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HIGHLIGHTS

* The Ontario Superior Court of Justice Divisional Court has upheld a decision of the Normal Farm Practices Protection Board which concluded that the importation and placement of fill (soil and earth) to establish an apple orchard in the Town of New Tecumseth to be a "normal farm practice". The land was zoned agricultural however the Town had prohibited the importation and placement of fill pursuant to a Town Bylaw. The Board's decision reversed the Town's ruling, because the Ontario Farming and Food Production Protection Act provides that "no municipal bylaw applies to restrict a normal farm practice carried on as part of an agricultural operation". The Court's decision considers the standard of review, and the deference to be afforded to the Board, with respect to Board decisions. (New Tecumseth (Town) v. Snieg, CALN/2018-004, [2018] O.J. No. 422, Ontario Superior Court of Justice)

* The Ontario Court of Appeal has held that the Federal Crown Liability and Proceedings Act barred a claim by a cattle farmer for consequential damages for loss of business and reputation where the farmer had already received compensation for the market value of damages for cattle which were directed to be destroyed pursuant to the Health of Animals Act. The farmer had been directed to destroy a number of cattle from his herd who were infected with anaplasmosis. He received compensation from the government for the market value of the cattle. The farmer claimed that the Federal Government was negligent in permitting the importation of foreign cattle into his herd which were infected with anaplasmosis, and sought additional damages for loss of business and reputation. (Vancise v. Canada (Attorney General), CALN/2018-005, [2018] O.J. No. 16, Ontario Court of Appeal)

NEW CASE LAW

New Tecumseth (Town) v. Snieg;

CALN/2018-004,

Full text: [2018] O.J. No. 422;

2018 ONSC 634,

Ontario Superior Court of Justice,

B.W. Abrams, W.M. Matheson and R.M.R. Bell JJ.,

January 26, 2018.

Right to Farm Legislation -- Ontario Farming and Food Production Protection Act -- Validity of Municipal Bylaws.

The Town of New Tecumseth (the "Town") appealed to the Ontario Superior Court of Justice Divisional Court from an Order of the Normal Farm Practices Protection Board (the "Board") dated September 27, 2016 (the "Order").

The Board concluded that a plan by Sam Snieg ("Snieg") related to the development of an apple orchard on land within the Town was a "normal farm practice" under s. 6(16) of the Farming and Food Production Protection Act, 1998, S.O. 1998, c. 1 (the "Act"). Snieg's plan involved the import and placement of fill on his land in relation to the development of the orchard.

In 2012, the Town passed a Site Alteration and Fill By-law which prohibited fill import and placement except where there was an exemption. The Bylaw defined "fill" as including "soil and earth".

Snieg's property was zoned agricultural. He applied to the Town in 2014 seeking an exemption from the Bylaw, but since none of the exemptions in the Bylaw applied, the Town refused.

Snieg then applied to the Board to determine if his proposal to import fill and regrade his farm was a "normal farm practice" under the Act which was therefore permissible in spite of the Bylaw.

Section 6(1) of the Act provides that:

> "No municipal by-law applies to restrict a normal farm practice carried on as part of an agricultural operation."

The Board conducted a 5 day hearing in 2015 and 2016 which considered evidence, including evidence from a number of expert witnesses called by Snieg and the Town, as

well as submissions from members of the community. The Board made a number of findings including the following:

> 1. That [Snieg] is a person entitled to apply to the Board pursuant to Subsection 6(3)(b).
>
> 2. That [Snieg]'s proposed practice of land improvement by way of the importation of fill is a part of or ancillary to the proposed agricultural operation.
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> 3. That Mr. Snieg has shown that he has demonstrable plans for the proposed practice.
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> 4. That the proposed practice is a normal farm practice as it makes use of innovative technology provided that it is consistent with proper advanced farm management practices, such as the MOECC - Management of Excess Soil - A Guide for Best Management Practices, in this case.
>
> 5. That the Town of New Tecumseth By-law No. 2012-136 restricts that normal farm practice.

The Board also directed that Snieg take certain steps to require the development and implementation of an environmentally compliant fill management plan.

The Town, among other things, challenged the Board's assessment of expert evidence; challenged the Board's decision that the development was an agricultural, not a commercial, operation; challenged the Board's interpretation of the Act and its conclusion that fill importation was a "normal farm practice" and an "agricultural operation", and argued that the Board imposed a fill management plan on the Town without jurisdiction to do so.

Decision: Matheson, J (Abrams and Ryan Bell, JJ concurring) allowed the appeal in part [at para. 29].

Matheson, J considered a number of issues including the following:

> (a) Standard of review:
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> > Matheson, J concluded [at para. 17] that the standard of review for all issues, including the Board's interpretation of the Act, was reasonable.
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> (b) Assessment of expert evidence:
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> > Matheson, J concluded [at para. 19 to 21] that the findings made by the Board were open to it based on all of the evidence before, and that no reviewable error had been demonstrated by the Town.
>
> (c) The Board's interpretation of the Act:

> Matheson, J concluded [at para. 22] that the Board was entitled to considerable deference in relation to its interpretation of its "home statute" [at para. 22]. Matheson, J also concluded that there was sufficient evidence for the Board to find that the proposed fill plan was normal farm practice in an agricultural operation, stating [at para. 24 and 25]:
>
> [24] ...The Board also had sufficient evidence to reasonably conclude that Mr. Snieg's proposed fill plan used technology within the s. 1 definition in the Act. Further, we do not agree that for the Board to conclude that the definition was met, including regarding the need to be "consistent with proper advanced farm management practices", the Board would need to be provided with a scientific study of the proposed method.
>
> [25] With respect to the definition of "agricultural operation"...the Town submitted that the Board failed to consider evidence that the Town submits shows that the plan is unnecessary and therefore cannot be considered a "necessary and ancillary part of an agricultural operation". Again, there was sufficient evidence for the Board to reasonably come to its conclusion. Further, the subsection relied upon by the Town for the "necessary" requirement, specifically s. 1(2)(j), does not restrict the broader meaning of "agricultural operation" as set out in s. 1(1) of the Act.

(d) The Board's direction that Snieg's fill management plan be filed with the Town without consultation from the Town:

> Matheson, J concluded [at para. 27] that the Act could not reasonably be interpreted to allow a decision to order a "fairly complex fill management plan to be enforced by the Town without [the Town] having any opportunity for input into it". Matheson, J noted that Snieg did not object to input from the Town with respect to the proposed fill management plan.
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> Matheson, J therefore directed [at para. 29] that the fill management plan must be submitted to the Town for comments which may be made within 30 days of receipt which comments should be considered by Snieg's expert.

Vancise v. Canada (Attorney General);

CALN/2018-005,

Full text: [2018] O.J. No. 16;

2018 ONCA 3,

Ontario Court of Appeal,

S.E. Pepall, M.L. Benotto and D. Paciocco JJ.A.,

January 3, 2018.

Health of Animals Act -- Compensation for Animals Directed to be Destroyed -- Crown Liability for Consequential Damages.

John Vancise ("Vancise") sued the Minister of Agriculture and Agri-Food (the "Federal Government") for damages in negligence, regarding damage sustained to his farm business and reputation as a result of an alleged failure to guard against the importation of cattle infected with anaplasmosis.

The Federal Government brought an application for summary dismissal relying on s. 9 of the Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, which provides:

> No proceedings lie against the Crown or a servant of the Crown in respect of a claim if a pension or compensation has been paid or is payable out of the Consolidated Revenue Fund or out of any funds administered by an agency of the Crown in respect of the death, injury, damage or loss in respect of which the claim is made.

In 1996, Vancise imported 4 hereford cattle from the United States, 3 of which were later discovered to be infected with anaplasmosis.

The American Health documentation certifying the animals to be disease-free had been falsified.

At the time anaplasmosis was considered to be a foreign animal disease and the Federal Government's policy was to destroy any infected animals. After the disease was discovered, the 4 infected animals were sent back to the Animal United States; Vancise's herd was quarantined as a "infected place"; 4 of Vancise's cattle which had become infected were ordered to be destroyed, and Vancise was required to treat all of his animals to eradicate the disease in his herd.

The Minister granted compensation of $12,900.00 to Vancise pursuant to s. 51 and 53 of the Health of Animals Act, S.C. 1990, c. 21, being the market value of the 4 destroyed cattle.

Vancise sued the veterinarian who had produced the fraudulent certificate and was paid $59,508.00 in settlement.

Vancise raised the negative affect of the anaplosmosis on his business with the Federal Government in 1996 and from 1998 to 2012 he demanded compensation. This action was

commenced in 2012 for an additional claim for damages to Vancise's reputation and business.

Vancise argued that s. 9 of the Crown Liability and Proceedings Act did not apply because his claim was not for the destruction of cattle, and that his action fell outside s. 9.

A Justice of the Ontario Superior Court of Justice summarily dismissed Vancise's claim on March 20, 2017.

Vancise appealed to the Ontario Court of Appeal.

Decision: Paciocco, JA (Pepall and Benotto, JJA concurring) dismissed the appeal [at para. 18]. Paciocco, JA did not accept Vancise's argument that his claim fell outside s. 9 of the Crown Liability Proceedings Act [at para. 11] and stated that the section prevents actions for recovery for all forms of damage, where a government scheme has already provided for compensation in relation to death, damage or loss, stating, at para. 12, 13 and 16:

> [12] Section 9 is not simply a bar on double recovery. Its effect is to prevent actions for recovery where a government scheme has already provided a form of compensation in relation to the death, injury, damage or loss that is relied on in the action.
>
> [13] The reach of s. 9 is settled. Section 9 has been interpreted to bar actions for additional compensation for the same death, injury, damage or loss for which compensation has been received, even where different heads of compensation are claimed: Langille v. Canada (Minister of Agriculture), 140 N.R. 304; and Begg v. Canada (Minister of Agriculture), [2005] F.C.J. No. 1819, 2005 FCA 362, 261 D.L.R. (4th) 36. It has also been interpreted to bar compensation that arises from "the same factual basis as the action": Sarvanis v. Canada, 2002 SCC 28, [2002] 1 S.C.R. 921, at para. 28.
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> [16] Claims similar to the appellant's were advanced by the plaintiffs in Langille and Vona v. Canada (Minister of Agriculture) (1994), [1994] O.J. No. 2485, (On SC), 20 O.R. (3d) 589 (Gen. Dov.), aff'd (1996) 30 O.R. (3d) 786 to no avail. Further, in Begg, s. 9 was held to preclude claims for alleged negligence in allowing diseased animals to be admitted to Canada. In our view, these cases, together with Sarvanis, are dispositive of the issues raised on this appeal.

CREDITS

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