CITATION: Grain Farmers of Ontario v. Ontario Ministry of the Environment and Climate Change, 2015 ONSC 6581
COURT FILE NO.: CV-15-531305
DATE: 20151023

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
GRAIN FARMERS OF ONTARIO Applicant	)	*Eric K. Gillespie and Karen L. Dawson*, for the Applicant
– and –	)	
ONTARIO MINISTRY OF THE ENVIRONMENT AND CLIMATE CHANGE Respondent	)	*Sandra Nishikawa and Domenico Polla*, for the Respondent
	)	**HEARD:** September 28, 2015

S.A.Q. AKHTAR J.

FACTUAL BACKGROUND AND OVERVIEW

Introduction

[1] Grain Farmers of Ontario ("GFO") applies for a stay of all sections of the Ontario Regulation 139/15 made under the *Pesticides Act*, R.S.O. 1990, c. P.11 ("the Regulation"). It argues that the implementation of the Regulation, designed to control the use of neonicotinoid treated seeds, would cause irreparable harm to Ontario corn and grain farmers if permitted to operate in its current form. GFO asks for a stay of the Regulation until May 2016, or "such time as the requirements of the Regulation can be met."

[2] The Ministry of Environment and Climate Change ("Ontario") opposes this application and brings a cross-motion to strike out GFO's Notice of Application to determine the

interpretation of Regulation. It argues that the application discloses no reasonable cause of action and must be dismissed.

[3] For the reasons set out below, I decline to order a stay of the Regulation and dismiss GFO's motion. With respect to Ontario's cross-motion to strike, I find that the GFO's application discloses no reasonable cause of action and must be dismissed.

The Factual Backdrop

[4] GFO represents 28,000 producers of corn, soybean and wheat in Ontario whose produce generates $2.5 billion in farm gate receipts and sustains 40,000 agricultural jobs.

[5] The province of Ontario regulates the classification, use, transportation and disposal of pesticides under the *Pesticides Act*. On 1 July 2015, as a result of amendments to Ontario Regulation 63/09 made under the Act, new conditions were created for the sale and control of neonicotinoid-treated seeds. The Regulation was passed in response to concerns that neonicotinoid, an insecticide, had a toxic effect on bees and other beneficial insects that provide essential pollination.

[6] In order to provide an adequate time period for compliance, the Regulation created a "transition year" whereby during the first year of operation, farmers wishing to use neonicotinoid-treated seeds on more than 50% of their lands would be required to prepare a pest assessment report ("PAR"). That report would need to be provided to vendors of neonicotinoid-treated seeds before any could be purchased. After this "transition year", farmers would be required to prepare PARs to use neonicotinoid-treated seeds on any of their lands.

[7] Two types of assessment may be conducted in order to obtain a PAR: soil pest assessment ("SPA") and crop pest assessment ("CPA"). The results of either assessment may provide proof that neonicotinoid-treated seeds are required on a particular piece of land. During the transition year of August 2015 to August 2016, any farmer may perform the SPA. The following year, a certificate demonstrating completion of training in the assessment process will be required before a SPA can be conducted. Post-2017, only a professional pest advisor will be permitted to conduct the SPA in order to obtain a PAR.

[8] A separate stipulation exists for the CPA. These may take place after 1 March 2016, and must be performed by a professional pest advisor.

The Issues

[9] There are three separate issues to be decided on this application and cross-motion:

1. Can this court grant injunctive relief to stay a statutory regulation?
2. If so, should injunctive relief be granted?
3. Does GFO's main application disclose a reasonable cause of action?

1. CAN THIS COURT GRANT INJUNCTIVE RELIEF?

The Legal Principles

[10] There is no dispute about the test for granting a stay. In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, [1994] S.C.J. No. 17 [cited to QL], the Supreme Court of Canada, at para. 43, outlined three criteria to be met before granting an interlocutory injunction:

1. Is there a serious question to be tried on the merits of the case?
2. Would the applicant suffer irreparable harm that cannot be compensated by damages if the application is refused?
3. Which party will suffer the greater harm from the granting or refusal of the remedy pending a decision on the merits?

[11] The court held that the same principles apply when the remedy sought is a stay.

The Request for Injunctive Relief

[12] GFO brings its motion for a stay on the basis that the Regulation places the farmers in an impossible position. It does not dispute that Ontario has the right to pass and implement the Regulation. Its complaint is with the way it operates. Since the Regulation only came into force in July 2015, the current year's crops were planted with neonicotinoid-treated seeds. Those seeds prevented any pest damage. Thus, GFO argues, any pest assessment report based on an SPA will not accurately disclose the required amount of neonicotinoid-treated seeds to be ordered for the following year. Since the farmers must place their orders for seed in the Autumn, they are placed at a huge financial disadvantage by having to wait until next Spring before they actually know how much neonicotinoid-treated seed they will be permitted to use. If the farmers are forced to delay their orders, the amount of neonicotinoid-treated seeds found to be required after preparation of the PAR might not be available to them. To avoid this situation, GFO asks that the implementation of the Regulation be stayed until May 2016, "or until such time as the requirements of the Regulation can be met." They seek an interim order to maintain the status quo.

[13] Injunctive relief against the Crown can only be granted in very limited circumstances. This restriction is evidence by s. 14(1) of the *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27, which provides that:

> 14. (1) Where in a proceeding against the Crown any relief is sought that might, in a proceeding between persons, be granted by way of injunction or specific performance, the court shall not, as against the Crown, grant an injunction or make an order for specific performance, but in lieu thereof may make an order declaratory of the rights of the parties.

[14] In the leading case of *Loomis v. Ontario (Ministry of Agriculture & Food)* (1993), 16 O.R. (3d) 188 (Div. Crt.), the Divisional Court held that that there was a general rule that interlocutory or interim declarations should not be granted against the Crown unless there is some evidence of a "deliberate flouting of the law." In *Aroland First Nation v. Ontario*, 27 O.R. (3d) 732, [1996] O.J. No. 557 (S.C. Gen. Div.) [cited to QL], Wright J., following *Loomis*, gave examples of this exception as instances where governmental authorities acted knowingly in breach of a court order or existing law. At para. 30, he added:

> An interim declaration is not to be used as an interim injunction to maintain the status quo pending a determination of the parties' rights. The Crown is in a special position. Generally speaking the Crown is entitled to act as it sees fit until there is a proper declaration of right upon the conclusion of proceedings.

[15] GFO accepts that there is no evidence of a deliberate flouting of the law. It also concedes that it does not challenge the regulation as being *ultra vires* or violating the *Charter of Rights and Freedoms*. Instead it relies upon two authorities as its basis for arguing this court has the power to issue interim relief.

[16] The first is the decision in *Amalorpavanathan v. Ontario (Minister of Health and Long Term Care)*, 2013 ONSC 4993, a decision of the Divisional Court where Lederer J. issued injunctive relief against the province of Ontario pending judicial review. This case, however, is distinguishable from the case at bar. First, it concerned an application for judicial review that had already been set down for hearing. Section 4 of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, permitted the court to order interim relief in the context of a judicial review application. Secondly, and in my view, critically, Lederer J., following *Aroland First Nation*, accepted that in order to issue injunctive relief, some evidence of a deliberate flouting of the law had to exist. He found that it did. In his view, the impugned regulation raised procedural concerns that the province might deliberately be seeking to avoid a procedural direction contained in the Ontario Regulatory Policy.

[17] As noted, in the case at bar, GFO does not suggest that there is a deliberate flouting of the law and, in my view, there is no evidence of that being the case.

[18] GFO's second case, *Couchiching First Nation v. Canada (Attorney General)*, 2010 ONSC 4373, 103 O.R. (3d) 745, concerned the granting of an interim preservation order restraining the province of Ontario and the Government of Canada from interfering with the town of Fort Frances' exclusive possession of a park. That order was to endure pending the final determination of the dispute between the parties at trial.

[19] I am not convinced, however, that *Couchiching* has the same application to the case at bar. First, *Couchiching* dealt with the narrow issue of a preservation order of a particular parcel of land or property. The original motions judge in *Couchiching* placed great emphasis on Rule 45 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, which expressly authorises the making of an interim order for the preservation of "any property in question in a proceeding". In the

motion judge's view, if the status quo of the park changed and Fort Francis lost possession, the land would cease in its 100-year-old ability to operate as a park. This is a very different set of circumstances to the dispute between GFO and the province of Ontario. Contrary to GFO's submissions, I take the view that this case is one of economic rather than property rights. What is affected here is the farmer's ability to generate income rather than the use of their land. As Ontario rightly points out, the use of farmland has always been highly regulated particularly in the realm of pesticide use. The Regulation simply tweaks control of that use by adding neonicotinoid-treated seeds to the list of controlled pesticides.

[20] Secondly, the relief sought in *Couchiching* was based on an underlying valid proceeding. As Shaw J. observed, this relief did not conflict with the *Loomis* line of cases because those cases had, as their subject matter, interim relief that was "viewed independently" of any other order. *Couchiching*, on the other hand, stands for the proposition, at para. 59, that a court "does have the competence to grant a preservation order on an interim basis to preserve the status quo, provided that it has the jurisdiction to undertake the particular lis which it has taken on." For the reasons set out later in this judgment, I find that GFO's application discloses no reasonable cause of action and is therefore not a valid proceeding.

[21] Finally, I pause to comment on GFO's position of the status quo in this case. As noted earlier, the use of farmlands in this province have been the subject of extensive regulation regarding the use of pesticides. The addition of neonicotinoid-treated seeds to the list of controlled pesticide treatments constitutes, in effect, a ban on its use subject to certain conditions. As Ontario points out, correctly in my view, the Regulation sought to be stayed actually provides an exemption to that ban by putting in place a transition period in its implementation. In order words, a stay of the regulation would mean the farmers would be subject to the more stringent condition that they could not use neonicotinoid-treated seeds on any of their lands without the required PAR. The status quo is not the unfettered rights of farmers to do as they please with neonicotinoid-treated seeds but prohibited use of the pesticide unless accompanied by a PAR.

[22] For the above reasons, I conclude that injunctive relief cannot be ordered in the circumstances of this case.

2. SHOULD A STAY BE ORDERED?

[23] If I am wrong on the matter of whether injunctive relief could be ordered against the Crown, I would still decline granting that relief. In my view, GFO fails to satisfy any of the three prongs that constitute the *RJR* test.

[24] In light of my finding, below, that the underlying application discloses no reasonable cause of action, it follows that there are no serious issues to be tried. Even if I assumed the contrary, GFO cannot demonstrate irreparable harm if a stay is not granted. Its claims of loss are purely speculative: the pesticide damage may not be as severe as expected and the seed required may still be available when the pest and soil assessments are conducted. Moreover, if any loss

was suffered, it would be quantifiable in damages - a situation that has been held by the courts to not constitute irreparable harm.

[25] Finally, even if the first and second limbs of *RJR* had been fulfilled, I find that the balance of convenience favours the dismissal of the motion for a stay. Ontario would be the party suffering the greater harm in this case when balancing the consequences of granting or refusing the motion. As previously noted, any claims of loss by the farmers is purely speculative at this stage. By contrast, there is a public interest aspect to ensuring the control of use of neonicotinoid-treated seeds to ensure that pollinators are not at risk. There is no requirement that Ontario prove that the Regulation will produce a public good as that is presumed to be the case: see *Harper v. Canada (Attorney General)*, 2000 SCC 57, 193 D.L.R. (4th) 38, at para. 9. A suspension of the regulatory scheme for the period of one year has potential harmful effects to the pollinating species in the province.

[26] For the above reasons, GFO's motion for an interim stay of the Regulation is dismissed.

3. DOES GFO'S MAIN APPLICATION DISCLOSE A REASONABLE CAUSE OF ACTION?

Rule 21.01 of the *Rules of Civil Procedure*

[27] Rule 21.01(b) of the *Rules of Civil Procedure* permits a judge to strike out a pleading on the ground that it discloses no reasonable cause of action. The test to be applied is when it is "plain and obvious" that an applicant's claim discloses no reasonable cause of action: see *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93 [cited to QL], at para. 33.

[28] The test must be read in the most generous possible light to the applicant whose litigation should not be prematurely dismissed on account of drafting deficiencies. The threshold is a low one. I am also cognisant of the observations made by Brown J. (as he then was), in *Barbra Schlifer Commemorative Clinic v. HMQ Canada,* 2012 ONSC 5271, on the need to exercise caution when applying the test in a Rule 21 motion to applications as opposed to a Statement of Claim. This is because the factual content of an application is contained in the materials rather than the notice of application.

The Application

[29] GFO's application ("the Application") seeks the following relief:

> a. An interpretation of Ontario Regulation 139/15 made under the *Pesticides Act*, R.S.O., c. P11, particularly those sections of the Regulation that refer to a "pest assessment report", pursuant to Rule 14.05(3)(d) of the *Rules of Civil Procedure*;
>
> b. A declaration that the coming into force of all sections of the Regulation be delayed until May 1, 2016, or such time as the requirements of the Regulation can reasonably be met;

> c. A stay of the effect of all sections of the Regulation until May 1, 2016 or such time as the requirements of the Regulation can reasonably be met.

[30] In making the Application, GFO relies upon Rule 14.05(3)(d) of the *Rules of Civil Procedure,* which provides:

> 14.05 (3) A proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is,
>
> [...]
>
> (d) the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution;

[31] It is clear that great deference is to be accorded to regulations and legislation passed by the government and legislature of this province. In *Apotex Inc. v. Ontario (Lieutenant Governor in Council)*, 2007 ONCA 570, at para. 32, the Court of Appeal set out the test for review of the validity of a regulation as being: (1) if the Cabinet has failed to observe a condition precedent set forth in the enabling statute or (2) if the power is not exercised in accordance with the purpose of the legislation.

[32] In *Animal Alliance of Canada v. Ontario (Minister of Natural Resources)*, 2014 ONSC 2826, the Divisional Court restated the principles in the following way, at para. 11:

> Recently the Supreme Court of Canada has confirmed in *Katz Group Canada Inc. v. Ontario (Health and Long Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810, that a regulation is only subject to narrow judicial review for *vires*. A regulation may be *ultra vires* for: (1) failure to satisfy a statutory condition precedent or (2) inconsistency with the objects and purposes of its enabling statute. The court held, at para. 27, that the inquiry "does not involve assessing the policy merits of the regulations to determine whether they are 'necessary, wise, or effective in practice.'"

[33] See also: *Pylypuk v. Ontario (Minister of Consumer and Business Services)*, 2005 CanLII 22130 (ON SCDC), 36 R.P.R. (4th) 297.

Does the Application Disclose a Reasonable Cause of Action?

[34] It is worth repeating that GFO does not argue the Regulation to be *ultra vires* or a violation of the *Charter of Rights and Freedoms*. It argues the application is about the property rights of the farmers that reside on the land that they own, specifically the power to exploit the object or right, alienate it or pledge it for credit. In GFO's view, absent government limitation, the holder of an estate in land may do with that land as they see fit within the rights and

obligations they hold. According to GFO, the Regulation directly affects a right that "but for" the Regulation, its members would continue to have, i.e. the right to use and manage their farms as they see fit. Thus, GFO argues that an interpretation of these rights "falls squarely within the purview" of this court.

[35] For the reasons set out earlier, I am of the view that the application is concerned with the economic interests of the affected farmers rather than any property rights. Prior to the Regulation, the farmers did not have an unrestricted right to use their lands as they wished but were subject to a highly regulated pesticide regime. Accordingly, I reject GFO's position that the interpretation of the Regulation is a determination of its members' rights.

[36] If there is no constitutional challenge or allegation of *ultra vires*, what then is GFO's aim in making the application? According to counsel's oral submissions and paragraph 30 of its factum, GFO seeks to resolve what it argues as an ambiguity with respect to the timing of the SPA in order to obtain a PAR. GFO asserts that since the Regulation specifies a date of Spring 2016 for the CPA, the SPA must necessarily be the same date. It asks this court for a declaration to this effect.

[37] In my view, GFO is not asking for a determination of rights that depend on the interpretation of the Regulation but a re-writing of that Regulation in a manner that would permit the effects of the Regulation to be delayed to its advantage.

[38] It is not the job of this court to pronounce on the efficacy or wisdom of government policy absent the aforementioned constitutional or jurisdictional challenges, neither of which are made here: see *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)* (2002), 211 D.L.R. (4th) 741 (Ont. C.A.). Nor is it within the power of this court to rewrite or "correct" legislation argued by a party to be faulty or ambiguous. Yet, this is precisely what GFO asks in the context of its application. Such a course of action would, in effect, render the operative Regulation inoperative and would, in effect, change the legislation. I agree with Ontario that it is neither possible nor desirable that this court have the jurisdiction to effectively grant a stay in the guise of a declaration of a Regulation which is otherwise unchallenged: *Rajan v. Canada (Minister of Employment and Immigration)* (1994), 86 FTR 70.

[39] The words of the Alberta Court of Appeal in *Trang v. Alberta (Edmonton Remand Centre)*, 2007 ABCA 263, 79 Alta. L.R. (4th) 1, at para. 22, are apposite in the circumstances of this case:

> Private litigants are not entitled to use the courts as an indirect method of altering public policy decisions, especially those involving the expenditure of public funds. Just because a private party has a sincere concern about the validity of a public policy does not entitle him or her to litigate its legality: *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236. As a corollary, the superior courts are not to use their powers to grant

> generally worded declarations as a method of controlling or influencing governmental operations.

[40] For these reasons, I conclude that GFO's application discloses no reasonable cause of action and must be dismissed.

[41] In light of this determination, it is not necessary to deal with Ontario's alternative argument that the application should be struck as procedurally defective.

Costs

[42] At the conclusion of the hearing, Ontario indicated that it would not be seeking costs if successful. Accordingly, no order for costs is made.

S.A.Q. Akhtar J.

Released: October 23, 2015

CITATION: Grain Farmers of Ontario v. Ontario Ministry of the Environment and Climate Change, 2015 ONSC 6581
COURT FILE NO.: CV-15-531305
DATE: 20151023

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

GRAIN FARMERS OF ONTARIO

Applicant

– and –

ONTARIO MINISTRY OF THE ENVIRONMENT AND CLIMATE CHANGE

Respondent

REASONS FOR JUDGMENT

S.A.Q. Akhtar J.