

**THE CONTAMINATED SITES REMEDIATION ACT
LOI CONCERNANT L'ASSAINISSEMENT DES LIEUX CONTAMINES**

ORDER/ORDRE

Order No./N° de l'ordre: CEC2023-1

Issue Date/Date de l'ordre: March 17, 2023

In accordance with The Contaminated Sites Remediation Act (C.C.S.M. c.205)/Conformement a la Loi Concernant L'Assainissement des Lieux Contamines (C.P.L.M. c. 205)

THIS ORDER IS ISSUED TO:/CET ORDRE EST DONNE A:

Auto Excell/Import City Inc. ("Import City")
c/o Tapper Cuddy LLP
1000-330 St. Mary Avenue Winnipeg, Manitoba R3C 3Z5
Attention: Mr. Jason D. Kendall, Mr. Brian E. Roach

Husky Oil Limited and Canhusk Real Estate ULC ("Husky")
c/o Thompson Dorfman Sweatman LLP
1700 – 242 Portage Avenue Winnipeg, Manitoba R3C 0V1
Attention: Mr. John D. Stefaniuk

Actton Petroleum Services ("Actton")
c/o Piblado LLP
2500-360 Main Street Winnipeg, Manitoba R3C 4H6
Attention: Mr. Eric Blouw

and

Parkland Fuel Corporation/Fas Gas ("Parkland")
c/o Fillmore Riley LLP
1700-360 Main Street Winnipeg, MB R3C 3Z3
Attention: Mr. Andrew Challis/Mr. Alexander Favreau

Pursuant to Section 26 of The Contaminated Sites Remediation Act, the Clean Environment Commission orders that Import City is responsible for costs of remediation of 302 Archibald Street, Winnipeg, Manitoba. The costs of completing a required Remediation Plan shall be included in the costs of remediation.



Jonathan Scarth, Chair



Betty Leitch, Panel Member



Glen Cummings, Panel Member

cc: Peter Crocker, CEC Secretary/Executive Director
Kristal Harman, Director, Environmental Compliance and Enforcement
Warren Rospad, Contaminated Sites Specialist
John Stefaniuk, Thompson Dorfman Sweatman
Jason Kendall/Brian E. Roach, Tapper Cuddy LLP
Eric Blouw, Pitblado LLP
Aaron Challis, Fillmore Riley LLP

IN THE MATTER OF
The Contaminated Sites Remediation Act
and
IN THE MATTER OF
302 Archibald Street, Winnipeg, Manitoba

Hearing Panel

Betty Leitch, Glen Cummings and Jonathan Scarth (Chair)

Procedural milestones

On April 28, 2022, pursuant to Section 23(1) and 23(2)(a)(b) of The Contaminated Sites Remediation Act (the "Act"), the Clean Environment Commission (the "commission") received a reference from the director ("the director") in Manitoba Environment, Climate and Parks (the "department") to apportion responsibility for costs associated with remediating an impacted site. The site in question is commonly known as 302 Archibald Street¹, Winnipeg, Manitoba (the "site"). The director has determined the potentially responsible parties under the authority of section 10(1) of the Act.

In order to meet timelines imposed by the Act, a hearing was scheduled for May 24, 2022 and was adjourned until further notice. The commission felt that the matter could be determined through documentary records and written submissions, and provided the parties with notice of a deadline for submissions of June 30, 2022 followed by a 3 week period within which the parties could respond to the submissions. The parties requested or consented to extensions of these deadlines to August 30, 2022 followed by a 3 week reply period. Following its review of the submissions and replies, the commission requested further information from Import City and the department with a deadline of November 4, 2022.

Summary

The site has for almost a century been used by a succession of owners to store and market petroleum products. The site was designated by the director as "impacted" pursuant to section 7.1(1) of the Act on March 17, 2020. The potentially responsible person ("PRP")s as named by the director are Acton, Husky, Parkland and Import City.

Pursuant to section 26 of the Act, the commission determines that the following parties should be responsible for a portion of the costs of remediation of the site as follows:

¹ Legally described as Title Number: 3053072/1 SP Lot 1 Plan 20089 WLTO, EXC Rue Archibald Plan 34390 WLTO IN LOTS M AND P ROMAN CATHOLIC MISSION PROPERTY

1. Actton: 0%
2. Husky: 0%
3. Parkland: 0%
4. Import City: 100%

Relevant Facts

1. The site was vacant until 1929, when it was acquired by the first of a succession of companies that would use the site for the storage and sale of hydrocarbons. The Panel is satisfied from the evidence provided that the site and the surrounding area hosted an active trade in hydrocarbon products facilitated by the adjoining railway.
2. The timeline during which the PRPs owned and affected the site can be summarized as follows:
 - Husky Oil owned and operated the site for the storage and sale of gasoline and petroleum products from January 6, 1966 until November 25, 1985.
 - Actton owned and operated the site for the storage and sale of gasoline and petroleum products from June 7, 1987 until April 7, 1997.
 - Parkland owned and operated the site for the storage and sale of gasoline and petroleum products from April 10, 1997 until February 2, 1998.
 - Husky Oil reacquired and operated the site for the storage and sale of gasoline and petroleum products from February 2, 1998 until 2004; they continued as owner of the site until June 10, 2016.
 - Import City acquired the site December 31, 2018 and is the current owner.
3. Previous land use on the site included three aboveground petroleum storage tank (“AST”)s located in the south-east portion of the property as noted on a 1949 Fire Insurance Plan Map, and four underground petroleum storage tank (“UST”)s in the center of the property as noted on a 1959 Fire Insurance Plan Map².
4. During Husky’s initial period of ownership (1966 to 1985), three USTs were installed and operated.
5. These three USTs were removed subsequent to Husky’s ownership of the site and replaced with three USTs.
6. Actton acquired the site on June 7th, 1987 and operated a gasoline fueling station including these three USTs on the site until April 7, 1997.
7. Parkland acquired the site on April 7, 1997 and operated a gasoline fueling station including these three USTs on the site until February 2, 1998.

² Shown in Appendix 2.

8. Parkland commissioned BOVAR Environmental to conduct a subsurface investigation on the site, the report of which dated June 27, 1997 (the “Bovar Report”)³ indicated hydrocarbon impacts in the south-east portion of the site.
9. A report commissioned by counsel for Actton and Parkland in 2022 (the “Samson Report”)⁴ concluded that the location and nature of Actton’s operations would have affected the area subsequently remediated by Husky in the northwest quadrant of the site.⁵ The Samson Report relied in part on the Bovar Report commissioned by Parkland, which confirmed the integrity of the three USTs and associated lines and concluded that the Level II hydrocarbon contamination⁶ found in borehole samples “extended beyond the UST and pump island operations,” implying that this contamination was not attributable to Actton’s operations.
10. Prior to Parkland’s sale of the site to Husky on February 2, 1998 an inspection report by the department dated January 22, 1998 indicated that “inventory was ok and no issues were identified”.⁷
11. The parcel was first registered in the department’s database in January of 1999, after the Bovar Report was submitted to the department. From that date forward, the site was listed on the program webpage; any member of the public could also pay a nominal fee and receive whatever information the department had on file in respect to the site by requesting an Environmental File Search.
12. In 2004, Husky Oil discontinued its active operations on the site and commenced remediation activities. A remediation plan was submitted to the department for approval on December 4, 2004.
13. Husky’s remediation plan was quickly approved by the department in a letter dated December 7, 2004 from Randy Webber (the “Webber Letter”).
14. Husky Oil then proceeded with the remediation work and submitted a closure report prepared by their consultant, Geokwan Environmental Ltd. (the “Geokwan Report”)⁸ on January 18, 2005. The Geokwan Report described the work as a “mini remediation” of the impacted soils due to “limited funds” and “extremely cold ambient temperatures”. It noted that residual contamination remained at the outer boundaries of the remediated area.⁹

³ Subsurface Investigation Super Save Gas Station 302 Rue Archibald Winnipeg, Manitoba, BOVAR Environmental, June 1997.

⁴ Historical Review and Expert Opinion 302 Archibald Street Winnipeg Manitoba, Samson Engineering Inc, July 28, 2022.

⁵ Samson Report, page 17.

⁶ Level II Remediation Criteria indicates the levels above which remediation is required according to the department’s guidelines at the time.

⁷ Samson Report, page 24.

⁸ Underground Storage Tank Removal Closed Archibald Husky Gas/Service Station 302 Rue Archibald, Location #9131 Winnipeg, Manitoba, Geokwan Environmental Ltd., January 18, 2005

⁹ Geokwan Report, pages 2 and 6 respectively.

15. On July 29, 2009, the department acknowledged receipt of the Geokwan Report in a letter signed by Andrea Bacler (the “Bacler Letter”), concluding its response as follows:

“It is the position of [the department] that no further remediation is required at this site at this time. The site is not considered a contaminated site pursuant to [the] Act. Should any residual contamination create an exposure concern or should the subject property change its intended land use in the future, the responsible party will be directed by this department to initiate any remedial measures.”

16. The Panel concludes that the department was well aware of contamination on this site beyond that remediated by Husky, that the contamination fell short of the threshold required to be designated as a “contaminated site” posing “a threat to human health or safety or to the environment”¹⁰, and that the contamination could be safely left in place on this vacant site until an exposure concern developed or a change in land use disturbed the site.

17. Subsequent to its receipt of the Bacler Letter, Husky transferred title to the site to Canhusk Real Estate ULC¹¹ (“Canhusk”).

18. Canhusk sold the site to Sam Kreviazuk (“Kreviazuk”) on March 27, 2017.

The purchase and sale agreement¹² between Husky and Kreviazuk included a number of provisions relevant to the contaminated nature of the site:

- Article 3.1: Lands “As is, Where is”: The parties hereto acknowledge that the Remediation Work has been conducted on the Lands which have been subject to hydro-carbon related contamination which has resulted from the previous use of the Lands, as well as other Hazardous Substances or other contamination that may be found in or on the Lands. The Buyer acknowledges that the purchase of the Lands by the Buyer is on an “AS IS, WHERE IS” basis and that the Seller is under no obligation to carry out any further Remediation of the Lands, that the Remedial End Point has been achieved and the Buyer accepts that the Seller’s obligations regarding Remediation of the Lands, if any, have been fulfilled in full.
- Article 3.2: Restrictions on Future Use of Lands: Buyer covenants and agrees that it shall:
 - a) not carry on business or use the Lands in any manner contrary to the restrictions on use as set forth in Schedule C hereto or as otherwise set forth in any Permitted Encumbrance registered against the Lands (the “Use Restrictions”); and

¹⁰ The Contaminated Sites Remediation Act, C.C.S.M. c. C205, s. 7(1).

¹¹ Unlimited Liability Company.

¹² Tab 8 to the Submission of Husky Oil to this proceeding.

b) take commercially reasonable steps to ensure any subsequent purchaser or permitted assignee of any of the Lands is bound by the Use Restrictions, by expressly including the same covenants in the instrument effecting the disposition or in any separate agreement that the Use Restrictions be observed and performed by the person or persons, firm or corporation (hereinafter called the "Transferee") to whom the disposition is made, and will exact and obtain from any Transferee the execution of an agreement containing the said covenant; and in the instrument effecting the disposition or in any separate agreement, it will include a covenant that the Transferee will exact and obtain from any further or future Transferee to whom a disposition of Lands, or any part thereof, is made, a covenant which is in the same form as the covenant contained in section 3.3(a)¹³ before a further disposition of the Lands or portion thereof is made, and so on from time to time in respect of any subsequent dispositions

- Schedule C: Remediation Work and Use Restrictions ("Schedule C")¹⁴

19. Kreviazuk sold the (still vacant) site to Import City on December 31, 2018.

Consistent with its obligations under the purchase and sale agreement with Husky cited above, Kreviazuk disclosed the following documents and information to Import City in the course of the sale:

- the Bacler Letter; and
- Schedule C.

20. Import City purchased the site to host a commercial automotive business which would include public access. As part of the conditions for its financing, Import City's financier required that a Phase-II environmental assessment be undertaken at the site. Import City retained Wood Environment & Infrastructure Solutions ("Wood Environment") for that purpose, and received their report ("Wood Environment Report")¹⁵ dated November 1, 2019.

21. Wood Environment dug six boreholes on the site to provide soil and groundwater samples sufficient to assess the soil and groundwater conditions. The test results indicated that petroleum hydrocarbon levels in the soil and water exceeded provincial guidelines representing "a potential risk to human health and the environment".¹⁶

¹³ No section 3.3(a) is found in the agreement.

¹⁴ Reproduced in full in Appendix 1.

¹⁵ Phase II Environmental Assessment, 302 Archibald Street, Winnipeg, Manitoba WX18919, Wood Environment & Infrastructure Solutions, November 1, 2019

¹⁶ Wood Environment Report, page 13.

22. After reviewing the Wood Environment Report, the department required Import City to develop a remediation plan, which it submitted on March 12, 2020 (“Wood Remediation Plan”).¹⁷

23. While it was implied in the Wood Environment Report that the development proposed by Import City would require disturbance of the surface and removal of soils¹⁸, the Wood Remediation Plan provides a more detailed description of the subsurface development:

- Excavation and Removal of PHC [Petroleum Hydrocarbons] Impacted Soils within the Proposed Building Footprint – The excavation of impacted soils from below the proposed building footprint will be conducted to facilitate construction. It is anticipated that excavated soils will be limited to that only required for the construction process, including subbase excavation (assumed to be 1.0 m depth) and pile cuttings;
- Excavation and Removal of Shallow PHC Impacted Soils — The excavation of shallow soils (less than 0.5 m depth) has been allowed for areas where the parking lot construction will potentially encounter impacted soils. This could include areas along the eastern and southern Site boundaries. Soils would be excavated to the depth required for the parking lot construction (assumed 0.5 m);
- Site Utilities — In instances where the existing Site utilities are decommissioned or rerouted, PHC impacted soils may be encountered during excavation...

24. The department formally designated the site as “impacted” pursuant to section 7.1(1) of the Act by letter to Import City dated March 17, 2020, which also approved the Wood Remediation Plan and constituted written authorization for Import City to proceed with the remediation of the Site according to that plan.

25. The Wood Remediation Plan address impacts in the south-east portion of the property. Historical petroleum activities on the site conducted by Acton, Husky and Parkland took place in the west and north-west portions of the property¹⁹.

Reference to the CEC

Pursuant to sections 23(1) and 23(2)(a)(b) of the Act, the Director requested that the Commission apportion responsibility for the costs of remediation amongst the identified PRPs, and the Commission struck this panel to determine that apportionment.

¹⁷ The Wood Remediation Plan was submitted in the form of a letter to the department dated March 12, 2020

¹⁸ Wood Environment Report, page ii.

¹⁹ Refer to Appendix 2.

Apportionment

Section 21 of the Act sets out the applicable considerations the Panel should consider in apportioning responsibility for remediation. The relevant provisions are as follows²⁰:

In ... apportioning the responsibility for the costs of remediation of a contaminated site among the potentially responsible persons in respect of the site, ... the commission ... shall

(a) apply the principle that the primary responsibility for the remediation of a contaminated site lies with the person or persons who contaminated it and that they should bear the responsibility for the remediation in proportion to their contributions to the contamination; and

(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,

(i) where the person is a current or previous owner or occupier of the site,
(A) whether the site was contaminated when the person acquired an interest in it, and

(B) if the site was contaminated when the person acquired an interest in it, whether the person knew or, by making reasonable inquiries, ought to have known of the contamination, and whether the presence of contaminants at the site was reflected in the value of the consideration paid or payable by the person for the interest,

(ii) where the person is a current owner or occupier of the site, the effect of remediation under this Act on the fair market value or the permitted uses of the site;

...

(vi) whether the person complied with all applicable environmental laws, orders, licences or permits in respect of the site,

(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

(B) notification of the applicable regulatory authorities,

(ix) the value of any economic benefit derived by the person from activities that resulted in the contamination of the site or in the course of which the contamination occurred;

...

(xi) the degree to which the person contributed to the contamination of the site in relation to the contributions made by others,

(xii) the quantity and toxicity of any contaminant released into the environment, ...

²⁰ The Contaminated Sites Remediation Act, C.C.S.M. c. C205, s. 21.

Applying these considerations to the PRPs in turn:

Import City

Import City knew or ought to have known of the contaminated status of the site in the course of acquiring title:

- Although not formally designated as “impacted” until 2020, information on the site was available from the department’s registry after January of 1999;
- the Bacler Letter indicated that should the use of the site change, remedial measures would be required; and
- Schedule C explicitly referenced restrictions on “subsurface development”, which was Import City’s intended use of the site.

The Panel was not provided with evidence whether the value of the consideration Import City paid for the site reflected its contaminated character as referenced in Section 21(b)(i) of the Act. It is satisfied, however, that the effect of the remediation will permit additional uses of the site and provide a benefit to Import City as described in Section 21(b)(ii) of the Act. On that basis, we find that Import City is responsible for the costs of remediation.

Actton and Parkland

Actton and Parkland were consecutive owners of the site for almost 11 years and operated a gasoline fueling station. The USTs during this interval were relatively new and there is evidence from both the Bovar Report and a departmental inspection that the USTs maintained their integrity and did not contribute to contamination on the site. Furthermore, the location of the Actton and Parkland operations were in the area subsequently remediated by Husky. The Panel finds that Actton and Parkland did not materially contribute to the contamination at the location of Import City’s development, and as such are not responsible for any of the costs of remediation.

Husky

Husky owned and operated the site for the storage and sale of gasoline and petroleum products during two distinct periods of time. It was the owner of the site from 1966 to 1985, and then again from 1998 to 2017. We find that during the latter period Husky was operating a relatively modern regime, and any contamination of the site it contributed during that period was remediated to the satisfaction of the department.

Although the historical record is not complete, the Panel finds no evidence that Husky’s operations during its earlier period of ownership contributed to the current levels of contamination, and that the location and nature of Husky’s operations during its earlier period of ownership did not contribute to the contamination now being remediated on the footprint of the Import City development. On that basis, we find Husky not responsible for the costs of remediation.

Appendix 1: Schedule C to Purchase and Sale Agreement between Husky and Kreviazuk

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SCHEDULE C REMEDATION WORK AND USE RESTRICTIONS

Site: 302 Archibald, Winnipeg, MB

Location #: 9131

Address: 302 Archibald Avenue

Site Size: 0.33 Acres

Remedial Status and Use Restrictions: The site is not known to be on the impacted site registry as per The Contaminated Sites Remediation Act, C.C.S.M, C. C205 maintained by the Manitoba Sustainable Development. Environmental Site Assessment performed in 2009 indicated that soil and groundwater were not impacted above Manitoba Conservation screening levels.

The property is currently suitable for Commercial slab-on-grade construction across the property with the additional restrictions on use:

- No drinking water wells or potable water wells
- No deep rooting plants
- No relocation of deeper soils to shallower depths
- No subsurface development
- * Buyer shall not carry on business or use the Lands in any manner for the purchase, sale, marketing, merchandising, handling, distributing or any kind of dealing in Petroleum Products, other than where such fuels or products are branded by Husky Oil Canada, or affiliate, until May 1, 2036.

Brief History of Site Use:

According to information provided by the previous owner, and to the best of Seller's knowledge, the site operated as a fuel storage and retail distribution facility from before 1960 until the early 1980's. Underground storage tanks (UST's) installed prior to 1974 were removed in 1980. The site was the location of a service station from at least the 1980's until at least 2002. The last tanks and pump island were removed in 2004 along with approximately 540 metric tonnes of impacted soil.

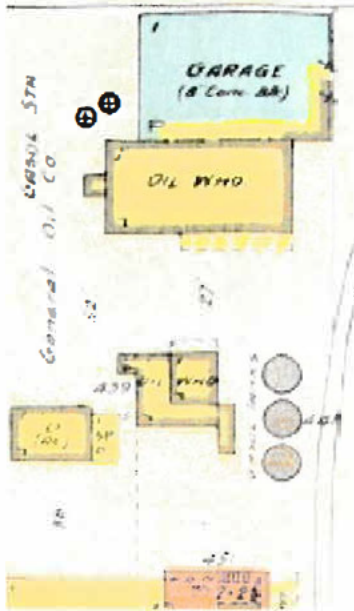
Description of Recent Environmental Activities:

Several site assessments were conducted at the Site including field investigations in 1997, 2002, 2003, 2004, and 2009. Prior to the onsite excavation and removal of approximately 540 metric tonnes (i.e. in 2004), impacts to soil and groundwater were identified. However, during the most recent site assessment in 2009, nine boreholes and eight monitoring wells showed that soil impacts were below Manitoba standards, and groundwater criteria were acceptable. Additional remediation and monitoring actions are not needed for the site.

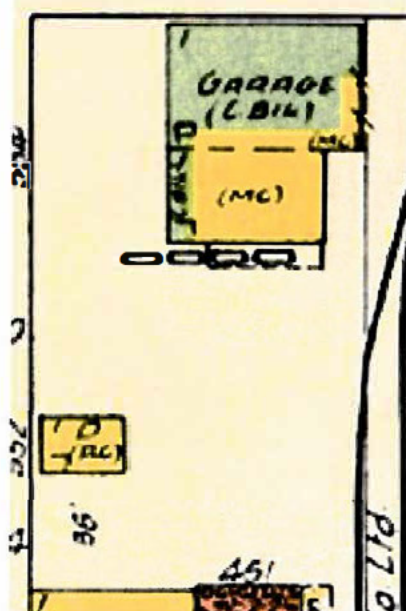
The information included in this Schedule is provided by the Seller to the best of its ability based on information available at the time this Schedule C was prepared. Circumstances may change whereby the scope of work contemplated in this Schedule C may change with the result that the Seller, or its affiliates, may be required to carry out or conduct a greater or lesser amount of work on the Lands; carry out a different variety or scope of work which may or may not be more invasive than as indicated; and/or projected time for completion of such work may be altered. In such event the buyer and the Seller agree that this Schedule C shall be deemed to be amended accordingly

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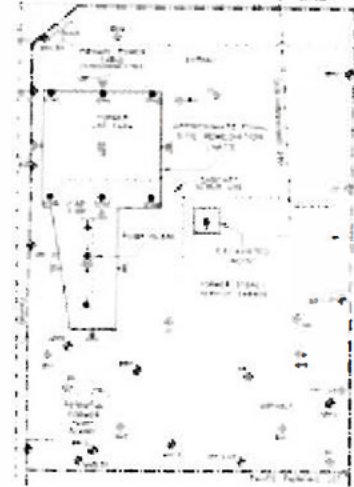
Appendix 2: Site Maps of 302 Archibald



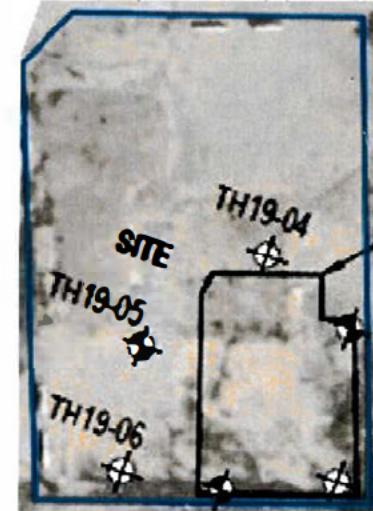
1949 Fire Map



1959 Fire Map



2004 Geokwan Excavation



2021 Wood Excavation