

Environmental Review Tribunal
Tribunal de l'environnement



ISSUE DATE: March 23, 2018

CASE NO.:

16-058

PROCEEDING COMMENCED UNDER section 140(1) of the *Environmental Protection Act*, R.S.O. 1990, c. E.19, as amended

Appellant: Union Gas Limited (File No. 16-058)
Appellant: Coca-Cola Refreshments Canada Company
(File No. 16-059)
Appellant: Rosart Properties Inc. (File No. 16-060)
Respondent: Director, Ministry of the Environment and Climate
Change
Subject of appeal: Order to undertake work with respect to
contaminants
Reference No.: 4280-A8JQEX
Property Address/Description: Site 1) 1565 Barton Street East
Site 2) 1575 Barton Street East
Site 3) 360 Strathearne Avenue North
Municipality: City of Hamilton
ERT Case No.: 16-058
ERT Case Name: Union Gas Limited v. Ontario (Environment and
Climate Change)

Heard: February 28, 2018 and March 14, 2018 by
telephone conference call

APPEARANCES:

Parties

Union Gas Limited

Coca-Cola Refreshments
Canada Company

Rosart Properties Inc.

Counsel

Leonard Griffiths

Patrick G. Duffy and Scott Kirkpatrick

Peter Pickfield

Director, Ministry of the
Environment and Climate
Change

Justin Jacob and Hayley Valleau (student at law)

ORDER DELIVERED BY JERRY V. DEMARCO AND MARCIA VALIANTE

REASONS

Background

[1] This Order relates to a request for the continuation of a stay.

[2] On April 19, 2016, the Director, Ministry of the Environment and Climate Change, issued Order No. 4280-A8JQEX (“Director’s Order”) against AVX Corporation, Union Gas Limited, Coca-Cola Refreshments Canada Company and Rosart Properties Inc. pursuant to s. 17, 18, and 196 of the *Environmental Protection Act* (“EPA”). The Director’s Order relates to the presence and migration of contaminants on three properties located in Hamilton, Ontario: (1) 1565 Barton Street East, (2) 1575 Barton Street East, and (3) 360 Strathearne Avenue North.

[3] Pursuant to s. 140 of the *EPA*, Union Gas Limited, Coca-Cola Refreshments Canada Company and Rosart Properties Inc. (“Appellants”) filed notices of appeal with the Environmental Review Tribunal (“Tribunal”). AVX Corporation did not appeal the Director’s Order.

[4] On June 17, 2016, the Tribunal issued an Order staying portions of the Director’s Order, as against the Appellants, until December 31, 2016 (see: *Union Gas Limited v. Ontario (Environment and Climate Change)*, 2016 CanLII 37491). In addition, the proceeding was adjourned on request of the parties until September 30, 2016.

[5] A status update telephone conference call (“TCC”) took place on September 30, 2016, at which time the parties requested that the proceeding continue to be adjourned

because action was being taken on a without-prejudice basis in response to the Director's Order. A further status update TCC was scheduled and took place on February 9, 2017, at which time the parties requested a further adjournment, as well as continuation of the stay until the next TCC. The Director consented to these requests. Subject to the same conditions as set out in its June 17, 2016 Order, the Tribunal issued an order on February 27, 2017 (see: *Union Gas Limited v. Ontario (Environment and Climate Change)*, [2017] O.E.R.T.D. No. 9) granting the requested continuation of the stay until the next TCC, scheduled for May 9, 2017.

[6] A further status update took place during the TCC on May 9, 2017. Rosart Properties Inc., explained to the Tribunal that work was progressing on the conceptual site model, that a revised report had been circulated, and that meetings were being held to discuss the report and work plan with the goal of finalizing the conceptual site model in the near future. The Appellants requested a further adjournment to another TCC and a further continuation of the stay. The Director consented. Union Gas Limited also requested that the stay be continued to a date four weeks following the date of the next TCC, to allow time for the parties to prepare for carrying out the Director's Order in the event the Tribunal does not grant a continuation of the stay at that TCC. The other Appellants agreed to that request. Subsequent to the TCC, the Director informed the Tribunal by email that he also consented to that request. Subject to the same conditions as set out in its June 17, 2016 Order, the Tribunal issued an order on May 30, 2017 (see: *Union Gas Limited v. Ontario (Environment and Climate Change)*, [2017] O.E.R.T.D. No. 31) granting the requested continuation of the stay until September 28, 2017 and scheduling the next TCC for August 31, 2017.

[7] Subsequently, the Tribunal held several TCCs where it was informed of the progress being made toward finalizing the conceptual site model and the work plan, and at each TCC ordered a continuation of the stay, each time subject to the same conditions as set out in its June 17, 2016 Order. The following Orders were issued:

- a. an order dated September 8, 2017 granting the requested continuation of the stay until October 27, 2017 and scheduling the next TCC for

- September 29, 2017 (see: *Union Gas Limited v. Ontario (Environment and Climate Change)*, [2017] O.E.R.T.D. No. 43);
- b. an order dated October 5, 2017 granting the requested continuation of the stay until December 28, 2017 and scheduling the next TCC for November 30, 2017 (see: *Union Gas Limited v Ontario (Environment and Climate Change)*, 2017 CanLII 65450); and
 - c. an order dated December 7, 2017 granting the requested continuation of the stay until March 28, 2018 and scheduling the next TCC for February 28, 2018 (see: *Union Gas Limited v. Ontario (Environment and Climate Change)*, [2017] O.E.R.T.D. No. 59).

[8] On February 28, 2018, the Tribunal held another TCC. Given the progress made, the parties requested, and the Tribunal granted a two-week adjournment for some of them to obtain instructions with respect to finalizing the conceptual site model and work plan.

[9] On March 14, 2018, the Tribunal held another TCC. The Director informed the Tribunal that there was now agreement that the work plan would be jointly submitted by the Appellants and would be implemented over the course of the next year. The Director requested that the proceeding be adjourned to a TCC to be held at the end of July 2018, so that the Tribunal could be informed of the progress of implementation, and consented to the extension of the stay to four weeks after that date. The Appellants expressed their preference for an adjournment to the end of the one year implementation period, and extension of the stay; however, the Director did not consent to this timing.

Analysis and Findings

[10] In its previous orders, the Tribunal found that it was not precluded under s. 143(2) or 143(3) of the *EPA* from issuing a stay of s. 3.1.1, 3.1.2, 3.2.1, 3.2.2, 3.3.1 and 3.5.1 of the Director's Order as against the Appellants. Based on these findings and the parties' submissions that there has been no change in circumstances, the

Tribunal finds that it is not precluded under s. 143(2) or 143(3) of the *EPA* from granting a continuation of the stay of these items in the Director's Order.

[11] As was the case in the earlier orders, the requested continuation of the stay is on consent of all parties and has the effect of extending some of the deadlines in the Director's Order. The Tribunal finds that there is no need to engage in a detailed analysis of Rule 110 of the Tribunal's *Rules of Practice* ("Rules").

[12] Subject to the same conditions set out in its earlier orders, the Tribunal grants the requested continuation of the stay, until four weeks following the next TCC.

[13] The Director requested that the next TCC be held in late July in order to keep the Tribunal apprised of the status of implementation of the workplan. He stated that he considers a TCC in July as necessary to provide an incentive for the parties to comply with the timeline for implementation. The Tribunal ordered that a TCC be held on July 31, 2018, but directed the Director to inform the Tribunal and the Appellants in writing by July 3, 2018 if that TCC would be necessary and, if not, whether the Director would consent to an extension of the stay to March 14, 2019 and to a next TCC on February 14, 2019.

ORDER

[14] The Tribunal orders that:

- a. Sections 3.1.1, 3.1.2, 3.2.1, 3.2.2, 3.3.1 and 3.5.1 of the Director's Order are stayed as against the Appellants until August 28, 2018.
- b. The Director or the Appellants may seek a removal or modification of this Order on 15 days' notice to the other parties and in accordance with Rule 108 of the Tribunal's Rules.
- c. The Director shall write to the Tribunal and the Appellants by July 3, 2018, informing them of whether a status update TCC should be held on July 31, 2018.

- d. If the Director informs the Tribunal by July 3, 2018 that a status update TCC should be held on July 31, 2018, the TCC will be held on that date at 10 a.m.
- e. If the Director informs the Tribunal by July 3, 2018 that a status update TCC should not be held on July 31, 2018, the next status update TCC will be held on February 14, 2019 at 10 a.m.
- f. If the Director informs the Tribunal by July 3, 2018 that a status update TCC should not be held on July 31, 2018, the Director shall also inform the Tribunal and the Appellants by July 3, 2018 whether the Director consents to the continuation of the stay to March 14, 2019. If the Director does not consent to the continuation of the stay, any party may seek a continuation of the stay in accordance with the Tribunal's Rules.

*Request for Continuation of Stay Granted
Procedural Directions Ordered*

"Jerry V. DeMarco"

JERRY V. DEMARCO
ASSOCIATE CHAIR

"Marcia Valiante"

MARCIA VALIANTE
VICE-CHAIR

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Environmental Review Tribunal

A constituent tribunal of Environment and Land Tribunals Ontario
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