

MUNICIPAL, LAND USE & DEVELOPMENT REPORT

RECOVERING NO-FAULT CLEAN UP COSTS POST KAWARTHA LAKES

A recent decision of the Ontario Court of Appeal, *Kawartha Lakes (City) v. Ontario (Environment)*, 2013 ONCA 310, may result in significant unanticipated expenses for municipalities that are ordered to clean up and remediate municipal lands contaminated through no fault of their own. This decision clarifies that property owners, including municipalities, are responsible for cleaning up their property and preventing further contamination in the event of a spill, even though such a property owner may be completely innocent. The Ontario Ministry of the Environment ("MOE") has the power and the willingness to make such orders as it deems necessary to ensure that prevention and cleanup is undertaken. Clean up and remediation costs incurred by municipalities in response to such MOE orders have the potential to devastate municipal budgets and reserves.

Key Facts in Kawartha Lakes Decision

The potential sources of contamination are numerous, but in the *Kawartha Lakes* case, the culprit was spilled heating oil. The Gendrons, owners of property adjacent to storm sewers and a road allowance owned by the City of Kawartha Lakes ("Kawartha Lakes"), had heating oil delivered to their property. Several hundred liters of oil leaked into the basement of the Gendron's property and subsequently migrated onto the property owned by Kawartha Lakes. A cleanup order was issued to the Gendrons; however, after they exhausted their financial resources, Kawartha Lakes' property was still not cleaned up and there was concern that the contamination would spread into Sturgeon Lake. The MOE issued an order pursuant to Section 157.1 of the *Environmental Protection Act* (the "EPA") requiring Kawartha Lakes to clean up its property and prevent further discharge of the contaminant. Kawartha Lakes, in seeking to have the order against it revoked, attempted to present evidence regarding who was at fault for the spill. Both the Environmental Review Tribunal (the "Tribunal") and the Divisional Court refused to permit such evidence on the grounds that it was not relevant to the requirement that Kawartha Lakes clean up its lands. Kawartha Lakes appealed the order to the Ontario Court of Appeal which upheld the earlier decisions that fault was not relevant in respect of the issuing of such orders:

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.

The primary purpose of the EPA is to protect and conserve the natural environment. The MOE has therefore been granted broad powers to order both public and private property owners to clean up the land which they own or occupy regardless of who is at fault for the contamination. The Court of Appeal confirmed that the issue of who is responsible for payment of Kawartha Lakes' costs of the cleanup should be resolved between the municipality and those at fault for the spill in civil court, if necessary.

Options for Recovery pursuant to the EPA

There are several avenues for a municipality to attempt to recover the cost of cleanup and remediation from those who may bear some responsibility for the spill.

Section 100 of the EPA gives municipalities the power to do everything practicable to prevent, eliminate or ameliorate any adverse effects from a spill and to restore the natural environment. Municipalities may bring an action to seek compensation from the "owner of the pollutant" or "the person having control of the pollutant" for all reasonable costs incurred for this purpose. An owner of the pollutant is defined as "the owner of the pollutant immediately before the first discharge of the pollutant" and the controller of a pollutant is defined as "the person and the person's employee or agent, if any, having the charge, management or control of a pollutant immediately before the first discharge of the pollutant." Importantly, liability under this section does not require a finding of fault or negligence and where two or more persons are found liable for the spill, they are jointly and severally liable pursuant to subsection 99(8) of the EPA. Any judgment for compensation pursuant to section 100 may be enforced by the court. Such enforcement actions might include: (1) filing a Writ of Seizure and Sale against any of the owner and/or controller's assets, (2) filing a Notice of Garnishment against such assets or income, or (3) taking

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any other enforcement proceedings permitted in Ontario or in jurisdictions in which Ontario judgments can be enforced.

In addition to the right to bring an action for compensation pursuant to section 100, section 100.1 of the EPA grants municipalities the power to make an order against the owner or controller of the pollutant, regardless of fault, for compensation for the reasonable costs which it incurred to prevent, eliminate, or ameliorate any adverse effects from a spill. Such municipal cost recovery orders ("MCROs") are enforceable by the court and, if the owner of the pollutant is also the owner of the real property on which the spill occurred, the municipality will be able to claim a priority lien pursuant to Section 1 of the *Municipal Act, 2001*.

A person against whom an MCRO is made has 15 days to appeal it to the Tribunal. Section 100.1(15) of the EPA provides only limited grounds for the Tribunal to consider on any such appeal. Liability is not a factor that the Tribunal may consider in determining the validity of the MCRO. An appeal to the Tribunal will automatically stay the operation of the MCRO.

An appeal of the Tribunal's decision may be brought in the Divisional Court or to the Minister of the Environment; however, such an appeal does not automatically stay the decision of the Tribunal, as it does on the initial appeal to the Tribunal and as a result, the MCRO may continue against the owner or controller of the pollutant pending the determination of the Divisional Court or the Minister.

Recovery at Common Law

In addition to the statutory remedies and powers available to a municipality for cost recovery, the common-law remedies of negligence and private nuisance should not be overlooked. Such

claims can be used, in conjunction with the claims and orders referred to above, to bring in additional parties who are not owners or controllers of the pollutant, but who may still bear some fault for the spill. Such claims may also be used in the case of historic spills where there are no owners or controllers of the pollutant against whom to bring a section 100 claim or to issue a section 100.1 MCRO.

Implications for Municipalities

It is now clear that the primary objective of the legislation is for the cleanup of contamination resulting from a spill and the prevention of further damage. Municipalities affected by a spill for which they are innocent would be prudent to take prompt action to, at a minimum, prevent further spreading of the contamination and any potential for adverse effects. Failure to do so may result in increased costs for cleanup and remediation and a tribunal or court may find that such delay caused or contributed to the losses or damages ultimately suffered.

While the above cost-recovery options allow municipalities to pursue recovery of the costs a municipality incurs in preventing, eliminating, or ameliorating any adverse effects from a spill, such recovery will be limited to the monetary resources of those against whom recovery is sought. In order to mitigate risk and maximize cost recovery, municipalities should conduct a careful review of their land inventory to determine the potential exposure to contamination from neighbouring industry or other use. Such an assessment is likely to identify problem sites in most municipalities and will permit the municipality to assess potential cleanup costs, establish appropriate reserves and take appropriate action for cost recovery.

About the Author

Lynn's litigation experience extends over a broad range of clients, courts and causes. She has appeared before many courts and regulatory commissions across Ontario. Lynn has defended her clients' interests in matters involving environmental, property, and personal injury law. She has also assisted in matters involving municipal governance, planning and zoning, land assembly and by-law enforcement.

Lynn advises on questions of environmental law and property interests. Having managed her own successful law practice, Lynn appreciates the challenges of balancing statute and regulation against business sustainability and profit.



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