Case Name:

Kawartha Lakes (City) v. Ontario (Ministry of the Environment)

IN THE MATTER OF an appeal by the Corporation of the City of Kawartha Lakes filed April 24, 2009 for a Hearing before the Environmental Review Tribunal pursuant to section 140 of the Environmental Protection Act, R.S.O. 1990, c. E.19, as amended, with respect to an Order issued by the Director, Ministry of the Environment, on April 9, 2009 under sections 157.3(5) and 157.2 of the Environmental Protection Act, regarding the prevention of further discharge of furnace oil to the natural environment from properties (roadway and shoreline of Sturgeon Lake) located at Verulam Township Lot 10 - 12, Concession 2, in the City of Kawartha Lakes, Ontario; and
IN THE MATTER OF a Motion regarding the scope of the appeal held on September 23, 2009 at 10:00 a.m. and September 24, 2009 at 1:00 p.m. in Hearing Room 3, 16th Floor, 655 Bay Street, in the City of Toronto, Ontario

[2009] O.E.R.T.D. No. 59

Case No. 09-007

Ontario Environmental Review Tribunal

Jerry V. DeMarco, Vice-Chair

November 20, 2009.

(102 paras.)

For a list of parties and excerpts in this matter, please see the Appendix.

Appearances:

Christine G. Carter - Counsel for the Appellant, Corporation of the City of Kawartha Lakes.

Nadine Harris - Counsel for the Director, Ministry of the Environment.

Martin Forget - Counsel for the Other Parties, Wayne and Liana Gendron.

Christopher Moore - Counsel for the Other Party, Doug Thomson Fuels Ltd.

John Tidball - Counsel for the Other Party, D.L. Services Inc.

William Scott - Counsel for the Other Parties, Farmers' Mutual Insurance Company and R. Ian Pepper Insurance Adjusters Inc.

Reasons for Decision

Background:

1 On April 24, 2009, pursuant to section 140 of the *Environmental Protection Act* ("*EPA*"), the Corporation of the City of Kawartha Lakes (the "City") filed a Notice of Appeal with the Environmental Review Tribunal (the "Tribunal"). The appeal relates to Director's Order Number 2585-7QESCT-1 (the "Director's Order"), which requires the City to complete clean-up and remedial work in relation to furnace oil that was spilled at 93 Hazel Street, City of Kawartha Lakes, Ontario. The City is the owner of a municipal drainage system and storm sewers located on Hazel Street. The City also owns the shoreline of Sturgeon Lake where the storm system discharges into Sturgeon Lake.

2 According to the Report prepared by Ministry of the Environment ("MOE") Provincial Officer, Cathy Curlew, several hundred litres of furnace oil leaked from the basement of Wayne and Liana Gendron's house located at 93 Hazel Street in December 2008. The Gendrons' insurance provider contracted D.L. Services Inc. ("D.L. Services") to begin remediation measures. D.L. Services commenced this work on December 30, 2008 and at that time noted that furnace oil had entered the City's municipal storm sewer system and culverts, and was being discharged into Sturgeon Lake. D.L. Services also notified the MOE that the furnace oil was leaving the Gendron property and affecting the natural environment. At that time, Ms. Curlew issued Provincial Officer's Order Number 001329 (the "First Provincial Officer's Order") to Mr. Gendron requiring the clean-up and remediation of the site. This Order was later amended to include Liana Gendron, Mr. Gendron's wife.

3 On March 20, 2009, D.L. Services and the Gendrons' insurance provider notified the MOE that the insurance coverage had reached its limit. Mr. and Mrs. Gendron advised the MOE that they did not have the financial means to complete the clean-up and restoration of the site as ordered in the First Provincial Officer's Order. The Provincial Officer's Report states that at that time, the municipal roadway and storm drains still contained furnace oil, and furnace oil continued to be present on the surface of Sturgeon Lake and on the shoreline owned by the City.

4 On March 27, 2009, pursuant to sections 157.1 and 196(1) of the *EPA*, Ms. Curlew issued Provincial Officer's Order Number 2585-7QESCT (the "Second Provincial Officer's Order") to the City requiring the following work to be done:

> 1. Within 24 hours of service of this Order, take all reasonable and necessary actions to prevent any further discharge of furnace oil to the natural environment from the properties owned by the City (roadway and shoreline of

Sturgeon Lake as more specifically identified and described in the attached Provincial Officer's Report) which has been impacted by furnace oil from the spill that occurred at 93 Hazel Street.

2. Within one (1) business day of service of this Order, retain the service of a competent and qualified consultant to undertake an assessment of the impacts to the properties owned by the City that have been impacted by the furnace oil from the spill at 93 Hazel Street and to prepare an action plan, with an implementation schedule, identifying the measures proposed to be taken to remediate the adverse effects of the furnace oil spill related to those properties and to restore the municipally owned property that has been impacted by furnace oil.
3. Within ten (10) business days of the service of this Order, provide to the undersigned Provincial Officer the Action Plan prepared by the Consultant.
4. Immediately upon receipt of the Issuing Provincial Officer's approval of the Action Plan prepared by the Consultant, implement the approved Action Plan.
5. Beginning April 3, 2009 and bi-weekly thereafter submit to the undersigned Provincial Officer in writing status reports detailing the clean-up efforts to restore the natural environment impacted by the contamination on and related to the properties owned by the City that have been impacted by the furnace oil from the spill at 93 Hazel Street and specific actions taken to comply with this Order.

5 On April 3, 2009, the City requested the Director, MOE, to review the Second Provincial Officer's Order. On April 9, 2009, Jacqueline Fuller, Director, MOE, pursuant to sections 157.2 and 157.3(5) of the *EPA*, issued Director's Order Number 2585-7QESCT-1 (the "Director's Order") to the City. The Director's Order amended the dates of compliance for Items 3 and 4, and confirmed all other Items of the Second Provincial Officer's Order.

6 On April 24, 2009, the City filed a Notice of Appeal of the Director's Order with the Tribunal. The primary relief sought by the City in its Notice of Appeal is a revocation of the Director's Order. The City raised the following four grounds of appeal:

(1) the Provincial Officer's Report contained inaccurate information;
(2) it is unfair, unreasonable, or contrary to the "polluter pays" principle to require the City to be responsible for the remediation, and the spill should have been dealt with in a more cost-efficient manner;
(3) the Second Provincial Officer's Order was issued in bad faith; and
(4) the Director's involvement in the issuance of the Second Provincial Officer's Order coloured her ability to conduct an impartial review.

7 On June 23, 2009, a Preliminary Hearing was held in Lindsay, Ontario. It was continued by teleconference on July 13, 2009. At the Preliminary Hearing, Party status was granted to Wayne and Liana Gendron; Farmer's Mutual Insurance Company and R. Ian Pepper Insurance Adjusters Inc., the Gendrons' insurer and adjuster; Doug Thomson Fuels Ltd., the fuel supplier; and D.L. Services Inc., the clean-up firm (the "Added Parties"), deadline dates were set for serving and filing documents, and provisional Motion and Hearing dates were set. At the Preliminary Hearing, Martin For-

get, Counsel for the Gendrons, indicated that he was considering filing a Motion for an adjournment of the Hearing.

8 On August 12, 2009, Mr. Forget filed a Motion requesting an adjournment. On August 25, 2009, the Motion for adjournment was heard in Toronto. During the course of the Motion hearing, the Parties agreed that the completion of the Motion hearing ought to be adjourned to September 9, 2009 because the Parties had reached agreement on other procedural issues that might render the adjournment request unnecessary. In particular, the Parties indicated that the provision of the City's witness statements prior to the completion of the Motion for adjournment might render the Motion moot if those witness statements revealed that the City was taking a narrow approach to its appeal. Mr. Forget noted that he was prepared to proceed with the scheduled Hearing on September 21, 2009 if the City took a narrow approach to its appeal but that he would continue to seek an adjournment if the City took a broad approach.

9 On September 9, 2009, the hearing of the Motion for adjournment resumed by teleconference. At that time, Mr. Forget indicated that the recently served witness statements and draft statement of facts demonstrated that the City was taking a broad approach. Therefore, he stated that he was again seeking an adjournment of the Hearing scheduled to commence on September 21, 2009. During the Motion hearing on September 9, 2009, the Parties provided additional arguments for and against an adjournment. However, during the course of the teleconference, Mr. Forget indicated that he was contemplating bringing a Motion concerning the permissible scope of the appeal. In particular, Mr. Forget took the position that some aspects of the City's case are not relevant to a proceeding regarding the appropriateness of a Director's Order. Mr. Forget indicated that he may not need to pursue his request for a lengthy adjournment if he was successful in having the Tribunal narrow the scope of the City's appeal. In light of the submissions made by Mr. Forget and other Counsel on September 9, 2009, the Tribunal determined in its Order dated September 14, 2009 that it would be more efficient for the Parties to have their dispute about the scope of the appeal determined prior to the commencement of the Hearing. A determination of that threshold issue would help the Parties understand what case they need to meet at the main Hearing. Accordingly, the Tribunal cancelled the upcoming service, filing and Hearing dates and set aside September 23, 2009 as the date to hear Mr. Forget's Motion regarding the scope of the appeal. The Tribunal also determined that Mr. Forget's Motion for adjournment of the Hearing will be continued on a date to be set, if necessary. If Mr. Forget is successful in restricting the scope of the City's appeal, then there will be no need for an adjournment. This Order deals with Mr. Forget's Motion regarding the scope of the appeal, which was heard on September 23 and 24, 2009.

Relevant Legislation:

Environmental Protection Act

10

> 145.2 Subject to sections 145.3 and 145.4, a hearing by the Tribunal under this Part shall be a new hearing and the Tribunal may confirm, alter or revoke the action of the Director that is the subject-matter of the hearing and may by order direct the Director to take such action as the Tribunal considers the Director should take in accordance with this Act and the regulations, and, for such purposes, the Tribunal may substitute its opinion for that of the Director.

157.1(1). A provincial officer may issue an order to any person who owns or who has management or control of an undertaking or property if the provincial officer reasonably believes that the requirements specified in the order are necessary or advisable so as,

(a) to prevent or reduce the risk of a discharge of a contaminant into the natural environment from the undertaking or property; or
(b) to prevent, decrease or eliminate an adverse effect that may result from, (i) the discharge of a contaminant from the undertaking, or

(ii) the presence or discharge of a contaminant in, on or under the property.

(2) The order shall,

(a) briefly describe the reasons for the order and the circumstances on which the reasons are based; and
(b) state that a review of the order may be requested in accordance with section 157.3.

(3) The order may require the person to whom it is directed to comply with any directions specified under subsection (4), within the time specified.
(4) The following directions may be specified in the order:

1. Any direction listed in subsection 18 (1).
2. A direction to secure, by means of locks, gates, fences, security guards or other means, any land, place or thing.

(5) Where the order requires a person to make a report, the report shall be made to a provincial officer.

Issue:

11 The issue in this Motion is whether the scope of the City's appeal should be restricted so as to exclude evidence and argument regarding fault for causing the spill and the reasonableness of the costs that have been incurred in remediating the spill.

12 In order to address this issue in the context of an appeal of a section 157.1 order, it is necessary to examine the scope of the City's appeal. The City argues that the conduct of others involved in the spill and remediation is relevant to its second ground of appeal, which includes arguments relating to "fairness" and the "polluter pays" principle. The other Parties submit that an inquiry into the conduct of others will have no bearing on the success of the City's arguments because the City was only named in the Director's Order in its capacity as an innocent owner. They argue that the conduct of others is irrelevant to, or beyond, the subject matter of the appeal. The other Parties have not moved to strike the City's second ground of appeal, but rather seek to restrict the scope of evidence to be heard in relation to that ground. As a result, this Order deals only with the narrow question of whether the Tribunal will hear evidence and argument on the conduct of others with respect to the spill and remediation.

Discussion and Analysis:

13 The Gendrons' Motion, which is supported by the other Added Parties and the Director, arises from a concern that the City is proposing to undertake an appeal with a wide scope. The wide scope of the City's appeal is evident in its Notice of Appeal, which includes the following:

> I. [...] that it is unfair, unreasonable and contrary to the well established principle of "polluter pays" to require the taxpayers of Kawartha Lakes to pay for a spill that occurred on private property [...]
>
> II(b). The Director erred in her finding that [it] was not unfair, unreasonable and contrary to the well established principle of "polluter pays" to require the taxpayers of Kawartha Lakes who were not responsible for this spill on private property to be responsible for the remediation when others, including the homeowners, the furnace oil delivery contractor, the homeowners' insurer, the insurance adjuster and the current contractor could and should have dealt with the spill in a more cost efficient manner.

14 The scope of the City's intended appeal is also evident from a draft statement of facts that was circulated by the City, which states:

> * Gendron did not report the spill to Thompson Fuels, TSSA or the Ministry of the Environment on December 18, 2008, contrary to the provisions of the Ontario Installation Code for Oil-Burning Equipment.
> * If immediate action had been taken, this spill could have been largely contained on private property. A dyke could have been installed to minimize the escape of the released oil to the subsurface and the catch basins plugged to minimize further migration via the stormwater management network that ultimately discharges to Sturgeon Lake, thereby preventing the furnace oil from migrating to the municipal property including the road, sewers and shoreline by this pathway. If these actions had been taken in the days immediately following the spill, the fuel oil would not have reached the lake via municipal infrastructure. The cost of remediating the spill could then have been in the range of $100,000.00, well within the homeowner's insurance limits.
> * The decision by either the Ministry of the Environment, the homeowner's contractor or its insurance adjuster to use the homeowners insurance proceeds to remediate Sturgeon Lake, which is under federal jurisdiction, prior to remediating the shoreline or road under the City's jurisdiction, was made in such a manner that the federal and provincial interests as well as private interests took precedence over the municipal interest, at the expense of the taxpayers of the City of Kawartha Lakes.
> * The City of Kawartha Lakes had no opportunity to prevent the furnace oil from making its way into Sturgeon Lake whereas Thompson Fuels, the homeowner, TSSA and the Ministry of the Environment were all aware that a spill occurred on private property and could/should have ensured that the spill remained contained on private property.

* Each of the homeowner, Thomson Fuels and/or the manufacturer of the tank bear responsibility for causing the spill.
* Each of the homeowner, Thompson Fuels, the homeowner's insurance adjuster, the Ministry of the Environment and the TSSA had an opportunity to prevent the fuel oil from reaching Sturgeon Lake, greatly reducing the remediation costs and virtually eliminating the need for an order being issued against the taxpayers of the City of Kawartha Lakes.

15 The Parties have not agreed to these allegations. Rather, they simply serve as an indication of the type of evidence the City hopes to call. Further details about the scope of the City's appeal are found in the two witness statements that it has filed as well as its intention to have summonses issued to Wayne Gendron, Brady Germyn, Anthony James and a representative of Farmer's Mutual if those persons are not called by the other Parties.

16 The Parties disagree on the proper characterization of the contested aspects of the City's intended appeal. The City states that the proposed evidence on the conduct of others will be used to make its case for "fairness", as that word is used in *724597 Ontario Ltd., Re* (1994), 13 C.E.L.R. (N.S.) 257 (Ont. Env. App. Bd.) ("*Appletex*") and *Ontario (Ministry of the Environment & Energy) v. 724597 Ontario Inc.* (1995), 26 O.R. (3d) 423 (Div. Ct.). In *Appletex*, two orderees who had involvement in a polluting enterprise were relieved from some aspects of a Director's order based on "fairness" factors. Mr. Forget states that the City's evidence is all about finding "fault" on the part of the Gendrons and the other Added Parties. Regardless of the terms used to describe the proposed contested evidence, what is clear is that the City wishes to adduce evidence about the alleged improper conduct of others (i.e., the Added Parties, and perhaps others such as the Technical Standards & Safety Authority). The question in the Motion is whether the Tribunal ought to hear that evidence.

17 According to Mr. Forget, the basis for excluding the contested evidence is that such evidence is either beyond the jurisdiction of the Tribunal to hear in an appeal of an order under section 157.1 or, if the Tribunal does have the jurisdiction to hear it, that it should not hear it as it is of no or limited probative value to the question before the Tribunal. The overall question before the Tribunal in this proceeding, it should be recalled, is whether the Director's Order against the City should be revoked.

18 Mr. Forget notes that section 145.2 sets out the jurisdiction of the Tribunal on this appeal. He states that the "subject matter" of this appeal, as used in section 145.2, is limited by the nature of the Director's Order, which was initially issued under section 157.1. He notes that section 157.1 is preventive in nature and intentionally excludes any reference to fault. He states that a person can be issued an order under this section merely by owning or managing contaminated property if the Provincial Officer believes there is a risk of further discharge. He argues that, with respect to the contamination of the City's property, section 157.1 could not apply to the Gendrons or others, unlike the situation with respect to the First Provincial Officer's Order.

19 Mr. Forget states that the *EPA* and the MOE's "Compliance Policy: Applying Abatement and Enforcement Tools, May 2007" (the "Compliance Policy") do not require the Provincial Officer, and hence the Director and the Tribunal, to consider fault under section 157.1. He, therefore, argues that questions of fault and the reasonableness of the costs incurred in recent remediation work are irrelevant to the subject matter of the appeal and outside the ambit of considerations under section 145.2.

20 He states that hearing the contested evidence would negate the purpose of section 157.1, which is to hold a party liable for remediation based on ownership or management of the contaminated property, and not on the basis of fault. Mr. Forget cites *Dibblee Construction Ltd. v. Ontario (Ministry of Environment and Energy)*, [1997] O.E.A.B. No. 36 at paras. 23-25 for the proposition that the contested evidence about the Gendrons' fault is beyond the subject matter of this appeal. He emphasizes that this appeal concerns a section 157.1 order against the City with regard to City property.

21 He also cites *RPL Recycling & Transfer Ltd. v. Ontario (Director, Ministry of the Environment)* (2006), 21 C.E.L.R. (3d) 80 at paras. 19-20 (Ont. Env. Rev. Trib.) for the proposition that there are limits on the scope of an appeal before the Tribunal:

> As per the terms of section 145.2 of the *EPA*, the Tribunal is not overly constrained in its approach to dealing with an issue. While it can simply confirm, alter or revoke the Director's action (which is how the role of the Tribunal's predecessor Environmental Appeal Board was described in the *EPA* until 1981), it can also, because of the "new hearing" provision, go beyond those options that were considered by the Director and fashion a new solution by substituting its opinion for that of the Director (see: *Uniroyal Chemical Ltd., Re* (1992), 9 C.E.L.R. (N.S.) 151 (Env. Appeal Board) at 168-170). This is in keeping with the Tribunal's role under statutes that have broad public interest mandates.
>
> However, as indicated in section 145.2, the Tribunal does not have limitless jurisdiction to deal with any environmental matter affecting the parties to a proceeding. Its jurisdiction is constrained by the subject matter of the proceeding, the underlying powers that the Director may exercise in accordance with the Act and regulations, and the purposes of the legislation. The limits of the subject matter of a proceeding are informed by such factors as the nature of the original action of the Director, the scope of the appellant's appeal, and any procedural determinations of the Tribunal regarding the proceeding's scope. As is clear from the second half of section 145.2, within this realm, the Tribunal can clearly go beyond what the Director may have done. However, in so doing, the Tribunal's actions must still remain within the overall subject matter of a proceeding.

22 Mr. Forget states that an appellant cannot unilaterally decide that it will pursue a matter on appeal. He submits that there are limits imposed by the nature of the original action taken by the Director.

23 Mr. Forget also argues that the "fairness" case that the City intends to make does not fall within the scenarios where fairness has been considered in the past. (The Tribunal generally refers to the *Appletex* notion of fairness as the "*Appletex* factors" in this Order.) Mr. Forget states that cases such as *Appletex* and *Montague v. Ontario (Ministry of the Environment)* (2005), 12 C.E.L.R. (3d) 271 (Ont. Div. Ct.) looked at fairness among multiple orderees. Here, there is only one orderee. He also adds that *Appletex* was rendered at a time when the present Compliance Policy did not exist. Mr. Forget emphasizes that the Canadian Council of Ministers of the Environment "Contaminated Site Liability Report: Recommended Principles for a Consistent Approach Across Canada" (1993) prepared by the Core Group on Contaminated Site Liability (the "CCME Report") referred to

in *Appletex* has little, if any, guidance to offer in the case of a no-fault order issued to one orderee under section 157.1.

24 Mr. Forget states that section 157.1 of the *EPA* is specifically designed to be "unfair" in one sense of that word because it clearly contemplates ordering innocent owners to pay for clean-ups. He emphasizes that the Legislature turned its mind to this unfairness and attenuated, but did not eliminate, it through provisions such as sections 99 and 100.1 of the *EPA* (which do not require proof of fault or negligence). Residual unfairness to an innocent owner can come about, for example, if an owner is not successful in obtaining reimbursement from impecunious parties through available avenues such as sections 99 and 100.1. However, Mr. Forget argues that this residual unfairness is justified according to the environmental protection priority.

25 Mr. Forget states that the City cannot, in making a case according to the *Appletex* factors, ask the Tribunal to exercise its discretion so as to undermine the scheme and purpose of the legislation. In this regard, he points to the following passage from *Associated Industries Corp. v. Ontario (Ministry of the Environment)*, [2008] O.E.R.T.D. No. 57 at paras. 74-78:

> The purpose of the *EPA* "is to provide for the protection and conservation of the natural environment" (section 3(1)). The importance of the *EPA*'s purpose in guiding the use of discretionary powers was noted in *Crest Centre,* at para. 30:
>
>> In the context of the *EPA*, the Tribunal has already found that statutory decision-makers like the Tribunal and Directors have a duty to carry out their discretionary powers in a way that furthers the public interest environmental protection purpose of the applicable legislation. The Tribunal stated, in *Johnson v. Ontario (Ministry of Environment)*, [2006] O.E.R.T.D. No. 5 at para. 65:
>>
>>> The Tribunal agrees that statutory decision-makers, including the Tribunal itself, have an authority and a "duty to choose the best course of action, from the standpoint of the public interest, in order to achieve the objectives of the environmental protection legislation" (*Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, [2003] 2 S.C.R. 624 at para. 38).
>
> The above noted constraints on the exercise of discretion may be seen to differ from the approach of the former Environmental Appeal Board in considering provisions in the *EPA* where the Director "may" do something to protect the environment (e.g., issue an order, revoke an approval, etc.). For instance, in [*Appletex*], *supra,* at 289, the Board stated:
>
>> ... the Act does not actually require environmental protection in any particular case. The power to issue an order is completely discretionary. The Director has no duty to issue an order, and thus has no legal duty to ensure the protection of the environment in any particular case.

> In a similar vein to the Tribunal's findings on its role under section 145.2 in Issue #2 above, and in light of recent case law developments, the Tribunal does not accept a characterization of the Directors' and Tribunal's roles under the *EPA* as being so "completely discretionary" that the actual purpose of the statute can be undermined through the exercise of "unfettered discretion". Regardless of whether the Board's approach was appropriate at the time that the decision in [*Appletex*], *supra*, was rendered, the Tribunal recognizes that its approach must evolve to reflect advancements in the case law that provide more guidance on the exercise of discretionary statutory powers.
>
> For the reasons stated in *Crest Centre, supra,* the Tribunal finds that the statutory discretion afforded Directors and the Tribunal is constrained by the purpose of the statute in which the discretionary powers lie (see also: *RPL Recycling & Transfer Ltd.*, *supra*). This approach not only best achieves the purpose of the legislation, but also best accords with the Supreme Court of Canada's guidance on the carrying out of environmental objectives in *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, [2003] 2 S.C.R. 624 and its directives on statutory interpretation in general in *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27. Thus, the Tribunal will approach its responsibility to act in the public interest with the *EPA*'s environmental protection purpose at the forefront of its considerations.
>
> In this case, the Tribunal must determine, under section 39 of the *EPA,* whether the operation of AIC's waste management system is not in the public interest.

26 Mr. Forget states that in this case, the Tribunal must determine, under section 157.1 of the *EPA*, whether the Director's Order ought to stand in light of the wording of that section. Mr. Forget stresses that the subject matter of the appeal limits the scope of the evidence that can be brought in an appeal. He states that the Tribunal's jurisdiction here relates only to whether the Director acted appropriately under section 157.1.

27 He states that the City's position is simple: "The City did not cause the spill, so the Director's Order is unfair". He states that the purpose of section 157.1 is preventive in nature and is specifically aimed at preventing further contamination. With respect to *LeLarco Properties (Hamilton) Inc. v. Director, Ministry of Environment and Energy*, [1993] O.E.A.B. No. 50, Mr. Forget emphasizes the following passage at p. 12:

> The *Environmental Protection Act* authorizes Directors to issue orders to protect the environment to the owners of property containing waste and potential and actual sources of pollution even if those owners did not deposit the waste or operate the polluting facilities. They can be made responsible even if they did not know or even suspect that waste was being deposited or hazardous activities were being carried on.

28 Mr. Forget states that the City cannot put forward an unfairness argument, which includes an examination of the fault of others, in a manner that undermines the purpose of section 157.1, which is protecting the environment. He states that in the context of a situation where it would be unfair to both an owner and the taxpayers of Ontario, the Legislature has determined that the owner bears the

brunt. The statute, he argues, clearly provides for the owner doing the necessary environmental work.

29 Mr. Forget also notes that, in *Brander v. Ontario (Ministry of the Environment),* [2009] O.E.R.T.D. No. 18 at para. 46, the Tribunal emphasized that ownership is a basis for liability under section 157.1. He states that the implication of that case is that allegations about the conduct of others (as was apparently being raised in *Brander*) will not get an appellant very far because mere ownership is a proper basis for issuing an order under section 157.1. He states that the *EPA* does not care whether an owner is at fault. Using the City's logic, Mr. Forget argues that the Gendrons could also plead innocence with respect to the First Provincial Officer's Order and simply try to point the finger at the fuel supplier. The fuel supplier could then point the finger at the tank manufacturer, then the parts manufacturer, and so on. He says that following such a chain would result in a loss of focus on the intent of the statute, which is to protect the environment and prevent further discharge. To allow arguments about fault would force the MOE to go through the causation chain and would provide innocent owners immunity. This, he says, would run contrary to the *EPA*. He states that the City is seeking to throw out the whole environmental protection system brought in by section 157.1, as well as sections 99 and 100.1.

30 Mr. Forget states that the Environmental Appeal Board's criticism of the MOE in *Appletex* stemmed from the absence of guidance on the exercise of discretion in issuing orders. He states that *Appletex* does not stand for the proposition that the Tribunal can exercise its discretion to eliminate the inherent unfairness of the legislation when that unfairness was specifically included to reflect the priority on environmental protection. He states that there is still room for fairness arguments relating to compassion and impecuniosity in other cases, but that there is no room for the City's general unfairness argument based on fault when the *EPA* clearly contemplates this type of unfairness.

31 On behalf of the Director, Ms. Harris makes three points in support of her position that the actions of others in dealing with the spill are irrelevant. First, she states that the statutory scheme applicable to spills provides the appropriate tools to address the City's concerns and that it should not raise those concerns in this appeal. Second, she states that the Compliance Policy provides that the current owner of contaminated property should be named in an order. Third, she states that the factors mentioned in *Appletex* and related cases involve situations of individuals who are named as orderees, as opposed to corporations like the City.

32 Ms. Harris points out that section 99 of the *EPA* helps address perceived unfairness to the City by permitting the City to receive compensation through the courts. Ms. Harris points out that Part X of the *EPA* was also recently amended to provide a special short-cut for municipalities to receive compensation under section 100.1. She relies on the following description of section 100.1 from *Friends Sweets & Tandoori Restaurant v. Brampton (City)*, [2007] O.E.R.T.D. No. 61 at para. 7 (see also *Swanson v. York (Regional Municipality)*, [2009] O.E.R.T.D. No. 21 at para. 19):

> The purpose of section 100.1 of the *EPA* is to allow a municipality to issue an order for payment of reasonable costs to prevent, eliminate or ameliorate any adverse effects, or to restore the natural environment, where a pollutant has been spilled. Pursuant to the circumstances prescribed in subsection 100.1(5), a municipality may enforce payment of an order by a lien registered against real property. Otherwise, pursuant to section 153 of the *EPA*, the City may file an order with the Superior Court of Justice for enforcement of the order as if it were an

> order of the Court. Accordingly, section 100.1 provides a municipality with a summary remedy to obtain payment of its costs where a pollutant has been spilled.

33 Ms. Harris states that section 100.1 saves the City both the time and cost associated with court proceedings and ensures that the City is promptly reimbursed.

34 Ms. Harris argues that the Compliance Policy, though not binding, is nevertheless a source of guidance in issuing an order under section 157.1 and in considering appeals of such orders (see: *Karge v. Ontario (Ministry of Environment and Energy)*, [1996] O.E.A.B. No. 51 at para. 129 and *Montague, supra,* at para. 59). Ms. Harris states that the Compliance Policy (excerpts of which are attached as Appendix B to this Order) contains general guidance with respect to the issuance of orders (p. 23) and specific guidance with respect to the issuance of orders in circumstances such as those in this case (p. 25). The Compliance Policy states that the Director, in deciding whether to relieve a person from being named in an order should consider only relevant factors, including the purpose of the *EPA* (p. 23). The Compliance Policy also states that it is not the Director's role to make findings of fault or to apportion liability among orderees (p. 23). The Compliance Policy then provides that "generally", a current owner of contaminated property should not be relieved from an order on the grounds that the circumstances giving rise to the contamination were beyond the owner's control (p. 25). Ms. Harris notes that the Compliance Policy contemplates "rare circumstances where no environmental purpose would be served to name a victimized person" (e.g., an innocent owner) in an order (p. 25).

35 Ms. Harris urges the Tribunal to consider that the MOE developed the Compliance Policy in response to the *Appletex* decision and that it provides useful guidance in situations such as this one. With respect to *Appletex*, Ms. Harris points out that the Environmental Appeal Board was primarily concerned about fairness to individuals as opposed to corporations (*Appletex, supra,* at 281). She also notes that orders impose joint and several liability.

36 William Scott, Counsel for Farmers' Mutual Insurance Company and R. Ian Pepper Insurance Adjusters Inc., argues for reasonable parameters on a party's ability to make a case based on the *Appletex* factors. He states that more guidance is needed, without fettering the discretion of decision-makers. He states that the Tribunal can also decide the matter raised in this Motion narrowly on the facts of this case. In particular, he says that the Tribunal can control its own process by stating that the conduct of the Added Parties is not relevant to this appeal. However, he states that the Tribunal should take this opportunity to bring some definition to the vagueness arising from the application of the *Appletex* factors. Mr. Scott believes that there is a need for more guidance on the relevance of the *Appletex* factors in appeals such as this so that parties better understand what to expect. He asks whether an appellant should be allowed to essentially embark on a trial about the conduct of others in an effort to extricate itself from an order. He also asks where the chain of fault will lead in a case such as this. Will an appellant stop at the fuel supplier or will it seek an inquiry into the fuel tank manufacturer, the tank maintenance company, the parts supplier, the parts installer, the oil industry, etc.? Mr. Scott posits that a detailed inquiry into the conduct of others could cause the Hearing to drag on for weeks.

37 Mr. Scott states that he has sympathy for the City as an innocent victim but does not believe that the appropriate remedy is to allow the City to call evidence about the conduct of the Added Parties. He states that the pre-spill and post-spill (including pre-clean-up and post clean-up) conduct of the Added Parties is irrelevant to the basic point that the City is making. No Party disputes that the

City is an innocent victim that owns the municipal property in question. He states that requiring the MOE to exhaust all options against all possible orderees before proceeding against an owner would threaten prompt environmental clean-ups, would straight- jacket the MOE and open a Pandora's Box. He states that the opposite of an expedient process would result. He states that a civil suit-like hearing would be created before the Tribunal, without any guarantee that an actual civil suit would be avoided. He states that this Motion is simply an effort to put reasonable parameters on the appeal so that a fair hearing will take place.

38 Mr. Scott goes on to state that additional evidence on what others did does not alter the fact that everyone knows that the City did nothing wrong. On the basis of *Karge, supra,* at para. 113, he states that no remedy would flow from an inquiry into the conduct of others and that it would not be a productive use of the Tribunal's and Parties' time. He states that the City has not earned the right to go any further with respect to the conduct of the Added Parties because it has not shown how that evidence would be relevant.

39 Christopher Moore, Counsel for Doug Thomson Fuels Ltd., agrees with the other Added Parties that the City did not contribute to the spill and that knowledge of the specific conduct of others does not add to any unfairness to the City or detract from any unfairness to the City. He argues that the City is an innocent party regardless of the conduct of others. He states that this case is a different situation from one where the appellant is one of many orderees who may be partly responsible for a spill. He states that the City will be saying that the order is unfair to the City regardless of what details are provided regarding the conduct of others. He asks, therefore, why we should waste everyone's time examining that conduct when the City's status as an innocent party will remain so. He cautions that allowing the City to proceed with its intended scope of appeal here could have broad ramifications and threaten the administrative efficiency of Tribunal proceedings in general.

40 John Tidball, Counsel for D.L. Services Inc., notes that his client became involved in this case only because of the City's intended broad scope of appeal. He argues that the City is proposing a novel approach to the use of fairness factors. He acknowledges that an appellant needs a reasonable amount of latitude in its appeal, but states that such latitude is not unlimited. He argues that the City's case is framed in fairness but is really an inquiry into the conduct of others. He states the real issue here is a balance between allowing an appellant to frame its case and ensuring that a proceeding remains efficient. He states that the Tribunal has a right and duty to control its process and supports the other Added Parties' efforts to restrict the scope of the City's appeal.

41 On behalf of the City, Christine Carter states that the City is not seeking findings of fault but rather a finding of unfairness towards the City. Ms. Carter states that the current wording of section 157.1 stems from the *Environmental Enforcement Statute Law Amendment Act, 2005* ("Bill 133"), which was meant to further implement the "polluter pays" principle in Ontario. She quotes then Minister Leona Dombrowsky as stating: "We believe that if the private sector spills, they should pay for its cleanup, not the taxpayers of Ontario" (Ontario Legislative Assembly, *Official Reports of Debates (Hansard)*, 153A, June 2, 2005). She states that the City will argue at the Hearing that it is unfair to require the taxpayers of Kawartha Lakes to pay for the acts of private citizens. In response to this point about legislative intent, Ms. Harris points out that section 100.1 of the *EPA* stems directly from Bill 133 but that section 157.1, in a slightly different form, predates Bill 133.

42 The focus of the City's case is that it is unfair, according to the *Appletex* factors, for it to be required to carry out the Director's Order. Ms. Carter relies on the following specific passages of *Appletex, supra,* at 287:

> Accordingly, the Board has taken the approach in past cases of applying a set of factors based implicitly on principles of fairness in determining whether to uphold a Director's order in relation to some classes of individuals. In *P & L Tire Recycling Inc.*, the Board suggested that it would look at factors such as the extent to which the person benefitted, the degree of influence the person could exercise over the factors creating the risk, and the steps taken by the person to reduce the risk. Collectively, the latter factors relate to the issue of whether the individuals ordered to prevent or remedy a problem took reasonable care, often referred to as "due diligence", to avoid creating the problem.
>
> Whether individuals exercised due diligence depends on the degree of influence or control they could exert to prevent the harm or risk they are being ordered to address and whether they exercised that influence or control constructively. In determining this, the Board can look at many factors, including the skills and knowledge of those individuals, the standards of conduct prevalent at the time, the affordability of preventive steps, the likelihood and seriousness of the risks to the environment, the alternatives available to those individuals, the extent to which the underlying causes of the problem were within or outside their control, and the foreseeability of the risk or problem that occurred.

43 She submits that the Director did not properly turn her mind to the issue of fairness in issuing the Order. In this respect, she relies on *Appletex*, at 291:

> Where neither the Ministry nor the Director appear to have put their mind to principles of fairness, efficiency, and effectiveness to guide the exercise of discretion, the Board may attempt to enunciate and apply such principles.

44 Ms. Carter argues that the "the scope of the appellant's appeal" factor mentioned in *RPL, supra,* at para. 20, is especially important in this case. The City wants to make its case according to the *Appletex* factors, in part, by inquiring into the conduct of others. She states that it would be unfair, at this preliminary stage, for the Tribunal to make a ruling that would prevent the City from making its case. She argues that this Motion is essentially a summary judgment Motion aimed at ending the City's appeal. She states that the mere presence of the other statutory remedies mentioned by Ms. Harris does not lead to the conclusion that the City is prevented from seeking a remedy in this appeal. She states that it is not up to the Director or anyone else to state which remedies the City should pursue. She states that the City has already weighed all of its options and has determined that its present approach is the one it wishes to utilize.

45 She emphasizes that the Compliance Policy does not bind the Tribunal and that the presence of the policy does not preclude the City from making its full case as per *Montague, supra*, at para. 59. She also states that, in any event, there are real questions of interpretation arising from the Compliance Policy. She states that even if this is a novel approach to fairness, this does not preclude the City from making its case (as conceded by Mr. Tidball). She also states that Ms. Harris' emphasis on the fact that corporations have not had the benefit of avoiding responsibility through the application of the *Appletex* factors is misplaced because a municipal corporation is much different than a for-profit corporation.

46 She acknowledges that the Director has jurisdiction to order an owner to take environmental measures in situations such as this one, but states that her case rests on fairness and not on jurisdiction. She emphasizes that the Tribunal is not limited to examining the jurisdiction of the Director or the reasonableness of the Director's decision as per *Associated Industries, supra*. She states that the Tribunal should look at the evidence before it and determine the appropriate course of action.

47 With respect to *LeLarco*, Ms. Carter emphasizes the following passage, at p. 13:

> As between the taxpayers paying to clean up or prevent pollution and the owners of land paying, it is generally fairer that the landowners bear this responsibility. Nevertheless, it is clearly not fair to order an innocent landowner to deal with problems caused by others without the landowner's knowledge or consent while ignoring those who caused the problem.

48 Mr. Forget replies that the taxpayers referred to in *LeLarco* are not the taxpayers of Kawartha Lakes but the taxpayers of Ontario and that the City as owner ought to bear the burden. While this may appear unfair, he states, this is the approach set out by the *EPA*. The reason for this, he states, is that it is justifiable from an environmental protection perspective and from the point of view of naming the person who has the greatest degree of control over a given property.

49 Ms. Carter goes on to call attention to the Board's comments on "injustice" to *LeLarco* (at p. 14). She states that her approach is not novel and that *LeLarco* is an example of the Environmental Appeal Board having turned its mind to some of the same issues raised by the City here. She acknowledges that, in *LeLarco,* the Board did not do what the City wants the Tribunal to do now (i.e., vacate the Order), but it could have done so. Hence, the City should be given the chance to make its case for the Order being vacated. She acknowledges that the Hearing will be longer if the City is permitted to proceed according to a wide scope, but disagrees with Mr. Scott on how much longer the Hearing would take.

50 Ms. Carter also relies on *Montague,* at para. 25, where the Divisional Court (citing *Appletex*) noted:

> First, the Tribunal determines the issue of jurisdiction, which is whether or not an order *can* be made against a party. If it determines that it has jurisdiction to make an order, the next stage is to determine whether it *should* make an order. In exercising its discretion, the Tribunal is entitled to consider issues of fairness.

51 She submits that, even if this case differs from *Appletex* and *Montague* (which had multiple orderees), there is sufficient reason to allow the City to show why the principles from those decisions, as applied to the facts of this case, would lead to the relief sought by the City.

52 She cautions against Mr. Scott's suggestion to try to further define fairness under *Appletex* and states that this would be a dangerous exercise. She states that limiting the types of conduct that can be examined under fairness would be difficult. She states that the City is not overreaching in putting forward its fairness case. She states that the City is not trying to impute fault and that Mr. Forget is, therefore, mischaracterizing the City's approach. She argues that the City is simply putting forward its fairness argument in a proper context, which includes reference to the involvement of others. She says the City cannot make its case in a vacuum. She states that the unfairness alleged by the City

can only be properly understood in the context of knowledge of what others did in respect of the spill. She also states that her "polluter pays" argument is superimposed on her fairness argument.

53 Ms. Carter also questions whether Mr. Forget is correct in stating that the Director's Order could only be issued against the City in regard to the City's property. However, the City is not seeking any relief respecting any other persons. The City only seeks to call evidence about the conduct of others in order to assist it in convincing the Tribunal to vacate the Director's Order against the City on fairness grounds. She states that, if the City succeeds in this appeal, then the Director will perhaps have to revisit what orders can be issued and to whom. She states that such issues can be addressed later.

54 With respect to the municipal property that is the subject of the Director's Order, Mr. Forget takes the position that the Gendrons or other Added Parties do not fall within the class of persons who can be named under section 157.1. He states that the City's "last-ditch" effort to speculate that others could be named as orderees if the City succeeds in this appeal has no basis in the legislation. He states that the City is raising the possibility of other possible orderees in an effort to show that this case is similar to *Appletex* and *Montague*, which involved multiple orderees. Ms. Harris states that the contamination that is causing an adverse impact is now on the municipal property. She believes that the only potential orderee for addressing contamination on the municipal property is the City.

55 Ms. Carter states that Mr. Forget has mischaracterized the City's intended case. She states that the City is not required to put forward its full case at this preliminary stage and that several interesting issues will arise at the Hearing itself. She relies on paragraph 64 of *Brander, supra,* in support of her proposition that it is premature to curtail the City's appeal. In that case, the Tribunal determined that it required evidence and argument on whether it could add third parties to an order. Mr. Forget states that this situation is completely different from *Brander* because here there are Added Parties who want to ensure that unnecessary evidence about their conduct is not put before the Tribunal. In *Brander*, the other possible orderees chose not to participate. In this case, the Added Parties argue that there is no need for further evidence on their conduct.

Findings:

Overview

56 For the purposes of this Motion, the Tribunal is not being asked whether the City will succeed in having the Director's Order revoked on the basis of fairness or the polluter pays principle. Rather this Motion deals with the narrower question of whether the Tribunal, in considering the City's second ground of appeal, should hear evidence and argument regarding fault for causing the spill and the reasonableness of the costs that have been incurred in remediating the spill. In order to answer this question, the Tribunal needs to know whether such evidence would be relevant to the determination of the City's appeal. The aspects of the City's appeal that are central to this Motion are those relating to "fairness" and "polluter pays". The Tribunal will first examine its statutory role in light of the *Appletex* factors and then make findings on the contested evidence in relation to the City's grounds of appeal within that larger context.

Mandate of the Tribunal

57 The Parties appear to differ on the role of the Tribunal. The City envisages a very wide role for the Tribunal, while the other Parties caution against the Tribunal embarking on a fault-based in-

quiry that ought to take place in another forum. In *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 at paras. 55-57, the Supreme Court of Canada commented on the role of the Tribunal's predecessor, the Environmental Appeal Board:

> ... a person affected by a decision of the Director is not without recourse under the Act. On the contrary, ss. 120 *et seq*. of the Act provide for the creation of an Environmental Appeal Board, whose sole function is to hear appeals from decisions of the Director. In particular, s. 122 authorizes a person to whom an order is directed to appeal to the Board within 15 days after service of the order. Sitting as a panel of three, the Board has full power to review the Director's decision and take any action it deems necessary and may substitute its own opinion for that of the Director (s. 123). It is, therefore, a *de novo* process whose purpose is to permit the Director's decision to be reviewed in light of submissions by the affected party. Furthermore, should this party not be satisfied with the outcome, he or she has a right of appeal to the Divisional Court on a question of law, and a right of appeal to the Minister on any other matter.
>
> In establishing this process, the legislature clearly intended to set up a complete procedure, independent of any right to apply to a superior court for review, in order to ensure that there would be a rapid and effective means to resolve any disputes that might arise between the Director and the persons to whom an order is directed. The decision to establish a specialized tribunal reflects the complex and technical nature of questions that might be raised regarding the nature and extent of contamination, and the appropriate action to take. In this respect, the Board plays a role that is essential if the system is to be effective, while at the same time ensuring a balance between the conflicting interests involved in environmental protection. (emphasis added)

58 There have been some changes to the *EPA* since the *Consolidated Maybrun Mines* decision (i.e., some of the references to section numbers and panel size above do not presently apply). However, the general points made by the Supreme Court with respect to the Environmental Appeal Board are still applicable today to the Tribunal. The Legislature has put in place a specialized body to determine a number of environmental disputes in a rapid and effective manner.

59 In the context of related civil proceedings, the Environmental Appeal Board reached a similar conclusion in *Re Straza* (1992), 9 C.E.L.R. (N.S.) 314 at 323:

> In my view, the intention of the legislature in creating the Environmental Appeal Board was to provide a quick and specialised process to resolve the problems of application of the *Environmental Protection Act.* If the parties wish to further debate their liability in front of the civil courts to establish the degree of responsibility of other persons not caught by the *Environmental Protection Act*, they can always do so. It is not an issue which concerns this Board.

60 One of the main roles of the Tribunal (and previously, the Board) is to provide an efficient resolution to many of the disputes relating to decisions of the Director in a manner that furthers the protection of the environment. Of course, what is considered to be a quick process will depend on

the complexity of the issues being raised as well as numerous other factors (including time set aside for negotiation or mediation).

61 In efficiently resolving disputes under the *EPA* and other statutes, what approach does the Tribunal take? As the Tribunal noted in *Associated Industries, supra*, the Tribunal conducts a new hearing in reviewing the substance of a Director's decision (whether it be an order or other type of decision). As Ms. Carter notes, the Tribunal is not required to focus only on whether the Director acted outside his or her jurisdiction (a matter which can arise, however) or whether the Director acted reasonably. Instead, the Tribunal stands in the shoes of the Director and makes a new decision based on the evidence tendered at the hearing.

Relevant Factors to be Considered in Light of the *Appletex* Decision

62 The question in this Motion is focused on what evidence would be relevant in the Tribunal's review of the Director's Order. In particular, should the City be permitted to call evidence about the conduct of others in trying to makes its case for a revocation of the Director's Order? Because much of the Parties' argument focused on the *Appletex* case before the Environmental Appeal Board and the Divisional Court, it is important to examine that case further. Of most interest to the instant case were the findings of the Board, which were upheld on appeal, regarding two individuals who invested in a bankrupt company. The decision looked at section 18 of the *EPA,* as it then read, which shares some commonalities with the present-day sections 18 and 157.1. The Board found that, based on the facts concerning the degree of control the investors exercised, the two individuals had the "requisite degree of management, charge or control" to fall within the ambit of section 18 (*Appletex, supra*, at 280). However, most importantly, the Board went on to relieve them from some aspects of the order issued against them based on a number of factors, including those set out in the CCME Report.

63 The CCME Report (excerpts of which are attached as Appendix C to this Order) is actually a report by the "Core Group on Contaminated Site Liability", which was comprised of representatives from five government ministries and departments, two environmental law organizations, a bankers group, a chemical producers group, and a petroleum group. Others participated through workshops and correspondence. The report outlines its purpose and scope (pp. 1-2) and notes that its principles were developed to provide a model for legislation and regulations (p. 3). The CCME Report does not state that it had been explicitly adopted as an expression of a policy of the Province of Ontario, though some aspects of it are consistent with policies and legislation in Ontario. For example, the first underlying principle in the CCME Report is "polluter pays" (p. 3), which has been adopted in Ontario. The Report goes on to refer to fairness (Principle 2), openness (Principle 3), beneficiary pays (Principle 4), and sustainable development (Principle 5) as the other four underlying principles. The Report also makes reference to the related problems of existing contaminated sites and pollution prevention in the context of the precautionary principle (p. 13). The *Appletex* factors draw extensively on Principle 9, which includes a list of "liability allocation factors" to be used when there is more than one responsible person involved in a contaminated site (pp. 9-10). The CCME Report notes that the factors "borrow heavily" from the Alberta *Environmental Protection and Enhancement Act* (p. 10).

64 The liability allocation factors in Principle 9 of the CCME Report were reproduced in *Appletex*, at 285-286. The Board indicated that it supported the CCME approach (at 286). It is clear that the Board found that the liability allocation factors were useful in determining the appropriate standard of care for potential responsible persons (though the Board recognized, at 287, that liability

will not always be limited to cases of a failure to exercise reasonable care). Most importantly, the Board sought guidance from the CCME Report and its own previous decisions because it felt that there was "an absence of legislative or policy guidance" on how the Director's discretion would be applied (at 284). Starting at page 292, the Board in *Appletex* looked at several "fairness factors" in determining whether it should provide relief to the investors. These factors included: (1) benefit from participation; (2) standard of care including investor negligence and foreseeability; (3) degree of influence over the underlying factors creating the risk and extent of contribution to creating the risk; (4) the steps taken to reduce the risk; and (5) other factors including the contribution of others and unjust enrichment. Generally speaking, these factors share similarities with Principles listed in the CCME Report such as Principles 9 (b), (e), (f), (h), and (j) (see: CCME Report, pp. 9-10) as well as factors listed in previous Board decisions. The analysis in *Appletex* also includes discussions of matters related to other Principles listed in the CCME Report (e.g., Principle 9(a), which relates to when a substance became present at a site).

65 Given the apparent lack of policy guidance at the time of *Appletex,* the Board identified a need to seek guidance to inform the discretion of the Director. It found the liability factors largely borrowed from Alberta's legislation and incorporated into the CCME Report to be a suitable source of guidance, coupled with the Board's own relevant case law. The Tribunal is aware that the *EPA*, though amended several times since the CCME Report, does not list liability allocation factors in the way that the Alberta legislation did in the 1990s, and does today. The *EPA* has maintained its singular environmental protection focus (section 3) and includes provisions, such as those aimed at "innocent owners", which promote environmental protection in a way that is not completely reflective of the CCME Report or the Alberta approach.

66 In *Appletex*, the Board referred to a report that was aimed at legislative and policy development at the time in order to assist it in the exercise of discretion. At the policy level, the MOE has responded to the vacuum that may have existed at the time of *Appletex*. While it can be said that some aspects of the *Appletex* factors found expression in the present Compliance Policy, it would be hard to argue that the Compliance Policy adopts the *Appletex* factors in their entirety. Most significantly, the Compliance Policy seeks to avoid situations where the application of *Appletex* factors would have the result of undermining environmental protection or forcing immediate recourse to Ontario taxpayers in order to fund environmental measures. A review of the *EPA* and the Compliance Policy demonstrates that Ontario has opted for an approach where the first priority is on environmental protection, with an emphasis on measures being carried out by polluters, beneficiaries and/or owners. The Province can also carry out measures, but the policy guidance appears to be one where other avenues should be explored first. In the present legal and policy environment, the Tribunal concludes that the reasoning of the Board in *Appletex*, at 289, regarding the optional nature of environmental measures and the availability of public funds, has little present-day relevance. The Tribunal should not vacate an order against a properly named orderee if the effect of such an action will thwart the purpose of the *EPA*.

67 The Board reached its conclusions in *Appletex* based on "fairness" factors, including those emanating from the CCME Report. The Board used the word "fairness", not in the administrative law sense, but as a description of the various factors that may be relevant in determining whether a potential orderee ought to be named. It should be noted that the *Appletex* factors are not necessarily unique to that case. They include factors discussed in previous Board cases and in other publications (such as the CCME Report). What was significant about *Appletex* was that the question of

whether the Board was entitled to consider and apply such factors was central to the case, both before the Board and before the Divisional Court.

68 The Divisional Court found that the Board did not commit an error of jurisdiction in limiting the extent of liability of the two individual investors. Similarly, the Board did not err in referring to the CCME Report, and its own prior decisions, as support for its decision to apply principles of fairness. The Board was entitled to take this course of action in exercising its discretion in deciding whether it "may" make an order.

69 Given that *Appletex* was decided approximately 15 years ago, it should come as no surprise that aspects of the decision, though relevant at the time, are now out of date. For example, as set out in *Associated Industries, supra,* at paras. 60-61, the Tribunal has recently found that the Tribunal's jurisdiction under section 145.2 of the *EPA* is not limited to an assessment of the reasonableness of the Director's decision. Similarly, in that same case, at paras. 75-76, the Tribunal found that it was no longer useful to characterize the Tribunal's discretion as complete or unfettered. The Tribunal found that its approach "must evolve to reflect advancements in the case law that provide more guidance on the exercise of discretionary statutory powers" (para. 76). As further discussed in *Oxford (County) v. Ontario (Ministry of the Environment)*, [2008] O.E.R.T.D. No. 40 at paras. 99-100, the Tribunal puts the priority on environmental protection in light of the purposes of the legislation. Secondary factors, such as some of those listed in *Appletex* or others such as financial factors (as in *Oxford (County), supra*), are just that - secondary. They are subordinate to the overarching purpose of the legislation. The consideration of secondary factors is not an excuse for jeopardizing environmental integrity. These are but two examples of how the legal landscape has changed since *Appletex*.

70 There has been at least one other significant change since *Appletex*. In addition to the legal evolution described above, the policy environment has changed. In *Appletex*, the Board took note of the "absence of legislative or policy guidance" as to how its "broad discretion will be applied". It further noted that this vacuum "results in a high degree of unpredictability and potential unfairness" (at 284). The gap identified in *Appletex* has now been partially filled by the present Compliance Policy.

71 Regardless of whether a previous policy or previous version of the Compliance Policy may have existed at the time of *Appletex* (the Parties did not provide the Tribunal with such information), the Tribunal considers that many of the issues that were raised in *Appletex* have been considered and acted upon by the MOE through the present Compliance Policy. This is not to say that the MOE's actions have raised the Compliance Policy to law. They have not. The Compliance Policy explicitly notes this at p. i (see also: *Montague, supra,* at para. 59). It is a source of guidance, but it cannot fetter the discretion of the Provincial Officer, Director or Tribunal (*Montague, supra,* at para. 59). Moreover, even within the Policy, through its use of words such as "generally", there is some room to manoeuvre. While the Compliance Policy is not a law or regulation, it nonetheless carries significant weight in the Tribunal's deliberations. It would not serve the goals of reducing unpredictability and unfairness to simply ignore the policies used by the Director, in making his or her decision, once the dispute reaches the Tribunal level.

72 In light of the present Compliance Policy, the Tribunal finds that one of the basic rationales for the development of the *Appletex* factors is not present today. A close look at the Compliance Policy demonstrates that there is no policy vacuum in regard to the issue of whether an owner should be named in an order. If there were a gap, as may still exist in other areas, the Tribunal

would be entitled to start from square one in determining which factors would be relevant to the exercise of a particular type of discretion from the standpoint of statutory interpretation. Today, with respect to an order such as the one before the Tribunal, the Tribunal should carefully consider the applicable policy and any other relevant factors in reaching a decision. In both cases, where there is a gap and where there is not, the purpose of the applicable statute and provision must be considered first in determining the relevance and priority of any factors to be considered, as correctly noted in the Compliance Policy (at p. 23). The presence of a relevant policy is not a final determinant of an appeal. It is, however, an important relevant consideration, especially when assessing the applicability of a previous decision that was subject to a different policy environment.

73 While the Tribunal finds that the *Appletex* factors are less persuasive than present *EPA*-specific policy, this is not to say that every factor listed in *Appletex* is now irrelevant. Indeed, it is clear that some aspects of the current Compliance Policy are partly compatible with the *Appletex* factors (e.g., the discussion of financial hardship on pp. 17-18, and 26 of the Policy). As well, the Tribunal can make a conscious decision not to follow a guideline if circumstances warrant (*Montague, supra,* at para. 59).

74 Accordingly, the fact that the MOE has a policy that speaks to many of the issues that can arise with respect to orders under the *EPA* does not resolve everything. Directors and the Tribunal must look at each case on its merits to determine the best course of action. The Compliance Policy comprises part of the environment in which those decisions are made. A closer look at the Compliance Policy demonstrates the degree to which it has more present-day weight than the *Appletex* factors. Recall above the reference to the fact that the Tribunal does not consider its wide jurisdiction over an order (such as the one in this case) as being synonymous with "unfettered discretion". Recent advancements in the case law cause the Tribunal to view its discretion as more structured than previously described (see: *Associated Industries, supra*). It is not difficult to see how these advancements could affect the outcome of a case. For example, in the opening paragraph of *Appletex*, the Board appears to acknowledge that a decision to relieve the two individuals from liability may result in the work not being done at all "as none of the other persons subject to this order has any financial capacity to comply" (at 260) or in the job falling to the public purse (at 289). Nowadays, given the Tribunal's findings in *Associated Industries, supra,* it is highly doubtful that the Tribunal would relieve an orderee from an order if there is jurisdiction to name that person and the environment would be compromised if they were relieved from compliance. In other words, considerations of fairness, costs, etc. are secondary to the environmental protection objective. Environmental protection is not simply an option to consider, as the implication appears to be in *Appletex* at 289, but rather the overarching goal to be accomplished.

75 In *LeLarco Properties (Hamilton) Inc. v. Director, Ministry of Environment and Energy,* [1993] O.E.A.B. No. 50, at pp. 14-17, it appears that the environmental protection objective took precedence:

> The Board does consider that an injustice has been done to LeLarco by the Ministry's failure to take actions that could have assisted LeLarco in identifying the source of this pollution and perhaps obtaining some redress, then singling LeLarco out for an order while ignoring others with equal or greater responsibility.

> [...] we feel that the Ministry's decision to single out the applicant and its principals has created an injustice, we must consider what the Board can do to redress this injustice.
>
> [...]
>
> The Board could attempt to address this injustice by refusing to uphold the Director's order. This would be inappropriate, since it would not address the environmental problem that exists. We heard evidence that the tank has been leaking and that leakage has been escalating in recent months. This cannot be allowed to continue.

76 The Board went on to uphold the Director's order, but recommended that the injustice to the owner be addressed in other ways. The Tribunal finds that the approach in *LeLarco* is more in keeping with the purpose of the *EPA* than the approach in *Appletex*.

77 As noted above, the lack of present-day utility for the *Appletex* factors in general is no reason to discard some of the key elements of those factors that are still relevant. Indeed, the MOE acknowledges in its Compliance Policy (see Appendix B to this Order) that there is still a role for secondary considerations such as financial hardship, which is one aspect of fairness (at pp. 17-18 and 26). Just as such fairness considerations may arise before the Director, so too may they arise before the Tribunal. However, in the present policy and law environment, the role for detailed *Appletex*-type inquiries is greatly diminished. The present focus is on prompt attention to environmental problems. Questions of ultimate liability, fault and other issues are generally left to arenas other than this Tribunal. Fairness can still arise, as in the Compliance Policy, at p. 26, and *Montague, supra,* at para. 50, but to the extent that *Appletex* could be used as basis for the City's proposal to embark on a detailed inquiry into fault and liability allocation, there is a strong rationale for the Tribunal declining to take such a course of action. A detailed inquiry into fault would prejudice the ability of the Tribunal (and perhaps the Provincial Officer or Director in the first instance) to deal with environmental problems in a prompt and efficient manner and would offer no corresponding benefit to the purposes of the environmental legislation.

78 Where there is no serious dispute about the propriety of the work ordered and the status of the orderee(s) as properly named parties who are capable of doing the work, the Tribunal should avoid getting into a detailed inquiry about the circumstances giving rise to the contamination in question. As Mr. Scott argues, it is difficult to know where such an inquiry would lead. Would it stop at the homeowner or go to the fuel supplier, the tank manufacturer, the parts manufacturer, etc.? The Tribunal needs to ask itself, regardless of whether there is one orderee (as here) or many, whether it will serve any useful purpose to engage in that type of inquiry if the named orderee clearly falls within the class of persons who can be named under the *EPA*. Generally speaking, it will not be a fruitful use of the parties' time to do so. This may explain why, even though Directors do not always list every possible person responsible on an order, it is rarely the case that appellants seek to spend the time and resources in a Tribunal proceeding to try to add other parties and, potentially, add other orderees (though the Tribunal has, to date, not ruled that it has such a power). When such a situation does arise, as noted by Mr. Forget with respect to *Brander, supra,* the Tribunal has pointed out that owners are liable under section 157.1 (at para. 46). The implication is that, just as it is unrealistic for a Director to postpone environmental action in the name of tracking down every possible person responsible and determining the relative contribution of each person to a problem, it is also unrealis-

tic to ask the Tribunal to embark on that type of inquiry unless it would increase the likelihood that the necessary work would be carried out.

79 At the end of the day, the *EPA* seeks to ensure that appropriate environmental measures are carried out by one or more of those who are properly named under the relevant ordering section and who have the capacity to do the work. While it may be interesting that others could have been named or that one party contributed to a problem less than others (or in the case of innocent owners, not at all), those are not really issues that are germane to the questions before the Tribunal. Those interesting issues are practically suited to resolution in another forum. Accordingly, the Tribunal finds that there is an obvious reason why many of the *Appletex* factors did not find their way into the Compliance Policy. The issuance of orders, and appeals therefrom, are not strictly speaking, meant to make final determinations of financial liability for contaminated sites. Some fairness issues, such as financial hardship, may continue to play an important role in appeals before the Tribunal but many of the other factors are better suited for consideration elsewhere. Indeed, with respect to contaminated sites, which were a focus of the CCME Report, a special regime has been developing to help address relevant issues (e.g., Part XV.1 of the *EPA*). It would be a mistake to transpose all of those considerations onto appeals arising from section 157.1.

80 The Tribunal recognizes that its current approach, as summarized in *Associated Industries, supra,* arguably puts a higher priority on environmental protection than in some previous cases such as *Appletex* and *Montague*. However, for many of the same reasons noted in *Associated Industries, supra,* the Tribunal believes that this modern approach best supports the *EPA*'s purpose. The Tribunal is aware that one of the consequences of its current approach is a diminishment of the relevance of the *Appletex* factors in cases such as this one. It should also be noted that *Appletex* factors were most useful, at the time of the decision, in assessing the standard of care of those involved in a polluting enterprise. In this case, the City's standard of care does not arise because the Director's Order is not based on management or control. As well, this is not a violation-based order. As is often the case with an "owner pay" order, fault or lack of care was not a factor in the issuance of the Director's Order. However, one factor from *Appletex* appears more applicable to the City's proposed case, namely, the contribution of others.

81 The Board in *Appletex*, at 288 and 303-304, mentioned the possibility of looking at the acts of others in some cases and appeared to make a conclusion about the relative contribution of the investors as compared to others (at 299). The Board noted, at 303, that there are some limitations of the suitability of engaging in such an inquiry. Some of those limitations are present in this case, because not all of those potentially at fault are parties to this proceeding. Regardless, the Tribunal already knows that the City did not engage in any wrongful conduct and that the spill occurred because of the acts or omissions of others.

82 This is not to say that the conduct of others will never be relevant in a Tribunal proceeding. There may be cases where the named orderees are not in a position to carry out the necessary environmental measures and that inquiring into the conduct of others may assist in achieving the purposes of the legislation. As well, if an appellant argues that he or she was not in control of an polluting undertaking and alleges that the Director mistakenly determined who was in control, it follows that the appellant can bring evidence of his or her lack of control and, after serving and filing a Notice of Allegation, can bring evidence of control by others not named in the order. Here, the Director did not mistakenly conclude that the City was responsible for the spill. Instead, the Director's Order is based on mere ownership of contaminated land (*Montague, supra*, at para. 54).

83 Despite the limited applicability of many of the *Appletex* factors to this case, other portions of the decision have not been affected by recent developments in law and policy. For example, the following general approach from *Appletex* and related cases still holds true today (as confirmed by *Montague, supra*). When hearing an appeal of an order, the Tribunal will determine whether an order can be issued to a person or persons. This step involves a determination of whether the conditions set out in the applicable section have been met (e.g., does the orderee fall within the appropriate class of persons, is there a contaminant on site, etc.). If there is jurisdiction to issue an order to a person, the Tribunal will then determine whether an order should be issued (and, if so, on what terms).

84 Many appeals involve fairly narrow inquiries. For example, an appellant may concede that there is an environmental rationale for an order and that the terms of an order are sound, but may dispute only whether it is properly within the class of persons that can be subject to an order. Such an appeal would look simply at whether there is jurisdiction to name the appellant as an orderee. In other cases, an appellant may concede that it is within the class of persons that can be subject to an order. In such a case, the substance of the debate may then focus on whether, from an environmental standpoint, an order should be issued against it or whether aspects of the order should be altered.

85 In this case, the City concedes the jurisdictional issue and focuses solely on whether the Director's Order ought to be issued against the City. Of particular relevance to this Motion is the City's argument that it would be unfair and contrary to the "polluter pays" principle to name the City in the Director's Order. Part of the City's intended argument on these grounds would involve evidence regarding the conduct of the Added Parties and perhaps others. In general terms, the City wishes to state that the conduct of others bolsters the City's case that it would be unfair to saddle the City with the obligations in the Director's Order.

86 Because the *EPA* does not require every potential orderee to be named in every instance, this aspect of the situation remains as it was at the time of *Appletex*. The Compliance Policy has not attempted to alter the situation where some potential orderees can be left off an order in some circumstances (see the use of words such as "generally", "in general" and "should" in the excerpts of the Compliance Policy found at Appendix B to this Order). The Tribunal will still be asked, from time to time, whether a particular orderee should have been named. Sometimes, an appellant will argue its case on simple jurisdictional grounds, including whether the orderee was in the class of persons that can be subject to the order in question. Other times, membership in the class of persons will be conceded (as here) but an appellant will argue that it is not appropriate for it to be named as an orderee.

87 In many ways, the Tribunal is not the ultimate decider of whether a polluter, owner, beneficiary or other responsible person "pays". Rather, more narrowly, the Tribunal is deciding whether a polluter, owner, beneficiary, or other responsible person is legally required to carry out certain steps to protect the environment (subject to appeals to the Minister or Divisional Court). Regardless of the City's success in this appeal, ultimate liability may be determined in a civil action, a court proceeding under section 99 of the *EPA*, an order (and possible appeal) under section 100.1 of the *EPA*, or through a negotiated or mediated agreement among the relevant parties. If the Tribunal were to significantly expand its role to replicate or pre-empt civil actions and other proceedings aimed at determining who will ultimately pay (i.e., liability allocation) by thoroughly examining the factors listed in Principle 9 of the CCME Report, it is doubtful that it could do so in a "quick and special-

ised process" (*Re Straza, supra,* at 323). Instead, a more detailed and time-consuming inquiry would need to take place. Moreover, there would be nothing preventing the duplication of such a process in a forum, such as the Superior Court, where jurisdiction over liability allocation is clearer.

88 It is hoped that in many cases, innocent owners (whether public or private) will be able to obtain relief in the appropriate forum. However, situations do arise where relief may be unattainable (e.g., unknown actors, insolvent entities, and persons who cannot be found) or where costs need to be incurred to obtain relief. While this is unfortunate, it is not possible to create a system where liability or fault can always be determined swiftly, before the necessary environmental steps are carried out. Rather, it is often the case that environmental action must be done promptly before everything is known about the circumstances giving rise to the problem at hand. The Tribunal notes that this environmental protection priority is also evident in other parts of the *EPA*, such as the prohibition on stays in certain circumstances under section 143. Put another way, the Tribunal finds that the present legal and policy regime in Ontario emphasizes environmental protection as the priority.

The Relevance of the Contested Evidence

89 As noted above, cases can arise where evidence about the specific conduct of an orderee and/or others will be relevant to an appeal. This case is not one of them. Viewed from the point of view of "relevance" (see: section 15(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22) or the "subject-matter" of the hearing (see: section 145.2 of the *EPA*), the Tribunal finds that it would serve no useful purpose for the Tribunal to entertain evidence about the conduct of others. The conduct of others is irrelevant to, or beyond, the subject matter of the appeal.

90 As noted above, the *Appletex* factors have limited utility in this appeal. To the extent that any of the *Appletex* factors do have relevance, nothing will be gained by having the Tribunal hear evidence on the conduct of others. As submitted by several of the Added Parties, the City's status as an innocent owner that did not cause the spill is undisputed. This means that the City can proceed with any of its arguments about what relief, if any, ought to flow from that status regardless of whether the Tribunal receives further evidence on which of the Added Parties or others is primarily responsible for the spill. In other words, knowing the exact circumstances of the spill and remediation will not cast the City in any different light. The City will be considered an innocent owner with or without an inquiry into the conduct of others. The same logic applies with respect to the City's "polluter pays" argument. The Added Parties concede that the City is not the polluter and that the spill resulted from the actions or omissions of others.

91 In reaching the conclusion that evidence on the conduct of others is irrelevant in this case, the Tribunal has carefully considered the attempts by Mr. Forget and Ms. Harris to distinguish the facts in this case from some of the facts that were present in other cases, such as *Appletex*. With respect to the issue of whether an appellant is a corporation or individual, the Tribunal notes that *Appletex* pointed out that some fairness considerations may differ as a result of this distinction. However, the Tribunal agrees with the City that this distinction does not mean that a corporation could never make a case based on fairness. For example, presumably a corporation can raise issues related to financial hardship in appropriate circumstances. Consequently, the Tribunal is not concluding that the City is prohibited from calling evidence on the conduct of others simply because the City is a corporation.

92 A more difficult question relates to the issue of the number of orderees on an order. Mr. Forget emphasizes that the investors were not the only orderees in *Appletex.* This is true. However, the

Board did not limit the requirements of the order in respect of the orderees because it was sure that other orderees had the means to carry out the necessary environmental measures. In fact, as discussed above, it was possible that limiting the investors' requirements would have resulted in the work not being done or the work being paid for by the taxpayers of Ontario. While the Tribunal acknowledges that the presence of multiple orderees distinguishes other *Appletex*- type cases from the facts in this case, the Tribunal refrains from concluding that this is the sole reason for concluding that it is not advisable to hear evidence about the conduct of others. The Tribunal is not of the view that the mere presence of multiple orderees is an adequate reason for appellants to use the Tribunal process to attempt to allocate liability amongst those who fall within the class of persons who can be ordered to carry out necessary environmental work. For example, if there were two persons who were properly subject to an order and who acknowledged the necessity of the work ordered, would the mere fact that there were two of them lead to the conclusion that a full *Appletex*-type of inquiry should take place automatically? It will be up to the Tribunal to determine, according to the circumstances of each case, whether evidence relating the *Appletex* factors will be of any use. In this case, the Tribunal finds that the absence of another orderee is not the determinative factor in deciding to restrict the scope of the City's appeal.

93 If there is an environmental and jurisdictional basis for an order, the Tribunal does not want to encourage multiple orderees to bring their liability allocation concerns to the Tribunal. Generally speaking, that exercise should occur in another forum. However, if an orderee holds the view that it was not within the class of persons that could have been ordered to do work or that there is not an adequate environmental basis for an order, then those questions should be raised before the Tribunal. Similarly, if an orderee acknowledges that there is an adequate environmental and jurisdictional basis for an order but wishes to propose different means and schedules for addressing the problem, then those questions should also be raised before the Tribunal. Similarly, an orderee may bring evidence on the conduct of others when such information will assist in achieving the purposes of the legislation (e.g., where the named orderee has limited capacity to carry out the necessary steps) or will assist in determining whether an orderee properly falls within the class of persons (e.g., owners, managers, etc.) subject to an order. If an orderee wishes to bring forward a fairness argument, as here, the Tribunal must determine whether the proposed argument falls with the subject matter of the appeal. In the circumstances of this case, the Moving Party demonstrated that there would be no utility in hearing evidence on the conduct of others because such evidence would not relate to a contested fact in issue that might arise under any *Appletex* factor that could apply to this case.

Conclusion

94 If the proposed evidence would assist the Tribunal in deciding whether the Director's Order should be revoked, then it would be relevant. In this case, the proposed evidence is not relevant to an issue that would have any effect on the Tribunal's ultimate decision regarding the proposed revocation. All Parties agree that the City was and is an innocent owner. The City can rely on its status as an innocent owner to ground any of its proposed legal arguments without the need for additional information on the conduct of others. Moreover, the proposed evidence will not bring to light any relevant information on any of the *Appletex* factors (e.g., financial hardship) that the Tribunal would consider in this type of appeal. To the extent that the proposed evidence does relate to some *Appletex* factors, the Tribunal has determined that such factors (e.g., contribution of others to the pollution problem) are not relevant to an order against an innocent owner. Similarly, the proposed evidence would not add anything to the City's "polluter pays" argument, as the Tribunal is already aware that the City is not the polluter. For all of the above reasons, the Tribunal finds that the City's

appeal should be restricted so as to exclude evidence and argument regarding fault for causing the spill and the reasonableness of the costs that have been incurred in remediating the spill.

95 With regard to Ms. Carter's argument against prematurely narrowing an appellant's case, the Tribunal notes that it will not limit an aspect of an appellant's case at a preliminary stage without assuring itself that there is a proper basis for restricting an appeal. Here, there is ample reason for the Tribunal to conclude that an inquiry into the conduct of others would serve no useful purpose. It does not serve the interests of the Parties to allow the City to bring detailed evidence that will not have any effect on the outcome of the appeal.

96 The Tribunal will allow the City time to consider its appeal in light of the above findings and to revise the scope of its appeal if necessary. The Tribunal notes that it has made no conclusions with respect to the basis for the Director's Order (aside from what has been conceded to date) and whether the City should be granted relief in these circumstances having regard to the facts and applicable law and policy. All that the Tribunal has determined is that it should not hear evidence about the conduct of others in the context of a case where it is well known that the City was named solely in its capacity as an innocent owner. The City is entitled to proceed with its appeal, including arguments relating to its status as innocent owner (recognizing, however, the limited applicability of the *Appletex* factors to the case) and to the polluter pays principle, without the proposed evidence on the conduct of others.

Order

97 The Gendrons' Motion to restrict the scope of the appeal is granted. The appeal will exclude evidence and argument regarding fault for causing the spill and the reasonableness of the costs that have been incurred in remediating the spill.

98 The Preliminary Hearing will continue on December 10, 2009 at 10:00 a.m. at 655 Bay St., 12th Floor, Hearing Room #2, in conjunction with the stay Motion that was previously scheduled for that date. Should the City wish, it may file a revised Notice of Appeal by December 3, 2009. Each Added Party shall notify the other Parties and the Tribunal by December 8, 2009 whether it wishes to continue to participate in the appeal.

99 Because the Gendrons' Motion to restrict the scope of the appeal was successful, the basis for the Gendrons' related Motion for a lengthy adjournment has been eliminated. Accordingly, the Gendrons' adjournment Motion is dismissed.

100 *Motion to Restrict Scope of Appeal Granted.*

101 *Motion to Adjourn Dismissed.*

102 *Procedural Directions Ordered.*

* * * * *

Appendix A

List of Parties

Appellant:	Corporation of the City of Kawartha Lakes
Counsel for the Appellant:	Christine G. Carter Papazian Heisey Myers Barristers & Solicitors Suite 510, 121 King Street West P.O Box 105 Toronto, ON M5H 3T9
Director:	Jacqueline Fuller Director, Section 157.3(5) *Environmental Protection Act*
Counsel for the Director:	Nadine Harris Ministry of the Attorney General Legal Services Branch, Environment 135 St. Clair Avenue West, 10th Floor Toronto, ON M4V 1P5
Other Parties:	Wayne and Liana Gendron
Counsel for the Other Parties:	Martin Forget Forget & Matthews LLP 402-214 King Street West Toronto, ON M5H 3X6
Other Party:	D.L. Services Inc.
Counsel for the Other Party:	John R. Tidball Miller Thomson LLP Barristers & Solicitors 60 Columbia Way Suite 600

Markham, ON L3R 0C9

Other Parties: Farmer's Mutual Insurance Company and R. Ian Pepper Insurance Adjusters Inc.

Counsel for the Other Parties: William Scott
McCarthy Tétrault LLP
Box 48, Suite 4700
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Toronto, ON M5K 1E6

Other Party: Doug Thompson Fuels Ltd.

Counsel for the Other Party: Christopher Moore
Genest Murray LLP
130 Adelaide Street West
Suite 700
Toronto, ON M5H 4C1

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Appendix B

Excerpts of MOE "Compliance Policy: Applying Abatement and Enforcement Tools, May 2007"

The purpose of this document is to provide guidance to ministry staff in exercising their authorities under statutes administered by the Ministry of the Environment. As this is a policy, it cannot fetter the discretion of a Ministry official exercising an authority under a statute administered by the Ministry of Environment. To understand the scope of authority a Ministry official is given under a statute administered by the Ministry of Environment, it is important to refer to the legislation. A copy of Ministry legislation can be viewed on the Province's e-laws website at http://www.e-laws.gov.on.ca/ (p. i)

1 Introduction

The Ministry of the Environment (Ministry) works to protect, restore and enhance the natural environment through tough legislation and enforcement, innovative programs and initiatives, strong

partnerships, and public engagement. The Ministry works to provide all Ontarians with safe and clean air, land and water.

The Ministry's approach to compliance and enforcement, as embodied in this Policy, seeks to safeguard the public interest by ensuring that the Ministry's response to an incident is proportionate to the severity of the incident. This Policy sets out the approach Ministry staff will use to determine the severity of an incident. For incidents that are determined to be more severe in nature, this Policy requires staff to consider a mandatory abatement response. For less severe incidents, this Policy permits staff to consider a voluntary abatement response. Generally, a mandatory abatement response is one where the law is used to compel a person to respond to an incident whereas a voluntary abatement response relies on a person's voluntary actions to respond to the incident.

At all times, staff will seek to work cooperatively and in a professional manner with the responsible person(s) to help address the impacts of a violation and to prevent its recurrence.

This approach seeks to provide enhanced environmental protection by using firm and swift action to incidents that result in or have the potential for significant health and/or environmental consequences, while allowing flexibility to address other situations.

2 Objective

The objective of the Compliance Policy is to support achievement of the Ministry's vision through the appropriate use of abatement and enforcement tools.

This Policy provides guidance in the selection of abatement and enforcement tools to address violations of Ministry legislation. It also provides direction on how to respond to environmental incidents with the potential to adversely affect human health or the natural environment, where there is no violation, and legal authority for staff to require preventive action exists.

The approach and procedures for individual programs may vary from this policy when there are specific legislative requirements or program-specific inspection protocols or procedures. (p. 1)

9.1.5 Control Documents (Orders)

P.O. orders are the most common type of control document issued by the Ministry. A P.O. Order is a mandatory abatement tool that is a legally-binding document that sets out obligations for a specific person or persons in relation to a specific operation. P.O. Orders are typically used to deal with incidents involving significant non-compliance and/or environmental or human health risks or when there is reason to believe the person involved with the non-compliance will not respond to a voluntary abatement approach.

Upon issuance of the P.O. Order, the responsible person may request that it be reviewed by a designated Director (normally the Manager of the local Ministry office). If dissatisfied with the Director's review, the responsible person may appeal the decision of the Director to the Environmental Review Tribunal ("ERT") within certain timelines.

A P.O. may also prepare a provincial officer's report and recommend to the Director that a Director's order be issued. A Director's order should be considered in cases where many responsible parties may be named in an order to deal with an incident and the extent of their contribution to the incident is difficult to determine. With respect to waste or contamination issues, Ministry legislation authorizes that only a Director's order can be issued to past responsible persons. For orders related to waste or contamination, the policies in Appendix 1 should be considered by the Director when

issuing such orders or when considering submissions made by persons named in such orders. A responsible person may appeal the Director's order to the ERT within certain timelines.

Note that not all control documents issued by the Director are subject to appeal before the ERT. For instance, provisions such as a notice issued by the Director to a responsible person under Air Pollution-Local Air Quality Regulation (O. Reg. 419/05) under the EPA cannot be appealed to the ERT.

Failure by a responsible person to comply with a control document should not generally be addressed by issuing another control document that requires compliance with the original control document. Such incidents should generally be addressed by referrals to IEB or, where such an administrative remedy is available, the issuance of an EP Order. If a responsible person requires more time to comply with a provision of a control document and the Ministry supports the reasons and purpose for the time extension, then this should be achieved by amending the original control document, or where that is impractical by issuing a new control document that sets out the abatement program to be undertaken with new deadlines - rather than requiring compliance with the original control document.

In regard to issuance of orders, financial hardship on the part of the responsible person should not be accepted as a reason for not issuing an order to respond to an incident. Financial hardship may be taken into consideration when determining the compliance schedule, and the type of requirements to be incorporated into the order. In support of a financial hardship submission, the responsible person should file the financial information specified in Guideline F-14, "Economic Analyses of Control Documents on Private Sector Enterprises and Municipal Projects" so that the ministry can undertake an economic analysis of that person's financial capacity in accordance with that Guideline.

The legislation also provides that a person who complies fully with an order shall not be prosecuted for or convicted of an offence in respect of the matter or matters dealt with in the control document that occurs during the period within which the control document is applicable. (pp. 17-18)

Appendix 1: Ministry Policies: Naming of Persons in Control Documents

Once the decision has been made under the Compliance Policy to deal with an incident through the issuance of a control document, the next determination is against whom the control document should be issued. Where a control document is to be issued in response to a violation (for instance, a P.O. violation based order), the determination is straight-forward: the control document should be issued against those persons who were responsible for committing the violation that gave rise to the incident.

Where a control document is to be issued in relation to an environmental incident that may not involve a violation, ministry legislation often authorizes issuing control documents to more than one person, such as an owner, an occupier or a person in charge, management or control of an undertaking. Under the EPA, the Director is empowered to name past owners, occupants and persons who were in charge, management or control of an undertaking, property or source of contaminant.

When a statutory decision-maker is deciding whether to relieve a person from being named in a control document or from a requirement specified in the document, the statutory decision-maker should consider and weigh only those factors and circumstances of the case which are demonstrated to be relevant, having regard to the legislative provision authorizing the issuance of the control document and the purposes of the statute under which the document is being issued. For instance, if the control document is being issued under section 18 of the EPA, the person seeking relief would

have to demonstrate that the factor or circumstance is relevant having regard to the wording of section 18 and the purposes of the EPA, which is "protection and conservation of the natural environment". Factors and circumstances which the statutory decision-maker concludes are irrelevant to either the statutory provision that authorizes the issuance of the control document or legislative purpose should be ignored.

Where a person is named in a control document, and he/she submits that his/her name ought to be removed from the document, the statutory decision-maker should only agree to the request based on a consideration of relevant factors. The named person must demonstrate, on balance of probabilities, that the purpose of the provision authorizing the issuance of the control document and the statute will be served, and not impaired, by exempting the person from the control document.

When issuing a control document to more than one person, it is not the role of the statutory decision-maker to apportion or allocate liability among parties, or make findings of "fault" or "degrees of fault". Since the legislation provides no mechanism to adjudicate such issues in relation to persons named in a control document, statutory decision-makers should generally refrain from apportioning liability among those persons. Also, any apportionment of liability in a control document would not be binding on any court, should the same incident be the subject of a civil action between some or all of the persons named in the document. Generally, those named in a control document are to be held jointly and severally liable to carry out the work specified in the document. After the control document is issued, named persons are free to negotiate matters of "fault" and apportionment of liability among themselves. Failing a settlement of such issues, they are free to take legal action against one another and have matters of apportionment of liability and "fault" adjudicated by the courts. If indeed the named persons are able to reach a settlement which includes a clear basis for allocating liability for the work specified in the document, with the consent of the statutory decision-maker and the named persons, the control document may be amended to incorporate the settlement.

In addition, the statutory decision-maker must consider provisions in the EPA, OWRA and the PA that provide some persons, such as secured creditors, trustees in bankruptcy and receivers, municipalities and fiduciaries with limited protections from orders. The legislation allows a person, such as a municipality who may have an interest in a non-municipal property: to conduct, complete or confirm environmental investigations related to the site; ensure the supply of water, sewage services, etc.; secure the property by means of locks, gates, fences etc.; or to insure the property under a contract of insurance without taking on the liability of being subject to an order. This is to encourage redevelopment of brownfield sites. The legislation does not provide any protection from prosecutions.

In addition, the authority to issue an order to specified people in relation to past contamination at a specific property after a record of site condition has been filed on the Environmental Site Registry is restricted in the EPA and the OWRA. This limitation applies to the owner that files the record of site condition and subsequent owners, as well as any person with charge, management or control of the property at the time the record of site condition was filed, or subsequent to that time. There are limitations to the protection provided to these parties by the legislation such that in some circumstances a specific order may be issued.

Policies not to be augmented

The above policies are meant to provide guidance for the issuance of control documents, and naming of persons in control documents, under the ministry's legislation as currently worded. These policies are not to be altered or changed through the consideration and application of any policies which have not been officially adopted by the ministry.

Four Common Fact Situations:

Below are four examples of common situations where a statutory decision-maker has been asked to relieve a person from the liability which may otherwise be imposed by a control document, and how they may be addressed, taking into consideration the policies outlined above. These examples are not intended to be prescriptive of how the statutory decision-maker must analyze those factors, nor are they intended to be exhaustive of all relevant or irrelevant factors. They are provided as examples only. (pp. 23-24)

2. Victimized current owners and occupants and those in charge, management and control

Generally, a current owner, occupant and those in charge, management and control of a contaminated site should not be relieved by a statutory decision-maker from liability (or taken off a control document) on the grounds that the circumstances leading to the contamination were beyond the control of that person.

In general, the current owner of the property should be named in a control document in order to ensure that:

> * any potential for adverse impacts to human health or the environment will be addressed by the owner in the event the polluting or illegal actor defaults under the control document;
>
> * the Ministry may recover costs for "work done by Ministry" under the cost recovery provisions of ministry legislation where both the polluter and the owner default under the control document;
>
> * the statutory decision-maker issuing the control document may require the owner to register a certificate on title of the property to ensure those acquiring an interest in the property have notice of the control document.

In exceptional or unusual circumstances, the statutory decision-maker may take into account the fact that a person named in a control document has been victimized when determining the timing and content of the work to be specified in the document. Also, there may be rare circumstances where no environmental purpose would be served to name a victimized person in a control document. For example, where an owner's property has been contaminated by a groundwater plume originating from a source of contamination on an adjacent property and the required cleanup must, in order to be effective, focus upon the adjacent property rather than the owner's, it may serve no environmental purpose to include the victimized owner in the control document. (p. 25)

4. Financial Hardship

Where a named person can demonstrate, on reasonable and probable grounds, that they are unable to pay and can therefore not carry out the requirements of an order, the statutory decision- maker may consider adjusting the requirements of the order so that his or her imposition does not cause

undue financial hardship. Generally, however, a statutory decision-maker should refrain from taking a person off a control document on the grounds of financial hardship or constraints. Doing so will tend to encourage other potential responsible persons to divest themselves of their assets when confronted with environmental cleanup costs, in order to render themselves financially unable to meet the requirements of a control document. This would undermine the administration of Ministry legislation. In addition, it may be necessary to name an individual despite their claims of financial hardship in order to ensure the ministry's ability to cause work to be done or to require registration on title.

Finally, experience shows that it is often extremely difficult to assess whether a person named in a control document faces undue financial hardship since all of the information is within the control of the person alleging the undue financial hardship.

Human health and environmental protection is first and foremost. The Ministry will use mandatory abatement tools such as orders and name responsible parties whenever warranted to firmly and swiftly respond to a situation or incident that has the potential for significant human health and/or environmental consequences. (p. 26)

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Appendix C

Excerpts of Canadian Council of Ministers of the Environment "Contaminated Site Liability Report: Recommended Principles for a Consistent Approach Across Canada" (1993)

Contaminated site liability is an issue causing difficulty in our attempts to achieve a sustainable environment and a sustainable economy. Contaminated sites must be properly managed, but who should pay? In some cases, the responsible person is clearly determined. In others, the responsible person or persons may be more difficult to identify or locate. Further complications result when responsible persons are unable to pay. (p. 1)

The CCME Task Group on Contaminated Site Liability came about because of pressure from a couple of sources. Firstly, environment ministries across the country are encountering this issue with increasing frequency. Secondly, certain business organizations urged CCME to lead a national exercise of resolution to reduce the unpredictabilities of liability. (p. 2)

It is important to note that the focus of the Task Group has been on the responsibility for remediation of existing contaminated sites. It is recognized that equally important is the ability to prevent future occurrences of contamination, and further work is required to address this issue. (pp. 2-3)

The following "Recommended Principles" have been developed to provide a model framework upon which individual member governments can develop legislation and regulations, but which will promote and facilitate a consistent approach to the issue of environmental liability across the country. These Recommended Principles have not been drafted in the form of legislative provisions;

rather, they are statements of the policy options adopted by the Task Group, and on the basis of which specific legislative provisions should be enacted.

The first five Recommended Principles are categorized as "Underlying Principles". They contain the general policies which should form the basis of this type of legislation. The remaining eight Recommended Principles are categorized as "Specific Principles", as they relate to specific substantive issues that must be dealt with in such legislation. The Task Group believes there is consistency between the "Underlying Principles" and the "Specific Principles", and that in the entirety the Recommended Principles provide a solid and effective framework for the drafting of legislation respecting liability for contaminated sites. (p. 3)

RECOMMENDED PRINCIPLES 1 to 5 - "UNDERLYING PRINCIPLES"

1 The principle of "polluter pays" should be paramount in framing contaminated site remediation policy and legislation.

2 In framing contaminated site remediation policy and legislation, member governments should strive to satisfy the principle of "fairness".

* This principle is recommended with the understanding that there are some stakeholders who believe this principle is more fundamental than the "polluter pays" principle.
* In designing a "process" to allocate liability, it should be possible for governments to satisfy both the principles of "polluter pays" and "fairness" by building appropriate mechanisms into the scheme so that cleanup costs are allocated fairly. (See Recommendations 6 and following.)
* The Principle of "fairness" incorporates, among other things, the concepts of certainty of process, effectiveness, efficiency, clarity, consistency, and timeliness in achieving environmental objectives.

While these concepts all relate to "process", it is also felt that "fairness" relates to substantive issues, and is associated with the principles of "polluter pays" and "beneficiary pays".

"Deep pockets", as a determinant of liability, should be rejected. Although there was broad support for this point, there were some stakeholders who did not support its rejection as a determinant of liability.

3 The contaminated site remediation process should enshrine the three concepts of "openness, accessibility, and participation".

* Accessible information and opportunity for public input are considered fundamental to the development and operation of policy and legislation related to contaminated site liability.

4 The principle of "beneficiary pays" should be supported in contaminated site remediation policy and legislation, based on the view that there should be no "unfair enrichment".

- * The meaning of this principle can be explained as follows: those who will benefit from the cleanup of a contaminated site should not be "unfairly enriched". They should contribute according to the benefit that they derive from the remediation. For example, a present owner of a contaminated site may have purchased an already-contaminated site at a significant discount; s/he should not be allowed to profit unfairly by selling the remediated site at a premium - unless of course s/he contributed to the costs of remediation in proportion to increases in the property value generated by remediation.
- * A second aspect of "beneficiary pays" is the notion that a person who benefited from the activity resulting in the contamination should share liability for its cleanup with other responsible persons. However, there was no consensus reached on defining the term beneficiary. To pursue this aspect of "beneficiary pays" would require additional time and effort.

5 Government action in establishing contaminated site remediation policy and legislation should be based on the principles of "sustainable development", integrating environmental, human health and economic concerns. (pp. 3-5)

9 A list of factors should be established for use in the liability-allocation process to allocate the liability of responsible persons depending upon the specific circumstances of their involvement, and in relation to the involvement of other responsible persons. The following list of "liability allocation factors" is suggested for use in cases where there is more than one responsible person to be considered in the allocation process. The list may not be exhaustive. Liability allocation factors:

a when the substance became present at the site;

b with respect to owners* or previous owners, including, but not limited to:

i whether the substance was present at the site when he took ownership;

ii whether the owner ought to have reasonably known of the presence of the substance when he took ownership;

iii whether the presence of the substance ought to have been discovered by the owner when he took ownership, had he taken reasonable steps to determine the existence of the contaminants at the site;

iv whether the presence of the substance was caused solely by the act or omission of an independent third person;

v the price the owner paid for the site and the relationship between that price and fair market value of the property had the substance not been present at the site at the time of purchase;

c with respect to a previous owner, whether that owner sold the property without disclosing the presence of the substance at the site to the purchaser;

d whether the person took reasonable steps to prevent the presence of the substance at the site;

e whether the person dealing with the substance followed the accepted industry standards and practices of the day;

f whether the person dealing with the substance followed the laws of the day;

g once the person became aware of the presence of the substance, did he contribute to further accumulation or the continued release of the substance;

h what steps did the person take on becoming aware of the presence of the substance, including immediate reporting to and cooperation with regulatory authorities;

i whether the person benefited from the activity resulting in the contamination, and what was the monetary value of their benefit;

j the degree of a person's contribution to the contamination, in relation to the contribution of other responsible persons; and

k the quantity and toxicity/degree of hazard of the substance that was discharged or otherwise released into the environment.

*** Includes lessees and other occupiers.**

These liability allocation factors borrow heavily from the list of factors contained in Section 114 of the Alberta *Environmental Protection and Enhancement Act*, passed in 1992.

[...]

* It is preferable to specifically list liability allocation factors in this manner, rather than relying upon more general terms such as "due diligence" or "mitigating circumstances". (pp. 9-10)

Prevention

The problem of contaminated sites is really a two-sided problem: on one side is the problem of existing contaminated sites, while the other side of the issue involves the prevention of future site contamination. Both sides of this issue are of equal significance, however, the approaches to resolving these related aspects of the issue will be very different. The Task Group has viewed its mandate as re-

> quiring it to focus on the problem of existing contaminated sites, rather than directly upon prevention. In other words, the Task Group has viewed contaminated sites in a historical, rather than in a forward-looking perspective. Even so, the adoption by member governments of the Recommended Principles will have spill-over effects into the area of prevention, as governments and stakeholders grow in their appreciation of the negative consequences of poor environmental practices. However, the importance of environmental liability in the context of preventing contaminated sites should not be minimized (in accordance with the internationally accepted "precautionary principle"), and it is deserving of a separate and complete examination in itself. (p. 13)

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