Case Name:

Kawartha Lakes (City) v. Ontario (Director, Ministry of the Environment)

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

[2012] O.J. No. 2378

2012 ONSC 2708

67 C.E.L.R. (3d) 123

349 D.L.R. (4th) 496

215 A.C.W.S. (3d) 125

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Court File No. 421/10

Ontario Superior Court of Justice
Divisional Court - Toronto, Ontario

W.L. Whalen, H.E. Sachs and T.P. Herman JJ.

Heard: April 26, 2012.
Judgment: May 28, 2012.

(84 paras.)

Environmental law -- Environmental liability -- Contaminated land -- Site remediation -- Cost of clean-up -- Appeal by City from affirmation of clean-up order dismissed -- Leak of furnace oil from private property to City property had potential to affect lake -- Private property owner exhausted insurance funds before completion of remediation of City property and was financially unable to complete remediation -- Tribunal affirmed Ministry order requiring City to clean up contamination

and prevent further discharge -- Ruling excluding evidence of fault did not breach rules of natural justice, as it was already acknowledged that City was innocent owner -- Decision on merits was reasonable and consistent with purpose of Act -- Environmental Protection Act, ss. 100.1, 157.1.

Appeal by the City of Kawartha Lakes from affirmation of a clean-up order issued by the Ministry of the Environment. Hundreds of litres of furnace oil leaked from the basement of private property onto City property. The oil had the potential to adversely affect Sturgeon Lake. The Ministry ordered the private property owners to remediate the damage. The owners had limited financial means. Their insurance funds were exhausted before completion of the remediation of City property. The Ministry consequently ordered the City to clean up the contamination and prevent discharge from its property to the lake. The order was issued by the Director, Ministry of Environment, pursuant to the Environmental Protection Act. The City requested review, and the order was confirmed by the Environmental Review Tribunal. The City appealed to the courts on the basis that the Tribunal erred in law and breached the rules of natural justice with respect to a ruling excluding evidence that would determine who was at fault for the contamination. The Tribunal's ruling recognized that the additional evidence was not required, as the parties acknowledged that the City was an innocent owner who had not caused the spill and was not responsible for initial remediation. The evidentiary ruling noted that the overriding purpose of the Act was protection of the Environment, and that the Tribunal was not the appropriate forum for determining extent of fault for the spill. The City contended that the clean-up order was unfair and unreasonable, as it was contrary to the principle that the polluter pays.

HELD: Appeal dismissed. The appeal was moot, as the City had complied with the clean-up order and performed the remediation work that was required. The court exercised its discretion to hear the appeal, as the resolution of the issues raised was in the public interest. The matter was reviewable on a standard of reasonableness. Recent evolution of policy and recent jurisprudence stood for the proposition that the Tribunal was no longer required to consider evidence of fault. There was no error of law in concluding that the proffered evidence from the City was irrelevant to the decision the Tribunal had to make regarding the fairness of the order. The Tribunal found that the Ministry exercised its discretion in a purposive manner consistent with the Act, as this was a situation where, left uncontrolled, a contaminant on an owner's property, where the owner was financially unable to remediate the damage, would cause damage to the other parts of the environment. The Tribunal's decision on the merits was thus reasonable.

Statutes, Regulations and Rules Cited:

Environmental Protection Act, R.S.O. 1990, c. E.19, s. 3(1), s. 100.1, s. 140, s. 145.6(1), s. 157.1, s. 157.1(1)

Statutory Powers Procedure Act, R.S.O. 1990, c. S.22, s. 15(1), s. 25, s. 25.01

Counsel:

Christine G. Carter, for the Appellant.

Nadine Harris and *Frederika Rotter,* for the Respondent Director, Ministry of the Environment.

Martin P. Forget for the Respondents Wayne and Liana Gendron.

REASONS FOR JUDGMENT

The judgment of the Court was delivered by

1 H.E. SACHS J.:-- Several hundred litres of furnace oil leaked from the basement of privately owned property located in the City of Kawartha Lakes (the "City.") The oil seeped onto property that the City owned and from there had the potential to adversely affect Sturgeon Lake. The Ministry of the Environment (the "MOE") ordered the private property owners to remediate the damage. The owners, who had limited financial resources, made an insurance claim, but their insurance funds ran out before remediation could be completed on the City property. The MOE then ordered the City to clean up the contamination on its property and to prevent discharge of the contaminant from its property.

2 This is an appeal by the City from the decision of the Environmental Review Tribunal (the "Tribunal") upholding the MOE order, which was issued by the Director, Ministry of the Environment (the "Director") under the *Environmental Protection Act,* R.S.O. 1990, c. E.19 (the "Act.")

3 The appeal centres on the question of what are the appropriate considerations in making a clean-up order under the Act, against an owner of contaminated land who had no responsibility whatsoever for the contamination. According to the City, the Tribunal erred in law and breached the rules of natural justice when it refused to allow the City to call evidence directed at proving the City's innocence and determining who was actually at fault for the contamination. According to the Respondents, the Tribunal did not err when it found that in this situation its primary mandate, protecting the environment, would not be furthered by engaging in a fault-finding exercise. That exercise was more properly carried out in another forum.

4 For the reasons that follow I would dismiss the appeal.

Factual Background

Events Leading up to the Tribunal Proceedings

5 In December of 2008 several hundred litres of furnace oil leaked from the basement of Wayne and Liana Gendron's house located at 93 Hazel Street, in the City of Kawartha Lakes, Ontario. Thompson Fuels had pumped the fuel into the storage tanks at the Gendron home.

6 When Mr. Gendron noticed the leak he contacted his insurance company, who retained D.L. Services Inc. to begin remediation measures. D.L. Services commenced their work at the end of December. They noticed that the furnace oil had entered the City's municipal storm sewer system and culverts and was being discharged into Sturgeon Lake. They notified the MOE about what was occurring.

7 In response, a Provincial Officer attended at the site and, after observing the discharge of furnace oil into the environment, issued an order to Mr. Gendron requiring him to assess the extent of the spill, eliminate any adverse effects caused by the spill and restore the natural environment. That order was later amended to include Mr. Gendron's estranged wife.

8 In March of 2009 the MOE was notified that the Gendron's insurance coverage had reached its limit. This meant that any clean-up efforts beyond the Gendron's property would be discontinued since the Gendrons did not have the financial means to continue the work. By this time the Gendron

property itself had been sufficiently remediated. However, contamination on the property owned by the City still had the potential to adversely impact Sturgeon Lake.

9 As a result, on March 27, 2009, the MOE issued a Provincial Order to the City, requiring the City to take all reasonable steps to prevent discharge of contaminant from its own property and to remediate its property. The City requested a review of this Order by the Director and the Director confirmed the Order (subject to certain timetable variations) on April 9, 2009.

Proceedings Before the Tribunal

10 On April 24, 2009, the City filed a Notice of Appeal with the Tribunal seeking to revoke the order that required it to remediate its property. At a preliminary hearing held in June of 2009, the Tribunal granted party status to the Gendrons, their insurer (Farmers Mutual Insurance Company), their adjuster (R. Ian Pepper Insurance Adjusters Inc.), the clean-up firm (D.L. Services Inc.), and the fuel provider (Thomson Fuels Ltd.)

11 On September 23 and 24, 2010, the Tribunal heard a motion brought by the Gendrons seeking to exclude any evidence that the City sought to call on the question of who was at fault for causing the spill and the reasonableness of any costs incurred in remediating the spill. On November 20, 2009, the Tribunal granted the motion and, as a result, the parties who had been added to the hearing in June of 2009 discontinued their participation in the City's appeal.

12 The Tribunal heard the City's appeal on April 27, 28 and 29, 2010. On July 16, 2010, the Tribunal issued a decision dismissing the appeal.

The Statutory Scheme

13 The purpose of the Act is described in section 3(1) as providing for "the protection and conservation of the natural environment."

14 Under s. 157.1(1), a provincial officer may issue an order "to any person who owns or who has management or control of an undertaking or property" requiring 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.

15 A person served with a s. 157.1 order may request the Director to review the order. The Director has the power to revoke, confirm or alter the order. A Director's Confirming Order may be appealed to the Tribunal under s. 140 of the Act. The Tribunal holds a hearing *de novo* and may confirm, alter or revoke the Director's Order.

16 Section 145.6(1) of the Act provides that a party to a hearing before the Tribunal may appeal the Tribunal's decision on a question of law to the Divisional Court.

17 Section 100.1 of the Act provides a municipality with a summary remedy to recover its costs for cleaning up a spill that it did not cause by issuing an order for payment to the owner of the pollutant or the person having control of the pollutant. In this case, after the Tribunal declined to revoke the Director's Confirming Order, the City issued s. 100.1 orders against the Gendrons, the fuel provider (Thompson Fuels Ltd.) and the Technical Standards and Safety Authority. The parties to whom the orders were directed appealed to the Tribunal, which had the effect of staying the City's s. 100.1 orders. These parties sought to adjourn the hearing of the appeal until such time as the civil proceedings that had been commenced by the City and others were resolved. The adjournment request

was heard by the Tribunal and on March 15, 2011, [2011] O.E.R.T.D. No. 8, the Tribunal adjourned the appeal "to give the parties an opportunity to try to reach a full resolution of the monies at issue in this proceeding (and any related issues) through negotiation, mediation or trial under the wider rubric of the Superior Court proceedings."

The Tribunal's Decisions

The Evidentiary Ruling

18 This ruling addressed whether the scope of the City's appeal from the Director's Confirming Order should be restricted so as to exclude any evidence and argument relating to the issue of whose fault it was that the spill contaminated City land and whether the costs incurred for remediating the spill were reasonable (given that the contamination could have been better contained by those at fault).

19 The request for the ruling arose from the fact that the City had circulated a draft statement of facts upon which it intended to rely at the appeal that made the following assertions:

(a) Mr. Gendron failed to report the spill promptly as required.
(b) If immediate action had been taken to remediate the spill then the spill could have been largely contained on the Gendron property and the costs associated with remediating the spill would have been well within the Gendrons' insurance limits.
(c) When the decision was made to use the insurance proceeds to remediate Sturgeon Lake, which is under federal jurisdiction, prior to remediating the property that was owned by the City, this decision was one that preferred the interests of others over the interests of the taxpayers of the City.
(d) The City, unlike others who were involved in dealing with the spill (including the MOE), had no opportunity to prevent the spill and to ensure that it was contained on private property.
(e) Each of the homeowners, the furnace oil provider and/or the manufacturer of the fuel holding tank bore responsibility for causing the spill.
(f) The City was in no way responsible for the spill or for failing in any efforts to contain the spill.

20 According to the Gendrons, who brought the motion to exclude evidence, these assertions spoke to matters that were irrelevant in the appeal before the Tribunal. Essentially, according to the Gendrons, the City was asserting that it was an innocent party that had not caused the spill and had had no opportunity to be involved in taking preventative measures to ensure that the spill did not come onto its property. Everyone agreed that the City was an innocent owner. The Gendrons argued that to require the Tribunal to hear evidence about why and who was the party at fault would serve to lengthen the hearing without adding anything of probative value to the matters that the Tribunal had to consider.

21 The City submitted that it was going to use the proposed evidence on the conduct of others to make its case on the issue of "fairness" as that word is used in *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.) ("*Appletex.*") In *Appletex*, two orderees who had some involvement in a polluting enterprise were relieved from some aspects of a Director's order to remediate based on "fairness" factors. These factors included con-

siderations as to whether the person to whom the order was directed had exercised due diligence to avoid creating the problem, whether the causes of the problem were within or outside the orderee's control and whether the orderee could have foreseen the risk or problem that had occurred.

22 The Tribunal granted the Gendron motion to exclude evidence. In doing so, it found that no one was disputing that the City was entirely an innocent owner - it had not caused the problem and was not in a position to control how the problem was initially remediated. Evidence further proving this was not required. At the hearing on the merits, the City was entitled to rely on its status as innocent owner to ground any of the arguments it wished to make about the fact that the Director's Confirming Order should be revoked.

23 The Tribunal also found that it was not the appropriate forum for making determinations as to who was at fault for the spill and to what extent. There were other forums that were more appropriate for this exercise, including the civil courts. The overriding purpose of the Act was clear: to protect the environment. In this case, delving into the circumstances giving rise to the contamination would undermine that purpose. As put by the Tribunal, "... it is difficult to know where such an inquiry would lead. Would it stop at the homeowner or go to the fuel supplier, the tank manufacturer, the parts manufacturer, etc.?" (Tribunal Decision, November 20, 2009, page 27.) In the meantime, there was a contamination that needed to be controlled and there was an orderee named who admitted that it fell within the class of persons who could be named in an order under the Act.

24 Finally, the Tribunal emphasized the changes that had occurred in the legal landscape during the fifteen years since *Appletex* had been decided.

25 Since *Appletex*, decisions (including *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706) have emphasized the fact that the purpose of the Act is not just to remedy environmental damage that has occurred, but to prevent further contamination from occurring. As put by the Supreme Court of Canada in *Maybrun*, "This purpose must, therefore, be borne in mind in interpreting the schemes and procedures established by the Act" (para. 54.)

26 The Tribunal that heard *Appletex* commented on the absence of legislative or policy guidance as to how provincial officers were to exercise their discretion under the Act. Since *Appletex*, the Ministry has filled that vacuum by publishing a Compliance Policy (the "Compliance Policy") the stated purpose of which is "to provide guidance to Ministry staff in exercising their authorities under statutes administered by the Ministry of the Environment" (Compliance Policy, May 2007, page i.)

27 The Compliance Policy makes it clear that if there are two or more persons who can be named in an order under s. 157.1, it is not up to the provincial officer issuing the order to apportion liability as amongst the various orderees. Each orderee is generally considered to be jointly and severally liable under the order and it is to be left to the parties to sort out the apportionment of liability amongst themselves.

28 The Compliance Policy also contains a specific provision dealing with "victimized" or innocent owners. According to that provision, current owners, innocent or not, should be named in an order. If there are exceptional and unusual circumstances, the timing and the content of the work to be done by a victimized owner can be adjusted. As well, if no environmental purpose would be served by naming the owner in the order, they do not need to be named.

29 In summary, according to the Tribunal, evidence that spoke to the fact that the City was not the polluter was not necessary since this was admitted. Evidence that sought to lay blame on others

for the contamination was not, in this case, relevant to any issue that would have an effect on the appeal. Thus, the Tribunal ruled that, "The appeal will exclude evidence and argument regarding fault for causing the spill and the reasonableness of the costs that have been incurred in remediating the spill" (Tribunal Decision, November 20, 2009, page 34.)

The Tribunal's Decision on the Merits of the Appeal

30 After a three-day hearing, the Tribunal dismissed the City's appeal. During the hearing the Tribunal heard from four witnesses, two on behalf of the MOE and two who were called by the City. One City witness testified about an alleged agreement that the MOE and the City had reached about not issuing an order when it did. Ultimately, the Tribunal did not accept the City's version of these events. The second City witness testified that the spill could have been contained on the Gendron property had it been dealt with promptly. If this had happened, the Gendron insurance proceeds would have covered the clean-up costs.

31 The main issue that was addressed on the appeal was whether the Director's Confirming Order was unfair, unreasonable and contrary to the "polluter pays" principle. Essentially, the City argued that as an innocent owner and as a victim of inaction on the part of others who could have prevented the spill from contaminating its land, it was unfair and unreasonable that it should have to pay the costs associated with remediating the contamination. Furthermore, it argued that one of the fundamental principles that should govern any order under the Act is the "polluter pays" principle. Since it was not the polluter and others were, it should not be paying.

32 The Tribunal found that the Act enshrined a system that specifically contemplated making innocent owners initially responsible for the clean-up and prevention of contamination, if to do so would promote the fundamental purpose of the Act: to protect the environment. Section 157.1 of the Act makes no mention of fault. Thus, to the extent that the City was arguing that this was unfair or unreasonable, its complaint was with the legislature which had, in enacting the Act, accepted that some unfairness to innocent owners was justifiable in order to protect the environment and to prevent the unfairness that could result to others from a compromised environment.

33 Furthermore, the Tribunal found that it was not sufficient for the City to ask the Tribunal to revoke a jurisdictionally and environmentally sound Order, without addressing how, if the Order were revoked, the environmental protection objective of the Act would be met. As put by the Tribunal:

> The reason for this is that the Tribunal is charged with carrying out its appellate mandate in the context of specific statutory purposes. It cannot ignore the environmental protection objective of the *EPA* and simply state that it would be fairer to the City that it be relieved from compliance. Fairness to the City must be accompanied by a solution that is also fair to the environment and fair to those affected by the pollution at issue here, including those who use Sturgeon Lake. (Reasons of the Tribunal, July 16, 2010, page 11.)

34 For these reasons the Tribunal dismissed the City's appeal and refused to revoke the Director's Confirming Order.

Issues Raised on This Appeal

35 The Appellant made two submissions on this appeal:

(i) The Tribunal erred in law when it made its ruling on November 30, 2009 limiting the evidence that the City could call in support of its appeal. In particular, the City submitted that the evidence that was excluded spoke to the "fairness factors" that two prior Divisional Court decisions have held are appropriate for the Tribunal to consider when deciding whether it should make an order requiring someone to remediate environmental damage.

(ii) The Tribunal breached the rules of natural justice when it refused to allow the Appellant to call the evidence it wished to call and then found that the Appellant had "not put forward an environmentally responsible solution in support of a revocation of the Director's Order."

36 The Gendrons argued, among other things, that the appeal should be dismissed on the ground that it was moot since the City had complied with the Director's Confirming Order and performed the remediation work required.

Should the Appeal be Dismissed as Moot?

37 We agree that this appeal is now moot, in the sense that the live controversy that existed between the parties has disappeared. What we must now decide is whether we should exercise our discretion to hear the appeal in spite of the fact that it is moot.

38 Generally, courts will refuse to hear matters that are moot. Our system of dispute resolution is structured as an adversarial one. If the controversy has ended, there may be no adversaries who are interested in providing the court with the material it needs to properly make a decision. Furthermore, judicial resources are scarce and should generally be expended on live controversies, not on academic exercises. The courts must be conscious of their proper role (*Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; *Mental Health Centre Penetanguishene v. Ontario*, 2010 ONCA 197.)

39 In this case, both the City and the MOE requested that we exercise our discretion to hear the appeal. According to them, the issue at stake is one that is important and could impact their future dealings with each other on environmental issues. Thus, it is in the public interest that the matter be addressed by the court.

40 Furthermore, they pointed out the City acted in the public interest in remediating the damage by complying with the Order before it had a chance to fully litigate its request that the Order be revoked. If the City had waited until this appeal was heard, the damage to Sturgeon Lake could have been much worse. Environmental contamination often requires quick remediation. To dismiss the appeal because the City acted in the public interest could discourage others from doing the same.

41 In *Mental Health Centre Penetanguishene*, *supra*, the Court of Appeal recognized that, "The mootness doctrine may also be shunted to the sidelines when the issues raised are of public importance and their resolution is in the public interest" (para. 42.)

42 In this case, it is our view that the resolution of the issues in this appeal is in the public interest. In addition, in spite of the fact that the live issue is resolved, the adversarial context persists. We have had the benefit of full argument on the issue from all interested parties. The circumstances giving rise to this appeal are likely to recur between the City (or other similarly-placed municipalities or entities) and MOE. Environmental contamination of municipally owned property through no fault of the municipality is a phenomenon that could repeat itself, giving rise to the questions at stake in this

appeal. We do not wish resolution of these questions to come at the expense of environmental damage by insisting that if the City wishes to appeal a determination on the issue it has raised in this appeal, it should not comply with an order to remediate.

Standard of Review

43 Under the Act, appeals from the Tribunal lie to this court on a question of law. Given this, the Appellant submits that the appropriate standard of review for this court to apply to the Tribunal's decisions is correctness. According to the Appellant, the Tribunal committed an error of law when it excluded the evidence that the City wished to call, thereby failing to recognize that it was bound by *Appletex* and another decision of this Court, *Montague v. Ontario (Ministry of the Environment)* (2005), 12 C.E.L.R. (3d) 271, 196 O.A.C. 173 (Div. Ct.), that also held that "fairness" was an appropriate consideration under s. 157.1 of the Act. In *Montague*, the Divisional Court applied a standard of correctness to the appeal.

44 The Respondents argue that the Tribunal, an expert tribunal, was dealing with a question of law involving its home statute and its decision, which was an evidentiary ruling, is owed deference by this Court and should be reviewed on a standard of reasonableness.

45 *Montague* was decided before the Supreme Court of Canada released its decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. In *Montague* the Divisional Court looked at four factors to determine the proper standard of review: the presence or absence of a privative clause or statutory right of appeal; the expertise of the tribunal relative to that of the reviewing court on the question in issue; the purpose of the legislation; and the nature of the question - law, fact or mixed fact and law.

46 The Court in *Montague* pointed out that the Act does provide for a statutory right of appeal on questions of law and since the appeal before it involved a question of law, this favoured "the normal appellate standard of correctness" (*Montague* at para. 12.) With respect to the expertise of the Tribunal, the Court found that the members of the Tribunal did not require any legal or scientific experience or training and therefore a consideration of this factor also pointed to a review standard of correctness. In the Court's view, the purpose of the legislation, which requires the Tribunal to balance multiple interests, including policy objectives, favoured a more deferential standard. It also found that the question before it was whether the Director had the jurisdiction to make the s. 157.1 order he had made in that case. This was a question of law of general importance that should be reviewed on a correctness standard. Weighing all of these considerations, the Court in *Montague* concluded that the correct standard of review was correctness.

47 In *Dunsmuir*, which was decided after *Montague*, courts were given new direction about how they should determine what standard of review to apply to the decision of an administrative tribunal. The Supreme Court directed that a consideration of the following factors would "lead to the conclusion that the decision-maker should be given deference and a reasonableness test applied": the existence of a privative clause; a tribunal with specialized expertise; and a question of law that does not rise to the level of (i) a question of central importance to the legal system as a whole and (ii) a question that is outside the specialized area of expertise of the tribunal (para. 55).

48 *Dunsmuir* also states that, "Where the question is one of fact, discretion or policy, deference will usually apply automatically" and that "the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated" (para. 53.) In addition, "Deference will usually result where the tribunal is interpreting its own statute or statutes

closely connected to its function, with which it will have particular familiarity" (para. 54.) Furthermore, while true questions of jurisdiction may attract a standard of correctness, "jurisdiction" is to be construed narrowly and limited to those situations where what is at issue is "whether its statutory grant of power gives it the authority to decide a particular matter" (para. 59.)

49 Since *Dunsmuir*, the Supreme Court of Canada in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] 3 S.C.R. 654, has once again clarified that:

> True questions of jurisdiction are narrow and will be exceptional. When onsidering a decision of an administrative tribunal interpreting or applying its home statute, it should be presumed that the appropriate standard of review is reasonableness.

50 In this case, as noted in *Montague*, there is no privative clause. With respect to the Tribunal's expertise, the Supreme Court of Canada had this to say in *Maybrun, supra* at paragraph 57 (regarding the Tribunal's predecessor, the Environmental Appeal Board):

> In establishing this process, the legislature clearly intended to set up a complete procedure, independent of any right to apply to a superior court for review, in order to ensure that there would be a rapid and effective means to resolve any disputes that might arise between the Director and the persons to whom an order is directed. The decision to establish a specialized tribunal reflects the complex and technical nature of questions that might be raised regarding the nature and extent of contamination, and the appropriate action to take. In this respect, the Board plays a role that is essential if the system is to be effective, while at the same time ensuring a balance between the conflicting interests involved in environmental protection. [Emphasis added.]

51 We accept that the Tribunal has specialized expertise in matters relating to the exercise of a discretionary power under s. 157.1 of the Act, its "home" statute.

52 For these reasons we find that the appropriate standard of review to apply to the Tribunal's decision is reasonableness.

53 The Appellant is also alleging that the Tribunal denied it natural justice when it refused to allow the City to put forward the evidence it wished to call and then found that the City had not put forward an environmentally-responsible solution. Any breach of the rules of natural justice must be reviewed on a standard of correctness.

54 The Respondents concede that if a tribunal has committed a breach of the rules of natural justice, then no standard of review analysis is required. A procedurally unfair decision cannot stand.

55 We agree that questions involving an alleged breach of the rules of natural justice do not require a standard of review analysis. A tribunal is required to act fairly, although what constitutes a fair procedure will vary depending on the nature of the circumstances surrounding the decision the tribunal is required to make: (*London (City) v. Ayerswood Development Corp.*, [2002] O.J. No. 4859, 167 O.A.C. 120 (C.A.); *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193).

The Evidentiary Ruling

56 Under the provisions of sections 15(1), 25.01 and 25 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, the Tribunal is given the authority to control its own process and may admit evidence that is "relevant" to the subject-matter of the proceeding. Thus, by implication, it is entitled to make rulings that certain evidence is irrelevant.

57 The Appellant argues that the Tribunal's evidentiary ruling prohibited it from calling the evidence it wished to call with respect to the "fairness" factors discussed in *Appletex.* By finding this evidence irrelevant, the Tribunal effectively ignored two Divisional Court decisions, *Appletex* and *Montague*, decisions by which it was bound.

58 However, *Appletex* and *Montague* stand for the principle that the Director may take into account any one or more of the "fairness" factors in deciding whether to make an order under s. 157.1 of the Act against "a person who owns or has management or control of an undertaking or property." Neither case holds that the Director must take any one or more of these factors into account.

59 In *Appletex* the issue was whether the Tribunal had exceeded its jurisdiction by applying considerations of fairness. The Divisional Court found that it was "unable to agree with that submission" because under the Act the Director has a discretion as to whether or not to make a remediation order.

60 In *Montague*, the current owner had purchased property after a previous owner had contaminated it. The current owner had no knowledge of the contamination and had exercised due diligence when she purchased the property. The Director found that the current owner "must" be subject to a remediation order "by virtue of her status as an owner." The Tribunal overturned the Director and, after considering the "fairness" factors, declined to make any order "that would burden her with the financial responsibility for the cleanup" (para. 53.) The Divisional Court agreed with the Tribunal that the Director was not required to make an order against the current owner and declined to interfere with the Tribunal's decision to exercise its discretion to consider and apply the "fairness" factors.

61 In this case, the Tribunal did not refuse to hear any evidence regarding the "fairness" factors. For example, one of the "fairness" arguments that the City made at the hearing was that the original order against it was made in contravention of an agreement between it and the MOE. At the hearing, both the City and the MOE called evidence on this issue.

62 Rather, the Tribunal found that if the evidence spoke to issues of fault, that evidence was not relevant to the ultimate decision it had to make - namely, whether the Director's Order should be confirmed.

63 As already summarized, the City's proposed evidence spoke to the fact that it was an innocent owner, which was acknowledged by all parties. The City also sought to introduce evidence that one or more other parties were responsible for the contamination. The Tribunal was of the view that, in seeking to introduce this aspect of its evidence, the City was seeking to turn the appeal before the Tribunal into a hearing wherein the Tribunal would determine who was actually at fault for the contamination.

64 The Tribunal found that it was not the appropriate forum for this determination. Its mandate was to protect the environment, both through remediating existing damage and preventing further damage. As acknowledged by the Supreme Court of Canada in *Consolidated Maybrun* at paragraph 59:

> Such a purpose requires rapid and effective means in order to ensure that any necessary action is taken promptly. This purpose is reflected both in the scope of the powers conferred on the Director and in the establishment of an appeal procedure designed to counterbalance the broad powers conferred on the Director by affording affected individuals an opportunity to present their points of view and assert their rights as quickly as possible.

65 The Tribunal found that there were other, more appropriate forums for determining liability. In this case, protecting the environment was a time sensitive matter. Determining fault was likely to be very time consuming.

66 The Tribunal was clear in its evidentiary ruling that it was in no way limiting the City's ability to make any arguments it wished about the fact that it would be "unfair" to make it pay for the remediation when it had done nothing to cause the contamination. All the Tribunal was saying was that there was no need for the City to call any evidence directed at establishing how innocent it was since everyone accepted that it was entirely so.

67 In regards to *Appletex*, the Tribunal pointed to changes that had occurred in the legal landscape since that case was decided in 1995. In *Appletex*, the Board was dealing with a situation where:

> Two businessmen invest their money in a bankrupt company which appears to have an experienced management team. When profits fail to materialize despite dramatic increases in production and sales, they find themselves increasingly involved in making management decisions in an attempt to safeguard their investment. Despite their efforts, the business fails and they lose their entire investment. The Ministry of Environment and Energy then orders them personally to pay for an extensive environmental clean-up of the abandoned site of the business. As none of the other persons subject to this order has any financial capacity to comply, this means that the entire clean-up costs falls on their shoulders. (*Appletex*, Reasons of the Tribunal, para. 2.)

68 In *Appletex*, the Tribunal decided that the MOE orders were unfair and relieved the two businessmen from much of their liability. In coming to the conclusion it did, the *Appletex* Tribunal commented upon the broad discretion afforded to the MOE to issue orders under the Act and upon the tension that exists between protecting the environment by expanding the pool of private parties who are available to pay for the costs of cleaning up the environment to parties such as officers, directors, lenders and receivers, and the need to avoid being unfair by simply attaching liability to "deep pockets." The *Appletex* Tribunal commented on the lack of policy guidance on resolving this tension. The Tribunal did find some guidance in the principles that were adopted by Core Group on Contaminated Site Liability in March of 1993 (a group composed of Ministers of the Environment from across the country and representatives from other environmental stakeholders.) According to the *Appletex* Tribunal, "the Core Group rejected a simplistic 'deep pockets' approach in favour of an approach that takes into account the circumstances of each case and looks at a variety of factors that come into play in deciding whether it is fair in the circumstances to impose liability" (*Appletex*, Reasons of the Tribunal, paragraph 115.)

69 In the case before us, the Tribunal correctly noted that the policy vacuum commented upon in *Appletex* had been filled by the Compliance Policy, a policy document that is specifically designed to provide guidance on how MOE officials are to exercise their discretion under the Act. Some aspects

of the Compliance Policy explicitly disagree with the principles adopted by the Core Group in 1993. For example, the Core Group suggested that before imposing liability for clean-up on an owner who purchases a property that is already contaminated, it was relevant to consider whether that owner ought reasonably to have known of the contamination. The 2007 version of the Compliance Policy, on the other hand, specifically states that the "fact that an owner of a contaminated site may have purchased it without notice of the presence of contamination is irrelevant to the purpose of the Ministry legislation and generally will not be considered by the statutory decision-maker to be grounds for relieving that owner from liability under a control document" (Compliance Policy, section 3.)

70 In *Montague*, as noted above, the owner had purchased a property that was already contaminated and had exercised reasonable diligence before purchasing the property. The Tribunal relieved the owner from liability in spite of the "Buyer Beware" provisions of the Compliance Policy. This formed one of the bases for the Director's appeal of the Tribunal's order. The Divisional Court, at paragraph 59, had this to say about the Tribunal's failure to consider and/or apply the policy (note that one of the issues raised before the Divisional Court in *Montague* was whether the Tribunal appreciated that the compliance guideline was an official policy document as opposed to a proposed policy document):

> Counsel for the appellant concedes that such guidelines "need not be followed by a Director". Thus, there is no error of law in the Tribunal's statement to that effect. *Appletex* and other cases make it clear that the Tribunal must consider Ministry guidelines, and it is clear that the Tribunal did turn its mind to the guideline in question. It is equally clear that the Tribunal made a conscious decision not to follow the guideline and it is a fair inference that it would have done so irrespective of whether the guideline was official or merely proposed. In the exercise of its discretion, the Tribunal was quite entitled to choose not to follow this guideline. <u>While documents of this nature may guide its discretion, they cannot fetter it.</u> [Emphasis added.]

71 In the case at bar, the Tribunal made the choice to have its discretion guided by the Compliance Policy, a choice that the Divisional Court in *Montague* implicitly agreed it was entitled to make.

72 As noted by the Tribunal, the Compliance Policy makes reference to the role of a statutory decision-maker when a clean-up order might be issued to more than one person. It is not the role of the decision-maker to allocate liability or make findings of fault or degrees of fault. People who are named in an order are held to be jointly and severally liable for the clean-up. If determining fault or degrees of fault as between one or more potential orderees is irrelevant to the exercise of a statutory decision-maker under s. 157.1, such a determination of fault becomes much more irrelevant when the parties against whom the findings of fault are sought are not even potential orderees under s. 157.1. In this case the City was seeking to have the Tribunal consider evidence about the fault of the fuel provider, fuel tank manufacturer, insurance company, insurance adjuster, and the MOE itself, none of which were potential orderees under s. 157.1 of the Act. A provincial officer can only make s. 157.1 orders against a "person who owns or who has management or control of an undertaking or property."

73 The Tribunal also considered the fact that the Compliance Policy does provide specific guidance where the statutory decision-maker is considering making an order against an innocent or "victimized" owner like the City. According to section 2 of the Compliance Policy, such an owner will not be relieved of liability. If an exceptional or unusual circumstance existed, the timing and

content of such an order could vary (but not whether it should be made in the first place). The Compliance Policy does acknowledge that there may be a "rare" circumstance when an innocent owner should not be named in an order, that is, where no environmental purpose would be served (for example, "where an owner's property has been contaminated by a groundwater plume originating from a source of contamination on an adjacent property and the required cleanup must, in order to be effective, focus upon the adjacent property rather than the owner's.") The case at bar does not involve such a rare circumstance.

74 Given the policy evolution since *Appletex* and the fact that *Appletex* and *Montague* do not stand for the proposition that a Tribunal is required to consider evidence of fault, we do not accept that the Tribunal committed an error in law when it found that evidence directed at fault was irrelevant, as it would not assist them in the decision that it ultimately had to make. In our view, the Tribunal's treatment of the law was reasonable.

The Tribunal's Decision on the Merits

75 The Appellant argues that the Tribunal's decision on the merits was unreasonable in that it violated a fundamental principle that is to guide the exercise of its discretion under the EPA: the "polluter pays" principle. Doing so was unfair and unreasonable, especially given the uncertainty surrounding whether the City would ever be reimbursed in another forum for the costs incurred from the real people at fault. According to the Appellant, since the Tribunal's decision on the merits, the City's ability to collect in another forum had been undermined by the Tribunal's own actions in adjourning the appeal relating to the City's issuance of an order under s. 100.1 of the Act.

76 In *Montague*, the Divisional Court does make reference to the "polluter pays" principle and notes at paragraph 1 that the Act "includes both a 'polluter pays' and an 'owner pays' enforcement mechanism."

77 Section 157.1 of the Act can be accurately described as an "owner pays" mechanism. It makes no reference to fault. It gives the provincial officer the discretion to make an order against an owner if the officer reasonably believes that such an order is necessary or advisable to protect the environment, which is the sole purpose of the Act.

78 Thus, to the extent that the Appellant is suggesting that an order against an owner must be unreasonable because it violates the "polluter pays" principle, the Tribunal was right - the Appellant's complaint is with the legislators who drafted the legislation, not with the statutory decision-makers whose mandate it is to act in accordance with the legislation as drafted.

79 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.

80 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.

81 With respect to the City's submissions about the Tribunal's reliance on s. 100.1 and its subsequent adjournment decision on this point, it is important to note that the Tribunal has not precluded the City from pursuing its s. 100.1 remedy. All it has said is that in view of the fact that the City's civil action in relation to the spill has been consolidated with another civil action in relation to the same spill, the appeal of the City's s. 100.1 order should be adjourned to see if liability could be worked out in the civil context. In coming to this decision, the Tribunal decided to monitor the civil action and specifically stated that if something changed that required the appeal to proceed sooner, it would reconsider its decision. At the time that the Tribunal adjourned the s. 100.1 appeal, the City had advised the Tribunal that there was no concern that the parties were going to dissipate assets.

The Rules of Natural Justice

82 The City also submits that when the Tribunal found that it had "not put forward relevant evidence of an environmentally responsible solution in support of a revocation of the Director's Order", the Tribunal committed a breach of the rules of natural justice. According to the Appellant, the evidence that the Tribunal refused to hear was the evidence that it was going to call on this issue. Clearly, according to the Appellant, the Tribunal breached the rules of natural justice when it refused to "hear and consider this admissible evidence before making a ruling with respect to the appropriateness of the order" (Appellant's Factum, para. 33.)

83 This submission - that the Tribunal breached the rules of natural justice when it refused to admit the evidence the City wished to call, and then found that the City had called no evidence about how the environment would be protected if the order against it were revoked - is problematic for several reasons. First, there is no evidence that the Tribunal ever precluded the City from calling evidence about how the environment would be protected if the order against it were revoked. Second, if evidence the City was precluded from calling were the evidence about how other parties were at fault, then this brings us back to the same argument that the City made when it sought to introduce the "fault" evidence in the first place. The Tribunal rejected the City's argument precisely because the City had not demonstrated how the proposed evidence was relevant to its overriding mandate of protecting the environment. In other words, the Tribunal did not accept that the City's proposed evidence about fault would assist it in coming up with an environmentally responsible solution if it revoked the Director's Confirming Order. I have already found that the Tribunal made no error in law in making this ruling. A lawful ruling on relevance of proposed evidence cannot constitute a violation of the rules of natural justice.

Conclusion

84 For these reasons the appeal is dismissed. The parties may make written submissions to us on the question of costs. These submissions shall be made within 14 days of the release of these reasons.

H.E. SACHS J.
W.L. WHALEN J.
T.P. HERMAN J.

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