Citation: Winnipeg (City of) v Manitoba (Director, Contaminated Sites Remediation Act) et al, 2022 MBCA 72
Date: 20220920
Docket: AI22-30-09726

IN THE COURT OF APPEAL OF MANITOBA

BETWEEN:

	)	***J. Paterson***
	)	*for the Applicant*
	)	
THE CITY OF WINNIPEG	)	***D. G. Guénette*** *and*
	)	***S. J. Zagozewski***
(Appellant) Applicant	)	*for the Respondent*
	)	*The Province of Manitoba*
- and -	)	
	)	***J. D. Stefaniuk*** *and*
THE PROVINCE OF MANITOBA (DIRECTOR, CONTAMINATED SITES REMEDIATION ACT)	)	***L. N. Warelis***
	)	*for the Respondent*
	)	*Imperial Oil Limited*
	)	
(Respondent) Respondent	)	***M. T. Green***
	)	*on a watching brief*
- and -	)	*for the Respondent*
	)	*The Clean Environment*
THE CLEAN ENVIRONMENT COMMISSION and IMPERIAL OIL LIMITED	)	*Commission*
	)	
	)	*Chambers motion heard:*
	)	***April 28, 2022***
Respondents	)	
	)	*Decision pronounced:*
	)	***September 20, 2022***

MAINELLA JA

Introduction

[1] This chambers proceeding, arising from an environmental clean-up dispute between the appellant (the City) and the respondent, The Province of Manitoba (the Director), under *The Contaminated Sites Remediation Act*,

CCSM c C205 (the *Act*), raises the administrative law issue of prematurity: when should a court intervene with an ongoing administrative proceeding?

[2] The City seeks leave to appeal a decision of the respondent, The Clean Environment Commission (the CEC), upholding the Director's designation of the City as a potentially responsible person (PRP) under the *Act* for remediation of an impacted site (see section 48 of the *Act*).

[3] The City proposes two grounds of appeal, namely: (i) the CEC breached the duty of fairness owed to the City when it upheld the PRP designation, not for the reason first stated by the Director, but for an alternative rationale raised for the first time during proceedings before the CEC, and (ii) the CEC applied the wrong legal test in concluding that the City was a PRP within the meaning of section 9(1)(d) of the *Act*.

[4] The Director and the respondent, Imperial Oil Limited (IOL), oppose the application for leave to appeal on the merits, and also say it is premature because the remediation process in relation to the environmental clean-up dispute is not yet completed.

[5] For the following reasons, I am persuaded that the City's application for leave to appeal is premature.

Background

[6] The *Act* is environmental protection legislation which creates a framework for the identification, assessment and management of contaminated sites and impacted sites. Section 1(1) of the *Act* makes clear that the "principal purpose" of the *Act* is to "provide for the remediation of contaminated sites and impacted sites, in accordance with the principles of

sustainable development, in order to reduce or mitigate the risks of further damage to human health or the environment and, where practicable, to restore such sites to useful purposes".

[7] The Director, appointed under the *Act*, is charged with decision-making responsibility, such as designating sites, designating PRPs, issuing orders, recovering costs, and entering into and approving remediation agreements.

[8] The environmental clean-up dispute in this case is in relation to responsibility for remediation of an impacted site. Central to the *Act* is the "polluter pays principle" (section 1(1)(c)(i); see also section 21(a)). However, before apportionment of responsibility for remediation occurs, a potential polluter must be designated as a PRP by the Director under Part 3 of the *Act*.

[9] IOL owns a parcel of land in northwest Winnipeg (the site). The north portion of the site is contaminated with hydrocarbons. The south portion of the site is contaminated with heavy metals.

[10] IOL has acknowledged responsibility for the hydrocarbon contamination and has implemented a remediation plan approved by the Director under the *Act*. The Director determined that IOL was not responsible for the remediation of the heavy metals contamination in the south portion of the site because the level of heavy metals contamination was not consistent with petroleum storage operations, but was consistent with landfill operations that included refuse, cinder and ash.

[11] On August 7, 2019, the Director designated the City as a PRP for remediation of the heavy metals contamination in the south portion of the site because, in her view, the contamination was consistent with the site being

used as a landfill and the Village of Brooklands (Brooklands) (incorporated into the City in 1972) owned the site and operated a landfill at it prior to 1954. The original PRP designation was based on section 9(1)(b) of the *Act*—the City being "an owner or occupier of the site at a time when the contamination occurred or at any time thereafter". As I will explain, the factual assumptions of the Director justifying the initial designation were incorrect.

[12] The City appealed the PRP designation to the CEC pursuant to section 39(1) of the *Act* on the grounds that neither it nor Brooklands owned or occupied the site and did not, by any activities carried out by either on the site or elsewhere, contaminate the site.

[13] The CEC conducted the City's statutory appeal in writing, receiving materials from the parties over the period of February 3, 2021 to October 25, 2021.

[14] The focus of the City's PRP designation shifted in the appeal before the CEC because neither the City nor Brooklands ever owned the site and the landfill that did exist was on non-adjacent property to the west of the site that, according to the expert evidence, could not have been the cause of the heavy metals contamination at the site. It is not disputed that the record before the CEC was that there was no basis to confirm the City's PRP designation under section 9(1)(b) of the *Act*.

[15] The alternative basis for the City's PRP designation was the theory that heavy metals contamination migrated to the site through groundwater from adjacent land.

[16] The CEC was provided with an environmental study that the City had commissioned in 1984, which included the adjacent lands to the south of the site, for the purposes of the City's methane gas policy (the 1984 report).

[17] The 1984 report identified the presence of cinders and ash on land described in that report as area G3, an undeveloped right of way immediately south of the site (the ROW) and private property to the south of the ROW (lot 61).

[18] Cinders and ash are commonly derived from the burning or incineration of municipal waste and are known to contain significant concentrations of heavy metals.

[19] The 1984 report also identified the presence of refuse on lot 61 and on the property to the south of lot 61, which was owned by the City (lot 62). In 2006, the City sold lot 62 and the titles to lots 61 and 62 were consolidated into lot 61 under private ownership.

[20] While the City was aware of the cinders and ash on the ROW in 1984, it took no action to manage or remove them. The City also took no regulatory or enforcement action in relation to the cinders, ash and refuse on lot 61, or to manage or remove the refuse on lot 62.

[21] Shallow horizontal groundwater contaminated with heavy metals flows from area G3 towards the area of the site.

[22] On June 9, 2021, after having received the Director's file, her written submissions and the written submissions of the City, the CEC received the written submissions of IOL.

[23] IOL advanced the alternative theory to the CEC that the heavy metals contamination affecting the site migrated through groundwater from area G3 and, thus, the City's PRP designation should be upheld, not on the basis of section 9(1)(b) of the *Act*, but on the City having "had possession, charge or control of a contaminant of the site immediately before or at the time of its release" (section 9(1)(d) of the *Act*).

[24] IOL pointed the CEC to the expert evidence before it that excluded other possibilities for the heavy metals contamination of the site other than contamination migrating through groundwater from area G3.

[25] After receiving IOL's written submission, the CEC requested additional information from the parties between June 25, 2021 and October 5, 2021.

[26] One of the requests from the CEC was on August 12, 2021, when it inquired whether there were pockets or layers of cinders and ash on the site that contributed to the heavy metals contamination on the site. IOL responded to the CEC's inquiry on September 1, 2021. It advised that, according to the expert, there were no pockets or layers of cinders or ash on the site, which was consistent with the alternative theory that the heavy metals contamination migrated onto the site via groundwater from area G3.

[27] At no time after being made aware of the alternative theory did the City request to adjourn the appeal.

[28] On October 25, 2021, the City made its final submissions to the CEC. Its arguments can be grouped into three areas.

[29] The first concern of the City was procedural fairness. It said that it would be "procedurally unfair" for the CEC to uphold the PRP designation because "the parties [had] not been provided an opportunity to review, comment on and investigate" the alternative theory.

[30] The next part of the City's submission focused on the evidence. It submitted that there was insufficient evidence to establish that the heavy metals contaminants migrated to the site from area G3 via groundwater.

[31] Finally, the City made several arguments about the application to it of section 9(1)(d) of the *Act*. It asserted that its legal relationship with the ROW was insufficient to bring it within the scope of section 9(1)(d). Alternatively, it argued that, even if it had possession or control of the ROW, it never had possession/charge/control of the ash and cinder immediately before or at the time of their release. It said there was simply no evidence it was responsible for the initial discharge of the contaminants into the environment.

[32] The CEC released its decision on January 17, 2022, upholding the Director's designation of the City as a PRP for remediation of the site, but not on the original ground.

[33] The CEC rejected the procedural fairness objection of the City. In its reasons, the CEC concluded that sections 41(1) and 42(1) of the *Act* gave it a "role" that was "much wider" than merely to review the decisions of the Director on an established record.

[34] The CEC accepted the alternative theory that the heavy metals contamination of the site migrated through groundwater from adjacent land. It decided that the City had possession and control of the ROW at law and that

the "likely source of the metal contamination found on the [s]ite" was the cinders and ash discovered on the ROW in 1984. The CEC concluded that the cinders and ash were either deposited on the ROW or the result of burning on the ROW, either of which was contrary to the City's bylaws. Although aware in 1984 of the cinders and ash on the ROW, the City undertook no action to remove them despite having the legal authority to do so. Accordingly, the CEC was of the view that the City "had possession, charge or control of a contaminant of the [s]ite at the time of its release" and, therefore, was a PRP for the remediation of the heavy metals contamination pursuant to section 9(1)(d) of the *Act*.

Discussion

Test for Leave to Appeal

[35] Section 48 of the *Act* reads as follows:

> **Appeal to Court of Appeal**
> **48(1)** A decision or order of the [CEC] may be appealed to The Court of Appeal by
>
> (a) in the case of an apportionment order, the director or a party to the hearing who participated in the apportionment hearing in respect of which the order was made; or
>
> (b) in the case of a decision or order made in respect of an appeal from a decision or order of the director, a party to the appeal who participated in the hearing of the appeal by the [CEC].
>
> **Appeal with leave**
> **48(2)** An appeal under this section may be taken only
>
> (a) on a question of jurisdiction or law; and

(b) with leave obtained from a judge of The Court of Appeal.

Time for application for leave
48(3) An application for leave to appeal a decision or order of the [CEC] shall be made within 14 days after the applicant receives a copy of the decision or order, or within such further time as the judge allows.

[36] The traditional leave to appeal criteria used for legislation similar to section 48 of the *Act* applies equally here:

(1) Does the applicant raise a true question of law or jurisdiction (i.e., one that does not involve assessment or analysis of conflicting factual issues)?

(2) Is the question of sufficient importance to warrant consideration by the province's highest court (i.e., will the decision assist in determining similar future disputes)?

(3) Is there an arguable case of substance (i.e., is there a reasonable prospect of success)?

See *Pelchat v Manitoba Public Insurance Corp and Automobile Injury Compensation Appeal Commission*, 2006 MBCA 90 at para 2; and *Winnipeg Airports Authority Inc v EllisDon Corp*, 2011 MBCA 51 at para 1.

Prematurity and Leave to Appeal Applications

[37] The general rule as to prematurity is that, absent exceptional circumstances, a court should not intervene in an administrative process before it is complete (see *Dorn v Association of Professional Engineers and*

Geoscientists (Man), 2014 MBCA 25 at paras 10-14). This general rule applies equally to applications for leave to appeal.

[38] In *Neufeld et al v The Manitoba Securities Commission*, 2017 MBCA 107, the Manitoba Securities Commission (the Commission) declined to dismiss administrative proceedings under *The Securities Act*, CCSM c S50, as being statute barred. Before administrative proceedings were completed, the applicants sought leave to appeal the decision of the Commission to this Court. Counsel did not raise the issue of prematurity and the chambers judge did not consider it. Leave to appeal was granted on two questions of law.

[39] A five-member panel of this Court dismissed the appeal for reasons of prematurity notwithstanding leave to appeal had been granted (see 2018 MBCA 101 at paras 3, 9 (*Neufeld 2018*)). It affirmed the general reluctance of the Court to engage in pre-emptive judicial intervention in an administrative proceeding before it is complete. Despite the hardship concern often raised by an applicant, there are good reasons for a court not to intervene in an administrative proceeding before it is complete (see paras 5-6).

[40] The approach taken by this Court in *Neufeld 2018* is similar to the approach taken in other jurisdictions regarding the general rule as to prematurity applying to applications for leave to appeal (see *Big Loop Cattle Co Ltd v Alberta (Energy Resources Conservation Board)*, 2009 ABCA 302).

Analysis

[41] The scheme of the *Act* makes clear that the administrative process concerning responsibility for remediation consists of several stages. The designation of the City as a PRP under Part 3 of the *Act* is only a step in the process. There is not yet a remediation plan for the heavy metals

contamination of the site (see Part 4 of the *Act*) or apportionment of responsibility for remediation (see Part 5 of the *Act*).

[42] In light of this Court's decision in *Neufeld 2018*, the onus lies on the City to demonstrate that exceptional circumstances exist in this case before this Court can determine its leave to appeal application because administrative proceedings in relation to responsibility for remediation of the site for the heavy metals contamination are not complete.

[43] The threshold for demonstrating exceptional circumstances is "very high" (*Dorn* at para 13; see also *Thielmann v The Association of Professional Engineers and Geoscientists of the Province of Manitoba*, 2020 MBCA 8 at para 24). As explained in *Thielmann*, there are no "hard and fast rules or pattern" as to what constitutes exceptional circumstances (at para 37); at best, there are relevant factors to weigh. As Professor Mullan explains, "context almost invariably matters" in deciding questions of prematurity (David J Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at 494).

[44] In considering whether the City has discharged its onus, I have weighed the factors discussed in *Thielmann* (see para 50) cumulatively to the ultimate question of whether this case presents exceptional circumstances to decide the leave to appeal application before the responsibility for remediation process is complete. Also, as Steel JA noted, "weight should always be given to the overarching consideration that an administrative tribunal should be given the opportunity to determine the issue first, and to provide reasons that can be considered by the court on any eventual review" (*ibid*).

[45] To begin, being the subject of an administrative proceeding is not a hardship to the City (at paras 51-53). The protracted nature of this case belies

any concerns of urgency for court intervention in it at this time. Furthermore, there is no suggestion of irreparable harm, prejudice or abuse of process if the City's leave to appeal application is not determined until after the administrative process under the *Act* is completed. This factor militates against the City.

[46] The City argues waste as a reason to hear its leave application at this time. The argument is that, if it is granted leave to appeal and is successful in its appeal, the expense of an apportionment hearing before the CEC will be unnecessary (see sections 23-27 of the *Act*). Other than the City's seeming preference for litigation of apportionment over the idea of apportionment by agreement (see section 22 of the *Act*), I have no facts as to how lengthy or resource intensive completing the administrative process would be. As explained in *Thielmann*, waste is a consideration to weigh separately and in conjunction with other factors and, in particular, the strength of the case (see para 54). The City's argument on waste of resources being a significant factor in its favour is not convincing.

[47] Delay of the administrative process is a concern that works against the City. Halting the responsibility for the remediation process under the *Act* should occur only for a compelling reason, which is absent here. The future of our society "depends on a healthy environment" (*114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at para 1). There is a strong public interest that environmental laws are respected and enforced without delay for the common good.

[48] In terms of fragmentation of proceedings, this consideration must be considered both in relation to the individual case, as well as the systemic concern of too quickly allowing early judicial review of uncompleted

administrative proceedings (see *Thielmann* at paras 56-58). Leaving aside the issue as to whether the proposed grounds of appeal are questions of law of sufficient importance, I am not satisfied that the City's case on either ground is so strong that there is a real advantage to fragmenting proceedings.

[49] More specifically, as to the strength of the City's case on the question of procedural fairness, it is noteworthy that the *Act* obligates the CEC to give the parties a reasonable opportunity to examine all relevant filed material (see section 41(2)), and gives the CEC the power to "make any decision . . . that the [D]irector could have made" (section 42(1)(b)) and the power to consider any information obtained by it "if the [CEC] informs the parties to the appeal of the nature of the information and gives them an opportunity to explain or refute it" (section 41(1)(d)).

[50] In light of the plain wording of sections 41 and 42 of the *Act* and the chronology of events I have discussed earlier, in my view, the strength of the City's argument that it was denied procedural fairness by the CEC is tepid at best.

[51] In terms of the City's submission as to the CEC applying the wrong legal test under section 9(1)(d) of the *Act*, this is the better of the two grounds raised by the City on a relative basis. The City is able to cite authorities from other jurisdictions under different environmental remediation frameworks to make the point that its legal relationship to the ROW may not be sufficient to fall within the scope of section 9(1)(d). The City underscores that the CEC's reliance on the City's authority to regulate the ROW as the foundation to it being a PRP under section 9(1)(d) has the potential to greatly expand the potential environmental liability of municipalities.

[52] Both the Director and IOL raise arguments in opposition to the City's concerns. I will not comment on the submissions other than to say that what is obvious to me, on a preliminary examination of the debate, is that the answer to the legal dispute is not one that is obvious in terms of the facts, the wording of section 9(1)(d) or decided case law. I will not say anything more as I am not considering the merits of the leave application. What can be said is this part of the City's case favours it in meeting its onus of demonstrating exceptional circumstances. That said, I am not satisfied that the case for the City is so compelling that systemic concerns as to fragmentation of proceedings should be overlooked. Nor am I prepared to say that the City's position is so strong that it would be a waste of resources for the administrative process relating to responsibility for remediation to be completed.

[53] Finally, there is the statutory context. As explained in *Neufeld 2018*, there are benefits to a reviewing court having the full administrative record, particularly where the tribunal has expertise and there is a danger of a court inserting itself too early into a carefully crafted legislative scheme (see paras 5-6). As previously mentioned, the designation as a PRP is only one stage of the process surrounding responsibility for remediation. Still uncompleted here are the issues of a remediation plan and apportionment of responsibility for remediation. The evidence as to the heavy metals contamination of the site is quite technical and the CEC is a specialized tribunal with expertise in environmental matters. In my view, this Court would benefit, in a matter of this complexity, from a complete record. I fail to see the sort of real injustice in events that have occurred in the process to date that would necessitate an extraordinary early intervention from the courts.

[54] The City's submission that section 48 of the *Act* gives it the right to attempt to appeal decisions of the CEC in the middle of an administrative process relating to responsibility for remediation of a contaminated site does not accord with this Court's comments in *Neufeld 2018*. *Neufeld 2018* decided that the mere fact that an applicant can seek leave to appeal a decision of an administrative tribunal, even where leave is actually granted following the traditional criteria set out in *Pelchat*, does not override the general rule as to prematurity in administrative law.

[55] The City's concern that it could be prejudiced by delaying the appeal of an interim decision or order of the CEC, by virtue of the 14-day appeal period set out in section 48(3) of the *Act*, is not persuasive. The plain wording of the section permits a judge of this Court to extend the time for making a leave to appeal application. Here, both the Director and IOL consented in their oral arguments to the tolling of the 14-day appeal period for the City until after the administrative process under the *Act* in relation to responsibility for remediation of the site for the heavy metals contamination is completed.

[56] In summary, the City has not demonstrated that there are exceptional circumstances for this Court to determine its application for leave to appeal the decision of the CEC before administrative proceedings in relation to remediation of the site for the heavy metals contamination are completed. The application for leave to appeal is premature.

Disposition

[57] In the result, the application for leave to appeal is dismissed without prejudice to the City to renew it once all proceedings for responsibility for remediation of the site are completed. Pursuant to section 48(3) of the *Act*,

the City's time to renew its application for leave to appeal the decision of the CEC dated January 17, 2022 is extended until 14 days after a date to be set by the registrar in consultation with counsel for the City, the Director and IOL.

[58] In the circumstances, each party will bear their own costs.

C.J. Wind JA