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COURT OF APPEAL FOR ONTARIO

LASKIN, CHARRON and MacPHERSON JJ.A.

B E T W E E N:	)	Michael Stephenson
BEN SUTCLIFFE and HELEN KIMMERLY	)	for the respondent
Applicants	)	(appellant)
(Respondents)	)	Minister of the Environment (Ontario)
- and -	)	Chris G. Paliare and Andrew K. Lokan
MINISTER OF THE ENVIRONMENT (ONTARIO) and CANADIAN WASTE SERVICES INC.	)	for the respondent
	)	(appellant)
Respondents	)	Canadian Waste Services Inc.
(Appellants)	)	Richard D. Lindgren and
A N D B E T W E E N :	)	Marlene Cashin
MOHAWKS OF THE BAY OF QUINTE	)	for the applicants
Applicant	)	(respondents)
(Respondent)	)	Ben Sutcliffe and Helen Kimmerly
- and -	)	Patrick F. Schindler
MINISTER OF THE ENVIRONMENT (ONTARIO) and CANADIAN WASTE SERVICES INC.	)	for the applicant
	)	(respondent)
	)	Mohawks of the Bay of Quinte
Respondents	)	Sara Blake
(Appellants)	)	for the intervener
- and -	)	Attorney General for Ontario
	)	Peter Pickfield
ATTORNEY GENERAL FOR ONTARIO,	)	for the intervener

TOWNSHIP OF WARWICK,	)	Township of Warwick
WARWICK WATFORD LANDFILL	)	Joseph F. Castrilli
COALITION and ST. THOMAS SANITARY COLLECTION SERVICE LIMITED	)	for the intervener
	)	Warwick Watford Landfill Coalition
	)	Raymond F. Leach
	)	for the intervener
	)	St. Thomas Sanitary Services Limited
	)	Andrew J. Roman and John R. Tidball
	)	for the *amicus curiæ*
	)	Ontario Waste Management Association
	)	Heard: June 28, 2004

On appeal from the judgment of the Divisional Court (Susan E. Lang J., Stanley R. Kurisko J., concurring, and J. Douglas Cunningham A.C.J., dissenting) dated June 17, 2003 and reported at [2003] O.J. No. 2576.

CHARRON J.A.:

[1] Canadian Waste Services Inc. ("CWS") operates an existing landfill site near Napanee and wishes to expand its operation. In order to do so, it must apply for and obtain approval from the Minister of the Environment under the *Environmental Assessment Act*, R.S.O. 1990, c. E.18 (the "Act"). As an initial step in the approval process, CWS submitted to the Ministry terms of reference governing the preparation of the environmental assessment that must be completed before the undertaking can be ultimately approved. Under the Act, terms of reference must be approved by the Minister for the project to continue. The Minister can only give his approval if he is satisfied that an environmental assessment, prepared in accordance with the terms of reference, will be consistent with the purpose of the Act and with the public interest.

[2] CWS obtained ministerial approval of the terms of reference for its proposed expansion

on September 16, 1999. The respondents in this appeal, Ben Sutcliffe, Helen Kimmerly and the Mohawks of the Bay of Quinte, all occupy land that is near the landfill and are opposed to the proposed expansion. Hence, they brought this application for judicial review of the Minister's decision before the Divisional Court.

[3] The Divisional Court, by judgment released on June 17, 2003, quashed the Minister's decision. A majority of the court held that the Act did not permit approval of the terms of reference submitted by CSW because they were not drafted in accordance with certain specified requirements in the Act. Those requirements may conveniently be considered as setting out the "generic" elements of an environmental assessment. The court held that, while the Minister could require additional information from a proponent, the Act did not permit the approval of terms of reference that did not contain, at a minimum, those generic elements. On this question, the court held that the Minister's decision was reviewable on a standard of correctness. Cunningham A.C.J., dissenting, would have held that approval of the terms of reference was permitted under the Act and that the court should defer to the Minister's decision.

[4] CWS appeals from the decision. It argues that the majority erred in its conclusion on the standard of review and that, at a minimum, the reasonableness *simpliciter* standard ought to have been applied in reviewing the Minister's decision in interpreting his home statute. CWS argues further that the majority erred in its interpretation of the statute and submits that, on a plain reading, it allows for an environmental assessment that is more specifically tailored to the circumstances of a particular project. CWS's position is supported by the Attorney General for Ontario and St. Thomas Sanitary Collection Service Limited, as interveners, and by the Ontario Waste Management Association as *amicus curiae*.

[5] The respondents take the position that the majority was correct in finding that the Minister lacks jurisdiction to exclude any of the generic elements of an environmental assessment that are listed in the Act. Their position is supported by two interveners, the Township of Warwick and the Warwick Watford Landfill Coalition.

[6] In the alternative, the respondents submit that even if the Minister has jurisdiction to approve terms of reference in the form submitted by CWS, the Divisional Court was correct in quashing his decision for two reasons: the Minister exercised his jurisdiction unreasonably in this case, and he failed to satisfy common law and statutory duties regarding public notice and consultation prior to approving the terms of reference.

[7] Finally, the Mohawks of the Bay of Quinte cross-appeal from the dismissal of their claim for costs.

[8] The crux of this appeal is whether the Minister may approve terms of reference that are tailored to a particular project and that are found by the Minister to be consistent with the purpose of the Act and the public interest, but do not include all of the generic elements of an environmental assessment that are set out in the Act. While this court heard much argument on the competing policy considerations at play, those are matters of legislative choice. This appeal turns not on the desirability or wisdom of one approach over the other, but on the strict question of statutory interpretation.

[9] For the reasons that follow, I would allow the appeal and reinstate the Minister's decision to approve the terms of reference. It is my view that his decision is entitled to a high level of deference and should not be interfered with unless it is patently unreasonable, which is not the case here. There is also no merit to the contention that the Minister ignored the notice and public consultation requirements of the Act.

[10] On the question of statutory interpretation, if it is indeed appropriate to consider the Minister's implicit interpretation of his home statute as a separate matter, I would agree with the position advanced by the appellant. His interpretation of the Act also engages the Minister's expertise and his policy role as set out in the statute. Hence, at a minimum, the standard of reasonableness *simpliciter* ought to apply in reviewing that aspect of his decision. The Minister's interpretation of his authority under the statute is supported by the plain reading of the Act and is reasonable. It was open to the Minister, under the terms of the Act, to approve terms of reference in the form submitted by CWS.

[11] The nature of the undertaking and the debate between the parties is fully canvassed in the reasons of the Divisional Court reported at [2003] O.J. No. 2576. Since I am substantially in agreement with the dissenting reasons of Cunningham A.C.J., my reasons will be brief.

Analysis

[12] The purpose of the Act is explicitly set out in s. 2:

2. The purpose of this Act is the betterment of the people of the whole or any part of Ontario by providing for the protection, conservation and wise management in Ontario of the environment.

[13] "Environment" is defined broadly in s. 1(1) as meaning:

(a) air, land or water,

(b) plant and animal life, including human life,

(c) the social, economic and cultural conditions that influence the life of humans or a community,

(d) any building, structure, machine or other device or thing made by humans,

(e) any solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or indirectly from human activities, or

(f) any part or combination of the foregoing and the interrelationships between any two or more of them,

in or of Ontario.

[14] "Proponent" and "undertaking" are also defined in the Act and there is no question that the terms include CWS and its project for expansion. As indicated earlier, CWS was required, as a first step in the process, to give the Ministry proposed terms of reference governing the preparation of an environmental assessment for the undertaking:

6(1) The proponent shall give the Ministry proposed terms of reference governing the preparation of an environmental assessment for the undertaking.

[15] In drafting terms of reference for approval, a proponent has three options, only two of which are relevant to this case:

6 (2) The proposed terms of reference must,

(a) ***indicate that the environmental assessment will be prepared in accordance with the requirements set out in subsection 6.1 (2)***;

(b) indicate that the environmental assessment will be prepared in accordance with such requirements as may be prescribed for the type of undertaking the proponent wishes to proceed with; ***or***

(c) ***set out in detail the requirements for the preparation of the environmental assessment*** [emphasis added].

[16] There are no existing regulations under s. 6(2)(b), hence CWS had two choices. It could have drafted the terms of reference by simply incorporating "the requirements set out in subsection 6.1(2)". Those requirements are the "generic" elements of an environmental assessment referred to earlier. CWS chose instead to set out in detail the requirements for the preparation of the environmental assessment. There is no question that it had the right to choose this option under s. 6(2)(c). The issue raised on this appeal relates rather to the minimal scope of the environmental assessment that can be proposed in such detailed terms of reference.

[17] The contents of the environmental assessment are dictated by s. 6.1. It reads as follows:

6.1 (1) The proponent shall prepare an environmental assessment for an undertaking in accordance with the approved terms of reference.

(2) ***Subject to subsection (3)***, the environmental assessment ***mustconsist of***,

(a) a description of the purpose of the undertaking;

(b) a description of and a statement of the rationale for,

(i) the undertaking,

(ii) the alternative methods of carrying out the undertaking, and

(iii) the alternatives to the undertaking;

(c) a description of,

(i) the environment that will be affected or that might reasonably be expected to be affected, directly or indirectly,

(ii) the effects that will be caused or that might reasonably be expected to be caused to the environment, and

(iii) the actions necessary or that may reasonably be expected to be necessary to prevent, change, mitigate or remedy the effects upon or the effects that might reasonably be expected upon the environment,

by the undertaking, the alternative methods of carrying out the undertaking and the alternatives to the

undertaking;

(d) an evaluation of the advantages and disadvantages to the environment of the undertaking, the alternative methods of carrying out the undertaking and the alternatives to the undertaking; and

(e) a description of any consultation about the undertaking by the proponent and the results of the consultation.

(3) ***The approved terms of reference may provide that the environmental assessment consist of information other thanthat required by subsection (2)***[emphasis added].

[18] CWS submits that the purpose of allowing a proponent to submit detailed terms of reference for approval by the Minister that may consist of information other than that set out in s. 6.1(2) is to inject some flexibility into the approval process. The provisions permit the specific tailoring of an environmental assessment to suit the circumstances of the particular project while ensuring that the terms are still consistent with the overall purpose of the Act and the public interest.

[19] By contrast, the respondents submit that a "flexible" reading of ss. 6(2)(c) and 6.1(3) undermines the overall purpose of s. 6.1 and of the Act. They submit that such an interpretation would allow proponents to eschew any or all of the historically recognized elements of an environmental assessment. For example, in this case, the terms of reference do not require CWS to consider further in its environmental assessment the need for expansion of this site, alternatives to landfill, or alternative sites. The respondents submit that it was not open to the Minister to approve the terms of reference without all of those essential requirements.

[20] I do not agree with the respondents that the overall purpose of the Act is undermined by allowing more flexibility with respect to the contents of an environmental assessment. Ministerial approval of the terms of reference is governed by s. 6(4) of the Act, which specifically requires that the Minister be satisfied that the proposed environmental assessment will be consistent with, not only the purpose of Act, but also the public interest:

s. 6(4) The Minister shall approve the proposed terms of reference if the Minister is satisfied that an environmental assessment prepared in accordance with them will be consistent with the purpose of this Act and with the public interest.

[21] Given the broad purpose of the Act and the diversity of matters that may be of concern to the public, the Minister's decision in approving terms of reference calls for a balancing of a multiplicity of factors and interests. Some flexibility may well be needed to meet those objectives.

[22] It is also important to note that the generic elements of an environmental assessment set out in s. 6.1(2) are not cast aside in this process. The majority of the Divisional Court framed the issue at para. 18 as follows:

If the proponent chooses to use s. 6(2)(c) (to provide detailed requirements for the EA), should s. 6.1 be interpreted to mean that the proponent may "design its own" EA? And does it mean that the custom-made EA need not include the traditional comprehensive s. 6.1(2) components because they are exempted by operation of s. 6.1(3)?

[23] In my view, the proponent is not free to simply design its own environmental assessment without regard to the requirements of the Act. The mandatory language of the provision makes it clear that the generic elements are still the presumptive requirements. The proponent must address those

elements, subject only to ministerial approval for any exception. In deciding whether to approve terms of reference, the Minister must also be guided by the terms of the statute. In some cases, the Minister may adjudge that the generic elements are not sufficient to meet the environmental and public interest concerns and, in such a case, the Minister will be duty bound to require additional information. In other cases, some of those elements may be found unnecessary. The Minister's decision in all cases, although entitled to high deference, will be subject to judicial review. It is difficult to imagine a situation where terms of reference that contain few or none of the elements listed under s. 6.1(2) could reasonably be viewed as consistent with the overall purpose of the Act and the public interest.

[24] In this case, Cunningham A.C.J. described the detailed environmental assessment proposed by CWS and approved by the Minister as including the following:

The detailed and full environmental assessment proposed by CWS and approved by the Minister, however, will include the following:

(1) a description of the purpose of the undertaking;

(2) a definition and description of the undertaking (to be further defined and described through the preparation of the environmental assessment);

(3) an assessment of alternative methods of carrying out the undertaking;

(4) a description of the environment potentially affected by the undertaking and alternatives;

(5) a description of the effects that will be caused or that might reasonably be expected to be caused to the environment by the undertaking and the alternative;

(6) a description of mitigation measures that are necessary to prevent, or reduce significant adverse environmental affects upon the environment;

(7) an evaluation of advantages and disadvantages to the environment as a result of the undertaking and the alternatives;

(8) a report on the consultation undertaken by CWS in carrying out and preparing the environmental assessment.

¶ 58 Moreover, within the TOR [terms of reference] there is a whole section on alternatives to be evaluated, all of which will be considered and assessed during the environmental assessment. Although an assessment of alternatives to the expansion of this particular landfill will not be considered during the environmental assessment, alternative methods for carrying out the undertaking, according to the TOR, will be considered and assessed during the environmental assessment. These are extensive. As well, the TOR and the background documents thereto describe the approach to be taken by CWS in the environmental assessment.

[25] The respondents contend that it was not even open to the Minister to consider these terms of reference for approval. It is implicit from the Minister's approval that he read the statute otherwise. This brings into question what standard of review is applicable to the Minister's decision: see *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982. In this case, the nature of the question, the legislative scheme, and the expertise of the decision-maker are important considerations.

[26] Determining what information will be necessary for an environmental assessment to meet the purpose of the Act and the public interest will vary greatly depending on the nature of the undertaking. It is a contextual exercise that requires the Minister to assess and weigh the often competing technical and public policy considerations inherent in the protection of the environment. This calls for a particular expertise. The Minister deals with environmental issues daily and is assisted by Ministry staff with that specialized expertise. There is no real dispute between the parties that the Minister's decision to approve the terms of reference, if otherwise permissible under the Act, is entitled to the highest level of deference. A court will set it aside only if it is patently unreasonable.

[27] The issue is whether the same standard should apply on the question of statutory interpretation. In my view, the Minister's expertise also informs the interpretation of the provisions in question on this appeal. As between the courts and the Minister, the Minister is in a far better position to ascertain whether the generic elements must be present in *all* environmental assessments in order to be consistent with the purpose of the Act and the public interest. It requires an understanding of environmental policy, of the mechanics of environmental assessments, and of what factors are more or less important in certain kinds of undertakings as opposed to others. It is not a pure question of law.

[28] Hence, on the question of statutory interpretation, assuming that it is appropriate to consider it separately, some level of deference should be afforded to the Minister's interpretation. I would conclude that the middle ground, reviewing the Minister's interpretation on a reasonableness standard, is the appropriate balance to strike. In applying this standard, I have no hesitation in finding that the Minister's interpretation of the Act, as allowing a tailoring of terms of reference to suit the circumstances of the undertaking, is reasonable. Hence, it was open to the Minister to consider the terms of reference submitted by CWS.

[29] I see no merit to the respondents' alternative contention that the Divisional Court was otherwise correct in quashing the Minister's decision because he exercised his jurisdiction unreasonably in this case. On this point, I adopt the reasons of Cunningham A.C.J. I also reject, as did both the majority and the dissenting justices, the contention that there was a failure to satisfy the notice and consultation requirements in this case.

[30] I would therefore allow the appeal, set aside the judgment of the Divisional Court and dismiss the application for judicial review. In light of my conclusion on the merits of the application, I would also dismiss the cross-appeal on costs brought by the Mohawks of the Bay of Quinte as moot.

[31] The question of costs, in respect of both the application before the Divisional Court and the appeal, remains to be determined. The appellants may file written submissions within 15 days of the release of this judgment and the respondents within a further 10 days. The appellants may file reply submissions, if so advised, within a further 5 days.

Released:

"AUG 25 2004" "Louise Charron J.A."

"JL" "I agree John Laskin"

"I agree J.C. MacPherson J.A."