

# **Occupational Health and Safety Council**

**Appeal from Orders of an OHS Officer**

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**Paragon Remediation Group Ltd.  
(operating as Enviro-Vac)**

Appellant

and

**Her Majesty the Queen in Right of Alberta**

Respondent

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## **ORDER**

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**Panel:** Peter Bowal (Chair), Nina Novak and Rob Munro

**Appeal Decision:** March 27, 2017

## **I. Nature of this Appeal**

[1] Enviro-Vac operates as a division of Paragon Remediation Group Ltd. (“Enviro-Vac”). On November 22, 2016, an OHS officer representing the Respondent (“OHS”), pursuant to its regulatory authority, issued two orders against the Appellant, Enviro-Vac.

[2] On December 21, 2016, Enviro-Vac appealed the orders to the Occupational Health and Safety Council (“Council”) on the grounds that it was compliant with the *Occupational Health and Safety Code* (“Code”). Enviro-Vac has asked Council to revoke the orders. The appeal was conducted by way of written submissions without an oral hearing.

## **II. Summary of Decision**

[3] For the reasons which follow, Council confirms the two orders under section 16 (3) (a) of the *Occupational Health and Safety Act* (“the Act”).<sup>1</sup>

## **III. Documents Reviewed**

[4] Council reviewed and considered the following written submissions received from the Appellant and Respondent:

- (a) The Notice of Appeal submitted by Enviro-Vac on December 21, 2016 including Contact Report dated November 22, 2016;
- (b) OHS reply submission dated January 17, 2017;
- (c) Submissions of the Appellant including:
  - i. Letter dated December 19, 2016 of supplementary information supporting their appeal
  - ii. Enviro-Vac rebuttal letter dated February 10, 2017 to the Respondents reply submission

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<sup>1</sup> RSA 2000, c O-2

#### **IV. OHS Officer's Investigation and Facts**

[5] On November 22, 2016, an OHS officer inspected an Enviro-Vac asbestos remediation worksite located in Paradise Valley, Alberta. Enviro-Vac had been contracted to complete the abatement activities by the Prime Contractor, OML Construction Ltd. The worksite, a vacant school scheduled for demolition, encompassed low, moderate, and high risk asbestos abatement work activities.

[6] During the inspection, the OHS officer attended at the waste transfer area and noted that an interior tape seam had been split open, exposing the interior of the asbestos containment area to the waste transfer room. The breach was believed to have occurred due to bags of waste asbestos resting against it. The officer documented the conditions with a photograph of the split in the containment while it was being repaired. As a result of these observations, the officer issued order #1, a stop work order related to section 31 of the *Code*. This order read: "Envirovac is required to move the asbestos waste inside the containment to prevent further damage, to seal the breach to prevent further potential release of asbestos fibres and to complete air sampling outside the waste transfer room to ensure that no contamination has occurred."

[7] The requirements for order #1 were met by Enviro-Vac that same day, November 22, 2016, by moving the bagged asbestos inside the containment area, sealing the breach, and testing the air quality outside the containment area at two locations. Results were within the occupational exposure limit for asbestos.

[8] Also during the inspection, the OHS officer observed 36 large storage containers of asbestos waste that had not been removed from the site and were being stored against a hallway wall in a clean area adjacent to the high risk work area. Enviro-Vac stated, "the only route out of the building was through the current high-risk work area". The officer documented the conditions with a photograph of the bags of asbestos waste stored against one of the hallway walls. As a result of these observations, the officer issued order #2 pursuant to section 28(b) of the *Code*. This order read: "Envirovac is required to remove any unnecessary accumulations of asbestos waste from the work site."

[9] A compliance date was set for November 24, 2016. Enviro-Vac requested an extension to order #2's compliance date, which was granted to December 1, 2016. There was a subsequent extension request, which was also granted to December 20, 2016. Enviro-Vac complied with order #2 on December 13, 2016 by removing the asbestos waste to a disposal site.

[10] Also during the same inspection on November 22, 2016, the OHS officer reviewed asbestos workers' certificates of completion against the OHS master

database to determine if all certificates were valid. The database was current to November 22, 2016. The OHS officer observed that an issued card number did not match the certificate of completion issued to the worker, thereby contravening section 37(2)(b) of the *Code*. A third order requiring workers to possess original valid certificates of completion of the necessary training was issued to the worker. This order was subsequently rescinded November 25, 2016 when it was determined that an incorrect name was searched.

## **V. Case on Appeal to this Council**

[11] Enviro-Vac appealed the two written orders and it has taken the position that it was in compliance with the applicable sections of the *Code*. Enviro-Vac's arguments are summarized as follows:

- (a) *Order #1:* It was unlikely that the breaches had been there for a long time. The negative air pressure in place in the containment would act as a failsafe in the event of a containment breach. Enviro-Vac argued that since the negative air pressure unit was functioning during the breach and the breach was repaired when noted, there was no need for an order to be issued. The breach was not of the high risk containment but of the waste transfer room that was not yet in use; and
- (b) *Order #2:* The bags of asbestos waste were in place but there was no other location to store them. Due to the site conditions and the inability to secure the waste at other locations, this did not constitute an unnecessary accumulation of waste material. This was not the main traffic hallway and the bags were secure. Enviro-Vac stated “[t]hat particular regulation refers to unpackaged waste or waste that is present in such an amount/design that it presents its own hazard (for example, present in amounts that there is the potential of being breached and contaminating an area or becoming a safety issue for emerging access/egress). The officer has used this regulation erroneously ...”

## **VI. Standard of Review**

[12] The standard of review is reasonableness. In *MacDougall v Occupational Health and Safety Council*, 2015 ABQB 591, the reviewing judge wrote at

paragraph 14:

. . . the Council was not engaged in anything more than I am engaged in. They were assessing the reasonableness of the officer's decision and the fairness of the process by which she arrived at that decision.

[13] A recent decision of the Court of Queen's Bench, *Procrane Inc (Sterling Crane) v. Thompson and Occupational Health and Safety Council*, 2016 ABQB 646, thoroughly canvassed this issue and confirmed the same standard of review at that level with regard to this legislation.

## **VII. The Law**

[14] An OHS officer is granted specific power in the *Act*. Section 8 (Inspection) of the *Act* states:

8 (1) For the purposes of this Act an officer may

- (a) at any reasonable hour enter into or on any work site and inspect that work site;
- (b) subject to subsection (2) require the production of any records, books, plans or other documents that relate to the health or safety of workers and may examine them, make copies of them or remove them temporarily for the purposes of making copies;
- (c) inspect, seize or take samples of any material, product, tool, appliance or equipment being produced, used or found in or on the work site that is being inspected;
- (d) make tests and take photographic or recordings in respect of any work site;
- (e) interview and obtain statements from persons at the work site.

[15] An OHS officer can write an order as outlined in section 9 (Order to remedy unhealthy or unsafe conditions) of the *Act*:

9 (1) When an officer is of the opinion that work is being carried out in a manner that is unhealthy or unsafe to the workers engaged in the work or present where the work is being carried out, the officer may in writing order the person responsible for the work being carried out.

- (a) to stop the work that is specified in the order, and
- (b) to take measures as specified in the order that are, in the opinion of the officer, necessary to ensure the work will be carried out in a healthy and safe manner,

or either of them, within the time limits specified in the order,

(2) When an officer is of the opinion that a person is not complying with the Act, the regulations or the adopted code, the officer may in writing order that person to take such measures, within the time limits specified in the order, as the officer considers necessary to ensure such compliance and specifies in the order.

[16] In this case, various requirements of the *Code* apply, such as Part 4 (Chemical Hazards, Biological Hazards and Harmful Substances):

28 An employer must

- (a) minimize the release of asbestos, silica, coal dust and lead into the air as far as is reasonably practicable,
- (b) keep the work site clear of unnecessary accumulations of asbestos, silica, coal dust and lead and waste materials containing any of these substances, and
- (c) ensure that the methods used to decontaminate the work area, workers, equipment and protective clothing prevent, as much as is reasonably practicable, the generation of airborne asbestos, silica, coal dust or lead.

31 (1) If it is determined that asbestos fibres may be released in a building, the building is in an unsafe condition.

(2) The employer must take all necessary steps to correct the unsafe condition.

37 (1) An employer must ensure that a worker who works with asbestos receives the training necessary for the worker to perform the work safely.

(2) An employer must ensure that a worker who enters a restricted area that is designated as a restricted area due to the presence of asbestos

- (a) has successfully completed a course of instruction approved by a Director of Occupational Hygiene, and
- (b) has in the worker's possession the original valid certificate of completion of the course issued to the worker.

[17] The power of Council is outlined in Section 7 (Duties of Council) of the *Act*.

7 The Council shall . . .

(b) hear appeals in accordance with this Act and the regulations

[18] Appeal processes are set out in section 16 (Appeal) of the *Act*:

16 (1) A person

(a) to whom an order is issued under section 9, 10, 11, 12, 14, 25 or 33 . . .

may appeal the order, administrative penalty, cancellation or suspension to the Council . . .

(3) After considering the matter being appealed, the Council may by order

(a) in the case of an appeal from an order referred to in subsection (1) (a) confirm, revoke or vary the order

### **VIII. Analysis and Reasons for Decision**

[19] Order 1 requires Enviro-Vac to properly secure and contain high risk asbestos abatement work areas. The OHS officer identified a danger to the health and safety of workers as a result of the breach in the containment wall. The interior tape seal of the inner door to the asbestos waste transfer area was split, exposing the interior of the high risk work area, a restricted work area.

[20] The Appellant concedes the breach of containment. The officer's photographic evidence of the asbestos work area containment seam breach proves violation of *Code* requirements.

[21] Evidence from OHS specialists indicate that negative air pressure alone is not sufficient to guarantee containment of airborne asbestos particles. Although the air in the containment area was at negative air pressure, air currents can form allowing asbestos particles to flow through the breach, which can then circulate within the waste transfer area.

[22] There are serious health risks associated with asbestos. This appeared to be a minor breach for a short period of time. Overall, Council cannot conclude that the officer's discretion to write this order was unreasonable or otherwise in error.

[23] Order 2 requires Enviro-Vac to ensure that there is no unnecessary accumulation of asbestos waste at the work site. The OHS officer found unacceptable the storage of bagged asbestos waste, which contained material with sharp edges. The requirement of the Alberta Asbestos Abatement Manual specifies continuous clean-up of asbestos waste. A disposal program must be in place to accomplish this.

[24] Again, the officer's photographic evidence proves violation of section 28(b) of the *Code*. The stored bagged asbestos waste is located in a hallway that was identified a clean area. The photographic evidence also shows these bags occupying a significant part of the hallway, adjacent to the hallway traffic pathway. The area was not secured to prevent general worker access, thereby increasing the risk that a bag could be punctured.

[25] The storage of bagged asbestos waste for extended periods of time in an unsecured and clean area is unacceptable. There was no valid reason provided by the Appellant that it could not have arranged for continuous disposal of the waste material over the duration of the project.

[26] The term "unnecessary accumulations" in the *Code* is inherently subjective. Enviro-Vac took the position that the accumulations were necessary as there were no other efficacious means for removal. Council is of the view that the officer's judgment and discretion in this regard were fairly exercised. It was not unreasonable for the OHS officer to conclude that extended accumulation of a significant quantity of bagged asbestos waste in an unsecured clean area is unnecessary accumulation of asbestos waste as prohibited by the *Code*.

[27] For these reason Orders 1 and 2 are confirmed.

## **IX. Order**

[28] Council confirms the two orders under section 16(3)(a) of the *Act* and dismisses this appeal.