

COURT OF APPEAL FOR ONTARIO

**B E T W E E N:**

**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**

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**FACTUM OF THE APPELLANT**

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January 21, 2013

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## **PART I: THE APPELLANT AND THE ORDER UNDER APPEAL**

1. The appellant, The Corporation of the City of Kawartha Lakes (the "City") appeals an order of the Divisional Court dated May 28, 2012.<sup>1</sup> The Divisional Court order dismissed an appeal by the City from a decision of the Environmental Review Tribunal (the "Tribunal") dated July 16, 2010.<sup>2</sup>

2. The Tribunal required the City to remediate fuel oil contamination on its property. The contamination originated on an adjacent residential property. All parties agree that the City was an "innocent" party, that is, not responsible in any manner whatsoever for the contamination or its off-site migration onto City property.<sup>3</sup>

3. The Tribunal held that principles of fairness, including the *Polluter Pays* principle, are irrelevant to and hence do not apply to a decision by the Director respecting (i) the issuance of an order requiring an innocent party to remediate nor (ii) the exercise of discretion by the Tribunal to confirm or rescind such an order. On these grounds, the Tribunal thus granted a motion by one of the polluters to prohibit the City from leading evidence to demonstrate that other parties (including but not limited to themselves) were:

- (a) at fault in causing the spill;
- (b) at fault in permitting the contamination to migrate onto City property; and
- (c) persons against whom the Director and the Tribunal could make an order requiring remediation.

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<sup>1</sup> Divisional Court order, May 28, 2012, Appellant's Appeal Book and Compendium, Tab 2.

<sup>2</sup> *Corporation of the City of Kawartha Lakes v. Director, Ministry of the Environment*, 2012 ONSC 2708 ["Divisional Court Reasons"], Appellant's Appeal Book and Compendium, Tab 3.

<sup>3</sup> Divisional Court Reasons, *supra* note 2, Appellant's Appeal Book and Compendium, Tab 3, at para. 22.

4. The Divisional Court upheld the decision of the Tribunal. At paragraphs 62 and 74 of its Reasons, the Divisional Court stated:

"[62] ...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.

[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. ..." <sup>4</sup> [Emphasis Added]

5. Similarly, the Divisional Court upheld the Tribunal's finding that the City had "not put forward an environmentally responsible solution in support of a revocation of the Director's Order". <sup>5</sup> At paragraphs 82 and 83 of its Reasons, the Divisional Court stated:

#### **The Rules of Natural Justice**

[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...

**...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 evoked the Director's Confirming Order. I have already found that the Tribunal made no error

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<sup>4</sup> Divisional Court Reasons, *supra* note 2, Appellant's Appeal Book and Compendium, Tab 3, at para. 62 and 74.

<sup>5</sup> Tribunal Decision Case No. 09-007, November 20, 2009, Appellant's Appeal Book and Compendium, Tab 5 at p. 69; Tribunal Decision, Case No. 09-007, July 16, 2010, Appellant's Appeal Book and Compendium, Tab 6 at pg. 99, para. 56; and Divisional Court Reasons, *supra* note 2, Appellant's Appeal Book and Compendium, Tab 3, at para. 82 - 83.

in law in making this ruling. A lawful ruling on relevance of proposed evidence cannot constitute a violation of the rules of natural justice.”<sup>6</sup> [Emphasis Added]

## PART II: OVERVIEW AND THE ISSUES RAISED ON APPEAL

6. The *Environmental Protection Act* (“EPA”)<sup>7</sup> empowers Provincial Officers and Directors of the Ministry of Environment (“MOE”) to make two kinds of orders:

- (a) **Fault Based Orders:** Orders may be made against persons who caused or permitted the escape of pollutants. These orders are grounded on the concept of fault or responsibility.<sup>8</sup>
- (b) **No Fault Orders:** Orders may also be made against persons that have no fault or responsibility for the escape of pollutants.<sup>9</sup>

7. As noted above, the Tribunal held that principles of fairness, including the *Polluter Pays* principle, are irrelevant to both (i) the existence of jurisdiction to make a no fault order; and (ii) the exercise of discretion to issue such an order.

8. The Tribunal thus held that the exercise of discretion by the MOE to make a no fault order was unconstrained; that evidence of fault or causation was irrelevant to the MOE’s exercise of discretion; and that a no fault order could be issued to an innocent party regardless of whether the polluters had first been ordered to remediate.

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<sup>6</sup> Divisional Court Reasons, *supra* note 2, Appellant’s Appeal Book and Compendium, Tab 3, at para. 83.

<sup>7</sup> R.S.O. 1990, c. E-19.

<sup>8</sup> Examples of fault based administrative orders include Stop Orders (section 7 and Part XI), Control Orders (section 8 and Part XI), Remedial Orders (section 17), Waste Removal Orders (section 43), Waste Management System Order (section 44), spill Orders (section 97), Director’s Orders for Spill Costs (section 99.1), Municipal Cost Recovery Orders (section 100.1), Financial Assurance Order (section 132), Order for Use of Financial Assurance (section 136), Orders to Pay MOE Costs (section 150), and Provincial Officer’s Contravention Orders (section 157).

<sup>9</sup> Examples of orders that can be issued to innocent parties include: Preventative Measures Orders (s. 18 Director, and s. 157.1 Provincial Officer), Spill Response Orders (s. 97), Waste Removal Orders (s. 43).

9. The question raised on this appeal is not whether the MOE may issue or has jurisdiction to issue a no fault order against an innocent party. Rather, the question is whether the MOE must have regard to principles of fairness including the *Polluter Pays* principle as part of its exercise of discretion to issue such an order. The City submits that the MOE must consider evidence of fault and only make a no fault order in the event that the polluter(s) cannot or will not comply with a fault based order.

10. The City further submits that both the Tribunal and the Divisional Court erred in concluding that the excluded evidence was not relevant to the issue of "... an environmentally responsible solution in support of a revocation of the Director's Order."<sup>10</sup> To the contrary, the excluded evidence pertained specifically to the existence of other persons who were at fault for the spill and off-site migration of fuel oil, and who could have been ordered by the Tribunal to remediate instead of the City.

11. In this case, the rejection of relevant evidence had such an impact on the fairness of the hearing before the Tribunal that it leads unavoidably to the conclusion that there has been a breach of natural justice.

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<sup>10</sup> Tribunal Decisions and Divisional Court Reasons, *supra* note 5, Appellant's Appeal Book and Compendium, Tab 3, at para. 82-83, Tab 5 at pg. 69 and Tab 6 at p. 99, para. 56.

### **PART III: THE FACTS**

#### **A. The Spill**

12. A fuel oil spill occurred on residential property owned by Mr. and Mrs. Gendron (the "Gendrons") on December 18, 2008.<sup>11</sup> The Gendron property is adjacent to a road allowance owned by the City which is in turn adjacent to the shore of Sturgeon Lake.

13. The oil was delivered to the Gendrons by Doug C. Thompson Fuels Ltd. on the day of the spill. The spill was reported to the MOE one day later, on December 19, 2008.<sup>12</sup> MOE then notified the Technical Standards and Safety Authority ("TSSA").<sup>13</sup>

14. The TSSA made an order against the Gendrons on December 22, 2008.<sup>14</sup> At that time, fuel oil had not migrated off-site.<sup>15</sup>

15. During the period December 18, 2008 to December 30, 2008, no steps of any kind were taken by the Gendrons or Thomson Fuels or any other person to contain or remediate the contamination as required by section 93 of the *EPA*.<sup>16</sup>

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<sup>11</sup> An estimated 500 litres of fuel oil escaped. TSSA Order, Inspection Date December 22, 2008, Appellant's Appeal Book and Compendium, Tab 10 at 164.

<sup>12</sup> Witness Statement of Officer Curlew, Appellant's Appeal Book and Compendium, Tab 9(a) at p. 123-124, para. 3-4.

<sup>13</sup> MOU for MOE / TSSA Involvement, Appellant's Appeal Book and Compendium, Tab 9(b) at p. 138 - 139.

<sup>14</sup> TSSA Order, *supra* note 11, Appellant's Appeal Book and Compendium, Tab 10.

<sup>15</sup> MOE Memo re: Fuel Oil Spill Action, February 11, 2009, Appellant's Appeal Book and Compendium, Tab 9(c) at p. 140; TSSA Order *supra* note 11, Appellant's Appeal Book and Compendium, Tab 10 at 164.

<sup>16</sup> The owner of a pollutant and person having control of a pollutant immediately prior to a spill – here the Gendrons and Thomson Fuels – are required by section 93 to mitigate the impacts of the spill immediately:

16. On December 30, 2008, twelve days after the spill, R. Ian Pepper Insurance Adjusters Inc. (the "Adjuster") retained D.L. Services Inc. ("DL Services") on behalf of the Gendrons' insurer, Farmers' Mutual Insurance Company (the "Insurer") to respond to the spill.<sup>17</sup> By that time, fuel oil had migrated through the storm sewers underneath the City's road allowance and into Sturgeon Lake.<sup>18</sup>

17. DL Services reported the offsite migration of the fuel oil to the MOE. The MOE issued a fault based order against the Gendrons pursuant to section 157.(1) of the *EPA* (the "Order Against the Gendrons"),<sup>19</sup> requiring the Gendrons to "prevent, eliminate and ameliorate the adverse effects" of the spill.<sup>20</sup> MOE did not issue an order to Thompson Fuels.

18. From January to March 2009, DL Services worked to remediate the spill.<sup>21</sup>

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**Duty to mitigate and restore**

93. (1) The owner of a pollutant and the person having control of a pollutant that is spilled and that causes or is likely to cause an adverse effect shall forthwith do everything practicable to prevent, eliminate and ameliorate the adverse effect and to restore the natural environment.

**When duty effective**

(2) The duty imposed by subsection (1) comes into force in respect of each of the owner of the pollutant and the person having control of the pollutant immediately when the owner or person, as the case may be, knows or ought to know that the pollutant is spilled and is causing or is likely to cause an adverse effect.

<sup>17</sup> Curlew, *supra* note 12, Appellant's Appeal Book and Compendium, Tab 9(a) at para. 7; DLS Group Fuel Oil Spill Investigation, January 6, 2009, Appellant's Appeal Book and Compendium, Tab 9(d) at p. 143.

<sup>18</sup> DLS Investigation note 17, Appellant's Appeal Book and Compendium, Tab 9(d) at p. 143; Figure showing Site location, Appellant's Appeal Book and Compendium, Tab 9(e) at p. 146.

<sup>20</sup> Provincial Officer's Order, December 30, 2009, Appellant's Appeal Book and Compendium, Tab 11(a) at p. 166; Amended Order, Appellant's Appeal Book and Compendium, Tab 11(b) at p. 171.

<sup>21</sup> Curlew *supra* note 12, Appellant's Appeal Book and Compendium Tab 9(a) at p. 124-126, para.7-22; DLS Investigation *supra* note 17, Appellant's Appeal Book and Compendium Tab 9(d) at p. 143.

19. On March 20, 2009, the Gendrons' Insurer refused to fund further off-site remediation,<sup>22</sup> while on-site work including the excavation of contaminated soil and the demolition and complete reconstruction of the Gendrons' home continued.<sup>23</sup> The Gendrons' alleged inability to fund off-site work was not verified by the MOE.<sup>24</sup>

20. In response to the Gendrons' default, the MOE did not:

- (a) investigate the cause of the spill or the failure to contain the fuel oil on-site;
- (b) issue an order against any person for allowing fuel oil to migrate off-site;
- (c) issue an order against the fuel oil supplier, Thompson Fuels;
- (d) enforce the Order Against the Gendrons, or obtain evidence of financial hardship as required by the MOE's Compliance Policy;<sup>25</sup>
- (e) evaluate the Insurer's claim that coverage for off-site remediation had been exhausted, while extensive on-site work continued to be funded;
- (f) consult with the TSSA regarding enforcement of the TSSA Order or issuance of further TSSA orders to the parties responsible for the spill; and
- (g) cause work to be done at provincial expense under section 99.1 of the *EPA* and seek to recover the costs from the polluter(s).

21. Instead, on March 27, 2009 the MOE made a no fault order against the City, requiring it to take over the off-site remediation. This order, made pursuant to section 157.1(1) of the *EPA*, was then confirmed by the Director (the "Order Against the City").<sup>26</sup>

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<sup>22</sup> Curlew *supra* note 12, Appellant's Appeal Book and Compendium, Tab 9(a) at p. 125-126, para. 18-21; Letter from Pepper to MOE, March 23, 2009, Appellant's Appeal Book and Compendium, Tab 9(f) at p. 147.

<sup>23</sup> Curlew *supra* note 12, Appellant's Appeal Book and Compendium, Tab 9(a) at p. 131-132, para. 60-67; Photo of reconstructed home, Appellant's Appeal Book and Compendium, Tab 9(i) at p. 160.

<sup>24</sup> Curlew *supra* note 12, Appellant's Appeal Book and Compendium, Tab 9(a) at p. 125-126, para. 18-22; Emails from W. and L Gendron, Appellant's Appeal Book and Compendium, Tab 9(g) at p. 148-149; Email from DLS Group to MOE, March 20, 2009, Appellant's Appeal Book and Compendium Tab 9(h) at p. 159.

<sup>25</sup> Appellants' Exhibit Book, Tab 1(B)(25), at p. 180.

## B. The City's Appeal to the Tribunal

22. At all times, the City acknowledged that the MOE had the jurisdiction to make a no fault order against an innocent party. Similarly, it was admitted by all parties, at all times, that the City was an innocent party; and that it did not cause and was not responsible for the spill or the migration of the contamination.<sup>27</sup>

23. The City complied with the Order Against the City. At the same time, it appealed to the Tribunal. Its appeal was predicated upon principles of fairness and the *Polluter Pays* principle in particular. The appeal was a hearing *de novo*.<sup>28</sup>

24. At the appeal before the Tribunal, the City did not contest the MOE's jurisdiction to make the Order Against the City. To the contrary, it argued that:

- (a) the exercise of the discretion of the Tribunal to grant or dismiss the appeal – to uphold the Order Against the City or to permit the City to be relieved from compliance thereunder – required relevant evidence.
- (b) relevant evidence included evidence pertaining to:
  - (i) the application of principles of fairness to the Order Against the City;
  - (ii) the *Polluter Pays* principle;
  - (iii) the identification of persons who were at fault in causing the spill and permitting its off-site migration, including the Gendrons, Thompson

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<sup>26</sup> Provincial Officer Order, Appellant's Appeal Book and Compendium, Tab 12 at p. 176 – 183; Director's Order, Appellant's Appeal Book and Compendium, Tab 13 at p. 184 – 197.

<sup>27</sup> Divisional Court Reasons, *supra* note 2, Appellant's Appeal Book and Compendium, Tab 3, at para. 22 and 63.

<sup>28</sup> Section 145.2(1) of the *EPA*, Schedule B, Appellants' Factum.

Fuels, and potentially the Adjuster, the Insurer and the TSSA itself;  
and

(iv) the ability of such persons to respond to a fault based order.

25. The Tribunal refused to admit this evidence and dismissed the City's appeal.<sup>29</sup>

### **C. Responsibility of the MOE and the TSSA to Prevent Off-Site Migration**

26. Both the MOE and the TSSA were aware of the spill from the day it was reported. Both had the statutory authority to ensure that fuel oil was contained and remediated before it could migrate off-site. Neither did so. Similarly, neither chose to expend provincial funds to remedy the spill following the Gendrons' default.

27. Failure to contain the fuel oil increased remediation costs by approximately \$1,400,000. The City was not advised that it would be required to take over remediation efforts until March 2009, three months after the fuel oil had migrated off-site. As a result, the City was denied the opportunity to contain and remediate the spill cost-effectively.<sup>30</sup>

### **D. The City's Thwarted Attempt to Secure Costs Recovery**

28. By June 15, 2010 the City completed the required remediation. It issued an order to recover costs in the amount of \$471,691.44 from the Gendrons, Thompson Fuels and the TSSA, pursuant to the summary proceeding mechanism set out in section 100.1 of

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<sup>29</sup> Tribunal Decisions and Divisional Court Reasons, *supra* note 5, Appellant's Appeal Book and Compendium, Tab 3, at para. 82-83, Tab 5 at pg. 69 and Tab 6 at p. 99, para. 56.

<sup>30</sup> Witness Statement of T. Mclellwain, Appellant's Appeal Book and Compendium, Tab 9(j) at p. 162, para. 5; Tribunal Decision, Case No. 09-007, July 16, 2010, Appellant's Appeal Book and Compendium, Tab 6 at p. 88, para. 17.

the *EPA*.<sup>31</sup> The City also commenced a civil action.<sup>32</sup> However, the Tribunal adjourned the proceedings pending completion of civil litigation. Four years later, the civil litigation continues and the City has not recovered costs.<sup>33</sup>

## E. The Statutory Scheme

29. The overwhelming majority of administrative powers to make orders set out in the *EPA* are fault-based and reflect the *Polluter Pays* principle which operates to the effect that the cost of remedying environmental damage should be borne by the person who caused it.<sup>34</sup> For example, Provincial Officer's "Contravention" orders<sup>35</sup> and Director's "Remedial" orders<sup>36</sup> may be issued to persons who have caused or permitted the discharge of a contaminant.

<sup>31</sup> *EPA* section 100.1, Appellant's Factum, Schedule B.

<sup>32</sup> Tribunal Decision, *supra* note 29, Appellant's Appeal Book and Compendium, Tab 7 at p. 105.

<sup>33</sup> Tribunal Decision, *supra* note 29, Appellant's Appeal Book and Compendium, Tab 7 at p. 105.

<sup>34</sup> *Imperial Oil Ltd. V. Quebec (Ministry of the Environment)*, 2003 SCC 58, [2003] 2 S.C.R. 624, Appellants' Book of Authorities, Tab 5 at para. 23 – 24.

### <sup>35</sup> Order By Provincial Officer Respecting Contraventions

157.(1) A provincial officer may issue an order to any person that the provincial officer reasonably believes is contravening or has contravened,

(a) a provision of this Act or the regulations;

(b) a provision of an order under this Act, other than an order under section 99.1, 100.1, 150 or 182.1 or an order of a court; or

(c) a term or condition of an environmental compliance approval, certificate of property use, renewable energy approval, licence or permit under this Act.

### <sup>36</sup> Remedial orders

17. Where any person causes or permits the discharge of a contaminant into the natural environment, so that land, water, property, animal life, plant life, or human health or safety is

30. No fault orders reflect the residual power of the MOE to require an innocent party who owns land that has been affected by contamination to remediate. For example, both Provincial Officers<sup>37</sup> and Directors<sup>38</sup> may issue "Preventive Measures" Orders to innocent parties.

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injured, damaged or endangered, or is likely to be injured, damaged or endangered, the Director may order the person to,

- (a) repair the injury or damage;
- (b) prevent the injury or damage; or
- (c) where the discharge has damaged or endangered or is likely to damage or endanger existing water supplies, provide temporary or permanent alternate water supplies.

<sup>37</sup> **Order By Provincial Officer Respecting Preventive Measures**

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 if the provincial officer reasonably believes that the requirements specified in the order are necessary or advisable so as,

- (a) to prevent or reduce the risk of a discharge of a contaminant into the natural environment from the undertaking or property; or
- (b) to prevent, decrease or eliminate an adverse effect that may result from,
  - (i) the discharge of a contaminant from the undertaking, or
  - (ii) the presence or discharge of a contaminant in, on or under the property

<sup>38</sup> **Order by Director re preventive measures**

18. (1) The Director, in the circumstances mentioned in subsection (2), by a written order may require a person who owns or owned or who has or had management or control of an undertaking or property to do any one or more of the following: .....

Grounds for order

(2) The Director may make an order under this section if the Director is of the opinion, on reasonable and probable grounds, that the requirements specified in the order are necessary or advisable so as,

- (a) to prevent or reduce the risk of a discharge of a contaminant into the natural environment from the undertaking or property; or
- (b) to prevent, decrease or eliminate an adverse effect that may result from,
  - (i) the discharge of a contaminant from the undertaking, or

31. If a Provincial Officer's Order is issued, a request for review may be made to the Director. The Director may confirm, amend or revoke the order.<sup>39</sup> A Director's Order, in turn, may be appealed to the Tribunal, which conducts a hearing *de novo*.<sup>40</sup>

32. The Tribunal may substitute its opinion for that of the Director, and require the Director to take any action deemed necessary and in accordance with the *EPA*:

145.2 (1) Subject to sections 145.3 and 145.4, a hearing by the Tribunal under this Part shall be a new hearing and the Tribunal may confirm, alter or revoke the action of the Director that is the subject-matter of the hearing and may by order direct the Director to take such action as the Tribunal considers the Director should take in accordance with this Act and the regulations, and, for such purposes, the Tribunal may substitute its opinion for that of the Director.

33. The *EPA* does not specify any criteria to guide the MOE's exercise of discretion when electing to make a no fault order to an innocent party.

34. The MOE may also have work done at provincial expense, and issue an order for costs to the polluter(s) where it appears that the recipient of an order will not comply.<sup>41</sup>

#### **PART IV - THE ISSUES AND THE LAW**

35. The issues raised on this appeal are:

(a) **Issue No. 1:** Did the Divisional Court err in law by upholding the decision of the Tribunal that principles of fairness, including the *Polluter Pays* principle, are **irrelevant** to the making of a no fault order?

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(ii) the presence or discharge of a contaminant in, on or under the property.

<sup>39</sup> *EPA* sections 157.3, Appellants' Factum Schedule B.

<sup>40</sup> *EPA* section 145.2, Appellants' Factum Schedule B.

<sup>41</sup> *EPA* section 99.1 and 147.1, Appellants' Factum Schedule B.

- (b) **Issue No. 2:** Did the Divisional Court err in law by failing to find that the Tribunal breached the rules of natural justice when it:
  - (i) excluded evidence pertaining principles of fairness, including the *Polluter Pays* principle (including the identification of persons who were at fault for the spill and its off-site migration, and the ability of such persons to respond to a fault based order to remediate); and
  - (ii) refused to allow the City to call the evidence and then concluded that the City had “not put forward an environmentally responsible solution in support of a revocation of the Director’s Order”?

### The Standard of Review

36. The Divisional Court held that the standard of review in this case is reasonableness. However, it came to this conclusion on the basis that:

- (a) principles of fairness, including the *Polluter Pays* principle are irrelevant to:
  - (i) the existence of jurisdiction to make a no fault order; and
  - (ii) the exercise of discretion when making such an order;

such that there was no resulting breach of natural justice by excluding evidence pertaining to other parties who could be ordered by the Tribunal to respond; and
- (b) there was no breach of natural justice resulting from the Tribunal’s decision to exclude evidence pertaining to other parties who could be ordered by the Tribunal to respond and, at the same time, concluding that the City had “not put forward an environmentally responsible solution in support of a revocation of the Director’s Order”.<sup>42</sup>

37. The City submits that the Divisional Court applied the wrong standard. The applicable standard is correctness given that there was a breach of natural justice. The respondents and the Divisional Court agree that the standard is correctness where there

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<sup>42</sup> Divisional Court Reasons, *supra* note 2, Appellant’s Appeal Book and Compendium, Tab 3, at para. 74 and para. 82 - 83.

has been a breach of natural justice. This is made unequivocally clear in paragraphs 53 to 55 of the reasons of the Divisional Court:

[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.**

38. In the event that this Court of Appeal concludes that the standard is to be determined pursuant to the test set out in *Dunsmuir* (as held by the Divisional Court in this case) then the City submits that:

- (a) the standard remains correctness given the following:
  - (i) the question of law raised on this appeal is of “central importance to the legal system ...and outside the ... specialized area of expertise” of the administrative decision maker” and “... will always attract a correctness standard.”
  - (ii) there is no privative clause in the *EPA* in respect of decisions of the Tribunal;
- (b) in any event, the decision of the Tribunal is unreasonable.

*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, Appellant’s Book of Authorities, Tab 1 at p. 22 – 23, para. 52, 55 and 59 [*“Dunsmuir”*].

**Issue 1: Did the Divisional Court err in law by upholding the decision of the Tribunal that principles of fairness including the *Polluter Pays* principle are irrelevant to the making of a no fault order?**

## A. Principles of Fairness

39. Nearly two decades ago, the MOE began issuing no fault orders to innocent parties with “deep pockets” such as banks, secured creditors, trustees in bankruptcy, shareholders, and officers and directors (in their personal capacity). The MOE’s goal was to ensure that remediation would occur where a polluter was insolvent.

*Re 724597 Ontario Inc. c.o.b. “Appletex” (1994), 13 C.E.L.R. (N.S.) 257 (Ont. E.A.B.), Appellant’s Book of Authorities, Tab 2 at p. 18, para. 103 to 106 [“Appletex”].*

40. Then, as now, the imposition of liability without regard for fault provoked questions of fairness. These questions were addressed by the Ontario Environmental Appeal Board (the predecessor to the Tribunal). In the leading decision, *Appletex*, the Tribunal stated:

“In the case of prosecution, liability rests on proof of fault or negligence. In the case of orders, fault or negligence is not a pre-requisite. This distinction is defensible because of the different purposes of prosecution and orders. The purpose of the former is to punish wrong-doing. The purpose of the latter is, like civil tort remedies, to redistribute loss in an efficient and fair manner.

**However, when the law allows the imposition of substantial liabilities on individuals regardless of fault, this raises questions as to when it is fair to do so” [Emphasis Added]**

*Appletex, supra, Appellant’s Book of Authorities, Tab 2, p. 18 at para. 104 – 105.*

41. The Tribunal also considered the lack of statutory criteria in the *EPA* to guide the exercise of the MOE’s discretion when making orders. In *Karge*, the Tribunal stated that the MOE’s discretion had to be exercised in a manner that was “consistent, fair and principled ...”:

“...anyone exercising the kind of broad discretion that the Director has to impose unlimited financial liability regardless of fault must exercise that discretion in a consistent, fair and principled fashion....”

***Karge v. Ontario (Ministry of Environment and Energy)* (1996), [1996] O.E.A.B. No. 51 (Ont. E.A.B.) ["Karge"], Appellant's Book of Authorities, Tab 5, p. 18 at para. 106.**

42. The Tribunal established a two-stage test:

- (a) first, the Tribunal will address the question of whether jurisdiction exists to issue a no fault order; and
- (b) second, the Tribunal will address the question of whether jurisdiction ought to be exercised.

***Appletex, supra, Appellant's Book of Authorities, Tab 2 at para. 34.***

43. Principles of fairness are considered as part of the second stage, thereby allowing the Tribunal to balance the imperative of environmental protection with administrative law concerns such as reasonableness, fairness and proportionality in the exercise of discretion.

44. Prior to the Tribunal's decision in this case, the Tribunal had for a period of 16 years rejected any suggestion that the MOE's discretion could be "unlimited by any considerations of fairness, reasonableness or proportionality".

***Karge, supra, Appellant's Book of Authorities, Tab 5 at p. 19, para. 116.***

45. Principles of fairness require consideration of such factors as:

- (a) fault or responsibility for the contamination;
- (b) the applicable standard of care;
- (c) the likelihood and seriousness of the risk;
- (d) alternatives available;
- (e) the skill and knowledge of the appellant before the Tribunal;
- (f) the foreseeability of risk or harm;
- (g) the degree of influence of the appellant before the Tribunal over the creation of risk of contamination;

- (h) whether preventative steps were taken;
- (i) whether reasonable care or due diligence was exercised to prevent the harm;
- (j) the benefit to the polluter from participation in the polluting enterprise;
- (k) unjust enrichment; and
- (l) the contribution of others not before the Tribunal to the contamination.

*Appletex, supra*, Appellant's Book of Authorities, Tab 2 at para. 119 – 124.

46. The principles of fairness set out in *Appletex* were affirmed by the Divisional Court and leave to appeal to this Court of Appeal was denied.

*Ontario (Ministry of Environment and Energy, Southern Region) v. 724597 Ontario Inc. (c.o.b. Appletex)* (1995), 18 C.E.L.R. (N.S.) 137 (Ont. Div. C.A), Appellant's Book of Authorities, Tab 3.

*Re 724597* (1996), 1996 CarswellOnt 737 (Westlaw) (Ont. C.A.), Appellant's Book of Authorities, Tab 4.

47. Since 1994, principles of fairness have been applied by the Tribunal and the courts as an appropriate check on the exercise of the MOE's discretion:

"the Board [Tribunal] may...[determine] whether the Director has failed to follow Ministry policies guiding the exercise of discretion or has followed such policies slavishly without regard to factors that would make following the policy inappropriate in the specific case.

Where neither the Ministry nor the Director appear to have put their mind to the principles of fairness, efficiency and effectiveness to guide the exercise of discretion, the Board may attempt to enunciate and apply such principles."

*Montague v. Ontario (Ministry of the Environment)*, (2005) 12 C.E.L.R. (3d) 271, 196 O.A.C. 173 (Ont. Div. Ct), Appellant's Book of Authorities, Tab 7 at para. 26 [*"Montague"*]

48. In this case, however, the Tribunal held that the need to protect the environment had greatly diminished the relevance of these principles:

"[77]...in the present policy and law environment, the role for detailed *Appletex*-type inquiries is greatly diminished. The present focus is on prompt attention to environmental problems...A detailed inquiry into fault would prejudice

the ability of the Tribunal (and perhaps the Provincial Officer or Director in the first instance) to deal with environmental problems in a prompt and efficient manner..."

**Tribunal Decision *supra*, Appellant's Appeal Book and Compendium, Tab 5 at para. 77.**

49. The City submits that the Tribunal and the Divisional Court erred by concluding that the environmental protection imperative and the principles of fairness conflict. They do not.

50. The MOE presented no evidence to support the findings of the Tribunal that:

- (a) environmental protection will be prejudiced if considerations of fairness are considered the exercise of discretion;
- (b) environmental protection has suffered during the sixteen years that *Appletex* was binding law; and
- (c) *Appletex* must be overturned in order to ensure environmental protection.

51. Moreover, there is no authority which provides that principles of fairness may be abandoned to achieve greater efficiency in environmental protection.

52. The Tribunal expressed a concern (echoed by the Divisional Court) that there would be a delay in the event that the City was permitted to lead evidence of fairness which would in turn prejudice the environment. This concern was ill-founded for the reasons that:

- (a) specifically, the City was obligated to comply and was in fact complying with the Order Against the City; and

- (b) more generally, an appeal does not automatically stay any order of the kind in question and the Tribunal may not grant a stay if, to do so, would result in impairment or “serious risk” to the environment.<sup>43</sup>

53. Accordingly, the Tribunal may consider applying principles of fairness without concern of delay and risk to the environment.

**Section 143, EPA, Appellant’s Factum, Schedule B.**

**B. The *Polluter Pays* Principle**

54. The *Polluter Pays* principle stands for the proposition that the cost of remedying environmental damage should be borne by persons causing pollution. As stated in the decision of the Supreme Court of Canada in *Imperial Oil*:

“...that principle assigns polluters the responsibility for remedying contamination for which they are responsible and imposes on them the direct and immediate costs of pollution. At the same time, polluters are asked to pay more attention to the need to protect ecosystems in the course of their economic activities.”

*Imperial Oil Ltd. V. Quebec (Ministry of the Environment)*, 2003 SCC 58, [2003] 2 S.C.R. 624, Appellants’ Book of Authorities, Tab 5 at para. 23 - 24 [*“Imperial Oil”*]

55. The *Polluter Pays principle* is firmly entrenched in the environmental law of Ontario (and Canada).

*Imperial Oil, supra*, Appellant’s Book of Authorities, Tab 5 at para. 23.

56. The MOE’s Statement of Environmental Values (“SEV”) explicitly incorporates the *Polluter Pays* principle. It states that the MOE “endeavours to have the perpetrator of pollution pay for the cost of clean-up...consistent with the polluter pays principle”.

**MOE Statement of Environmental Values, Appellants’ Appeal Book and Compendium, Tab 14 at p. 199 (bullet 6).**

<sup>43</sup> An appeal does not stay the operation of an order and the Tribunal *may not* grant a stay if doing so would result in impairment, or even “serious risk of impairment of the quality of the natural environment for any use that may be made of it”, pursuant to section 143(3).

57. The MOE is required by law to consider its Statement of Environmental Values, including the *Polluter Pays* principle, when making decisions that might significantly affect the environment. This includes the issuance of instruments such as orders.

*Environmental Bill of Rights, 1993*, S.O. 1993, c.28, section 11, Appellants' Factum, Schedule B;  
*Dawber v. Ontario (Director, Ministry of the Environment)* (2008), 36 C.E.L.R. (3d) 191, 241 O.A.C. 156 (Ont. Sup. Ct.) ["Dawber"], Tab 9, p. 203 – 204, at para. 56.

### C. Interpreting the EPA

58. The co-existence of fault based order powers and no fault order powers within the EPA creates the potential for conflict within the statutory scheme.

59. The modern principle of statutory interpretation is that the words of an Act are to be read "in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".

Ruth Sullivan, *Sullivan on the Construction of Statutes 5th Edition*, (Toronto: Lexis Nexis Canada, 2008), Appellant's Book of Authorities, Tab 10 at p. 1;  
*Re Rizzo & Rizzo Shoes Ltd.* (1998), [1998] 1 S.C.R. 27 (S.C.C.), Appellant's Book of Authorities, Tab 11, p.41, at para. 21.

60. It is submitted that applying the modern principle, and having regard to the *Polluter Pays* principle, the no fault order powers must be treated as residual powers. Prioritizing the making of fault based orders, while recognizing that innocent parties may be asked to remediate as a last resort, reconciles the need for environmental protection with the *Polluter Pays* principle harmoniously within the statutory scheme of the EPA.

61. In contrast, to finding that the MOE may hold innocent parties liable for contamination, *even if the polluters have not been ordered to remediate*, undermines the *Polluter Pays* principle and creates unnecessary conflict within the statutory scheme. It

also violates the MOE's obligation to apply its Statement of Environmental Values to decision-making, and undermines the very objective of the *EPA*, which is environmental protection. In particular, polluters have little incentive to internalize environmental cost, and thus reduce environmental risk, if they are not forced to bear the cost of remediation.

62. The MOE itself argued that by holding current and historical polluters responsible before spending Crown funds to remediate, it was acting inconsistent with the *Polluter Pays* principle. The City asks for nothing more.

“At the heart of its argument, counsel to the MOE submits that the *EPA* contemplates a number of remedial and preventative measures (stages (i) to (iv) on the regulatory continuum referenced above)... these remedial measures... are consistent with the “polluter pays” principle which seeks to hold the polluting party responsible for remedying environmental contamination.”

*Re Nortel Networks Corp.*, 2012 ONSC 1213, 66 C.E.L.R. (3d) 310, Appellants' Book of Authorities, Tab 12, p. 14 – 15, at para. 85 and 88 [*“Nortel”*].

**Issue No. 2: Did the Divisional Court err in law by failing to find that the Tribunal breached the rules of natural justice when it:**

- (i) **excluded evidence pertaining to principles of fairness and the *Polluter Pays* principle (including the identification of persons who were at fault for the spill and its off-site migration, and the ability of such persons to respond to a fault based order to remediate); and**
- (ii) **refused to allow the City to call the evidence it wished to call and then concluded that the City had “not put forward an environmentally responsible solution in support of a revocation of the Director’s Order”?**

63. Every public authority making an administrative decision has a duty of procedural fairness. The failure to afford a fair hearing “must always render a decision invalid”.

*Cardinal v. Director of Kent Institution* (1985), [1985] 2 S.C.R. 643 (S.C.C), Appellant’s Book of Authorities, Tab 13, p. 13, at para. 23 [*“Cardinal”*].

64. In some cases, “the rejection of relevant evidence has such an impact on the fairness of a proceeding” that it leads “unavoidably” to the conclusion that there has been a breach of natural justice. This is such a case.

***Universite du Quebec a Trois Riviere v. Larocque* (1993), [1993] S.C.R. 471 (S.C.C.), Appellant’s Book of Authorities, Tab 2, p. 14 – 15, at para. 46, 48 [“*Universite du Quebec*”].**

65. The City accepts that the MOE had jurisdiction to issue a no fault order against it. However, the excluded evidence was relevant to the exercise of the Tribunal’s discretionary power to confirm or rescind that order, and failure to hear such evidence was a breach of natural justice.

66. Put differently, the City did not contend that a no fault order could not be issued against it, but rather that it *ought not* to be issued unless the Tribunal had first:

- (a) considered relevant evidence;
- (b) applied principles of fairness and the *Polluter Pays* principle to such evidence; and
- (c) ensured that if there were polluter(s) available to respond, that they had been asked to remediate and had failed to comply.

67. The City further submits that the excluded evidence related not only to the issue of fairness but also to the manner in which the environment would be protected if the City were granted relief. Without the excluded evidence the City was not in a position to request that fault based orders be issued against other parties. The City was therefore precluded from putting forward an “... environmentally responsible solution in support of a revocation of the Director’s Order”. This too is a breach of natural justice.

68. As in *Universite du Quebec*, the Tribunal's decision to dispose of issues central to the case, after having expressly refused to hear evidence in relation thereto, amounts to a breach of natural justice that renders the decision invalid.

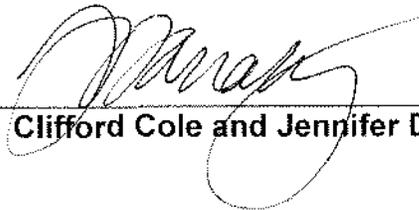
"[the arbitrator] found himself in the position of **disposing of an extremely important point in the case before him**...without having heard any evidence whatever from the respondent on this point, and even **having expressly refused to hear the evidence which the respondent sought to present** on the point. This quite clearly amounts to a breach of natural justice."

*Universite du Québec, supra*, Appellant's Book of Authorities, Tab 2, p. 14 – 15, at para. 48.

#### **PART V - ORDER REQUESTED**

69. For the reasons set out above, the City asks that the Divisional Court order be set aside and reversed.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 21<sup>st</sup> day of January 2013.



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**COURT OF APPEAL FOR ONTARIO**

**B E T W E E N:**

**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

**CERTIFICATE**

I, Clifford I. Cole, lawyer for the Appellant, certify that:

- (i) an Order under subrule 61.09(2) (original record and exhibits) is not required; and
- (ii) 1.5 hours will be needed for the City's oral argument of the appeal, including reply.

**DATED AT** Toronto, Ontario this 21<sup>st</sup> day of January, 2013.

  
\_\_\_\_\_  
for **Clifford Cole**

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Lawyers for the Appellant

**TAB "A"**

**SCHEDULE "A"**  
**LIST OF AUTHORITIES**

1. *Cardinal v. Director of Kent Institution* (1985), [1985] 2 S.C.R. 643 (S.C.C.).
2. *Universite du Quebec a Trois Riviere v. Larocque* (1993), [1993] S.C.R. 471 (S.C.C.).
3. *Montague v. Ontario (Ministry of the Environment)* (2005), 12 C.E.L.R. (3d) 271, 196 O.A.C. 173 (Ont. Div. Ct.).
4. *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.
5. *Imperial Oil Ltd. V. Quebec (Ministry of the Environment)*, 2003 SCC 58, [2003] 2 S.C.R. 624.
6. *Dawber v. Ontario (Director, Ministry of the Environment)* (2008), 36 C.E.L.R. (3d) 191, 241 O.A.C. 156 (Ont. Sup. Ct.) ["Dawber"]
7. Ruth Sullivan, *Sullivan on the Construction of Statutes 5th Edition*, (Toronto: Lexis Nexis Canada, 2008).
8. *Re Rizzo & Rizzo Shoes Ltd.* (1998), [1998] 1 S.C.R. 27 (S.C.C.)
9. *Re Nortel Networks Corp.*, 2012 ONSC 1213, 66 C.E.L.R. (3d) 310 (Ont. Sup. Ct.).
10. *Re 724597 Ontario Inc. c.o.b. "Appletex"* (1994), 13 C.E.L.R. (N.S.) 257 (Ont. E.A.B.).
11. *Re Director, Southeastern Region, Ministry of Environment and Energy and 724597 Ontario Inc. c.o.b. "Appletex" et al, Environmental Appeal Board, Intervenor* (1995), 26 O.R. (3d) 423 (Ont. Div. Ct.)
12. *Re 724597* (1996), 1996 CarswellOnt 737 (Westlaw) (Ont. C.A.).
13. *Karge v. Ontario (Ministry of Environment and Energy)* (1996), [1996] O.E.A.B. No. 51 (Ont. E.A.B.).
14. *Karge v. Ontario (Ministry of Environment and Energy)* (1997), [1997] O.E.A.B. No. 35 (Ont. E.A.B.).

**TAB "B"**

**SCHEDULE "B"****TEXT OF STATUTES, REGULATIONS & BY-LAWS****Courts of Justice Act  
R.S.O. 1990, CHAPTER C.43****Court of Appeal jurisdiction**

6.(1) An appeal lies to the Court of Appeal from,

- (a) an order of the Divisional Court, on a question that is not a question of fact alone, with leave of the Court of Appeal as provided in the rules of court;
- (b) a final order of a judge of the Superior Court of Justice, except an order referred to in clause 19 (1) (a) or an order from which an appeal lies to the Divisional Court under another Act;
- (c) a certificate of assessment of costs issued in a proceeding in the Court of Appeal, on an issue in respect of which an objection was served under the rules of court. R.S.O. 1990, c. C.43, s. 6 (1); 1994, c. 12, s. 1; 1996, c. 25, s. 9 (17)

**Environmental Bill of Rights, 1993  
S.O. 1993, c.28**

The people of Ontario recognize the inherent value of the natural environment.

The people of Ontario have a right to a healthful environment.

The people of Ontario have as a common goal the protection, conservation and restoration of the natural environment for the benefit of present and future generations.

While the government has the primary responsibility for achieving this goal, the people should have means to ensure that it is achieved in an effective, timely, open and fair manner.

Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

**Purposes of Act**

2. (1) The purposes of this Act are,

- (a) to protect, conserve and, where reasonable, restore the integrity of the environment by the means provided in this Act;
  - (b) to provide sustainability of the environment by the means provided in this Act; and
  - (c) to protect the right to a healthful environment by the means provided in this Act.
- 1993, c. 28, s. 2 (1).

**Same**

(2) The purposes set out in subsection (1) include the following:

- 1. The prevention, reduction and elimination of the use, generation and release of pollutants that are an unreasonable threat to the integrity of the environment.

2. The protection and conservation of biological, ecological and genetic diversity.
3. The protection and conservation of natural resources, including plant life, animal life and ecological systems.
4. The encouragement of the wise management of our natural resources, including plant life, animal life and ecological systems.
5. The identification, protection and conservation of ecologically sensitive areas or processes. 1993, c. 28, s. 2 (2).

**Same**

- (3) In order to fulfil the purposes set out in subsections (1) and (2), this Act provides,
- (a) means by which residents of Ontario may participate in the making of environmentally significant decisions by the Government of Ontario;
  - (b) increased accountability of the Government of Ontario for its environmental decision-making;
  - (c) increased access to the courts by residents of Ontario for the protection of the environment; and
  - (d) enhanced protection for employees who take action in respect of environmental harm. 1993, c. 28, s. 2 (3).

**Ministry statement of environmental values**

7. Within three months after the date on which this section begins to apply to a ministry, the minister shall prepare a draft ministry statement of environmental values that,

- (a) explains how the purposes of this Act are to be applied when decisions that might significantly affect the environment are made in the ministry; and
- (b) explains how consideration of the purposes of this Act should be integrated with other considerations, including social, economic and scientific considerations, that are part of decision-making in the ministry. 1993, c. 28, s. 7.

**Effect of statement**

11. The minister shall take every reasonable step to ensure that the ministry statement of environmental values is considered whenever decisions that might significantly affect the environment are made in the ministry. 1993, c.28, s. 11.

**Environmental Protection Act  
R.S.O. 1990, CHAPTER E.19**

**Purpose of Act**

3. (1) The purpose of this Act is to provide for the protection and conservation of the natural environment. R.S.O. 1990, c. E.19, s. 3.

### **Control orders**

7. (1) When the report of a provincial officer contains a finding that a contaminant discharged into the natural environment is a contaminant the use of which is prohibited by the regulations or is being discharged in contravention of section 14 or the regulations, the Director may issue a control order directed to,

- (a) an owner or previous owner of the source of contaminant;
- (b) a person who is or was in occupation of the source of contaminant; or
- (c) a person who has or had the charge, management or control of the source of contaminant.

### **Stop orders**

8. (1) When the Director, upon reasonable and probable grounds, is of the opinion that a source of contaminant is discharging into the natural environment any contaminant that constitutes, or the amount, concentration or level of which constitutes, an immediate danger to human life, the health of any persons, or to property, the Director may issue a stop order directed to,

- (a) an owner or previous owner of the source of contaminant;
- (b) a person who is or was in occupation of the source of contaminant; or
- (c) a person who has or had the charge, management or control of the source of contaminant.

### **Remedial orders**

17. Where any person causes or permits the discharge of a contaminant into the natural environment, so that land, water, property, animal life, plant life, or human health or safety is injured, damaged or endangered, or is likely to be injured, damaged or endangered, the Director may order the person to,

- (a) rEPAir the injury or damage;
- (b) prevent the injury or damage; or
- (c) where the discharge has damaged or endangered or is likely to damage or endanger existing water supplies, provide temporary or permanent alternate water supplies. R.S.O. 1990, c. E.19, s. 17; 2005, c. 12, s. 1 (7).

### **Order by Director re preventive measures**

18. (1) The Director, in the circumstances mentioned in subsection (2), by a written order may require a person who owns or owned or who has or had management or control of an undertaking or property to do any one or more of the following:

1. To have available at all times, or during such periods of time as are specified in the order, the equipment, material and personnel specified in the order at the locations specified in the order.
2. To obtain, construct and install or modify the devices, equipment and facilities specified in the order at the locations and in the manner specified in the order.

3. To implement procedures specified in the order.
4. To take all steps necessary so that procedures specified in the order will be implemented in the event that a contaminant is discharged into the natural environment from the undertaking or property.
5. To monitor and record the presence or discharge of a contaminant specified in the order and to report thereon to the Director.
6. To study and to report to the Director on,
  - i. the presence or discharge of a contaminant specified in the order,
  - ii. the effects of the presence or discharge of a contaminant specified in the order,
  - iii. measures to control the presence or discharge of a contaminant specified in the order,
  - iv. the natural environment into which a contaminant specified in the order may be discharged.
7. To develop and implement plans to,
  - i. reduce the amount of a contaminant that is discharged into the natural environment,
  - ii. prevent or reduce the risk of a spill of a pollutant within the meaning of Part X, or
  - iii. prevent, decrease or eliminate any adverse effects that result or may result from a spill of a pollutant within the meaning of Part X or from any other discharge of a contaminant into the natural environment, including,
    - A. plans to notify the Ministry, other public authorities and members of the public who may be affected by a discharge, and
    - B. plans to ensure that appropriate equipment, material and personnel are available to respond to a discharge.
8. To amend a plan developed under paragraph 7 or section 91.1 in the manner specified in the order. R.S.O. 1990, c. E.19, s. 18 (1); 2005, c. 12, s. 1 (8, 9).

### **Grounds for order**

(2) The Director may make an order under this section if the Director is of the opinion, on reasonable and probable grounds, that the requirements specified in the order are necessary or advisable so as,

- (a) to prevent or reduce the risk of a discharge of a contaminant into the natural environment from the undertaking or property; or
  - (b) to prevent, decrease or eliminate an adverse effect that may result from,
    - (i) the discharge of a contaminant from the undertaking, or
    - (ii) the presence or discharge of a contaminant in, on or under the property.
- 2005, c. 12, s. 1 (10).

**Order for removal of waste**

**43.** Where waste has been deposited upon, in, into or through any land or land covered by water or in any building that has not been approved as a waste disposal site or in respect of which no registration under Part II.2 is in effect, the Director may issue an order to remove the waste and to restore the site to a condition satisfactory to the Director to,

- (a) an owner or previous owner or a person who otherwise has or had charge and control of the land or building or waste;
- (b) an occupant or previous occupant of the land or building; or
- (c) a person that the Director reasonably believes engaged in an activity prohibited by section 40 or 41 that resulted in the deposit of the waste. 1998, c. 35, s. 6; 2010, c. 16, Sched. 7, s. 2 (33).

**Order by Director**

**44.** Where a waste management system or a waste disposal site is not in conformity with this Part or the regulations, the Director may order an owner or previous owner to take such action as is required to bring the system or the site into conformity with this Part or the regulations within the time specified in the order. R.S.O. 1990, c. E.19, s. 44.

**PART X  
SPILLS**

**Interpretation and application, Part X**

**91.** (1) In this Part,

“municipality” means an upper-tier municipality, a lower-tier municipality or a single-tier municipality; (“municipalité”)

“owner of the pollutant” means the owner of the pollutant immediately before the first discharge of the pollutant, whether into the natural environment or not, in a quantity or with a quality abnormal at the location where the discharge occurs, and “owner of a pollutant” has a corresponding meaning; (“propriétaire du polluant”, “propriétaire d’un polluant”)

“person having control of a pollutant” means the person and the person’s employee or agent, if any, having the charge, management or control of a pollutant immediately before the first discharge of the pollutant, whether into the natural environment or not, in a quantity or with a quality abnormal at the location where the discharge occurs, and “person having control of the pollutant” has a corresponding meaning; (“personne qui exerce un contrôle sur un polluant”, “personne qui exerce un contrôle sur le polluant”)

“pollutant” means a contaminant other than heat, sound, vibration or radiation, and includes any substance from which a pollutant is derived; (“polluant”)

“practicable” means capable of being effected or accomplished; (“réalisable”)

“restore the natural environment”, when used with reference to a spill of a pollutant, means restore all forms of life, physical conditions, the natural environment and things existing immediately before the spill of the pollutant that are affected or that may reasonably be expected to be affected by the pollutant, and “restoration of the natural environment”, when used with reference to a spill of a pollutant, has a corresponding meaning; (“reconstituer l’environnement naturel”, “reconstitution de l’environnement naturel”)

“spill”, when used with reference to a pollutant, means a discharge,

- (a) into the natural environment,
- (b) from or out of a structure, vehicle or other container, and
- (c) that is abnormal in quality or quantity in light of all the circumstances of the discharge,

and when used as a verb has a corresponding meaning; (“déversement”, “déverser”)

“substance” means any solid, liquid or gas, or any combination of any of them.

(“substance”) R.S.O. 1990, c. E.19, s. 91 (1); 2001, c. 9, Sched. G, s. 5 (5, 6); 2002, c. 17, Sched. F, Table.

### **Notice of spills**

**92. (1)** Every person having control of a pollutant that is spilled and every person who spills or causes or permits a spill of a pollutant shall forthwith notify the following persons of the spill, of the circumstances thereof, and of the action that the person has taken or intends to take with respect thereto,

- (a) the Ministry;
- (b) any municipality within the boundaries of which the spill occurred or, if the spill occurred within the boundaries of a regional municipality, the regional municipality;
- (c) where the person is not the owner of the pollutant and knows or is able to ascertain readily the identity of the owner of the pollutant, the owner of the pollutant; and
- (d) where the person is not the person having control of the pollutant and knows or is able to ascertain readily the identity of the person having control of the pollutant, the person having control of the pollutant. R.S.O. 1990, c. E.19, s. 92 (1); 2002, c. 17, Sched. F, Table; 2005, c. 12, s. 1 (15).

### **When duty effective**

**(2)** The duty imposed by subsection (1) comes into force in respect of each of the persons having control of the pollutant and the person who spills or causes or permits the spill of the pollutant immediately when the person knows or ought to know that the pollutant is spilled. R.S.O. 1990, c. E.19, s. 92 (2); 2005, c. 12, s. 1 (16).

### **Additional information to Director**

**(3)** The person required by subsection (1) to give notice and the owner of the pollutant shall give to the Director such additional information in respect of the pollutant,

the source of the pollutant and the spill of the pollutant as may be required by the Director. R.S.O. 1990, c. E.19, s. 92 (3).

### **Duty to mitigate and restore**

**93. (1)** The owner of a pollutant and the person having control of a pollutant that is spilled and that causes or is likely to cause an adverse effect shall forthwith do everything practicable to prevent, eliminate and ameliorate the adverse effect and to restore the natural environment.

### **When duty effective**

**(2)** The duty imposed by subsection (1) comes into force in respect of each of the owner of the pollutant and the person having control of the pollutant immediately when the owner or person, as the case may be, knows or ought to know that the pollutant is spilled and is causing or is likely to cause an adverse effect. R.S.O. 1990, c. E.19, s. 93.

### **Directions by Minister, spills**

**94. (1)** Where a pollutant is spilled and the Minister is of the opinion that there is or is likely to be an adverse effect as a result of the spill, the Minister, in the circumstances specified in subsection (2), may give directions in accordance with subsection (3) to the employees in and agents of the Ministry. R.S.O. 1990, c. E.19, s. 94 (1); 2006, c. 35, Sched. C, s. 36 (2).

### **Where Minister may give directions**

**(2)** The Minister may give directions in accordance with subsection (3) where the Minister is of the opinion that it is in the best interest of the public to do so and,

- (a) the Minister is of the opinion that neither the person having control of the pollutant nor the owner of the pollutant will carry out promptly the duty imposed by section 93;
- (b) the Minister is of the opinion that the person having control of the pollutant or the owner of the pollutant cannot be readily identified or located and that as a result the duty imposed by section 93 will not be carried out promptly; or
- (c) the person having control of the pollutant or the owner of the pollutant requests the assistance of the Minister in order to carry out the duty imposed by section 93. R.S.O. 1990, c. E.19, s. 94 (2).

### **Contents of directions**

**(3)** Under this section, the Minister may direct the employees in and agents of the Ministry to do everything practicable or to take such action as may be specified in the directions in respect of the prevention, elimination and amelioration of the adverse effect and the restoration of the natural environment. R.S.O. 1990, c. E.19, s. 94 (3); 2006, c. 35, Sched. C, s. 36 (3).

### **Orders by Minister, spills**

**97. (1)** Where a pollutant is spilled and the Minister is of the opinion that there is or is likely to be an adverse effect and that it is in the best interest of the public to make an

order under this section, the Minister may make an order directed to one or more of the following:

1. The owner of the pollutant.
2. The person having control of the pollutant.
3. The owner or the person having the charge, management or control of any real property or personal property that is affected or that may reasonably be expected to be affected by the pollutant.
4. The municipality within whose boundaries the spill occurred.
5. Any municipality contiguous to the municipality within whose boundaries the spill occurred.
6. Any municipality that is affected or that may reasonably be expected to be affected by the spill of the pollutant.
7. Any public authority.
8. Any person who is or may be adversely affected by the pollutant or whose assistance is necessary, in the opinion of the Minister, to prevent, eliminate or ameliorate the adverse effects or to restore the natural environment. R.S.O. 1990, c. E.19, s. 97 (1); 2002, c. 17, Sched. F, Table.

#### **Content of orders**

(2) In an order under this section, the Minister may require the doing of everything practicable or the taking of such action as may be specified in the order in respect of the prevention, elimination and amelioration of the adverse effects and the restoration of the natural environment within such period or periods of time as may be specified in the order. R.S.O. 1990, c. E.19, s. 97 (2).

#### **Director's order for costs and expenses**

**99.1 (1)** If a pollutant is spilled, the Director may issue an order requiring the owner of the pollutant or the person having control of the pollutant to pay to the Minister of Finance any reasonable costs or expenses incurred by Her Majesty in right of Ontario for the following purposes:

1. To prevent, eliminate or ameliorate any adverse effects or to restore the natural environment.
2. To prevent or reduce the risk of future discharges into the natural environment of any pollutant owned by or under the charge, management or control of the person against whom the order is made. 2005, c. 12, s. 1 (19)

#### **Municipality's order for costs and expenses**

**100.1 (1)** If a pollutant is spilled, a municipality may issue an order requiring the owner of the pollutant or the person having control of the pollutant to pay to the municipality any reasonable costs or expenses incurred by the municipality, or a local board of the municipality within the meaning of the *Municipal Affairs Act*, to prevent,

eliminate or ameliorate any adverse effects or to restore the natural environment. 2005, c. 12, s. 1 (21).

### **Same**

(2) If an order to pay costs or expenses is issued under subsection (1) to a receiver or trustee in bankruptcy, the receiver or trustee in bankruptcy is not personally liable for those costs unless the spill arose from the gross negligence or wilful misconduct of the receiver or trustee in bankruptcy or of a receiver representative or trustee in bankruptcy representative. 2005, c. 12, s. 1 (21).

### **Contents**

(3) An order under subsection (1) shall include,

- (a) a statement identifying the spill to which the order relates;
- (b) a description of things for which the municipality or local board incurred costs or expenses for a purpose referred to in subsection (1);
- (c) a detailed account of the costs and expenses incurred in doing the things; and
- (d) a direction that the person to whom the order is issued pay the costs and expenses to the municipality. 2005, c. 12, s. 1 (21).

### **Application of s. 153**

(4) Section 153 applies, with necessary modifications, in respect of an order under subsection (1). 2005, c. 12, s. 1 (21).

### **Lien**

(5) If a municipality issues an order under subsection (1) against a person who owns real property in the municipality and the pollutant was spilled on that property, the municipality shall have a lien on the property for the amount specified in the order and that amount shall have priority lien status, as described in section 1 of the *Municipal Act, 2001* or section 3 of the *City of Toronto Act, 2006*, as the case may be. 2005, c. 12, s. 1 (21); 2006, c. 32, Sched. C, s. 19 (1).

### **Contribution and indemnity**

(6) Subsections 99.1 (5) to (8) apply, with necessary modifications, in respect of orders issued by a municipality under subsection (1) and, for that purpose, a reference in those subsections to Her Majesty in right of Ontario shall be deemed to be a reference to the municipality. 2005, c. 12, s. 1 (21).

### **Appeals**

(7) A person to whom an order of a municipality is directed under subsection (1) may, by written notice served on the municipality and the Tribunal within 15 days after service on the person of a copy of the order, require a hearing by the Tribunal. 2005, c. 12, s. 1 (21).

### **Extension of time for requiring hearing**

(8) The Tribunal shall extend the time in which a person may give a notice under subsection (7) requiring a hearing if, in the Tribunal's opinion, it is just to do so because service of the order on the person did not give the person notice of the order. 2005, c. 12, s. 1 (21).

### **Contents of notice requiring hearing**

- (9) A person who gives a notice under subsection (7) shall state in the notice,
- (a) the portions of the order in respect of which the hearing is required; and
  - (b) the grounds on which the person intends to rely at the hearing. 2005, c. 12, s. 1 (21).

### **Effect of contents of notice**

(10) Except with leave of the Tribunal, at a hearing by the Tribunal, the person who required the hearing under subsection (7) is not entitled to appeal a portion of the order, or to rely on a ground, that is not stated in the person's notice requiring the hearing. 2005, c. 12, s. 1 (21).

### **Leave by Tribunal**

(11) The Tribunal may grant the leave referred to in subsection (10) if the Tribunal is of the opinion that to do so is proper in the circumstances, and the Tribunal may give such directions as the Tribunal considers proper consequent on the granting of the leave. 2005, c. 12, s. 1 (21).

### **Automatic stay on appeal**

(12) The commencement of a proceeding before the Tribunal stays the operation of the order made under subsection (1). 2005, c. 12, s. 1 (21).

### **Parties to hearing**

(13) The person requiring the hearing, the municipality and any other person specified by the Tribunal are parties to the hearing. 2005, c. 12, s. 1 (21).

### **Costs may be increased**

(14) At a hearing by the Tribunal under this section, the municipality may, on reasonable notice to all parties, ask the Tribunal to amend the order by adding new costs or expenses or by increasing the amounts set out in the order. 2005, c. 12, s. 1 (21).

### **What Tribunal may consider**

- (15) At a hearing by the Tribunal under this section, the Tribunal shall consider only,
- (a) whether the person to whom the order was directed was, immediately before the discharge into the natural environment,
    - (i) the owner of the thing that was discharged,
    - (ii) the person having charge, management or control of the thing that was discharged, or
    - (iii) the employee or agent of the person having charge, management or control of the thing that was discharged; or
  - (b) whether any of the costs or expenses specified in the order,
    - (i) do not relate to things for which the municipality or local board incurred costs or expenses for a purpose referred to in subsection (1), or
    - (ii) are unreasonable having regard to what was done. 2005, c. 12, s. 1 (21).

### **Appeals from Tribunal**

(16) Any party to a hearing before the Tribunal under this section may appeal from its decision or order on a question of law to the Divisional Court in accordance with the rules of court. 2005, c. 12, s. 1 (21).

### **Appeal to Minister**

(17) A party to a hearing before the Tribunal under this section may, within 30 days after receipt of the decision of the Tribunal or within 30 days after final disposition of an appeal, if any, under subsection (16), appeal in writing to the Minister on any matter other than a question of law and the Minister shall confirm, alter or revoke the decision of the Tribunal as to the matter in appeal as the Minister considers in the public interest. 2005, c. 12, s. 1 (21).

### **Decision of Tribunal not automatically stayed on appeal**

(18) An appeal of a decision of the Tribunal to the Divisional Court or to the Minister under this section does not stay the operation of the decision, unless the Tribunal orders otherwise. 2005, c. 12, s. 1 (21).

### **Divisional Court or Minister may grant or set aside stay**

(19) If a decision of the Tribunal is appealed to the Divisional Court or to the Minister under this section, the Divisional Court or the Minister may,

- (a) stay the operation of the decision; or
- (b) set aside a stay ordered by the Tribunal under subsection (18). 2005, c. 12, s. 1 (21).

### **No Automatic Stay**

**143.(1)** The commencement of a proceeding before the Tribunal under this Part does not stay the operation of a decision or order made under this Act, other than,

- (a) an order to pay costs and expenses under section 99.1;
- (b) an order to pay the costs of work made under section 150;
- (c) an order to pay an environmental penalty; or
- (d) an order to pay an administrative penalty. 2005, c. 12, s. 1 (24); 2010, c. 16, Sched. 7, s. 2 (54).

### **Tribunal may grant stay**

(2) The Tribunal may, on the application of a party to a proceeding before it, stay the operation of a decision or order, other than,

- (a) an order to monitor, record and report; or
- (b) an order issued under section 168.8, 168.14 or 168.20. 2001, c. 17, s. 2 (20).

### **When stay may not be granted**

(3) The Tribunal shall not stay the operation of a decision or order if doing so would result in,

- (a) danger to the health or safety of any person;
- (b) impairment or serious risk of impairment of the quality of the natural environment for any use that can be made of it; or
- (c) injury or damage or serious risk of injury or damage to any property or to any plant or animal life. R.S.O. 1990, c. E.19, s. 143 (3); 2000, c. 26, Sched. F, s. 12 (12).

### **Powers of Tribunal**

145.2 (1) Subject to sections 145.3 and 145.4, a hearing by the Tribunal under this Part shall be a new hearing and the Tribunal may confirm, alter or revoke the action of the Director that is the subject-matter of the hearing and may by order direct the Director to take such action as the Tribunal considers the Director should take in accordance with this Act and the regulations, and, for such purposes, the Tribunal may substitute its opinion for that of the Director. 2005, c. 12, s. 1 (26).

### **Director may cause things to be done**

147. (1) Where an order or decision made under this Act is not stayed, the Director may cause to be done any thing required by it if,

- (a) a person required by the order or decision to do the thing,
  - (i) has refused to comply with or is not complying with the order or decision,
  - (ii) is not likely, in the Director's opinion, to comply with the order or decision promptly,
  - (iii) is not likely, in the Director's opinion, to carry out the order or decision competently, or
  - (iv) requests the assistance of the Director in complying with the order or decision;
- (a.1) a receiver or trustee in bankruptcy is not required to do the thing because of subsection 19 (5) or 168.20 (7); or
- (b) in the Director's opinion, it would be in the public interest to do so. R.S.O. 1990, c. E.19, s. 147 (1); 2001, c. 17, s. 2 (21).

### **Notice of intent to cause things to be done**

(2) The Director shall give notice of an intention to cause a thing to be done under subsection (1),

- (a) to each person required by an order or decision made under this Act to do the thing; and

(b) if a receiver or trustee in bankruptcy is not required to do the thing because of subsection 19 (5) or 168.20 (7), to the receiver or trustee in bankruptcy. 2001, c. 17, s. 2 (22).

Idem

(3) A person who receives a notice under subsection (2) shall not do the thing referred to in the notice without the permission of the Director. R.S.O. 1990, c. E.19, s. 147 (3).

### **Order to pay**

**150. (1)** The Director may issue an order to pay the costs of doing any thing caused to be done by the Minister or Director under this Act to any person required by an order or decision made under this Act to do the thing. R.S.O. 1990, c. E.19, s. 150 (1).

### **Order to pay may be enforced as judgment of the Superior Court of Justice**

**153. (1)** An order to pay costs may be filed with a local registrar of the Superior Court of Justice and enforced as if it were an order of the court. R.S.O. 1990, c. E.19, s. 153 (1); 2001, c. 9, Sched. G, s. 5 (21).

### **Interest**

**(2)** Section 129 of the *Courts of Justice Act*, applies in respect of an order filed with the Superior Court of Justice under subsection (1) and, for the purpose, the date of filing shall be deemed to be the date of the order. R.S.O. 1990, c. E.19, s. 153 (2); 2001, c. 9, Sched. G, s. 5 (21).

### **Collection of costs as tax lien**

**154. (1)** For the purposes of subsections (2) and (8), a thing done as a result of activities or conditions on real property is a thing done in connection with that property, whether or not the work is done on that property. R.S.O. 1990, c. E.19, s. 154 (1).

### **Lien**

**(2)** If an order to pay costs is directed to a person who owns real property in a local municipality, and the Director instructs the municipality to recover amounts specified in the order that relate to things done in connection with that property, the municipality shall have a lien on the property for those amounts and they shall have priority lien status, as described in section 1 of the *Municipal Act, 2001* or section 3 of the *City of Toronto Act, 2006*, as the case may be, in respect of the property and shall be added by the treasurer of the municipality to the tax roll. 2002, c. 17, Sched. F, Table; 2006, c. 32, Sched. C, s. 19 (2).

### **Order by provincial officer: contraventions**

**157. (1)** A provincial officer may issue an order to any person that the provincial officer reasonably believes is contravening or has contravened,

- (a) a provision of this Act or the regulations;
- (b) a provision of an order under this Act, other than an order under section 99.1, 100.1, 150 or 182.1 or an order of a court; or

- (c) a term or condition of an environmental compliance approval, certificate of property use, renewable energy approval, licence or permit under this Act. 1998, c. 35, s. 16; 2001, c. 17, s. 2 (33); 2005, c. 12, s. 1 (34); 2009, c. 12, Sched. G, s. 15 (1); 2009, c. 33, Sched. 15, s. 5 (3); 2010, c. 16, Sched. 7, s. 2 (60).

### **Order by provincial officer re preventive measures**

**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 if the provincial officer reasonably believes that the requirements specified in the order are necessary or advisable so as,

- (a) to prevent or reduce the risk of a discharge of a contaminant into the natural environment from the undertaking or property; or
- (b) to prevent, decrease or eliminate an adverse effect that may result from,
  - (i) the discharge of a contaminant from the undertaking, or
  - (ii) the presence or discharge of a contaminant in, on or under the property. 2005, c. 12, s. 1 (38).

### **Information to be included in order**

**(2)** The order shall,

- (a) briefly describe the reasons for the order and the circumstances on which the reasons are based; and
- (b) state that a review of the order may be requested in accordance with section 157.3. 1998, c. 35, s. 16.

### **What the order may require**

**(3)** The order may require the person to whom it is directed to comply with any directions specified under subsection (4), within the time specified. 1998, c. 35, s. 16.

### **Same**

**(4)** The following directions may be specified in the order:

1. Any direction listed in subsection 18 (1).
2. A direction to secure, by means of locks, gates, fences, security guards or other means, any land, place or thing. 1998, c. 35, s. 16.

### **Where order requires report**

**(5)** Where the order requires a person to make a report, the report shall be made to a provincial officer. 1998, c. 35, s. 16.

### **Request for review, orders under ss. 157 to 157.2**

157.3 (1) A person to whom an order under section 157, 157.1 or 157.2 is directed may, within seven days after being served with a copy of the order, request that the Director review the order. 1998, c. 35, s. 16.

**Environmental Review Tribunal Act, 2000**  
**S.O. 2000, CHAPTER 26**  
**SCHEDULE F**

**Environmental Review Tribunal**

1. (1) The Environmental Assessment Board and the Environmental Appeal Board are amalgamated and continued as a tribunal known in English as the Environmental Review Tribunal and in French as Tribunal de l'environnement. 2000, c. 26, Sched. F, s. 1 (1).

**Composition of Tribunal**

(2) The Tribunal shall be composed of not fewer than five persons who shall be appointed by the Lieutenant Governor in Council. 2000, c. 26, Sched. F, s. 1 (2).

**Same**

(3) None of the members of the Tribunal shall be public servants employed under Part III of the *Public Service of Ontario Act, 2006* who work in the Ministry of the Environment. 2006, c. 35, Sched. C, s. 37 (1).

**Expert assistance**

6. The Tribunal may appoint from time to time one or more persons having technical or special knowledge of any matter to inquire into and report to the Tribunal and to assist the Tribunal in any capacity in respect of any matter before it. 2000, c. 26, Sched. F, s. 6.

THE CORPORATION OF THE CITY OF KAWARTHA LAKES  
Appellant

- and -

DIRECTOR, MINISTRY OF THE ENVIRONMENT et al.  
Respondents

COURT OF APPEAL FOR ONTARIO  
PROCEEDING COMMENCED AT  
TORONTO

FACTUM

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