COURT OF APPEAL FOR ONTARIO

CITATION: Grain Farmers of Ontario v. Ontario (Environment and Climate Change), 2016 ONCA 283
DATE: 20160420
DOCKET: C61289

Laskin, Cronk and Miller JJ.A.

BETWEEN

Grain Farmers of Ontario

Applicant (Appellant)

and

Ontario Ministry of the Environment and Climate Change

Respondent (Respondent)

Eric Gillespie and Karen Dawson, for the appellant

Sandra Nishikawa and Domenico Polla, for the respondent

Heard: March 9, 2016

On appeal from the order of Justice Suhail A.Q. Akhtar of the Superior Court of Justice, dated October 23, 2015, with reasons reported at 2015 ONSC 6581.

B.W. Miller J.A.:

I. Overview

[1] The Ontario farmers represented by the Grain Farmers of Ontario ("GFO") rely on seeds treated with neonicotinoids, a class of pesticide, to protect crops against harmful insects. However, neonicotinoids are believed to have a toxic effect on bees and other pollinators. Out of concern over the environmental

impact of neonicotinoids, Ontario amended Regulation 139/15 (the "Regulation") made under the *Pesticides Act*, R.S.O. 1990, c. P. 11 (the Act") to sharply reduce, but not eliminate, their use. GFO is concerned that the Regulation is unworkable, will produce little benefit, and will significantly impair the ability of its members to protect their crops from damaging insects.

[2] GFO brought an application under r. 14.05(3)(d) of the *Rules of Civil Procedure*, for a declaration interpreting the Regulation. It also brought a motion for a stay of the Regulation pending the determination of the application. The respondent, Ontario Ministry of the Environment and Climate Change ("Ontario") brought a cross-motion to strike out GFO's Notice of Application as disclosing no reasonable cause of action. The motion judge granted Ontario's cross-motion and dismissed GFO's application and stay motion. GFO appeals the dismissals of the application and the stay motion.

[3] This appeal turns on whether the motion judge erred in holding that the remedy that GFO sought was not a determination of rights arising from the interpretation of the Regulation, but a re-writing of the Regulation. Importantly, GFO challenges neither the constitutionality of the Regulation nor its validity. It claims that the Regulation, on a plain reading, is ambiguous and that a declaration of what the Regulation requires is needed to ascertain the farmers' rights and obligations in respect to the use of treated seeds. GFO submits that in

circumstances where a party's rights depend on the interpretation of an ambiguous regulation, r. 14.05(3)(d) authorizes that party to apply to court for a determination of its rights.

[4] I would dismiss the appeal. The Regulation is not ambiguous and GFO has not identified a genuine dispute about the farmers' rights and obligations. To grant the remedy that GFO seeks would be tantamount to amending a regulation through interpretation, a remedy well outside the court's discretionary power to order declaratory relief.

II. Background

[5] GFO represents 28,000 producers of corn, soybean, and wheat in Ontario. Their produce generates $2.5 billion in farm gate receipts and sustains 40,000 agricultural jobs. It believes neonicotinoid-treated seeds to be an important weapon in the arsenal against crop infestation, allowing for more efficient grain farming to the benefit of both farmers and their customers.

[6] The Act establishes Ontario's authority for classifying pesticides and regulating their use in Ontario. The Regulation came into force on July 1, 2015, amending O. Reg 63/9 made under the Act, restricting the sale and use of neonicotinoid-treated seeds. The amendments added neonicotinoid-treated seeds to the substances classified as pesticides. The use of these treated seeds is still permitted where a user obtains a pest assessment report that establishes

that the use is in fact necessary, according to the criteria set out in the Regulation and Pest Assessment Guideline. The pest assessment report must be presented to seed vendors prior to the purchase of treated seeds.

[7] The Regulation provides for two different types of pest assessment reports: a crop pest assessment (“CPA”), and a soil pest assessment (“SPA”). The Regulation specifies that a CPA may only be prepared after March 1, 2016. There is no similar temporal restriction on the preparation of an SPA. GFO argues that the absence of a date governing the preparation of SPAs creates an ambiguity in the Regulation, making its application uncertain and rendering compliance with it impossible. It asks the court to grant a declaration reading a specific date into the text of the Regulation before which SPAs will not be required. At the appeal hearing, GFO proffered a date of March 1, 2017. This would, in effect, create a one year stay of the Regulation.

[8] The Regulation includes a transitional provision: in the first year of the new regime, farmers can use treated seeds on 50% of their lands without needing a pest assessment report. GFO argues that the transitional provision suffers from a baseline problem: a pest assessment report in the transition year would not accurately indicate the need for treated seeds, because the use of treated seeds in the previous year will have temporarily suppressed the harmful pests in crops and soil. With reduced access to treated seeds, GFO expects the harmful insects

to rebound, resulting in substantial crop damage in the transition year, possibly in the millions of dollars. Only after the farmers have incurred these losses will they have the evidence necessary to obtain a favourable pest assessment report and purchase treated seeds to combat infestation in the next planting cycle. Ontario's response is that the transition provision recognizes the baseline problem and provides a compromise by allowing for treated seeds to be used on up to 50% of the area farmed without requiring a pest assessment report.

[9] On GFO's reading, the plain textual meaning of the Regulation would perpetrate a senseless and harmful result – significant losses from crop damage. It submits that such an interpretation is inconsistent with the basic assumption that Ontario is a competent institution acting in the public interest.

[10] GFO applied for a declaration providing an interpretation of the Regulation that would relieve farmers from having to comply with the Regulation's requirements for the 2016 growing season.

[11] Ontario brought a cross-motion to strike GFO's application as disclosing no reasonable cause of action. The motion judge granted that motion, holding at para. 38 that although GFO formally sought an interpretive declaration, in reality it was asking the court "to rewrite or 'correct' legislation argued […] to be faulty or ambiguous."

III. Issues

[12] GFO raises two issues on appeal. It submits that the motion judge erred in finding that: (1) the Regulation does not limit the farmers' property rights, and (2) the relief sought is not the determination of rights through the interpretation of a regulation.

IV. Analysis

(1) Does the Regulation affect property rights?

[13] GFO submits that the motion judge erred by characterizing GFO's claim as "one of economic rather than property rights." It is unnecessary, however, to decide whether the Regulation affects property rights. It would be enough, for the purposes of GFO's argument, that the Regulation affect any of the farmers' legal rights. Nothing is added to GFO's argument by further specifying those rights as distinctly property rights.

[14] Although the motion judge concluded that the Regulation does not affect property rights, I do not interpret him as concluding that the Regulation does not affect the farmers' legal rights at all. In any event, in my view, it plainly does. Purchasing and using treated seeds is an exercise of a liberty. A liberty, to use the standard grammar of juridical relationships, is a species of legal right: it is the absence of any law that would constrain any particular action: *MacDonald v. City*

of Montreal, [1986] 1 S.C.R. 460 (Wilson J., in dissent) at pp. 517-519.[1] Because a liberty is only the absence of a legal restriction, and not a legal or constitutional right that government not create such restrictions, a liberty can be narrowed, or extinguished entirely, by a constitutionally valid statute or regulation.

[15] The Regulation narrows the farmers' range of legally permitted options, and so affects the farmers' rights in this sense. Little, however, turns on this. The limitation of a right does not, standing alone, create a justiciable issue. The problem that GFO cannot overcome is that there is simply no controversy as to the farmers' rights or obligations under the Regulation that could make the matter justiciable. As the motion judge held, and as I explain below, the exercise of the court's declaratory power is discretionary and is informed by the doctrine of justiciability: *Canada v. Solosky*, [1980] 1 S.C.R. 821, at p. 832; *Green v. Canada (A.G.)*, 2011 ONSC 4778, [2011] O.J. No. 3615, at paras. 24-25.

(2) Rule 14.05(3)(d): has GFO identified a justiciable issue?

[16] The motion judge was correct to strike the application on the basis that it presented no genuine issue for determination. Although the court has broad jurisdiction to grant declaratory relief as a result of its inherent jurisdiction and pursuant to s. 97 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, the party

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[1] See also Adam J. Macleod, *Property and Practical Reason* (Cambridge University Press 2016) p. 60, 214-15. Simon Douglas, Ben MacFarlane 'Defining Property Rights' in James Penner and Henry Smith (eds.) *Philosophical Foundations of Property Law* (Oxford University Press 2013)

seeking the declaration must establish that the question it raises in its application is a legal or justiciable issue: L. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed. (Toronto: Carswell, 2012), at p. 275; *Bedford Service Commission v. Nova Scotia (A.G.)* (1976), 72 DLR (3d) 369, (N.S. C.A.), rev'd on other grounds [1977] 2 S.C.R. 269.

[17] GFO has attempted to ground the relief sought in r. 14.05(3)(d), arguing that it provides free-standing jurisdiction where an interpretative question is raised. This submission is clearly in error. Rule 14.05(3)(d) is procedural in nature. The rule provides:

> (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,
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> …
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> (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;

[18] Rule 14.05, as has often been noted, does not create jurisdiction but assumes it, and provides a means by which to engage that jurisdiction: *Canada Post Corp. v. C.U.P.W.* (1989), 70 O.R. (2d) 394, 62 D.L.R. (4th) 724 (H.C.), at p. 397; *N.(J.) v. Durham Regional Police Service*, 2012 ONCA 428, 284 C.C.C. (3d) 500, at para. 16.

[19] Accordingly, r. 14.05(3)(d) does not expand the court's jurisdiction to grant declaratory relief on the basis of a free-standing challenge to the wisdom or

fairness of governmental action. The motion judge, as required by r. 21, accepted the facts as pleaded: the regime will create significant, serious hardship for the farmers represented by GFO. But even if, as pleaded, the Regulation creates financial hardship, is futile, and provides little environmental benefit, neither the wisdom nor the efficacy of a regulation is a justiciable issue. Although couched in the language of r. 14.05(3)(d), the remedies that GFO is actually seeking are solely within the powers of the legislative and executive branches of government.

[20] Although its policy dispute with Ontario is real and may have significant consequences for GFO, the problem of legal interpretation alleged by GFO is artificial – the dispute between the parties does not turn on the interpretation of the Regulation. The regulatory preconditions that must be satisfied before a farmer can purchase and use treated seeds are clear. A farmer must obtain a pest assessment report that demonstrates the need for treated seeds, according to the criteria set in the Regulation. GFO has not identified any ambiguity in the Regulation. The absence of a date in the SPA provision does not create any interpretive problems. It is clear that the farmers are free to obtain an SPA report at any time, as Ontario argued.

[21] The issues raised in the Notice of Application can be contrasted with the issues raised in *Schaeffer v. Wood*, 2011 ONCA 716, 107 O.R. (3d) 721, rev'd on other grounds, 2013 SCC 71, [2013] 3 S.C.R. 1053. *Schaeffer* involved a

successful application for a determination of rights under r. 14.05(3)(d). In that case, the applicants sought an interpretation of a legislative framework governing investigations by the Special Investigations Unit, which was established by the *Police Services Act*, R.S.O. 1990, c. P.15. That legislation had left unspecified whether police officers involved in SIU investigations were permitted to consult with legal counsel prior to drafting notes that they were required to make. There were, in short, practical questions to be answered about the rights of state actors under legislation that was intended to guide and constrain their conduct.

[22] There are no similarly practical questions of interpretation or application raised here. Instead, GFO makes an open-ended invitation to the court to rewrite a regulation of general application. GFO asks the court to take the alleged unfairness of the Regulation as authority to rewrite it to alleviate the burden on its members. To do so would not resolve a genuine interpretive question. It would instead defeat the intention of the Regulation. This problem was clearly identified by the motion judge at para. 37 of his reasons:

> 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.

[23] I agree entirely with the reasoning of the motion judge at paras. 38-39:

> 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)*. 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)*.
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> The words of the Alberta Court of Appeal in *Trang v. Alberta (Edmonton Remand Centre)* are apposite in the circumstances of this case:
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> > 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)*. 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. [Citations omitted.]

[24] The motion judge made no error in concluding that the Notice of Application does not disclose a reasonable cause of action. I would dismiss the appeal from the dismissal of GFO's application.

[25] Given this result, it is unnecessary to consider the appeal from the dismissal of GFO's stay motion.

V. Disposition

[26] For the reasons given, I would dismiss the appeal from the dismissal of GFO's application. I would make no order as to the costs of the appeal.

Released: "JL" APR 20 2016

"B.W. Miller J.A."
"I agree. John Laskin J.A."
"I agree. E.A. Cronk J.A."