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Environmental Appeal Board

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DECISION NOS. 2007-EMA-004(a) & 2007-EMA-005(a)

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

BETWEEN:	Chief Wayne Christian, on behalf of the Splatsin First Nation Peter Kruyk and Carolyn A. Broad	**APPELLANTS**
AND:	Director, *Environmental Management Act*	**RESPONDENT**
AND:	Monty Lee Andrew Willis	**THIRD PARTY**
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE:	Conducted by way of written submissions concluding on July 4, 2007	
APPEARING:	For the Appellants Peter Kruyk and Carolyn A. Broad: Russ Collins Splatsin First Nation: Jennifer Spencer, Counsel For the Respondent: Mike J. Reiner For the Third Party: Steven Dvorak, Counsel	

PRELIMINARY ISSUES OF JURISDICTION

Two separate appeals were filed regarding a letter issued on April 18, 2007, by Mike J. Reiner on behalf of the Director, *Environmental Management Act* (the "Director"), Ministry of Environment, to Monty Willis. The letter acknowledges receipt of a completed registration form for discharge to surface water from a sewage treatment plant located on land adjacent to the Shuswap River, pursuant to the *Municipal Sewage Regulation*, B.C. Reg. 129/99 (the "*Regulation*"). The letter states that the registration is effective on November 22, 2006, and the letter sets out a number of requirements that the Director imposed regarding the discharge.

Chief Wayne Christian filed an appeal on behalf of the Splatsin First Nation (the "Splatsin") (Appeal No. 2007-EMA-004). Russ Collins filed an appeal on behalf of Peter Kruyk and Carolyn A. Broad (Appeal No. 2007-EMA-005). In their Notices of Appeal, the Appellants requested that the Board rescind the registration.

By letter dated May 22, 2007, the Board stated that it is unclear whether a registration is an appealable decision under section 99 of the *Environmental Management Act* (the "*Act*"). Accordingly, the Board requested written submissions from the parties regarding whether a registration under the *Regulation* is an appealable decision under section 99 of the *Act*.

Subsequently, Mr. Kruyk and Ms. Broad amended the remedy sought in their Notices of Appeal. The Board then issued a letter offering the parties an opportunity to comment on the Board's jurisdiction to accept their appeal, as amended.

These preliminary matters were heard by way of written submissions.

BACKGROUND

Before setting out the factual background to this matter, it is helpful to outline the legislative scheme.

Sections 6(2) and (3) of the *Act* generally prohibit the discharge of waste into the environment. However, those sections are subject to section 6(5) of the *Act*. Section 6(5)(a) states as follows:

6 (5) Nothing in this section or in a regulation made under subsection (2) or (3) prohibits any of the following:

(a) the disposition of waste in compliance with this Act and with all of the following that are required or apply in respect of the disposition:

...

(iv) a regulation;

The *Regulation* provides that certain discharges from sewage treatment facilities may be exempt from section 6(2) and (3) of the *Act* under certain circumstances, if a person registers the discharge under section 3 of the *Regulation*. The *Regulation* states as follows:

2 (1) A person is exempt from section 6 (2) and (3) of the Act for the purposes of discharge if the person

(a) registers under section 3...

3 (2) An application for registration must be made to a director in a form acceptable to the director and must include the following information:

...

(3) Registration under this section takes effect on the date application under subsection (2) is received by a director.

Part 4 of the *Regulation* sets out standards for effluent reuse and discharge to the environment, including discharges to water. Part 5 of the *Regulation* addresses the

design and construction of sewage facilities, and Part 6 addresses the management and operation of such facilities.

Numerous schedules to the *Regulation* contain further criteria regarding registration, standards for discharges to water, design standards for sewage facilities, and various other matters. Conditions 4 and 5 of Schedule 1 are referenced in the Director's letter. In particular, condition 4(1) states as follows:

> **4** (1) In place of a standard or requirement specified in this regulation, the discharger must comply with an equivalent or more stringent standard or requirement that a director specifies in writing for a particular discharge.

The Third Party, Mr. Willis, submitted an application for registration of a discharge from a sewage treatment facility to be located adjacent to the Shuswap River, downstream from Sugar Lake, on land described as: Lot 1, District Lot 2166 and 5306, Osoyoos Division, Yale District, Plan KAP 78195. Mr. Willis is the owner/operator of Kokanee Lodge and Resort.

A report titled "KOKANEE LODGE AND RESORT WASTEWATER TREATMENT PLANT ENVIRONMENTAL IMPACT STUDY" was prepared by Summit Environmental Consultants Ltd. for Kokanee Lodge and Resort in support of the application for registration. The Appellants posted a copy of that report on a website to which they referred the Board. On page 1, the report describes the proposal as follows:

> Kokanee Lodge and Resort at Sugar Lake ("Kokanee Lodge") is located at the south end of Sugar Lake within the Regional District of North Okanagan. It is situated close to the outlet of Sugar Lake where the lake discharges to the Shuswap River. Water levels in Sugar Lake are controlled by B.C. Hydro's Sugar Lake dam. Accommodations at Kokanee Lodge currently include recreational vehicle sites, tent sites, stand-alone cabins, and rooms within the main lodge. In addition, there is a full service restaurant on site. Guests at Kokanee Lodge participate in a wide range of outdoor activities including fishing, boating, swimming, hiking, and cross-country skiing.
>
> Wastewater at Kokanee Lodge is currently discharged to ground through septic tanks and fields. As part of a planned expansion, Kokanee Lodge is proposing to install and operate a wastewater treatment plant (WWTP) to treat its domestic sewage. The new WWTP would replace the septic systems, which would be decommissioned. Current plans call for the treated effluent to be discharged to Shuswap River at the outlet from Sugar Lake.

On April 18, 2007, the Director issued a letter to Mr. Willis. That letter is the subject of these appeals, and it states, in part:

> Receipt of the completed Municipal Sewage Regulation registration form for the subject discharge is acknowledged. Pursuant to Part 2, Section 3 of the Municipal Sewage Regulation, the effective date of registration of this discharge is November 22, 2006. This registration however is subject to additional conditions specified below.
>
> ...

> The Municipal Sewage Regulation allows more stringent standards or requirements to be specified by the Director. Accordingly, pursuant to Schedule 1 Condition 4 of the Municipal Sewage Regulation, in addition to the terms and conditions of the regulation, the following standards and requirements apply:
>
> 1. the effluent discharge quality is required to be more stringent than the levels… referenced on the registration form. The more stringent effluent discharge quality hereby required is:
>
>> TSS [total suspended solids] less than or equal to 10mg/L;
>>
>> BOD_5 [5 day biochemical oxygen demand] less than or equal to 10 mg/L; and
>>
>> Fecal coliforms less than or equal to 50 MPN per 100ml.
>>
>> …
>
> 2. Pursuant to Schedule 1, Condition 5, I require that security be provided, and a capital replacement fund established…
> 3. With respect to the allowable discharge quality during the commissioning period, I require that disinfection must be in operation throughout the commissioning period…
> 4. The Plant must be classified under the Environmental Operator Certification Program… and a suitable qualified operator(s) designated…
>
> The decision to specify additional requirements under the Municipal Sewage Regulation may be appealed to the Environmental Appeal Board…

On May 15, 2007, Chief Christian filed an appeal on behalf of the Splatsin.

In its Notice of Appeal, the Splatsin provided several grounds for appeal, which may be summarized as follows:

- the Province breached its duty to consult the Splatsin regarding their aboriginal rights and interests, including the right to fish from Sugar Lake and the Shuswap River system, before authorizing conduct that infringes their aboriginal rights and interests;
- the terms and conditions of the registration are inadequate to protect Sugar Lake and the Shuswap River system, and do not adequately mitigate the negative effects of the discharge on the Splatsin's aboriginal rights generally and the Splatsin's fish hatchery downstream of the sewage treatment plant in Bessette Creek, in particular.

The Splatsin request that the Board set aside the registration and all of the conditions associated with it due to lack of consultation with First Nations. The Splatsin also request that the Board order a stay of any effluent discharge from the facility.

On May 17, 2007, Mr. Collins filed an appeal on behalf of Mr. Kruyk and Ms. Broad. Their Notice of Appeal provides several grounds for appeal, which may be summarized as follows:

- the decision did not give adequate weight to the dangers associated with pharmaceuticals and other chemicals that may be in the discharge, and particularly the effects of those compounds on humans and aquatic life;
- the decision did not give adequate weight to the risk that the facility could malfunction or fail;
- the decision considered the proposal in isolation, and failed to consider the cumulative effects of the proposal in the context of future development of Sugar Lake and future water flows due to climate change;
- there is a moratorium on all new privately-owned sewage treatment facilities on Shuswap Lake, and the decision-makers failed to consider the dangers posed to the area covered by the moratorium by effluent flowing into Sugar Lake; and
- the discharge is inconsistent with other provincial regulations, and government policies, which discourage or prohibit discharges to water, and encourage improvements to water quality.

In that Notice of Appeal, Mr. Kruyk and Ms. Broad requested that the Board prohibit the discharge to surface waters by the proposed sewage treatment facility, and order a stay of the construction of the facility.

By letter dated May 22, 2007, the Board advised the parties that it was satisfied that it had jurisdiction to hear the appeals of the additional requirements that were imposed by the Director. However, the Board noted that it is unclear whether a registration itself is an appealable decision under section 99 of the *Environmental Management Act* (the "*Act*"). Accordingly, the Board requested written submissions from the parties regarding:

> … whether the Registration under the *Municipal Sewage Regulation* is an appealable decision under Section 99 of the *Act*.

In a letter dated June 4, 2007, Mr. Collins advised the Board that Mr. Kruyk and Ms. Broad wished to amend their Notice of Appeal to state that the relief they requested was an order from the Board "appending" a requirement to the Director's letter, such that "the Type of disposal system not include discharge to any watercourse." Mr. Collins also requested that the Kruyk/Broad appeal not be heard concurrently with the Splatsin appeal.

In a letter dated June 6, 2007, the Board offered the parties the "opportunity to comment on the Board's jurisdiction to accept the Kruyk/Broad appeal, as amended", and whether the Board should hear that appeal together with the Splatsin appeal.

The Board received written submissions from all of the parties on the preliminary issues of jurisdiction over the appeals.

The Splatsin argue that a registration under the *Regulation* is a decision that may be appealed to the Board. It takes no position on the Board's jurisdiction to accept the Kruyk/Broad appeal, as amended, or whether the appeals should be heard together.

Mr. Kruyk and Ms. Broad did not directly address whether a registration is an appealable decision.

The Director submits that a registration under the *Regulation* is not a "decision" that may be appealed to the Board. Regarding the Kruyk/Broad appeal, he only states that the Kruyk/Broad appeal, as amended, no longer challenges the registration itself.

Mr. Willis submits that:

- a registration is not a "decision" that may be appealed to the Board,
- the relief sought by the Appellants Kruyk and Broad is not within the Board's jurisdiction;
- the Crown has no duty to consult the Splatsin insofar as no "decision" was made by the Director; and
- none of the Appellants have standing to appeal. Section 100(1) of the *Act* states that a person may appeal who "has a genuine grievance because an order has been made which prejudicially affects his interests", but none of the Appellants have established that they are "persons aggrieved" within the meaning of section 100(1).

If the appeals are accepted, Mr. Willis states that the appeals should be heard together.

It should be noted that all of the Appellants addressed their standing to appeal in their respective Notices of Appeal. In addition, on its own initiative, the Splatsin addressed Mr. Willis' challenge to its standing, making submissions and providing an affidavit sworn by Chief Wayne Christian. Mr. Kruyk and Ms. Broad submit that their standing is not properly in issue, as the Board has already accepted their appeal based on their submission on standing contained in their Notice of Appeal, but that further submissions would be provided if the Board considers it necessary.

RELEVANT LEGISLATION

The following sections of the *Act* are relevant to the preliminary issue:

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) 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.

ISSUES

As noted above, the Board has advised the parties that it has jurisdiction to hear appeals from the additional requirements imposed by the Director. This is not disputed by any of the parties. The Director's decision to impose additional requirements under section 4 of Schedule 1 of the *Regulation* is "imposing a requirement" within the meaning of section 99(b) of the *Act*, and is, therefore, an appealable decision.

Accordingly, this preliminary issue of jurisdiction does not relate to those requirements. They may be appealed. It only relates to the question of the Board's jurisdiction over the registration itself and any remedy in relation to the registration itself.

The Board has framed the preliminary issues to be determined as follows:

1. Whether the registration of the discharge is a "decision" within the meaning of section 99 of the *Act* that may be appealed to the Board.
2. If the registration is not an appealable decision, are there other issues raised in the two appeals that are within the jurisdiction of the Board.
3. Whether the Appellants have standing to appeal as "persons aggrieved" within the meaning of section 100 of the *Act*.
4. If the Board has jurisdiction over both of the appeals, should the appeals be heard together?

DISCUSSION AND ANALYSIS

1. Whether the registration of the discharge is a "decision" within the meaning of section 99 of the *Act* that may be appealed to the Board.

For the Board to have jurisdiction to hear an appeal of the registration itself, and to rescind the registration itself, the registration 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 may be appealed to the Board.

Parties' submissions

The Splatsin submit that the Director's acceptance of the registration application is an appealable decision within the meaning of section 99 of the *Act* on the following grounds:

(a) the Director "exercised his power" under the *Regulation* to review the merits of the proponent's application and to impose additional conditions and standards in his sole discretion, thereby bringing the decision under the ambit of subsection 99(c) of the *Act*; and

(b) the resulting decision letter, in its entirety, is an "order" that may be appealed to the Board under subsection 99(a) of the *Act*.

The Splatsin's other arguments are specific to its appeal alone, and will be addressed under issue #2.

The Splatsin submit that the exercise of accepting an application for registration under the *Regulation* is the exercise of a power under subsection 99(c). It notes that the registration process is subject to review by the Director. The Director may consider a proponent's application for an exemption and either accept the application, or impose additional standards and conditions. Therefore, the Splatsin maintain that the *Regulation* grants the Director the ability to exercise a discretionary power under the *Act* with respect to discharge registrations, consistent with the definition of an appealable decision under subsection 99(c) of the *Act*.

In the alternative, the Splatsin submit that the Director's imposition of additional requirements after reviewing the registration was an "authoritative direction", which, based on the plain and ordinary interpretation of the term "order", amounted to an order within the meaning of subsection 99(a). The Splatsin maintain that it is inconsistent with the Board's powers under the *Act* to consider one aspect of a decision letter an "order" reviewable under the *Act*, while considering the balance of the same letter to be outside the scope of the Board's jurisdiction. In sum, the Splatsin submit that an authoritative direction by the Director to the proponent regarding the discharge of sewage is an "order" in its entirety within the meaning of the *Act*. Therefore, it is an appealable decision under section 99(a) of the *Act*.

Mr. Kruyk and Ms. Broad did not address this issue.

The Director submits that he can only exercise the powers that the *Act* or the *Regulation* specifically define and assign to him. He notes that neither the *Act* nor the *Regulation* expressly defines a "registration". He submits, however, that section 3(2) of the *Regulation* clearly indicates that a "registration" consists of mandatory information that is listed, and that "registering" is the act of submitting that information to the Director in the form of an application. He further notes that section 3(3) states that "Registration under this section takes effect on the date application under subsection (2) is received by a director." The Director submits that this process does not assign discretion or power to either refuse or accept a

registration, nor does the process require a person to make a decision or choice before the registration takes effect. The *Regulation* does not state that the Director is required to "accept" a registration before it can take effect.

The Director argues that the registration process set out in the *Regulation* is unlike those associated with the issuance of permits and approvals, as set out in sections 14 and 15 of the *Act*, respectively. In particular, the Director submits that those sections specifically assign to the Director and the Minister of Environment power and discretion through the use of phrases such as "may issue", "may require", "may amend", "may renew", "may suspend" and "may cancel."

Additionally, the Director notes that the word "registration" is not used in section 99 of the *Act*, which sets out the definition of "decision" for the purpose of appeals to the Board.

The Director also notes that section 100(2) of the *Act* prohibits appeals of "decisions" made by the Minister of Environment or the Lieutenant Governor in Council. The Director submits that the *Regulation* is a regulation created under the powers granted to the Lieutenant Governor in Council by sections 138 and/or 139 of the *Act*; therefore, the "decision" to implement the registration process and requirements set out in the *Regulation* cannot be appealed to the Board, because that process and those requirements were decided upon by the Lieutenant Governor in Council and not by the Director.

Mr. Willis adopts the Director's submissions on this issue. Additionally, he submits that, in this case, the only potential exercise of power or discretion by the Director was the imposition of the four additional requirements regarding the registration.

The Panel's findings

Whether the registration process set out in the *Regulation* involves an "exercise of power" within the meaning of section 99(c) of the *Act*

As noted by the parties, the Board has had the opportunity to interpret section 99 of the *Act*, and its predecessor provision in the *Waste Management Act*, on a number of occasions. Although the Board is not bound by its previous decisions, the Panel finds that the Board's analysis in *Shell Canada Products Limited and Imperial Oil Limited v. Director, Environmental Management Act*, June 11, 2007 (Decision Nos. 2006-EMA-013(a) & 2006-EMA-014(a)) is informative. In that decision, the Board found that the legislature intended 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. The Panel finds that the definition of "decision" in section 99 of the *Act* is exhaustive, and each subsection refers to a specific exercise of statutory power that may be appealed to the Board.

The Panel notes that previous Board decisions on the definition of "decision" have considered the words in the *Act* (and its predecessor legislation) and its regulations in their grammatical and ordinary sense, read in the context of the statute 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. 1983), the analytical approach to statutory

interpretation that has been adopted by the Supreme Court of Canada: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21.

Applying that approach to this case, the Panel finds that a plain reading of section 99(c) of the *Act* and the words in the *Regulation* does not support the contention of the Splatsin that the Director "exercised a power" when the registration was received.

In reaching that conclusion, the Panel has reviewed the process that leads to "registration", as set out in the *Regulation*. Section 3(2) of the *Regulation* lists the information that must be included in an application for registration. That section also states that an application for registration "must be made to a director in a form acceptable to the director." This indicates that a director determines what constitutes an acceptable form for an application, such as whether it may be submitted as a paper document or an electronic file. There is no language in section 3(2) to indicate that a director has any discretion to accept or reject an application that: (a) is in an acceptable form; and, (b) includes the information required under section 3(2) of the *Regulation*. A decision regarding the proper form for an application is a matter of office administration, and can hardly be characterized as a matter that the legislature would have intended to be appealable to the Board.

Section 3(3) states that a registration under section 3 "takes effect on the date application under subsection (2) is received by a director." That language clearly indicates that a director has no discretion over when or whether a registration takes effect: once an application for registration is received by the director, the registration takes effect, as long as the application contains the information required under section 3(2) and is in an acceptable form.

Based on the language in section 3 of the *Regulation*, the Panel finds that "registering" is the act of submitting to the Director an application that includes the information required by section 3(2) in an acceptable form. The Panel further finds that the registration process does not provide a director with any decision-making power over the registration itself, provided that it meets the requirements of section 3. The Panel agrees with the Director that the language in section 3 of the *Regulation* regarding applications for registrations is very different from that in the *Act* regarding applications for permits or approvals. Sections 14 and 15 of the *Act*, respectively, state that a director "may issue" a permit or an approval, whereas the *Regulation* does not state that the Director "may issue" a registration, nor does the *Regulation* state that a director is required to "accept" a registration before it can take effect. A director has no discretion or authority to refuse, accept or issue a registration, and there is no indication that a director exercises a statutory authority to make a "decision" that may be appealed to the Board. The Panel finds that mere receipt of the application for registration by the Director does not constitute an "exercise of power" as contemplated under section 99(c) of the *Act*.

For these reasons, the Panel finds that the registration process set out in section 3 of the *Regulation* does not involve an "exercise of power" within the meaning of section 99(c) of the *Act*.

Whether the Director's letter, in its entirety, is the "making of an order" within the meaning of section 99(a) of the *Act*

The Splatsin submit that the Director's April 18, 2007 letter, in its entirety, is an "order" that may be appealed to the Board under subsection 99(a) of the *Act*. However, the Panel finds that the Director's acknowledgement that the registration application was received is statutorily and factually separate from the decision to impose additional requirements, even though they appear in the same letter. As stated above, the registration became effective upon receipt of the application under section 3(3) of the *Regulation*, before the additional requirements were imposed under section 4 of Schedule 1 of the *Regulation*. Moreover, as stated in the Director's letter, the effective date of registration of the discharge is November 22, 2006, while the additional requirements did not come into effect until April 18, 2007, when the Director's letter was issued. The timing of these events lends support to the finding that the registration and the imposition of requirements are two discrete events, and that one event may be an appealable "decision" while the other may not. As a result, the Panel concludes that it is not inconsistent for the Board to find that one event (i.e. the registration) is outside the scope of the Board's jurisdiction, while the other (i.e. the imposition of the requirements) is an appealable decision within the meaning of section 99 of the *Act*.

Conclusion

In sum, the Panel finds that the imposition by the Director of the additional requirements by his April 18, 2007 letter amounts to "imposing a requirement" within the meaning of section 99(b), and is, therefore, appealable. However, the registration of the discharge pursuant to section 3 of the *Regulation* is not an appealable decision within the meaning of section 99 of the *Act*.

2. Are there other issues raised in the two appeals that are within the jurisdiction of the Board.

The Splatsin's appeal

As noted above, in their Notice of Appeal, the Splatsin submit that the Province breached its duty to consult with them regarding their aboriginal rights and interests before authorizing conduct that infringes their aboriginal rights and interests. The Splatsin maintain that the terms and conditions of the registration do not adequately mitigate the negative effects of the discharge on the Splatsin's aboriginal rights. The Splatsin request that the Board set aside the registration and all of the conditions associated with it due to lack of consultation with First Nations.

The Splatsin argue that, even if the registration itself cannot normally be appealed, its case is different. Specifically, the registration itself is appealable by the Splatsin, and should be rescinded, because the Director "exercised a power", as contemplated under subsection 99(c) of the *Act*, in making a decision not to consult the Splatsin about the registration application in respect of their aboriginal rights.

With respect to the first point, the Splatsin submit that they were not consulted by the Director regarding the proponent's application for an exemption from the waste discharge prohibitions in the *Act*. More specifically, the Splatsin maintain that the Director *decided* not to consult with them, and, in doing so, he exercised his

discretionary power as a decision-maker under the *Act*. Therefore, the Splatsin argue that the Director's overt decision that First Nations consultation was not required prior to proceeding with his assessment of the registration application was an exercise of power falling under subsection 99(c) of the *Act*. The Splatsin note that the Board has the jurisdiction to consider issues of aboriginal rights, including the right to be consulted.

In support of these submissions, the Splatsin referred to several decisions of the courts, including the Supreme Court of Canada's decisions in *Haida Nation v. British Columbia (Minister of Forests),* [2004] 3 S.C.R. 511, 2004 SCC 73 (hereinafter *Haida*); and *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585 (hereinafter *Paul*).

The Panel's findings regarding the Splatsin appeal

The Panel has considered the Splatsin's claim that the Director's decision not to consult with them about the registration application constitutes an appealable decision. The law is clear that the Crown's duty to consult aboriginal people is triggered when the Crown has knowledge of the potential existence of the Aboriginal right or title and the Crown contemplates conduct that might adversely affect the potential right or title: *Haida*. In other words, the duty to consult is not triggered unless the Crown contemplates conduct that might adversely affect an aboriginal right. Thus, the Crown must first be considering a particular type of action or decision before a duty to consult arises.

In the present case, this means that the duty to consult does not arise unless the Director contemplated conduct that might adversely affect the Splatsin's aboriginal right (assuming that the Crown had knowledge of the potential existence of the Splatsin's aboriginal right or title). For the Splatsin's argument to succeed, the Director, as an agent of the Crown acting under statutory authority, had to contemplate making a decision regarding the registration that could adversely affect the Splatsin's aboriginal rights or interests. Only if the Director contemplated such a decision would he then need to consider whether to consult with the Splatsin.

The Panel also notes that all appealable decisions within the meaning of section 99 of the *Act* are decisions made by statutory decision-makers. The Crown's duty to consult with First Nations does not arise from a statutory authority. Rather, it arises from the honour of the Crown, which has constitutional and common law origins. Therefore, a decision by an agent of the Crown regarding whether to consult aboriginal people cannot properly be described as an exercise of a statutory authority under the *Act*; rather, such statutory decisions may, in some cases, lead to a duty to consult which requires statutory decision-makers to make decisions about whether, and to what extent, they should consult aboriginal people who may be affected by the action/decision contemplated by the Crown.

In addition, for the Board to consider questions regarding the Crown's duty to consult with First Nations, the Board must first be satisfied that there is an appealable decision within the scope of section 99 that may be considered by the Board. If the legislature had intended that a "person aggrieved" may appeal any

type of decision made under the *Act*, the specific categories of appealable decisions listed in section 99 would have been unnecessary.

The Panel also notes that in *Paul*, the Supreme Court of Canada found that "the Province of British Columbia has legislative competence to endow an administrative tribunal with the capacity to consider a question of aboriginal rights *in the course of carrying out its valid provincial mandate*" [emphasis added]. The Board's mandate under the *Act* is to hear appeals of decisions made under the *Act* regarding environmental matters. As such, the Panel finds that it is consistent with the *Paul* decision to conclude that the Board may only consider questions of aboriginal rights, including consultation, when those questions arise from an appealable statutory "decision" under the *Act*.

For all of these reasons, the Panel finds that decisions regarding consultation with aboriginal people are not "decisions" under section 99 of the *Act* that may trigger an appeal to the Board. Actions or decisions by agents of the Crown regarding consultation may be considered by the Board only if there is first an appealable statutory "decision" as defined in section 99. However, if the Panel determines that there is an appealable decision, the Board may consider any concerns regarding consultation in the context of that particular statutory decision.

Applying that reasoning to the present case, the Panel finds that the Director's decision not to consult the Splatsin is not an "exercise of power" within the meaning of section 99(c) of the *Act*. However, given that the Director's decision to impose additional requirements is an appealable decision, the Board may consider any concerns regarding consultation in the context of the imposition of the additional requirements.

Accordingly, the Panel finds that the Splatsin's appeal, as it relates to the Director's decision to impose additional requirements, is appealable. However, the Splatsin's appeal against the registration itself, and the request to rescind the registration, is beyond the jurisdiction of the Board.

The Kruyk/Broad appeal

Mr. Kruyk and Ms. Broad submit that they do not appeal the registration *per se*, but they maintain that the registration is inseparable from the April 18, 2007 decision of the Director. They submit that the registration is the object of the additional requirements that were imposed by the Director.

The Director did not address this issue.

Mr. Willis submits that the relief sought by Mr. Kruyk and Ms. Broad is outside of the Board's jurisdiction. Mr. Willis notes that Mr. Kruyk and Ms. Broad initially sought an order from the Board "prohibiting discharge to surface waters for the sewage treatment facility… at Sugar Lake." He also notes that, in their June 4, 2007 letter, they state that they do not seek to have the registration rescinded; rather, they seek to have the Board consider "…the facts leading up to the decision by the responsible authority to permit the discharge of sewage to surface waters", and they request that the Board impose an additional requirement prohibiting the discharge of effluent to surface waters. Mr. Willis submits that the amendment to

the Notice of Appeal goes to the heart of the registration itself, and therefore, is not appealable to the Board.

Panel's findings

The Panel has carefully reviewed the Notice of Appeal filed by Mr. Collins on behalf of Mr. Kruyk and Ms. Broad. In that Notice of Appeal, the Appellants originally requested that the Board prohibit the discharge to surface waters by Mr. Willis' proposed sewage treatment facility, and that the Board order a stay of the construction of the facility. In his June 4, 2007 letter, Mr. Collins amended the Notice of Appeal to state that the relief requested was an order from the Board "appending" a requirement to the Director's letter, such that "the Type of disposal system not include discharge to any watercourse."

The Panel finds that the relief requested in the June 4, 2007 letter is effectively the same as the relief that was originally requested in the Notice of Appeal; namely, prohibiting the sewage treatment facility from discharging effluent to a water body. The remedy has been re-worded to focus less on the registration itself, and more on the additional requirements. However, if either remedy were granted, the end result would be the same. If the new remedy (that the Board vary the additional requirement imposed by the Director by adding a further requirement that the facility may not discharge to any watercourse) was granted, the facility could not discharge sewage effluent to surface waters.

In this regard, the Panel finds that the Notice of Appeal, as amended, seeks to prohibit what the registration and the *Regulation* allow; namely, the discharge of effluent to surface waters. Given that the Panel has already found that the registration is not a "decision" that may be appealed to the Board, the Panel finds that the Board has no jurisdiction to grant a remedy that would prohibit what the registration and the *Regulation* allow.

Additionally, the Panel notes that the imposition of the additional requirements imposed by the Director is an appealable decision under section 99(b) of the *Act*. That section provides that an appeal may be accepted from "imposing a requirement". In this case, Mr. Kruyk and Ms. Broad seek to have the Board impose an additional requirement that the Director did not impose. The Panel notes that, section 99(b) only contemplates affirmative decisions. Unlike section 99(d), section 99(b) does not contemplate an appeal of a refusal to impose a requirement. The Board has previously decided in a number of cases that a refusal to take a positive action listed in sections 99(a) through (c) of the *Act* is not appealable to the Board (see, for example: *Shell Canada Products Limited et al v. Director, Environmental Management Act*, Decision Nos. 2006-EMA-013(a) & 014(a), June 11, 2007). Thus, the Panel finds that a refusal by the Director to impose an additional requirement may not be the basis for an appeal. However, the Board may consider the merits of the additional requirements that were imposed by the Director.

For these reasons, the Panel finds that the Board has no jurisdiction over the remedy to add a requirement prohibiting discharge of effluent to surface water, which is being sought by Mr. Kruyk and Ms. Broad.

However, the Panel is satisfied that Mr. Kruyk and Ms. Broad have expressed concerns in their Notice of Appeal that are directly related to the additional requirements that were imposed by the Director. For example, they expressed concerns about the chemical composition of the proposed discharge, which is also a matter that was addressed by the Director. Accordingly, their appeal, as it relates to the specific requirements imposed by the Director, is within the Board's jurisdiction and will be allowed to proceed.

3. Whether the Appellants have standing to appeal as "persons aggrieved" within the meaning of section 100 of the *Act*.

As noted above, the Board did not specifically request that the parties address the Appellants' standing to bring their appeals, but Mr. Willis raised this issue in his submissions. For certainty, the Panel had addressed the Appellants' standing.

The test applied by the Board in determining whether a person has standing to bring an appeal under section 100(1) of the *Act* is whether the person "has a genuine grievance because an order has been made which prejudicially affects his interests." This test is from the decision of the House of Lords in *Attorney General Gambia v. N'Jie*, [1961] 2 ALL E.R. 504, where the Court stated as follows:

> The words "person aggrieved" are of wide import and should not be subjected to a restricted interpretation. They do not include, of course, a mere busybody who is interfering in things that do not concern him; but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests.

This test for standing has been consistently applied by the Board in a number of cases[1] dealing with the discharge of emissions under the current *Environmental Management Act* as well as its predecessor statute, the *Waste Management Act*.

Thus, in determining whether the Appellants have standing to bring their appeals, the Panel must determine whether they have disclosed sufficient information to allow the Panel to reasonably conclude that the Director's imposition of the additional requirements has or will prejudicially affect their interests.

Parties' submissions

Mr. Kruyk and Ms. Broad submit in their Notice of Appeal that they have domestic water licences downstream, of the proposed point of discharge, and are recreational users who regularly swim and fish in the watercourse. They further argue that they are aggrieved by the "real probability" of dangerous health effects, depreciated quality of life, depreciated property values, and psychological trauma that will result from drinking, swimming and fishing in and living next to, water flowing from the

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[1] For example, see *Brian H. Ruddell on behalf of North Peace Clean Air Association v. Director of Waste Management* (Appeal No. 2005-EMA-009(a), September 13, 2006); and *G.N. (Neil) Thompson v. Deputy Director of Waste Management and Canfor-LP OSB (G.P.) Corp.* (Appeal No. 2005-EMA-008(a), November 25, 2005).

sewage outfall. They also express concerns regarding the potential for degradation of fish habitat and salmon spawning grounds in the affected area.

In response to Mr. Willis' submissions, they submit that their standing is not properly before the Board in this preliminary matter. They further submit that, should the Board require evidence of their standing prior to deciding whether to proceed with their appeal, they would request direction from the Board in that regard.

The Splatsin submit that their standing to bring their appeal is not a live question because their standing has already been accepted by the Board. In that regard, the Splatsin point out that, when the Board requested submissions on whether a registration is an appealable decision, the Board did not question their standing.

Additionally, the Splatsin maintain that they are "aggrieved" within the meaning of the *Act*. The Splatsin submit that the discharge of sewage within their traditional territory will harm fish and other resources that they rely on for traditional purposes, and may harm the Splatsin people who use those resources. The Splatsin further submit that the discharge will infringe their aboriginal rights, and that the Crown breached its duty to consult with the Splatsin.

In support of those submissions, the Splatsin provided an affidavit sworn by Chief Wayne Christian. In his affidavit, Chief Christian deposes how his people exercise their aboriginal rights and traditional practices on Sugar Lake, including using fish and other resources. He also describes existing health and environmental concerns with water quality in the Sugar Lake watershed. The Splatsin submit that the Board is entitled to take notice of Chief Christian's traditional knowledge regarding his peoples' customs and traditional practices.

Moreover, the Splatsin argue that Mr. Willis mistakes the question of standing with arguments on the merits of the appeal. They submit that definitive proof of how the Splatsin people are aggrieved or prejudiced is not required for the purposes of determining standing before the Board. Rather, it is sufficient for the Splatsin to disclose enough evidence to allow the Board to reasonably conclude that the Splatin's interests are prejudicially affected. In support of those submissions, the Splatsin cite the Board's decisions in *Squamish Terminals Ltd. v. Director of Waste Management* (Appeal No. 2004-EMA-002(a), March 22, 2005); and *Howe Sound Pulp and Paper Ltd. v. Deputy Director of Waste Management* (Appeal No. 98-WAS-05, July 17, 1998), confirmed [1999] BCJ No. 9798 (BCSC).

The Director did not address this issue.

Mr. Willis submits that Mr. Kruyk and Ms. Broad have no standing to appeal because they are not "persons aggrieved" within the meaning of the *Act*. He submits that the Appellants have the onus of establishing their standing as "persons aggrieved", and he maintains that Mr. Kruyk and Ms. Broad have provided no evidence to support their assertions regarding standing. He further submits that the additional requirements put the Appellants in a better position than they would be in without the additional requirements, and therefore, the Appellants cannot be aggrieved by the additional requirements.

Regarding the standing of the Splatsin, Mr. Willis submits that Chief Christian's affidavit contains no cogent, persuasive evidence to establish that the Splatsin have suffered, or will suffer, any prejudice as a result of the additional requirements. Mr. Willis submits that Chief Christian's concerns that the discharge poses a serious risk of harm to the health of fish and other resources that the Splatsin use for traditional purposes, and to the health and safety of the Splatsin people who use the water and the fish, are speculative and unsubstantiated opinions. Additionally, Mr. Willis submits that the Splatsin have provided no evidence that the proposed discharge will affect their ability to exercise their aboriginal rights. Moreover, Mr. Willis submits that the additional requirements put the Appellants in a better position than they would be in without the additional requirements.

In support of those submissions, Mr. Willis refers to several of the Board's decisions, including *G.N. (Neil) Thompson v. Director of Waste Management* (Decision No. 2005-EMA-008(a), November 25, 2005); and *Ajah Azreal v. Regional Waste Manager* (Decision No. 2004-WAS-004(a), June 14, 2004).

Panel's findings

The Panel notes that, although the additional requirements impose higher standards than those listed in the *Regulation*, the Appellants' grounds for appeal indicate that the Appellants are concerned that the additional requirements are insufficient to protect the environment from the potential adverse effects of the discharge. The Panel rejects Mr. Willis' assertion that the Appellants cannot be "aggrieved" because the additional requirements are for the benefit of the environment, and the Appellants have not provided evidence to support their allegations of potential environmental damage. The question of whether the additional requirements are sufficient to protect the environment goes to the merits of the appeal, and therefore, is not properly before the Board in this preliminary proceeding.

Regarding Mr. Willis' allegation that there is a lack of evidence to support the Appellants' claims to be persons aggrieved, the Panel notes that, for the purposes of this preliminary proceeding, the Appellants are not required to provide definitive proof that they are harmed by the imposition of the additional requirements. As the Board stated in *Fleischer and Goggins* v. *Assistant Regional Waste Manager* (Appeal No. 97-WAS-11(a), November 17, 1997) (unreported), "To require lay people to essentially 'prove' how they will or will likely be affected is to impose an impossible burden on them. Proof of their cases comes at the hearing stage when the merits of the case are addressed…." For the purposes of establishing standing, Appellants must disclose enough information or evidence to allow the Panel to find that their interests are or may be prejudicially affected.[2]

The Panel notes that, in the Notice of Appeal of Mr. Kruyk and Ms. Broad, they provided addresses for service that are on Sugar Lake Road in Cherryville and on Shuswap River Road in Lumby. Further, they addressed their standing to appeal in their Notice of Appeal, advising that they have domestic water licences downstream

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[2] See *Ajah Azreal v. Regional Waste Manager*, Appeal No. 2004_WAS-004(a), June 14, 2004; *Houston Forest Products Co. and others* v. *Assistant Regional Waste Manager* (Appeals No. 99-WAS-06(c), 08(c), and 11(c)-13(c), February 3, 2000).

of the proposed outfall and are recreational users who swim and fish in the watercourse. They also note that they are aggrieved by the "real probability" of (a) dangerous health effects, (b) depreciated quality of life, (c) depreciated property values, (d) psychological trauma caused by the above, that will result from drinking, swimming and fishing in and living next to, water flowing from a 100% sewage outfall. They also expressed concerns for fish habitat and salmon spawning grounds in the affected area.

Consequently, the Panel finds that Mr. Kruyk and Ms. Broad have provided sufficient evidence to establish that they may be prejudicially affected by the additional requirements. Therefore, the Panel finds that they are persons aggrieved for the purposes of this appeal.

The Panel also finds that the Splatsin have disclosed sufficient information and evidence to establish that they are or may be prejudicially affected by the additional requirements. In particular, the affidavit of Chief Christian establishes that the discharge will occur in the Splatsin's traditional territory, and that the Splatsin are concerned about the potential effects of the discharge on fish and other natural resources that the Splatsin rely on in exercising their traditional aboriginal practices.

In summary, the Panel finds that the information and evidence before the Board is sufficient to conclude that the Appellants have "a genuine grievance because an order has been made which prejudicially affects [their] interests". The Panel finds that they meet the test of a "person aggrieved", as stated by the House of Lords in *Attorney General Gambia v. N'Jie*, above.

4. Whether the appeals should be heard together.

Mr. Kruyk and Ms. Broad initially objected to having their appeal heard at the same time as the Splatsin appeal. In their submissions on these preliminary matters, they state:

> [We] laud the concerns about cost and duplication expressed by the [Third Party]. We have no further information for the Board, should it agree to hear both Appeals, for determining what portions of each appeal should be held in conjunction with what portions of the other.

Neither the Splatsin nor the Director addressed this issue.

Mr. Willis supports hearing the appeals concurrently. He maintains that hearing the appeals together is consistent with the just, speedy and inexpensive resolution of disputes.

The Panel notes that page 16 of the Board's *Procedure Manual* states as follows:

> Where the Board considers that two or more appeals are related to each other or that some, or all, of the parties are the same, it may consider combining the appeals and dealing with them in one proceeding. The goal of joining appeals is to make the appeal process more efficient.

In the present circumstances, the Panel finds that the appeals should be heard together. In particular, the Respondent is the same in each appeal, and the

Appellants appeal the same decision. Also, the evidence and submissions regarding potential environmental issues will be similar for each appeal, and hearing the appeals together will result in savings of costs and time compared to holding two separate hearings. Moreover, there is no indication that hearing the appeals together will cause prejudice to any party.

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 as follows:

- the Board has no jurisdiction over the appeals as they relate to the November 22, 2006 registration;
- the Board has no jurisdiction to order remedies that prohibit what the *Regulation* authorizes, such as an order prohibiting discharge to surface waters;
- the Board has jurisdiction over the appeals, to the extent that they pertain to the four additional requirements that were imposed by the Director;
- the Board has no jurisdiction over the issue of consultation with aboriginal peoples regarding the November 22, 2006 registration;
- the Board has jurisdiction over the issue of consultation with the Splatsin regarding the four additional requirements that were imposed by the Director on April 18, 2007;
- the appeals will be heard together; and
- the standing of both Appellants to bring their appeals is confirmed.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

August 22, 2007