Province of British Columbia

Environmental Appeal Board

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DECISION NO. 2006-EMA-004(a)

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

BETWEEN:	Ed Ilnicki	**APPELLANT**
AND:	Director, *Environmental Management Act*	**RESPONDENT**
AND:	Henry Rempel and Lexington Properties Ltd.	**THIRD PARTIES**

BEFORE: A Panel of the Environmental Appeal Board
Don Cummings, Panel Chair

DATE: September 28, 2006

PLACE: Abbotsford, B.C.

APPEARING: For the Appellant: Ed Ilnicki
For the Respondent: Jennifer McGuire

APPEAL

This is an appeal of the April 11, 2006, Information Order OS-18043 (the "Information Order") of Jennifer L. McGuire, Regional Manager, Environmental Protection Division, Lower Mainland Region, Ministry of Environment (the "Ministry"), requiring:

- the Appellant; and
- Lexington Properties Ltd. and Henry Rempel

to provide information pursuant to section 77 of the *Environmental Management Act* (the "*Act*"). When the Respondent issued the Information Order, she was acting in the capacity of a Director under the *Act*.

The authority for the Environmental Appeal Board to hear this appeal is found in section 93 and 100 of the *Act*. Pursuant to section 103 of the *Act* the Board may:

(a) send the matter back to the person who made the decision, with directions,

(b) confirm, reverse or vary the decision being appealed, or

(c) make any decision that the person whose decision is appealed could have made, and that the appeal board considers appropriate in the circumstances.

The Appellant asks the Board to reverse the decision to issue the Information Order.

BACKGROUND

The Appellant operates a business under the name of Valley Demolition Design and Repair from his residence at 5763 Riverside Street, Abbotsford. A 2006 business licence, issued to him by the City of Abbotsford, shows the Appellant's business type as "Contactor Building Trades" and describes his business as "demolish, repair, design & rebuild buildings, machinery & equipment."

The Appellant testified that he stored materials necessary for his business in a warehouse located at Suite 105-31234 Wheel Avenue, Abbotsford (the "Property") – the address set out in the Information Order. The legal description of the Property is Lot B, Plan 75921, Part NW1/4, Section 18, Township 16, New Westminster Land District. Based on the information before the Panel, it appears that the Third Party, Lexington Properties Ltd., as represented by Henry Rempel, owns the Property.

On January 31, 2006, Greg Kanya, a Toxic Management/Emergency Response Officer with the Ministry, wrote to the Appellant regarding a December 7, 2005, inspection of the Property. Mr. Kanya reported that his inspection uncovered the storage of "large quantities of unidentifiable wastes." Due to the lack of documentation, there was concern that the stored wastes "may meet the criteria for hazardous waste as defined in the Hazardous Waste Regulation [the "*Regulation*"]."

The Appellant was advised that the hazardous wastes in excess of what is permitted under Schedule 6 of the *Regulation* were to be immediately removed using a licenced hazardous waste transporter and that a report of his actions was to be provided to the Ministry by February 14, 2006.

The Appellant's report was to include all appropriate documentation including:

- waste records;
- relevant documentation clarifying what wastes were stored on the Property; and
- completed manifests for all hazardous wastes leaving the Property.

On February 14, 2006, the Appellant wrote to Mr. Kanya claiming that the stored material was not hazardous waste, but constituted an "inventory of supplies and equipment … used in my private business of which I am licensed for by the City of Abbotsford." The Appellant stated that he was moving his business and would seek permits for "shipping out any material that I may consider unnecessary for my business, material which you may consider hazardous or special waste."

The Appellant, in his concluding paragraph wrote, "You will be afforded the necessary legal documentation, should any become available, regarding shipment."

On March 31, 2006, Mr. Kanya wrote to the Appellant stating that his February 14 letter "does not address the Ministry's concerns relating to the storage of hazardous wastes that were identified during the Ministry inspection on December 7, 2005." Mr. Kanya expressed concern that "the wastes present a potential hazard to both human health and the environment should a spill, fire or some other incident occur on site."

In response, the Appellant wrote that the manner in which he kept his personal property "should be of no concern to you. The materials on site are no different in scope than any other general contractor warehouse." The Appellant refused to comply with Mr. Kanya's requests and stated that Mr. Kanya was "exceeding [his] levels of authority and abusing [his] legislated power."

On April 11, 2006, the Respondent issued the Information Order pursuant to section 77 of the *Act*. In the Information Order, the Respondent did not focus on hazardous waste. She set out numerous requirements the Appellant was to meet regarding all waste on the Property, which are summarized as follows:

1. Retain a qualified third party consultant to conduct an inventory and characterize the wastes stored on the Property and submit the name and qualifications of that third party to the Respondent by April 13, 2006.

2. Provide written confirmation of the methodology to be used by the approved qualified consultant by April 18, 2006.

3. Provide a detailed inventory and characterization of wastes found on the Property by May 4, 2006.

4. Provide an evaluation of whether the wastes were being stored in a safe manner, in conjunction with the inventory, by May 4, 2006.

5. Prepare a report of any discharges to sewers, municipal garbage, and/or air emissions resulting from the storage, processing, and/or treatment of wastes on the Property by April 27, 2006.

6. Provide a written report on the origin and transportation of hazardous wastes on the Property by April 27, 2006.

On May 11, 2006, the Appellant appealed the Information Order. In his Statement of Points, the Appellant asserts:

1. Materials, supplies and machinery found on the Property are his personal belongings, owned by him for more than twenty years and are necessary for his business.

2. The construction supplies cannot be considered waste if still useable and in "virgin" condition.

3. The Property was dry, secure, and safe with no public access, and with no public business conducted from the Property.

4. The Respondent gained access to the Property without warrant or just cause.

On September 13, 2006, the Third Party, Mr. Rempel, wrote to the Board advising that the Appellant had vacated the Property. He provided a receipt for steam cleaning the Property and enclosed shipping manifests for materials he removed along with photographs showing the warehouse on the Property empty.

ISSUE

The main issue to be decided in this appeal is whether the Information Order was reasonable in the circumstances. However, the Appellant raised a number of other issues relating to the existence of hazardous waste on the Property, which are addressed under a separate heading of "Other Issues Raised by the Appellant".

RELEVANT LEGISLATION

The Information Order was issued pursuant to section 77 of the *Act*, which is set out in this decision under "Discussion and Analysis".

The Information Order required the Appellant to provide information about wastes located on the Property, including any hazardous waste. "Waste" is defined in section 1 of the *Act* as follows:

"Waste" includes

(a) air contaminants,

(b) litter,

(c) effluent,

(d) refuse,

(e) biomedical waste,

(f) hazardous waste, and

(g) any other substance prescribed by the Lieutenant Governor in Council, or

the minister under section 22 *(minister's regulations — codes of practice)*, or, if either of them prescribes circumstances in which a substance is a waste, a substance that is present in those circumstances, whether or not the type of waste referred to in paragraphs (a) to (f) or prescribed under paragraph (g) has any commercial value or is capable of being used for a useful purpose;

"Hazardous waste" is defined in the *Hazardous Waste Regulation*, B.C. Reg. 63/88, in part, as:

"hazardous waste" means

(a) dangerous goods that are no longer used for their original purpose if they

(i) are no longer used for their original purpose, and

(ii) meet the criteria for Class 2, 3, 4, 5, 6, 8 or 9 of the federal dangerous goods regulations,

including those that are recycled, treated, abandoned, stored or disposed of, intended for recycling, treatment or disposal or in storage or transit before recycling, treatment or disposal,

...

"Dangerous goods" are defined in the *Regulation* as "dangerous goods as defined in section 2 of the federal Act and as regulated in the federal dangerous goods regulations, except for the exemption for dangerous goods within manufacturing or processing facilities under section 1.25 of the federal dangerous goods regulations."

DISCUSSION AND ANALYSIS

1. Whether the Order was reasonable in the circumstances.

The Appellant's arguments focus on what constitutes a "hazardous waste" within the meaning of the legislation, and whether the material he was storing falls within that definition. The Appellant, in his May 11, 2006, notice of appeal sets out two points, amongst others, to justify his request to reverse the decision to issue the Information Order:

1. The material stored on the Property was his personal inventory necessary for his business.
2. He was not operating a "facility" [within the meaning of the *Regulation*, e.g. storing "hazardous waste"].

The Panel finds that the questions of whether the materials stored on the Property meet the definition of "hazardous waste" or whether the Appellant was operating a "facility" within the meaning of the *Regulation* are not decisive of the real issue in this appeal; namely, whether it was reasonable in the circumstances to issue the Information Order. Section 77 of the *Act* sets out the statutory authority for issuing an information order and is as follows:

Requirement to provide information

77 (1) For the purpose of determining whether there are reasonable grounds for making a pollution prevention order under section 81 (*pollution prevention orders*) or a pollution abatement order under section 83 (*pollution abatement orders*), a director may order a person who is conducting an industry, trade or business to provide to the director the information described in subsection (2) that the director requests, whether or not

(a) the industry, trade or business is prescribed for the purposes of section 6(2) (*waste disposal*), or

(b) an activity or operation of the industry, trade or business is prescribed for the purposes of section 6 (3) (*waste disposal*).

(2) An order under subsection (1) must be served on the person to whom it applies and may require the person to provide, at his or her own expense, information relating to

(a) the operations or activities of the industry, trade or business, or

(b) substances used, stored, treated or introduced or caused or allowed to be introduced into the environment in the course of the industry, trade or business.

(3) Information required by an order under this section must be provided in the time and manner specified in the order.

[underlining added]

The language in section 77 indicates that the authority to issue an information order is not predicated on a determination that hazardous waste is, in fact, being stored contrary to the *Act*, or that a person is operating a hazardous waste storage facility contrary to the *Act*. Rather, the primary purpose of an information order is to **obtain information** about operations or activities being conducted, or substances being stored, used, et cetera, so that the Ministry can determine **whether** there is reasonable basis for issuing a pollution abatement order or pollution prevention order.

The purposes for issuing an information order are linked to the purposes of pollution prevention orders and pollution abatement orders. As is implied from the term "pollution prevention order" itself, section 81(1) of the *Act* states that a pollution prevention order may be issued "If a director is satisfied on reasonable grounds that an activity or operation has been or is being performed by a person in a manner that is likely to release a substance that will cause pollution" [underlining added]. A pollution abatement order may be issued under section 83 of the *Act* if "a director is satisfied on reasonable grounds that a substance is causing pollution" [underlining added]. "Pollution" is defined in the *Act* as "the presence in the environment of substances or contaminants that substantially alter or impair the usefulness of the environment."

Thus, when sections 81 and 83 are read together with section 77 of the *Act*, it becomes apparent that an information order may be issued to obtain information that will assist a director in determining if there are reasonable grounds to believe that an activity or operation is likely to release a substance that will substantially alter or impair the usefulness of the environment, or has already done so. The Panel finds that an information order may be issued when there is a reasonable suspicion, or there is evidence of a reasonable risk, that an operation or activity is likely to cause, or has caused "pollution" as defined.

Consequently, the questions of whether the materials that the Appellant was storing were "hazardous waste" or whether the Appellant was operating a "facility" without authorization, are not decisive of whether it was reasonable to issue the

Information Order. However, the Panel has, under Issue 2 in this decision, considered the Appellant's submissions on those and other points.

The Respondent submits that the Information Order was issued in accordance with section 77 of the *Act*. The Respondent submits as follows regarding the specific purpose of the Information Order in this case:

> [Section 77] is an instrument available to the director to determine whether there are reasonable grounds for issuing a pollution prevention order or a pollution abatement order. In this instance, the director ordered the facility operator (the appellant) and the property owner (as waste ownership could be transferred to the owner of the land – EMA [*Environmental Management Act*] Section 132), who were conducting or responsible for a waste storage, treatment or disposal facility, to provide the director information to clarify the activities at the site, and the substances stored on the property.
>
> [underlining added]

The Panel finds that the purpose for issuing the Information Order in this case is consistent with the purpose set out in section 77 of the *Act*; namely, to obtain information that would help the Director determine whether there were reasonable grounds for making a pollution prevention order or a pollution abatement order.

Regarding the circumstances that led to issuing the Information Order, the Respondent submits that it was issued because the inspection of the Property indicated that hazardous waste was being stored on the Property, there is a history of non-compliance by the Appellant with the requirements of the *Act*, and reasonable attempts to obtain the requested information from the Appellant were unsuccessful.

The Respondent submits that, based upon the December 7, 2005 inspection:

> … many containers were found to contain varying quantities of waste…
>
> … it was observed that the containers found in the facility were not all labelled, some containers were showing signs of wear and decay (i.e. Barrels were rusted and evidence of wastes seeping from the containers was found).

The Respondent provided copies of photographs of the material found on the Property during the December 7, 2005, inspection. The photographs show leaking containers, unlabelled containers, and poorly stored containers whereby inspection is impossible.

Additionally, the Respondent referred the Panel to an inventory of materials found on the Property during the December 7, 2005, inspection. The following table shows the totals for each class of material found during that inspection.

Transport Canada Classification	Quantity (Kg or L)[1]	Panel's Conversion of Quantities (assuming litres) into 45 Imperial Gallon Drum Equivalent (Rounded)
Class 3 (Flammable Liquid)	21,755.0	106
Class 4 (Flammable Substances)	550.4	3
Class 5. (Oxidizers)	100.0	0
Class 8 (Corrosive)	3,857.0	19
Unknown (unlabelled)	34,075.0	166
Total	60,337.4	294

As can be seen from the table, there was a significant volume of material inventoried – the equivalent to 294, 45 imperial gallon drums.

The manifests submitted by the Third Party (Mr. Rempel) show that the following materials were removed from the Property:

- 600 kilograms of waste oil (oily rags)
- 600 litres of waste printing ink (Class 3)
- 200 litres of waste flammable liquids (xylene) (Class 3)
- 2,400 litres of waste oil (grease)
- 1,400 litres of waste paint related material (Class 3)
- 200 kilograms of waste oil (tank bottom)
- 400 litres of waste oil (oily water)
- approximately 4,500 kilograms of waste oil filters

The designation "Class 3" relates to flammable liquids as described in Transport Canada's Transportation of Dangerous Goods Regulations.

The inventory of materials found on the Property during the December 7, 2005, inspection by Ministry staff shows considerably more material found on the Property than is shown on the manifests of material that were provided by the Third Party. Of concern to the Panel is the unaccounted volume of material that may well be classified a hazardous waste, that was removed from the Property. The Appellant, in his February 14, 2006, letter, stated that he would provide "the necessary legal

[1] The inventory list combines liquid volumes and material weights together in the total.

documentation, should any become available, regarding shipment," but none has been provided to the Respondent.

The Appellant questioned Mr. Kanya's expertise regarding hazardous waste. The Panel has reviewed Mr. Kanya's curriculum vitae, and accepts that he is knowledgeable about issues involving hazardous waste, being a graduate of the Northern Alberta Institute of Technology (Earth Resources Technology, Water Resources major), and has maintained his level of competency through attending various courses and seminars. In addition, he has over 15 years experience with the Ministry. The Panel finds that Mr. Kanya has expertise and experience in assessing risks to the environment from pollution, and was able to determine from information obtained during the December 2005 inspection whether there was reason to believe that hazardous wastes were being stored on the Property.

The Respondent also provided evidence detailing the Appellant's previous operation of an unauthorized hazardous waste storage facility at 33970 Industrial Avenue in Abbotsford. The Appellant was the President of the defunct Canada Petroleum Corp., which was involved with handling hazardous waste at Industrial Avenue. The Appellant, while operating his business, had a history of non-compliance regarding the *Special Waste Regulation*, which has been superceded by the *Hazardous Waste Regulation*. Canada Petroleum Corp. was convicted in Provincial Court of two offences, one under the former *Waste Management Act* and another under the former *Special Waste Regulation*, arising out of waste storage activities in December 2001.

Following complaints and subsequent inspections regarding the Industrial Avenue site, the issuance of a pollution prevention order, and a Declaration of an Environmental Emergency by the Minister of Environment, the Ministry began cleanup of the Industrial Avenue site on August 26, 2005. Material removed from the site, at a cost to the Ministry of $869,550.75, included:

- chromic acid;
- formaldehyde;
- waste oil, oily sludge, oily solids;
- paint related material; and
- waste pesticides.

The Respondent provided documentation to show that the majority of the waste was contained in 205 litre (45 imperial gallon) containers. The Respondent's evidence shows that 1,690 drums and containers plus 270,000 litres of bulk hazardous waste, totaling over 500,000 litres, was removed from the Industrial Avenue site.

The Appellant testified that he moved some material stored at the Industrial Avenue site to the Property; material he contends was not hazardous waste and was necessary for his other businesses, unrelated to operating an unauthorized hazardous waste management facility.

Given the Appellant's operation on Industrial Avenue, the Respondent was also justifiably concerned that material may have been moved from Industrial Avenue to the Property, which the Appellant testified was the case.

The Panel notes that the Appellant and Third Parties were provided with a copy of the draft Information Order and were invited to submit comments to the Respondent. They did not do so, nor did they submit satisfactory information regarding the materials stored on the Property, materials that the Respondent suspected might be hazardous waste.

The Panel finds that when all avenues to seek information about the material stored on the Property on a voluntary basis were exhausted, the Respondent was left with no other options than to issue the Information Order pursuant to section 77 of the *Act*.

The Panel finds that the Information Order allows the Ministry to make an informed decision as to whether the environment is, or may be, at risk from pollution as a result of the Appellant's storage of materials that were on the Property. Given the nature and quantity of materials found on the Property during the inspection, the Appellant's failure to provide the proper documentation for those materials in response to Mr. Kanya's letter, and the Appellant's history of serious contraventions related to the improper and unauthorized storage of hazardous wastes, there was ample basis for issuing the Information Order.

The Respondent is entrusted with protection of the environment. Given the Appellant's history regarding hazardous waste along with his refusal to provide the documentation asked for on January 31, 2006, and a reasonable suspicion that hazardous waste was transported from Industrial Avenue to the Property and then stored there, the Panel finds that the Respondent operated responsibly and within her legislated authority in issuing the Information Order.

Although the Property has been emptied, the Respondent requests that the Information Order remain in effect even though the materials in question are no longer being stored at the Property, because the waste storage operation that was occurring at the Property is now being operated at 1717 Foy Street, Abbotsford. The Panel agrees that this is a reasonable request. The Panel notes that failure to comply with the Information Order is a contravention of the *Act*, and may result in enforcement action.

2. Other Issues raised by the Appellant

1. Personal inventory – whether the material is "hazardous waste"

The Appellant claims the material he stored on the Property is still useful and; therefore, not a hazardous waste.

The definition of "hazardous waste" in the *Regulation* indicates that, to fall within the definition, the material stored on the Property must meet two conditions:

a) the material meet the criteria for certain classes under the federal dangerous goods regulations; and

b) the materials are no longer being used for their original purpose.

a) Whether the dangerous goods meet the criteria for Class 2, 3, 4, 5, 6 ,7 , 8, or 9 of the federal dangerous goods regulations.

From the manifests provided by the Third Party, 600 litres of waste printing ink, 200 litres of waste xylene, and 1,400 litres of waste paint related material, all of which are Class 3 dangerous goods, were removed from the Property. In addition, the inventory provided by the Respondent shows that in excess of 21,000 litres of Class 3 goods were found on the Property, as well as quantities of Class 4 and 8 dangerous goods in excess of 500 litres, and 100 litres of Class 5 dangerous goods.

b) Whether the dangerous goods are no longer used for their original purpose.

The Appellant contends that the material stored on the Property was useable in his business involving the repair and rebuild of buildings, machinery, and equipment as set out in his Business Licence. Hence, the material cannot be labeled as hazardous waste, and he is not bound by the *Regulation* and the *Act*.

The Appellant testified that he can, and does, use old paint. Further, he stated that the printing ink is still useable for its original purpose, although the Appellant did not make clear how he used printing ink in conducting his business.

Therefore, as the Appellant contends, if materials are still being used for their original purpose, then they do not meet the definition of hazardous waste as set out in section 1 of the *Regulation*.

The Panel appreciates that what may appear to be waste material is still useable for its original purpose. For example, paint if properly stored for several years can be used as if new even though a can may be half full and covered with a skim. If properly handled it will retain both its original tint and its ease of application, albeit with some additional work that may not be cost effective in a commercial application.

However, the Appellant provided no substantiation to support his assertion that the large volume of material stored on the site is necessary to conduct his business. The Panel notes, for example, that 700 litres of fountain solution, a Class 3 dangerous goods, was found on the Property on December 7, 2005. Fountain solution is used for dampening the image plate in lithographic or offset printing. If discharged to a sewer or stream, it can cause serious environmental damage. The Appellant's Business Licence does not show that he is running a printing business, and the Appellant, during his testimony, did not make any reference to running such a business. The Panel appreciates that the Appellant may have found another use for fountain solution, but then the fountain solution "is no longer used for their original purpose," and therefore, it falls under the definition of hazardous waste.

As well, the Panel notes that 22, 45 imperial gallon drums and two, 1,000 litre totes were filled with waste/used oil filters. The Panel cannot accept that waste/used oil filters have any use whatsoever.

The quantity of inventoried material found on the Property leads the Panel to question the credibility of the Appellant's assertion that the material was necessary for his business. Further calling into question the Appellant's credibility is his history of operating an unauthorized facility in Abbotsford.

Moreover, from photographs and the inventory of material found on the Property during the December 7, 2005, inspection, it is obvious to the Panel that there was the possibility of a large quantity of hazardous waste being stored on the Property.

In any case, the Panel finds that the Appellant's assertion that the material that was stored on the Property was still useful only serves to distract from the overriding issues of protecting the environment from the consequences of improper storage and handling of all of the waste on the Property, whether or not it was "hazardous waste", and whether it was reasonable to issue the Information Order.

2. Whether the Appellant was operating a facility

Section 8 of the *Act*, addresses the operating of hazardous waste management facilities. It states:

Hazardous waste management facility

8 A person must not construct, establish, alter, enlarge, extend, use or operate a facility for the treatment, recycling, storage, disposal or destruction of a hazardous waste except in accordance with the regulations.

The *Regulation* defines "facility" as meaning "any works that are designed to or do handle, store, treat, destroy or dispose of hazardous waste, and includes … short term storage facilities …;

The Appellant argues that he was not operating such a facility and, therefore, the Information Order should not have been issued to him.

With the materials removed from the Property, and no documentation provided by the Appellant regarding what was being stored (e.g. manifests), the Panel cannot properly assess the merits of the Appellant's argument that he was not operating a facility. Given the Panel's finding that there was evidence that large amounts of waste were being stored on the Property, at least some of which was hazardous waste, and given the definition of a "facility" set out in the *Regulation*, it is apparent to the Panel that the Appellant may well have been operating a facility for short term storage (i.e. a period exceeding 96 hours) without authorization.

However, that issue is quite separate from the Information Order itself, and whether it was reasonable to issue the Information Order. As stated above, the question of whether the Appellant was, in fact, operating an unauthorized "facility" is not relevant to that issue. Although one of the purposes of the Information Order may have been to obtain information that would help determine whether a facility was in operation without authorization, the primary purpose of the Information Order was to gather information to help determine whether there were grounds for issuing a pollution prevention order or pollution abatement order.

Other issues

The Appellant claims Mr. Kanya "gained access to [the Property] by coercing the Abbotsford Fire Department to a safety inspection, thereby entering the premises without warrant or just cause." How Mr. Kanya gained access to the Property is beyond the purview of the Panel and not at issue in this appeal.

The Appellant claims the Information Order "is totally unnecessary" and the "cost of undertaking the order would be in the tens of thousands of dollars." Given the discussion above, the Panel finds that the Respondent's decision to issue the Information Order was appropriate in the circumstances. Regarding cost, the Panel notes that the Appellant was afforded the opportunity on January 31, 2006, to provide certain information that would have been much less onerous and less expensive than that required under the Information Order. He failed to do so.

Finally, the Appellant contends that the Information Order is a "continuing and ongoing harassment" and referred to statements made by the Respondent regarding his defunct Canada Petroleum Corporation. Such issues are beyond the purview of the Panel.

DECISION

In making this decision, the Panel has considered all of the relevant documents and oral evidence, whether or not specifically reiterated herein.

For the reasons set out above, the Panel confirms the Information Order.

The appeal is dismissed.

"Don Cummings"

Don Cummings, Panel Chair
Environmental Appeal Board

November 21, 2006