CITATION: Baker v. Ministry of the Environment, 2013 ONSC 4142
DIVISIONAL COURT FILE NO.: 208/13
DATE: 20130619

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

BETWEEN:	)	
	)	
NEIL BAKER, MARK EMERY, GORDON FLATT, GLENN HESS, DONALD JACKSON, DAVID RATTEE, GREG SCHINDLER, WAYNE SHAW, MICHAEL TKACH, JAMES WALLACE, COLIN WATSON and CRAIG YUEN	)	**Barry Weintraub and Sara Erskine**, for the Appellant/Responding Party *Neil Baker*
	)	**Paul Guy**, for the other Appellants/Responding Parties
Appellants/Responding Parties	)	
- and -	)	**Nadine Harris, Mario Faieta and Justin Jacob**, for the Respondent/ Moving Party
DIRECTOR, MINISTRY OF THE ENVIRONMENT	)	
Respondent/Moving Party	)	
	)	**HEARD at Toronto:** May 31, 2013

H. SACHS J.

REASONS FOR JUDGMENT

Overview

[1] The Respondent issued an Order on November 14, 2012 (the "Director's Order") pursuant to her powers under sections 17, 18 and 196 of the *Environmental Protection Act*, R.S.O. 1990, c. E-19 (the "Act"). The Order required the Appellants to carry out certain environmental remediation work and preventative measures. The Appellants appealed the Director's Order to the Environmental Review Tribunal (the "Tribunal"). Pending the appeal, the Appellants applied to the Tribunal for a stay of the Director's Order. On March 22, 2012,

the Tribunal dismissed the Appellants' motion for a stay. The Appellants have both appealed and brought applications to judicially review the Tribunal's stay decision.

[2] The Respondent moved before me for an order quashing the statutory appeals on the basis that there is no right of appeal of interlocutory decisions under the Act. The Appellants oppose the motion, arguing that the wording of the appeal right in the Act does not limit appeals to appeals of final orders and that in any event the Tribunal's stay decision is a final order.

[3] In the event that I find that there is no statutory right to appeal the Tribunal's stay decision, the Appellants have also applied to judicially review that decision. The Respondent is requesting that I quash these applications on the basis of prematurity. In the alternative, on the judicial review applications, the Respondent seeks to strike two affidavits that have been submitted as fresh evidence by the Appellants.

[4] For the reasons that follow I would grant the Respondent's motion to quash both the appeals and the applications for judicial review. Essentially, I agree with the Respondent that the Tribunal's stay decision is an interlocutory decision and that the statutory right of appeal in the Act is limited to appeals from final orders. I also agree with the Respondent that the applications for judicial review are manifestly premature and that the Appellants should be required to exhaust their administrative remedies before applying to the court for intervention.

Factual Background

Events Leading Up to the Stay Decision

[5] The Appellants are all former directors and/or officers of Northstar Aerospace, Inc.("Northstar Inc.") and/or its wholly-owned subsidiary, Northstar Aerospace (Canada) Inc. ("Northstar Canada").

[6] In 2004 Northstar Canada discovered and reported to the Ministry of the Environment ("MOE") the presence of Trichloroethylene (TCE) on a property that it owned in Cambridge, Ontario. Between 2005 and August of 2012, Northstar Canada voluntarily completed extensive investigation, remediation and monitoring activities at the site of the contamination and in the surrounding community in conjunction with the MOE and local authorities.

[7] In 2012 the MOE became concerned about the financial well-being of Northstar Inc. and Northstar Canada. As a result it issued a Director's Order on March 15, 2012 pursuant to sections 17, 20 and 196 of the Act (the "Remediation Order") ordering Northstar Inc. and Northstar Canada to develop and implement a plan to clean-up contaminated groundwater.

[8] On May 31, 2012, the MOE issued a second Director's order requiring both companies to provide financial assurance in the amount of $10,352,906 by a date in June of 2012 to ensure that the remediation activities at the contaminated site would continue notwithstanding the financial difficulties of both companies.

[9] Neither company had sufficient funds to satisfy the MOE's financial assurance order and on June 14, 2012 both companies applied for protection under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"). The directors of both companies resigned effective upon the issuance of the initial CCAA Order.

[10] The CCAA court approved a sales process with respect to all of the assets of Northstar Inc., and its affiliate companies, including Northstar Canada. That process culminated in the sale of the majority of the assets of both companies to a third party, which was approved by the CCAA court and closed on August 24, 2012. The sale transaction did not include the contaminated site.

[11] Following the closing of the sale, the sale proceeds were distributed pursuant to a distribution order made by the CCAA court. The bulk of the proceeds were paid to the secured creditor group, which was still left with a significant shortfall.

[12] As a result of the sale and the ensuing distribution, Northstar Inc. and Northstar Canada were left with little or no assets. Northstar Canada was adjudged bankrupt as of August 24, 2012 and Northstar Canada's remediation activities at the contaminated site and in the surrounding community ceased.

[13] Pursuant to a direction from the Minister of the Environment the MOE took over the work required by the Remediation order on August 27, 2012.

[14] On November 14, 2012, the MOE issued the Director's Order against the Appellants requiring them to assume responsibility for the remediation activities at the site and in the surrounding community at an estimated cost (according to the MOE) of about $1.4 million per year.

[15] The Appellants appealed the Director's Order to the Tribunal on November 30, 2012 and December 7, 2012. The Appellants also brought a motion to have the Superior Court of Justice (Commercial List) assume jurisdiction for their appeal from the Director's Order. As part of their appeal, the Appellants requested a stay and interim stay of the Director's Order pending the hearing of their appeal. The stay motion was heard on February 8, 2013. On February 15, 2013, the Tribunal issued an order dismissing the motion. On March 22, 2013, it released its reasons for that decision.

The Stay Decision

[16] The Tribunal's jurisdiction to issue a stay is limited in certain circumstances. Specifically, subsection 143(2)(a) of the Act provides that the Tribunal may not stay an order "to monitor, record and report." In addition, subsection 143(3) provides that the Tribunal "shall not stay the operation of an order if doing so would result in danger to the health and safety of any person, impairment or serious risk of impairment of the quality of the natural environment, or injury or damage or serious risk of injury or damage to any property or to any plant or animal life."

[17] First, the Tribunal found that it was without jurisdiction to order a stay in respect of certain parts of the Director's Order because those parts were orders to "monitor, record and report."

[18] Second, the Tribunal found that an overall stay was not precluded by s. 143(3) because the threat to human health and safety posed by the contaminants at the site were alleviated by the actions of the MOE, who had taken over the remediation work at the site.

[19] Finally, the Tribunal held that a stay was not appropriate under the *RJR MacDonald* test because the Appellants had not established irreparable harm and the balance of convenience did not favour granting a stay.

[20] In assessing the irreparable harm issue, the Tribunal noted that there was a possibility of money from the CCAA proceedings being used to reimburse the Appellants for the costs of complying with the Director's Order (in the form of the "D & O Charge"). At the time of the hearing of the stay motion, there was a motion outstanding in the CCAA proceedings to determine whether the Appellants could access the D & O Charge.

[21] In regards to the balance of convenience, the Tribunal found that the harm to the Appellants was "strictly financial," whereas granting a stay would cause harm to the public interest.

Events That Occurred Subsequent to the Stay Decision

[22] After the Tribunal released its stay decision, the CCAA court decided that the Appellants could not access the D & O Charge to defray the costs associated with complying with the Director's Order.

[23] Neil Baker, one of the Appellants, retained separate counsel. His counsel and counsel for the other Appellants have both filed appeals and judicial review applications in relation to the stay decision. Both sets of proceedings are the subject of the Respondent's motion to quash.

[24] Tentative hearing dates for the appeal of the Director's Order have been set for October 28, 2013, continuing until December 3, 2013. These dates are subject to any order that may be made by the CCAA court concerning whether it should assume jurisdiction over the appeal. Counsel for the Appellants have reserved the right to ask for earlier hearing dates once the venue motion is decided by the CCAA court.

Issues on the Motion

[25] The issues on this motion are as follows:

1. Is the Tribunal stay decision an interlocutory or final decision?

2. If the decision is an interlocutory decision, should the statutory appeals be quashed because there is no right of appeal under the Act of an interlocutory decision?

3. If there is no statutory right of appeal, should the applications for judicial review be quashed because they are premature?

4. If the applications for judicial review are not quashed should the fresh evidence sought to be filed by the Appellants be struck?

Is the Tribunal Stay Decision Interlocutory or Final?

[26] The Appellants submit that the Tribunal's stay decision is a final order because, according to them, its effect is to finally determine a substantial issue between the parties, namely, whether the Appellants are required to spend hundreds of thousands of dollars on interim remediation costs pending their appeal of the Director's Order. The Appellants argue that they have no chance of recovering these costs because the Tribunal has no jurisdiction to order reimbursement.

[27] In support of their submission the Appellants point to caselaw that sets out the test for determining whether an order is final or interlocutory. Specifically, the test is whether the "order in question finally disposes of an issue between the litigants.": see*Charlebois v. Enterprises Normand Ravary Ltee* (2006), 79 O.R.(3d) 504 (C.A.) at para.12.

[28] The debate between the parties to this motion revolves around the question of what type of "issue" must be disposed of to qualify as a "final" order. According to the Appellants, it is any "substantial" issue and what makes the issue substantial in this case is the quantum of the remediation costs that the Appellants will have to pay as a result of the denial of the stay. According to the Respondent, to be a final order, the order must dispose of a central issue in the litigation between the parties. In this case, the central issue in the pending appeal is the whether the Director's Order should be revoked. The Tribunal's stay decision makes no finding on this issue.

[29] In *Charlebois* the issue in question was whether the defendants could rely on the one year limitation period to defeat the plaintiffs' claim against them. The motion judge had determined that the limitation period should be extended. The Court of Appeal found that since the order in question finally disposed of the defendants' right to rely on the limitation period, it was a final order.

[30] In *Kulidjian & Associates v. Gareene Homes Inc.*, 2010 ONSC 1138, [2010] O.J. No. 824, the Divisional Court found that an order dismissing a motion to set aside an Assessment Order of a Registrar was a final order because it "disposed of a substantive right." (para. 4.)

[31] In *Mountainview Mall Ltd. v. Greymac Trust Co.* (1985), 10 O.A.C. 275, the Divisional Court determined that an order requiring the discharge of a mortgage was a final order because it "finally and irrevocably dispose[d] of the important right to recover the full amount secured by the mortgage; also any possible rights arising under the mortgage including the exercise of a power of sale." (para. 15.)

[32] In this case the Tribunal's stay order does not finally dispose of any of the Appellants' rights in the proceedings it has pending before the Tribunal. The Tribunal has

made no final findings or dispositions concerning any of the issues that the Appellants have raised in their appeal. The order deals with a "collateral" issue in the litigation, namely who should bear the costs of remediation pending the hearing of the appeal. As such, it is an interlocutory order.

[33] The Appellants' position that any order that has the effect of causing a party to incur a "substantial" financial consequence is a final order is not a tenable position at law. First, there are many orders that are clearly interlocutory in nature that can and do have this effect: an obvious example is an order granting or refusing an interlocutory injunction. Second, it cannot be that the issue of whether an order is final or interlocutory is left to be determined on the basis of what the anticipated financial effect of the order may be. Apart from anything else, this would introduce an unacceptable uncertainty into this already fraught area of the law.

Does the Act provide a right to appeal an interlocutory order?

[34] The Appellants rely on subsection 145.6(1) of the Act as the basis for this court's jurisdiction to hear their appeals. It states:

> Any party to a hearing before the Tribunal under this Part may appeal from its decision or order on a question of law to the Divisional Court in accordance with the rules of the court.

[35] According to the Appellants, there is nothing in the wording of this section that precludes the hearing of an appeal from an interlocutory decision.

[36] The Respondent disagrees and, in doing so, points to the use of the word " hearing" in subsection 145.6(1). According to the Respondent, this word is used in other sections of Part XIII of the Act, which governs appeals to Tribunals, and when these sections are read together it is clear that a "hearing" within the meaning of Part XIII means a hearing on the merits of an order and does not include an interlocutory proceeding such as an application for a stay.

[37] Section 140 of the Act provides that any person to whom an order of the Director is requested may "require a hearing by the Tribunal." Section 142 specifies what an applicant for a "hearing by the Tribunal" shall state in its notice requiring a hearing, which includes specifying "the portions of the order... in respect of which the hearing is required" and stating "the grounds on which the applicant for the hearing intends to rely at the hearing." Subsection 145.2(1) of the Act states that "[s]ubject 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..." Section 145.6(1) then provides for the right of appeal by "any party to a hearing before the Tribunal under this Part."

[38] I agree with the Respondent that, read together with the other sections in Part XIII, what is meant by the word "hearing" in subsection 145.6(1) is the hearing that takes place when a party who is the subject of a Director's order requires such a hearing under s. 140,

gives notice as to what aspects of the order he or she is challenging under s. 142 and is the subject of an order or decision by the Tribunal under ss. 145.2(1). It does not mean the application for a stay, which is separately provided for under s. 143 of the Act.

[39] This interpretation is consistent with the way that courts have interpreted the statutory right of appeal for a "decision" or "order" as only permitting appeals of final decisions. This caselaw was recently reviewed and followed by Molloy J. in *Sazant v. McKay*, 2010 ONSC 4273, 271 O.A.C. 63. The rationale for the interpretation is the fact that if any decision of a Tribunal could be subject to appeal this would undermine "[t]he traditional rationale for the establishment of administrative tribunal", namely, "cheapness, expedition and expertise." (*Roosma v. Ford Motor Co. of Canada Ltd.* (1988), 68 O.R. (2d) 18 (Div.Ct.) at para. 26.)

[40] Thus, I agree with the Respondent that there is no statutory right to appeal the Tribunal's stay decision.

Are the judicial review applications premature?

[41] An application for judicial review will be quashed as premature by a single judge where it is "manifestly premature" or it is "plain and obvious" that the application is premature. While judicial review is a discretionary remedy and a single judge should be reluctant to limit the discretion of a full panel, there are obvious practical advantages associated with having applications that are "manifestly premature" struck at an earlier stage. (See *Haigh v. College of Denturists of Ontario*, 2011 ONSC 2152, 280 O.A.C. 292 (Div. Ct) at paras. 7-10 and 31; *Deeb v. Investment Industry Regulatory Organization of Canada*, 2012 ONSC 1014, 289 O.A.C. 81 (Div. Ct) at paras. 23-24 and 31-33; *Sears Canada Inc. v. Davis Inquest (Coroner of)* (1997), 102 O.A.C. 60 (Div Ct) at paras. 9 and 11; *Geneen v. Toronto (City)* (1999), 117 O.A.C. 305 at paras. 12-18; *Courts of Justice Act*, R.S.O. 1990, c. C. 43, s. 21(3).)

[42] In *Ackerman v. Ontario (Provincial Police)* 2010 ONSC 910, 259 O.A.C. 169 the Divisional Court reiterated the general principle that interlocutory or interim decisions of an administrative tribunal should not be judicially reviewed. At para. 11 the Court states:

> Judicial review is a discretionary remedy. As a general principle, this court will decline to exercise its discretion to judicially review a tribunal decision that is interlocutory or interim in nature and does not determine the rights of the parties. This is a principle rooted in public policy, respect for Parliamentary intention, and deference to administrative tribunals. (cites omitted).

[43] In *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S. C. R. 706 the Supreme Court of Canada underlined the need for the courts to refrain from interfering with the processes established by the Act, which includes the right of the Director to make an order and the right to have that decision reviewed by the Tribunal at a *de novo* hearing.

> 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 the questions that might be raised about the nature and extent of contamination, and the appropriate action to take. (para. 57.)

[44] In *Toth Equity Ltd. v. Ottawa*, 2011 ONCA 372, 283 O.A.C. 33 at paras. 34-35 the Court of Appeal cited with approval the following summary of the general rule that parties can only proceed to court after exhausting all adequate remedies within the administrative process:

> ... [A]bsent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.
>
> This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway... Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience. .. Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision-makers who, like judges, have decision-making responsibilities to discharge... (citing to *C.B. Powell Ltd. v. Canada (Border Services Agency)*, 2010 FCA 61, at paras. 31-32)

[45] In this case the Appellants have failed to avail themselves of all effective remedies that are available within the administrative process. First, under the Tribunal's Rules of Practice and Practice Directions, a party "may request a review of an order or decision" (Rule 235). In deciding whether to review "all or part of its order or decision, the Tribunal may

consider any relevant circumstance…" (Rule 238). Following the review "the Tribunal may confirm, vary, suspend, or cancel the order or decision under review in whole or in part." (Rule 242). The Appellants never requested such a review of the Tribunal's stay decision.

[46] More significantly, the Appellants have not – and could have – brought a new motion to stay the Director's Order in light of the new evidence and arguments that were not put forward at the first motion. In *Courtice Steel Inc. v. Ontario (Ministry of Environment)*, [1991] O.E.A.B. No. 55 the Ontario Environmental Appeal Board confirmed that it does have jurisdiction to hear such a motion.

[47] The new evidence and arguments were not before the Tribunal when it dealt with the stay motion, even though some of the evidence was available at that time (particularly the evidence regarding Mr. Baker's role in the companies). Thus, the Tribunal has not had an opportunity to consider what effect, if any, this evidence would have on a request to stay the Director's Order. Accordingly, there is no record upon which this court can conduct a review with respect to the evidence and arguments being advanced. In other words, the Appellants are essentially asking this court to act as a tribunal of first instance rather than as a reviewing court. To accept this role would only undermine the legislature's clear intention to "repose decision-making power in the tribunal and deference to that tribunal" (*Ackerman*, para. 18).

[48] If exceptional circumstances are demonstrated a court will consider a judicial review application while administrative proceedings are ongoing:

> However, the court will do so rarely…For example, judicial intervention may be warranted in situations where the tribunal clearly lacks jurisdiction to proceed; where the decision, although interlocutory in most respects determines a particular issue (as in *Canada(Minister of Public Safety and Emergency Preparedness) v. Kahlon* (2005), 35 Admin L.R. (4th) 213 (F.C.) in which the summons issues would be dispositive of the witnesses' privacy rights); or, where proceeding with the hearing would result in an unfair hearing or a breach of natural justice. Even in these extreme situations, the remedy is discretionary and will be exercised sparingly. (*Ackerman* at para. 19, some cites omitted).

[49] The Appellants have provided no authority to support the proposition that an administrative decision that results in the expenditure of money constitutes an exceptional circumstance. Further, the Appellant's assertion that the decision that resulted in this expenditure was made after the Tribunal committed an error of law in its consideration of the *RJR MacDonald* test does not constitute an exceptional circumstance (see *C.B. Powell Limited v. Canada (Border Services Agency)*, 2010 FCA 61, [2011] 2. F.C.R. 332 (F.C.A.)).

[50] In the end the Appellants' position on this motion is driven by what they submit is the fundamental unfairness inherent in the fact that by virtue of the Tribunal's stay decision they may be called upon to pay substantial unrecoverable costs pursuant to an order that should never have been made.

[51] First, while the Tribunal does not have jurisdiction to order that these costs be reimbursed, it is not clear that some of the Appellants will not be able to recover any of these costs. Apart from anything else, it may be that certain Appellants will be found liable and others will not. If this happens, the Appellants who are successful on the appeal may be able to recover from those who were not. In this regard it is worth noting that one of the directors named in the Director's Order has not appealed and is thus bound by the order.

[52] However, even if the effect of the Tribunal's stay decision is the one the Appellants are complaining about, the effect is one that arises from a choice made by the legislature.

[53] Prior to 1990, any director's order was automatically stayed pending an appeal. After a major fire at a tire facility, the legislature introduced the *Environmental Statute Law Amendment Act, 1990*. By virtue of this legislation s. 143 of the Act was enacted. Section 143 not only provides that an order is not automatically stayed upon the commencement of a proceeding before the Tribunal, but it also specifically limits the authority of the Tribunal to stay certain orders. The effect of these amendments is precisely the one the Appellants are complaining about – persons who are subject to an order, which they are appealing, may have to incur the costs of interim compliance. This is consistent with the purpose of the Act, which is "to provide for the protection and conservation of the natural environment." (the Act, s. 3).

[54] In other words, there is nothing "exceptional" about the circumstances that the Appellants find themselves in. These circumstances are the result of the legislature's intention and apply uniformly to everyone in Ontario.

[55] Thus, I find that the Appellants' applications for judicial review are manifestly premature.

Conclusion

[56] For these reasons, an order will go quashing both the Appellants' statutory appeals and their applications for judicial review of the Tribunal's stay decision. Mr. Baker and the Respondent agreed that neither party was seeking costs against the other. With respect to the other Appellants, the agreement was that the successful party on this motion would be awarded $7500.00 by way of costs. On this basis I am ordering the Appellants, other than Mr. Baker, to pay the Respondent the sum of $7500.00 by way of costs.

Sachs J.

Released: June 19, 2013

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REASONS FOR JUDGMENT

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