

**IN THE MATTER OF**

The Contaminated Sites Remediation Act and

**IN THE MATTER OF**

100 Oak Point Hwy, Winnipeg, Manitoba

January 17, 2022

**1 HEARING PANEL**

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Betty Leitch, John Doering and Serge Scrafield (Chair)

**2 BACKGROUND**

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This appeal involves property commonly known as 100 Oak Point Highway (“the Site”) in the City of Winnipeg (“the City”). Imperial Oil Limited (“IOL”) owns the Site.

On August 8, 2018 a director (“the director”) in Manitoba Sustainable Development (now known as Manitoba Conservation and Climate and hereinafter referred to as “the department”) informed IOL that the Site had been designated as an “impacted site” under s. 7.1 of The Contaminated Sites Remediation Act (“the Act”).

The Site has been impacted by two distinct types of contamination, being hydrocarbons located in the soils toward the northern portion of the Site and metals in the soils of the southern part of the Site. IOL has acknowledged responsibility for the hydrocarbon contamination and has implemented a remediation plan approved by the director.

This dispute concerns potential responsibility for the metals contamination of the soils on the Site.

The director wrote to the City on August 7, 2019 advising that it had been designated as a potentially responsible person for the remediation of metals contamination at the Site.

On February 18, 2020 the City, through its legal representatives, wrote to the Clean Environment Commission (“the commission”) appealing that designation.

The commission determined that the appeal could be determined without the necessity of a public hearing but rather through documentary records and written submissions.

The Chairperson of the commission, pursuant to s. 40(1) of the Act, selected a hearing panel to hear and decide the appeal.

The panel requested and received written submissions from the director and from the two parties, IOL and the City. The panel also posed written questions to the parties and the director.

The following is the panel’s decision as respects the City’s appeal.

**3 DIRECTOR’S DECISION**

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The relevant parts of the director’s written notice to the City on August 7, 2019 are that:

1. The City was designated as a potentially responsible person for the remediation of metals contamination at the Site under s. 10(1) of the Act. The City was designated because:
  - a. A site investigation completed at the site and submitted to the department indicated the presence of heavy metals in soil and groundwater at the Site in concentrations that exceeded the applicable criteria.
  - b. The presence of heavy metals at the Site was not consistent with the former operation of a petroleum retail fuel outlet and cardlock facility by

IOL. However, the heavy metal contamination was consistent with the past use of the Site as a landfill.

- c. A historical land title search indicated that the Village of Brooklands (incorporated into the City of Winnipeg in 1972) formerly owned the Site and that the Village of Brooklands (“Brooklands”) operated a landfill at the Site prior to 1954.
2. Only the City was named as a potentially responsible person for the remediation of heavy metal contamination at the Site.
  3. Pursuant to s. 10(2) of the Act, the City was obligated to propose a plan of remediation for the Site. However, the City might wish to contact Imperial Oil Limited or their attorney and submit a plan of remediation jointly.

#### **4 THE CITY’S APPEAL**

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1. The City appealed the director’s decision to the commission, under s. 39(1) of the Act, on the grounds that:
  - a. At no time did the City or Brooklands own or occupy the Site.
  - b. At no time did the City or Brooklands contaminate the Site by any activities conducted by them, or for which they were responsible, occurring on the Site or elsewhere.
2. The City asked that the director's decision be rescinded in its entirety, with costs awarded in its favour as against IOL.

#### **5 RELEVANT FACTS**

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1. There were a number of private owners of the Site, from September 11, 1942 to July 14, 1988, after which IOL owned and continues to own the Site. At no time between 1942 and the present did the City or Brooklands own the Site.
2. The Site was used for a race track stadium and associated parking from 1953 to 1973 and for a retail fuel outlet, card lock facility and restaurant from 1988 to 2012. At other times since 1953 the site was and is now vacant.
3. In 1984, lands south of the Site included:
  - a. Hyde Avenue Right of Way (“Hyde Ave ROW”) immediately adjacent to the Site.
  - b. Lot 61 immediately adjacent to Hyde Ave ROW.
  - c. Lot 62 immediately adjacent to Lot 61.
4. Based on the evidence presented, neither the City itself nor Brooklands itself operated a landfill at the Site or undertook activities on the lands south of the Site in a manner that would have caused contamination of the Site.
5. A 1984 report titled *The Brooklands Landfill Site, Landfill No. 28*, was produced by the City (the “1984 Report”) pursuant to an investigation under the City’s Methane Gas Policy. The study covered a wide geographical area including the Site and the lands to the south of the Site. The relevant information from the 1984 Report is:
  - a. An air photo interpretation drawing showing that, seven years earlier, fill covered a very wide area including the entire Site as well as lands to the south of the Site and a substantial area to the west of the Site.

- b. A 1984 drawing delineating an “Area 5” which included most of the Site with the report noting the variability of filling of the site was evident in Area 5. A minor component of this fill were incidental small pockets or layers of “cinders-and-ash-type” fill and “refuse-type” fill, described as silty clay containing rubble, steel, wire, tin cans & paper.
  - c. The same drawing delineating an “Area 4”, south of the Site, being used as a disposal area. The report notes that surface dumping was evident in this area which was piled high with debris such as lumber, wooden pallets, construction waste, 45 gallon drums and other materials the nature of which was unknown.
  - d. Another 1984 drawing delineating
    - i. An area of cinders, ash (“G3”) close to and south of the Site straddling Lot 61 and Hyde Ave ROW.
    - ii. An area of refuse (“F7”) south of the Hyde Ave ROW encompassing large portions of Lot 61 and Lot 62.
6. The City, in its response to questions from the panel, confirmed that:
- a. Upon learning in 1984 of the presence of cinders and ash on the Hyde Ave ROW, no actions were undertaken to manage or remove them.
  - b. Upon learning in 1984 of the deposition of refuse on lot 61, which was privately owned, the City took no regulatory or enforcement action to have the refuse managed or removed.
  - c. Upon learning in 1984 of the deposition of refuse on Lot 62, which the City owned at the time, the City undertook no actions to manage or remove the refuse.
7. In 2006, the City sold Lot 62, after which the titles to Lots 62 and 61 were consolidated into Lot 61 (“current Lot 61”) under private ownership.
8. An April, 2015 pre-excavation report provided evidence of metal contamination, including arsenic, copper, nickel, selenium and zinc, in the soils (test pits) on the southern portion of the Site.
9. A 2016 Phase II Environmental Site Assessment report stated that the inferred principal direction of the shallow overburden groundwater flow was to the northeast and that metal concentrations exceeded applicable criteria in one or more soil samples collected from several boreholes in the southern portion of the Site.
10. IOL responded to a question from the panel stating that in the course of their detailed investigations the consultant did not find evidence of buried ash or cinders at the Site during any of its investigations.
11. On June 28, 2021, the director confirmed that the department had not required a site investigation of the Hyde Ave ROW or of current Lot 61 and that the department had no further information on file for these areas.

## **6 RELEVANT PROVISIONS OF THE ACT**

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The relevant sections of the Act are:

- 4(1) If the director believes on reasonable grounds that a site is contaminated, the director may in writing order
- (a) one or more owners or occupiers of the site to conduct an investigation to determine the existence, nature and extent of the contamination and provide to

the director a report, in a form acceptable to the director, of the results of the investigation; or

9(1) Subject to subsections (2) and (3), the following persons may be held responsible for the remediation of a contaminated site:

(d) a person who owned or had possession, charge or control of a contaminant of the site immediately before or at the time of its release;

10(1) If, in the director's opinion,

(a) taking into account all the relevant factors, including those set forth in section 18, all or a part of a contaminated site requires remediation; and

(b) taking into account all the relevant factors, including those set forth in section 21, and the information available to the director regarding persons described in subsection 9(1), two or more of them should be held responsible for the remediation;

the director may, before issuing a remediation order under subsection 17(1) in respect of the site, by written order designate those persons as being potentially responsible for the remediation of the site.

21 In determining whether to approve a proposed apportionment agreement, in mediating the negotiations toward an apportionment agreement or in apportioning the responsibility for the costs of remediation of a contaminated site among the potentially responsible persons in respect of the site, the director, the mediator or the commission, as the case may be, shall

(b) take into account all other relevant factors, which shall include when the site became contaminated and might include, in respect of any potentially responsible person,

(viii) actions taken by the person upon becoming aware of the presence of a contaminant at the site, including

(A) steps taken to prevent or limit the contamination of the site and surrounding areas, and

Sections 41(1) and 42(1) of the Act are also relevant but are cited later.

## **7 POSITION OF THE DIRECTOR**

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The director recommends that the City be held responsible for remediation of the heavy metal impacts in the southern portion of the Site. The level of isolated heavy metal contamination is consistent with the landfill operations that include refuse, cinder, and ash deposit areas, similar to that associated with the operations at the City property south of the Site. No other potential sources of heavy metal impacts have been identified by either potentially responsible party, or by Manitoba.

## **8 POSITION OF THE PARTIES**

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### **1. Position of the City:**

The relevant parts of the City's position are:

a. The director's decision should be overturned. The director wrongly concluded that the City caused the metal contamination through its ownership and use of the land south of the Site for municipal landfill operations. In fact, Brooklands only briefly owned the land south of the Site, and there is no evidence of historical municipal use of the land whatsoever. The director's decision relies on insufficient evidence that the land south of the Site is contaminated, and an incorrect assumption that the alleged contamination in the area was caused by the City.

b. The director failed to consider alternative causes of the contamination, including contamination from: private surficial dumping south of the Site, contamination

from the former Brooklands Speedway immediately west of the Site, as well as pre-existing contamination from small pockets or layers of refuse and cinders and ash type fill on the Site as outlined in the 1984 Report.

- c. The Landfill Drawing and its underlying reporting are an insufficient evidentiary basis to establish that contamination on G3 caused the metal contamination. To the City's knowledge, no testing has been conducted on G3 and no commentary exists as to the extent of alleged ash/cinder deposition in the area.
- d. There is no evidence that groundwater can act as a conduit for migration of heavy metals.

In its final submission, the City added:

- e. The designation relies on incorrect factual assumptions and justifications that are no longer seriously advanced by any party to the appeal. The commission ought not to uphold the designation based on entirely different reasons, and a different section of the Act, than the director advanced in the designation itself. In support of its position the City says:
  - i. An appeal of an administrative decision includes both review of the outcome of the decision and its supporting rationale. Here, the director's rationale is meritless, and fails to consider all relevant factors as required by Section 21 of the Act;
  - ii. The designation is procedurally unfair because the parties have not been provided an opportunity to review, comment on and investigate the reasons now advanced in support of the designation.

The submission cited a number of legal authorities to support the argument that maintaining the designation would be procedurally unfair.

## 2. Position of IOL

The relevant parts of IOL's position are:

- a. The metals contamination is consistent with leaching from cinders and ash;
- b. The groundwater flow direction and the presence of metals contamination at the depth of the water table are consistent with the conclusion that the metals impacts migrated northeastward onto the Site from cinders and ash deposited in Area G3 located in part on the Hyde Ave ROW.
- c. The City had, and has, ownership, possession or control of Hyde Ave ROW, and is therefore a person who owned or had possession, charge or control of a contaminant of the site immediately before or at the time of its release within the meaning of clause 9(1)(d) of the Act or is a person who contaminated the Site.
- d. The evidence supports the designation of the City as a potentially responsible person pursuant to subsection 10(1) of the Act.
- e. Based on the apparent usage, location of the Brooklands Speedway facilities, and the groundwater flow direction at the Site, the metals impacts at the Site are not consistent with the operations of the former Brooklands Speedway.
- f. This appeal should therefore be dismissed, with costs to IOL, and the designation of the City as a potentially responsible person made by the director should be upheld.

In support of its position, IOL submitted correspondence of May 17, 2019 from a professional geoscientist which included this opinion:

"It is our continued opinion, at this time, that the area designated by the City as G3 is the likely source of metals impact found on the Imperial Site, as: burned or incinerated municipal waste is known to contain heavy metals similar to those found in soil beneath the south end of the Site; the close proximity of G3 to the

Site (directly adjacent); groundwater flow direction; and, absence of other potential sources of metals impacts on-Site based on historical Site use.”

## 9 ANALYSIS AND DECISION

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The panel is satisfied that the director’s designation of the City as a potentially responsible person should be upheld, although not on the grounds set out in the director’s letter of Aug 7, 2019.

1. As mentioned under 8.1, the City, in its final written submission, puts forward a number of bases in favour of its appeal from the director’s having designated it as a potential responsible party.

The City argues that the main reason cited in the director’s letter of August 7, 2019 for making the designation is that Brooklands (which was incorporated into the City in 1972) was a former owner of the Site and that it had operated a landfill at the Site prior to 1954.

After the appeal from the director’s designation was filed, it became apparent that in fact Brooklands had never been an owner of the Site nor had the Site been used as a landfill by Brooklands. The City argues that since the director’s stated reason for the designation was inaccurate then that should be the end of the matter. The appeal should be allowed and the designation overturned.

A number of legal authorities are cited in the written submission and the City goes on to say that if the commission goes further and considers other possible reasons for maintaining the designation that it would be indulging in procedural unfairness in that there is “a moving target” and that the City was not aware of the case that it had to meet.

Specifically the City argues in its written submission that the commission

“ought not to now uphold the Designation on an entirely different factual and legal basis. It is a basic principle of administrative law that a decision must be justified both in its reasoning and its outcome.”

The City relies upon the following excerpt from a 2019 decision of the Supreme Court:

“Where, even if the reasons given by an administrative decision maker for a decision are read with sensitivity to the institutional setting and in light of the record, they contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision. Even if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome: *Delta Air Lines*, at paras. 26-28. To allow a reviewing court to do so would be to allow an administrative decision maker to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion.”

**Canada (Minister of Immigration) v Vavilov, 2019 sec 65 at para 96 [Tab 2]**

The panel is not persuaded by the City’s argument that it cannot go beyond the stated reason for the designation contained in the director’s letter of August 7, 2019.

The cases cited by the City are distinguishable in that they all involve the role and powers of a “reviewing court”. The Act makes it clear, in the panel’s opinion, that the commission’s role is much wider than that of a “reviewing court”.

The following provisions in the Act are noteworthy.

41(1) The commission may

- (a) on notice to the parties to a hearing, before or during the hearing, carry out any investigation or inspection it considers necessary or advisable;
- (b) adopt the director's findings of fact except insofar as a party to an appeal puts them in issue;
- (c) receive evidence in any manner the commission considers appropriate; and
- (d) consider relevant information in the possession of the director or that is otherwise obtained by the commission, if the commission informs the parties to the appeal of the nature of the information and gives them an opportunity to explain or refute it

42(1) The commission may, on hearing an appeal from a decision or order of the director,

- (a) confirm, vary or rescind the decision or order; or
- (b) make any decision or order that the director could have made.

In the panel's opinion, those provisions make it clear that the jurisdiction of the commission goes well beyond that of being a reviewing authority limited to examining an established record.

2. Given no evidence to the contrary, the panel accepts and adopts the reasoning and opinion of a qualified professional that the cinders and ash, which were discovered in 1984 to be on the Hyde Ave ROW and on Lot 61, are the likely source of the metal contamination found on the Site.
3. The panel concludes that the cinders and ash were either deposited on Hyde Ave ROW or were the result of burning on the ROW, either of which were in contravention of City bylaws.

In this regard, the panel notes that the City's Anti-Litter By-law No.1075/75 prohibited the depositing of litter, including ashes, upon any public place, public area or private property.

### 3.1 Littering

No person shall dump, deposit, drop, throw, discard or leave, or cause or permit the dumping, depositing, dropping, throwing, discarding or leaving of litter upon any public place or public area or upon private property

Litter included ashes defined in part under the bylaw as the residue from burning to dispose of waste combustible materials.

#### 2.1 In this By-law

"Ashes" means residue from the burning of wood, coal, coke and other like material for the purpose of cooking, heating buildings, and disposing of waste combustible materials.

"Litter" means animal and agricultural wastes, ashes, construction and demolition wastes, dead animals, garbage, industrial refuse, rubbish, solid wastes or refuse, abandoned or unattended shopping carts, and special wastes, including but not limited to street cleanings, containers, packages, bottles, cans or parts thereof, and any deserted or discarded article, product or goods of manufacture.....

The By-Law stated that persons owning or occupying private property shall ensure that no litter blows or is otherwise carried from that property onto a public place, public area or other private property.

#### 3.3 Spreading of Litter

Persons owning or occupying private property shall ensure that no litter blows or is otherwise carried from that property onto a public place, public area or other private property. (added 2951/81)

In addition, s. 14(a) of the City's Solid Waste By-law No. 1340/76 expressly prohibited the open burning of any solid waste.

## Removal and Disposal of Wastes

14. (a) The open burning of any solid waste is expressly prohibited.

4. In its written submission to the panel, IOL addressed the City's ownership, possession or control of Hyde Ave ROW as follows:

"20. The land within the Hyde Avenue right-of-way (now shown on Plan No. 24342, extract below) was originally created as a public roadway by Plan No. 67 WLTO (extract below) filed in December of 1876. Although title to roads is vested in the Provincial Crown, by operation of municipal statutes (currently The City of Winnipeg Charter) possession and control of roads rests with the municipality (now the City). As public roadway, Hyde Avenue was under the possession and control of The Village of Brooklands when the Village came into existence in 1921, until 1961 when The Village of Brooklands became a town. From 1961 until 1965 Hyde Avenue was under the possession and control of The Town of Brooklands. From 1965 to January 1, 1967, as a result of the amalgamation of The Town of Brooklands and The City of St. James, Hyde Avenue was under the possession and control of The City of St. James. Since the amalgamation of The City of St. James with the City of Winnipeg in 1972, Hyde Avenue has been under the possession and control of the City.

21. As corporate successor, by amalgamation, to The Village of Brooklands, The Town of Brooklands and The City of St. James, the City is responsible for Hyde Avenue and for the historic activities on the Hyde Avenue right-of-way."

The panel agrees with and adopts the conclusion that the City, in 1984, had possession and control of Hyde Ave ROW. The following sections of The City of Winnipeg Act of 1971 are noteworthy in this regard:

### Definitions

1 Whenever used in this Act, except where the context otherwise requires,

(t) "highway" means any place or way, including any structure forming part thereof, which or any part of which the public is ordinarily entitled or permitted to use for the passage of vehicles or pedestrians, with or without fee or charge therefor, and includes all the space between the boundary lines thereof whether or not used for vehicular or pedestrian traffic; and, without restricting the generality of the foregoing, includes roads, **road allowances**, streets, lanes, thoroughfares (bold italics emphasis added)

(u) "in" as applied to a street whether such word be used by itself or as part of the word "therein", includes "on", "under", or "over";

(ss) "street" means any public highway, lane, park, square, subway, bridge, wharf, thoroughfare or way or any part thereof;

(uu) "jurisdiction over" includes possession and control

### City to assume jurisdiction over existing highway and streets.

495 (1) Upon the coming into force of this Part, the city shall forthwith assume jurisdiction over any highway or street formerly under the jurisdiction of an area municipality

### Possession and control vested in city.

495 (3) Where the city assumes jurisdiction over a highway or street pursuant to subsection (1) and title to the land on which the highway is situated is vested in Her Majesty, the title remains so vested, but **possession and control thereof is vested in the city.** (bold italics emphasis added)

The panel is satisfied that Hyde Ave ROW comes within the definition of a highway as noted above. The panel concludes that the above sections of The City of Winnipeg Act of 1971 have the effect of putting the City in possession and control of Hyde Ave ROW which supports the designation of the City as a potentially responsible party.



5. The City had the authority in 1984 to prevent or control the placing or maintaining of cinders and ash on Hyde Ave ROW and to remove the cinders and ash placed or maintained there in contravention of a by-law. The following section of The City of Winnipeg Act of 1971 is noteworthy in these circumstances:

**Control of use of streets.**

500 The city shall have power

- (a) to prevent or control, or, in the discretion of the council in each case, to permit or licence any act or the placing or maintaining of any thing in a street, and to prevent or control a nuisance or dangerous condition in or near a street, and to authorize an officer of the city to abate or remedy any such nuisance or dangerous condition at the expense of the person causing or permitting the same, or to remove from a street anything placed or maintained therein in contravention of a by-law, or otherwise without lawful authority, such removal, except as otherwise herein provided, to be at the expense of the owner of such thing

6. Based on 2-5 above, the City had possession, charge or control of a contaminant of the Site at the time of its release and thereby is a person potentially responsible for the remediation of the metal contamination of the Site as set out in s. 9(1)(d) of the Act.
7. The City undertook no action upon becoming aware in 1984 of the presence of a contaminant at the Hyde Ave ROW, including no “steps taken to prevent or limit the contamination of the Site and surrounding areas” as referenced in section 21 of the Act.

The panel therefore upholds the director’s designation of the City as a potentially responsible person for the remediation of metals contamination at the Site.

Although strictly speaking not within its present mandate, the panel notes that, given the presence in 1984 of cinders, ash and extensive refuse on lands to the south of the Site and no evidence of actions taken to remove or properly manage the cinders, ash and refuse, there are reasonable grounds to believe that lands to the south of the site are contaminated. Under section 4(1) of the Act, an investigation of those lands could be conducted to determine the existence, nature and extent of contamination.

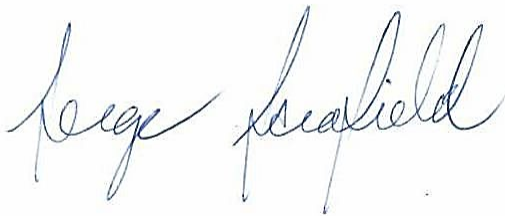
## 10 COSTS

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The parties shall bear their own costs respecting this appeal.

DATED this day January 17, 2022

MANITOBA CLEAN ENVIRONMENT COMMISSION



Serge Scrafield, Chair

On behalf of the Panel