

Environmental Review Tribunal
Tribunal de l'environnement



ISSUE DATE: November 21, 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: November 6, 2019 by telephone conference call

APPEARANCES:

Parties

Counsel

Union Gas Limited

Leonard Griffiths

Coca-Cola Refreshments Canada Company

Patrick G. Duffy

Rosart Properties Inc.

Peter Pickfield

Director, Ministry of the
Environment, Conservation and
Parks

Isabelle O'Connor and Justin Jacob

ORDER DELIVERED BY HELEN JACKSON AND HUGH S. WILKINS

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 for 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 at the request of the Appellants as consented to by the Director, 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));
- e. an order dated 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));
- f. an order dated February 25, 2019, granting the requested continuation of the stay until May 20, 2019, scheduling the next TCC for April 18, 2019 and directing the Director to write to the Tribunal by April 4, 2019 informing it

- whether a TCC should be held on that date. The order further directed that if no TCC was to be held on April 18, 2019, the next TCC would be held on June 19, 2019 and the stay would be continued to July 19, 2019 if the Director consented (see: *Union Gas Limited v. Ontario (Environment, Conservation and Parks)*, [2019] O.E.R.T.D. No. 10);
- g. an order dated April 11, 2019 continuing the stay to July 19, 2019 and scheduling the next TCC for June 19, 2019 (see: *Union Gas Limited v. Ontario (Environment, Conservation and Parks)*, 2019 CanLII 32427 (ON ERT)); and
 - h. an order dated June 21, 2019 continuing the stay to December 6, 2019 and scheduling the next TCC for November 6, 2019 (see: *Union Gas Limited v. Ontario (Environment, Conservation and Parks)*, 2019 CanLII 57834 (ON ERT)).

[8] On November 6, 2019, the Tribunal held another TCC. Mr. Pickfield advised that the installation of off-site monitoring wells had been done and sampling and testing from the wells had occurred. Information has been shared between the parties through their consultants and a draft conceptual site model is currently under review for approval for circulation to all the Orderes prior to providing it to the Director for review by December 13, 2019. Counsel for Union Gas Limited, Mr. Griffiths, indicated some reservations regarding setting December 13, 2019 as a firm date, given that there are numerous consultants involved in reviewing the model. Mr. Pickfield indicated that the parties hope that this conceptual model and mitigation plan will lead to a resolution of the matter; otherwise, further discussion, mediation, or adjudication may be required. Upon consent, the parties requested a continuation of the stay to 30 days following the next TCC to be held in March 2020; whereupon the parties would provide the Tribunal with an update in the matter. Mr. Pickfield indicated that the parties are all working together in good faith to resolve this matter without a hearing. Counsel for the Director, Ms. O'Connor agreed, and also indicated that at the next TCC the parties will be able to

provide insight as to whether a resolution is in sight or not. All parties agreed to this proposal and consented to an extension of the stay, on the same conditions as before, until 30 days following the next TCC.

Analysis and Findings

[9] 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, 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.

[10] As was the case with 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").

[11] Subject to the same conditions set out in its earlier orders, the Tribunal grants the requested continuation of the stay, until 30 days following the next TCC.

ORDER

[12] 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 April 27, 2020;
- 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 Rule 108 of the Tribunal's Rules; and
- c. A status update TCC will be held on **March 26, 2020** at **10 a.m.**

*Request for Continuation of Stay Granted
Procedural Directions Ordered*

"Helen Jackson"

HELEN JACKSON
MEMBER

"Hugh S. Wilkins"

HUGH S. WILKINS
MEMBER

If there is an attachment referred to in this document,
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Environmental Review Tribunal

A constituent tribunal of Tribunals Ontario - Environment and Land Division
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