

Environmental Review Tribunal
Tribunal de l'environnement



ISSUE DATE: August 30, 2019

CASE NO.:

16-109

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

Appellant:	Corporation of the City of Mississauga
Respondent:	Director, Ministry of the Environment, Conservation and Parks
Subject of appeal:	Order to perform various work with respect to waste street sweepings
Reference No.:	3506-A8QGC3
Property Address/Description:	Cayuga Site, Selkirk Site, and Other Sites
Municipality:	Various municipalities
ERT Case No.:	16-109
ERT Case Name:	Mississauga (City) v. Ontario (Environment, Conservation and Parks)

Heard: August 8, 2019 by telephone conference call

APPEARANCES:

Parties

Corporation of the City of
Mississauga

Director, Ministry of the
Environment, Conservation and
Parks

Counsel

Liane Langstaff

Isabelle O'Connor
Jessica Rosenberg

ORDER DELIVERED BY MARLENE CASHIN AND JUSTIN DUNCAN

REASONS

Background

[1] On November 30, 2016, Tim Webb, Director, Ministry of the Environment and Climate Change, now the Ministry of the Environment, Conservation and Parks (“MECP”), issued Director’s Order No. 3506-A8QGC3 (“Director’s Order”) to the Corporation of the City of Mississauga (“City”). The Director’s Order relates to street sweepings from the City that were delivered to various properties between 2004 and 2011, defined in the Director’s Order as the “Cayuga Site”, “Selkirk Site”, “Other Sites” and “Additional Sites”.

[2] The Director’s Order requires the City, by specified dates, to take all necessary steps to: share information in the City’s possession relating to the street sweepings (Part 3a, Items No. 1 to 5); retain one or more Qualified Persons to complete work with respect to street sweepings at the Cayuga Site (Part 3b, Items No. 6 to 9); retain one or more Qualified Persons to complete work with respect to street sweepings at the Selkirk Site (Part 3c, Items No. 10 to 12); retain one or more Qualified Consultants to conduct a forensic audit regarding the Other Sites and Additional Sites, prepare a report and submit it to the Director and Public Health Officials (Part 3d, Items No. 13 to 16); and retain one or more Qualified Persons to complete work with respect to street sweepings at the Other Sites, and the Additional Sites where a specific property address is known (Part 3d, Items No. 17 to 20).

[3] On December 6, 2016, the City filed a notice of appeal of the Director’s Order with the Environmental Review Tribunal (“Tribunal”). The City appealed the Director’s Order in its entirety, including the work ordered pursuant to each Work Item set out in Part 3.

[4] The City sought a stay of all the Work Items in the Director’s Order pending the disposition of this appeal. In an order issued December 13, 2016, the Tribunal granted

the City's request for an interim stay. The Tribunal heard the stay motion on January 23, 2017 and, on February 28, 2017, issued an order: granting a stay of Part 3b, Part 3c and Items No. 17 to 20 of Part 3d of the Director's Order until the final resolution of the appeal; and dismissing the City's request for a stay of Part 3a and Items No. 13 to 16 of Part 3d of the Director's Order (See *Mississauga (City) v Ontario (Environment and Climate Change)*, 2017 CanLII 11501 (ON ERT)). In a further order issued April 7, 2017, the Tribunal ordered revised dates for completion of the Work Items in Part 3a and Items No. 13 to 16 of Part 3d of the Director's Order (2017 CanLII 19954 (ON ERT)).

[5] Following the disposition of the stay motion, the Tribunal convened several status telephone conference calls on June 23, July 25, October 3, November 3 and December 5, 2017 and January 16, 2018, involving various counsel for the Parties, to address procedural issues in advance of scheduling the Pre-hearing Conference ("PHC").

[6] At the PHC held in Mississauga on March 28, 2018 there were no requests for status in the matter. Filing deadlines were set and a 10-day hearing was scheduled to commence on November 7, 2018.

[7] Subsequent to the PHC, the Parties advised the Tribunal that they were attempting to reach a settlement and they requested that the hearing dates be vacated. The Tribunal vacated the hearing dates and received various updates from the Parties on the status of their settlement discussions.

[8] A telephone conference call was held on August 8, 2019 for the purpose of hearing submissions on a proposed settlement agreement reached by the Parties. The Proposed Minutes of Settlement entered into by the Parties includes a Terms of Reference that establishes a process for assessing and addressing contaminants that may be contained in street sweepings at various properties. The Proposed Minutes of Settlement, including the Terms of Reference, are appended to this Order as Appendix 1. The Terms of Reference can be summarized as follows:

- a. Identifies various properties in the City assessed through a completed Forensic Audit that will require no further assessment.
- b. Requires the City to engage in consultation with property owners who received street sweepings on their properties.
- c. Requires the City to hire an environmental consulting firm to conduct site visits on properties where street sweepings were received to confirm the location of street sweeping deposits. City and MECP staff will accompany the City's consultant on site visits.
- d. Requires the City to conduct sampling and testing of street sweepings.
- e. Requires the City to compare testing results against the applicable site condition standards as found in "Soil, Ground Water and Sediment Standards for Use Under Part XV.1 of the *Environmental Protection Act*" for each site that received street sweepings.
- f. If test results for any contaminants of concern do not meet the applicable site condition standards, then the City's consultant is to undertake further risk analyses to determine if the levels of contaminants found at the Site have the potential to cause harm to human health and/or the environment. A report will be prepared that will include an overview of the test results, information on any potential risks to human and environmental health and recommendations regarding whether the street sweepings should be left in place, and if so, under what conditions. The report will be prepared by consultants hired by the City and will be reviewed by the MECP. Comments, if any, will be provided to the City and are to be addressed by the City's consultant in a final report to be provided to the property owner, local Health Unit and MECP.

- g. Upon receiving the final report, the City and MECP will contact the property owner to discuss the results of the testing and options for the street sweepings deposited on the property. Options include the implementation of risk management strategies, removal of street sweepings or no further action (street sweepings left in place).
- h. If there is disagreement between a property owner and the City on the implementation of mitigation measures or removal of street sweepings, the City shall inform the MECP. If the City and the MECP disagree on the implementation of mitigation measures or removal of street sweepings, the matter will be referred to the Tribunal for resolution.

[9] As part of the Proposed Minutes of Settlement, the Parties have agreed that the City will not withdraw its appeal while the measures outlined in the Terms of Reference are being undertaken. Further, they have agreed that should a dispute with respect to any aspect of the Terms of Reference arise, either Party may request the assistance of the Tribunal in resolving the dispute. Finally, upon completion of the measures outlined in the Terms of Reference, the Parties have agreed that the City is to request a withdrawal of its appeal, the Director shall consent to the request, and the Parties will request that the Tribunal direct the Director to issue an order amending or revoking the Director's Order as agreed to by the Parties.

[10] Upon considering the Proposed Minutes of Settlement and hearing submissions from the Parties during the telephone conference call, the Tribunal determined that since the Parties have not entered into a full settlement of the appeals at this time, the Tribunal was not prepared to approve the Proposed Minutes of Settlement, since a partial settlement is not contemplated by the *Rules of Practice* of the Environmental Review Tribunal. Nevertheless, the Tribunal determined that the process contemplated by the Proposed Minutes of Settlement, including the Terms of Reference, was acceptable and adjourned the appeal to Friday, December 13, 2019 to allow the Parties

time to carry out the work contained in the Terms of Reference and for the Parties to provide an update to the Tribunal as to whether a full settlement has been reached.

ORDER

[11] The Parties are directed to provide an update on the status of this appeal to the Tribunal by Friday, December 13, 2019 with a proposal for next steps. The update may be made in writing, or a request for a telephone conference call may be made through the Tribunal's Case Coordinator.

*Adjournment Granted
Procedural Directions Ordered*

"Marlene Cashin"

MARLENE CASHIN
MEMBER

"Justin Duncan"

JUSTIN DUNCAN
VICE-CHAIR

Appendix 1 – Proposed Minutes of Settlement, including Terms of Reference

If there is an attachment referred to in this document,
please visit 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 Telephone: 416-212-6349 Toll Free: 1-866-448-2248

APPENDIX 1

Minutes of Settlement, August 7, 2019

Case No.: 16-109

ENVIRONMENTAL REVIEW TRIBUNAL

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

Appellant:	Corporation of the City of Mississauga
Respondent:	Director, Ministry of the Environment, Conservation and Parks
Subject of the Appeal:	Order to perform various work with respect to waste street sweepings
Reference No.:	3506-A8QGC3
Property Address/Description:	Cayuga, Selkirk and Other sites
Municipality:	Various
ERT Case No.:	16-109
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MINUTES OF SETTLEMENT

WHEREAS the Director, Ministry of the Environment, Conservation and Parks (“the Director”) issued Order 3506-A8PQA9 (“the Order”) to the City of Mississauga (“the City”) in respect of street sweepings delivered by the City (the “street sweepings”) to various sites in southern Ontario;

AND WHEREAS the Order requires, among other things, the City to share information with respect to street sweepings in its possession with the Director, owners of the sites, and public health officials; to remove street sweepings from the Cayuga site; to submit a plan for intrusive investigations at the Selkirk site; to conduct a forensic audit with respect to the City’s management of street sweepings from 2004-2011; and to prepare a plan for intrusive investigations at other sites where it is suspected that street sweepings were deposited;

AND WHEREAS the City appealed the Order in its entirety to the Environmental Review Tribunal (“the ERT”);

AND WHEREAS the ERT has stayed those portions of the order requiring work in respect of the Cayuga, Selkirk and other sites;

AND WHEREAS the City has complied with portions of the order that are not stayed (i.e. information sharing and the preparation of a forensic audit);

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AND WHEREAS the City and the Director have reached an agreement with respect to a plan for investigation and remediation (if necessary) of all sites subject to the Order;

AND WHEREAS the agreement establishes a process for assessing the properties which may have or did receive street sweepings from the City between 2004 and 2011 and for determining how the street sweepings will be managed on site by site basis;

AND WHEREAS the details for implementation of the agreement are set out in a Terms of Reference;

AND WHEREAS the Terms of Reference provides for the work to be undertaken in phases which include: identification of the sites to be excluded from further assessment; consultation with owners of sites where street sweepings may have been deposited; site visits; sampling and testing of street sweepings; and, reporting and recommendations to owners of property which has been sampled and tested;

THEREFORE the City and the Director (collectively, "the Parties") agree that the City's appeal of the Order will be settled as follows and that the proposed settlement is in the public interest;

1. The Appellant will implement the appended Terms of Reference dated XX, 2019, and attached to these Minutes of Settlement as Appendix A.
2. Phase I of the Terms of Reference has already been undertaken.
3. Phase II of the Terms of Reference provides for consultation with property owners:
 - a. Joint letters to be sent to property owners are attached to these Minutes of Settlement as Appendix B;
 - b. The joint letters will be sent to the owners within fourteen (14) days of the Order of the ERT approving these Minutes of Settlement; and
 - c. The owners will have thirty (30 days) from the date of the joint letter to make their wishes known with respect to their participation in the investigations.
4. Phase III of the Terms of Reference sets out the requirements for site visits to properties where an owner has opted in Phase II to participate. Phase III will be conducted after completion of Phase II and will be completed by December 31, 2019.

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5. Phase IV sets out sampling of street sweepings at sites where street sweepings are located and, where street sweepings are detected in the samples, laboratory analysis of the street sweepings.
6. Phase V sets out the actions to be taken on properties where street sweepings are identified based on the results of the laboratory analysis.
7. The results of the chemical analysis from the testing completed in Phase IV will be compared to the applicable site condition standards as found in "Soil, Ground Water and Sediment Standards for Use Under Part XV.1 of the Environmental Protection Act" for each site that received street sweepings.
 - a. Where the test results meet the applicable site condition standards as agreed upon by the Director a report will be prepared summarizing the investigations conducted at the site. The report will be reviewed by MECP and if accepted the final report will be provided to the property owner, the MECP and the local health unit. No further action will be required by the City.
 - b. If the test results do not meet the applicable site condition standards, then the City's consultant will undertake further risk analyses to determine if the levels of contaminants found at the site have the potential to cause harm to human health and/or the environment. A report will be prepared that will include an overview of the test results, information on any potential risks to human and environmental health and recommendations regarding whether the street sweepings should be left in place, and if so, under what conditions. The report will be review by the MECP. The final report will be provided to the property owner, local health unit and MECP. The Director and the City will contact the affected property owner to discuss the results of the testing and options for the street sweepings deposited on the property. Options include the implementation of risk management strategies, removal of street sweepings or no further action (street sweepings left in place).
 - i. Where the recommendation is that the street sweepings remain at a property (with or without the implementation of risk mitigation measures) the consent of the owner must first be obtained.
 - ii. Consent from Owners will be required for implementation of risk mitigation measures. Consent is also required for the removal of the street sweepings before the work may be undertaken. Where owners do not want the street sweepings removed the street sweepings will be left in place.
 - iii. Where consent has been obtained the City and its consultants will carry out the work.

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- iv. Where there is a disagreement between the property owner and the City on the implementation of mitigation measures or removal of street sweepings, the City shall inform the MECP.
 - v. If the City and the MECP disagree on the implementation of mitigation measures or removal of street sweepings, the matter will be referred to the ERT for resolution.
8. The Parties agree that the City will not withdraw its appeal while the measures outlined in the Terms of Reference are undertaken.
9. Should a dispute with respect to any aspect of the Terms of Reference arise between the Parties, either party may request the assistance of the ERT in resolving the dispute.
10. Upon completion of the measures outlined in the Terms of Reference, the City shall request to withdraw its appeal, the Director shall consent to the request, and the Parties shall request that the ERT direct the Director to issue an order amending or revoking the Director's Order as agreed to by the Parties.
11. The City shall not appeal any amendments made to the Order in accordance with these Minutes of Settlement.
12. These Minutes of Settlement may be executed in any number of counterparts, each of which shall be deemed to be an original, and all of which taken together shall be deemed to constitute one and the same instrument.

IN WITNESS WHEREOF the Corporation of the City of Mississauga and the Director have executed these Minutes of Settlement.

On behalf of the Corporation of the City
of Mississauga,

I have authority to bind the corporation.

Date

Director under the *Environmental Protection Act*

Date

APPENDIX A

TERMS OF REFERENCE August 7, 2019

Summary

The City of Mississauga (the “City”) and the Ministry of Environment, Conservation and Parks (“MECP”) met on November 21, 2018 and prepared a Proposed Settlement (attached). The Proposed Settlement is in respect of the Director’s Order No. 3506-A8QGC3, as amended (the “Order”).

The Proposed Settlement establishes a process for assessing the properties which may have, or did receive street sweepings from the City between 2004 and 2011 and for determining how the street sweepings will be managed on a site by site basis.

It was agreed that the properties to be assessed are Sites 1 - 58 as identified in the “2004 – 2011 Street Sweepings Forensic Audit”, dated July 2017 (“Forensic Audit”), prepared by MNP LLP on behalf of the City as a requirement of the Order. Of the 58 sites identified in the Forensic Audit there are only 31 sites for which addresses are available.

These Terms of Reference (“TOR”) provide additional details for the implementation of the Proposed Settlement.

PHASE I – IDENTIFY THE SITES TO BE EXCLUDED FROM FURTHER ASSESSMENT

The Proposed Settlement describes a process whereby some Sites identified in the Forensic Audit as potentially having received street sweepings may be excluded from further assessment if any of the following criteria are met:

- i) no specific address for the Site is obtainable;
- ii) it is determined that street sweepings were never likely received at the Site or that street sweepings had been temporarily stored at the Site and were subsequently removed; or
- iii) the street sweepings were deposited at a Site in a manner consistent with uses described in the MECP protocol “Management of Excess Materials in Road Construction and Maintenance”, dated July 1994 (“the Protocol”).

It is agreed that the following Sites identified in the Forensic Audit are to be excluded from further consideration

1. Sites 29, 33-48, 50-52, 55, 57 and 58 on the basis that no specific address could be identified.
2. Site 16 as it was determined that street sweepings were never likely received at the Site or that street sweepings had been temporarily stored at the Site and were subsequently removed.
3. Sites 13, 14, and 21 as the street sweepings were deposited in a manner consistent with the MECP Protocol.

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PHASE II – CONSULTATION WITH OWNERS OF REMAINING SITES WHERE STREET SWEEPINGS MAY HAVE BEEN DEPOSITED

The City and MECP have developed joint letters to inform property owners of the settlement. The letters will be sent to the owners of the Sites that were not excluded in Phase I. The letters will be provided to the owners of the following 31 Sites that were identified in the Forensic Audit: Sites 1 – 12, 15, 17-20, 22 – 28, 30 – 32, 49, 53 – 54 and 56.

The letter outlines the process described in this TOR and will include an attached form (with a postage paid envelope) to be completed by each property owner and to be returned to the MECP. Property owners can select any of the following options:

1. I would like to be contacted by staff from the City and MECP to discuss my questions about the process;
2. I do not want sampling of my property; or
3. I consent to the investigation and sampling of street sweepings from the City, if present, on my property. Staff from the City and/or MECP will contact me to make the arrangements.

If a form is not returned, the City and MECP will seek to follow-up with the property owner to determine their selection preference.

No further action will be required by the City regarding a Site if a property owner declines to participate or ultimately does not respond.

PHASE III – SITE VISITS

The purpose of the site visits is to identify the locations where street sweepings from the City may have been deposited on a property. All work will be performed by an environmental consulting firm hired by the City at no cost to the property owner. MECP staff will accompany the City and its consultant on the site visits.

Site visits will be conducted at all properties where an owner has opted in Phase II to participate.

If the ownership of a Site has changed hands the City will take all reasonable steps to contact the person(s) that owned the property at the time the street sweepings from the City were deposited to try to determine the location of the street sweepings from the City prior to completing the site visit. Where the original owner of the site is not the current owner and can be contacted, the owner will be asked to identify location of the sweepings on his/her site, or former site.

If the former owners' contact information cannot be found, or they do not respond to a joint letter from the MECP and City, and three phone calls within 30 days of being contacted, the City will be deemed to have taken all reasonable steps to contact the prior landowner.

If the original owner cannot be contacted or will not provide the location of the placement of any street sweepings, and if the location(s) of placement of any street sweepings is not apparent from a general walkthrough of a property by the City's consultant and MECP, then follow-up visits as part of Phase III may be needed to try to locate the street sweepings.

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Follow-up visits will be based on the recommendation of the City's consultant and the MECP. Where agreement cannot be reached on the need for follow up visits the issue will be referred to the ERT for resolution. Follow-up visits could include drilling boreholes/hand auguring, digging test pits or other investigative techniques such as electromagnetic surveys. If street sweepings are not located upon completion of a site walkthrough and any subsequent follow-up visits, there will not be any more work required at that site.

If street sweepings are not located on a property, a letter will be prepared by the City's consultant that documents the efforts taken to locate the street sweepings. The letter will be provided to the property owner and to the MECP. No further action will be required by the City.

If street sweepings are located on a property and a property owner indicates that they do not want to participate further in the process, the City's consultant will prepare a letter that documents the known location of the street sweepings. The letter will be provided to the property owner and MECP. No further action will be required by the City.

PHASE IV – SAMPLING AND TESTING OF STREET SWEEPINGS

The sampling of street sweepings will be completed at each Site where street sweepings from the City are located except for Sites where a property owner has indicated a wish not to participate further in the process, or did not respond to the City and MECP regarding the options in Phase II. The work will be completed by the City's consultant at no cost to the property owner. The timing of the work will be scheduled with the property owner and the MECP will be notified two weeks in advance of the date the work is to be carried out.

The scope of the investigation at each Site is dependent on the extent and nature of the street sweepings deposited at the site. In determining what sampling and testing needs to be conducted the following considerations will be given to those sites that received materials in addition to street sweepings:

- The City will not bear the costs of any testing or remedial measures in respect of any materials encountered that are not reasonably believed to be street sweepings delivered by the City from 2004-2011. The City and MECP will inform owners about the limited scope of the City's work and responsibilities.
- If comingled materials are encountered, the testing procedure will be considered on a case by case basis.

For reference purposes only, the City's site visits and truck haulage summaries as well as MECP site visits and site summary charts indicate the following sites received several types of materials, from different sources, in addition to street sweepings from the City: Sites 6, 8, 9, 15, 20, 22, 25, 28, 31, and 32.

In general, the investigation will be as set out below:

- The number of test locations would depend on the size of the material deposits. A minimum of 3 boreholes would be advanced at each Site and more boreholes would be advanced at sites with larger material deposits. It is anticipated that at most, up to 10 boreholes would be advanced.

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- The method of borehole advancement would be selected based on site conditions. Boreholes will either be advanced with a hand auger or using small hand portable drilling equipment such as a pionjar or geoprobe 420/520 direct push drilling rig.
- Boreholes will be advanced to the maximum depth of material deposits, which is anticipated to be at most about 1 to 1.5 m. Samples will be retrieved continuously from ground surface to borehole termination, and the soil stratigraphy will be logged by field staff for soil type, texture, colour, structure, moisture content and visual and olfactory evidence of impact.
- 1 sample from each of the proposed borehole locations that is interpreted to be representative of the material will be submitted for laboratory analysis of metals and inorganic parameters (including EC, SAR, cyanide), PHCs F1 – F4, and PAHs (“Contaminants of Concern”). The City’s consultant will collect discrete samples of any material encountered that is suspected to be street sweepings. Samples will be collected that are representative of at a minimum 0.6 m interval. Discrete samples will be used to be consistent with the sampling used when conducting Phase II ESA’s under O. Reg. 153/04 for the purposes of supporting a risk assessment, remediation or risk management plan, as it is understood that the information gathered during these investigations will be used to determine the need for further work at the site. Duplicate samples will be submitted at a frequency of one duplicate for every 10 primary samples and analyzed for the same parameters as the primary sample.

PHASE V – REPORTING AND RECOMENDATIONS TO PROPERTY OWNERS

The results of the chemical analysis from the testing completed in Phase IV will be compared to the applicable site condition standards as found in “Soil, Ground Water and Sediment Standards for Use Under Part XV.1 of the *Environmental Protection Act*” for each Site that received street sweepings.

If the test results for all Contaminants of Concern meet the applicable site condition standards (as agreed upon by the MECP), then a report will be prepared by the City’s consultant summarizing the environmental investigations conducted at the Site and will be reviewed by the MECP. Copies of the final report will be provided to the property owner, the MECP and the local Health Unit. No further action will be required by the City.

If the test results for any of the Contaminants of Concern do not meet the applicable site condition standards then the City’s consultant will undertake further risk analyses to determine if the levels of contaminants found at the Site have the potential to cause harm to human health and/or the environment. A report will be prepared that will include an overview of the test results, information on any potential risks to human and environmental health and recommendations regarding whether the street sweepings should be left in place, and if so, under what conditions. The report will be prepared by consultants hired by the City and will be reviewed by the MECP. Comments, if any, will be provided to the City and are to be addressed by the City’s consultant in a final report to be provided to the property owner, local Health Unit and MECP.

Upon receiving the final report the City and MECP will contact the property owner to discuss the results of the testing and options for the street sweepings deposited on the property. Options include the implementation of risk management strategies, removal of street sweepings or no further action (street sweepings left in place). Where the recommendation is that the street sweepings remain at a property (with or without the implementation of risk mitigation measures) the consent of the owner must first be obtained. Consent from owners will be required for implementation of risk mitigation measures. Consent is also required for the removal of the street sweepings before the work may be undertaken. Where consent has been obtained the City and its consultants will carry out the work. Where there is a

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disagreement between the property owner and the City on the implementation of mitigation measures or removal of street sweepings, the City shall inform the MECP. If the City and the MECP disagree on the implementation of mitigation measures or removal of street sweepings, the matter will be referred to the ERT for resolution.