BRITISH COLUMBIA

# Environmental Appeal Board

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## APPEAL NOS. 2000-WAS-028(a); 2000-WAS-031(a)

In the matter of an appeal under section 44 of the *Waste management Act*, R.S.B.C. 1996, c.482.

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| **BETWEEN:** | Joan Sell and Don McIvor on behalf of Sierra Club of British Columbia - Quadra Island Group Reach for Unbleached! | **APPELLANTS** |
| **AND:** | Assistant Regional Waste Manager | **RESPONDENT** |
| **AND:** | Island Cogeneration Limited Partnership | **THIRD PARTY** |
| **BEFORE:** | A Panel of the Environmental Appeal Board<br>Alan Andison, Chair | |
| **PLACE OF HEARING:** | Conducted by way of written submissions | |

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| **APPEARING:** | For the Appellants: | |
| | Sierra Club of British Columbia - Quadra Island Group | William J. Andrews, Counsel |
| | Reach for Unbleached! | Delores Broten |
| | For the Respondent: | Dennis Doyle, Counsel |
| | For the Third Party: | Robert S. Anderson Counsel |

## APPLICATION

This is an application by the Sierra Club of British Columbia – Quadra Island Group and Don McIvor (the "Applicants") to have the Environmental Appeal Board hear a preliminary motion concerning Permit PA-16080 (the "Permit") issued by R.A. Bollans, the Assistant Regional Waste Manager (the "Regional Manager") to Island Cogeneration Limited Partnership ("Island Cogeneration"). The Applicants seek to have the Permit rescinded and sent back to the Regional Manager with directions, on the grounds that the Regional Manager fettered his discretion when he issued the Permit.

This application was conducted by way of written submissions.

## BACKGROUND

The Permit was issued under the *Waste Management Act* (the "*Act*") to Island Cogeneration on December 1, 2000. The Permit allows the discharge of air contaminants from a cogeneration power facility located in Campbell River, B.C.

The Applicants submitted a joint notice of appeal dated December 21, 2000 to the Environmental Appeal Board (the "Board"). In their notice of appeal, the Applicants state that they "are primarily concerned about the impact of this project on local air quality and human health, and on the local and global environment." They then list further grounds for appeal concerning the merits of the Permit. For example, they state that the Permit fails to adequately regulate emissions from the cogeneration plant, and does not require that pollution controls be installed on the plant.

Reach for Unbleached!, a separate organization, submitted a notice of appeal dated December 29, 2000 to the Board. Its grounds for appeal relate to the pollution levels allowed by the Permit, and the effects of this pollution on human health and the environment.

On January 31, 2001, the Board received a letter from William J. Andrews notifying that he would be acting as counsel for the Applicants.

On February 8, 2001, the Board notified the parties that an oral hearing of the appeal had been scheduled for June 4 to 8, 2001 in Campbell River, B.C.

On April 23, 2001, the Board received the application that is the subject of this decision, from counsel for the Applicants. In their application, the Applicants request that the Board quash the Permit on the ground that the Regional Manager fettered his discretion by deferring to the Project Approval Certificate issued to Island Cogeneration under the *Environmental Assessment Act* instead of exercising his jurisdiction under the *Waste Management Act.* Specifically, the Applicants submit that the Regional Manager relied exclusively on the information in the Project Approval Certificate for the cogeneration plant, which was issued as a result of review under the *Environmental Assessment Act*. The Applicants further submit that a technical report dated November 28, 2000, which was prepared by Ministry of Environment, Lands and Parks engineering staff (the "Technical Report"), "displays clearly on its face that the issuance of the Permit was based fundamentally on the Project Approval Certificate and not on an independent examination of the application [for the Permit] on its merits under the *Waste Management Act*.

In a letter dated April 23, 2001, the Board offered the parties an opportunity to make written submissions on the question of whether it is appropriate to deal with the fettering issue as a preliminary motion that would be heard in writing. The parties were further asked to provide their submissions as follows. Reach for Unbleached!, the Respondent and the Third Party were to provide their submissions to the Board and the other parties by Wednesday, May 2, 2001. The Sierra Club (Joan Sell) and Don McIvor (the Applicants) were to provide their reply to the submissions by Monday, May 7, 2001. The Board further advised that if it decided

to consider the fettering issue as a preliminary matter, it would establish a schedule for the exchange of submissions on that issue.

All of the parties provided submissions in response to the Board's request.

Reach for Unbleached! supports the application to hear the preliminary motion in advance of the oral hearing.

The Respondent and Island Cogeneration both oppose the application.

## ISSUE

The issue in this application is:

Whether the Board should hear the preliminary motion in writing prior to the oral hearing.

## DISCUSSION

### Whether the Board should hear the preliminary motion in writing prior to the oral hearing.

The Applicants did not make any specific submissions in their application dated April 22, 2001 regarding the rationale for the Board to consider the preliminary motion in writing prior to the oral hearing. Although the Applicants referred to the decision of *Koopman* v. *Ostergaard*, [1995] B.C.J. No, 1822, that decision deals with substantive issues regarding fettering of discretion, rather than the issue of whether the application should be heard as a preliminary motion prior to the oral hearing.

In a letter dated May 1, 2001, counsel for the Regional Manager, Dennis A. Doyle, opposed the application. He submitted that the issue of fettering should not be dealt with as a preliminary matter but, rather, should be addressed in the course of the hearing scheduled to commence on June 4, 2001. Mr. Doyle argued that in dealing with an issue such as fettering, it is necessary to consider the whole of the decision making process, and to consider the evidence of the manager and technical staff who assisted in the evaluation of the Permit application. He further noted that the relief sought by the Applicants in the preliminary motion is not simply procedural in nature, and if successful, the preliminary motion would decide the appeal.

In a letter dated May 2, 2001, counsel for Island Cogeneration, Robert S. Anderson, opposed the application, and submitted that all questions relating to the preliminary motion should be determined at the hearing of the appeal. In support of his submission, Mr. Anderson argues that the preliminary motion raises issues of both fact and law, and that the exercise of discretion requires careful consideration of the factual basis for the Regional Manager's decision. He argued that in order to properly assess the issues raised, it would be necessary for the Board to consider the history of the Island Cogeneration Project, and the history of the involvement of

the Regional Manager and his staff. Counsel further submitted that the application to hear the preliminary motion seeks relief based on a ground of appeal that is not set out in the Applicants' notice of appeal. Mr. Anderson advised that if the Board allows this new issue to be raised at the hearing of appeal, Island Cogeneration intends to call evidence related to it.

In a letter dated May 2, 2001, Delores Broten, representative for Reach for Unbleached! supported the application to hear the preliminary motion.

In a reply dated May 5, 2001, counsel for the Applicants argued that the reasons for an administrative decision must stand on their own merits. Where the reasons for an administrative decision disclose a jurisdictional error, it is not open to the decision-maker to argue that there exist additional facts not mentioned in the reasons for decision. With respect to the argument that this matter is final rather than a procedural in nature, Mr. Andrews argued that there is no requirement that a preliminary motion must be procedural in nature. He further argued that while the preliminary motion, if successful, would decide the appeal, it would not be a final decision with respect to Island Cogeneration's Permit.

With respect to the argument that the Applicants seek relief based on a ground of appeal that was not stated in their notice of appeal, Mr. Andrews submitted that Island Cogeneration is not prejudiced by the application, and that the Board has the authority to allow an amendment to the notice of appeal. Mr. Andrews also supports the argument of Reach for Unbleached! that, if the preliminary motion were successful, a subsequently issued permit may not require an oral hearing.

The Board subsequently received several responses with regard to Mr. Andrews' May 5, 2001 letter.

By a letter dated May 8, 2001, counsel for the Regional Manager stated that it does not accept all of the Applicants' submissions on the law in this matter, and in particular, that the Respondent is limited to the matters raised in the Technical Report in dealing with the fettering issue. Counsel submitted that the Technical Report is a recommendation for the consideration of the decision-maker, and has never been represented as reasons for the Regional Manager's decision.

Mr. Andrews responded in a letter dated May 8, 2001, and requested leave of the Board to reply to Mr. Doyle's submission that the Technical Report is not the "reasons" for the issuance of the Permit. Mr. Andrews then referred to a recent decision of the B.C. Supreme Court, and stated that the wording of the Technical Report supports the conclusion that it was intended to serve as the reasons for the issuance of the permit, although it is cast in the form of recommendations.

In a letter dated May 8, 2001, counsel for Island Cogeneration responded to Mr. Andrews' further submissions. In this letter, counsel submitted that the Applicants must point to some positive evidence to show that there has been fettering. Mr. Anderson further argued that, because no application to amend the notice of appeal to raise the issue of fettering has been made, the issue of whether the Board should allow such an amendment does not arise. He also argued that, if such an

application were made, the amendment would have to be raised prior to the substantive issue raised in the Applicants' letter dated April 22, 2001.

Mr. Andrews responded by a second letter dated May 8, 2001. In this response, Mr. Andrews asked that the Board not consider the May 8, 2001 submission from counsel for Island Cogeneration. He noted that counsel for Island Cogeneration did not request the leave of the Board to file a second response after the conclusion of written arguments. He submitted that this second response could have been included in their May 1, 2001 response.

Mr. Andrews further submitted that if the Board allows Island Cogeneration's submission, he requests leave of the Board to reply to Island Cogeneration's May 8, 2001 response. Mr. Andrews also provided his reply, as follows:

- The Applicants are arguing that the reasons for decision disclose on their face an unlawful fettering of discretion by the Regional Manager in issuing the Permit.

- Counsel for Island Cogeneration has dealt with legal issues in its letter.

- The case of *Davison* v. *Maple Ridge (District) supra* can be distinguished on its facts.

- The Applicants has pointed to some positive evidence to show that there has been a fettering of discretion.

- The case of *ARA Holdings* v. *British Columbia (Provincial Approving Officer) supra is* distinguishable because it did involve evidence regarding the alleged fettering of discretion.

- He also refers the Board to the case of *Saunders Farms Ltd.* v. *British Columbia (Liquor Control and Licensing Branch)* [1995] B.C.J. No. 82, in which the Court of Appeal found that an unlawful fettering of discretion was disclosed by the reasons themselves.

- With respect to Island Cogeneration's argument that any application to amend the notice of appeal should be done prior to resolution of the preliminary motion, counsel for Island Cogeneration does not argue there is any reason the Board would not allow an amendment of the notice of appeal.

- The Board has the authority to allow such an amendment without a request to do so.

- The argument raised by Island Cogeneration does not support Island Cogeneration's submission that the preliminary motion should not be dealt with before a full hearing on the merits of the appeal.

*Admissibility of the submissions received after May 7, 2001*

The Panel has considered all of the submissions received in relation to this application, including those submitted after May 7, 2001. The Panel notes that the Applicants have had an opportunity to reply to the additional submissions, and accordingly, no prejudice to the Applicants, or any other party, has occurred.

*Grounds of Appeal*

The Panel finds that it clearly has the authority to allow an amendment to a notice of appeal, whether at the request of a party or on its own request. Under section 3 of the *Environmental Appeal Board Procedure Regulation*, a notice of appeal may be amended in order to correct deficiencies. The Board may request that a notice of appeal be amended after it has been filed, and may refuse to proceed with a hearing where such a request is not complied with. Further, in terms of procedural fairness, the Panel notes that an appellant is not barred from adding new grounds for appeal after the initial notice of appeal has been filed, provided that the general principles of administrative fairness are adhered to. If the other parties to the appeal receive adequate notice of a material change to an appellant's grounds for appeal, such that they are not prejudiced and are able to prepare their respective cases, the amendment will not result in breach of the principles of natural justice.

In this case, the Panel finds that the parties have received adequate notice of the issue raised in the application, and have not been prejudiced by the fact that the issue was not mentioned in the Applicants' notice of appeal. While the Applicants have not submitted a formal amendment to their notice of appeal, their application to hear the preliminary motion provides notice to the other parties that the Applicants intend to make submissions on the issue of fettering when it is heard.

*Factual Evidence*

Counsel for the Applicants argues that the reasons for Regional Manager's decision disclose, on their face, an unlawful fettering of discretion in issuing the Permit. Therefore, the Applicants argue that they are entitled to a decision from the Board on whether the Regional Manager's reasons for decision disclose a jurisdictional error, without the Regional Manager having an opportunity to adduce new evidence regarding the reasons for his decision. Both counsel for the Regional Manager and Island Cogeneration argue that the application raises questions of both fact and law, and that in order to properly assess the issues raised in considering the application, the Board should hear evidence in that respect at a full hearing of the appeal. Both counsel for the Regional Manager and Island Cogeneration indicated their intent to call such evidence at the oral hearing of the appeal. This evidence would be with respect to such matters as the decision-making process and the history of the project.

The Panel finds that proper consideration of the issue raised in this application involves questions of both fact and law. The Panel agrees with counsel for Island Cogeneration and the Regional Manager that the parties would not be precluded from presenting evidence regarding the fettering of discretion at the hearing, even

where there could be an error on the face of the record. Nothing in the case law provided convinces the Panel that the parties should be precluded from calling such evidence.

The Panel further agrees with the Regional Manager's submission that, in dealing with the fettering issue, it is necessary to consider the whole of the decision making process. The Regional Manager's decision must be considered in light of the history of the Island Cogeneration project, including the history of involvement by the Regional Manager and the Ministry's technical staff. As a result, relevant evidence may include both that relating to the Regional Manager's decision making process, and the technical evidence that he relied on in evaluating the Permit application. Based on the parties' submissions, the Panel is not satisfied that the fettering issue may be decided based solely on the face of the Permit and the reasons for the Regional Manager's decision.

*Further considerations*

In determining whether to allow this application, the Panel has also considered matters related to efficiency, the nature of the Board's jurisdiction, and the potential need for a subsequent hearing of the merits of the Permit, should the application be allowed and the Applicants succeed in their preliminary motion.

The Panel notes that, under section 46(2) of the *Waste Management Act*, the Board has the authority to conduct an appeal as a hearing *de novo*. Thus, a new hearing of the matter before the Board will correct any jurisdictional errors committed by the Regional Manager. Moreover, the Board may, under subsections 47(b) and (c) of the *Waste Management Act*, decide to confirm, reverse or vary the decision being appealed, or make any decision that the Regional Manager could have made and that the Board considers appropriate in the circumstances. Thus, a hearing before the Board may result in the same remedies as could be sought from the Regional Manager, if he were directed to reconsider the decision to issue the Permit.

The Panel also notes that, if the application is granted, the Board may have to hold a hearing on the merits of the Permit regardless of whether the preliminary motion is successful. If the preliminary motion failed, a hearing of the remaining grounds for appeal would proceed. If the preliminary motion succeeded, any subsequent "decision" by the Regional Manager with respect to the Permit could also be appealed to the Board. Section 43 of the *Act* defines "decisions" that may be appealed to include "the issue, amendment, renewal, suspension, refusal or cancellation of a permit" and "the inclusion in any… permit… of any requirement or condition." Thus, it may be more efficient and expedient for all of the parties if the Board hears the matter in full, as scheduled, than to adjourn the scheduled hearing, hear the fettering issue alone, and risk having to reconvene at a later date to hear the merits of either the Regional Manager's original decision or any subsequent decision.

Thus, for all the above-noted reasons, the Panel finds that that the subject matter of the preliminary motion would best be dealt with at a full hearing of the appeal.

## DECISION

In making this decision, the Panel of the Environmental Appeal Board has considered all of the evidence before it, whether or not specifically reiterated here.

The Panel finds that the application to hear the preliminary motion in writing should be dismissed. The hearing of the appeal will proceed as scheduled on June 4 to June 8, 2001 in Campbell River, B.C.

Alan Andison
Chair

May 11, 2001