

City of Kawartha Lakes loses fight over “unfair” oil spill clean-up Order

By John Willms

The Ontario Court of Appeal has ruled that the necessities of spill containment and environmental protection can take precedence over the “polluter pays” principle and the rules of natural justice. In assessing the validity of a Director’s clean-up order for a 2009 oil spill in the City of Kawartha Lakes, the Court deemed questions of who was at fault were “irrelevant.” The City, which bore no responsibility for the original spill, was ordered to clean up oil that had spread onto municipal lands and threatened to re-contaminate nearby Sturgeon Lake.

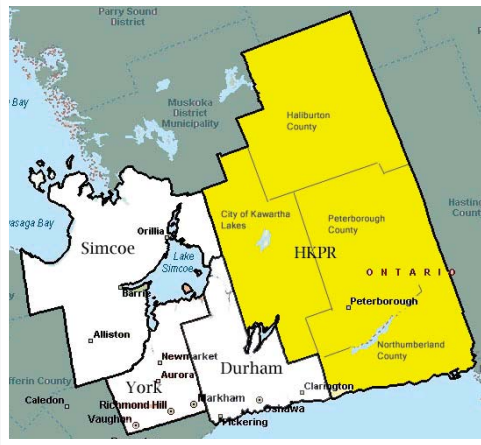
Since then, the City of Kawartha Lakes has fought a series of legal battles to correct what it considers “a breach of natural justice.” While the City did not dispute the jurisdiction of the Ministry to issue such a “no fault” Order, it argued that “the MOE must have regard to principles of fair-

ness, including the ‘polluter pays principle’, as part of its exercise of discretion to issue such an Order.” The City maintained that the MOE should only issue a “no fault” Order in the event that the polluter(s) cannot or will not comply

with a fault-based Order. The Appeal Court did not agree. In its decision released May 10, 2013, Justice Goudge writes that,

“Evidence of the fault of others says nothing about how the environment would be protected and the legislative objective served if the Director’s order were revoked. Indeed, by inviting the Tribunal into a fault finding exercise, permitting the evidence might even impede answering the question in the timely way required by that legislative objective. (Kawartha Lakes (City) v. Ontario (Environment), 2013 ONCA 310).”

The Ministry had issued a preventative Order under section 157(1) of the *Environmental Protection Act* to ensure prompt remediation and minimize any adverse effects. The Ministry had already issued a remediation Order on the responsible parties, but the



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spilled oil had spread onto City property. Therefore, a second Order could rightfully be issued to the City as the party that, “owns or has management and control of an undertaking or a property,” even though it bore no fault for the original spill.

The Order against the City was appealed to the Environmental Review Tribunal. However, the ERT refused to consider fault, arguing that the overwhelming purpose of EPA s.157(1) is to protect the environment and that, “questions of ultimate liability, fault and other issues are generally left to arenas other than this tribunal.”

On May 28, 2012, the Divisional Court upheld the ruling of the ERT, and the appellants appealed the decision to the Ontario Court of Appeal. While the issues were winding their way through the legal system, the City completed the clean-up of its property at an estimated cost of \$470,000. Justice Goudge of the Appeal Court writes,

“I agree with the Tribunal and the Divisional Court that evidence that others were at fault for

the spill is irrelevant to whether the order against the appellant should be revoked. That order is a no fault order. It is not premised on a finding of fault on the part of the appellant, but on the need to serve the environmental protection objective of the legislation.”

In a separate case before the Ontario Superior Court, the City is tak-

ing steps to recover its clean-up costs (under s.100.1 of the EPA) from the oil company, the insurer, the adjuster, the homeowners, the firm that undertook the site clean-up, the tank manufacturer, the Technical Standards and Safety Authority and the MOE.

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No one disputes the basic facts of the case ...

On December 18, 2008, an estimated 500 litres of fuel oil were spilled into the basement of the home of Wayne and Liana Gendron. By the time an insurance adjuster visited the property some 12 days later, the oil had already migrated through the storm sewers under the adjoining city road and into nearby Sturgeon Lake.

The Ministry of the Environment immediately issued a Provincial Officer’s Order requiring the Gendrons to prevent, eliminate and ameliorate the adverse effects of the spill. Remediation efforts continued “around the clock” until March 20, 2009, when the Gendrons’ insurer refused to fund further off-site work, while continuing with the on-site excavation of contaminated soil and the complete demolition and reconstruction of the Gendrons’ home.

Although the lake pollution had already been cleaned up, the ministry issued a preventive Order against the City, requiring it to undertake the remediation of any oil remaining in the culverts and sewers that could recontaminate Sturgeon Lake.

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