Environmental Review Tribunal
Tribunal de l'environnement

ISSUE DATE: January 22, 2021 **CASE NOS.:** 19-076

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

Appellant:	NexCycle Industries Ltd. (File No. 19-076)
Appellant:	NexCycle Properties Ltd. (File No. 19-077)
Respondent:	Director, Ministry of the Environment, Conservation and Parks
Subject of appeal:	Order to conduct certain work including submitting a waste Environmental Compliance Approval and a financial assurance estimate to ensure that appropriate measures are taken to prevent adverse effects
Reference No.:	3858-BCFPDZ
Property Address/Description:	PT Lot 4, Plan 677; PT Lot 26, Concession 7
Municipality:	Township of Puslinch
Upper Tier:	Wellington County
ERT Case No.:	19-076
ERT Case Name:	NexCycle Industries Ltd. v. Ontario (Environment, Conservation and Parks)

APPEARANCES:

Parties	**Counsel**
NexCycle Industries Ltd.	John Tidball and Bryan Buttigieg
Director, Ministry of the Environment, Conservation and Parks	Nadine Harris and Rishi Ariyakumaran

HEARD: March 23, 2020 by teleconference
ADJUDICATOR(S): Helen Jackson, Member

ORDER

Background

[1] On October 7, 2019, and amended October 11, 2019, Amy Shaw, Director, Ministry of the Environment, Conservation and Parks (“MECP”), issued Director’s Order No. 3858-BCFPDZ (“Director’s Order”) to NexCycle Industries Ltd. and NexCycle Properties Ltd. (the “Appellants” or “NexCycle”). The Director’s Order relates to a property located at 50 McLean Road in the Township of Puslinch as described in the header above (the “Site”). NexCycle operate a glass recycling facility at the Site.

[2] Items 1 to 4 of the Director’s Order require the Appellants to take all necessary steps to retain a qualified consultant(s) satisfactory to the Director and have the consultant complete and submit an application for an Environmental Compliance Approval (“ECA”) for a waste disposal site (transfer and processing) as required by Part V of the *Environmental Protection Act* ("*EPA*"). Items 5 and 6 require an estimate of financial assurance for the potential clean-up of the Site. Items 7 to 15 relate to other reporting and maintenance requirements.

[3] On October 18, 2019, the Appellants filed a Notice of Appeal of the Director’s Order with the Environmental Review Tribunal (the “Tribunal”). The Appellants appealed the Director’s Order in its entirety, including all the work ordered. The Appellants dispute the need for an ECA for a waste disposal site and the need for work that is already being addressed.

[4] By letter of October 30, 2019, the Appellants sought a stay of items 1 to 6 in the Director’s Order that relate to the requirement for an ECA for a waste disposal site and a financial assurance estimate pending the disposition of this appeal. The Tribunal granted a stay by Order of January 27, 2020.

[5] The first pre-hearing conference (“pre-hearing”) was held on January 29, 2020. No persons attended to request status. At the pre-hearing, the parties indicated that the

core issue in the appeal is the legal requirement for an ECA for a waste disposal site. The Tribunal directed that the appeal be undertaken in two phases, with the first phase being a hearing to determine whether an ECA for a waste disposal site is legally required. The second phase would proceed following the decision on the first phase and would require setting a future date for a continuation of the pre-hearing to address the remainder of the appeal.

[6] The parties provided an Agreed Statement of Facts ("ASF") on February 24, 2020, and written submissions were served upon the parties and Tribunal on March 13, 2020. The Tribunal heard oral argument in the first phase of the appeal by telephone conference call ("TCC") on March 23, 2020.

[7] This decision provides the Tribunal's findings on the first phase of the appeal.

Description of the Facility

[8] The ASF lays out the operation of the facility for the purposes of the first phase of this matter which the Tribunal accepts. Key facts from the ASF are reproduced below.

> 3. At the Site, NexCycle currently receives glass from the following sources:
> (a) Glass bottles collected by The Beer Store in its packaging return system and under the Ontario Deposit Return Program;
> (b) Post-industrial window plate glass from manufacturers;
> (c) Glass bottles and jars collected in municipal blue box recycling programs and received by way of material recycling facilities; and
> (d) Automotive windshield glass from replacement programs.
> 4. NexCycle processes the glass received at the Site by raw material sorting, drying, screening, crushing, shredding and optical sorting.
> 5. The processed glass, which is referred to in the industry as "glass cullet", is sold to NexCycle's customers across North America and internationally,

and used in the manufacturing of various glass products such as bottles, fiberglass insulation, reflective highway beads and construction glass.

6. The processing generates a waste stream consisting of plastic, paper, ceramic materials, organic materials, rejected glass and glass from processing losses, which is disposed of at an approved landfill. Metals recovered in processing are sold at prevailing market prices.
7. All buildings and processing and storage areas at the Site are located less than 50 metres from the property boundaries.

Relevant Legislation

[9] Waste management in Ontario is governed by Part V of the *EPA* and its associated regulations. There is a general prohibition under Part V of the *EPA* at s. 27 (1) that prohibits a person from using, operating, establishing, altering, enlarging, or extending a waste management system or a waste disposal site except under and in accordance with an ECA.

[10] In this matter, the key regulations are Regulation 347 and Ontario Regulation ("O. Reg.") 101/94. Regulation 347 is the general waste management regulation made under the *EPA* to regulate various types of waste materials. O. Reg. 101/94 sets out the regulatory scheme for waste disposal sites used to recycle and compost waste. Municipal Waste Recycling Sites are governed under O. Reg. 101/94 Part IV. In particular, s. 21 (1) and (2) state:

> **21.** (1) This Part applies to a waste disposal site whose only function is to be used to accept waste that consists solely of waste from one or more of the categories set out in Schedule 1, 2 or 3 and that has been separated from other kinds of waste and to transfer the waste, either after processing or without processing, for recycling.
>
> (2) This Part does not apply to a site where a process, other than any of the following, is used: sorting, grading, sizing, cleaning, drying, de-inking, size reduction, pulping, pelletizing, composting, baling or packaging.

Issue

[11] The issue is whether an ECA for a waste disposal site is legally required for the subject Site.

[12] In their submissions, the Appellants have laid out a number of sub-issues to answer this question. The Tribunal will use these as a framework to guide this decision and the findings, as follows:

- Sub-Issue 1: Is the glass received by NexCycle “waste” for the purpose of the *EPA*?
- Sub-Issue 2: If the glass received by NexCycle is waste, is it exempt waste?
- Sub-Issue 3: Is the NexCycle operation an exempt waste disposal site?
- Sub-Issue 4: In the event of ambiguity, how should the waste and site exemptions be interpreted?

Sub-Issue 1: Is the glass received by NexCycle “waste” for the purpose of the *EPA*?

The Appellants’ Position

[13] The Appellants contend that the glass streams received by NexCycle are not waste for the purpose of the *EPA*. As such, s. 27 (1) of the *EPA* has no application to the NexCycle operation, and no waste ECA is required for NexCycle to operate.

[14] Section 25 of the *EPA* defines waste as including “ashes, garbage, refuse, domestic waste, industrial waste, or municipal refuse and such other materials as are designated in the regulations”.

[15] Regulation 347 provides further definitions in s. 1. (1) as follows:

> "domestic waste" includes asbestos waste;
>
> …
>
> "industrial waste" means waste from,
>
> (a) an enterprise or activity involving warehousing, storage or industrial, manufacturing or commercial processes or operations,
> (b) research or an experimental enterprise or activity,
> (c) an enterprise or activity to which clause (a) would apply if the enterprise or activity were carried on for profit,
> (d) clinics that provide medical diagnosis or treatment, or
> (e) schools, laboratories or hospitals; or
> (f) a facility or vehicle owned or operated by a municipality;
>
> …
>
> "municipal waste" means,
>
> (a) any waste, whether or not it is owned, controlled or managed by a municipality, except,
> (i) hazardous waste,
> (ii) liquid industrial waste, or
> (iii) gaseous waste, and
> (b) solid fuel, whether or not it is waste, that is derived in whole or in part from the waste included in clause (a);
> …

[16] The Appellants submit that none of the glass constitutes "ashes, garbage, refuse, domestic waste, industrial waste, or municipal refuse". NexCycle contends that the glass could only be waste if it satisfies the definition of waste in the *EPA*, which John Tidball, counsel for the Appellants, asserts it does not.

[17] Rather, Mr. Tidball argues that the facility receives glass from four different sources which is then used as raw materials in the production of glass cullet. Mr. Tidball submits that because the glass received is used as raw materials for the production of glass cullet, it is not waste for the purpose of the *EPA*.

[18] To assist in clarifying the definition of waste, Mr. Tidball referenced *Philip Enterprises Inc. v. Ontario (Ministry of Envorinment & Energy)*, 1997 CarswellOnt 3174, [1977] ("*Philip*"), where the Ontario Court of Justice addressed whether chop-line

residue, the material that results from the chopping of plastic-covered copper wire, is waste. In that matter, the applicant, Philip Enterprises Inc., sought a judicial interpretation of whether or not chop-line residue fell within the definition of waste for the purpose of the *EPA*. The Court determined that the material was not considered waste under the *EPA*.

[19] Mr. Tidball cited paragraphs 11 and 23 of *Philip* as follows:

> [11] The purpose of the Statute, if I may attempt to paraphrase it without intending to be all inclusive, is to minimize the amount of waste, landfill, pollution and harm to the environment. Its purpose is to regulate the management of harmful entities, and to encourage the maximizing of resources and the minimizing of unusable leftovers.
>
> …
>
> [23] The Applicant and other corporations in the Applicant's position, acknowledge that leftovers from a particular process remain resources available for further use, for the development of further products or byproducts, means increasing opportunity to do business, increasing ways to make money, less payment of disposing fees and an incentive to work creatively to develop new technology. For the Ministry such an interpretation is totally consistent with the Statute's philosophy of "reduce, reuse, recycle" for the conservation and protection of the environment. And, if the Ministry has concern about a particular industry it retains the right to designate. As well, under Part II, which includes general provisions relating prohibition against pollution, it has its remedies.

[20] Mr. Tidball contends the Tribunal should find that the material received by NexCycle does not meet the definition of waste in the *EPA*, similar to the Court's finding in the *Philip* case. Mr. Tidball submits that the Court's reasoning and consideration of the policy framework underlying the definition of waste in the *EPA* is relevant and should be applied to this matter, notwithstanding that since the time the *Philip* decision was issued, by amendment to Regulation 347 chop-line residue is now designated as waste.

[21] As described above, the Appellants conclude that the material does not meet the *EPA* definition of waste; therefore, the next question is whether the glass constitutes material that is "designated" as waste. Designated wastes are listed in s. 2 (1) of

Regulation 347. The potential applicable designations are provided in the following paragraphs:

> 4. Material that consists solely of waste from one or more categories set out in Schedule 1, 2 or 3 of Ontario Regulation 101/94 and that either (emphasis added),
>
> i. Has been separated from other kinds of waste at the source of the material, or
> ii. Comes from a waste disposal site.
>
> …
>
> 13. Municipal waste;
> 14. Residue from an industrial, manufacturing or commercial process or operation, if the residue leaves the site where the process or operation is carried on.
>
> Schedule 1 includes: 2. Glass bottles and jars for food or beverages; and, Schedule 2 includes: 1. Glass.

[22] In their submissions the Appellants state:

> All of the glass received by NexCycle constitutes glass and/or glass bottles for food and beverages, both of which are scheduled categories in Regulation 101/94. For the paragraph 4 designation to apply, however, the glass received by NexCycle would have to be waste for the purpose of the *EPA* definition. None of the four types of incoming glass are waste for the purpose of the EPA definition, ... The glass received by NexCycle is therefore not designated as waste by paragraph 4.
>
> Paragraph 13 designates municipal waste. It is defined in a circular manner; in that it is defined as any waste except specified wastes. The real purpose of the municipal waste definition appears to be the creation of a defined Regulation 347 category for all waste that is nonhazardous waste, liquid industrial waste or gaseous waste … For the reasons described above, the glass received by NexCycle is not waste for the purpose of the *EPA* definition. The glass received by NexCycle is therefore not designated as waste by paragraph 13.
>
> Paragraph 14 – the term residue is not defined in Reg. 347. The Oxford Dictionary defines "residue" as, "a small amount of something that remains after the main part has gone or been taken or used". Black's Law Dictionary defines "residue" as, "something that is left over after a part is removed or disposed of; a remainder". Neither glass bottles collected by The Beer Store nor glass bottles and jars collected in municipal blue box recycling programs are residues, nor are they generated by any industrial, manufacturing or commercial process or operation. Post-industrial window plate glass and automotive windshield glass originate from industrial, manufacturing or commercial process or operation. Post-industrial window plate glass and automotive windshield

> glass originate from industrial, manufacturing or commercial processes or operations, but do not constitute residues as the term is commonly defined. The glass received by NexCycle is therefore not designated as waste by paragraph 14.

[23] The Appellants maintain that the glass materials that go to the facility from four different sources are not waste, as described above in paragraphs [17] to [21]. The glass is used as raw materials in the production of glass cullet.

[24] Mr. Tidball provided extensive oral submissions on the difficulty in interpreting the legislation, specifically in regard to the multiple and circular definitions for "waste". He submits that the Director has a rigid approach to the interpretation of the regulatory scheme contrary to the intent of the legislation, which is to promote recycling. He contends his interpretation meets the intent of the legislation.

The Director's Position

[25] The Director's interpretation of the legislation is that the material received by NexCycle is a waste, and the Site is a Municipal Waste Recycling Site. Nadine Harris, counsel for MECP, notes that "waste" is defined under Part V of the *EPA* using a non-exhaustive listing. Specifically, s. 25 of the *EPA* states that waste "includes ashes, garbage, refuse, domestic waste, industrial waste, or municipal refuse and such other materials as are designated under the regulations" (emphasis added). Ms. Harris notes that the definition does not use the word "means", which renders a definition an exhaustive one. Instead, the definition uses the word "includes" which is normally used to expand the ordinary meaning of a word and ensure that it is not inappropriately read down, as provided by Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law, 2016) at page 81, and; by the Tribunal in *African Lion Safari and Game Farm Ltd. v. Ontario (Ministry of Agriculture and Food)*, [2014] O.E.R.T.D. No. 47 ("*Lion Safari*").

[26] Ms. Harris cited the case of *Canadian National Railway Company v. Ontario (Environment and Climate Change)*, 14 C.E.L.R. (4th) 70 (2017), ("*CNR*"), at paragraphs 13 to 16, where the Tribunal set out its approach to statutory interpretation:

[13] The Tribunal starts the interpretive exercise by adopting the approach set out in *Midwest Properties Ltd. v. Thordarson*, 2015 ONCA 819 (Ont. C.A.) ("*Midwest*") at para. 48:

> The modern principle of statutory interpretation requires that courts read legislative provisions "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42 (CanLII), [2002] 2 S.C.R. 559, at para. 26.

[14] The main provisions that must be interpreted in this case are s. 99.1 and 145.3(1)(b) of the *EPA*.

[15] The purposes of the *EPA* were analyzed in *R. v. Castonguay Blasting Ltd.*, [2013] 3 S.C.R. 323 (S.C.C.) ("*Castonguay*") at paras. 9 and 10:

> The *EPA* is Ontario's principal environmental protection statute. Its status as remedial legislation entitles it to a generous interpretation (*Legislation Act*, 2006, S.O. 2006, c. 21, Sch. F, s. 64; *Ontario v. Canadian Pacific Ltd.*, 1995 CanLII 112(SCC), [1995] 2 S.C.R. 1031, at para. 84). Moreover, as this Court recognized in *Canadian Pacific*, environmental protection is a complex subject matter – the environment itself and the wide range of activities which might harm it are not easily conducive to precise codification (para. 43). As a result, environmental legislation embraces an expansive approach to ensure that it can adequately respond "to a wide variety of environmentally harmful scenarios, including ones which might not have been foreseen by the drafters of the legislation" (para. 43). Because the legislature is pursuing the objective of environmental protection, its intended reach is wide and deep (para. 84).
>
> The overall purpose of the *EPA* is set out in s. 3: "The purpose of this Act is to provide for the protection and conservation of the natural environment." "[N]atural environment" is defined in s. 1(1) as the "air, land and water, or any combination or part thereof, of the Province of Ontario". The *EPA* also protects those who use the natural environment by protecting human health, plant and animal life, and property. This purpose was aptly summarized by MacPherson J.A. in *R. v. Dow Chemical Canada Inc.* (2000), 2000 CanLII 5685 (ON CA), 47 O.R (3d) 577 (C.A.), as being "to protect the natural environment and the people who live, work and play in it" (para. 49).

[16] The Tribunal follows the approach set out in *Midwest*, *Castonguay* and the *Legislation Act*. The *EPA*, as public interest-

> focussed remedial legislation, is to be given a generous interpretation *vis-à-vis* the important goal of environmental protection. *Castonguay* also serves as a reminder that the *EPA* protects the natural environment as well as those who use the natural environment.

[27] Ms. Harris submits that at paragraph 15 of *CNR*, the Tribunal sets out the importance of considering an expansive and wide interpretation of the *EPA* and places an emphasis on the purpose of the *EPA*. Paragraph 16 outlines how the Tribunal follows this approach by applying a generous interpretation of the legislation to meet the goal of environmental protection.

[28] In the current situation, Ms. Harris contends that the Appellants' assertion that the glass material does not fall under any of the *EPA* s. 25 definitions is not correct because the material clearly falls under domestic waste, industrial waste, and municipal waste. Further, she notes that the definition of industrial waste under Regulation 347 is very broad and captures a commercial or industrial process which would include plate glass and glass from auto manufacturing.

[29] Ms. Harris submits that if the Tribunal does not agree that the materials fall into the definition of waste in Part V of the *EPA*, the materials certainly fall into the designated materials categories under paragraph 4 of s. 2 (1) of Regulation 347, given that the materials consist solely of waste from one or more of the categories set out in Schedule 1, 2 or 3 of O. Reg. 101/94 and that have been separated from other kinds of waste at the source.

[30] In their submissions, the Director states that the materials received at the NexCycle facility consist solely of glass bottles collected by Beer Store, glass bottles and jars collected in the municipal blue box recycling programs, post-industrial window plate glass from manufacturers and automotive windshield glass from replacement programs, and that these glass materials are caught by the designation under s. 2(1) of Reg. 347 since they fit within either the category of "Glass bottles and jars for food or beverages" in Schedule 1 of O. Reg. 101/94 or the category of "Glass" under Schedule 2 of that regulation.

[31] As well, the glass received at the facility has been separated from other kinds of waste before being sent to the NexCycle facility. For example, the glass bottles and jars collected in municipal blue box programs are separated from other waste first by the consumer and then at materials recycling facilities. Similarly, for the glass bottles collected by the Beer Store. Therefore, the Director submits that the glass received at the NexCycle facility is designated "waste" under paragraph 4 of s. 2 (1) of Regulation 347, and therefore, is waste for the purposes of Part V of the EPA.

[32] Similarly, the Director states that the material is also designated as waste under paragraph 14 of s. 2 (1) of Regulation 347 because it is "residue from an industrial, manufacturing or commercial process or operation, if the residue leaves the site where the process or operation is carried on". The material received by NexCycle includes post-industrial window plate glass which is residue from manufacturing and automotive windshield glass which is residue from a commercial process. Therefore, the Director submits that the glass received at the NexCycle facility is designated "waste" under paragraph 14 of s. 2 (1) of Regulation 347, and therefore, is waste for the purposes of Part V of the EPA.

[33] Ms. Harris referenced *Grant v Ontario (Director Ministry of the Environment*), 46 C.E.L.R. (3d) 213 ("*Grant*") where the Tribunal was invited to apply a general definition of waste to determine whether rubber buffing material was waste. In *Grant*, the Tribunal held that it does not have to decide in the abstract whether this material is waste since Regulation 347 designates it so.

[34] Ms. Harris disagrees with the Appellants' position that if a material has a "market value", it is not waste. She contends this is contrary to the plain language of the *EPA* and Regulation 347, as the regulatory scheme defines the term "waste" very broadly without any reference to market value and includes designations of specific materials as waste, many of which likely have a market value.

[35] Ms. Harris looks to *Caledon (Town) v. 541904 Ontario Ltd.*, 2006 CarswellOnt 7389, ("*Caledon*") at paragraphs 14 and 15 where the Court defined waste from the perspective of the one who is disposing of the object:

> I agree with Justice Lane that you define what is "waste" from the perspective of the person discarding the object. When a homeowner discards non-returnable bottles that is "waste". The fact that if a homeowner had tons of non-returnable bottles to dispose of, they might be able to sell them for some amount does not alter the fact that they are properly, in ordinary parlance, considered "waste". I do not, therefore, attach any significance to the evidence that Waste Wood pays for the wood scrap it obtains. Nor is it relevant that after processing waste wood has value and can be sold.
>
> Waste can take many forms – including wood, glass, scrap metal and tires.
> …

[36] Ms. Harris also cited *Greenisle Environmental Inc. v. New Brunswick (Minister of Environment)* (2006), 2006 NBQB 173, 2006 CarswellNB 264, 21 C.E.L.R. (3d) 209 (N.B. Q.B.) ("*Greenisle*") where the New Brunswick Court of Appeal explored the idea that one person's garbage is another's treasure. In this case, the argument was made that because used beverage containers can be reused, they are not "useless" or "unsaleable", and therefore do not constitute waste. The Court did not accept that argument, as stated at paragraph 22:

> I agree that useless or unsaleable materials constitute waste. But I do not accept that the converse is true: useful and saleable materials cannot constitute waste. Certainly, one person's garbage is another person's treasure. ... But no one would say that such discarded possessions do not qualify as waste or rubbish even though they may serve a useful purpose to some. Waste is the by-product of human activity, be it in the form of industrial or consumer waste. The fact that certain forms of waste or rubbish can be transformed into something of use or value is a testament to the ingenuity of those seeking to promote the environmental welfare of all. It is not a reason to declare that the materials should never have been classified as waste in the first place.

[37] Ms. Harris submits it is clear that the material is waste both by definition and by designation.

Findings on Sub-Issue 1: The glass received by NexCycle is "waste" for the purpose of the EPA

[38] The Tribunal does not agree with the Appellants' submissions that the glass streams received by NexCycle do not fit into the *EPA* s. 25 definition for waste or the definitions for waste provided in Regulation 347. The Tribunal agrees with Mr. Tidball's observation that the definitions provided are circular; however, the Tribunal finds that by a plain reading of the legislation, the glass material clearly fits into the provided definitions of waste.

[39] The Tribunal looks to the ASF to examine the glass material that NexCycle receives. As agreed, the glass is from the following sources:

(a) Glass bottles collected by The Beer Store in its packaging return system and under the Ontario Deposit Return Program;
(b) Post-industrial window plate glass from manufacturers;
(c) Glass bottles and jars collected in municipal blue box recycling programs and received by way of material recycling facilities; and
(d) Automotive windshield glass from replacement programs.

[40] The Appellants' submission that none of the glass constitutes "ashes, garbage, refuse, domestic waste, industrial waste, or municipal refuse" is clearly not sustainable when one considers what NexCycle agrees that it accepts. Item (c) is commonly considered to be "garbage, domestic waste, or municipal refuse" in ordinary parlance. No one considers that their empty jars are anything but garbage, waste or refuse that at least one is able to recycle. The same applies to empty beer bottles, item (a). The empty beer bottles are garbage, waste or refuse to the consumer; but the empty beer bottle still has value because there was a deposit paid for the bottle by the consumer. Therefore, they are returned to the beer store to recover the deposit. Items (b) and (d) are clearly industrial waste.

[41] The Tribunal finds that items (a) to (d), which describe the materials received by the NexCycle facility, meet the first level of definitions of "waste" provided by *EPA* s. 25: "includes ashes, garbage, refuse, domestic waste, industrial waste, or municipal refuse".

[42] Ms. Harris encourages the Tribunal to consider the modern approach to statutory interpretation when determining whether the glass material received by NexCycle falls within the definitions provided by *EPA* s. 25 and Regulation 347. The Tribunal notes that the definition provides the word "includes" which indicates that the definition is to be inclusive and not exhaustive. In this case, the Tribunal is satisfied that the material clearly fits into the definition of "waste" provided by *EPA* s. 25. It is not necessary to delve deeply into the mechanics of statutory interpretation, given the clarity in this determination.

[43] Mr. Tidball argues that it is necessary to consider that NexCycle uses the glass material to produce cullet and therefore this raw material should not be considered waste. He cites *Philip*, *supra*, for the proposition that one should interpret the legislation generously so that recycling will be encouraged, with a minimum of barriers to recycling. However, it is clear by the clarity of the definitions of waste that apply to this particular situation, that there is no need nor would it be correct to vary from the clear direction of the words provided by the definitions that apply in this matter.

[44] The Tribunal finds that the direction provided by both the *Caledon* and *Greenisle* cases to be instructive. In both these cases, the Court was clear in its assessment that even if an item has value, or has value as a recyclable material, the material itself is waste. The Tribunal finds the following from paragraph 22 of *Greenisle* to aptly convey the determination of this panel member in the current matter:

> Waste is the by-product of human activity, be it in the form of industrial or consumer waste. The fact that certain forms of waste or rubbish can be transformed into something of use or value is a testament to the ingenuity of those seeking to promote the environmental welfare of all. It

> is not a reason to declare that the materials should never have been classified as waste in the first place.

[45] In addition to the Tribunal's determination that the material fits within the *EPA* s. 25 definition of waste, the Tribunal finds that the material fits within the categories of "designated waste" under paragraphs 2 and 14 of s. 2 (1) of Regulation 347.

[46] As described in the evidence, the material received by NexCycle consists solely of waste from the categories set out in Schedule 1 and 2 of O. Reg. 101/94 and has been separated from other kinds of waste at the source. Schedule 1 materials include "glass bottles and jars for food or beverages" and Schedule 2 materials include "glass". These are both categories of designated waste under paragraph 2.

[47] Also, NexCycle receives post-industrial window plate glass which is residue from manufacturing and automotive windshield glass which is residue from a commercial process; and these are also designated as waste under paragraph 14, which is "residue from an industrial, manufacturing or commercial process or operation, if the residue leaves the site where the process or operation is carried on".

[48] In *Grant*, *supra*, the Tribunal found that a detailed examination of whether the material in question was waste was not necessary, given that the material was designated by regulation as waste. In the current matter, the material received by NexCycle is also designated as waste, and therefore no further detailed examination is required. The Tribunal finds that the glass material in question is clearly designated as waste under paragraphs 2 and 14 of s. 2. (1) of Regulation 347.

[49] This panel of the Tribunal follows the approach set out previously by the Tribunal in *CNR* in coming to the findings on Sub-Issue 1. In *CNR*, the Tribunal was clear that the *EPA* is a public interest focused remedial legislation and is to be given a generous interpretation considering its important goal of environmental protection. The Tribunal's findings on Sub-Issue 1 are supportive of this goal.

Sub-Issue 2: If the Glass Received by NexCycle is waste, is it exempt waste?

The Appellants' Position

[50] The Appellants contend that the glass is exempt waste because of the exemptions in Regulation 347, s. 3 (2), paragraph 2, noted below. Therefore, as all of the waste streams received by NexCycle are exempt from Part V of the *EPA*, the Appellants contend that the NexCycle facility does not legally require an ECA for waste processing.

> 2. Municipal waste, consisting solely of waste from a single category of waste set out in Schedule 1, 2 or 3 of Ontario Regulation 101/94, transferred by a generator and destined for,
>
> i. a waste disposal site that, but for the exemption in section 5 of Ontario Regulation 101/94, would be a municipal waste recycling site to which Part IV of that regulation applies and that is located at a manufacturing establishment that uses all the output, other than residues, of the site, or (emphasis added)
>
> ii. a site for use at the site in an ongoing agricultural, commercial, manufacturing or industrial process or operation used principally for functions other than waste management if the process or operation does not involve combustion or land application of the waste.

[51] Regulation 347 s. 3 (2) paragraph 2 contains two branches, both of which require as a prerequisite that the waste consist solely of a single category of waste set out in one of the schedules to O. Reg. 101/94 (emphasis added).

[52] The first branch exempts waste transferred by a generator and destined for a waste disposal site that, but for the exemption in s. 5 of O. Reg. 101/94, would be a municipal waste recycling site to which Part IV of O. Reg. 101/94 applies and that is located at a manufacturing establishment that uses all the output other than residues, of the site (emphasis added).

[53] The second branch exempts waste transferred by a generator and destined for a site for use at the site in an ongoing agricultural, commercial, manufacturing or industrial process or operation used principally for functions other than waste management if the process or operation does not involve combustion or land application of the waste.

[54] Mr. Tidball submits that each of the four types of glass received at the facility consists solely of a single category of waste set out in Schedule 1 or 2 of O. Reg. 101/94, "glass and/or glass bottles for food and beverages." For example, glass bottles collected by The Beer Store in its packaging return system or in the Ontario Deposit Return Program consist solely of a single category, being glass bottles for food and beverages. Mr. Tidball submits that, as a result of the paragraph 2 exemption, no waste ECA is required for the collection and storage of bottles by The Beer Store, transportation of the bottles to NexCycle does not have to be in an approved waste transportation system and NexCycle does not require a waste ECA to process the bottles into glass cullet.

[55] He states that the same analysis applies to post-industrial window plate glass, glass bottles and jars collected in municipal blue box recycling programs and recovered in material recycling facilities, and automotive windshield glass. He submits each of the four types of glass received by NexCycle therefore meets the common requirement of the paragraph 2 exemption. Mr. Tidball asserts that the exemption does not cease to apply if NexCycle receives more than one type of exempt glass.

[56] Mr. Tidball contends that the first branch of the paragraph 2 exemption applies to the four glass streams on the basis that NexCycle is a manufacturing establishment that uses all of the output, other than residues, of the site. Mr. Tidball submits that each of the four glass streams is destined for NexCycle, a waste disposal site that, but for the exemption in s. 5 of O. Reg. 101/94, would be a municipal waste recycling site to which Part IV of the Regulation applies.

[57] He contends that the second branch of the exemption also applies, because NexCycle is simply a glass processor, as each of the four types of glass received and processed by NexCycle is destined for customers where it is used in ongoing industrial or manufacturing operations, i.e., the manufacture of glass products such as bottles and insulation (emphasis added). He states that those operations are not waste management operations, nor do they involve combustion or land application of the glass. Therefore, he contends that each of the four glass streams is exempt from Part V of the *EPA* under this branch.

[58] Mr. Tidball notes that the second branch also applies to the four glass streams on the basis that the glass is destined for the NexCycle facility, which itself is an ongoing manufacturing operation used principally for functions other than waste management, i.e. the manufacture of glass cullet, which does not involve combustion or land application of the glass.

The Director's Position

[59] The Director does not agree that the glass received at the NexCycle facility meets the requirements for this exemption. This exemption only applies to municipal waste consisting solely of waste from a single category of waste set out in the Schedules (emphasis added). The material that NexCycle receives is municipal waste, however, the material consists of waste from two categories of waste set out in the Schedules; glass bottles and jars from blue box waste (Schedule 1) and glass from recyclable waste other than blue box waste (Schedule 2).

[60] Ms. Harris notes that NexCycle has asserted that each stream of glass they receive consists of a single category and therefore the exemption applies. However, she contends that this is inconsistent with the plain language of paragraph 2 and the regulatory scheme governing waste management. On its face, the exemption is clear that it only applies if the material received by NexCycle is from a single category. Furthermore, she contends that since the requirement for a waste ECA in Part V applies

to the person managing the waste, which is NexCycle, the relevant material is that received by the NexCycle facility, which consists of waste from more than one category; it is irrelevant that the waste may have been from a single category before arriving at the facility.

[61] Ms. Harris submits that in separating these two types of glass in the Schedules as two separate categories and only exempting waste solely from one category, the legislature clearly intended to not exempt facilities like NexCycle that accept waste from more than one category. She states that this clear legislative intent should be followed.

[62] Other categories of waste listed in the Schedules include magazines, leather and leaf and yard waste. Under the interpretation put forward by the Appellants, a facility that accepts all these categories of waste from separate sources could also fall under this exemption. She posits that absurd consequences would result if the Appellants' interpretation were followed, as a facility that receives these varied categories of waste would qualify for this exemption.

[63] Ms. Harris asserts that is also clear that NexCycle does not meet either of the requirements under subparagraphs i. or ii. of the exemption in paragraph 2. She articulated the key question as: "what are they doing - is it manufacturing or is it processing?" Subparagraph i. requires NexCycle to be integrated into a manufacturing facility that uses the glass cullet to produce glass products. Subparagraph ii. requires that the process or operation at the Site be used principally for functions other than waste management. Ms. Harris states that the operations at the Site are for the purposes of processing waste and transferring it to be recycled by other manufacturers. She concludes the facility is not manufacturing any products; rather, the operations are principally for waste management functions.

[64] To assist in clarifying the distinction between manufacturing and processing, Ms. Harris took the Tribunal to a case by the New Brunswick Queen's Bench. In *J.D. Timber Holdings Ltd. v. New Brunswick (Forest Products Commission)* 2010 NBQB 242

(“*J.D. Timber*”), the Court reviewed the jurisprudence concerning the meaning of “manufacturing” and adopted the following summary of the law provided by counsel for the commission at paragraph 24:

> What is common throughout all of the cases reviewed is the simple fact that "manufacturing" involves a combining of elements into a new whole. Whether molecular or chemical, or through an action apparent to the eye - as with a hammer and nail - "manufacturing" is an act of combining separate elements into a new item. The act of processing a singular element into a modified version of itself – be it wood, water or fish - is processing. Or as quoted (from McNicol et al. v. Pinch, [1906] 2 K.B. 352) in Alliston Curling Club (supra): "I think the essence of making or manufacturing is that what is made shall be a different thing from that out of which it is made.

[65] The Court in *J.D. Timber* went on to hold that harvesting trees and converting them into wood chips and biomass is not manufacturing since the end product is not a different thing from which it is made, and its nature remains unchanged, as provided at paras 25 and 26.

> I agree with this analysis. Shredding large pieces of wood into smaller pieces of wood is not 'manufacturing" nor is it a "manufacturing process" within the meaning of the definition of "private woodlot." The scale of the Gillespie operation does not alter the nature of the operation. The end product is not "a different thing from that out of which it is made." Its essential nature remains unchanged.
>
> The question stated is: Is the Applicants' utilization of trees in the production of wood chips and biomass a "manufacturing process" thereby removing the Applicants' lands from the definition of "private woodlot" in the *Forest Products Act*? The answer is No.

[66] Ms. Harris contends that if producing wood chips from trees as in *J.D. Timber* is not manufacturing, sorting and crushing glass cannot possibly be considered to be manufacturing.

[67] Ms. Harris also cited *Royal Bank of Canada v. Deputy Minister of National Revenue for Customs and Excise* [1981] 2 S.C.R. 139 (“*Royal Bank of Canada*”), where the Supreme Court of Canada (“SCC”) adopted the following definition of manufacturing at paragraph 10:

> …the production of articles for use from raw or prepared material by giving to these materials new forms, qualities and properties or combinations whether by hand or machinery.

[68] With the above in mind, Ms. Harris submits that the glass cullet is not distinct in such a way from the glass waste from which it is made; it does not have different properties or qualities. It is not prepared by giving new forms or combinations to the glass from which it is made. NexCycle sorts and crushes glass to make it suitable for use in the manufacturing of products. This process merely prepares the glass to be used in such a way; it does not itself constitute "manufacturing".

[69] She states that this interpretation is consistent with the SCC decision in *Waters (Township) v. International Nickel Co. of Canada*, [1959] S.C.R. 585 ("*Waters*") at paragraph 18. In that case, the Court held that a process that separates various metals from each other and from waste rock and fuses them into small balls so that they can be used by a mill in the production of steel is not in the nature of manufacturing and it is irrelevant whether the metal was powdered or in the form of balls. The Court held that the only reason for its form is to make it usable in the blast furnace at the mill.

> The contention that anything in the nature of manufacturing is carried on at the plant in question appears to me to be quite without foundation. The process there carried out results in the separation of the iron, nickel and copper content of the concentrate from each other and from the waste rock and, so far as the iron concentrate is concerned, thereafter compacting it by partial fusion into small balls, a form in which it can be conveniently used by a manufacturer, in this case a steel mill. The situation is no different, in my opinion, than if the concentrate were shipped in powder form. The reason that it is not so shipped is that, in that form, it would not be usable in a blast furnace. In so far as the small quantities of nickel and copper recovered are concerned, it is shown that these were shipped either to the smelter or refinery of the respondent where the metal is after further treatment produced in a form in which it may be used by a manufacturer.

[70] Similarly, as Ms. Harris contends, NexCycle's sorting and crushing of the glass it receives is not manufacturing and is simply putting the glass into a form usable by manufacturers of glass products. She submits that NexCycle takes a singular element

and creates a modified version of itself through processing steps to produce cullet. NexCycle takes glass and makes it suitable for manufacturing a finished glass material by others. It is others that take the cullet and make a finished product.

[71] Ms. Harris submits that the exemption is intended for a municipal waste recycling site that is located in a manufacturing establishment that uses all the output, other than residues, of the site. She reiterates that the site must be integrated into the manufacturing operations and must supply recovered materials to the manufacturing process.

[72] Ms. Harris provided examples of such a site being one which receives, sorts, pulps and de-inks various categories of waste paper as part of a pulp and paper mill that manufactures paper products using the waste paper as a partial replacement of virgin wood fibre. Another example is a site which receives, sorts and shreds various categories of wood waste and waste paper as part of a manufacturing operation which produces construction products from the wood and paper.

[73] She submits that what NexCycle does is a waste management process, not a manufacturing activity, and it fails subparagraphs i. and ii of the paragraph 2 exemption.

Findings on Sub-Issue 2: The glass received by NexCycle is not exempt waste

[74] Regulation 347 provides exemptions for waste under s. 3 (2) paragraph 2; however, the prerequisite is that the waste consists solely of a single category of waste, set out in one of the Schedules to O. Reg. 101/94. Mr. Tidball submits that this prerequisite is met because each of the four types of glass received at the facility do consist solely of a single category of waste set out in the noted Schedules. He contends that each type of glass is exempt, and therefore the waste received by NexCycle is exempt waste.

[75] Ms. Harris contends that this is inconsistent with the plain language of paragraph 2; and on its face, the exemption is clear that it only applies if the material received by NexCycle is from a single category. Paragraph 2 states: "Municipal waste, consisting solely of waste from a single category of waste set out in Schedule 1, 2 or 3 of Ontario Regulation 101/94, …" (emphasis added). Schedule 1 includes as the second item in the list: "2. Glass bottles and jars for food or beverages." Schedule 2 includes as the first item in the list: "1. Glass." NexCycle agrees that it receives glass from both these Schedules.

[76] The Tribunal finds that the language in the legislation is clear and unambiguous – "solely of waste from a single category" means exactly that. In this case, NexCycle receives waste from two categories. Again, the principles of statutory interpretation apply, as provided in *CNR* at paragraph 13 quoting *Midwest* at paragraph 48: "The modern principle of statutory interpretation requires that courts read legislative provisions "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42 (CanLII), [2002] 2 S.C.R. 559, at para. 26."

[77] When considering the words of the legislation "in their grammatical and ordinary sense", the Tribunal concludes that NexCycle receives waste from two categories and as such does not meet the prerequisite for the exemption provided by Regulation 347 s. 3 (2) paragraph 2. In this case, a plain reading of the words leads to the conclusion that the waste received by NexCycle cannot meet the prerequisite as it consists of waste from more than one category.

[78] If the Tribunal were to ignore the plain language interpretation provided above, and accept Mr. Tidball's interpretation that each stream is exempt, then the next requirement to meet the waste exemption being that the site "is located at a manufacturing establishment that uses all the output, other than residues, of the site, …."

[79] Mr. Tidball contends that the Site meets this requirement, given that NexCycle is a manufacturing establishment that uses all of the output, other than residues. This is at the core of this dispute – the Appellants' position that NexCycle is a manufacturing facility that takes raw glass material and produces a finished product, being cullet (emphasis added).

[80] The Director disagrees and considers this facility to be a Municipal Waste Recycling Site, where wastes are processed for use by others.

[81] As laid out above, O. Reg. 101/94, Part IV, Municipal Waste Recycling Sites, s. 21 (2) sets out that the regulation "does not apply to a site where a process, other than any of the following is used: sorting, grading, sizing, cleaning, drying, de-inking, size reduction, pulping, pelletizing, composting, baling or packaging" (emphasis added). This section sets out that the named processes may occur at a at a municipal waste recycling site. In this matter, according to ASF item 4, the parties agree that the facility receives glass material that is processed by "raw material sorting, drying, screening, crushing, shredding and optical sorting". The Tribunal finds that the agreed upon activities as described in the ASF fall within the processes that are undertaken at a municipal waste recycling site.

[82] Further, the parties agree, according to item 5 of the ASF, that NexCycle sells the glass cullet to others who use it "in the manufacturing of various glass products such as bottles, fiberglass insulation, reflective highway beads and construction glass".

[83] The jurisprudence in relation to the question of "what is manufacturing versus processing" is helpful to the Tribunal in the determination of whether the NexCycle facility is a manufacturing or a processing facility.

[84] In paragraph 25 of *J.D. Timber*, *supra*, the Court determined that harvesting trees and converting them into wood chips is not manufacturing and stated: "The end product

is not “a different thing from that out of which it is made.” Its essential nature remains unchanged.”

[85] That analysis aligns with the analysis of NexCycle’s operation: taking glass material and making it into cullet. The Tribunal agrees with the Director in that what NexCycle does is change a singular element, glass waste received at the facility, into a modified version of itself in the form of “glass cullet”. “Glass cullet” is not a different thing from the glass received at the Site and its nature remains unchanged. The Tribunal finds this is an act of processing not manufacturing, as was determined in *J.D. Timber*.

[86] In *Royal Bank of Canada*, the SCC defined manufacturing as “the production of articles for use from raw or prepared material by giving to these materials new forms, qualities and properties or combinations whether by hand or machinery”.

[87] The Tribunal agrees with the submissions of Ms. Harris and finds that the glass cullet is not distinct from the waste glass from which it is made. It does not have different qualities or properties, it is merely crushed and prepared in such a way as to make it suitable for others to use in their respective manufacturing processes. This is not to say that NexCycle must not do significant activity, or work, or processing of that material to make it suitable for the respective manufacturers that are NexCycle’s clients; it simply means that the effort that NexCycle expends in order to provide good quality cullet material suited to the needs of each respective manufacturer, likely with their own particular requirements, is processing, it is not manufacturing.

[88] The Tribunal adopts the reasoning provided by the SCC in the *Waters* decision. In that case, the SCC determined that the process that separates metals and fuses them into small balls so that they can be used in a mill to produce steel is processing and not manufacturing. The Court states: “The process there carried out results in the separation of the iron, nickel and copper content of the concentrate from each other and from the waste rock and, so far as the iron concentrate is concerned, thereafter

compacting it by partial fusion into small balls, a form in which it can be conveniently used by a manufacturer, in this case a steel mill". The Tribunal finds the situation described is analogous to the situation at the NexCycle facility; where glass waste is processed in such a way as to make it useable to another manufacturer at its own facility. The Tribunal finds that what NexCycle does is processing, similar to the finding of the SCC in *Waters*.

[89] The Tribunal accepts Ms. Harris' submission and finds that NexCycle is not integrated into a manufacturing facility that uses the glass cullet to produce glass products. Processing of the glass material happens at NexCycle. The material then leaves the NexCycle facility for manufacturing elsewhere. In this case, it is not located where the manufacturing occurs and therefore does not fit into the exemption.

[90] The Tribunal finds that the NexCycle facility is not a manufacturing establishment, contrary to what is required by Regulation 347, s. 3 (2) paragraph 2, subparagraph i, in order to meet the exemption provided by this part.

[91] The Tribunal finds that NexCycle processes waste and transfers it to other entities who then manufacture other products. The Tribunal finds that the NexCycle operation is a waste management function, and therefore neither does it meet the exemption provided by subparagraph ii.

[92] In Mr. Tidball's closing submissions, he requested the opportunity to provide further evidence on the nature of the activities that occur at the NexCycle facility for the purposes of supporting the Appellants' position that the production of cullet at the facility is manufacturing. The Tribunal indicated that it would consider this request during deliberations in making this decision and would request further evidence if it found it to be necessary. The Tribunal finds that the activities that occur at the NexCycle facility are clearly processing, not manufacturing, and does not require any further evidence on this point.

Sub-Issue 3: Is the NexCycle operation an exempt waste disposal site?

The Appellants' Positon

[93] The Appellants submit that the NexCycle facility is also an exempt waste disposal site by virtue of s. 5 of O. Reg. 101/94, as provided below.

> **5.**(1) The following waste disposal sites are exempt from sections 27, 40 and 41 of the Act and this Regulation other than subsection (2):
> 1. A waste disposal site that, but for the exemption in this section, would be a municipal waste recycling site to which Part IV applies and that is located at a manufacturing establishment that uses all the output, other than residues, of the site (emphasis added).

[94] For the purposes of establishing that the facility meets this exemption, the Appellants state that the facility is a waste disposal site that meets the requirements for definition as a municipal waste recycling site because it only accepts waste that consists solely of waste from Schedules 1 and 2. The waste has been separated from other kinds of waste, and NexCycle processes the waste and transfers it for recycling. The processes used by NexCycle all constitute sorting, grading, sizing, cleaning, drying, size reduction, baling or packaging for the purpose of s. 21 (2) of O. Reg. 101/94. NexCycle contends that, but for the s. 5 exemption, the facility would be a municipal waste recycling site to which Part IV of O. Reg. 101/94 applies.

[95] Further, the Appellants state that the NexCycle facility is located at a manufacturing establishment that uses all of the output, other than residues, of the Site to manufacture glass cullet.

[96] Similar to the Appellants' position on Sub-Issue 2, the Appellants argue that the facility uses the glass material received by NexCycle to manufacture glass cullet. By virtue of manufacturing cullet, the Appellants contend the facility meets the s. 5 (1) 1. exemption because it is a "municipal waste recycling site to which Part IV applies and

that is located at a manufacturing establishment that uses all the output, other than residues, of the site."

The Director's Position

[97] Ms. Harris disagrees that the facility qualifies as an exempt waste disposal site. She asserts that the site is a municipal waste recycling site. Ms. Harris states that O. Reg. 101/94 is the regulation that the legislature put in place to regulate a facility such as NexCycle. She referenced "*A Guide to Approvals for Recycling Sites, Leaf and Yard Waste Composting Sites and Compost Use*" published by the Ministry of Environment and Energy (precursor to the MECP), which is intended to help waste generators and recycling site operators comply with the minimum requirements for establishing Municipal Waste Recycling Sites, and other sites regulated under O. Reg. 101/94.

[98] Ms. Harris notes that at page 1 in the Introduction, "processing sites" are what is intended for the NexCycle facility, and item 1 describes what NexCycle does. She states it is a Municipal Waste Recycling Site:

> …A waste disposal site is any land or facility where wastes are handled, including transfer stations, processing sites, and landfills.
>
> Regulation 101/94 (Recycling and Composting of Municipal Waste) contains specific requirements for waste disposal sites used to recycle waste. These sites prepare the wastes for use by others, such as manufacturers, who convert the wastes into a new product. The following three types of waste disposal sites are subject to Regulation 101/94:
>
> 1. Municipal Waste Recycling Site – where wastes are sorted and prepared for end-users of secondary materials.
>
> 2. Municipal Waste Recycling Depot – a convenient location where the public can deposit source-separated materials.
>
> 3. Leaf and Yard Waste Composting site – where leaf and yard waste is converted into compost.
>
> Under Regulation 101/94, if these sites meet certain standards, then they may be exempt from approvals under section 27 of the Act. This will

> speed up the establishment of the necessary recycling infrastructure in Ontario.

[99] For the waste disposal site exemption above to apply, the site must be located at a manufacturing establishment that uses all the output, other than residues, of the site. This is the same requirement as noted in Regulation 347, s. 3 (2) paragraph 2, subparagraph i. The Director is of the view that NexCycle is not a manufacturing facility and provided submissions in that regard as described above in response to Sub-Issue 2. Given that NexCycle is not a manufacturing facility, Ms. Harris concludes that the NexCycle facility does not qualify for the manufacturing exemption and is subject to the requirement for a waste ECA.

Findings on Sub-Issue 3: The NexCycle operation is not an exempt waste disposal site

[100] As described under the findings for Sub-Issue 2, the Tribunal found that the NexCycle facility is a processing facility, it is not a manufacturing facility. Therefore, the NexCycle facility does not qualify for the manufacturing exemption for a waste disposal site as permitted by s. 5 of O. Reg. 101/94. The NexCycle facility therefore is subject to the requirement for a waste ECA.

Sub-Issue 4: In the event of ambiguity, how should the waste and site exemptions be interpreted?

The Appellants' Position

[101] The Appellants contend that any ambiguity in the interpretation of the regulatory exemptions should be resolved in favour of the underlying public policy, which favours a broad interpretation of the exemptions and promotes the goals of recycling.

The Director's Position

[102] The Director submits that there is no ambiguity in the matter. When the correct approach to statutory interpretation is used, the NexCycle facility requires approval under Part V of the *EPA*. Ms. Harris submits that the Tribunal's role is to interpret the legislation, as was done in *Lion Safari*, *supra*. The Tribunal cannot change the legislative scheme.

Findings on Sub-Issue 4: Interpretation of the the waste and site exemptions

[103] The Tribunal finds that there is no ambiguity in the Tribunal's interpretation of the regulatory scheme as it relates to the NexCycle facility. The Tribunal finds that the facility is a municipal waste recycling site that does not qualify for any of the exemptions, the reasons for which are explained above.

Conclusion

[104] In conclusion, the Tribunal finds that NexCycle is legally required, by virtue of s. 27 (1) of the *EPA* Part V, to operate this facility under and in accordance with a waste ECA.

[105] By this decision, the Tribunal finds that NexCycle is required to undertake items 1 to 4 of the Director's Order. NexCycle is required to take all necessary steps to retain a qualified consultant(s) satisfactory to the Director and have the consultant complete and submit an application for an ECA for a waste disposal site (transfer and processing) as required by Part V of the *EPA*. The Tribunal did not hear submissions on a compliance date for completion of items 1 to 4 of the Director's Order and therefore directs the parties to provide brief written submissions (three pages maximum) on proposed compliance dates for items 1 to 4. The parties are encouraged to confer and jointly propose compliance timelines. The submissions are to be provided to the Case Coordinator within two weeks of the date of issuance of this decision.

[106] By a previous Order of the Tribunal, issued January 27, 2020, the Tribunal stayed items 1 to 6 of the Director's Order pending the disposition of the appeal. The Tribunal did not hear submissions on items 5 and 6 of the Director's Order, which require an estimate of financial assurance for the potential clean-up of the Site. Therefore, the stay of items 5 and 6 remains in place. The Tribunal directs the parties to contact the Case Coordinator in order to schedule a TCC with the Tribunal to address the procedure for hearing submissions on items 5 and 6 of the Director's Order. Additionally, the TCC will address procedural matters for the remainder of the appeal.

ORDER

[107] The Tribunal orders that the appeal is dismissed as it relates to items 1 to 4 of the Director's Order.

[108] The Appellants are ordered to undertake items 1 to 4 of the Director's Order. The Tribunal directs the parties to provide brief written submissions on the proposed compliance dates to the Case Coordinator within two weeks of the date of issuance of this decision. The Tribunal will confirm the compliance dates for items 1 to 4 of the Director's Order following deliberation on the submissions.

[109] The stay of items 5 and 6 of the Director's Order remain.

[110] The Tribunal directs the parties to contact the Case Coordinator in order to schedule a TCC with the Tribunal to address the procedure for hearing submissions on items 5 and 6 of the Director's Order. Additionally, the TCC will address procedural matters for the remainder of the appeal.

Partial Appeal Dismissed
Partial Stay Continued
Procedural Directions Ordered

"Helen Jackson"

HELEN JACKSON
MEMBER

If there is an attachment referred to in this document,
please visit www.olt.gov.on.ca to view the attachment in PDF format.