



Environmental Appeal Board

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APPEAL NO. 2003-WAS-006(b); 2003-WAS-018(a)

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

BETWEEN: British Columbia Power and Hydro Authority **APPLICANT**

AND: Regional Waste Manager **RESPONDENT**

AND: Imperial Oil Limited
BC Rail Ltd.
City of Quesnel
Shell Canada Products Limited **THIRD PARTIES**

BEFORE: A Panel of the Environmental Appeal Board
Alan Anderson, Chair

DATE: Conducted by way of written submissions
concluding on September 10, 2003

APPEARING: For the Appellants:
British Columbia Power and Hydro Authority
Imperial Oil Limited
BC Rail Ltd.
City of Quesnel
Shell Canada Products Limited
For the Respondent:

David G. Perry, Counsel
Simon R. Wells, Counsel
Graham Walker, Counsel
James Yardley, Counsel
Robert J. Lesperance, Counsel
Dennis A. Doyle, Counsel

STAY DECISION

APPLICATION

The Applicant, British Columbia Power and Hydro Authority ("BC Hydro"), requests a reconsideration of the decision to deny a stay of Remediation Order OE-17312 (the "Order") and, accordingly, a stay of all other obligations under subsequent orders as they apply to BC Hydro.

BACKGROUND

On January 22, 2003, Joe Negraeff, Regional Waste Manager for the Cariboo Region of the Ministry of Water, Land and Air Protection (the "Regional Manager"), issued

the Order to BC Hydro, BC Rail Ltd. ("BC Rail"), the City of Quesnel, Imperial Oil Limited ("Imperial Oil"), and Shell Canada Products Limited ("Shell"). The Order requires all of them to submit and implement a remediation plan to address contamination on several properties located on Quesnel Legion Drive, north of and adjacent to the Quesnel River in the City of Quesnel, B.C. (the "Site").

Between February 13 and 21, 2003, all of the persons named in the Order appealed the Regional Manager's decision, and requested a stay of the Order pending a decision on the merits of the appeals.

In a decision dated March 21, 2003, the Board denied a stay of the Order (see Appeal No. 2003-WAS-006(a), 007(a), 008(a), 009(a), 010(a)).

An Implementation Order has since been issued by the Regional Manager, which has also been appealed by all of the same parties, and is currently the subject of a stay application by BC Hydro, among others.

On July 29, 2003, the British Columbia Court of Appeal issued reasons for judgment in the matter of *British Columbia Hydro and Power Authority v. British Columbia (Environmental Appeal Board)* 2003 BCCA 436 (the "BCCA decision"). The majority found that the terms of a 1965 amalgamation agreement combining British Columbia Electric Company Ltd. ("BC Electric"), the British Columbia Power Commission ("BC Power Commission"), and BC Hydro were worded in such a way that BC Hydro could not be named as a "responsible person" under Part 4 of the *Waste Management Act*, for the actions of BC Electric in the circumstances of that case.

The following day (July 30, 2003), BC Hydro requested that the Regional Manager reconsider his decision to name BC Hydro to the Order, based on the BCCA decision.

The Regional Manager established a submission schedule for that application, requiring final submissions no later than October 1, 2003.

In an August 27, 2003 letter to the Board, BC Hydro requested that the Board issue a stay of the Order, as amended, in respect to BC Hydro until the Regional Manager has completed the reconsideration process. BC Hydro submits that the BCCA decision is relevant to the issue of whether BC Hydro should be named in the Order.

On August 28, 2003, the Board asked the parties to respond to BC Hydro's request.

In a September 2, 2003 letter to the Board, the Regional Manager advised that he takes no position on BC Hydro's request for a stay.

In a letter dated September 3, 2003, Imperial Oil advised that it takes no position in BC Hydro's request.

The other parties made no submissions on BC Hydro's request.

It should be noted that on April 25, 2003, the Regional Manager issued a further order, an Implementation Order, to BC Hydro among others. BC Hydro has

appealed that order and applied for a stay (Appeal No. 2003-WAS-018). Although it is clear that the findings of the BCCA decision would also apply to BC Hydro being named to the Implementation Order, the Board is of the view that a stay of the main Order is the first question to be addressed. If the Remediation Order naming BC Hydro should be stayed as against BC Hydro, then a stay of the subsequent orders would likely follow.

ISSUE

On March 21, 2003, the Board issued its decision denying a stay of the Order as it pertains to BC Hydro. As such, BC Hydro is essentially asking the Board to reconsider that stay decision, based on new information: i.e. a new development in the law. It states that the BCCA decision impacts the assessment of irreparable harm.

The onus is on BC Hydro to demonstrate why the stay should be granted.

DISCUSSION AND ANALYSIS

BC Hydro made brief submissions in support of its request. It states:

Although, of course, the Board is a party to [the BCCA decision] and is therefore aware of this decision, the Board should consider the holding of the Court of Appeal that the terms of amalgamation which created BC Hydro also ensured that BC Hydro is not a responsible person based on actions of its predecessor corporations, namely BC Electric and the BC Power Commission.

The [Regional] Manager is currently accepting submissions with respect to an application by BC Hydro to be removed from the Order. It is our submission that, given that the legal basis for naming BC Hydro as a responsible person based on the actions by the BC Power Commission has now been overturned by the Court of Appeal, that a stay of this Order, at least with respect to BC Hydro, should be issued until the Manager has had an opportunity to reconsider his decision to name BC Hydro. After the Manager has issued his decision, the stay can be reconsidered by the Board on application of the parties.

It appears that BC Hydro is of the view that the findings in the BCCA decision are applicable to BC Hydro in the present case and that it should not be named to the Order.

A party seeking a reconsideration of a Stay decision is required to explain how the change in facts or law impacts the decision. None of the submissions provided by the parties addresses whether the specific facts in the BCCA decision are the same as the facts supporting the naming of BC Hydro to the Order in this case. The decision of a court on another matter, in different circumstances, is not in and of itself, sufficient for the Board to reverse one of its own decisions. Similarly, the BCCA decision itself is not sufficient in this case to grant a stay of other orders of the Regional Manager.

The Board notes that the BCCA decision turns on an interpretation of the express language in the 1965 amalgamation agreement between BC Electric, BC Power Commission and BC Hydro. Specifically, the amalgamation included language that BC Hydro possessed only those liabilities that existed “immediately before the amalgamation.” This phrase, combined with the legal presumption against the retroactive interpretation of prejudicial legislation, were the grounds for the majority decision.

Because of the unique language of the particular amalgamation agreement in the BCCA case, Prowse J.A. states at para. 82 that the BCCA decision is “not of precedential value.” In other words, the BCCA decision only applies to that particular amalgamation agreement and the particular circumstances found in that case.

The Board was not provided with a copy of the amalgamation agreement between BC Hydro and the relevant predecessor corporation in this case. The phrase “immediately before the amalgamation” may be present in the agreement, or it may not. If it is, then the Regional Manager may find that he is bound by the BCCA decision to remove BC Hydro as a responsible person. If it is not, the question will remain a “live” one for future argument at the hearing on the merits of BC Hydro’s appeal of the Order and subsequent Implementation Order.

In any event, the parties have not provided any evidence or argument to support a conclusion that there is a material change to the facts underlying the Board’s previous decision.

Although BC Hydro suggests that the Board should stay the Order now and then reconsider the stay after the Regional Manager has issued his decision, this ignores the test for granting an extraordinary remedy and asks the Board to make that decision without the benefit of informed submissions. Under these circumstances, the Board is not prepared to grant a stay of the Order or an interim stay of the Implementation Order at this time.

DECISION

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

For the reasons provided above, the Panel denies BC Hydro’s application.

Alan Andison, Chair
Environmental Appeal Board

September 24, 2003