Province of British Columbia

Environmental Appeal Board

Fourth Floor 747 Fort Street
Victoria British Columbia
Telephone: (250) 387-3464
Facsimile: (250) 356-9923

Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1

APPEAL NO. 2004-EMA-002(a)

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

BETWEEN:	Squamish Terminals Ltd.	**APPELLANT**
AND:	Director of Waste Management	**RESPONDENT**
AND:	District of Squamish	**THIRD PARTY**

BEFORE: A Panel of the Environmental Appeal Board
Alan Andison, Chair

DATE: Conducted by way of written submissions concluding on December 10, 2004

APPEARING:

For the Appellant:	John A. McLachlan, Counsel
	John H. Shevchuk, Counsel
For the Respondent:	Nancy E. Brown, Counsel
	Elizabeth J. Rowbotham, Counsel
For the Third Party:	Reece E. Harding, Counsel

PRELIMINARY ISSUE OF STANDING

Squamish Terminals Ltd. ("Squamish Terminals") appealed the September 16, 2004 decision of Alan McCammon, Deputy Director of Waste Management (the "Deputy Director"), Ministry of Water, Land and Air Protection (the "Ministry"), to issue an approval in principle (the "AIP") to the District of Squamish (the "District").

Squamish Terminals is not named in the AIP; it owns property near the contaminated site that is the subject of the AIP.

In a letter dated November 5, 2004, the Environmental Appeal Board raised the issue of Squamish Terminals' standing to appeal the AIP as a result of the Board's recent decision on standing in *427958 BC Ltd. (dba the Super Save Group of Companies) v. BC Hydro and Power Authority,* (Appeal No. 2004-WAS-007(a), November 2, 2004) (hereinafter *Super Save*).

This preliminary issue of Squamish Terminals' standing was heard by way of written submissions.

BACKGROUND

The AIP was issued pursuant to section 53(1) of the *Environmental Management Act* (the *"Act"*) and constitutes the Deputy Director's authorization for the District to implement a plan to remediate a contaminated site comprised of two parcels of land and waterlots legally described as:

> P.I.D. 008-606-153, Block B, District Lots 4618, 5717, 6042, 7134, Plan 13542 and P.I.D. 007-774-010, Lot G, District Lots 486, 4271, 5717, 6042, 7134, Plan 14953.
>
> (the "Site")

The Site is located in the vicinity of the foot of Galbraith Street in Squamish, British Columbia. The Site, and some of the surrounding lands and adjacent water bodies, are contaminated with mercury. The contamination was the result of some of the processes used by a chlor-alkali plant (the "Plant") that operated on part of the Site between 1964 and 1991. Nexen Inc. ("Nexen"), formerly known as Canadian Occidental Petroleum Ltd., was one of the ground tenants and former operators of the Plant. British Columbia Railway Company, BC Rail Partnership, BC Rail Ltd. and BCR Properties Ltd. (referred to collectively as "BC Rail") formerly owned the Site: it leased the land to the former owners and operators of the Plant. The District now owns the Site.

The contamination from the Plant became the subject of regulatory action in 1999 when Remediation Order OS-16149 was issued to Canadian Occidental Petroleum Ltd. (now Nexen). It was issued to address contamination of the Site and adjacent properties and waterbodies.

Squamish Terminals is a deep-sea terminal located at the northerly tip of Howe Sound between the Cattermole Channel and the Squamish Estuary, in close proximity to the western quarter of the Site. It was not a party to the Remediation Order but made submissions to the Ministry as an interested party between 1999 and 2004. In its submissions to the Ministry regarding the Remediation Order, Squamish Terminals expressed concerns about the scope of the remediation, the appropriate level of monitoring and the posting of security for costs of off-site contamination. Its dredge pockets are located directly adjacent to the lands and waterlots that are now the subject of the AIP.

The AIP

As noted above, the District is now the owner of the Site. Transfer of title from BC Rail to the District was the result of lengthy negotiations involving the District, the Ministry of Transportation, Nexen and BC Rail. The District's agreement to take title to the Site was subject to the granting of the AIP by the Ministry. The transfer agreement stipulated that this condition was for the benefit of the District and the Province as represented by the Minister of Transportation.

On March 8, 2004, URS Canada Inc. (Consulting Engineers and Architects) applied for an AIP for the Site on behalf of the District in contemplation of the proposed transfer of the subject lands, and other adjacent property, to the District. As part of Nexen's departure from the Site, certain protocols for maintenance and

monitoring were developed addressing on-site excavation and construction, dredging and sediment management, and on-going monitoring. Draft protocols were circulated to various stakeholders.

The Deputy Director issued the AIP to the District on September 16, 2004. A copy of the AIP was provided to Squamish Terminals, as one of the stakeholders on the Stakeholder Distribution List.

The AIP applies only to the Site - not to the adjacent properties or waterbodies defined in the Remediation Order. It is valid for Commercial/Industrial land use and Marine Aquatic Life water use. Residential land use was permitted subject to written approval of the Deputy Director, upon confirmation that risks to human health and the environment were at acceptable low levels.

The AIP included conditions requiring that all known or suspect contaminated soil, water, groundwater and sediment remaining on the Site be managed in accordance with three risk management plans that were developed by URS Canada Inc.

The Appeal

On October 13, 2004, Squamish Terminals appealed the AIP. It seeks to have the AIP amended to include additional terms to require plans to characterize and delineate the off-site residual mercury contamination in the sediment surrounding its property; to require dredging plans to support future dredging activity or other in-water works; and to require Nexen to post financial security to provide funds to compensate for the further treatment, removal and management of the off-site contamination.

The Standing Issue

In a letter dated November 5, 2004, the Board invited submissions from all of the parties on the issue of Squamish Terminals' standing as a "person aggrieved" as defined by the *Environmental Management Act*. The Board raised the standing issue as a result of its recent decision in *Super Save*, a case involving an approval in principle issued to BC Hydro in which Super Save's standing to appeal was denied. Like the present case, in *Super Save*, the appellant (Super Save) owned an adjacent property and was concerned that the contamination to be remediated under the approval in principle and Remedial Action Plan did not include adjacent owners who were, or were likely to be, affected by the contamination.

In that case, the Board found that "the AIP does not prejudicially affect Super Save's interests, and Super Save cannot properly be characterized as a 'person aggrieved' by the AIP."[1] The Board's reasoning is summarized as follows:

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[1] It should be noted that the approval in principle and appeal provisions at issue in *Super Save* were under the *Waste Management Act*. The standing provision under section 44(1) of the *Waste Management* stated:

> Subject to this part, a person aggrieved by a decision of a manager, director or district director may appeal the decision to the appeal board.

On July 7, 2004, the *Waste Management Act* was repealed and the *Environmental Management Act came* into force. However, the standing provision in section 100(1) of the *Environmental*

- Although the Deputy Director has the discretion under section 27.6(1)(c) of the *Act* [*Waste Management Act*] to include conditions in an approval in principle, there is no express statutory requirement for him to include conditions that are beyond the scope of the Remedial Action Plan, such as the remediation of adjacent contaminated properties that may or may not have been contaminated as a result of migration from the properties covered by the Remedial Action Plan.
- Super Save is not aggrieved by anything that is in the AIP or the Remedial Action Plan, nor has it provided evidence or information indicating that it will suffer prejudice as a result of the remediation work that will be carried out.
- Regardless of whether the Deputy Director decided to issue or refuse the AIP, Super Save's property would not have been remediated. A refusal of the AIP would have simply resulted in the Remedial Action Plan not being implemented. It would not have led to the remediation of Super Save's property.
- Section 27.6(6) of the *Act* states that the Deputy Director "may issue an approval in principle… for part of a contaminated site." Therefore, even if Super Save's lands were contaminated by migrating contaminants originating from the BC Hydro Properties, the Deputy Director is not precluded from issuing an approval in principle for part of a contaminated site.
- The power to issue an approval in principle must be considered in light of the purposes of Part 4 of the *Act*, which include the expeditious remediation of contaminated sites. Even if Super Save's property was contaminated by migrating contaminants, refusing to issue the AIP until after Super Save's concerns are resolved would delay the remediation on the BC Hydro Properties.
- Where the AIP endorses a remediation plan that is the product of years of negotiations with government and amongst the owners of contaminated lands, appeals by persons who are not subject to the AIP or are not party to the remediation proposal may unreasonably delay the remediation of contaminated sites, and may discourage private parties from negotiating ways to remediate contaminated sites. Legitimate AIPs should not be frustrated by persons who have grievances that go beyond the terms and requirements of the AIP.
- Should circumstances change or new information arise in the future, the Deputy Director may exercise his discretion under the *Act* to require additional remedial action to address the contamination on Super Save's property.

In the present case, Squamish Terminals submits that it is a "person aggrieved" within the meaning of the *Act* and, therefore, has standing to appeal. It argues that the findings in *Super Save* are distinguishable and should not be applied in this case.

Management Act is very similar to that in the *Waste Management Act*, and uses the same words "a person aggrieved."

The Deputy Director and the District submit that Squamish Terminals does not have standing to appeal the AIP as it is not a "person aggrieved."

ISSUE

The preliminary issue to be determined in this matter is whether Squamish Terminals is an "aggrieved person" for the purposes of bringing an appeal of the AIP under section 100(1) of the *Act.* This main issue has been broken down into two sub issues:

1. What is the test to be applied to determine whether a person is "aggrieved" for the purposes of having standing to appeal under section 100(1) of the *Act*?
2. Does Squamish Terminals meet the test?

RELEVANT LEGISLATION

The relevant provisions of the *Act* are as follows:

Definition of "decision"

99 For the purpose of this Division, "decision" means

(a) making of an order,

(b) imposing a requirement,

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

(d) issuing, amending, renewing, suspending, refusing or canceling a permit, approval or operational certificate,

(e) including a requirement or a condition in any 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) have not been performed.

Appeals to Environmental Appeal Board

100 (1) A person aggrieved by a decision of a director or district director may appeal the decision to the appeal board.

Approvals in principle and certificates of compliance

53 (1) On application by a responsible person, a director, in accordance with the regulations, may issue an approval in principle stating that a remediation plan for a contaminated site

(a) has been reviewed by the director,

(b) has been approved by the director, and

(c) may be implemented in accordance with conditions specified by the director.

Other relevant legislation is cited in the discussion and analysis, below.

DISCUSSION AND ANALYSIS

1. What is the test to be applied to determine whether a person is "aggrieved" for the purposes of having standing to appeal under section 100(1) of the *Act*?

The test applied by the Board in determining whether an appellant is a "person aggrieved" was established under the predecessor standing provision set out in section 44(1) of the *Waste Management Act.* The test is "whether the person has a genuine grievance because an order has been made which prejudicially affects his or her interests." In *Super Save*, the Board confirmed the applicability of that test to questions of standing to appeal an approval in principle under the *Waste Management Act*.

Squamish Terminals argues that the definition of "person aggrieved" that has been applied by the Board in the past is too restrictive considering the objects of the *Act*. It cites a number of British Columbia Supreme Court and Court of Appeal decisions confirming that a broad and liberal interpretation should be applied to the term "person aggrieved", and that the term should be interpreted within the context of, and in order to give effect to, the specific legislation.

In addition, Squamish Terminals referred to the BC Court of Appeal's decision in *Matcom Investments Ltd. v. British Columbia (Liquor Control and Licensing Branch)*, [1987] B.C.J. No. 1660 (QL) (hereinafter *Matcom*). The standing provision considered in *Matcom* was "a person aggrieved", as set out in section 31(2) of the *Liquor Control and Licensing Act*, R.S.B.C. 1979, c. 237. The facts in *Matcom* are as follows.

Matcom sought to appeal the decision of the General Manager, Liquor Control and Licensing Branch, to issue a liquor license to another neighbourhood public house. Matcom owned and operated a licensed public house and licensed hotel, and objected to the issuance of a further license on the ground that the public house was to be located within one mile of their operations, contrary to section 17(4)(f) of the *Liquor Control and Licensing Act Regulations,* B.C. Reg. 608/76. The Commercial Appeals Commission concluded that Matcom was not a "person aggrieved" by the decision of the General Manager, so had no standing to appeal.

The Court found that the Commission erred in its interpretation of the words "person aggrieved" and the application of the *Regulation*. In allowing the appeal, Madam Justice McLachlin (as she then was), said at page 6:

> In my opinion, "persons aggrieved" under the *Act* cannot be confined to persons who have been refused something which they had a right to demand. Such an interpretation runs counter to the intention of the legislature as expressed in ss 31(2) and 32(2)…
>
> In my opinion, the intention of the legislature was to give a general right of appeal to the Commission under s. 31(2) to persons with grievances or claims founded on the *Act* and Regulations…

> …[the appellants] have a right of appeal, not because they may suffer adverse economic consequences if the neighborhood pub is licensed, but rather because a benefit which the Regulations specifically give them has arguably been removed by a questionable decision.

Squamish Terminals also submits that, to establish that it is a person aggrieved, it need only show, on a balance of probabilities, that its interests *may* be affected.

The Deputy Director argues that this Panel should adopt a restrictive interpretation of the standing provision when the appeal is against an approval in principle. He submits that the policy reasons set out by the Board on page 9 of *Super Save*, apply with equal force to approvals in principle issued under the *Act*:

> Additionally, there are policy reasons for restricting access in appeals of AIP decisions. The Deputy Director's role is to review the remediation proposal and decide whether it should be implemented, bearing in mind that the proposal should be consistent with the purposes of Part 4 of the Act, including the protection of the environment and human health, as well as the expeditious remediation of contaminated sites. In cases such as this, where the AIP endorses a remediation plan that is the product of years of negotiations with government and amongst the owners of contaminated lands, appeals by persons who are not subject to the AIP or are not party to the remediation proposal may unreasonably delay the remediation of contaminated sites, and may discourage private parties from negotiating ways to remediate contaminated sites. Legitimate AIPs should not be frustrated by persons who have grievances that go beyond the terms and requirements of the AIP.

The District notes that the Court's decision in *Matcom* is not relevant to this case as it involves different legislation.

The Panel's Findings

The Panel is of the view that the test previously applied, i.e., whether the person has "a genuine grievance because an order has been made which prejudicially affects his or her interests", takes into consideration the context of the *Act*, and the provisions regarding remediation and approvals in principle.

As noted in *Super Save*, there are policy reasons for restricting standing in appeals of AIP decisions. The Deputy Director's role is to review the remediation proposal and decide whether it should be implemented, bearing in mind that the proposal should be consistent with the purposes of Part 4 of the *Act*, including the protection of the environment and human health, as well as the expeditious remediation of contaminated sites at the responsible parties' expense. Approvals in principle involve voluntary remediation and, in some cases such as the present one, may be the product of years of negotiations. Appeals by persons who are not subject to the approval in principle can add uncertainty, may unreasonably delay the remediation of contaminated sites, and may discourage private parties from negotiating ways to remediate contaminated sites or portions thereof. The Panel agrees with the Board in *Super Save* that "legitimate AIPs should not be frustrated by persons who have grievances that go beyond the terms and requirements of the AIP."

While the Panel is not legally bound by previous decisions of the Board, the courts have recognized that there is value in consistency of tribunal decisions, particularly where the facts and issues are very similar and the cases arise in close temporal proximity.

In the present case, the Panel finds that there are no compelling reasons to deviate from the approach taken in *Super Save*. In addition, the cases cited by Squamish Terminals are not persuasive in this context as they either deal with different legislation or, where they are previous decisions of this Board, they involved appeals of permits or remediation orders, not approvals in principle for voluntary remediation as in *Super Save* or the current case.

Although an appellant bears the onus of demonstrating that he/she is an aggrieved person under the *Act*, definitive proof of how they will be effected for purposes of standing is not required; it is sufficient if they disclose enough evidence to allow the Board to reasonably conclude that their interests are being prejudicially affected. This is consistent with the Board's decision in *Azreal v. Regional Waste Manager* (Appeal No. 2004-WAS-004(a)), [2004] B.C.E.A. No. 28 (QL) (B.C.E.A.B.) and in *Howe Sound Pulp and Paper Ltd. v. Deputy Director of Waste Management* (Appeal No. 98-WAS-05), [1998] B.C.E.A. No. 41, as confirmed by the Supreme Court in *Howe Sound Pulp and Paper Ltd. v. British Columbia (Environmental Appeal Board)*, [1999] B.C.J. No. 9798 (QL) (B.C.S.C.).

The Panel adopts the test as confirmed in its earlier decisions and finds that the appropriate test to use in this case is whether the Appellant has disclosed sufficient evidence to allow the Panel to reasonably conclude that Squamish Terminals has a genuine grievance because an order has been made which prejudicially affects its interests. When assessing the "grievance", the Board must consider whether the appeal will frustrate the goals/purposes of the legislation in relation to approvals in principle as set out in *Super Save*.

2. Does Squamish Terminals meet that test?

Squamish Terminals submits that its interests are prejudicially affected by what is contained in the AIP, and by what has not been included in the AIP. Therefore, it clearly fits within the definition of a "person aggrieved" under the *Act*.

There is no dispute that Squamish Terminals was first informed of the potential impact from contaminants originating from the Site on March 12 and 13, 1999 and has been recognized by the Ministry as a "stakeholder" in the remediation process since then. As a stakeholder, Squamish Terminals has been asked to provide, and has provided, feedback on proposed sampling and remediation programs, been involved and included in monthly technical meetings and has been copied on the written progress reports which were circulated to all persons interested in the remediation of the Site.

Squamish Terminals maintains that the implementation of the AIP in its present form will cause it to suffer financial hardship and will not adequately protect it from further migration of contamination from the Site. It alleges that mercury contamination has migrated from the Site to its adjacent dredge pockets, and submits that the conditions imposed in the risk management plans under the AIP

relating to dredging will require additional costs to be expended by Squamish Terminals in the course of its business operations.

It further submits that the lack of adequate monitoring of the off-site area and surrounding air quality could pose a hazard to the environment and to the employees of Squamish Terminals. Squamish Terminals submits that, without more comprehensive monitoring under the AIP, it will not be able to accurately determine if and when there has been further migration of contamination.

Squamish Terminals submits that the objects of the *Act*, as a whole, are to control, ameliorate and, where possible, eliminate the deleterious effects of pollution. Furthermore, the underlying principle of the *Act* is the governmental policy of "polluter pay" to properly allocate the financial burden of remediation to the parties responsible for the contamination. It submits that the failure of the Deputy Director to impose specific conditions in the AIP requiring continued monitoring and the posting of security for costs goes against the broad objects of the *Act*.

Squamish Terminals submits that this situation is similar to that of the appellant in *Matcom*. As noted earlier, *Matcom* involved an appeal made pursuant to the *Liquor Control and Licensing Act*. The appellants in that case objected to the issuance of a license to a competing licensed establishment on the grounds that the competing establishment was to be located within one mile of Matcom's operations, contrary to section 17(4)(f) of the *Regulation*, which reads:

> (4) A "D" License may be issued to establishments known as Neighbourhood Public Houses and the following regulations apply:
>
> ...
>
> (f) no licensed Neighbourhood Public House shall be located within one mile of another licensed Neighbourhood Public House or licensed hotel, except as approved by the general manager;

In granting the right to appeal from that approval, Madam Justice McLachlin said at page 6 that "Regulation 17(4)(f) gives the owners of licensed establishments within one mile of a proposed neighbourhood pub a benefit or right – the right not to have the pub licensed unless the General Manager gives his approval," and further, that the appellants had a right of appeal "because a benefit which the Regulations specifically give them has arguably been removed by a questionable decision."

Squamish Terminals submits that, in the present case, the Deputy Director's exercise of discretion <u>not</u> to include such terms and conditions in the AIP that would benefit it or protect Squamish Terminals' interests is a "denial of benefits" under the *Act* and accordingly can be said to "aggrieve" Squamish Terminals. It refers to sections 53(1), 48(2)(c) and 54(3)(d) of the *Act* and sections 47(3)(b), (e) and (f) the *Contaminated Sites Regulation*, B.C Reg. 375/96 in support of this assertion. It submits that these sections provide a statutory protection of its interests, both economic and environmental. Those provisions are as follows:

> **53** (1) On application by a responsible person, a director, in accordance with the regulations, may issue an approval in principle stating that a remediation plan for a contaminated site

(a) has been reviewed by the director,

(b) has been approved by the director, and

(c) may be implemented in accordance with conditions specified by the director.

48 (1) A director may issue a remediation order to any responsible person.

(2) A remediation order may require a person referred to in subsection (1) to do any or all of the following:

...

(c) give security, which may include real and personal property, in the amount and form the director specifies.

54 (3) A director may at any time during independent remediation by any person

...

(d) impose requirements that the director considers are reasonably necessary to achieve remediation.

Regulation

47 (3) When issuing an approval in principle under section 53(1) of the Act, a director may specify conditions for any or all of the following:

...

(b) risk assessment and risk management measures which may be required for part or all of a site for any reason;

...

(e) testing and monitoring to evaluate the quality and performance of any remediation measures;

...

(f) any financial security required by the director in accordance with section 48;

Squamish Terminals submits that it is inefficient to require Squamish Terminals to resort to other time consuming and costly remedies in order to further the objects of the *Act* when the same goals can be achieved through this appeal. While other remedies are available, it is precisely the denial of the benefits that could be accorded to it by the exercise of the Deputy Director's discretion in the approval in principle process, which qualifies Squamish Terminals as a "person aggrieved" under the *Act* in accordance with *Matcom*.

Finally, Squamish Terminals argues that it would be egregious to deny it a right of appeal at this stage where it has been involved as an interested stakeholder and has sought to have its concerns addressed over a number of years and where others, in similar factual situations, have been granted standing to appeal to the Board. For instance, in November of 1999, International Forest Products Ltd. ("Interfor"), who owned property immediately to the east of the Site, was able to

file an appeal against the Remediation Order OS-16149 that was issued to Canadian Occidental Petroleum Ltd. (now Nexen) in relation to the mercury contamination on the Site, adjacent lands and waterbodies.

Squamish Terminals also refers to a number of previous Board decisions where standing has been granted to parties who resided in close proximity to the subject site and sought amendments to permits or approvals issued to third parties.

The Deputy Director submits that Squamish Terminals is not a "person aggrieved," with respect to his decision to issue an AIP to the District. He notes that the AIP only applies to the Site, not to adjacent properties upon which Squamish Terminals is situated. He further notes that Squamish Terminals does not seek to have the AIP cancelled or rescinded; rather, it seeks to have the AIP amended to add additional conditions regarding sediment surrounding Squamish Terminals' property, which are not subject to the AIP, and to have Nexen, who is not a party to the AIP,

(a) pay for additional reports and monitoring, and

(b) to provide financial security for compensation of additional remediation costs that may be incurred in the future, in regard to the adjacent properties.

The Deputy Director submits that Squamish Terminals has not shown that any part of the remediation plan, which is the subject of the AIP, will cause it to suffer prejudice. Instead, Squamish Terminals says that it is *potentially* prejudiced by *potential* migration of the contamination, and by what is missing from the AIP and the remediation plan. The Deputy Director submits that compliance with the remediation plans endorsed in the AIP will not increase existing contamination or negatively impact Squamish Terminals' property or the environment.

Further, the Deputy Director submits that any previous participation of Squamish Terminals as a stakeholder is not determinative of its standing to appeal the AIP. In support of that proposition, he relies on *Dave Stevens v. Regional Waste Manager* (Appeal No. 2001-WAS-030, February 28, 2002), [2002] B.C.E.A. No. 9 (Q.L.) (hereinafter *Stevens*), where the Board held:

> Regardless of his previous participation in the permit approval process, the Board finds that Mr. Stevens must meet the test required under section 44 of the [Waste Management] Act, namely that he is a "person aggrieved."

The Deputy Director further submits that an approval in principle simply authorizes a responsible person to implement a remediation plan voluntarily submitted by that person. He states that appeals by third parties, whose lands are not negatively impacted by the approval in principle, may impede the remediation process. This is particularly so when alternative remedies, such as civil cost recovery proceedings, are provided in the *Act*.

The District submits that the appeal by Squamish Terminals must be dismissed for lack of standing because the objects of the *Act* support leaving the AIP in place, and not subjecting it to the inherent delay of the Board's appeal process or frustrating it by Squamish Terminals' requests for additional terms and conditions.

The District argues that Squamish Terminals' position defeats, rather than enhances, the purpose of section 53 of the *Act*. The District argues that it is clear from the Board's comments in *Super Save* regarding section 27.6(1) of the *Waste Management Act* (which is substantively similar to section 53(1) of the *Act*), that the purpose of section 53 of the *Act* is to promote the voluntary remediation of contaminated sites, and that subjecting the AIP to the delay inherent in the appeal process, and perhaps to judicial process, is contrary to the environmental remediation objectives of the *Act*.

The District further submits that the *Stevens* and *Super Save* decisions should be highly persuasive in this case. In particular, it refers to the Board's comments at page 9 of the *Super Save* decision and suggests that they are equally applicable to the current situation:

> … the Panel finds that, while Super Save may have a grievance, it is not one that directly arises from the content of the AIP, which prejudicially affects Super Save's interests. The Panel finds that, in issuing the AIP, the Deputy Director did not make a decision that prejudicially affects Super Save's interests. Rather, he made a decision that approves a plan to implement remediation on certain properties. While the Deputy Director may have been aware of the contamination on Super Save's property before he issued the AIP, he was not obligated to address that contamination in the AIP. Rather, he was required to consider whether he should approve the implementation of a proposed remediation plan for the BC Hydro Properties and the adjacent federal lands. The Panel finds that, by approving the plan, he did not prejudicially affect Super Save's interests.

The District argues that, given that the issues, facts and law are very similar in this appeal when compared with the *Super Save* decision, the Panel should follow the *Super Save* decision and create a body of authority which provides certainty to stakeholders throughout the Province when choosing to remediate contaminated land through an approval in principle.

Finally, the District submits that Squamish Terminals will not lose any substantive rights under the *Act* if it is denied standing to appeal. While the District concedes that Squamish Terminals may have a grievance, it argues that an appeal of the District's AIP is not the place for that potential grievance to be resolved. It notes that there are other remedies specifically available to Squamish Terminals under the *Act*, despite the terms of the AIP.

In addition, the District points to the terms of the AIP itself which states that the AIP is made without prejudice to the right of the Ministry to make orders or to require additional remedial measures as the Ministry may deem necessary as the remediation work progresses.

In reply, Squamish Terminals argues that its appeal is not contrary to the underlying purposes of the *Act* and that the relief sought does not interfere with the implementation of the AIP. Instead, its appeal serves to exemplify the *Act's* underlying purposes regarding environmental health and safety and to ensure that

those responsible for the contamination are held accountable. It argues that issuance of the AIP involves the exercise of discretion by the Deputy Director. It is *how* Squamish Terminals is affected by that failure to exercise his discretion that is properly the subject of the appeal; that is, has Squamish Terminals been "aggrieved" by the denial of the remedies sought through the AIP process.

Finally, in regard to the *Super Save* decision, Squamish Terminals submits that in the present case it is not seeking a cancellation of the AIP nor is it seeking a stay of proceedings. Therefore, Squamish Terminals argues that there is nothing in the appeal that will cause delay or that restricts the District from complying with the AIP and continuing to remediate the site.

The Panel's Findings

The Panel notes that any previous participation of Squamish Terminals as a stakeholder in the Remediation Order process is not determinative of its standing to appeal the AIP. Squamish Terminals must meet the test required under section 100(1) of the *Act*; namely, that it is a "person aggrieved" by the AIP.

Furthermore, the Panel does not agree with Squamish Terminals that the Board's acceptance of Interfor's appeal against the Remediation Order supports its standing to appeal the AIP. The issue of Interfor's standing was not raised prior to Interfor withdrawing its appeal and, therefore, there was no decision on that matter. Furthermore, in order to properly compare the two situations, a detailed factual analysis of the two situations would be required. Submissions have not been provided to this Panel that would allow such a comparison.

The question before the Panel is whether Squamish Terminals has "a genuine grievance" because the AIP "prejudicially affects" its interests. What is the "prejudice" being claimed in this case?

Squamish Terminals argues that it is prejudiced by the AIP because the AIP deprives Squamish Terminals of a benefit or right under the legislation. It submits that, in accordance with *Matcom*, it is clearly "aggrieved" and, therefore, has standing to appeal the AIP to the Board. The sections which it claims confer these benefits and rights are sections 53(1), 48(2)(c) and 54(3)(d) of the *Act*, and sections 47(3)(b), (e) and (f) the *Contaminated Sites Regulation*, B.C Reg. 375/96.

The Panel has carefully reviewed these provisions and the Court's decision in *Matcom*. The Panel notes that the referenced provisions provide the Deputy Director with the general authority to exercise his discretion to add conditions that he considers reasonably necessary to achieve remediation. While these conditions may ultimately benefit Squamish Terminals, they do not, in the Panel's view, confer a particular right or benefit on Squamish Terminals.

This is highlighted by the nature of the Deputy Director's discretion to issue approvals in principle. An approval in principle authorizes a responsible person to implement a remediation plan submitted by that responsible person. In the present case, the AIP authorizes implementation of a remediation plan that addresses the contamination on the Site. Although the Deputy Director has the discretion under section 53(1)(c) of the *Act* to include conditions in an approval in principle, there is no express statutory requirement for him to include the conditions requested by

Squamish Terminals in regard to off-site contamination, which are beyond the scope of the remediation plans for the properties covered by the AIP.

It should also be noted that the AIP in question does not apply to the whole of the contaminated site under the Remediation Order, and that section 53(6) of the *Act* states that the Deputy Director "may issue an approval in principle… for part of a contaminated site." Therefore, the Deputy Director is not precluded from issuing an approval in principle for part of a contaminated site, as he has done with the subject AIP.

This legislative scheme differs substantively from the provisions at issue in *Matcom*. Section 17(4)(f) of the *Liquor Control and Licensing Act Regulations*, provides a very specific right to a limited, identifiable group of people (licensees of a Neighbourhood Public House), which could only be taken away by approval of the general manager. The benefit being removed is the statutory right to not have another neighbourhood pub established within a one-mile radius of an existing neighbourhood pub. Conversely, the legislation at issue in the present appeal does not confer such a positive benefit or protective right on Squamish Terminals which can be considered to been removed by the Deputy Director's decision to approve the AIP.

The AIP has the effect of cleaning up lands that are adjacent to lands owned by Squamish Terminals. The clean up of an adjacent contaminated site removes no existing benefit or statutory right from Squamish Terminals. Any rights or benefits available under the legislation continue to be there, and are available to Squamish Terminals regardless of the existence of the AIP. Therefore, the reasoning in *Matcom* does not apply.

There is no dispute that Squamish Terminals is not a party to the AIP. Nor are its property and/or operations the subject of the AIP. Its claims of prejudice from the AIP focus on financial impacts and other environmental or human health impacts arising from off-Site mercury contamination.

It is clear that the presence of mercury contamination may require Squamish Terminals to incur additional costs in maintaining its dredging operations. However, there is no evidence to suggest that the AIP, or the specific remediation plans or activities approved for the Site by the AIP, will cause additional cost to Squamish Terminals. Furthermore, there is no evidence to suggest that the AIP or the remediation plans approved for the Site have caused, or will cause, the contamination to migrate.

In any event, the Panel notes that the AIP states at page 2:

> The provisions of this approval are without prejudice to the right of the ministry to make orders or to require additional remedial measure as the ministry may deem necessary in accordance with applicable laws and nothing contained in this approval shall in any way restrict or impair the ministry's powers in that regard.

Therefore, if the circumstances change or new information is presented to the Ministry in the future, the Deputy Director may exercise his discretion under the *Act* to require additional remedial action. That remedial action could address any

environmental or health concerns or further migration of contamination on Squamish Terminals' property as a result of the activities undertaken by the District under the AIP.

The Panel acknowledges, however, that Squamish Terminals seeks to prevent the need for future remedial action by filing an appeal at this time. It argues that future costs to its company and future impacts could be avoided through the addition of specific terms to the AIP. Squamish Terminals' primary concerns are summarized succinctly in its September 17, 2004 letter to the Ministry, which states:

> It is clear from the documentation produced by Nexen, its consultants and various branches of the Provincial Government that contamination is not limited to the property boundaries of the Nexen site. The contamination has migrated to Howe Sound and other parts of the area and is now subject to a risk management program. STL [Squamish Terminals], like others in the area, is very concerned that there be proper safeguards put in place to ensure that STL's property and water lots are properly remediated and that the areas immediately adjacent to the Terminal not be a source of future problems and financial liability for the activities that STL undertakes in the normal course of its business; including dredging or other foreshore work.

It also submits to the Panel that:

> … the AIP and the Plans do not address the need for air quality monitoring during excavations, nor do they provide for a specific contingency plan for reactivation of the pump and treat system. The lack of monitoring and planning could pose a hazard to the environment and to the employees of Squamish Terminals.

Squamish Terminals argues that without adequate monitoring in place it will not be able to determine the extent of the current migration, or whether there is further migration as a result of the activities under the AIP.

Thus, the prejudice claimed by Squamish Terminals relates primarily to what is <u>not</u> contained in the AIP, i.e., what is not being done to protect its financial and other interests arising from any remaining off-site mercury contamination.

The Panel notes that there are numerous contaminated sites and environmental issues throughout the province that may create adverse financial impacts for property owners. The *Act* places the responsibility on the Ministry to set its priorities and determine whether or not to exercise its powers and authorities within the context of its mandate to ensure the protection of human health and the environment. As Squamish Terminals has pointed out, remedial and other costs may be incurred by third parties as a result of contamination. If Squamish Terminals is required to remediate its property, and there is evidence that the contamination on its property originated from the Site, Squamish Terminals may apply to recover its reasonably incurred remediation costs from a responsible person under section 47(5) of the *Act*. The Panel is not persuaded that it is unreasonable to expect Squamish Terminals to take advantage of the other specific provisions in the *Act* that are available to address its concerns and ensure that

those responsible for the contamination and associated costs are ultimately held to account.

In the Panel's view, Squamish Terminals has not demonstrated that there is anything in the AIP that would reasonably lead the Panel to conclude that Squamish Terminals will suffer harm or prejudice as a result of the decision to approve the AIP. Implementing the remediation plan contemplated by the AIP will not negatively impact Squamish Terminals nor is there any evidence that it will negatively impact the environment. The AIP does not put Squamish Terminals in any worse position than it would be without the AIP. Squamish Terminals is not aggrieved by anything that is in the AIP or the remediation plans, to which it is not a party, and which do not apply to its property. Nor has it provided sufficient evidence or information indicating that it will suffer prejudice as a result of the remediation work that will be carried out by the District on its property.

Ultimately, the Panel finds that, while Squamish Terminals may have a grievance, it is not one that directly arises from the issuance of the AIP. The Panel is of the view that, in issuing the AIP, the Deputy Director did not make a decision that prejudicially affects Squamish Terminals' interests. Rather, he made a decision that approves a plan to implement remediation on certain properties. The Panel finds that, by approving that plan as set out in the AIP, he did not prejudicially affect Squamish Terminals' interests, as required under section 100(1) of the *Act*.

Based on the arguments and evidence presented, the Panel concludes that Squamish Terminals has not established that it has a "genuine grievance" because the AIP "prejudicially affects its interests." Accordingly, the Panel finds that Squamish Terminals is not a person aggrieved and has no standing to bring the appeal.

DECISION

In making this decision, the Panel has considered all of the evidence and submissions before it, whether or not specifically reiterated herein.

For all of the reasons set out above, the Panel finds that Squamish Terminals cannot properly be considered a "person aggrieved" by the decision to issue the AIP. Therefore, Squamish Terminals has no standing to bring the appeal, and the Board has no jurisdiction over the appeal.

Accordingly, the appeal is dismissed for lack of jurisdiction.

Alan Andison, Chair
Environmental Appeal Board

March 22, 2005