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**DECISION NO. 2017-EMA-010(c)**

In the matter of an appeal under section 100 of the *Environmental Management Act*, S.B.C. 2003, c. 53.

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| **BETWEEN:** | Gibsons Alliance of Business and Community Society and Marcia Timbres | **APPELLANTS** |
| **AND:** | Director, *Environmental Management Act* | **RESPONDENT** |
| **AND:** | The George Gibsons Development Ltd. | **THIRD PARTY** |
| **EFORE:** | A Panel of the Environmental Appeal Board<br>Darrell LeHouillier, Chair | |
| **DATE:** | Conducted by way of written submissions concluding on September 6, 2019 | |
| **APPEARING:** | For the Appellants: | William J. Andrews, Counsel |
| | For the Respondent: | Stephanie Lacusta, Counsel |
| | For the Third Party: | Aidan Cameron, Counsel<br>Lindsay Burgess, Counsel |

## APPLICATION FOR SUMMARY DISMISSAL

[1] Gibsons Alliance of Business and Community Society and Marcia Timbres (collectively, the "Appellants") filed an appeal against certain parts of a July 12, 2017 letter (the "July 2017 Letter") issued by Vince Hanemayer, for the Director, *Environmental Management Act* (the "Director"), Ministry of Environment (the "Ministry")[1]. A three-week oral hearing of the appeal is scheduled to commence on October 21, 2019.

[2] On August 16, 2019, the Third Party to this appeal, The George Gibsons Development Ltd. (the "Applicant"), applied to summarily dismiss the appeal on the grounds that the appeal is now moot and ought to be dismissed. It states that the subject matter of the Director's July 2017 Letter is a remediation plan and schedule that will no longer be implemented. Instead, the Applicant will be performing an independent remediation in accordance with a new, 2019 plan. The Applicant argues that the decision under appeal relates to an obsolete plan and, accordingly, should be dismissed.

[1] The Ministry of Environment is now the Ministry of Environment and Climate Change Strategy.

[3] If its application for summary dismissal is granted, the Applicant also applies for an order for costs against the Appellants pursuant to section 47(1) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (the "*ATA*"). Alternatively, if the application for summary dismissal is denied and the appeal proceeds to a hearing, the Applicant seeks an order requiring the Appellants to deposit an amount of money sufficient to cover its anticipated costs pursuant to section 47.1 of the *ATA*.

[4] The Director supports the application to dismiss on the grounds of mootness but takes no position on the application for costs or for security for costs.

[5] The Appellants oppose the application. They argue that their appeal is not moot and should not be summarily dismissed for any reason. The Appellants submit that their appeal ought to proceed to a hearing but they should not be ordered to deposit security for costs under section 47.1 of the *ATA*. They made no submission on the application for costs under section 47(1) of the *ATA*.

## BACKGROUND

[6] This decision contains a brief background of the most important facts for this application. A more detailed background can be found in two preliminary decisions by the Board: the first addressed the Board's jurisdiction over the appeal and whether the Director's July 2017 Letter contained an appealable decision (see *Gibsons Alliance and Community Society et al. v. Director, Environmental Management Act*, (Decision No. 2017-EMA-010(a), October 24, 2017) (the "Jurisdiction Decision"); the second addressed the Appellants' application for a stay (*Gibsons Alliance and Community Society et al. v. Director, Environmental Management Act*, (Decision No. 2017-EMA-010(b), December 5, 2017).

[7] The appeal at issue relates to a contaminated site in the Town of Gibsons, British Columbia, which borders the Strait of Georgia. The contaminants from the site have migrated to a water lot within Gibsons Harbour, which is subject to water lot leases in favour of the provincial Crown.

[8] The Applicant owns a portion of the site and wants to develop it, including by erecting a building. The Applicant hired Keystone Environmental Ltd. ("Keystone") to prepare a site profile, conduct site investigations, and prepare a remediation plan for the Site. In June of 2017, Keystone submitted to the Ministry an October 2016 Detailed Site Investigation (the "2016 DSI"), a June 29, 2017 Remedial Plan (the "2017 Remedial Plan"), and a June 29, 2017 Summary of Site Conditions on behalf of the Applicant. The Applicant asked the Director to review the documents.

[9] The 2017 Remedial Plan contemplated the excavation and off-site disposal of contaminated soils and sediments. Contaminated sediments in the foreshore of the water lot were to be removed through shallow excavation and relocated to the upland area. Upland soil remediation on the site was intended to involve shallow excavation, with contaminated soils from the foreshore of the water lot and the upland area to be transported and disposed of off-site. According to the schedule, the remediation was to be completed in the summer of 2017.

[10] In his July 2017 Letter, the Director advised that he "supported" or "accepted" the proposed remediation plan and schedule.

[11] The Appellants appealed the July 2017 Letter on four main grounds which are summarized as follows:

1. The decision fails to address the known presence of toxic tributyltin ("TBT") in sediments at the site, the suspected presence of TBT in soil at the site, and the evidence of off-site migration of metals contamination.
2. The decision purports to approve a remediation plan that does not adequately protect the environment and public health, including the Gibsons aquifer.
3. The decision letter does not provide adequate reasons for the decision.
4. The decision violates the principles of fairness because the Appellant, Gibsons Alliance of Business and Community Society, was denied an opportunity to provide informed input prior to decision-making.

[12] In this appeal, the Appellants have asked the Board to reverse the Director's decision and order the Applicant to provide public consultation on the proposed remediation. Alternatively, the Appellants have asked the Board to send the matter back to the Director with directions to: require public consultation on the proposed remediation; provide the Appellants an opportunity to review and comment on the 2017 Remedial Plan and supporting documents prior to any Ministry decision-making; and determine whether TBT in sediments is satisfactorily addressed in any remedial plan later provided to the Director.

[13] The Director challenged the Board's jurisdiction to consider the appeal, stating that the July 2017 Letter was not an appealable decision. The Board concluded that a portion of the July 2017 Letter was appealable. Specifically, the Jurisdiction Decision noted that the Director had decided that the documents submitted to him satisfied certain reporting requirements and were satisfactory to him. The Jurisdiction Decision concluded that the July 2017 letter amounted to an exercise of power on the part of the Director and, as such, was appealable.

[14] After consultation with the parties, the Board scheduled a hearing of the appeal for October and November, 2018. This hearing was postponed, by consent, after amendments were made to the *Contaminated Sites Regulation*, B.C. Reg. 375/96 (the "*CSR*"). The amendments revised soil and sediment standards for many substances and introduced new parameters for substances not previously regulated, including establishing numerical standards for TBT in soil.[2]

[15] In light of these changes, Keystone recommended that additional testing and investigations be conducted for the presence of TBT and other metals in the soil and groundwater in order to achieve full delineation of the contaminants. In a July 20, 2018 letter from counsel for the Applicants to the other parties, counsel noted that Keystone's additional work would lead to amendments to the 2016 DSI and, possibly, amendments to the 2017 Remedial Plan.

[16] New hearing dates were scheduled for October and November 2019 to allow the additional testing and investigation to occur.

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[2] There was an existing standard for TBT in water at the time of the amendments to the *CSR*. That standard did not change.

*The Results of 2019 Investigation*

[17] On July 9, 2019, Keystone delivered a *Report on Findings – Detailed Site Investigation* dated July 2019 (the "2019 DSI") containing updated information and test results, including test results related to TBT and other changes in the *CSR*, relevant to contamination at the site and water lot. The 2019 DSI also contains a recommended remedial plan (the "2019 Remedial Plan").

[18] According to the Applicant, the 2019 Remedial Plan "is materially different" from the 2017 Remedial Plan. In particular, it does not call for off-site disposal of contaminated soils and sediments. The Applicant states:

> (a) The current geotechnical design for the building foundation calls for the use of soil mixing with a cementitious grout. As such, soil contamination on the upland area of the Site will not be excavated, but rather encapsulated within the cement matrix and isolated from the surrounding environment;
>
> (b) The shallow sediments in the foreshore area of the Water Lot are intended to be excavated and used on the upland portion of the Site as structural fill capped by the building structure; and
>
> (c) A human health and ecological risk assessment will be completed for the upland contaminated soil and the contaminated sediment placed on the uplands to meet the requirements for remediation to risk based standards.

[19] The Applicant has decided to carry out independent remediation of the site and the foreshore of the water lot in accordance with the 2019 Remedial Plan, not the 2017 Remedial Plan (or schedule) that is the subject of the Director's decision under appeal. The Applicant advised the Director that the 2017 Remedial Plan is no longer in effect and provided him with a copy of the 2019 DSI "for information purposes only".

[20] Under the *Environmental Management Act* (the "*Act*"), an independent remediation may take place without being reviewed or pre-approved by the Ministry. The only mandatory requirements in the legislation relate to giving notice to the Ministry, or others, at certain times or in the specified circumstances prescribed in section 54 of the *Act* and Part 13 of the *CSR*. However, as regulator, section 54 of the *Act* expressly allows a director to impose requirements or take additional action if and when needed. In addition, a person may have to comply with any protocols established under section 64 of the *Act*, including certain additional notice requirements.

[21] In summary, under this legislative scheme a director "may", but is not required to, determine in advance whether a remediation plan or remedial activities comply with the legislation or with the requirements of Protocol 12, which was made pursuant to sections 63 and 64 of the *Act*. The only exception is when the person intending to carry out independent remediation requests a review of the remediation by the Director under section 54(4) of the *Act*. This is what took place with respect to the 2017 Remedial Plan and resulted in the July 2017 Letter under appeal.

[22] The Applicant states that, unlike the situation in 2017, it has not requested, and will not be requesting, any review by the Director of its new remediation plans.

[23] The Director confirms that he received the 2019 DSI for his information only, along with a letter indicating that the 2017 Remedial Plan "is no longer in effect".

[24] The Appellants provided a detailed history of the events leading to this application. They point out that they consented to the postponement of the previous hearing because they understood that the additional testing of the site could result in an improved remedial plan and could advance their goal of resolving risks to human health and the environment. They also expected that Keystone's results would be available in plenty of time for the parties to consider the results prior to the rescheduled oral hearing. Instead, they were told that the 2017 Remedial Plan had been replaced by the new 2019 DSI and 2019 Remedial Plan, that the Applicant would be carrying out independent remediation of the new plan without Ministry oversight, and their appeal was now moot. The Appellants argue strenuously that their appeal should proceed as scheduled and that the application should be dismissed.

## ISSUES

[25] The issues to be addressed are as follows:

1. Whether the appeal is moot and ought to be summarily dismissed, with costs to the Applicant.
2. If not, whether the Board should order the Appellants to deposit a sum of money as security for costs.

## DISCUSSION AND ANALYSIS

### 1. Whether the appeal is moot and ought to be summarily dismissed, with costs to the Applicant.

[26] All parties agree that the applicable test to determine whether the appeal is moot is the two-step test endorsed by the Supreme Court of Canada in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 [*Borowski*]. In *Borowski*, Sopinka J. described the "doctrine of mootness" and the two-step test as follows at page 353:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present

> live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.
>
> The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant. [Emphasis added]

[27] The Court expressed three basic reasons why a court would not address cases that have become moot:

1. recognition of the importance of an adversarial context to the competent resolution of legal disputes;
2. concern for conserving scarce judicial resources; and
3. concern that the Court not be seen to be intruding into the role of the legislative branch by pronouncing judgments in the absence of a dispute affecting the rights of the parties.

[28] The Board has adopted and applied this test on numerous occasions over the years to consider whether an issue or an appeal is moot (see, for example: *Blackwell v. Deputy Regional Manager*, (Decision No. 2017-WIL-014(a), March 14, 2018; *Pacific Northwest Raptors Ltd. v. Regional Manager*, (Decision No. 2009-WIL-002(b), April 3, 2009); *Leggett v. Director, Fish and Wildlife*, (Decision No. 2008-WIL-006(a), July 16, 2008); *Vlchek v. Regional Water Manager*, (2013-WAT-009(b) & 2013-WAT-025(b), April 14, 2015).

## Step 1 – Is there a live controversy?

[29] Applying the first step of the test, the Applicant argues that there is no longer any "live controversy" between the parties with regard to the decision under appeal and that deciding the merits of the moot appeal will have no practical impact on any of the parties.

[30] The Applicant submits that the 2017 Remedial Plan is not going to be implemented. It has been superseded by a new, materially different remediation plan and schedule which is described in the 2019 DSI. As the 2017 Remedial Plan was the subject of the decision under appeal and is now obsolete, the Applicant argues the appeal is moot. The Applicant submits that any decision by the Board

regarding the Director's consideration and acceptance of the 2017 Remedial Plan would be purely academic: none of the remedies sought by the Appellants, even if granted, would impact the rights of the parties.

[31] The Applicant tendered two affidavits sworn on August 15, 2019 in support of its application: an affidavit by Klaus Fuerniss, the principal and director of the Applicant, and an affidavit of Michael Geraghty, Senior Technical Manager with Keystone. Mr. Fuerniss states in his affidavit that the Applicant "will be remediating the Site and the high risk conditions on the foreshore of the Water Lot in accordance with the recommended remedial plan in the 2019 DSI, not the 2017 Remedial Plan (or schedule) submitted to the Director on June 29, 2017". Mr. Geraghty confirms that "With the issuance of the 2019 Remedial Plan, the 2017 Remedial Plan, including the schedule which contemplated completion of remedial activities in summer of 2017, is no longer in effect."

[32] The Applicant submits that the changes to the 2017 Remedial Plan are not simply amendments, which may be separately appealed, they are new plans which are not the subject of a new decision by the Director. It submits that the 2019 Remedial Plan was created after changes were made to the *CSR*, after further site investigations, and that it incorporates different remedial requirements than the 2017 Remedial Plan.

[33] Although the Applicant acknowledges that there was a live controversy when the appeal was commenced, based on the above facts, it maintains that this is no longer the case.

[34] The Director agrees with and supports the Applicant's analysis and submissions on mootness. The Appellants strongly disagree.

[35] The Appellants maintain that, even if the 2017 Remedial Plan is obsolete, the appeal is not. This is because the appeal is against the Director's decision – not an appeal of the 2017 Remedial Plan. They argue that the Director's decision remains legally valid unless and until it is reversed by the Board; therefore, there remains a live controversy about the validity of the Director's decision until the Board decides whether to allow their appeal.

[36] If the Board does not deal with this live controversy, the Appellants submit that there will be "real world" impacts. For instance, if the Director's decision is not rescinded, the Applicant might rely on that decision as evidence that it has met the requirements of Protocol 12 (as described in a letter to the Applicant dated June 15, 2017), even though that decision only considered the 2017 Remedial Plan. Conversely, if the Board rescinds that decision after some sort of hearing (possibly in writing), this will provide clarity to the Applicant, other decision-making entities, and concerned citizens that the obsolete plan is no longer accepted. It will also prevent the Applicant from reverting back to the 2017 Remedial Plan, or one like it, on the grounds that it has already been accepted by the Ministry.

*The Panel's findings*

[37] After considering the submissions of the parties and the applicable test as described above, I find that there is no live controversy to be adjudicated between

the parties because the 2017 Remedial Plan considered by the Director in July 2017 is obsolete.

[38] The appeal is based on the Appellants' concerns with the Director's analysis of the 2017 Remedial Plan, as well as their concerns with the Director's lack of written reasons for accepting that plan and his failure to provide one of the Appellants with an opportunity to provide input on the plan. All of their concerns with the Director's decision relate to his review and approval of the 2017 Remedial Plan. The Board is not a decision-maker at first instance. To file an appeal under section 100 of the *Act*, there must be an appealable decision made by a director or the district director. An appealable decision must have some object. The Appellants' argument artificially separates the subject of the decision – in this case the 2017 Remedial Plan – from the decision under appeal. As noted in the Jurisdiction Decision, the decision appealed was whether the 2017 Remedial Plan satisfied certain reporting requirements and whether the Director supported or approved that plan. The July 2017 decision under appeal is inextricably tied to the 2017 Remedial Plan.

[39] In addition, any decision the Board may make about the Director's decision would have no practical effect on the rights of any of the parties; they would be purely academic because the remedies relate back to a plan that is not in effect. I agree with the Applicant that any order the Board might make on the appeal would be hollow and serve no practical purpose because it would relate to a remedial plan and schedule that are obsolete. For instance, if the Board reversed the appealable portion of the July 2017 Letter, i.e., the Director's "support" or approval of the 2017 Remedial Plan or his conclusion that the 2017 Remedial Plan met reporting requirements under Protocol 12, the Applicant could still carry out its independent remediation in accordance with the 2019 Remedial Plan.

[40] Similarly, the other remedies requested by the Appellants all relate to the 2017 Remedial Plan, which means that any order the Board might make as a result of their appeal would relate solely to that now obsolete plan. The time and effort invested in hearing the appeal would not result in any change to the actual remediation of the site or give the Appellants an opportunity to consult on the new plan: the remedy would only relate to the old plan. I agree that any order relating to the obsolete plan would have no practical impact on the parties' rights.

[41] Regarding the impacts identified by the Appellants if the appeal is not heard and the Director's decision is not formally rescinded, I find those impacts to be highly speculative and without merit in the context of the legislative scheme. For example, even if the Applicant wanted to rely on the Director's decision to establish compliance with Protocol 12 or other requirements, the Director has statutory authority to reject this and impose new requirements. Section 54(3) of the *Act* states that "at any time during independent remediation" a director may

> (a) inspect and monitor any aspect of the remediation to determine compliance with the regulations,
>
> (b) issue a remediation order as appropriate,

(c) order public consultation and review under section 52 *[public consultation and review]*, or

(d) impose requirements that the director considers are reasonably necessary to achieve remediation.

[42] In *Borowski*, the issue that Mr. Borowski sought to have decided by the Supreme Court of Canada was whether a foetus' *Charter* rights were violated by certain sections of the *Criminal Code*. Those sections were struck down before that Court heard the appeal. Applying step 1 of the live controversy test, the Court found that the foundation of Mr. Borowski's appeal had disappeared; sections of the *Criminal Code* that he had challenged had been struck down. The circumstances of this case are similar. The foundation for the appeal has disappeared.

[43] Finally, while this was not specifically argued in this application, I note that the Board's jurisdiction over the Appellants' appeal is based upon their standing under section 100(1) of the *Act* as persons "aggrieved" by the decision under appeal. "Aggrieved" in this context means that the Appellants have a genuine grievance because a decision has been made which prejudicially affects their interests (see, for example: *Ellis O'Toole et al v. Director, Environmental Management Act* (Decision Nos. 2016-EMA-150(a) to 153(a), March 29, 2017)). The Appellants' standing is based upon them being aggrieved by the Director's decision-making process in relation to the 2017 Remedial Plan, and the Director's consideration of that plan. As that plan is no longer in effect, there is no longer any basis to find them "aggrieved" by that decision.

[44] For all of these reasons, I find that there is no longer a live controversy as that term is meant in *Borowski*, and that any remedy granted by the Board if the appeal was heard would be solely theoretical or academic.

## Step 2 – Is there any compelling reason to hear the appeal even if there is no "live controversy"?

[45] The second step under *Borowski* is to decide whether the Board should exercise its discretion to hear an otherwise moot appeal. The Applicant and the Director submit that there are no compelling reasons for the Board to do so; the Appellants submit that there are.

[46] The Appellants make a number of arguments in support. They argue that their appeal ought to proceed because the 2019 DSI and 2019 Remedial Plan should properly be considered as *replacements* of the 2017 plan and the information considered by the Director as part of his decision. They argue that the Ministry's oversight of the remediation of this high risk site is an ongoing process under Protocol 12, and that the 2019 DSI and Remedial Plan are replacements as part of that ongoing process. They submit that the 2019 remediation information must comply with the reporting requirements described in the Director's June 15, 2017 letter and that the Applicant cannot simply chose to provide this to the Director "for information purposes only". As this information relates to pre-existing requirements, they submit that the wording "for information purposes only" is meaningless.

[47] Rather than dismissing the appeal based on the new 2019 documents, the Appellants submit that the Board should proceed with the hearing and evaluate this new evidence to determine whether it meets the "legally binding High Risk Reporting Requirements and whether the 2019 Remedial Plan is acceptable."

[48] In support, the Appellants note that the Board has the authority to hold a "new hearing", in which it may consider evidence that was not before the Director at the time of his decision, and that the Board has the power to "make any decision" that the Director could have made and that the Board considers appropriate in the circumstances (section 103(c) of the *Act*).

[49] In the alternative, the Appellants submit that the Board should exercise its discretion to hear the appeal on the issue of "inadequate reasons" and procedural fairness.

[50] Underlying many of their arguments is a concern with the lack of oversight if neither the Ministry, nor the Board, consider the merits of the 2019 DSI and 2019 Remedial Plan. They argue that, since the Director appears to be "refraining from making an appealable decision" on the 2019 remediation plans, the only assurance that this high risk site meets the applicable requirements must come from the Board through an evidentiary hearing by the Board of the replacement plan and schedule.

*The Panel's findings*

[51] I find that there is nothing to be gained from the Board hearing the Appellants' appeal. The evidence before me is that the Applicant will proceed with the 2019 DSI and 2019 Remedial Plan via independent remediation. The 2017 Remedial Plan has been abandoned. Consequently, there is no compelling reason for the Board to determine the reasonableness of the Director's decision on the obsolete 2017 Remedial Plan. As the Applicant has no intention of implementing the 2017 Remedial Plan, it would be a misuse of Board resources to go through the motions of hearing the Appellants' appeal which, ultimately, relates back to that plan.

[52] I also find that the 2019 DSI and 2019 Remedial Plan are not simply replacements of the 2017 Remedial Plan. Rather, the evidence before me is that they are new plans, which are not the subject of a new decision by the Director. As stated by the Applicant, these documents were created after changes were made to the *CSR*, after further site investigations, and incorporate different remedial requirements than the 2017 Remedial Plan.

[53] Further, since the 2019 documents have not been considered by the Director and, according to the evidence, will not be considered by the Director, there is no jurisdiction for the Board to consider their merits. The Legislature established the requirements for contaminated site remediation by independent operators, the appeal structure, and the Board's powers on an appeal. While the Board can hear new evidence and has broad discretion to make any decision that the Director could have made, the Board is not a decision-maker of first instance. It cannot consider the merits of the 2019 DSI and 2019 Remedial Plan without a director first considering those documents and making a decision that is appealable. Similarly,

the Board does not have the authority to require the Director to respond to these 2019 documents when the Applicant has not submitted them for review under section 54(4) of the *Act*.

[54] While it is clear that the Appellants would like a full hearing on the merits of the 2019 Remedial Plan to ensure that the merits of the 2019 Remedial Plan are evaluated, the question before me is whether there is any reason to exercise the Board's discretion to hear an otherwise moot appeal of the Director's decision. As I previously found, the Appellants' appeal relates back to the 2017 Remedial Plan – not the 2019 Remedial Plan—and none of the requested remedies (i.e., rescinding the 2017 Remedial Plan, finding that inadequate reasons were provided, or requiring input or public consultation on the 2017 Remedial Plan)—would have any practical effect.

[55] It may be that the Appellants have some opportunity to comment on the 2019 Remedial Plan. In an August 7, 2019 letter, the Director advised that the 2019 DSI involves on-site disposal of contaminated sediment which will require a Waste Discharge Authorization. As part of that authorization process, an application will need to be posted in accordance with the *Public Notification Regulation*, whereby interested persons will have an opportunity to comment at that time. This process is unrelated to the present appeal, however, and is beyond the scope of the Board's jurisdiction on this matter.

[56] As a final note, I appreciate that the Appellants and the residents of Gibsons are concerned about the contamination at the site and its impacts on human health and the environment. While I understand these concerns, the Legislature of the province has set up the independent remediation scheme to encourage polluters and owners of contaminated sites to clean up the sites without being forced to do so by the province, and without advance approval of remediation plans. The Ministry's website notes that this type of remediation "can be carried out with very little involvement from the government, which helps avoid unnecessary delays or paying fees".[3] However, the Ministry's *Administrative Guidance 9- Independent Remediation of Contaminated Sites*, clarifies that the Director has a continuing jurisdiction over an independent remediation:

> At any time during the independent remediation process the Director may inspect and monitor any aspect of the remediation to determine compliance with the Regulation. The Director may also impose requirements or issue a Remediation Order if it is considered necessary to achieve successful remediation (see section 54 (3) (d) of the Act).

*Conclusion on Issue 1*

[57] For all of the above reasons, I find that the appeal is moot and there is no compelling justification to exercise discretion to hear the merits of the appeal in these circumstances. The hearing of the appeal is, therefore, cancelled.

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[3] https://www2.gov.bc.ca/gov/content/environment/air-land-water/site-remediation/contaminated-sites/the-remediation-process/independent-remediation

[58] Given this outcome, the Applicant asks to make submissions on an application for costs against the Appellants. The Applicant is free to file an application for costs with the Board and address the Board's policy on costs. If an application is made, the Board will establish a submission schedule to hear the application.

[59] As the hearing is cancelled, there is no need to decide the security for costs issue.

## DECISION

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

[61] The application for summary dismissal is granted. The appeal is dismissed pursuant to section 14(c) of the *ATA* and its common law powers to manage its own processes in accordance with the principles of procedural fairness.

"Darrell LeHouillier"

Darrell LeHouillier, Chair
Environmental Appeal Board

September 24, 2019