BRITISH COLUMBIA

Environmental Appeal Board

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APPEAL NO. 2001-WAS-026(a)

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

BETWEEN:	Atlantic Industries Ltd.	**APPELLANT**
AND:	Regional Waste Manager	**RESPONDENT**
AND:	Beazer East, Inc. Canadian National Railway Company	**THIRD PARTIES**
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE OF HEARING:	Conducted by way of written submissions concluding on October 18, 2001	
APPEARING:	For the Appellant:	James M. Sullivan, Counsel
	For the Respondent:	Joyce Thayer, Counsel
	For the Third Parties:	
	Beazer East, Inc.:	Nicholas R. Hughes, Counsel
	Canadian National Railway Company:	Steven W. Lesiuk, Counsel

PRELIMINARY ISSUE – JURISDICTION

By Notice of Appeal dated September 14, 2001, Atlantic Industries Ltd. ("Atlantic") appealed the August 27, 2001 decision of Douglas T. Pope, Regional Waste Manager (the "Manager"), Ministry of Water, Land and Air Protection, to the Environmental Appeal Board (the "Board").

On September 18, 2001, the Board received a letter from counsel for the Manager, submitting that the Manager's August 27, 2001 decision is not an appealable decision and is, accordingly, beyond the jurisdiction of the Board. She, therefore, asked the Board not to accept the appeal as filed.

Prior to accepting the appeal as filed, the Board offered the Parties an opportunity to provide written submissions in respect of the Board's jurisdiction to accept the appeal.

BACKGROUND

On December 19th, 1997, the Manager issued Remediation Order OS-15343 (the "Order") under the *Waste Management Act* (the "*Act*"). By virtue of the Order, as amended, Atlantic, Canadian National Railway Company ("CNR") and Beazer East, Inc. ("Beazer") are required to carry out the remediation of the contaminated site at 8335 Meadow Avenue, Burnaby, B.C. (the "Meadow Avenue Site").

On June 11, 2001, counsel for CNR wrote to the Manager advising him that in April 2001, Atlantic notified CNR and Beazer that it would discontinue its contributions towards the costs of remediation. As a result, CNR asked that the Manager issue an order against Atlantic requiring it to pay an equal portion of the remediation costs pursuant to section 27.1 of the *Act*. In its letter, CNR also advised the Manager that it believed that Atlantic had taken action to diminish and reduce assets in contravention of section 27.1(7) of the *Act*, and asked the Manager to take appropriate action under the *Act*.

By letter dated August 27, 2001, the Manager stated that Atlantic is in non-compliance with its obligation as an ordered party to contribute on an ongoing basis to the costs of remediating the Meadow Avenue Site. He further stated:

> [I] am further satisfied that the fact that Atlantic has made an offer to the other ordered parties to settle their share of liability does not relieve Atlantic of their obligation to contribute on an ongoing basis to the costs of remediation…
>
> Nonetheless I am prepared to give Atlantic a final opportunity to show that they are continuing to demonstrate good faith compliance with Order OS-15343 by providing evidence that they are making a reasonable without prejudice contribution towards the ongoing costs of remediating the Site…
>
> If such evidence is not forthcoming they are on notice that I will not hesitate to utilize the appropriate regulatory tools to deal with non-compliance with the terms of Order OS-15343.

In his letter, the Manager also clarified that:

> This decision relates only to the issue of Atlantic's regulatory compliance. I make no determination under section 27.1 of the *WMA* as to what portion of the remedial costs should finally be allocated to any of the Ordered Parties.

In its Notice of Appeal, Atlantic submits that "…the Manager, in issuing the Decision, erred in law and fact, exceeded his jurisdiction, made an incorrect and patently unreasonable decision, refused or failed to consider all of the evidence before him or made the Decision in the absence of evidence, and acted arbitrarily and contrary to the rules of natural justice." Particulars of the grounds for appeal are:

1. The Manager erred in law and exceeded his jurisdiction in allocating responsibility amongst the persons named on the Amended Order in making the Decision;

2. The Manager erred in law and acted in excess of his jurisdiction in failing to consider the questions before him and by determining matters and issues which were not before him;

3. The Manager erred in law and acted in excess of his jurisdiction in requiring Atlantic to make payments pursuant to Remediation Order OS-15343;

4. The Manager erred in law and acted in excess of his jurisdiction by taking irrelevant considerations into account in making and issuing the Decision;

5. Such further and other grounds as counsel may advise.

Atlantic seeks an order from the Board that the decision be quashed, or in the alternative, an order requiring the Manager to withdraw the decision, or in the further alternative, an order referring the matter back to the Manager with directions. Atlantic also seeks a stay of the decision pursuant to section 48 of the *Act*, pending the Board's determination of the appeal.

The Manager requests that the Board decline to consider the purported appeal.

Beazer and CNR both submit that the appeal is premature because there is no appealable decision.

ISSUE

Whether the Manager's August 27, 2001 letter constitutes a decision that can be appealed to the Board.

RELEVANT LEGISLATION

The relevant sections of the *Act* are set out as follows:

Definitions and interpretation

1 In this Act:

...

"order" means an order made or given under this Act;

...

Definition of "decision"

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

(a) the making of an order,

(b) the imposition of a requirement,

(c) an exercise of a power,

(d) the issue, amendment, renewal, suspension, refusal or cancellation of a permit, approval or operational certificate, and

(e) the inclusion in any order, permit, approval or operational certificate of any requirement or condition.

Appeals to Environmental Appeal Board

44 (1) Subject to this Part, a person aggrieved by a decision of a manager, director or district director may appeal the decision to the appeal board.

...

DISCUSSION AND ANALYSIS

Manager's Submissions

By letter dated September 18, 2001, counsel for the Manager submits that the Board "should not hear this purported "appeal" because the August 27, 2001 letter is not a "decision" within the meaning of the *Act*. Therefore, the Board does not have jurisdiction to hear an appeal under section 44 of the *Act*. Counsel notes that the Manager, in his August 27, 2001 letter, declined to make any new order to amend the existing Order. Counsel submits that the Manager made the following findings:

- By refusing to continue to fund the ordered remedial works after April 2001, Atlantic was in non-compliance with its obligations as an ordered party.
- Attempts at settlement do not excuse a party in the position of Atlantic from its obligations.
- In the Manager's view, payment of one-third of the remediation costs to date would bring Atlantic back into compliance with the Order.
- If Atlantic wished to argue that a less than one-third share of the remediation costs is reasonable, it must provide the Manager with full and complete financial evidence in support of that submission, verified by affidavit, and the other parties must have an opportunity to provide reply submissions.

Counsel for the Manager further submits that the Manager made no express determination under section 27.1 of the *Act* as to what portion of the remedial costs should finally be allocated to any of the Parties to the Order, and that Atlantic was given until September 14, 2001 to provide evidence that it was making a reasonable contribution to the costs of remediation. As well, Atlantic was put on notice that if it did not provide such evidence by that date, the Manager would not hesitate to utilize the appropriate regulatory tool to deal with non-compliance with the terms of the Order.

In support of her submissions, counsel for the Manager refers the Board to section 43 of the *Act*, which defines "decision" for the purposes of section 44 of the *Act*. Counsel also refers the Board to its decision in *Darcy McPhee* v. *Deputy Director of Waste Management* (Appeal No. 95/08 – Waste, December 14, 1995) (unreported) (hereinafter *Darcy McPhee*), and submits that the Board confirmed that it has no jurisdiction to consider an appeal of any act or omission of a manager unless it is a "decision" within the meaning of the *Act*.

Counsel for the Manager submits that Atlantic's appeal is premature because no decision has been made in this case. Counsel indicates that in the course of exercising their regulatory functions, it is necessary for managers to make preliminary factual determinations, provide parties with deadlines, and provide notice that further regulatory action may be expected if deadlines are not met. It is only when these preliminary steps culminate in a decision as defined by the *Act* that an aggrieved party has the right to commence an appeal to the Board.

Further, counsel submits that a finding of non-compliance with an order is not a "decision" as the term is defined in section 44 of the *Act*: She submits that Atlantic's right of appeal crystallizes only if the Manager's finding of non-compliance leads to further regulatory action, and the further regulatory action constitutes a "decision" within the meaning of section 44.

For these reasons, the Manager asks the Board to decline to consider Atlantic's appeal.

CNR's Submissions

CNR agrees with the Manager that Atlantic's appeal is premature, in that there is no appealable decision at this time. CNR submits that the statements of the Manager as set out in his August 27, 2001 letter do not satisfy the definition of "decision" under section 43 of the *Act*.

In particular, CNR submits that section 43(a) of the *Act* has not been satisfied because the Manager has not made a new order and has not amended the existing Order. Rather, the Manager has put any decision to make an order or amend the existing Order in abeyance pending receipt of information indicating that Atlantic intends to abide by the Order.

Similarly, CNR argues that there has been no imposition of a requirement under section 43(b) of the *Act*. CNR submits that, although Atlantic was offered an opportunity to bring itself into compliance with the Order, it was not required to do anything as a result of the Manager's August 27, 2001 letter. CNR submits that any requirements which may be enforced against Atlantic pertain to its obligations under the Order, and nothing contained in the Manager's letter is subject to enforcement under the *Act*.

With respect to section 43(c) of the *Act*, CNR submits that the Manager has not yet exercised his discretionary powers under that section. CNR refers the Board to the Supreme Court of Canada decision in *Fee* v. *Bradshaw*, [1982] 1 S.C.R. 609

(hereinafter *Fee*), in support of the proposition that the exercise of a statutory discretionary power is the taking of a position favouring one course of conduct over another. In this case, CNR submits that the Manager has not yet chosen one course of conduct over another, and, therefore, there has been no exercise of a power.

CNR further submits that sections 43(d) and (e) have no application to the present matter, because, neither a permit, approval nor operational certificate is in issue. Further, the Manager did not include in the Order any additional requirement or condition with respect to the matters contained in the Manager's August 27, 2001 letter.

In summary, CNR submits that there has not yet been a decision on the matters contained in the Manager's letter dated August 27, 2001. Therefore, there can be no appeal.

Beazer's Submissions

Beazer agrees with the Manager and CNR that the Manager's August 27, 2001 letter does not give rise to any appealable matter. Beazer argues that, the Manager did not exercise any of his powers under the *Act* to reprimand Atlantic or make any decision respecting an allocation of responsibility for the on-going costs of remediation. Beazer submits that the Manager, by his letter, simply expressed his opinion that Atlantic was in breach of the Order, and that he would take regulatory action if such non-compliance continued.

Beazer submits that before an appealable issue arises, a legal consequence must flow from the action of the Manager, and such consequence will not flow until the Manager takes the threatened regulatory action.

Atlantic's Response

Atlantic submits: that if the Manager's letter is not a "decision", then the directives, advice or suggestions provided to Atlantic in the letter are of no force and effect, and Atlantic is not bound by or obliged to do anything in accordance with the letter. Alternatively, Atlantic submits that if the letter is a decision, it exceeds the Manager's statutory jurisdiction, offends the principles of natural justice, and is appealable to the Environmental Appeal Board.

Atlantic concludes by stating that the issuance of the letter by the Manager is "inappropriate", the letter should be withdrawn, and any decision contained in the letter should be quashed.

Findings

Under section 44(1) of the *Act*, a person aggrieved by a "decision" of a manager may appeal the decision to the Board. In order to be appealable, a "decision" must fall within the definition of "decision" that is specified in section 43 of the *Act*.

In considering this issue, the Panel has reviewed the contents of the August 27, 2001 letter. In the letter, the Manager concluded that Atlantic is not in compliance with its obligation to contribute on an ongoing basis to the costs of remediation. However, the Manager indicated that he was going to provide Atlantic with an opportunity to provide evidence that it is making a reasonable contribution towards the ongoing costs of remediating the Meadow Avenue Site. In the event that such evidence was not forthcoming, the Manager stated that he would not hesitate to utilize the appropriate regulatory tools to deal with non-compliance with the terms of the Order. The Panel further notes that the Manager clarified that he was not making a determination under section 27.1 of the *Act* as to what portion of remedial costs should be allocated to any of the persons subject to the Order.

The Panel finds that, in essence, the Manager's letter constitutes a refusal to grant CNR's request for an order under section 27.1 of the *Act*, or for other action under the *Act*, along with a notice that he may consider taking action against Atlantic in the future, pending further information. Consequently, the Panel finds that the Manager's letter is similar to the letter appealed in *Darcy McPhee*, whereby a manager declined to issue a pollution abatement order after being requested to do so by a property owner who alleged that his property was contaminated.

The Panel has also reviewed each clause in section 43 of the *Act* to determine whether the above findings of the Manager constitute a decision within the meaning of each clause. In interpreting section 43, the Panel adopts the following findings in *Darcy McPhee*:

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

With respect to section 43(a) of the *Act*, the Panel finds that the Manager's finding that Atlantic is in non-compliance with the Order does not constitute the "making of an order" under section 43(a) of the *Act*. The Panel notes that "order" is defined in section 1 of the *Act* as "an order made or given under this Act." The Panel agrees with CNR that, in the letter, the Manager has not made a new order under the *Act* or amended the Order. Therefore, the letter does not constitute "the making of an order" as referred to in section 43(a) of the *Act*.

Next, the Panel has considered whether the Manager's findings in the August 27, 2001 letter are "an imposition of a requirement" under section 43(b) of the *Act*. The Panel finds that the Manager's findings do not constitute "an imposition of a requirement" under the *Act*. The Panel agrees with CNR's submission that, although Atlantic was offered an opportunity to provide evidence showing that it demonstrated "good faith compliance" with the Order, it was not required to do anything as a result of the Manager's letter. The Panel finds that providing an opportunity to submit evidence of compliance with an order is not an exercise of a statutory power under the *Act.* The

Panel finds that if the Manager's finding of non-compliance leads to a future decision to take further regulatory action, then that decision may be appealable to the Board.

The Panel has also considered whether the Manager's findings in the August 27, 2001 letter are "an exercise of a power" under section 43(c) of the *Act*. The Panel finds that the Manager has not yet exercised his discretionary powers under the *Act*. As indicated by the Supreme Court of Canada in *Fee*, an exercise of a statutory discretionary power means taking a position favouring one course of conduct over another. That is not the situation in this case. Further, as the Manager has indicated, in the course of exercising regulatory functions, it is necessary for managers to make preliminary factual determinations, provide deadlines and notice that further regulatory action may be expected if deadlines are not met. As a result, in the Panel's view, Atlantic's appeal is premature.

The Panel notes that sections 43(d) and (e) do not apply in this case. No action has been taken with respect to a permit, approval or operational certificate, and no requirement or condition has been included in any order, permit approval or operational certificate.

For all of these reasons, the Panel finds that the Manager's letter does not constitute a "decision" as defined in section 43 of the *Act*.

Finally, the Panel makes no finding with respect to Atlantic's argument that, if the Manager's letter does not constitute an appealable decision, then the directives, advice or suggestions provided by the Manager are of no force and effect, and ought to be withdrawn.

DECISION

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

The Panel finds that the Manager's letter dated September 14, 2001 does not constitute a "decision" within the meaning of section 43 of the *Act*.

Therefore, the Board has no jurisdiction under section 44 of the *Act* to hear the matter. Accordingly, the appeal is dismissed.

Alan Andison, Chair
Environmental Appeal Board

January 31, 2002