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DECISION NO. 2019-EMA-008(a)

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

BETWEEN:	MSP Transport Ltd.	**APPELLANT**
AND:	Director, *Environmental Management Act*	**RESPONDENT**
BEFORE:	A Panel of the Environmental Appeal Board Darrell LeHouillier, Chair	
DATE:	Conducted by way of written submissions concluding on September 9, 2019	
APPEARING:	For the Appellant:	S. Luke Dineley, Counsel
	For the Respondent:	Robyn Gifford, Counsel Ben Naylor, Counsel

PRELIMINARY ISSUE OF JURISDICTION

[1] On June 14, 2019, MSP Transport Ltd. ("MSP") appealed a Letter of Demand for Cost Recovery that was issued to MSP on May 15, 2019 (the "Demand Letter"). The Demand Letter states that MSP should pay $3,576.48 to the Minister of Finance to reimburse the government for its costs incurred to respond to a spill from a truck that overturned on December 30, 2018. The Demand Letter was issued by Kathryn Berry, a delegate of the Director, *Environmental Management Act* (the "Director"), and the Acting Recovery Section Head, Environmental Emergency Program, Ministry of Environment and Climate Change Strategy (the "Ministry"). After the appeal was filed, a preliminary issue was raised regarding whether the Demand Letter contains an appealable "decision of a director" within the meaning the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "*Act*"). If the Demand Letter does not contain a "decision of a director", the Board has no jurisdiction over the appeal. This decision addresses that preliminary issue.

BACKGROUND

[2] On December 30, 2018, a truck overturned in a river near Clearwater BC, and the Ministry's Environmental Emergency Program responded. According to the Ministry's Dangerous Goods Incident Report ("DGIR") 183588, the truck's trailer ripped open, some frozen meat had spilled into the river, and vehicle fluids and diesel may have spilled into the river. Although neither DGIR 183588 nor the Demand Letter state who the truck belonged to, the fact that the Demand Letter was sent to MSP implies that MSP is a "responsible person" who had "possession,

charge or control of" the substances that spilled, as defined in Division 2.1 of the *Act*.

[3] Division 2.1 of the *Act* provides the government with the authority to respond to spills in certain circumstances, and provides a director with certain powers in relation to spills. For the purposes of Division 2.1, a spill occurs where any substance or thing with the "potential to cause adverse effects to the environment, human health, or infrastructure" is introduced into the environment in a way that is not authorized under the *Act*.

[4] Section 91.4(2) in Division 2.1 of the *Act* gives a director the discretion to respond to a spill to manage the spill and many of its effects, including on public or private property and on the environment.

[5] Sections 91.4(3) to (7) of the *Act* address liability for, and recovery of, the government's costs of responding to a spill. The relevant subsections are reproduced below:

91.4 (3) Subject to the regulations, the costs incurred by the government under this Division in relation to a spill are a debt due to the government by the responsible person and the owner of the substance or thing spilled.

(4) The costs referred to in subsection (3) include all of the government's costs in relation to the spill…

(5) The responsible person and owner referred to in subsection (3) are jointly and separately liable for amounts described in that subsection.

(6) For the purpose of recovering costs referred to in subsection (3), a director may file a certificate with a court that has jurisdiction, and, upon filing, the certificate has the same force and effect, and all proceedings may be taken on it, as if it were a judgment of the court with which it is filed against the persons named, and in the amount set out, in that certificate.

(7) A certificate under subsection (6) may be in the prescribed form, must be signed by a director and must contain

(a) the name of the responsible person in relation to the spill and the owner of the substance or thing that was spilled,

(b) the date and place of the spill to which the certificate relates, and

(c) the costs referred to in subsection (3).

[6] On March 26, 2019, the Ministry issued a letter to MSP titled "Intent to Pursue Cost Recovery" (the "Intent Letter"). The Intent Letter stated that the Ministry intended to recover costs incurred by the government for spill response actions in relation to the December 30, 2018 incident, pursuant to section 91.4(3) of the *Act*. The Intent Letter also stated that the Ministry intended to issue a Letter of Demand for Cost Recovery, and the amount specified in that letter would be a debt due to the government.

[7] On May 15, 2019, the Director issued the Demand Letter to MSP. The Demand Letter references DGIR 183588 and stipulates that MSP owes the

government a debt of $3,576.82 for actions undertaken to address the December 30, 2018 spill. The Demand Letter stipulates that interest will be charged on any amount unpaid after 30 days and that the Demand Letter "…may be filed with a court that has jurisdiction for the purpose of recovering costs in accordance with section 91.4(6) of the Act." The Demand Letter provides MSP 30 days to contest the letter, by contacting the Environmental Emergency Program's Cost Recovery Clerk.

[8] Attached to the Demand Letter is a list of "Response Costs" which consist of responder wages, responder expenses, a 25% administration fee, and GST, totalling $3,576.82.

Appeal of the Demand Letter

[9] On June 14, 2019, MSP appealed the Demand Letter on the following grounds:

(a) The demand includes GST;

(b) No information has been provided in support of the Demand and it is therefore impossible to assess whether the costs incurred were reasonable, necessary, or an appropriate response to Dangerous Goods Incident Report 18588; and

(c) The Demand is for spill response actions which were not necessary to ensure public safety, environmental protection, or incident resolution.

[10] MSP's Notice of Appeal requests "reversal of the decision for recoverable costs of $3,576.82." It also states that MSP was contesting the Demand Letter with the Environmental Emergency Program's Cost Recovery Clerk, but was appealing to the Board to "preserve its right of appeal pending the result of the internal review by the Environmental Emergency Program."

Preliminary Issue of Jurisdiction over the Appeal

[11] In a June 19, 2019 letter, the Board acknowledged receipt of MSP's Notice of Appeal, and noted that section 100(1) of the *Act* provides for appeals of decisions of a "director" but the Demand Letter was issued by a "Recovery Section Head". The Board further stated:

> Given that the Letter of Demand for Cost Recovery was not issued by a person acting in the capacity of a director under the Act, the Board has no jurisdiction over the matter and is unable to accept your appeal.

[12] On July 16, 2019, MSP requested that the Board allow the parties to make submissions on the Board's jurisdiction over the appeal. MSP submitted that the Demand Letter was issued by either a director or a delegate of the director; otherwise, the Recovery Section Head would have no ability to enforce the Demand Letter pursuant to section 91.4(6) of the *Act*.

[13] On July 22, 2019, the Board advised that it would reconsider its jurisdiction over the appeal, and offered the parties an opportunity to make submissions.

[14] The Director's submissions on the question of jurisdiction included affidavit evidence confirming that she was authorized to act as a delegate of the Director when she issued the Demand Letter. However, she submitted that the Demand Letter did not contain an appealable "decision" within the meaning of section 99 of the *Act*.

[15] MSP requested an extension of time to reply to the Director's submissions, given the new issue that was raised regarding whether the Demand Letter contains an appealable "decision". With the Director's consent, the Board granted MSP's request. The Board also extended the deadline for the Director to file her sur-reply.

ISSUE

[16] The issue to be decided is whether the Demand Letter contains an appealable "decision" of the Director under section 99 of the *Act*.

RELEVANT LEGISLATION

[17] Under section 100(1) of the *Act*, the Board may hear an appeal from a person aggrieved by a "decision" of a director. Section 99 of the *Act* defines "decision" for the purposes of appeals to the Board. The relevant subsections indicate that a decision includes:

99 For the purpose of this Division, "decision" means

(a) making an order,

(b) imposing a requirement,

(c) exercising a power except a power of delegation

…

DISCUSSION AND ANALYSIS

Whether the Demand Letter contains an appealable "decision" of the Director under section 99 of the *Act*.

Summary of MSP's submissions

[18] MSP submits that section 99 of the *Act* provides a broad right of appeal, and should not be interpreted narrowly: *Unifor Local 2301 v. British Columbia (Environmental Appeal Board)*, 2017 BCCA 300 [*Unifor*], at paras. 31-35. MSP also submits that the Board must consider, based on a generous reading of the relevant provisions of the *Act*, whether it is "plain and obvious" that the appeal is beyond the Board's jurisdiction: *Cobble Hill Holdings Ltd. v. British Columbia (Ministry of Environment)*, [2014] B.C.E.A. No. 1, at para. 50 [*Cobble Hill*]. MSP submits that this test was applied in *Revolution Organics, Limited Partnership v. Director, Environmental Management Act* (Decision No. 2017-EMA-004(a), April 13, 2017)[*Revolution #1*], at para. 82, which also addressed whether a letter contained an appealable "decision".

[19] According to MSP, the modern approach to statutory interpretation requires that the words in a statute are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27, at para. 21 [*Rizzo*]. MSP submits that this approach is also reflected in section 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, which provides:

> **8** Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[20] MSP argues that when interpreting legislation, there is also a presumption of legislative coherence, meaning that the provisions in legislation are presumed to work together to form a rational, internally consistent framework, with each part contributing toward the intended goal: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed., ch. 11 [*Sullivan*], at 11.2. Furthermore, according to the "golden rule" of statutory interpretation, the Board may depart from the grammatical and ordinary sense of the words in a statute to avoid absurd results: *Sullivan*, ch. 2, at 2.16 – 2.17.

[21] MSP submits that the purpose of the *Act* is environmental protection, and the purpose of section 91.4 is to protect the environment by limiting the immediate damage caused by a spill and addressing the longer-term impacts of a spill through cost recovery actions. The addition of Division 2.1 to the *Act* on October 30, 2017, including section 91.4, was intended to reduce the chances of British Columbians having to absorb the costs of responding to spills: Bill 21, *Environmental Management Amendment Act, 2016*; *Hansard*, 40th Parliament, 5th Session, Volume 36, No. 9 (April 11, 2016), at p. 12029, (Hon. M. Polak, second reading of Bill 21)[*Hansard*].

[22] In addition, MSP submits that when reading section 91.4 as a whole, it is apparent that the Legislature intended a director to have the authority to make decisions regarding spill response actions and to recover the government's costs arising from those actions. It would lead to an absurd result to interpret section 91.4(3) in isolation from sections 91.4(6) and (7). MSP submits that the Demand Letter is signed by the Director, as required by section 91.4(7), and is intended to be a "certificate" within the meaning of sections 91.4(6) and (7). MSP maintains that this view is supported by language in the Demand Letter, which states:

> … this Letter of Demand for Cost Recovery may be filed with a court that has jurisdiction for the purpose of recovering costs <u>in accordance with s. 91.4(6) of the Act</u>
>
> [underlining added]

[23] Further, MSP submits that it is not "plain and obvious" that the Demand Letter does not contain an appealable decision. MSP maintains that, unlike the letter in *Sumas Environmental Services Ltd. v. Director, Environmental Management Act* (Decision No. 2019-EMA-002(a), April 26, 2019)[*Sumas*], the Demand Letter contains a final and substantive decision. The Demand Letter imposes liability on MSP for the government's spill response costs under section

91.4(3) of the *Act*, and was not issued as a warning or for informational purposes. Until the Director exercised her discretion to issue the Demand Letter, MSP was not obliged to pay the government's spill response costs. While section 91.4(3) provides that the costs are a debt due to the government, the debt does not arise until a demand for payment is made and a party becomes obligated to make payment. In addition, section 91.4 makes it discretionary, and not mandatory, for a director to pursue spill response cost recovery by issuing a certificate and filing it with a court for enforcement purposes.

[24] MSP submits that the language on p. 5 of an October 12, 2017 Ministry document summarizing Division 2.1 of the *Act* also supports this view:

> Cost to clean up a spill by government is debt due to the government jointly and separately by the responsible persons and owners of the substance or thing that spilled. If a decision is made to pursue these costs, a certificate of cost recovery will be issued to the responsible person and owner of the substance or thing that spilled.
>
> [underlining added]

[25] Turning to section 99 of the *Act*, MSP submits that the Demand Letter contains a "decision" under subsections (a), (b), or (c), because the Director made orders, imposed requirements, and exercised powers when she issued it. Specifically, the Director:

- ordered or required MSP to make a cheque payable to the Minister of Finance in the amount of $3,576.82;
- ordered or required MSP to make payment within 30 days from the date of the Demand Letter;
- ordered that interest would be calculated if funds were not paid within 30 days; and
- exercised a power under section 91.4(6) of the *Act* by signing the Demand Letter for the purposes of recovering costs referred to in subsection (3).

[26] Moreover, MSP submits that the decision to issue the Demand Letter is part of a "staged" decision-making process under section 91.4 of the *Act* involving wide discretion to take actions from the outset of a spill. Subsection 91.4(2) provides that the government may take various actions in response to a spill "if the director considers it necessary or desirable".

[27] MSP maintains that if the Demand Letter is not appealable to the Board, MSP will have no opportunity to challenge the Director's decisions in relation to the need for, and extent of, the government's spill response actions. The Legislature could not have intended for MSP's only recourse to be appealing a decision to file the Demand Letter with a court as a certificate under section 91.4(6).

[28] Finally, MSP submits that the provisions in section 91.4 of the *Act* are substantially the same as those in its predecessor, section 80 of the *Act* (which was repealed when Division 2.1 was enacted). Section 80 provided that the government's spill response costs became a debt due to the government upon service of a certificate, whereas section 91.4(3) provides that the costs are a debt

due to the government in general, and a certificate may be filed under subsection (6) for the purpose of recovering the costs. MSP maintains that under both former section 80 and current section 91.4, a director decides whether government action is necessary in response to a spill, what actions will be taken, and whether to seek recovery of the costs of those actions.

Summary of the Director's submissions

[29] The Director submits that the Demand Letter does not contain a "decision" under section 99 of the *Act*. In order for there to be an appealable "decision", "there must be some exercise of authority under the legislation that relates to a subsection of section 99": *Revolution #1*, at para. 68. The Director submits that there was no exercise of authority when she issued the Demand Letter.

[30] In addition, the Director maintains that the "plain and obvious" test does not apply in this case. In *Cobble Hill*, the test was applied to decide whether certain grounds of appeal should be struck on the basis that they were beyond the Board's jurisdiction. The test was not used to decide the threshold question of whether the decision under appeal was within the Board's jurisdiction. The Director submits that in paras. 38 to 39 of *Revolution Organics, Limited Partnership v. Director, Environmental Management Act* (Decision No. 2017-EMA-012(a), September 27, 2017)[*Revolution #2*], the Board summarized the principles in *Revolution #1* and *Unifor* for deciding the threshold question of jurisdiction, as follows:

> In its Jurisdictional Decision [*Revolution #1*], the Board considered how to evaluate the contents of a letter in order to determine whether any or all of the contents are appealable as a "decision" under section 99 of the *Act*. This Panel agrees with and adopts the following findings of the Board in the Jurisdictional Decision:
>
> 1) To be an appealable "decision", there must be some exercise of authority under the legislation that relates to a subsection of section 99.
>
> 2) "While a letter may, indeed, communicate a decision that is appealable under the *Act*, it may also convey information or decisions that are not appealable. Thus, as noted by the Director, it is the contents of a letter that must be examined to determine if there are any decisions that have been made and are, therefore, appealable" (paragraph 70).
>
> 3) The Board should consider the nature of the decision and the legislation at issue, and not decline its jurisdiction on a "purely formal or technical basis" (paragraph 68).
>
> Further, the Board is mindful of Justice Groberman's finding in *Unifor* that section 99 is intended to comprehensively enumerate virtually all of the various types of <u>substantive decisions</u> that are made under the *Act*.
>
> [emphasis in original]

[31] The Director submits that the Demand Letter was not issued under section 91.4(3), and she did not make a substantive decision by signing the Demand Letter. Under section 91.4, she has no authority to determine the extent or nature of a person's liability for the government's spill response costs, because sections

91.4(3) and (5) of the *Act* automatically impose liability for those costs. There is no decision by a director to impose liability. In addition, the Director maintains that she has no discretion to determine the amount of those costs, because section 91.4(4) of the *Act* states that the costs referred to in subsection (3) "include all of the government's costs in relation to the spill" and a percentage of those costs (25%) which is prescribed in section 5 of the *Spill Preparedness, Recovery and Response Regulation*, B.C. Reg. 185/2017 (the "*Regulation*"). Thus, the Director's only authority with respect to cost recovery under section 91.4 is to decide whether to file a certificate in court to recover the debt pursuant to subsection (6).

[32] In contrast, the Director maintains that under former section 80 of the *Act*, a person was required to pay the government's costs *only* if a director *decided* to issue a certificate to that person. Under section 80, a director had the authority to decide: whether to issue a certificate to a person or persons; the contents of the certificate, including the spill response costs; and, how those costs would be apportioned among persons named in the certificate.

[33] The Director argues that MSP's interpretation is contrary to the words in section 91.4, the broader statutory context, and the purpose of section 91.4. Section 91.4 imposes a debt by operation of the law, and the debt does not depend on a director making a decision about liability or issuing a letter demanding payment. If the government responded to a spill pursuant to sections 91.4(1) or (2), all of those costs (subsection (4)) are automatically a debt owing by the responsible person and the owner of the substance spilled (subsection (3)), and they are automatically jointly and severally liable for the debt (subsection (5)).

[34] The Director submits that although she may decide to file a certificate in court under section 91.4(6), such a decision is not conditional on her first deciding to impose responsibility for costs on a person, or issuing a letter of demand. The Director maintains when the Legislature repealed section 80 and enacted section 91.4, it limited her discretion because it sought to simplify the cost recovery process and reduce the chance of British Columbians having to pay for those costs: *Hansard*.

[35] The Director characterizes the Demand Letter as an administrative measure that communicated the following information to MSP:

- a summary of the costs incurred by the government as determined by section 91.4(4) of the *Act* and the *Regulation*;
- an explanation that liability was imposed by section 91.4(3);
- instructions on how to pay or dispute the costs;
- an explanation of the accumulation of interest under the *Interest on Overdue Accounts Receivable Regulation*; and
- a statement that the Demand Letter may be filed in court under section 91.4(6).

[36] In other words, the Demand Letter conveyed information about the effect of the *Act* and regulations, and asked for payment prior to the commencement of legal proceedings for debt recovery. The Director claims that the *Act* is silent on the

methods that the Ministry may use to encourage payment before commencing legal proceedings, and therefore, the Ministry may use methods that are typically used by creditors, such as issuing intent to pursue letters and demand letters. As the Board concluded in *Sumas*, not every communication or action by a director constitutes an appealable "decision" under the *Act*. A decision to remind a debtor of their debt does not create a debt in the first place.

[37] The Director advises that the Demand Letter has not been filed in court (as of the date of her affidavit). She submits, therefore, that no substantive "decision" within the scope of section 99 of the *Act* has been made with respect to cost recovery in this case.

The Panel's findings

[38] In *Cobble Hill*, the Board applied the "plain and obvious" test to decide whether to strike certain grounds of appeal on the basis that they were beyond the Board's jurisdiction under the *Act*. The test was not used to decide the threshold question of whether there was an appealable "decision" under section 99 of the *Act*. In *Cobble Hill*, there was no dispute that the letter under appeal contained an appealable "decision" under section 99. I find that the "plain and obvious" test does not apply to the question of whether the Demand Letter contains an appealable "decision".

[39] In paras. 38 - 39 of *Revolution #2*, the Board summarized the test for deciding whether a letter contains a "decision" under section 99 of the *Act* based on the principles in *Revolution #1* and *Unifor*. That summary is described above and I agree with those findings and adopt that reasoning in this case.

[40] To determine whether the Demand Letter contains an appealable "decision" within the meaning of section 99(a), (b) and/or (c) of the *Act*, I have considered the provisions in section 91.4 and 99 of the *Act* based on the principles of statutory interpretation. In particular, I have applied the modern approach to statutory interpretation as set out in para. 21 of *Rizzo*, above, and have taken into account the remedial nature of the *Act* as required by section 8 of the *Interpretation Act*.

[41] While I have taken a liberal approach to interpreting the relevant sections of the *Act*, I am mindful that an appealable "decision" must involve some exercise of authority under, or derived from, the *Act* that fits within section 99 of the *Act*. In *Unifor*, the Court of Appeal agreed with the lower court that the appealed decision in that case represented the second stage of a staged decision-making process, but the Court of Appeal also specified that the appealed decision was a "deferred exercise of a power" under sections 14 and 16 of the *Act* (at para. 21). In other words, the decision constituted "exercising a power" under subsection 99(c) of the *Act* that was derived from specific sections of the *Act*. Based on those findings in *Unifor*, I find that "imposing a requirement" under section 99(b) of the *Act* means imposing a requirement under an authority that is provided in, or derived from, the *Act*. Similarly, "exercising a power" under section 99(c) of the *Act* means exercising a power pursuant to a specific section of the *Act* or an authority derived from the *Act*. As for "making an order" under section 99(a), I note that section 1 of the *Act* defines "order" to mean "an order made or given under this Act".

[42] Regarding the purposes of the *Act* as a whole, the Board has previously held that the *Act* creates a scheme that "deals with competing interests of permitting waste to be introduced into the environment but also imposing requirements for the protection of the environment" (*Emily Toews and Elisabeth Stannus v. Director, Environmental Management Act* (Decision Nos. 2013-EMA-007(g) & 2013-EMA-010(g), December 23, 2015, at para. 233; *StewardChoice Enterprises Inc. v. Director, Environmental Management Act* (Decision No. 2016-EMA-066(a), at para. 54). I agree with those findings. It is with a view of this overarching scheme that I must consider the content of section 91.4 of the *Act*.

[43] Turning to the context of section 91.4, it is within Division 2.1, Part 7, of the *Act*. Division 2.1 focuses on spill preparedness, response, and cost recovery. I find that Division 2.1 in general, and section 91.4 in particular, are consistent with the *Act*'s objective of protecting the environment. The *Act* defines "spill" in Division 2.1 as the unauthorized introduction into the environment of "a substance or thing that has the potential to cause adverse effects to the environment, human health or infrastructure" [underlining added]. Division 2.1 requires certain persons to take action in response to a spill in order to protect the environment (e.g., section 91.2 provides that "if a spill occurs or is at imminent risk of occurring", the "responsible person must ensure that the actions necessary to address the threat or hazard caused by the spill are taken"). However, Division 2.1 also provides Ministry decision-makers with broad discretion to take action in response to a spill. Notably, under section 91.4(2), the government may take action in relation to managing a spill and its impacts "if a director considers it necessary or desirable".

[44] Division 2.1 makes certain categories of persons responsible for the consequences of spills, including not only environmental clean-up and remediation, but also costs. In particular, sections 91.4(3) to (7) address liability for, and recovery of, costs incurred by the government in responding to a spill. The quantum and liability for those costs owing appears to be created by operation of sections 91.4(3) to (5), without any "decision" by a director. However, persons who are liable for the debt have no way of knowing about the amount owing until notice is provided and payment is sought by the Ministry. Sections 91.4(3) to (5) are silent about how the Ministry may notify persons about the debt owing, and how the government may request payment prior to filing a certificate with a court.

[45] In the present case, the Intent Letter first informed MSP that the Ministry intended to recover the government's costs for responding to the December 30, 2018 incident, and that the costs were a debt pursuant to section 91.4(3) of the *Act*. The Intent Letter did not state the amount of costs that were being sought. For those reasons, I find for the purposes of this application that the Intent Letter was informational and not substantive.

[46] Unlike the Intent Letter, the Demand Letter notified MSP that it owed a specific amount ($3,576.82) to the government as a debt, and requested payment within a specific time frame by a specific method of payment (within 30 days by a cheque made out to the Minister of Finance). While the amount of the debt may have been calculated by the Ministry in accordance with section 91.4(4) of the *Act* and the *Regulation* (although MSP disputes the addition of GST), MSP had no way of knowing the amount of the debt, when it was due, or how to make payment until

it received the Demand Letter. In other words, in the Demand Letter, the Director imposed certain requirements: to pay a specific amount, within a specific timeframe, using a specific method of payment. The Director also stated that failure to comply with those requirements would trigger the calculation of interest under the *Interest on Overdue Accounts Receivable Regulation*, and the Demand Letter "may be filed with a court … for the purpose of recovering costs in accordance with section 91.4(6)".

[47] MSP asserts this to have been a "decision" under section 99 of the *Act*, while the Director asserts this was an informational letter. An examination of the context surrounding the Demand Letter makes its nature more clear.

[48] The Demand Letter constitutes an intermediate step within the spill response/cost recovery system set out in section 91.4 of the *Act*. In assessing this overall process, I have kept in mind the legislative intent behind the Act, Division 2.1 of the Act, and section 91.4 in particular. That is, I have kept in mind the government's role in protecting the environment and human health, expressed in this case through its authority to address spills as defined in Division 2.1 of the Act. I have also kept in mind the government's desire to be able to make parties responsible for spills and the owners of materials that are spilled liable for costs associated with the government's actions to address spills.

[49] I conclude that a Director's decision to impose debt recovery under section 91.4 may be framed as either "imposing a requirement" on a person, or "exercising a power other than a power of delegation", derived from section 91.4. Either amounts to a decision for the purposes of appeal under sections 99(b) and (c) of the *Act*, respectively. Such a decision could aggrieve the person named in the decision, giving a right of appeal under section 100 of the *Act*.

[50] The question I must decide is, at what point of the phased decision-making process under section 91.4 of the *Act* does the appealable decision get made?

[51] The first decision made in this phased process is where a director decides that the government will take action with respect to a spill. The next decision is where a director decides to take action to recover the government's costs. A decision to use the debt recovery provisions of section 91.4 of the *Act* is a decision that prejudicially affects the interests of those from whom cost recovery could ultimately be undertaken. This would satisfy the definition of "aggrieved", as discussed in *Ellis O'Toole et al v. Director, Environmental Management Act* (Decision Nos. 2016-EMA-150(a) to 153(a), March 29, 2017). Taking a broad and purposive view of the legislation, however, and considering the principle of legislative coherence, I conclude that the right of appeal should not be triggered by a director's decision to take action with respect to a spill under section 91.4(2). This would potentially trigger prolonged appeal processes in response to emergent situations.

[52] As noted by the Director, once a director has authorized spill response actions to be done, the amount of the debt, and who is liable for the debt, are set by legislation and regulation. There is no decision-making involved on cost recovery until such time as a director takes action to recover that debt.

[53] Section 91.4(6) of the *Act* permits the Director to file a certificate in court to recover the debt related to the government's spill response actions. It does not mandate that the Director will do so. Subsection (6) states that a director "may" file a certificate; it does not say that a director "must" do so. It is logical that, in the course of deciding to do so, a director would have to decide to issue a certificate that complies with subsection (7). The government is free to encourage payment of the debt in other ways, including by charging interest for non-payment, as it did in the Demand Letter. By communicating the amount owed by MSP and the repercussions under section 91.4(6) for not voluntarily paying within a specific timeframe, the Director imposed a requirement to pay the debt incurred under the *Act*. The Director also made a decision on how to attempt to collect that debt. In doing those things, the Director was acting under powers derived from, or imposing requirements derived from, section 91.4 of the *Act*.

[54] As stated in *Unifor* at para. 32, decisions "deriving from the statute" are "decisions" under section 99 of the *Act*. In *Unifor*, the Court of Appeal held that the appealed decision was part of a two-stage decision-making process (para. 35). The first stage was granting a permit amendment pursuant to sections 14 and 16 of the *Act*, and the second stage was approving the requirements and conditions in an emissions monitoring plan. The plan itself was required under the terms and conditions of the permit amendment. At para. 34, the Court stated that "Any authority that the director has in the permit, therefore, is a power deriving from the statute." Similarly, I find that any authority that a director has under a certificate that is signed and issued by a director under section 91.4(6) and (7) of the *Act* is a power deriving from the *Act*.

[55] The only other decision in the phased decision-making process is the decision to file a certificate with the court to make the debt collectable. From a broad and purposive perspective, I do not consider the legislative intent was to make that an appealable "decision". I find that the filing of a certificate under section 91.4(6) of the *Act* is intended to be a procedural step to aid in the collection of the debt, rather than a substantive decision on whether to collect the debt.

[56] This interpretation is supported by section 88 in Division 1, Part 7, of the *Act*. Division 1 provides certain powers to decision-makers in the event of an "environmental emergency" including certain types of spills. "Environmental emergency" is defined in section 87(1) as "an occurrence or natural disaster that affects the environment and includes … a spill or leakage of oil or of a poisonous or dangerous substance" [underlining added]. Notably, section 88 authorizes the minister to spend government funds to order to immediately respond to an environmental emergency, and those funds spent become a debt owing to the government by persons who caused or authorized events that caused the environmental emergency. The relevant portions of section 88 state:

> **88** (1) If the minister certifies that money is required for immediate response to an environmental emergency, the amount the minister certifies to be required may be paid out of the consolidated revenue fund without an appropriation other than this section.

> (2) A certificate signed by the minister and showing an amount of money expended by the government under this section is conclusive as to the amount expended.
>
> (3) An amount shown by a certificate referred to in subsection (2) is a debt due to the government and, subject to subsection (4), is recoverable, by action in the Supreme Court from any person whose act or omission caused or who authorized the events that caused the environmental emergency in proportions the court determines.
>
> (4) If the court is satisfied that the expenditure incurred by the government under this section was either
>
> (a) excessive, taking into consideration the magnitude of the emergency and the results achieved by the expenditure, or
>
> (b) unnecessary, taking into consideration the unlikelihood of significant material loss to any person had the government not acted under this section,
>
> the court may reduce or extinguish the amount of the judgment that it otherwise would have ordered be entered against the person against whom the action has been brought.
>
> [underlining added]

[57] The language in section 88(3) is similar to section 91.4(3), to the extent that it states that government funds that are spent to respond to the environmental emergency are a debt owing to the government by specific persons. However, unlike sections 91.4(6) and (7), section 88(4) expressly provides the BC Supreme Court with the power to reduce or extinguish the debt in certain circumstances. This is important given that section 100(2) of the *Act* states that a decision of the minister is not appealable to the Board. Thus, the Court provides a review or appeal function in the Board's absence.

[58] In contrast, no such powers are provided to a court under section 91.4. Filing a certificate with a court pursuant to section 91.4(6) is for the limited purpose of enforcing payment of the debt. If a right of appeal were to exist on the decision to file a certificate, the Board would be put into conflict with the enforcement arm of the courts. Such a conflict would result in inter-jurisdictional conflict and considerable procedural complexity.

[59] The only sensible phase of the decision-making process to impose cost recovery pursuant to section 91.4 of the *Act* is at the stage at issue in this appeal. The Director held out that the Demand Letter was a "certificate" for the purposes of sections 91.4(6) and (7) of the *Act* by stating that it could be registered in court. Section 91.4(7) does not demand any form for a certificate, merely requiring that it be signed by a director, name the responsible person in relation to the spill and the owner of the substance or thing spilled, specify the date and place of the spill, and quantify the costs giving rise to the debt. The Demand Letter conforms with the requirements of section 91.4(7).

[60] In the circumstances of this case, if I were to interpret section 91.4 to mean that the Demand Letter could not be appealed to the Board, MSP would have no clear way to challenge whether the costs in it were a reasonable, necessary, or appropriate response to DGIR 18588. Although the Demand Letter states that it may be contested by contacting the Environmental Emergency Program's Cost Recovery Clerk within 30 days, the Demand Letter is silent about what remedies the Clerk can provide. No powers of review or appeal are provided to a "clerk" under the *Act* or the *Regulation*, and it seems unlikely that a clerk would have the power to rescind or vary a letter signed by a director.

[61] If the costs specified in the Demand Letter were neither appealable to the Board nor subject to scrutiny by a court, there would be no independent review or appeal at all of costs under section 91.4. Such an interpretation of section 91.4 would be inconsistent with the broad jurisdiction provided to the Board by sections 99 and 100 of the *Act*, to address decisions made by directors under the *Act*.

[62] For all of the reasons provided above, I conclude that when viewed liberally, the Demand Letter contains a substantive decision that was made under, or derived from, sections 91.4(6) and (7) of the *Act*, which constitutes "imposing a requirement" and/or "exercising a power" within the meaning of sections 99(b) and (c) of the *Act*. Given that neither the Demand Letter nor any of the provisions in section 91.4 mention an "order" or "ordering" MSP to do something, and I find that the Demand Letter does not contain an "order" as defined in section 1 of the *Act*, and does not constitute "making an order" under section 99(a) of the *Act*.

DECISION

[63] I have considered all of the submissions and arguments made, whether or not they have been specifically referenced herein.

[64] For the reasons provided above, I conclude that the appeal of the Demand Letter is within the Board's jurisdiction under the *Act*.

"Darrell LeHouillier"

Darrell LeHouillier, Chair
Environmental Appeal Board

September 25, 2019