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Smelly organic waste plant ordered closed

By John Jaffey
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An organic waste processing plant just north of Toronto, whose "pungent feces-like smell" adversely affected neighbouring residents and businesses for more than two years, was deemed a public nuisance under Ontario's *Municipal Act* and ordered closed for nine months by the Ontario Superior Court.

Marc McAree

Taking into account that "it is in the public interest that organic waste be processed into compost," Justice Alan Bryant stayed his order for 90 days to allow the plant "a window to abate the public nuisance."

Marc McAree, who acted for the Town of Newmarket, Ont., told *The Lawyers Weekly* this is the first time s. 433 of the Act (which came into force on January 1, 2003) has been judicially considered. He said the decision is "cutting-edge in terms of a fairly new power granted by the province to municipalities."

Halton Recycling Ltd. has been operating the plant in Newmarket since April 2004, processing kitchen waste and "green bin" materials from Toronto. Before commencing its operations, Halton installed new equipment to minimize odourous emissions. All told it has spent $8 million to remedy the problem. However, between July 2004 and July 2006, the town received more than 1100 complaints about odours from the plant.

At the end of a nine-day trial, Justice Bryant concluded "that Halton falls below the industry standard for processing facilities by reason of its failure to comply with its operating certificate of approval in respect of odour emissions from July 2004 to the present."

As for the big picture, he wrote, "I find that s. 433 of the Municipal Act should be interpreted in a broad and purposive way to grant a municipality the authority to make an application for closure when odours cause a public nuisance."

McAree also pointed out two other important aspects of the decision: "It confirms that odours can constitute a public nuisance. This is a significant finding, as the law of public nuisance has been difficult and not always clearly understood.

Vivienne Ball

"Another point of significance for municipal and environmental lawyers is that Justice Bryant's decision affirms clear statements from the Supreme Court of Canada in *SprayTech v. Hudson [114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] S.C.J. No. 42], and it also affirms clear statements from the Ontario Court of Appeal in *CropLife Canada v. City of Toronto* [[2005] O.J. No. 1896] that municipalities have authority to protect their citizens from environmental and health related harms.

"The *Newmarket* decision is a significant confirmation of the municipalties' authority to regulate local environment issues, and when dealing with environmental matters municipalities are often challenged with the argument that the province already regulates the issue. In this case Halton argued that the Ministry of the Environment was the primary regulator, not the town. But Justice Bryant found that regulation of the local environment is not the exclusive jurisdiction of the province when it comes to odours that are a nuisance."

Co-counsel with McAree was Vivienne Ball, also of Willms & Shier Environmental Lawyers LLP.

David Crocker and Jonathan Davis-Sydor of Davis & Company's Toronto office acted for Halton Recycling. Crocker told *The Lawyers Weekly* his client has not yet decided whether to appeal. He said the decision is significant "because it now clearly puts into the hands of municipalities a regulatory function which had previously been the exclusive jurisdiction of the Ministry of the Environment."

He also commented, "I don't think that the comments in the daily press do the decision justice. What the decision does is to order the facility closed and then stay that decision in order to allow

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Much equipment already purchased

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Halton Recycling to continue the program that it's already well into in terms of implementing its remedial action plan designed to eliminate odours." He said it is "well within the realm of possibility to get the work done within 90 days of receiving approvals. Much of the equipment needed to complete the work has already been purchased."

David Crocker

Jonathan Davis-Sydor

Finally, looking at the decision in a different light, Crocker noted, "I think his honour found himself in an awkward position. He wanted to maintain a certain control over the proceedings in order to encourage the completion of the remedial program and to kind of steward the whole exercise through. I think with sober second thought he realized that really wasn't the function of the court. So he took the only option he had to keep the process moving and keep it alive. Section 433 doesn't allow the applicant to reapply as part of the same case to vary the order. It allows a party with an interest in the facility to do that. It would only be Halton. He clearly invites Halton to do that in the decision. Realizing he can't be actively the steward of this, he has encouraged the completion of the project in this way. I hope he expects Halton to take advantage of the opportunity he offered them to reapply to have his orders varied to suit the improving situation, and I hope he doesn't ever feel it will be necessary for Halton to close. That's the way we are taking this."

Reasons: *Newmarket (Town) v. Halton Recycling Ltd.*, [2006] O.J. No. 3918).