Kawartha Lakes (City) v. Gendron

Ontario Judgments

Ontario Superior Court of Justice

J.C. Corkery J.

Heard: August 24-28, September 3, 4, 8, 14, 21, 2020.

Judgment: July 30, 2021.

Court File No.: CV 11-072

[2021] O.J. No. 4249

RE: The Corporation of the City of Kawartha Lakes, Plaintiff, and Wayne ***Gendron***, Liana ***Gendron***, Doug C. Thompson Fuels Ltd., operating as Thompson Fuels, Her Majesty the Queen in Right of Ontario, Technical Standards and Safety Authority, D.L. Services Inc., R. Ian Pepper Insurance Adjusters Inc., Farmers' Mutual Insurance Company and Les Reservoirs D'acier De Granby Inc., Defendants

(114 paras.)

Counsel

Christine G. Carter, for the Plaintiff.

Martin P. Forget, for the Defendants, Wayne ***Gendron*** and Liana ***Gendron*** William G. Scott, for the Defendant, Farmers' Mutual Insurance Company Albert Wallrap, for the Defendant, Doug C. Thompson Fuels Ltd. operating as Thompson Fuels.

REASONS FOR DECISION

J.C. CORKERY J.

A. Introduction

1 In December 2008 furnace oil leaked from a fuel tank in the ***Gendron***'s basement. The oil contaminated the ground under the ***Gendron***'s house. It contaminated ground adjacent to the house and it contaminated Sturgeon Lake, across the street from the ***Gendron*** house. The total remediation cost was almost $2 million dollars.

2 As a result of the spill, Wayne ***Gendron*** commenced a civil action for damage to his property

and The Corporation Of The City Of Kawartha Lakes (the City) commenced a civil action and proceedings under the the *Environmental Protection Act*, R.S.O. 1990, c. E.19 (the "*EPA*") for damage to the adjacent public lands.

3 The ***Gendron*** action was against Doug C. Thompson Fuels Ltd. operating as Thompson Fuels, Her Majesty The Queen in Right of Ontario (HMQ), the Technical Standards and Safety Authority (TSSA), D.L. Services Inc. (DLS), and Les Reservoirs D'Acier de Granby Inc. (Granby).

4 The City action includes four additional defendants: R. Ian Pepper Insurance Adjusters Inc. (Pepper) and Farmers' Mutual Insurance Company (Farmers' Mutual). The actions were consolidated by consent order and were set for trial commencing November 7, 2016.

5 The trial of the ***Gendron*** action proceeded. It lasted 27 days. Justice Charney released his decision in July 2017 (***Gendron*** *v. Thompson Fuels*, 2017 ONSC 4009). He found that Mr. ***Gendron*** was 60% at fault, Thompson Fuels was 40% at fault and that the TSSA was not at fault. Thompson Fuels was ordered to pay Mr. ***Gendron*** $864,628 in damages, plus $465,000 in costs. TSSA was awarded $150,000 in costs. The decision was upheld on appeal, except for a small adjustment to the amount of the damages awarded (***Gendron*** *v. Doug C. Thompson Fuels Ltd. (Thompson Fuels)*, 2019 ONCA 293, 34 C.P.C. (8th) 144, leave to appeal refused, [2019] S.C.C.A. No. 228).

6 This action did not proceed to trial. On December 14, 2015, the City entered into a partial settlement with Thompson Fuels, Granby, DLS, Pepper, TSSA, and HMQ (the settling defendants). Granby, DLS, Pepper, and TSSA entered into separate releases and/or dismissal orders and made payment to the City towards the partial settlement. On November 7, 2016, when the trial was set to commence, the City informed Justice Charney that it had reached a partial settlement and that the City would not proceed to trial regardless of any subsequent events.

7 The spill also led to several proceedings and orders under the *EPA*. Two remediation orders were issued by the province under s. 157 the *EPA*, one against the ***Gendrons*** and one against the City. The order against the City was upheld on review by the Director and on appeal to the Environmental Review Tribunal (the "ERT"), the Divisional Court and the Court of Appeal. The City served a s. 100.1 order on the ***Gendrons*** to recover its costs. The ***Gendrons*** appealed this order to the ERT which reduced the amount of the order. The City has registered that order on the title to the ***Gendron*** property where it remains as a priority lien against the ***Gendron***'s property.

8 There are seven motions before the Court. All parties request the dismissal of the City's action. All parties seek their costs for their motions and, with the exception of Thompson Fuels, for the action.

1. The City's Motion

9 The City seeks:

1. An order approving partial settlement of the action;

2. A bar order;

3. An order dismissing the action as against the non-settling defendants Wayne and Liana ***Gendron*** with costs, and Farmers' Mutual Insurance Company on a without costs basis;

4. An order dismissing the crossclaims by and against the non-settling defendants Wayne and Liana ***Gendron*** and Farmers' Mutual Insurance Company on a without costs basis;

5. In the alternative, an order for summary judgment of the claim against the non-settling defendants on the basis that there is no genuine issue requiring a trial between the parties;

6. In the further alternative, an order for summary judgment of the plaintiff's claim in nuisance against Wayne and Liana ***Gendron*** on the basis that nuisance is a strict liability tort for which there is no defence;

7. Costs of this motion and of the entire action, as against the non-settling defendants Wayne and Liana ***Gendron***. on a solicitor client basis.

2. Wayne and Liana Gendron's Motions

10 The ***Gendrons*** bring three motions. The first motion seeks:

1. A dismissal of the action and all cross-claims;

2. An order setting aside the order of the ERT dated June 30, 2016;

3. In the alternative, an order that the $313,005 ordered by the ERT be reduced by the amount received by the City from the co-defendants;

4. Costs of this motion and this action on a full indemnity scale against the City and/or Thompson Fuels.

11 The second ***Gendron*** motion seeks:

1. A declaration that any amount found owing by the moving parties to the plaintiff by the ERT pursuant to s.100.1, if any, is satisfied by the funds to be received by the City by the co-defendants in accordance with their settlement agreement.

12 The third ***Gendron*** motion is for its costs in the action against the City and Thompson Fuels.

3. Farmers' Mutual

13 Farmers' Mutual seeks:

1. An order for summary judgement dismissing the claim and all cross-claims as against Farmers' Mutual;
2. Costs of this motion and this Action payable by the Plaintiff on a substantial or partial indemnity scale.

4. Thompson Fuels

14 Thompson Fuels seeks:

1. A dismissal of the action and all cross-claims;
2. An order to enforce the partial settlement agreement between Thompson Fuels and the City;
3. An order to dismiss the action and crossclaims as against Thompson Fuels on a without costs basis;
4. An order to amend the Statement of Claim to reflect the partial settlement in the form attached as Exhibit "A" to the Affidavit of Connie Li sworn November 8, 2019;
5. An order directing the City to execute the standard terms and conditions of a Pierringer agreement and release in the form attached as Exhibit "B" to the Affidavit of Connie Li, sworn November 8, 2019, or in another form at this Honourable Court's discretion.

15 The second Thompson Fuels motion seeks:

1. An order to strike allegations against Thompson Fuels only in paragraph 4 (page 2) of ***Gendron***'s Fresh as Amended Notice of Motion dated October 15, 2019 seeking costs "on a full indemnity scale" for the motion and action;
2. An order to strike the allegations against Thompson Fuels only in paragraph 386 of ***Gendron***'s Factum dated November 11, 2019;
3. In the alternative, an order to adjourn ***Gendron***'s motion and an order compelling particulars of the allegations and cross-examination of ***Gendron***'s affiant, Ms. Fahreen Kurji;

B. Background

16 The hearing proceeded in court governed by COVID-19 protocols. Almost all of the material in support of these motions was provided in electronic form in addition to being filed in paper form with the Court filing office. Unfortunately, the delivery of documents to the Court in electronic form proved challenging. At the time, there were no organized systems or conventions in place to receive electronic filings. Thousands of pages of electronic documents arrived in various Word and PDF file formats with confusing filenames. The Compendium of Evidence was a 5,151 page PDF file.

17 At the Court's invitation, the parties filed an Agreed Statement of Facts. Although lengthy, it

provides a helpful chronology which I will summarize.

2008

December 18, 2008 Approximately 450 - 550 litres of heating oil escaped from the home owned by Wayne and Liana ***Gendron*** and occupied by Wayne ***Gendron***. The oil had leaked from a hole in the bottom of the end wall in the steel oil tank after a delivery of fuel from Thompson Fuels. On the day of the leak and into the early morning hours of the next day, Mr. ***Gendron*** attempted to collect the leaking oil and to clean up the oil leak.

December 19, 2008 Mr. ***Gendron*** complained to Thompson Fuels that they had not delivered all of the 700 litres of oil he had ordered. Thompson Fuels sent a technician to the ***Gendrons***' home and then contacted the TSSA.

December 22, 2008 A TSSA inspector attended the ***Gendrons***' home and completed an inspection and observed oil stains on the basement floor.

December 29, 2008 Mr. ***Gendron*** reported the spill to his insurer, Farmers' Mutual.

December 30, 2008 An independent adjuster, Pepper, and a remediation contractor, DLS, attended the ***Gendron*** property having been retained by Farmers' Mutual. Pepper discovered the oil had spread to the adjacent municipal lands. The same day the Ministry of the Environment (the MOE) issued an order under s. 157.1 of the *EPA* requiring Mr. ***Gendron*** to remediate the spill.[1]

2009

About March 24, 2009 The MOE was informed by Pepper that the ***Gendrons***' third-party liability insurance limit would soon be reached and that the ***Gendrons*** had no money complete remediation of the municipal lands.

March 27, 2009 The MOE issued a s. 157 remediation order against the City. The City retained Golder and Associates to complete the remediation of municipal lands.

April 3, 2009 City sought a review of the remediation order against it, pursuant to section 157.3 of the *EPA*.

April 9, 2009 The City appealed portions of the Director's decision reviewing the City remediation order to the ERT.

June 29, 2009 Farmers' Mutual wrote to the City providing documents and information regarding the date ***Gendron***

August 7, 20, 2009 had reported the spill to Farmers' Mutual and the amounts spent on remediation.

November 2009 The ERT granted the ***Gendrons***' motion to restrict the scope of grounds of appeal, excluding any consideration of fault and the hearing of the appeal was scheduled for the spring of 2010.

2010

January 19, 2010 The City held a closed session council meeting wherein legal counsel presented options and recommendations for cost recovery.

February 2, 2010 City Council passed a resolution authorizing its legal counsel to pursue three of the five legal options presented to Council on January 19: a statutory action under s. 99 of the *EPA*; issuing a municipal order under s. 100 of the *EPA*; and an insurance claim.

In April, 2010 The City's appeal of the s. 157.3 remediation order against it proceeded before the ERT.

June 15, 2010 The City served the ***Gendrons*** with orders under s. 100.1 of the *EPA* for $471,691.44. This amount included $148,686.91 described only as "accounts". These "accounts" were not particularized or produced.

June 22, 2010 The City's legal counsel provided a draft statement of claim of the City. July 16, 2010 The ERT dismissed the City's appeal. The City appealed this decision to Divisional Court.

July 30, 2010 The ***Gendrons*** appealed the City's s. 100.1 orders to the ERT.

July 30, 2010 The City issued the Statement of Claim in this action seeking recovery of the expenses incurred in the remediation.

2011

March 15, 2011 The ERT granted the ***Gendrons***' motion to adjourn the hearing of the appeal of the City's s. 100.1 orders, due, in part, to the duplicity of proceeding.

December 20, 2011 I dismissed a motion by the City for an order prohibiting ***Gendron*** from selling the house without the consent of the City.

2012

January 12, 2012 Farmers' Mutual, Pepper and DLS brought motions for summary judgment seeking to dismiss the City's action against them. On March 30, 2012, Justice MacDougall delivered reasons partially dismissing the motions for summary judgment. Justice MacDougall allowed the City's amendment to plead negligence against Farmers' Mutual. He dismissed the City's s. 99 claim against the Farmers Mutual, DLS, and Pepper and he dismissed the motions to dismiss the City's remaining claims.

March 16, 2012 The City moved before the ERT to amend its adjournment order on the basis that the house might be sold. The ERT dismissed the motion.

May 28, 2012 The Divisional Court dismissed the City's appeal of the s. 157 order against it. The City appealed the Divisional Court decision to the Court of Appeal.

February 16, 2012 The City moved before the ERT to amend its adjournment order on the basis that the house might be sold. The ERT dismissed the motion.

November 7, 2012 The ERT extended the adjournment of the ***Gendrons***' appeal of the City's s. 100.1 order.

January- March, 2013 Examinations for discovery of all parties were completed.

May 10, 2013 The Court of Appeal dismissed the City's appeal of the Divisional Court decision, upholding the ERT's dismissal of the City's appeal of the s. 157 Order.

2014

January 6, 2014 The parties attended mediation. In its mediation brief, the City stated that it incurred costs and expenses of $975,997.99 in the remediation.

July 11, 2014 Robyn Carlson, who was then City solicitor, emailed Christine Carter, re: litigation strategy to pursue civil action and s. 100.1 Order:

> *"Were you able to confirm that the City could immediately seize and sell the property after obtaining an order from the ERT? ... Then, once we have the **Gendron** Order in place and have seized and sold the property, we can continue to settle out the balance of the defendants to cover the balance."*

October 29, 30, 2014 The parties attended a pre-trial conference. In its pre-trial brief, the City repeated its claim that it incurred costs and expenses of $975,997.99.

December 1, 2014 The ***Gendrons*** wrote to RSJ Fuerst seeking a fixed trial date with the trial estimated to be 8 to 10 weeks.

December 10,12, 2014 E-mails were exchanged between Robyn Carlson and Christine Carter, re: litigation strategy to pursue partial settlement of civil action and withdrawal legal fees from s. 100.1 order against the ***Gendrons***. Ms. Carter states:

> *"The remaining defendants have now put together a settlement package of $350,000. In exchange, the City would withdraw its tribunal claim against Thompson Fuels and TSSA... The City would then pursue **Gendron** only for the balance of its claims before the Tribunal... If we are going to proceed in this fashion, I also want to make sure we have a 'clean' appeal before the Tribunal. I have proposed to Thompson Fuels that if we proceed in this fashion, I will withdraw the claim for $148,000 in legal fees from the Tribunal and will not put the additional invoices of approximately $89,000 before the Tribunal. Thompson Fuels and the remaining defendants will agree that their $350,000 contribution covered the $148,000 plus the $89,000 plus some interest and costs in the civil proceeding. They will also agree that the remaining $322,000 of 'clean' invoices remain unpaid"*.
>
> In her response, Ms. Carlson states:
>
> *"If the City is successful before the ERT and is able to register a writ of execution against the **Gendron** property, and a subsequent judgement debtor examination confirms that the **Gendron**'s have a least $200,000 in equity in the house, the City would be able to settle with the defendants to the civil action for as little as $365,000..."*

December 22, 2014 The ERT heard a motion for a further adjournment of the s. 100.1 appeal brought by the ***Gendrons***. The motion was granted for reasons released on February 12, 2015.

2015

July 20, 2015 The parties attended a second pre-trial conference. The City's pre-trial brief again indicated that City had incurred $975,997.99.

September 8, 2015 The ***Gendrons*** wrote to the ERT to provide a status update of the action, that the parties were waiting on RSJ Fuerst to schedule a trial date.

September 24, 2015 The City advised the ERT that the civil action was tentatively settled with some defendants, who would pay some of the City's invoices, and that the City would withdraw its civil action against the ***Gendrons*** if the appeal of the s.100.1 hearing proceeded.

October 9, 2015 The ERT granted the City's request to have the hearing heard and listed the appeal's hearing for February 22, 2016.

December 1, 2015 The ***Gendrons*** served the Affidavit of Fahreen Kurji in support of their motion to adjourn the s. 100.1 appeal hearing. Ms. Kurji stated the following at paragraph 71:

> *"I spoke with counsel for Thompson Fuels on September 28, 2015. At that time, he was unaware of any change or movement in the settlement negotiations since the pre-trial, contrary to the City's assertion there was tentative settlement, or even settlement discussions."*

December 8, 2015 The City held a meeting with the settling defendants to discuss settlement.

December 10, 2015 E-mails were exchanged between the City and the settling defendants re: due date of City's ERT motion material. Thompson Fuels sent the wording of an indemnification provision from a standard Pierringer agreement and stated that the settling defendants required finality and certainty in any partial settlement:

> *"The plaintiff agrees to indemnify the Settling Defendants and to hold the Settling Defendants harmless in respect of any crossclaims, any other proceeding or any other claim whatsoever arising from the issues and allegations in the Action (including any claims for costs)."*

December 11, 2015 Thompson Fuels wrote to the City that it could not confirm a number for the collective offer yet. Thompson Fuels stated that the settling defendants required the City to enter into a standard Pierringer agreement with indemnification.

December 14, 2015 In an e-mail exchange between the City and the settling defendants, the terms and conditions of the partial settlement offer were described as follows:

a) *The settling defendants pay $325,000 all-in;*
b) *The City and Thompson Fuels agree to waive their cost orders from the summary judgement motion;*
c) *The City and settling defendants agree to discontinue any crossclaims against each other and enter into a Pierringer agreement on mutually agreed terms and conditions;*
d) *The City agrees to dismiss its action against the settling defendants and execute a release on mutually agreed terms and conditions;*
e) *The City will make best effort to commence the ERT hearing as scheduled for the third week of February 2016 or as soon as reasonable thereafter;*
f) *The City will make best efforts to settle its remaining claims in the civil action;*

g) *The City and settling defendants agree to maintain confidentiality of the terms and conditions of the Pierringer agreement, except as required by law or by the ERT; and*

h) *The agreement becomes effective upon commencement of the first day of the ERT hearing*.

December 14, 2015 The City accepted the offer by email, stating their understanding:

> *We have discussed [t]he Pierringer agreement referred to in (c) below and agree that the City will not be responsible for any judgment the **Gendrons** may obtain in the **Gendron** action against any of the settling defendants*.
>
> *With respect to (f) below, the City will make best efforts to settle its claim and all crossclaims by and against the non-settling defendants on a without costs basis and will approach Justice McKelvey and/or SR Justice Fuerst to assist in this regard if required and the settling defendants will participate in such an effort if required;*
>
> *The settling defendants will support the City's effort to have the ERT matter heard in February 2016 as currently scheduled*.

December 14, 2015 The City delivered the Affidavit of Robyn Carlson in response to the ***Gendrons***' motion to adjourn the s. 100.1 appeal hearing. It included the following description of the partial settlement:

> *The settlement provides that the settling defendants are contributing to some but not all of the invoices, as well as legal fees, pre-judgement interest and costs;*
>
> *If the hearing proceeds, the City will only be seeking from the appellants recovery of the remediation contractor Golder Associates fees of $337,729.87;*
>
> *All other invoices will be withdrawn;*
>
> *The settlement is conditional on the hearing taking place on February 22, 2016; The settlement will be void if the hearing does not take place then*.

December 16, 2015 The City served a revised s. 100.1 order in the amount of $337,473.93 against both Wayne and Liana ***Gendron***.

December 18, 2015 The ***Gendrons*** requested particulars of the settlement agreement from Thompson Fuels. Thompson Fuels stated the terms were confidential and referred the ***Gendrons*** to the City.

2016

January 5, 2016 The City delivered its factum for the ERT hearing of January 7, 2016. The City submitted it did not intend to double recover, that it worked to resolve all the issues in dispute and that it came to the Tribunal with "clean hands".

January 7, 2016 The ***Gendrons***' motion to adjourn the s. 100.1 appeal hearing was heard by the ERT. On January 8, 2016, the ERT dismissed the ***Gendrons***' motion with reasons to follow.

January 20, 2016 There is a dispute between the parties regarding the order of Justice McKelvey that was made on this date, regarding the delivery of motion material for the within motion.

January 22, 2016 The ERT delivered reasons dismissing the ***Gendrons***' motion to adjourn the s.

100.1 appeal hearing, on the basis of limited jurisdictions by s. 100.1(15) of the

EPA.

January 25, 2016 The ***Gendrons*** delivered a motion record for summary judgment, seeking a dismissal of the claims and crossclaims, seeking costs on a substantial indemnity basis, and alleging against the City double recovery and abuse of process.

January 27, 2016 Thompson Fuels provided the City with a draft Pierringer agreement incorporating the previously provided standard terms, urging the importance to have it completed before the hearing. The draft agreement included a standard indemnification provision and stated that the settling defendants required finality and would not agree to settle the action were they exposed to any further claims or legal costs. The draft agreement provided a breakdown of the payment from the settling defendants of $275,000 for damages and $50,000 for costs and disbursements.

February 10, 2016 The ***Gendrons*** moved to add Thompson, Granby, and the TSSA to their s. 100.1 appeal and to include the issues of double recovery and abuse of process. The City moved to strike the ***Gendrons***' Notices of Allegations.

February 11, 2016 The TSSA wrote to the City requesting their response to the draft agreement and noting that additional costs may be incurred if the agreement is not finalized before the ERT hearing, and specifically noting that the ***Gendrons*** were attempting to seek contribution and indemnity in their s. 100.1 appeal.

February 12, 2016 Thompson Fuels wrote to the City and requested that the City finalize the form of the Pierringer agreement and provide an unredacted copy to ***Gendron*** as soon as possible.

February 12, 2016 The City served its Notice of Motion for its Bar Order. It sought an order dismissing the action against the ***Gendrons*** without costs. In the alternative, the City sought an order for summary judgment against the ***Gendrons*** on the basis that there was no genuine issue requiring a trial, or on the basis that nuisance is a strict liability tort. The City did not serve the supporting affidavit.

February 12,13, 2016 The ***Gendrons*** requested the Affidavit of Robyn Carlson, referred to in the Notice of Motion.

February 19, 2016 The ERT dismissed the ***Gendrons***' motion with reasons to follow.

February 19, 2016 The ***Gendrons*** again requested immediate disclosure of the agreement. DLS and Thompson Fuels indicated that the form of the Pierringer was finalized, and suggested to the City that the ***Gendrons*** should be provided the agreement.

February 22, 2016 The ERT appeal hearing commences. At the outset of the hearing the ***Gendrons*** sought orders for:

> *The production of the agreement between the City and the settling defendants; Leave to amend the Notice of Appeal to add the following:*
>
> *The Appellants state that if the Respondents did in fact incur expenses to remediate contamination, which is not admitted but specifically denied, it had been indemnified for those expenses in a settlement of their civil action;*
>
> *The Appellants state that the order issued constitutes an abuse of statutory authority and must be set aside; and*
>
> *The Appellants state that the pursuit of costs in two different legal forums constitutes an abuse of process*.
>
> The ERT again denied the motions on the basis of limited grounds of appeal by s. 100.1(15).

February 22 - 26, 2016 The ***Gendrons***' appeal of the s.100.1 Order proceeded before the ERT.

March 4, 2016 The City responded to Thompson Fuel's email of January 27, 2016. The City wrote that it had made changes reflecting their written agreement and a boardroom discussion they had. The City removed the standard indemnification clause from the agreement. No breakdown was included in the City's draft agreement. Thompson Fuels wholly disputes the truth of the contents in this e- mail. P2342

March 7, 2016 Ms. Carter and Mr. Wallrap exchange emails regarding the dispute between the City and Thompson Fuels as to the form of the Pierringer agreement.

March 8, 2016 DLS emails the City regarding the dispute as to the terms of the partial settlement.

March 31, 2016 The City served the Affidavit of Robyn Carlson in support of its motion seeking a Bar Order. The City also served an Amended Notice of Motion, now seeking costs against ***Gendron***.

April 25, 2016 Robyn Carlson was cross-examined on her Affidavit in support of the Bar Order motion. At the lunch break, the City, for first time, provided the ***Gendrons*** with Schedules "A" and "B".

June 30, 2016 The ERT dismissed ***Gendron***'s appeal in part and ordered the City to amend its s. 100.1 Order against ***Gendron*** to demand $313,005.08. The ERT granted Liana ***Gendron***'s appeal in its entirety.

July 14, 2016 Master Brott begins hearing ***Gendron***'s and FM's motions regarding the refusals made on Ms. Carlson's cross-examination on April 25 and 26, 2016.

July 25, 2016 The ***Gendrons*** served a Notice of Appeal and Appellant's certificate requesting an appeal of the ERT decision to the Divisional Court.

November 3, 2016 The City served a revised Motion Record returnable before Justice Charney which included a revised Affidavit of Ms. Carlson sworn November 3, 2016.

November 7, 2016 Justice Charney permitted ***Gendron*** to amend his statement of claim to add a claim for $313,005.08 against Thompson Fuels for contribution and indemnity pursuant to s. 100.1(6) of the *EPA*.

November 7, 2016 The City attended before Justice Charney and advised that its action would not proceed to trial as scheduled. City asked that Justice Charney hear City's motion, which Justice Charney declined to do.

November 16, 2016 The City executed a full and final release in favour of DLS.

2017

March 13, 2017 The City executed a full and final release in favour of Pepper.

> The City brought a motion to withdraw the Affidavit of Robyn Carlson sworn March 31, 2016 and file a new Affidavit in its place. The motion was dismissed by Master Brott.

July 17, 2017 Justice Charney released his Reasons for Judgment in the ***Gendron*** action, which dismissed the ***Gendrons***' claim for contribution and indemnity under s. 100.1 as against Thompson. Both Thompson Fuels and ***Gendron*** appealed the trial decision.

August 2, 2017 Master Brott ordered the City to answer refusals and produce documents relating to the settlement. That order was appealed to the Superior Court.

November 16, 2017 Justice Charney dismissed the post-trial motions under Rule 59.06 dealing with the s. 100.1 order and partial settlement set off, among others.

2018

February 8, 12, 14, 2018 The City's appeal of Master Brott was heard by Justice Woodley.

March 23, 2018 The City added $313,005.08 to the ***Gendrons***' property tax roll as a result of his non-payment of the s.100.1 Order.

May 1, 2018 Justice Sosna dismissed the ***Gendrons***' motion for a mandatory injunction requiring the City to reverse the charge of $313,005.08. He granted an injunction ordering "That the City not take any action relating to any power of sale on the municipal property at 93 Hazel Street in Dunsford, Ontario, pending the resolution of the Divisional Court appeal."

> At the same hearing, the City brought a motion before Justice Sosna seeking "an order preventing the defendant, Wayne ***Gendron*** from taking any further steps in this action until he complies with the order of the Environmental Review Tribunal dated June 30, 2016 dated June 30, 2016 and the *Environmental Protection Act* s. 100.1 order of the City dated June 15, 2016." The motion was dismissed.

June 11, 2018 Justice Woodley delivered written reasons dismissing the City's appeal of Master Brott's Order.

August 7 and 9, 2018 The cross-examination of Robyn Carlson continued.

August 22, 2018 Justice Woodley ordered the City to pay costs for its appeal of Master Brott's Order.

September 27, 2018 The City and the ***Gendrons*** reached a settlement for the withdrawal of the ***Gendrons***' appeal to the Divisional Court, on the basis that "the order made by the ERT for payment of the sum of $313,005 is outstanding subject only to any amount set off by the Superior Court for any double recovery or as a result of abuse of process if a Superior Court Judge makes an order for set off".

October 25, 2018 City obtained a Notice of Garnishment against Forget Smith and Thompson Fuels requiring them to remit to the sheriff all monies owed by them to Wayne ***Gendron***.

2019

March 29, 2019 The City registered a tax arrears certificate on the ***Gendrons***' home, permitting it to commence public sale proceedings one year later.

April 12, 2019 The Ontario Court of Appeal released its decision in the appeals of Justice Charney's trial decision and the post-trial motions, dismissing the appeals of Thompson Fuels and ***Gendron*** except for a minor reduction in damages.

April 25, and 26, 2019 Master Brott heard the ***Gendrons*** and Farmers' Mutual's motion for productions.

The City was ordered to produce documents and information. The City was ordered to pay Farmers $7,000 in costs. Argument on the costs of ***Gendrons***' motion was deferred to August 22, 2020.

May 29, 2019 The City served the Notice of Registration of Tax Arrears Certificate to counsel for the ***Gendrons***.

July 2, 2019 ***Gendron*** brought a motion seeking production of documents previously ordered by Master Brott. It also brought a Rule 30.10 motion seeking productions of same records from settling defendant.

August 22, 2019 Master Brott ordered the City to answer the refusals and produce the documents. The documents provided under seal by Thompson Fuels and DLS were provided to the ***Gendrons***. The City was ordered to pay $5,000 in costs forthwith.

August 23, 2019 These motions were placed on the trial list for the Fall 2019 sitting.

October 15 2019 ***Gendron*** delivered a Fresh as Amended Notice of Motion seeking to set aside the ERT order and, in the alternative, to reduce the ERT order by the partial settlement amount, and also seeking full indemnity costs against the City and/or Thompson.

November 14, 2019 The Supreme Court of Canada dismissed Thompson Fuel's leave application in the ***Gendron*** action.

November 25, 2019 Master Brott released a further endorsement on costs. The City was ordered to pay a further $4,500 to the ***Gendrons*** in costs forthwith.

December 5, 2019 The parties were advised that these motions would be adjourned as a result of a shortage of judicial resources.

December 18, 2019 The ***Gendrons*** wrote to the Court seeking to have these motions heard before March 29, 2020 - the date on which the City could initiate public sale proceedings for the ***Gendrons***' house.

January 17, 22, 23, 25, and 29, 2020 The ***Gendrons*** wrote to the City seeking an agreement that the public sale would not proceed prior to the hearing of these motions

February 7, 2020 The ***Gendrons*** served a Motion Record for an urgent motion seeking an interlocutory injunction, "pursuant to s. 101 of the Courts of Justice Act, restraining the Plaintiff, the Corporation of the City of Kawartha Lakes, from commencing proceedings for a public sale of this Defendant's home".

February 14, 2020 The ***Gendrons***' urgent motion proceeded before Justice Bale.

March 6, 2020 Justice Bale granted the injunction "prohibiting the City of Kawartha Lakes from selling the ***Gendrons***' home pending final disposition of this action".

May 21, 2020 Justice Bale ordered the City to pay the ***Gendrons***' costs in the amount of $16,895.92. He described the City opposition to the ***Gendrons***' request as being "without merit" and added that "the City should not have opposed the motion".

August 7, 2020 Ashley Charby deposed an affidavit listing the unpaid costs at $26,395.92. August 13,2020 City served a reply affidavit denying this allegation.

C. The Issues

18 All parties seek to have the action and all cross-claims dismissed. Accordingly, the City's action and all cross-claims are dismissed.

19 The ***Gendrons*** seek a stay of the action due to the City failing to disclose the settlement agreement. Were the action proceeding, I would be prepared to grant this relief. However, as the action is dismissed, it is unnecessary. This will be a factor to be considered in determining costs.

20 The issues to be determined are:

1. What order, if any, is appropriate to approve of and/or enforce the settlement agreement, including any bar order?
2. Can this Court stay, set aside, or reduce the $313,005 ordered by the ERT pursuant to s.100.1, or order that it is satisfied by funds to be received by the City from the settling defendants?
3. Costs.

D. Analysis

1. What order, if any, is appropriate to approve of and/or enforce the settlement agreement, including any bar order?

21 The City's motion seeks:

1. an order approving partial settlement of the action;
2. a bar order to achieve finality for the partial settlement

22 Thompson Fuels seeks (paragraph numbers are as in the Notice of Motion):

2. an order to enforce the partial settlement agreement between Thompson Fuels and the City (the "partial settlement");
4. an order to amend the Statement of Claim to reflect the partial settlement in the form attached as Exhibit "A" to the Affidavit of Connie Li sworn November 8, 2019;
5. an order directing the City to execute the standard terms and conditions of a Pierringer agreement and release in the form attached as Exhibit "B" to the Affidavit of Connie Li, sworn November 8, 2019, or in another form at this Honourable Court's discretion.

a) The terms of the settlement agreement

23 The City acknowledges that on December 14, 2015 it accepted the settling defendants' offer to settle. However, the City submits that the terms of the partial settlement provide that the City and the settling defendants would enter into what the City calls a "Pierringer type Agreement". Because the City was no longer intending to pursue its claim against the non-settling defendants, the City's position is that it was not required to indemnify the settling defendants as required by a standard Pierringer Agreement.

24 Thompson Fuels' position is that the terms of settlement that the City accepted and agreed to on December 14, 2015 are unambiguous, including the term that "[t]he City and settling defendants agree to ... enter into a Pierringer agreement on mutually agreed terms and conditions." The City, Thompson Fuels submits, has failed to honour that term.

25 The standard terms and conditions of a Pierringer agreement are well known in civil litigation in Ontario.

> Under Pierringer Agreements (also known as BC Ferries settlements), a plaintiff settles their claim against some defendants in a multi-party dispute and discontinues the claim against the settling defendants. The plaintiff continues the action against the remaining defendants for their proportionate share of liability for the plaintiff's loss. [Citation omitted.] (Elizabeth Adjin-Tettey, Pierringer Settlement Agreements - Proceeding with Eyes Wide Open, 2021 99-1 *Canadian Bar Review* 29, 2021 CanLIIDocs 1020, at p 30.)

26 The purpose and essential terms of a Pierringer agreement were recently addressed by the Ontario Court of Appeal in *Endean v. St. Joseph's General Hospital*, *2019 ONCA 181*, *54 C.C.L.T. (4th) 183*, at para 52:

[52] This brings us to the Pierringer Order in the Hearsey Action. Named after *Pierringer v. Hoger*, 124 N.W. 2d 106, 21 Wis. 2d 182 (U.S. Wis. S.C. 1963), the purpose of a Pierringer Order is to facilitate a settlement between a plaintiff and a defendant who wishes to settle (a settling defendant), while maintaining a level playing field for the remaining (non-settling) defendant against whom the plaintiff wishes to proceed to trial: see *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, [2013] 2 S.C.R. 623, at paras. 6, 23-26. It does this by certain essential provisions:

(1) The settling defendant settles with the plaintiff;

(2) The plaintiff discontinues its claim [against] the settling defendant;

(3) The plaintiff continues its action against the non-settling [defendant] but limits its claim to the non-settling defendant's several liability (a 'bar order');

(4) The settling defendant agrees to co-operate with the plaintiff by making documents and witnesses available for the action against the non-settling defendant;

(5) The settling defendant agrees not to seek contribution and indemnity from the non-settling defendant; and

(6) The plaintiff agrees to indemnify the settling defendant against any claims over by the non-settling defendants.

Handley Estate v. DTE Industries Limited, 2018 ONCA 324, 421 D.L.R. (4th) 636, at para. 39, citing Paul M. Perell & John W. Morden, The Law of Civil Procedure in Ontario, 3d ed. (Toronto: LexisNexis Canada, 2017), at p. 762.

27 The factors relevant to the determination of whether a binding settlement agreement exists are summarized in *Betser-Zilevitch v. Nexen Inc.*, 2018 FC 735, 157 C.P.R. (4th) 1, at para 15:

[15] The parties and Court agree that considerations relating to finding a binding settlement agreement are set out in *Apotex Inc. v Allergan, Inc.*, 2016 FCA 155 [*Allergan*]. There must be an objective, mutual intention to create legal relations: *Allergan* at para 21. There must be consideration flowing in return for a promise: *Allergan* at para 25. The terms of the agreement must be objectively, sufficiently certain: *Allergan* at para 26. Courts will be reluctant to hold agreements void on the ground of uncertainty, and will rather strive to give effect to the reasonable expectations of the parties, objectively determined: *Allergan* para 28, and see *McCabe v Verge*, [1999] NJ No 272 (NLCA) at paras 17-18 [McCabe], referred to in *Allergan* at paras 22, 24, and 33. There must be a matching offer and acceptance on all terms essential to the agreement: *Allergan* at para 30.

[16] A key question then, is whether an honest, sensible business person, when objectively considering the parties' conduct, would reasonably conclude that the parties intended to be bound or not, per *Allergan* at para 32. The fact that a further document is required to formalize the agreement between parties is not an impediment to finding that an oral or written exchange constitutes a binding contract, if the terms in the exchange contain agreement on all of its essential terms: *Allergan* at para 35. Courts may use the

> subsequent conduct of the parties to shed light on whether there has been an agreement on essential terms: *Allergan* at para 39.

28 Parties to a contract have a general duty of honesty in the performance of the contract. "This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance." (*Bhasin v. Hrynew*, *2014 SCC 71*, *[2014] 3 SCR 494*, at para 73.)

29 The City's position, that it agreed with the settling defendants to enter into a "Pierringer *type* Agreement", is inconsistent with the law and unsupported by the facts of this case.

30 A "Pierringer type Agreement", in which the plaintiff does *not* agree to indemnify the settling defendant against any claims over by the non-settling defendants, does not exist. Indemnification of the settling defendants by the plaintiff is an essential provision of a Pierringer agreement.

31 Furthermore, the undisputed facts surrounding the partial settlement are inconsistent with the City's characterization of the settlement agreement.

32 The City and the settling defendants agree that there was a partial settlement. The City acknowledges that it accepted the December 14 settlement offer by email on the same day. In that email, the City did not add or delete any of the terms proposed. It simply put forth its understanding. With respect to the Pierringer agreement, the City stated only that it had discussed the Pierringer agreement and "agree[d] that the City will not be responsible for any judgment the ***Gendrons*** may obtain in the ***Gendron*** action against any of the settling defendants". Clearly, the City understood that the Pierringer agreement required indemnification. Nothing more was offered to qualify the City's position with respect to the Pierringer agreement.

33 Four days before accepting the partial settlement offer, Thompson Fuels emailed the City stating that the settling defendants required finality and certainty in any partial settlement and made the expectation of the settling defendants clear. Thompson Fuels provided the City with a standard Pierringer agreement indemnification provision, on December 10, 2015, that reads:

> "The plaintiff agrees to indemnify the Settling Defendants and to hold the Settling Defendants harmless in respect of any crossclaims, any other proceeding or any other claim whatsoever arising from the issues and allegations in the Action (including any claims for costs)."

34 What happened after the partial settlement was reached on December 14, 2015, further undermines the City's position.

35 On January 27, 2016, Thompson Fuels provided a draft Pierringer agreement to the City incorporating the previously provided standard terms, urging the importance of having it completed before the ERT hearing scheduled for February 22, 2016. The draft agreement included the standard indemnification provision. Thompson Fuels stated that the settling

defendants required finality and would not agree to settle the action were they exposed to any further claims or legal costs.

36 Prior to the ERT hearing, executed versions of the Pierringer agreement were delivered to counsel for the City.

37 Despite repeated urgent requests from the settling defendants to the City to provide the executed agreement before the ERT hearing commenced on February 22, 2016, the City did not respond until March 4, 2016, after the hearing had concluded. Counsel for the City, in her response, states:

> *As you are aware, the ERT proceedings began on February 22, 2016 and the condition in our agreement was met. Now that condition has been met and the evidence portion of the hearing is complete, I have had the opportunity to review the draft agreement you provided. Attached is a blacklined copy with the changes that reflect both our written agreement and the matters we discussed in our boardroom when you were all here. I am sending this version to Ms. Carlson for review and she may have additional comments. Once all parties are in agreement, Ms. Carlson will take the agreement to Council for approval and execution*.

38 The changes in the blacklined copy of the agreement referred to deletes the indemnification provision.

39 Relying upon the partial settlement agreement having been reached with the City, Thompson Fuels did not participate in the ERT hearing, to its detriment.

40 I make the following findings:

1. On December 14, 2015, a partial settlement was reached between the City and the settling defendants (including Thompson Fuels) that became effective on February 22, 2016. The parties agree on this.
2. The partial settlement included a term that the City and the settling defendants execute a Pierringer agreement. A Pierringer agreement, by definition, includes an indemnification provision. It is an essential provision that "(6) The plaintiff agrees to indemnify the settling defendant against any claims over by the non-settling defendants. (*Endean, supra*)". The City knew that the settling defendants expected this. The City knew the form of indemnification provision the settling defendants sought before accepting the settlement offer on December 14, 2015.
3. On December 14, 2015, the City accepted the term and agreed that the City and the settling defendants execute a Pierringer agreement that would include an indemnification provision. The City failed to do so.
4. The City, having been provided with the Pierringer agreement on January 27, 2016, is estopped from making any changes to that agreement after February 22, 2016.

5. The City failed to implement the partial settlement agreement in a timely fashion, in particular, by its refusal to execute the January 27, 2016 Pierringer agreement, and to fulfill its obligations therein.

6. The City's position on March 4, 2016, that they had agreed to a Pierringer agreement with no indemnification provisions, is irreconcilable with their acceptance of the partial settlement on December 14, 2015. There was no misunderstanding. On December 4, 2015, when it accepted the settlement offer, the City misled the settling defendants into thinking that it would be executing a Pierringer agreement, including the standard indemnification provision. The City never did so. It did not respond to repeated requests for the executed document. When it did respond, it was an "attempt to completely change the nature of the bargain between the City and the Settling Defendants" (as characterized by counsel for Thompson Fuels in his reply). The City breached its duty to the settling defendants to act in good faith. In the context of settlements negotiations, good faith absolutely critical. Unfortunately, the City failed in this regard.

41 The request for relief sought by the City at paragraph 1 of its Notice of Motion is dismissed.

42 The request for relief sought by Thompson Fuels at paragraphs 2, 4 and 5 of its Notice of Motion is granted.

b) The bar order

43 The City seeks a bar order. The City submits (with reference to the March 31, 2016 affidavit of Robin Carlson) that seeking a bar order was part of what it agreed to when it accepted the offer to settle on December 14, 2015 as part of a number of "additional conditions" it imposed. First, that the City would not be responsible for any judgment that the ***Gendrons*** may obtain in the ***Gendron*** action against any of the settling defendants. Second, if the City was unable to settle its remaining claims, the City agreed to bring a motion for a bar order to deal with those claims if required. Third, the City requested that the settling defendants support the City in its efforts to have the ERT hearing proceed if required.

44 The City's December 14, 2015 acceptance of the offer to settle did make three statements about the City's understanding (see the Agreed Statement above). The second statement was that "... the City will make best efforts to settle its claim and all crossclaims by and against the non-settling defendants on a without costs basis and will approach Justice McKelvey and/or SR Justice Fuerst to assist in this regard if required and the settling defendants will participate in such an effort if required". There is no mention of the City agreeing to bring a motion for a bar order to deal with the remaining claims of the non-settling defendants.

45 A bar order is another essential provision found in a Pierringer agreement: "(3) The plaintiff continues its action against the non-settling [defendant] but limits its claim to the non- settling defendant's several liability (a 'bar order') (*Endean, supra*)". A bar order permits the plaintiff to make only several claims against the non-settling defendants. There is no joint liability with the settling defendants. The non-settling defendants' liability is limited to the degree of liability proven

against them at trial. Such a bar order may be worded as follows:

> The Plaintiffs shall not make joint and several claims against the Non-Settling Defendants but shall restrict their claims to several claims against each of the Non-Settling Defendants such that the Plaintiffs shall be entitled to receive only those damages proven to have been caused by each of the Non-Settling Defendants. See: *Gariepy v. Shell Oil Co.*, *2002 CanLII 12911* (ON SC), at para 19; *Ontario New Home Warranty Program v. Chevron Chemical Company et al.*, *1999 CanLII 15098* (ON SC), *[1999] O.J. No. 2245* at para. 36.

46 The City's Notice of Motion states that the motion is for: "A bar order to achieve finality for the partial settlement". The grounds in the Notice of Motion, however, states: "A bar order is required to achieve finality of the partial settlement agreement *and of the action in its entirety* [emphasis added]". The City explained that it was seeking a bar order to protect the settling defendants *and* the City. The City submits that a bar order should be granted to prevent the non- settling defendants from claiming their costs on the dismissal of the action.

47 Once again, the City's position finds no support in the facts of this case or in the law. A bar order is not available to prevent a cost claim against the City.

48 The request for relief sought by the City at paragraph 2 of its Notice of Motion is dismissed.

2. Staying the ERT Order

49 When the spill occurred the ***Gendrons***' insurer assumed responsibility for remediation. When the ***Gendrons***' liability insurance limits were exhausted, the MOE ordered the City to complete the remediation of municipal lands. The City was an innocent party. However, remediation orders under s. 157 can be made without consideration of fault or responsibility. After completing the remediation, the City unsuccessfully pursued appeals of the MOE remediation order to the ERT, the Divisional Court and the Court of Appeal for policy reasons, to establish a "precedent" to prevent future orders against innocent municipalities. Even if successful, the appeals would not have resulted in the City recovering its remediation expenses.[2]

50 On June 15, 2010, the City issued orders for costs and expense pursuant to s. 100.1 of the *EPA* against the ***Gendrons***, the TSSA and Thompson Fuels in the amount of $471,691.44 "in relation to the cleanup of the spill performed by the City of Kawartha Lakes".

51 Included in the $471,691.44 amount in the order was $148,686.91 for which there was no description or details provided apart from "accounts". These "accounts" were not particularized or produced. The accounts were, in fact, the legal costs the City had incurred in pursuing its appeals of the remediation order, cost that were not recoverable under s. 100.1 which is limited to costs or expenses incurred to "prevent, eliminate or ameliorate adverse effects to the natural environment."

52 The s. 100.1 orders against the TSSA and Thompson Fuels were later withdrawn. After the original orders were served, the City received additional invoices from the remediation contractor

for $89,556.23, which, the City claims, brought their total costs for remediation to $561,247.67, excluding pre-judgment interest and costs.

53 The s. 100.1 order issued against the ***Gendrons*** demanded payment of the $471,691.44 and stated that any amount unpaid would be transferred to the tax roll after 15 days.

54 The City acknowledges that a s. 100.1 order is an order enforceable in this Court under the *EPA*.

55 On July 29 and 30, 2010, the ***Gendrons***, the TSSA, and Thompson Fuels appealed the City's s. 100.1 order to the ERT. On the same day the City issued its Statement of Claim commencing this action to recover its remediation costs including the amount claimed in the s. 100.1 order.[3]

56 On January 13, 2011, the ERT heard a preliminary motion wherein the ***Gendrons*** sought an adjournment of the ERT appeal pending the resolution of this action. The City opposed. The ERT granted the adjournment, acknowledging that there was duplicity in the proceedings:

> The result of denying the adjournment would, therefore, likely duplicate efforts in part, before the Tribunal and the Superior Court ... it makes sense for the Tribunal to give the Parties an opportunity to try to reach a full resolution of the monies at issue in this proceeding (and any related issues) through negotiation, mediation, or trial under the wider rubric of the Superior Court proceedings.

57 On February 16, 2012, the ***Gendrons*** again moved for an adjournment of the ERT appeal hearing and again the City opposed. The ERT once again granted the adjournment, holding that "proceeding immediately would likely result in unnecessary duplication and would waste adjudicative and party resources."

58 On December 20, 2011, this action came before me on a motion by the City to prevent the ***Gendrons*** from selling or encumbering their home. I dismissed the City's motion and set a timetables for the exchange of affidavits of documents, examinations for discovery, and mediation. Costs were ordered against the City.

59 On September 6, 2012, the s. 100.1 appeal again returned before the ERT. Once again the City opposed the ***Gendron***'s adjournment request. Once again the ERT granted the adjournment stating:

> The City did not file the action and then take steps to hold it in abeyance. Rather, it is proceeding with the civil action and appears only willing to cease doing so if it recovers its costs following a Tribunal hearing. In other words, the City is proceeding on two parallel tracks.
>
> ...
>
> The City's status as an innocent landowner is not a license to require the duplication of litigation processes.

60 The ERT ordered the parties to return on November 8, 2013 by conference call to provide an update on the civil action.

61 After failed mediation, Ms. Carlson wrote to the City's lawyer on July 11, 2014, looking for a way to advance the City's plan to seize and sell the ***Gendron*** home, stating:[4]

> In case anything goes sideways with the ***Gendron*** property and the order from the ERT, my suggestion is that we drop the ERT proceedings as against TSSA and MOE in exchange for them not seeking costs, then approach the ERT for a TCC Preliminary Hearing to set a date for hearing the ERT appeal against ***Gendron*** only on an expedited matter. We should try to convince the Tribunal that there is urgency, as the security could be sold.
>
> Then once we have the ***Gendron*** Order in place and have seized and sold the property, we can continue to settle out the balance of the defendants to cover the balance.

62 There was never any evidence that the ***Gendrons*** planned to sell their property.

63 Emails exchanged between Ms. Carlson and the City's lawyer on December 10 and 12, 2014 set out the City's litigation strategy. The City anticipated it could reach a settlement with the settling defendants for $350,000. Realizing that the $148,686.91 in legal costs it had claimed in the 100.1 order was not recoverable in law, the lawyer for the City determined that it had to "make sure we have a 'clean' appeal before the Tribunal". To accomplish this, the City planned to allocate the unrecoverable legal costs of $148,686.91 to the settlement and then present "the remaining $322,000 of 'clean' invoices" in the ERT appeal.

64 Ms. Carlson, responds:

> "If the City is successful before the ERT and is able to register a writ of execution against the ***Gendron*** property, and a subsequent judgement debtor examination confirms that the ***Gendron***'s have a least $200,000 in equity in the house, the City would be able to settle with the defendants to the civil action for as little as $365,000 (subject to receiving Council instruction) and meet the intent of Council Resolution of December 10, 2013: 'That the Director of Corporate Services be authorized to negotiate a settlement for the reimbursement to the City for the Thurstonia Oil Spill of an amount not less than $565,000.'"

65 The City's goal was to settle for not less than $565,000. To achieve that, it would recover 'clean invoices' from the ***Gendrons*** in the ERT appeal hearing. It could then associate invoices that were not 'clean invoices' with settlement proceeds.

66 On December 11, 2014, the City informed the ERT that it had "come to a 'settlement agreement in principle', which required the City to revoke its s. 100.1 orders against the TSSA and Thompson Fuels."

67 The ERT appeal hearing was set for the week of February 2, 2015. Once again the ***Gendrons*** brought a motion seeking an adjournment opposed by the City. In support of its position, the City filed an affidavit stating, "Once the ***Gendron*** appeal is heard the week of February 2, 2015, the settlement of the City's civil action will be finalized and will virtually come to an end." In submissions, the City stated it had reached a "tentative settlement".

68 However, there was no settlement. Under cross-examination on August 7, 2018, it was put to Ms. Carlson: "any suggestion that the civil action was settled in December of 2015 - or tentatively settled [in] 2014 would be false?", to which she answered, "yes, it's not settled".

69 The ERT granted a further adjournment, stating, "The City has shown no signs that it will hold off on its civil claim." ... "Ms. Carter clarified at the hearing of the motion that the City's action would come to an end if the City succeeds before the Tribunal. Thus, the potential for duplication remains".

70 The City continued to represent to the ERT that the matter was tentatively settled. On September 24, 2015, in a conference call with the ERT, the City undertook not to pursue the civil action if the ERT appeal proceeded, even if unsuccessful. As a result, the ERT set a date for the hearing to proceed on February 22, 2016. The ***Gendrons*** were ordered to file their submissions on December 1, 2015, with CKL's response due on December 14, 2015.

71 Prior to filing their material, the ***Gendrons*** confirmed with Thompson, one of the supposed settling defendants, that there had been no settlement of the civil action and negotiations remained ongoing. Ms. Carlson acknowledged under cross-examination that there was no settlement as of December 8, 2015.

72 On December 10, 2015 Thompson Fuels provided the City with the standard Pierringer indemnity provision.

73 On December 14, 2015 the City accepted the settling defendants offer, as discussed above. An agreement was reached. The settling defendants would pay $325,000.

74 Two days later, on December 16, 2015, the City served a revised s. 100.1 order, removing the $148,686.91 in legal invoices, and adding further invoices from its remediation contractor. The City now had a s. 100.1 order with 'clean' invoices.

75 On December 18, 2015, the ***Gendrons*** wrote to Thompson Fuels inquiring about the settlement negotiations. Thompson Fuels referred the ***Gendrons*** to the City. On December 22, 2015, the ***Gendrons*** wrote to the City asking for a copy of the settlement agreement, "as you are required to disclose."

76 The City did not respond. The ***Gendrons*** arranged an urgent conference call with Justice McKelvey to address the non-disclosure. Justice McKelvey ordered the City to file its material for the bar order, including the settlement agreement on or before February 12, 2016, ten days before the ERT hearing. On February 12, 2016, ***Gendron*** received only the Notice of Motion, no affidavit,

no agreement. At this stage, the ***Gendrons*** were unaware that no written agreement had yet been prepared.

77 On February 10, 2016, the ***Gendrons*** sought to have the ERT add the issues of double recovery and abuse of process to the hearing. The ***Gendrons*** also requested the disclosure of the terms and amount of the purported settlement, and to add Thompson and the TSSA as parties to the proceedings. The ERT declined these requests, holding that s.100.1(15) allows for only a very narrow scope of appeal.

78 The hearing proceeded as scheduled on February 22, 2016. The ***Gendrons*** did not receive disclosure of the terms of the settlement or the amount.

79 On April 25, 2016, the City disclosed to the ***Gendrons*** a summary of the total damages it claims, Schedules A and B:

"Schedule A - Invoices Paid by Settling Defendants"	$226,112.47
"Schedule B - Outstanding Invoices"	$336,056.37
Total Claim	$564,022.94

80 The ERT released its decision on June 30, 2016. Accepting the 'clean' invoices produced by the City, up to and including September 7, 2010. The ERT reduced the amount payable under the 100.1 order to $313,005.08, payable by Mr. ***Gendron*** only. This amount reflects the total of the 19 invoices that the ERT recognized.

81 These 19 invoices are included in Schedule B. Schedule B also includes the five Golder invoices that the ERT refused to recognize.

82 Schedule A includes the $148,686.91 in legal invoices that the City had included in its original 100.1 order, together with various other accounts.

83 The ***Gendrons*** submit that the execution of the s. 100.1 order should be stayed pursuant to s. 106 of the *Courts of Justice Act*. The ***Gendrons*** submit that the City has acted oppressively, vexatiously, pursued duplicitous proceedings, and committed abuses of the Court's process, which justify a stay of the execution of the s. 100.1 order. The ***Gendrons*** further submit that staying the execution of this Order will not cause an injustice to the City. In the alternative, the ***Gendrons*** seek to set-off the amount the City received in its partial settlement against the s. 100.1 order to prevent double recovery by the City. Additionally, the ***Gendrons*** ask that this action be stayed as a consequence of the City's failure to disclose the settlement.

84 The City's position is that it was not required to hold any part of its proceeding in abeyance. It did not owe ***Gendron*** a duty of good faith and therefore did not, and could not, breach it and it accurately disclosed all the terms of the agreement in a timely manner as required by law in

Ontario. Resorting to s. 106 is an impermissible collateral attack on the ERT order and the decision in this matter by Justice Sosna.

85 Section 106 of the *Courts of Justice Act* reads:

> Stay of proceedings
>
> 106 A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

86 The court's authority under s. 106 to stay the execution of a judgment was recently considered by the Court of Appeal in *Peerenboom v. Peerenboom*, *2020 ONCA 240* at para. 34

> [34] A stay of execution of a judgment may be granted in rare circumstances where the conduct of the judgment creditor is oppressive or vexatious or an abuse of process of the Court, and where the stay would not cause an injustice to the plaintiff: *1247902 Ontario Inc.*, at paras. 8, 10, citing *Gruner v. McCormack (2000), 45 C.P.C. (4th) 273* (Ont. S.C.), at para. 30, *per* Epstein J. This test for the stay of proceedings was cited with approval by this court in *Yaiguaje v. Chevron Corporation*, *2013 ONCA 758*, *370 D.L.R. (4th) 132*, at paras. 54-55, aff'd *2015 SCC 42*, *[2015] 3 S.C.R. 69*, a case involving the stay of an action for the enforcement of a foreign judgment.

87 In my view this case represents a rare circumstance in which a stay is appropriate.

88 Although the ***Gendrons*** had originally appealed the decision of the ERT to the Divisional Court, the issues of abuse of process, duplicity of proceedings or double recovery were not the subject of that appeal. The ERT stated that it had no jurisdiction under the *EPA* to rule on those issues and that they should be addressed by this Court. The parties agreed that those issues should come before this Court and were not properly before the Divisional Court.

89 In this case the City issued a Statement of Claim to recover the same expenses from the same parties that it intended to recover by the *EPA* s. 100.1 order. There is no problem with commencing both proceedings. The problem arises when both proceedings are prosecuted in tandem with the object of maximizing recovery through both. Such a strategy is duplicitous and will include the prospect of double recovery, which is exactly what happened here.

90 Throughout the lengthy history of this matter, the City was vigorously attempting to recover against the ***Gendrons*** by executing their 100.1 order and selling the ***Gendron*** home. The City did so in a manner that was both oppressive and vexatious.

91 From the outset, when it issued the original s. 100.1 order, the City's conduct was wrong. In clear contravention of the specific requirements of s. 100.1, the City attempted to force the ***Gendrons*** to pay $148,686.91 for expenses that were clearly not recoverable; expenses that were not incurred to prevent, eliminate or ameliorate adverse effects to the natural environment.

92 The *EPA* is very clear as to what must be included in a s. 100.1 order:

> (3) An order under subsection (1) shall include,
>
> (a) a statement identifying the spill to which the order relates;
>
> (b) a description of things for which the municipality or local board incurred costs or expenses for a purpose referred to in subsection (1);
>
> (c) a detailed account of the costs and expenses incurred in doing the things; and
>
> (d) a direction that the person to whom the order is issued pay the costs and expenses to the municipality.

93 The included "accounts" for $148,686.91 obviously failed to comply to 101.1(3)(b) and (c). The City deliberately concealed the nature of the $148,686.91 by labelling them "accounts" and refusing to provide the particulars required by s. l00.1(3)(b). The City further concealed the nature of the $148,686.91 by not providing a detailed account, invoices and other supporting documentation as required by s. 100.1(l)(3)(c). Given the nature of those "accounts", I can only conclude that the failure to do so was by design and not by accident. All of the other expenses claimed were supported with the required descriptions and accounts.

94 Additionally, the City claimed $11,405.29 in staff time, labour and mileage which also were *not* incurred as required by s.100.1, and without enclosing any supporting documentation for that claimed expense, contrary to s. 100.1(l)(3)(c).

95 On July 11, 2014, Ms. Carlson told counsel for the City, "We should try to convince the Tribunal that there is urgency, as the security could be sold." There was no urgency.

96 The City opposed every adjournment request of the ***Gendrons*** to move forward with the ERT hearing so that they could sell the ***Gendron*** home.

97 As the prospect of settlement approached, which the City needed, to proceed with the ERT hearing, the City created a new order with 'clean' invoices. The City knew that it had to create a 'clean' s. 100.1 order for the appeal. The 'clean' invoices for the ERT were separated from the 'unclean' invoices for the settlement in Schedules A and B. However, there was no actual separation of invoices in the settlement agreement.

98 The City misrepresented the settlement to the ***Gendrons*** and to the ERT. Most egregiously, the City failed to fully and accurately disclose all the terms of the settlement to the ***Gendrons*** before the hearing, and then represented to the ERT that the settlement would be void if the hearing did not proceed on February 22, 2016. At the same time the City was ignoring repeated requests from the settling defendants to provide the executed Pierrenger agreement.

99 As the action did not proceed to trial and has been dismissed against all defendants, liability and damages cannot, and will not, be determined. The City's claim that its damages are $565,000

is unproven. It remains only a claim. Schedules A and B represent only the City's itemization of its claim.

100 I have carefully reviewed the calculations provided by the City and by the ***Gendrons***. I reject the City's calculations. They are premised on a finding that the City's damages were $565,000.

101 The ***Gendrons*** accept that the City has incurred certain costs. With reference to Schedule A, the ***Gendrons*** recognize $63,790.90 as valid expenses (deducting the legal expenses and items unsupported by receipts). With reference to Schedule B, the ***Gendrons*** recognize $313,005.08 as valid expenses (representing only those invoices accepted by the ERT).

	City's Claim	Rejected by Gendrons	Accepted by Gendrons
"Schedule A - Invoices Paid by Settling Defendants"	$226,112.47		
legal expenses (claimed in original s. 100.1 order)		$148,686.91 $13,634.66	
items unsupported by proper receipts			$63,790.90
items supported by proper receipts			
"Schedule B - Outstanding Invoices"	$336,056.37		
Invoices accepted by ERT			$313,005.08
Invoices not accepted by ERT		$24,905.39	
Totals	$564,022.94	$187,226.96	$376,795.98

102 The ***Gendrons*** submit that having recovered $275,000 from the settling defendants, the City's outstanding loss will be no more than $101,795.98 ($376,795.98-$275,000), exclusive of pre-judgment interest. Even allowing for pre-judgment interest, the City will certainly double recover if permitted to execute the s. 100.1 order for $313,005.08. The law in Canada is clear: double recovery is not allowed.

103 I am satisfied that the test for a stay pursuant to s. 106 of the *Courts of Justice Act* has been is met. In this case, a partial stay is appropriate. The s. 100.1 order shall be reduced to $101,795.98 plus pre-judgment interest.

104 The City submit that pre-judgment interest is properly estimated using an annual percentage rate of 3.3%. This is too high. The ***Gendrons*** submit the proper annual pre-judgment interest rate is 0.8%. This is too low. If the parties cannot agree on the proper rate and amount, I will receive further submissions.

3. Costs

105 All of the parties seek their costs. Having dismissed the action and the City's motion for a bar order, costs are properly awarded to the successful parties.

106 All of the defendants seek costs on an increased scale.

107 Farmers' Mutual seeks its costs on a partial indemnity basis until January 2013 and substantial indemnity basis after January 2013.

108 Although Justice MacDougall dismissed Farmer's Mutual motion for summary judgment in January 2013, it was only to permit the City to amend its Statement of Claim to pursue a novel pleading in negligence against Farmers' Mutual. However, this claim turned out to be wholly without merit. And, ultimately, the City chose not to pursue it. Once again, the City's position was unsupported by the law and by the facts. An insurer does not owe a duty of care to a non- insured third party. And there was nothing to be found in the evidence in this case to suggest it did. The City's novel claim against Farmer's Mutual was certain to fail from the outset.

109 Farmers' Mutual is awarded its costs payable by the City on a partial indemnity basis until October 1, 2014 (six months after Justice MacDougall's decision) and on a substantial indemnity basis after October 1, 2014.

110 Thompson Fuels seek its costs for this motion on a substantial indemnity basis. An order shall go accordingly.

111 The ***Gendrons*** seek their costs of the action and this motion on a full indemnity scale against the City and against Thompson Fuels. I am not prepared to grant costs in favour of the ***Gendrons*** against Thompson Fuels. In my view, given the difficult circumstance it found itself in due to the conduct of the City, Thompson Fuels bears no responsibility for failing to disclose the terms of the settlement to the ***Gendrons***.

112 Although unnecessary, given this determination of costs, I would have granted the relief sought by Thompson Fuels in its second motion (para 1 and 2).

113 The ***Gendrons*** are awarded their costs, payable by the City on a partial indemnity basis until February 22, 2016, and on a substantial indemnity basis after February 22, 2016. This was the date that the ERT hearing began and the date that the settlement agreement became effective. This was the critical date for the ***Gendrons*** to have been informed of the terms of the agreement, before the hearing proceeded. The failure of the City to disclose the agreement was serious enough that a stay may have been granted anytime thereafter.

114 A date may be obtained from the trial coordinator for the matter to return to return before me to address the calculation of pre-judgment interest and a timetable for submissions as to costs.

J.C. CORKERY J.

1 The MOE s. 157.1 order was subsequently amended on February 23, 2009 to include Liana ***Gendron***. Wayne and Liana ***Gendron*** were separated at the time of the oil spill. Although Wayne ***Gendron*** and Liana ***Gendron*** both owned the house, Liana ***Gendron*** never lived in it.

2 The City attempted to have the ***Gendrons***, Thompson and TSSA added as interested parties on its appeal to its ERT on the basis they were at fault for the contamination forcing the ***Gendrons*** to move before the ERT for an order limiting CKL's appeal to the issues raised under Section 157.1 which do not include fault.

3 Both the ***Gendrons*** and Farmers' Mutual point out that counsel for the City could produce no formal authorization from City Council to commence a civil action.

4 Communication between the City and its lawyer that would normally be protected by solicitor- client privilege was disclosed by the City On August 2, 2917 Master Brott, on a motion to answer refusals and produce documents, ruled that the City had waived solicitor-client privilege. Master Brott's decision was upheld by Justice Woodley on appeal.

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