Province of British Columbia

Environmental Appeal Board

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DECISION NO. 2003-WAS-004(b)

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

BETWEEN:	Houweling Nurseries Limited	**APPELLANT**
AND:	District Director of the Greater Vancouver Regional District	**RESPONDENT**
AND:	Roger Emsley	**THIRD PARTY**
AND:	Corporation of Delta	**PARTICIPANT**

BEFORE: A Panel of the Environmental Appeal Board
Alan Andison, Chair
Dr. Robert Cameron, Member
Phillip Wong, Member

DATE: Conducted by way of written submissions concluding on December 19, 2006

APPEARING:

For the Appellant:	Robert W. Grant, Counsel
For the Respondent:	M. Kevin Woodall, Counsel
For the Third Party:	Roger Emsley
For the Participant:	Verne Kucy

APPLICATION TO INTRODUCE NEW EVIDENCE

Houweling Nurseries Limited ("HNL") appealed a decision of the District Director of the Greater Vancouver Regional District ("GVRD") dated December 20, 2002, refusing HNL's application to amend air quality permit GVA 0349, as previously amended (the "Permit"). The Permit was issued pursuant to the *Waste Management Act*, R.S.B.C. 1996, c. 482 (the "*Act*"), and authorizes the discharge of air emissions from HNL's greenhouse facilities located in Delta, British Columbia.

In 2003, the Environmental Appeal Board (the "Board") commenced a joint hearing of the appeal of the refusal to amend the Permit and an appeal of a separate order that had been issued by the District Director. On April 26, 2004, the Board issued written reasons that followed an oral decision that it had no jurisdiction over the appeal regarding the Permit: *Houweling Nurseries Limited v. District Director of the Greater Vancouver Regional District*, Appeal Nos. 2002-WAS-025(a) and 2003-

WAS-004(a)(unreported). In that decision, the Board made no findings on the merits of the appeal regarding the Permit.

Subsequently, HNL filed a petition to have the Board's decision judicially reviewed in the B.C. Supreme Court (the "Court"). On June 15, 2005, the Court concluded that the Board had jurisdiction to hear the appeal of the refusal to amend the Permit: *Houweling Nurseries v. District Director of the GVRD et al.*, 2005 BCSC 894. The matter was remitted to the Board for a hearing on the merits of the appeal.

Before the Board reconvened the appeal hearing, HNL wrote to the Board requesting that it be allowed to introduce new evidence regarding facts and matters that have arisen since the initial hearing. The Board provided the other parties with an opportunity to make submissions on HNL's application to introduce new evidence. This is the Board's decision on HNL's application.

BACKGROUND

Since 1985, HNL has operated a greenhouse in Delta, British Columbia (the "Delta Greenhouse"), where it cultivates flowers, tomatoes, and other plants. The greenhouse buildings are heated to enhance plant growth. At the time of the Board's hearing in 2003, there were three wood fired heaters and six natural gas fired heaters supplying heat as needed to the Delta Greenhouse operation. The burning of fuels, including waste wood and natural gas, produces air emissions. Under section 24 of the *Act*, the District Director of the GVRD has certain powers to regulate air emissions within the GVRD.

The Third Party, Roger Emsley, owns property in Delta near the Delta Greenhouse. Mr. and Mrs. Emsley reside at that property and operate a horse boarding farm there. They have made many complaints to the GVRD regarding emissions from the heaters at HNL's Delta Greenhouse.

HNL installed wood fired heaters when it began operating its Delta Greenhouse. On September 20, 1985, the GVRD granted HNL a permit to discharge contaminants from its heaters. Between 1985 and 1990, HNL expanded its Delta Greenhouse operations, and added three wood fired heaters and one natural gas fired heater to heat the increased greenhouse space. HNL obtained permit amendments from the GVRD each time a new wood fired heater was added to its operations.

In 1995, HNL began further expansions, and applied to the GVRD for a permit amendment to install a natural gas fired heater, called the Saskatoon boiler.

On October 3, 1997, the GVRD issued an amended permit to HNL which authorized installation of the Saskatoon boiler, but also required HNL to cease using its wood fired heaters by December 31, 1999. That deadline was later extended to March 31, 2000. In or around March 2000, HNL installed the Saskatoon boiler, but HNL experienced problems with the new heater between March and September 2000, and HNL was granted further extensions by the GVRD to address those problems.

HNL shut down its wood fired heaters on September 4, 2000, and began relying solely on gas fired heaters. However, by that time, the price of natural gas had

increased significantly. As a result, HNL reactivated the wood fired heaters in late 2000.

On December 14, 2000, an Assistant District Director of Air Quality with the GVRD wrote to HNL advising that, as of September 28, 2000, HNL was no longer authorized to burn wood, and HNL would have to apply for a permit amendment if it wished to reactivate its wood fired heaters.

In a letter dated January 11, 2001, HNL explained to the GVRD that the requirement to switch to natural gas threatened the survival of HNL's business and the jobs that it provides.

In or about May 4, 2001, HNL was charged with burning wood without a valid permit.

On June 8, 2001, HNL applied for a permit amendment to allow the use of its wood fired heaters. The application contemplated the use of four wood fired heaters with multiclones and an electrostatic precipitator to remove particulate emissions.

On December 20, 2002, the then District Director issued her decision refusing HNL's application to amend the Permit.

On January 17, 2003, HNL appealed the refusal to amend the Permit.

During 2003 and 2004, a Panel of the Board heard evidence and some closing submissions on the merits of the appeal. Before the conclusion of closing submissions, the Panel requested that the parties provide submissions on whether the Board had jurisdiction to hear the appeal. Specifically, the Panel asked the parties whether a refusal to amend a permit was an appealable "decision" under sections 43 and 44 of the *Act*.

After considering the parties' submissions on the jurisdictional issue, the Panel issued an oral decision, with written reasons to follow, concluding that the Board had no jurisdiction to hear the appeal. The Panel's written reasons were issued on April 26, 2004, as noted above.

Subsequently, the Board's decision was judicially reviewed, resulting in the Court's 2005 decision that the Board had jurisdiction to hear the appeal, as noted above. The GVRD then filed an appeal to the B.C. Court of Appeal, but that appeal was abandoned in June 2006.

By a letter dated June 21, 2006, the Board advised that, in accordance with the Court's decision, the appeal would be reconvened in order to decide the merits of the appeal.

On June 23, 2006, HNL advised the Board that it wished to introduce fresh evidence "respecting facts and matters which have arisen since the initial hearing" when the hearing reconvened.

On November 29, 2006, HNL formally applied to the Board to introduce new documents and oral evidence respecting the following matters:

- a current list of greenhouses in the GVRD that are burning wood;
- natural gas prices since 2003;

- natural gas price projections for the next 5 years;
- equipment changes at Houweling Nurseries;
- update and confirmation of available emission control technology;
- current economics of the greenhouse industry in the GVRD, including economic spin-offs; and
- the developing International, Canadian and British Columbian policies on the use of biomass as an energy source.

With its application, HNL provided all of the proposed new document evidence, along with submissions supporting the application.

HNL submits that the evidence it seeks to introduce was unavailable when the initial hearing occurred, and is relevant to the appeal.

The District Director objects to some of the evidence that HNL seeks to introduce. The District Director further submits that, if the Board rules that HNL may introduce new evidence, then the GVRD will apply to introduce further new evidence.

Mr. Emsley and Delta oppose HNL's application.

ISSUE

Whether the Panel should allow HNL to submit new evidence when the hearing reconvenes.

RELEVANT LEGISLATION

On July 7, 2004, the *Environment Management Act* and the *Waste Management Act* were repealed and the *Environmental Management Act*, S.B.C. 2003, c. 53, was brought into force. Pursuant to sections 35 and 36 of the *Interpretation Act*, the provisions of the *Waste Management Act* that were in force when the District Director's decision was made still apply for the purposes of considering the merits of the District Director's decision. However, the procedures that now apply to this appeal are those in the *Environmental Management Act*. Consequently, the following sections of the *Environmental Management Act* are relevant to this application:

Parties and witnesses

94 (1) In an appeal, the appeal board or panel

(a) may hear the evidence of any person…

(2) A person or body, including the appellant, that has full party status in an appeal may

…

(b) present evidence,

…

(d) make submissions as to facts, law and jurisdiction.

Procedure on appeals

102 (2) The appeal board may conduct an appeal under this Division by way of a new hearing.

DISCUSSION AND ANALYSIS

Whether the Panel should allow HNL to submit new evidence when the hearing reconvenes.

HNL submits that the Board's discretion to hear evidence generally is set out in section 94 of the *Act*. HNL notes that the Board's *Procedure Manual* also addresses the admissibility of evidence. In particular, HNL notes that the *Procedure Manual* states at page 31 that the rules of evidence which apply to a hearing before the Board are "less formal than those applied by a Court." HNL also refers to page 33 of the *Procedure Manual*, which addresses reopening a hearing on the basis of new evidence:

> Once the record is closed, no additional evidence will be accepted from the parties unless the Board decides that the evidence is material to the issues, there are good reasons for the failure to produce it in a timely fashion, and acceptance of such evidence is in accordance with the principles of natural justice and procedural fairness.

HNL notes that in *O'Flaherty v. Senior Environmental Health Officer* (Appeal No. 2002-HEA-015, January 31, 2003), [2003] B.C.E.A. No. 5 (Q.L.) (hereinafter *O'Flaherty*), the Board considered whether to allow the appellant in that case to introduce new evidence. The appellant sought to introduce the reports of two consultants that she had retained after the conclusion of the hearing but before the Board issued a decision on the merits of the appeal. Although the Board was concerned about the appellant's conduct, it found that those concerns "must be weighed against the importance of having the best evidence before the Panel to ensure that it is able to make a well informed decision and prevent an injustice".

HNL also notes that, in *O'Flaherty*, the Board relied on the principles on which Courts rely in deciding whether to admit new evidence after the conclusion of a hearing. However, HNL submits that those principles should be applied with greater flexibility in proceedings before administrative tribunals, as indicated by the Supreme Court of Canada's decision in *Chandler v. Alberta Association of Architects* (1989), 101 A.R. 321. HNL further submits that, in the present case, the Board is not *functus officio* given that it has issued no decision on the merits of the appeal.

HNL submits that the evidence it seeks to introduce is material to the appeal. HNL maintains that the new evidence relates to the allegations that the District Director violated the principles of administrative law by discriminating against HNL and putting HNL in an unfair economic position relative to other companies in the greenhouse business. HNL says that the new evidence also relates to the financial consequences of the refusal to amend the Permit, and HNL's current situation in terms of current equipment, the economics of the greenhouse industry, available emissions control technology, and government policies on using biomass as fuel.

Moreover, HNL submits that none of the evidence was available when the appeal was initially heard. It argues that accepting the evidence will ensure that the Panel has the best available evidence when deciding the merits of the appeal. HNL notes that, while there has been a lengthy delay since the initial hearing, the delay was no fault of HNL. HNL further argues that this is not a case where all parties have made final submissions and all that remains is for the Board to make a final decision. Rather, all parties will have an opportunity to address the new evidence.

Finally, HNL indicates that it intends to call Casey Houweling, Mary-Margaret Gaye, and Brian McCloy as witnesses, and that Mr. McCloy will be tendered as an expert witness.

The District Director objects to some of the evidence that HNL seeks to adduce. Specifically, the District Director submits that HNL's document regarding other greenhouses in the GVRD that burn wood appears to be a note by an unknown author, and the basis of the author's information is not stated. The District Director also argues that evidence of past and future natural gas prices may be misleading if admitted without a proper context. In particular, the District Director submits that although HNL seeks to introduce that information to support its claim of financial hardship if the amendment is refused, HNL has provided no financial evidence to support its contention of hardship. Moreover, the District Director argues that profitability concerns, as opposed to viability, are not a proper basis for allowing businesses to emit greater quantities of contaminants. The District Director submits, therefore, that if HNL leads evidence on natural gas prices, it should be ordered to provide financial statements from 1997 to the present.

The District Director also has two objections to HNL's evidence about equipment changes. First, the District Director submits that such evidence is irrelevant given that the appeal is of a decision made in 2002, and not based on current equipment. Second, the District Director submits that HNL should have to provide information about all relevant aspects of its operations, including the use of fuel oil, diesel, and CO_2, if it is permitted to introduce evidence regarding current equipment.

Additionally, the District Director objects to the evidence regarding the current economics of the greenhouse industry, on the basis that the evidence consists of unverified statements by an industry lobby group. Regarding the documents about government policies on biomass burning, the District Director submits that the information is irrelevant because it pertains to energy policies, not environmental policies.

Mr. Emsley says that he would not oppose HNL's application to introduce new evidence if there was an equal opportunity for other parties to introduce new evidence. However, he maintains that the evidence he seeks to introduce has not been forthcoming from Houweling, and therefore, he opposes HNL's application. He further submits that the documents that HNL seeks to introduce pertain to topics that were previously addressed at the hearing. Mr. Emsley also submits that most of the material is general, and not specific to the Houweling operation. Finally, Mr. Emsley emphasizes that it would be inequitable for HNL to be allowed to introduce new evidence without the other parties being given the same opportunity.

The Corporation of Delta submits that the new evidence does not explore new subjects. Rather, it addresses subjects that were explored at the initial hearing, and was either available before that hearing concluded or is irrelevant because it was unavailable when the decision under appeal was made.

HNL made various submissions in reply, many of which reiterate or clarify points it has already made. However, it is notable that the HNL advised in its reply that it would be prepared to disclose its financial statements if that information could be tendered on a confidential basis, so that the information would not be publicly disclosed, and in particular, not disclosed to its competitors.

The Board's *Procedure Manual* indicates that, in order for it to accept additional evidence, the Panel must be satisfied that,

- the evidence is material to the issues;
- there are good reasons for the failure to produce the evidence in a timely fashion; and
- acceptance of the evidence is in accordance with the principles of natural justice and procedural fairness.

The Panel also notes that the *Procedure Manual* states at page 31 that:

> Relevance is the primary consideration for the Board when deciding whether to admit evidence. Relevant evidence can be described as evidence (oral or written) that will shed some light on a disputed matter or tends to prove or disprove a fact in issue.

Regarding the relevance of the new evidence that HNL seeks to present, the Panel finds that most of the objections concerning relevance have to do with the fact that some of it deals with current facts, yet the appealed decision was made in 2002, and not in the present. In that regard, the Panel notes that the Board has broad powers under section 94 of the *Act* to admit evidence. The Board also has the authority under section 102(2) of the *Act* to conduct an appeal as a hearing *de novo*, and it has the power under section 103 of the *Act* to:

> (a) send the matter back to the person who made the decision, with directions,
>
> (b) confirm, reverse or vary the decision being appealed, or
>
> (c) make any decision that the person whose decision is appealed could have made, and that the appeal board considers appropriate in the circumstances.

As such, the Panel finds that the Board has broad discretion in hearing evidence and deciding appeals, and it is not limited to reviewing the merits of the decision under appeal. Evidence of facts that have arisen since the appealed decision was made, and since the initial hearing occurred, may be material to the Panel in deciding on an appropriate disposition of this appeal.

Other objections regarding relevance allege that some of the evidence pertains to irrelevant considerations such as the effects of the appealed decision on HNL's profitability (as opposed to viability) or government energy policies (as opposed to

environmental policies). The Panel notes that government policies on biomass burning may help provide a context for the practice of burning wood waste. The Panel also notes that government policies are not legally binding. However, that does not mean the information is irrelevant or inadmissible. The Panel also finds that concerns about a lack of context for some of the evidence, unknown authorship, or its lack of specificity to the Houweling operation can also be addressed by assigning appropriate weight to the evidence, rather than excluding the evidence.

Additionally, the Panel finds that there are good reasons for the failure to produce the evidence at the initial hearing. Unlike *O'Flaherty*, this is not a case where HNL was aware, or should have been aware, that the evidence in question was available and would be needed to support its case. The evidence relates to new facts or circumstances that have arisen since the initial hearing. Three years have passed since the initial hearing, largely due to the judicial review proceedings, and the Panel finds that the new information may be helpful to the Panel. As stated in *O'Flaherty*, it is important that the Panel have "the best evidence before the Panel to ensure that it is able to make a well informed decision and prevent an injustice".

The Panel further finds that allowing HNL to introduce the new evidence will not unduly lengthen the proceedings. The Panel has considered that allowing HNL to present the new evidence will likely result in further hearing time being required. In particular, in accordance with the principles of natural justice and procedural fairness, the other parties may need time to cross-examine HNL's witnesses and, possibly, to present their own new evidence in response to HNL's evidence. However, the Panel finds that the amount of time required to complete those tasks should not be unreasonable. Further, any concerns about lengthening the hearing process are outweighed by the need to ensure that the Panel has the best available evidence before it when deciding the appeal.

Finally, regarding the District Director's request that HNL should disclose its financial statements to provide context for its evidence regarding the financial consequences of using natural gas, the Panel notes that the Board has, in previous appeals, accepted evidence on a confidential basis. The Panel further notes that HNL has agreed to tender this information on a confidential basis if necessary. The Panel requests that any party that wishes to inspect those financial records contact HNL's counsel directly for that purpose under the terms of a confidentiality agreement. Should those records then need to be filed before the Panel, the Panel will determine the level of confidentiality that shall be attached to the exhibit.

For all of these reasons, the Panel finds that HNL's application to introduce new evidence is granted.

The other parties will be allowed a reasonable amount of time at the reconvened hearing to respond to the new evidence, including cross-examining witnesses. Subject to the Board's discretion and the Board's policies on pre-hearing disclosure, the other parties may also present new evidence in response to HNL's new evidence.

DECISION

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

For the reasons provided above, the Panel finds that HNL's application to introduce new evidence is granted.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

January 11, 2007