Province of
British Columbia

Ministry of
Environment

ENVIRONMENTAL APPEAL BOARD
Victoria
British Columbia
V8V 1X5

APPEAL: 84/01 WASTE MGT

J U D G E M E N T

Appeal against the decision of the Director of Waste Management, dated August 3, 1983, being Waste Management Permit PR-4231, issued to the Corporation of the District of North Vancouver, heard under Section 28 (1) of the Waste Management Act, and Section 11 of the Environment Management Act.

HEARING DETAILS:

The hearing was held at the Coach House Inn, North Vancouver, B.C. on March 26th, 1984. Mr. H.D.C. Hunter presided as the Chairman of a Panel of One, appointed under the provisions of the Procedural Regulations of the Environmental Appeal Board.

Miss Shirley Mitchell, Secretary to the Board, acted as the recorder of the proceedings.

PARTICIPANTS:

Appellant: Mr. H. Lawson, represented by Mr. J.G. Ince, Counsel

Permit Holder: District of North Vancouver, represented by Mr. R.J. Bauman, Counsel

Waste Management Branch:

represented by Mr. P.G. Jarman, Counsel

District of West Vancouver - represented by Mr. B. Emerson, Municipal Solicitor

The District of West Vancouver requested and was granted party status.

Witnesses called by the Appellant:

Mr. H. McBride, P. Eng., Deputy Director of Engineering for District of North Vancouver (by subpoena)

Mr. F.P. Hodgson, Manager, Technical Services Section, Waste Management Branch (by Subpoena)

Mr. J.G. Spencer, P. Eng., Technical Services, Municipal, Waste Management Branch (by Subpoena)

Mr. J.J. O'Brien, P. Eng. - resident of North Vancouver.

The other parties called no witnesses.

EXHIBITS:

No. 1 - Appellant's documents

No. 2 - District of North Vancouver's documents

No. 3 - Newspaper clipping

No. 4 - Letter of F.P. Hodgson, dated March 29th, 1983, and list of Objectors.

GROUNDS FOR APPEAL:

The parties were reminded at the outset by the Chairman that he had made a ruling on a preliminary point of law that the appellant was restricted to the grounds of appeal in his submission of August 18, 1983. The grounds were -

"1. The increase in tonnage authorized by an amendment exceeds the quantity requested in the published notice dated April 24, 1983.

"2. Irregularities occurred with the posted amendment applications that gave the impression that the appeal period had expired".

The submission expanded on these grounds by way of explanation.

EVIDENCE:

The evidence of the witnesses was not seriously contradicted as to facts, and the following events occurred:

The District of North Vancouver (the District) applied in November, 1982, to expand the use of its landfill site. There was much opposition and the application was withdrawn.

The District applied on 21 January 1983 for an amendment to its existing permit. A copy of this application appears as Document 1 in Exhibit 1. The amendment was to increase the average daily tonnage from 230 tons to 500 tons over ten years.

This application also caused much opposition. The list of objectors (Exhibit 4) indicates about 150 objectors, the great majority of whom simply signed a form letter.

The Municipal Council formed a committee to consider the matter and the committee heard objections. The Waste Management Branch (the Branch) sent a form letter to all objectors on February 21, 1983 (Document 7 Ex. 1) saying the application was on hold.

As a result of the opposition and discussions, the District wrote to the Branch on March 18, 1983, (Doc.4,Ex.2) requesting that the application be altered to 450 tons per day over 4 years. The application form itself was not amended or reposted on the ground at this time.

On March 29, 1983, the Branch wrote to objectors (Doc.9, Ex.1), saying that the application was now to be processed. The reference is to the original application of January 21, not amended as requested in the letter of March 18th. This letter gave objectors a further 30 days to object. It also stated that the Branch would order publication in the press. The witness, Mr. O'Brien, replied to this with an objection. It appears that others did not reply in any significant numbers.

The District was ordered to advertise by letter dated March 31, 1983 (Doc. 5, Ex. 2). This letter contains instructions and warnings regarding inaccuracies in advertising. This letter was accompanied by a copy of the January 21 application form.

Mr. McBride telephoned the Branch to confirm that the advertisement should be for 450 tons per day over 4 years, and this was confirmed. He then gave instructions to his secretary to"white-out" the 500 tons and the 10 years and type in 450 tons and 4 years on the application form.

Another copy of the application form, still dated 21 January, 1983, but showing the amended figures, was posted on the site about mid-April.

The application was advertised in the "SUN" and the "PROVINCE" on April 21, 1983, and in the "NORTH SHORE NEWS" on Sunday, April 24, 1983. All the advertisements showed 450 tons per day over 4 years and they all stated that objectors had 30 days "from the date of posting, publication, service or display" to object in writing.

The application was granted and objectors notified by letter dated August 3, 1983 (Doc.15, Ex.1). This letter stated that the permit was for 450 tonnes per day. This appeal resulted.

The Director of the Branch agreed to amend the permit to 450 tons instead of 450 tonnes. Counsel for the Branch and the District again consented to this change.

Mr. O'Brien wrote two letters of objection: February 3, 1983 and April 12, 1983 (docs. 5 and 10 Ex.1). Both were replied to. He claimed that he had been misled about the time for filing objections. Under cross-examination, he admitted that he had little to add to his previous objections. He was unaware that the original application form had shown Bowen Island and Lions Bay as sources of refuse, and thought that this was an amendment in April. He had not seen any of the advertisements. He saw the final posting in mid-May and thought his time for appeal had passed.

ARGUMENT:

Counsel for the appellant turned first to the second ground of appeal. He referred to the Waste Management Regulations (B.C. Reg. 432/82) and the Waste Management Act. He pointed to Sec. 11 of the Act which authorizes the Director "subject to this section and the regulations,and for the protection of the environment" to amend a permit. If the regulations are not obeyed, he has no jurisdiction to grant an approval. In his view, the regulations had not been complied with because Sec. 2 not only required the use of a form supplied by the Director, but also Section 2(2) "The application shall state that any person who may be adversely affected by the discharge or storage of the waste may within 30 days from the last date of posting under Section 3(a) or publication, service or display under Section 4,write to the manager stating how he is affected".

The form used by the District, which was not proved to have come from the Director, did not contain the required words. The form stated, "Any person .... may within 30 days from the date of posting, publication, service or display, state in writing to the Manager how he is affected."

Counsel referred to regulations, section 10, which refers to amendments. This requires the application "to be dated". In this case, the change in the application was not dated, there was no indicated of when it was posted, so that no one knew when the time for objection was passed. Mr. O'Brien was misled, and he only found out about the change from "500 tons and 10 years" to "450 tons and 4 years" in mid-May, from looking at the last application posted. He thought his time to object had passed. This showed that people had been misled about their rights.

He argued that in the preliminary argument, the Chairman had ruled that regulations must be strictly interpreted and obeyed, and, therefore, the Chairman must also, in this case, take the same position: rule strictly and hold that the Director was without authority to issue the permit.

He further argued that it was clear from Mr. O'Brien's evidence that people had been misled as to their rights to object, and even if there was discretion (which he did not admit), it should be exercised in favour of the appellant. It was apparently assumed by the Branch that because the volume was reduced from 500 tons to 450 tons, and the time from 10 years to 4 years, the objectors would be satisfied. There was no evidence or justification for this opinion.

With respect to the first ground of appeal, Counsel argued that the permit was void because it was issued for more than the quantity applied for. He pointed to section 11 of the Act which, still subject to the regulations, authorizes amendment of a permit "on application of a holder". The Director could not issue a permit for more than had been applied for and, therefore, the permit was void and incapable of amendment.

The appellant was simply seeking a declaration that the amendment was invalid and thus require the District to reapply,following the correct procedure.

In reply, Counsel for the District argued that reliance on the absence of "the last date" was not one of the grounds of appeal in the letter of August 18, 1983, or in the explanation in that letter.

Turning to the points raised, he pointed to Sec. 11(2)(f) in the Act, which allows the Director to authorize "a change" in the quantity of waste discharged. This is not "increase" or "decrease" but "change" - it can go either way. The reference to 450 "tonnes" instead of "tons" was a clerical error. (Counsel for the appellant objected as there was no evidence for this). In any event, the amendment was properly issued and the Director could reduce the amount to "tons". Under Section 28(3)(c), the Appeal Board had authority to order this change.

In respect of the second ground, counsel pointed out that Sec. 10 of the regulations required an applicant to use a form supplied by the Director. This had been done. Neither the regulations nor the form require the date of posting to be shown. Under these circumstances, it is difficult to see how the public would benefit from using the word "last" in the form.

No one was misled by the dates, the change did not have to be reposted, the applicant did not tell the public on the form that an amendment had occurred and the regulations did not require this.

In fact, the time for objections was set by the advertisement. It would have been misleading to suggest that it was set by the reposting.

Both the Act and the regulations are silent on whether a change in the application requires a fresh start.

In fact, the public were well informed as shown by the objectors and by the letters sent from the Branch. The newspaper advertisements also had wide circulation. It was not the applicant's fault if objectors such as Mr. O'Brien did not see the advertisement.

In his submission, counsel claimed that it was clear that no one was misled.

Turning to authorities, he cited Mosaic Enterprises Ltd. v. Kelowna (1979) 15 BCLR 327 at 344. As an obiter dictum Aikens JA stated "I do not quarrel with counsel's submission that, when substantial compliance with the statutory prerequisites to enacting a bylaw is shown, the court should not quash". In the instant case, it was perhaps impossible to obey all the regulations as they appeared to be inconsistent.

Time periods and other matters going to the jurisdiction of the court or tribunal are strict and have always been strictly construed; where the regulation is of an administrative nature, substantial compliance, where no prejudice is shown, is adequate.

The next case cited was Kerr v. Thompson-Nicola Regional District SCBC 1977 . Here the Court considered that the purpose of the requirement was to ensure adequate notice to the public and as this was shown to have been accomplished, the Court declined to quash a bylaw.

In Haddock v. North Cowichan (1967) 59 WWR 481 compliance with the statutory requirement was impossible, and as the desired publicity had been achieved, the bylaw was not quashed.

In the present case, it was clear that the regulations are intended to ensure wide public notice and to provide an opportunity for public input; this had obviously been achieved.

Mr. Jarman, for the Branch, pointed out that Mr. Ince had produced no cases to support his argument.

He quoted from "Administrative Law Cases, Text, and Materials" by Evans, Janisch, Mullan and Risk, and in particular from portions of Chapter 6. He read extracts of Ridge v. Baldwin (1964) AC 40 (Eng.H.L.) re Polgrain and Ivanhoe Corp. (1976) 71 DLR 3d 348 (Ont. Dir.Ct) Coney v. Choyce (1975) 1 WLR 422 (Eng. Ch.D)). These cases suggest that a Court will seek to establish whether there has been a denial of a right to be heard.

In his submission on the facts and on the law, there had been no miscarriage of justice. The last date for objection was fixed by the advertisement.

Mr. Ince replied that although the grounds of appeal did not specifically refer to "the last date", it was inherent in that the impression was given that the time to comment was past.

He pointed out that there was no evidence of a "clerical error". Mr. Hodgson gave no reason for using "tonnes".

He pointed out that Sec. 11(2) of the Act only gave the Director authority on an application or on his own initiative. There was nothing to allow correction of an error.

He also stated that the principles of environmental law differed from other branches in that the public must be given the widest input . The Act and the Regulations must give respect to this basic principle. None of the cases quoted covered the facts of this case. Mr. Jarman had quoted cases of judicial review, but the Environmental Appeal Board is not restricted to matters of law; it can correct errors of discretion.

He did not know of any cases which covered the situation in this appeal. He did not think there were any.

DECISION:

The cases cited at the earlier hearing and at this one appear to make it clear that Regulations and statutory requirements fall into two categories: those which must be obeyed exactly and those, administrative ones, which must be obeyed in principle. Those which give a tribunal jurisdiction to consider cases are in the first category. Time of appeals, the grounds of appeal and the organization of the tribunal seem to be held by the courts to be absolute requirements. The courts appear to consider regulations regarding notice to the public to be more flexible. The case of Coney v. Choyce is particularly apposite: the court pointed out that it was clear that the public was well aware of the situation although precise, proper notice had not been given. The court would not interfere with the decision.

In this case, the failure to state on the form that objectors had 30 days from the last date of posting or publication did not prevent objections. About 150 persons objected.

The regulation does not require that the date of posting be stated; therefore, the public cannot tell from the posting what exact date is the last day.

The regulations clearly give the public 30 days from the last date of publication in a newspaper. The objectors were told in the letter of March 29th that there would be an advertisement. Although the letter implied 30 days from the letter, the regulations and the advertisement gave 30 days from April 24th. Even if the posted application had used the words of the regulations, the public would still have had 30 days from April 24th. This failure to meet the regulations did not result in any failure in natural justice.

The change from 500 tons over 10 years to 450 tons over 4 years is in a different category. A new application was posted, but it was dated January 21, although it was posted in mid-April. This would have been misleading as the form reads, after the date, "was posted" on the ground (emphasis added). It is unfortunate that the regulations are totally

silent about amending an application, nor is the Act in a better state. If the result is that the Director can only issue a permit as originally applied for, or totally reject it, he would have to issue one and then amend it under his powers in Sec. 11 of the Act. This hardly makes sense.

If a request to amend an application requires the applicant to start again, the applicant did in fact repost the application, although the date was incorrect. The regulations were met by advertising which disclosed the amounts of 450 tons over 4 years. This also contained the required words of "last date of publication". Thus, the amended application had the incorrect date and did not have the required words "last date", but it was on the Director's form. However, the advertisement was correct.

The public was well aware that the application had been made in January. There was much opposition and considerable discussion. As a result, the Director was prepared to process the application for 500 tons per day. This is shown by his letter of March 29th (Exhibit 4). Notwithstanding the evidence of Mr. O'Brien, it is unlikely that 450 tons per day would have been more detrimental to the environment. He was entitled to issue a permit for the 450 tons applied for. Whether the "450 tonnes" was a clerical error or the S1 equivalent of the "500 tons" as originally applied for is irrelevant. The permit was not a nullity and the Director has authority under Sec. 11 to amend it to 450 tons.

The Board does not consider that the failure to have the exact words of Reg. 2(2) on the form provided by the Director is such as to deprive the Director of his jurisdiction to issue a permit. It has not resulted in a denial of natural justice.

The alteration to 450 tons per day was not against any regulation of the Act, and it was regularized by the advertisement in the newspapers.

The permit was issued for the incorrect amount and the Director is hereby ordered to amend the permit to 450 tons per day - if he has not already done so.

Subject thereto, the appeal is dismissed.

H.D.C. Hunter
Panel Chairman
Environmental Appeal Board

Victoria, B. C.
April 5th, 1984

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J U D G E M E N T

Appeal by Mr. H. Lawson against Amended Waste Management Permit PR-4231, granted to the District of North Vancouver

Hearing date: January 10th, 1984

Before H.D.C. Hunter, Board Member - a Panel of One appointed by the Chairman of the Board.

The Appellant, Mr. H. Lawson, was represented by Mr. J. Ince, Counsel.

The Permit Holder, the District of North Vancouver, was represented by Mr. R.J. Bauman, Counsel.

The Permit Holder had given notice of a preliminary objection relating to the grounds of appeal put forward by the Appellant; therefore, the Panel Chairman had given direction that only the preliminary objection would be dealt with at this hearing, and a date for a further hearing would be set in consultation with Counsel following a decision on the preliminary point.

Mr. Bauman opened his case by submitting that by virtue of Section 36 of the Waste Management Act, proclaimed in force September 16, 1982, all proceedings should be covered by that Act and not by the Pollution Control Act. Mr. Ince concurred in this. The Board accepted this submission.

Mr. Bauman continued with his main submission. Mr. Lawson had appealed to the Board in a letter dated August 18, 1983, and this was clearly within the time limit. This letter set

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out the details required by the Regulations and in particular contained grounds of appeal disclosing two very technical grounds.

Later on, as a result of a letter from the Waste Management Branch, Mr. Lawson wrote to the Branch on November 2, 1983, with a copy to the Board, setting out additional grounds of appeal, going to the merits of the whole application procedure.

It was Mr. Bauman's submission that the Board could not permit this attempted addition to the original grounds of appeal. He claimed that the Board had no jurisdiction to do so under the Environment Management Act or the Regulations, and being a statutory body, the Board had no inherent jurisdiction such as the Supreme Court had. He referred to cases in support of this submission.

As an alternative submission, Mr. Bauman argued that if the Board had the jurisdiction to allow a widening of the grounds, it should not exercise its discretion to do so unless the Appellant could show good reason to do so. In support of this, he quoted authorities under the Labour Code.

In this case, the District had applied on January 21, 1983, for 500 tons; this was later amended by the District to 450 tons. Publication was required in the newspapers. The Waste Management Branch wrote to some 157 interested persons and invited comments. On April 1st, there was a further submission from a Mr. O'Brien, which caused the Branch to seek further information from the District, which was given. The public had every opportunity for input, the Branch had considered such input, but the Appellant wanted to reopen the whole case.

In reply, Mr. Ince submitted that there was no provision to prevent an appellant widening his grounds of appeal, and he referred to Sec. 28 (2) of the Waste Management Act

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which specifically allowed the Board to enlarge the time for filing an appeal. In this case, the Board had not complied with its own regulations in respect of fixing the time for a hearing. He submitted that the body of environmental law recently developed turned away from strict interpretations by lawyers and was in favour of public input. He cited no cases to support the submission. The strict rules of Municipal Law did not apply, while the provisions of Sec. 28 of the Waste Management Act grant the Board great flexibility - as it should.

With respect to the cases referred to by Mr. Bauman, he pointed out that an appeal under the Municipal Act was on a matter of law only, while the Board had an unfettered discretion to hear appeals on any grounds. Furthermore, any irregularity had been waived. First, the Board had not raised the point when setting the date; secondly, Mr. Bauman had not raised the matter when asking for further particulars.

With regard to the merits, he alleged serious irregularities in the procedure in handling the application; that amendments had been improperly permitted, and as result, the Appellant has lost confidence in the Branch and wants a new hearing in front of the Board.

In reply to a question from the Board, Mr. Ince submitted that the powers of amendment given by Sec. 11 of the Waste Management Act are only exercisable subject to the Regulations.

In rebuttal, Mr. Bauman submitted that Sec. 11 of the Act clearly allowed the Director to amend an application while it was under consideration. He suggested that while Sec. 28(2) of the Waste Management Act permitted an extension of time, it did not apply to grounds of appeal. He did not admit that any waiver had occurred, and repeated his submission that where jurisdiction is involved, waiver is impossible.

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DECISION:

The Notice of Appeal, dated 18 August, 1983, was a complete document, containing all the requirements set out in the Regulations. It, therefore, gave the Board jurisdiction to hear the appeal. If no adequate grounds of appeal had been set out, the Regulations permit the Chairman to ask for further details, and, in such a case, an extension of time to perfect the appeal may be granted. That does not apply in this case.

It is trite law that a statutory tribunal has no inherent jurisdiction and can only operate within the powers given to it by Statute. The Waste Management Act allows appeals to the Board, but its requirements are mandatory. Sec. 28(2) which specifically grants a power to extend the time for filing an appeal goes no further, and does not include widening grounds of appeal. The inclusion of this power inevitably suggests a lack of any other discretion. Cases cited by Mr. Bauman regarding the absolute requirements to comply with the Act (re Merry and City of Trail (1962) 34 DLR 2d 594; re Prince George unreported BC 19/74 Prince George Registry;). These show that compliance with regulations is mandatory. He also cited Johnstone v.Nanaimo (unreported 1983) as authority for the proposition that grounds of appeal in a Municipal Act application cannot be expanded. The principle must apply with greater force to a statutory tribunal. The reference to an Ontario case by Mr. Ince and to Labour Code cases by Mr. Bauman are, in the opinion of the Board, of little value as the statutory backgrounds are different.

It is, therefore, decided that the Board has no jurisdiction to allow the Appellant to expand on his original grounds for appeal. Although it is not necessary to decide the matter in the light of the above decision, the Board would not exercise its discretion in the

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Appellant's favour if it had such discretion. The original letter of August 18th, 1983, shows that the Appellant had a complete knowledge of the Regulations, while the letter of November 2nd, 1983, indicates that the Appellant was following some deliberate plan, although the reason for such a plan is not disclosed.

H.D.C. Hunter
Panel Chairman

Victoria, B. C.
January 16, 1984