COURT OF APPEAL FOR ONTARIO

CITATION: Kawartha Lakes (City) v. Ontario (Environment), 2013 ONCA 310
DATE: 20130510
DOCKET: C56382

Rosenberg, Goudge and Tulloch JJ.A.

BETWEEN

The Corporation of the City of Kawartha Lakes

Appellant

and

Director, Ministry of the Environment, Wayne Gendron, Liana Gendron, Doug Thompson Fuels Ltd., D.L. Services Inc., Farmers' Mutual Insurance Company and Ian Pepper Insurance Adjusters Inc.

Respondents

Cliff Cole and Jennifer Danahy, for the appellant

Nadine Harris and Fredrika Rotter, for the respondent Director, Ministry of the Environment

Martin Forget, for the respondents Wayne Gendron and Liana Gendron

Heard: May 1, 2013

On appeal from the order of the Divisional Court (Justices W. Larry Whalen, Harriett E. Sachs and Thea P. Herman), dated May 28, 2012, dismissing the appeal from the decision of the Environmental Review Tribunal, dated July 16, 2010.

Goudge J.A.:

[1] This proceeding arises from a fuel oil spill that occurred on December 18, 2008 on residential property owned by Mr. and Mrs. Gendron. The Gendron property is adjacent to a road allowance owned by the appellant City of Kawartha Lakes, which is in turn adjacent to the shore of Sturgeon Lake. The fuel oil was delivered to the Gendrons that day by Thompson Fuels Ltd.

[2] Following the spill, fuel oil migrated on to the appellant's property and into Sturgeon Lake. As a consequence, the Ministry of the Environment (the MOE) ordered the appellant to remediate the adverse effects of the spill on its property. The appellant appealed unsuccessfully, first to the Environment Review Tribunal, and then to the Divisional Court. With leave, it now appeals to this court.

[3] All parties agree that the appellant bore no responsibility for the spill. The issue is whether the Tribunal erred in preventing the appellant from calling evidence to show who was at fault for the spill. The Divisional Court found that the Tribunal was correct in doing so.

[4] I would dismiss the appeal. To explain why, it is necessary to describe the background in a little more detail.

[5] Twelve days after the spill, on December 30, 2008, a provincial officer of the MOE issued an order under the *Environmental Protection Act*, R.S.O. C.E 19 (the Act). It ordered the Gendrons to "prevent, eliminate and ameliorate" the adverse effects of the spill. This order was based on the Gendrons' fault, namely

their suspected violation of the Act by discharging or permitting the discharge of a contaminant into the natural environment.

[6] The Gendrons commenced remediation by hiring a clean up firm, but by March 20, 2009, they had run out of funds and could not continue any remediation off site, that is on the appellant's property.

[7] Faced with this, on March 27, 2009, the MOE issued a provincial officer's order to the appellant under s. 157.1 of the Act, to remediate the adverse effects of the spill on its own property. As permitted by s. 157.1, this was a no fault order. In other words, the order did not require an assertion by the MOE of any fault on the part of the appellant, and none was made.

[8] As the Act permits, the appellant requested the respondent Director of the MOE to review the order. On April 9, 2009 the Director confirmed the order.

[9] The appellant appealed the Director's order to the Environmental Review Tribunal. Under s. 145.2(1) of the Act, such an appeal is a hearing de novo.

[10] The parties before the Tribunal included the appellant, the respondent Director, the Gendrons, Thompson Fuels Ltd. and the clean up firm retained by the Gendrons. All parties agreed that the appellant was innocent of any wrong doing in connection with spill. The appellant's position was that while the MOE had jurisdiction to issue a s. 157.1 order against it as a property owner, to do so was unfair and contrary to the "polluter pays" principle, which assigns polluters

the responsibility for, and the cost of, remedying the contamination for which they are responsible. To make this case, the appellant sought to call evidence that each of the home owners, the fuel provider and/or the maker of the fuel tank was at fault for the spill.

[11] The Gendrons moved to prohibit the appellant from calling such evidence. In its procedural decision of November 20, 2009, the Tribunal found that evidence of who was at fault for causing the spill should not be permitted. It held that no evidence of the appellant's innocence was necessary, since that was agreed, and evidence of who was at fault was not relevant since it would be of no assistance to the Tribunal in deciding whether the Director's order to the appellant should be revoked or upheld. The Tribunal found that although in some cases evidence of the conduct of others would be relevant, this was not such a case. Evidence of others being at fault for the spill was simply irrelevant to the Tribunal's task of determining whether the Act's objective of environmental protection meant that the Director's order should be upheld. The Tribunal concluded that, despite this evidentiary ruling, in proceeding with its appeal, the appellant was entitled to argue that its status as an innocent owner together with the "polluter pays" principle should relieve it of the Director's order.

[12] On the appeal itself, the Tribunal explicitly considered the issue relating to the "polluter pays" principle. It found that if environmental work was necessary, the environmental protection objective of the Act takes precedence over the

"polluter pays" principle. It concluded that it was not enough for the appellant to rely on its status as an innocent victimized owner without addressing how the legislative objective of environmental protection would be met if the Director's order were revoked. Since the appellant presented no evidence of an environmentally responsible solution in the event of revocation of the Director's order, the Tribunal dismissed its appeal.

[13] The appellant appealed to the Divisional Court. In reasons that are thorough and persuasive, the Divisional Court dismissed the appellant's attack on both the Tribunal's procedural ruling and its ultimate disposition of the appeal.

[14] In addition to appealing the Tribunal's order, the appellant has taken advantage of s. 100.1 of the Act which permits a party subject to a no fault order to seek to recover its costs from persons having control of the pollutant. In this case, the appellant seeks recovery from the Gendrons, Thompson Fuels Ltd. and the Technical Standards and Safety Authority. That proceeding has not yet concluded.

[15] In this court, the appellant does not contest that the Director had jurisdiction to make her order. Rather it says that in making the order, the Director erred in several ways.

[16] First, it argues that in disposing of the appeal itself, the Tribunal erred in law by not considering the "polluter pays" principle. That argument can be

shortly disposed of. The Tribunal explicitly considered the principle. It did not decline to do so. It is thus unnecessary to decide whether, had it declined to consider the "polluter pays" principle entirely, this would constitute legal error.

[17] The appellant also argued that the Tribunal's procedural order excluding evidence that others were at fault for the spill denied it natural justice and prevented it from fully making its case that it should be relieved of the Director's order because of the "polluter pays" principle.

[18] Framed either way, I would dismiss this argument. It turns entirely on whether the evidence sought to be tendered by the appellant was properly found irrelevant to the issue before the Tribunal. If the evidence is irrelevant, excluding it does not constitute a denial of natural justice to the appellant, nor does it improperly limit its ability to argue that the "polluter pays" principle requires that the Director's order be revoked.

[19] In this case, all agree that the appellant is innocent of any fault for the spill. I agree with the Tribunal and the Divisional Court that evidence that others were at fault for the spill is irrelevant to whether the order against the appellant should be revoked. That order is a no fault order. It is not premised on a finding of fault on the part of the appellant but on the need to serve the environmental protection objective of the legislation.

[20] The tribunal had to determine whether revoking the Director's order would serve that objective. Deciding whether others are at fault for the spill is of no assistance in answering that question. Evidence of the fault of others says nothing about how the environment would be protected and the legislative objective served if the Director's order were revoked. Indeed, by inviting the Tribunal into a fault finding exercise, permitting the evidence might even impede answering the question in the timely way required by that legislative objective.

[21] I would therefore conclude that the Tribunal correctly excluded the evidence proffered by the appellant. The Divisional Court was correct to uphold the Tribunal's procedural order. Given this conclusion it is unnecessary to decide if that order ought to attract a deferential standard of review. That issue can be left for another case.

[22] In conclusion, I would dismiss the appeal.

[23] As the parties have agreed, there will be no order of costs.

Released: MAY 10 2013