

Ecojustice Denied Leave to Intervene as "Friend Of Court"

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In a very short but useful decision from Chief Justice Strathy of the Ontario Court of Appeal in *Huang v. Fraser Hillary's Limited*,² the Court denied the environmental group Ecojustice leave to intervene in an appeal as a "friend of the court".

In essence, the Court ruled that Ecojustice should be denied leave because, applying the test for intervention set out by the Court of Appeal in *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.*:

- 1) The nature of the case was "fundamentally private litigation";
- 2) The issues that arise in the case "concern the application of well-settled, one might say ancient, causes of action: trespass, negligence and nuisance"; and
- 3) The court concluded that Ecojustice would not make a useful contribution without causing injustice. Specifically, on this third factor, the court stated:

[13] However, I am not satisfied that the proposed intervention would assist the court in any meaningful way. As Fraser Hillary's Limited demonstrates in its responding factum on the motion to intervene, many of Ecojustice's submissions on the common law causes of action simply recast the submissions made by the parties themselves. For the reasons set out above, the submissions of Ecojustice on the retrospective application of s. 99(2) of the EPA will not materially assist the court.

[14] It seems to me that it would be unfair to require the respondents on the appeal to address the intervener's perspectives on the issue, without a demonstration that the perspective will materially assist the court.

[15] There is an additional concern about injustice. The appeal is scheduled to be heard in approximately seven weeks. The proposed intervener has not filed a draft factum outlining the submissions it would make if permitted to intervene, but says it will file its factum within the next two weeks. I cannot judge how long it will take the respondents to respond, but they will clearly be required to respond to new arguments

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² 2018 ONCA 277.

going beyond the fairly narrow scope of the appeal. It could be necessary to adjourn the appeal, something that has already occurred once. This would cause additional prejudice to the parties.

The decision is important because it underscores that public interest groups, like Ecojustice, cannot simply pick and choose to intervene in any environmental case in which they wish to advance their environmental justice issues. Where litigation is fundamentally private, deals with well-settled causes of action, and the non-governmental organization has nothing useful to contribute and may cause injustice by delaying proceedings, leave to intervene may be denied.