



Environmental Appeal Board

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APPEAL NO. 2001-WAS-032(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:	Conducted by way of written submissions concluding on November 8, 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 October 4, 2001, Atlantic Industries Ltd. ("Atlantic") appealed the September 20, 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").

In a letter dated October 9, 2001, the Board advised the Parties of its concern as to whether the Manager's September 20, 2001 letter constitutes an appealable decision as defined under the *Act*, and whether it may consequently be beyond the jurisdiction of the Board. Prior to accepting the appeal as filed, the Board offered the Parties an opportunity to provide written submissions on the Board's jurisdiction to accept the appeal.

The Board received written submissions from Atlantic and Beazer East, Inc. ("Beazer"). Canadian National Railway Company ("CNR") and the Manager declined to make submissions on this matter.

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, CNR, and 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 the Manager to 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.

The Manager gave Atlantic until September 14, 2001 to provide evidence of their contribution. 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.

Atlantic sent a Notice of Appeal dated September 14, 2001, to the Board concerning the Manager's statement in his August 27, 2001 letter that Atlantic is in non-compliance with the Order. That appeal is not the subject of this preliminary decision, and was heard by the Board as a separate matter.

In his September 20, 2001 letter to the Parties, which is the subject of this appeal, the Manager made several statements concerning Atlantic's non-compliance with the Order. These statements are summarized as follows:

- On September 14, 2001, he received a letter from Atlantic requesting an extension of time to October 14, 2001, to assemble financial information in support of its contention that continued funding of remediation costs would put it out of business.
- He stated that "Atlantic has never provided me with evidence of their financial status in support of their contention that they have limited capacity to fund the costs of remediating the site." He observed that, "If Atlantic's financial circumstances are as dire as Atlantic suggests it should have been a simple matter to provide me with the information to support apportionment of a lessor share of the costs of allocation prior to April 11, 2001."
- He further noted a June 4, 2001 letter from counsel for Atlantic to counsel for CNR, which stated that, "We have not said we 'cannot afford to contribute.' We have a disagreement only over the amount of the contribution."
- He was satisfied that "Atlantic has the financial resources to continue to fund a one third share of the costs of remediation while they make submissions to me on the final share of remediation costs that should be apportioned to them."
- He stated that Atlantic's September 14, 2001 letter confirms that "they remain in deliberate non-compliance" with the Order.

With respect to Atlantic's alleged diminishment of assets, the Manager's letter included the following statements:

- He was satisfied that "CNR has made out a '*prima facie* case' that Atlantic has dissipated assets in contravention of section 27.1(7) of the *Act* by declaring and distributing discretionary dividends of \$500,000 on January 31, 1999; \$450,000 on January 31, 2000 and \$250,000 on January 31, 2001."
- "Atlantic does not dispute that the payment of dividends in 1999, 2000 and 2001 were discretionary."
- To determine whether Atlantic's transactions breach section 27.1(7), he asked Atlantic to provide certain financial information, including audited financial statements, the register of directors, the valuation of assets, relevant agreements, and lists of shareholders for Atlantic and its related, non-arms-length companies.
- He stated that "In these circumstances where Atlantic is refusing to pay their share on ordered costs after stripping the company of funds," he found it appropriate to add Atlantic's director Michael Wilson to the Order as a responsible person. He noted that "Mr. Wilson is a director of all of the closely related companies which stand to profit from the impugned transactions. As a

director of Atlantic, he approved the discretionary distribution of assets in the form of dividends... As one of two directors of Atlantic Mr. Wilson would also have approved Atlantic's decision not to fund any further share of the ongoing remedial costs after April 11, 2001."

- He further stated that "I intend to amend" the Order by adding Michael Wilson as a responsible person. "To prevent this, Atlantic has until October 18, 2001 to bring themselves back into compliance with their obligations under Order OS-15343 by providing me with evidence that they have:
 1. paid a one third share of the costs of remediation from April 11, 2001, and,
 2. taken the steps necessary to ensure that \$1,200,000 in dividends, plus interest from the date the funds were transferred without my consent, is returned to Atlantic so that it is available to fund Atlantic's share of the ongoing cost of remediating the Meadow Avenue site."

In its Notice of Appeal with respect to the September 20, 2001 letter, 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 include:

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;
- ...
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;
- ...
5. The Manager erred in law and acted in excess of his jurisdiction in threatening to name Michael Wilson to Remediation Order OS-15343 as a responsible person;
6. The Manager erred in law and acted in excess of his jurisdiction in finding that Atlantic is not complying with Remediation Order OS-15343...

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.

ISSUE

Whether the Manager's September 20, 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

Atlantic's Submissions

Atlantic submits that the Manager's September 20, 2001 letter constitutes a "decision" within the meaning of section 44 of the *Act*, and thereby provides the Board with jurisdiction to hear its appeal. Atlantic notes that section 43 of the *Act* defines a decision for the purpose of section 44.

Atlantic submits that the Manager determined in his September 20, 2001 letter "that Atlantic was dissipating assets and required that the dividends be paid back to Atlantic." It argues that this is "clearly a purported exercise of a power by the Manager leading to a requirement being imposed on Atlantic." Atlantic also submits that the Manager threatened to name one of Atlantic's Directors to the Order if Atlantic did not take certain steps. Atlantic submits that the Manager cited no authority for his jurisdiction to make such an "order".

Atlantic submits that the *Act* does not restrict the jurisdiction of the Board to reviews of "orders." It argues that the Board's jurisdiction is much broader as the *Act* refers to "decisions." Atlantic maintains that "this indicates that the will of the Legislature was to ensure that the conduct of the Manager, throughout the fulfilment of the terms of the Order, is subject to review in circumstances where the Manager exercises a power or imposes a requirement." It argues that "This makes sense because the Manager's exercise of a power or imposing of a requirement may be as onerous as the terms of the Order itself..."

Atlantic concludes with the argument that "The function of the Board is to ensure that parties, such as Atlantic, have the opportunity to have such decisions of the Manager reviewed to ensure that the decisions are reasonable, warranted and within the jurisdiction of the Manager."

Beazer's Submissions

Beazer submits that Atlantic's appeal is premature. Beazer submits that the Manager's September 20, 2001 letter has two main aspects, as follows:

1. A reiteration of the fact that Atlantic is not in compliance with the Order and a further warning that, if Atlantic does not bring itself into compliance, it will face regulatory sanctions;
2. A finding that Atlantic has dissipated its assets contrary to the *Waste Management Act* and a warning that unless Atlantic brings itself into compliance and receives back \$1,200,000 from the parties it dividended [sic] these funds to, the Manager will add one of Atlantic's directors to the Order.

Beazer states that its position with respect to Atlantic's non-compliance with the Order is identical to the position it took in its submissions regarding Atlantic's appeal of the Manager's August 27, 2001 letter.

In its submissions with respect to the August 27, 2001, letter Beazer argued that the Manager had not exercised 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 beyond September 14, 2001.

In those submissions, Beazer also argued that, before an appealable issue arises, a legal consequence must flow from the action of the Manager. Such consequence would not flow until the Manager takes the threatened regulatory action.

With respect to the second aspect of the Manager's September 2001 letter, Beazer submits that Atlantic's appeal is premature because the Manager has not issued a remediation order naming Mr. Wilson, and therefore, the issue of whether Mr. Wilson can and should be named has not ripened into an appealable issue.

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 first reviewed the contents of the September 20, 2001 letter. The Panel notes that, in the letter:

1. The Manager concluded that Atlantic "remains in deliberate non-compliance" with the terms of the Order which require Atlantic to fund a one-third share of the remediation costs on an ongoing basis; and
2. The Manager stated his intention to amend the Order by adding Atlantic's director Michael Wilson to the Order as a responsible person, if Atlantic did not bring itself back into compliance with the Order by October 18, 2001 by providing evidence that it has paid a one third share of the costs of remediation from April 11, 2001, and arrange for \$1,200,000 in dividends, plus interest, to be returned to Atlantic.

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. The Panel finds that the Manager's letter in this case is similar to the letter that was considered in *Darcy McPhee v. Deputy Director of Waste Management* (Appeal No. 95/08 - Waste, December 14, 1995, [1995] B.C.E.A. No. 52 (Q.L.) (hereinafter *Darcy McPhee*). The main issue in that appeal was whether a letter in which a manager declined to issue a pollution abatement order constituted a "decision" that could be appealed to the Board. The manager in that case refused to issue the order after being requested to do so by a property owner who alleged that his property was contaminated. In *Darcy McPhee*, the Board found that:

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.

The Panel agrees with these findings in *Darcy McPhee*, and has adopted this reasoning in reviewing 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.

With respect to the question of whether the Manager's finding concerning Atlantic's continuing non-compliance with the Order constitutes a "decision" within the meaning of section 43 of the *Act*, the Panel notes that this is the same issue that it considered in Atlantic's appeal of the Manager's August 27, 2001 letter (*Atlantic Industries Ltd. v. Regional Waste Manager*, Appeal No. 2001-WAS-026(a), January 31, 2002) (unreported). The Panel adopts the Board's reasoning and findings in that decision, and concludes that the Manager's finding that Atlantic remains in non-compliance with the Order does not fall within the definition of "decision" under sections 43(a), (b) or (c) of the *Act*. Specifically, it does not constitute the "making of an order" because the Manager has not made a new order or amended the Order. It does not constitute "an imposition of a requirement," because Atlantic was not required to do anything. Rather, Atlantic was given a further opportunity to submit evidence to the Manager, to prove that it is in compliance with the Order and is not in contravention of section 27.1(7) of the *Act*. Finally, it does not constitute "an exercise of a power," because the Manager has not taken a position favouring one course of conduct over another (*Fee v. Bradshaw*, [1982] 1 S.C.R. 609).

With respect to the Manager's other findings, the Panel notes that the Manager stated his intention to amend the Order to add Mr. Wilson as a responsible person if Atlantic did not bring itself into compliance by October 18, 2001, by providing the Manager with evidence that it has taken certain action. He did not amend the Order. In the Panel's view, this statement of intention does not constitute the "making of an order" under section 43(a) of the *Act*.

Similarly, the Panel finds that the Manager's statement of intention does not constitute "an imposition of a requirement" or "an exercise of a power" as specified in sections 43(b) and (c). When the Manager made a statement of intention to carry out a future action which is conditional upon events that may or may not occur, he did not impose a requirement or exercise a power.

The Panel agrees with Beazer that Atlantic's appeal with respect to the issue of dissipation of assets is premature, given that the Manager has not issued a remediation order, or an amendment of the Order, naming Mr. Wilson. The appropriate time for Atlantic to appeal the Manager's decision on this issue is after he issues such an order.

Finally, the Panel notes that sections 43(d) and (e) do not apply in this case, because 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.

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 20, 2001, does not constitute a "decision" within the meaning of section 43 of the *Act*.

Therefore, the Board does not have the jurisdiction to hear the matter.

The appeal is dismissed.

Alan Andison, Chair
Environmental Appeal Board

January 31, 2002