

Environmental Review Tribunal
Tribunal de l'environnement



ISSUE DATE: February 26, 2021

CASE NO.:

18-049

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

Appellant:	Pamela Poulin (File No. 18-049)
Appellant:	Harold Westendorp (File No. 18-050)
Appellant:	1248833 Ontario Inc. (File No. 18-051)
Appellant:	1085488 Ontario Ltd. (File No. 18-052)
Respondent:	Director, Ministry of the Environment, Conservation and Parks
Subject of appeal:	Order requiring a Phase One Site Assessment and an assessment of all boilers, fuel storage tank(s), fuel supply lines, associated equipment and structures, the boiler room(s) and the fuel storage room(s), to be undertaken by a Certified Professional
Reference No.:	0868-B2EMYT-1
Property Address/Description:	36 Georgina Street
Municipality:	City of Brockville
Upper Tier:	United Counties of Leeds and Grenville
ERT Case No.:	18-049
ERT Case Name:	Poulin v. Ontario (Environment, Conservation and Parks)

APPEARANCES:

Parties

Pamela Poulin, Harold Westendorp,
1248833 Ontario Inc. and 1085488
Ontario Ltd.

Director, Ministry of the
Environment, Conservation
and Parks

Counsel

J. Douglas Grenkie

Jon Bradbury

HEARD: October 6 to 8, 2020 by video conference
ADJUDICATOR: Laurie Bruce, Member

DECISION

BACKGROUND

[1] The subject of this hearing is an appeal of Director's Order No. 0868-B2EMYT-1 ("Director's Order") issued on September 25, 2018 in accordance with s. 157.1 of the *Environmental Protection Act* ("EPA") to Pamela Poulin, Harold Westendorp, 1248833 Ontario Inc. and 1085488 Ontario Ltd. (the "Appellants"). The Director's Order is a preventative measures order requiring a Phase One Environmental Site Assessment ("Phase One Assessment") for 36 Georgina Street in the City of Brockville (the "subject site") and the completion of a Characterization Report to identify any waste materials or contaminants of concern that may be at the subject site. The Director's Order also requires any waste materials identified in the Characterization Report to be removed and properly disposed of.

[2] The original Provincial Officer's Order ("Officer's Order"), issued August 20, 2018, was for a Phase Two Environmental Site Assessment ("Phase Two Assessment") which would require the assessment of any areas of potential environmental concern on the subject site. However, following a request that Director Trevor Daglis review the Officer's Order in accordance with s. 157.3(5) of the *EPA*, the Director replaced the requirement for the Phase Two Assessment with a Phase One Assessment.

[3] Director Daglis stated in his Director's Order that the purpose of a Phase Two Assessment is to "determine the location and concentration of one or more contaminants in the land or water on, in or under the property". He stated that it was a prudent and reasonable first step to require a Phase One Assessment to "determine the likelihood that one or more contaminants have affected any land or water on, in or under

the property. He further stated that if following the Phase One Assessment a Qualified Person determines there is potentially contaminated activity, the completion of a Phase Two Assessment will be required.

[4] Mr. Westendorp appeared before the Tribunal with legal counsel representing all Appellants. Pamela Poulin was not in attendance at the hearing.

History and Setting

[5] Since 1994, the subject site has been used for the storage and sale of materials acquired by Harold's Demolition and Recycling and for the storage of various pieces of demolition equipment. Recycled materials are brought to the site, sorted, and materials stored until they are sold either for reuse or recycling.

[6] Mr. Westendorp described the history of the site for the Tribunal. He stated that the property had been purchased in 1994 by Sam Zigman, who operated it as a scrap yard as 1085488 Ontario Ltd. Prior to that time, the property was the former site of Brockville Co-op which sold hardware, feed and operated a garden centre and gas pumps. The pumps and associated tanks were removed when the property was purchased by Mr. Zigman. Mr. Westendorp recalled that when the property was purchased, the soils were sampled and there was no evidence of hydrocarbons but acknowledged he had not had any success finding the results from that soil testing.

[7] Ms. Poulin worked for 1085488 Ontario Ltd. starting in 1994. Mr. Westendorp testified that he became "involved with" the property in 1996.

[8] Mr. Westendorp stated that the nature of the business is such that salvaged materials accumulate and that it is necessary to have a full stock. He stated he has not brought in any waste that could go to a "dump". He described the types of materials as 2 x 4 or 2 x 6 pieces of wood, insulation, sinks, toilets, pipes, and wires, but acknowledges that it would be difficult to state the number of units of each.

[9] The subject property is located at the intersection of Georgina and Hamilton Streets in the City of Brockville. The 1.4-acre subject site is occupied by three commercial buildings and is bisected by a public storm drain on a city easement. The storm drain receives water runoff from the adjacent neighbourhood and empties into the City owned Railway Tunnel drainage ditch to the west of the property.

The Appeal

[10] The Appellants in this appeal include:

- 1248833 Ontario Inc. which operates the business at the subject site under the name “Harold’s Demolition and Recycling”.
- 1085488 Ontario Ltd, the owner of the subject site.
- Ms. Poulin who is an officer, director and shareholder of 1085488 Ontario Ltd.
- Mr. Westendorp who was a director and officer of 1085488 Ontario Ltd up until January 10, 2013.

[11] The Appellants submit that the way the Ministry of Environment, Conservation and Parks (the “Ministry”) came to investigate the subject site was based on falsehoods that had been provided to the City and subsequently shared with the Ministry. Further, it was their submission that if the Ministry had concerns about any contamination, the Ministry could have undertaken their own inspection including soil and groundwater sampling. The Appellants state that the materials they have on site are not wastes, are properly managed, and do not pose any environmental harm in the form of soil or groundwater contamination. Further, Mr. Westendorp stated that the business provides a service that supports reduction and reuse practices.

[12] Mr. Westendorp stated that while there was a fuel oil storage tank that was found to be of concern, it was removed, and it was his understanding that the soil under the

tank was not contaminated. Further, he stated that light ballasts suspected of containing Poly Chlorinated Bi-Phenols (“PCBs”) had now been removed and therefore, there were no remaining issues to address. It was his submission that in accordance with s. 157.1 of the *EPA*, the Ministry should not have issued this Order without a reasonable belief that there was an environmental risk.

[13] Mr. Westendorp contends that he is not appropriately named as an Orderee as he is not currently an employee or director of operations and receives no remuneration for his part in the day-to-day operations of the business. No evidence either in support or contrary to this position was submitted by the other Appellants. J. Douglas Grenkie represented all Appellants and his submissions were that Mr. Westendorp was not appropriately named as an Orderee.

Site Inspections and Outcomes

[14] Ministry inspectors first visited the subject site in October 2017. Provincial Officer Nathalie Matthews stated that inspections are usually unannounced. Properties are inspected proactively or in some cases reactively if there is a concern that there may be situations that are resulting in environmental impacts.

[15] Ms. Matthews and Thomas Guo, the Ministry hydrogeologist, stated upon observing the subject site, that they were concerned with the quantity of materials, the condition of some of the materials and the way they were stored. Ms. Matthews and Mr. Guo stated they observed materials stored outside uncovered and exposed to the elements, including old electric light ballasts, stacks of old ceiling tiles, and areas where there were so many materials stacked that it was impossible to have a sense of what was there and their condition (Exhibit 18, Tab 5).

[16] The Tribunal was provided with video evidence created and narrated by Mr. Westendorp that confirmed the presence of large quantities of various metals,

ceiling tiles, treated wood products, refrigeration equipment, florescent lights, bathroom fixtures and insulation, amongst other products (Exhibit 11).

Fuel Oil Tank

[17] During their initial inspection in October 2017, Ms. Matthews and Mr. Guo stated they observed a very strong fuel odour in the boiler room of the main building.

[18] In the main building, there is a heating boiler and an interior oil tank which Mr. Westendorp testified had never been used by the current owners, stating that the company operates only with electric heat.

[19] In November 2018, the Appellants retained Triangle Pump Service Limited (“TPSL”) to decommission the boiler, close the vent pipe, disconnect lines from the tank to the burner and drain the lines. Mr. Westendorp stated that the amount of oil in the tank was “about one quart”. This statement was not consistent with the TPSL report which stated 20 litres of fuel was pumped from the supply tank. The Inspection Report also stated that there was no visible leakage of the tank or lines, but that a visual inspection of the tank could not be completed as it was encased in concrete.

[20] After the decommissioning, the Technical Standards and Safety Authority (the “TSSA”) conducted a site inspection and ordered the vent be replaced since the room was filling with fumes. The TSSA advised that the tank could be left in-place but it would have to be filled with concrete. The other option was to have it removed. Mr. Westendorp subsequently arranged for the removal and disposal of the tank.

[21] Mr. Westendorp testified that he took a soil sample from under where the tank was located and submitted it to Paracel Laboratories for analysis. It was Mr. Westendorp’s belief that the results showed that all environmental parameters were within the standard environmental limits.

[22] The Tribunal qualified Mr. Guo as a professional hydrogeologist who had expertise assessing potential risks to groundwater. Part of his professional knowledge included the interpretation of chemical analyses such as the one performed by Paracel Laboratories. Contrary to Mr. Westendorp's statement, it was the expert testimony of Mr. Guo that the results of the laboratory analyses showed there were exceedances by some of the parameters (Exhibit 10, Page 56). This is discussed further in this decision.

Lighting Ballasts

[23] Ms. Matthews and Mr. Guo stated that they observed many lighting ballasts which they considered improperly stored given the potential that they contained PCBs. Ms. Matthews stated since it was her understanding that Environment and Climate Change Canada regulates the storage of PCB material, she advised the federal department that a large number of electric ballasts were stockpiled at the subject site. Subsequently she met with Federal Enforcement Officer Gordon Moore at the site.

[24] Mr. Westendorp stated that some of the ballasts were on site already when the business was started.

[25] Federal officers issued an order to 1085499 Ontario Ltd. c/o Harold Westendorp requiring the removal and proper disposal of electrical light ballasts on the basis that there were identified as contaminated (PCBs). Ms. Matthews was advised by Officer Moore that there were at least 40 electrical ballasts at the site that contained PCB oil and that a federal Environmental Protection Compliance Order was issued to 1085488 Ontario Ltd. to comply with federal environmental legislation relating to the storage and disposal of such materials. Mr. Westendorp stated that the identified ballasts were removed by a company called Aevitas (Exhibit 15). Mr. Westendorp provided the Tribunal with an invoice sent to his attention from Aevitas.

Ceiling Tiles

[26] Ms. Matthews stated that she observed large piles of ceiling tiles, some of which were damaged. Ms. Matthews stated that if these tiles contained asbestos, they needed to be removed and properly disposed of. As a result, she contacted the Ministry of Labour. During the summer of 2018, Mr. Westendorp indicated that the Ministry of Labour inspected ceiling tiles for asbestos. He undertook his own sample of three different ceiling tiles which were sent for analysis. The results were reported as no evidence of asbestos. Jon Bradbury, counsel for the Director, submitted that this sampling approach was not done by an independent party and therefore may not have resulted in representative samples.

Other

[27] In his testimony, Mr. Guo also identified concerns with other materials stored at the subject site including treated wood products, various metals and other liquid materials, in addition to the waste oils. His concerns were related to the manner of storage and the uncertainty about the length of time materials have been stored. It was his opinion that exposure to the elements can cause some of these materials to break down which in turn could cause harmful leachates to infiltrate the soil and contaminate the groundwater.

ISSUES

[28] The issues before the Tribunal are as follows:

- a. Is the manner in which the Ministry came to take interest in the Site material to the decision of the Tribunal?
- b. Is Mr. Westendorp a person in management and control of the Site within the meaning of s. 157.1 of the *EPA*?

- c. Are the requirements specified in the Order requiring a Phase One Assessment and/or Characterization Report necessary or advisable within the meaning of s. 157.1 of the *EPA*?
- d. Is the requirement for a Phase Two Assessment, originally requested in the original Provincial Officer's Order but modified by the Director's Order, now needed given what is known about the subject site?

LEGISLATION

[29] Section 157.1 of the *EPA* provides that a provincial officer may issue an order to any person who owns or has management or control of an undertaking or property so as:

- a) To prevent or reduce the discharge of a contaminant into the natural environment from the undertaking or property; or
- b) To prevent, decrease or eliminate an adverse effect that may result from, (i) the discharge of a contaminant from the undertaking, or (ii) the presence or discharge of a contaminant in, on or under the property.

[30] The Director submits that the Tribunal must undertake a two-stage analysis under s. 157.1(1) of the *EPA* that corresponds to two of the issues to be decided in this hearing:

- a. First, the Tribunal must determine if the Director had the jurisdiction to make this order. This includes jurisdiction over the person, i.e., whether the person named in the order has management and control, and jurisdiction over the subject matter (i.e., the undertaking or property at issue): and

- b. Second, whether the requirements of the order are necessary or advisable within the meaning of s. 157.1 of the *EPA*.

EVIDENCE AND ANALYSIS

Issue 1: Is the manner in which the Ministry came to take interest in the Site material to the decision of the Tribunal?

[31] The Tribunal heard that the Ministry was first alerted to potential issues at the site through a letter sent to the City by Shawn McIntosh, a former boyfriend of Ms. Poulin's daughter. Mr. McIntosh had periodically worked at the subject site but was not a regular employee. It was Mr. Westendorp's submission that the allegations in the letter were fabrications and were motivated by poor relationships with the Poulin family. It was Mr. Westendorp's opinion that the letter caused suspicions that there were contaminants and wastes on site and that led to the inspection.

[32] Ms. Matthews stated that sites are inspected either because of complaints or as a matter of practice. She stated that the complaint had brought forward a site visit, but that she had been planning on visiting the subject site as a matter of practice. Ms. Matthews stated that the only thing the letter did was change the timing of when the site would have been visited. She stated, "the contents of the letter did not tell me I needed to issue an order".

[33] There was no evidence provided by the Appellants that the legislation leading to this Director's Order constrains how site inspections can be initiated. Therefore, the Tribunal finds that the matter is appropriately before the Tribunal and the specific circumstances leading to the initial site visit in this case is not determinative.

Issue 2: Is Mr. Westendorp a person in management and control of the Site within the meaning of s. 157.1 of the *EPA*?

[34] Mr. Westendorp is the sole Director and Officer of a company known as Abatement Solutions Inc., which has a registered office address at the subject site.

[35] Mr. Westendorp stated he has no management or control of 1085488 Ontario Ltd. He acknowledged he was a director and officer of 1085488 Ontario Ltd up until January 10, 2013 when Ms. Poulin became the sole officer, director and shareholder. Mr. Westendorp would not disclose why he is no longer a director and officer of the company. Further, he states that 1248833 Ontario Inc. operates the business, and he has no management or control over this company which operates a business at the subject site under the name "Harold's Demolition and Recycling".

[36] Mr. Westendorp characterized his role as an advisor and indicated that it was Appellant Ms. Poulin who operated the demolition and recycling business from the main building. He stated he did not receive any remuneration for this role and as such should not be named in the Director's Order.

[37] When asked by Mr. Bradbury to explain his relationship with the business, Mr. Westendorp replied that he is involved in the tendering process and contact negotiation and at times has signed tender documents, assisting Ms. Poulin when requested. He stated that he does not have final say on contracts and does not supervise employees. He also advised the Tribunal he is authorized to promote and speak on behalf of the company.

[38] Mr. Westendorp's familiarity with the property and the materials stored on site was evident in the very detailed videos of the property. In these videos (Exhibit 11), he described the various materials on the property as he walked through the buildings and outside storage areas narrating the video.

[39] Both Ms. Matthews and Mr. Guo stated that, other than the first site visit, on other subsequent occasions they dealt with Mr. Westendorp.

[40] Mr. Bradbury in his closing submissions states that “Jurisdiction over the person(s) named in an order can be established by proving, on a balance of probabilities, that the person had ‘management or control’ of the undertaking or property”. Mr. Bradbury referenced jurisprudence for establishing guiding principles for determining whether a person has or had management or control. These include:

- a. A person who is not the directing mind of a company can still be a person in management and control (*Montague v. Ontario (Ministry of the Environment)*, 2005 CarswellOnt 971 (Div. Ct) at para. 41);
- b. More than one person may have management or control of an undertaking or property and it is not necessary for a person to have “absolute management and control” (*Grant v. Ontario (Director, Ministry of the Environment)*, 2009 CarswellOnt 5963 at para. 67);
- c. Control does not only encompass the formal legal control available to officers and directors, but also *de facto* control by others in a position to significantly influence the management of the undertaking or property ((*P&L Tire Recycling Inc. v Director, Ministry of the Environment*, 1992 CarswellOnt 5001, at para. 72) and *Rocha v. Ontario*, 2015 CanLill 43581, at para. 118));
- d. The Tribunal may infer from a person’s conduct, their close relationship to the owners of the property, and the extent of their knowledge of the issues that a person is in a strong position to influence the use of the property (*P&L Tire Recycling, supra*, at para. 77 and *Rocha, supra*, at para. 120).

[41] Counsel for both parties referenced *Rocha, supra*, in support of their positions. This case rests on the Divisional Court's finding in para. 41 that the appellant in that case, while not the directing mind of the company, had hired subcontractors, carried out a supervisory position and exerted influence over how cleanup was conducted. The Director submitted that Mr. Westendorp "has played a role analogous to the persons found to be in control in the...*Rocha* case and the Tribunal should make a finding consistent with [that decision]."

[42] It was Mr. Grenkie's submission that Mr. Westendorp was just an advisor and that he knew the site in his role as an advisor. He stated that Mr. Westendorp gratuitously showed the Ministry officials about the property only to explain where and what materials were for sale and the fact that he knew the history of the usage of the lands should not be a factor in deciding if Mr. Westendorp was to be a person pursuant to *EPA* s. 157.1.

[43] Mr. Westendorp testified that he retained and oversaw TPSL on three occasions to perform work related to the fuel soil storage tank, taking soil samples after the removal of the tank and sending them to a laboratory for analysis. He oversaw the removal of waste oils and electrical ballasts. It was the Director's submission that his actions were not simply those of a passive advisor particularly since Mr. Westendorp was the only Appellant who interacted with the Ministry on this Director's Order.

[44] The Tribunal infers from Mr. Westendorp's conduct and the current knowledge of the operation that he is in a strong position to influence the use of the property. He does not need to have absolute management and control and is able to significantly influence the operation. Further, since he was a director and owner up until 2013, it is possible that materials currently at the subject site were brought there when he was in this role. The Tribunal finds that Mr. Westendorp is in management and control of the subject site within the meaning of s. 157.1 of the *EPA*. Further, the Tribunal confirms that 1085488 Ontario Ltd, the property owner, 1248833 Ontario Inc, the operator of the business, and

Ms. Poulin, the officer, director and shareholder of 1085488 Ontario Ltd are also in management and control of the subject site.

Issue 3: Are the requirements specified in the Order requiring a Phase One Assessment and/or Characterization Report necessary or advisable within the meaning of s. 157.1 of the *EPA*?

Phase One Assessment

[45] The requirement for a Phase One Assessment is set out at Item Nos. 1, 2 and 7 of the Director's Order. Director Trevor Dagilis stated that he was concerned about the potential impacts from fuel oil in the basement of the main building at the subject site and the potential generation and discharge of contaminants from materials stored there. The Director submitted that the authority to require a Phase One Assessment is derived from s. 157.1(3) of the *EPA* which "incorporates by reference the various types of requirements that may be included in an order made under section 18(1) of the *EPA*." Section 18(1) 6 allows a Director to require a person who owns, **owned or who has or had management or control of an undertaking or property** (emphasis added) to study and report to the Director on "the presence or discharge of a contaminant specified in the order" or "the effects of the presence or discharge of a contaminant specified in the order."

[46] Director Dagilis submitted that the business operations of 1248833 Ontario Inc. constitute an undertaking that gives rise to a risk of discharge due to the nature of the business and storage practices. The evidence provided by Ms. Matthews and Mr. Guo supported the Director's position that there is a risk of discharge of contaminants at the subject site due to the type of materials onsite including, but not limited to the light ballasts and the presence of fuel oil in soils where the oil tank had been located.

[47] Mr. Westendorp stated that all materials at the subject site are for sale directly to the public and in fact, serves a positive environmental function by promoting the reuse

or recycling of materials. The Appellants stated that there has been no testing to indicate that there are contaminants and that unless there is evidence of contamination or evidence of waste materials, they should not be required to undertake the Phase One Assessment or complete the Characterization Report. Mr. Westendorp asserted that there was ample ability for the Ministry to undertake testing if they had concerns about the potential for contamination on the property, but that none were taken.

[48] Mr. Westendorp submitted that the video and photographic evidence demonstrates that all the materials were properly stored both inside buildings and outside on paved areas in containers. Further, it was his opinion that there was no evidence that the storage of the materials at the subject site, whether inside or outside, could reasonably cause adverse environmental impacts. It was his position that since no testing had been done, it was conjecture that harm could be caused.

[49] Mr. Westendorp acknowledged that there had been some possible pollutants on the property, specifically associated with an oil tank in the basement of the main building and in lighting ballasts. However, he stated the tank and the ballasts had been removed, and the soil under the tank had been analyzed with no evidence of contamination, excavated and disposed of.

[50] Mr. Westendorp's interpretation of the soil analysis was brought into question. While Mr. Westendorp was confident in his conclusion, he inaccurately interpreted the results of the Certificate of Analysis. This was confirmed by Mr. Guo who stated that the Certificate of Analysis for the soil sample confirmed that the soil was heavily contaminated with hydrocarbons (e.g. Ethylbenzene was present at a level of 1.59 µg/g versus a standard of 0.05 µg/g). Mr. Guo also discussed the results of the soil analysis relative to Table 3 in Soil, Groundwater and Sediment Standards for Use Under Part XV.1 of the *EPA*. He stated that the standard for Petroleum Hydrocarbons F2 is 250 µg/g while the results show fraction assessment concentrations of 6,990 µg/g. The results for F3 were 7,130 µg/g while the standard is 2,500 µg/g. Mr. Guo stated that

these results show the soils are heavily contaminated which in turn can easily contaminate the groundwater.

[51] Mr. Westendorp called Richard VanVeldhuisen to speak to the possibility that contaminants may have entered groundwater at the site. Mr. VanVeldhuisen is a retired environmental engineer and therefore does not currently meet the definition of a "qualified person" (under the definition of the *EPA*).

[52] It was Messrs. Westendorp and VanVeldhuisen's positions that considering the historic uses of 36 Georgina Street and on the surrounding properties, there may well be contamination in the area particularly in the gully immediately to the west side of the border of 36 Georgina Street. The sources of potential contamination, they speculated, would be from the sewer located on the easement that crosses the lands of 36 Georgina Street. It was Mr. Westendorp's opinion that the properties surrounding the subject site should be properly examined by the Ministry.

[53] Mr. VanVeldhuisen testified that the groundwater levels at a nearby property are well below the surface can therefore any contaminants from the subject site would unlikely affect groundwater.

[54] Section 157.1 of the *EPA* states that a preventative order may be issued to prevent or reduce the discharge of a contaminant into the natural environment from the property; or to prevent, decrease or eliminate an adverse effect that may result from the presence or discharge of a contaminant in, on or under the property.

[55] The Director submitted that to support a preventative measure order, the Director or the Tribunal need only have a reasonable belief that there is a risk to the natural environment, not evidence of actual environmental impact.

[56] Mr. Bradbury submitted in accordance with *Currie v. Ontario (Director, Ministry of the Environment)*, 2011 CarswellOnt 5580 at paras. 100 and 121, the focus of the

power to issue a preventative measure order is to further the purposes of the *EPA*, namely the protection and conservation of the natural environment. Mr. Bradbury also referenced *McIntosh v. Ontario (Director, Ministry of the Environment)*, 2010 CarswellOnt 1785 at para. 63 that the Tribunal has stated that a “precautionary approach applies when there is scientific uncertainty about the risk of environmental harm from an activity. In essence the approach provides that scientific uncertainty about environmental harm from an existing activity should not prevent the adoption of measures to protect the environment”.

[57] Mr. Bradbury submitted that if the Appellants take the position that the Director’s Order is not required, the onus is on the Appellants to demonstrate how the environmental protection objectives of the *EPA* will be met. Counsel for the Ministry submits that “the Tribunal is charged with carrying out its appellant mandate in the context of specific statutory purposes. It cannot ignore the environmental protection objective of the *EPA*”.

[58] Therefore, Mr. Bradbury submitted that the Tribunal “needs to hear evidence on how the environmental protection objective of the *EPA* will be met if the Order is revoked. It is not sufficient for an appellant to provide reasons for the revocation...without addressing how the environmental protection objective will also be met...It cannot ignore the environmental protection objective of the *EPA*”. (see: *The Corporation of the City of Kawartha Lakes v. Director, Ministry of the Environment*, 2012 ONSC 2708 (Div. Ct) at para. 38)

[59] The Tribunal finds that the requirement for a Phase One Assessment is required due to the nature of the materials located on the subject site. The Tribunal heard compelling evidence that the type of materials and the manner in which they were stored could result in the discharge of a contaminant into the natural environment. Further, there is evidence that there is already contaminated soil located in the vicinity of the oil tank. Section 157 of the *EPA* calls for a preventative measure order to prevent or reduce the risk of the discharge of a contaminant or to prevent, decrease or eliminate

an adverse effect resulting from the presence or discharge of a contaminant in, on or under the property.

Characterization Report

[60] The Characterization Report is described at Items No 8, 9 and 10 of the Order. The Director stated that the purpose of the report is to understand the range and quantity of materials held at the subject site in order to understand potential environmental impacts.

[61] Mr. Grenkie submitted that there is no evidence that waste was brought onto the property and therefore why should a business itemize all of its inventory when it is displayed for buyers to wander and purchase what they want or need.

[62] Ms. Matthews testified that it remains unclear if all the materials can be reused or recycled. She observed that in some places one cannot easily walk through or even turn on a light, making it difficult to believe everything on the property can practically be for sale. The purpose of the Characterization Report is to identify what kinds of materials are at the subject site so that the “risk of discharge by leachate or other mechanism could be properly assessed and mitigated...even materials that are not wastes can be sources of contamination, particularly if they are not adequately protected from the elements while stored at the site” (par 60 Director’s submissions).

[63] It was Mr. Westendorp’s opinion that the requirement for a Phase One Assessment and Characterization Report places an unfair financial burden on the Appellants. Mr. Westendorp suggests it is a tremendous burden to identify the types of materials that are on-site. He states that the request for the Characterization Report lacks guidance on what is expected. He also states that the evidence is clear that no waste was brought to the property and that all materials on-site are re-saleable or recyclable. The Tribunal notes that no evidence of financial hardship was provided.

[64] The Tribunal agrees with Mr. Westendorp that the Ministry did not define in their Order what a Material Characterization Report encompasses. However, the Tribunal finds that if the purpose is to identify the potential for contamination that it can be limited to a listing of categories of materials that are on-site (e.g., copper pipes, washroom fixtures, planes of glass and windows, wood, furniture, small appliances) with an estimate of the quantity of materials and an indication of where and how the material is stored (e.g., inside, outside open to the elements or outside covered). This will help the Appellants and the Ministry determine if there are in fact materials that could have a contamination potential which the Appellants were not aware as a problem, much like the PCBs containing light ballasts.

[65] The Tribunal finds that the requirement for the preparation of a Material Characterization Report is advisable due to the potential for contaminating materials located at the subject site.

[66] The Tribunal concludes that the Director's Order is necessary to prevent or reduce the discharge of a contaminant and to eliminate an adverse effect that may result from the presence or discharge of a contaminant and that a Phase One Assessment and Characterization Report is in fact needed to satisfy the environmental protection objectives of the *EPA*.

Issue 4: Is the requirement for a Phase Two Assessment, originally requested in the original Provincial Officer's Order but modified by the Director's Order, now needed given what is known about the subject site?

[67] In accordance with s. 145.2 of the *EPA*, the Tribunal, on appeal of a Director's Order, may confirm, alter or revoke the action of the Director that is the subject-matter of the hearing and may by order direct the Director to take such action as the Tribunal considers the Director should take in accordance with this Act and the regulations, and, for such purposes, the Tribunal may substitute its opinion for that of the Director.

[68] Ms. Matthews in the Officer's Order originally identified the need for a Phase Two Assessment. She stated that by installing monitoring wells and taking soil samples, it would be possible to identify if there were any contaminants leaving the subject site.

[69] Mr. Guo stated that it is already known that there is contamination at the subject site based on the results of the soil sampling under the fuel tank and therefore a Phase Two study is what is needed. Mr. Guo stated that the purpose of Phase Two is to determine if the soil and groundwater are contaminated. Mr. Guo indicated he is also concerned about metals, hydrocarbons, volatile Organic Carbons and PCBs.

[70] Director Dagilis stated that based on his review of Ms. Matthews' Officer's Report, his own observations during a site visit on September 5, 2018 and the review of a series of videos sent to him by Mr. Grenkie on behalf of the Appellants, he concluded that there are environmental concerns at the subject site which present a risk of discharge of contaminants into the natural environment which could result in adverse effects on adjacent properties.

[71] Director Dagilis stated that when he was asked to review the Officer's Order, he was mindful that typically a Phase One Assessment is done first to determine such things as where on-site materials are held and previous activities on site. The Director acknowledged that there was evidence presented to the Tribunal of soil contamination on-site and that in accordance with s. 145.2(1), the Tribunal may substitute its opinion and also require a Phase Two Assessment.

[72] The Tribunal finds that there is uncontroverted evidence of soil contamination at the subject site. The soil sample taken from the area around the fuel oil storage tank was heavily contaminated with hydrocarbons and there was evidence that light ballasts containing PCBs were stored on site. The Tribunal adopts Mr. Guo's professional opinion evidence that a Phase Two Assessment should be undertaken to identify the extent of soil contamination in the area of the former storage tank.

CONCLUSIONS

[73] The subject of this hearing is the completion of a Phase One Assessment and a Characterization Report. Without this information, it is not possible to confirm whether the *EPA* objectives can be met due to the potential contamination on the Site. It was the Appellants' responsibility to demonstrate to the Tribunal how the environmental protection objective of the *EPA* would be met if the order was revoked. The Appellants instead took the position that there are no sources of contaminants at the Site and therefore no need for an order. The Tribunal has heard evidence of contamination from the fuel oil storage tank and evidence that established credible risk of contamination from this and from other materials currently or previously stored at the subject site.

[74] The concerns expressed by Ms. Matthews leading to the issuance of the Officer's Order were confirmed. There was contaminated soil below the tank and there were older ballasts containing PCBs. There is the potential for further contamination which needs to be addressed through a Phase One Assessment and Characterization Report.

[75] Considering the evidence of soil contamination and the potential that there may be other sources of contamination arising from the historical storage of materials, the Tribunal finds that a preventative measures order is required to prevent or reduce the risk of discharge of a contaminant into the natural environment.

[76] The original Provincial Officer's Order was for a Phase Two Assessment. Following the Appellants' request for review, the Director modified the order to require just the Phase One Assessment in addition to the Characterization Report stating this is the normal sequence of practice.

[77] Pursuant to s. 145.2 of the *EPA*, the Tribunal may confirm, alter or revoke the action of the Director that is the subject-matter of the hearing and may by order direct the Director to take such action as the Tribunal considers the Director should take in accordance with this Act and the regulations, and, for such purposes, the Tribunal may

substitute its opinion for that of the Director. This gives the Tribunal jurisdiction to stand in the shoes of the Director and provides it with broad authority to make an order that is justified on the evidence, so long as the Tribunal does not usurp the Director's ongoing regulatory role and so long as the Tribunal does not go beyond the subject matter of the proceeding. Since the time of the issuance of the Director's hearing, new information has come to light which demonstrates there is contaminated soil in the vicinity of the former fuel oil storage tank. The Tribunal heard evidence from Mr. Guo and Director Dagilis that a Phase Two Assessment is therefore needed.

[78] The Tribunal finds that in addition to the work Ordered under the Director's Order, a Phase Two Assessment, relying on the findings of the Phase One Assessment, should be undertaken as provided for in s.157.1(1) of the *EPA*: (a) to prevent or reduce the risk of a discharge of a contaminant into the natural environment from the undertaking or property; or (b) to prevent, decrease or eliminate an adverse effect that may result from, (i) the discharge of a contaminant from the undertaking, or (ii) the presence or discharge of a contaminant in, on or under the property.

ORDER

[79] The Tribunal orders that the appeal of the Director's Order is dismissed.

[80] The Director is ordered to issue a revised Director's Order that also includes a requirement for a Phase Two Site Assessment that will be based on the findings of the Phase One Assessment.

[81] The Tribunal may be spoken to on the proposed compliance dates of the modified Director's Order by making written submissions to the Case Coordinator within one month of the date of the issuance of this decision. The Tribunal will confirm the compliance dates following deliberations on the submissions.

*Appeal Dismissed
Director Directed to Amend Director's Order*

"Laurie Bruce"

LAURIE BRUCE
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.

Environmental Review Tribunal

A constituent tribunal of Ontario Land Tribunals

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