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Environmental injunctions need not pass the flagrant breach threshold

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(i) Introduction

In ***Lake Simcoe Region Conservation Authority v. Eng,***[1] the applicant Conservation Authority obtained an interim injunction against the owner of a property in an area of provincially designated wetland in Uxbridge, Ontario.

In granting the interim injunction, Mr. Justice Boswell of the Ontario Superior Court of Justice held that it was not necessary for the applicant to establish that the respondent's breach was flagrant. That said, on the facts, it clearly was. The respondent knew that he required a permit to conduct the operations he was engaged in. He knew that he did not have such a permit. Despite this, he openly carried on a large-scale commercial activity in breach of the applicable regulation and contrary to the strong public interest in the preservation of valuable wetlands. That was a flagrant breach in Justice Boswell's book.

The ruling that the violation need not be flagrant opens the door a little wider for injunctions in the environmental context. In *Lakehead Region Conservation Authority v. Demichele,* the Ontario Court of Appeal upheld injunctions in the public interest to ensure compliance with the *Conservation Authorities Act*, where a person clearly stated that they intended to continue illegal activity after having been asked to stop by a Conservation Authority.[2] The test as set out in *Demichele* was that the granting of an injunction is appropriate "when the appellant's clearly stated intention to continue with this activity after being asked to stop by the Authority and his statement that he had no intention of seeking a permit from the Authority."

The *Lake Simcoe* case does not appear to require that flagrant conduct be a condition precedent.

(ii) Background

1 *Lake Simcoe Region Conservation Authority v. Eng*, 2021 ONSC 4425 (CanLII)

2 *Lakehead Region Conservation Authority v. Demichele*, 2010 ONCA 480 [***Demichele***]

Continued on page 2

In *Lake Simcoe Region Conservation Authority v. Eng*, the respondent's entire property was subject to the provisions of the *Conservation Authorities Act*, and Regulation 179/06 thereunder. As a result, the respondent was not permitted to undertake any development, including site grading or the dumping or removal of material on the property, without first obtaining permission from the Conservation Authority.

The respondent, a self-described "peat farmer," carried on a type of business mixing peat excavated from his property with manure and soil to create "triple-mix," which he sells. He has been bringing in substantial quantities of fill material to replace the excavated peat and received significant income from allowing the dumping of fill on his property. He received significant income from allowing the dumping of fill on his property. He had not sought a permit from the Conservation Authority before doing so. While the full extent of his operation was not clear, he stated that he employed five workers on a full-time basis.

After compliance officers conducted surveillance of the respondent's activities over the course of several months, the Conservation Authority commenced an application for a permanent injunction to stop the respondent from breaching the Regulation, as well as significant monetary damages to compensate for the harm he had caused to the wetland.

In June 2021, the Conservation Authority sought a temporary injunction pending the application hearing. The Conservation Authority argued that there were grave concerns about the potential environmental damage the respondent was causing to the wetland and that he had a history of non-compliance. There was a prior prosecution brought against him which culminated in a conviction in January 2012 for breach of the Regulation. He was ordered to rehabilitate the property but had never done so. Further, while the respondent could be charged with a provincial offence, the penalties associated with a conviction are modest and would be nothing more than a cost of doing business.

In response, the property owner argued that he had historically complied with the Regulation and that he had previously applied for permits. He argued that he had submitted an application for a permit in 2018 that remained unprocessed.

(iii) Criteria for environmental injunctions

The motion judge assessed whether the Conservation Authority established the traditional criteria for the granting of an injunction: the showing (a) of a serious question to be tried; (b) of irreparable harm if the injunction is not granted; and (c) that the balance of convenience favoured granting the injunction: *RJR MacDonald Inc. v. Canada (Attorney-General)*, 1994 CanLII 117 (SCC), 1994 SCC 117, [1994] 1 S.C.R. 311.

The court noted that on cases where a public authority is seeking an injunction to prevent the ongoing breach of a statutory term, regulation or bylaw, there is generally a presumption that the public authority is acting in the best interests of the public and a further presumption of irreparable harm where a regulatory breach is established. Accordingly, the second and third branches of the *RJR-MacDonald* need not be satisfied in the same way as would be necessary if the applicant were a private individual, and where a municipal authority seeks an injunction to enforce a bylaw which it establishes is being breached, the courts will refuse the injunction only in "exceptional circumstances": *Newcastle Recycling Ltd. v. Clarington (Municipality),* 2005 CanLII 46384 (ON CA), at para. 32.

The same reasoning is applicable where a

Conservation Authority, acting as a public authority, is seeking an injunction to enforce its regulations. Whether or not the respondent's breach of the Regulation was "flagrant" or not was immaterial.

Based on these principles, there was little dispute that the Conservation Authority was entitled to a temporary injunction. There was no question that the respondent was in breach of the Regulation by carrying out his fill-dumping and excavation activities without a permit. A pending permit application is not the equivalent of having an issued permit.

In granting the injunction, Justice Boswell stated as follows:

> There is a strong public interest in ensuring that wetlands are preserved and maintained. They benefit everyone. And they are not readily replaceable. In my view, the law provides that, barring exceptional circumstances, the applicant is entitled to the injunctive relief sought on the establishment of the breach. There are no exceptional circumstances present here that would stand in the way of the granting of the injunction.

In the result, the Conservation Authority obtained an interim injunction prohibiting the respondent from carrying on the activities which interfered with the wetland, including the excavation of peat and dumping of fill. The respondent was not (yet) permanently banned from carrying out those activities, but rather was ordered to cease them until he obtained the necessary permits to do so. The court acknowledged that he had five employees who would lose their jobs if his activities were halted and that there may be a shortage of triple-mix in the GTA market next year. However, these concerns were not justified by illegal activities, and Jusicce Boswell was not persuaded that the GTA's "appetite for triple-mix" justified the unregulated destruction of a protected wetland.

(iv) Recognition of ex ante environmental rules to protect the public

The permit system in the *Conservation Authorities Act* is an *ex ante* type of regulation.

A simple example illustrates the difference between *ex ante* and *ex post*. The control of obscene material can be accomplished by a system of prior restraint. The classic example is a censor board that reviews all movies, and in some cases, censors the movies or outright prohibits their exhibition. This is an example of *ex ante* control by an administrative tribunal. The alternative model is the criminalization of obscenity which is enforced in the courts *ex post*. Under this model one is free to show whatever movie one wants, but may be prosecuted after the fact (*ex post*) for the offence of displaying an obscene film.[3]

There is precedent for the use of *ex ante* prior approval to protect human life. Under the *Conservation Authorities Act*, one must obtain prior approval from the regulator to build in areas adjacent to floodplains, or in areas adjacent to significant wetlands, given the risks to human life and safety that may be created by structures that are in the path of a flood and given the important function of wetlands.[4]

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3 *Profiting from Risk Management and Compliance* by Todd L. Archibald *and* Kenneth E. Jull
Chapter 7. Evolution and Classification of Offences
II. Ex Ante Versus Ex Post Rules

4 See, *eg.*, *Conservation Authorities Act*, R.S.O. 1990, c. C.27, s. 28.

(v) The role of compliance programmes in ex ante regimes

Ex ante regulations will likely increase in use in certain sectors, which will require better compliance programs. Indeed, the Court of Appeal noted the role of ex ante regulation in the context of speed governors on trucks in the *Michaud*[5] decision:

> There is good reason to favour *ex ante* rules where human life or safety is at stake and where there is scientific uncertainty as to the precise nature or magnitude of the possible harms. In such cases, regulators utilize a "precautionary principle," which the authors of Risk Management note, "tackles the problem of an absence of scientific certainty in certain areas of risk, and directs that this absence of certainty should not bar the taking of precautionary measures in the face of possible irreversible harm" (1:40). The Supreme Court has recognized the precautionary principle in the context of environmental protection regulations: *114957 Canada Ltee v. Hudson (Town)*, [2001] 2 S.C.R. 241.
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> Although the problem of over-inclusiveness would not arise if the legislature had chosen to penalize speeding truck drivers instead of preventing them from speeding in the first place, the regulator has determined that the objective of highway safety is best met by a hybrid regulation that couples an *ex ante* precaution with an *ex post* consequence.[3]

5 *R. v. Michaud* (2016), 127 O.R. (3d) 81, 328 C.C.C. (3d) 228 (Ont. C.A.), leave to appeal refused 2016 CarswellOnt 7198 (S.C.C.), at para. 102.

The first step in any compliance programme is for the organization to establish compliance standards and procedures that are "reasonably capable of reducing the prospect of criminal conduct".[6] A written corporate code of conduct may be an important element.

The second step requires the organization to assign high-level personnel to oversee the compliance effort.[7] The lesson of *Lake Simcoe* is that organizations should review their permit application processes and ensure that senior personnel are doing their due diligence.

Contact us

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6 M. Joseph, "Organizational Sentencing" (1998), 35 Am. Crim. L.R. 1017 at p. 1028.

7 *Profiting from Risk Management and Compliance* by Todd L. Archibald *and* Kenneth E. Jull Chapter 3, "Compliance: Behavioral Theory, Gender and Diversity"