



# Environmental Appeal Board

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## **APPEAL NO. 2002-HEA-026**

In the matter of an appeal under section 8(4) of the *Health Act*, R.S.B.C. 1996, c. 179.

**BETWEEN:** Word of Mouth Construction Ltd. **APPELLANT**

**AND:** Chief Environmental Health Officer **RESPONDENT**

**BEFORE:** A Panel of the Environmental Appeal Board  
Tracey Cook, Panel Chair

**DATE:** Conducted by way of written submissions  
concluding October 14, 2002

**APPEARING:** For the Appellant: L. John Alexander, Counsel  
For the Respondent: Robert Macquisten, Counsel

### **PRELIMINARY ISSUE – JURISDICTION**

On September 11, 2002, Word of Mouth Construction Ltd. filed an appeal against the August 23, 2002 decision of Gary Gibson, Chief Environmental Health Officer (the "EHO"), to cancel six sewage disposal permits.

On September 16, 2002, the Board advised the Appellant that it could not accept the appeal because section 8(4) of the *Health Act* (the "*Act*") does not grant the Board jurisdiction to hear an appeal from a permit cancellation.

On September 23, 2002, the Appellant requested an opportunity to make written submissions to the Board on the question of jurisdiction.

This decision solely addresses the jurisdictional issue raised by the Appellant's Notice of Appeal.

### **BACKGROUND**

On July 8, 2002, six sewage disposal permits were issued for Lots 4, 5, 7, 8, 11, and 12, Block 1, Section 13, Range 1 West, North Saanich District, Plan 2276, to Bullock Bauer Associates Ltd., agents for the Appellant.

On August 23, 2002, Bullock Bauer received a letter from the EHO indicating that the permits had been cancelled. The letter reads:

We have further reviewed the information submitted with the Sewage Disposal Applications for the above properties and believe that information missing from the proposal justifies a reassessment of these sites. In particular, the Site Investigation Reports lack details on depth of soil to the water table, as well as detailed information on soil conditions found in the four-foot inspection holes. In addition, the depth of soil to hardpan does not coincide with our findings on this site, nor agree with our past experience with this area.

For these reasons, the...permits...have been cancelled....

If acceptable soil conditions and depths can be determined, we might be in a position to entertain further proposals, including winter assessments of water tables, in the future....

On September 11, 2002, Bullock Bauer submitted the Notice of Appeal at issue, on behalf of the Appellant, appealing the cancellations on the grounds that the *Act* and *Sewage Disposal Regulation*, B.C. Reg. 411/85 (the "*Regulation*") do not give the EHO authority to cancel valid permits.

The Appellant argues that the Board has jurisdiction over the appeal.

## ISSUE

The question before the Board is whether the EHO's August 23, 2002 decision to cancel the permits is a decision that may be appealed to the Board.

## RELEVANT LEGISLATION

Section 8(4) of the *Act* states:

If a person is aggrieved by the **issue or the refusal** of a permit for a sewage disposal system under a regulation made under subsection (2)(m), the person may appeal that ruling to the Environmental Appeal Board established under section 11 of the *Environment Management Act* within 30 days of the ruling. [emphasis added]

## DISCUSSION AND ANALYSIS

The Appellant submits that section 8(4) of the *Act* gives the Board a wide ambit of appellate authority. The Appellant cites *Minister of Health v. Environmental Appeal Board and Mountain Pacific Investment Ltd.* [1996] B.C.J. No. 1531 (S.C.) (Q.L.) (hereinafter *Mountain Pacific*) as authority for this submission. In *Mountain Pacific*, the Court concluded that the legislature intended to confer on the Board a wide appellate authority to deal with appeals from any person aggrieved by the issue or the refusal of a permit. Essentially, the Appellant submits that the issue and subsequent cancellation of a permit should be interpreted together, because together, in substance, they constitute a "refusal."

In the alternative, the Appellant submits that it applied for the a sewage disposal permit and, "[it] either has one or it does not. If it has a permit, it is aggrieved by the issue of that permit as a result of the action or decision of the EHO on August

23, 2002. If it does not have a permit, then it is aggrieved by the refusal of that permit." In any event, the Appellant submits that the Board should not get caught up in semantics, and that the Board must have jurisdiction over permit cancellations because otherwise the result is unfair.

Further, the Appellant submits that the substance of the decision to cancel the permits involves technical environmental issues that are appropriate for the Board to deal with because of its expertise and familiarity with those issues. The Appellant also submits that if the Board does not have jurisdiction over cancellations, the Appellant's only recourse is judicial review, which has a much narrower standard of review than an appeal to the Board on the merits.

Finally, the Appellant submits that if the Board declines jurisdiction, it will create an avenue for "abuse of system" by providing the EHO with a mechanism to refuse permits with "no right of appeal." The Appellant submits that a literal interpretation of section 8(4) of the *Act* means that every decision to refuse a permit could be made unappealable, simply by the issuance of every permit requested, and then the cancellation of those permits.

The EHO responds that section 8(4) of the *Act* very clearly limits the Board's jurisdiction to only the issuance or refusal of permits. In this case, the permits were issued and then cancelled as a result of incomplete or inaccurate information in the application. The EHO argues that this situation does not fit within either category of decision described in section 8(4) of the *Act*.

Finally, the EHO states that the Appellant's argument that a literal interpretation of section 8(4) may be used to make decisions "unappealable" is unfounded and misguided. The EHO submits that decision-makers must act in good faith and are subject to the rules of natural justice and procedural fairness. The EHO submits that, in this case, the Vancouver Island Health Authority is not attempting to circumvent the Board or deny the Appellant its rights. The EHO submits that he is fully prepared to review new applications for the permits.

Regarding available remedies, the EHO submits that the Appellant is not without a remedy because all it has to do is re-apply for the sewage disposal permits with complete and accurate applications. The EHO would then render a decision on whether the permits should be issued, and, should the permits be refused, the Appellant can then avail itself of the Board's jurisdiction.

#### *The Board's Findings*

Nothing in law requires that the decision to cancel a permit must be appealable to the Board. The Board notes that *Principles of Administrative Law*, 3<sup>rd</sup> Edition, by Jones and de Villars, states at page 528:

There is no legal or constitutional requirement that an appeal should exist from any decision made by a statutory delegate...[there are] numerous examples where legislation has made no provision for an appeal whether to the courts or to another step in the administrative hierarchy...

Thus, the Appellant has no inherent "right" to appeal a permit cancellation unless the legislature has established that right. In this case, the legislature has set out two categories of decisions that may be appealed to the Board: the issuance or the refusal of a permit. The *Act* is silent about whether the cancellation of a permit is an appealable decision. For the Appellant's appeal to be accepted as within the Board's jurisdiction, the Board must be able to interpret section 8(4) to include a permit cancellation as a "refusal."

The *Oxford English Dictionary* provides the following useful definitions:

"refuse" – to not grant a request;

"cancel" – to withdraw or revoke a previous arrangement.

Applying the general principle of statutory interpretation that words in a statute are interpreted as their everyday meaning, it is apparent that refusals and cancellations are two different things.

The next question is whether those words should not be interpreted in their ordinary, grammatical sense. The Board finds there is no valid reason to deviate from the ordinary meaning of "refusal" or "cancel". To the contrary, there is every reason not to do so.

First, the *Regulation* which expressly grants the EHO the power to issue a sewage disposal permit (and the converse - the refusal to issue a permit) sets out a number of other powers which may be exercised by an EHO, including the power to cancel a permit. Section 3(6) of the *Regulation* expressly authorizes an EHO to cancel a permit in certain circumstances. It states: "A violation of a condition of a permit issued under this section operates to confer a right upon the grantor of it to cancel the permit."

Furthermore, section 4 requires authorization from an EHO prior to the actual operation of a sewage system. Should the EHO refuse to authorize the system, the *Act* does not provide for an appeal to the Board on this decision. Also, section 3.1(3) allows an EHO to order additional inspections of a sewage system when it is in the EHO's opinion that more inspections are required to determine the system's level of protection. A fee of \$100 must be paid for each additional inspection. Additional inspection orders are not appealable. Further, under section 3(5), the EHO may impose terms and conditions on permits, in addition to those listed in subsection 3(4). There is no right of appeal to the Board from these decisions.

Therefore, despite a number of express provisions in the *Regulation*, which can have serious consequences for an applicant or permittee, the legislature has not provided a corresponding right of appeal in the *Act*. The potential impact of the administrative decision on a person does not appear to be the sole rationale for providing a right of appeal in this particular legislation.

Second, there are numerous examples of appeal provisions in other statutes, which contain language to capture the cancellation of a permit, as well as the issuance and refusal of a permit. The absence of such language in the *Act* is a further

indication that the legislature did not intend to include sewage disposal permit cancellations in the scope of the Board's jurisdiction.

For example, the *Waste Management Act* provides an appeal from a "decision" defined by section 43 as:

- (a) the making of an order,
- (b) the imposition of a requirement,
- (c) an exercise of a power,
- (d) the issue, amendment, renewal, suspension, refusal or **cancellation of a permit**, approval or operational certificate, and
- (e) the inclusion in any order, permit, approval or operational certificate of any requirement or condition. [emphasis added]

Section 6(1) of the *Commercial River Rafting Safety Act* states:

If the registrar suspends or **cancel**s a registration, licence or permit or refuses to register or issue a licence, the person may appeal to the Environmental Appeal Board established under the *Environment Management Act*. [emphasis added]

(Additional examples include: the *Medicare Protection Act*, section 42; the *Community Care Facility Act*, section 15; and the *Mineral Tenure Act*, section 10.)

The fact that there are a variety of appeal provisions that could have been, but were not used to ensure that permit cancellations are appealable to the Board, is a further indication that the legislature did not intend cancellations to be appealable.

While the Court in *Mountain Pacific* found that the Board has a wide ambit of appellate authority, the Board's authority does not extend beyond the powers set out in the statute. In this case, the Board finds that its authority under section 8(4) of the *Act* does not cover permit cancellations. While this may have an unfortunate result in this case, the Board finds that to interpret section 8(4) of the *Act* to include cancellations would be to add words to that section. Although a purposive approach to interpretation allows one to read a provision in its broader context, it is improper to extend this reading to adding words, deleting words, or otherwise rewriting a provision (Sullivan, Ruth. *Driedger on the Construction of Statutes*, Third Edition, Butterworths Canada Ltd. 1994, at page 103).

Based on these principles of statutory interpretation, the Board is unable to interpret "cancellation" as an appealable decision within section 8(4).

Further, the Board finds that the Appellant's argument that an EHO could use cancellations to circumvent the appeal process rests upon an assumption of bad faith on the part of the public service. In the context of administrative law, the courts have articulated a presumption in favour of the due execution by public officials of their duty. In the dissent of *Taku River v. Ringstad et al.* [2002] B.C.J.

No. 155 (C.A.) (Q.L.), Southin J.A. paraphrases comments in *MacMillan Bloedel v. Galiano Island* (1995) 10 B.C.L.R. 3(d) 121 (C.A.). In that case, Southin J.A. stated that it is presumed that the legislature does not intend to “confer a power to act contrary to the rules of procedural fairness or to act corruptly.” The Supreme Court expressed a similar presumption, called the presumption of regularity, in *Ellis-Don v. Ontario (Labour Relations Board)* [2001] 1 S.C.R. 221. In that case, it was held that reviewing courts can presume that administrative decision-makers acted appropriately and in accordance with the law, absent evidence to the contrary. Therefore, the Board finds that when interpreting a section of the legislation it is improper to assume that an EHO would intentionally circumvent the appeal process by issuing and then cancelling a permit, instead of “refusing” it.

Finally, the Board finds that the Appellant is not without a recourse in this situation. As argued by the EHO, the Appellant may re-apply for the permits – or complete its current application – and appeal to the Board if the permits are refused. Alternatively, the Appellant may wish to apply for a judicial review of the EHO’s decision.

## **DECISION**

In making its decision, the Board has carefully considered the submissions of the parties, whether or not they have been specifically reiterated here. The Board finds that it has no jurisdiction over this matter.

Accordingly, the appeal is rejected.

Tracey Cook, Panel Chair  
Environmental Appeal Board

October 31, 2002