Environmental Law Update

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LAWYERS

Overview

Contaminated Land

Officers Liability

Reporting Obligations

Kawartha Lakes (City) v Ontario (Environment)

Facts

1. furnace oil leak seeped from private property onto abutting City property – adjacent to lake
2. private property owner's funds were insufficient to cover clean up costs
3. Ministry of Environment (MOE) issued no-fault remediation order against the City

City's argument on appeal

- order was unfair and contrary to the polluter pays principle

Kawartha Lakes (City) v Ontario (Environment)

Environmental Review Tribunal dismissed appeal

1. no fault orders explicitly authorized by *Environmental Protection Act (EPA)*
2. *EPA's* objective of environmental protection trumps the "polluter pays" principle
3. city failed to address how the environment would be adequately protected if the order were revoked

Appeals to the Divisional Court and the Court of Appeal dismissed

- courts both found evidence of fault was irrelevant

Kawartha Lakes (City) v Ontario (Environment)

What is the Solution?

1. *Protect your road allowances*
   - *Require clean up*
   - *Enter indemnity agreements where immediate clean up is not necessary/practical*
2. *Rely on EPA clean up provisions*

Baker v Ontario (Environment)

Facts

- remediation order was issued against Northstar Aerospace for contamination caused by historical manufacturing operations
- company became insolvent
- assets other than the site were sold, leaving no resources for remediation
- MOE issued a Director's Order against 13 former directors for violating s. 17, 19 & 196 EPA by permitting the contamination to occur and for failing to provide resources for remediation
- The directors appealed the order
- their motion to stay the order to remediate was dismissed by the Environmental Review Tribunal (ERT)

Baker v Ontario (Environment)

Issues

1. does 145.6(1) permit the directors to appeal the dismissal of the stay application to Divisional Court?
2. would the court judicially review the stay decision?

Appeal and application for judicial review dismissed

1. application for stays are not ERT hearings and s. 145.6(1) only permits appeal of orders made at "hearings"
2. application for judicial review premature
   - efficiency favours judicial review of administrative decisions once they are final
   - incurring irrecoverable remediation costs pending an appeal is not an extenuating circumstance as it was what the legislature intended

Castonguay v Ontario (Environment)

Facts

- Blasting operations caused rock debris to fly beyond the controlled blast area resulting in $15,000 in property damage
- Incident reported to Ministries of Labour and Transportation but not to MOE
- MOE charged Castonguay with failing to report the discharge of a contaminant into the natural environment contrary to s 15(1) of the EPA

Castonguay v Ontario (Environment)

Issue

- Is the reporting obligation triggered when there has been no impairment of the quality of the natural environment?

SCC held that reporting is required when

1. a contaminant has been discharged
2. into the natural environment
3. out of the normal course of events
4. causing or likely to cause an adverse effect
5. that is not trivial or minimal

Castonguay v Ontario (Environment)

The SCC further held that "adverse effect" includes property damage independent of any impairment to the natural environment

- adverse effect is defined under the EPA as meaning "one or more of,… (b) injury or damage to property or to plant or animal life"
- interpreting the provision as submitted by Castonguay would
  1. read out the plain and obvious meaning of the definition
  2. restrict the scope of the reporting requirement and be inconsistent with the remedial purpose of the legislation

Who am I?

Tony Fleming is a Partner in the Land Use Planning, Development and Environmental Group and the Municipal Group at Cunningham Swan. Tony is recognized by the Law Society of Upper Canada as a Certified Specialist in Municipal Law (Local Government/ Land Use Planning and Development). As a Certified Specialist, Tony has demonstrated expertise in the fields of municipal law and land use planning and development law.

Tony provides advice to municipalities and private sector companies on all aspects of land use planning and development as well as environmental law. Tony appears regularly before the Ontario Municipal Board, the Assessment Review Board and the Environmental Review Tribunal. In addition, Tony appears in all levels of Ontario Courts on administrative law matters, including prosecuting and defending by-laws.

Prior to joining Cunningham Swan, Tony was Senior Legal Counsel with the City of Kingston. Tony focused on providing advice on land use planning and development and environmental law with the City of Kingston, building on his experience in private law firms in Toronto where Tony practised as a land use planning and environmental lawyer. Tony has defended large and small corporations and municipalities against Ministry of the Environment orders and manages regulatory investigations and prosecutions (Environment, Labour and Fisheries and Oceans).

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