called by the plaintiff, on one issue. That issue relates to Mr. McLaughlin's testimony that plaintiffs' counsel made "alarmist announcements" about the carcinogenic nature of nickel oxide. The implication is that plaintiffs' counsel raised public awareness of the nickel problem in Port Colborne, by making incorrect announcements.

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I am not going to permit cross examination of Mr. McLaughlin on this issue. My reasons can be set out quite simply as follows.

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First of all, the statutory authority for cross examining one's own witness in a civil case in Ontario is Section 23 of the Ontario Evidence Act. This particular situation does not fall within the scope of Section 23. In order to make use of Section 23, the plaintiff would, in this case, need to show that the witness is adverse. In this case, plaintiffs' counsel is not asking me to find Mr. McLaughlin to be an adverse witness. However, even if he were to ask, I would not find that Mr. McLaughlin is an adverse witness. In my view, he has

been very forthright and objective to date.

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Secondly, even if Mr. McLaughlin is found to be  
adverse, it would appear that Section 23 only  
permits cross examination on a prior inconsistent  
statement. In this case, Mr. McLaughlin's prior  
statements are set out in his affidavit and they all  
10 seem to be consistent with what he has testified to  
on the witness stand.

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Third, despite Section 23, I agree that as a trial  
judge, I do have a residual discretion in an  
appropriate case, to permit plaintiffs' counsel to  
cross examine his own witness. However, in my view,  
that discretion should be exercised sparingly. The  
principles with respect to the exercise of that  
discretion are set out in the case of R. v. Clancey  
[1992] O.J. No. 3968, at least in the criminal  
20 context.

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In this case, I already have evidence of any  
announcement or press release made by plaintiffs'  
counsel. I can read those announcements and press  
releases and decide what effect they might have had.  
The only real issue then, is whether I find those  
announcements to be alarming or misleading. In that  
respect, frankly, whatever Mr. McLaughlin says about  
how he would characterize these announcements is  
irrelevant to me. I will read the announcements and  
I will determine how to characterize them. I do not  
30 need Mr. McLaughlin to tell me whether they are  
alarmist or not.

3.  
Ruling - Henderson, J.

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Fourth, plaintiffs' counsel wants to confront Mr. McLaughlin with statements made by people or a person other than Mr. McLaughlin, with respect to the carcinogenic nature of nickel oxide. In my view, plaintiffs' counsel should not be permitted to do that, in any event, as the statements made by a third person to the public, or at a public hearing, should be put into evidence by direct testimony from that third person. To put third party statements to this witness has the effect of introducing hearsay evidence and it should not be permitted.

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Fifthly, the third party hearsay evidence in this case is likely to be in the form of expert opinion evidence from an expert. The plaintiff, I understand, does not intend to call that expert as a witness. In my view, that is another reason not to permit the plaintiff not to cross examine Mr. McLaughlin by confronting him with this other expert evidence. I have already made a similar ruling when the plaintiff went down this road in the examination of Ellen Smith.

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So, for all those reasons, I am not going to permit the requested cross examination.

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4.  
Certification

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

Evidence Act

10 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 Welland, Ontario, taken from Recording No. 4521-1-0170-2009, which has been certified in Form 1.

15 Dec. 2/09 .....  
Date

*H. Marceau* .....  
(Signature of Authorized Person)  
Heather L. Marceau  
Certified Verbatim Court Reporter