

SUPERIOR COURT OF JUSTICE

B E T W E E N:

ELLEN SMITH

Plaintiff

- and -

INCO LIMITED

Defendant

P R O C E E D I N G S A T T R I A L

(Ruling - Request for Mr. Maughan To Do Further Calculations)

BEFORE THE HONOURABLE JUSTICE J.R.
HENDERSON on Monday, November 9, 2009, at
Welland, Ontario.

APPEARANCES:

E. Gillespie
K. Baert
C. Poltak
D. Rosenfeld
J. Croome

Counsel for the plaintiff

A. Lenczner
L. Lowenstein
L. Fric
R. Stephenson

Counsel for the defendant

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Transcript Ordered: November 9, 2009
Transcript Completed: November 9, 2009
Ordering Party Notified: November 9, 2009

1.
Ruling - Henderson, J.

MONDAY, NOVEMBER 9, 2009

(ISSUE: During cross-examination - request by defence counsel for Mr. Maughan to perform calculations on sales data (four further years)

(Oral Reasons subject to additional written reasons)

R U L I N G

HENDERSON, J. (Orally):

This problem is one of several problems that have arisen, primarily because of the fact that Mr. Maughan's final calculation as to damages was delivered very late. I have already given another ruling in which I allowed Mr. Maughan's final calculations to go in, as the calculations are very relevant to this case. However, I made some comments in that ruling to the effect that there would be some leeway given to the defendant to respond to Mr. Maughan's calculations. Part of that leeway involved an examination for discovery of Mr. Maughan, during the course of the trial. The net result was that there were undertakings given by Mr. Maughan to do some further work, and there were directions by myself to Mr. Maughan, while he was on the witness stand, to do some work in between court appearances. At this point, those undertakings and directions have resulted in two years out of the six years of Maughan's calculations being broken down further. Maughan, and he has now been cross-examined on those two years.

It is open to the court to consider that those two years are representative of Maughan's work with

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respect to all six years, and it is also open for the court to consider otherwise.

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I do agree that the process we have followed is slightly out of the ordinary. We followed this procedure in order to avoid an adjournment of the trial and to attempt to be fair to all parties. I do agree that a court is not to be encouraged to order an expert to do work in between court appearances. At some point, an expert may be ordered to do certain work, but certainly that cannot continue. At some point it becomes too onerous for the expert.

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I am not going to order Mr. Maughan to do any further work or calculations. Whether he does so, or not, is entirely up to him and to plaintiffs' counsel.

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Also influencing my decision is the timing of this request. Certainly I ordered that there be an examination for discovery in hopes of dealing with these types of requests before Mr. Maughan even testified. In my view, any of those requests probably should have been considered at the examination for discovery. Now that we are well into cross examination, it may be very late for me to order Mr. Maughan to do anything further.

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Lastly, I reiterate that I am still going to give the defendant some leeway in dealing with Mr. Maughan's evidence. What that means at this point is that I am going to give them some leeway with respect to the rule in Browne v. Dunn (1893) 6 R. 67 (H.L.), if

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there is evidence that is called to contradict Mr. Maughan's evidence. I will not make a specific determination on that issue, other than to note that most of these problems arise from the late service of the plaintiffs' calculations of damages.

FORM 2

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CERTIFICATE OF TRANSCRIPT (SUBSECTION 5(2))

Evidence Act

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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. 4521-1-0145-2009, which has been certified in Form 1.

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Nov 17/09
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Date

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