BRITISH COLUMBIA

Environmental Appeal Board

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APPEAL NOS. 2003-WAS-007(b) & 2003-WAS-016(a)

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

BETWEEN:	Imperial Oil Limited	**APPLICANT**
AND:	Regional Waste Manager	**RESPONDENT**
AND:	British Columbia Power and Hydro Authority BC Rail Ltd. City of Quesnel Shell Canada Products Limited	**THIRD PARTIES**
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE:	Conducted by way of written submissions concluding on May 23, 2003	

APPEARING:	For the Applicant:	Simon Wells, Counsel
	For the Respondent:	Dennis Doyle
	For the Third Parties:	
	British Columbia Power and Hydro Authority	David Perry, Counsel
	BC Rail Ltd.	Graham Walker, Counsel
	City of Quesnel	James Yardley, Counsel
	Shell Canada Products Limited	Robert Lesperance, Counsel

APPLICATION

On February 17, 2003, Imperial Oil Limited ("Imperial") appealed the final determination of contaminated site and Remediation Order OE-17312 (the "Order"), issued by Joe Negraeff, P.Eng., Regional Waste Manager for the Cariboo Region, Ministry of Water Land and Air Protection (the "Regional Manager").

In its Notice of Appeal, Imperial applied for an order that its appeal be conducted as an appeal for reversible error on the record (a "true appeal"), rather than a hearing *de novo*. This application has been dealt with as a preliminary matter by way of written submissions.

On May 23, 2003, after submissions on Imperial's application were received by the Board, a new appeal was filed by Imperial against the Regional Manager's April 25, 2003 decision to reject Imperial's proposed remediation plan and require all parties named to the Order to implement the February 27, 2003 remediation plan authored by Seacor Environmental Inc. (the "Implementation Order"). Imperial also applied to have this new appeal heard as an appeal for reversible error on the record, rather than a hearing *de novo*. This decision also applies to that application.

BACKGROUND

On January 22, 2003, the Regional Manager issued the Order to Imperial and the following parties: British Columbia Hydro and Power Authority ("BC Hydro"), BC Rail Ltd. ("BC Rail"), BCR Properties Ltd., the City of Quesnel and Shell Canada Products Limited ("Shell Canada"). The Order requires all of these "responsible persons" to submit and implement a remediation plan to address soil and groundwater contamination by petroleum hydrocarbon products on several properties located on Quesnel Legion Drive, north of and adjacent to the Quesnel River in the City of Quesnel, B.C. (combined, the properties are referred to as "the Site").

Each of the parties or their predecessors owned or leased property and/or operated at various locations on the Site. According to the Order, Imperial was named as a responsible person because Imperial, and its corporate predecessor, leased a portion of the Site for the purposes of operating a petroleum product bulk plant for approximately 32 years (1925-1957).

Between February 13 and 21, 2003, each of the named parties appealed the Order. The Board decided that it would hear the appeals jointly. The Board also offered each appellant third party status in the others' appeals.

Imperial does not dispute that there is evidence of contamination within parts of its lease area. Imperial's primary concern is that the Order makes Imperial responsible for remediating the entire Site, as opposed to a smaller area that may have been contaminated by Imperial's operations. Consequently, Imperial seeks to have the Order quashed and set aside, and to have the Board remit the matter back to the Regional Manager for reconsideration.

In addition to the ultimate remedy sought, Imperial applied for three orders:

1) an order that its appeal be conducted as an appeal for reversible error on the record, or a true appeal, rather than a hearing *de novo*;

2) an order directing the Regional Manager to produce the full record pertaining to the Order and all related proceedings, including all written submissions and summaries or notes of all oral submissions made to him directly or indirectly by any persons, including impacted property owners, their counsel, Ministry staff, or other Crown agencies or bodies, in relation to the issuance

of the Order, and any other proceedings or consultations relating to the area in and surrounding the Site, initiated since January 1, 1997; and

3) an order directing the Ministry to produce all documents pertaining to public policy objectives of the Ministry in relation to the extent of the intended liability of persons who are found to be "responsible persons" under the *Waste Management Act.*

This decision addresses the first order requested, namely, to conduct an appeal for reversible error on the record, or a true appeal, rather than a hearing *de novo*.

Imperial objects to the Board hearing its appeal as a hearing *de novo*. It argues that a hearing *de novo* will be costly, inefficient and is unnecessary given Imperial's grounds for appeal and the remedy it seeks.

The Regional Manager does not oppose Imperial's application for an appeal on the record.

The Third Parties all oppose the application. They argue that all of the appeals should be heard as hearings *de novo*.

ISSUES

1. Whether the Board has the discretion to hear an appeal as a hearing on the record for a reversible error (a true appeal), as opposed to a hearing *de novo*.

2. If so, what are the relevant factors to be considered in this exercise of discretion.

3. Whether Imperial's appeal should be heard as a true appeal as opposed to a hearing *de novo*.

RELEVANT LEGISLATION

The Board has the authority to hear Imperial's appeal pursuant to the *Waste Management Act*, R.S.B.C. 1996, c. 482, the *Environment Management Act,* R.S.B.C. 1996, c. 118 and the *Environmental Appeal Board Procedure Regulation,* B.C. Reg. 1/82.

The relevant sections of these enactments are as follows:

Environment Management Act

Environmental Appeal Board

11 (12)In an appeal, the board or a panel

(a) may hear any person, including a person the board or a panel invites to appear before it, and

(b) on request of

(i) the person,

(ii) a member of the body, or

(iii) a representative of the person or body,

whose decision is the subject of the appeal or review, must give that person or body full party status.

(13) A person or body that is given full party status under subsection (12) may

(a) be represented by counsel,

(b) present evidence,

(c) where there is an oral hearing, ask questions, and

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

Environmental Appeal Board Procedure Regulation

Procedure following receipt of notice of appeal

4 (2) The chairman shall within 60 days of receipt of the notice of appeal or of the amended notice of appeal, as the case may be, determine whether the appeal is to be decided by members of the board sitting as a board or by members of the board sitting as a panel of the board and the chairman shall determine whether the board or the panel, as the case may be, will decide the appeal on the basis of a full hearing or from written submissions.

Waste Management Act

Procedure on appeals

46 (1) An appeal under this Part

(a) must be commenced by notice of appeal in accordance with the practice, procedure and forms prescribed by regulation under the *Environment Management Act,* and

(b) subject to this Act, must be conducted in accordance with the *Environment Management Act* and the regulations under that Act.

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

Powers of appeal board in deciding appeal

47 On an appeal, the appeal board may

(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 board considers appropriate in the circumstances.

DISCUSSION AND ANALYSIS

1. Does the Board have the discretion to hear an appeal as a hearing on the record for a reversible error (a true appeal), as opposed to an appeal *de novo*?

Traditionally, the courts have distinguished between two different types of appeal - a "trial *de novo*" and a "true appeal." As noted by Imperial in its submissions, this distinction was described by the B.C. Court of Appeal in *Dupras v. Mason* [1994] B.C.J. No 2456. In that case, the Court considered the nature of an appeal from the Chief Gold Commissioner to the B.C. Supreme Court at paragraph 15:

> The distinction between a trial *de novo* and a true appeal is that in a trial *de novo* the question before the court is the very question that was before the Chief Gold Commissioner, namely, was the claim located or recorded according to the Act and Regulations, whereas in a true appeal the question before the Court is whether the Chief Gold Commissioner made a reviewable error of fact, of law, or of procedure. A trial *de novo* ignores the original decision in all respects, except possibly for the purposes of cross-examination. A true appeal focuses on the original decision and examines it to determine whether it is right or wrong, flawed or unflawed.

The Court then considered the statutory schemes in the *Mineral Tenure Act* and the *Supreme Court Rules* and concluded that the appeal to the Supreme Court from a decision of the Chief Gold Commissioner is in the nature of a true appeal.

As in *Dupras*, the nature of an appeal must be determined through an understanding of the relevant legislation; in this case, the *Environment Management Act* and the *Waste Management Act*. Neither of these statutes expressly provide for appeals to be either in the nature of a "true appeal" or an appeal "*de novo*." However, section 46(2) of the *Waste Management Act* states

that the Board "may" conduct an appeal "by way of a new hearing." This section suggests that the Legislature intended to give the Board some flexibility in the way that it hears appeals under the *Waste Management Act* - i.e., it may or may not conduct the appeal as a "new hearing."

In addition, the *Environment Management Act* states that a person or body given full party status may "present evidence" as well as make submissions as to "facts, law and jurisdiction." Under the *Waste Management Act*, section 47 provides the Board with broad remedial powers, including the power to "make any decision that the person whose decision is appealed could have made, and that the board considers appropriate in the circumstances."

Considering all of these provisions together, the Panel finds that the Legislature has given the Board the discretion to tailor its hearing procedure to the circumstances of the case. The Board may conduct a hearing as a true appeal, a hearing *de novo* or something along the spectrum of the two.

Imperial submits that the fact that the Board *may* hold a hearing *de novo* does not mean that the Legislature intended the Board to be pre-disposed to hold hearings *de novo*. It states that, "Had the Legislature intended that every hearing … be presumptively in the form of a hearing *de novo*, it would have used clearer language."

In practice most hearings before the Board are a hybrid, of a hearing *de novo* and a true appeal. A full hearing of the evidence occurs, including new evidence, but the government official's decision and the "record" before that decision-maker are also considered by the Board. In the Panel's view, there is some indication that the Legislature intended this to be the case. It has specifically authorized the hearing of evidence under the *Environment Management Act* and has given the Board broad remedial powers. Further, neither the *Environment Management Act* nor the *Waste Management Act* refers to the decision below. However, the Board can summons witnesses and the original decision maker is made a full party. Clearly this allows the Board to hear both the evidence from the record below and additional evidence that was not part of that record.

For the vast majority of appeals, this hybrid procedure facilitates full evidence and argument to be presented to the Board. Defects or deficiencies in the process below may then be cured rather than sent back to the original decision-maker, only to have the administrative decision-making and appeal processes begin again. It therefore results in some administrative efficiencies and cost savings to all involved.

To summarize, the Panel finds that the legislation provides the Board with the discretion to hear an appeal as a true appeal, an appeal *de novo*, or a hybrid of the two. While the Board finds that a hybrid process is generally the most fair and effective method for hearing the majority of its appeals, it is not mandatory and the Board may conduct an appeal on the record. The question is whether it is appropriate to do so in this case.

2. If so, what are the relevant factors to be considered in the exercise of this discretion?

Imperial argues that the main consideration for the Board is whether the approach chosen is "fair and just to the parties." More specifically, Imperial argues:

> …the Board has only a limited jurisdiction to order a hearing *de novo* over the objections of an appellant, and must plainly find that to do so is more fair, efficient and appropriate than a hearing on the record in the circumstances. In doing so, it ought to be particularly mindful of the cost and expense to the parties of the different procedures.

Imperial submits that even where an error may be cured on appeal within an administrative process, if that appeal is expensive and inconvenient the courts have said that it is not an adequate alternative remedy (*Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, pp. 582-3, 593 (hereinafter *Harelkin*).

Imperial also argues that the Board must consider the appellant's grounds for appeal and the remedy sought when determining what is fair and just to the parties. It referred the Panel to a number of cases that considered the remedy sought when evaluating the appropriateness of a hearing *de novo* as opposed to a different procedure.

The Panel agrees that when deciding on the type of hearing, one of the considerations for the Board is whether the hearing procedure will be fair and just. The Panel agrees that it must consider the circumstances of the case, the remedy sought, and ascertain the most fair and effective method for the evidence and argument to be presented so that the Board can decide the issues in the appeal. The Board must also consider practical matters such as the availability of a proper "record."

In addition, the Panel is of the view that other factors may be relevant to the exercise of this discretion such as the purpose of the legislation under which the appeal has been filed. Will that purpose be jeopardized by the type of hearing procedure chosen by the Board? What are the submissions of the other parties involved?

The Panel has also considered whether the principle of "judicial economy" applies to this exercise of discretion. The principle is aimed at bringing an end to litigation in an efficient manner. In *Lim v. Lim*, 1999 BCCA 596, [1999] B.C.J. No. 2317 (B.C.C.A.), Hall J.A. states:

> 10 The above noted quotations express what I might call a principle of judicial economy, namely that to the extent possible, controversies ought to be settled as efficiently and as comprehensively as possible. The following provisions of the Supreme Court Rules seem to me to be an expression of that principle or expectation:
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> Rule 1

> ...
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> (5) The object of these rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.
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> Rule 5
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> (1) Subject to subrule (6), a person, whether claiming in the same or different capacities, may join several claims in the same proceeding.

The *Supreme Court Rules* do not apply to the Board. However, as master of its own procedure, the Board may join appeals so they will be heard together and, as a matter of practice, the Board attempts to secure the just, speedy and inexpensive determination of every proceeding on its merits. Therefore, the Panel finds that the principle of judicial economy is also a relevant consideration for the Board when determining the nature of the hearing.

To summarize, the Panel finds that one of the main questions is whether the form of hearing and the nature of the inquiry sought is fair and just in the circumstances. The factors relevant to answering this question are as follows:

- Are there any practical impediments to the Board hearing the appeal in the manner sought?
- Do the grounds of appeal and the remedy sought warrant one form of hearing over the other?
- Will the hearing procedure provide all parties with a fair opportunity to be heard and to present relevant evidence?

The Panel also finds that these factors should be balanced against the following broad policy factors:

- Will the form of hearing requested have any impact on the goals or objectives of the relevant legislation?
- Will the form of hearing raise issues of "judicial economy?"

3. Whether Imperial's appeal should be heard as a true appeal as opposed to a hearing *de novo*.

Imperial's arguments

Imperial submits that the circumstances of this case and fairness require that its appeal be conducted as a true appeal on the record whereby the decision of the Regional Manager is reviewed for error, and not as a "true" *de novo* hearing. It submits that a full rehearing of the evidence on the merits is not just or appropriate and will impose an unfair burden on Imperial.

Imperial states that the proceedings related to the remediation of the Site have been ongoing for approximately seven years. It submits that there is a clear record of the evidence and proceedings before the Regional Manager as all submissions

were exchanged in writing. The record consists of those written submissions, the documents accompanying those submissions and expert reports. Therefore, a hearing *de novo* would be an unnecessary expenditure of time and money since the record contains all of the information that is relevant to the appeal.

Most importantly, Imperial argues that its grounds for appeal and the remedy it seeks do not require a hearing *de novo*.

Imperial argues that these grounds for appeal relate to substantive jurisdictional errors committed by the Regional Manager that can and should be corrected on the record.

In particular, Imperial seeks to demonstrate that the Regional Manager's decision to add Imperial to the Order was made absent sufficient evidence, and based on evidence not properly before him. Imperial states: "a fundamental issue in this appeal is its contention that the Regional Manager erred in law by failing to consider the absence of evidence implicating Imperial as a responsible person for most of the contamination it has been ordered to clean up." If an appeal proceeds on the record, Imperial states that it is prepared to demonstrate the factual foundation for this contention by reference to the record, and to argue this ground and other grounds as an issue of law. A hearing of the merits is unnecessary and unjustified.

Second, Imperial states that the legal issues on appeal go to the jurisdiction of the Regional Manager to issue the Order that he did. Imperial asserts that the Regional Manager did not apply the *Waste Management Act* properly when imposing liability, and that this can be established from an examination of the record.

Third, Imperial states that it seeks principally to challenge the Regional Manager's decision based on errors of law. It states that it "does not seek to directly impugn any findings of fact by the Manager except where Imperial says there was *no* evidentiary foundation for an apparent finding, or where Imperial says the Manager erred in law in considering evidence not properly before him." Imperial reserves the right to directly challenge facts as an alternative to its principal argument but states that, if it does so, it will meet the high standard for overturning any findings of fact in an appeal on the record.

Regarding remedy, Imperial seeks to have the Order quashed and set aside and for the matter to be remitted back to the Regional Manager for reconsideration. Imperial maintains that it does not want a rehearing of the merits. It does not seek to have a "new" decision made by the Board. It simply asks that the procedural and jurisdictional deficiencies that form the basis of its appeal be addressed, which, it argues, simply require a review of the decision below.

In light of the grounds for appeal and the remedy sought, Imperial submits that it is unfair for Imperial to endure a costly hearing *de novo* when the jurisdictional error alleged may mean that Imperial should not be embroiled in a hearing on the merits at all. It states that the Regional Manager, when faced with a different legal interpretation of the *Waste Management Act* by the Board, may take a very

different approach to the Site. In addition, a hearing on the merits will require Imperial to retain and instruct experts at significant expense. It submits that such a process is particularly unfair because the Board will require Imperial to positively disprove the case against it.

Imperial referred to a number of cases in support of its position. It submits that the courts have found administrative appeals to be an inadequate remedy in similar circumstances to the present case. In particular, Imperial relies upon *Imperial Oil Limited v. British Columbia (Regional Waste Manager)* (1998), 4 Admin.L.R. (3d) 182 (B.C.S.C.); 51 B.C.L.R. (3d) 93 (hereinafter *Oldham*).

In *Oldham*, the Court considered the question of whether the right of appeal from an order made under the *Waste Management Act* was an adequate alternative remedy to judicial review. Because many of Imperial's arguments in the current application are similar to those it made in *Oldham*, the facts from *Oldham* are set out in some detail.

In 1995, the Ministry issued a pollution abatement order to the Petitioner (Imperial) without first notifying it of the Ministry's intent to issue the order, and without providing the Petitioner with an opportunity to be heard. The Petitioner appealed the order to the Deputy Director on the grounds that the rules of natural justice had been breached by the Ministry's failure to hold a hearing before the order was issued, and that there had been no reasonable evidentiary foundation for issuing the order against the Petitioner.[1]

The Petitioner asked the Deputy Director to hear the Petitioner's natural justice and jurisdiction issues as a preliminary application to avoid the expense of a lengthy hearing on the merits. The Deputy Director refused to hear the issues in advance of the appeal. He advised that the appeal would be a full hearing on the merits and that this procedure would address any of Imperial's procedural concerns.

The Petitioner applied to the court to quash the order. It argued, in part, that the appeal to the Deputy Director (and then to the Environmental Appeal Board) was not an adequate alternative remedy for several reasons, including that the appeal would not deal with the procedural and jurisdictional issues that formed the basis of its appeal. Rather, the internal appeal would be based on a full hearing of the merits. The Petitioner argued to the Court that the history of the ownership and use of the lands was complex, preparation for the hearing would be expensive and the hearing itself would be at least five days. During those five days of hearing, it would have to provide and respond to scientific evidence when its main issue was whether it should be named to the order at all.

The Respondent (the Deputy Director) in *Oldham* argued that any alleged flaws in the initial procedure would be cured by a new hearing, and that the Petitioner must

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[1] At the time, the *Waste Management Act* provided for an appeal to the Deputy Director and then a further appeal from the decision of the Deputy Director to the Board.

exhaust any internal appeal procedures. The Court did not accept the Respondent's arguments in part because:

> …on the appeal, the procedural matter concerning the propriety of the issuance of the Order in the first instance would not be considered, but the appeal would proceed on a consideration of the merits. That, of course, does not answer the assertion that Imperial wishes to avoid the expense of investigation and preparation for the appeal on its merits if, on the consideration of the preliminary procedural matter, there is no reason for Imperial to be there at all. (at para. 28)

Imperial also referred the Panel to *Misra v. College of Physicians and Surgeons*, [1988] 5 W.W.R. 333 (Sask.C.A.) (hereinafter *Misra*). In *Misra*, the Court considered an argument about the failure to file an appeal. The Chambers judge had said that he based his decision to refuse certiorari and mandamus primarily upon the appellant's failure to exercise his right of appeal. Under section 64(1) of the *Medical Professions Act*, S.S. 1981, C. M-10.1, an appeal was required to be a *de novo* hearing. In reviewing the leading case in *Harelkin,* Sherstobitoff J.A. stated for the Court at 354:

> The majority judgment [in *Harelkin*] based its decision, in large part, on the likelihood that the appellant in the Harelkin case would have a hearing *de novo* which would give an adequate, or even better remedy than a prerogative writ.

Sherstobitoff J.A. then stated:

> Although the appellant is entitled, in this case, to a hearing *de novo*, that would not remedy the matters of which he complains given that the burden of the appellant's complaint is unreasonable delay in proceeding together with a long period of unjustified suspension. It would compound the already unreasonable delay. A successful appeal would not give him back the years of lost practice. There is some question as to the jurisdiction of an appeal tribunal to prevent the charges from proceeding. Expedition and costs are also important in this case. Put simply, it would be unjust, in the circumstances of this case, to send the appellant back to an appeal tribunal under *The Medical Profession Act* with the possibility of further appeals from the decision of that body. Fairness, remedy, expedition and costs dictate that the discretion of the court should be exercised in favour of the appellant on this issue.

Imperial submits that the Order was issued by the Regional Manager after seven years of proceedings, during which time Imperial has "endured seven separate hearings." The appeal involves a complicated dispute between many parties and a large area of land on which several parties have conducted industrial operations. As noted above, Imperial submits that the proceedings related to the remediation of the Site have been ongoing for many years and most or all of the evidence in a

de novo hearing would have to be given by multiple experts. All of the parties would want to cross-examine Imperial's experts, which will be lengthy and repetitive. Consequently, Imperial estimates that a full *de novo* hearing of the appeals will take roughly five weeks to hear and will cost each of the parties tens of thousands of dollars in legal and expert fees.

However, as a true appeal, Imperial states that the costs for all will be greatly reduced because the hearing is shortened and because experts "will not need to be retained to testify *de novo* at length on their views of the Site and to review and reply to the views of other experts (and be subject to cross-examination)." Allowing for the complexity of this case and the number of parties, it suggests that one week should be ample to hear its appeal as an appeal on the record. Therefore, it submits that an appeal on the record could be scheduled, heard and decided more quickly than a much longer appeal *de novo*. In the interim, Imperial is compelled to comply with the Order because the Board previously refused to grant a stay of the Order (*British Columbia Power and Hydro Authority et. al. v. Regional Waste Manager*, Appeal Nos. 2003-WAS-006(a), 007(a), 008(a), 009(a), 010(a), March 21, 2003; [2003] B.C.E.A. No. 14 (Q.L.))

Imperial argues that the Board should heed the statement by Beetz J. in *Harelkin* that "the court should not use their discretion to promote delay and expenditure unless there is no other way to protect a right." In this case, Imperial's "rights" can be protected by the expeditious and less costly appeal on the record. Consistent with the decisions in *Oldham*, *Misra* and *Harelkin*, Imperial argues that a hearing on the record will directly address the defects of the lower decision, would be speedier, less expensive and efficacious and, therefore, fairer to all parties involved.

Imperial also argues that the hybrid hearing procedures adopted by the Board for *de novo* hearings is "fundamentally unfair for an appellant." In particular, Imperial cites two procedures that would be unfair to Imperial in this case:

1. Appellants are generally required to present their cases first absent unusual circumstances. Imperial states that this contradicts the normal procedure for a hearing *de novo,* which would require the party initiating proceedings and seeking relief (Imperial submits that it is the Regional Manager in this case) to lead his case first.
2. Appellants are required to positively prove their grounds of appeal on a balance of probabilities before the Board will interfere with the original decision. Imperial submits that the Board defers to the decision-maker below, as an appellate body would normally only do in an appeal on the record.

Imperial submits that "for appellants like Imperial who were a respondent in the proceedings below, these procedural differences reverse the onus from that of a true appeal *de novo*." It states that the resulting "hybrid" appeal process is doubly difficult when compared to either an appeal on the record or a true appeal *de novo*, because it combines the aspects of both types of appeal that work against the appellant: "On the one hand, the Board defers to the decision-maker below and

forces the appellant to make out an appeal, but then, if an error can be shown, the Board also allows the other parties to the appeal to lead evidence to try to answer that error and corrects it."

Ultimately, Imperial argues that if its appeal proceeds as a full *de novo* hearing and the Board rules on expert evidence that the Regional Manager *did not* consider because of his view of his legal obligations, the Board will simply be performing the task that the Regional Manager has refused to perform. It argues that this will "in no way serve to correct or prevent the same error from occurring again." It seeks to have the Board carry out "its supervisory role as an appellate body" by dealing with the questions of law that Imperial wants addressed in its appeal. As an appellate body, Imperial submits that the Board should be sitting in review of the decision of the decision-maker below. In doing so, the Board will hold the Regional Manager accountable for the careful and proper exercise of his powers. If successful on its appeal, Imperial states that the Regional Manager will be at liberty to rehear the matter and to consider the evidence in the appropriate legal context, as directed by the Board. Then, if the Regional Manager fails to properly consider the evidence, Imperial, if dissatisfied, may be in a position to appeal. At that time, an appeal *de novo* may be appropriate.

The Other Parties' Arguments

As noted at the outset, the Respondent does not oppose Imperial's application for an appeal on the record for a reversible error.

Of the Third Parties, Shell Canada, BC Rail and the City of Quesnel submit that Imperial's hearing should be a hearing *de novo* in keeping with the usual Board practice and procedure. These parties submit that there is no reason for proceeding differently in this case. The City of Quesnel also submits that this procedure will permit a more complete consideration of the issues on their merits.

BC Rail argues that Imperial has not participated reasonably in the process leading up to the Order, so its application should not be granted. It submits that Imperial refused to provide facts at the time of the original decision, and it will be highly unfair if Imperial is allowed to use a review on the record to cast the Regional Manager's decision as being unsupported by the facts. BC Rail argues that if the Board allows Imperial's appeal to be heard on the record, responsible persons under the *Waste Management Act* will be encouraged to withhold information at the first instance of decision-making in order to then attack those decisions as being made on insufficient evidence.

BC Rail submits that the only way for Imperial's appeal to proceed "in a fair manner" is for Imperial to disclose its relevant documents, as the other parties have done, call evidence, and be put to the task of proving that it is entitled to an exemption under the *Waste Management Act* in order to avoid its absolute, joint and several liability for contamination at the Site.

BC Hydro states that where factors of both evidence and jurisdiction are being considered, a *de novo* hearing before the Board is more appropriate. It notes that the enabling legislation requires the Board to allow any party to present evidence. BC Hydro submits that it intends to call additional expert evidence with respect to the conditions of the Site. If the Board orders that the matter be heard on the record, then BC Hydro will be deprived of the opportunity to make a full argument in this case.

The Panel's Analysis and Findings

Imperial maintains that there is a clear record of the evidence and proceedings before the Regional Manager as all submissions were exchanged in writing. None of the other parties dispute the availability of a proper record, although BC Rail argues that, if the record lacks information vis-à-vis Imperial, it is because Imperial refused to provide facts at the time of the original decision.

The Panel accepts that there is a record and, despite concerns by some of the other parties that Imperial has withheld information, there do not appear to be any practical impediments to hearing Imperial's appeal as a true appeal.

Regarding its grounds for appeal and the remedy sought, the Panel agrees that the issues raised can be framed as legal and jurisdictional errors which are amenable to being heard on the record for reviewable error. However, the question is whether this is appropriate in the circumstances of this case.

This application highlights the tension between the "right" of an appellant to argue the case as it sees fit versus the goals or objectives of the contaminated sites legislation. The courts have considered those goals or objectives on a number of occasions. For instance, in *Imperial Oil Ltd. v. British Columbia (Ministry of Water, Land and Air Protection)* 2002 BCSC 219, Ross J. considered the contaminated sites provisions in Part 4 of the *Act*. She states:

> 66 The purposes of the Act were addressed by Justice Tysoe *in Beazer East, Inc. v. Environmental Appeal Board et al.* (2000), 84 B.C.L.R. (3d) 88 at p.107-108:
>
> > The purposes of the Act are the prevention of pollution and the identification and remediation of contaminated sites … It is the latter purpose that is the focus of Part 4 of the Act.
> >
> > In *Swamy*, Hunter J. concluded that the principles set out in *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 (S.C.C.) by the Supreme Court of Canada applied to our legislation. In that case, the Court held that the purpose of the legislation before it was to prevent and remedy environmental contamination. The Court also said the following about the remediation purpose
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> > > Such a purpose requires rapid and effective means in order to ensure that any necessary action is taken promptly. This purpose is reflected both in the scope of

> the powers conferred on the Director and in the establishment of an appeal procedure designed to counterbalance the broad powers conferred on the Director by affording affected individuals an opportunity to present their points of view and assert their rights as quickly as possible… (para. 59)

> Similarly, the purpose of remediation under the Act encompasses the need for expeditious action. The Act empowers a manager to issue a remediation order as required and anyone named as a responsible person has a right of appeal to the Board. The ultimate allocation of responsibility is left by the Act to a more time-consuming court process unless there is a voluntary remediation agreement among all responsible persons.

67 Justice Tysoe also noted at p. 105 that:

> While the Act empowers a manager to investigate and determine whether a site is contaminated and to order responsible persons to remediate the site, the Legislature decided that the courts should be authorized to determine the allocation of responsibility for the contamination. Section 27(4) of the Act provides that any person who incurs costs of remediation may commence legal action for contribution from one or more responsible persons and s. 35(5) of the Contaminated Sites Regulation sets out the factors to be considered by the court in such an action. Section 27.2(1) also provides for allocation of responsibility to be considered by an allocation panel but the opinions of allocation panels are not binding and it is more likely that a person who incurs remediation costs will resort to legal action unless there is a reasonable prospect of a voluntary remediation agreement among all responsible persons.

It is apparent from these quotes that the courts have recognized that speed and efficiency in preventing and remedying environmental contamination are important goals in this legislative scheme.

In the present case, the evidence before the Panel is that the Regional Manager issued the Order after discussion between the parties had broken down and work to remediate the Site was not proceeding. The Order itself states:

> By July 1998, it was apparent the parties were not willing to voluntarily carry out any further remediation of the Site. I therefore advised the parties I was prepared to proceed with a remediation order.

> A lengthy period of submissions and counter submissions ensued which resulted in:
>
> - Notice of a preliminary determination of a contaminated site dated November 13, 1998, and the issuance of a final contaminated site determination dated February 19, 1999;
> - Imperial filing a notice to the Environmental Appeal Board ("EAB") on March 18, 1999, appealing the contaminated site determination (this appeal is currently in abeyance);
> - Imperial filing an application on September 28, 1999, for judicial review to quash the contaminated site determination and prohibit further proceedings on responsible person status (this … application is currently adjourned sine die);
> - A draft remediation order and a proposed amendment to my contaminated site determination being sent to the parties on March 3, 2000, for review and comment (Draft Order #1);
> - A second draft remediation order and proposed amendment to my contaminated site determination being sent to the parties on August 9, 2000, for review and comment (Draft Order #2);
> - The remediation order proceedings being held in abeyance because, in November 2000, five of the six parties [BC Rail, BCR Properties Ltd., BC Hydro, the City of Quesnel and Shell Canada] agreed to voluntarily undertake the first requirement of the proposed remediation order, which was to complete the detailed site investigation of the Site.
>
> …
>
> The Voluntary Group subsequently advised that they were not willing to continue voluntary remediation of the Site in the absence of an order requiring Imperial to participate in or contribute financially to the remediation of the Site.
>
> I am therefore issuing the attached remediation order to protect the environment.

In the Order, the Regional Manager also outlined his rationale for naming Imperial as a person responsible for remediating the Site. He states:

> Imperial has consistently maintained that the Site as defined is overbroad and that the Site should be split into multiple smaller sites. … This position has also been taken at times by the City of Quesnel and BCR/BCRP. However, I remain convinced that attempting to define and then remediate a number of smaller individual sites would hinder remediation. My view regarding breaking the Site into several smaller sites has been articulated in Draft Orders #1 and #2 and my previous correspondence with the parties. … I remain convinced a

> single, comprehensive remediation plan is the best means to ensure protection of the environment. (p. 5)

Section 27 of the *Waste Management Act* makes it clear that a person who is responsible for remediation at a contaminated site is "absolutely, retroactively and jointly and severally liable to any person or government body" for the reasonably incurred costs of remediation of the contaminated site, whether incurred on or off the contaminated site. Section 27(4) of the *Act* allows a person who incurs costs in carrying out remediation at a contaminated site to pursue "in an action or proceeding the reasonably incurred costs of remediation from one or more responsible persons in accordance with the principles of liability set out in this Part." In such a proceeding, the court may, among other things, apportion a share of the costs of remediation at a contaminated site and make such other determinations as necessary to achieve a fair and just disposition of the matter (see also *Workshop Holdings Ltd. v. CAE Machinery Ltd*. 2003 BCCA 56).

Thus, even if the Board hears the appeal, it is not the final decision authorized by statute with respect to who is ultimately responsible or the extent of the financial responsibility under the *Act*. This is a different legislative scheme than was in place at the time the order was made in *Oldham*.

Oldham is also distinguishable for other reasons. In *Oldham*, the Petitioner was the only party named to the order, unlike the Order in this case. In addition, there is no indication that the site in *Oldham* was as large or the contamination as complex as in this case (i.e., involving different smaller sites and sources of contamination).

Further, the Court in *Oldham* concluded that the appeal process to the Deputy Director was unreasonable or inadequate for two main reasons. First, the main defect alleged by Imperial was that there had been NO opportunity to be heard before it was named in the pollution abatement order. The Court agreed that there was a procedural fairness defect and that, if an opportunity to be heard had been provided to Imperial, Imperial may not have been named to the Order at all. Therefore, proceeding to a full hearing on the merits was unnecessary, expensive and unwarranted. The Court states:

> Without wishing to belabour the point, Imperial does not want to embark on a full hearing of the merits if it is not necessary to do so. In *Harelkin*, it was necessary for the student to continue to the next stage in any event. That is not necessarily so for Imperial. (at para. 34)

Second, and of significant concern to the Court, the Deputy Director had refused to hear Imperial's procedural complaints as a preliminary matter. The Court noted that Imperial's choice was then either a lengthy hearing on the merits (including scientific evidence relating to the contamination itself) or facing criminal sanctions.

Conversely, in the present case there was an extensive process of draft orders and, as Imperial notes, seven years of proceedings and seven separate hearings prior to

the issuance of the Order. Imperial had the opportunity to comment on the drafts and its grounds for appeal are not limited to a simple procedural defect. Its grounds are numerous and will involve an evaluation of the evidence before the Regional Manager at the time of the Order, including evidence of the contamination at the Site generally, as well as an evaluation of the historic activities of Imperial and its corporate predecessor at the Site. As noted by Imperial, its appeal also requires, at minimum, a review of the various expert reports available to the Regional Manager at the time he issued the Order.

Unlike *Oldham*, Imperial has not applied to have its issues in this case dealt with as a preliminary matter, likely because they are not truly "preliminary" as they were in *Oldham*.

For the above reasons, the Panel finds that the Court's conclusion in *Oldham* that the *de novo* appeal was not an adequate remedy does not apply in the present case.

Imperial has emphasized in its submissions that it does not want the Board to make a new decision. Assuming that the Regional Manager made the errors alleged, it wants the Board to refer the matter back with directions rather than correcting the errors.

As noted above, Part 4 of the *Act* focuses on the expeditious identification and remediation of environmental hazards and pollution. The Board must also take this into account when it hears an appeal under that Part. In the Panel's view, an appeal under Part 4 of the *Waste Management Act* is not merely an opportunity to determine whether a decision is correct or incorrect based on the information available at a particular point in time. It is generally an opportunity to correct mistakes and determine the most effective and fair method of addressing the public interest concerns of health and the environment based on the most relevant evidence available. As noted by Tysoe J. in *Beazer*,

> … the purpose of remediation under the Act encompasses the need for expeditious action. The Act empowers a manager to issue a remediation order as required and anyone named as a responsible person has a right of appeal to the Board. The ultimate allocation of responsibility is left by the Act to a more time-consuming court process unless there is a voluntary remediation agreement among all responsible persons.

In addition, the Panel cannot disregard the context of the appeal, situated as it is within a number of appeals from the same Order. The other parties' all agree to their appeals being conducted in the usual hybrid *de novo* fashion, where it is anticipated that new evidence will be advanced. The Board initially decided to hear the appeals together so that the evidence and arguments could be presented as efficiently and effectively as possible. If the hearing of Imperial's appeal is on the record, the appeal would have to be (a) heard separately, because the other appeals are to conducted as a new hearing, or (b) heard together, but the new

evidence could not be applied to Imperial's appeal. These procedures do not promote either expeditious or effective results.

Imperial has cited the statement of Beetz J. in *Harelkin* as support for its position: "the court should not use their discretion to promote delay and expenditure unless there is no other way to protect a right." In this case, the Panel finds that holding a hearing on the record could very well promote delay and expenditure. If the Board agreed with Imperial and referred the matter back to the Regional Manager, the Regional Manager would then consider any new evidence and correct the deficiencies identified by the Board. New decisions by the Regional Manager may then result in further appeals. Imperial notes that an appeal "may" then warrant a *de novo* hearing.

It is apparent that this procedure could result in a great deal of additional delay and cost in remediating the Site, or that portion found to be contaminated by Imperial. The Panel finds that this result is contrary to the intent and purpose of the *Waste Management Act* and contrary to the principle of judicial economy in that the appeals will not be settled as efficiently and comprehensively as possible. Although Imperial also referenced *Misra* as support for its position, the Panel finds that case does not support its application for a true appeal. In *Misra* the Court states:

> Expedition and costs are also important in this case. Put simply, it would be unjust, in the circumstances of this case, to send the appellant back to an appeal tribunal under *The Medical Profession Act* with the possibility of further appeals from the decision of that body. Fairness, remedy, expedition and costs dictate that the discretion of the court should be exercised in favour of the appellant on this issue. [emphasis added]

In the present case, it would not be expeditious or cost effective to hold a true appeal, refer any errors back to the Regional Manager, and then have a new decision and further appeals. In the present case, the Panel finds that "fairness, remedy, expedition and costs dictate that the discretion" of the Board should not be exercised in favour of the Appellant, Imperial. A true appeal is not the most fair and just process for all involved in the context of this legislation.

Specifically, the Panel finds that conducting different types of hearings for the different appeals and applying a different standard of review and ignoring new evidence in Imperial's appeal, will result in a longer and more contentious remediation effort, with further uncertainty for the parties and a multiplicity of proceedings.

Further, the Panel notes that at least three of the other appellants have stated in their grounds for appeal that the Regional Manager erred in refusing to order Imperial to contribute towards the costs of remediation. In their joint appeal hearing, the evidence tendered by the parties *could* lead to a finding that Imperial is a responsible person and should be ordered to contribute, notwithstanding the Regional Manager's findings in the Order. Therefore, at worst, different hearings

could also result in inconsistent decisions being rendered by different panels of the Board vis-à-vis Imperial. This would not further the goals or purposes of the *Waste Management Act* and would, in fact, frustrate the clean-up given the number of parties involved. In the context of contaminated sites legislation, this cannot be the result intended by the Legislature.

At the same time, the Panel does not accept the Third Parties' concerns regarding their ability to present evidence in Imperial's appeal. The Board has consolidated the appeals because the facts and legal issues are intertwined. However, each appeal must be decided on its own merits. The issues to be decided in Imperial's appeal will be driven by its grounds for appeal. Its appeal does not constitute a "free for all." The other parties may wish to present the evidence that they believe is relevant to their respective cases as part of their own appeals, to which Imperial is a Third Party.

Finally, Imperial has raised a concern with the usual "order of presentation" by the parties. At common law, the Board is the "master of its own procedure" and, as such, is able to establish the order of presentation. While the Board generally hears from the appellant first, it is important to note that it also provides an appellant with an opportunity to reply to evidence presented by a respondent or another party, therefore, fairness is preserved. In addition, this procedure generally allows a panel to make a fully informed decision on the merits of the case. In any event, nothing significant turns on this for the purposes of this application; panels of the Board often deviate from the usual order of presentation when the case or the evidence will be better understood using a different order of presentation.

With respect to the "onus of proof" issue, the Panel finds that it is appropriate for an appellant to have the onus of proving the facts it asserts to be true on a balance of probabilities. This applies regardless of whether it is a true appeal or an appeal *de novo*.

Balancing all of the relevant factors, the Panel finds that Imperial's appeals should not be heard as a true appeal, in the circumstances. They will be conducted as a new hearing, joined with the other appeals, and new evidence will be accepted. The Board acknowledges that a joint hearing of these appeals will be costly. It is for this reason that the Board encourages parties to enter into negotiations or mediation. However, the issue of cost cannot override the other considerations, such as the enabling legislation, which gives all parties the opportunity to adduce any evidence or argument they believe is relevant to their interest. In light of the purpose of the *Act*, it would be inappropriate to focus on the private expenditures of the parties when the public interest over the environment is at stake.

DECISION

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

For the reasons stated above, the Panel denies Imperial's applications for its appeals to be conducted as a true appeal. Imperial's appeals will proceed by way of a new hearing of the evidence and arguments so that the Board may decide the issues based on that new evidence and argument.

Alan Andison, Chair
Environmental Appeal Board

February 6, 2004