

## **DECISION NO. 2009-IPM-001(a)**

In the matter of an appeal under section 14 of the *Integrated Pest Management Act*, S.B.C. 2003, c. 58.

<b>BETWEEN:</b>	Margaret Hurst	<b>APPELLANT</b>
<b>AND:</b>	Administrator, <i>Integrated Pest Management Act</i>	<b>RESPONDENT</b>
<b>BEFORE:</b>	A Panel of the Environmental Appeal Board Alan Andison, Chair	
<b>DATE:</b>	Conducted by way of written submissions concluding on November 6, 2009	
<b>APPEARING:</b>	For the Appellant: Krista M. Robertson, Counsel For the Respondent: Dennis Doyle, Counsel	

### **PRELIMINARY DECISION - JURISDICTION**

[1] On August 18, 2009, Daphne Dolhaine, an Administrator under the *Integrated Pest Management Act* (the "Administrator"), Ministry of Environment (the "Ministry"), issued a decision refusing to amend pesticide user non-service licence 13122 (the "Licence"). The Licence authorizes Island Timberlands Limited Partnership ("Island Timberlands") to apply certain pesticides on its private managed forest lands on southern Vancouver Island near Duncan, BC.

[2] On September 16, 2009, Margaret Hurst filed a notice of appeal with the Board regarding the Administrator's decision.

[3] This decision addresses the issue of whether the Administrator's decision is appealable to the Board, and consequently, whether the Board has jurisdiction over Ms. Hurst's appeal. This matter was conducted by way of written submissions.

### **BACKGROUND**

[4] In a letter dated July 20, 2009, Ms. Hurst requested that the Administrator amend the Licence to exclude the Koksilah River watershed from its application. In the letter, Ms. Hurst stated that she lives within 150 metres of an area that was proposed for pesticide treatment under the Licence. She stated that Island Timberlands notified her that it intended to use a formulation of the pesticide glyphosate known as Vision(R) to control the growth of Big Leaf Maple within commercial forest crops in the Kelvin Creek watershed, which is within the Koksilah River watershed. Ms. Hurst requested that the Administrator amend the Licence on

the basis that the proposed pesticide use would cause unreasonable adverse effects including harm to human health and the environment.

[5] The Administrator's August 18, 2009 decision refusing to amend the Licence states, in part, as follows:

The IPMR [Integrated Pest Management Regulation] allows for licensees to use pesticides as part of an IPM [integrated pest management] program if those pesticides are registered by the Pest Management Regulatory Agency (PMRA). The Ministry of Environment places a great deal of confidence in the environmental and human health assessment conducted by the PMRA as part of the registration and periodic review process.

Licensees must adhere to the requirements of the IPMR when applying pesticides. Requirements include maintenance of Pesticide Free Zones (PFZ) around rivers and creeks as well as sensitive locations, and restrictions from spraying when wind velocities are greater than 8 km/hour to reduce the chance of drift into areas outside of the treatment locations. There are some special allowances to reduce the PFZ when glyphosate is applied using selective application methods that ensure no pesticide is applied to non target organisms. The ministry has confidence that these techniques will not produce an unreasonable adverse effect.

Because the active ingredient has been reviewed and approved by Health Canada, the product is being used as an active part of an IPM program, the techniques to be employed are selective and protective measures are required under the IPMR, I do not see the need at this time to restrict the activities of the licensee in question.

[6] Ms. Hurst's notice of appeal was filed by her legal counsel. Her grounds for appeal may be summarized as follows:

- the use of glyphosate as authorized by the Licence is likely to cause an unreasonable adverse effect; and
- the Administrator's refusal to amend the Licence failed to consider the evidence provided by Ms. Hurst.

[7] Ms. Hurst requests that the Board "substitute or vary" the Administrator's decision, or alternatively, send the matter back to the Administrator with directions.

[8] By a letter dated September 17, 2009, the Board requested that Ms. Hurst provide submissions as to whether the Board has jurisdiction under the *Integrated Pest Management Act* (the "Act") to accept her appeal. The Board referred to sections 9(3) and 14 of the *Act*. In response, Ms. Hurst's legal counsel provided written submissions.

[9] By a letter dated October 1, 2009, the Board provided the Administrator with an opportunity to comment on the question raised by the Board. The Administrator's legal counsel responded with written submissions.

[10] Ms. Hurst submits that she has standing to appeal the Administrator's decision, and the Board has jurisdiction over her appeal.

[11] The Administrator submits that her decision in response to Ms. Hurst's request for a change to the Licence is not an appealable decision within the meaning of section 14 of the *Act*, and therefore, the Board has no jurisdiction over her appeal.

### ISSUE

[12] The issue before the Panel is whether the Administrator's decision refusing Ms. Hurst's application to amend the Licence is appealable to the Board.

### RELEVANT LEGISLATION

[13] Sections 9 and 14 of the *Integrated Pest Management Act* are relevant to this issue:

#### Administrator

- 9 (1) An administrator must be appointed under the *Public Service Act* for the purposes of this Act.
- (2) The administrator has the powers necessary and is responsible for the administration of this Act.
- (3) Without limiting subsection (2), in addition to the powers and duties given or assigned to the administrator under this Act, the administrator may
- (a) refuse to issue a licence, certificate or permit,
  - (a.1) on application by the holder, amend a licence, certificate or permit, or refuse to make the amendment,
  - (a.2) on the administrator's own initiative, amend a licence, certificate or permit,
  - (b) specify forms for use under this Act, and
  - (c) perform other duties the minister requires.

...

#### Appeals to Environmental Appeal Board

- 14 (1) For the purposes of this section, "**decision**" means any of the following:
- (a) making an order, other than an order under section 8 [*minister's orders*];

- (b) specifying terms and conditions, except terms and conditions prescribed by the administrator, in a licence, certificate or permit;
  - (c) amending or refusing to issue, amend or renew a licence, certificate or permit;
  - (d) revoking or suspending a licence, certificate, permit or confirmation;
  - (e) restricting the eligibility of a holder of a licence, certificate, permit or pest management plan to apply for another licence, certificate or permit or to receive confirmation;
  - (f) determining to impose an administrative penalty;
  - (g) determining that the terms and conditions of an agreement under section 23 (4) [*administrative penalties*] have not been performed.
- (2) A declaration, suspension or restriction under section 2 [*Act may be limited in emergency*] is not subject to appeal under this section.
- (3) A person may appeal a decision under this Act to the appeal board.

...

## DISCUSSION AND ANALYSIS

### **Whether the Administrator's decision refusing Ms. Hurst's application to amend the Licence is appealable to the Board.**

[14] Ms. Hurst submits that the right of appeal set out in section 14 of the *Act* is not limited to the holder of a licence, permit or certificate. Ms. Hurst argues that section 9(2) of the *Act* establishes the Administrator's broad discretion to administer the *Act*, and section 9(3) is explicit in stating that "without limiting subsection (2)" the Administrator has the specific powers listed in subsection (3). Ms. Hurst maintains that the list of specific powers is non-exhaustive. Moreover, Ms. Hurst submits that the Administrator's letter did not indicate that Ms. Hurst lacked standing to apply for the amendment; rather, it indicates that the Administrator considered Ms. Hurst's application and refused to amend the Licence.

[15] In addition, Ms. Hurst submits that she has a right to notification and consultation about the proposed pesticide use, pursuant to section 62(1) of the *Integrated Pest Management Regulation*. She submits that the Administrator, in exercising her powers under the *Act*, has a duty to consider Ms. Hurst's application for an amendment, in light of the potential for an adverse effect to result from the proposed pesticide use.

[16] Further, Ms. Hurst argues that section 14 states that a refusal to amend a licence may be appealed to the Board, and it does not specifically refer to section 9(3). This failure to reference section 9(3) creates an ambiguity on the face of the statute as to who may apply for, and appeal, an amendment. Ms. Hurst refers to the "modern principle of statutory interpretation" as adopted by the Supreme Court

of Canada in *R. v. Sharpe*, [2001] S.C.J. No. 3, which cites *Driedger on the Construction of Statutes*, 2<sup>nd</sup> ed., 1983, at page 87. Ms. Hurst submits that the principles of statutory interpretation indicate that the Legislature's intention may be assessed by looking to the Hansard transcripts pertaining to the passing of the *Act*. Ms. Hurst refers to the Hansard transcript of debates in 2003 regarding sections 9 and 14 of the *Act*. In particular, she submits that the then Minister of Environment stated as follows at page 7541: "Any person has a right to appeal a decision...".

[17] The Administrator submits that her decision is not appealable under the *Act*. She submits that, for the purposes of section 14, "decisions" must relate to an exercise of discretion conferred under the *Act*, and section 9 of the *Act* limits the Administrator's power to amend a licence. Specifically, she submits that under section 9, an amendment to a licence may only be initiated by the Administrator or the licensee. A licence may not be amended in response to an application by a third party such as Ms. Hurst. She argues, therefore, that a response to a third party request for an amendment is not appealable to the Board.

[18] The Administrator submits that policy reasons support a restrictive interpretation of the appeal provisions in the *Act*. She submits that the appeal provisions would be meaningless if a third party could appeal a refusal to amend a licence.

[19] Finally, the Administrator submits that it is unnecessary to consider the Hansard transcripts because there is no ambiguity in the wording of the *Act*.

#### *Panel's findings*

[20] The question before the Board is whether the Administrator's refusal to amend the Licence in response to Ms. Hurst's request is a "decision" within the meaning of section 14 of the *Act*. Both parties have referred to the principles of statutory interpretation, as enunciated by *Driedger on the Construction of Statutes*, 2<sup>nd</sup> ed., 1983. The most recent edition of that text, *Sullivan and Driedger on the Construction of Statutes*, 4<sup>th</sup> ed., 2002, describes Driedger's modern principle of statutory interpretation at page 1, as follows:

... Elmer Driedger described an approach to the interpretation of statutes which he called the modern principle:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The modern principle has been cited and relied on in innumerable decisions of Canadian courts, and in *Re Rizzo and Rizzo Shoes Ltd.* it was declared to be the preferred approach of the Supreme Court of Canada.

[21] The Panel has reviewed the relevant provisions of the *Act*, and has considered the meaning of the words in the *Act* based on the modern principle of statutory interpretation, as described above.

[22] Section 14 of the *Act* sets out the right of appeal to the Board. Subsection 14(3) states that "A person may appeal a decision under this Act to the appeal board" [underlining added]. There is no limitation in the *Act* on the meaning of "person". The parties do not dispute that Ms. Hurst is a "person". However, for a person to have a valid appeal, the matter they seek to appeal must be a "decision" within the meaning of the *Act*.

[23] Section 14(1) of the *Act* defines "decision" for the purposes of appeals to the Board. It lists numerous specific types of decisions. By providing a detailed definition of decision in the *Act*, it is reasonable to infer that the Legislature was attempting to narrow the categories or types of decisions that could be appealed.

[24] Subsection 14(1)(c) is most relevant in this case. It states:

**14** (1) For the purposes of this section, "**decision**" means any of the following:

...

(c) amending or refusing to issue, amend or renew a licence, certificate or permit;

[underlining added]

[25] Subsection 14(1)(c) refers to "refusing to... amend... a licence...". Based on this language, the question becomes whether any refusal by the Administrator to amend a licence is a "decision" that may be appealed. This requires a consideration of the Administrator's powers under the *Act* with regard to refusing to amend a licence.

[26] Subsection 9(3)(a.1) of the *Act* provides the Administrator with the discretion "on application by the holder" to amend a licence "or refuse to make the amendment" [underlining added]. Use of the phrase "the amendment" as opposed to "an amendment" indicates that the Administrator's discretion to refuse may be exercised in relation to amendments sought by licensees. In addition, subsection 9(3)(a.2) provides the Administrator with the discretion to amend a licence "on the administrator's own initiative". Section 9(3) does not say that an Administrator may amend a licence, or to refuse to amend a licence, in response to an application by "a person" or "any person".

[27] The use of restrictive language in section 9(3), as opposed to the broader language used in section 14(3), indicates an intention to restrict the Administrator's powers when it comes to amending or refusing to amend a licence. The Administrator may amend a licence either on her own initiative or in response to an application by the licensee, and the Administrator may refuse to amend a licence in response to an application by the licensee. There is no express power to either amend a licence, or to refuse to amend a licence, in response to an application by a third party. When these provisions are read together with section 14(1)(c), they indicate that only a refusal to amend a licence in response to an application by the licensee may be appealed to the Board.

[28] Ms. Hurst suggests that section 9(2) grants the Administrator broad powers to administer the *Act* that are not limited by the specific powers listed in section 9(3). Ms. Hurst also maintains that, as an owner of property within 150 metres of the treatment area under the Licence, who has a right to notice and consultation about the proposed pesticide use, she is "integrated into the scheme and purpose of the Act", and her concerns about the potential unreasonable adverse effects of the proposed pesticide use should be considered by the Administrator.

[29] First, the Panel notes that the Administrator did consider Ms. Hurst's letter and responded in the letter August 18<sup>th</sup> letter. Had the Administrator determined that there were reasonable and proper grounds to amend the Licence based on the contents of Ms. Hurst's information, the Administrator could have done so on her own initiative. The fact that she considered Ms. Hurst's letter and responded to it does not make it an appealable "decision" under the *Act*.

[30] The Panel also notes that there are various provisions in the *Act* which authorize that Administrator to take action against "unreasonable adverse effects". Part 2 of the *Act* generally prohibits the sale and use of pesticides unless a person holds the appropriate licence, certificate or permit, and complies with the *Act*, regulations, and the terms and conditions of the licence, certificate or permit. Section 4(3) of the *Act* provides the Administrator with the discretion to issue a licence for the sale or use of pesticides to an applicant if they meet certain criteria, and under section 4(4) the Administrator may specify in a licence certain terms and conditions.

[31] Part 5 of the *Act* provides the Administrator with powers to ensure compliance with the *Act*. Section 15(1) empowers the Administrator to suspend or revoke a licence, or order a licensee to refrain from using a pesticide or use the pesticide in a particular manner, if the Administrator considers that the licensee:

- (a) has not been or is not complying with this Act, the regulations, an order under this Act or a term or condition of the licence, ... or
- (b) is using, handling, storing, transporting, disposing of or selling or has used, handled, stored, transported, disposed of or sold a pesticide in a manner that is likely to cause or has caused an unreasonable adverse effect...

[32] Under section 15(2), the Administrator may also restrict, for the period of time the Administrator considers appropriate, the eligibility of the licensee to apply for another licence. Further, under section 23 of the *Act*, the Administrator may levy an administrative penalty if the administrator is satisfied on a balance of probabilities that a person has contravened a prescribed provision of the *Act* or the regulations, failed to comply with an order under the *Act*, or failed to comply with a requirement of a licence.

[33] In summary, the *Act* regulates the sale and use of pesticides through the issuance of licences, certificates and permits, and it grants the Administrator various specific powers to ensure compliance with the *Act*, regulations, orders, and the terms and conditions of licences, and to prevent or address unreasonable

adverse effects. The Administrator's statutory powers do not expressly or impliedly include a power to amend, or to refuse to amend, a licence in response to a request by a third party.

[34] In conclusion, the Panel finds that the *Act* does not authorize the Administrator to amend a licence in response to a request or application from a third party. Consequently, the Administrator's refusal to amend the Licence in response to Ms. Hurst's request is not an appealable "decision" under section 14 of the *Act*.

## **DECISION**

[35] The Panel has considered all the submissions and arguments made, whether or not they have been specifically referenced herein.

[36] For the reasons stated above, the appeal is dismissed for lack of jurisdiction.

"Alan Andison"

Alan Andison, Chair  
Environmental Appeal Board

December 3, 2009