Environmental Review Tribunal
Tribunal de l'environnement

Ontario

ISSUE DATE: September 23, 2014 **CASE NO(S).:** 14-016

Rocha v. Director, Ministry of the Environment

In the matter of an appeal by Alberto Rocha filed March 21, 2014 for a Hearing before the Environmental Review Tribunal pursuant to section 140 of the *Environmental Protection Act*, R.S.O. 1990, c. E.19, as amended, with respect to Director's Order No. 5565-9G7M7D-1 issued by the Director, Ministry of the Environment, on March 5, 2014 under section 157.3(5) of the *Environmental Protection Act*, to prevent or reduce risk of a discharge of a contaminant or to prevent, decrease or eliminate an adverse effect therefrom at a site located at 520 Speers Road, Oakville, in the Regional Municipality of Halton;

In the matter of a motion by the appellant, Alberto Rocha, for an order staying the Director's Order.

Heard : April 29, 2014 by telephone conference call.

APPEARANCES:

Parties	**Counsel**
Alberto Rocha	Rosalind Cooper
Director, Ministry of the Environment	Justin Jacob and Kevin Hille

ORDER DELIVERED BY ROBERT V. WRIGHT

REASONS

Background

The Appeal and the 2014 MOE Orders

[1] Alberto Rocha (the "Appellant") brought a motion for an order staying, until the hearing of the appeal, Director's Order No. 5565-9G7M7D-1 (the "2014 Director's Order") issued by the Ministry of the Environment (the "MOE") to the Appellant on

March 5, 2014. On April 30, 2014, the Tribunal issued an order dismissing the Appellant's motion for a stay, while providing that either party could request an expedited hearing of the appeal. These are the reasons for the Tribunal's April 30, 2014 order.

[2] The arguments on the motion centred on the jurisdiction of the Tribunal to grant a stay of the work required and, if the Tribunal has jurisdiction, whether the Tribunal should exercise its discretion to grant a stay.

[3] The 2014 Director's Order confirmed Provincial Officer's Order 5565-9G7M7D, issued on February 28, 2014 (the "2014 Provincial Officer's Order"), requiring the Appellant to conduct off-site indoor air sampling and delineation of a plume of contamination coming from a property located at 520 Speers Road, Oakville, in the Regional Municipality of Halton (the "Property"). The Appellant had requested a review of the 2014 Provincial Officer's Order.

[4] The Director's motion materials describe the contamination in the soil and its vicinity as volatile organic compound contamination with the primary contaminants of concern being trichloroethylene ("TCE"), a degreasing solvent that can clean metal but is a human carcinogen, and vinyl chloride ("VC"), a breakdown product of TCE. The materials describe a possible "vapour intrusion" because: "TCE and VC vapours can be given off from contaminated groundwater, travel through the ground and potentially enter building spaces through sumps or cracks in the basement foundations."

[5] The 2014 Director's Order included the following reasons for the response to the Appellant's request for a review of the 2014 Provincial Officer's Order:

> I do not agree with your submission in which you indicate that your interest in the property is as lender and which, in your understanding of the Act, does not mean that you are in control of the property. The Provincial Officer's Report and the information above provide significant details which lead me to believe that you are the person making decisions regarding the TCE contamination at 520 Speers Road. I believe you are not only a lender, but you are the person making decisions and exercising charge, management or control of the property either as an advisor to Mr. Machado and Autochrome, or as a person who has a financial interest in 520 Speers Road.

Grounds for the Appeal

[6] The Appellant filed an appeal of the 2014 Director's Order under s. 140 of the *Environmental Protection Act* ("*EPA*"). The grounds for appeal are:

> Section 157.1 of the *EPA* permits a Provincial Officer to issue an Order to any person who "owns or who has management or control of an undertaking or property if the Provincial Officer reasonably believes that the requirements specified in the Order are necessary to achieve certain objectives".
>
> It is Mr. Rocha's position that he neither has or is exercising management or control of the Property, either on the basis of his position as advisor to Mr. Machado and Autochrome, or as a person having financial interest in the Property.

[7] The parties have agreed that whether or not there is a contamination plume is not an issue on this appeal.

[8] The Appellant brought this motion for a stay of the 2014 Director's Order on March 21, 2014. The evidence on the motion consisted of the Appellant's affidavit, sworn April 17, 2014, and, on behalf of the Director, the affidavit of Alison Rodrigues sworn April 24, 2014. There were no cross-examinations on the affidavits. The background information stated in these reasons is subject to findings of fact to be made on the evidence at the main hearing.

The Property

[9] The Property is owned by Autochrome Limited. It is located in a mixed commercial, industrial and residential neighbourhood in Oakville. Another related company, Precision Platers Ltd., operated a chrome plating business at the Property between 1964 and 2010. Collectively, they will be referred to as the "Companies". Manuel Machado is the sole shareholder, director and corporate officer of the Companies and, according to the Director, still carries on a business at the Property.

The Appellant

[10] For several years, the Appellant has, in his words, "been involved in representing and assisting the owner" of the Property and business located there. He also

acknowledges “that I have been advising these entities in matters involving the Ministry and have been the contact person on behalf of Mr. Machado, Autochrome and Precision Platers in various interactions with the Ministry and others.” The Appellant states that he has a professional accounting practice, that he has been paid for his advisory services by Mr. Machado and that he also has an advisory role with a number of other clients.

[11] The Appellant also has a mortgage interest in the Property, refers to himself as a creditor, and said that he has similar mortgage interests in other properties.

Previous steps taken regarding the contamination

[12] The evidence of the Director provides detailed information about steps taken by various persons to investigate and monitor subsurface groundwater and indoor air contamination in the area of the Property since the contamination plume was discovered in 2004 by a neighbouring property owner and the MOE became aware of it in 2005.

[13] In brief, and as described in the motion materials, there have been surveys, sampling, monitoring, studies, investigations, reports, technical reviews, discussions, meetings, proposals (including partial mitigation and remediation), and recommendations by various persons, as well as a series of MOE orders (four Provincial Officer’s orders and three Director’s orders from 2007 to 2014, although the MOE put indoor air monitoring on hold in 2010 for a period of time) to do certain work. The foregoing matters have involved one or more of: the neighbouring property owner, the Companies, Mr. Machado, the Appellant (in a capacity to be determined in the appeal), the Town of Oakville, the Halton Health Department, and the MOE.

[14] Some of the above matters have been acted upon, but many, or most, have not. For example, the Companies pled guilty to not complying with a 2011 Director’s order and were fined. Also, the most recent MOE Provincial Officer’s order made against the Companies and Mr. Machado, issued in September 2013 (the “2013 Provincial Officer’s Order”), requires Mr. Machado and the Companies to conduct air sampling at

residences in the vicinity of the Property, delineate offsite contamination, including groundwater monitoring, and submit reports on the findings. This work was not done.

Work Items in the 2014 MOE Orders being appealed

[15] Except for the completion dates, the Work Items required of Mr. Rocha under the 2014 Director's Order confirming the 2014 Provincial Officer's Order are the same as those required under the 2013 Provincial Officer's Order. The work was to be completed by April 30, 2014 (hence the return date of this motion of April 29, 2014 and the order made without reasons on April 30, 2014), and the reports were to be submitted by June 20, 2014.

[16] The following are the Work Items as set in the orders:

> Item No. 1
>
> By April 30, 2014, conduct indoor air sampling at 557, 553, 547, 543, 537, 533, 527, 523, 517 and 544 Pinegrove Road and 384, 378 and 379 Burton Road in accordance with Schedules "A", "B", and "C", attached and forming part of this Order. [The schedules are described below.]
>
> Item No. 2
>
> By June 20, 2014, provide a report on the results of the indoor air sampling required by Item No. 1 to the Provincial Officer, with three (3) written copies and an electronic copy.
>
> Item No. 3
>
> By April 30, 2014, implement the Off-site Delineation Investigation Proposal attached as Schedule "D" of this order, including but not limited to the installation of three (3) groundwater monitoring wells at the following municipal property locations, as described in the proposal: 345/351 Burton Road at Wildwood Drive; 505/511 Pineland Avenue to the south of 520 Speers Road; and, 529/531 Pineland Avenue east of Burton Road.
>
> Item No. 4
>
> By June 20, 2014, provide a report, completed by a Qualified Person, on the results of the Off-site Delineation Investigation Proposal work to the Provincial Officer, with two (2) written copies and an electronic copy.

> Item No. 5
>
> Effective immediately, if access to any property, or monitoring equipment or facility, where access to the property, equipment or facility is required for doing the things required by this Order, is prevented or is otherwise inaccessible, you shall forthwith notify the Provincial Officer, verbally and by fax follow-up. The fax follow-up shall state why the access is required, and the details and reason why access has been prevented, or is otherwise inaccessible.
>
> Item No. 6
>
> Effective immediately, pursuant to the authority vested in me under s. 197(1) of the *EPA*, I require you and any other person with an interest in 520 Speers Road, before dealing with 520 Speers Road in any way, to give a copy of this Order, including any amendments that may be made thereto, to every person who will acquire an interest in the property as a result of the dealing.
>
> A. While this Order is in effect, a copy or copies of this order shall be posted in a conspicuous place.
> B. While this Order is in effect, report in writing, to the District or Area office, any significant changes of operation, emission, ownership, tenancy or other legal status of the facility or operation.
> C. Unless otherwise specified, all requirements of this Order are effective upon service of the Order.

[17] The next paragraphs summarize the four schedules incorporated by reference in the above Work Items.

[18] Schedule A is a “Residential Indoor Air Sampling Protocol”. It sets out the procedures for sampling for specific volatile organic compounds (“VOCs”), which may be affecting indoor air quality in homes and it incorporates by reference the “Operations Manual for Air Quality Monitoring in Ontario”. The protocol indicates that it “is intended to ensure that air sampling data is collected in a consistent and useful manner”. There is a pre-sampling inspection to “allow for the identification of potential sources of VOC’s that may interfere with the indoor air test.” There is a screening requirement that “should also include a survey of potential outdoor air sources.” Homeowners are to be given instructions so as not to skew the sampling, e.g., to not use oil based paints. The sampling procedure is to be conducted using approved methods, with samples taken at various specified locations in the home, generally over a 24 hour exposure period. There are provisions for laboratory analysis by an appropriately accredited laboratory and to ensure quality control, e.g., the use of a field test data sheet and a chain of

custody form. MOE is to be provided with a monitoring plan setting out the sampling program and the report that is to include, at a minimum: “copies of the completed screening checklist; details of the pre-sampling activities; details on the sampling procedure; field log sheets, chain of custody forms, interpretation of the results … and laboratory Certificates of Analysis.”

[19] Schedule B is a “Draft Indoor Air Quality Screening Form” It sets out questions to determine the physical characteristics of the building, heating, ventilation and other equipment used in the building, and potential contaminant sources inside and outside the building to determine existing baseline conditions at the sampling site.

[20] Schedule C is an “Indoor Air Building Survey and Sampling Form”. It sets out questions to determine the physical characteristics of the building, heating, ventilation and other equipment used in the building, and potential contaminant sources inside and outside the building to determine existing baseline conditions at the sampling site.

[21] Schedule D is the TRY Environmental Services Inc. “Off-Site Delineation Investigation Proposal: 520 Speers Road, Oakville, Ontario”. It outlines the proposal to install monitoring wells to monitor progress of the contamination in the vicinity of private residences in the area.

Relevant Tribunal Rule and Legislation

[22] The relevant Rule of the Tribunal’s Rules of Practice (the “Rules”) and legislation are set out below (additional relevant legislative provisions are set out in Appendix A):

> *Environmental Protection Act*
> ...
> 143(2) The Tribunal may, on the application of a party to a proceeding before it, stay the operation of a decision or order, other than,
> (a) an order to monitor, record and report;
> …

Rules of Practice of the Environmental Review Tribunal

110. The Party shall provide evidence and submissions in support of its motion respecting:

(a) how the relevant statutory tests that are applicable to the granting or removal of a stay are met;
(b) whether there is a serious issue to be decided by the Tribunal;
(c) whether irreparable harm will ensue if the relief is not granted; and
(d) whether the balance of convenience, including effects on the public interest, favours granting the relief requested.

Issue

[23] The issue is whether the 2014 Director's Order, confirming the Work Items in the 2014 Provincial Officer's Order, should be stayed until the disposition of the appeal under Tribunal Rule 110 and s. 143(2)(a) of the *EPA.* This involves consideration of two sub-issues: whether the Tribunal has jurisdiction to grant a stay of the Work Items and, if so, whether any of the Work Items should be stayed.

Discussion, Analysis and Findings

Rule 110 and s. 143(2)(a) of the EPA

[24] Rule 110 requires the moving party, the Appellant, to provide evidence and submissions as to, firstly, any relevant statutory tests, and, secondly, the considerations incorporating the three-part common law test for a stay in *RJR-MacDonald Ltd. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 ("*RJR-MacDonald*"), namely: whether there is a serious issue to be decided by the Tribunal; whether irreparable harm will ensue if the relief is not granted; and whether the balance of convenience, including effects on the public interest, favours granting the relief requested.

[25] The parties submitted that, in this case, s. 143(2)(a) of the *EPA* is the relevant statutory test under Rule 110(a). The statutory test limits the Tribunal's jurisdiction to grant a stay under that provision because it provides that the "Tribunal may … stay the operation of a decision or order, other than an order to monitor, record and report".

Whether the Tribunal has jurisdiction to grant a stay

[26] In determining whether the Tribunal has jurisdiction to grant a stay because an order is not to "monitor, record and report", the Tribunal has, in previous decisions, turned to considering s. 18 of the *EPA*. It sets out preventative measures that a Director's order may require a person to take. A preventative order made by a Provincial Officer under s. 157.1(4) of the *EPA* may incorporate directions under s. 18(1). The 2014 Director's Order confirms the Work Items in the 2014 Provincial Officer's Order. Given the relationship between s. 18 and s. 157.1, references in these reasons are primarily to s. 18, which is the subject of the relevant jurisprudence, even though the Work Items originally emanated from a Provincial Officer's order under s. 157.1.

[27] The following are some of the guiding principles that have been developed by decisions of the Tribunal regarding the s. 143(2)(a) "monitor, record and report" exception to the Tribunal's jurisdiction to grant a stay:

- the party alleging that the Tribunal lacks jurisdiction to grant a stay [usually the Director in these cases] has the onus of showing that the order is to "monitor, record and report" on a balance of probabilities. See: *Tembec Industries Inc. v. Ontario (Ministry of the Environment)*, [2010] O.E.R.T.D. No. 31 ("*Tembec No. 2*") at para. 19, and *Baker v. Ontario (Ministry of the Environment)*, [2013] O.E.R.T.D. No. 21("*Baker*"), at para. 18. Nevertheless, the moving party seeking a stay should provide evidence on the issue of the statutory bars. See: *Tembec No. 2* at para. 15;

- the legislature differentiated between orders by the Director under s. 18(1)(5) of the EPA that require a person to "monitor and record the presence or discharge of a contaminant specified in the order and to report thereon to the Director", and those under s. 18(1)(6) that require a person "to study and to report to the Director" about a contaminant. See: *Currie v. Ontario (Ministry of the Environment)*, [2010] O.E.R.T.D. No. 33 ("*Currie*") at para. 52, and *Tembec No. 2* at paras. 28-29;

- "it is necessary to examine both the wording of the Director's Order and its context". See: *Currie* at para. 61;

- "[t]he Tribunal must examine the parts of an order to determine whether they are, in substance, an order to monitor, record and report; the labels given to the parts of the order are not determinative." See: *Currie* at para. 61; *Baker* at para. 29, and *Tembec No. 2* at paras. 24 and 29;

- "The purpose of environmental monitoring is to inform the need for remedial or preventative actions." See: *Baker* at para. 29, and *Tembec No. 2* at para. 31;
- the requirements to "monitor, record and report" are conjunctive. The decision or order must include all three of those elements referred to in s. 143(2)(a). See: *Tembec Industries Inc. v. Ontario (Ministry of the Environment)*, [2009] O.E.R.T.D. No. 33 ("*Tembec No. 1*") at para 29, and *Baker* at para. 28; and

- if "the real nature of the requirement is to investigate the "state of affairs" at the Site and propose remediation measures" … and "the work of the qualified professional is [not] on-going in terms of tracking or continually assessing the extent or migration of the contamination" then these are indicia that the requirements do not fall within the wording of "monitor, record and report". See: *Currie* at para. 61, and *Hart v. Ontario (Ministry of Environment)*, [2013] O.E.R.T.D. No. 48 ("*Hart*") at para. 13;

- "there can be some overlap between an 'order to monitor, record and report' issued under section 18(1)5 of the *EPA* and an order 'to study and report' under section 18(1)6. See: *Tembec No. 2* at paras. 28 and 33;

- the Tribunal does not take an 'all or nothing' approach to the work items in an order. "What the Tribunal needs to do … is look at the substance of the order in question and determine whether any provisions, on their own or taken

together, require monitoring, recording or reporting." See: *Tembec No. 2* at para. 29. "A stay of the 'study' component of an order can be granted even if the monitoring, recording and reporting portions cannot be stayed." See: *Tembec No. 2* at para. 28, agreeing with the finding in *Uniroyal Chemical Ltd. v. Ontario (Ministry of the Environment)*, [1991] O.E.A.B. No. 1;

- "The section reflects a precautionary approach, whereby monitoring activities that may reveal more significant environmental problems must continue while an appeal proceeds." See: *Tembec No. 2* at para. 31, and *Currie* at para. 53; and

- "by virtue of section 143(2)(a) the Legislature has stated that determining responsibility in an appeal yields to the higher priority of carrying out the monitoring work in the interim." See: *Tembec No. 2* at para. 37. "The legislature sets out a clear mandate that the 'show must go on' with respect to "monitoring, recording and reporting" work even if the orderee strongly disputes any responsibility for the Site." See: *Tembec No. 1* at para. 25 cited in *Tembec No. 2* at para. 30. "[T]here is no authority in the *EPA* for Appellants to demand a resolution of their appeals before they become legally responsible for complying with the Order." See: *Baker* at para. 59.

[28] The submissions of the parties regarding the Tribunal's jurisdiction focused on Work Items 1 and 3 and whether they are in the nature of an order to "monitor and record". Work Items 2 and 4 are clearly to "report" and so that requirement is met. As per the finding below, Work Items 5 and 6 are ancillary to the other Work Items. Work Item 5 simply requires that the Provincial Officer be notified if there is any difficulty obtaining access to any property to carry out Work Items 1 and 3. Work Item 6 requires disclosure of the 2014 Director's Order to anyone acquiring an interest in the Property.

Work Items 1 and 2: Off-site Residential Indoor Air Monitoring

[29] Work Item 1 requires indoor air sampling at specific residential addresses off the Property, using: the Schedule "A" Residential Indoor Air Sampling Protocol for the

procedures for sampling for specific VOCs; the Schedule “B” Draft Indoor Air Quality Screening Form; and the Schedule “C” Indoor Air Building Survey and Sampling Form.

[30] Work Item 2 requires that the results of the sampling be reported to the Provincial Officer.

[31] The Director submitted that Work Items 1 and 2 are “the latest in a series of attempts to monitor the risks posed to the residences near the [Property] posed by the high levels of the contaminants in their groundwater.” The Director asserted that these Work Items are necessary to update and expand upon information from the sampling done by the Town of Oakville in 2006. The Director indicated that the Work Items duplicate the 2013 Provincial Officer’s Order, the purpose of which was “to determine whether there may be human health impacts due to long-term exposure of the contaminants as per the Ministry’s technical recommendations in 2007 and 2009.”

[32] The Director’s motion materials state that the purpose of the Residential Indoor Air Sampling Protocol is “to obtain a worst-case representative sample that provides a conservative indication of the health risk posed by the VOC spill/release to the occupants”. The Director submitted that this work is “intended to inform the need for additional remedial or preventative actions.”

[33] The Director emphasized that monitoring is not possible unless baselines are established and other potential areas of contamination identified. The Director argued that monitoring, recording and reporting can overlap with other activities, such as conducting a study. The Director submitted that distinguishing “monitoring, recording and reporting” from “studying”, or investigative work, is artificial in this case because the specific activities set out in the schedules to the 2014 Director’s Order are necessary for effective monitoring. The Director submitted that activities ancillary to monitoring, recording and reporting are also barred from a stay under s. 143(2)(a) of the *EPA*.

[34] The Director submitted that s. 143(2)(a) must be read as providing for the protection and conservation of the natural environment, which is the purpose of the

EPA, and that “the show must go on”, i.e., monitoring, recording and reporting must proceed even though the Appellant disputes responsibility for the contamination.

[35] The Director submitted, therefore, that the Tribunal lacks jurisdiction to consider a stay of Work Items 1 and 2 under *EPA* s. 143(2)(a) because they require the Appellant to “monitor, record and report”.

[36] The Appellant also argued that the Tribunal must consider the purpose and intent of the *EPA* when determining how to apply s. 143(2)(a). The Appellant argued that the Tribunal should consider the wording of s. 18 and the context of the Director’s Order as a whole and that to “study and report” (s. 18(1)6) is much broader than to “monitor, record and report” (s. 18(1)5).

[37] The Appellant submitted that the evidence of the Provincial Officer is that the purpose of the Work Items is to determine human health impacts and that this is investigative.

[38] The Appellant argued that requiring air sampling with control samples and household surveys are “one-off” investigative activities, whereas monitoring is an ongoing activity of simply taking a reading or performing a measurement.

[39] The Appellant submitted that the evidence does not demonstrate all three of the components to “monitor, record and report”.

[40] In reply submissions, the Appellant argued that the Tribunal has never held that “ongoing attempts” at monitoring satisfy the “monitoring” aspect of s. 143(2)(a) of the *EPA* and that, in this case, the Tribunal has jurisdiction to grant a stay.

[41] The Tribunal decisions interpreting the meaning of the phrase “monitor, record and report” in s. 143(2)(a) of the *EPA* reflect the hierarchy of preventative measures that the MOE may order under s. 18(1)5, 18(1)6 and 18(1)7 of the *EPA*. The focus of s.

18(1)5 is the gathering of information about the presence or discharge of a contaminant. The work required under s. 18(1)6.i. is a repeat of s.18(1)5, but the focus of ss. 18(1)6 and 7 is using the information collected about the presence or discharge of a contaminant to study the contaminant's effects, measures to control the contaminant, or the natural environment into which the contaminant may be discharged and, or, to develop and implement plans to reduce, prevent the risk, decrease or eliminate the adverse effects of a discharge or spill of the contaminant.

[42] The s. 18(1)5 requirement "to monitor and record the presence or discharge of a contaminant … and to report thereon" will normally be less onerous, in terms of work required and cost, than the preventative measures set out in s. 18(1)6 and 7.

[43] In addition to the provisions of s. 18(1), the other provisions of s. 143 provide context to when a stay may be granted under s. 143(2)(a). While the general rule under s. 143(1) is that a proceeding commenced before the Tribunal does not operate as a stay of the Director's decision or order, there are exceptions, such as the automatic stay of orders requiring the payment of the costs of certain work and environmental and administrative penalties. Section 143(2) gives the Tribunal discretion to grant a stay except with respect to "an order to monitor, record and report." Under s. 143(3), the Tribunal shall not stay the operation of a decision or order if doing so would result in danger to health or safety of any person, impairment of the quality of the natural environment, or injury or damage to property, plant or animal life. Therefore, s. 143(3) is concerned with more pressing situations. The Tribunal is mindful that merely describing an activity as "monitoring" in an order does not make it "monitoring" in fact. The Tribunal must look at "the substance of the order".

[44] The Tribunal notes that some of the information to be obtained in accordance with Schedules B and C could be considered as "study" or "investigative" work, e.g., obtaining information about other possible VOC sources. However, Work Item 1 was ordered in the context of an undisputed plume of groundwater contamination and a known risk of 'vapour intrusion' from that contamination and, therefore, it is not investigative in that regard. The Tribunal finds that, in the circumstances of this case,

the Schedule B and C work is for the purpose of establishing baseline information that legitimates the collection of data in the Schedule A monitoring process. The Tribunal further finds that obtaining the screening and background information required by Schedules B and C incorporated in Work Item 1 is necessary to establish the reliability and relevance of the indoor air quality data and, therefore, the information is ancillary to the collection of the data about the presence or discharge of a contaminant.

[45] In addition, previous decisions of the Tribunal have held that there can be some overlap of “monitoring” with “studying” or “investigative” work (see: *Tembec No. 2* at paras. 28 and 33). Here the overlap is minor and supports the “monitoring” nature of the indoor air sampling work.

[46] The sampling required under the 2014 Director’s Order will be at various specified locations in the homes over a 24 hour exposure period. In some cases it may be appropriate, as in this case, for the “monitoring” to involve one or more sampling events in one or more locations over a short period, e.g., 24 hours, and in other cases “monitoring” might involve several sampling events in one or more locations over a lengthy period of time, e.g., several years. The most appropriate monitoring protocols for a contaminant can depend on a variety of factors, such as the nature of the contaminant, where it is located, how it is being discharged, the nature and extent of existing data, and other matters.

[47] The Director in this case argued that air quality monitoring Work Items 1 and 2 are a continuation of work previously ordered by the MOE. The Appellant argued that previous “attempts” at requiring air quality monitoring do not count as monitoring within the meaning of the s. 143(2)(a) of the *EPA*.

[48] The Town’s indoor air quality surveys and sampling of homes adjacent to the Property in 2006 were to establish if there were any immediate health concerns. The evidence indicates that a subsequent recommendation to conduct air sampling was not followed through by any action, indoor air monitoring was generally put on hold for an

unspecified period of time by the MOE in 2010, and the 2013 Provincial Officer's Order was not complied with.

[49] The Tribunal finds that the purpose of the Schedule A "Residential Indoor Air Sampling Protocol" is to obtain information about the presence or discharge of a contaminant. Work Item 1 will inform the need to prepare a study about the effects and measures to control the presence or discharge of a contaminant, or the need to develop and implement plans to prevent, reduce the risk, decrease or eliminate the adverse effects of a discharge. Work Items 1 and 2 do not require further work as described in ss. 18(1)6.ii to iv, or 18(1)7 of the *EPA*, e.g., studies or plans.

[50] The Tribunal finds, on a balance of probabilities, that Work Items 1 and 2 are to "monitor, record and report" the presence or discharge of a contaminant. The Tribunal finds that it does not have jurisdiction to consider a stay of Work Items 1 and 2 in the 2014 Director's Order.

Work Items 3 and 4: Offsite Delineation of the Contamination Plume

[51] Work Item 3 requires the installation of three groundwater monitoring wells at municipal property locations off of, and down gradient from, the Property. It requires the implementation of the Schedule D "Off-site Delineation Investigation Proposal". It proposes "to install three sentry (monitoring) wells on municipal property to monitor the southerly progress of the plume in the vicinity of private residences …". It also refers to "sampling and monitoring of existing monitoring wells" on the Property, and to the new wells as "permanent groundwater monitoring wells" of a depth consistent with the depth of the monitoring wells installed by the Town and on the Property.

[52] Schedule D provides information that gives context to this Work Item, including: a groundwater plume has already been delineated migrating from the Property; in 2011 the MOE required that three monitoring wells be installed; and in 2013, remediation had already been proposed in the source area with three sentry wells. Schedule D also requires analysis of soil samples and groundwater samples, and "a report of findings on the subsurface due diligence investigation".

[53] Work Item 4 requires a report of the work completed to the Provincial Officer.

[54] The Director argued that these Work Items "are intended to update and expand existing information on the groundwater contamination in and around the [Property]" and will provide "new information to help determine whether more residences would need indoor air testing in the future."

[55] The Appellant argued that the off-site delineation of the groundwater contamination in this case is similar to the situation that the Tribunal dealt with in *Currie*. In that case the Tribunal distinguished investigating a "state of affairs" and "study and report", from "monitoring". The Tribunal found that provisions in the order that required the assessment and delineation of sources of contamination are investigative. The Appellant submitted that the work ordered in *Currie* was similar to Work Items 3 and 4 in the 2014 Director's Order and, therefore, the Tribunal has jurisdiction to grant a stay of these Work Items, and should do so.

[56] The Appellant further submitted that these Work Items are also similar to the work ordered in *Strite Industries Limited v. Ontario (Ministry of the Environment*), 2010 CarswellOnt 1393 (Ont. Env. Rev. Trib. case No. 09-175, March 4, 2010) ("*Strite*"). While in that case the MOE consented to a stay, the Tribunal found that requiring Phase I and II environmental assessments was not an order to "monitor, record and report" and, therefore, the Tribunal had jurisdiction to grant a stay.

[57] As discussed above, it is known that there is groundwater contamination in the vicinity of the Property and its existence is not an issue raised by this appeal.

[58] Schedule D, incorporated by reference in Work Item 3, requires contractors to drill (emphasis added) "three sentry (monitoring) wells on municipal property to <u>monitor the southerly progress</u> of the plume in the vicinity of private residences" and "instrument the three (3) boreholes as <u>permanent groundwater monitoring wells</u>".

[59] The groundwater monitoring wells will collect data to delineate the boundary of the known contamination plume thereby determining the migration of pollutants, which information will also be useful in deciding where to conduct indoor air quality monitoring off-site in the residential area. This situation is different from the one in *Currie*, because it is not work to classify materials for removal, nor is the work to investigate the Property to delineate all sources of contamination. Here there is a known contamination plume off-site that is not at issue.

[60] This situation is also different from the one in *Strite*, where the order staying the environmental assessments was made on consent. Environmental assessments, by their very nature, involve study and analysis. Such work clearly goes beyond mere monitoring and recording the presence or discharge of a contaminant.

[61] The Tribunal finds that Work Item 3 does not require the preparation of a study about the effects and measures to control the presence or discharge of a contaminant (see s. 18(1)6 of the *EPA*) or the development and implementation of plans to prevent, reduce the risk, decrease or eliminate the adverse effects of a discharge (see s. 18(1)7 of the *EPA*).

[62] In the materials filed on the motion, there is evidence of previous work regarding groundwater contamination having been done or proposed that was both investigative and monitoring in nature. The work was done by different people and at various locations. Groundwater wells were drilled on the Property in 2007 (by one of the Companies) and on neighbouring municipal lands near the Property by the Town of Oakville in 2006 and 2007. Groundwater studies were conducted at the Property and on neighbouring lands in 2008. In 2011 and 2012, there were proposals to install a groundwater extraction system and additional monitoring wells.

[63] While Work Items 3 and 4 in the 2014 Director's Order are perhaps "ongoing" in a limited sense because they continue the use of groundwater wells for monitoring and recording in 2006 and 2007, they will be new wells and in different locations. The Tribunal finds that in the context of all of the work ordered in this case, the collection of

information in a coherent manner is a more important factor in determining whether the work is to “monitor” and “record” than whether the work is of an “ongoing” nature.

[64] The Tribunal finds, on a balance of probabilities, that the Director has shown that Work Items 3 and 4 are to “monitor, record and report” on the presence or discharge of a contaminant within the meaning of s. 143(2)(a) of the *EPA.* The Tribunal finds that it does not have jurisdiction to consider a stay of Work Items 3 and 4 in the Director’s 2014 Order.

Work Item 5: Access to Property

[65] Work Item 5 requires that the Provincial Officer be notified if there is any difficulty obtaining access to any property to carry out Work Items 1 and 3. Work Item 5 is only operative in relation to Work Items 1 and 3. It does not require any additional work in the nature of a study or plan.

[66] The Tribunal finds that Work Item 5 is ancillary to Work Items 1 to 4 and that the same result should follow. However, the Tribunal did not receive full submissions on whether Work Item 5 is also outside of the Tribunal’s jurisdiction under s. 143(2)(a) of the *EPA* because it is ancillary to Work Items 1 to 4. The Tribunal does not make a finding regarding jurisdiction, however, if the Tribunal has jurisdiction, it would not exercise its discretion to stay Work Item 5 in this case because of its ancillary nature.

Work Item 6: Disclosure

[67] Work Item 6 requires disclosure of the 2014 Director’s Order to anyone acquiring an interest in the Property.

[68] As with Work Item 5, the Tribunal did not receive full submissions on whether Work Item 6 is also outside of the Tribunal’s jurisdiction under s. 143(2)(a) of the *EPA* because it is ancillary to Work Items 1 to 5. While it appears more likely that the Tribunal does have jurisdiction regarding Work Item 6, the Tribunal does not need to make a finding in that regard because, as with Work Item 6, the Tribunal would not

exercise its discretion to stay Work Item 6 in this case because of its ancillary nature and because the Appellant did not provide evidence or submissions to support the irreparable harm and balance of convenience requirements of Rule 110(c) and (d) and the common law test that are discussed below.

Whether any of the Work Items should be stayed if the Tribunal has jurisdiction to grant a stay

[69] Due to the above findings that the Tribunal does not have jurisdiction to grant a stay of Work Items 1 to 4, the Work Items that were the focus of the evidence and submissions of the parties on the motion, it is not necessary to consider whether a stay should be granted under the three-fold *RJR-MacDonald* stay test incorporated in Tribunal Rule 110 regarding those Work Items. Nevertheless, as the Tribunal has not made a specific finding that it lacks jurisdiction to consider a stay of Work Items 5 and 6, and because the parties made full submissions on this second stage of the Rule 110 enquiry, including the Appellant's submissions regarding the potential for "abuse" of the use of the Director's authority, the Tribunal will provide further reasons for having concluded that a stay was not granted even if the Tribunal has jurisdiction to do so.

[70] Rule 110 sections (b), (c) and (d) incorporate the common law test for the granting of a stay set out in *RJR-MacDonald.* Rule 110 requires that the party seeking the stay provide evidence and submissions in support of its motion respecting:

> …
>
> (b) whether there is a serious issue to be decided by the Tribunal;
>
> (c) whether irreparable harm will ensue if the relief is not granted; and
>
> (d) whether the balance of convenience, including effects on the public interest, favours granting the relief requested.

[71] As previously noted, the Appellant, as the moving party, has the onus of showing that a stay is warranted, on a balance of probabilities.

Serious issue

[72] This stage of the test has a low threshold, intended to rule out claims that are frivolous or vexatious. (See: *Limoges v. Ontario (Ministry of Environment)*, [2007] O.E.R.T.D. No. 13 ("*Limoges*"), at para. 56.) The parties were in agreement that whether the Appellant has or had management or control of an undertaking or the Property in relation to the contamination is a serious issue to be tried, and the Tribunal finds this to be the case.

Irreparable harm

[73] At this stage of the analysis, it is the moving party's (the Appellant's) interests that are relevant. The issue is whether harm to the Appellant's interests through refusing the stay could not be remedied if there is a different result on the merits after the main hearing. Harm that might be suffered by the respondent and the public interest, should the stay be granted, should be considered at the next stage that considers the balance of convenience. See: *RJR-MacDonald* at para. 57.

[74] The Appellant estimated that the cost of the work ordered will be in the range of $150,000. The Appellant's affidavit states that he will not be able to recover the cost of the work from the Companies or Mr. Machado for the same reasons that the MOE has not had any success in enforcing their compliance with previous orders against them.

[75] The Appellant relied upon the Tribunal's decision in *TankTek Environment Services Ltd. v Ontario (Ministry of the Environment)* (2013), 76 C.E.L.R. (3d) 84 ("*TankTek"*), in which the Tribunal granted a stay of an order made under s. 143(3) of the *EPA* regarding vapours inside a house and alleged "danger to health" on the basis of the three-part *RJR-MacDonald* test. In that case the Tribunal accepted "that *TankTek's* prospects of recovering funds from 2280503 Ont. Ltd. and Mr. Joshi should be considered to be no better than the Director's. Therefore, the requirement to pay for the measure in Item 10 of the Order amounts to irreparable harm." The Tribunal found this to be the case although there was some evidence of insurance coverage.

[76] Regarding the Appellant's creditor status, he stated in his affidavit the concern that:

> Given that I hold security in the Property and would be directly exposed to liability if I were to attempt to realize on that security and become owner of the Property, I cannot take steps to do so without exposing myself to significant liability that could far exceed the value of my security.

[77] The Director argued that the Appellant did not provide sufficient evidence regarding his estimate of the cost of the work required and that the Director's estimate of the cost of complying with the 2014 Director's Order is approximately $80,000. The Director states that this amount is substantially less than the Appellant's estimate.

[78] The Director further argued that the Appellant has not provided details or corroborating evidence of alleged irreparable harm. The Director argues that evidence that the Companies or Mr. Machado have not complied with previous MOE orders does not prove that the Appellant will be unable to recover compensation from them. The Director argues that there is evidence to the contrary that the Companies and Mr. Machado have sources of funds, including: the assessed market value of the Property, the upgrades made to the building on the Property, and the rental income that the Property generates.

[79] The quantum of the cost of performing the Work Items, whether the amount is $80,000, as estimated by the Director, or $150,000 as estimated by the Appellant, is not determinative of the second stage of the analysis. As stated in *RJR-MacDonald*, at para. 59: "'Irreparable' refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other."

[80] The *TankTek* decision relied upon by the Appellant involved consideration of s. 143(3)(a) of the *EPA* under which a stay is barred if it would result in "danger to the health or safety of a person". However, on the question of irreparable harm, the holding of the Tribunal in *TankTek*, at para. 31, was that the Director had come to the opinion that the previous orderees in that case "had exhausted their financial resources." This

finding was the basis for the statement by the Tribunal in the same paragraph that *TankTek's* prospects of recovering funds from the orderees was no better than the Director's and the concluding finding, at para. 31, that "the requirement to pay for the measures in Item 10 of the Order amounts to irreparable harm." There is no similar evidence here that the Director has concluded that the previous orderees are impecunious.

[81] The Appellant's allegation that the Companies and Mr. Machado lack funds is not supported by any evidence other than the fact that the previous orderees have not done the work ordered. This does not, by itself, support a finding that they will be unable to compensate the Appellant for the cost of doing the work. There are other possible explanations and there is some evidence that the previous orderees, or one or more of them, do have some financial resources. There is no evidence on the motion that the Companies and Mr. Machado "exhausted their financial resources".

[82] The Tribunal finds that the Appellant has not established that he will be without recourse for compensation from the Companies and Mr. Machado should the Director's 2014 Order not be stayed and he is ultimately found not responsible for the Work Items that are the subject of the appeal. The Tribunal finds that the Appellant has not demonstrated that harm to the Appellant's interests through refusing the stay could not be remedied if there is a different result on the merits after the main hearing. Therefore, the Appellant has not met the irreparable harm requirement.

Balance of convenience and public interest considerations

[83] The Appellant argues that it is not in the public interest that the application of the *EPA* have unintended consequences (e.g., that the "management or control" net be cast so wide as to include advisers) and that the Tribunal should exercise its discretion to stay the work ordered pending the hearing of the appeal as a "safety valve" to curtail the over extensive use of preventative orders in circumstances such as these.

[84] The Appellant argued that this appeal is important and unique because it highlights the potential for "abuse" of the use of *EPA* s. 18 preventative orders against an adviser pending the hearing of appeals and that such use is not in the public interest.

[85] The Appellant submitted that the appeal will be moot if the Appellant is required to do the ordered Work Items now, for reasons discussed above in relation to "irreparable harm".

[86] The Appellant further argued that there is no urgency to complete the Work Items because the contamination issue is not new or urgent. The Appellant stated that the Director has been aware of the contamination problems in relation to the Property for a decade and that no health effects from the contamination have been detected.

[87] The Appellant submitted that the MOE has other options, such as issuing an order to a neighbouring property owner or conducting the work itself and obtaining an undertaking from the Appellant to reimburse the MOE should he be found liable at the end of the day.

[88] The Director argued that the balance of convenience favours not granting a stay because there is a strong public interest in monitoring, recording and reporting on the contamination, particularly in the context of the continuing attempts of the MOE to deal with the contamination.

[89] The Director submitted that the ongoing efforts of the MOE to deal with the contamination demonstrate the importance of the matter and counter the alleged lack of urgency.

[90] This third stage of the analysis, dealing with the balance of convenience, including effects on the public interest, will often be determinative of a stay motion in cases before the Tribunal due to the nature of the legislation with which the Tribunal deals.

[91] In *RJR-MacDonald,* the Court indicated that the public interest may be considered as a special factor in a broader spectrum of cases than constitutional ones. The Court cited, at para. 64, *Ainsley Financial Corp. v. Ontario Securities Commission* (1993), 14 O.R. (3d) 280 (Gen. Div.), at pp. 303-4, for the proposition (emphasis added):

> Interlocutory injunctions involving a challenge to the constitutional validity of legislation or to the authority of a law enforcement agency stand on a different footing than ordinary cases involving claims for such relief as between private litigants. The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interest of the private litigants.

[92] Tribunal Rule 110 specifically incorporates consideration of the public interest as a factor in assessing the balance of convenience.

[93] Sections 18 and 157.1 of the *EPA* (preventative orders by a Director and Provincial Officer, respectively) reflect public interest concerns that are consistent with the purpose of the Act, stated in s. 3(1) to be: "to provide for the protection and conservation of the natural environment." The "natural environment" is defined in the *EPA* as: "the air, land and water, or any combination or part thereof, of the Province of Ontario". Work Items 1 to 6 deal with air quality and groundwater contamination.

[94] The Tribunal has held on many occasions that the *EPA* is protective of the environment, and that this is in the public interest. See: *Limoges*, at para. 65; and *Baker*, at para. 91.

[95] The Tribunal agrees with the submission of the Director that there is a strong public interest in ensuring human and environmental health in the community. Of note, however, "the government does not have a monopoly on the public interest" and it is "open to both parties in an interlocutory *Charter* proceeding to rely upon considerations of the public interest. … 'Public interest' included both the concerns of society generally and particular interests of identifiable groups." See: *RJR-MacDonald* at para. 66. Each party alleging that the balance of convenience and public interest favours the party's position regarding whether a stay should be granted must demonstrate that is the case.

[96] The Tribunal has given careful consideration to the Appellant's submission that a stay should be granted to safeguard against "abuse" of the use of preventative orders against mere advisers. However, the Appellant's status in relation to the Property, whether he had or has management or control, is the issue yet to be determined on the appeal. In this case, the Appellant's dual role as an adviser and lender, with a mortgage against the Property is relevant to the "management or control" issue, which was addressed in the "serious issue" stage of the stay analysis above.

[97] The general principles derived from previous decisions of the Tribunal cited above address the situation of an appellant having to deal with work ordered to be performed before the hearing of the appeal.

[98] Evidence that the problem is a longstanding one and that the Director has tried unsuccessfully in the past to seek compliance do not make those efforts to deal with the matters of the groundwater contamination and possible interior air quality problem unimportant or untimely. In this case, the evidence that groundwater contamination has spread from the Property to various neighbouring properties is not disputed. The Tribunal agrees with the Director's submission that the ongoing efforts of the MOE to address the contamination at the Property underline the significance of the problem and the need for some action to be taken.

[99] The Appellant did not provide any compelling evidence relevant to this phase of the analysis that would tip the balance of convenience in favour of the Appellant.

[100] The Tribunal finds that in circumstances such as these, where groundwater contamination is present and is spreading, the Work Items are consistent with the purpose of the *EPA* and with protecting the public interest. The Work Items require the obtaining of information that will inform the need for further preventative measures that will support the protection and conservation of the natural environment and human health, both generally and for an identifiable group of neighbouring property owners in the community.

[101] The Tribunal finds that the balance of convenience, including effects on the public interest, favours not staying Work Items 1 to 6 incorporated in the 2014 Director's Order. The Tribunal would not, therefore, exercise its discretion to grant a stay of Work Items 1 to 6, if it has jurisdiction to do so.

Summary of Findings

[102] The Tribunal finds that it does not have jurisdiction to grant a stay of Work Items 1 to 6 set out in the 2014 Provincial Officer's Order and incorporated into the 2014 Director's Order. The Tribunal further finds that, even if it has jurisdiction to stay any of the Work Items, it would not exercise its discretion to do so because the Appellant has not shown that it would suffer irreparable harm. In any event, the balance of convenience, including consideration of the public interest, does not warrant a stay.

ORDER

[103] The motion by the appellant, Alberto Rocha, for an order staying Director's Order No. 5565-9G7M7D-1 is dismissed.

[104] The hearing of the appeal shall be expedited at the request of either of the parties.

Stay Refused
Procedural Directions Ordered

ROBERT V. WRIGHT
VICE-CHAIR

Appendix A – Relevant Legislation

Appendix A

Relevant Legislation

Environmental Protection Act

Purpose of Act

3.(1) The purpose of this Act is to provide for the protection and conservation of the natural environment.

Order by Director re preventive measures

18.(1) The Director, in the circumstances mentioned in subsection (2), by a written order may require a person who owns or owned or who has or had management or control of an undertaking or property to do any one or more of the following:

1. To have available at all times, or during such periods of time as are specified in the order, the equipment, material and personnel specified in the order at the locations specified in the order.
2. To obtain, construct and install or modify the devices, equipment and facilities specified in the order at the locations and in the manner specified in the order.
3. To implement procedures specified in the order.
4. To take all steps necessary so that procedures specified in the order will be implemented in the event that a contaminant is discharged into the natural environment from the undertaking or property.
5. To monitor and record the presence or discharge of a contaminant specified in the order and to report thereon to the Director.
6. To study and to report to the Director on,
   i. the presence or discharge of a contaminant specified in the order,
   ii. the effects of the presence or discharge of a contaminant specified in the order,
   iii. measures to control the presence or discharge of a contaminant specified in the order,
   iv. the natural environment into which a contaminant specified in the order may be discharged.
7. To develop and implement plans to,
   i. reduce the amount of a contaminant that is discharged into the natural environment,
   ii. prevent or reduce the risk of a spill of a pollutant within the meaning of Part X, or
   iii. prevent, decrease or eliminate any adverse effects that result or may result from a spill of a pollutant within the meaning of Part X or from any other discharge of a contaminant into the natural environment, including,

A. plans to notify the Ministry, other public authorities and members of the public who may be affected by a discharge, and

B. plans to ensure that appropriate equipment, material and personnel are available to respond to a discharge.

8. To amend a plan developed under paragraph 7 or section 91.1 in the manner specified in the order.

Grounds for order

(2) The Director may make an order under this section if the Director is of the opinion, on reasonable and probable grounds, that the requirements specified in the order are necessary or advisable so as,

(a) to prevent or reduce the risk of a discharge of a contaminant into the natural environment from the undertaking or property; or

(b) to prevent, decrease or eliminate an adverse effect that may result from,

(i) the discharge of a contaminant from the undertaking, or

(ii) the presence or discharge of a contaminant in, on or under the property.

No automatic stay on appeal

143. (1) The commencement of a proceeding before the Tribunal under this Part does not stay the operation of a decision or order made under this Act, other than,

(a) an order to pay costs and expenses under section 99.1;

(b) an order to pay the costs of work made under section 150;

(c) an order to pay an environmental penalty; or

(d) an order to pay an administrative penalty.

Tribunal may grant stay

(2) The Tribunal may, on the application of a party to a proceeding before it, stay the operation of a decision or order, other than,

(a) an order to monitor, record and report; or

(b) an order issued under section 168.8, 168.14 or 168.20.

When stay may not be granted

(3) The Tribunal shall not stay the operation of a decision or order if doing so would result in,

(a) danger to the health or safety of any person;

(b) impairment or serious risk of impairment of the quality of the natural environment for any use that can be made of it; or

(c) injury or damage or serious risk of injury or damage to any property or to any plant or animal life.

Order by provincial officer re preventive measures

157.1 (1) A provincial officer may issue an order to any person who owns or who has management or control of an undertaking or property if the provincial officer reasonably believes that the requirements specified in the order are necessary or advisable so as,

(a) to prevent or reduce the risk of a discharge of a contaminant into the natural environment from the undertaking or property; or

(b) to prevent, decrease or eliminate an adverse effect that may result from,

(i) the discharge of a contaminant from the undertaking, or

(ii) the presence or discharge of a contaminant in, on or under the property.

…

What the order may require

(3) The order may require the person to whom it is directed to comply with any directions specified under subsection (4), within the time specified.

Same

(4) The following directions may be specified in the order:

1. Any direction listed in subsection 18 (1).

2. A direction to secure, by means of locks, gates, fences, security guards or other means, any land, place or thing.

Where order requires report

(5) Where the order requires a person to make a report, the report shall be made to a provincial officer.

…

157.3 (1)A person to whom an order under section 157, 157.1 or 157.2 is directed may, within seven days after being served with a copy of the order, request that the Director review the order.

…

Decision of Director

(5) A Director who receives a request for review may,

(a) revoke the order of the provincial officer; or

(b) by order directed to the person requesting the review, confirm or alter the order of the provincial officer.

Orders, consequential authority

196. (1) The authority to make an order under this Act includes the authority to require the person or body to whom the order is directed to take such intermediate action or such procedural steps or both as are related to the action required or prohibited by the order and as are specified in the order.

Disclosure of orders and decisions

197. (1) A person who has authority under this Act to make an order or decision affecting real property also has authority to make an order requiring any person with an interest in the property, before dealing with the property in any way, to give a copy of the order or decision affecting the property to every person who will acquire an interest in the property as a result of the dealing.