Environmental Review Tribunal

Case Nos.: 12-158 to 12-169

Baker v. Director,
Ministry of the Environment

In the matter of appeals by Neil W. Baker, Mark Emery, Gordon Flatt, Glenn E. Hess, Donald K. Jackson, David A. Rattee, Greg A. Schindler, Wayne E. Shaw, Michael J. Tkach, James D. Wallace and Colin D. Watson filed November 30, 2012 and Craig A. Yuen filed December 7, 2012 for a hearing before the Environmental Review Tribunal pursuant to section 140 of the *Environmental Protection Act,* R.S.O. 1990, c. E.19, as amended; with respect to Order No. 5866-8WKU92 issued by the Director, Ministry of the Environment, on November 14, 2012 under sections 17, 18, and 196 of the *Environmental Protection Act*, requiring certain work to be undertaken at, and in the vicinity of, a site located at 695 Bishop Street North, Cambridge; and

In the matter of a motion for a stay brought by the Appellants heard on February 8, 2012 at 10:00 a.m. at 655 Bay Street, Toronto, Ontario.

Before:		Heather Gibbs, Panel Chair Marcia Valiante, Member
Appearances:		
Paul Guy, Scott McGrath and Katharine Montpetit	-	Counsel for the Appellants, Neil W. Baker, Mark Emery, Gordon Flatt, Glenn E. Hess, Donald K. Jackson, David A. Rattee, Greg A. Schindler, Wayne E. Shaw, Michael J. Tkach, James D. Wallace, Colin D. Watson and Craig A. Yuen
Mario Faieta, Nadine Harris and Justin Jacob	-	Counsel for the Director, Ministry of the Environment
Alexandra Mingo	-	Articling Student for the Director, Ministry of the Environment

Dated this **22nd** day of **March, 2013.**

REASONS FOR DECISION

Background

[1] This case relates to the presence of tricholoroethylene ("TCE"), hexavalent chromium, both human carcinogens, and contaminants in soil and groundwater on and in the vicinity of property located at 695 Bishop Street North in Cambridge, Ontario (the "Site") that was owned by Northstar Aerospace (Canada) Inc. ("Northstar Canada"). Northstar Canada and its predecessors operated a facility on the Site for the manufacturing and processing of helicopter and aircraft parts from about 1981 to April 2010.

[2] In 2004, a Phase I and Phase II Environmental Site Assessment found levels of TCE, total chromium and hexavalent chromium, well above Ministry of the Environment ("MOE") standards, in the groundwater on the Site. The MOE was notified and further investigations revealed that the contamination had migrated off-site. Groundwater from wells installed in a residential area southwest of the Site, known as the Bishop Street Community, was found to be contaminated with up to 4,000 parts per billion ("ppb") of TCE, at a time when the MOE standard was 50 ppb (It is now 1.6 ppb). Further investigations determined that there were elevated levels of TCE in many homes in the Bishop Street Community. More than 500 residences were identified as requiring on-going monitoring and mitigation. In addition, monitoring showed that groundwater contaminated with TCE and hexavalent chromium extends to the Grand River, where there is some discharge to surface water from springs and seeps.

[3] To address the necessary remediation actions, Northstar Canada submitted an Interim Remedial Action Plan ("IRAP") to the MOE in July 2006. The MOE deemed the IRAP to be acceptable and remediation began in 2009. The IRAP was revised in September 2011 to identify the necessary remediation work for the following 18 months, with an understanding that a further revised IRAP would be submitted to the MOE in the spring of 2013. The cost of remediation activities has been estimated to be about $1.4 million per year and is likely to be required for a further 10 years.

[4] From 2004 to 2012, Northstar Canada carried out investigations, mitigation and remediation on a voluntary basis, without the MOE issuing any orders. In early 2012, however, disclosures about Northstar Canada's financial situation caused the MOE to become concerned about its continued solvency. As a result, two Director's Orders were issued under the *Environmental Protection Act* ("*EPA*") against Northstar Canada and Northstar Aerospace Inc. ("Northstar Inc."), the American parent corporation of

Northstar Canada. The first Director's Order, No. 6076-8RJRUP, issued on March 15, 2012, required Northstar Canada and Northstar Inc. to continue to carry out the work identified in the IRAP for monitoring and remediation. The second Director's Order, No. 2066-8UQP82, issued May 31, 2012, required those companies to provide financial assurance in the amount of $10,352,906 to the MOE by June 6, 2012. Northstar Canada requested an extension of the date for providing financial assurance to June 20, 2012, and the MOE agreed.

[5] On June 14, 2012, Northstar Canada, Northstar Inc. and two related companies applied for and obtained protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("*CCAA*"). The Canadian proceedings were done simultaneously with a filing in the United States Bankruptcy Court. As a result of these proceedings, a Monitor, Ernst & Young Inc., and a Chief Restructuring Officer, FTI Consulting, were appointed. The directors of the companies resigned effective June 14, 2012. Two of the officers of the companies remained involved in their management, Glen E. Hess as President and Chief Executive Officer, and Craig A. Yuen as Secretary, Vice President and Chief Financial Officer.

[6] The initial order of the Ontario Superior Court under the *CCAA*, dated June 14, 2012, also provided that during a "Stay Period", originally established as until July 14, 2012 and later extended, "no proceeding or enforcement process in any court or tribunal … shall be commenced or continued against or in respect of the companies or affecting the business or the property," except with written consent or leave of the Court. In addition, the Court ordered that during the Stay Period no proceeding could be commenced or continued against "any of the former, current or future directors or officers" of the companies respecting claims against them in that capacity that arose before the date of the order. The Court ordered further that the directors and officers be granted a charge on the property of the companies, not exceeding $1,750,000, as security for their indemnification "against obligations and liability that they may incur as directors and officers" of the companies.

[7] On July 24, 2012, the Court approved the sale of the Canadian assets of the companies, excluding the Site, to Heligear Canada Acquisition Corporation. The Court also ruled that the companies were not legally obligated to continue to comply with the March 15, 2012 Director's Order, although they did comply until the sale to Heligear closed. The MOE brought a motion to prevent approval of the sale, or in the alternative to prevent distribution of the proceeds, or an order lifting the stay or declaring that the first Director's Order is not subject to the stay. This motion was dismissed.

[8] On August 2, 2012, Northstar Canada was adjudged bankrupt, effective on the closing of the sale of its assets, and a trustee in bankruptcy, BDO Canada Limited, was appointed. The assets excluded from the sale, including the Site, vested in the trustee.

[9] On August 15, 2012, the Minister of the Environment issued a "Direction to Cause Work to Be Done" (the "Direction"), pursuant to s. 146 of the *EPA*, to the Director of the MOE West Central Region. The Direction was to carry out "some or all of the work" required in the March 15, 2012 Director's Order, including to operate and maintain the existing indoor air mitigation systems installed in the nearby homes, to operate, monitor and maintain the soil vapour extraction systems, and to operate, monitor and maintain the groundwater pump and treat system, and "any other work not mentioned above as deemed necessary…". This Direction was based on the Minister's expectation that there would be no further funding from the companies to continue this work and that the Site would be abandoned. The Direction stated that the MOE was to do the work "until such time as any other person assumes responsibility for the work required by the Director's Order" of March 15, 2012. On August 24, 2012, the bankruptcy became effective. On that date, the sale of the companies' assets closed, Mr. Hess and Mr. Yuen ceased to hold office, and the trustee in bankruptcy gave notice of its abandonment of the Site, pursuant to s. 14.06(4)(a)(ii) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. The MOE commenced remediation work on the Site on August 27, 2012.

[10] The Court, in its order of August 2, 2012, also established a claims procedure, covering claims against the companies or their directors and officers, including those asserting the directors' and officers' responsibility for contamination of the companies' property. The date by which claims were to be received by the Monitor was set as October 23, 2012. On October 19, 2012, the MOE filed the required form asserting both a pre-filing and a post-filing claim against 17 directors and officers of the companies in the amount of $15,066,240.32. The MOE claim was based on a draft Director's Order. Once the Stay Period expired on October 31, 2012, the directors and officers brought a motion to the Court managing the *CCAA* process and asked for an order restraining the MOE Director from issuing an order against them until the Court rules on a motion brought by the Monitor to prescribe the appropriate procedures for adjudication of the MOE claim. On November 9, 2012, the Court refused to grant the motion.

[11] On November 14, 2012, Jane Glassco, Director of the Guelph District Office of the MOE, issued Director's Order No. 5866-8WKU92 (the "Order") under sections 17, 18 and 196 of the *EPA* to Neil W. Baker, Thomas E. Connerty, Mark Emery, Gordon

Flatt, Glenn E. Hess, Donald K. Jackson, David A. Rattee, Greg A. Schindler, Wayne E. Shaw, Michael J. Tkach, James D. Wallace, Colin D. Watson and Craig A. Yuen, all former directors and officers of the companies, and to Northstar Canada. The Order requires them to carry out the work that was originally ordered in the March 15, 2012 Director's Order. This work includes:

- submission and implementation of a plan for securing the Site;
- retention of Competent Persons and Qualified Persons and certified Laboratories;
- submission and implementation of a Residential Indoor Air Monitoring Protocol, and submission of annual reports detailing the findings, assessment and interpretation of the program;
- operation and maintenance of the existing Indoor Air Mitigation Systems installed in the Bishop Street Community and those that may be required to be installed as a result of findings of the Air Monitoring Protocol, and submission of annual reports documenting operation and maintenance of these systems;
- operation, monitoring and maintenance of the 21 existing Soil Vapour Extraction Systems and those that may be required as a result of findings of groundwater monitoring, and submission of annual reports;
- operation, monitoring and maintenance of the groundwater pump and treat system detailed in the IRAP, and submission of semi-annual reports documenting its effectiveness;
- undertaking of the Groundwater Remediation Program detailed in the IRAP;
- implementation of the groundwater and surface water monitoring programs, and submission of reports;
- implementation of the final work plan for the delineation of the groundwater contamination in the bedrock groundwater, and submission of reports;
- submission of a final report evaluating the effectiveness of the use of in situ chemical oxidation, implementation of the preferred remedial option for remediation of the groundwater contamination, and submission of semi-annual reports;
- submission and implementation of an updated IRAP;

- undertaking various forms of communications with the local community; and
- miscellaneous “Other Requirements”.

[12] On November 30, 2012, Paul Guy, on behalf of 11 of the former directors and officers named in the Order (all those named save Mr. Yuen and Mr. Connerty), filed a notice of appeal of the Order with the Environmental Review Tribunal (the “Tribunal”). Mr. Yuen received notice of the Order later than the others, and on December 6, 2012 Mr. Guy filed a notice of appeal on his behalf within 15 days of receiving notice. These 12 are the Appellants in this matter.

[13] On December 21, 2012, the Tribunal held a telephone conference call with the parties to set dates for the filing of materials and the hearing of a motion for a stay of the Order. The Appellants filed a motion on January 21, 2013 requesting that the Tribunal stay all of the requirements of the Order, pending resolution of the appeal. The motion was heard on February 8, 2013. A disposition without reasons was issued on February 15, 2013, dismissing the motion and refusing the stay. These are the Tribunal’s reasons for that order.

Relevant Legislation and Rule

[14] *Environmental Protection Act*

> 143. (1) The commencement of a proceeding before the Tribunal under this Part does not stay the operation of a decision or order under this Act, other than
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> (a) an order to pay costs and expenses under section 99.1;
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> (b) an order to pay the costs of work made under section 150; or
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> (c) an order to pay an environmental penalty.
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> (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.
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> (3) The Tribunal shall not stay the operation of a decision or order if doing so would result in,
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> (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.

Rules of Practice of the Environmental Review Tribunal

> 110. The Party shall provide evidence and submissions in support of its motion respecting:
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> (a) how the relevant statutory tests that are applicable to the granting or removal of a stay are met;
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> (b) whether there is a serious issue to be decided by the Tribunal;
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> (c) whether irreparable harm will ensue if the relief is not granted; and
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> (d) whether the balance of convenience including effects on the public interest, favours granting the relief requested.

Issues

[15] The issue is whether the Tribunal should grant a stay of the Director's Order. The specific issues are:

1. whether s. 143(2) of the *EPA* prevents the Tribunal from issuing a stay of Parts 3.1, 3.2 and 3.7 of the Order;
2. whether s. 143(3) of the *EPA* prevents the Tribunal from issuing a stay of the Order; and
3. if not, whether the requirements for a stay in Rule 110 are satisfied.

Discussion, Analysis and Findings

[16] The *EPA* limits the Tribunal's jurisdiction to grant a stay in certain circumstances. Section 143(2)(a) provides that the Tribunal may not stay an order "to monitor, record and report" or an order issued under certain sections of the *EPA*. In addition, s. 143(3) provides that the Tribunal shall not stay the operation of a decision if doing so would result in danger to the health or safety of any person, impairment or serious risk of impairment of the quality of the natural environment, or injury or damage or serious risk of injury or damage to any property or to any plant or animal life. The Tribunal will first examine whether any of the portions of the Order under appeal are covered by these statutory bars to a stay. The Tribunal will then proceed to the other Rule 110 considerations. The relevant Parts of the Order are attached to these reasons as Appendix A.

Issue 1: Whether s. 143(2) of the *EPA* prevents the Tribunal from issuing a stay of Parts 3.1, 3.2 and 3.7 of the Order.

[17] The Director takes the position that the Tribunal has no jurisdiction to order a stay of Parts 3.2 (Indoor Air Monitoring) and 3.7 (On-going Groundwater and Surface

Water Monitoring on and off the Northstar Property) as they are orders to monitor, record and report. In addition, the Director's position is that the portions of Part 3.1 that relate to 3.2 and 3.7 may not be stayed as a result of s. 143(2).

[18] The Appellants note that the Director has the onus to satisfy the Tribunal that portions of the Order fall within this provision, on a balance of probabilities. They argue that Parts 3.2, 3.7 and related portions of Part 3.1 of the Director's Order are not, in substance, an order to monitor, record and report. Rather, they submit that these provisions go beyond monitoring, and in substance require a study.

[19] The Appellants argue that s. 143(2)(a) is closely related to s. 18(1)5 of the *EPA*, from which the Director derives her authority to require an orderee to "monitor and record the presence or discharge of a contaminant specified in the order and to report thereon to the Director." The obligation to study and report, on the other hand, comes from s. 18(1)6 of the *EPA,* which authorizes the Director to issue an order to:

> To study and to report to the Director on,
>
> i. the presence or discharge of a contaminant specified in the order,
>
> ii. the effects of the presence or discharge of a contaminant specified in the order,
>
> iii. measures to control the presence or discharge of a contaminant specified in the order,
>
> iv. the natural environment into which a contaminant specified in the order may be discharged.

[20] The Appellants point to *Tembec Industries Inc. v. Ontario (Ministry of the Environment)*, [2010] O.E.R.T.D. No. 31 ("*Tembec 2010*") at paragraphs 22 and 33, which clarifies that orders to monitor, record and report may overlap with orders to study and report, but they are not the same thing and one is not necessarily the other.

[21] The Appellants argue that Part 3.2.5 of the Order requires the reporting of not only the results of the monitoring of the Residential Indoor Air Monitoring Program, but also an "assessment and interpretation of these results." The Appellants argue that the assessment of the records, their interpretation and a determination of modifications to the contaminant monitoring program, change the order "from a mere monitoring exercise to a study."

[22] With respect to Part 3.7 of the Order, regarding on-going groundwater and surface water monitoring, the Appellants argue that the placement of the monitoring wells and sample sites renders the requirement in substance a study.

[23] The Appellants argue that s. 143(2)(a) should not be given an unduly broad interpretation, consistent with the fact that the *EPA* gives the Appellants the right to appeal the Order. The Appellants' position in the appeal, while not the subject of this motion, is that the Director did not have statutory authority to issue the Order at all.

[24] The Director notes that Part 3.2 of the Order requires the orderees to submit a protocol to the MOE for approval, to monitor indoor air contaminants for a number of residences in the Bishop Street Community, and then to implement the approved plan. In the Director's view, the requirements under Part 3.2 are similar to those which were found by the Tribunal in *Tembec Industries Inc. v. Ontario (Ministry of the Environment)*, [2009] O.E.R.T.D. No. 33 ("*Tembec 2009")* to fall within the wording of s. 143(2)(a).

[25] The Director argues that the monitoring, recording and reporting requirements in Part 3.2 of the Order "are necessary to determine whether the indoor air concentrations of TCE in the 461 residences of the Bishop Street Community are within acceptable levels and whether additional mitigation measures are needed." The Director argues that the nature of environmental monitoring "inherently includes data analysis and interpretation for the purpose of shaping future actions."

[26] Part 3.7 of the Order addresses the level of contaminants in groundwater on and off the Site and in surface water in and entering the Grand River. The Director argues that, contrary to the Appellants' position, this Part should not be considered a "study" as the nature of groundwater monitoring "always relies on monitoring wells that have been carefully located to most accurately characterize the nature of the contamination".

[27] The Director relies on the following passage from *Tembec 2010*:

> (I)t is clear that proceeding with the monitoring work will help reduce the uncertainties faced by the parties and provide a clearer sense of whether any further steps will be needed. The monitoring work will also provide evidence on whether there is any serious risk to the environment in the short-term. In light of the purposes of the *EPA*, it is not difficult to see why the Legislature determined that monitoring work of this nature must proceed even if the responsibility of the orderee has not been determined. The section reflects a precautionary approach, whereby monitoring activities that may reveal more significant environmental problems must continue while an appeal proceeds. (para. 31)

Findings on Issue 1

[28] There is no dispute that the three words used in s. 143(2), "monitor, record and report" are conjunctive; that is, an order to monitor and record, without a requirement to report, is not caught under this section. (see *Tembec 2009* at para 29.)

[29] As noted in *Tembec 2010,* the Tribunal decision which most closely analyzes the s. 143(2) bar to the granting of a stay, the purpose of environmental monitoring is to inform the need for remedial or preventative actions. The Tribunal must examine the parts of an order to determine whether they are, in substance, an order to monitor, record and report; the labels given to the parts of the order are not determinative.

[30] Part 3 of the Order outlines the Work Ordered. The Parties do not dispute that the Tribunal has jurisdiction to grant a stay of Part 3.0 (Site Security), which in any event has been completed for the most part by the MOE.

[31] Part 3.1 relates to retaining a "Competent Person", a "Qualified Person" and an accredited laboratory, to prepare and complete, or supervise, the work specified in the Order. The Tribunal finds that, where this Part relates to the Parts of the Order that involve monitoring, recording and reporting, it is outside the jurisdiction of the Tribunal to stay. It is the complexity of the remediation processes that have been instituted, and are ongoing at this Site, that prompted the requirement that a "Competent Person" or "Qualified Person", as the case may be, undertake them. Part 3.1.1, for example, requires that the "Qualified Person" possess hydrogeological expertise and have expertise in the assessment and remediation of soil and groundwater contamination, in particular the remediation of Volatile Organic Compounds. As the monitoring, recording and reporting of this Order relate to contamination of soil and groundwater, the requirement for relevant expertise is an essential component and must continue. This is true for all of Part 3.1, where the requirement to monitor, record and report under other Parts of the Order is to be done by a "Competent person" or "Qualified Person".

[32] Part 3.2 deals with Indoor Air Monitoring. Parts 3.2.1 to 3.2.4 of the Order relate to the drafting and submitting of a monitoring protocol. In the Tribunal's view, this is an integral part of the requirement to monitor, record and report as the protocol delineates the manner in which these three functions are to occur.

[33] Part 3.2.5 specifies what must be included in an annual report, which "details the findings, assessment and interpretation of the Residential Indoor Air Monitoring Program". The Part then outlines minimum elements of the report, listed from (i) to (v). The Tribunal will examine each of the requirements.

[34] Part 3.2.5(i) of the Order requires details of the work completed. The Tribunal finds that this clearly falls within reporting (i.e., reporting on what was done), and so is outside the Tribunal's jurisdiction to grant a stay.

[35] Part 3.2.5(ii) of the Order requires “an evaluation and interpretation of the indoor air monitoring results, including an evaluation of any trends and an assessment with respect to the remedial action benchmarks”. It must be kept in mind that the monitoring, recording and reporting to take place under Part 3.2 is in the context of a site where complex remediation work is ongoing: indoor air mitigation systems, soil vapour extraction systems, and a groundwater pump and treat system are in operation. All parties agree that the systems are reducing contamination and must continue. This is reflected in paragraph15 of the Director’s submissions:

> Indoor air monitoring data collected by Northstar Canada indicates that the mitigation systems have been effective at reducing indoor air concentrations of TCE in the homes. Monitoring results have also indicted that where a SVES has ceased to operate properly, the indoor air concentration levels for TCE have increased and not drop again until the operational issues were remedied.

[36] The monitoring, recording and reporting in this case are vital to keep the Director informed of whether the remediation, which is ongoing, is fulfilling its purpose. The Tribunal finds this requirement to be consistent with the nature of environmental monitoring. In this regard, an evaluation and interpretation of the trends, and assessment against the benchmarks, is part and parcel of “reporting” to the Director. The Tribunal finds this to be entirely consistent with the notion of reporting what has been monitored and recorded.

[37] Part 3.2.5(iii) of the Order requires “an assessment of the adequacy of the Revised Residential Indoor Air Monitoring Protocol and recommendations for any modifications to the program, as appropriate that are to be considered in the updated Residential Indoor Air Monitoring Protocol detailed in Item 3.2.1 of this order”. This requirement ties directly into the Monitoring Protocol listed in 3.2.1 to 3.2.4, and logically assumes that the party doing the monitoring will be the party best placed to observe its failings, and recommend improvements to the program. This is especially true where, as is the case here, the monitoring, recording and reporting is of a complex scientific nature and must be undertaken by a “Qualified Person” as defined in Part 3.1. Requirements to assess and recommend modifications to the Monitoring Protocol fall within the ambit of “monitoring, recording and reporting”.

[38] In this case, the nature of the work ordered is assessing the effectiveness of the ongoing work in reducing the risk of harm. It makes practical sense for the orderees to produce a report that recommends modifications to parts of the monitoring program that are not effective.

[39] Part 3.2.5(iv) of the Order requires, as part of the report, “any recommendations for additional work to be completed”. The Tribunal observes that all parties agree that, due to the serious and significant contamination of the Site, ongoing remediation work is needed to prevent environmental harm. Similar to the analysis above, the Tribunal finds that this section reflects the practical matter that the qualified parties undertaking the monitoring will be on site and will possess the information as to whether the remediation efforts are effective, and if not, what may improve the results. Though Part 3.2.5(iv) uses general language, it is clear that the work referred to relates only to the matters set out at the beginning of Part 3.2.5, which relate to monitoring, recording and reporting. Thus Part 3.2.5(iv) falls within the wording of s. 143(2).

[40] The Tribunal finds that Part 3.2.5(v) of the Order goes beyond a requirement to monitor, record and report. It requires the development of a proposed mitigation action plan, over and above the monitoring, recording and reporting on the effectiveness of the remediation work that has been done thus far. It provides that the annual Residential Indoor Air Monitoring Program report shall include:

> in accordance with the protocol accepted by the Ministry and Public Health a proposed mitigation action plan to reduce the indoor air concentration for any residential property found to have indoor air concentrations equal to or above the accepted action level of TCE in indoor air of 0.5 mg/m^3. This plan shall include:
>
> - a description of the proposed remedial action to be taken; and
> - a schedule for implementation and completion of the mitigation action plan.

[41] The Tribunal finds that this requirement is more akin to an order under s. 18(1)7 of the *EPA*, to develop a plan to prevent, decrease or eliminate any adverse effects of a spill, and as a result the s.143(2)(a) bar does not apply to Part 3.2.5(v).

[42] Parts 3.2.6 and 3.2.7 of the Order specify to whom the report must be sent, and the permitted time delay, where certain concentrations of TCE are detected. The Tribunal finds these are clear requirements to report on the results of the monitoring, and that it has no jurisdiction to stay these Parts.

[43] In summary, the only portions of Part 3.2 over which the Tribunal has jurisdiction to order a stay is 3.2.5(v).

[44] The parties also disagree over the application of s.143(2) of the *EPA* to Part 3.7 of the Order, regarding “On-going Groundwater and Surface Water Monitoring on and

off the Northstar Property". The fact that the sampling is to take place over a wide variety of monitoring wells and locations has no effect on the monitoring quality of the requirements. Rather, it is a reflection of the nature of groundwater and surface water monitoring. After a careful review of the provisions included in that Part, the Tribunal finds that the substance of Part 3.7 is a requirement to monitor, record and report with respect to groundwater and surface water, for a number of parameters listed in Schedule C of the Remediation Order. The Tribunal finds that it has no jurisdiction to issue a stay with respect to Part 3.7.

Issue No 2: Whether s. 143(3) of the *EPA* prevents the Tribunal from issuing a stay of the Order.

[45] Section 143(3) of the *EPA* provides that the Tribunal shall not stay operation of an order if doing so would result in a danger to health or safety, impairment or serious risk of impairment of the natural environment, or injury or damage, or serious risk thereof, to property, plant life or animal life.

[46] The Appellants submit that there is no evidence that any harm of this nature will result from the granting of a stay and, therefore, the Tribunal is not barred by this provision from staying the operation of the parts of the Order requiring active remediation.

[47] The Appellants concede that the ongoing remediation work must continue because of the seriousness and extent of the contamination; however they take the position that the MOE is "currently performing the remediation work, and will continue to do so" if a stay is granted. They submit that the "Direction to Cause Work to Be Done", issued by the Minister of the Environment to the Director of the West Central Region office of the MOE on August 15, 2012, creates a legal requirement for the MOE to operate and maintain the indoor air mitigation systems, the soil vapour extraction systems and the groundwater pump and treat system until "any other person assumes responsibility for the work". The Appellants submit that they are not required to assume responsibility for the work until their appeals are heard and determined by the Tribunal. They rely on the Tribunal's decisions in *Tembec 2009* and *Superior Fine Papers Inc. v. Ontario (Ministry of the Environment)*, [2009] O.E.R.T.D. No. 74 for the proposition that "where a party is already performing the remediation work, section 143 is no bar" to a stay.

[48] The Appellants also submit that instead of issuing the Order that she did, the Director could have issued an order to pay the costs of work caused to be done by the

MOE, under s. 150 of the *EPA*. Under s. 143(1)(b), such an order is automatically stayed once an appeal is commenced. The Appellants argue that this is the true nature of the Order that was made here and it should be treated similarly.

[49] The Director submits that the continued operation of the remediation systems in Parts 3.3, 3.4 and 3.5 of the Order is essential to avoid danger to human health and serious risk of impairment to the natural environment. According to the Director, the MOE took over operation of these systems on an interim basis because it had "no choice" due to the companies' bankruptcy and the sale of its assets and the stay of proceedings issued by the Court. In the Order, the Director indicates a clear intention to stop doing this work because parties were now legally responsible for taking it over. The Director submits that the Appellants, by refusing to act in accordance with the Order, have created the circumstances whereby the MOE is forced to continue to operate the remediation systems.

[50] The Director argues that the Appellants should not be entitled to use their own inaction as a basis for avoiding the application of s. 143(3) of the *EPA*. To do so, the Director submits, would reward behaviour that does not protect the environment and penalize the MOE for taking environmentally responsible measures. The Director argues that the Appellants' failure to carry out the Order pending the outcome of the appeals undermines the purpose and scheme of the *EPA*, which establishes that the person who can be legally compelled to carry out work has the primary responsibility for remediation, with the MOE only stepping in as a last resort. The Director submits further that pursuant to a purposive interpretation of s. 143(3), it is irrelevant that the MOE is carrying out the work. According to the Director, the *Tembec 2009* case is distinguishable, on the grounds that the Tribunal held in that case that s. 143(3) would not bar a stay because one of the orderees was carrying out the work ordered, whereas in this case all of the orderees have refused to comply with any aspect of the Order, leaving the public and the environment at serious risk.

[51] The Director argues further that the Minister's Direction issued under s. 146 of the *EPA* is not relevant to the analysis under s. 143(3). The Director submits that the Direction was issued only because the companies were unable to comply with the original order and because of a stay of proceedings issued by the Court that prevented the issuance of a Director's order to the directors and officers of the companies. The Direction, according to the Director, is properly characterized as an authorization to the Regional Director to carry out certain work, rather than a legally binding order to do so until the Tribunal determines the appeals. The Director submits that, once the Court

lifted the stay and the Order to the Appellants was issued, it was reasonable to expect that the Appellants would take over the work. The Director submits that the Minister could revoke the Direction, in which case s. 143(3) would apply and prohibit the Tribunal granting a stay, but that would not be an environmentally responsible action. However, according to the Director, the MOE does not need to go to that end in order for the Tribunal to properly interpret the *EPA*.

Findings on Issue No. 2

[52] The Tribunal has held in previous decisions that the onus is on the Director to establish that the granting of a stay would result in the harm identified in s. 143(3) (for example, *Limoges v. Ontario (Ministry of the Environment),* [2007] O.E.R.T.D. No. 14 at para. 40) ("*Limoges*")). In making its findings, the Tribunal "errs on the side of caution, especially … where the Parties clearly agree that the Site is contaminated…" (*Limoges*, para. 47). The Tribunal must inquire into what *would* happen if a stay is granted, not what *could* happen. As the Tribunal stated in *Tembec 2009*:

> Section 143(3) focuses on the effects that staying a Director's Order would have on the environment, health, safety, etc. This is unlike the test in section 143(2(a), which focuses on the contents of a Director's Order. Under section 143(3), the Tribunal must examine the consequences that would emanate from granting a stay. If any of the situations noted in clauses (a), (b) or (c) "would" happen if a stay were granted, then the statute erects a bar against the issuance of a stay (paragraph 41).
>
> Though section 143(3) uses the word "would", it also uses words such as "danger" and "serious risk", which involve something less than certain harm. … Using the word "would" together with the word "serious risk" or "danger" means that the statute is not demanding proof that impairment will occur. A lower threshold is used. However, … the threshold is not as low as "could result in a danger or serious risk" (paragraph 43).

[53] The parties agree that the remediation work is essential to protect against danger to human health and impairment of the natural environment, and cannot be interrupted. This remediation work was being done by Northstar Canada, and was only taken over by the MOE because the company stopped the work when it was declared bankrupt and its assets were sold, and because of the Court's prohibition on the institution of new proceedings against the company or its directors and officers. Given the seriousness of the contamination, the MOE believed it had no other option. Once the stay period expired, the MOE acted immediately to issue the Order with the expectation of handing over the day-to-day responsibility of remediation to the Appellants. Yet the Appellants refused to take over and have since missed many of the deadlines in the Order.

[54] The Tribunal finds that there is sufficient evidence to demonstrate that danger to human health and serious risk of impairment to the natural environment would result if the remediation work were to be interrupted. This is not a situation where an order is issued to require commencement of a remediation program that might be able to be delayed for a few months pending the resolution of an appeal. Rather, the Order here was issued to confirm an ongoing remediation program for an extremely serious contamination problem affecting hundreds of nearby residents and regional water systems and to ensure that the program continues until all risk of harm due to the contamination is removed.

[55] Where the parties divide is over the relevance of the actions by the MOE pursuant to the Minister's Direction in ensuring that minimum remediation activities continue to be carried out. The Appellants argue that the fact that the MOE is doing this work means that granting a stay of the Order requiring the Appellants to do the same, or similar work would not result in the danger or risk of harm identified in s. 143(3). Therefore, the Appellants argue, on a simple reading of the statutory provision there is no bar to the Tribunal issuing a stay. The Director argues for a purposive interpretation of the provision, so that the result of the interpretation will not undermine the purpose of the *EPA* or the statutory scheme of assigning responsibility for cleaning up contamination.

[56] The purpose of the *EPA,* as set out in s. 3, is to provide for the protection and conservation of the natural environment. The statutory scheme provides broad authority to the MOE to carry out that purpose through different legal tools to prevent, control and clean up discharges of contaminants into the environment that cause or are likely to cause adverse effects. As submitted by counsel for the Director, the primary method of the *EPA* is to have the MOE cause the persons responsible for contamination to carry out the necessary work, not for them to be able to sit back and expect the MOE to do the work at the public's expense. This is consistent with the "polluter pays principle". Yet, the *EPA* also provides for an appeal process that will ultimately settle the issue of whether any of the Appellants is properly named in the Order.

[57] The *EPA* in Part XV, titled "Work Done by Ministry", explicitly contemplates that there are circumstances where the MOE will be forced to do work to ensure protection of human health and the natural environment. Section 146 authorizes the Minister to cause work to be done when an order or decision has been stayed. Section 147 authorizes the Director to cause work to be done where an order is not stayed and the person named in the order "has refused to comply with or is not complying with" the

order. MOE policy on doing work is to do so only as a "last resort". According to the "Guiding Principles" of the Environmental Clean-up Fund, which was established by the government to allow the ministry to act quickly to resolve serious or urgent environmental problems:

> 2.1.1 The Environmental Clean-up Fund is a funding mechanism of last resort. All other funding possibilities must first be explored before Environmental Clean-up Fund funding is sought. Funding will only be provided if a party responsible for the contamination cannot be identified, or refuses or is unable to take the necessary remedial action. …
>
> 2.3 … Except where immediate ministry action is necessary to protect the natural environment or public health and safety, funds from the Environmental Clean-up Fund shall only be made available if a responsible party cannot be identified, or where other measures such as Control Orders, Director's Orders or Minister's Orders have not been complied with…" (MOE, Environmental Assessment and Approvals Branch, Operations Division, *Guide on Environmental Clean-up Fund and Provincial Liability Fund,* May 2005, pp. 7 and 9).

[58] These policies apply to this situation. The bankruptcy of Northstar Canada and Northstar Inc. and the sale of their assets prevented them from continuing the remediation work. During the Court-imposed stay period, the MOE issued no orders. Thus, when the Minister issued the Direction under s. 146 of the *EPA*, he was directing the MOE regional office to carry out work under the original Director's Order made against Northstar Canada and Northstar Inc. because those companies had no assets and so were unable to carry out the remediation. From the time the Appellants were named in the Order, they have made no efforts to take over the work.

[59] In their appeals, the Appellants claim that they were not properly named in the Order pursuant to the provisions of s. 17, 18 and 196 of the *EPA.* It is not relevant to the determination of the stay issue that the Director may have had authority to issue orders under other provisions of the *EPA*. Until the issue of whether any or all of the Appellants was properly named in the Order is decided, they have stated that they are not willing to expend funds on remediation that they may not recover if they are ultimately found to be not responsible.. Despite their argument, the Tribunal finds that there is no authority in the *EPA* for Appellants to demand a resolution of their appeals before they become legally responsible for complying with the Order. With the 1990 amendments to the *EPA*, the Legislature deliberately chose to impose responsibility on an orderee during the interim period pending the resolution of an appeal unless and until the Tribunal stays the order. Thus, the Appellants became legally responsible for carrying out the Order from the start, and have failed to meet many of the deadlines. There is no suggestion or evidence that the Appellants are unable to carry out this work.

They offered to set aside funds and re-pay the MOE if they are found to be responsible, which offer was refused by the MOE. The Appellants simply refuse to take any action until the Tribunal decides the appeals, and demand a stay in reliance on the MOE continuing to carry out the remediation work. Counsel for the Appellants terms this situation "unfortunate".

[60] This puts the MOE in a difficult position. The Director worries that an interpretation of s. 143(3) that does not bar a stay in these circumstances will have the perverse result of providing an incentive for every appellant in the most serious cases to refuse to carry out an order, thereby precipitating action by the MOE, and guaranteeing a stay which will protect them from a prosecution. This, it is argued, would effectively reverse the 1990 amendments in the most serious cases. The Tribunal agrees with the Director that a stay in these circumstances may provide such an incentive to orderees in other cases. However, the Tribunal cannot read language into s. 143(3). As written, s. 143(3) directs the Tribunal to consider only what the result of a stay would be on health and the environment in the specific circumstances before it.

[61] As was noted above, the *EPA* and MOE policy both contemplate circumstances where an orderee "refuses" to comply with an order, resulting in the need for the MOE to carry out the work in the face of such refusal. In this case, there is a unique set of circumstances. Northstar Canada undertook the work up until it was unable to continue. There is a Direction from the Minister in place requiring the MOE to carry out some of the work until a person "assumes responsibility" for the work. The Director intended for the Appellants to assume responsibility. However, by refusing to comply with the Order, the fact remains that the Appellants have not assumed responsibility, forcing the MOE to continue to do so. For the purpose of s. 143(3), this case is similar to the situation in *Tembec 2009*, where the work ordered was being done by one party, with the practical effect that a stay in favour of the other party would not result in a danger to health or increased risk to the environment during the period before the disposition of the appeal.

[62] The Tribunal finds that so long as the MOE continues to carry out the remediation work identified in the Minister's Direction, which it has been directed to do until a person assumes responsibility, a stay of Parts 3.3, 3.4 and 3.5 of the Order would not result in a danger to human health or impairment or serious risk of impairment of the natural environment, or injury or damage or serious risk of injury or damage to property, plant life or animal life. Thus, the Tribunal finds that s. 143(3) of the *EPA* does not bar it from issuing a stay of Parts 3.3, 3.4 and 3.5 of the Order.

[63] Here, the MOE is not carrying out all of the work under the Order. Rather, it is doing the minimal work necessary to maintain the status quo and prevent harm to residents and to nearby waters. This is the work identified in Parts 3.3, 3.4 and 3.5 of the Order. Part 3.6 of the Order requires the Appellants to undertake the Groundwater Remediation Program in the vicinity of the Site as set out in the IRAP. This program, also referred to as the "In Situ Chemical Oxidation program", requires the injection of potassium permanganate into the groundwater in order to actively destroy the TCE. This is not part of the work specified in the s. 146 Direction and the MOE is not currently implementing the full injection program. The Director did not argue that a stay of this part of the Order would result in the harm identified in s. 143(3) and the Tribunal finds that the Director's decision not to implement this program is evidence that danger to human health or increased risk of environmental impairment will not result if Part 3.6 of the Order is stayed until the appeal is finally determined. Thus, the Tribunal finds that s. 143(3) of the *EPA* does not bar it from issuing a stay of Part 3.6 of the Order.

[64] Part 3.8 of the Order requires the Appellants to implement the final work plan for the delineation of the contamination in the bedrock groundwater in the vicinity of the Site, once the work plan has been approved by the MOE. The Director notes that, since the MOE has not yet approved the Work Plan, this Part does not currently require the Appellants to do any work.

[65] There is no allegation that there is any statutory bar to the Tribunal ordering a stay of Parts 3.9 to 3.12 of the Order.

Issue 3: Whether the requirements for a stay in Rule 110 are satisfied.

[66] The Tribunal has found that it is barred from granting a stay under s.143(2)(a) with respect to Parts 3.1 and 3.7 of the Director's Order, and all of Part 3.2 except for Part 3.2.5(v). In order for the remainder of the provisions of the Order to be stayed, the Appellants must establish that a stay is warranted under Rule 110. For the reasons set out below, the Tribunal finds that the Appellants have not met this test.

[67] Rule 110 reflects the approach taken by the courts in Canada, as described by the Supreme Court of Canada in *RJR MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311 ("*RJR MacDonald*"). This case established the three elements of the test for a stay: whether there is a serious issue to be decided, whether irreparable harm will ensue if there is no stay, and whether the balance of convenience, including effects on the public interest, favours the granting of a stay.

Serious Issue

[68] In considering the first prong of the three-part test for granting a stay, the Tribunal applies "a very low threshold, intended only to rule out frivolous or vexatious claims" (*Limoges,* para. 56). The Director concedes, for the purposes of this stay motion, that the Appellants have raised a serious issue in their appeals of the Order.

[69] The Tribunal finds that the Appellants meet the first prong of the test for granting a stay, that there is a serious issue to be decided in the appeals.

Irreparable Harm

[70] The Appellants submit that they will suffer irreparable harm if the Order is not stayed. They cite *RJR MacDonald,* at para. 59*,* for the meaning of "irreparable harm":

> 'Irreparable' refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.

[71] They cite the case of *Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Limited Partnership* (2011), 341 D.L.R. (4th) 407 (Sask. C.A.), in support of their position that they do not need to demonstrate to a "high level of certainty" that irreparable harm will occur, only that there is "meaningful risk of irreparable harm" if no stay is granted.

[72] The Appellants submit that they will incur significant costs in complying with the Order, which may not be recovered if the appeals are successful and they are ultimately found not to be properly named orderees. While the irreparable harm branch of the test for a stay refers to the nature of the harm suffered rather than its magnitude, the Appellants note nonetheless that the cost of compliance is significant, at approximately $1.4 million per year.

[73] The Appellants submit that none of the potential sources of compensation for these expenditures are likely to be available to them if they are successful in their appeal. First, they filed evidence to establish that the $15 million insurance policy for indemnification of the directors and officers of Northstar Canada expressly excludes environmental remediation costs from coverage.

[74] Second, the Appellants argue that they will not be able to recover the costs from either of the two orderees, Northstar Canada and Thomas Connerty, who have not appealed the Order. Northstar Canada is bankrupt and has no assets remaining. Mr. Connerty lives in the United States, did not appeal the Order and has taken no steps to

comply with it. The Appellants argue that this case is similar to *Currie v. Ontario (Ministry of the Environment)*, [2010] O.E.R.T.D. No. 56, in which the Tribunal found, at para. 84, that the appellants would suffer irreparable harm where two other orderees had not appealed the order and one of those orderees was outside of the country and the other had made no serious attempt to address any of the issues on the Site.

[75] In addition, they argue that Mr. Connerty is not a potential source of compensation if the Appellants are successful on appeal because he is also a former director of Northstar Canada. Thus, if the Appellants are successful on their appeals, the reasons for quashing the Order (for example, as being without jurisdiction or on fairness grounds) would equally apply to exonerate Mr. Connerty. Similarly, the Appellants argue they could not recover from one another, because they are all appealing on the same grounds. That is, a success for one is a success for all.

[76] Third, the Appellants argue that the $1.75 million charge on the assets of Northstar Canada, set aside by the Court to indemnify the directors and officers of the company (the "D&O Charge") would cover their interim costs of remediation but may not be available to them. The Monitor overseeing the procedure for the payment of claims arising out of the insolvency of Northstar Canada and Northstar Inc. has filed a motion with the Court for a determination of whether the MOE's claim is a valid claim for which the directors and officers would be entitled to be indemnified out of the D&O Charge. This motion was heard by the Court in December 2012, but the Court has not yet issued a decision. The Appellants supported the MOE on the motion but submit that the availability of the D&O Charge is "far from proven". They argue that, were the Tribunal to conclude that the Appellants have the benefit of the D&O Charge, it would lead to potentially inconsistent results.

[77] Fourth, the Appellants explain that there are two plumes of contamination: a western plume and a southern plume. The southern plume is much larger in area than the western plume, and accounts for the vast majority of remediation costs. The Appellants note that while General Electric Company Canada ("GE Canada") may potentially be held liable in damages for remediation costs relating to the western plume, this would represent only a minor portion (less than 10%) of the remediation costs to be expended under the Order.

[78] Finally, the Appellants argue there is no provision in the *EPA* to recover funds from the Director, should the Appellants win their appeals.

[79] The Director submits that the Appellants are required to put forward specific evidence of irreparable harm, and not merely to suggest possible economic hardship, but that they have not done so. The Director submits that *RJR MacDonald* is the leading authority and it establishes that the onus is on the Appellants to prove that irreparable harm *will* occur, not that a lower threshold will suffice. The Director submits that the Appellants have not provided evidence that demonstrates that they will not be able to recover their remediation costs if any or all of them are ultimately successful in their appeals. The Director asserts that there are possible avenues of recovery of the costs expended, including between the Appellants themselves, from Mr. Connerty, and from the D&O Charge fund.

Findings on Irreparable Harm

[80] The Tribunal has adopted the meaning of "irreparable harm" from *RJR MacDonald*, which refers to the nature of the harm, and not its magnitude. It is "harm which either cannot be quantified in monetary terms or which cannot be cured usually because one party cannot collect damages from the other".

[81] The Tribunal has consistently held in previous cases that appellants must demonstrate that irreparable harm would in fact occur if a stay is not granted. In other words, an unsubstantiated claim or proof of a risk of irreparable harm is not sufficient to meet this part of the test for a stay. For example, in *Limoges, supra*, paras. 60 and 61, the Tribunal stated:

> First, the caselaw makes it clear that the litigant arguing irreparable harm must demonstrate that such harm would occur. … The possibility that compliance with the Order will create some economic hardship is not sufficient to meet this criterion.
>
> Second, the caselaw also states that the harm must be such that it cannot be quantified in monetary terms or it cannot be cured because, for example, one party cannot collect damages from the other. In this case, there is no evidence that the Appellant cannot seek reimbursement for its costs to comply with the Order should the Tribunal find in their favour.

[82] The onus of proof is on an appellant to establish, on a balance of probabilities, that it cannot recover its costs in complying with an order that it is ultimately found to be not responsible for. In this case, the Appellants can go no further at this time than establishing that they may not be able to recover their costs.

[83] The Appellants have acknowledged that, if the court determines that they may access the D&O Charge to pay for the costs of complying with the Order, then they will not suffer irreparable harm. That decision is currently under reserve, so it is premature

for the Tribunal to conclude that the Appellants will not be able to recover their costs from this fund, should their appeals be successful before the Tribunal.

[84] Given the above findings, it is not necessary to determine whether the Appellants have established that they will not be able to recover damages from one another, or from Mr. Connerty.

Balance of Convenience

[85] The Appellants argue that the balance of convenience favours the granting of a stay of the Order. They submit that any funds they expend for the remediation of the Site will be unrecoverable, while the MOE could have recovered the funds it is expending if it had accepted the reasonable offer made by the Appellants to pay into a trust fund. In refusing to accept that offer, the Appellants argue, the Director has negated her argument on this prong of the test. In addition, the Appellants note that there will be no harm to the environment and no harm to the statutory scheme of the *EPA* if the stay is granted.

[86] The Director submits that the balance of convenience favours denying the stay. In weighing the relative harm suffered by each party, the Director argues that the Tribunal must consider the impact on the public interest, including risk to the environment and the impact of a stay on the statutory scheme. It is the Director's position that the balance of convenience generally favours a public authority acting in the public interest, citing *RJR MacDonald*. In this case, the Director argues, a stay would prejudice the public interest by forcing the MOE into a position where it must continue to expend public resources when a responsible party has been identified and ordered to carry out the work. Such refusal also undermines the statutory scheme, allowing orderees to ignore an order without consequence pending an appeal, in effect reading an amendment into the *EPA*. Finally, the Director submits that the Appellants' "settlement offer" may be appropriate in a private law action, but is not appropriate in light of the statutory scheme.

Findings on balance of convenience

[87] The third part of the test for a stay requires the Tribunal to weigh the different types of harm that each of the parties will suffer should a stay be granted or refused. In this case, the Appellants have not shown that the financial harm that they would suffer is irreparable. Nonetheless, the Tribunal finds that even if this harm were considered to be irreparable, the balance of convenience favours the Director for the following reasons.

[88] The prejudice to the Appellants is strictly financial. While there are also financial implications for the Director, the major consideration to be balanced against this is harm to the public interest that would result from the granting of a stay.

[89] The public interest is a significant factor that the Tribunal will consider in weighing the balance of convenience. As the Tribunal stated in *Limoges*, at para. 65:

> Regardless of whether the 'public interest' is a dominant or overriding consideration in assessing the balance of convenience, it is a significant and imperative factor that must be taken into consideration. It is clearly stated in Rule [110] ... It should also be recalled that the Tribunal's very mandate is rooted in the protection of the public interest …

[90] In the *RJR MacDonald* case, the Supreme Court held, at para. 71:

> In our view, the concept of inconvenience should be widely construed in Charter cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

[91] While *RJR MacDonald* involved the *Charter*, the role of the public interest is also central in other situations under public welfare legislation such as the *EPA*, which has as its purpose the protection of the environment.

[92] The central harm to the public interest from a stay of the Order in the circumstances of this case would be to the statutory scheme itself. The Tribunal has found that a stay of several aspects of the Order is not barred under section 143(3) because of the unique circumstances of this case, that is, because the MOE is carrying out the minimum amount of remediation work. The Tribunal recognizes that the MOE initiated its work prior to the issuance of this Order. However, the reason that the MOE continues to carry out this work with public resources is that the Appellants have not met their obligations under the *EPA*, despite a clear statutory direction that requires compliance with an order pending an appeal unless the Tribunal orders otherwise.

[93] The conduct of parties is a relevant consideration in the context of a discretionary remedy such as a stay. The Tribunal agrees with the Director that a stay of the Order would be perceived as a reward to the Appellants for their inaction and would sanction disrespect for the statutory scheme.

[94] The Tribunal emphasizes that there is no automatic stay of most orders under the *EPA*, including this Order. Appellants seeking a discretionary remedy such as a stay should make efforts to comply with the Order pending the determination of their appeals or pending the issuance of an interim stay (a hearing for which can be arranged on short notice) or stay by the Tribunal. The Tribunal notes that, in many situations, the hearing of an interim stay motion or a stay motion will take place before the first deadlines in an order and compliance and conduct issues will not arise.

[95] If the Tribunal were to routinely grant stays to those who simply ignore their statutory obligations, this would amount in practice to a situation where there is an automatic stay pending appeal. The Legislature clearly opted for another approach when it amended the stay provisions of the *EPA*. The present statutory scheme is one where orderees are required to comply unless a stay is granted. The Tribunal finds that there would be significant harm to the public interest if the Tribunal were to grant a stay in the circumstances of this case. For these reasons, the Tribunal finds that even if the harm to the Appellants were considered to be irreparable or there were no bar to the issuance of a stay for aspects of the Order under s. 143(2), the balance of convenience favours the Director.

Summary of Findings

[96] The Tribunal finds that s. 143(2) of the *EPA* bars a stay of Part 3.7 of the Director's Order, Part 3.2 except for Part 3.2.5(v), and Part 3.1 as it relates to Parts 3.2 and 3.7. The Tribunal finds that the remainder of the Order is not barred from a stay pursuant to s. 143(3). The Tribunal further finds that, regardless of the bars to a stay, a stay should not be granted under Rule 110.

ORDER

[97] The motion for a stay is dismissed.

Stay Refused
Motion Dismissed

Heather I. Gibbs, Panel Chair

Marcia A. Valiante, Member

Appendix A – Direction to Cause Work to be Done, dated August 15, 2012
Appendix B – Director's Order No. 5866-8WKU92 (Excerpts)

Appendix A

Direction to Cause Work to be Done

Environmental Protection Act, subsection 146(1)

DIRECTION TO CAUSE WORK TO BE DONE

TO: Bill Bardswick,
Director, West Central Region
Ministry of the Environment
119 King Street West, 12th Floor
Hamilton, Ontario
L8P 4Y7

SITE: 679 and 695 Bishop St. North, Cambridge, Ontario ("the Property")

Lots 38 – 39 RCP 1374 Cambridge except Part 3, Plan 67R-3167;
Part Block A Plan 1319 Cambridge as in W648730;
Part Lot 37 RCP 1374 Cambridge being Part 3, Plan 67R-3011, except Parts 1 & 2, Plan 67R-3167; Cambridge

Lot 40 RCP 1374 Cambridge except Part 3, Plan 67R-3167;
City of Cambridge, Regional Municipality of Waterloo

Definitions:

For the purposes of this Notice:

"Bishop Street Community" means the area of investigation based upon the current extent of groundwater contaminants and trichloroethylene indoor air concentrations as a result of soil vapour.

"Contamination" means Trichloroethylene (TCE), 1,1-Trichloroethane (1,1-TCA), Tetrachloroethylene (PCE), 1,1-Dichloroethylene (1,1-DCE), Cis-1,2-Dichloroethylene (cis-1,2-DCE), trans-1,2-Dichloroethylene (trans-1,2-DCE), Vinyl Chloride (VC) and 1,1-Dichloroethane (1,1-DCA), hexavalent chromium and any other known associated breakdown products.

Legislative Authority:

Section 146 of the *Environmental Protection Act*, R.S.O. 1990, c.E19, as amended (EPA) provides that where an order made under this Act is stayed, the Minister may cause to be done any thing required by the order or decision.

Notice:

1. On March 15, 2012, Director's Order No. 6076-8RJRUP was issued to Northstar Aerospace (Canada) Inc. and Northstar Aerospace, Inc. ("Northstar") requiring work to be done. On July 24, 2012 the Ontario Superior Court of Justice (Commercial List) ruled that Northstar was not legally obliged to undertake the work required by the Director's Order on the basis that the stay of proceedings

issued under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c C.36 in respect of Northstar applied to the Director's Order. At the same time, the court also approved the sale of substantially all of the operating assets of Northstar Aerospace, Inc. and its affiliates other than the Property. On August 2, 2012, the Ontario Superior Court of Justice (Commercial List) ordered that Northstar be adjudged bankrupt effective upon the sale of Northstar's operating assets described above. The Ministry expects that there will be no funding from Northstar to continue the work required by the Director's Order within the Bishop Street Community. Northstar advised the Ministry that, upon conclusion of the insolvency proceedings, the Property will be abandoned and no further work required by the Director's Order would be carried out. Until such time as any other person assumes responsibility for the work required by the Director's Order, I am of the opinion that it is in the public interest to cause some or all of the work required by the Director's Order to be done by the Ministry as follows:

a) Operate and maintain the existing indoor air mitigation systems that have been installed in the Bishop Street Community;

b) Operate, monitor and maintain the soil vapour extraction systems in accordance with Amended Environmental Compliance Approval No. 5018-8KSR9B dated January 5, 2012;

c) Operate, monitor and maintain the groundwater pump and treat system on and in the vicinity of the Property in accordance with Amended Permit to Take Water No. 7007-87HLXW dated August 9, 2010 and Amended Certificate of Approval No. 2388-7KLJ35 dated November 5, 2009;

d) Any other work not mentioned above as deemed necessary to carry out the work required by the order with respect to the Contamination.

DATED at Toronto, this 15th day of August, 2012.

Jim Bradley

The Honourable Jim Bradley
Minister of the Environment

Appendix B

Director's Order No. 5866-8WKU92 (Excerpts)

Part 3.1 - Retain a Qualified Person and Laboratory

3.1.1 By November 30, 2012, retain Competent Person (s) and Qualified Person (s) and certified laboratory (ies) ("Laboratory') to prepare and complete, or supervise, the work specified in this order. The Qualified Person shall possess hydrogeological expertise and have expertise in the assessment and remediation of soil and groundwater contamination, in particular the remediation of volatile organic compounds ("VOCs").

3.1.2 The Qualified Person must be a licensed member of the Professional Engineers of Ontario, as required by the *Professional Engineers Act,* R.S.O. 1990 and its regulations and/or the Association of Professional Geoscientists of Ontario, as required by the *Professional Geoscientists Act,* S.O. 2000, c. 13 and its regulations.

3.1.3 The Laboratory must be accredited by a Ministry approved accreditation body and compliant with the International Standard ISO/IEC 17025. The Laboratory's accreditation must include accreditation for the parameters to be assessed under this order.

3.1.4 The Competent Person shall have the education, training, or experience to perform the particular tasks and analysis required within this order that are not to be performed by a Qualified Person.

3.1.5 By November 30, 2012, provide written confirmation to the Ministry's Guelph District Manager that the Competent Person, Qualified Person and Laboratory have been retained.

Part 3.2 – Indoor Air Monitoring

3.2.1 A Residential indoor Air Monitoring Protocol shall be submitted to the Ministry's Guelph District Manager and the Regional Municipality of Waterloo Public Health ("Public Health") for review and approval on an annual basis on or before December 1st, 2012 and no later than September 1st of each year, thereafter.

3.2.2 On or before December 15, 2012 and no later than December 15th of each year, upon written approval from the Ministry's Guelph District Manager and Public Health, the Parties shall, begin implementing the Residential Indoor Air Monitoring Protocol identified in Item 3.2.1 of this order.

3.2.3 The termination of, or modifications to, the Residential Indoor Air Monitoring Protocol identified, in Item 3.2.1 of this order must be requested by the Parties in writing to the Ministry's Guelph District Manager and Public Health on or before December 1 of each year.

3.2.4 The termination of, or modifications to, the updated Residential Indoor Air Monitoring Protocol shall only be implemented by the Parties upon the Parties receiving written approval from the Ministry's Guelph District Manager and Public Health.

3.2.5 On or before July 1, 2013, and annually thereafter, the Parties shall submit in writing to the Ministry's Guelph District Manager and Public Health a report which details the findings, assessment and interpretation of the Residential Indoor Air Monitoring Program completed in accordance with the Revised Residential Indoor Air Protocol as per Item No. 3.2.1 of this order. This report shall be prepared by the Qualified Person in accordance with acceptable scientific, geoscientific and engineering practices, include sufficient information, data and recommendations for the ultimate purpose of protecting and conserving the natural environment pursuant to Section 3 of the EPA, and shall include at a minimum:

i. details of the work completed to sample and analyze the indoor air, including all field and analytical data and laboratory certificates of analysis, as required by this order;

ii. an evaluation and interpretation of the indoor air monitoring results, including an evaluation of any trends and an assessment with respect to the remedial action benchmarks;

iii. an assessment of the adequacy of the Revised Residential Indoor Air Monitoring Protocol and recommendations for any modifications to the program, as appropriate that are to be considered in the updated Residential indoor Air Monitoring Protocol detailed in Item 3.2.1 of this order;

iv. any recommendations for additional work to be completed; and

v. in accordance with the protocol accepted by the Ministry and Public Health a proposed mitigation action plan to reduce the indoor air concentration for any residential property found to have indoor air concentrations equal to or above the accepted action level for TCE in indoor air of 0.5 µg/rn^3. This plan shall include:

- a description of the proposed remedial action to be taken; and
- a schedule for implementation and completion of the mitigation action plan.

3.2.6 The Parties, shall within two weeks of receiving sample results report, in writing to the Ministry's Guelph District Office, the City of Cambridge, and Public Health any detection of TCE in the indoor air of residential, homes, including the concentration, which is greater than 0.5 µg/rn^3.

3.2.7 The Parties shall forthwith report in writing to the Ministry's Guelph District Office, the City of Cambridge, and Public Health any new detection of TCE in the indoor air of residential homes, including the concentration, which is greater than

10 µg/rn³. A new detection means for a home not previously tested or for an existing home where the previous two sample results were less than 10 µg/rn³.

3.7 On-going Groundwater and Surface Water Monitoring on and off the Northstar Property:

3.7.1. Commencing November 30, 2012 the Parties shall implement the groundwater and surface water monitoring programs as follows:

i. The groundwater blanket sampling program shall include, at a minimum, the following:

a. semi-annual (June/September) monitoring and sampling of all available groundwater monitoring wells installed in the Area Under Investigation (the groundwater monitoring network) as detailed in the Figure No. 1 Site Plan, Well Locations in the Study Area as of June 2009 attached to the report prepared by AMEC entitled “Ground Water blanket Sampling Event, 695 Bishop Street North and Vicinity, Cambridge, Ontario, October 2009” dated December 2009;

b. any new groundwater monitoring wells installed, by the Parties, at and in the Area Under Investigation are required to be included as part of the groundwater monitoring network and incorporated into the semi-annual groundwater monitoring and sampling program;

c. semi-annual monitoring shall include the measurement of groundwater levels in all available wells in the groundwater monitoring network;

d. semi-annual groundwater samples shall, be taken from all available wells in the groundwater monitoring network and analyzed for the parameters listed in Schedule “C” of the Remediation Order, and;

e. the semi-annual groundwater monitoring and sampling program shall, be consistent with the methodology for the Field Program and the Quality Assurance Program (Analytical) detailed in the report prepared by AMEC entitled “Ground Water blanket Sampling Event, 695 Bishop Street North and Vicinity, Cambridge, Ontario, October 2009” dated December 2009;

ii. The surface water sampling program shall include, at a minimum, the following:

a. surface water samples of the seeps and springs along a section of the Grand River as identified in Figure No. 1 entitled Northstar Aerospace 695 Bishop Street North and Vicinity, Approximate Sample Locations: January 2012 attached to the report prepared by AMEC entitled “Surface Water Sampling Downgradient of Northstar Aerospace (Canada) Inc., Cambridge, Ontario, October 2011,” dated February 2012, shall be taken three times a year (Spring, Summer and Fall);

b. surface water samples of transects of the Grand River once per year;

c. surface water grab samples shall be collected and analysed for the parameters listed in Schedule “C” of the Remediation Order; and

d. the surface water sampling program shall be consistent with the methodology for the Field Program and the Quality Assurance Program (Analytical) detailed in the report AMEC entitled “Surface Water Sampling Downgradient of Northstar Aerospace (Canada) Inc., Cambridge, Ontario, October 2011” dated February 2012.

3.7.2 On or before December 21, 2012, and annually thereafter, the Parties shall, submit to the Ministry’s Guelph District Manager a Groundwater Monitoring Report prepared by the Qualified Person that is consistent with the report prepared by AMEC entitled “Ground Water Blanket Sampling Event, 695 Bishop Street North and Vicinity, Cambridge, Ontario, December 2010” dated December 20, 2010.

3.7.3 Within 90 days of completion of each surface water sampling event, the Parties shall submit to the Ministry’s Guelph District Manager a Surface Water Monitoring report prepared by the Qualified Person that is consistent with the report prepared by AMEC entitled “Surface Water Sampling Downgradient of Northstar Aerospace (Canada) Inc., Cambridge, Ontario, October 2011” dated February 2012.

3.7.4 The termination of, or modifications to, the groundwater and or surface water monitoring programs detailed in Items 3.7.1, 3.7.2 and 3.7.3 of this order must be requested by the Parties in writing to the Ministry’s Guelph District Manager.

3.7.5 The termination of, or modifications to, the groundwater and or surface water monitoring programs shall only be implemented by the Parties upon the Parties receiving written approval from the Ministry’s Guelph District Manager.