

Environmental Review Tribunal
Tribunal de l'environnement



ISSUE DATE: April 22, 2021

CASE NO.: 21-022

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

Appellant: 7069367 Canada Inc.
Respondent: Director, Ministry of the Environment, Conservation and Parks
Subject of appeal: Order to retain the services of a Qualified Person(s) to assess the extent of groundwater impacts on- and off-Site, and to assess the potential risk of Contaminants of Concern to receptors in the Residential Neighbourhood
Reference No.: 4260-BHDQHR
Property Address/Description: 587 Third Line
Municipality: City of Oakville
Upper Tier: Regional Municipality of Halton
ERT Case No.: 21-022
ERT Case Name: 7069367 Canada Inc. v. Ontario (Environment, Conservation and Parks)

APPEARANCES:

Parties

7069367 Canada Inc.

Director, Ministry of the Environment, Conservation and Parks

Counsel

Gabrielle Kramer and Barbora Grochalova

Isabelle O'Connor

HEARD: April 8, 2021 by Telephone Conference Call
ADJUDICATOR(S): Hugh Wilkins, Member

ORDER

REASONS

[1] On February 12, 2021, the Director, Ministry of the Environment, Conservation and Parks (“MECP”), issued Order No. 4260-BHDQHR (“Director’s Order”) against 7069367 Canada Inc. (“Appellant”), Tamlann Investments Limited, Ambi Corporation, Geoin Investments Inc., and C and 3S Investments Limited (together, “Orderees”) under s. 18 and s. 196 of the *Environmental Protection Act* (“EPA”). The Director’s Order relates to the presence and migration of contaminants from the property located at 587 Third Line (“subject lands”) in the Town of Oakville.

[2] To paraphrase the items in the Director’s Order, they require the Orderees to take the following actions:

1. Item 1 - by April 19, 2021, retain the services of one or more qualified persons to, among other things, assess the extent of groundwater impacts of the discharge of contaminants on- and off-site of the subject lands and assess the potential risk of the contaminants to receptors nearby;
2. Item 2 - by April 19, 2021, submit to the Director confirmation from the qualified persons that they: have received a copy of the Director’s Order; have been retained to carry out the applicable work required in the Director’s Order; and have the experience and qualifications to carry out the work;
3. Item 3 - by May 21, 2021, submit to the Director a proposed delineation work plan;
4. Item 4 - no later than 45 days after receiving written notice of the accepted delineation work plan from the Director, have the retained qualified persons

initiate the work plan, notify the Director of the date of initiation, and complete the work;

5. Item 5 - notify the Director upon completion of the field component of the delineation work plan;
6. Item 6 - no later than 90 days after completion of the field component of the delineation work plan, submit to the Director a delineation work plan report; and,
7. Item 7 - no later than 90 days after completion of the field component of the delineation work plan, submit to the Director a proposed next steps work plan.

[3] On March 3, 2021, the Appellant filed an appeal of the Director's Order with the Environmental Review Tribunal ("Tribunal") under s. 140 of the *EPA* and requested a stay under s. 143 of the *EPA*. None of the other Orderees appealed the Director's Order within the required time period for appeals to be filed. The Appellant is the sole appellant in this proceeding.

[4] In regard to the request for a stay of the Director's Order, the Appellant seeks, on consent, the following relief:

- (a) an Order of the Tribunal extending the dates for compliance with Items 2 and 3 of the Director's Order as follows:
 - a. Item 2, by May 25, 2021;
 - b. Item 3, by June 25, 2021; and,
- (b) an Order staying compliance with Items 4-7 until such time as the appeal is heard and determined by the Tribunal.

[5] On April 8, 2021, the Tribunal received evidence and heard submissions from the Parties in support of the stay motion by telephone conference call.

Relevant Legislation and Rules

[6] The relevant provisions of the *EPA* and *Tribunal's Rules of Practice and Practice Directions* ("*Tribunal's Rules*") are as follows:

Environmental Protection Act

143(2) The Tribunal may, on the application of a party to a proceeding before it, stay the operation of a decision or order, other than,

- (a) an order to monitor, record and report; or
- (b) an order issued under section 168.8, 168.14 or 168.20.

143(3) The Tribunal shall not stay the operation of a decision or order if doing so would result in,

- (a) danger to the health or safety of any person;
- (b) impairment or serious risk of impairment of the quality of the natural environment for any use that can be made of it; or
- (c) injury or damage or serious risk of injury or damage to any property or to any plant or animal life.

Tribunal's Rules:

110. The Party shall provide evidence and submissions in support of its motion respecting:

- (a) how the relevant statutory tests that are applicable to the granting or removal of a stay are met;
- (b) whether there is a serious issue to be decided by the Tribunal;
- (c) whether irreparable harm will ensue if the relief is not granted; and
- (d) whether the balance of convenience, including effects on the public interest, favours granting the relief requested.

Evidence

[7] The Appellant filed an affidavit sworn by David Wade, dated April 6, 2021. He is a geoscientist who has been retained by the Appellant. Based on Mr. Wade's experience, education and expertise, as set out in his *curriculum vitae* filed with his affidavit in the Appellant's Motion Record, the Tribunal qualifies Mr. Wade to provide opinion evidence as a geoscientist.

[8] In his affidavit, Mr. Wade states that based on his review of studies undertaken at the subject lands, the discharges of contaminants likely occurred prior to 1987. He opines that the concentrations of contaminants collected in the area have decreased over time. He states that none of the items in the Director's Order requires monitoring, recording and reporting and, given the age and nature of the plume, the proposed stay would not result in: any danger to the health or safety of any person; the impairment or serious risk of impairment of the quality of the natural environment for any use that can be made of it; or injury or damage or serious risk of injury or damage to any property or to any plant or animal life.

[9] The Director did not file any evidence.

Submissions

[10] The Appellant submits that the granting of the proposed stay is not precluded by the requirements in s. 143(2)(a) of the *EPA*. It submits that the Director's Order requires the development of a delineation work plan for the drilling and installation of wells, hydraulic conductivity testing, collection and analysis of soil, groundwater, and rock core samples, assessment of groundwater flow, updating elevation surveys, and the preparation and submission of a report. It submits that this requires it to study and assess the presence of contaminants and, as stated by Mr. Wade, does not require the Orderees to monitor, record and report.

[11] The Appellant submits that s. 143(2)(b) of the *EPA* does not apply as the Director's Order is not an order issued under s. 168.8, 168.14 or 168.20 of the *EPA*.

[12] The Appellant submits that the granting of the proposed stay satisfies the requirements in s. 143(3) of the *EPA*. Based on Mr. Wade's evidence on the age and nature of the plume, the Appellant submits that the contamination is not migrating toward residential properties and the proposed stay would not result in the harms set out in s. 143(3).

[13] The Appellant also submits that the proposed stay satisfies the requirements in Rule 110 of the *Tribunal's Rules*. It submits that the appeal raises serious issues to be decided by the Tribunal, including with regard to the Appellant's responsibility for addressing the contamination. The Appellant submits that it would incur irreparable harm through the loss of its business if the proposed stay is not granted and it would have no viable recourse for monetary compensation. The Appellant argues that the contamination has existed for decades and there is no urgency for compliance with the Director's Order. It submits that the balance of convenience, therefore, favours granting the proposed stay.

[14] The Director submits that the plume continues to migrate and needs to be delineated as required in the Director's Order. However, she supports the granting of the proposed stay noting that work in preparing the required delineation plan will continue while the appeal is being processed. She submits that the Director's Order is to investigate the state of the plume and does not require an on-going or continual assessment. She submits that it does not require monitoring, recording and reporting. The Director submits that the proposed stay satisfies the requirements in s. 143(2) and (3) of the *EPA* and argues that, given that the proposed stay is on consent, the Tribunal does not need to apply the requirements in Rule 110 of the *Tribunal's Rules*.

[15] The Director emphasizes that the proposed stay would only apply to the Appellant and not to the other Orderes.

Analysis and Findings

[16] Based on Mr. Wade's opinion evidence and the submissions of the Parties, the Tribunal finds that it is not precluded from granting the proposed stay under s. 143(2) of the *EPA* and that it has jurisdiction to grant the requested relief.

[17] The Tribunal also finds that given Mr. Wade's evidence on the historic nature of the contamination and its alleged slow rate of migration, the proposed stay will not result in: any danger to the health or safety of any person; the impairment or serious risk of impairment of the quality of the natural environment for any use that can be made of it; or injury or damage or serious risk of injury or damage to any property or to any plant or animal life. Based on this, the Tribunal finds that the statutory tests for a stay in s. 143(3) of the *EPA* are met.

[18] Given that the stay is on consent of the Parties and the Tribunal's findings that it has jurisdiction and that the statutory tests for a stay have been met, it is not necessary to analyze the elements listed in Rule 110 of the *Tribunal's Rules* relating to evidence and submissions in support of a motion for a stay.

[19] The Tribunal grants the motion on consent, as requested. The stay only applies to the Appellant and not to the other Orderees.

ORDER

[20] The Tribunal grants the Appellant's motion for a stay.

[21] The Tribunal orders that:

1. the dates for compliance by the Appellant with Items 2 and 3 of the Director's Order are extended as follows:

- a. Item 2, by May 25, 2021;
 - b. Item 3, by June 25, 2021; and,
2. compliance by the Appellant with Items 4-7 of the Director's Order is stayed until such time as the Appellant's appeal is heard and determined by the Tribunal.
 3. the Director or the Appellant may seek a removal or modification of this Order on 15 days' notice to the other Parties in accordance with Rule 108 of the *Tribunal's Rules*.

Request for Stay Granted

"Hugh S. Wilkins"

HUGH S. WILKINS
MEMBER

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Environmental Review Tribunal

A constituent tribunal of Ontario Land Tribunals

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