

# Environmental Review Tribunal

## Tribunal de l'environnement



**ISSUE DATE:** February 25, 2019

**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, Conservation and Parks
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, Conservation and Parks)

**Heard:** February 14, 2019 by telephone conference call

### APPEARANCES:

#### Parties

Union Gas Limited

Coca-Cola Refreshments Canada  
Company

Rosart Properties Inc.

#### Counsel

Leonard Griffiths

Patrick G. Duffy

Peter Pickfield

Director, Ministry of the  
Environment, Conservation and  
Parks

Isabelle O'Connor and Justin Jacob

## **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, Conservation and Parks, issued Order No. 4280-A8JQEX (“Director’s Order”) against AVX Corporation, Union Gas Limited, Coca-Cola Refreshments Canada Company and Rosart Properties Inc. (“Rosart”) 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 (“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 (ON ERT)). 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 CanLII 11499 (ON ERT)) 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. Peter Pickfield, counsel to Rosart, 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 CanLII 34386 (ON ERT)) 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 CanLII 59192 (ON ERT));
- 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 (ON ERT));
- 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 CanLII 83925 (ON ERT));
- d. an order dated March 23, 2018 granting the requested continuation of the stay until August 28, 2018, scheduling the next TCC for July 31, 2018 and directing the Director to write to the Tribunal by July 3, 2018 informing it whether a TCC should be held on that date. The order further directed that if no TCC was to be held on July 31, 2018, the next TCC would be held on February 14, 2019 and the stay would be continued to March 14, 2019 if the Director consented. (see: *Union Gas Limited v. Ontario (Environment and Climate Change)*, 2018 CanLII 25525 (ON ERT)).

[8] On July 3, 2018, Isabelle O'Connor, counsel to the Director, wrote to the Tribunal stating that the Director was of the view that a status update was not required until February 14, 2019 and consenting to the continuation of the stay to March 14, 2019, subject to the usual conditions. The Tribunal issued an order on July 13, 2018 continuing the stay to March 14, 2019 and scheduling the next TCC for February 14, 2019 (see: *Union Gas Limited v. Ontario (Environment, Conservation and Parks)*, 2018 CanLII 65911 (ON ERT)).

[9] On February 14, 2019, the Tribunal held another TCC. Mr. Pickfield advised the Tribunal that Rosart was leading implementation of the work plan but had recently run into delays with respect to obtaining access to off-site properties to install groundwater monitoring wells. He requested a status update TCC be scheduled for June to provide time for the wells to be installed, tests to be conducted and the results evaluated, and for the final conceptual site model to be reviewed by all parties. Ms. O'Connor requested that the Tribunal schedule the next TCC for mid-April and, if not needed at that time, consented to scheduling the TCC for June. The other parties did not object.

### **Discussion, 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, in accordance with the Order set out below.

## ORDER

[13] 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 May 20, 2019.
- 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 April 4, 2019, informing them of whether a status update TCC should be held on April 18, 2019.
- d. If the Director informs the Tribunal by April 4, 2019 that a status update TCC should be held on Thursday, April 18, 2019, the TCC will be held on that date at 10 a.m.
- e. If the Director informs the Tribunal by April 4, 2019 that a status update TCC should not be held on April 18, 2019, the next status update TCC will be held on Wednesday, June 19, 2019 at 10 a.m.
- f. If the Director informs the Tribunal by April 4, 2019 that a status update TCC should not be held on April 18, 2019, the Director shall also inform the Tribunal and the Appellants by April 4, 2019 whether the Director consents to the continuation of the stay to July 19, 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

If there is an attachment referred to in this document,  
please visit [www.elto.gov.on.ca](http://www.elto.gov.on.ca) to view the attachment in PDF format.

**Environmental Review Tribunal**

A constituent tribunal of Tribunals Ontario - Environment and Land Division  
Website: [www.elto.gov.on.ca](http://www.elto.gov.on.ca) Telephone: 416-212-6349 Toll Free: 1-866-448-2248