Court File No: C56382

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

FACTUM OF THE RESPONDENT
DIRECTOR, MINISTRY OF THE ENVIRONMENT

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DIRECTOR, MINISTRY OF THE ENVIRONMENT

PART I - OVERVIEW

1. This is the response of the Director, Ministry of the Environment ("Director") to an appeal from a decision of the Divisional Court dated May 28, 2012 dismissing the City of Kawartha Lakes' (the "City") appeal of a decision of the Environmental Review Tribunal ("Tribunal"). The City's appeal should be dismissed as the Divisional Court was correct in finding that:

(i) the Tribunal did not commit an error in law when it found that evidence directed at fault was irrelevant because it would not assist it in the decision that it ultimately had to make;

(ii) the Tribunal did not violate the rules of natural justice; and

(iii) the Tribunal properly held that the Director had exercised her discretion in a purposive manner consistent with the purpose and provisions of the *Environmental Protection Act* ("EPA") and the Ministry of Environment's (the "Ministry") Compliance Policy.

2. In December 2008, after furnace oil was spilled from a fuel tank in the basement of Wayne and Liana Gendron's house, the Ministry ordered the Gendrons to clean up the spill and restore the natural environment. The spilled oil had entered the municipal storm sewer and culverts and was discharging into Sturgeon Lake. The Gendrons, through their insurer, carried out much of the work including the remediation of their property and the clean-up of Sturgeon Lake. Insurance funds ran out before the City's property, including the municipal roadway and storm drains, could be completely cleaned up. Faced with the potential recontamination of Sturgeon Lake from the contamination present on the City's property and the imminent end of the Gendrons' clean-up efforts, the Ministry issued a preventive measures order to the City requiring it to take all reasonable steps to prevent the discharge of contaminants from its property. The order was upheld by the Tribunal which found that the Ministry's actions were appropriate and necessary to protect the environment.

3. The City has since cleaned up its property as required by the Order and has taken steps to recover its costs by issuing an order under section 100.1 of the EPA to the Gendrons and others. Such an order is a summary remedy under the

EPA, to allow a municipality to seek reimbursement for cleaning up a spill that it did not cause.

4. At its core, the City's appeal centers around an evidentiary ruling by the Tribunal excluding from the hearing evidence regarding fault for causing the spill, on the basis that such evidence was irrelevant.

5. The Appellant mischaracterizes the Tribunal's evidentiary ruling as holding that the principles of "fairness" and the polluter pays principle are irrelevant to the issuance of an order to an innocent party. The Tribunal did not make such a ruling, nor did it refuse to hear evidence regarding "fairness" or the polluter pays principle. The Tribunal properly excluded only evidence relating to fault. The Tribunal found this evidence to be irrelevant to the remedy sought by the City (namely the revocation of the Order) given that the parties and the Tribunal had accepted that the City was entirely innocent of causing the spill.

6. The Divisional Court correctly held that the Tribunal had the authority to control its process and exclude irrelevant evidence. The Tribunal's evidentiary ruling did not affect or detract from the overall fairness of the Tribunal's process, which complied with the rules of natural justice.

PART II – THE FACTS

7. The Director agrees with the facts as set out in the decision of the Divisional Court. The Director does not agree with the City's alleged facts as contained in paragraphs 3, 6, 7, 8, 15, 16, 17, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30 and 33

of its appeal factum. In particular, as detailed below, the Director takes issue with various new "facts" that are unsupported in the record, and with the City's characterization of the regulatory scheme, the evidence heard by the Tribunal and the arguments made by the parties, both before the Tribunal and the Divisional Court.

The *Environmental Protection Act* ("EPA")

8. The purpose of the EPA is "to provide for the protection and conservation of the natural environment." The EPA does not just aim to remedy environmental contamination, but also aims to prevent such contamination.

> ***Environmental Protection Act,* R.S.O. 1990, c. E.19 [EPA], s. 3(1), Schedule B, Factum of the Director**
>
> ***R. v. Consolidated Maybrun Mines Ltd.,* [1998] 1 S.C.R. 706 [*Consolidated Maybrun*], para. 54, Book of Authorities of the Director, Tab 1**

9. To do so, the EPA gives Ministry officials a range of tools to protect and conserve the environment. These tools include *remedial* order powers to remediate contamination that has occurred and *preventive* order powers to prevent future contamination. Orders can be issued to "the persons responsible for the contamination", as well as those "who currently own and control the land, even if the latter had nothing to do with causing the contamination".

> ***Montague v. Ontario (Ministry of the Environment),* [2005] O.J. No. 868, para. 1, Book of Authorities of the Director, Tab 2**

10. *Remedial* orders (such as those issued under sections 17 and 157(1) of the EPA) incorporate the polluter pays principle, inasmuch as such orders can be issued to any person who "causes or permits" the discharge of a contaminant.

> **EPA, ss. 17 & 157, Schedule B, Factum of the Director**

11. *Preventive* measures orders (such as those issued under sections 18 and 157.1 of the EPA) can be issued to any person who owns or has management and control of an undertaking or a property, requiring that person to take steps to *prevent* or reduce the risk of a discharge of a contaminant into the natural environment or to *prevent*, decrease or eliminate an adverse effect that may result from the discharge of a contaminant. These orders can be issued to a person who has management and control of a property, regardless of their role in the contamination of the property.

EPA, ss. 18 & 157.1, Schedule B, Factum of the Director

12. In paragraphs 29 and 30 of its factum, the City mischaracterizes the order powers under the EPA as overwhelmingly "fault-based" with "residual power" to issue "no fault orders". The EPA does not refer to or categorize orders as "fault" and "no fault"; nor does it lay out a hierarchy of order powers with "no fault" orders being "residual". Instead, as set out above, the EPA provides Ministry officials with a range of tools necessary to protect and conserve the environment and the discretion to select the appropriate tool based on the circumstances of each case. *Preventive* measures orders, based on ownership or management and control of property, are equally as valid and authoritative as *remedial* orders.

13. In issuing an order, Ministry officials must exercise their discretion in a manner consistent with the purpose of the EPA, which is the protection and conservation of the natural environment. Officials are also guided by Ministry policies including the Compliance Policy which provides both general and specific guidance in this exercise of discretion.

***Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* [2010] 1 S.C.R. 815 [*Criminal Lawyers' Association*], para. 46, Book of Authorities of the Director, Tab 3**

***Associated Industries Corp. v. Ontario (Ministry of the Environment),* [2008] O.E.R.T.D. No 57, paras. 74, 76 & 77, Book of Authorities of the Director, Tab 4**

Compliance Policy, Compendium of the Director, Tab 1, p. 307

14. The EPA also provides municipalities with special order powers where they incur costs to clean up a spill they did not cause. Municipalities can recover their costs by issuing an order for payment to the owner of the pollutant or the person having control of the pollutant. The amount of the cost order has priority lien status on the property.

EPA, s. 100.1(1) & (5), Schedule B, Factum of the Director

Events Leading to the Issuance of the Director's Order

15. On December 18, 2008, furnace oil was spilled from the fuel tank at 93 Hazel Street, a private home owned by Wayne and Liana Gendron.

Tribunal Final Decision, July 16, 2010, para. 3, Compendium of the Director, Tab 4, p. 394

16. The Gendrons' insurance adjuster, Pepper Insurance Adjusters Inc., retained D.L. Services Inc. ("D.L. Services") to remediate the spill.

Tribunal Final Decision, July 16, 2010, para. 3, Compendium of the Director, Tab 4, p. 394

17. When D.L. Services arrived on site on December 30, 2008, they found that furnace oil had entered the municipal storm sewer and culverts and was

discharging into nearby Sturgeon Lake. They promptly notified the Ministry of those facts.

Tribunal Final Decision, July 16, 2010, para. 3, Compendium of the Director, Tab 4, p. 394

18. A Ministry Provincial Officer attended at the site that same day. After observing the discharge of furnace oil into the environment, the Officer issued a *remedial order* to Mr. Gendron. The order required Mr. Gendron to assess the extent of the spill, eliminate the adverse effect caused by the spill and restore the natural environment. The order was later amended to include Ms. Gendron.

Witness Statement of Cathy Curlew, paras. 8-10, Compendium of the Director, Tab 1, p. 8

19. D.L. Services worked around the clock between December 2008 and March 2009 in an effort to address the effects of the spill and restore the natural environment.

Witness Statement of Cathy Curlew, para. 14, Compendium of the Director, Tab 1, p. 9

20. In March 2009, the Ministry was notified that clean-up efforts beyond the Gendrons' property would be discontinued since the insurance coverage limit for off-site clean-up had been reached and the Gendrons did not have the financial means to continue the work.

Tribunal Final Decision, July 16, 2010, para. 4, Compendium of the Director, Tab 4, p. 394

21. By this time, the Gendrons' property itself was being sufficiently remediated through the planned demolition of the house and the removal of contaminated

soil. However, contamination that had migrated to property owned by the City, including the municipal roadway and storm drains, had the potential to adversely impact the natural environment and undo much of the clean-up work that had already been undertaken in Sturgeon Lake.

Witness Statement of Cathy Curlew, para. 19, Compendium of the Director, Tab 1, p. 9

22. Accordingly, on March 27, 2009, the Provincial Officer issued a *preventive measures* order to the City under s. 157.1 of the EPA, requiring the City to take all reasonable steps to *prevent* the discharge of contaminants from *its* property and to develop and implement an action plan to remediate *its* property. The order did not require that City "take over the off-site remediation" as the City alleges at paragraph 21 of its factum.

Tribunal Final Decision, July 16, 2010, para. 5, Compendium of the Director, Tab 4, p. 394

Factum of the Appellant, para. 21

23. The issuance of the order was urgent given the imminent removal of D.L. Services' clean-up equipment and the wet weather forecast that could mobilize and further spread the spilled fuel from the City's property to Sturgeon Lake.

Tribunal Final Decision, July 16, 2010, para. 5, Compendium of the Director, Tab 4, p. 394

24. In response to a request for review by the City, the Director confirmed the order under s.157.3(5) of the EPA on April 9, 2009, altering some compliance dates.

Tribunal Final Decision, July 16, 2010, para. 6, Compendium of the Director, Tab 4, p. 395

EPA, s. 157.3(5), Schedule B, Factum of the Director

25. At paragraphs 19 and 20 of its factum, the City includes a number of alleged facts about what the Ministry did not do in response to the Gendrons' inability to continue the off-site remediation. These allegations are not supported by the evidence in the record and many of the allegations are simply untrue.

Factum of the Appellant, paras. 19 & 20

26. Similarly, the alleged facts recited at paragraphs 26 and 27 of the City's factum are not supported by the evidence in the record and many of the allegations are untrue.

Factum of the Appellant, paras. 26 & 27

Proceedings before the Tribunal

27. On April 24, 2009, the City filed a Notice of Appeal to the Tribunal pursuant to s.140 of the EPA, seeking the revocation of the Order. In its appeal, the City acknowledged that the Director had jurisdiction to issue the Order and did not challenge the specific terms of the Order. The City only questioned whether the Order ought to have been issued in light of so-called "fairness" principles and the doctrine of polluter pays. The City used the term "fairness" not in the administrative law sense (which refers to concepts of natural justice), but as a description of the considerations that may be relevant in exercising the discretion to name a party in an environmental order.

EPA, s. 140, Schedule B, Factum of the Director

Tribunal Final Decision, July 16, 2010, paras. 2 & 21, Compendium of the Director, Tab 4, pp. 394 & 399

Tribunal Evidentiary Decision, November 20, 2009, para. 85, Compendium of the Director, Tab 2, p. 362

28. The remedy sought by the City in its Notice of Appeal was the revocation of the Order as against the City. The City did not seek any remedy respecting any other person (e.g. the issuance of a remedial order), contrary to what the City alleges throughout its factum.

Tribunal Evidentiary Decision, November 20, 2009, paras 6 & 53, Compendium of the Director, Tab 2, pp. 339 & 353

Tribunal Final Decisions, July 16, 2010, para. 7, Compendium of the Director, Tab 4, p. 395

Factum of the Appellant, paras 3(c), 10, 24(b)(iv), 35(b)(ii), 36(b) & 67

29. At the Preliminary Hearing held on June 23, 2009, the Tribunal granted party status to the following five parties ("Added Parties"): the Gendrons; Farmer's Mutual Insurance Company and R. Ian Pepper Insurance Adjusters Inc. (the Gendrons' insurer and adjuster); Doug Thomson Fuels Ltd. (the fuel supplier); and D.L. Services Inc. (the clean-up firm).

Tribunal Final Decision, July 16, 2010, para. 8, Compendium of the Director, Tab 4, p. 395

30. On September 23 and 24, 2009, the Tribunal heard a motion by the Gendrons to exclude evidence and argument at the hearing regarding fault for causing the spill and the reasonableness of the costs incurred in remediating the spill. On November 20, 2009, the Tribunal granted the motion, holding that the City's status as an innocent owner was undisputed and that evidence on the conduct of others is irrelevant in this case. As a result of this ruling, the Added Parties discontinued their participation in the City's appeal.

Tribunal Final Decision, July 16, 2010, para. 9, Compendium of the Director, Tab 4, p. 396

Tribunal Evidentiary Decision, November 20, 2009, paras. 90, 91 & 97, Compendium of the Director, Tab 2, pp. 363-365

31. The City revised its Notice of Appeal on December 2, 2009 following this evidentiary ruling. The only remedy sought by the City continued to be the revocation of the Order. The City did not seek remedial orders against other parties.

Tribunal Final Decision, July 16, 2010, para. 9, Compendium of the Director, Tab 4, p. 396

City's Amended Notice of Appeal, Compendium of the Director, Tab 7, p. 438

32. On December 10, 2009, the Tribunal heard the Director's motion to dismiss the City's appeal and a motion by the City to stay the main requirement of the Order. The Tribunal dismissed both motions in a decision dated December 18, 2009. In its reasons on the motion, the Tribunal again reminded the City that if it intended to seek the revocation of the Order, it had to present at the hearing a solution that is "in keeping with the environmental purpose of the EPA". According to the Tribunal, "given the statutory jurisdiction to issue orders against innocent owners, it is not enough to simply assert that the City did not cause the spill and therefore, the Director's Order should be revoked".

Tribunal Stay Decision, December 18, 2009, paras. 18 & 41, Compendium of the Director, Tab 3, p. 384 & 390

33. The appeal hearing was held on April 27, 28 and 29, 2010. The City argued that the Order should be revoked for "fairness" and polluter pays reasons. On July 16, 2012, the Tribunal issued a decision dismissing the City's appeal on the basis that the City's arguments do not support a finding that the Order should be revoked.

Tribunal Final Decision, July 16, 2010, paras. 10 & 71, Compendium of the Director, Tab 4, pp. 396 & 410

34. At paragraph 23 of its factum, the City alleges that it complied with the order and "[a]t the same time, it appealed to the Tribunal". This paragraph misrepresents the events as they occurred. Under section 143(1) of the EPA, an order is not automatically stayed on appeal. In certain circumstances, the Tribunal may grant a stay on the application of a party. The City brought a motion for a stay which was denied by the Tribunal on December 18, 2009. The City was thus legally required to comply with the order or face prosecution for non-compliance.

Factum of the Appellant, para. 23

EPA, section 143, Schedule B, Factum of the Director

Tribunal Final Decision, July 16, 2010, para. 10, Compendium of the Director, Tab 4, p. 396

35. The City mischaracterizes its own submissions to the Tribunal at paragraphs 10 and 24 of its factum. The City's submissions were essentially that the Order should be revoked because it is unfair and contrary to the polluter pays principle for the City to be held responsible for cleaning up pollution that resulted solely from the acts and omissions of others. At no point did the City make submissions on the need to hear evidence about the ability of the Added Parties "to respond to a fault based order". Nor did the City argue that the Added Parties should have been ordered to carry out the remediation instead of the City.

Factum of the Appellant, paras. 10 & 24

Tribunal Final Decision, July 16, 2010, paras. 1 & 2, Compendium of the Director, Tab 4, p. 394

36. Similarly, paragraphs 3 and 25 of the City's factum misrepresent the Tribunal's evidentiary ruling. The ruling relates to the narrow question of whether

the Tribunal would hear evidence and argument regarding fault for causing the spill and the reasonableness of the costs that had been incurred in remediating the spill. As confirmed by the Divisional Court, the Tribunal excluded only this evidence. All other evidence was allowed.

Factum of the Appellant, paras. 3 & 25

Tribunal Evidentiary Decision, November 20, 2009, paras. 12 & 97, Compendium of the Director, Tab 2, pp. 342 & 365

Divisional Court Decision, May 28, 2012, paras. 61 & 83, Compendium of the Director, Tab 5, pp. 424 & 428

Appeal to the Divisional Court

37. The City appealed the Tribunal's decision to the Divisional Court on August 13, 2010 and perfected its appeal on June 30, 2011. The appeal raised issues similar to those the City now raises at the Court of Appeal.

38. In a unanimous decision dated May 28, 2012, the Divisional Court dismissed the City's appeal and found that the Tribunal's interpretation and application of the law was reasonable. The Court specifically found that the Tribunal had not breached the rules of natural justice, and held that a lawful ruling on the relevance of proposed evidence cannot constitute a violation of the rules of natural justice.

Divisional Court Decision, May 28, 2012, para. 83, Compendium of the Director, Tab 5, p. 428

39. The Court also upheld the Tribunal's finding that the Director had properly exercised her discretion in a purposive manner, consistent with the purpose and provisions of the EPA and the Ministry's Compliance Policy. The Court found

that the Tribunal made a valid choice to have its discretion guided by the Ministry's Compliance Policy, and that such a decision does not constitute an error of law.

Divisional Court Decision, May 28, 2012, paras. 71, 74 & 80, Compendium of the Director, Tab 5, pp. 426-428

PART III – ISSUES AND THE LAW

40. The issues to be decided on this appeal are:

a) Did the Divisional Court apply the appropriate standard of review?

b) Did the Divisional Court err in law in upholding the decision of the Tribunal regarding the principles of "fairness" and the polluter pays principle?

c) Did the Divisional Court err in law by failing to find that the Tribunal breached the rules of natural justice?

A. DIVISIONAL COURT APPLIED THE APPROPRIATE STANDARD OF REVIEW

41. In addressing the City's allegation of a denial of natural justice, the Divisional Court properly held that a standard of review analysis was not required. This is consistent with established case law on procedural fairness and is undisputed by the parties. In the present case, the Court assessed the specific circumstances giving rise to the allegation and determined that there had been no denial of natural justice.

Divisional Court Decision, May 28, 2012, paras. 55 & 83, Compendium of the Director, Tab 5, pp. 423 & 428

***London (City) v. Ayerswood Development Corp.*, [2002] O.J. No. 4859, para. 10, Book of Authorities of the Director, Tab 5**

***Ontario (Commissioner, Provincial Police) v. MacDonald*, [2009] O.J. No. 4834, para. 37, Book of Authorities of the Director, Tab 6**

42. In its review of the substance of the Tribunal decision, the Divisional Court applied the well-settled law since *Dunsmuir.* It held that the standard of review was reasonableness, since the Tribunal was a specialized tribunal dealing with the exercise of discretion under s. 157.1 of the EPA, its "home" statute.

Divisional Court Decision, May 28, 2012, paras. 47, 48, 50 & 51, Compendium of the Director, Tab 5, pp. 422 & 423

***Dunsmuir v. New Brunswick,* [2008] 1 S.C.R. 190 [*Dunsmuir*], paras. 54 & 55, Book of Authorities of the Director, Tab 7**

***Consolidated Maybrun, supra.*, para. 57, Book of Authorities of the Director, Tab 1**

43. The Divisional Court properly rejected the characterization of the issues before it as ones of "central importance to the legal system as a whole". Since the Tribunal was applying its "home" statute, the appropriate standard of review was found to be reasonableness.

Divisional Court Decision, May 28, 2012, paras. 51 & 52, Compendium of the Director, Tab 5, p. 423

***Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] 3 S.C.R. 654, para. 39, Book of Authorities of Director, Tab 8**

44. The Divisional Court's conclusion that the appropriate standard of review is reasonableness is consistent with its post-*Dunsmuir* decision in *Lafarge,* which involved a judicial review of a decision by the same Tribunal interpreting another of its "home" statutes, the *Environmental Bill of Rights.*

***Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal),* [2008] O.J. No. 2460, para. 36, Book of Authorities of the Director, Tab 9**

B. DIVISIONAL COURT WAS CORRECT IN UPHOLDING THE DECISION OF THE TRIBUNAL ON THE PRINCIPLES OF "FAIRNESS" AND THE "POLLUTER PAYS" PRINCIPLE

45. The City mischaracterizes the Tribunal's evidentiary ruling as holding that the principles of "fairness" and the polluter pays principle are irrelevant to the issuance of an order to an innocent party. The Tribunal did not decide that these principles are "irrelevant". Nor did the Tribunal exclude evidence regarding "fairness" or the polluter pays principle. The only evidence excluded by the Tribunal was evidence relating to fault of others for causing the spill, which the Tribunal held was *not* relevant to the ultimate decision it had to make, namely whether the Order should be revoked as requested by the City.

Factum of the Appellant, paras. 3 & 35

Divisional Court Decision, May 28, 2012, paras. 61-63, Compendium of the Director, Tab 5, p. 424

Principles of "Fairness"

46. The term "fairness" in this case does not refer to natural justice concepts but to the factors that a Ministry official and/or the Tribunal may consider in determining whether a person ought to be named in an Order.

Tribunal Evidentiary Decision, November 20, 2009, para. 67, Compendium of the Director, Tab 2, p. 357

47. The Tribunal did not hold that principles of "fairness" generally are irrelevant to the issuance of an order under section 157.1 of the EPA. On the contrary, the Tribunal affirmed the two-step process when hearing an appeal of an order, whereby the first step is to determine whether the Director has the jurisdiction to issue the order, and the second step is to determine whether the order should be

issued/upheld, and if so, on what terms. The Tribunal also held that in some situations, fairness considerations and the conduct of an orderee and others will be relevant, but in this case, such evidence is irrelevant.

> **Tribunal Evidentiary Decision, November 20, 2009, paras. 73, 79 & 83, Compendium of the Director, Tab 2, pp. 358, 360 & 361**
>
> **Tribunal Stay Decision, December 18, 2009, paras. 17 & 18, Compendium of the Director, Tab 3, pp. 383 & 384**

48. However, the Tribunal held that the specific principles of "fairness" used in *Appletex* (referred to as the *Appletex* factors) were out of date given the legal and policy evolution over the past fifteen years. Many of the *Appletex* factors have been superseded by the principles articulated in current EPA-specific guidance documents including the Ministry's Compliance Policy.

> **Tribunal Evidentiary Decision, November 20, 2009, paras. 69-74, Compendium of the Director, Tab 2, pp. 357-359**
>
> **Divisional Court Decision, May 28, 2012, para. 69, Compendium of the Director, Tab 5, p. 425**

49. The Tribunal emphasized that some elements of the *Appletex* factors are still relevant and some, such as financial hardship, have been incorporated into the Compliance Policy.

> **Tribunal Evidentiary Decision, November 20, 2009, paras. 77 & 79, Compendium of the Director, Tab 2, p. 360**

50. In reviewing the Tribunal's evidentiary ruling, the Divisional Court confirmed that the Tribunal did not refuse to hear evidence regarding "fairness" factors. For example, one of the "fairness" arguments that the City made at the hearing was that the Order had been made in contravention of an agreement between it and

the Ministry. The Tribunal heard evidence and argument on this point from both the City and the Director.

Divisional Court Decisions, May 28, 2012, para. 61, Compendium of the Director, Tab 5, p. 424

51. At its core, the City's complaint is that the decision of the Director and the Tribunal was guided by the Compliance Policy in preference to the *Appletex* factors. According to the City, the *Appletex* factors "were affirmed by the Divisional Court and leave to appeal to this Court of Appeal was denied." This is a mis-statement. As the Divisional Court held in the present case, the decision in *Appletex* stands for the principle that the Director **may** take into account any one or more of the *Appletex* factors in deciding whether to make an order under s. 157.1, and not that the Director **must** take any one or more of these factors into account.

Factum of the Appellant, para. 46

Divisional Court Decision, May 28, 2012, para. 58, Compendium of the Director, Tab 5, p. 424

52. In the present case, the Divisional Court held that the Tribunal chose to have its discretion guided by the Compliance Policy instead of the *Appletex* factors, a choice it was entitled to make. The Court concluded that the Tribunal's treatment of the law was reasonable.

Divisional Court Decision, May 28, 2012, para. 71 & 74, Compendium of the Director, Tab 5, pp. 426 & 427

53. In its factum, the City alleges that the Tribunal and the Divisional Court concluded that the environmental protection imperative and the principles of fairness conflict. This is not so. The Tribunal and the Court simply applied the

administrative law principle that discretion must be exercised consistently with the purpose of the statute. Since the EPA has the singular overarching purpose of protecting and conserving the environment, the discretion of the Director and the Tribunal *must* be exercised in a way that furthers environmental protection and conservation. As a result, "fairness" considerations must take into account not just what is fair to the City, but also what is fair to the environment and to "those affected by the pollution at issue, including those who use Sturgeon Lake."

Factum of the Appellant, para. 49

***Criminal Lawyers' Association*, *supra*., para. 46, Book of Authorities of the Director, Tab 3**

Tribunal Evidentiary Decision, November 20, 2009, para. 74, Compendium of the Director, Tab 2, p. 359

Tribunal Final Decision, July 16, 2010, para. 38, Compendium of the Director, Tab 4, p. 403

54. At paragraph 50 of its factum, the City states that the Tribunal found that "environmental protection would be prejudiced if considerations of fairness are considered in the exercise of discretion". The Tribunal made no such finding. The Tribunal found that in the circumstances of this case, there was urgency to the issuance of the Order in light of the adverse weather forecast and the resulting risk of recontamination of Sturgeon Lake. The Tribunal specifically found that the "Director would not have served the interest of environmental protection by undertaking a lengthy investigation into whether other persons might have been the proper subject of an order." These findings of fact have not been challenged by the City.

Tribunal Final Decision, July 16, 2010, paras. 43 & 44, Compendium of the Director, Tab 4, p. 404

Polluter Pays Principle

55. The Director acknowledges that the polluter pays principle is an important principle for guiding Ministry officials and the Tribunal in the exercise of their discretion. It is, however, not the only principle. Nor does the polluter pays principle take precedence over the overarching objective of the EPA, which is the protection of the environment. To require consideration of the polluter pays principle in an order made under section 157.1 of the EPA would be to misconstrue the meaning and intent of the legislation and misread the plain language of the section.

56. The Divisional Court and the Tribunal both considered the City's argument regarding the polluter pays principle, and rejected it as inconsistent with the statutory scheme and the preventive measures order provisions in section 157.1 of the EPA. According to the Divisional Court, the section 157.1 order power can be accurately described as an "owner pays" mechanism as opposed to a "polluter pays" mechanism and:

> Thus, to the extent that the Appellant is suggesting that an order against an owner must be unreasonable because it violates the "polluter pays" principle, the Tribunal was right – the Appellant's complaint is with the legislators who drafted the legislation, not with the statutory decision-makers whose mandate it is to act in accordance with the legislation as drafted.
>
> **Divisional Court Decision, May 18, 2012, paras. 76-78, Compendium of the Director, Tab 5, p. 427**

57. The Tribunal correctly held that the polluter pays principle ought to be considered along with other applicable principles as "a mechanism for furthering

environmental protection and should not be used in a way that could jeopardize the integrity of the environment".

Tribunal Final Decision, July 16, 2010, para. 53, Compendium of the Director, Tab 4, p. 406

58. In the present case, the Ministry first ordered the Gendrons to clean up the spill and the Gendrons, through their insurer, carried out much of the work. However, insurance funds were exhausted before the City's property could be completely cleaned up. Faced with the potential recontamination of Sturgeon Lake from the City's property and the imminent end of the Gendrons' clean-up efforts, the Ministry ordered the City to take all reasonable steps to prevent the discharge of contaminants from *its* property. Both the Divisional Court and the Tribunal found that the Director had exercised her discretion in a purposive manner, consistent with the purpose of the EPA and the Compliance Policy. The Tribunal also referred to the fact that the special order provisions available to municipalities under section 100.1 of the EPA are a "polluter pays" mechanism that allows the City to recover its costs.

Divisional Court Decision, May 28, 2012, para. 80, Compendium of the Director, Tab 5, p. 428

Tribunal Final Decision, July 16, 2010, paras. 42-46 & 55, Compendium of the Director, Tab 4, pp. 404 & 407

59. In its factum, the City refers to the fact that the polluter pays principle is part of the Ministry's Statement of Environmental Values to support its position. The City fails to mention that the polluter pays principle is one of *ten* principles included in the Ministry's Statement of Environmental Values and that no one

principle is given priority.

Factum of the City, paras. 56, 57 & 61

Statement of Environmental Values, Compendium of the Director, Tab 6, p. 431

60. Moreover, the Statement of Environmental Values states that "[t]he Ministry *endeavours* to have the perpetrator of pollution pay for the cost of clean up and rehabilitation consistent with the polluter pays principle" [*emphasis added*]. This wording reflects an aspiration rather than an immutable rule.

Statement of Environmental Values, Compendium of the Director, Tab 6, p. 432

61. The City also argues that the polluter pays principle is necessary to address any potential conflicts between the order powers in the EPA. There is no legal or factual basis for this argument. As discussed above, the EPA gives Ministry officials a range of tools to protect the environment. Officials can issue *remedial* orders to remediate contamination that has already occurred and *preventive* orders to prevent future contamination. There is no conflict between these different order powers and no need to import polluter pays concepts into preventive measures orders. Ministry officials and the Tribunal must look at the facts in each case to determine the best course of action and the appropriate tools to utilize in that particular case. These discretionary decisions must be made in a manner that is consistent with the environmental protection purpose of the EPA, having regard to EPA-specific guidance documents including the Ministry's Compliance Policy.

Tribunal Evidentiary Decision, November 20, 2009, para. 74, Compendium of the Director, Tab 2, p. 359

C. DIVISIONAL COURT WAS CORRECT IN HOLDING THAT THERE WAS NO BREACH OF NATURAL JUSTICE

62. The City argues, as it did before the Divisional Court, that the Tribunal breached the rules of natural justice since:

(i) the fault evidence excluded by the Tribunal was relevant to the Tribunal's discretion to confirm or revoke the Order; and

(ii) without the excluded evidence, the City was unable to put forward "an environmentally responsible solution in support of the revocation of the Order."

Factum of the Appellant, paras. 65 & 67

63. The Divisional Court correctly held there was no violation of the rules of natural justice in the present case. The Court found that the Tribunal had made a lawful decision to exclude irrelevant evidence as part of its authority under the *Statutory Powers Procedure Act* to control its own process, and that such a decision cannot constitute either an error of law or a violation of the rules of natural justice.

Divisional Court Decision, May 28, 2012, paras. 56, 74, 83, Compendium of the Director, Tab 5, pp. 423, 427 & 428

64. The finding of the Divisional Court is consistent with well-settled law that no violation of the rules of natural justice occurs where a tribunal excludes evidence which it determines is irrelevant to the question before it, or prefers one set of relevant evidence to another.

***Bell Canada v. Canada (Labour Relations Board)*, [1983] 2 F.C. 336, p. 3, Book of Authorities of the Director, Tab 10**

***Saha v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1117, para. 43, Book of Authorities of the Director, Tab 11**

Divisional Court Decision, May 28, 2012, para. 83, Compendium of the Director, Tab 5, p. 428

65. The Divisional Court also found that, in the present case, there was no evidence that the Tribunal ever prevented the City from calling evidence about how the environment would be protected if the order against it were revoked.

Divisional Court Decision, May 28, 2012, para. 83, Compendium of the Director, Tab 5, p. 428

66. The City relies on the *Larocque* case as support for its submission that the Tribunal breached the rules of natural justice. In that case, the Supreme Court of Canada considered the question of whether there is a breach of natural justice whenever *relevant* evidence is rejected. The Supreme Court held that even the rejection of *relevant* evidence is *not automatically* a breach of natural justice. Such a breach only occurs when what has happened amounts to "a reckless rejection of relevant evidence" which has had "such an impact on the fairness of the proceeding, leading unavoidably to the conclusion that there has been a breach of natural justice". Such evidence must be "prima facie crucial" in that its rejection would have severe consequences with respect to the outcome of the hearing.

***Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471 [*Larocque*], paras. 45-48, Book of Authorities of the Director, Tab 12**

67. In the present case, in a lengthy and carefully reasoned evidentiary decision, the Tribunal concluded that the proposed evidence was *not relevant* to the scope of its inquiry and would *not* be of assistance in determining whether the Director's decision should be revoked. The Tribunal found that the admission of this evidence "would serve no useful purpose" and would not have added

anything to the City's "fairness" or "polluter pays" argument. Indeed, its admission would "not have [had] any effect on the outcome of the appeal." This is because the Tribunal already knew that "the City did not engage in any wrongful conduct and that the spill occurred because of the acts or omissions of others."

Tribunal Evidentiary Decision, November 20, 2009, paras. 81, 94 & 95, Compendium of the Director, Tab 2, pp. 361, 364 & 365

68. Accordingly, the rejected evidence cannot be described either as "prima facie crucial" or even relevant, as the City asserts. Thus, its exclusion had no impact on the fairness of the proceeding and cannot be considered prejudicial, much less a breach of the rules of natural justice.

69. Moreover, the Supreme Court in *Larocque* affirmed that a tribunal has complete jurisdiction to determine the *scope* of an issue before it. The Court held that a "necessary corollary" of that jurisdiction is that the adjudicator "may inter alia choose to admit only the evidence he considers relevant to the case as he has chosen to define it."

***Larocque, supra.*, para. 34., Book of Authorities of the Director, Tab 12**

70. The ruling in *Larocque* confirms that the relevance of the rejected evidence to the scope of the hearing *as defined by the tribunal* must be carefully considered, in light of the tribunal's discretion to control its own proceedings. A tribunal has the authority to determine the scope of its inquiry and to decide what evidence is relevant and admissible in that determination.

***Larocque, supra.*, para. 34, Book of Authorities of the Director, Tab 12**

***Syndicat des professeurs et professeures de l'Université Laval c. Université Laval*, [1998] J.Q. no 450, para. 45, Book of Authorities of the Director, Tab 13**

71. This is especially so where, as in the present case, "full and cogent" reasons are given when considering the nature of the disputed evidence, and the adjudicator concludes that the rejected evidence is of marginal relevance.

***Compass Group Canada (Health Services) Ltd. (c.o.b. Crothall Services Canada) v. Hospital Employees' Union*, [2007] B.C.J. No. 2145, para. 62, Book of Authorities of the Director, Tab 14**

72. The City also argues at paragraph 67 of its factum that the failure to hear the excluded evidence somehow precluded the City from requesting that fault-based orders be issued against others, and that this was also a breach of natural justice. No evidence on the record supports this allegation. The City never raised the issue of orders to other parties at the hearing before the Tribunal. On the contrary, during the motion on the admissibility of evidence, the City explicitly stated that it was "not seeking any relief respecting other persons". The City claimed it was calling evidence about the conduct of others solely in order "to assist it in convincing the Tribunal to vacate the Director's Order against the City on fairness grounds".

Tribunal Evidentiary Decision, November 20, 2009, paras. 16 & 53, Compendium of the Director, Tab 2, pp. 343 & 353

73. In conclusion, the decision of the Divisional Court upholding the Tribunal decision was correct and should be upheld. The Tribunal's decisions were clearly reasonable and there was no denial of natural justice.

PART IV – ORDER SOUGHT

The Director respectfully requests that the appeal be dismissed with costs.

March 21, 2013

Nadine Harris (LSUC# 52267T)

Frederika Rotter (LSUC# 17932O)

Counsel for the Respondent Director,
Ministry of the Environment

Court File No. C56382

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, Nadine Harris, counsel for the Respondent, Director, Ministry of the Environment, certify that:

1. No order is required under subrule 61.09(2) (original record and exhibits).

2. Approximately one hour is required for the Respondent Director's oral argument.

DATED at Toronto, Ontario this 21st day of March, 2013.

Nadine Harris

SCHEDULE "A" – AUTHORITIES

Cases:

1. *R. v. Consolidated Maybrun Mines Ltd.,* [1998] 1 S.C.R. 706 (S.C.C.)

2. *Montague v. Ontario (Ministry of the Environment),* [2005] O.J. No. 868 (Ont. Div. Ct.)

3. *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* [2010] 1 S.C.R. 815 (S.C.C.)

4. *Associated Industries Corp. v. Ontario (Ministry of the Environment),* [2008] O.E.R.T.D. No 57 (Environmental Review Tribunal)

5. *London (City) v. Ayerswood Development Corp.,* [2002] O.J. No. 4859 (Ont. C.A.)

6. *Ontario (Commissioner, Provincial Police) v. MacDonald, ,* [2009] O.J. No. 4834 (Ont. C.A.)

7. *Dunsmuir v. New Brunswick,* [2008] 1 S.C.R. 190 (S.C.C.)

8. *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association,* [2011] 3 S.C.R. 654 (S.C.C.)

9. *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal),* [2008] O.J. No. 2460 (Ont. Div. Ct.)

10. *Bell Canada v. Canada (Labour Relations Board),* [1983] 2 F.C. 336 (Federal C.A.)

11. *Saha v. Canada (Minister of Citizenship and Immigration),* [2003] F.C.J. No. 1117 (F.C.)

12. *Université du Québec à Trois-Rivières v. Larocque,* [1993] 1 S.C.R. 471 (S.C.C.)

13. *Syndicat des professeurs et professeures de l'Université Laval c. Université Laval,* [1998] J.Q. no 450 (Quebec C.A.)

14. *Compass Group Canada (Health Services) Ltd. (c.o.b. Crothall Services Canada) v. Hospital Employees' Union,* [2007] B.C.J. No. 2145 (B.C. C.A.)

SCHEDULE "B" – RELEVANT PROVISIONS

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

Section 3

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.

Extra-provincial environment

(2) No action taken under this Act is invalid by reason only that the action was taken for the purpose of the protection, conservation or management of the environment outside Ontario's borders.

Idem

(3) Subsection (2) applies even if the action was taken before the coming into force of that subsection. 1992, c. 1, s. 23.

Section 17

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).

Section 18

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).

Section 157

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).

Contravention of s. 14

(1.1) Subsection (1) does not apply to a contravention of section 14 unless,

(a) an order to pay an environmental penalty could be issued in respect of the contravention; or

(b) the contravention involves a discharge that causes or is likely to cause an adverse effect. 2005, c. 12, s. 1 (35).

Information to be included in order

(2) The order shall,

(a) specify the provision, term or condition that the provincial officer believes is being or has been contravened;

(b) briefly describe the nature and, where applicable, the location of the contravention;

(b.1) in the case of a contravention of section 14 for which an order to pay an environmental penalty could be issued, describe the adverse effects that were caused by or that may be caused by the contravention; and

(c) state that a review of the order may be requested in accordance with section 157.3. 1998, c. 35, s. 16; 2005, c. 12, s. 1 (36).

What order may require

(3) The order may require the person to whom it is directed to comply with any directions set out in the order within the time specified relating to,

(a) achieving compliance with the provision, term or condition;

(b) preventing the continuation or repetition of the contravention;

(c) securing, whether through locks, gates, fences, security guards or other means, any land, place or thing;

(d) where the contravention is related to the deposit of waste, removing the waste;

(e) where the contravention has injured, damaged or endangered animal life, plant life, human health or safety, or the natural environment or is likely to injure, damage or endanger animal life, plant life, human health or safety, or the natural environment,

(i) repairing the injury or damage,

(ii) preventing the injury or damage,

(iii) decreasing, eliminating or ameliorating the effects of the damage, and

(iv) restoring the natural environment;

(f) where the contravention has caused damage to or endangered or is likely to cause damage to or endanger existing water supplies, providing temporary or permanent alternate water supplies;

(g) submitting a plan for achieving compliance with the provision, term or condition, including the engagement of contractors or consultants satisfactory to a provincial officer;

(h) submitting an application for an environmental compliance approval, renewable energy approval, licence or permit;

(h.1) registering an activity under Part II.2;

(i) monitoring and recording in relation to the natural environment and reporting on the monitoring and recording;

(j) posting notice of the order; and

(k) if the provincial officer reasonably believes that a term or condition of a renewable energy approval is being or has been contravened, doing any other thing referred to in subsection 16 (3) of the *Ontario Water Resources Act*. 1998, c. 35, s. 16; 2005, c. 12, s. 1 (37); 2009, c. 12, Sched. G, s. 15 (2, 3); 2010, c. 16, Sched. 7, s. 2 (61, 62).

Section 157.1

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.

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.

Section 157.3

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.

Manner of making request

(2) The request may be made orally, with written confirmation served on the Director within the time specified in subsection (1), or in writing. 1998, c. 35, s. 16.

Contents of request for review

(3) A written request for review under subsection (1) or a written confirmation of an oral request under subsection (2) shall include,

(a) the portions of the order in respect of which the review is requested;

(b) any submissions that the applicant for the review wishes the Director to consider; and

(c) for the purpose of subsection (7), an address for service by mail or by electronic facsimile transmission or by such other means of service as the regulations may prescribe. 1998, c. 35, s. 16.

No automatic stay

(4) The request for review does not stay the order, unless the Director orders otherwise in writing. 1998, c. 35, s. 16.

Decision of Director

(5) A Director who receives a request for review may,

(a) revoke the order of the provincial officer; or

(b) by order directed to the person requesting the review, confirm or alter the order of the provincial officer. 1998, c. 35, s. 16.

Same

(6) For the purposes of subsection (5), the Director may substitute his or her own opinion for that of the provincial officer. 1998, c. 35, s. 16.

Notice of decision

(7) The Director shall serve the person requesting the review with a copy of,

(a) a decision to revoke the order of the provincial officer; or

(b) an order to confirm or amend the order of the provincial officer, together with reasons. 1998, c. 35, s. 16.

Automatic confirmation of order

(8) If, within seven days of receiving a written request for review or a written confirmation of an oral request for review, the Director does not make a decision under subsection (5) and give oral or written notice of the decision to the person requesting the review, the order in respect of which the review is sought shall be deemed to have been confirmed by order of the Director. 1998, c. 35, s. 16.

Same

(9) For the purpose of section 140 and a hearing required under that section, a confirming order deemed to have been made by the Director under subsection (8),

(a) shall be deemed to be directed to each person to whom the order of the provincial officer was directed; and

(b) shall be deemed to have been served, on each person to whom the order of the provincial officer was directed, at the expiry of the time period referred to in subsection (8). 1998, c. 35, s. 16; 2000, c. 26, Sched. F, s. 12 (12); 2005, c. 12, s. 1 (39).

Same

(10) Subsections (8) and (9) do not apply if, within seven days of receiving the request for review, the Director stays the order under subsection (4) and gives written notice to the person requesting the review that the Director requires additional time to make a decision under subsection (5). 2005, c. 12, s. 1 (40).

Section 140

Appeal of order

140. (1) A person to whom an order of the Director is directed may, by written notice served upon the Director and the Tribunal within fifteen days after service upon the person of a copy of the order, require a hearing by the Tribunal. R.S.O. 1990, c. E.19, s. 140 (1); 2000, c. 26, Sched. F, s. 12 (12).

Failure or refusal to issue, etc., order

(2) No failure or refusal to issue, amend, vary or revoke an order is an order. R.S.O. 1990, c. E.19, s. 140 (2).

Section 100.1

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).

Section 143

No automatic stay on appeal

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).

Right to apply to remove stay: new circumstances

(4) A party to a proceeding may apply for the removal of a stay if relevant circumstances have changed or have become known to the party since the stay was granted, and the Tribunal may grant the application. R.S.O. 1990, c. E.19, s. 143 (4); 2000, c. 26, Sched. F, s. 12 (12).

Right to apply to remove stay: new party

(5) A person who is made a party to a proceeding after a stay is granted may, at the time the person is made a party, apply for the removal of the stay, and the Tribunal may grant the application. R.S.O. 1990, c. E.19, s. 143 (5); 2000, c. 26, Sched. F, s. 12 (12); 2009, c. 19, s. 67 (3).

Removal of stay by Tribunal

(6) The Tribunal, on the application of a party under subsection (4) or (5), shall remove a stay if failure to do so would have one or more of the results mentioned in clauses (3) (a) to (c). R.S.O. 1990, c. E.19, s. 143 (6); 2000, c. 26, Sched. F, s. 12 (12).

Court File No. C56382

CORPORATION OF THE CITY OF KAWARTHA LAKES
Appellant

- and -

DIRECTOR, MINISTRY OF THE ENVIRONMENT
Respondent

COURT OF APPEAL FOR ONTARIO
Proceeding commenced at Toronto

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