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Court considers fairness versus fault

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The Divisional Court has upheld a MOE order requiring a city to remediate contaminated property that the city did not contaminate.

Oscar Wilde wrote, "Life is never fair, and perhaps it is a good thing for most of us that it is not." I expect that the captain of Canada's Olympic women's soccer team, Christine Sinclair, like the City of Kawartha Lakes, would agree that life is not fair.

Whether this is ever a good thing must be impossible to acknowledge in the moment when one receives an unfair decision. Few of us could be magnanimous at such a time. The City of Kawartha Lakes is seeking leave to appeal what it doubtless perceives as an unfair decision of the Divisional Court.

Christine Sinclair, despite the most valiant of efforts in Olympic semi-final play, which included no less than a hat trick, had no avenue of appeal, and so played for bronze instead of Olympic gold.

Appeals

In *The Corporation of the City of Kawartha Lakes v. Director, Ministry of the Environment*, the City of Kawartha Lakes, Ontario (the "City") appealed the decision of the Environmental Review Tribunal (the "Tribunal").

The Tribunal had upheld an order of the Ministry of the Environment (the "MOE") under the *Environmental Protection Act* (the "Act") that required the City to prevent the discharge of a contaminant from its property and to remediate its property, even though the City bore no responsibility for the contamination.

The City's appeal concerned the appropriate considerations in issuing a clean-up order under the *Act* against an

innocent owner of contaminated land. The Divisional Court dismissed the City's appeal. The City has given notice that it will be seeking leave to appeal the Divisional Court's decision.

Background

It all began in December 2008 when several hundred litres of furnace oil leaked from Wayne and Liana Gendron's basement, located in the City. Despite the Gendron's remediation efforts, at some point the furnace oil entered the municipal storm sewer system and culverts and was being discharged into nearby Sturgeon Lake.

The MOE issued an order to the Gendrons requiring, among other things, restoration of the natural environment.

The Gendron's insurance coverage reached its limit before any remediation beyond the Gendron's own property occurred.

As a result, contamination on the City's property lingered, which contamination had the potential to harm nearby Sturgeon Lake.

The MOE then issued an order to the City requiring it to take all reasonable steps to remediate its property and prevent any further discharge of the contaminant.

The City sought a review of the order by the Director. The Director confirmed the order and the City appealed to the Tribunal. The Tribunal dismissed the appeal and the City appealed to the Divisional Court.

Purpose of the Act

The purpose of the *Act* is well established as providing for the protection and conservation of the environment. To this end, section 157.1(1) of the *Act* provides that a MOE order may be issued to, "any person who owns or who has management or control of an undertaking or property."

The order may require that person to take steps to "prevent or reduce the

risk of a discharge of a contaminant into the natural environment from the undertaking or property" or "to prevent, decrease or eliminate an adverse effect that may result from" the discharge or presence of such a contaminant.

In other words, fault, or the absence of fault, would play no role in a MOE decision to issue an order to an owner of property.

Fairness factors

That the City was in no way responsible for the oil leak or for failing in any effort to contain the spill was never in dispute. In launching its appeal – first to the Tribunal and then to the Divisional Court – the City relied on the decision in *724597 Ontario Ltd., Re* (1994) ("*Appletex*") and what are commonly referred to as the "fairness factors."

The fairness factors include considerations as to whether: the subject of the order (in this case, the City) had exercised due diligence to avoid causing the contamination; the cause of the problem was within the City's control; and the City could have foreseen the risk in question.

The City argued, unsuccessfully, that it should be relieved of any liability for the contamination based on these fairness factors. The Tribunal, in fact, excluded evidence that served to demonstrate that the City was not the polluter or that others were at fault. The Tribunal had excluded such evidence because, in the case of the City's innocence, this was already admitted, and, in the case of laying blame on others, this was not relevant to any issue on the appeal.

Compliance policy

The Tribunal emphasized that there had been changes to the environmental regime since the decision in *Appletex*, including publication of the Compliance Policy.

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That policy document was specifically designed to provide guidance on how MOE officials are to exercise their discretion under the *Act*. The Compliance Policy states that current owners, *whether innocent or otherwise*, should be named in MOE clean-up orders.

Fault determination

The Tribunal found that it was not the appropriate forum to determine who was at fault for, in this case, the furnace oil leak, and to what extent; the civil courts were more appropriate for such a determination.

Harkening back to the purpose of the *Act* — to protect the environment — the Tribunal held that delving into the cause and circumstance of the leak would undermine that purpose and delay the necessary remediation.

Reasonableness

The Divisional Court found that the appropriate standard of review to apply to the Tribunal's decision was reasonableness. The City's position was that the Tribunal's decision on the merits was unreasonable in that it violated the fundamental guiding principle under the EPA: the "polluter pays" principle.

The City argued that to ignore the long-held polluter pays principle was unfair, particularly given that the City may never be reimbursed in any other forum by those at fault for the furnace oil leak.

"Owner pays" provision

The Divisional Court acknowledged that while the *Act* provides for a "polluter pays" enforcement mechanism, it equally provides for an "owner pays" enforcement mechanism.

Section 157.1 of the *Act* gives the provincial officer the discretion to make an order against an owner if the officer reasonably believes that such an order is necessary to protect the environment. This, the Divisional Court reiterated, is the purpose of the *Act*.

...under the Act, the protection of the environment is paramount; some unfairness for innocent owners is therefore justifiable.

Appletex Distinguished

The Divisional Court further distinguished *Appletex* in stating as follows:

In this case the provincial officer was faced with a situation where the contaminant on the owner's property was starting to cause damage to other parts of the environment. Left uncontrolled, that damage would only get worse. As noted by the Tribunal, this was a "recent spill" event, unlike the long-term contamination scenario that was the subject of *Appletex*. The owner of the adjoining property, where the contaminant had come from, was financially unable to remediate the damage. The provincial officer exercised her discretion and ordered the innocent owner to do the clean-up.

The Tribunal, in refusing to revoke the clean-up order, found that the MOE had exercised its discretion in a purposive manner consistent with the purpose of the *Act*. The exercise of discretion was also consistent with the Compliance Policy that was designed to assist officers in exercising their discretion under the *Act*. These findings were clearly reasonable.

Significance

The Divisional Court has made the following very clear: to the extent that an order against an owner is perceived to be unfair because it violates

the "polluter pays" principle, the owner's complaint rests with the drafters of the legislation and not with the statutory decision-makers who apply the legislation as drafted. The Tribunal and the Divisional Court emphasized that under the *Act*, the protection of the environment is paramount; some unfairness for innocent owners is therefore justifiable.

Fairness to all parties

If, the court seemed to suggest, fairness is to be an overarching principle, then fairness to those who enjoy Sturgeon Lake and fairness to the environment itself must also be part of the analysis.

It may now be tempting to conclude that innocent owners are without a defence to MOE clean-up order. However, the Tribunal, as the court, left an opening for owners when it can be shown that fairness to an owner is, "accompanied by a solution that is also fair to the environment and fair to those affected by the pollution . . .".

Property Insurance

Given the court's focus on the clear purpose of the *Act* and the changes to the legal landscape since the decision in *Appletex*, the City's appeal, should leave be granted, has some challenges ahead.

In the meantime, property owners would be well advised to review their policies of insurance to consider pollution impacting their property caused by neighbours or other third parties. This may not be the end of the road for innocent owners; time, as they say, will tell.

REFERENCES: *The Corporation of the City of Kawartha Lakes v. Director, Ministry of the Environment*, 2012 ONSC 2708 (CanLII); *Environmental Protection Act*, R.S.O. 1990, c. E.19; *724597 Ontario Ltd., Re* (1994), 13 C.E.L.R. (N.S.) 257 (Ont. Env. App. Bd.), *aff'd*. (1995), 26 O.R. (3d) 423 (Div. Ct.).