

COURT OF APPEAL FOR ONTARIO

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

TABLE OF CONTENTS

	<u>Page No.</u>
<u>PART I – OVERVIEW STATEMENT</u>	1
<u>PART II – THE FACTS</u>	1
History	1
Proceedings before the ERT	2
The Divisional Court	4
<u>PART III – ISSUES AND THE LAW</u>	5
Standard of Review	5

Should the MOE have considered fault before issuing the s.157.1 Order to the City	6
A. The EPA	6
B. The Role of the ERT	8
C. Did the Divisional Court err in finding that the Order Against the City was not unfair?	11
D. "Polluter Pat's" principle	13
E. Principles of Natural Justice	15
<u>PART IV – ORDER SOUGHT</u>	16

Schedule "A" – List of Authorities

Schedule "B" – Text of Relevant Provisions

PART I – OVERVIEW STATEMENT

1. The appellant appeals the Divisional Court’s decision restricting the scope of its appeal and the Environmental Review Tribunal (“ERT”)’s decision ultimately dismissing its appeal of Director’s Order No. 2585-7QESCT-1 (“the Order”) made pursuant to s.157.1 of the *Environmental Protection Act (EPA)* issued on April 9, 2009.
2. The appellant, City of Kawartha Lakes (“the City”), has raised two issues which can be condensed as follows:

Should the Ministry of the Environment, (“MOE”) have considered that the spill was caused by others before issuing the s. 157.1 Order compelling the City to remediate?

PART II – THE FACTS

History

3. On December 18, 2008, oil escaped the property owned by Wayne and Liana Gendron and contaminated the neighbouring municipal property.¹
4. On December 30, 2008, the MOE issued a Provincial Officer’s Order under s. 157.1 of the *EPA*² as against Wayne Gendron regarding the spill and requiring him (through his insurer) to hire a contractor to remediate the spill.³
5. On March 27, 2009 the MOE issued Provincial Officer’s Order Number 2585-7QESCT to the City, pursuant to s. 157.1 of the *EPA*, ordering it to remediate the contamination

¹ Decision of the Environmental Review Tribunal, *Corporation of the City of Kawartha Lakes v. Director, Ministry of Environment*, July 16, 2010 at para 3, Compendium of the Respondents Wayne and Liana Gendron Tab 1 at p 2 [“*July Decision*”].

² RSO 1990, c E-19.

³ Provincial Officer’s Order 003129, Compendium of the Respondents Wayne and Liana Gendron, Tab 2 at p 24.

of the municipal property and to take the necessary steps to prevent further environmental contamination.⁴

6. On April 3, 2009, the City asked the MOE to review and reconsider the Provincial Officer's Order arguing it was unfair and contrary to the "polluter pays" principle to require it to remediate contamination it did not cause.⁵ Upon review, the above-mentioned Director's Order was issued against the City for the remediation.⁶

Proceedings before the ERT

7. On April 24, 2009, the City appealed the order to the ERT on the grounds the order was unfair because it required the City to remediate contamination it did not cause.⁷
8. As the hearing of the appeal could potentially affect them, the Gendrons, Farmers' Mutual Insurance Company, R. Ian Pepper Insurance Adjusters Inc., Doug Thompson Fuels Ltd. and D.L. Services Inc. were added as interested parties.⁸
9. The Gendrons moved to restrict the grounds of appeal and to specifically exclude any reference to their potential fault in causing the spill arguing that s. 157.1 permitted the MOE to issue the Order against the City notwithstanding that it had not caused the spill.⁹

⁴ Provincial Officer's Order 2585-7QESCT, Compendium of the Respondents Wayne and Liana Gendron, Tab 3A.

⁵ *Supra* note 1, Compendium of the Respondents Wayne and Liana Gendron, at p 3.

⁶ Director's Order 2585-7QESCT-1, Compendium of the Respondents Wayne and Liana Gendron Tab 3B.

⁷ Decision of the Environmental Review Tribunal, *Kawartha Lakes (City) v. Ontario (Director, Ministry of the Environment)*, November 20, 2009 at para 6, Compendium of the Respondents Wayne and Liana Gendron at p 56 ["November Decision"].

⁸ *Ibid*, at para 8, Compendium of the Respondents Wayne and Liana Gendron at p 56.

⁹ *Ibid* at paras 11, 13 & 18, Compendium of the Respondents Wayne and Liana Gendron, Tab 4 at, p 58-60.

10. The City argued that the conduct of the Gendrons was relevant to its arguments relating to “fairness” and the “polluter pays” principle.¹⁰
11. The ERT granted the Gendrons’ motion holding that to consider the fault of others would be inconsistent with the purpose of s. 157.1 and the overarching objective of the *EPA*, to protect the environment.¹¹
12. In reaching its decision, the ERT concluded as follows:

One of the main roles of the Tribunal (and previously, the Board) is to provide an efficient resolution to many of the disputes relating to the decisions of the Director in a manner that furthers the protection of the environment.¹²

The Tribunal puts the priority on environmental protection in light of the purposes of the legislation. Secondary factors, such as some of those listed in *Appletex* or others such as financial factors are just that – secondary. They are subordinate to the overarching purpose of the legislation. The consideration of secondary factors is not an excuse for jeopardizing environmental integrity.¹³

However, in the present policy and law environment, the need for detailed *Appletex*-like inquiries is greatly diminished. The present focus is on prompt attention to environmental problems. Questions of ultimate liability, fault and other issues are generally left to arenas other than this Tribunal.

A detailed inquiry into fault would prejudice the ability of the Tribunal (and perhaps the Provincial Officer or Director at first instance) to deal with environmental problems in a prompt and efficient manner and would offer no corresponding benefits to the purposes of the environmental legislation.¹⁴

¹⁰ *Ibid* at para 12, Compendium of the Respondents Wayne and Liana Gendron p 58.

¹¹ *Ibid* at para 97, Compendium of the Respondents Wayne and Liana Gendron p 85.

¹² *Ibid* at para 60, Compendium of the Respondents Wayne and Liana Gendron p 73.

¹³ *Ibid* at para 69, Compendium of the Respondents Wayne and Liana Gendron p 75.

¹⁴ *Ibid* at para 77, Compendium of the Respondents Wayne and Liana Gendron p 78.

The Divisional Court

13. The City appealed to the Divisional Court who heard the decided the matter despite the completion of the remediation work, identifying the issue as one of public importance and engaging the public interest.¹⁵
14. The appeal focused on the considerations associated with issuing an order under s. 157.1 against an innocent owner of contaminated land.¹⁶
15. The City argued that its inability to call evidence regarding fault was unfair and that the ERT's decision not to revoke the Director's Order was unreasonable.
16. The Divisional Court found that the MOE had exercised its discretion in a manner consistent with the *EPA* and Compliance Policy¹⁷ and that while there may be some inherent unfairness to the legislation by permitting liability to be imposed on innocent landowners, the manner in which it was executed was not unfair. Issuing the order fell within the discretionary parameters offered to Provincial Officers under s.157.1
17. Specifically, the Court found: "Section 157.1 of the Act can be accurately described as an 'owner pays' mechanism. It makes no reference to fault."¹⁸ It concluded that there was no need for the ERT to have considered fault when it reviewed the MOE's issuance of the order to the City.

¹⁵ *The Corporation of the City of Kawartha Lakes v. Director, Ministry of the Environment*, 2012 ONSC 2708, at para 42, Compendium of the Respondents Wayne and Liana Gendron Tab 5 p 128 ["Divisional Court"].

¹⁶ *Ibid* at para 3, Compendium of the Respondents Wayne and Liana Gendron Tab 5 p 122.

¹⁷ *Ibid* at paras 74, 80 & 83, Compendium of the Respondents Wayne and Liana Gendron Tab 5 p 134, 135-136.

¹⁸ *Ibid* at paras 77-78 Compendium of the Respondents Wayne and Liana Gendron, Tab 5 p 134.

18. Additionally, the Court determined that making findings of fault in the context of s.157.1 is futile when the purpose is to impose fault on those who could to be ordered to remediate the City property under s.157.1.¹⁹

PART III – ISSUES AND THE LAW

Standard of Review

19. The Divisional Court did not err by applying the standard of reasonableness to its review of the ERT decision.
20. It is well-settled since *Dunsmuir v. New Brunswick*, that reasonableness, not correctness, is the appropriate standard of review to be applied to a specialized tribunal with respect to matters relating to the exercise of discretion under its own statute. This is also consistent with *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)*, a post-*Dunsmuir* decision involving the judicial review of a decision by the ERT interpreting another of its “home” statutes.

Dunsmuir v. New Brunswick, 2008 SCC 9, [2008] 1 SCJ 9 at para 54 (QL) [“*Dunsmuir*”]. Book of Authorities of the Respondents, Wayne and Liana Gendron, Tab 1

Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal), [2008] OJ No 2460 at paras 34 & 36 (QL).
Book of Authorities of the Respondents, Wayne and Liana Gendron, Tab 2

21. The decision of the ERT did not fall outside its specialized area of expertise. As a consequence, the applicable standard of review is reasonableness.

¹⁹ *Ibid* at para 72, Compendium of the Respondents Wayne and Liana Gendron, Tab 5 p 134-135.

Should the MOE have considered fault before issuing the s.157.1 Order to the City?

22. A fault-based analysis is not required for the MOE to exercise its discretion in issuing orders under s.157.1.

A. The EPA and Compliance Policy

23. The purpose of the *EPA* is to protect and conserve the natural environment.

Environmental Protection Act, RSO 1990 c E-19 s 3.1.

Factum of the Respondents Wayne and Liana Gendron, Schedule "B"

24. Section 157.1 of the *EPA* reads:

The 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,
- b. to prevent, decrease or eliminate an adverse effect that may result,
 - i. the discharge of a contaminant of the undertaking, or
 - ii. the presence of discharge of contaminant in, on or under the property.

Environmental Protection Act, RSO 1990 c E-19 s 157.1.

Factum of the Respondents Wayne and Liana Gendron, Schedule "B"

25. Under s. 157.1, a party may be held liable for remediation based on ownership or management of a contaminated property. Fault is not a requirement. The legislation allows orders to be issued against innocent parties for the purpose of attaining its foremost objective; protecting the environment. The MOE's Compliance Policy states:

Generally, a current owner, occupant and those in charge, management and control of a contaminated site should not be relieved by a statutory decision-maker from liability (or taken off a control document) on the grounds that the circumstances leading to the contamination were beyond the control of that person.

In general, the current owner of the property should be named in a control document in order to ensure that:

- Any potential for adverse impacts to human health or the environment will be addressed by the owner in the event the polluting or illegal actor defaults under the control document;
- The Ministry may recover costs for “work done by Ministry” under the cost recovery provisions of ministry legislation where both the polluter and the owner default under the control document;
- The statutory decision-maker issuing the control document may require the owner to register a certificate on title of the property to ensure those acquiring an interest in the property have notice of the control document.

In exceptional or unusual circumstances, the statutory decision-maker may take into account the fact that a person named in a control document has been victimized when determining the timing and content of the work to be specified in the document.²⁰

26. It also states:

Human health and environmental protection is first and foremost. The Ministry will use mandatory abatement tools such as orders and name responsible parties whenever warranted to firmly and swiftly respond to a situation or incident that has the potential for significant human health and/or environmental consequences.²¹

27. The purpose of s. 157.1 is preventative. It is aimed at preventing further contamination. It does not limit the potential orderes to persons who have caused the contamination in question. As the Environmental Appeal Board (now the ERT)

²⁰ *Compliance Policy: Applying Abatement and Enforcement Tools May 2007*, Compendium of the Respondents Wayne and Liana Gendron, Tab 6 at p 167 [“*Compliance Policy*”].

²¹ *Ibid*, Compendium of the Respondents Wayne and Liana Gendron Tab 6 at p 168.

found in *LeLarco Properties (Hamilton) Inc. v. Director, Ministry of Environment and Energy*:

The *Environmental Protection Act* authorizes directors to issue orders to protect the environment to the owners of properties containing waste and potential and actual sources of pollution **even if those owners did not deposit the waste or operate the polluting facilities**. They can be made responsible even if they did not know or even suspect that waste was being deposited or hazardous activities were being carried on (emphasis added).

LeLarco Properties (Hamilton) Inc. v. Director, Ministry of Environment and Energy, [1993] OEAB No. 50 at p 12 (QL) [*“LeLarco”*].
Book of Authorities of the Respondents Wayne and Liana Gendron, Tab 3

28. In *LeLarco*, the Board held that environmental protection takes precedence over “fairness”. It acknowledged that although an injustice was done to LeLarco by the failure to issue an order against those with greater responsibility, the order was not improper. It found refusing to uphold the order would be “inappropriate” because doing so would render the environmental problem unaddressed.

LeLarco, ibid at p 17.

29. The MOE’s primary objective is to protect the environment. To expect it to identify and pursue any potential polluter while an environmental hazard spreads is unreasonable and asking it to act contrary to the purposes of the *EPA*.

B. The Role of the ERT

30. The role of the ERT is to make rapid decisions to protect and preserve the environment. In *R. v. Consolidated Maybrun Mines Ltd.* the Supreme Court of Canada commented on the role of the Environmental Appeal Board (now the ERT) as follows:

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 mean to resolve any disputes that might arise between the director and person's 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 (emphasis added).

R. v. Consolidated Maybrun Mines Ltd., [1998] 1 SCJ No 32 at para 57 (QL).
Book of Authorities of the Respondents Wayne and Liana Gendron, Tab 4

31. The intention of the legislature in creating the Environmental Appeal Board was to provide a quick and specialized process to resolve the problems stemming from the application of the *EPA*. In describing the role of the Board, Appeal Board Member Natalie Des Rosiers stated in *Tyre King Tyre Recycling Ltd. and Straza v. Director, West Central Region, Ministry of the Environment*:

If the parties wish to further debate their liability in front of the civil courts to establish the degree of responsibility of other persons not caught by the *Environmental Protection Act*, they can always do so. It is not an issue which concerns this Board.

Tyre King Tyre Recycling Ltd. and Straza v. Director, West Central Region, Ministry of the Environment, [1992] OEAB No 79 at p 6 (QL).
Book of Authorities of the Respondents Wayne and Liana Gendron, Tab 5

32. The ERT's jurisdiction to hear an appeal is governed by section 145.2 of the *EPA* which limits the ERT's jurisdiction to the subject matter of the order in question; the underlying powers the MOE exercised; and the purpose of the legislation. In hearing the appeal the ERT must remain within the subject matter of the proceeding, in this case, s. 157.1.

Environmental Protection Act, RSO 1990 c E-19 s 145.2.
Factum of the Respondents, Wayne and Liana Gendron, Schedule "B"

RPL Recycling and Transfer Ltd. v. Ontario, [2006] O.E.R.T.D. No. 13.
Brief of Authorities of the Respondents Wayne and Liana Gendron, Tab 6

33. As set out by the ERT in *Associated Industries Corp. v. Ontario, Ontario (Ministry of the Environment)*, the tribunal has the authority and a “duty to choose the best course of action, from the standpoint of the public’s interest, in order to achieve the objectives of the environmental protection legislation”.

Associated Industries Corp. v. Ontario (Ministry of the Environment) [2008] OERTD No 57 at para 74 (QL).
Book of Authorities of the Respondents, Wayne and Liana Gendron, Tab 7

34. The ERT concluded that the MOE order against the City was not improper. The MOE issued its order on the City after determining that Gendrons did not have the means to complete the necessary remediation to on City property. In his decisions Vice Chairman Jerry DeMarco stated:

“the naming of an innocent landowner in appropriate circumstances can contribute to the purpose of the *EPA*. The Tribunal cannot undermine the *EPA*’s purpose in favour of the outcome sought by the City.”²²

35. The *EPA* clearly accounts for scenarios where innocent victims may be “saddled” with the responsibility to carry out necessary remediation work. Where there is environmental work to be completed, the objective of protecting the environment takes precedence over other considerations and the ERT recognized that there are cases where naming an innocent landowner is appropriate, regardless of fault, in order to protect the environment.

²² *July Decision*, *supra* note 1, Compendium of the Respondents Wayne and Liana Gendron Tab 1 p 11.

36. Allowing the City to attempt to lay blame on others in the context its appeal of s.157.1 would be inconsistent with the purpose of the section and would undermine the intent of the legislature.

C. Did the Divisional Court err in finding that the Order against the City was not unfair?

37. The Divisional Court did not err in failing to find that the MOE's exercise of discretion was not unfair.
38. The Divisional Court did not conclude that fairness was not a consideration, and the City was still entitled to argue on this basis. The Court simply found that the ERT decisions, and MOE Order, were not unfair in light of the environmental legislative landscape.
39. The City argued that the ERT failed to follow *Re 724597 Ontario Inc. c.o.b. "Appletex"*, and the 'fairness factors'. The ERT considered *Appletex* and properly held that since its release there have been several changes to the environmental protection landscape including the enactment of s. 100.1 of the *EPA* and the MOE's Compliance Policy which provides the following:

when a statutory decision maker is deciding whether to relieve a person from being named in a control document or from a requirement specified in the document, the statutory decision maker should consider and weigh only those factors and circumstances of the case which are demonstrated to be relevant, having regard to the legislative provision authorizing the issuance of the control document and the purposes of the statutes under which the document is being issued....factors and circumstances which the statutory decision maker concludes are irrelevant to either the statutory provision that authorizes the issuance of the control document or legislative purpose should be ignored.

Where a person is named in a controlled document, and he/she submits that his/her name ought to be removed from the document,

the statutory decision maker should only agree to the request based on a consideration of the relevant factors. The named person must demonstrate, on a balance of probabilities, that the purpose of the provision authorizing the issuance of the control document and the statute will be served, and not impaired, by exempting the person from the control document.²³

724597 Ontario Inc. c.o.b. "Appletex" v. Ontario (Minister of Environment and Energy), (1994) OEAB No 17 (QL) ["Appletex"].
Book of Authorities of the Respondents, Wayne and Liana Gendron, Tab 8

40. Moreover, the "fairness" argument by the City does not fall within the scenarios where fairness has been considered in the past. Cases such as *Appletex* and *Montague v. Ontario (Ministry of the Environment)*, on which the City relies, looked at fairness among multiple ordererees. Here, there is only one ordereree: the City. Additionally, *Appletex* was rendered before the Compliance Policy was created.²⁴ The Compliance Policy guides statutory-decision makers in their interpretation and application of the *EPA*, including issuing non-fault based orders.

Montague v. Ontario (Ministry of the Environment), [2005] OJ No 868 (QL).
Book of Authorities of the Respondents Wayne and Liana Gendron, Tab 9

41. The Divisional Court decision does not allow the MOE to be unfair. The City's position conflates fault and fairness, purporting that the Divisional Court should have found the ERT's failure to undergo a fault-based analysis to be unfair.
42. The Divisional Court found that the MOE and ERT may consider fault, among other factors, but are not bound to do so:

Given the policy evolution since *Appletex* and the fact that *Appletex* and *Montague* do not stand for the proposing that a Tribunal is required to consider evidence of fault, we do not accept that the

²³ *Compliance Policy*, *supra* note 20 Compendium of the Respondents Wayne and Liana Gendron, Tab 6 p 165.

²⁴ *November Decision*, *supra* note 7 at para 23, Compendium of the Respondents Wayne and Liana Gendron, Tab 4 p 62.

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.²⁵

43. Instead, the decision identifies that the MOE has certain discretionary powers to issue remediation orders against innocent parties and that the MOE may, at times, exercise these powers to safeguard the environment. When discussing s.157.1 the Court found:

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.²⁶

44. The City argues that the ERT and Divisional Court decisions frame environmental protection and fairness as conflicting. This is a mischaracterization. Instead these decisions prioritize environmental protection, pursuant to s. 3.1 of the *EPA*, over other considerations, in order to prevent further environmental damage.

D. "Polluter Pays" principle

45. The MOE exercised its discretionary power residually. It ordered the Gendrons to clean up their property and prevent further contamination. The Gendrons complied but unfortunately could not prevent any escape of contaminant to City property, nor did they have the means, within their insurance funds, or otherwise, to remediate the City's property. When this was discovered, the MOE issued the order as against the City. The order was necessary to ensure that the containment not contained on the

²⁵ *Divisional Court, supra* note 15 at para 74, Compendium of the Respondents Wayne and Liana Gendron Tab 5 at p 134.

²⁶ *Ibid* at para 77, Compendium of the Respondents Wayne and Liana Gendron Tab 5 p 134-135.

Gendron property was addressed, the City property remediated and further contamination prevented.

46. The City is not an impecunious or incapable, albeit innocent, owner. Remediating the City's property required swift action to prevent further contamination, including that to Sturgeon Lake. This is not the case of an impecunious landowner without the resources or remedy to respond.
47. The *EPA* offers a remedy to the City, as municipality, to give effect to the "polluter pays" principle. The City can seek to recover the costs it bore to protect or restore the environment under s.100.1, a provision that does not apply to other innocent landowners.

Environmental Protection Act, R.S.O. 1990 c E-19 s 100.1.

Factum of the Respondents Wayne and Liana Gendron, Schedule "B"

48. This will not open the "floodgates" with respect to remediation costs or deter innocent individuals from reporting contamination for fear they will be financially liable for the remediation. Sections 15 and 92 of the *EPA* impose statutory obligations to report environmental spills or discharges.

Environmental Protection Act, RSO 1990 c E-19 ss 15, 92.

Factum of the Respondents Wayne and Liana Gendron, Schedule "B"

49. The s. 157.1 analysis is not about fault or penalty. It is about preventing harm to the environment. The *EPA* purposefully distinguishes between fault and non-fault based orders. The legislators contemplated scenarios where innocent landowners may be called upon to respond to environmental issues. Incorporating fault into the analysis permits landowners to turn a blind eye to contamination on their property not generated by them, and undermines the entire purpose of *EPA*. Further, it handcuffs

the MOE it into picking the at-fault individual, and removes the flexibility built into the statute for the MOE to issue different types of orders to ensure the appropriate remediation takes place and the environment protected.

E. Principles of Natural Justice

50. The Divisional Court found no breach of natural justice in the ERT's failure to consider evidence regarding who was at fault for the contamination. All parties accepted that the City was an innocent owner.
51. The City relies on *Universite du Quebec a Trois Riviere v. Larocque*, which puts forth that refusing to hear relevant and admissible evidence may constitute a breach of the rules of natural justice.

Universite du Quebec a Trois Riviere v. Larocque (1993), [1993] SCJ
No 23 at para 59 (QL).

Book of Authorities of the Respondents Wayne and Liana Gendron, Tab 10


52. As s. 157.1 has been consistently interpreted as not requiring fault, evidence of fault was irrelevant. The Divisional Court found that the ERT did not exclude relevant evidence as the ERT accepted the innocence of the City. Hearing evidence aimed at establishing who did cause the damage would not alter this conclusion. It would therefore not assist the Tribunal in determining whether or not the City should be relieved from liability by revoking the order.
53. The City concedes that the MOE had the jurisdiction to make the Order but argues that because it did not cause the contamination, the MOE should not have ordered it to remediate it. The City's entire argument ignores the wording of s. 157.1 and the overarching purpose of the *EPA* which is not to apportion fault, but rather to protect

the environment. Aside from the assertion that the City was an innocent owner, there is no cogent evidence that the order was issued unfairly.

PART IV – ORDER SOUGHT

54. The Gendrons ask that this Appeal be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 22nd DAY of March, 2013

pr. 

Martin P. Forget (#40196J)
FORGET SMITH MOREL
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Wayne and Liana Gendron