Appeal Court denies stay of regulation under *Pesticide Act*

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The Court of Appeal for Ontario has effectively determined that the encroachment of a regulation on the use of land is legitimate for environmental protection purposes.

In the recent decision of *Grain Farmers of Ontario v. Ontario (Ministry of the Environment and Climate Change)* the Court of Appeal for Ontario (the "ONCA") dismissed the GFO's appeal to stay Ontario Regulation 139/015 (the "Regulation") made under the *Pesticides Act* (the "Act").

The ONCA found that while the Regulation did impact upon the GFO members' use of their lands, it did not rise to the level of a justiciable issue. The ONCA effectively determined that the Regulation's encroachment on the use of the GFO members' lands for the purpose of protecting the environment was legitimate.

The ONCA quoted the following passage from the Superior Court decision in this case — which goes to the heart of this matter — with approval:

> It is not the job of this court to pronounce on the efficacy or wisdom of government policy absent the aforementioned constitutional or jurisdictional challenges....Nor is it within the power of this court to rewrite or "correct" legislation which is argued by a party to be faulty or ambiguous.

Background

GFO represented approximately 28,000 producers of corn, soybean, and wheat in Ontario whose produce generates approximately $2.5 billion in farm gate receipts and whose operations employ some 40,000 people in Ontario. (The farm gate value of an agricultural product is the net value of the product when it leaves the farm, after marketing costs have been subtracted.)

The GFO members relied upon seeds treated with neonicotinoids, a kind of pesticide which protects their crops from harmful pests. Neonicotinoids do, however, have a harmful and toxic effect on bees and other helpful insects which provide essential pollination.

Amendment

Under the *Act*, the province of Ontario regulates the classification, use, transportation and disposal of pesticides. The province amended the Regulation to control the sale and use of neonicotinoid treated seeds. The amendment included a grace period of one year.

In the first year of the amendments coming into effect, a farmer who wished to plant neonicotinoid seeds on more than 50 percent of his/her lands must provide the seed vendors with a pest assessment report ("PAR") prior to purchase. The PAR must show that the farmer's land required neonicotinoid treated seeds.

SPA assessment

Two types of assessment may be conducted to obtain a PAR: a soil pest assessment ("SPA") or a crop pest assessment ("CPA"). During the grace period (from August 2015 to August 2016) any farmer could actually perform the SPA. In the next year, upon expiration of the grace period, only those who had obtained a certificate of completion of training in the assessment process could do so.

And, following 2017, only a professional pest advisor would be permitted to conduct the SPA to obtain a PAR.

CPA assessment

The CPA assessment was treated differently. A CPA could take place following March 1, 2016, and had to be conducted by a professional pest advisor.

Superior Court application

The GFO brought an application in the Superior Court under Rule 14.05(3)(d) (the "Rule") for a declaration interpreting the Regulation, and a motion to stay all sections of the Regulation. The GFO took the position on the application that the amendments were unworkable, would produce little benefit, and would cause irreparable harm to the Ontario corn and grain farmers.

The GFO argued that the property rights of farmers were at stake: absent government limitation, owners of land may do with that land as they see fit, within their rights. The GFO maintained that an interpretation of these rights was within the court's jurisdiction. The GFO did not argue that the Regulation was *ultra vires* or a violation of the *Charter of Rights and Freedoms*.

The Ministry for Environment and Climate Change (the "Ministry") brought a cross-motion to dismiss the GFO's application for failing to show a reasonable cause of action.

Issues at stake

Put succinctly, the three issues to be determined on the application and cross motion were as follows:

1. Can the court grant injunctive relief to stay a statutory regulation;
2. If so, should injunctive relief be granted; and
3. Does the GFO's main application disclose a reasonable cause of action.

When seeking a stay, the same principles apply as for an injunction.

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Further, injunctive relief against the Crown is only granted in limited circumstances.

Application judge's dismissal

The application judge was of the view that the case did not concern property rights but, instead, economic rights. The farmers' ability to generate income was affected, not the use of their land.

The application judge agreed with the Ministry that the use of farmland has always been highly regulated, particularly with respect to pesticide use. The Regulation merely enhances control of that use by adding neonicotinoid-treated seeds to the list of controlled pesticides.

The application judge concluded that injunctive relief could not be granted against the Ministry in this case and that, in any event, the GFO failed to meet any of the three prongs of the test for injunctive relief. The court found that the GFO was not seeking a determination of rights based on the interpretation of the Regulation but, instead, was seeking to have the Regulation rewritten to delay its effects.

The court then concluded that the GFO's application disclosed no reasonable cause of action. Accordingly, the Superior Court granted the Ministry's cross-motion and dismissed the GFO's application and motion to stay.

ONCA Decision

The GFO appealed the Superior Court decision to the ONCA on the grounds that the application judge erred in finding that (1) the Regulation did not limit farmers' property rights and (2) the relief sought was not a determination of rights through the interpretation of a regulation.

In dismissing the GFO's appeal, the ONCA stated that while they disagreed with the application judge's conclusion that the Regulation does not affect the property rights of GFO members, nothing turned on this disagreement. The ONCA held that the Regulation provided for a mere limitation on a liberty, which could be extinguished by a constitutionally valid piece of legislation.

No justiciable issue

As the ONCA stated:

> The limitation of a right does not, standing alone, create a justiciable issue. The problem the GFO cannot overcome is that there is simply no controversy as to the farmers' rights or obligations under the Regulation that could make the matter justiciable.

The court noted that while broad discretion is granted to provide declaratory relief under s. 97 of the *Courts of Justice Act*, it is for the party seeking such declaratory relief to establish a legal or justiciable issue.

The ONCA further noted that the Rule, cited by the GFO as the basis for seeking declaratory relief, does not provide "free-standing jurisdiction where an interpretive question is raised"; rather, the Rule is procedural in nature, and "does not create jurisdiction but assumes it."

Accordingly, the ONCA found that the application judge was correct in concluding that the Rule did not expand the court's jurisdiction to grant declaratory relief to an applicant who seeks to challenge the wisdom, fairness or efficacy of government action; such challenges are not, in themselves, justiciable issues.

No jurisdiction

The ONCA went on to find that the application judge was correct in holding that the relief sought by the GFO was solely within the power of the legislature and the executive, not the court. The ONCA had no jurisdiction to cure what the GFO perceived to be unfairness in the Regulation.

If the court attempted to do so by rewriting the legislation, this would be *ultra vires* the jurisdiction provided under the Rule: such a cure would not be the resolution of a genuine interpretive question.

Significance

It is worth noting that the GFO did not seek leave to appeal to the Supreme Court of Canada. The decision in this case contains a host of practical and legal reminders for litigants with respect to procedure, statutory interpretation and beyond.

The GFO undoubtedly has a genuine policy dispute with the province of Ontario, with significant consequences. However, the GFO's decision to found the dispute on statutory interpretation proved problematic.

The Superior Court and the Court of Appeal for Ontario found the obligations imposed on farmers before they could purchase and plant treated seeds to be unambiguous. Plain and simple, farmers must now obtain PARs that demonstrate the need for treated seeds.

While the ONCA noted that the legislation did impact farmers' rights, this impact did not rise to the level of a justiciable issue. This decision has implications for landowners, certainly, but there are of course broader implications.

While little was said about the object of the Act or the Regulation, the reminder operating in the background is that the public interest in protecting the environment — in this case, protecting bees and other pollinators — will often outweigh other adverse impacts, whether economic or otherwise.

REFERENCES: *Grain Farmers of Ontario v. Ontario (Ministry of the Environment and Climate Change)*, 2016 ONCA 283, 2016 CarswellOnt 5890 (Ont. C.A.) at paras. 15, 17, 18, affirming 2015 ONSC 6581, 2015 CarswellOnt 16597 (Ont. S.C.J.) at para. 38; *Pesticides Act*, R.S.O 1990, c. P. 11; *Rules of Civil Procedure*, R.R.O.1990, Reg. 194, R. 14.05(3)(d); *Courts of Justice Act*, R.S.O. 1990, c. C.43.