Courts of Justice Act

Court File No. 91204/15DC

NOTICE OF APPLICATION

DEBORAH GORDON

APPLICANT

-and-

DIRECTOR, MINISTRY OF THE ENVIRONMENT AND CLIMATE CHANGE, THE MINISTER OF ENVIRONMENT AND CLIMATE CHANGE, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, THANE DEVELOPMENTS LIMITED and HOWARD SNIATOWSKI

RESPONDENTS

NOTICE OF APPLICATION TO DIVISIONAL COURT FOR JUDICIAL REVIEW

TO THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.

THIS APPLICATION for judicial review will come on for a hearing before the Divisional Court on a date to be fixed by the registrar at the place of hearing requested by the applicant. The applicant requests that this application be heard at Oshawa, Ontario (*150 Bond Street East Oshawa, Ontario L1G 0A2*).

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the office of the Divisional Court, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in additional to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the office of the Divisional Court within thirty days after service on you of the applicant's application record, or not later than 2 p.m. on the day before the hearing, whichever is earlier.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN TO IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO

DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date April 2, 2015 Issued by D Bowes
Local registrar

TO: Howard Sniatowski
12 Glenoaks Crt ,
Thornhill, Ontario L4J 6N7

AND TO: Thane Developments Limited
55 Waterloo Ave
Downsview, Ontario M3H 3Y1

23078 Warden Avenue
Keswick, Ontario L4P 3E9

AND TO: Attorney General of Ontario
Crown Law Office – Civil
720 Bay Street
8th Floor
Toronto, Ontario M7A 2S9

NOTICE OF APPLICATION FOR JUDICIAL REVIEW

1. This case is about a small rural community that has suffered from the conduct of polluters for many decades.

2. The polluters are Thane Developments Limited, the registered owner and former operator of an abandoned secondary aluminum smelter property in Keswick, Ontario in the Town of Georgina (**Thane**), and Howard Sniatowski, (**HS**) the sole director of Thane.

3. The Ontario Ministry of the Environment and Climate Change and its predecessor Ministries (**Ministry**) have consistently failed to take any meaningful action to protect the community from ongoing pollution of soil, groundwater and wetlands or to force the polluters to take action and clean up the property.

4. The Ministry, through various officials including successive Ministers, Directors and Provincial Officers, has clearly stated that the smelter Site is an illegal waste disposal site, that the Waste on the Site is highly contaminated and is likely causing adverse effects to the environment within the meaning of the Ontario *Environmental Protection Act* and that it is discharging contaminants into the natural environment on and off the Site. Further, the Ministry has consistently indicated that a clean-up is necessary.

5. The Ministry has consistently and repeatedly promised the Applicant that it will ensure that the Site is cleaned up.

6. Despite this, the Ministry has failed to ensure that the polluter cleans up the Site and has failed to take steps to control or remediate the pollution from the Site as a remediator of last resort.

7. This judicial review challenges the decision of the Director of the Ministry of Environment and Climate Change (the **Director**) to revoke a Provincial Officer's Order requiring the polluters to remove the Waste from the smelter Site.

RELIEF SOUGHT

8. The Applicant makes application for an order for:

   a) Certiorari quashing the decision of the Director of the Ministry of Environment and Climate Change dated the 25th of July 2014 in Order 0687-9K5SPE to revoke Order P636001 (as amended) (the **Decision**);
   b) Declaring that the Director's Decision to revoke Order P636001 (as amended) was unreasonable and procedurally unfair;
   c) Declaring that condition 2 of Order P636001 is in full force and effect;
   d) Declaring that the Applicant is entitled to notice and comment in all future decisions by the Ministry of Environment and Climate Change about the Thane Smelter Site;
   e) Costs of the application or in the alternative, an order that the Parties bear their own costs; and
   f) Such other and further relief as counsel may advise and the Court deems just.

GROUNDS

9. The grounds for the application are:

   a) The Decision was procedurally unfair;
   b) The Decision should be set aside under the doctrine of legitimate expectations;
   c) The Decision was unreasonable and outside the jurisdiction of the Director;

The Applicant

10. The Applicant Deborah Gordon (**Gordon**) is a resident of the Town of Georgina (**Town**) in the Regional Municipality of York.

11. Ms. Gordon is an active member and frequent spokesperson of the unincorporated association of Save the Maskinonge (**STM**), a group of Georgina residents advocating for the protection and restoration of the Maskinonge River.

12. In her work for STM, Ms. Gordon has engaged in numerous advocacy issues to benefit the Maskinonge River including working on the environmental assessment of the 404 Highway extension, with the Maskinonge River Recovery Project and on pedestrian access issues.

13. Ms. Gordon has advocated for the clean-up of the Thane Smelter Site as a spokesperson for STM for over a decade. This has included participation in the Thane Public Liaison Committee (**PLC**) from May 2009 to December 2013 and the Public Input and Notification Committee (**PINC**) for the Thane Smelter in 2014-2015. Ms. Gordon has been involved in numerous deputations and processes at the provincial and municipal level dealing with the Thane Smelter. This includes a 2002 application for investigation to the Ministry of the Environment.

14. Ms. Gordon resides on Riverglen Avenue in Keswick Ontario and owns property abutting the Maskinonge River at a location downstream and downwind from the Thane Smelter location, approximately 5 km from the Site.

The Site

15. Thane Developments Limited was incorporated under the laws of Ontario on May 8, 1969 (Ontario Corporation No. 223177). Thane owns the property municipally known as 23078 Warden Avenue, Keswick, Town of Georgina, Ontario (**the Site**). The Site is also known as Part Lot 2, Concession 4, Township of Georgina, Ontario. Thane has owned the Site since October 26, 1973.

16. HS is and was at all material times (since June 22, 1978) the sole Director of both Thane and Aluminum Dross Recycling Co. Thane and HS (collectively the **Polluters**) are and were at all material times in care and control of the Site. HS is and was at all material times the only individual in care and control of the Site while Thane is the registered owner of the land.

17. The Site slopes to the west into a wetland and wooded area which exists both on the Property and on the adjacent Town of Georgina lands. The Maskinonge River, which flows northwest and into Lake Simcoe, is located approximately 450 metres west of the Site.

18. The Site contains a wetland, called the Maskinonge River Wetland Complex that is connected to the Maskinonge River in the Lake Simcoe watershed (**the Wetland**). The Wetland extends from the Site onto adjacent properties. In the 1980s the Wetland was evaluated as Provincially Significant under the Ministry of Natural Resources guidelines for the protection of wetlands. In 2004, the Wetland was evaluated again and confirmed to be provincially significant.

The Operation

19. A secondary aluminum smelter operated on the Site beginning in 1974. During operations, Thane accepted materials including aluminum skimmings, foundry sand and scrap aluminum from foundries, also known as dross, and processed it to recover the remaining aluminum.

20. While in operation, salt was used in an aluminum smelting process, which leaves behind a dross Waste salt/slag material containing sodium, chloride, nickel, copper and zinc (**Waste**).

21. Some of the aluminum dross stored at the Site was considered a raw material for the operation of a business and therefore did not require a Certificate of Approval for Waste under Part V of the Ontario *Environmental Protection Act* (**EPA**) due to an exemption in O. Reg 347 for Waste material that is "wholly utilized in an ongoing agricultural, commercial, manufacturing or industrial process".

22. However, even during operations, it was clear that some Waste was being stockpiled on the Site that had no market value and was not being used in operations and therefore required a certificate of approval for a waste disposal site. The Ministry was aware of this, as well as of complaints from the public and the Town about the stockpiling of Waste on the Site by the Polluters.

Regulatory history of the Site

23. For over a decade the smelter operated without proper environmental controls and without a valid Certificate of Approval under the EPA. The workers and the community were exposed to toxic dust due to the unlawful and dangerous practices of the Polluters.

24. The Ministry issued a control order and a Certificate of Approval under the EPA in the late 1980s that covered the installation, operation and testing of the pollution controls at the smelter Site. This was not a Certificate of Approval for Waste and did not permit use of the Site for waste disposal.

25. In the late 1980s the Town of Georgina and the community asked the Ministry to require the Polluters to provide adequate financial assurance to cover a clean-up prior to issuing approvals for the smelter.

26. To ensure the Town would provide permits to the Polluters without financial assurance, Minister Jim Bradley promised the Town and the public that the Ministry would clean up the Site if it ever became necessary.

27. When the smelter ceased operations in 1997 the Waste material on the Site required a Certificate of Approval for a waste disposal site (now called an Environmental Compliance Approval) under Part V of the EPA. The Polluters did not ever apply for a Certificate of Approval for the Waste under Part V of the EPA.

28. The Polluters promised, were required or otherwise committed to the Ministry that they would remove the Waste from the Site on numerous occasions including promises to remove the Waste by the following dates:

a) HS's removal plan by December 1997

b) Extended by the Ministry until June 30, 1998

c) Condition 2 of Provincial Officer Order P636001 issued under s.157 and s.157.1 of the EPA dated November 23, 2000 (**Clean-up Order**) requiring removal of the Waste by June 30, 2001

d) Director's Orders under s.157.3 of the EPA amending Order P636001 several times during 2000-2001 to extend removal dates for condition 2 until a final date of December 20, 2001.

29. Since 2001 the Polluters have been non-compliant with the Clean-up Order and have taken no steps to control, contain or remove the Waste from the Site.

30. Since the 1980s the Ministry and the Polluters have undertaken numerous studies of the Waste on the Site and its behaviour. These studies confirm that, among other things:

a) The soil and groundwater on the Site are heavily contaminated, such that no plants will grow on the Site and Ministry Site Condition Standards for soil and groundwater as well as Ontario Drinking Water Standards are exceeded.

b) There are dioxins and other serious contaminants such as metals (for example lead) contained in the Waste.

c) Runoff from the Waste pile on the Site moves towards the Wetland and onto neighbouring properties. Over time, the contaminants migrate further.

d) The on-site Wetland is so contaminated by the Waste that no aquatic organisms can survive in parts of it, and the Wetland contamination exceeds Provincial Water Quality Standards for a number of parameters designed to protect aquatic organisms.

e) There is a groundwater plume beneath the Site that is heavily contaminated and impacting the Town landfill and adjacent properties.

f) The area all around the Site contains high concentrations of some contaminants, such as aluminum, which were also found in the Smelter's baghouse dust.

The Decision under review

31. On July 25, 2014 the Director revoked the Clean-up Order in its entirety by issuing order 0687-9K5SPE.

32. The Decision occurred without notice to the public, the Regional Municipality, the Conservation Authority or the Applicant.

33. Specifically, the Director noted in his reasons for the Decision revoking the Clean-up Order that "it is no longer a Ministry requirement to remove the Waste Salt/Slag from the Site."

34. The Decision relied on s.157.2 and/or s.157.3 of the *Environmental Protection Act* and Sections 49 and 54 of the *Legislation Act*.

The Director's Decision was procedurally unfair and should be set aside under the doctrine of legitimate expectations

35. On several occasions, the Ministry and its officials promised Ms. Gordon and the public as well as the Town that the Ministry would clean up the Site if it ever became necessary and further acknowledged that a clean-up was necessary including:

a) The Town asked for more financial assurance in relation to Waste stockpiling on the Site before the operating smelter received approvals in the late 1980s. Minister Jim Bradley refused to require financial assurance and issued approvals but promised in

writing in 1989 that the Ministry would clean up the Waste on the Site if it ever became necessary.

b) In the late 1990s and early 2000s, after the smelter Site was abandoned by the Polluters the Ministry conducted studies of possible adverse effects, found that offsite adverse effects were likely and issued a Clean-up Order against the Polluters.

c) Through successive studies, the Ministry kept that Clean-up Order in place for 14 years relying repeatedly finding that offsite adverse effects were likely and that a clean-up was necessary to prevent discharges into the natural environment.

d) In 2002 opposition MPP (formerly Environment Minister) Jim Bradley demanded a clean-up in the legislature, submitted a petition for clean-up to the legislature and wrote to then Minister Chris Stockwell stating that a clean-up of the Site was necessary due to adverse effects.

e) In 2005 the Ministry consulted the public on a bioassessment of the Wetland that concluded that the Waste on the Site was causing adverse effects to the Wetland.

f) In 2007 Environment Minister Laurel Broten wrote to Ms. Gordon promising that the Ministry would ensure the Site was cleaned up.

g) In 2007 the Ministry also issued Director's Order no. 4307-73WJEY (the **XCG Order**) on the basis that there was a discharge of Waste from the Site into the natural environment that was likely to cause adverse effects and the Order was necessary to prevent adverse effects. The XCG Order required a study to determine remediation options and was posted for public notice and comment on the *Environmental Bill of Rights* public registry.

h) When the Polluters did not comply with the XCG Order, the Ministry caused the work to be done under the order, by commissioning the 2008 report by XCG Consultants Limited (**XCG Report**) which recommended removal of the Waste as well as other containment measures and described on and offsite adverse effects.

i) From 2009-2013 the Ministry hosted a Public Liaison Committee (**PLC**), which Ms. Gordon participated in. The stated purpose of the PLC was to "to provide a forum for stakeholder consultation and engagement in the evaluation of remedial options." The Terms of Reference also noted that the XCG Report: "confirmed onsite soil, groundwater and surface water impacts, as well as limited offsite groundwater and surface water impacts resulting from the Thane slag Waste. It also determined a potential for contamination in the Maskinonge River, and presented several removal or containment options to address impacts." Revoking the Clean-up Order was never presented as an option or discussed at the PLC.

j) The PLC had 10 meetings in 2009-2010 to review the report findings and discuss challenges and options for the Thane Site. In January 2010 the Ministry decided to host a facilitated workshop to engage a wider range of experts and stakeholders on the issue. The 2010 workshop's stated objectives were "The Liaison Committee continues to work towards Thane Site remediation to applicable standards and look to explore funding options to complete work with 2 to 5 years. The Committee also recognizes the importance of a locally acceptable and environmentally sustainable end use for the Thane Site and consider cost recovery potential of any option." Revoking the Clean-up Order was not discussed as an option.

k) After a total of approximately 40 meetings of the PLC, at no time was it suggested that the Clean-up Order would be revoked.

l) In 2013 the Ministry issued more Provincial Officer's and Director's Orders on the grounds that the Waste on the Site was discharging into the natural environment and the Orders were necessary to prevent adverse effects. This included Order number 6086-93LL44 (**2013 PINC Order**) requiring the Polluters to conduct further monitoring and run a Public Notification and Input Committee to continue to consult the public on orders and proposals for the Site.

m) Order number 4467-979R43 (**2013 Costs Order**) required HS and Thane to pay the costs of the XCG Report. The Order reiterated that the Waste on the Site was discharging contaminants into the natural environment in a manner likely to cause adverse effects and that the order was necessary to prevent adverse effects.

n) The stated Objectives of the Public Input and Notification Committee in the 2013 PINC Order were "keeping the community informed about the activities on the Site and off the Site in relation to the requirements of my Director's order."

o) The PINC held one meeting on March 6, 2014. At this meeting, revocation of the Clean-up Order was not discussed or minuted, and any proposal to revoke the Clean-up order was not released to Ms. Gordon as a member of the PINC. No further PINC meetings were held until Ms. Gordon complained to the Ministry in early 2015. At a meeting in March 2015, which had no agenda, Ms. Gordon was provided no information about the Clean-up Order, the plans for the Site or the monitoring program.

36. The Applicant Ms. Gordon participated in many of the above processes as a representative of Save the Maskinonge. In the course of doing so she received numerous promises and representations from the Ministry, including from the Director, at numerous PLC meetings, presentations to the Town and workshops. The Applicant also received personal letters and promises from successive Ministers acknowledging the Site required remediation and committing to clean up the Site or ensure the Polluters cleaned it up.

37. The Applicant also diligently reviewed documents including historic documents, Provincial Officers' Reports, scientific studies prepared by the Ministry and Orders. These all concluded or strongly suggested that the Site was causing or was likely to cause adverse effects. She also participated in workshops concluding that the Site was likely causing adverse effects and that remediation options including removal of the Waste were warranted to prevent adverse effects on the environment.

38. In addition to the above, Ms. Gordon received other representations from the Ministry including Ministry responses to her 2002 application for investigation under the *Environmental Bill of Rights* and personal conversations with staff at the Ministry and the Minister's office. The official Ministry response indicated that the results of the Ministry's investigations would be provided to Ms. Gordon. Ms. Gordon was never provided with any conclusion of investigation finding that adverse effects were unlikely.

39. Ms. Gordon received many representations from the Ministry and others that the Site was likely to cause adverse effects and needed to be cleaned up, and moreover that the Ministry would ensure a clean-up took place. These spanned over a decade and led to Ms. Gordon's legitimate expectation that:

a) the Ministry would take diligent steps to remediate the condition of the Site and ensure that the Waste was removed.

b) STM and Ms. Gordon, as well as other stakeholders, including the Town and the Region, would be consulted on any Ministry orders or plans for enforcement on the Site.

40. Ms. Gordon put the Minister and the Director on actual notice that she had these legitimate expectations in a June 2012 letter to Minister Jim Bradley, which Director Dave Fumerton was copied on. The Minister and the Director or any other Ministry representative never answered this letter nor met with Ms. Gordon about the letter. No one at the Ministry contacted her about the letter orally or in writing or denied that she had such an expectation.

41. Ms. Gordon volunteered many years of her life to working closely with the Ministry, at the Ministry's request, to assist in identifying clean-up options and appropriate study of the Site in order to protect the Maskinonge River and Wetland, a clear objective of STM. As a result, Ms. Gordon had a genuine interest in the future of the Site and was owed a duty of procedural fairness requiring that she be given notice and an opportunity to comment by the Ministry on future options and regulatory processes involving the Site, including plans for enforcement of the Clean-up Order.

42. Further, Ms. Gordon uses water from a Town drinking water intake that the Town has represented could be impacted by any contamination of the Maskinonge River by the Smelter. Accordingly, Ms. Gordon, along with other residents of the Town, is potentially impacted by the migration of contaminants from the Site in the air and water.

43. The Director was aware of Ms. Gordon's interest in the Site and had unambiguous written notice of her legitimate expectations. Despite this, Ms. Gordon and all other public stakeholders, local residents and neighbours were not in any way informed of the Ministry's plan to revoke the Clean-up Order against the Polluters. There was no public notice on the *Environmental Bill of Rights* registry, there was no PINC meeting on this topic, there was no presentation at a public meeting, and the Director and Ministry Staff did not contact Ms. Gordon to inform her of these plans or seek her views or the views of the public in general.

44. During the months that followed the Decision, Ms. Gordon continued to actively campaign for a Site clean-up with various public agencies, including the City of Barrie, all of whom were seemingly unaware of the Decision.

45. Ms. Gordon learned of the Decision from the Town Chief Administrative Officer at a public meeting of the Town shortly after the Town discovered the Decision in late January 2015.

46. The Director owed the public, the Town and specifically Ms. Gordon and the members of the PINC a duty of procedural fairness of notice and comment prior to the Decision and owed a duty to inform them of the Decision once it had been made.

47. In making the Decision without notice and comment opportunities, the Director acted in a procedurally unfair manner and the Decision should be set aside as procedurally unfair and contrary to the doctrine of legitimate expectations.

The Decision was unreasonable

48. The Director's Decision was unreasonable because:

a) The Director applied the wrong legal test to the revocation decision by limiting the decision to offsite soil and groundwater adverse effects that the Ministry was "aware of";

b) The Director had no evidence upon which to reach new and materially different conclusions about Site conditions and adverse effects both on and offsite;

c) The Director's reasons for the Decision fail to explain the conclusions about Site conditions in a transparent and intelligible manner;

d) The Director ignored relevant considerations that were material to the Decision including an array of Ministry policies and practices;

e) The Director gave irrelevant considerations material weight in making the Decision;

f) The Director's Decision was inconsistent with the purpose of the EPA.

49. The correct legal test for revoking an order under s.157.2 and/or 157.3 of the EPA is whether there are reasonable and probable grounds to believe that "adverse effects" to the environment on or off the Site are "likely" and/or whether there are reasonable and probable grounds to believe that the Site is an unauthorized waste disposal site.

50. Accordingly the Director applied the wrong legal test by:

a) Misstating and misapplying the legal test in his reasons for the Decision;

b) Failing to turn his mind to grounds for believing there were onsite adverse effects;

c) Failing to turn his mind to on and offsite adverse effects on surface water;

d) Failing to turn his mind to grounds for believing there to be a breach of waste disposal site provisions of the EPA;

e) Failing to consider whether an adverse effect was "likely" either on or off the Site;

f) Failing to apply a correct definition of "adverse effect" to the conditions on and off the Site.

51. The Director applied the wrong legal test by applying a definition of adverse effect that was confined to the offsite area and that did not incorporate the existence of offsite surface, groundwater and soil exceedances of Ministry standards designed to prevent adverse effects including:

a) Provincial Water Quality Standards designed to protect aquatic life.

b) Site Condition Standards for soil and groundwater that were exceeded for serious contaminants on and offsite.

c) Ontario Drinking Water Standards exceeded for groundwater.

52. The Director also applied an erroneous and unreasonable definition of adverse effect that did not include adverse effects to surface water in the Wetland both on and offsite.

53. Further, the Director did not apply the correct legal test of whether there were reasonable and probable grounds to believe adverse effects were likely, but instead applied an incorrect test of whether there was absolute proof of adverse effects and whether the Ministry was "aware of" adverse effects.

54. The Director also applied the wrong legal test and acted unreasonably by ignoring his authority under sections 27, 40, 41, 43, 46, 157 and 157.1, of the EPA permitting the

issuance of an order to remove the Waste from an illegal waste disposal site, even in the absence of a discharge or any likely adverse effects.

55. Not only did the Director apply the wrong legal test for revoking the Clean-up Order, relying on an incorrect and unreasonable definition of adverse effects, but the Decision failed to provide an environmentally responsible solution to the contamination on the Site that accorded with the purpose of the Ontario EPA and the scope of the Director's powers under s.157.2 and/or 157.3 of the EPA.

56. The polluter pays principle is one of the "guiding tenets" of the EPA. The Decision was inconsistent with the principle because it relieved the Polluters of any further liability for remediation of the Site and the pollution they caused for many decades.

57. Accordingly, the Director lacked jurisdiction to issue the Decision and the Director's Decision was unreasonable because it advanced neither of the objectives of pollution remediation or prevention as set out in the EPA.

58. Further, because the Ministry is in a position to take over the Site through escheat or through control orders and implement the clean-up, the Ministry and the Director are in care and control of the Site and accordingly have a duty to comply with Ontario's environmental laws and to protect the environment through their decisions under the EPA.

59. Further, the Director's Decision relied on material factual errors, including that the financial means of the Polluters continued to be inadequate, that there were no adverse

effects or likely adverse effects offsite, and that the Ministry was "not aware of" any adverse effects. The Director knew or ought to have known that these facts were untrue.

60. The Director and the Ministry acknowledged the existence of a discharge causing likely adverse effects and relied on this in issuing numerous previous orders, including the 2013 PINC Order which was not revoked.

61. The Director and the Ministry had also reviewed the financial means of the Polluters on numerous other occasions and concluded that this was not a ground for revoking the Clean-up Order.

62. There was no new information before the Director in making the Decision. All information on the Polluter's financial ability to carry out the Clean-up Order, as well as the potential for adverse effects was at least seven years old, if not older at the time the Decision to revoke the Clean-up Order was made.

63. There was no evidence before the Director that at the time of the Decision, the Polluters currently lacked the means to remediate the Site. Further, there was no evidence before the Director, specifically no studies or reports concluding that the Site was not causing or likely to cause any adverse effects.

64. Moreover, to the extent, if any, that the Director received a new request for review under s.157.3 of the EPA such a request was out of time and the Director lacked jurisdiction to consider it by virtue of the deeming provisions of s.157.3(8).

65. In the alternative, if any new information was before the Director, it was procedurally unfair for the Director to fail to disclose this new information or the existence of it to the

public, including the Applicant, and it was unreasonable and lacking in transparency and intelligibility for the Director to rely on any new information without noting it in his reasons for the Decision.

66. The Director's Decision made material errors in relation to the findings about offsite adverse effects in the XCG Report which the Director knew or ought to have known were wrong.

67. The factual findings of the Director on adverse effects and ability to pay, upon which the Director relied materially in making the Decision, materially contradicted past factual and legal findings of Provincial Officers and Directors and other Ministry staff. These included information and conclusions that were provided to the public and Ms. Gordon from 1997-2013 as well as the 2008 XCG Report cited in the reasons for the Director's Decision.

68. Instead of applying the test for revoking the Clean-up Order that he was legally obliged to apply, the Director relied materially on irrelevant considerations, including the financial means of the Polluters and the existence of a Ministry program for the voluntary remediation of contaminated Sites under Part XV.1 of the EPA and Ontario Regulation 153/04, in a manner that undermined the remedial and pollution prevention purposes of the EPA.

69. In addition to failing to make a Decision that accorded with the purpose of the EPA, the Director ignored other important and legally relevant considerations in making the Decision, including but not limited to:

a) The Ministry's Statement of Environmental Values requiring the Director to consider transparency, polluter pays principle, remediation, precautionary principle, and other matters under s.11 of the *Environmental Bill of Rights*.

b) The risk of contamination of the Maskinonge River in a flood and the long-term risk of environmental harm from the Waste.

c) The Ministry's Compliance and Enforcement Policy and all matters made relevant under that policy.

d) All prior orders and Site condition studies of the Ministry from the 1970s to 2007.

e) The very long history of non-compliance of the Polluters.

f) Ministry Guideline F-14.

g) Resolutions by the PLC asking the Ministry to remediate the Site.

h) The Ministry's promises to provide the conclusions of the Ministry investigation to the Applicant.

i) Public concern and the potential impact on the community.

j) Potential impact on drinking water and public concerns about drinking water including the proposed source protection plan under the *Clean Water Act*.

k) The Ministry's duties to protect the environment and comply with the laws of Ontario as a remediator of last resort and a party with care and control over the Site.

l) Ministry contamination guidelines including but not limited to: Site Condition Standards, Provincial Water Quality Objectives and Ontario Drinking Water Standards, Guideline B-9 for the resolution of groundwater interference.

70. The failure to consider or address the above highly relevant issues was material to the Director's Decision and renders it unreasonable. For example, the Director did not turn his mind to the PLC resolutions requesting a Ministry clean-up or the likelihood that the Site would ever be remediated without a Clean-up Order.

71. In the absence of an approved remediation or containment plan, the revocation of the Clean-up Order was unreasonable and outside the Director's jurisdiction under s.157.2 and/or s.157.3 of the EPA as well as under the provisions of ss. 49 and 54 of the *Legislation Act.*

72. Accordingly the Director's Decision should be quashed, and the Clean-up Order reinstated.

Statutory instruments relied on

73. *Environmental Protection Act*, RSO 1990, c E.19.

74. *Records of Site Condition - Part XV.1 of the Act*, O Reg 153/04

75. *General - Waste Management*, RRO 1990, Reg 347

76. *Ontario Water Resources Act*, RSO 1990, c O.40

77. *Judicial Review Procedure Act*, RSO 1990, c J.1.

78. *Statutory Powers and Procedure Act*, RSO 1990, c S.22

79. *Legislation Act*, *2006*, SO 2006, c 21, Sch F.

80. *Courts of Justice Act*, RSO 1990, c C.43.

81. *Environmental Bill of Rights, 1993*, SO 1993, c 28.

82. *Rules of Civil Procedure*, RRO 1990, Reg 194.

DOCUMENTARY EVIDENCE

83. The following documentary evidence will be used at the hearing of the application:

a) Affidavit of Deborah Gordon (to be sworn).

b) Such other and further materials as counsel may advise and the court may permit.

April 2, 2015

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APPLICANT		RESPONDENTS	

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

PROCEEDING COMMENCED AT
OSHAWA, ONTARIO

NOTICE OF APPLICATION TO DIVISIONAL COURT FOR JUDICIAL REVIEW

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