Environmental Appeal Board

APPEAL NO. 97-WAS-09(c)

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

BETWEEN:	Gurmeet Brar	**APPELLANT**
AND:	Deputy Director of Waste Management	**RESPONDENT**
AND:	District of Invermere	**THIRD PARTY**

APPEAL NO. 97-WAS-12(a)

BETWEEN:	District of Invermere	**APPELLANT**
AND:	Deputy Director of Waste Management	**RESPONDENT**
AND:	Gurmeet Brar	**THIRD PARTY**

BEFORE:	A Panel of the Environmental Appeal Board Toby Vigod, Chair	
DATE OF HEARING:	March 5, 1998	
PLACE OF HEARING:	Victoria, B.C.	
APPEARING:	For Gurmeet Brar:	Gurmeet Brar
	For the District of Invermere:	F. Timothy Williamson, Counsel Reece Harding, Counsel

STANDING OF GURMEET BRAR BEFORE THE BOARD

BACKGROUND

The District of Invermere ("District") operates a waste water treatment plant adjacent to Toby Creek under waste permit PE-03094 issued pursuant to the *Waste Management Act* ("WMA"). The District applied for an amendment of its permit, and on January 10, 1997, the Regional Waste Manger issued an amended permit. The amended permit allowed the District to discharge a maximum of 2275 m^3/day with an annual average of 1850 m^3/day of effluent from the municipal waste water treatment plant to the ground and to Toby Creek.

On January 30, 1997, Mr. Gurmeet Brar, a resident of Invermere, appealed the amended permit to the Deputy Director of Waste Management ("Deputy Director"). The hearing was conducted in writing. On August 1, 1997, the Deputy Director denied the appeal but added two further conditions to the Amended permit. The Deputy Director required the District to design an alternate wastewater treatment system if any one of three conditions occur. The District was also required to conduct a feasibility study to determine water reuse possibilities for any new subdivisions and developments connected to the District's treatment facility. In his decision, the Deputy Director required the Regional Waste Manager to revise the permit in accordance with the terms of his decision.

On August 19, 1997, Mr. Brar appealed the Deputy Director's decision to the Environmental Appeal Board (the "Board") pursuant to section 44 of the WMA and requested a stay of the Deputy Director's August 1, 1997 decision. On October 17, 1997 the Board granted an interim stay of the amended permit, pending the final decision of the Board (see 97-WAS-O9(a)).

In the meantime, on September 16, 1997, the District requested an extension of time to commence an appeal of the August 1, 1997 decision of the Deputy Director. On September 18, 1997, the Board wrote to the District indicating that it had no discretion to extend the time for appeal as section 46(2) of the WMA, which allowed the chair to extend the time for commencing an appeal to the Board, had been repealed on July 28, 1997 following the passage of Bill 14, the *Environment, Lands and Parks Statutes Amendment Act, 1997*.

On October 16, 1997, the District filed a notice of appeal in relation to certain provisions of the amended permit issued by the Regional Manager on September 16, 1997. The Board, in a letter to the District dated October 24, 1997, indicated that it only had jurisdiction to hear an appeal of the additional or new requirements imposed by the Regional Waste Manager relating to the Pollution Control Objectives, the combining of nitrite/nitrate levels and the requirement to prepare a feasibility study for the "entire District of Invermere". In that letter, the Board noted that as Mr. Brar had been an appellant in the appeal before the Deputy Director that he was being offered third party status in the District's appeal pursuant to section 11(12)(a) of the *Environment Management Act*. Mr. Brar accepted in writing on November 3, 1997.

On November 13, 1997, the District applied to the Board requesting its determination on whether Mr. Brar is a "person aggrieved" by the decision of Deputy Director pursuant to section 44 of the WMA which had also been amended on July 28, 1997. The District also requested that Mr. Brar be removed as a third party in the District's appeal.

On November 21, 1997, Mr. Brar replied to the District's application. He said he had a "Primary Argument" that his appeal was a continuation of the appeal process under section 44 of the WMA before it was amended, and that the test for standing that should apply is the test of "a person who considers himself aggrieved". His secondary argument was that he had a residence on Lake Windermere, and as well had "ownership interests" in Lots 17 and 18, which lie immediately north of the sewage treatment plant.

In its reply dated November 26, 1997, the District noted that a title search did not disclose Mr. Brar as the registered owner of those two lots. On November 27,1997, the Board wrote to Mr. Brar noting the conflicting evidence on whether he had any "ownership interests" in Lots 17 and 18. The Board indicated it was "prepared to provide you with an opportunity to submit documentary proof of the ownership interests you have in those two lots." Mr. Brar was to submit proof by December 5, 1997. A conference call took place between the Board and the parties on November 28, 1997. At that time Mr. Brar was again requested to submit documentary evidence of his "ownership interests".

On November 28, 1997, the Board received a letter from a lawyer, Mr. McRoberts, advising that he acted on behalf of Mr. Brar in respect to the purchase of an "ownership interest" in Lots 17 and 18. In response to requests for further clarification of his November 28 letter, Mr. McRoberts sent a letter to the Board on December 5, 1998, indicating that he had drafted a Contract of Purchase and Sale on behalf of Mr. Brar wherein he purchased 100 percent ownership of Lot 18 and an option to purchase 100 percent of Lot 17.

On December 8, 1997, the District wrote to the Board raising concerns that the letters from Mr. McRoberts left questions unanswered including when the contract of purchase and sale was entered into.

On January 6, 1998, the Board issued a decision on standing (see 97-WAS-09(b)). The Board rejected Mr. Brar's Primary Argument and found that as the Deputy Director's decision of August 1, 1997 was made after the amendments to the WMA, the amended section 44 applied and the test for standing was whether he was a "person aggrieved". The Board also rejected Mr. Brar's argument that he was aggrieved because he owns and resides on a property located adjacent to Lake Windermere, approximately 2.5 kilometres south of the north end of Lake Windermere. The Board found that based on the information it had before it, that it is unlikely that the amended permit would have any effect on Mr. Brar's rights or interests associated with this property.

However, the Board granted Mr. Brar standing on the basis that he has "ownership interests" in Lots 17 and 18, Plan 14927, which lie immediately north of the waste water treatment plant site. The Board found that given the proximity of Mr. Brar's lands to the waste treatment site, it is reasonable to believe that the subject decision may prejudicially affect Mr. Brar's rights or interests. The Board relied on Mr. McRoberts letters, which he filed as "an officer of the court", to establish Mr. Brar's ownership interests.

Subsequent to the issuance of its January 6, 1998 decision, the District brought to the Board's attention Mr. Brar's failure to provide a date for the contract of purchase and sale and option to purchase Lots 17 and 18. On January 13, 1998, the District applied for summonses to obtain copies of these documents. The District also requested an expedited hearing to compel the attendance of witnesses and production of documents prior to the date set for the hearing. While the Board declined to convene an expedited hearing, it issued the summonses to Mr. Brar, the vendors, and Mr. McRoberts on January 16, 1998. The Board requested that Mr.

Brar comply with the request for disclosure of the documents outlined in the summonses in a timely manner which would allow the summonses to be vacated.

On January 30, 1998, Mr. Brar wrote to the Board indicating that the Contract of Purchase and Sale was executed on November 17 (sic), 1997. However, he stated that he was not prepared to divulge documents or contractual documents. Mr. Brar also stated that as part of his business dealing, it has been his "intention" for over two years to acquire suitable property in the Industrial area for specific commercial purposes. Mr. Brar also attempted to reargue his Primary Argument and further alleged that the Deputy Director may have improperly delayed his decision of August 1, 1997, until after the legislation was proclaimed. At this time, Mr. Brar also requested a hearing on the issue of standing.

The Board wrote to the parties on February 10, 1997 and again affirmed that the repealed section 44(1) of the WMA only applies to decisions made prior to July 28, 1997. The Board referred to section 31(1), the transition section in the *Environment, Land and Parks Statutes Amendment Act, 1997* which provides:

> 31 (1) Despite the amendments made by this Act, the following apply for the purposes of transition:
>
> (b) in relation to decisions under the *Waste Management Act* made before section 20 of this Act came into force, that Act as it read before that amendment applies in relation to appeals of those decisions.

However, due to the new information, the Board decided to convene an oral hearing limited to the question of whether Mr. Brar is a "person aggrieved" within the meaning of section 44 of the WMA. The Board declined to hear submissions on Mr. Brar's Primary Argument and the residency argument, as it had already come to its conclusion on these issues. In its letter of February 10, 1998, the Board noted that Mr. Brar had asserted that his interest in Lots 17 and 18 and other properties in the area of the plant pre-dates the August 1, 1997 decision of the Deputy Director. It indicated that it would receive submissions from the parties on that pre-existing interest. An outline of submissions was filed by Mr. Brar on February 14, 1998.

On February 18, 1998, a copy of the Contract of Purchase and Sale dated November 19, 1997, an Extension agreement and the State of Title Certificate in relation to Lots 17 and 18 was filed by Mr. McRoberts with the Board. The District filed its Statements of Points on February 24, 1998.

The hearing was held on March 5, 1998. At that time, the Board also heard submissions on the issue of Mr. Brar's third party status in the appeal launched by the District as that standing had also been challenged by the District, and on the issue of whether costs should be awarded to the District.

On February 12, 1998, the Deputy Director advised the Board that he took no position on this matter and that he did not plan on attending the hearing. The Regional Waste Manager did not attend the hearing held on March 5, 1998.

RELEVANT LEGISLATION

Section 44(1) of the *Waste Management Act* was amended on July 28, 1997 to read:

> Subject to this part, a *person aggrieved* by a decision of a manager, director, or district director may appeal the decision to the appeal board. (emphasis added)

The repealed section 44(1) provided:

Subject to this part, a *person who considers himself aggrieved* by a decision of:

> (a) a manager may appeal to the director, or
>
> (b) the director or district director may appeal to the appeal board. (emphasis added)

ISSUES

l. Whether Mr. Brar is a "person aggrieved" pursuant to section 44 of the WMA.

2. Whether Mr. Brar should retain his third party status in the appeal launched by the District.

3. Whether costs should be awarded to the District.

DISCUSSION AND ANALYSIS

1. Whether Mr. Brar is a "person aggrieved" pursuant to section 44 of the WMA.

The Deputy Director's decision under appeal was issued on August 1, 1997 and the Notice of Appeal filed by Mr. Brar was dated August 19, 1997, both decisions being made after section 44(1) was amended. The relevant test is therefore whether Mr. Brar is a "person aggrieved".

Mr. Brar submits that he has had business interests in the area of the sewage treatment plant for some time. In his outline of submissions filed on February 14, 1998, he states that he has spoken to realtors in Invermere about industrial property; that he spoke on more than one occasion to another property owner; that he spoke to a group interested in locating a micro-brewery, and finally that he looked at potential involvement in two existing business operations that were for sale. Mr. Brar has said that his interests in the area of the plant go back to at least 1996. He submitted that the date of the Contract of Purchase and Sale for Lots 17 and 18 cannot be interpreted as being representative of the commencement of his interests in the area of the plant.

At the hearing, Mr. Brar also said that he has an interest as a taxpayer, as a property owner and as a member of the community. He said that it would be disturbing if standing rights were unduly restricted. Mr. Brar also submitted that

the Board's decision in *Metalex Products Ltd*. v. *Deputy Director of Waste Management and Gerry Wilkin* (Environmental Appeal Board, Appeal No. 96/17(b), April 24, 1997)(unreported) did not restrict the term "interest" to an "ownership" interest" and that he has a long-standing interest in acquiring property in the Athalmer Industrial Area near the plant.

The District submits that Mr. Brar has failed to show that he was a "person aggrieved" during the relevant appeal period which ran from August 1- August 31, 1997. The District submits that once it became clear that the "ownership interests" in Lots 17 and 18 were not entered into until November 19, 1997, that Mr. Brar could not rely on this argument to found his standing claim. The District notes that Mr. Brar now seems to only be relying on an "intention" to purchase property in the vicinity of the sewage treatment plant. The District argues that even the evidence of the "intention to purchase" is vague and that Mr. Brar did not even refer to Lots 17 and 18. The District argues that a negative inference should be drawn from the fact that the offer and acceptance in the Contract of Purchase and Sale for Lots 17 and 18 was done in one day - November 19, 1997, just two days before Mr. Brar replied to the challenge to his standing.

The District says that for the Board to accept Mr. Brar's "intention" argument would undermine the legislative intent of the amendment to section 44, which was to narrow standing. The District says that to accept Mr. Brar's "intention" argument would be to leave the door open to any appellant to create standing by claiming an intention to purchase land near a plant, and then after the appeal period expired, purchasing or taking some interest in land near to an operation.

The District also said that Mr. Brar's argument is not supported by the case law or Board authority. The District referred to previous decisions of the Board including *Metalex*; *Fleischer* v. *Deputy Director of Waste Management* (Environmental Appeal Board; Appeal No. 97-WAS-11(a), November 17, 1997)(unreported); and *Keays et al*. v. *Assistant Regional Waste Manager* (Environmental Appeal Board, Appeal No. 97-WAS-10(a), November 17, 1997) (unreported). The Board has accepted the court's interpretation in *Capital Regional District* v. *Corporation of District of Saanich* (1980), 24 B.C.L.R. 154 (B.C.S.C.) of the phrase "a person aggrieved" as "a person who has a genuine grievance because an order has been made which prejudicially affects his interests" (p.168). Further, the District referred to the Board's statement in *Metalex* (which dealt with standing under the old section 44), that "the legislature did not intend the WMA to give a right of appeal to every person whose sensibilities are offended by government decisions, but only to those people whose rights and interests are genuinely affected."

In cases subsequent to *Metalex*, the Board has indicated that residency and proximity to the "discharge site" are relevant considerations to an assessment of whether a person is "aggrieved". In *Metalex*, the Board denied standing to an applicant who lived approximately 75 kilometres from the mine site, as he could not "reasonably fear for the safety of his air, water, soil, or livelihood" (p.3). In *Keays* (No. 97-WAS-10(a)) and *Keays* v. *Assistant Regional Waste Manager* (Environmental Appeal Board, Appeal No. 97-WAS-10(c), January 6, 1998)(unreported), the Board found the applicants lived close enough to the mill site and that their children attended school within such a close proximity of the mill

site that they had legitimate concerns about air emissions from the mill. The Board found that their rights and interests could reasonably be affected and that they were therefore persons aggrieved under section 44 of the WMA.

In the instant case, the District queried how Mr. Brar's "interests" could be prejudicially affected by the order of the Deputy Director when all he had was an intention to purchase in the vicinity of the plant.

There is no dispute that Mr. Brar did not own any property in the vicinity of the sewage treatment plant during the appeal period from August 1, 1997 - August 31, 1997. There is also no dispute that the Contract of Purchase and Sale in regard to Lots 17 and 18 was signed on November 19, 1997. While the Board accepts that even though the offer and acceptance were made in a day, that there would have been some negotiations prior to that date, Mr. Brar did not testify that these occurred during the relevant appeal period. The Board finds that the burden of proof is on Mr. Brar to establish that he is a person aggrieved. The Board also finds that the threshold for standing has been raised by the amendments to section 44 of the WMA. In *Giglio Enterprises Ltd*. v. *Edward Link* (1989) O.J. No. 1652, Action No. DCM 4355/89, Zalev D.C.J. was interpreting the phrase "any person who considers himself aggrieved". He states:

> It must be noted that s. 15(1) uses the words "any person who considers himself aggrieved*". This must include a class of persons wider than "any person aggrieved"…* In any event, it cannot include every person who, for whatever reason, has a personal axe to grind, whether real or fanciful, against the municipal authorities… At the very least there must be reasonable grounds for believing oneself aggrieved. (emphasis added)

As noted above, this Board has adopted British Columbia Supreme Court's test in *Capital Regional District* v. *District of Saanich*, above. While a proprietary interest need not be established, some interest must be shown that is prejudicially affected above that of the general public.

The Board finds that during the 30-day appeal period, Mr. Brar did not have an interest that could reasonably be prejudiced by the Deputy Directors decision of August 1, 1997. Ironically, he was the one who chose to purchase property in the vicinity of the sewage treatment plant over two months after the Deputy Director's decision. However, at the time of the appeal period, Mr. Brar had no more of an interest than the general public. This is not enough to found a claim for standing under the WMA.

2. Whether Mr. Brar should retain his third party status in the appeal launched by the District.

Section 11(12) of the *Environment Management Act* provides that:

11 (12) In an appeal, the board or panel

> (a) may hear *any person*, including a person the board or a panel invites to appear before it. (emphasis added)

This section was not amended by the Environment, Lands and Parks Statutes Amendment Act, 1997.

In its letter of November 13, 1997, the District submitted that Mr. Brar's status as a third party in the appeal brought by the District should be revoked as there is no valid reason why he should have such status when compared to any other resident of the District if his appeal is dismissed for lack of standing. At the hearing, the District again argued that if Mr. Brar failed to retain his standing in his appeal, than he should fail in his bid to retain his third party status. The District also submitted that the only reason Mr. Brar wants to become a party in the District's appeal is to stop the expansion of the sewage treatment plan.

Mr. Brar argued that the test for third party status was different than that test for standing to appeal and that he has spent three years actively dealing with the sewage treatment plant issue and was the appellant in the proceedings before the Deputy Director which resulted in amendments to the permit. He also said that his position has been clear from the outset and that he would be participating in the District's appeal to uphold the need for a feasibility study for the District of Invermere, which he states would demonstrate that the expansion of the sewage treatment plant is not required.

The Board finds that the test for third party status as set out in section of the Environment Management Act is considerably broader than the test for standing to launch an appeal. In fact, "any person" can be considered to be at one end of the spectrum of possible tests for the granting of standing. In its letter of October 24, 1997, the Board offered Mr. Brar third party status because he was an appellant in the appeal before the Deputy Director. The Board does not see a reason for varying its decision and does not find that its decision need be linked to the decision in regard to Mr. Brar's standing to launch an appeal. While the legislature has narrowed the test for standing to launch an appeal, it has retained the broad language for the Board to grant third party status in the appeal by another party. Mr. Brar has contributed to the changes made to the permit by the Deputy Director, and the Board finds that he would have relevant information pertaining to the issues raised in the District's appeal.

Therefore, Mr. Brar will continue to have his third party status in the appeal launched by the District.

3. Whether costs should be awarded to the District.

On July 28, 1997 section 11 of *Environment Management Act* was amended to allow the Board to make an order:

> 11(14.2)(a) requiring a party to pay all or part of the costs of another party in connection with the appeal, as determined by the appeal board.

This cost power did not previously apply to decisions made by the Board pursuant to the WMA.

The District submits that the Board should exercise its discretion and award costs for the District's participation in the March 5, 1998 hearing and for all costs related to dealing with the issue of standing. The District argues that Mr. Brar and Mr. McRoberts "snowed" the Board in their correspondence dealing with Mr. Brar's "ownership interests" in Lots 17 and 18. The District argued that Mr. Brar knew that the date the interests were acquired was critical to the Board's decision and that Mr. McRoberts' letter of December 5, 1997, which the Board relied upon in reaching its decision on standing, was cleverly worded to trick the Board. Further, the District referred to a number of letters it had filed with the Board in which it raised the issue of the date the "ownership interests" were acquired.

The District submitted that had Mr. Brar indicated earlier that he did not acquire the "ownership interests" in Lots 17 and 18 until November 19, 1997, that the Board may very well have come to a different decision in regard to Mr. Brar's standing to appeal. The District argued that the actions of Mr. Brar had prolonged this procedure and that the date of the contract was only disclosed after the summonses were issued and that it still took some additional time for Mr. Brar to file the specific documentation.

Mr. Brar submitted that the application for costs by the District should be rejected. He stated that he did not believe that his interests crystallized in a single day and that he was not trying to "snow" the Board by not producing the documents, but was rather trying to "protect what he believed needed protecting". He also noted that the Committee in the District dealing with the sewage treatment plant had been instructed not to talk to him after the lawyers had been brought in. Mr. Brar noted that the Board in issuing the stay decision had found that he had raised issues which are neither frivolous nor vexatious. Mr. Brar says that he should not be painted as the "bad guy" as he has made a significant contribution to the permit which was amended by the Deputy Director. He noted that had the decision come out a few days earlier, he would have had standing under the repealed section 44 of the WMA.

The Board's policy, as set out in its Procedure Manual, is not to follow the civil court practice of "loser pays the winner's costs", but rather is to award costs only in special circumstances. These circumstances as outlined in the Manual would include the situation where the action of a party, or the failure of a party to act in a timely manner, results in prejudice to any of the parties; where a party unreasonably delays the proceeding; or where a party's failure to comply with an order or direction of the Board, has resulted in prejudice to another party.

The Board considers that Mr. Brar has delayed the proceedings. In its letter of November 27, 1997, and in the teleconference held on November 28, the Board requested documentary proof of the "ownership interests". Implicit in its requests for documentation was the date that the "ownership interests" had been acquired. What the Board received instead were two lawyer's letters from Mr. McRoberts regarding Mr. Brar's "ownership interests" which the Board relied upon in coming to its decision of January 6, 1998. It was not until January 30, 1998, subsequent to

the issuance of summonses by the Board, that Mr. Brar finally indicated that the "ownership interests" had been acquired on November 17(sic), 1997.

However, the Board is reluctant to award costs in this case due to the fact that Mr. Brar would have had standing in this proceeding but for the legislation being amended on July 28, 1997 just three days before the issuance of the Deputy Director's decision. It cannot be said that Mr. Brar's decision to appeal was frivolous or vexatious. Further, the District itself did not challenge his standing until November 13, 1997 almost three months after Mr. Brar's appeal was filed and subsequent to the stay being granted. The Board has also found that Mr. Brar should retain his third party status in the District's appeal.

For these reasons, the Board declines to award costs to the District in regard to the issue of Mr. Brar's standing.

DECISION

The Board finds that Mr. Brar does not have standing to appeal the Deputy Director's decision of August 1, 1997. It, therefore, dismisses the appeal launched by Mr. Brar on August 19, 1997. The Board also revokes the stay imposed on the District on October 17, 1997.

The Board finds that Mr. Brar retains his third party status in the appeal launched by the District.

The Board declines to award costs to the District in regard to the issue of Mr. Brar's standing.

Toby Vigod, Chair
Environmental Appeal Board

March 11, 1998