

DATE: 20110328
DOCKET: M39803 (C52491)

COURT OF APPEAL FOR ONTARIO

Juriansz J.A. (In Chambers)

BETWEEN

Ellen Smith

Plaintiff (Respondent)

And

Inco Limited

Defendant (Appellant)

Linda Collins and Kaitlyn Mitchell, for Friends of the Earth Canada

Celeste Poltak and Kirk Baert, for Ellen Smith

Larry Lowenstein and Lauren Tomasich, for Inco Limited

Heard: March 22, 2011

ENDORSEMENT

[1] The moving party, Friends of the Earth Canada, moved to intervene as a friend of the court in this appeal. In the appeal, Inco Limited, the defendant at trial, contests the judgment pronounced July 6, 2010 in favour of the plaintiffs in a class action. The action was for private nuisance and breach of the rule in *Rylands v Fletcher*. The members of the class claimed damages for the reduction in the value of their properties due to the

deposit of nickel from emissions from Inco's refining operations that ceased in 1984. The case involves no health issues.

[2] The motion of Friends of the Earth is opposed both by the appellant and the respondent.

[3] I have not been satisfied that intervention by Friends of the Earth would be of assistance to the court on the hearing of the appeal. Friends' proposed arguments virtually duplicate those of the respondent. The respondent is ably represented and class counsel was successful at trial in advancing essentially all the positions that Friends wishes this court to embrace. I am not satisfied that it would assist the court to hear argument from Friends on the same issues.

[4] There is only one difference between the respondent's position and what Friends wishes to argue. Friends wishes to argue that the class members' case was made out by the simple fact of contamination of their property and it was not necessary for them to establish a reduction of their property values. In this case, the plaintiffs did establish a reduction of their property values and much of the evidence related to damages. In my view, this appeal is not a proper vehicle for consideration of the question that Friends wishes to raise. While a class action, this is nevertheless a private litigation. The intervention of Friends would distract the court from the concrete issues arising out of the evidence and decision at trial that the parties have placed before the court.

[5] The question Friends wishes to address, while perhaps, an important one on a conceptual level, is not grounded on the facts of this case and how it was litigated at trial. The appellant would be prejudiced by having to respond to a new theory of how it is liable at this late stage.

[6] I have also considered that this appeal is scheduled to be heard beginning on May 9, 2011, and that the time allocated for the parties' argument was less than the time they requested.

[7] The motion for intervention is dismissed.

A handwritten signature in black ink, appearing to be "R. G. [unclear]", written in a cursive style.