Province of British Columbia

Environmental Appeal Board

Fourth Floor 747 Fort Street
Victoria British Columbia
**Telephone:** (250) 387-3464
**Facsimile:** (250) 356-9923

Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1

## APPEAL NOS. 2004-WAS-001(a) & 2004-WAS-002(a)

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

| | | |
|---|---|---|
| **BETWEEN:** | Petro-Canada | **APPELLANT** |
| **AND:** | Assistant Regional Waste Manager<br>Deputy Director of Waste Management | **RESPONDENTS** |
| **BEFORE:** | A Panel of the Environmental Appeal Board<br>Alan Andison, Chair | |
| **DATE:** | Conducted by way of written submissions concluding on October 27, 2005 | |
| **APPEARING:** | For the Appellant: R.R.E. DeFilippi, Counsel<br>Jason Bourgeois, Counsel<br>For the Respondent: Dennis Doyle | |

## APPEALS

On January 14, 2004, Petro-Canada appealed a conditional certificate of compliance (the "Conditional Certificate"), issued on December 16, 2003, by Doug Walton, Assistant Regional Waste Manager (the "Regional Manager"), Ministry of Water, Land and Air Protection (now the Ministry of Environment) (the "Ministry"). On January 14, 2004, Petro-Canada also appealed a certificate of compliance (the "Certificate"), issued on December 22, 2003, by John E.H. Ward, Deputy Director of Waste Management for the Ministry. Both the Conditional Certificate and the Certificate pertain to lands owned by Petro-Canada that have been remediated to address soil and groundwater contamination.

By the parties' agreement, an issue regarding the Respondents' jurisdiction was heard as a preliminary matter. In this preliminary hearing, Petro-Canada submits that an indemnity clause in favour of the Crown in Schedule "B" of both the Conditional Certificate and the Certificate is void and unenforceable due to a lack of jurisdiction. Petro-Canada requests that the Board vary the Respondents' decisions by removing those indemnity clauses or, alternatively, declaring them to be void and unenforceable.

These appeals were heard by way of written submissions.

## BACKGROUND

These appeals pertain to two remediated sites on lands owned by Petro-Canada. One site is located in Golden, BC and the other is located in Sechelt, BC. Specifically, the Golden site is located at 1417 Trans Canada Highway North, and is the former location of a service station. The Sechelt site is located at 5482 Wharf Street, and is the former location of a bulk storage plant for petroleum products.

Both of the sites contained petroleum-based contaminants in excess of prescribed levels. Petro-Canada contracted SEACOR Environmental Inc. ("SEACOR") to conduct site investigations and remediation at both of the sites. The Golden site was remediated in accordance with numerical soil standards for commercial land use and the risk-based standards set out in the *Contaminated Sites Regulation*, B.C. Reg. 375/96 (the "*Regulation*"). The Sechelt site was remediated in accordance with the numerical standards for commercial land use and aquatic life marine water use set out in the *Regulation*.

In or about May 2003, SEACOR applied, on behalf of Petro-Canada, for a conditional certificate of compliance regarding remediation at the Golden site. Similarly, on or about December 12, 2004, SEACOR applied, on behalf of Petro-Canada, for a certificate of compliance regarding remediation at the Sechelt site. When those applications were submitted, section 27.6(3) of the *Waste Management Act*, R.S.B.C. 1996, c. 482 (the "*Act*") empowered managers to issue conditional certificates of compliance for sites that had been remediated in accordance with prescribed risk-based methods and environmental impact requirements. Similarly, section 27.6(2) of the *Act* empowered managers to issue certificates of compliance for sites that had been remediated in accordance with prescribed numerical standards.

On December 16, 2003, the Regional Manager issued the Conditional Certificate to Petro-Canada, pertaining to the Golden site. The Conditional Certificate contains the following qualification:

> This certificate is qualified by the requirements described in Schedule "B" which is attached to, and forms a part of this certificate.

Schedule "B" to the Conditional Certificate provides, in part, as follows:

> The following notations form part of this determination:
>
> ...
>
> 3. The site owners indemnify the provincial Crown, and her employees against loss, damages, costs, actions, suits and claims arising from the contamination remaining at the site.

On December 22, 2003, the Director issued the Certificate to Petro-Canada, pertaining to the Sechelt site. Similar to the Conditional Certificate, the Certificate contains the following qualification:

> This certificate is qualified by the requirements described in Schedule "B" which is attached to, and forms a part of this certificate.

Schedule "B" to the Certificate provides, in part, as follows:

> The following notations form part of this determination:
>
> ...
>
> 3. The site owners indemnify the Crown, and her employees against loss, damages, costs, actions, suits and claims arising from any contamination remaining onsite.

In this decision, the Board refers to the indemnity clauses in the Schedules noted above as the "Indemnity Clauses."

Both the Certificate and the Conditional Certificate also contain a clause listing the substances for which "remediation has been satisfactorily completed." Substances not included in those lists are not covered by the Certificate and the Conditional Certificate.

On January 14, 2004, Petro-Canada filed separate Notices of Appeal with the Board regarding both the Certificate and the Conditional Certificate. In both of the Notices of Appeal, Petro-Canada's primary ground for appeal is that the Respondents' inclusion or imposition of the Indemnity Clauses in the Certificate and the Conditional Certificate is outside of their jurisdiction under the *Act*.

Shortly after filing its Notices of Appeal, Petro-Canada requested that the appeals be held in abeyance pending discussions with the Respondents.

By a letter dated June 8, 2005, the Board requested that Petro-Canada provide an update on the status of the parties' discussions.

In a letter dated June 22, 2005, Petro Canada advised that it wished to proceed with the appeals. It requested that the Board conduct the appeals by first hearing the statutory interpretation issue regarding the Respondents' jurisdiction under the *Act*, and then hearing an issue regarding fettering of the Respondents' discretion.

By a letter dated July 11, 2005, the Board requested comments from the Respondents on Petro-Canada's proposal to proceed by hearing those two issues separately.

In a letter dated July 18, 2005, the Respondents advised that they preferred that the appeals proceed by first hearing the issue of whether the Respondents had jurisdiction under the *Act* to include an indemnity clause as a condition in a conditional certificate of compliance or a certificate of compliance.

By a letter dated July 18, 2005, the Board advised the parties that it would hear separately the two issues that had been raised by Petro-Canada if Petro-Canada agreed to proceeding with the first issue as framed by the Respondents.

In a letter dated July 26, 2005, Petro-Canada agreed to proceed in that manner, and agreed that the first question would be limited to addressing the question of the Respondent's jurisdiction to include the Indemnity Clauses in the Certificate and the Conditional Certificate based on the proper interpretation of the *Act.*

Petro-Canada requests that the Board vary the Certificate and the Conditional Certificate by deleting the Indemnity Clauses. Alternatively, Petro-Canada requests that the Board declare the Indemnity Clauses to be void and unenforceable.

The Respondents request that the Board confirm their jurisdiction to include the Indemnity Clauses in the Certificate and the Conditional Certificate. Alternatively, the Respondents request that the Board refer the matters back to the Respondents with directions to review Petro-Canada's applications to determine whether it is in the public interest to issue a certificate or conditional certificate given that contamination may remain on the sites.

## ISSUE

1. Whether the Respondents had jurisdiction under the Act or the Regulation to include the Indemnity Clauses in the Certificate and the Conditional Certificate.

The parties also provided arguments regarding the standard of review that the Board should apply to the decisions under appeal. However, the Panel notes that the Board is a specialized tribunal that may, under sections 46 and 47 of the *Act*, respectively, conduct an appeal by way of a new hearing and may make any decision that a director or manager could have made under the *Act*. Based on its procedural and decision-making powers under the *Act*, the Board has previously found that it owes no curial deference to the decision-makers whose decisions are the subject of appeals to the Board (see *British Columbia Railway Company et al. v. Director of Waste Management*, Appeal No. 2000-WAS-018(b), March 3, 2004 (unreported), and *Joan Sell et al. v. Assistant Regional Waste Manager*, Appeal Nos. 2000-WAS-028(b) and 2000-WAS-031(b), April 25, 2002 (unreported)). The Panel adopts that reasoning in this matter.

## RELEVANT LEGISLATION

The Respondents issued their decisions in December 2003, and the appeals were commenced in January 2004. Therefore, although the *Act* was repealed and replaced by the *Environmental Management Act*, S.B.C. 2003, c. 53, effective July 8, 2004, the *Act* and the *Regulation* (as they were when the appealed decisions were issued) are the applicable legislation in these appeals.

The following sections of the *Act* and the *Regulation* are relevant to these appeals. For convenience, other relevant legislation is set out in the text of the decision.

### *Waste Management Act*

**Part 4 — Contaminated Site Remediation**

**Certificates of compliance**

**27.6** (2) A manager, in accordance with the regulations, may issue a certificate of compliance with respect to remediation of a contaminated site if

(a) the contaminated site has been remediated in accordance with

(i) prescribed numerical standards,

(ii) any orders under this Act,

(iii) any remediation plan approved by the manager, and

(iv) any requirements imposed by the manager, and

(b) any security in an amount and form, which may include real and personal property, required by the manager has been provided relative to the management of substances remaining on the site.

(3) A manager, in accordance with the regulations, may issue a conditional certificate of compliance with respect to remediation of a contaminated site if

(a) the contaminated site has been remediated in accordance with

(i) prescribed risk based standards and prescribed environmental impact requirements,

(ii) any orders under this Act,

(iii) any remediation plan approved by the manager, and

(iv) any requirements imposed by the manager,

(b) information about remediation and the substances remaining on the site has been recorded in the site registry,

(c) any monitoring plan relative to the presence of substances on the site required by the manager has been prepared and works have been installed to implement the plan,

(d) any security in an amount and form, which may include real and personal property, required by the manager has been provided relative to the management of substances remaining on the site, and

(e) the responsible person, if required by the manager, prepares in a form acceptable to a manager, registers and provides proof of registration of a restrictive covenant under section 219 of the Land Title Act.

**Immunity**

**28.6** (1) In this section, "protected person" means

(a) the government,

(b) the minister,

(c) a municipality,

(d) a current or former approving officer,

(e) a current or former employee or agent of the government,

(f) a current or former elected official of the government,

...

(2) Subject to subsection (3), no action lies and no proceedings may be brought against a protected person because of

(a) any

(i) act, advice, including pre-application advice, or recommendation, or

(ii) failure to act, failure to provide advice, including pre-application advice, or failure to make recommendations

in relation to this Part, regulations under this Part,… or

(b) any

(i) purported exercise or performance of powers, duties or functions, or

(ii) failure to exercise or perform any powers, duties or functions

arising under this Part, regulations under this Part...

(3) Subsection (2) does not provide a defence if, in relation to the subject matter of the action or proceedings,

(a) the protected person is a responsible person, or

(b) the conduct of the protected person was dishonest, malicious or wilful misconduct.

…

***Contaminated Sites Regulation***

**Covenants and financial security — general principles**

**48** (1) A manager may require that a covenant be registered under section 219 of the *Land Title Act* for the purposes of any or all of

(a) setting the conditions regarding works, and their inspection and maintenance at a site, considered necessary to secure the contamination at the site and to protect human health or the environment,

(b) setting conditions for restricting disturbance of soils, or preventing a changed use of a site, which would invalidate a risk assessment and potentially increase exposure of human and environmental receptors to site contamination,

(c) specifying requirements to monitor for movement or impacts of contamination, and

(d) indemnifying the Crown or its agents or employees from losses, charges, actions or suits related to contamination remaining at the site,

if these purposes are, in the opinion of the manager, unlikely to be satisfactorily met by

(e) the entry of notations in the site registry, and

(f) specifications or conditions in a conditional certificate of compliance.

(2) A person may request that a manager have a covenant made under the authority of subsection (1) discharged if the person believes that the conditions which gave rise to the covenant no longer exist or have been complied with.

(3) A manager must have a covenant made under the authority of subsection (1) discharged when

(a) remediation has been carried out in accordance with the numerical standards for remediation set out in section 17, and

(b) the manager issues a certificate of compliance for the remediation referred to in paragraph (a).

(4) A manager may require financial security if

(a) a significant risk could arise from conditions at a contaminated site because

(i) the site is left in an unremediated state, or

(ii) the site is remediated using risk based standards but requires ongoing management and monitoring of contamination which is left at the site, and

(b) a covenant under section 219 of the Land Title Act is, in the opinion of the manager, unlikely to be an effective means to ensure that necessary remediation is carried out at the site.

(5) The financial security required by a manager under subsection (4) may be for the purpose of any or all of the following:

(a) ensuring that a responsible person completes remediation or guarantees performance to the satisfaction of the manager;

(b) providing funds to further treat, remove or otherwise manage contamination;

(c) complying with the applicable legislation and financial management and operating policies of British Columbia.

**Financial security as a condition of a certificate**

**50** (1) If financial security is a condition of an approval in principle for a remediation plan for a particular site, all terms of the security requirement must be met before a manager may issue a certificate of compliance for that site.

(2) If a manager requires financial security in accordance with section 27.6 (3) (d) of the Act and section 48 (4) of this regulation, before the manager issues a certificate of compliance, a responsible person must

(a) provide, to the manager, satisfactory evidence of the availability of the required security, and

(b) provide any required contractual agreement relating to the terms and conditions of the security, signed by the responsible person.

## DISCUSSION AND ANALYSIS

### 1. Whether the Respondents had jurisdiction under the *Act* or the *Regulation* to include the Indemnity Clauses in the Certificate and the Conditional Certificate.

*Submissions of Petro-Canada*

Petro-Canada maintains that the key difference between the parties' submissions is how the jurisdictional question is framed. Petro-Canada submits that the issue should be framed narrowly, as follows: whether an indemnity in favour of the Crown, incorporated as a condition of a certificate of compliance or conditional certificate of compliance, is beyond the powers granted to a manager under the *Act*. Petro-Canada submits that the Respondents frame the issue more broadly: whether a manager has the authority, as a matter of discretion, to include a Crown indemnity clause as a condition in a certificate of compliance or conditional certificate of compliance.

For the purposes of these appeals, Petro-Canada does not dispute the general jurisdiction of a manager to issue a certificate of compliance or a conditional certificate of compliance under sections 27.6(2) and (3) of the *Act*, respectively. Rather, Petro-Canada submits that the Indemnity Clauses in the Certificate and the Conditional Certificate were beyond the powers granted to the Respondents under the *Act*. Petro-Canada submits that the Respondents acted outside of their jurisdiction by including the Indemnity Clauses in the Certificate and the Conditional Certificate.

Petro-Canada maintains that the most obvious potential sources of jurisdiction for the Respondents to include the Indemnity Clauses in the Certificate and the Conditional Certificate are sections 27.6(2) and 27.6(3) of the *Act*, respectively. The next most obvious potential source of jurisdiction is section 28.6 of the *Act*, which addresses persons who have immunity from certain actions or proceedings associated with exercises of power under Part 4 of the *Act*. Petro-Canada has also reviewed section 48 of the *Regulation* as a possible source of jurisdiction, which relates to when a manager may require covenants and financial security.

Certificates of compliance

Petro-Canada submits that certain matters or conditions had to be met before a manager could issue a certificate of compliance under section 27.6(2) of the *Act*. Petro-Canada maintains that the key indication in this regard is the use of the word "if" at the end of the initial portion of the section, before the sections goes on to list, under subsections (a) and (b), a series of conditions or matters that must be

fulfilled or addressed. In this case, Petro-Canada argues that the relevant condition is in subsection (b), which may be summarized as follows:

> A manager, in accordance with the regulations, may issue a certificate of compliance with respect to remediation of a contaminated site **if… any security** in an amount and form, which may include real and personal property, **required by the manager has been provided**…
>
> [emphasis added]

Petro-Canada argues that any condition or requirement imposed by a manager under section 27.6(2)(b) must, like those listed in section 27.6(2)(a), be imposed *prior to or during the course of remediation*, and not *after* remediation was completed. Similarly, Petro-Canada argues that nothing in section 27.6(2)(a) of the *Act*, interpreted in its grammatical or ordinary sense, grants a manager the jurisdiction to impose, as part of a certificate of compliance, additional requirements after remediation has been completed.

Moreover, Petro-Canada submits that the Indemnity Clause in the Certificate, which protects the Crown from any contamination remaining on site after remediation has been completed, is not a requirement related to the remediation of a contaminated site. Rather, a certificate of compliance is issued as a manager's certification that the site has been remediated and the applicable conditions listed in section 27.6(2) have been met. With regard to the Sechelt site, Petro-Canada argues that the only applicable conditions or requirements were found in section 27.6(2)(a), and all of those conditions or requirements had been met when the Certificate was issued. Specifically, Petro-Canada had remediated the site in compliance with Ministry standards for commercial land use and aquatic marine life water use, no orders had been made under the *Act*, and a manager had confirmed that the site had been remediated in accordance with reports prepared by SEACOR.

With regard to whether a manager has the jurisdiction to impose "any requirements" under section 27.6(2)(a)(iv) of the *Act*, Petro-Canada maintains that no such requirements had been imposed by a manager in relation to the Sechelt site prior issuance of the Certificate, and in any case, such requirements may only pertain to the remediation process itself. The relevant portions of that section state as follows:

> **27.6** (2) A manager, in accordance with the regulations, may issue a certificate of compliance with respect to remediation of a contaminated site if
>
> (a) the contaminated site has been remediated in accordance with
>
> …
>
> (iv) any requirements imposed by the manager, and…

Petro-Canada argues that the "requirements" referred to in subsection (a)(iv) are limited to those that may have been imposed by a manager *prior to or during* the remediation process. Specifically, the phrase "has been remediated in accordance with" those requirements indicates that the requirements pertain to the remediation

itself, and not the imposition of new or additional obligations *after* remediation has been completed.

Regarding the meaning of "requirements" within section 27.6(2)(iv), Petro-Canada submits that sections 28(3)(d) and 27.4 of the *Act* provide some guidance. Section 28(3)(d), which addresses a manager's powers in independent remediation procedures, provides that a manager "may at any time during independent remediation by a person… impose requirements that the manager considers are reasonably necessary to achieve remediation… ." Petro-Canada submits that a manager's ability to exercise that power arises during the course of remediation, and not after a site has been remediated. Similarly, Petro-Canada submits that section 27.4(1) of the *Act*, which addresses voluntary remediation agreements, speaks of terms, conditions or directions that were required or given by a manager during the remediation process or prior to entering into a voluntary remediation agreement. Petro-Canada maintains that those "requirements" ensure that the remediation program is achieved. Such "requirements" have no application to a manager deciding whether to issue a certificate of compliance.

Based on sections 28(3)(d) and 27.4 of the *Act*, Petro-Canada submits that the Legislature did not intend to grant a manager the jurisdiction to impose <u>any</u> requirement that he or she saw fit when issuing a certificate of compliance. Rather, a manager's jurisdiction to impose "requirements" under section 27.6 of the *Act* is limited to requirements that relate to the remediation of the site, and they must have been reasonably necessary to achieve remediation.

With regard to section 27.6(2)(b) of the *Act*, which empowers a manager to require an applicant for a certificate to provide "any security in an amount and form… required by the manager… relative to the management of substances remaining on the site," Petro-Canada notes that the term "security" is not defined in the *Act* or the *Regulation*. However, Petro-Canada argues that it is clear from the plain words in section 27.6(2)(b) that "security" was intended to be in an amount and form that would ensure that funds were available for monitoring or control of any contamination remaining on a site when a certificate is issued. Petro-Canada submits that "security" in that sense is akin to what a lending institution would require so that the government would not have to pay to address remaining contaminants in the event that the responsible person(s) are unable or unwilling to pay. Petro-Canada maintains that "security" is generally something that a creditor can use for recovery of a debt or obligation, and is in addition to the requirement of the debtor to pay or fulfill its obligation to the creditor. For example, a person who borrows money may be asked to secure their obligation to repay that money by granting the lending institution security in the borrower's assets. In this regard, Petro-Canada refers to the definitions of "security" found in *Black's Law Dictionary* (6th ed., 1990), *The Concise Oxford Dictionary* (10th ed., 2002), and *The Dictionary of Canadian Law* (2nd ed., 1995).

Petro-Canada argues that the Indemnity Clauses are not a form of "security" within the meaning of section 27.6 of the *Act*, because they are merely unsecured covenants that the Crown already has by reason of the general liability provision in section 27(1) of the *Act*, which states that all persons responsible for remediation are jointly and severally liable for the reasonably incurred costs of remediation.

Moreover, Petro-Canada submits that, even if an indemnity clause such the one in the Certificate is the type of "security" contemplated in section 27.6(2)(b), then the indemnity had to be signed by the site owner, or the site owner had to do something to indicate that an indemnity had been granted, so as to be enforceable under section 59(6) of the *Law and Equity Act*, R.S.B.C. 1996, c. 253. Section 59(6) states as follows:

> **59** (6) A guarantee or indemnity is not enforceable unless
>
> (a) it is evidenced by writing signed by, or by the agent of, the guarantor or indemnitor, or
>
> (b) the alleged guarantor or indemnitor has done an act indicating that a guarantee or indemnity consistent with that alleged has been made.

Petro-Canada submits that neither it, as the site owner, nor its agents, signed the "indemnity" in this case. Petro-Canada also maintains that it did nothing that would have indicated that it agreed to give an indemnity. Rather, the Indemnity Clause was unilaterally imposed by the Respondent, making it unenforceable under section 59(6) of the *Law and Equity Act* even if it is "security" within the meaning of section 27.6(2)(b) of the *Act*.

Further, Petro-Canada submits that the phrase "has been" in section 27.6(2)(b) of the *Act* creates a temporal aspect to the act of providing "security." Specifically, the security must have been required by a manager, and provided by the applicant for the certificate, before the certificate was issued. Petro-Canada argues that the *Act* did not contemplate that the certificate itself would be the vehicle for imposing a requirement for security.

Conditional certificates of compliance

Petro-Canada maintains that its submissions regarding certificates of compliance apply equally to conditional certificates of compliance issued under section 27.6(3) of the *Act*, as sections 27.6(2) and (3) are substantially the same and the differences between the two sections do not significantly impact the analysis.

Regarding the Golden site, Petro-Canada submits that it had met all applicable conditions listed in section 27.6(3) before it applied for the Conditional Certificate. Specifically, it had remediated the site in compliance with numerical soil standards and risk-based standards in the *Regulation*, no orders had been made under the *Act*, the remediation plan had been approved by a manager, and no requirements were imposed nor security required by a manager in relation to the remediation.

With regard to section 27.6(3)(e) of the *Act*, which permits a manager to require that a restrictive covenant be registered by a site owner under section 219 of the *Land Title Act*, Petro-Canada submits that section 48(1) of the *Regulation* sets out the purposes for which a manager may require that such a covenant be registered. Petro-Canada notes that the language in section 48(1)(d) of the *Regulation* is very similar to that in the Indemnity Clauses. That section states as follows:

> **48** (1) A manager may require that a covenant be registered under section 219 of the *Land Title Act* for the purposes of any or all of
>
> …
>
> (d) indemnifying the Crown or its agents or employees from losses, charges, actions or suits related to contamination remaining at the site,
>
> if these purposes are, in the opinion of the manager, unlikely to be satisfactorily met by
>
> (e) the entry of notations in the site registry, and
>
> (f) specifications or conditions in a conditional certificate of compliance.

The Panel notes that section 219 of the *Land Title Act* provides for the registration of positive or negative covenants in favour of the Crown, a Crown corporation or agency, or certain other government bodies, in respect of land use or alienation. Under section 219(6), a covenant registrable under section 219 "may include, as an integral part… an indemnity of the covenantee against any matter agreed to by the covenantor and covenantee… ." Thus, a covenant under section 219 of the *Land Title Act* is a form of indemnity.

Petro-Canada submits that section 48 of the *Regulation* grants managers the jurisdiction to require an indemnity to be registered under the *Land Title Act* only, in which case the person from whom a manager requested the covenant would have to execute a covenant granting the indemnity and would have to agree to register the covenant on the title of the land. Petro-Canada argues, therefore, that a manager could not impose such an indemnity unilaterally in a conditional certificate of compliance. Petro-Canada suggests that, if a person refused to execute and register such a covenant, then the manger could refuse to grant the conditional certificate of compliance. Petro-Canada submits that, in any case, section 48 contemplated that such a covenant would be registered before a conditional certificate of compliance is issued.

Crown immunity

Petro-Canada rejects the proposition that the Indemnity Clauses may be a reiteration of the Crown immunity provisions in section 28.6 of the *Act*. Petro-Canada notes that section 28.6 provides immunity to a specified list of "protected persons" including provincial and municipal government employees and officials. Specifically, section 28.6(2) bars proceedings and actions against a "protected person" for certain acts and omissions done when carrying out duties under Part 4 of the *Act* and the regulations under that Part. Petro-Canada argues that affording "immunity" to certain persons carrying out duties under Part 4 of the *Act* is different from requiring a person to "indemnify" the Crown in relation to

contamination remaining on a site. Petro-Canada submits that section 28.6 does not empower managers to impose an indemnity. In that regard, Petro-Canada refers to the definitions of "indemnify" in *The Dictionary of Canadian Law* and *Black's Law Dictionary*. The former provides as follows:

> **INDEMNIFY.** *v*. To make good the loss which someone suffered through another's act of default; to grant an indemnity; to agree to indemnify.

Petro-Canada argues that a clause granting Crown "immunity" would have imposed a passive or negative duty on the site owner to not commence a proceeding or action against the Crown. Rather, the Indemnity Clauses impose an active or positive duty on the site owner to indemnify the Crown. Moreover, the Indemnity Clauses purport to prohibit all actions and proceedings against the Crown, whereas section 28.6(3) of the *Act* expressly states that an action or proceeding may lie against the Crown if it is a responsible person or if it acted with dishonesty, maliciousness or wilful misconduct.

Summary

In summary, Petro-Canada submits that, by imposing the Indemnity Clauses, the Respondents acted outside of their jurisdiction. Petro-Canada maintains that the Indemnity Clauses are inconsistent with the *Act*, and purport to amend section 28.6 of the *Act* by effectively prohibiting all actions and proceedings against the Crown. In these circumstances, Petro-Canada submits that the Respondents' decisions are null and void.

Petro-Canada notes the Board has the authority under sections 46 and 47 of the *Act* to hear an appeal as a new hearing of the matter, and to make any decision that the person whose decision is appealed could have made. Petro-Canada requests that the Board vary the Certificate and the Conditional Certificate so as to delete the Indemnity Clauses. Alternatively, Petro-Canada requests that the Board declare the Indemnity Clauses to be void and unenforceable.

*Submissions of the Respondents*

The Respondents maintain that the Indemnity Clauses are in the nature of conditions precedent to the Certificate and the Conditional Certificate, and that the authority for such conditions derives from a manager's general discretion under the legislation to issue certificates of compliance and conditional certificates of compliance. The Respondents maintain that the Indemnity Clauses are not contractual in nature, although the Certificate and Conditional Certificate may not be effective until such time as a contractual indemnity is in place. The Respondents submit that the alleged lack of jurisdiction does not involve a preliminary matter that prevents the Respondents from acquiring jurisdiction, as submitted by Petro-Canada. Rather, the alleged error relates to a collateral or subsidiary issue involving an exercise of discretion (i.e. the discretion to determine the form and content of certificates) in the course of exercising a statutory power. The Respondents submit that the concept of an indemnity for contaminants remaining

on a site is consistent with the legislative scheme, in that it protects the Crown from liability where contaminants may remain on lands described in a certificate.

The Respondents acknowledge that sections 27.6(2) and (3) of the *Act* limit the circumstances in which a manager is authorized to issue a certificate of compliance or a conditional certificate of compliance. The Respondents also acknowledge that, if those circumstances are not satisfied, a manager could be acting outside of his or her powers, resulting in a certificate having no legal force. The Respondents note that a manager's discretion under those sections must be exercised "in accordance with the regulations," as stated in the opening words of both sections. Sections 49 and 50 of the *Regulation*, respectively, set out requirements regarding information that must be submitted with an application for a certificate of compliance or conditional certificate of compliance, and where financial security is a requirement of a certificate. However, the Respondents submit that a manager's discretion to issue a certificate or conditional certificate is not otherwise restricted under the *Act*, and neither the *Act* nor the *Regulation* specify the form in which a certificate is to be issued. The Respondents argue, therefore, that the form in which a certificate of compliance or conditional certificate of compliance is issued is left to the discretion of the manager who issues them.

In this case, the Respondents submit that the Indemnity Clauses are qualifications to the Certificate and the Conditional Certificate, and are limited to claims arising from contaminants remaining on the sites. The Respondents submit that the jurisdiction to determine the form and content of the Certificate and the Conditional Certificate arises by implication from sections 27(2) and (3) of the *Interpretation Act*, R.S.B.C. 1996, c. 238, which address powers that are ancillary to the powers given under an enactment. Section 27(2) of the *Interpretation Act* states as follows:

> **27** (2) If in an enactment power is given to a person to do or enforce the doing of an act or thing, all the powers that are necessary to enable the person to do or enforce the doing of the act or thing are also deemed to be given.

Additionally, the Respondents submit that more specific indication of legislative intent to give managers the authority to include conditions in a certificate of compliance or conditional certificate of compliance are found in sections 27.6(2)(a)(iv) and 27.6(3)(a)(iv) of the *Act*, which recognize a manager's role in setting "requirements" regarding remediation. Further, the Respondents argue that sections 27.6(2)(b) and 27.6(3)(d), which give managers the authority to require "any security" relative to the management of substances remaining on a site, clearly anticipate that a manager issuing a certificate should consider the question of liability for contamination remaining on site after the issuance of the certificate. The Respondents submit that there would be no purpose in the requirement for security if conditions governing the disposition of that security were not included in a certificate of compliance or a conditional certificate of compliance.

In addition, the Respondents argue that "security" includes an indemnification, and therefore, section 27.6(2)(b) and 27.6(3)(d) may constitute express authority for the Indemnity Clauses.

The Respondents also submit that section 48(1)(d) of the *Regulation*, which empowers a manager to require that a covenant be registered under section 219 of the *Land Title Act* for the purpose of "indemnifying the Crown or its agents or employees for losses, charges, actions or suits related to contamination remaining at the site," explicitly recognizes that the Legislature intended to give managers the authority to protect the Crown and its agents from claims relating to contamination remaining following remediation.

The Respondents maintain that section 51(b) of the *Regulation* also supports the proposition that the jurisdiction to address liability as part of a certificate can be inferred from the *Act* and the *Regulation*. That section of the *Regulation* addresses the issuance of certificates for remediation of parts of a site, and provides as follows:

> **51** When a responsible person applies for and a manager issues… a certificate of compliance or a conditional certificate of compliance for part of a contaminated site as authorized by section 27.6(6) of the Act, a manager must
>
> …
>
> (b) consider, in accordance with section 48, whether a covenant under section 219 of the *Land Title Act* or financial security is required relative to any part or parts not remediated.

The Respondents argue that it would be illogical to conclude that managers have no authority to do in a certificate what they can expressly to do under section 51 of the *Regulation*.

In response to Petro-Canada's submissions regarding the immunity provisions in section 28.6 of the *Act*, the Respondents agree that there is a distinction between indemnity and immunity. Immunity is characterized by an absence of legal liability, whereas indemnity assumes the existence of legal liability and seeks to reapportion it. The Respondents submit that the apportionment of risk contemplated in the Indemnity Clauses is consistent with the *Act* and the public interest, as it ensures that the Crown, as regulator, does not face undue risk by issuing a certificate where every possible contaminant on site has not been investigated thoroughly.

In summary, the Respondents submit that there was ample authority for them to include the Indemnity Clauses in the Certificate and the Conditional Certificate.

Regarding the appropriate remedy, the Respondents request that the Board confirm the Respondents' jurisdiction to include the Indemnity Clauses in the Certificate and the Conditional Certificate. Alternatively, the Respondents request that the Board

refer the matters back to them with directions to review Petro-Canada's applications to determine whether it is in the public interest to issue a certificate of compliance or a conditional certificate of compliance. The Respondents submit that deleting parts of the Certificate or the Conditional Certificate could create dangers for the environment and the public interest, as the owners and users of the sites may be more likely to use the sites without due regard for the contaminants remaining on the sites.

*Panel's findings*

Jurisdictional question

The authority to include the Indemnity Causes in the Certificate and the Conditional certificate must either be expressly set out in the *Act* or the *Regulation*, or must be implied from the relevant statutory provisions. The Panel notes that, although the *Act* and the *Regulation* are silent regarding the form and content of certificates of compliance and conditional certificates of compliance, that discretion is not unlimited. The Legislature did not grant managers the discretion to include in such certificates "any" conditions or terms that he or she sees fit. The conditions or terms of a certificate must be consistent with the authority granted in sections 27.6(2) and (3) of the *Act*, and the overall purposes of Part 4 of the *Act*. In addition, sections 27.6(2) and (3) direct that the issuance of a certificate must be "in accordance with the regulations." While the *Regulation* does not specify the form and content of certificates of compliance and conditional certificates of compliance, the sections of the *Regulation* referred to by the parties provide guidance regarding when and how certain requirements or conditions may be imposed by managers.

The Panel has considered whether any authority to include the Indemnity Clauses in the Certificate or the Conditional Certificate may be found in sections 27.6(2) and (3) of the *Act*. In that regard, the Panel has considered whether the Indemnity Clauses may be considered "any requirements imposed by the manager" or "any security… required by the manager."

First, both types of certificates may be issued "if the contaminated site has been remediated in accordance with… any requirements imposed by the manager," as stated under sections 27.6(2)(a)(iv) and 27.6(3)(a)(iv). The Panel agrees with Petro-Canada that, based on the plain wording in those sections, the "requirements" referred to those sections are limited to those that may have been imposed by a manager *prior to or during* the remediation process. The phrase "has been remediated in accordance with" indicates that the requirements pertain to the remediation, and not liability for contaminants that may remain on site after remediation has been completed. Moreover, the Panel finds that the use of the word "requirements" in sections 28(3)(d) and 27.4 of the *Act* supports that conclusion. Section 28(3)(d) refers to the imposition of "requirements that the manager considers are reasonably necessary to achieve remediation". Similarly, 27.4(1) speaks of terms, conditions or directions that were required or given by a manager during the remediation process, or prior to entering into a voluntary

remediation agreement. For these reason, the Panel concludes that the "requirements" referred to in sections 27.6(2)(a)(iv) and 27.6(3)(a)(iv) are those that relate to the remediation of the site, and not conditions or requirements that may be included in a certificate of compliance or conditional certificate of compliance.

Second, both types of certificates may be issued "if any security… required by the manager has been provided relative to the management of substances remaining on the site" under sections 27.6(2)(b) and 27.6(3)(d) of the *Act*. Neither the *Act* nor the *Regulation* define "security," "indemnity" or "indemnify." Section 29 of the *Interpretation Act* does not define "indemnity" or "indemnify," but it does define "security" as follows:

> **"security"** includes a security as defined in the *Securities Act;*

The *Securities Act*, R.S.B.C. 1996, c. 418, defines "security," as follows:

> **"security"** includes
>
> (a) a document, instrument or writing commonly known as a security,
>
> (b) a document evidencing title to, or an interest in, the capital, assets, property, profits, earnings or royalties of a person,
>
> (c) a document evidencing an option, subscription or other interest in or to a security,
>
> (d) a bond, debenture, note or other evidence of indebtedness, share, stock, unit, unit certificate, participation certificate, certificate of share or interest, preorganization certificate or subscription other than
>
> (i) a contract of insurance issued by an insurer, and
>
> (ii) an evidence of deposit issued by a savings institution,
>
> (e) an agreement under which the interest of the purchaser is valued, for the purposes of conversion or surrender, by reference to the value of a proportionate interest in a specified portfolio of assets, but does not include a contract issued by an insurer…,
>
> (f) an agreement providing that money received will be repaid or treated as a subscription to shares, stock, units or interests at the option of the recipient or of any person,
>
> (g) a profit sharing agreement or certificate,
>
> (h) a certificate of interest in an oil, natural gas or mining lease, claim or royalty voting trust certificate,
>
> (i) an oil or natural gas royalty or lease or a fractional or other interest in either,
>
> (j) a collateral trust certificate,

(k) an income or annuity contract, other than one made by an insurer,

(l) an investment contract,

(m) a document evidencing an interest in a scholarship or educational plan or trust,

(n) an instrument that is a futures contract or an option but is not an exchange contract, or

(o) an exploration permit under the Petroleum and Natural Gas Act,

While "security" is broadly defined in the *Interpretation Act* and the *Securities Act*, the Panel notes that those definitions do not expressly refer to "indemnity" or "indemnify". The Panel also notes that the definition in the *Securities Act* generally refers to things that may be used as collateral for an obligation to pay, i.e. things with a quantifiable value or documents evidencing an interest in a thing of quantifiable value. The Panel finds that this definition indicates that "security" is something more than simply an obligation to pay.

The Panel also notes that *Black's Law Dictionary* (7th ed., 1999) defines "indemnify," "indemnity" and "security" as follows:

> **indemnify 1.** To reimburse (another) for a loss suffered because of a third party's act or default. **2.** To promise to reimburse (another) for such a loss. **3.** To give (another) security against such a loss.
>
> **indemnity 1.** A duty to make good any loss, damage, or liability incurred by another. **2.** The right of an injured party to claim reimbursement for its loss, damage, or liability from another person who has such a duty **3.** Reimbursement or compensation for loss, damage, or liability in tort…
>
> **security 1.** Collateral given or pledged to guarantee the fulfillment of an obligation…

These definitions also indicate that "security" is more than an "indemnity". An "indemnity" is simply a promise or obligation to pay another for a loss, whereas "security" is collateral that is given to guarantee or assure fulfillment of an obligation.

Based on all of these definitions, the Panel finds that the Indemnity Clauses are not "any security" within the meaning of section 27.6 of the *Act*. A security is collateral. It is something of value, or an interest in something of value, which is given to assure payment of an obligation. Security must be given by one party and agreed to the other party; it cannot be unilaterally imposed. In contrast, the Indemnity Clauses are simply obligations or promises to "indemnify" or pay, which are not guaranteed by any collateral.

In addition, even if the Indemnity Clauses could be considered "any security", the Panel notes that the language in sections 27.6(2)(b) and (3)(d) of the *Act* clearly

indicates that the manager had to request the security, and the applicant had to provide the security, before either type of certificate may be issued. Both sections state that a manager "may issue [a certificate of compliance or a conditional certificate of compliance] with respect to remediation of a contaminated site if… any security… required by the manager has been provided" [emphasis added]. There is no evidence before the Panel that the Respondents asked Petro-Canada for "any security" before they issued the Certificate and the Conditional Certificate, or requested that Petro-Canada agree, before the Certificate and the Conditional Certificate were issued, to do what is required by the Indemnity Clauses. Moreover, there is no evidence that Petro-Canada agreed, before the Certificate and the Conditional Certificate were issued, to do what is required by the Indemnity Clauses.

The Panel has also considered section 27.6(3)(e) of the *Act* and sections 48 and 51 of the *Regulation*, which empower managers to require a responsible person to register a restrictive covenant under section 219 of the *Land Title Act* with regard to sites remediated in accordance with risk-based standards. The Panel agrees with Petro-Canada that, while those provisions authorize a manager to require an indemnity, this authority is limited to covenants under section 219 of the *Land Title Act*. The Panel finds that the indemnity set out in the Indemnity Clauses clearly is not a requirement to register a covenant under section 219 of the *Land Title Act*. Despite the similarities between the language in the Indemnity Clauses and section 48(1)(d) of the *Regulation*, section 219(6) of the *Land Title Act* states that a covenant registrable under section 219 "may include, as an integral part… an indemnity of the covenantee against any matter agreed to by the covenantor and covenantee…" [emphasis added]. It is clear from the evidence that there has never been agreement between Petro-Canada and the Crown regarding the matters addressed in the Indemnity Clauses. Moreover, it is clear from that a section 219 covenant must be registered on the title of the lands to which it applies, and that has not occurred in this case nor has Petro-Canada agreed to do so.

Furthermore, the Panel finds that any jurisdiction to include the Indemnity Clauses in the Certificate and the Conditional Certificate cannot be implied from the jurisdiction to require a person to register a covenant under section 219 of the *Land Title Act*. The language in the relevant sections of the *Act* and the *Regulation* is very specific, and it only refers to covenants under section 219 of the *Land Title Act*. This indicates that the Legislature considered the question of indemnities in favour of the Crown, and it specifically limited a manager's jurisdiction to require a single form of indemnity, i.e. a section 219 covenant. The Panel find that the failure to refer to other forms of indemnity in the relevant sections of the *Act* and the *Regulation* implies an intention to exclude other forms of indemnity. The Panel notes that, if the Legislature had intended to include other types of indemnities, words such as "any indemnity" could have been in the relevant sections of the *Act* and the *Regulation*, just as it used the words "any security" in sections 27.6(2)(b) and 27.6(3)(d) of the *Act*. It did not do so. As such, the Panel finds that covenants under section 219 of the *Land Title Act* are the only form of indemnity in favour of the Crown that may be required by a manager in the context of remediation.

The Panel has also considered whether jurisdiction to include the Indemnity Clauses in the Certificate and the Conditional Certificate may be implied from the immunity

provisions in section 28.6 of the *Act*. The Panel agrees with Petro-Canada that the obligation to indemnify the Crown and its agents under the Indemnity Clauses is different in a number of important aspects from the immunity granted to "protected persons" under section 28.6 of the *Act*. Section 28.6 clearly provides "protected persons" with a limited form of protection against proceedings or actions arising from the exercise of powers under Part 4 of the *Act*. For example, section 28.6(3) indicates that the Crown may be subject to proceedings or actions if it is a responsible person in relation to a site, or its conduct was "dishonest, malicious or wilful misconduct." In contrast, the Indemnity Clauses purport to require Petro-Canada to indemnify the Crown and its employees against all loss, actions, or claims arising from contaminants remaining at the sites. In that regard, the Indemnity Clauses are inconsistent with the limited Crown immunity created under section 28.6 of the *Act*. Furthermore, immunity from proceedings or actions is different from indemnification. The former creates a defence or exception to liability, whereas the latter seeks to reapportion the risks that may be associated with liability. Consequently, the Panel finds that jurisdiction to include the Indemnity Clauses in the Certificate and the Conditional Certificate cannot be implied from the immunity provisions in section 28.6 of the *Act*.

Finally, given that the Panel has found no obvious source of express or implied authority in the *Act* or the *Regulation* to include the Indemnity Clauses in the Certificate or the Conditional Certificate, the Panel has considered whether authority may be implied based on the ancillary powers provisions in section 27 of the *Interpretation Act*. The Panel notes that any ancillary authority granted under section 27(2) of the *Interpretation Act* must be "necessary to enable the person to do or enforce the doing of the act or thing" [emphasis added] that the person is empowered under a statute to do. Thus, the question becomes whether it was necessary for the Respondents to have the power to include the Indemnity Clauses in the Certificate and the Conditional Certificate in order to enable them to exercise their powers under section 27.6(2) and (3) of the *Act*, i.e. the power to decide whether to issue the Certificate and the Conditional Certificate.

The Indemnity Clauses do not assist the Respondents is determining whether the conditions or requirements listed in section 27.6(2) and (3) have been met by the applicant. For example, they do not help managers to determine whether the site has been remediated in accordance applicable standards, any orders under the *Act*, any remediation plans approved by a manager, or any requirements imposed by a manager. Nor do they ensure that any security required by a manager has been provided by the person relative to the management of substances remaining on the site. If security had been required by a manager, a manager should be able to determine before a certificate is issued whether that security has been provided. If the security has not been provided or the manager is uncertain whether it has been provided, then presumably the certificate would not be issued. Similarly, if a manager required the person to register a covenant under section 219 of the *Land Title Act*, section 27.6(3)(e) states that the person has to provide proof of its registration before a conditional certificate of approval may be issued. Thus, if proof had not been provided, then presumably, the certificate would not be issued.

Moreover, in terms of the public policy objectives that are intended by the Indemnity Clauses (which, according to the Respondents' submissions, include

protecting the environment, public health, and the Crown from risks associated with contaminants remaining at the sites), the Panel finds that the Respondents had other means to achieve those results. In particular, section 28.7 of the *Act* provides as follows:

> **Government retains right to take future action**
>
> **28.7** A manager may exercise any of the manager's powers or functions under this Part, even though they have been previously exercised and despite any voluntary remediation agreement, if
>
> (a) additional information relevant to establishing liability for remediation becomes available, including information that indicates that a responsible person does not meet the requirements of a minor contributor,
>
> (b) standards under the regulations have been revised so that conditions at a site exceed or otherwise contravene the new standards,
>
> (c) activities occur on a site that may change its condition or use,
>
> (d) information becomes available about a site that leads to a reasonable inference that a site poses a threat to human health or the environment,
>
> (e) a responsible person fails to exercise due care with respect to any contamination at the site, or
>
> (f) a responsible person directly or indirectly contributes to contamination at the site after the previous action.

The Respondents could use the powers provided under this section in order to protect the environment, public health, and the Crown from risks associated with contaminants remaining at remediated sites (and now directors have virtually the same powers under section 60 of the *Environmental Management Act*). For example, section 28.7 of the *Act* enabled managers to require responsible persons, which may include site owners, to conduct further investigation, remediation, or monitoring of a site if new information arose that led to the reasonable inference that the site poses a threat to human health or the environment, despite the previous issuance of a certificate of compliance or a conditional certificate of compliance. Similarly, if activities occurred on a site that changed its use after a certificate had been issued, a manager also require additional investigation, remediation or monitoring despite the issuance of a certificate. Thus, the powers in section 28.7 ensure that responsible persons remain potentially liable for contaminants that may remain at a site after it has been remediated. Indeed, certificates simply confirm that a certain degree of investigation and remediation has occurred at a site, based on the standards that were in force at the time. They do not provide a guarantee that a responsible person may not remain liable for remaining contaminants, nor that a party who later acquires the site may not be required to conduct further remediation. The Panel also notes that, in cases where a certificate has been issued but the site is later found to need further remediation, and the site has become “orphaned” because all known responsible persons have

ceased to exist or have no money, the existence of a clause such as the Indemnity Clauses would be of no assistance because, if there is no person who can be ordered to undertake the necessary remediation measures, there is no person who can indemnify the Crown. Consequently, the Panel finds that it is not "necessary" within the meaning of section 27(2) of the *Interpretation Act* to deem that the Respondents had the power to include the Indemnity Clauses in the Certificate and the Conditional Certificate.

For all of these reasons, the Panel finds that the Respondents had no authority under the *Act* or the *Regulation* to include the Indemnity Clauses in the Certificate and the Conditional Certificate. The Respondents erred by including conditions or requirements in the Certificate and the Conditional Certificate that they had no authority to include.

Remedy

The Panel finds that imposing the Indemnity Clauses did not result in a defect in acquiring the jurisdiction to issue the Certificate and the Conditional Certificate. The defect occurred in exercising discretion over the content of Schedule "B" of the documents, and not in deciding whether to issue the Certificate or the Conditional Certificate under section 27.6 of the *Act*. This defect does not go to the heart of the jurisdiction to issue the Certificate and the Conditional Certificate. Moreover, with the exception of the Indemnity Clauses, Petro-Canada has not questioned the content of the Certificate and the Conditional Certificate, nor has it questioned the Respondents' jurisdiction to issue certificates of compliance or conditional certificates of compliance in general. As such, for the purposes of these appeals, the Panel finds that the error did not occur in acquiring jurisdiction, but rather in exercising discretion as part of an otherwise valid exercise of statutory power. Therefore, the Certificate and the Conditional Certificate are not, in their totality, void and null, but the Indemnity Clauses are invalid.

In these circumstances, the Panel finds that the appropriate remedy is to delete the Indemnity Clauses from the Certificate and the Conditional Certificate.

## 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 orders that the Certificate and Conditional Certificate under appeal are varied and that the Indemnification Clauses found in those documents are hereby deleted.

The appeal is allowed.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

January 17, 2006