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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

DECISION NOS. 2006-EMA-013(a) & 2006-EMA-014(a)

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

BETWEEN:	Shell Canada Products Limited Imperial Oil Limited	**APPELLANT**
AND:	Director, *Environmental Management Act*, Ministry of Environment	**RESPONDENT**
AND:	BC Rail Ltd. BC Hydro and Power Authority City of Quesnel	**THIRD PARTY**
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE:	Conducted by way of written submissions concluding on January 29, 2007	
APPEARING:	For the Appellants Shell Canada Products Limited: Robert J. Lesperance, Counsel Imperial Oil Limited: Simon Wells, Counsel For the Respondent: Dennis Doyle, Counsel For the Third Parties BC Rail Ltd.: Graham Walker, Counsel BC Hydro and Power Authority: David Perry, Counsel City of Quesnel: James Yardley, Counsel	

PRELIMINARY ISSUE OF JURISDICTION

Two appeals were filed against the Director's September 18, 2006 refusal to remove Imperial Oil Limited ("Imperial"), Shell Canada Products Limited ("Shell"), and BC Hydro and Power Authority ("BC Hydro") from Remediation Order OE-17312. Shell appealed the refusal in a Notice of Appeal dated October 16, 2006 (Appeal No. 2006-EMA-013). Imperial appealed the refusal in a Notice of Appeal dated October 17, 2006 (Appeal No. 2006-EMA-014).

As as result of a previous Board decision which concluded that a refusal to remove a named party from an order was not an appealable decision (*Canadian National Railway Company v. Regional Waste Manager* (Appeal No. 2001-WAS-025, May 24,

2002; [2002] B.C.E.A. No.31 (Q.L.)) (hereinafter *CNR*)), Imperial asked the Board to make a preliminary ruling on the issue of whether the Director's refusal is an appealable decision. In particular, Imperial asks the Board to make a ruling on whether the Director's refusal constitutes an "exercise of power" as set out in the definition of "decision" in section 99(c) of the *Environmental Management Act* (the "*Act*"). If the refusal is an exercise of power, and hence is a "decision", the Board has jurisdiction over these appeals and a hearing may proceed.

In a letter dated October 25, 2006, the Board offered the parties the opportunity to provide written submissions on this jurisdictional question.

BACKGROUND

In January of 2003, a Regional Waste Manager with the then Ministry of Water, Land and Air Protection issued Remediation Order OE-17312 to BC Hydro, BC Rail Ltd. ("BC Rail"), the City of Quesnel, Shell and Imperial, pursuant to section 26.2 of the *Waste Management Act*, R.S.B.C. 1996, c. 482. The Order required these parties to remediate a contaminated site located at Quesnel Legion Drive, north of and adjacent to the Quesnel River in Quesnel, B.C. (the "Site"). The Site contains petroleum related hydrocarbon contamination in the soil and in the ground water.

Over the years, there have been various amendments to the original Order and there have been appeals filed with the Board.

Imperial advises that the parties named to the Order have been trying to coordinate compliance with the Order and to deal with liability among themselves. The outcome of these efforts is that BC Rail has now taken over remediation of the Site. Imperial advises that all of the parties have reached individual settlements with BC Rail, except for the City of Quesnel. It also states that, as part of those settlements, BC Rail asked the Director to "release the settled parties from the Order"; namely, to remove Imperial, Shell and BC Hydro from the Order pursuant to his powers under section 48(12) of the *Act*. BC Rail also asked that Imperial, Shell and BC Hydro not be included in future orders, if any, concerning the Site.

In a letter dated September 18, 2006, Mike Macfarlane, for the Director, refused this request, with reasons. Shell and Imperial filed separate appeals to the Board alleging that the Director erred when he refused to remove their names from the Order. They ask the Board to set aside the Director's decision and to order that their names be removed from the Order. BC Hydro did not appeal the Director's refusal.

This preliminary jurisdictional question arises out of the definition of "decision" set out in section 99 of the *Act*. In order for the Board to accept the appeals of Imperial and Shell, the Director's refusal must fall within one of the subsections set out in the definition of "decision" in section 99: only decisions that fall within one of those subsections that may be appealed to the Board. Imperial submits that when the Director refused to amend the Order under section 48(12) of the *Act*, he was "exercising a power" which is specified in subsection 99(c) as an appealable decision. Shell agrees with and adopts Imperial's submissions on this matter.

BC Hydro and BC Rail made no submission in respect of the preliminary jurisdictional question. The Director took no position on the application.

The City of Quesnel opposes the application and submits that the Board is without jurisdiction to hear the appeal.

ISSUE

The only issue to be decided at this time is whether the Director's refusal to remove Imperial and Shell from the Order was an "exercise of power" and, therefore, an appealable decision under section 99(c) of the *Act*.

RELEVANT LEGISLATION

The Director has the authority to amend a remediation order under section 48(12) of the *Act*.

Remediation orders

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

...

(12) A director may amend or cancel a remediation order.

Part 8 of the *Act* sets out the appeal provisions.

Appeals to Environmental Appeal Board

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.

(2) For certainty, a decision under this Act of the Lieutenant Governor in Council or the minister is not appealable to the appeal board. [emphasis added]

Part 8 also contains a definition of "decision". It is the definition of decision that is at issue in this preliminary matter. If the Director's letter does not contain a "decision" as defined in this section, the Board cannot accept the appeals. Section 99 states:

Definition of "decision"

99 For the purpose of this Division, "**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.

DISCUSSION AND ANALYSIS

Whether the Director's refusal to remove Imperial and Shell from the Order was an "exercise of power" and, therefore, an appealable decision under section 99(c) of the *Act*.

As noted above, the Board has previously considered whether refusing a request to remove persons from a remediation order is a decision that may be appealed to the Board. In *CNR*, the regional waste manager refused to amend a remediation order by removing Canadian National Railway Company, and refused to cancel the order as it applied to the company. The same preliminary issue of jurisdiction arose in that case as in the present case; specifically, whether the failure or refusal to "exercise a power" met the definition of "decision". In *CNR*, "decision" was defined in section 43 of the *Waste Management Act*:

43 For the purpose of this Part, **"decision"** means

(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.

The *Waste Management Act* was later repealed and was incorporated into the *Act*. Section 43 is similar to the current definition set out in section 99 of the *Act*.

In *CNR*, the Board concluded that the refusal to remove named parties from remediation order did not constitute an "exercise of power" under subsection 43(c) and, therefore, the regional waste manager's refusal to remove Canadian National Railway Company from the remediation order was not a "decision" within the meaning of section 43 of the *Waste Management Act* [now section 99 of the *Environmental Management Act*].

In considering how to interpret subsection 43(c), the Board looked at the entire definition of "decision" in section 43, and the context of the *Waste Management Act*. It found as follows:

[42] In the context of the *Act*, the legislature has given a fairly detailed definition of decision. This is unlike many other enactments, which also define "decision" and/or establish a right of appeal. For instance, the *Pesticide Control Act*, R.S.B.C. 1996, c. 360, defines decision as an "action, decision or order." Further, it is relatively common to find an appeal provision where specified people are given the right to appeal an "action", "order", "decision", "ruling" or "determination" of certain government officials, or a combination thereof. By providing a more detailed definition of decision in the *Act*, it is reasonable to believe that the legislature was attempting to narrow the categories or types of decisions from which it would provide a right of appeal.

[43] When there is a more detailed description of what can be appealed, it is not uncommon for the legislature to list the decision in the positive and the negative (e.g., both the act and the refusal to act). For instance, section 8(4) of the *Health Act*, R.S.B.C. 1996, c. 179, states that if a person is aggrieved "by the issue or the refusal of a permit," the person may appeal. Section 46 of the *Hospital Act* allows appeals from certain decisions as well as a "failure or refusal of a board of management to consider and decide an application for a permit." The *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159, allows affected parties to appeal certain determinations, broadly defined as "any act, omission, decision, procedure, levy, order or other determination made under this Act…." It also specifically authorizes the Forest Practices Board to appeal a "failure to make a determination" under specific sections.

[44] In specifying the types of decisions that could be appealed in the *Act*, the Panel notes that the legislature only set out one power in the "negative"; subsection 43(d) includes the "**refusal or cancellation** of a permit, approval or operational certificate" …. The other subsections, including the subsection 43(c), are framed in the positive. Despite the many examples where the legislature has specifically authorized appeals from a "failure or refusal" to act, it did not do so in subsections 43(a)(b)(c) and (e). The Panel finds that this indicates that the legislature did not intend for those subsections to include the negative. The Panel adopts the following findings in *McPhee* [*McPhee v. British Columbia (Deputy Director of Waste Management*) 14 December 1995, Appeal No. 95/08-WASTE]:

> A reading of section 25 [now section 43] seems to clearly indicate that there must generally be a positive act which would constitute an appealable provision. Each enumerated head under the section refers to a specific exercise of statutory power. The Board agrees… that if a refusal to make a decision were to be included under this section the legislature would have specifically stated it.

> [45] Accordingly, the Panel finds that the failure or refusal to "exercise a power" is not an appealable decision.
>
> [46] The Panel further notes that, if the legislature had wanted to allow an appeal from a refusal to amend an order, it could have simply amended subsection 43(d) by adding the words "or application for amendment" so that the phrase would read "refusal … of a permit, approval, operational certificate, **or application for amendment**." The fact that these words are not included is simply another indication that the legislature did not intend such decisions to be appealable to the Board.
>
> [47] The Panel also finds that its interpretation is supported on policy grounds. As argued by the Regional Manager and Beazer, the 30-day appeal period could become a meaningless date if a party could simply request an amendment to the decision and then appeal to the Board if that request for an amendment is denied. ….
>
> [emphasis in original]

Imperial and Shell, the Appellants in the present case, argue that this Panel should not adopt the reasoning in *CNR* on the grounds that it was wrongly decided for a variety of reasons.

The Appellants submit that, in *CNR*, the Board was incorrect when it concluded that a "refusal to exercise a power" is not a positive exercise of power and is therefore not caught by section 99(c). The Appellants state that the "power" exercised in this case was a statutory power given to the Director by section 48(12) of the *Act* – the power to amend a remediation order. Although the Director refused to amend the Order in this case, they submit that the power to decide *whether or not* to exercise that power is inherent within the power to amend.

Moreover, the Appellants submit that the Board incorrectly interpreted "exercise of power", and the other phrases in the definition of decision, to only refer to "positive" decisions (the issuance or a permit, order certificate etc.), as opposed to a negative action (such as refusals), as being appealable.

The Appellants arguments against the Board's previous interpretation fall into two broad categories. They submit that the Board failed to properly apply the principles of statutory interpretation to section 99, and that the Board's analysis of the objective of and/or policy behind the "categories" set out in the definition of decision was flawed.

Regarding the statutory interpretation, the Appellants submit that the Board did not properly apply the modern approach to statutory interpretation as set out by Elmer Dreidger in *Construction of Statutes* (2nd ed. 1983), page 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the Parliament.

The Appellants submit that the Board's interpretation of section 99 is too narrow. They refer to the general appeal provision in section 100, which gives standing to "a person aggrieved" by a decision as defined in section 99. They state, "In the context of the appeal scheme in particular, s. 100 makes clear its intent is to give aggrieved persons a right of appeal, and when read in the context of the Act as a whole the significant impairment of rights reflected under the remediation order powers of the Act gives support to a robust right of appeal." However, they maintain that the Board's past interpretation of the definition of decision defeats the intent to give this robust right of appeal and it produces a confusing and irrational statutory scheme.

Properly interpreted, the Appellants submit that there is no legislative intent to restrict the scope of appeals to "positive" decisions. The Appellants submit that the overriding legislative intent discernable from the *Act* is to allow a right of appeal to persons aggrieved by a decision that adversely impacts their rights and liabilities. They submit that, as the Director's decision in this case has such an impact, "every effort should be made to read the statute in harmony with that intent, and not to fall back on restrictive rules of statutory construction that would defeat that purpose unless no other conclusion is supportable." They state that if the words "exercise of power" are given their plain and ordinary meaning, read harmoniously with the scheme and context of the Act, there would be a right of appeal from the decision in issue.

The Appellants also argue that there are good policy reasons for their position. They emphasize that the powers of the Director are open ended and can be imposed for an indefinite period. They submit that it would be both repugnant and contrary to basis principles of fundamental justice to offer no right of appeal to those required to obey the Director.

Contrary to the Board's reasoning in *CNR*, the Appellants argue that a broad interpretation of the definition section would not create endless appeals. They point out that only new matters can be litigated due to the doctrines of issue estoppel and *res judicata*. Further, as an appeal does not trigger an automatic stay of the decision under appeal, an appeal does not have to impact remediation efforts. Even if there are numerous appeals, the Appellants maintain that this should not be the deciding factor. They state, "the notion that allowing too many appeals would slow down remediation is wrong in substance and unsupported by anything in the language of the *Act*. Such a notion could be equally applied to all rights of appeal and places too much weight on administrative convenience over private rights."

The City of Quesnel made brief submissions on this issue. It takes the view that the Board does not have jurisdiction to hear the appeals, and that the Board should not deviate from its reasoning in *CNR*. It submits that there are no material differences between in the facts between *CNR* and the present case, and that the Appellants have failed to show that *CNR* was wrongly decided or that there is any compelling reason for the Board to depart from the reasoning in that case. The Panel agrees.

The Board has had the opportunity to interpret section 99 of the *Act*, and its predecessor section in the *Waste Management Act*, on a number of occasions. Since its 2002 decision in *CNR*, which most closely resembles the type of decision at

issue in this case, the Board has considered the definition of "decision" in at least five cases:

- *Britannia Mines and Reclamation Corp. v. Director of Waste Management* (Appeal No 2002-WAS-008(a), September 17, 2002), [2002] B.C.E.A. No. 51 (Q.L.);
- *Beazer East, Inc. and Canadian National Railway Co. v. Director of Waste Management* (*Appeal* Nos. 2002-WAS-016(a), 2002-WAS-017(a)), October 23, 2002), [2002] B.C.E.A. No. 65 (Q.L.);
- *Beazer East, Inc. v. Assistant Regional Waste Manager (Appeal No. 2003-WAS-002(a), February 5, 2004), [2004] B.C.E.A. No. 7 (Q.L.);*
- *Houweling Nurseries Ltd. v. District Director for the Greater Vancouver Regional District (Appeal No. 2002-WAS-025(a) and 2003-WAS-004(a), April 26, 2004), [2004] B.C.E.A. No. 11 (Q.L.); and*
- *Donald Steven Graham v. Director of Waste Management* (Decision No. 2005-EMA-010(a), January 24, 2006), [2006] B.C.E.A. No. 3 (Q.L.).

In all of these cases, the Board ultimately adopted the Board's reasoning from *CNR*.

In addition, the Board's analysis of the definition of decision has received general support in a 2005 decision of the Supreme Court of British Columbia. In a judicial review of the Board's decision on jurisdiction, *Houweling Nurseries v. District Director of the GRVD et al*., 2005 BCSC 894 (hereinafter *Houweling*), the Court considered section 43 of the *Waste Management Act* and whether the Board erred in finding that it did not have jurisdiction to hear an appeal of the district director's decision. Although the Court found that the Board erred in its interpretation of section 43(d) (now section 99(d) of the *Act*), it affirmed the Board's interpretation of the first three subsections. In that decision, Madam Justice Gerow commented that:

> [32] The first three subsections of s. 43 define "decision" as positive acts of the district director in (a) making an order; (b) imposing a requirement; and (c) exercising a power.
>
> [33] The subsections were considered in *Imperial Oil Limited v. British Columbia (Ministry of Water, Land and Air Protection)* 2002, 98 B.C.L.R. (3d) 360, [2000] B.C.J. No. 295 (S.C.). Ross J. agreed with the analysis of the Board in *McPhee v. British Columbia (Ministry of Environment, Lands and Parks)*, [1995] B.C.E.A. 52 (B.C.E.A.B.) that the meaning of the acts referred to in s. 43 is to be found in the provisions of the *Act*. In *Imperial Oil* there were no provisions in the *Waste Management Act* which contemplated or authorized the action taken by the decision maker, and therefore the court concluded that the decision was not subject to an appeal to the Board, but was subject to judicial review under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241.

> [34] In *McPhee* the Board considered whether the refusal to make an order was an appealable decision under s. 25(b) (now s. 43(b)) of the *Waste Management Act*. In interpreting s. 25(b) the Board considered subsections (a), (b), and (c) and noted that each of the subsections refers to an action by the manager. The Board said that the same could be said for subsections (d) and (e) in that each of those subsections captures the decisions made by a manager when issuing or amending permits, approvals and operational certificates. The Board commented that the only subsection that contemplates permitting an appeal of a refusal to act is s. 25(d), but that subsection only applied to permits, approvals or operational certificates, not to orders. Given that (d) did not apply to orders it was unnecessary for the Board to deal with it. The Board held that s. 25(b) refers to a positive act, i.e. exercising a power, as an appealable decision, and did not include a refusal to make a decision on the issuance of pollution abatement order.
>
> Therefore the applicant did not have a right of an appeal to the Board under s. 25.
>
> [35] Neither *McPhee* nor *Imperial Oi*l dealt directly with s. 43(d) which differs from the other subsections of s. 43 in that it expressly included within the definition of decision a "refusal" to act.

The same or substantially similar arguments made by the Appellants in this case, were advanced by counsel in those other cases and were considered by the Board. Like this case, most of those prior cases also involved remediation orders and the remediation orders imposed significant clean-up obligations and liabilities on the named parties. Counsel involved in those cases provided thoughtful and thorough submissions on both the statutory interpretation of the definition of "decision" and on the possible rationale for this section in the context of the contaminated sites regime.

In all of those cases, the Board arrived at the same conclusion. It concluded that the legislature sought to limit the types of decisions that would be subject to a right of appeal to the Board, and it chose to do so by carefully wording the definition of "decision" in terms of positive acts and negative acts. In addition, the Board concluded that those acts (the subsections in the definition), are not intended to overlap; rather, they can be related back to certain specific statutory provisions.

While this Panel acknowledges that many of these acts, in a general sense, involve an exercise of a power or discretion, the categories in the definition can be read to refer to different things. The Board has previously found that this was the intention of the legislature, and this Panel agrees with that conclusion. For example, there are various type of decisions authorized in the *Act* that would not fit within the other categories in section 99, yet involve the "exercise of a power" by the Director and therefore could be appealed to the Board. These include decisions made under the following provisions:

> section 42 – establishing a roster, adding names to the roster or suspending qualified professionals from the roster

section 53 - approval in principle and certificates of compliance which includes the power to withhold or rescind an approval in principle or certificate of compliance

section 17 – transfer of a permit or approval

section 44 – final determination that a site is contaminated

section 50 – determination of minor contributor status

Further support for the Board's previous interpretation is found in a recent legislative amendment to subsection 99(d) that came into force on March 30, 2006. At that time, the legislature added a "negative" act to subsection 99(d). The section previously read that a "decision" means:

...

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

The amendment changed it to say that a "decision" means:

...

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

[emphasis added]

If the Appellants are correct that the wording in section 99(c) includes both positive actions and negative actions (e.g., refusals), the Board is of the view that the same logic would apply to the other subsections and this amendment would have been unnecessary.

The Appellants note that one result of this interpretation is that many people are unable to appeal decisions that impact them. They submit that these people are put at a significant practical and financial disadvantage by having to resort to the courts if they pursue a review of the decision. The Panel is also concerned by this result. However, the Appellants' solution is to give a broad interpretation to section 99 such that "person's aggrieved" may appeal *any* type of decision issued under the *Act*. This is clearly not what the legislature had in mind. If it had intended this result, it could have been done very simply: the seven subsections describing appealable decisions in section 99 would not have been required.

Ultimately, the question of whether there "ought" to be a right of appeal from all decisions is one for the legislature, not the Board. The Panel notes that the previous Board decisions on this definition have considered the words in their grammatical and ordinary sense, read in the context of Part 8, and harmoniously with the scheme and object of the enactments and the intention of the legislature. This is consistent with the analysis set out by Dreidger in *Construction of Statutes* (2nd ed.), the analytical approach to statutory interpretation that has been decisively adopted by the Supreme Court of Canada.

Although the Panel is not bound by its previous decisions, the Panel adopts the reasoning in the Board's past decisions on the definition of "decision", and specifically, its reasoning in *CNR.* The Panel finds that the failure or refusal to amend an order to remove named parties is not an "exercise of a power" and is, therefore, not an appealable decision under section 99(c) of the *Act*.

DECISION

In making this decision, the Panel has carefully considered all of the submissions and arguments provided, whether or not specifically reiterated herein.

The Panel finds that the Director's refusal to remove Imperial and Shell from the Order are not appealable decisions. Accordingly, the Board has no jurisdiction over the appeals.

Imperial's appeal is dismissed for lack of jurisdiction.

Shell's appeal is dismissed for lack of jurisdiction.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

June 11, 2007