

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

ORDER/ORDRE

Order No./N° de l'ordre : CEC2018-02

Issue Date/Date de l'ordre: September 20, 2018

In accordance with The Contaminated Sites Remediation Act (C.C.S.M. c.205)/
Conformément à la Loi concernant l'assainissement des lieux contaminés (C.P.L.M. c. 205)

THIS ORDER IS ISSUED TO:/CET ORDRE EST DONNÉ À:

Richard and Linda Cabana
[REDACTED]

and

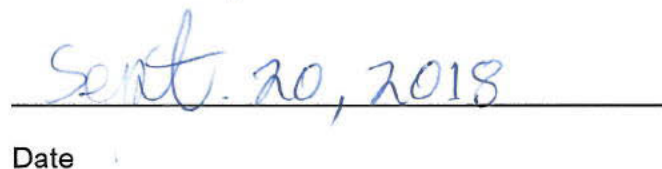
Joanne Emes
[REDACTED]

Pursuant to Section 26 of The Contaminated Sites Remediation Act, the commission orders that Richard and Linda Cabana and Joanne Emes are responsible for costs of remediation of 1098 PR 308 Sprague, Manitoba and apportions responsibility for remediation of the site as follows:

1. Richard and Linda Cabana are responsible for 91% of the costs of remediation.
2. Joanne Emes is responsible for 9% of the costs of remediation.



CHAIR



Date

cc: Director
Justin Vincent
David Laurence



IN THE MATTER OF
The Contaminated Sites Remediation Act
and
IN THE MATTER OF
1098 PR 308 Sprague, Manitoba

Hearing Panel

Glennis Lewis, Ian Gillies, Serge Scrafield (Chair)

Preamble

On April 18, 2016, pursuant to section 23(2) of *The Contaminated Sites Remediation Act* ("the Act"), the Clean Environment Commission ("the commission") received a reference from the director ("the director") at Manitoba Conservation and Water Stewardship (now known as Manitoba Sustainable Development and hereinafter referred to as "the department") to apportion responsibility for costs of remediation of an impacted site among the potentially responsible parties.

The impacted site is commonly known as 1098 PR 308 Sprague, Manitoba ("the site").

In order to meet timelines imposed by the Act, the hearing was scheduled for May 30, 2016 but was adjourned until further information could be received from the department.

On July 13, 2017 an updated file was received but still left some information gaps. Requests for further clarification were made to the department and responses were received in due course.

Ultimately, the hearing panel felt that the matter could be determined through documentary records and written submissions and therefore a public hearing was not necessary. Written submissions were requested from the parties and were received in due course. The parties also submitted responses to the submissions from other parties.

Summary

The site was designated as an impacted site under section 7.1(1) of the Act due to the type and level of contamination found on the property. The potentially responsible persons as named by the director under section 10(1) of the Act were Richard and Linda Cabana ("the Cabanas") and Joanne Emes ("Emes").

Pursuant to section 26 of the Act, the commission determines that the Cabanas and Emes should be responsible for the costs of remediation of the site as follows:

1. The Cabanas are responsible for 91% of the costs of remediation.
2. Emes is responsible for 9% of the costs of remediation.

Background

1. August 24, 2015, the director advised Emes that the site, then owned by Emes, had been designated as an impacted site under section 7.1(1) of the Act.
2. Sept. 18, 2015, counsel for Emes made an application for determination of responsibility for the remediation of the site.

3. October 8, 2015, the director designated the Cabanas and Emes as persons potentially responsible for remediation of the site under section 10(1) of the Act and invited them each to propose a remediation plan, or to comment on any remediation plan proposed by another potentially responsible person.
4. December 14, 2015, the director required, the current owner David Laurence ("Laurence"), pursuant to section 14.1(1) of the Act, to submit a remediation plan and advised him that he was responsible for any environmental assessments of the property that may be required.
5. January 21, 2016, the director, under subsection 15(1) of the Act, ordered Richard Cabana to retain the services of a qualified environmental professional acceptable to the director to develop a remediation plan in conjunction with previously identified potentially responsible persons.
6. April 14, 2016, the director advised Laurence that he was not the party responsible for remediation under section 14.1 but, as owner of the property, remained responsible for an environmental site assessment. Such an assessment or investigation has not been ordered by the director.
7. April 18, 2016, pursuant to section 23(2) of the Act, the director referred the matter to the commission for apportionment of the costs of remediating the site between the potentially responsible persons.

Relevant Facts:

1. R & L Service (Sprague) Inc. (R&L) was the registered owner of the site from 1986 to 2012. The Cabanas operated a petroleum storage facility on the site during this period.
2. The Cabanas replaced the underground storage tanks with above ground storage tanks in June, 1996. Department officials attended the removal of the underground tanks on June 18, 1996, tested soils around the tank nest and required additional soil be removed and taken to a treatment facility. On June 24th, 1996, the department officials attended the removal of additional contaminated soil from around the pump island. Field testing of the soils from the perimeter of the excavation revealed that the majority of the contaminated soil had been removed.
3. July 8, 1996 the department advised Richard Cabana by letter that the site was in "suitable condition for continued occupancy and operation as a petroleum retail facility, and no further site remedial actions are required at this time". In a July 16, 1996 letter to a financial institution, a department official writes that concentrations of petroleum compounds in existing soil at the site fall within acceptable levels for operation of a petroleum retail facility.
4. From 1996 onwards, the site appeared on the department's list of all sites on file. This list was placed on the department's website in January 2002. Any interested party, including prospective purchasers of the site after 1996, could have accessed the department's detailed file regarding the site through the formal file search process and payment of a fee.
5. The department recorded a site inspection in 1997 in relation to the new tanks, an inspection in 2000 in relation to piping and provided final approval for the system on August 3, 2000.
6. February 7, 2005, the department issued a permit to R&L to operate a petroleum storage facility; prior to 2005 such permits were not issued.

7. March 7, 2007, department records show that fuel inventory records were not kept as required by regulation. Such records can be compared to records of sale volumes and discrepancies between the two can indicate a leak.
8. May 10, 2011, the department renewed the permit to operate a petroleum storage facility to R & L Service (Sprague) Inc. and required the following:
 - i. Facility must be upgraded per attached Upgrade Schedule.
 - ii. All tests, corrections and inspections must be performed in accordance with Part 11 (Required Tests and Inspections) of the Storage and Handling of Petroleum Products and Allied Products Regulation ("the regulation").
 - iii. The owner or operator of the storage tank system must comply with the record-keeping requirements of Part 6 (Inventory and Record Keeping) and Part 11 of the regulation.
 - iv. Maintenance of Electronic Leak Detection Equipment shall be performed by a Petroleum Technician who is licensed for that purpose.
9. October 17, 2011, a note in the departmental record indicates the required upgrades had not yet been done.
10. In 2011, a prospective buyer commissioned a registered professional engineer to conduct a Phase II Environmental Assessment of the site. A report dated September 2011 was produced. The department received a copy of the report no later than November 17, 2011 after which date it could have been accessed through the department's formal file search process by any interested party. The prospective buyer did not proceed with the purchase.
11. The assessment report recorded the presence of various contaminants related to petroleum products which exceeded the government standards for soils on sites used for commercial purposes, in the vicinity of the pump island. A department record of September 30, 2011 notes that impacts were fairly shallow which may indicate surficial spills.
12. May 1, 2012, the site was purchased by 5260248 Manitoba Inc. From that date, Emes operated a business on the site, including a petroleum storage facility.
13. July 12, 2013, departmental emails indicate that no record can be found that the upgrades required on May 10, 2011 had been done.
14. July 12, 2013, the department conducted an inspection of the petroleum storage facility on the site and on July 25, 2013, advised Emes (although name misspelled as Enns), by letter that:

The inspection identified a number of concerns and deficiencies related to:

- the lack of adequate inventory and tank inspection records
- deteriorated and inadequate seals in the transition sump
- non evident monitoring systems and/or check valves for above ground tanks with underground piping

To correct these concerns the department required Emes to:

- maintain inventory records and provide copies on a monthly basis to the department
- maintain and provide to the department a record of storage tank inspections
- retain a licensed petroleum technician to repair the transition sump, inspect and if necessary install monitoring systems or check valves for the tanks and piping

- carry out any maintenance required by the technician
15. July 22, 2013, the department issued a petroleum storage facility permit renewal to 5260248 MB Inc. which repeated requirements (ii), (iii) and (iv) from the May 10, 2011 permit.
 16. November 22, 2013, a licensed technician advised Emes that the diesel line passed the government standard but the regular gasoline line did not and recommended replacing the pipe.
 17. In December 2013, Enns ceased operations on the site as confirmed by her legal counsel in a later submission to the director.
 18. August 24, 2015, the director advised Emes that the site had been designated as an impacted site under section 7.1(1) of the Act. The director copied the Caisse Populaire Groupe Financier Ltee. who had exercised their right to sell the property although they did not operate the business or the associated petroleum storage facility.
 19. October 16, 2015, Six Fold Marketing purchased the site and David Laurence is the current operator.
 20. December 11, 2015, a pipeline test report conducted by a pump service company, submitted to the department found that: "Since [the] site had been shut down for a long period of time the pipelines were tested for the required time. There was a loose fitting on regular pipe so we took apart fitting and repaired leak after repair pipe tested good. So both pipelines tested and held pressure for there (sic) required time, while on site we checked out all sumps and required valves. This site meets all current codes as per install"
 21. February 4, 2016, the department issued a permit to operate a petroleum storage facility to Six Fold Marketing.

Position of the Parties

In the submissions from the parties, matters were set out that in the opinion of the panel are irrelevant in their determination. Those types of arguments will not be included in the outline of the position of the parties nor will they be considered in making the determination of apportionment.

R & L Service (Sprague) Inc. (Richard and Linda Cabana):

1. R&L Service (Sprague) Inc. ("R&L") notes that, although the department personally named Richard and Linda Cabana as the appropriate parties to this action, their corporation held title to the land in question. Any reference to Richard and Linda Cabana should be acknowledged as "interchangeable" with R&L.
2. R&L submits that their inclusion in this matter be discontinued as they sold the property.
3. R&L asserts that there be an up-to-date investigation to determine the source, origin and age of contamination and that all previous and current owners who had operated or operate a petrol service on the property be included in the matter, as well as the Caisse who foreclosed on the site during Emes ownership.

4. R&L submits that from 1996 onwards it carried on its operations in a proper manner. An inspection conducted in May of 2011 by a licensed technician found the site to be in compliance with 2010 codes.
5. R&L asserts never having been provided a copy of the 2011 Phase II environmental site assessment report or having been informed of its results.
6. An independent consultant engaged by R&L's legal counsel, although not a fuel tank expert, commented on deficiencies identified, after R&L's ownership, in the 2013 site inspection:
 - Deteriorated seals could likely result in soil and groundwater contamination.
 - The lack of monitoring systems and/or check valves for above ground tanks could result in soil and groundwater contamination.
 - Failing the pressure test could be indicative of potential underground leaking.
7. R&L asserts that it is the buyer's responsibility to ensure they have taken all proper precautions in informing themselves of the property they are purchasing. Failure to do so should have factored into the department's assessment of who should bear responsibility for the costs of any remediation work at the site.
8. R&L advises that they had provided a holdback of \$25,000.00 for a period of six (6) months to Emes for the purposes of serious repair to the site, as R&L states that Emes knew there could remain some residual contamination since removing the site's underground tanks in 1996. R&L also asserts that a purchaser should have completed their due diligence to ensure the site was not contaminated before releasing the \$25,000.00 holdback to the vendor.

Joanne Emes (5260248 Manitoba Inc.)

1. Emes asserts that she asked the Cabanas and the real estate agent for all the necessary paperwork that was needed for the purchase of the site. Emes received the 1996 site assessment documents from the Cabanas but asserts that when asked if they had anything more recent, they said this is all they had.
2. Emes asserts that in October 2013 a department official told her about the failed soil test of 2011 but that this is the first she'd heard of it. Emes adds that the department therefore knew that the problem existed before her purchase of the business and questions why it took so long to take action.
3. Emes concludes that the 1996 documents that she received show acceptable limits of hydrocarbons in the soil but the Phase II Environmental Assessment results show contamination exceeding the applicable criteria.
4. Emes asserts that the Cabanas knew the site was contaminated while they owned, occupied and controlled both the site and the contaminant.
5. Emes states that in accordance with "The Polluter Pay Rule", the party responsible for producing pollution is responsible for paying for the damage. Cabanas owned and operated the petroleum service station from 1988 until 2012 and should be 100% responsible. She concludes that contamination found in 2011, occurred long before she was involved.
6. Emes asserts that they [Cabanas] did not give her any records of gas sales. She states when asked for them, they told her that they didn't keep records of gas sales. Emes also stated that when asked where the meters were on their gas pumps, they said there were none.

7. Emes states that when the department inspected in 2013, they noted that there were outstanding work orders from the previous owner. Also, she notes that no tests to detect contamination were done at the time and questions how she can be held accountable without any evidence.
8. Emes outlined the steps taken in October 2013 to obtain historical site records from the department through a FIPPA request.

Manitoba Sustainable Development:

1. The director recommends that responsibility for remediation be apportioned equally between the two previous owners: R & L Service (Sprague) Inc. (owned by Richard Cabana) and 5260248 Manitoba Ltd. (owned by Joanne Emes). Furthermore, the cost of additional assessment of the site should be considered part of the cost of remediation and be apportioned among the two previous owners.

Analysis and Findings

1. The commission concludes that contamination found on the site, and reported in September, 2011 to be in excess of guidelines for commercial sites, occurred after July 1, 1996 as:
 - i. The department advised on July 8, 1996 that, after inspecting the removal of the old tanks, testing the surrounding soils and requiring the removal of additional soil and after attending the excavation, removal and testing of soil around the pump island, the site was suitable for operation as a petroleum retail facility.
 - ii. In a July 16, 1996 letter to a financial institution, a department official wrote that concentrations of petroleum compounds in existing soil at the site fell within acceptable levels for operation of a petroleum retail facility.
2. The commission holds that contamination of the site continued after the finding of contaminants in September, 2011 up until gas sales ended in early December 2013 as:
 - i. Department records show that as of October 17, 2011 the Cabanas had not implemented the upgrades required by the petroleum storage facility permit renewal of May 10, 2011.
 - ii. There were deficiencies in the gas handling system identified by the department and communicated to Emes on July 25th, 2013.
 - iii. The deficiencies persisted until the facility ceased operations in early December 2013, as the regular gas line failed a pressure test in late November, 2013 and, in fact, leaked when retested in December 2015 prior to being reactivated.
3. The commission holds that the petroleum storage facility was conforming to current operating standards, once operations resumed in early 2016, as the required repairs to the system had been made.
4. Based on (1), (2) and (3) above, the commission concludes that the contamination of the site occurred between July 1, 1996 and early December, 2013 when operations on the site ceased, a period of 209 months.
5. Section 1(1) of the *Act* provides for *“a fair and efficient process for apportioning responsibility for the remediation of contaminated sites, that applies the “polluter pays principle”...”* and that the commission *“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 the contamination”.

Sale of the property does not absolve the person or persons who contaminated the site of responsibility for remediation. Therefore, the commission determines that the relative contributions to the contamination of the site should be based on the length of time each potentially responsible person operated a business with a petroleum storage facility on the site during the contamination period of 209 months.

6. As stated above the director has named Richard Cabana, Linda Cabana and Joanne Emes as potentially responsible persons under section 10 of the Act.
7. It is unclear why R + L Service (Sprague) Inc. was not included as a potentially responsible person as that company was the registered owner of the site for over 23 years. Section 9(1) specifically contemplates registered owners as potentially responsible persons.

Be that as it may, the commission is satisfied on the evidence before it that Robert Cabana and Linda Cabana should be held to be responsible persons as excerpts from the Companies Office records reveal that at the material time Richard Cabana was a shareholder, director and president of R + L Service (Sprague) Inc. Similarly, Linda Cabana was a shareholder, director, treasurer and secretary of the company.

8. The commission therefore finds that each of these individuals fall within the purview of section 9(1)(j)(ii) of the Act which provides:

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

. . . (j) a person who

. . .(ii) being in a position to influence, control, direct or manage another person, directed, required or authorized any act or omission by which a person contaminated the site.”

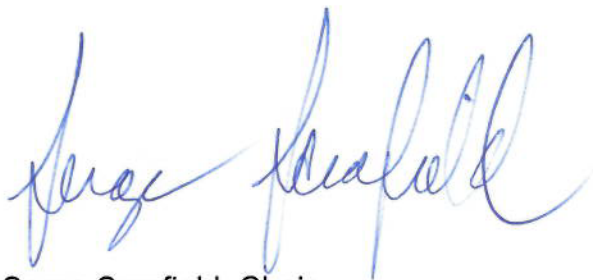
9. On a balance of probabilities both Richard Cabana and Linda Cabana were implicitly in a position to control, direct or manage R + L Service (Sprague) Inc. and authorized the acts or omissions which contaminated the site.
10. Similarly, 5260248 Manitoba Inc. was not named as a potentially responsible person under section 9(1), despite the fact that it was the registered owner of the site from May 2012 to October 2015.
11. Companies Office records reveal that Joanne Emes was a sole director and shareholder, as well as president, of the company.
12. Additionally, in her written submission to the commission Ms. Emes makes the statement that “I was not able to run the business the way it was intended”.
13. On the basis of the corporate records as well as the written submission the commission also finds Joanne Emes responsible under section 9(1)(j)(ii) of the Act.
14. The commission finds that during the period of contamination:
 - i. The Cabanas operated a business with a petroleum storage facility on the site from July 1st, 1996 to April 30, 2012, a period of 190 months or 91% of the period.
 - ii. Emes operated a business with a petroleum storage facility on the site from May 1, 2012 until early December 2013, a period of 19 months or 9% of the period.

Decision

Pursuant to section 26 of the Act, the commission determines that Richard and Linda Cabana and Joanne Emes should be responsible for the costs of remediation of the site as follows:

1. Richard and Linda Cabana are responsible for 91% of the costs of remediation.
2. Joanne Emes is responsible for 9% of the costs of remediation.

DATED this day September 20, 2018
MANITOBA CLEAN ENVIRONMENT COMMISSION



Serge Scrafield, Chair
On behalf of the Hearing Panel