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**** HIGHLIGHTS ****

* An Ontario Court has dismissed the challenge by Grain Farmers of Ontario of a Regulation made under the Pesticides Act (Ontario). The Regulation controlled the use of neonicotinoid-treated seeds, which have a toxic effect on bees and other pollinators. The use of the treated seeds was not prohibited, but limited to circumstances in which farmers could produce pest assessment reports demonstrating the need for the use of treated seeds. The Grain Farmers of Ontario argued that because the Regulations were implemented late in the farming season, the testing for the presence of pests would not be accurate, and that the implementation of the Regulation should therefore be delayed. The Court concluded that it had no authority to grant injunctive relief and that the claim did not disclose a reasonable cause of action. (Grain Farmers of Ontario v. Ontario (Ministry of the Environment and Climate Change), CALN/2015-025, [2015] O.J. No. 5662, Ontario Superior Court of Justice)

**** NEW CASE LAW ****

Grain Farmers of Ontario v. Ontario (Ministry of the Environment and Climate Change); CALN/2015-025, Full text: [2015] O.J. No. 5662; 2015 ONSC 6581, Ontario Superior Court of Justice, S.A.Q. Akhtar J., October 23, 2015.

Pesticide Regulation -- Judicial Authority to Delay Implementation of Regulations.

Grain Farmers of Ontario ("Grain Farmers") brought an application for a stay of all sections of Ontario Regulation 139/15 made under the Pesticides Act, R.S.O. 1990, c. P-11 (the "Regulation").

Grain Farmers argued that the implementation of the Regulation would cause irreparable harm to Ontario corn and grain farmers and asked for a stay of the Regulation until May, 2016, or such time as the requirements of the Regulation could be met.

The Ministry of Environment and Climate Change (the "Ministry") opposed the application and brought a cross application to strike out Grain Farmers' application.

Grain Farmers represents 28,000 producers of corn, soy bean and wheat in Ontario.

On July 1, 2015, Regulations under the Pesticides Act were enacted for the sale and control of neonicotinoid, an insecticide, which has a toxic effect on bees and other beneficial insects that pollinate plants.

The Regulation created a "transition year" during which farmers wishing to use neonicotinoid-treated seeds ("Treated Seeds") on more than 50% of their lands would be required to prepare a pest assessment report (a "Report") which had to be provided to seed vendors before the Treated Seeds could be purchased. After this transition year, farmers would be required to prepare reports to use Treated Seeds on any of their lands.

Two types of assessments can be conducted to obtain a Report: a soil pest assessment and a crop pest assessment. The results of either assessment may provide proof that Treated Seeds are required on a particular piece of land.

During the transition year, August 2015/16, any farmer can perform a soil pest assessment. In the following year a certificate demonstrating completion of a training assessment process is required before a soil pest assessment can be conducted.

After 2017, only a professional pest advisor is permitted to conduct a soil pest assessment in order to obtain a Report.

A separate stipulation was put in place for crop pest assessments. After March 1, 2016, crop pest assessments must be performed by a professional pest advisor.

Grain Farmers did not dispute that the Ministry had the right to pass and implement the Regulation. Grain Farmers argued that since the Regulation only came into force in July of 2015, after crops were already planted with Treated Seeds, those seeds would prevent pest damage, and any pest assessment report would not accurately disclose the amount of Treated Seeds needed to be ordered for the following year. Since farmers must place their orders for Treated Seed in the autumn, they would be placed at a financial disadvantage by having to wait until the next spring before they need to know how much Treated Seed they would be permitted to use. As a result, the amount of Treated Seeds they require might not be available to them. To avoid this situation, Grain Farmers asked that the implementation of the Regulation be stayed until May, 2016.

Decision: S.A.Q. Akhtar, J. concluded that Grain Farmers' application disclosed no reasonable cause of action and that it must be dismissed [at para. 40].

Akhtar, J. considered the following issues:

1. Can the Court grant injunctive relief?

Akhtar, J. observed [at para. 13] that injunctive relief against the Crown can only be granted in very limited circumstances and [at para. 14] that there was a general rule that interlocutory or interim declarations should not be granted against the Crown unless there was some evidence of a "deliberate flouting of the law", relying on Loomis v. Ontario

(Ministry of Agriculture & Food) (1993), 1993 CanLII 8625 (ON SC), 16 O.R. (3d) 188 (Div. Crt.) and Aroland First Nation v. Ontario, 1996 CanLII 7961 (ON SC), 27 O.R. (3d) 732, [1996] O.J. No. 557 (S.C. Gen. Div.).

Grain Farmers did not allege there was a deliberate flouting of the law, and Akhtar, J. concluded that there was no evidence of this [at paras. 15 and 17].

Akhtar, J. rejected Grain Farmers' position that the stay was only intended to preserve the status quo, noting that the use of farmlands in Ontario has always been the subject of extensive regulation regarding the use of pesticides. The addition of Treated Seeds to the list of controlled pesticide treatments constituted a ban on the use of Treated Seeds. The Regulation offered a conditional exemption to this total ban [at para. 21].

2. Should a stay be ordered?

Akhtar, J. also considered whether injunctive relief should be granted, if he was wrong in concluding that injunctive relief could not be ordered against the Crown. Akhtar, J. concluded that the three prongs of the RJR test could not be met in any event [at para. 23]. He concluded that there was no reasonable cause of action and no serious issues to be tried, and that in any event, Grain Farmers could not demonstrate irreparable harm if the stay was not granted as its claims of loss were purely speculative [at para. 24]. Further, Akhtar, J. concluded that the balance of convenience did not favour Grain Farmers as there was a public interest in establishing the control of Treated Seeds to ensure that pollinators are not at risk. It is presumed that a regulation will produce a public good; the government is not required to prove it: Harper v. Canada (Attorney General), 2000 SCC 57 (CanLII), 193 D.L.R. (4th) 38.

3. The Ministry's application to strike -- Does Grain Farmers' application disclose a reasonable cause of action?

Akhtar, J. observed [at para. 31] that great deference is to be accorded to regulations and that the test for the review of the validity of a regulation is whether:

(a) The Cabinet has failed to observe a condition precedent set forth in the enabling statute; or

(b) The power is not exercised in accordance with the purpose of the Regulation.

Akhtar, J. observed that Grain Farmers did not argue the Regulation to be ultra vires, but instead argued that since the Regulation specifies a date of spring, 2016, for the crop pest assessment, the soil pest assessment must necessarily be of the same date, and asked for a declaration to this effect [at para. 36].

Akhtar, J. concluded that Grain Farmers was not requesting an interpretation of the Regulation but a rewriting of the Regulation, and that the Court did not have the authority "to pronounce on the efficacy or wisdom of government policy absent [a] constitutional or jurisdictional challenge..." [at para. 38].

** CREDITS **

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