COURT FILE NO.: DC - 06-0065 ML
DATE: 20070905

2007 CanLII 36641 (ON S.C.D.C.)

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

CARNWATH, KITELEY AND SWINTON JJ.

B E T W E E N:	
THE NIAGARA ESCARPMENT COMMISSION	*Dennis W. Brown, Q.C.*, for the Appellant
Appellant	
- and -	
PALETTA INTERNATIONAL CORPORATION, REGIONAL MUNICIPALITY OF HALTON, CITY OF BURLINGTON, and CONSERVATION HALTON	*Scott Snider and Shelley Kaufman*, for Paletta International Corporation *Jeffrey Wilker and Peter Dailleboust*, for Regional Municipality of Halton *Angela Broccolini*, for City of Burlington
Respondents	
	HEARD at Brampton: May 29, 2007

SWINTON J.:

[1] The Niagara Escarpment Commission ("NEC") appeals from a decision of the Ontario Municipal Board ("Board") dated June 22, 2006 holding that an application for subdivision brought by the respondent Paletta International Corporation could proceed to a hearing before the Board. Leave to appeal was granted by Dawson J. on February 9, 2007.

[2] The main issue in this appeal is whether the Board erred in concluding that it had jurisdiction to hold a hearing with respect to the approval of a draft plan of subdivision

pursuant to s. 51(15) of the *Planning Act*, R.S.O. 1990, c. P. 13, as amended, despite amendments to the *Niagara Escarpment and Development Act*, R.S.O. 1990, c. N.2 (“NEPDA”).

2007 CanLII 36641 (ON S.C.D.C.)

Background Facts

[3] Paletta owns 32 hectares of land in the City of Burlington (“City”) in the Regional Municipality of Halton (“Region”), which are wholly situated with the area covered by the Niagara Escarpment Plan (“NEP”), established pursuant to the NEPDA. This land is designated as “Escarpment Rural Area” by the NEP and is included in the area of development control established by Ontario Regulation 826, R.R.O. 1990 under the NEPDA.

[4] The purpose of the NEPDA, as stated in s. 2, is to provide for the maintenance of the Niagara Escarpment and land in its vicinity as substantially a continuous natural environment, and to ensure that only such development occurs as is compatible with that natural environment.

[5] The NEP was approved by the Lieutenant Governor in Council on June 12, 1985. Under the 1985 NEP, low-density plans of subdivision were a permitted use within the Escarpment Rural Areas, subject to the applicant meeting stated criteria.

[6] The NEP is subject to periodic review, as set out in the NEPDA. The first review of the NEP was conducted in March 1993. Paletta, along with other landowners, participated in the hearings and advocated unsuccessfully against any change to the 1985 NEP in relation to permission for plans of subdivision. On June 15, 1994, the Lieutenant Governor in Council approved the Revised NEP, which stated that low density plans of subdivision were no longer a permitted use. An applicant would need an amendment to the NEP for a use that was not permitted.

[7] Meanwhile, on March 4, 1994, Paletta had submitted a draft plan of subdivision application pursuant to the *Planning Act* proposing a 24-lot plan of subdivision with a private well and septic services on its 32 hectare property. At that time, the NEP, as well as the Official Plans of the Region and the City, all permitted rural estate plans of subdivision on the lands. No land use planning or supporting studies accompanied the submission. On March 15, 1994, the Region advised Paletta that its application was incomplete.

[8] Paletta took the position that it was following the standard process at the time, and that the application was made in accordance with its existing rights as a landowner at the time. However, the Region continued to dispute the completeness of the application and refused to formally circulate it. Nevertheless, on August 19, 1994, the City forwarded a copy of the application to the NEC. The NEC advised that the Paletta plan was no longer a permitted use, and that an amendment to the NEP would be required.

[9] On September 25, 1996, the Region informed Paletta that its file had been declared inactive and, on the basis of a year-long inactivity, the application for a plan of subdivision would be refused. On November 6, 1996, Paletta asked the Region to circulate the draft plan of subdivision. The Region did not do so because of incompleteness and non-compliance.

[10] On September 9, 1998, Paletta requested that the Region refer its application for draft plan approval to the Board pursuant to s. 51(15) of the *Planning Act*, which then read:

> At any time before the Minister has given or has refused to give approval to a draft plan of subdivision, the Minister may, and upon application therefore shall, refer the draft plan of subdivision to the Municipal Board unless, in the Minister's opinion, such request is not made in good faith, or is frivolous or vexatious or is made only for the purpose of delay and where the draft plan is referred to the Board the Board shall hear and determine the matter.

The Minister had delegated the authority to refer the application to the Region.

[11] Paletta made a further request for referral on March 10, 2000. On March 29 of that year, the Region referred the matter to the Board.

[12] Between Paletta's request for referral on September 9, 1998 and the Region's referral to the Board in 2000, a number of amendments were made to the NEPDA on December 22, 1999. Subsections 24(1), (2) and (3) were repealed and new provisions were substituted. The new subsection 24(3) provides that no decision that relates to development shall be made unless a development permit has been issued under the NEPDA. Section 6.1 was enacted and provided that an amendment to the NEP shall be made by application to the NEC.

[13] On August 16, 2000, the NEC advised the Board that under s. 24(3) of the NEPDA, no decision is to be made without a development permit, and that under s. 14 of the Act, the NEPDA prevails where there is a conflict with a local plan.

[14] On September 19, 2000, Paletta disputed the applicable policies and law and requested a pre-hearing conference before the Board.

[15] In January 2001, the NEC considered Paletta's plan of subdivision and adopted a resolution, dated January 25, 2001, advising Paletta that it was required to apply for an amendment to the NEP to obtain authorization for the proposed development. To date, Paletta has not made any application for such amendment or for development permits.

[16] On April 4, 2002, the Region advised the Board that Paletta's application was incomplete, as it had not submitted a hydrogeological study or a clearance letter with its application, nor had it applied for a development permit under the NEPDA. The Region

2007 CanLII 36641 (ON S.C.D.C.)

proposed a Joint Board under the *Consolidated Hearings Act*, R.S.O. 1990, c. C.29 as the proper forum to adjudicate the dispute.

[17] Paletta made further requests for pre-hearing conferences before the Board on April 8, 2002 and July 9, 2004.

[18] On December 16, 2004, there were further amendments to the NEPDA. Subsections 6.1(1) and (2) were repealed, and a new subsection 6.1(2.2) was enacted, which prohibits an application to amend the NEP if the applicant is seeking to permit urban use. Subsection 6.1(2.3) was also enacted, allowing a party to request an amendment to the NEP during the ten year review period, which ends in 2015.

[19] On June 1, 2005, the Lieutenant Governor in Council approved a second Revised NEP, which continues to state that low density plans of subdivision are not a permitted use.

[20] In January, 2006, the Region, the City and the NEC brought a joint motion before the Board seeking the dismissal of Paletta's application without a hearing or, in the alternative, an order adjourning the hearing until Paletta filed an application with the NEC to amend the NEP and to obtain the required development permits, and referral of all matters to a Joint Board under the *Consolidated Hearings Act*.

The Ontario Municipal Board's Decision

[21] In a decision dated June 22, 2006, the Board rejected the motion to dismiss Paletta's application without a hearing. It took the position that the critical issue before it was the determination of the policy regime applicable to Paletta's application (Reasons, p. 6). The Board considered decisions dealing with the proper evaluation of applications when there has been a change in policy regime between the date of application and the date of consideration of the application by it. *Clergy Properties v. City of Mississauga* (1996), 34 O.M.B.R. 277 adopted the principle that an application should be determined in light of the policy documents in place at the time of the application. However, the Board held in *James Dick Construction Ltd. v. Town of Caledon*, [2003] O.M.B.D. No. 1195 that it could consider policies passed after the application date, but before a decision by the Board.

[22] The Board determined that "the *Clergy* principal [*sic*] cannot be relied upon by Paletta to entirely obsolve [*sic*] it from having its application evaluated under the current policy regime" (Reasons, p. 8). Given that Paletta's application was filed when rural estate lots were permitted, the Board held that Paletta was entitled to have a hearing. It further held that at the hearing, government agencies would be able to test the appropriateness, from a planning perspective, of rural estate lots, given the passage of time since the date of the original application in 1994. It also stated that "[i]mpacts and land use compatibility, in light of recent policy changes, will all be relevant factors" (Reasons, p. 9). The onus would be on Paletta to show that the application constituted good planning, given current planning standards.

2007 CanLII 36641 (ON S.C.D.C.)

2007 CanLII 36641 (ON S.C.D.C.)

[23] The Board refused to adjourn its hearing in order to allow Paletta to apply for an amendment to the NEP and to obtain development permits and then to proceed with a Joint Board hearing. The Board concluded that it should first determine whether draft plan approval constituted good planning, and if it determined that rural estate lots are appropriate, Paletta would have to satisfy any other approvals required in order to proceed with the project.

Issues

[24] The appellant submits that the Board exceeded its jurisdiction, given s. 24(3) of the NEPDA. Paletta submits that the Board had jurisdiction, because Paletta has a vested right to a hearing and determination of its application by the Board, despite the 1999 amendment to s. 24(3) of the NEPDA. Therefore, the issue for this Court is to determine whether the Board erred in concluding that it had jurisdiction to hold a hearing.

The Standard of Review

[25] An appeal lies from the Board to this Court, with leave of the Court, on a question of law alone (*Ontario Municipal Board Act*, R.S.O. 1990, c. O.28, s. 96(1)). The standard of review of Board decisions turns on the nature of the particular question of law before it. The standard is reasonableness with respect to questions of law that engage the specialized expertise of the Board and correctness with respect to questions of law of general application (*London (City) v. Ayerswood Development Corp.*, [2002] O.J. No. 4859 (C.A.) at para. 7).

[26] Here, the issue to be determined requires application of the law relating to vested rights, as well as the interpretation of the *Planning Act* and the NEPDA. The law related to jurisdiction and to vested rights is not within the specialized expertise of the Board. Therefore, we agree with counsels' submission that the appropriate standard of review in this case is correctness.

Analysis

Jurisdiction of the Board

[27] Subsection 24(1) of the NEPDA provides that in an area of development control, no development shall be undertaken unless it complies with a development permit or is permitted by regulation. Subsection 24(3), as amended in 1999, states that no approval or decision that relates to development shall be made in respect of any land located within an area of development control in the NEP unless a development permit has been issued under the NEPDA, or there is an exemption by regulation to those permit requirements. It states:

> No building permit, work order, certificate or licence that relates to development shall be issued, and **no approval**, consent, permission **or other decision that is**

> **authorized or required by an Act and that relates to development shall be made, in respect of any land**, building or structure **within an area of development control, unless the development is exempt under the regulations or,**
>
> a. **a development permit relating to the land**, building or structure **has been issued under this Act;** and
>
> b. the building permit, work order, certificate, licence, approval, consent, permission or decision is consistent with the development permit. (emphasis added)

2007 CanLII 36641 (ON S.C.D.C.)

[28] The NEC and the Region submit that the Board had no jurisdiction to proceed with the hearing under the *Planning Act*, given the requirement in s. 24(3) of the NEPDA that there be a development permit relating to the land before any approval relating to the development of the land can be given. "Development" is defined in s. 1 of the NEPDA as including a change in the use of any land.

[29] Paletta does not take issue with the current interaction between the *Planning Act* and the NEPDA, but submits that it had a vested or accrued or accruing right under s. 51(15) of the *Planning Act* to a hearing and determination by the Board, and therefore, s. 24(3) of the NEPDA does not apply to prevent the Board hearing from continuing.

[30] The Board never discussed the impact of s. 24(3) of the NEPDA in its reasons. Instead, its decision turns on its application of its own jurisprudence dealing with a change in policy regime after an application for a plan of subdivision has been made. Again and again, it refers to changes in policies, without discussing the effect of this legislative amendment. It saw its task to be a determination whether draft plan approval constitutes good planning.

[31] The clear wording of s. 24(3) of the NEPDA precludes the Board from proceeding with its hearing, unless Paletta's submission with respect to vested rights succeeds. The lands that are the subject of the application are located within an area of development control within the NEP. The NEC has jurisdiction over the issuance of development permits, and none have been issued for the subject lands. Since the 1999 amendments to the NEPDA, a development permit under the NEPDA is required prior to any decision that is authorized or required by any Act that relates to development within an area of development control, such as the approval of a plan of subdivision.

[32] Moreover, ss. 13 and 14 of the NEPDA establish the priority of the NEP in relation to municipal planning matters. Section 13 provides that municipal developments, undertakings or by-laws may not be made for purposes that conflict with the NEP, while s. 14 provides that despite any other Act, if there is a conflict between any provision of the NEP and any provision of an official plan or zoning by-law, the NEP prevails.

[33] The reasons of the Board in this case make no reference to the mandatory language of s. 24(3) of the NEPDA. Therefore, the Board erred in law in failing to address its jurisdiction.

2007 CanLII 36641 (ON S.C.D.C.)

Whether Paletta had a vested right to a hearing under s. 51(15) of the Planning Act

[34] Paletta takes the position that once it made a *bona fide* request to have its application referred to the Board in 1998, it had a vested or accrued or accruing right to a hearing and a determination by the Board pursuant to s. 51(15) of the *Planning Act*. Therefore, Paletta submits, this Court should not interfere with the Board's decision to proceed with a hearing, even though the Board did not address either s. 24(3) of the NEPDA or vested rights, as the Board nevertheless had jurisdiction to proceed.

[35] For reasons that follow, I find that Paletta did not have a statutory or common law vested, accrued or accruing right to a hearing and determination by the Board.

[36] Often, as part of the amendments to environmental and land use statutes, the Legislature provides transition provisions to deal with existing applications (see, for example, *Oak Ridges Moraine Conservation Act*, *2001*, S.O. 2001, c. 31, s. 15; *Planning Act*, R.S.O. 1990, c. P. 13, as amended, ss. 74, 74.1, 75 and 76). However, the NEPDA contains no transition provisions that address existing applications.

[37] Section 14(1)(c) of the *Interpretation Act*, R.S.O. 1990, c. I.11 deals with vested rights on the repeal of a legislative provision. It provides:

> Where an Act is repealed or where a regulation is revoked, the repeal or revocation does not, except as in this Act otherwise provided,
> …
> (c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the Act, regulation or thing so repealed or revoked.

That provision is not directly applicable to the facts of this case, as there has been no repeal of s. 51(15) of the *Planning Act*. It was s. 24 of the NEPDA that was repealed and re-enacted in 1999. However, Paletta is not claiming vested rights under the earlier provisions of that Act; rather, it is claiming that the new restriction on approvals on development in s. 24(3) of the NEPDA does not affect the jurisdiction of the Board under s. 51(15) of the *Planning Act*.

[38] Even if s. 14(1)(c) of the *Interpretation Act* does not apply, Paletta can invoke common law principles of statutory construction relating to interference with vested rights. In *Gustavson Drilling (1964) Ltd. v. Canada (Minister of National Revenue – M.N.R.)*, [1977] 1 S.C.R. 271, the Supreme Court stated that a statute should not be construed as impairing existing rights unless the language requires such a construction (at p. 7 (Quicklaw)). The Court also observed that "[n]o one has a vested right to continuance of the law as it stood in the past" (*ibid.*).

[39] More recently, the Supreme Court discussed vested rights in *Dikranian v. Quebec (Attorney General),* [2005] S.C.J. No. 75, where the Court stated (at para. 30),

> Vested rights result from the crystallization of a party's rights and obligations and the possibility of enforcing them in the future.

Bastarache J. adopted the analytical framework to determine the existence of vested rights suggested by Professor Pierre-André Côté in *The Interpretation of Legislation in Canada* (3rd ed., 2000) (at para. 38). First, an individual's juridical or legal situation must be "tangible, concrete and distinctive" (at para. 39). In addition, the legal situation must be "sufficiently constituted" at the time of the new statute.

[40] Noting that whether a right is sufficiently concrete depends on the juridical situation in question, Bastarache J. concluded that rights and obligations, in that case, had been created at the time a contract was made between a student and a financial institution for the loan of funds for educational purposes. Legislation subsequently changing the terms of repayment was held not to interfere with the rights vested in the contract to have the terms of repayment governed by the legislative provisions operative at the time of the contract (at paras. 40, 51 and 53).

[41] The Supreme Court adopted the analytical approach to vested rights applied by the Saskatchewan Court of Appeal in *Scott v. College of Physicians and Surgeons of Saskatchewan* (1992), 95 D.L.R. (4th) 706. In that case, a physician had sought to be reinstated to the College, and provided the outstanding fees and required documentation to his solicitor. However, there was an ongoing dispute with the College about the amount owing. Before the reinstatement occurred, the applicable legislation had changed to require an individual who did not apply for reinstatement within one year after being struck from the register to apply as a new member. The previous legislation had required reinstatement on payment of annual fees for past years, outstanding court costs and penalties. The Court held that the physician had done all that he could do prior to the amendment to take advantage of the rights available to him under the Act. All that remained was the quantification of the amount owing by him, and therefore, he had an accrued or an accruing right under the repealed legislation (at p. 19 (Quicklaw)).

[42] Accrued or vested rights must have inevitability and certainty. In the words of the Supreme Court in *Dikranian, supra*, they must have "crystallized". While a party may claim it has an accruing right, it can do so only "if its eventual accrual is certain and not conditional on certain events" (*R. v. Puskas*, [1998] 1 S.C.R. 1207 at para. 14).

[43] Professor Ruth Sullivan has observed that the presumption that the legislature does not intend to interfere with vested rights is weaker than the presumption against retroactive application of legislation and, in some contexts, "easily rebutted" (R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Butterworths, 2002) at p. 546). Ultimately, she suggests, the courts are concerned about unfairness when determining whether there is an interference with accrued or accruing rights.

[44] Paletta claims that it has a right to a hearing and determination by the Board because it requested a referral to the Board under s. 51(15) of the *Planning Act* before the

2007 CanLII 36641 (ON S.C.D.C.)

NEPDA was amended in 1999. However, it does not claim, in this appeal, that it has a right to have its application determined without regard to legal provisions governing land use in the Escarpment enacted after either 1994, when it made its application, or after 1998, when it requested a referral to the Board.

2007 CanLII 36641 (ON S.C.D.C.)

[45] Paletta claims that it is in the same position as the female complainants in *Bell Canada v. Palmer*, [1974] 1 F.C. 186 (C.A.) where the Federal Court of Appeal held that they had an accrued right to pursue an equal pay claim. There, the complainants had launched an equal pay complaint and a referee had been appointed to determine the complaint. After their complaint, the legislation was changed to remove the right to an order for compensation if an equal pay complaint succeeded. As well, the referee procedure was abolished. The Court held that the complainants had an accrued right to equal pay, as provided by the statute that they had sought to enforce. They had taken the only procedural step they had to take – namely, a complaint to the Minister seeking the appointment of a referee. In these circumstances, they had an accrued right to pursue the complaint under the previous procedure and in light of the law as it stood before the amendments (at paras. 13 and 15).

[46] In my view, that case is distinguishable. There, the complainants had accrued a substantive right under the statute and commenced the procedure to enforce the right. Here, Paletta had no similar vested, accrued or accruing substantive right to approval of its subdivision plan at the time of the legislative amendment to the NEPDA.

[47] At most, Paletta had a hope or expectation that its application might be approved by the Board, as in *Director of Public Works v. Ho Po Sang*, [1961] 2 All E.R. 721. In that case, the lessee of Crown lands had applied to the Director of Public Works for a rebuilding certificate to permit demolition and new construction. The Director indicated his intention to grant the certificate. The legislative regime at the time of application would have allowed eviction of tenants without compensation once the lessee obtained a rebuilding certificate. The tenants petitioned the Governor in Council, and the lessee filed a cross-petition. While these proceedings were pending, the legislation was changed, with the result that the lessee would need an order to obtain vacant possession. This would invariably be conditional on the payment of compensation to tenants. The Privy Council held that the applicant had no accrued right to a rebuilding certificate nor a right to vacant possession of the premises under the repealed legislation. At most, he had a hope of a favourable decision at the time of the legislative change. Moreover, he had no right to have the application procedure continue. The Privy Council adopted the following statement from the Appellate Division:

> It is one thing to invoke a law for the adjudication of rights which have already accrued prior to the repeal of that law; it is quite another matter to say that, irrespective of whether any rights exist at the date of the repeal, if any procedural step is taken prior to the repeal, then, even after the repeal the applicant is entitled to have that procedure continued in order to determine whether he shall be given a right which he did not have when the procedure was set in motion.

2007 CanLII 36641 (ON S.C.D.C.)

[48] As Robertson J.A. observed in *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742 (C.A.) at 772, aff'd [1994] 3 S.C.R. 1100 at para. 56:

> If a decision-maker has an unfettered discretion which he or she has not exercised as of the date a new law takes effect, then the applicant cannot successfully assert either a vested right or even the right to have the decision-maker render a decision. This is the ratio of the Judicial Committee of the Privy Council in *Director of Public Works v. Ho Po Sang*.... [i]n that case, the court distinguished a "vested right" from a "mere hope or expectation" and determined that an applicant for a re-building permit had only a mere hope or expectation that the permit would be granted at the time that repealing legislation came into force.

[49] Paletta also relies on *Falconbridge Nickel Mines Ltd. v. Ontario (Minister of Revenue)*, [1981] O.J. No. 27. However, that case turns on a finding by the Court of Appeal that a taxpayer had a right to claim a refund for overpayment of sales tax based on the legislation at the time when the overpayment was made. Therefore, the taxpayer had an accrued right to invoke the appeal procedure in effect at the time of the overpayment, despite a subsequent change to the appeal provisions to impose a limitation period (at paras. 32, 34).

[50] This is not a situation like the one in *Scott*, *supra*, where the individual had done all that he could do to fulfill his obligations under repealed legislation, except for resolving a dispute about the amount owing. In such a case, as Professor Sullivan observed, *supra*, it would have been grossly unfair to apply the amended legislation to Dr. Scott, making him ineligible for reinstatement to his profession.

[51] In this case, there is no equivalent unfairness. The Board has not commenced its hearing on the merits of the application. Moreover, it is evident from the decision of the Board that Paletta does not have a vested or an accrued right to a particular decision, since the Board stated that its task was to determine whether the draft plan constitutes good planning. It also stated that it should do so in light of current planning practices. In its process, the Board would have the discretion to approve the plan of subdivision, attach conditions or refuse to approve the plan of subdivision. Furthermore, the Board, in its reasons, observed that neither Paletta nor the Region, City and NEC had moved this application forward quickly, and there were further delays caused by the Board itself.

[52] With the amendments to the NEPDA in 1999, there is a condition precedent to proceeding before the Board – namely, Paletta is required to obtain a development permit before any other approval about development is made. In my view, the application of s. 24(3) of the NEPDA to restrict the jurisdiction of the Board to hear the Paletta application does not interfere with an accrued or accruing right of Paletta. There is no vested or accrued right to approval of a plan of subdivision until the Board has made a determination, nor can there even be said to be an accruing one here, when the Board has not begun the actual hearing process.

[53] Paletta made reference to s. 71 of the *Planning Act*, which provides

> In the event of conflict between the provisions of this and any other general or special Act, the provisions of this Act prevail.

In my view, there is no conflict between the NEPDA and the *Planning Act*. There has been a clear condition precedent placed on the jurisdiction of the Board under s. 51(15) of the *Planning Act* by the amendment to s. 24(3) of the NEPDA. Indeed, Paletta concedes that the Board's jurisdiction is now limited unless a party has a vested right (Factum, paragraph 29).

[54] Paletta also submits that its right to a hearing and determination is an appeal right, which was described in *Puskas*, *supra* as a substantive right. In that case, the Supreme Court held that the right to appeal to the Supreme Court of Canada accrued only after a decision by the Court of Appeal. Therefore, the individuals in that case did not have the right to an automatic appeal to the Supreme Court of Canada, as no decision of the Court of Appeal was delivered before the new appeal provisions requiring leave had come into effect.

[55] The referral to the Board for a hearing is not an appeal right, as in *Puskas*. There has been a referral to the Board to determine whether an application for subdivision should be approved, a decision that would be made on the basis of applicable statutory principles and planning policies.

[56] In my view, the requirement to obtain development permits pursuant to s. 24(3) of the NEPDA before a hearing and decision by the Board does not violate any vested, accrued or accruing right of Paletta. Therefore, the Board erred in law in assuming jurisdiction to proceed with the hearing under s. 51(15) of the *Planning Act*, given s. 24(3) of the NEPDA.

Conclusion

[57] The appeal is allowed, and Decision/Order No. 1798 of the Board, dated June 22, 2006, is set aside. Whether Paletta's application should be determined by a Joint Hearing under the *Consolidated Hearings Act* is a matter for determination by the Chairs of the OMB and the Environmental Review Board, not this Court.

[58] If the parties are unable to agree on costs, they may make brief written submissions within 21 days of the release of this decision.

____
Swinton J.

____
Kiteley J.

Released: September 5, 2007

2007 CanLII 36641 (ON S.C.D.C.)

<u>CARNWATH J.</u> (dissenting in part)

[59] I agree with my colleagues that the Board erred in law in failing to refer to the mandatory language of s.24(3) of the *NEPDA*. In failing to address its jurisdiction to hold a hearing in the face of s.24(3), it erred in law.

[60] However, I respectfully disagree with my colleagues' decision to set aside the Board's order. I would send it back to a new panel, differently constituted, to consider the issue of the Board's jurisdiction.

[61] My colleagues' decision to set aside the decision flows from their conclusion that Paletta did not have a vested right to a hearing. I am not persuaded that such is the case. A strong argument can be made that Paletta had done everything it needed to do to obtain the right to a hearing.

[62] My colleagues stress that Paletta had no "substantive right to approval of its subdivision plan at the time of the legislative amendment to the *NEPDA.*" ([46], above) and "[T]here is no accrued right to approval of a plan of subdivision …" [52], above. I agree. However, the question to be decided is whether Paletta had a right to a <u>hearing</u>.

[63] Since I would return the matter to the Board, it would be inappropriate for me to pronounce on this issue until the Board has considered it.

Carnwath J.

Released: September 5, 2007

2007 CanLII 36641 (ON S.C.D.C.)

COURT FILE NO.: DC- 06 – 0065 ML
DATE: 20070905

2007 CanLII 36641 (ON S.C.D.C.)

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

CARNWATH, KITELEY AND SWINTON JJ.

B E T W E E N:

NIAGARA ESCARPMENT COMMISSION

Appellant

- and -

PALETTA INTERNATIONAL CORPORATION, REGIONAL MUNICIPALITY OF HALTON CITY OF BURLINGTON and CONSERVATION HALTON

Respondents

REASONS FOR JUDGMENT

KITELEY and SWINTON JJ. (concurring)
CARNWATH J. (dissenting in part)

Released: September 05, 2007