

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – April 23, 2012

IN THE MATTER OF sections 91, 92, and 95 of the
Environmental Protection and Enhancement Act, R.S.A. 2000, c.
E-12;

-and-

IN THE MATTER OF an appeal filed by 719722 Alberta Ltd.
with respect to *Environmental Protection and Enhancement Act*
Environmental Protection Order No. EPO-2010/48-CR issued to
719722 Alberta Ltd by the Director, Central Region,
Environmental Management, Alberta Environment and Water.

Cite as: Intervenor Decision: 719722 *Alberta Ltd. v. Director, Central Region, Environmental Management, Alberta Environment and Water* (23 April 2012), Appeal No. 10-031-ID1 (A.E.A.B.).

**INTERVENOR DECISION
BEFORE:**

Mr. Alex G. MacWilliam, Panel Chair.

SUBMISSIONS BY:

Appellant: 719722 Alberta Ltd., represented by Mr. Ron Kruhlak and Mr. Sean Parker, McLennan Ross LLP.

Director: Mr. Gerald Feschuk, Director, Central Region, Environmental Management, Alberta Environment and Water, represented by Ms. Erika Gerlock, Alberta Justice.

Intervenor Applicants: W.W. Importers and Exporters Ltd., represented by Ms. Karin Buss; Leduc Co-op Ltd., represented by Mr. Rick Polasek, General Manager Leduc Co-op Ltd.; Country Club Inn Ltd., represented by Mr. Kenneth G. Tamke, Shaw & Tamke; and the Town of Calmar, represented by Mr. Derek J. King, Brownlee LLP.

EXECUTIVE SUMMARY

Alberta Environment and Water issued an Environmental Protection Order to 719722 Alberta Ltd. in respect of petroleum hydrocarbon contamination at a service station in Calmar.

The Board subsequently received a Notice of Appeal from 719722 Alberta Ltd.

In response to the Notice of Hearing, the Board received applications from W.W. Importers and Exporters Ltd. (previous owner of the service station), Country Club Inn Ltd. (previous owner of the service station), the Leduc Co-op Ltd. (adjacent landowner), and the Town of Calmar (adjacent landowner) to be added to the appeal proceeding as intervenors.

After receiving and reviewing the submissions from the participants, the Board granted the requests and the applicants have been granted intervenor status. The basis for the decision was that, from the materials submitted by 719722 Alberta Ltd. in connection with its appeal, it was clear the appellant intends to argue that other persons, including the intervenor applicants, should be named in the Environmental Protection Order. Therefore, the Board determined that all the applicants have a direct interest in the appeal and should be given the opportunity to participate in the appeal as full intervenors.

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I. BACKGROUND

[1] On November 12, 2010, the Director, Central Region, Environmental Management, Alberta Environment and Water (the “Director”), issued Environmental Protection Order No. EPO-2010/48-CR (the “EPO”) under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”), to 719722 Alberta Ltd. requiring, among other things, the remediation of petroleum hydrocarbon contamination at a gas station located at 4710-50 Avenue in Calmar, Alberta (the “Site”). Three amendments to the EPO were issued by the Director on December 20, 2010, March 24, 2011, and March 6, 2012.

[2] On November 19, 2010, the Environmental Appeals Board (the “Board”) received a Notice of Appeal from 719722 Alberta Ltd. (the “Appellant”) appealing the EPO. The Appellant requested a determination of whether there were other persons responsible for the contamination that should have been named in the EPO.¹

¹ Section 1(tt) of EPEA defines “person responsible” as:

“when used with reference to a substance or a thing containing a substance, means

- (i) the owner and a previous owner of the substance or thing,
- (ii) every person who has or has had charge, management or control of the substance or thing, including, without limitation, the manufacture, treatment, sale, handling, use, storage, disposal, transportation, display or method of application of the substance or thing,
- (iii) any successor, assignee, executor, administrator, receiver, receiver-manager or trustee of a person referred to in subclause (i) or (ii), and
- (iv) a person who acts as the principal or agent of a person referred to in subclause (i), (ii) or (iii),

but does not include

- (v) a municipality in respect of
 - (A) a parcel of land shown on its tax arrears list, unless after the date on which the municipality is entitled to possession of the parcel under section 420 of the *Municipal Government Act* or becomes the owner of the parcel under section 424 of that Act the municipality releases on that parcel a new or additional substance into the environment that may cause, is causing or has caused an adverse effect or aggravates the adverse effect of the release of a substance into the environment on that parcel....”

[3] The Board held a mediation meeting on July 19, 2011, and continued the mediation meeting on February 27, 2012. The mediation meeting did not result in the appeal being withdrawn.²

[4] The Board asked the Director and Appellant for available dates to schedule the hearing. After reviewing the dates provided, the Board set the hearing for April 11 to 13, 2012.³

[5] The Notice of Hearing was published in the Leduc Representative, Leduc Wetaskiwin Pipestone Flyer, and the Community Voice, was provided to the Town of Calmar and Leduc County, and a news release was placed on the Alberta Government and Board websites and distributed to the media throughout the Province. In response to the notice, the Board received intervenor requests from the Leduc Co-op Ltd. (the “Co-op”), the Town of Calmar (“Calmar”), W.W. Importers and Exporters Ltd. (“W.W.”), and Country Club Inn Ltd. (“Country Club”).

II. SUBMISSIONS

A. Applicants

1. Leduc Co-op Ltd.

[6] The Co-op is the owner of property located adjacent to the Site. It stated that that, if it was granted intervenor status, it would provide information regarding the complete clean up of its site to ensure compliance with Alberta Environment and Water requirements. Such information would include the environmental reports detailing the remediation undertaken on its property and the removal of contaminated soil.

² Even though the mediation meeting did not resolve the appeal, the Director and Appellant can continue settlement discussions up to and during the hearing.

³ The hearing of the appeal was originally scheduled for April 11 to 13, 2012. However, both the Director and Appellant requested the hearing be adjourned to a later date because an amended EPO, amending the dates for the Appellant to complete the work required under the EPO, was issued. As of this date, the Board is in the process

2. Town of Calmar

[7] Calmar submitted that it has a tangible interest in the appeal and its participation would materially assist the Board. It stated that it owns the property immediately east of the Appellant's land, commonly referred to as the "Veterinary Clinic." Calmar noted the Appellant submitted in its Notice of Appeal that Calmar may be responsible in whole or in part for the contamination identified in the EPO.

[8] Calmar noted the Veterinary Clinic lands are separated from the Appellant's land by a road under the direction, control, and management of Calmar, beneath which petroleum hydrocarbon contamination has been identified.

[9] Calmar stated its legal and property rights could be affected by the appeal and, therefore, it should be allowed to participate in the hearing. It submitted that:

"...as the former landowner of the adjacent lands and as Municipality with direction, control and management of adjacent roads, and as a person the Appellant intends to argue bears sole or contributory responsibility for the subject contamination, is a directly affected party and a necessary participant in the appeal."⁴

[10] Calmar stated it is opposed to any effort on the part of the Appellant to argue that Calmar is a responsible party for the contamination.

3. W.W. Importers and Exporters Ltd.

[11] W.W. noted the Appellant was seeking to name additional parties to the EPO, including past owners of the contaminated Site. W.W. previously owned the Site.

[12] W.W. stated that, if it is granted intervenor status, it would provide evidence and argument as to why it is not a person responsible within the meaning of EPEA and why the Board should not recommend amending the EPO in relation to W.W.

[13] W.W. stated its interests may be directly and adversely affected by the appeal.

4. Country Club Inn Ltd.

[14] Country Club is also a prior owner of the Site. It stated that, if it is granted intervenor status, it would provide information and arguments to counter the suggestion that it should be added to the EPO as a past owner of the Site.

B. Appellant

[15] The Appellant did not take a position on the intervenor requests.

C. Director

[16] The Director did not provide comments on the applicants' requests for intervenor status. He stated his position remains that the proper party (the Appellant) was named in the EPO. He also stated that when the hearing is rescheduled, he would provide comments on the intervenor requests.

III. ANALYSIS

[17] Under section 95 of EPEA, the Board can determine who can make representations before it. Section 95(6) states:

“Subject to subsection (4) and (5), the Board shall, consistent with the principles of natural justice, give the opportunity to make representations on the matter before the Board to any persons who the Board considers should be allowed to make representations.”

[18] Section 9 of the *Environmental Appeal Board Regulation*, Alta. Reg. 114/93 (the “Regulation”), requires the Board to determine whether a person submitting a request to make representation should be allowed to do so at the hearing. Sections 9(2) and (3) of the Regulation provide:

⁴ Town of Calmar's submission, dated March 19, 2012, at page 2.

- “(2) Where the Board receives a request in writing in accordance with section 7(2)(c) and subsection (1), the Board shall determine whether the person submitting the request should be allowed to make representations in respect of the subject of the notice of appeal and shall give the person written notice of that decision.
- (3) In a notice under subsection (2) the Board shall specify whether the person submitting the request may make the representations orally or by means of a written submission.”

[19] The test for determining intervenor status is stated in the Board’s Rules of Practice. Rule 14 states:

“As a general rule, those persons or groups wishing to intervene must meet the following tests:

- their participation will materially assist the Board in deciding the appeal by providing testimony, cross-examining witnesses, or offering argument or other evidence directly relevant to the appeal; the intervenor has a tangible interest in the subject matter of the appeal; the intervention will not unnecessarily delay the appeal;
- the intervenor in the appeal is substantially supporting or opposing the appeal so that the Board may know the designation of the intervenor as a proposed appellant or respondent;
- the intervention will not repeat or duplicate evidence presented by other parties....”

[20] As noted above, the Director did not provide comments on the intervenor requests and has indicated he would provide comments when the hearing is rescheduled. The Board set the process to receive intervenor applications and comments from the Appellant and Director. The Director chose not to provide comments, but the Board is making its decision now on the applicants’ intervenor applications. This issue will not be revisited.

[21] The Co-op and Calmar own properties adjacent to the Site. These properties were contaminated, but both of these applicants undertook remediation work. One of the major issues the Appellant noted in its Notice of Appeal was whether all the persons responsible for the contamination on the Site were named in the EPO. The Appellant stated in previous correspondence that the Co-op and Calmar should also be named in the EPO given past contamination history on their sites and the existence of co-mingled contamination plumes.

[22] The issue suggests to the Board that the Co-op and Calmar clearly have an interest in the outcome of the appeal hearing. Depending on the evidence presented at the hearing, it is conceivable the Board could recommend to the Minister the EPO be amended to include the Co-op and Calmar as persons responsible for the contamination and, therefore, responsible for a share of the remediation work. The principles of natural justice require these applicants have the opportunity to participate in the appeal to address evidence and respond to arguments relating to the question of whether they should be added to the EPO. It is clear the Co-op and Calmar may have information they could bring forward regarding their sites, the remediation work they have undertaken, and the location and sources of the contamination plume. Their evidence will not duplicate that presented by the Appellant or Director, and it would be beneficial to the Board in making its recommendations.

[23] Therefore, the Board grants full intervenor status to the Co-op and Calmar.

[24] Based on the issues raised in the Notice of Appeal, the Appellant intends to ask the Board to consider whether W.W. and Country Club should be included in the EPO as persons responsible based on their prior ownership of the Site. If the Appellant can establish that these applicants had charge, management, and control of the substance, it is conceivable the Board could recommend the EPO be varied to add their names. Again, the principles of natural justice require that W.W. and Country Club be given the right to address these issues in the appeal.

[25] The Board accordingly grants W.W. and Country Club full intervenor status.

[26] As full intervenors, the Co-op, Calmar, W.W., and Country Club will be allowed to provide opening comments and direct and rebuttal evidence, cross-examine witnesses called by the Appellant, and provide closing comments to the Board.

IV. CONCLUSION

[27] The Board grants the requests of the Leduc Co-op Ltd, the Town of Calmar, W.W. Importers and Exporters Ltd., and Country Club Inn Ltd. to be added to the appeal as intervenors.

Dated on April 23, 2012, at Edmonton, Alberta.

“original signed by”

Alex G. MacWilliam
Panel Chair