



Province of  
British Columbia

# Environmental Appeal Board

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## APPEAL NO. 2004-PES-001(a)

In the matter of an appeal under section 15 of the *Pesticide Control Act*, R.S.B.C. 1996, c. 360.

<b>BETWEEN:</b>	Jim Fairall	<b>APPELLANT</b>
<b>AND:</b>	Deputy Administrator, Pesticide Control Act	<b>RESPONDENT</b>
<b>BEFORE:</b>	A Panel of the Environmental Appeal Board Lynne Huestis, Panel Chair	
<b>DATE:</b>	Conducted by way of written submissions concluding on May 26, 2004	
<b>APPEARING:</b>	For the Appellant: Jim Fairall For the Respondent: Jeff Fournier	

## APPEAL

This is an appeal of the December 12, 2003 decision of Jeff Fournier, the Deputy Administrator, Pesticide Control Act, for the Lower Mainland Region of the Ministry of Water, Land and Air Protection (the "Ministry"), to revoke Pesticide Applicator Certificate No. 113372 (the "Certificate") belonging to Jim Fairall, and to restrict Mr. Fairall's right to apply for a new certificate in accordance with sections 12(2)(b) and 13 of the *Pesticide Control Act* (the "Act").

The Environmental Appeal Board has the authority to hear these appeals under section 11 of the *Environment Management Act* and section 15 of the *Act*. The Board's authority under section 15(7) of the *Act* is as follows:

On an appeal, the appeal board may

- (a) send the matter back to the person who made the decision being appealed, 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.

Mr. Fairall seeks an order reversing or varying the decision of the Deputy Administrator to revoke the Certificate.

The appeal was conducted by way of written submissions.

## **BACKGROUND**

Mr. Fairall has owned and operated a structural pest control company, currently called Anteater Pest Control, for approximately the past 25 years. Mr. Fairall applied for and was issued the Certificate in March 2001; the Certificate was valid until 2006.

Until 2001, Mr. Fairall had also held Pest Control Service Licence No.3171S (the "Licence"). This Licence expired on April 1, 2001. Mr. Fairall applied for a new pest control service licence in January of 2001. The Ministry contacted Mr. Fairall on March 15, 2001, by telephone to discuss the status of his application for the new licence, and advised Mr. Fairall that he was required to provide proof of insurance before the Ministry could complete the processing of his application.

On October 19, 2001, Mr. Fairall received a warning letter from the Ministry advising him that it had come to the attention of the Ministry that Anteater Pest Control was conducting pest control services "that may involve the use of pesticides," and warning Mr. Fairall that it was an offence to provide pest control services that involved the use of pesticides without a valid pest control service licence.

On November 15, 2001, the Ministry notified Mr. Fairall in writing that, if proof of insurance was not received by November 30, 2001, the Ministry would consider the application for pest control service licence to be abandoned. Mr. Fairall did not respond to this letter, and the pest control service licence application was abandoned. In his submissions to the Board, Mr. Fairall states that he "dropped" the application because he found the costs of securing liability insurance to be too costly, given the part time nature of the pest control services that he was providing at the time.

On October 3, 2003, Aaron Miller, Pesticide Management Officer with the Lower Mainland Region of the Ministry, conducted an internet search of the British Columbia Structural Pest Management Association ("SPMA") website and discovered an advertisement for Anteater Pest Control. It is undisputed that, in October 2003, the SPMA advertised that all of its members, of which Anteater Pest Control was listed as one, were certified and licenced by the Ministry, and carried liability insurance. A search of the Pest Control Canada website by Mr. Miller also showed another advertisement for Anteater Pest Control which displayed the SPMA logo, representing that Anteater Pest Control was a member of SPMA.

On October 27, 2003, Mr. Miller conducted an investigation by placing an anonymous telephone call to Anteater Pest Control and talking to Mr. Fairall. The parties disagree on the contents of this telephone call. The Ministry submits that Mr. Fairall offered, by telephone, to apply rat bait on a "fee for service" basis. Mr. Miller's written record of the telephone call indicates that he told Mr. Fairall that he had a rat problem and that he had already tried traps. When Mr. Miller asked what Mr. Fairall would do to treat the rats, Mr. Fairall said that he could come and put down some rat bait to kill the rats, as that was the cheapest method. When asked

if Mr. Fairall sold rat bait, Mr. Fairall directed Mr. Miller to another company to buy the rat bait if Mr. Miller wanted to do it himself. Mr. Fairall offered to come by and do a free inspection and give Mr. Miller an estimate of the costs involved.

The Deputy Administrator submits that he was in attendance with Mr. Miller during the October 27, 2003 telephone call between Mr. Miller and Mr. Fairall, and that Mr. Miller's account of the telephone conversation is consistent with what he witnessed.

Mr. Fairall initially admitted in his submission to having some difficulty remembering what was actually said during the October 27, 2003 telephone conversation with Mr. Miller, but denies offering to apply a rodenticide. He claims that the telephone call was strictly an inquiry and that there was no agreement on his part to do any service. He also described the general practice of Anteater Pest Control, and denied that any representative of the company would offer to blatantly place bait on the premises to kill rats. He described the general practice of the company to be prevention trapping, with baiting as a last resort when the company was licenced. He claimed that a decision to bait was never made until the job site had been sized up and that, if baiting was required, the job would have been passed on to a licenced pest control operator.

During the course of this appeal, Mr. Fairall made a request for, and received, a copy of the Ministry's records of the October 27, 2003 telephone call. After reviewing the notes, Mr. Fairall made further submissions concerning the accuracy of some of the statements in Mr. Miller's notes. In particular, Mr. Fairall states that when asked by Mr. Miller whether he would use rat bait, he did not give an adamant "yes", but more likely stated, "yes that could be done."

Mr. Miller contacted Anteater Pest Control again by telephone on October 28, 2003, and spoke to Mr. Fairall. The Ministry's written record of this phone call indicates that, when asked if he was "government certified," Mr. Fairall confirmed that he was certified by the government to do rat control work.

On November 20, 2003, Joanne Edwards, Pesticide Management Technician with the Lower Mainland Region of the Ministry, placed a telephone call to Mr. Fairall asking him to attend a meeting at the Ministry offices to review the status of his Certificate. The reason given to Mr. Fairall for the meeting was to discuss the circumstances surrounding the potential infractions involving advertising pest control services on the Internet. According to Ms. Edwards' written account of this telephone call, Mr. Fairall became very agitated. Her notes state that, at times, he indicated that he was conducting pest control services; while at other times indicated that he was not. She states that Mr. Fairall reiterated that the liability insurance was too costly, that he had not conducted business for some time and that he was not prepared to comply with the request for a meeting.

Mr. Fairall does not dispute Ms. Edwards' account of this telephone call, but states that he took issue with the authoritative and confrontational tone of the telephone call.

On November 24, 2003, Mr. Fairall placed a telephone call to the Deputy Administrator to complain about the telephone call he received from Ms. Edwards and to seek clarification of the reasons for the call. The Deputy Administrator's

written record of this telephone call indicates that he advised Mr. Fairall of the nature of the complaints against him. Mr. Fairall was told that the Ministry viewed his website advertisements as representing him as a licence holder, by virtue of being a SPMA registrant, and as a government certified applicator. The Deputy Administrator also advised Mr. Fairall of the investigation conducted by Mr. Miller by telephone on October 27, 2003, where Mr. Miller understood Mr. Fairall to have offered to do rat control, using bait on a "fee for service" basis. The Deputy Administrator's notes indicate that Mr. Fairall admitted to offering to apply rodenticides on a "fee for service" basis, but claimed that he did so with the belief that rodenticides were exempted products. The Deputy Administrator told Mr. Fairall that he should have known that rodenticides were not exempted products, and that he was responsible to understand and comply with legislation. Mr. Fairall also appears to have told the Deputy Administrator that he did not need the Certificate for the type of pesticide work that he intended to pursue in the future.

During the course of this conversation with the Deputy Administrator, Mr. Fairall agreed to take a number of corrective steps, including removing his advertisement from the SPMA website and removing the government certification aspect from his advertisements used on other websites. The Deputy Administrator does not dispute that Mr. Fairall did in fact take the necessary corrective steps regarding the misleading advertising.

By registered letter dated December 12, 2003, the Deputy Administrator revoked the Certificate in accordance with section 13 of the *Act*, directed Mr. Fairall to deliver the revoked Certificate to the Deputy Administrator immediately and suspended Mr. Fairall's right to re-apply for a pest control service licence and/or a pesticide applicator certificate for 3 months commencing from the date of receipt by the Ministry of the revoked Certificate in accordance with section 13(2) of the *Act*. The reasons listed by the Deputy Administrator for the revocation of Certificate are as follows:

1. advertising on the Structural Pest Management Association of British Columbia website without possessing a Pest Control Service Licence and liability insurance which are advertised requirements for membership in that association,
2. offering a service over the telephone on November 20, 2003<sup>1</sup>, without the required Pest Control Service Licence and insurance coverage to do rat control on a "fee for service" basis by placing rat baits that would kill rats,
3. since March 2001 you have been reminded at least twice of your need to have a Pest Control Service Licence and appropriate liability insurance before you used non-exempted pesticides,

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<sup>1</sup> The Ministry later corrected the date of the contravention listed in paragraph 2 of the December 12, 2003 to October 27, 2003, by facsimile on December 23, 2003.

4. your agreement that you do not require a Pest Control Service Licence or Applicator Certificate for the type of work you indicated that you plan to do in the future.

Mr. Fairall delivered the Certificate to the Deputy Administrator on December 23, 2003.

Also on December 23, 2003, Mr. Fairall appealed the decision of the Deputy Administrator. He appealed on the grounds that the Deputy Administrator did not have grounds to revoke the Certificate or, in the alternative, that the Certificate should have been suspended rather than revoked.

On April 16, 2004, Mr. Fairall sent an e-mail to the Deputy Administrator seeking to have his Certificate re-instated. The Deputy Administrator refused, by e-mail dated April 27, 2004, to re-instate the revoked Certificate in order to allow the Board to completely deal with the issues raised in the appeal.

## **ISSUES**

This appeal raises two issues:

1. Whether there are grounds to revoke or suspend Mr. Fairall's Certificate.
2. If so, should Mr. Fairall's Certificate be suspended rather than revoked.

## **RELEVANT LEGISLATION AND CASE LAW**

The relevant provisions of the *Pesticide Control Act* are as follows:

### **Suspension and revocation**

- 13** (1) The administrator may revoke, or suspend for the time the administrator considers appropriate, a licence, permit, certificate or approved pest management plan if the administrator considers
- (a) that this Act, a regulation or a term of the licence, permit, certificate or pest management plan is not being complied with, or
  - (b) that the holder is applying, has applied or is handling a pesticide in a manner that is likely to cause or has caused an unreasonable adverse effect.
- (2) If the administrator revokes or suspends a licence, permit, certificate or approved pest management plan, the administrator may restrict, for the time the administrator thinks appropriate, the holder's right to apply for another licence, permit, certificate or to apply for approval of another pest management plan.
- (3) If a licence, permit, certificate or approved pest management plan is revoked or suspended, the holder must deliver it immediately to the administrator.

**Licence required to sell pesticides**

- 4 (1) Except as otherwise provided in the regulations, a person who does not hold a licence must not
- (a) carry on, or represent that the person is available to carry on, the business of selling pesticides, applying pesticides or providing any service respecting pesticides, or
  - (b) purchase, directly or indirectly, a pesticide for the purpose of selling it to another person.
- (2) An application for a licence must
- (a) be made to the administrator,
  - (b) be in the form required by the administrator,
  - (c) contain the information prescribed by regulation and any other information required by the administrator, and
  - (d) be accompanied by the applicable fee established by regulation.
- (3) The administrator may
- (a) issue a licence if satisfied that the applicant meets the prescribed requirements, and
  - (b) include requirements, restrictions and conditions as terms of the licence.

The relevant provisions of the *Pesticide Control Act Regulation* (the "*Regulation*") are as follows:

Section 1(1) of the *Regulation* defines a "service licence" to mean "a licence authorizing the licensee, his agent, assistant or employee to offer, sell or provide a service."

**General Restrictions**

- 4 (1) No person shall
- ...
- (i) offer, sell or provide a service other than from an office in respect of which a service licence has been issued

**Bonding and Insurance**

- 24 (1) The administrator may at any time require a person who holds or applies for a service licence to provide evidence of cover for public liability and property damage for himself and his employees by bond or insurance in an amount fixed by the administrator for any one claim
- (a) of not less than \$100,000 for bodily injury or death, and
  - (b) of not less than \$25,000 for property damage.

## DISCUSSION AND ANALYSIS

### 1. Whether there are grounds to revoke or suspend Mr. Fairall's Certificate.

The evidence before the Panel shows that Mr. Fairall, carrying on business as Anteater Pest Control, advertised on both the SPMA Internet site, and on the Pest Control Canada internet site using the SPMA logo. Mr. Fairall argues that he was unaware that using the SPMA logo implied to persons reading the advertisement that he held a valid pest control service licence. Mr. Fairall also argues that very little business was actually generated by this misleading advertisement.

The evidence shows that the SPMA Internet site clearly states that "all members must be Ministry of Environment certified and licenced," and "must carry liability insurance." The Panel finds the listing of Anteater Pest Control on the SPMA Internet site, and the use of the SPMA logo in Anteater Pest Control advertisements on the Pest Control Canada Internet site, did give the impression that Mr. Fairall was licenced by the government to apply provincially non-exempted pesticides.

The Panel finds that there is sufficient evidence to conclude that Mr. Fairall was not in compliance with section 4(1)(i) of the *Regulation*. The fact that little business was actually generated by these advertisements is not relevant to this conclusion.

Mr. Fairall also denies offering, over the phone, a pest control service that requires a valid pest control service licence, and that he did so despite previous warnings from the Ministry staff. The parties dispute the statements made during the October 27, 2003 telephone call. Mr. Fairall also described the investigative phone call made by Mr. Miller on October 27, 2003 as "an entrapment type phone call," but makes no further submissions or legal argument on this point.

After reviewing all the evidence, the Panel accepts the evidence of the Ministry that Mr. Fairall did offer, by phone, to apply a rodenticide on a "fee for service" basis. By his own admission, Mr. Fairall had only a vague recollection of the October 27, 2003 phone conversation with Mr. Miller. His denial of the accuracy of the Ministry's account of the telephone call is based on what he describes as general company practice, rather than on any actual recollection of the conversation with Mr. Miller. The Panel also finds it significant that Mr. Fairall admitted telling the Deputy Administrator, in a later telephone conversation, that he had trouble thinking of rodenticides as restricted products.

The Panel finds that there is sufficient evidence to conclude that Mr. Fairall was not in compliance with section 4(1)(a) of the *Act*. Based on the evidence of non-compliance with the *Act* and *Regulation*, the Panel finds that there are grounds to revoke or suspend Mr. Fairall's Certificate under section 13(1)(a) of the *Act*.

### 2. If so, should Mr. Fairall's Certificate be suspended rather than revoked.

Mr. Fairall makes several submissions on this issue. He submits that the decision of the Deputy Administrator to revoke his Certificate was not fair. He argues that the

Deputy Administrator decided to revoke the Certificate without giving him an opportunity to be heard.

The Panel notes that Mr. Fairall does not deny being asked to attend Ministry offices to discuss the status of his Certificate in light of the misleading advertisements found on the Internet, but argues that he felt justified in refusing to attend the meeting because of the "authoritative and confrontational" tone of the request, and the fact the meeting was requested at an inconvenient time for him (i.e., immediately before Christmas). Nor does Mr. Fairall deny talking to the Deputy Administrator four days later, at which time he was made fully aware of the nature of the complaints against him.

The duty of fairness requires that a person affected by an administrative decision has the right to know the case against him or her, and must be given the opportunity to reply to it. The evidence before the Panel indicates that Mr. Fairall was aware of the specific nature of the complaints against him prior to the Deputy Administrator's December 12, 2003 decision to revoke his Certificate. Mr. Fairall refused to meet with the Ministry to discuss the circumstances surrounding these potential infractions or the potential consequences arising out of the potential infractions. The Panel further finds that Mr. Fairall had the opportunity to reply to these complaints when he spoke to the Deputy Administrator on November 24, 2003. In the circumstances, the Panel finds that there was not a breach of procedural fairness prior to the December 12, 2003 decision.

Mr. Fairall also submits that the decision to revoke the Certificate is unduly harsh given his history of compliance with Ministry requirements. He argues that the offending advertisements did not generate much business and that no actual harm was done. He also points out that he took corrective action immediately to remove the offending advertisements.

It is apparent that the Deputy Administrator's decision to revoke the Certificate was meant to have a deterrent effect. The Panel finds it significant that Mr. Fairall has, since 2001, been made aware by the Ministry on a number of occasions, of the requirement to have a pest control service licence before offering a service involving the application of provincially non-exempted pesticides such as rodenticides. Despite these earlier warnings, Mr. Fairall offered, over the telephone, to apply a rodenticide on a "fee for service" basis. The Panel also accepts the Deputy Administrator's argument that compliance with the *Act* and its licencing requirements is essential for ensuring the protection of human health and is in the public interest. The Panel notes that it was only the apparent cooperation of Mr. Fairall in surrendering the Certificate that influenced the Deputy Administrator not to charge him with an offence under the *Act* but, rather, to pursue only the administrative actions that are the subject of this appeal. In the circumstances, the Panel finds that the revocation of the Certificate was an appropriate enforcement action in this case.

Mr. Fairall also submits that the decision to revoke the Certificate has hampered the re-establishment of his business. He argues that he should not have to re-write the certification exam to have his Certificate re-instated, given his consistent 80% score on previous certification exams. The Panel disagrees. The Panel notes that

Mr. Fairall told the Deputy Administrator that he did not need an applicator certificate or a pest control service licence to conduct the type of pesticide work he intended to pursue in the foreseeable future during their November 24, 2003 telephone call. The Deputy Administrator understood this statement to mean that a revocation was not likely to unduly impact Mr. Fairall's livelihood. Mr. Fairall now states that it would not be in his best interest to completely terminate Anteater Pest Control at the present time, but makes no further submissions on this point.

Based on all the evidence before the Panel, the Panel is not persuaded that the decision to revoke the Certificate will hamper the re-establishment of Mr. Fairall's business. There is nothing in the decision of the Deputy Administrator that would preclude Mr. Fairall from applying for a new applicator certificate or a pest control service licence to conduct the type of pesticide work he now says he intends to pursue. The Panel does not view the regulatory requirement to re-write the certification exam to secure a new applicator certificate to be unduly harsh or unfair in the circumstances.

After carefully considering all the evidence, the Panel finds that the revocation of the Certificate was an appropriate enforcement action. The Panel is not prepared to reverse or vary the decision of the Respondent to revoke Certificate.

## **DECISION**

In making this decision, the Panel has considered all of the evidence and arguments provided, whether or not they have been specifically reiterated here.

For the reasons provided above, the appeal is dismissed.

A handwritten signature in black ink, appearing to read 'L. Huestis', with a stylized flourish extending to the right.

Lynne Huestis, Panel Chair  
Environmental Appeal Board

July 14, 2004