Environmental Appeal Board

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DECISION NO. EAB-EMA-21-A014(a)

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

BETWEEN:	Beacon Pacific Properties Ltd.	**APPELLANT**
AND:	Director, *Environmental Management Act*	**RESPONDENT**
AND:	Canadian Tire Real Estate Limited	**THIRD PARTY**
BEFORE:	A Panel of the Environmental Appeal Board Darrell Le Houillier, Chair	
DATE:	Conducted by written submissions concluding on April 1, 2022	
APPEARING:	For the Appellant: Brent Meckling and Buck Hughes, Counsel For the Respondent: Dennis Doyle, Counsel For the Third Party: Brad Gilmour, Counsel	

Decision on Application to Dismiss

[1] This preliminary decision relates to an appeal concerning a contaminated site consisting of three parcels of land in Victoria, British Columbia (the "Site"). Canadian Tire Real Estate Limited ("Canadian Tire") owns land at 2959 Douglas Street that is believed to be the source of the contamination at the Site. Canadian Tire's land was already contaminated with 1,2-dichloropropane when Canadian Tire purchased it.

[2] Two properties may have been impacted by a plume of 1,2-dicholorpropane contamination (the "Contamination") that has migrated, underground, away from Canadian Tire's property. The City of Victoria (the "City") owns one property, which contains Spruce Avenue. Beacon Pacific Properties Ltd. ("Beacon") owns the other, which has a building that Beacon leases to various tenants. Canadian Tire says that the Contamination is stable, according to experts who have assessed it.

[3] Beacon appealed a decision (the "Preapproval") issued by a delegate of the Director, *Environmental Management Act*. The Preapproval allows Canadian Tire to proceed with applying for a certificate of compliance ("Certificate") for the part of

the Site consisting of the properties owned by Canadian Tire and the City, and to defer applying for a Certificate for Beacon's property until a later date.

[4] Canadian Tire has applied to the Board for an order dismissing Beacon's appeal on the basis that: (1) the Preapproval is not an appealable "decision" within the meaning of section 99 of the *Environmental Management Act* S.B.C. 2003, c. 53 (the "*Act*"); and (2) Beacon is not a "person aggrieved" by the Preapproval within the meaning of section 100(1) of the *Act*.

[5] This decision addresses Canadian Tire's application to dismiss the appeal.

BACKGROUND

[6] Canadian Tire has made some efforts to investigate and delineate any Contamination on Beacon's property. Canadian Tire has supplied Beacon with information about the Contamination on Canadian Tire's and the City's properties. Canadian Tire also provided an access and indemnity agreement (the "Agreement") to Beacon. In addition, Canadian Tire has offered funds to have consultants review the information and the Agreement, and to provide legal and technical services to Beacon.

[7] Canadian Tire and Beacon signed the Agreement, in which Canadian Tire agreed to indemnify Beacon for "… all reasonable costs and expenses …" incurred by Beacon during any testing at Beacon's affected property.

[8] Beacon and Canadian Tire disagree about the amount of funds that would be reasonable, to cover legal services associated with the Agreement and/or with investigating and remediating the Contamination on Beacon's property. Both Beacon and Canadian Tire consider the other's position to be unreasonable. Due to this impasse, Beacon says that Canadian Tire breached the Agreement and Beacon has not allowed Canadian Tire to access Beacon's property, to confirm the extent of the Contamination on its property.

[9] As the owner of a contaminated site, Canadian Tire is designated as a "responsible person", according to section 45(1)(a) of the *Act*. A "responsible person" is liable for remediation of the contaminated site for which they have responsibility under section 47(1) of the *Act*. A "responsible person" may also be subject to remediation orders under section 48(1) of the *Act*. Canadian Tire acknowledges its responsibility as a "responsible person" to delineate and remediate the Contamination.

[10] Section 53 of the *Act* allows a director to issue a Certificate in respect of all or part of a contaminated site. If Canadian Tire obtains a certificate of compliance ("Certificate") for part of the Site, and another person subsequently proposes or undertakes to change the use of the site and provide additional remediation, Canadian Tire would cease to be a "responsible person", according to section 46(1)(m) of the *Act*.

[11] Where a responsible person intends to seek a Certificate for part of a contaminated site, section 4.0 of *Protocol 6: Applications with Approved*

Professional Recommendations and Preapprovals ("*Protocol 6*") requires that person to obtain a preapproval.[1]

[12] Canadian Tire applied for a preapproval in April 2021, so that it could remediate the affected areas of the City's property and its own property. Canadian Tire submitted that Beacon's unwillingness to allow access to its property was preventing Canadian Tire from expeditiously addressing any of the Contamination that had migrated into Beacon's property.

[13] On November 16, 2021, Alan McCammon (the "Director"), a delegate for a director appointed under the *Act,* issued the Preapproval, as requested by Canadian Tire. In his reasons for granting the Preapproval, the Director stated that Canadian Tire had taken steps to adequately engage with Beacon on the issue of the Contamination affecting Beacon's property.

[14] In its Notice of Appeal, Beacon stated that Canadian Tire unreasonably refused to pay legitimate expenses incurred as a result of the Contamination of Beacon's property, the disruption for Beacon's tenants, and contracting for independent advice pertaining to the Contamination. Beacon says the Director failed to appreciate and understand that Canadian Tire had breached the Agreement, and had erred by failing to apply the "polluter pay" principle. Beacon stated that the Director had "… foisted the burden of delineating and remediating the Beacon property on the innocent landowner, Beacon." Beacon says the Director should not have decided to grant the Preapproval because Canadian Tire adequately communicated with Beacon, but rather should have considered the content of those communications. Beacon concluded by saying, "The stinginess of Canadian Tire, a multi-billion dollar corporation, was the only reason investigation and delineation of the Beacon property could not occur."

[15] On February 18, 2022, Canadian Tire applied for an order dismissing Beacon's appeal, saying that the Preapproval was not a "decision" as defined in the *Act*, and so could not be appealed to the Board. Canadian Tire also argued that Beacon was not a "person aggrieved" by the Decision and so lacked the ability to bring the appeal.

[16] The Director supports Canadian Tire's application, while Beacon opposes it. Each party filed submissions with respect to Canadian Tire's application.

ISSUES

[17] The issues to be addressed in this preliminary decision are whether:

1. the Preapproval is a "decision" under the *Act*;
2. Beacon was "aggrieved" by the Preapproval; and
3. the appeal should be dismissed.

[18] To the extent that the parties discussed other issues, including whether the Director acted within the bounds of his jurisdiction, whether the funds that

[1] *Protocol 6* was created by the Director, as authorized by section 64 of the *Act*.

Canadian Tire offered to Beacon were reasonable, and the nature and development of the Agreement, I have not summarized those evidence and submissions, although I considered them. The application being addressed in this preliminary decision is focused on the issues above.

SUBMISSIONS AND ANALYSIS

1. Is the Preapproval a "decision" under the *Act*?

[19] Section 100 of the *Act* allows "A person aggrieved by a decision of a director or a district director …" to appeal that decision to the Board.

[20] Section 99 of the *Act* defines a decision to mean:

a) making an order,
b) imposing a requirement,
c) exercising a power except a power of delegation,
d) issuing, amending, renewing, suspending, refusing, cancelling or refusing to amend a permit, approval, or operational certificate,
e) including a requirement or a condition in an order, permit, approval or operational certificate,
f) determining to impose an administrative penalty, and
g) determining that the terms and conditions of an agreement under section 115 (4) [*administrative penalties*] have not been performed.

Canadian Tire's position

[21] Canadian Tire argues that section 99 provides an exhaustive list of what qualifies as a "decision" under the *Act*. Each item in this section is to be interpreted broadly and liberally, such that one decision may qualify as a "decision" through more than one of the listed provisions.

[22] Canadian Tire says that the Preapproval could only potentially be a decision under provisions c) and d), but it argues that neither applies.

[23] With respect to provision c), Canadian Tire says that issuing a preapproval is not the same as issuing a Certificate. A Certificate is issued under section 53(3) and (6) of the *Act*, and issuing a Certificate is exercising a power. A preapproval is an administrative step, in which the Director forebears from exercising his power under section 64(6) of the *Act*, which allows him to refuse to accept an application that does not comply with *Protocol 6*. This is not a substantive decision, and is distinct for that reason from the decisions listed in section 99 of the *Act*. As the Court of Appeal has stated, section 99 is, "… intended to comprehensively enumerate virtually all of the various types of <u>substantive</u> decisions that are made under the statute."[2]

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[2] Canadian Tire quotes from *Unifor Local 2301 v. Rio Tinto Alcan Inc.*, 2017 BCCA 330 [*Unifor*], at para. 31, with emphasis added.

[24] With respect to provision d), Canadian Tire says that "approval" is a defined term in the *Act*. Under section 1(1), "approval" means one that is issued under section 15 or under a regulation. A preapproval under *Protocol 6* does not relate to section 15 and is not made under a regulation, as the BC Supreme Court has stated that "Director's protocols are not regulations."[3]

The Director's position

[25] The Director notes that the Board has previously considered what constitutes a "decision" under the *Act*, in *Revolution Organics, Limited Partnership v. Director, Environmental Management Act*, Decision No. 2017-EMA-012(a), September 27, 2017 [*Revolution Organics*]. At paragraph 68 of that decision, the Board reinforced the following points, described in an earlier decision:

1. an appealable "decision" must have some exercise of authority under the *Act* that relates to a subsection of section 99;
2. a letter may communicate an appealable "decision", plus non-appealable information and decisions; and
3. the Board should consider the nature of the decision and legislation at issue, and not decline jurisdiction on a "purely formal or technical basis".

[26] The Director also references paragraph 39 of *Revolution Organics*, where the Board referenced *Unifor*, saying that section 99 of the *Act* is intended to comprehensively enumerate virtually all substantive decisions made under the *Act*.

[27] The Director notes that the Board applied those authorities in *Gibsons Alliance of Business and Community Society; Marcia Timbers v. Director, Environmental Management Act*, 2017-EMA-010(a), October 24, 2017 [*Gibsons Alliance*]. In that case, the Board considered the exercise of a director's decision-making authority under another protocol enacted under the same provisions of the *Act*, concerning a contaminated site.

[28] The Board considered the appealed decision in that case, and concluded in paragraph 114 that the director "… intended to evaluate the 'manner and schedule' for remediation of the [s]ite, and decide whether it was to his 'satisfaction'." The Board found that this amounted to a "substantive decision", as described in *Unifor*, regarding whether the remedial methods and schedule met the requirements of Protocol 12, and whether the manner and schedule of proposed remediation was satisfactory to him.

[29] The Director contrasts the appealed decision in *Gibsons Alliance* with the Preapproval, in which he stated that "… this decision does not constitute review nor acceptance by the Director of the investigations or remediation conducted at, or planned for, the referenced properties." According to the Director, the Preapproval was purely procedural, unlike the decision appealed in *Gibsons Alliance*. The Preapproval just confirmed that Canadian Tire can proceed with an application for a

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[3] Quoting from *Burnaby (City) v. Environmental Appeal Board*, 2017 BCSC 2267 [*Burnaby 2017*], at para. 19.

Certificate, in respect of a portion of the Contamination associated with the Site, rather than the whole.

[30] The Director also notes that Beacon's right to reimbursement of remediation costs, authorized under section 47(5) of the *Act*, exists regardless of whether Canadian Tire obtains one Certificate in respect of the Contamination on the Site, or multiple Certificates. Beacon will still be eligible to file an action or a proceeding in court, to recover any reasonably incurred costs associated with remediating the Contamination on its property.

Beacon's position

[31] Beacon notes that there is no dispute that issuing a Certificate is a "decision", as defined in section 99 of the *Act*. Furthermore, Beacon says that in *Gibsons Alliance*, the Board observed that a Protocol's requirements may include substantive decisions that fall within that same definition.

[32] Beacon also points out that the Preapproval repeatedly describes itself as a "decision", including, at one point, a "… decision on the application … for preapproval under Protocol 6 …."

[33] Beacon references court cases that speak to the definition of a "decision" under section 99 of the *Act*. Beacon relied on the same three points from *Revolution Organics* as were described by the Director. Beacon also cited *Unifor*, saying that the items listed in section 99 are to be given a fair, large, and liberal construction, taking into account the scheme and objects of the *Act*. These items in section 99 are not "watertight compartments", and there may be overlap between them. Furthermore, to be appealable, a decision need not be made directly under the *Act*'s provisions—it is enough if the decision is made pursuant to an authority derived from the *Act*.

[34] In this case, Beacon argues that the Preapproval imposes a requirement on Canadian Tire, to meet the requirements in the Preapproval, when applying for a Certificate. Beacon also says that the Preapproval exercises a power of the Director, by defining the scope of the prospective Certificate and removing a barrier for Canadian Tire, bringing it one step closer to the granting of a Certificate and authorizing Canadian Tire to "… proceed with an application …" for a Certificate. The restriction in scope in this case limits Beacon's property from remediation for the foreseeable future, as Canadian Tire's remediation efforts focus elsewhere.

Canadian Tire's reply

[35] Canadian Tire replies by saying that even Beacon's submissions acknowledge that the Protocol sets "procedural requirements" necessary to obtain Certificates. Canadian Tire emphasizes that the Preapproval was not a substantive decision, but merely allowed Canadian Tire to apply for a Certificate. Although the Preapproval was a prerequisite to obtaining a Certificate, this does not mean that the Preapproval itself is a "decision" as defined in section 99 of the *Act*. Canadian Tire says that Beacon cannot appeal the mere prospect of a substantive decision.

The Board's findings

[36] As noted by Beacon, the Preapproval describes itself as a "decision". This is not persuasive to me, however. It is for the Board to determine whether the Preapproval meets the specific, statutory definition of a "decision", as described in section 99 of the *Act*, such that it may be appealed to the Board. Whether or not the Director was considering that same meaning of "decision" when he wrote the Preapproval and described it as a decision, the Board owes him no deference on that question. The Board must decide whether the Preapproval is an appealable decision.

[37] Furthermore, the Preapproval may address procedural matters but, as noted by the Director, a single document may contain both an appealable decision and non-appealable information. As such, regardless of whether the Preapproval addresses procedural matters, the Board must still determine whether it includes an appealable decision. This complexity is reflected in the *Act*, which allows for the creation of Director's protocols, under section 64(1)(d), "… establishing substantive and procedural requirements for persons planning, conducting or reporting on the remediation of a contaminated site …" [emphasis added].

[38] The parties correctly state that what qualifies as a "decision" under the *Act* is exhaustively described in section 99. Further, each potential definition of a "decision" is to be interpreted broadly and liberally, and does not constitute a watertight compartment. Additionally, as noted by the Director, the Board should not decline jurisdiction on a purely formal or technical basis.

[39] Beacon argues that the Preapproval is a "decision" because it imposes a requirement (meeting the criterion at section 99(b) of the *Act*), or because it involves the exercise of power other than delegation (meeting the criterion at section 99(c) of the *Act*), or both.

[40] Beacon does not argue that section 99(d) (issuing an approval) applies, and I agree with Canadian Tire: that subsection is inapplicable. Under section 1(1) of the *Act*, "approval" means one that is issued under section 15 of the *Act* or under a regulation. The Preapproval does not relate to section 15, which provides a director with the authority to approve the introduction of waste into the environment for a period of up to 15 months. The Preapproval was not made under a regulation, given that the BC Supreme Court held in *Burnaby 2017* that director's protocols are not regulations.

[41] The Preapproval carries hallmarks of a substantive decision. It outlines information the Director considered, as well as submissions from parties with differences in opinion as to the appropriate outcome. It authorizes Canadian Tire to apply for separate Certificates based, in part, on the "rationale and supporting information" provided on behalf of Canadian Tire, including "A detailed summary of communications … demonstrating adequate engagement [with Beacon]." The Preapproval notes Beacon's concerns, but states that the communications at issue meet the requirements of *Protocol 6*, before concluding that Canadian Tire may apply for separate Certificates for the contamination at its property and the City's property on one hand, and for Beacon's property on the other.

[42] While the Preapproval did not amount to a "decision" about whether a Certificate would be granted, I conclude that it contained a "decision" under the

Act. Specifically, it involved the exercise of a power except a power of delegation (a "decision" under section 99(c)).

[43] I disagree with Canadian Tire and the Director that the Preapproval was merely a procedural step. As noted by Canadian Tire, the Director decided whether to exercise his authority pursuant to section 64(4) of the *Act*, which states that "a director may refuse to accept anything governed by the protocol that is not in compliance with it." Applications for preapprovals are governed by section 4 of *Protocol 6*. Section 4.2 of *Protocol 6* specifies the information and documents required for an application for a preapproval. Section 4.2 states that "Decisions on Protocol 6 preapproval applications are based on partial site investigation and remediation information." Section 4.2 specifies that preapproval applications require submission of:

- a stand-alone document of all relevant information indicating that all reasonable efforts have been made to delineate and remediate the entire extent of contamination in accordance with the provisions of [the *Act*] and the [Contaminated Sites Regulation] and ministry approved methods, including ministry policy, guidance and webpages.
- all relevant figures, tables and data;
- clear presentation of a full and detailed rationale for seeking preapproval;
- when required, records of communication with affected parcel owners; and
- when required, information about the human health and environmental risks associated with the incomplete investigation or remediation.

[44] Assessing whether these requirements have been met requires a substantive assessment of the adequacy of the information provided with an application for a preapproval. These requirements are not simply procedural in nature.

[45] In the present case, the Director considered whether to refuse to consider Canadian Tire's application for a preapproval to proceed with an application for a Certificate. The Director granted the Preapproval, which allowed the application for a Certificate to proceed, concluding that (among other criteria) the information provided by Canadian Tire established that it had engaged adequately with Beacon on the question of the contamination.

[46] Importantly, the Preapproval also indicates that the Director will consider, as the next phase in the decision-making process, whether to grant a Certificate in respect of the Contamination at Canadian Tire's property and on the City's property, separate from whether to grant a Certificate in respect of the Contamination at Beacon's property.

[47] This exercise of discretion allowed Canadian Tire to progress from one phase of the decision-making process, which involves "… consideration of partial site investigation and remediation information …"[4], to the next, which involves a more

[4] Item 4.2 of *Protocol 6*.

complete review.[5] Based on the wording in the Preapproval, the Director decided, in that letter, to authorize Canadian Tire to apply for two separate Certificates in respect of the Contamination. In doing so, the Director found that Canadian Tire met the requisite information called for in *Protocol 6*, contrary to the submissions made by Beacon.

[48] This is similar to the *Gibsons Alliance* case, in that the Director considered information put forward and did not simply decide whether the information complied with certain requirements, but made findings of mixed fact and law. In this case, the Director addressed whether the information indicated "adequate engagement" between Canadian Tire and Beacon, such that Canadian Tire could apply for multiple Certificates in respect of the Contamination emanating from Canadian Tire's property.

[49] I appreciate Canadian Tire's argument that a prospective decision cannot be appealed, but I find that the Director has engaged in a phased decision-making system. He indicated that he would only consider exercising his discretion under section 53(6) of the *Act* to allow multiple Certificates in respect of the Site and the Contamination in accordance with *Protocol 6*. The exercise of this discretion is a power the Director exercises under the *Act*, other than discretion. It meets the definition of a "decision", under section 99(c) of the *Act*.

[50] While the Preapproval may also be a warning of an impending decision as to whether to issue a Certificate, the outcome Canadian Tire seeks involves two separate decisions under the *Act*: the exercise of discretion to allow multiple Certificates; and, the granting of one or more Certificates. The Preapproval simply represents that those decisions are being made in that order. The Director's decision to allow applications for multiple Certificates in this case was not to be revisited, based on the wording in the Preapproval. The only decision that remained, after the Preapproval, was whether to grant any Certificates with respect to the Site and the Contamination.

[51] While the requirements in *Protocol 6* may not be legislation or regulation, I conclude, as the Board did in *Unifor*, that this is a substantive decision. It is an exercise of the power provided in section 64(4) of the *Act*.

[52] Whether Beacon's interests have been affected, with respect to its right to reimbursement of remediation costs or otherwise, is irrelevant to whether the Preapproval is a decision. The question of Beacon's standing, as a "person aggrieved by" the Preapproval, will be determined in the next portion of this preliminary decision.

[53] For the reasons above, I conclude that the Preapproval is a "decision" under the *Act*.

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[5] The existence of phased approaches to regulatory decision-making has been acknowledged in *Unifor*. The Court of Appeal agreed with the analysis of the court below, which included the finding that "… the director's delegate, in granting the permit amendment in 2013, divided the approval of the permit amendment into two stages by deferring the imposition of certain requirements pending further review." [paragraph 21]

2. Is Beacon "aggrieved" by the Preapproval?

[54] As noted above, section 100 allows a "person aggrieved" by a decision of a director to appeal that decision to the Board. Canadian Tire does not say that Beacon is not a "person", but it says Beacon is not "aggrieved" by the Preapproval.

Canadian Tire's position

[55] Canadian Tire notes that the Board has interpreted the word "aggrieved" in section 100 to mean that the person must have "… a genuine grievance because an order has been made which prejudicially affects [their] interests."[6] The burden of proof is on a first impression ("*prima facie*") basis, and on an objective standard.[7] To establish itself as a "person aggrieved", Beacon must present enough objective evidence for the Board to reasonably conclude that Beacon's interests are, or may be, prejudicially affected by the Preapproval.[8]

[56] Referencing paragraph 77 of *Gagne*, Canadian Tire argues that the test for whether a "person aggrieved" under the *Act* may be more restrictive than interpretations of such language under different statutes. Canadian Tire says this is because a purpose of the *Act* is to expeditiously remediate contaminated sites, and because appeals by those uninvolved with remediation may add uncertainty and unreasonably delay the remediation process. Canadian Tire argues that these considerations may remain relevant when considering a person whose interests are already protected by "multiple avenues" under the *Act*.

[57] Canadian Tire also relies on the Board's decision in *Burnaby 2016*. *Burnaby 2016* involved an appeal by the City of Burnaby, against a "decision" by a director to issue a risk-based Certificate to Suncor Energy Inc. ("Suncor"), in respect of contamination on Suncor's. The City of Burnaby's neighbouring property had been contaminated from the same source, but was addressed in a different Certificate that also had been appealed.

[58] In *Burnaby 2016*, the Board concluded that the City of Burnaby was not aggrieved by the director's decision to issue a Certificate for Suncor's property, saying that any concerns about the delineation of contamination on the City of Burnaby's property would be addressed in the appeal of the Certificate, related to the contamination on its property. The Board stated, at paragraph 53, with respect to the Certificate issued for Suncor's property, "… the City is only prejudiced by, or has a genuine grievance, if those defects mean that the contamination has not been remediated on the City's property, or the contamination is flowing onto the City's

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[6] This quote, with gendered language addressed, is taken from *City of Burnaby v. Director, Environmental Management Act*, Decision No. 2016-EMA-064(a), April 22, 2016 [*Burnaby 2016*], at paragraph 21, and other decisions.
[7] *Gagne v. Sharpe*, 2014 BCSC 2077, at paras. 63–64, 74 [*Gagne*].
[8] *Gagne v. Environmental Appeal Board*, Victoria 14-3037, October 31, 2014 (unreported) at para. 24.

property." *Burnaby 2016* underwent judicial review and was upheld by the BC Supreme Court.[9]

[59] Canadian Tire argues that there is no basis for Beacon's comment, that the Preapproval "… foisted the burden of delineating and remediating the Beacon property on the innocent landowner, Beacon."

[60] Rather, Canadian Tire says the preapproval does not affect Beacon's property or rights. Referencing *Gagne* and *Burnaby 2016*, Canadian Tire says having a separate Certificate for its property does not alter its responsibility to remediate the Contamination at Beacon's property, or its motivation to expeditiously remediate Beacon's property to obtain a Certificate and relieve its liability. Beacon retains the ability to raise concerns about the delineation and remediation of the Contamination on its property, when Canadian Tire seeks a Certificate in respect of that property. Further, the Director retains the ability to issue a remediation order for any property should subsequent investigations reveal more liability for Canadian Tire, regardless of any Certificate that had been issued previously.[10]

[61] Canadian Tire notes that Beacon has not provided any evidence of defects in the delineation of contamination on Canadian Tire's property, or that contamination continues to flow onto Beacon's property. Even if the Board were concerned about that conclusion, however, Canadian Tire argues that the Preapproval "… does not constitute review nor acceptance by the director of the investigations or remediation conducted at, or planned for, the referenced properties."[11] Regardless, Beacon is not prejudiced by the discrete administrative step of considering separate applications for different Certificates, in respect of the contamination originating at the Canadian Tire property.

[62] Furthermore, Canadian Tire says Beacon's claim of prejudice is that the Preapproval denies it the right, under *Protocol 6*, to argue in favour of what "reasonable expenses" it should be entitled to, under the Agreement and the *Act*. Canadian Tire says *Protocol 6* confers no such right, and Beacon cannot claim to be aggrieved by the loss of a right it never had.

[63] Canadian Tire adds that *Protocol 6* designates what materials an applicant must submit, when applying for a preapproval. It does not require the Director to adjudicate disputes over compensation. Canadian Tire references an earlier, similar scheme under the previous *Waste Management Act*, R.S.B.C. 1996, c. 482. Under that scheme, a director did not have the authority to order compensation with respect to, or adjudicate, such claims. He could therefore not consider compensation for third parties, beyond the costs of remediation, when exercising his discretion to grant an Approval In Principle, for the remediation of a

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[9] *Burnaby 2017*.
[10] Canadian Tire quotes from *427958 BC Ltd (dba the Super Save Group of Companies), BC Hydro and Power Authority, Applicant v. Deputy Director of Waste Management (Ocean Construction Supplies Ltd, Third Party)*, Decision No. 2004-WAS-007(a), November 2, 2004 [*Super Save*], at para. 11.
[11] Quoting from the Preapproval.

contaminated site.[12] Canadian Tire says the Director's discretion in granting the Preapproval was limited to deciding whether the materials submitted in Canadian Tire's application satisfied the requirements of *Protocol 6*, and was consistent with the statutory purpose of his authority to issue Certificates under section 53(6) of the *Act*: the expeditious remediation of contaminated sites.[13]

[64] Canadian Tire argues that, even if the Director had refused to issue the Preapproval, Beacon would be in the exact same situation: Beacon's property would remain contaminated. The Preapproval being denied would have only meant that Canadian Tire's and the City's properties would also remain contaminated while Canadian Tire gains access to Beacon's property for the purposes of delineating and remediating any of the Contamination present. Canadian Tire says such a refusal runs contrary to the purposes of Part 4 of the *Act*.

The Director's position

[65] The Director references *Burnaby 2017*, at paras. 65–66, when he states that an "aggrieved person" is one that presents evidence to objectively show, on a *prima facie* basis, "… a genuine grievance because an order has been made which prejudicially affects [their] interests."

[66] In this case, the Director argues that Beacon is not prejudiced. Canadian Tire remediating its property will avoid any risk of further migration of the Contamination into neighbouring properties. Beacon will retain its right to recover reasonable costs associated with the cleanup of contamination that has migrated from Canadian Tire's property onto Beacon's property.

[67] The Director also clarified that, while he considered the communications between the parties and the difficulties they experienced when trying to reach agreement, this did not change his view on whether there was adequate communication between them, a factor he is to consider under *Protocol 6*.

Beacon's position

[68] Beacon says that *Gagne* and subsequent decisions were summarized well in *Patricia Rush et al. v. District Director, Environmental Management Act*, Decision No. 2018-EMA-003(a), August 20, 2018 [*Patricia Rush*]. Beacon summarizes the test for standing, as described in *Patricia Rush*, along the same terms as the other parties.

[69] Beacon says that the facts in *Burnaby 2016* are unlike those in this appeal. In that case, the contamination had been delineated on the properties relevant to the appeal. The "responsible person" in that case had applied for two Certificates, both of which were granted and appealed by the City of Burnaby. This allowed the

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[12] Canadian Tire referenced *Imperial Oil v. Driedger et al.*, 2002 BCSC 219, at para. 74.
[13] Canadian Tire's submission references the analysis from *Super Save*. At paragraphs 38–39 of that decision, the Board describes the purposes of Part 4 of the *Act* (including section 53), as the protection of human health and the environment, and the expeditious remediation of contaminated sites.

City of Burnaby to seek the same remedies under each appeal. Furthermore, after the Certificates were issued, subsequent contamination that was discovered, seemingly from a third party, although it was related to or continuous with the previously identified contamination.

[70] Beacon argues at different points in its submissions that the decision at issue is a Certificate or a preapproval. Beacon says that the decision prejudicially affects its interests by excluding Beacon's property from remediation for an indeterminate amount of time. Additionally, Beacon says it has no alternate course of appeal.

[71] Beacon says that, by delaying remediation on its property, the Preapproval affects Beacon's ability to finance, lease, redevelop, and otherwise deal with that property. It affects Beacon's ability to negotiate leasing arrangements as a result of the contamination-related uncertainty affecting the property. Furthermore, Beacon says it cannot provide information to other interested parties that have business with Beacon, related to the property. This can include financing, business function impacts for Beacon's tenants, redevelopment approvals by the municipality, and interactions with all parties concerned with potential health impacts associated with the Contamination.

[72] Beacon describes Canadian Tire's position as unreasonable. Beacon says Canadian Tire has refused to pay Beacon's reasonable expenses, despite being a large and well-funded company. Beacon is concerned because Canadian Tire's property has sat unused for several years, and Beacon is aware that Canadian Tire has a potential purchaser interested in the property.

Canadian Tire's reply

[73] Canadian Tire agreed with the Director's submissions and disagreed with Beacon's.

[74] Canadian Tire adds that Beacon is the cause of any uncertainty about the remediation of Beacon's property. Further, Canadian Tire says it is no less motivated or able to remediate Beacon's property as a result of the Preapproval.

[75] Canadian Tire also says that Beacon's description of the prejudice it has incurred, relating to financing, leasing, and redeveloping its property, are speculative and unsupported by evidence. Canadian Tire says, at any rate, these concerns are unrelated to the Preapproval and could be addressed when a Certificate is considered in respect to any Contamination at Beacon's property. Canadian Tire says that Beacon has not provided evidence, beyond mere assertions, to support its claims of prejudice. Canadian Tire says it is Beacon's unreasonable refusal to grant access to their property that has delayed delineation and remediation of any contamination on that property.

[76] Canadian Tire also says that there is no evidence to support Beacon's assertion that Canadian Tire would be less motivated to remediate the Contamination at Beacon's property. Canadian Tire says this argument also fails under consideration of common sense, as Canadian Tire both has tried to begin remediating the process and needs to do so to resolve the issue of the Contamination completely.

[77] Canadian Tire adds that *Protocol 6* allows for the issuance of multiple Certificates for one contaminated site, and says that this "… prevents affected parcel owners from gaining an unfair advantage in negotiations over fair compensation for remediation by unreasonably refusing access …." Canadian Tire adds that Beacon's loss of this unfair advantage was not prejudicial, as Beacon was never intended to have that advantage in the first place.

The Board's findings

[78] The parties agree on the relevant test I am to apply in deciding whether Beacon is a "person aggrieved", as contemplated in section 100 of the *Act*. To conclude that Beacon has standing a "person aggrieved", I must conclude that it has a genuine grievance because the Preapproval prejudicially affects its particular interests. This requires some evidence beyond mere assertions, but the proof need only be established on a *prima facie* basis.

[79] It is important to note that the Preapproval does not deal with the Contamination itself. It does not preclude the Director from ordering the remediation of any Contamination affecting Beacon's property. The Preapproval likewise does not authorize any particular remediation plan, or accept any particular definition for the scope of the Contamination. It merely allows Canadian Tire to apply for two Certificates in respect of the Contamination that originated at its property, rather than one.

[80] Beacon has provided insufficient evidence to support a conclusion that the Preapproval will delay the remediation of any Contamination at its property. Beacon has asserted that the Preapproval will cause Canadian Tire's focus to be on addressing Contamination on Canadian Tire's property and the City's property, such that it will be unable to concurrently deal with any Contamination affecting Beacon's property. Beacon did not present any evidence in support of that contention, made without reference to evidence at paragraph 85 of Beacon's submissions.

[81] Furthermore, Beacon argued that Canadian Tire had extensive resources, undermining its argument that Canadian Tire lacked the resources to address the Contamination affecting Beacon's property at the same time as the Contamination affecting Canadian Tire's property and the City's property. Beacon also argued that Canadian Tire has a potential purchaser in line to buy the property, which calls into question Beacon's assertion that Canadian Tire would not be motivated to address any Contamination affecting Beacon's property, if the Preapproval remains in effect.

[82] As a result, all of the prejudices that Beacon relates to delayed delineation and remediation of any Contamination at its property cannot be related to the Preapproval. The state of affairs with respect to any Contamination at Beacon's property remains exactly the same after the Preapproval as it was beforehand: the area is likely contaminated and Canadian Tire, while a "responsible person" is not required to delineate or remediate it on any particular timeframe. Furthermore, the Director could impose a remediation order on Canadian Tire at any time, just as was the case before the Preapproval was issued. Just as before the Preapproval, Beacon is not responsible for the delineation or remediation of any Contamination on its property that originated from Canadian Tire's property.

[83] Furthermore, I agree with Canadian Tire, that the Preapproval does not address whether Canadian Tire has compensated Beacon for "reasonable expenses" associated with the portion of the Contamination that may exist on Beacon's property, either under the *Act* or under any agreement. The Preapproval leaves open the question of Canadian Tire's attempts to access Beacon's property, and any conditions associated with that access. This is the same state of affairs as existed before the Preapproval.

[84] I note that no party has argued that the remediation of Contamination at Canadian Tire's property and the City's property could affect any Contamination present at Beacon's property. The only evidence, beyond any assertion, is that the Contamination is stable. This is analogous to that consideration in *Burnaby 2016* and, like in *Burnaby 2016*, gives rise to no prejudice on the part of the Appellant.

[85] Furthermore, as described in *Burnaby 2016*, Beacon retains the ability to appeal any Certificate that may be issued for the remediation at its property, if Beacon is "aggrieved" by such a Certificate. Although in this case, unlike in *Burnaby 2016*, there is no concurrent right of appeal, that does not alter that Beacon will have a right of appeal with respect to any Certificate that may be issued, relating to Beacon's property, if it is "aggrieved" by it.

[86] For these reasons, I conclude that Beacon is not "aggrieved" by the Preapproval within the meaning of section 100 of the *Act*.

3. Should the appeal be dismissed?

[87] I have already concluded that, while the Preapproval is a "decision" under the *Act*, Beacon is not a "person aggrieved" by that decision. As a result, Beacon lacks the standing required to appeal the Preapproval to the Board.

[88] None of the parties argue that I should not dismiss the appeal, if I conclude that Beacon lacks the standing to appeal.

[89] Section 31(1)(a) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (the "*ATA*") allows the Board to dismiss appeals on a preliminary basis, where the appeal is not within its jurisdiction.[14] This section of the *ATA* applies to the Board, as described in section 93.1(d) of the *Act*.

[90] I find that the appeal is not within the jurisdiction of the Board because Beacon, the only appellant, lacks the standing to advance the appeal. For this reason, absent any convincing explanation why I should not do so, I conclude that it is appropriate to dismiss the appeal under section 31(1)(a) of the *ATA*. Section 31(2) requires that the parties have the opportunity to make written submissions or otherwise be heard before I dismiss the appeal. The parties have had this opportunity.

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[14] The *ATA* uses the term "application" instead of "appeal"; however, it defines applications to include appeals.

CONCLUSION

[91] For the reasons above, I grant Canadian Tire's application and dismiss the appeal.

[92] In reaching this conclusion, I have considered all evidence and submissions provided by all parties, even if they are not specifically referenced in this decision.

"Darrell Le Houillier"

Darrell Le Houillier, Chair
Environmental Appeal Board

June 1, 2022