COURT FILE NO.: 127/04
DATE: 20060331

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
HER MAJESTY THE QUEEN	)	Jerry Herlihy, for the Appellant
	)	
Appellant	)	
	)	
- and -	)	
	)	
INCO LIMITED	)	Doug Hamilton, for the Respondent
	)	
Respondent	)	
	)	
	)	**HEARD:** January 13, 2006

Patricia C. Hennessy, S.C.J.

(1) Overview

[1] INCO was charged with discharging untreated mine effluent into a water course and with failing to report the discharge. The trial judge granted INCO's motion for non-suit. The Crown appeals the decision on the motion as well as the decision refusing to allow an employee of the Ministry of the Environment to give expert opinion evidence. The Ministry's appeal raises the following issues:

1. What was the direction to the trial judge articulated by the Court of Appeal?

2. Did the trial judge apply the test as directed by the Court of Appeal?

3. Did the trial judge apply the correct test on the motion for non-suit?

4. Was Dr. Mak properly excluded as an expert witness?

5. Was Dr. Mak's evidence relevant to the ultimate question on the non-suit motion?

[2] For the reasons that follow, I grant the appeal and remit the matter back to the Ontario Court for a trial.

(2) The Facts

[3] The facts are fully set out in the decision of the Court of Appeal, *R. v. Inco* (2001), 54 O.R. (3d) 495.

(3) Background

[4] This case is now 12 years old. In 1994, INCO was charged with two offences under s. 30(1) of the *Ontario Water Resources Act* relating to the discharge of untreated mine effluent into a watercourse. In 1998, INCO was convicted on both counts after trial before a Justice of the Peace.

[5] On appeal to the Ontario Court of Justice, Wilson J. overturned both convictions and ordered a new trial. He found that the Justice of the Peace had failed to apply the correct test for determining whether the offence of impairing water quality had been committed. The Crown appealed the decision of Wilson J. to the Ontario Court of Appeal.

[6] In 2001, the Court of Appeal dismissed the Crown's appeal and upheld Wilson J.'s decision directing a new trial. Writing for the Court, McMurtry C.J.O. set out the test for determining whether the offence of impairing water quality had been committed.

[7] The new trial was heard in 2004, in the Ontario Court of Justice, pursuant to s. 126 (1) of the *Provincial Offences Act*, which requires that where a court orders a new trial, it shall be held in the Ontario Court of Justice. After the conclusion of the Crown's case, the trial judge granted a motion for non-suit.

(4) Standard of Review

[8] The appeal of a trial judge's ruling on a non-suit motion raises a question of law and is subject to the standard of review of correctness. This court must consider whether the appropriate test was applied. A reviewing judge cannot interfere with a trial judge's decision unless there is a palpable and overriding error. (*Services Liu v. Toronto (City) Police Board*, [2005] O.J. No. 2492 (Div.Ct.)).

(5) Direction from the Ontario Court of Appeal

[9] The main issue in the present appeal involves a dispute over the appropriate test to apply in determining whether an offence has been committed under s. 30(1) of the *Ontario Water Resources Act*. Section 30 reads as follows:

> 30. (1) Every person that discharges or causes or permits the discharge of any material of any kind into or in any waters or on any shore or bank thereof or into or in any place that may impair the quality of the water of any waters is guilty of an offence.
>
> (2) Every person that discharges or causes or permits the discharge of any material of any kind, and such discharge is not in the normal course of events, or from whose control material of any kind escapes into or in any waters or on any shore or bank thereof or into or in any place that may impair the quality of the water of any waters, shall forthwith notify the Minister of the discharge or escape, as the case may be.

[10] The test for determining whether an offence has been committed under this section was first articulated in *R. v. Toronto Electric Commissioners* (1991), 6 C.E.L.R. (N.S.) 301 (Ont.Gen.Div.) at 316. In that case, Corbett J. held that the offence is made out if the Crown proves that the material, by its very nature, may impair water quality. In other words, the discharge of material that is inherently toxic will always constitute an offence under s. 30(1) of the *Ontario Water Resources Act*.

[11] This test was then modified in *R. v. Imperial Oil Ltd.*, [1995] O.J. No. 4232 (Gen. Div.). In that case, Austin Prov. J. held that the *Toronto Electric* test does not preclude a conviction where the discharged substance would not impair water quality at low levels but would at high levels. In other words, when the discharged material is not inherently toxic, the Crown must prove beyond a reasonable doubt that the discharge may impair water quality by adducing evidence as to:

> (1) the nature of the material;
>
> (2) the nature and circumstances of the discharge, including
>
> a. the quantity and concentration of the discharge
>
> b. the time frame over which the discharge occurred.

[12] In providing the direction as to the appropriate test to apply at the new trial, McMurtry C.J.O., writing for the Court of Appeal in *R. v. Inco. Ltd.*, [2004] O.J. No. 2098 (C.A.), considered both *Toronto Electric* and *Imperial Oil*. McMurtry C.J.O. concluded at para. 52 that these two cases operate together to create a two-part test:

> 52. The Imperial Oil test should be applied when determining whether an offence under s. 30(1) has been made out. Inherently toxic substances will always fail that test, reflecting zero-tolerance for discharging materials that, by their nature, may impair water quality. If the material in the discharge is not inherently toxic, then it will be necessary to consider

> the quantity and concentration of the discharge as well as the time frame over which the discharge took place.

[13] The first part of the test requires the court to determine whether or not the material that has been discharged is inherently toxic. If the court is satisfied that the evidence establishes that the discharged material is inherently toxic, this will be sufficient to find that the offence has been committed.

[14] The second part of the test applies only when there is no evidence that the discharged substance is inherently toxic. At this stage, the court must consider the quality and concentration of the discharge, as well as the time frame over which the substance was discharged. Therefore, *Toronto Electric* and *Imperial Oil* do not set out two different tests that are at odds with each other. Rather, *Toronto Electric* can be considered as the first part of the test articulated by Austin Prov. J. in *Imperial Oil*.

[15] Summarizing the tests set out in *Toronto Electric* and *Imperial Oil*, the Ontario Court of Appeal affirmed that the trial judge was required to engage in a two-step analysis that includes the following questions:

1. Was the discharged material inherently toxic?

   If yes, the offence has been committed.[1]

2. If the material was not inherently toxic, did it have potential to impair as a result of excessive quantity or concentration[2].

3. Consider potential in Question 2 by examining the combined effect of a quantity and concentration as well as the time frame over which the discharge took place.[3]

[16] Thus, the trial judge is first required to determine if the material discharged was an inherently toxic substance, like the PCBs at issue in *Toronto Electric*, or whether the untreated mine effluent was an innocuous substance, like the sludge at issue in *Imperial Oil*, which, under certain conditions, may still impair the quality of water.

[17] In this case, as noted in the Court of Appeal decision, the Crown does not allege that nickel is an inherently toxic or harmful substance in water regardless of the concentration or the circumstances. Therefore, it is necessary to apply the second step of the analysis, and the Court of Appeal said at para. 58:

> Although s. 30(1) does not require a showing of actual impairment of water, it does require a showing of capacity to impair. I would uphold Wilson J.'s decision directing a

[1] *R. v. Toronto Electric Commissioners* affirmed a zero tolerance principle in relation to discharge of toxic chemicals into Ontario waterways. Affirmed by *R. v. Inco Ltd.* para. 52
[2] *R. v. Imperial Oil Ltd*. para. 18 and *R. v. Inco Ltd*. para. 52
[3] *R. v. Inco Ltd*. para. 52 affirms and *R. v. Imperial Oil Ltd*. para. 24

new trial on the impairment issue, for purposes of determining whether the nature and circumstances of the discharge of nickel, including its quantity and concentration, as well as the time frame over which the discharge took place, had the capacity to impair water quality.

(6) The Decision on the Non-Suit Application

[18] The trial judge found on the evidence that nickel is not an inherently impairing substance. The trial judge went on to analyze the evidence under the second step question, which he called the "circumstances test."

[19] The trial judge considered the evidence of Julie Schroeder, a qualified expert in the aquatic toxicity of metals. On the basis of her evidence, the trial judge found, at para. 9, that there "was evidence showing that the discharge had the capacity to impair the watercourse because of the nickel levels, but there is no evidence to properly employ the circumstances test."

[20] It is this second portion of the above sentence which is at the nub of this appeal.

[21] The appellant Crown submits that the trial judge erred in holding that there was no evidence as to the "nature and circumstances" of the discharge and its capacity to impair water quality. The respondent, INCO, submits that the trial judge correctly granted the non-suit application on the basis that the Crown had adduced no evidence concerning the nature of the nickel discharged nor the concentration of the discharge of nickel.

[22] The Crown lead evidence of a discharge of untreated mine water to Grassy Creek over five days at the rate of 150 gallons per minute.[4]

[23] The Ministry of Environment took samples showing the nickel concentration to be 25.2 parts per million at the entry point to the natural environment, 24 parts per million within a kilometer and 8.19 ppm at 3-5 kilometers downstream.

[24] It is INCO's position that the direction from the Court of Appeal required the Crown to lead evidence, first on the nature or specific form of the nickel in the discharge and then on the quantity, concentration and time frame circumstances with respect to that specific form of nickel.

[25] The respondent, INCO, submitted that the trial judge correctly decided that there was no evidence on the nature and circumstances of the discharge of nickel, because the Crown's witness could not and did not identify the specific form of nickel present in the discharge. In particular, the Crown witness did not identify the concentration of the harmful form of nickel present in the discharge.

[4] Evidence of Brian McMahon, Vol. 2 pp. 40-41, 54

[26] The Crown submits that the repeated and consistent evidence of Ms. Schroeder was that the combination of constituents in the effluent would impair the water. Ms. Schroeder testified:

> "The concentration in the discharge of nickel was much higher than that required, based on the literature, published data, to kill 50 per cent of the organisms exposed to it".[5]

[27] The Crown's evidence was based on the toxicity of nickel in the discharge, and it lead evidence on the quantity, concentration and time frame in that respect. On the other hand, the trial judge found there was no evidence on the concentration of a particular species of nickel. The trial judge based his decision on a very technical cross-examination of the Crown witness, Ms. Schroeder, who admitted that the toxicity of a metal depends on which forms or species are present and agreed that certain forms could be present. The trial judge found the evidence on concentration, therefore, to be speculative. He ignored the uncontradicted evidence of the Crown witness that nickel was present in ranges from 25.2 – 44.7 ppm and that at those levels, it had the capacity to impair.

> "ANSWER: Yes, so essentially what this is all telling me is that nickel is a metal that can exert a toxic effect at a very low concentration. There are things that mitigate nickel toxicity, but I'm not of the opinion that the nature of this effluent is such that toxicity would have been removed completely by hardness ions. I'm not sure about if there was any organic material in it, I'm not of the opinion that the organic material would have been able to counteract the effects of such a high concentration of nickel. There may have been other things present in the effluent that contributed to the mortality or potential effects from this effluent when discharged over—I believe the discharge period was eight or nine days, so we're looking at a considerable amount of time in which you would expect some sort of impairment from that high concentration. I mean, it's so much higher than anything that we would conceive of causing effects that I can't have any other opinion but the effluent was impairing.[6]
>
> QUESTION: And in this particular case did you do any determination of the form of nickel that would have been present in the effluent chemistry tests that are available between February 23 and March 2, 1994?
>
> ANSWER: Again I only tried to get a picture of, of whether it was likely that the concentration of available nickel would have been reduced to a level that it was likely that I wouldn't have seen an impact. I wasn't so much concerned about specifically what forms of, of nickel could be there because the only form that I'm really concerned with is, is the nickel two positive ion, and again just looking at a comparison of 40 milligrams per litre and 2 milligrams per litre I had the impression that, you know, we, we could quibble about where the LC50 would go and we, we would never know for sure without running these tests with the effluent. I, I fully admit to that, but I, I, I was asked to provide an opinion of whether I thought this, this discharge would be impairing based on the

[5] Evidence of Julie Schroeder - Vol. 4 Compendium P. 4 – Lines 20-21
[6] Evidence of Julie Schroeder – Vol. 4 p. 16 Lines 7 to 17

concentration of nickel present and based on that I, I believed there would be enough free nickel present to cause impairment.[7]

ANSWER: Well like I said, I've run a lot of tests with high concentrations of organic material and high concentrations of calcium, just loading up the dilution water with various ions that I believe will bind up or compete with nickel and I still see LC0s that are far, far, and an order of magnitude lower than 40 milligrams per litre. And you're right, I don't know all the species present, I couldn't say which accuracy what the bio-available portion of nickel would be in the effluent. But based on my experience with testing nickel and by looking at it into the literature I have never seen a, a toxicity value reported for nickel that is in any, anywhere near 40 milligrams per litre, indicating that it's unlikely that the bio-available portion of nickel present in that sample was low enough not to cause any impairment…[8]

(7) Test For Non-Suit

[28] A non-suit should only be granted where there is no evidence which, if believed, could result in a conviction. At the non-suit stage, the cases allow that the fact that there is "some evidence" is sufficient to avoid the non-suit, even if the evidence is, in the opinion of the trier of fact, "manifestly unreasonable". (*United States of America v. Sheppard* (1976), 30 C.C.C. (2d) 424 (S.C.C.), *Monteleone v. The Queen* (1987), 35 C.C.C. (3d) 193 (S.C.C.).

[29] The specific question for the trial judge was whether there was some evidence of the five issues as set out in paras. 52 and 58 in the reasons of McMurtry C.J.O.:

1. nature and circumstances of the discharge of nickel including:
2. its quantity
3. its concentration
4. time frame over which discharge took place
5. had the capacity to impair water quality.

[30] Crown witnesses gave evidence on these elements as follows:

1. Nature and circumstances: During a period of shut-down, untreated mine effluent was discharged into a series of treatment of ponds, ultimately flowing into Grassy Creek. Because of the shut-down, the usual treatment agent, lime, was not added to the

[7] Evidence of Julie Schroeder - June 14, 2004 transcript – p. 31 Line 26 to p. 32 Line 15

[8] Evidence of Julie Schroeder – June 14, 2004 transcript – p. 35 Line 22 to p. 36 Line 5

ponds. The treatment, objective for discharged mine water, was a nickel concentration at or below one part per million.

2. Quantity: The untreated mine water flowed in at 150 gallons per minute for a total discharge of over 500,000 gallons over five days.

3. Concentration: Samples taken by INCO during the five-day period show nickel concentrations ranged from 37.5 to 44.7 parts per million. Samples taken by Ministry of the Environment at the end of the five-day period were 25.2 parts per million.

On the issue of concentration, Crown witness, Julie Schroeder, said:

"The concentration in the discharge of nickel was much higher than that required, based on literature, published data, to kill 50 percent of the organisms exposed to it.[9]

If I were to try to predict an LC50 from it, yes I would need that information. If I wanted to determine whether it's likely that the discharge could impair, as I have stated, and at the risk of repeating myself, and because the concentration is so much higher and because even if 90 percent of the, of the total concentration was found or removed form, was unavailable, we still have a high enough concentration to expect some form of an effect, so again I'm going by that type of general review of that information…"[10]

4. Time Frame: The untreated mine water was discharged on February 23, February 25, February 28, March 1 and March 2, 1994.

5. Capacity to impair water quality: see above evidence of Julie Schroeder para. 28.

[31] The trial judge misapprehended the evidence of Julie Schroeder. He erred when he found that there was no evidence to properly employ the circumstances test. There was some evidence on each of the five elements of the second part of the test. The trial judge was of the view that the test required that there had to be evidence on each of these five elements as it relates to a particular species of nickel. A close reading of the Court of Appeal decision does not support this narrow interpretation.

[32] The Court of Appeal did not direct the trial judge to require or reject any particular type of scientific evidence on the nature of the discharge. INCO submits that the phrase "nature of nickel" has a scientific meaning, i.e. that para. 58 requires evidence of a particular species of nickel. There is nothing in the Court of Appeal decision to support this view. The Court of Appeal specifically adopted the approach in *Imperial Oil*. In that case, the court dealt with a material referred to as "activated sludge". The Court did not require evidence on the details of each constituent chemical compound.

[9] Evidence of Julie Schroeder – Tab 23 Compendium of the Appellant Crown - p. 4 Lines 20 - 21
[10] Evidence of Julie Schroeder – Tab 29 Compendium of the Appellant Crown – p. 56 Lines 8 -18

[33] At para. 55, the Court of Appeal says:

> "The key question to be decided is whether the nickel in the discharge is an inherently deleterious substance in water akin to PCB's considered in Toronto Electric Commissioners or rather, like the activated sludge in Imperial Oil, a matter that is innocuous absent certain conditions surrounding its discharge".

[34] Further, the scientific evidence suggests that this narrow approach is either irrelevant or unnecessary to the determination of toxicity. In any event, that latter matter is best left to be tested at trial, on all of the evidence.

[35] The trial judge misapprehended the test on a non-suit. There was ample evidence to defeat a motion for a non-suit. The granting of the motion for non-suit was not correct.

[36] The appeal is granted and the matter is remitted back for trial.

(8) Exclusion of Expert Evidence

[37] The Crown offered Mr. Mak as an expert in surface water quality assessment.

[38] The trial judge declined to qualify the proposed Crown witness as an expert capable of giving opinion evidence on the ground that he was not independent of the party.

i) **The Test and Scope of Review**

[39] The test for admission of expert evidence was set out in *R. v. Mohan* (1994), 89 C.C.C. (3d) 402 and reiterated by the Supreme Court of Canada in *R. v. D.D.*, [2004] 2 S.C.R. 275 at para. 11.

> The test for the admissibility of expert evidence was consolidated in *Mohan* supra. Four criteria must be met by a party which seeks to introduce expert evidence: relevance, necessity, the lack of any other exclusionary rule, and a properly qualified expert. Even where these requirements are met, the evidence may be rejected if its prejudicial effect on the conduct of the trial outweighs its probative value.

[40] It is settled law that appellate courts owe deference to decisions of trial judges to admit or reject expert evidence. However, this deference does not preclude appellate review, keeping in mind that these decisions are case-specific: *R. v. D.D., supra* at para. 13.

ii) **Analysis**

[41] The role of the expert is to assist the court in matters which require a special knowledge or expertise beyond the knowledge of the court. In order to fulfill this role, the expert has certain duties, which include:[11] [12]

> 1) Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
>
> 2) An expert should provide independent assistance to the court by objective, unbiased opinion in relation to matters within his or her expertise. An expert witness should never assume a role of advocate.
>
> 3) An expert should state the facts or assumptions on which the opinion is based and should not omit to consider material facts which detract from that opinion.
>
> 4) An expert should make it clear when a particular question or issue falls outside of the expert's expertise.
>
> 5) If an expert's opinion is not properly researched because insufficient data is available, this must be stated with an indication that the opinion is no more than a provisional one.

[42] The independence required of experts may be the subject of special inquiry, particularly where an "in-house" expert is proffered by one of the parties. The inquiry requires that the trial judge, on a *voir dire*, look beyond the witness' employment relationship or retainer and consider the basis on which the opinion is proffered. Unless the terms of the retainer make the witness an obvious "co-venturer" with the party, as in the case where the witness worked on a contingency fee arrangement which was dependent on the outcome of the case,[13] the trial judge must examine the actual opinion evidence to be offered in a *voir dire*. The proposed expert's independence can be tested in the usual way, by cross-examination on his or her assumptions, research and completeness. The trial judge can then assess whether the expert has assumed the role of advocate.

[43] The trial judge rejected him on the basis that he could be perceived as lacking independence:

> "Experience and education in this matter are not an issue. Mr. Mak has ample of both. The question here is the matter of impartiality or independence.
>
> Mr. Mak is not only employed by the Ministry of the Environment, but is attached to and intimately concerned with the day-to-day operations involving investigations and enforcement by instructions to and education of other members of the Branch and

[11] *Fellowes, McNeil v. Kansa General International Insurance Company Ltd. et al.* (1998), 40 O.R. (3d) 456 (Gen.Div.) at 460. Note: varied by ONCA [2000] O.J. No. 3309, but not on this point.
[12] *Ikarian Reefer* (1993], 2 Lloyd's Report 68 at 81.
[13] *Bank of Montreal v. Citak*, [2001] O.J. No. 1096 (S.C.J.)

> including experts. I have no doubt that Mr. Mak is an honourable person. I have no doubt that he would attempt to be honest and fair in his testimony, and in giving his opinions, but he is not being proffered in the same light as those government expert/employees such as, first instance, work in the Centre of Forensic Sciences, the Ministry of the Solicitor General, with which I am probably aware of more than other experts that are preferred by the government in prosecutions. These experts are used not only extensively in prosecutions, but also to a very large degree by the defence bar of Ontario and I dare say outside of the province and even the country. They do not have that connection as does Mr. Mak. They do not gather, direct or instruct as does he. His position, in my view, could only be perceived by the public as capable of lacking independence.
>
> There is nothing in the evidence to suggest actual bias, but his position does not lend to the appearance of professional objectivity. In my view, who pays him, who assesses him, is no more relevant than who pays and who assesses experts from the Centre of Forensic Sciences. That is not in consideration in this case".
>
> Basically, the bottom line here is that there is not the separation between Mr. Mak and the Crown/Prosecution that ensures the vital appearance of impartiality. He will not, therefore, be permitted to testify as an expert. (Pages 10-11 Mahaffy J.)

[44] The mere fact that the witness in this case was employed in the Investigations & Enforcement Branch as a "technical enforcement specialist" is not a sufficient basis on which to find him incapable of providing an independent opinion. The trial judge did not assess whether the witness' evidence was based on valid assumptions, whether he fully disclosed all material facts or whether his opinion was properly researched and fell within his area of expertise. The witness, himself, testified that his relationship with investigators in his branch was "the equivalent of a police officer going to the Centre of Forensic Studies."

[45] Before rejecting a witness based on a perceived lack of independence, the trial judge should conduct a *voir dire* to test this perception against the actual opinion evidence to be proffered. On a *voir dire*, the trial judge can assess this perception in light of the opinions tested under cross-examination, in particular the assumptions, the disclosure of material facts, the completeness and the level of expertise.

[46] The trial judge indicated that he was guided by the remarks of E. MacDonald J. in *Fellowes, McNeil v. Kansa General International Insurance Company Ltd. et al.* (1998), 40 O.R. (3d) 456. However, there is an important factual distinction between these two cases. In *Fellowes, McNeil*, the court found that the proposed expert had earlier been an advocate for the *Kansa* against *Fellowes, McNeil*. E. MacDonald J. set out the prior role played by the proposed expert. She found that he "has been an advocate for *Kansa*'s positions since he became involved in the matter…" (p. 3).

[47] There was no finding in this case, nor was there any evidence that Mr. Mak had ever been an advocate for the Ministry. Nor was Mr. Mak shown to be a co-venturer, as in *Bank of*

Montreal. He has a technical role as a scientist in his employment and he was proposed as an expert to give technical and scientific opinion evidence. The prohibition against expert witnesses assuming the role of advocate is well founded in case law, but has not been extended to a prohibition against qualifying a witness as an expert merely because that witness is employed by a party to the litigation. The mere fact that the proposed expert is employed by the party can be taken into account when the trial judge assesses the weight and value of the evidence.

[48] The decision in *R. v. Rindero*, [2004] B.C.J. No. 1176 (B.C.S.C.) supports my view that the witness' independence must be tested against the actual or substantive opinion evidence that is to be proffered:

> As with any witness, Dr. Lohrasbe, if he does the assessment, may be challenged on premises upon which the assessment is predicated and the process by which he followed to achieve that assessment. If that process of challenge reveals a biased or closed mind, then that is something that may well detract from the opinion being given the full weight that an otherwise dispassionate assessment might be accorded. (para. 72)

[49] This step is especially significant in a case where the proposed expert has been qualified to give opinion evidence 19 times in courts of concurrent jurisdiction in Ontario while working in the same capacity, for the same Ministry.[14] A finding of lack of independence or impartiality cannot be based on a cursory examination of the employment relationship or status. Unless the court is satisfied that the witness is in a co-venture with the party, is currently in a position as an advocate for the party or has acted as advocate for the party on the same matter, the court must test any perceived partiality through a *voir dire* hearing that tests the substance of the opinion to be proffered. After such a *voir dire*, the trial judge will be in a much better position to assess the partiality of the witness..

[50] The Respondent INCO submitted that because the finding of the trial judge was based on a lack of evidence on the exact species of nickel and since Mr. Mak was not going to be giving evidence on this subject, then his evidence would not have affected the trial judge's decision to grant the non-suit.

[51] I disagree with this proposition. By rejecting the proposed expert opinion evidence, the trial judge granted the non-suit in the absence of all of the evidence the Crown had to prove the essential elements of the offence. On the non-suit motion, the judge was persuaded that there was insufficient evidence to convict. In doing so, he relied on a very narrow interpretation of the test. The decision on the motion for a non-suit was made without the proper factual foundation. Had he heard the evidence of the proposed expert surface water evaluator, it cannot be said that his decision would necessarily have been the same.

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[14] The Ontario Courts have recently considered the ruling under appeal, *R. v. Regional Municipality of York*, O.C.J. (unreported) November 5, 2004, where the court qualified Mr. Mak as an expert, and rejected finding in *R. v. INCO*. *R. v. Capital Environmental Resource Inc*., O.C.J. (unreported) November 24, 2004, where the court qualified an expert notwithstanding his involvement in investigations for Ministry of Labour. Mr. Mak also gave opinion evidence in the case of *R. v. Imperial Oil*, [1995] O.J. No. 4232.

[52] I have already decided that the matter should be remitted back for trial. At trial, the decision on whether to reject this proposed witness as an expert should only be made after a full *voir dire* on the proposed evidence.

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Patricia C. Hennessy
Superior Court Justice

Released: March 31, 2006

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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant

- and –

INCO LIMITED

Respondent

REASONS FOR JUDGMENT

Patricia C. Hennessy, S.C.J.

Released: March 31, 2006