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DECISION NO. 2017-EMA-012(a)

In the matter of an appeal under section 100 of the *Environmental Management Act*, S.B.C. 2003, c. 53.

BETWEEN:	Revolution Organics, Limited Partnership	**APPELLANT / APPLICANT**
AND:	Director, *Environmental Management Act*	**RESPONDENT**
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Panel Chair	
DATE:	Conducted by way of written submissions concluding on September 15, 2017	
APPEARING:	For the Appellant/Applicant:	Murray A. Clemens, Q.C., Counsel Geoffrey B. Gomery, Q.C., Counsel
	For the Respondent:	Stephen E. King, Counsel Fernando de Lima, Counsel

STAY APPLICATION AND PRELIMINARY ISSUES

[1] On September 7, 2017, Revolution Organics, Limited Partnership ("Revolution") appealed the contents of a letter dated September 1, 2017 (the "September Letter") from A.J. Downie, for the Director, *Environmental Management Act* (the "Director"), Ministry of Environment (the "Ministry")[1]. Revolution also applied for a stay.

[2] As the September Letter requires Revolution to meet certain requirements by September 22, 2017, the Board established an expedited submission schedule on the stay application.

[3] In the Director's response to the stay application, he raised a preliminary question of jurisdiction; specifically, whether the September Letter contains an appealable "decision", as defined in section 99 of the *Environmental Management Act* (the "*Act*"). The Director submits that the letter simply extends the timelines set out in a decision dated February 14, 2017 (the "Original Decision"), which is the subject of an existing appeal by Revolution (Appeal No. 2017-EMA-004), and which was also the subject of an application for a stay that was denied by the Board: *Revolution Organics, Limited Partnership v. Director, Environmental Management Act*, (Decision No. 2017-EMA-004(b), June 20, 2017); 2017 B.C.E.A. No. 12 (Q.L.) (the "Stay Decision").

[1] The Ministry of Environment is now the Ministry of Environment and Climate Change Strategy.

[4] The Director further submits that the new appeal and the stay application ought to be struck because they amount to a relitigation of the issues in Revolution's appeal of the Original Decision, as well as a relitigation of the Board's Stay Decision.

BACKGROUND

[5] The general background to Revolution's organic composting operation and its appeal of the Original Decision has been described, in detail, in previous Board decisions and will not be repeated here (see *Revolution Organics, Limited Partnership v. Director, Environmental Management Act*, (Decision No. 2017-EMA-004(a), April 13, 2017); 2017 B.C.E.A. No. 11 (Q.L.) [the "Jurisdictional Decision"], and the Stay Decision).

[6] For the purposes of addressing the Respondent's preliminary issues and Revolution's current application for a stay, the following procedural background is relevant.

The Original Decision and Appeal No. 2017-EMA-004

[7] On February 16, 2017, Revolution filed an appeal against the Original Decision (i.e., a letter dated February 14, 2017 made by the Acting Deputy Director, Regional Operations Branch of the Ministry). The Original Decision addressed the notice requirements in relation to Revolution's application for a waste permit, made in accordance with sections 3.1 and 33 of the *Organic Matter Recycling Regulation* ("*OMRR*"). Those notice requirements were originally set out in a letter dated January 19, 2017, as were the timelines for meeting those requirements. Of note, Revolution was required to give notice of its application to the following parties: Environment Canada, the Agricultural Land Commission, the Ministry of Agriculture, the Ministry of Forests, Lands, and Natural Resource Operations, the Interior Health Authority, the Village of Lytton and the Regional District of Thompson-Nicola.

[8] Revolution raised concerns about the requirements of the January 19th letter with the Ministry, which resulted in the Original Decision. The Original Decision states, in full, as follows:

> **Re: Revolution Organics LP ("Revolution") Permit Application 108529; job # 352284 X Reference 104217**
>
> I write further to my letter of January 19, 2017 and Revolution's response of February 6 and 10, 2017 and our recent discussions and correspondence regarding public notification requirements in relation to this matter.
>
> Application and Environmental Protection Notice
>
> I have reviewed the Environmental Protection Notice ("EPN") that Revolution has submitted attached to your email to Mr. Van Hinte on February 10, 2017. The EPN that Revolution has submitted is not acceptable for the following reasons:

- The EPN as revised by Revolution contains a reference in the second paragraph to Revolution having "already received an approval" for the facility. This is not accurate. While the ministry acknowledges that Revolution takes the position that it has an "approval" for the facility, the ministry's position, as it has stated previously, is that the acceptance of an environmental impact study report under section 23(2) of the Organic Matter Recycling Regulation ("OMRR") is not an "approval" for the purpose of the *Environmental Management Act*. The reference to Revolution's position of having already received an approval for the facility does not belong in the EPN and the ministry does not consider the EPN provided by Revolution to be an acceptable application for the purpose of the Public Notification Regulation ("PNR").
- The EPN as revised by Revolution does not adequately reference the description, characteristics and volume of waste in accordance with PNR sections 2(1)(e), (f) and (g). The ministry's position is that the EPN must reference the waste discharge of up to 125,000 wet tonnes of compostable materials per year. The discharge information must be included in the EPN in order to meet the requirements of section 2(1) of the PNR.

I have attached an EPN that addresses the above items and is acceptable to the ministry for the purpose of complying with the PNR and section 33 of the OMRR.

In addition, please be aware that the ministry continues to review Revolution's permit application, and any permit that is issued will be based on all waste discharges (e.g. compostable materials, air contamination, effluent) that are applicable.

In your February 10 correspondence, you have also taken issue with the form of the EPN in that it is not the "actual application" form completed by Revolution which was submitted to the ministry on a "without prejudice" basis in August 2016. For practical reasons, the ministry accepts the one-page EPN for the purpose of providing public notification, as opposed to the six-page long application form. However, if Revolution wishes to use the six-page long application form for the purpose of providing public notification, this would be acceptable to the ministry provided that the application contains the information required by section 2(1) of the PNR. The application submitted by Revolution to the ministry on August 4, 2016 (and dated August 8, 2016) on a "without prejudice" basis does not meet the requirements of section 2(1) of the PNR. In particular:

- Revolution states on page 1 of the application that the facility does not discharge any waste, which is inaccurate and would need to be removed; and
- There is no information provided on page 4 under the headings "discharge source and associated details", "rate of discharge" and

> "contaminants or parameters in the discharge", which must be filled in.
>
> Therefore, for the purpose of complying with the PNR and section 33 of the OMRR, the ministry would accept the attached EPN, or the six-page application form with the information properly completed in accordance with the above.
>
> Timelines
>
> In my letter of January 19, 2017, there were timelines included for compliance with public notification requirements. Revolution requested an extension of 10-14 days on February 1, 2017. In addition, Revolution subsequently confirmed the date of application of February 3, 2017, which I will accept as the date for the purpose of calculating timelines under the PNR and section 33 of OMRR.
>
> As such, taking this information into account, I have agreed to recalculate the timelines in my January 19, 2017 letter in accordance with the following (using the numbering in my January 19 letter):
>
> – Section A(1) – Revolution must give notice of the application as set out in this section of the letter by February 24, 2017. Proof must be provided to a director within 30 days after the date the application was mailed or delivered.
>
> – Section A(2) – Revolution must post the application on site no later than February 18, 2017, and provide a statement in writing to the director by March 3, 2017.
>
> – Section A(2) – Revolution must post a copy of the application at the Canada Post Lytton office no later than February 24, 2017 and provide a statement in writing to the director by March 10, 2017.
>
> – Section A(3) – Revolution must publish the application in the Ashcroft-Cache Creek Journal and the Bridge River Lillooet News by March 3, 2017, and provide the director with a full page tear sheet within 30 days of the date of publication as proof that the application was published.
>
> All other requirements in my January 19, 2017 letter are unchanged and remain in force. Failure to comply with the requirements of the PNR and section 33 of the OMRR may result in compliance and enforcement action by the ministry.

[9] When Revolution appealed this Original Decision, it also applied for an interim stay.

[10] Upon receipt of the appeal, the Board sought submissions from the Parties on a preliminary issue of jurisdiction; specifically, whether the Original Decision was an appealable "decision" under section 99 of the *Act*.

[11] On February 23, 2017, and with the consent of the Parties, the Board ordered a stay of certain provisions of the Original Decision until March 31, 2017, or until the Board issued its decision on the preliminary issue of jurisdiction.

[12] By letter dated March 29, 2017, the Director consented to a further stay of the requirements in the Original Decision until seven days after the Board issued its decision on the preliminary issue of jurisdiction. The Board issued its Jurisdictional Decision on April 13, 2017. The Board concluded at paragraph 87 that:

> 87. … with the exception of the timelines set by section 5(1)(a) of the *PNR* [the *Public Notification Regulation*], the Director's decision to impose timelines under section 33(3) of the *OMRR* [the *Organic Matter Recycling Regulation*], and her decision to specify the form and content of the notice under the *PNR*, are appealable decisions.

[13] The Board, therefore, found that the Original Decision contained some appealable decisions as defined in section 99 of the *Act*, and found that those aspects could be heard by the Board.

[14] On April 19, 2017, the Director consented to the interim stay remaining in place until the Board issued its final decision on the merits – or until August 31, 2017 - whichever occurred first.

[15] The hearing of the appeal on the merits was set for a four-day oral hearing, commencing on October 23, 2017. As the voluntary interim stay was only valid until August 31st, the Board considered Revolution's application for a stay, which, as a result of the voluntary stay, would take effect September 1st and end upon release of the Board's decision on the merits of the appeal.

[16] On June 20, 2017, the Board issued the Stay Decision. The Board denied Revolution's application for a stay of the Original Decision. In the Stay Decision, the Board concluded as follows at paragraphs 107-117:

> 107. The Panel finds that evidence of irreparable harm is relevant to the inquiry regarding the balance of convenience, as is the issue of mootness: *CP Railway* at para. 46. That said, in this instance, the Panel has already found that there is no evidence that Revolution will suffer any significant harm, let alone irreparable harm, if the stay is not granted. Revolution has provided no evidence to support its submission that it will suffer significant harm including serious reputational harm if the stay is denied. Further, the best evidence before the Panel is that the possibility of compliance or enforcement action that could result in financial losses to Revolution and its employees is remote. Even if an administrative penalty was levied against Revolution, it could appeal the penalty which would delay any requirement to pay the penalty until after that appeal was decided. There is no reasonable likelihood that Revolution will suffer any of the harms alleged before the appeal on the merits is heard and determined. Similarly, the Panel has found that Revolution's appeal will not be moot if the stay is not granted.
>
> 108. The Panel finds that delaying the completion of the public notification requirements in the Decision would hamper the Director in her exercise of her oversight responsibilities under the *Act* and the *OMRR* in the public interest. Any inconvenience or harm to the Director is, in this instance, an inconvenience or harm to the public

interest, as there is public interest in ensuring that proponents comply with the permitting process in a timely fashion.

109. The weight accorded to public interest concerns is partly a function of the nature of the specific legislation under attack: *RJR-MacDonald Inc*. at p. 351 (para. 76). The *OMRR*, which is central to this appeal and was a basis for the Director's Decision, was adopted to address public concern regarding composting facilities and their potential impact on the surrounding environment and the public. The Panel finds that the public has a strong interest in ensuring that composting facilities, whose operations have the potential to discharge waste into the environment, are subject to regulatory oversight so that there are no significant or long-lasting impacts on the surrounding environment.

110. The Panel finds that the Director has reason to be concerned, on behalf of the public, about the potential impact on the environment of Revolution's composting facility, given that the EIS has identified the potential for leachate water discharge during the feedstock receiving/storage and composting activities to affect surface water and, further, given the potential for leachate water discharge and nutrient leaching affecting groundwater quality. The Panel finds that the Director's concern is justifiable given that Revolution's QP recommended groundwater monitoring and surface water sampling for parameters of concern to monitor water quality prior to annual production exceeding 19,000 tonnes, but those recommendations have not been acted upon.

111. The Panel also finds that the public interest in managing odour emissions from the facility has been demonstrated by the number of complaints that the Ministry has received.

112. In addition, the Panel finds that the public has a real interest in ensuring that works at Revolution's facility are properly maintained and regularly inspected to reduce the likelihood of any harmful impact on the environment brought about by a failure in the liner or other works.

113. However, the Panel cautions that these findings are made solely for the purpose of deciding this preliminary stay application, and have no bearing on the merits of the appeal, which will be decided after a full hearing of the parties' evidence and submissions.

114. The Panel finds that an interim stay until the appeal is determined would not be for "a few short weeks" as suggested by the Director. The Board's experience is that appeals of this nature may raise complex issues of law and fact, and it may take several months after the voluntary stay ends on August 31, 2017 before a decision on the merits is rendered.

115. However, the Panel finds that the public interest in denying a stay and ensuring that the completion of the public notification

> requirements in the Decision in a timely manner, in this instance, outweighs any inconvenience to Revolution even if its appeal is ultimately successful. The Panel finds that the balance of convenience tips in favour of the public interest in ensuring that public notification of Revolution's permit application proceeds in a timely fashion.
>
> …
>
> 117. For the reasons provided above, the application for a stay of the Director's Decision pending the determination of the appeal is denied. However, for further certainty, the Board orders that the voluntary stay that the Director agreed to until August 31, 2017, remains in place until that date.

[17] On August 31, 2017, the voluntary stay of the requirements in the Original Decision expired. As the Board had denied a stay of that decision, the requirements of the Original Decision would be enforceable on September 1st.

[18] In a letter dated September 1, 2017, the Director issued a letter setting out new dates for the requirements in the Original Decision. The September Letter requires Revolution to comply with the requirements by September 22, 2017. It states, in full, as follows:

> **Re: Revolution Organics LP Permit Application 108529 …**
>
> The Ministry of Environment (the "Ministry") is writing further to its letter dated July 31, 2017 in relation to Appeal File No. 2017-EMA-004 and the above-referenced application for an Environmental Management Act permit for Revolution's compost facility ….
>
> The director is specifying the following timelines and other requirements for Revolution to give notice of, post and publish the Application in accordance with section 33 of the Organic Matter Recycling Regulation ("OMRR") and the Public Notification Regulation ("PNR"):
>
> - In accordance with PNR sections 4(1) and 6(9) and OMRR section 33(3)(b), Revolution must give notice of the Application by **September 22, 2017** to the following persons, agencies or groups:
>   - Environment Canada
>   - Agricultural Land Commission - …
>   - Ministry of Agriculture - ….
>   - Ministry of Forests, Lands, Natural Resource Operations and Rural Development - …
>   - Interior Health Authority
>   - Village of Lytton
>   - Regional District of Thompson-Nicola

> I draw your attention to PNR section 6(7)(b) and 6(9)(b) which requires proof of mailing or delivery to be provided to the director.
>
> - In accordance with PNR section 6(2) and OMRR section 33(3)(d), Revolution must publish the Application in the Ashcroft–Cache Creek Journal and the Bridge River Lillooet News by September 22, 2017. I draw your attention to PNR section 6(4) which requires proof that the application was published to be provided to the director.
> - In accordance with PNR section 6(5) and OMRR section 33(3)(e), Revolution must post a copy of the Application at the Canada Post Lytton office by **September 22, 2017**.
>
> With respect to the site posting requirement in section 5(1) of the PNR, the timeline for doing so – 15 days after the date of the application – is set out in the PNR and is not set by the director. It is the understanding of the Ministry that no site posting of the Application has occurred to date. If site posting has in fact occurred, then I draw your attention to section 5(1)(b) of the PNR which requires the application to be posted for a period of not less than 30 days, and section 5(1)(c) of the PNR which requires the applicant to state in writing to the director the date the copy of the application was posted.
>
> The Ministry has previously provided comment to Revolution on February 14, 2017 [the Original Decision] on the content of an Environmental Protection Notice (EPN) that would be acceptable for the purpose of providing public notification of the Application.
>
> Finally, the Ministry reserves the right to carry out compliance and enforcement action for failure to comply with the requirements of the PNR and section 33 of OMRR.
>
> [Emphasis in original]

[19] It is this September Letter that Revolution now appeals.

[20] In its Notice of Appeal, Revolution explains the reasons for its appeal of the September Letter as follows:

> With full knowledge of the hearing of the substantive appeal before the environmental appeal board set to commence October 23, 2017 ... the Director specified "timelines and other requirements for Revolution Organics, Limited Partnership to give notice and post and publish the Application in accordance with s. 33 of the ... [*OMRR*] and the ... [*PNR*] by September 22, 2017 a mere 30 days before the hearing to determine whether the Director erred in the decision dated 14 February 2017 as particularized in the Notice of Appeal attached as Schedule "B".
>
> If the points on the appeal to be heard commencing October 23, 2017 are upheld, the publication and posting required by the decision under appeal in this appeal will have been without legal authority and in the

event of non-compliance, subject to administrative penalty which will bring the Ministry's and the Board's process into disrepute.

[21] Revolution then sets out 11 errors in the September Letter.

[22] In its Notice of Appeal of the September Letter, Revolution also applied for a stay. Its fourth remedy is for "the Decision, including any compliance or enforcement action in relation to the Decision or the application for a permit submitted by the Appellant under OMRR and the Act, be stayed pending the determination of this appeal" [Emphasis added]p.

[23] It is this application for a stay application, and this appeal of the September Letter, that are the subject of the preliminary challenges by the Director.

[24] Revolution provided full submissions and two affidavits in support of its stay submissions. The affidavits in support are sworn by Ralph D. McRae on February 17, 2017, and Maureen Pepin on September 13, 2017. Mr. McRae's affidavit was also part of the evidence considered by the Board in the Stay Decision.

[25] In support of his preliminary issues, the Director provided submissions and an affidavit sworn by Charlene Hay on September 14, 2017.

ISSUES

[26] The Board has addressed the following issue in this preliminary decision:

1. Whether the September Letter is an appealable decision under section 99 of the *Act*?
2. If so, whether the appeal and/or the application for a stay ought to be dismissed on the grounds that they will be a "relitigation" of the existing appeal and/or the Stay Decision.
3. If the application for a stay proceeds, should the September Letter, including any compliance or enforcement action in relation to the letter or the application for a permit submitted by Revolution under *OMRR* and the *Act*, be stayed pending a decision on the merits of the appeal?

RELEVANT LEGISLATION AND CASE LAW

Jurisdiction

[27] Under section 100(1) of the *Act*, the Board may hear an appeal from a person aggrieved by certain "decisions". Section 100(1) states:

100(1) A person aggrieved by a decision of a director or a district director may appeal the decision to the appeal board in accordance with this Division. [Emphasis in original]

[28] The *Act* defines appealable decisions in section 99 as follows:

99 For the purpose of this Division [appeals to the Board], "decision" means

(a) making an order,

(b) imposing a requirement,

(c) exercising a power except a power of delegation,

(d) issuing, amending, renewing, suspending, refusing, cancelling or refusing to amend a permit, approval or operational certificate,

(e) including a requirement or a condition in an order, permit, approval or operational certificate,

(f) determining to impose an administrative penalty, and

(g) determining that the terms and conditions of an agreement under section 115 (4) [administrative penalties] have not been performed.

[29] The case law relevant to the jurisdictional issue will be set out in the decision, as needed.

Stays

[30] Section 25 of the *Administrative Tribunals Act*, which applies to the Board under section 93.1 of the *Act*, empowers the Board to order stays:

Appeal does not operate as stay

25 The commencement of an appeal does not operate as a stay or suspend the operation of the decision being appealed unless the tribunal orders otherwise.

[31] When considering an application for a stay, the Board applies the three-part test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385 (S.C.C.); 1 S.C.R. 311 [*RJR-MacDonald*]. That test requires an applicant for a stay to demonstrate the following:

1. there is a serious issue to be tried;

2. irreparable harm will result if the stay is not granted; and

3. the balance of convenience favors granting the stay.

[32] The onus is on the applicant for a stay to demonstrate good and sufficient reasons why a stay should be granted.

DISCUSSION AND ANALYSIS

1. Whether the September Letter is an appealable decision under section 99 of the *Act*?

Director's submissions

[33] The Director submits that the September Letter simply extends or revises the timelines for compliance that were set out in the Original Decision. He submits that the September Letter does not contain any new "decision" under section 99 of the *Act* that would give rise to the Board's jurisdiction to hear the present appeal. Rather, it simply extended the timelines which, under the Original Decision, expired in February and March of 2017, and, under the terms of the voluntary stay, expired on August 31st.

[34] In light of the Stay Decision denying Revolution's application for a stay of the Original Decision, the Director submits that the proper way to view the timelines in the September Letter is that they are "an indication of the Director's willingness not to take any action on the basis of the expiration of the previous timelines until the new timelines have passed." He argues that extending the timelines was predictable, fair and consistent with the Stay Decision, and is not an appealable decision.

[35] In the alternative, if the extension of the timelines constitutes a new appealable "decision", the Director suggests that Revolution's existing appeal of the Original Decision may be moot.

Revolution's submissions

[36] Revolution submits that the Director imposed requirements or made orders in the September Letter that bring it within subsections 99(a) or (b) of the *Act*. Specifically, he "ordered" Revolution to take certain steps, and/or "required" Revolution to take certain steps, by a specified deadline. It argues that this is a "fresh development" that imposed a "significant and substantive obligation" on Revolution as contemplated by Justice Groberman in *Unifor Local 2301 v. Rio Tinto Alcan Inc.*, 2017 BCCA 300 [*Unifor*]:

> 31. It is apparent on the face of s. 99 that it is intended to comprehensively enumerate virtually all of the various types of substantive decisions that are made under the statute. Undoubtedly, some of the enumerated types of decisions overlap with others. There is nothing inappropriate about that.

[37] Thus, Revolution submits, the letter constitutes an appealable "decision".

The Panel's findings

[38] In its Jurisdictional Decision, the Board considered how to evaluate the contents of a letter in order to determine whether any or all of the contents are

appealable as a "decision" under section 99 of the *Act*. This Panel agrees with and adopts the following findings of the Board in the Jurisdictional Decision:

1) To be an appealable "decision", there must be some exercise of authority under the legislation that relates to a subsection of section 99.
2) "While a letter may, indeed, communicate a decision that is appealable under the *Act*, it may also convey information or decisions that are not appealable. Thus, as noted by the Director, it is the contents of a letter that must be examined to determine if there are any decisions that have been made and are, therefore, appealable" (paragraph 70).
3) The Board should consider the nature of the decision and the legislation at issue, and not decline its jurisdiction on a "purely formal or technical basis" (paragraph 68).

[39] Further, the Board is mindful of Justice Groberman's finding in *Unifor* that section 99 is intended to comprehensively enumerate virtually all of the various types of substantive decisions that are made under the *Act*.

[40] The Panel has reviewed the September Letter and finds that the only substantive decision in the letter is the extension of the timelines previously established by the Original Decision. The remaining content is simply referring back to the requirements of the Original Decision for context, providing explanation for the letter, and providing legislative authority. The list of agencies to be given notice in the September Letter, is identical to the list in the Ministry's January 19, 2017 letter, which was incorporated into the Original Decision.

[41] In the Original Decision, the decision-maker exercised the Director's authority to establish requirements for specifying "a time by which a discharger that submits an application … [for a permit] must" provide certain information, give notice and post the application under section 33(3) of the *OMRR*. That is one of the exercises of discretion that was appealable in the Original Decision. The September Letter is simply an exercise of the same discretion to extend the original dates. While the change in timelines is a minor change to the Original Decision, it is a change nonetheless. As such, it is also appealable to the Board.

[42] In light of the limited scope of what may be appealed in the September Letter, the Panel finds that the new appeal does not render the existing appeal (of the Original Decision) moot.

2. Whether the appeal and/or the application for a stay ought to be dismissed on the grounds that they will be a "relitigation" of the existing appeal and/or the Stay Decision.

The Director's submissions

a) The entire appeal is an attempt to relitigate issues in the original appeal

[43] The Director submits that the new appeal violates the principle of law *nemo debet bis vexari pro eadem causa*; i.e., that nobody should be vexed twice in respect of the same cause.

[44] The Director compares the Notice of Appeal filed against the Original Decision and the Notice of Appeal filed against the September Letter. He submits that there are only two minor differences in the allegations set out in Revolution's new appeal and its existing appeal. The new allegations are that the Director acted arbitrarily and is abusing the process of the Board. The Director submits that this is evidence that the current appeal is an attempt to relitigate the same issues that are already being litigated by Revolution in the existing appeal.

b) The present appeal is an abuse of process

[45] The Director notes that section 31(c) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, gives the Board the power to dismiss all or part of an appeal if the Board determines that it "gives rise to an abuse of process".

[46] The Director notes that the courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. In *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, [2003] 3 S.C.R. 77 [*CUPE*], the Court states at paragraphs 37-38 as follows:

> 37. In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would … bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, *per* Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:
>
> > The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).
> >
> > One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined.
>
> As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. … This has resulted in some criticism, on

> the ground that the doctrine of abuse of process by relitigation is in effect non-mutual issue estoppel by another name without the important qualifications recognized by the American courts as part and parcel of the general doctrine of non-mutual issue estoppel (Watson, *supra*, at pp. 624-25).
>
> 38. It is true that the doctrine of abuse of process has been extended beyond the strict parameters of *res judicata* while borrowing much of its rationales and some of its constraints. It is said to be more of an adjunct doctrine, defined in reaction to the settled rules of issue estoppel and cause of action estoppel, than an independent one (Lange, *supra*, at p. 344). The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (Lange, *supra*, at pp. 347-48):
>
> > The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.
> >
> > [Court's emphasis]

[47] The Director submits that the current appeal "eviscerates" the policies that give rise to the Board's discretion to prevent its process from being abused, namely:

- there will be no end to the litigation;
- the Director has been twice vexed by the same cause;
- the Director will arguably expend twice as much resources litigating the new appeal;
- the Board will, arguably, expend twice as much resources in adjudicating the new appeal;
- the integrity of the administrative appeal system is jeopardized by a lack of respect towards, and compliance with, a decision of the Board;
- the risk of inconsistent results by the Board is very much alive; and
- there will be no finality.

[48] The Director, therefore, submits that this new appeal is an example of what the doctrine of abuse of process is meant to prevent.

[49] Further, or in the alternative, the Director submits that the new application for a stay falls into the same concern with relitigation; in essence, it amounts to a relitigation of the Stay Decision.

[50] The Director submits that Revolution is trying to circumvent the findings and conclusions of the Board set out in the Stay Decision. Revolution's new stay

application "is a further attempt to have the Board revisit its Prior Stay Decision and it has the effect of impugning the authority of the Board in the minds of reasonable observers, doing further violence to the policies that form the basis of the doctrine of abuse of process."

[51] Alternatively, the Director submits that the Board is *functus officio* the new stay application, having already exercised its jurisdiction to determine whether a stay of the Original Decision was warranted.

[52] In the further alternative, the Director submits that the new stay application is a collateral attack on the Stay Decision. The Director notes that, in its submissions on its new stay application, Revolution takes issue with the Board's findings in the Stay Decision, and that the Board "ignored [a] fact" and that "the conclusion reached by the Board does not follow from the premise" postulated by the Board. The Director argues that, if Revolution was dissatisfied with the Stay Decision, the proper remedy was for it to seek judicial review.

[53] The Director notes that the most striking evidence that the new stay application is an attempt to relitigate the Stay Decision is that the same affidavit of Mr. McRae, relied upon by Revolution in its application for a stay of the Original Decision, is adduced and relied upon to support Revolution's present application. The only additional evidence adduced in support of the present application is an affidavit from Ms. Pepin, legal assistant with the law firm representing Revolution in this appeal, attaching "what is supposed to be a rebuttal expert report commissioned for the purposes of the Pending Appeal … which is said to 'prove' that the appellant discharges no waste" under the *Act* (the September 11, 2017 rebuttal expert report by GSI Environmental). The Director submits that this report is irrelevant to the issue of the stay, and that the opinions contained in the report are not supported by factual evidence.

[54] The Director further submits that the Board was "alive" to the fact that a hearing was scheduled on the existing appeal when it issued the Stay Decision, and was "alive" to the fact that, if the Board denied a stay, then Revolution would have to take certain steps under the Original Decision and that those steps were the subject of its appeal. It nonetheless denied the stay. Revolution's recourse was to judicially review that decision.

[55] In conclusion, the Director argues that the following quote from *Telus Communications Inc. v. Telecommunications Workers Union*, 2005 BCSC 264 applies to Revolution's new stay application:

> 56. It seems to me that the Union [the appellant], dissatisfied with the ruling of one individual in the Chair, and deciding not to appeal that decision, chose instead to re-litigate the point through the next individual in the Chair. This is not a satisfactory way to manage the grievance process, including the process of appeals. …. In my opinion, it was an abuse of process for the dispute between the parties to be re-determined by a second identical application to the Chair.

c) Conclusion

[56] For all of the reasons above, the Director submits that the appeal of the September Letter and/or the application for a stay of the September Letter ought to be dismissed.

Revolution's submissions

[57] Revolution submits that its appeal of the September Letter is not an attempt to relitigate the issues in the existing appeal. It submits that "one cannot relitigate issues that have not yet been decided." To the extent that the issues overlap, it submits that the two appeals may be heard together.

[58] Similarly, Revolution submits that hearing the appeal of the September Letter is not an abuse of process. It argues that, as noted by the Director in his submissions, the doctrine of abuse of process may prevent a party from litigating issues that have been decided against it where the strict requirements of issue estoppel are not met. The first appeal (2017-EMA-004) has not been decided against Revolution. Therefore, the second appeal cannot be a "relitigation".

[59] Regarding the allegation that the present stay application is a relitigation of the Stay Decision, Revolution responds that, in the Stay Decision, the Board could not, and did not, address whether the September Letter should be stayed as the September Letter had not been issued. For this same reason, the Board cannot be *functus officio*, as it has not yet exercised any jurisdiction in the new appeal.

[60] Regarding the argument that the present stay application is either a collateral attack on the Stay Decision, or constitutes an abuse of process, Revolution argues that it would only be a collateral attack if it were essential to the applicant's argument that the former decision be ignored or set aside. Revolution submits that this is not the case.

[61] Moreover, Revolution submits that the circumstances have changed since the Stay Decision was released in June, and that new evidence is available. For instance, Revolution notes that, at the time of the Stay Decision, there was no evidence that the Director would take action against Revolution for non-compliance; however, the very fact that the September Letter imposed new compliance dates provides that evidence. Revolution submits that this material change of circumstances is a full answer to the Director's claim of an abuse of process.

[62] In addition to this change in circumstance, Revolution submits that there is also new evidence. First, there is now another decision under appeal. Second, there is an expert report by GSI Environmental.

[63] Revolution submits that the September Letter is a new decision and a new development that warrants a fresh assessment of the circumstances. Further, the application for a stay of the September Letter ought to be decided by the Board in the usual course.

The Panel's findings

[64] The Panel finds that acceptance of the new appeal does not constitute an abuse of process. There will be no relitigation. The Board has found that the decision under appeal in the September Letter is the extension of the timelines only. Revolution's extensive grounds for appeal, which, as noted by the Director, essentially duplicate the grounds in its existing appeal, can be read down such that they only apply to the appealable decision in the new appeal: the extended timelines.

[65] Further, where there are two related appeals, the Board's practice is to join them for the purposes of a hearing. This is done to address many of the policy issues identified by the Director such as duplication in processes, resources and expenditures. Accordingly, the Panel finds that accepting the new appeal of the decision to extend the timelines established in the Original Decision does not constitute an abuse of process, or violate any of the other legal doctrines identified by the Director. However, the same cannot be said for the stay application.

[66] While Revolution submits that the September Letter is a "new decision" and a "new development" that warrants a fresh assessment of the circumstances, and that the application for a stay ought to be decided by the Board in the usual course, the Panel disagrees. The Panel finds that Revolution's application for a stay of the timelines would result in a relitigation of the Stay Decision and is *res judicata* the Board.

[67] The Panel finds that, when the Board refused to grant a stay of the Original Decision, it considered the material or substantive elements of the Original Decision (i.e., the posting and notice requirements). It is apparent from the Stay Decision that the Board was aware that, when the voluntary stay ended on August 31st, the substantive elements of the Original Decision would be in force/take effect. The Board specifically noted the voluntary stay in paragraph 117 of the Stay Decision, and when it ended.

[68] The Board was also aware that there would be a gap between when the voluntary stay ended and when a decision on the merits of the appeal may be issued. It stated at paragraph 114:

> 114. The Panel finds that an interim stay until the appeal is determined would not be for "a few short weeks" as suggested by the Director. The Board's experience is that appeals of this nature may raise complex issues of law and fact, and it may take several months after the voluntary stay ends on August 31, 2017 before a decision on the merits is rendered. [Emphasis added]

[69] It is also evident from the Stay Decision that the Board considered Revolution's concerns with compliance and enforcement of the requirements established in the Original Decision pending a hearing and final decision on the merits of the appeal. Nevertheless, the Board was not persuaded by Revolution that a stay ought to be granted. Aware of all of these circumstances, the Board refused to stay the Original Decision pending a final decision on the merits of that appeal.

[70] Thus, the Panel finds that the substance of the present stay application, and the arguments provided by Revolution in support of the application, were considered by the Board in the Stay Decision.

[71] The Panel finds that the change in the timelines for compliance is not a material change in the factual or legal matrix considered by the Board in the Stay Decision. If fact, Revolution's concern with enforcement of the material or substantive elements of the Original Decision, which were not changed by the September Letter, was the main reason for Revolution's original stay application. This new application amounts to an attempt to have a "second kick at the can" – an attempt to stay the material or substantive requirements in the Original Decision despite the fact that the September Letter just amends/extends the dates for compliance with those existing requirements. It is an attempt to relitigate the subject matter of the Stay Decision under the guise of a new decision; a new decision which only adjusts the dates for compliance established in the Original Decision.

[72] Further, the Panel finds that the "new evidence" of GSI Environmental does not pertain to the subject matter of the September Letter; rather, its relevance, if any, is to the subject matter of the Original Decision (the report has been submitted as expert rebuttal evidence to be tendered during the hearing of the existing appeal commencing on October 23rd), and to the Board's findings in the Stay Decision. The appealable decision in the September Letter is simply an extension of the timelines established in the Original Decision. This minor change cannot open up the entire matter afresh. If the new timelines had not been provided, Revolution would have been in non-compliance with the Original Decision on September 1st. The extension simply provided Revolution with additional time to comply with the Original Decision, which the Board refused to stay.

[73] Accordingly, the Panel will not consider the application for a stay of the appealable decision contained in the September Letter; i.e., the timelines, on the grounds of *res judicata*. However, if all of all of the specific elements of *res judicata* have not been met in this case, the Panel finds, in the alternative, that the new stay application is an abuse of process.

DECISION

[74] The Panel has considered all the submissions and arguments made, whether or not they have been specifically referenced herein.

[75] For the reasons provided above:

- the Director's application to dismiss the appeal on the grounds of jurisdiction is denied;
- the appeal of the timelines in the September Letter will be heard at the same time as the appeal of the Original Decision, commencing on October 23, 2017; and
- Revolution's application for a stay is denied.

[76] As a final matter, the Panel notes that the September 22, 2017 deadline has now expired and Revolution will be in non-compliance if it has not complied with the posting and notice requirements of the Original Decision.

[77] Although it ought to have been prepared to comply with the Original Decision once the voluntary stay expired on August 31st, the Director provided a three-week extension to September 22, 2017. In recognition of the uncertainty that a stay application creates, but considering that Revolution had plenty of time prior to August 31st to prepare its documents in order to comply, the Panel will provide a short extension of the timelines in the September Letter. Pursuant to its authority under section 103(c) of the *Act*, the timelines in the September Letter are extended to **Wednesday, October 4, 2017.**

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

September 27, 2017