

ALBERTA
ENVIRONMENTAL APPEAL BOARD

Decision

Date of Hearing – May 2 and 3, 2001

Date of Decision – May 14, 2001

IN THE MATTER OF Sections 84, 87, 91, 92 and 223 of the
Environmental Protection and Enhancement Act, S.A. 1992, c.E-
13.3;

-and-

IN THE MATTER OF an appeal filed on January 17, 2001, Mr.
Thomas Mudry, McCaffery Goss Mudry, on behalf of Kedon
Waste Services Ltd. and Lethbridge Regional Landfill Ltd. with
respect to Administrative Penalty No. 00/03-BOW-AP-00/34
issued on December 18, 2000, by the Director, Bow Region,
Natural Resource Service, Alberta Environment.

Cite as: *Kedon Waste Services Ltd. and Lethbridge Regional Landfill Ltd. v. Director,
Bow Region, Natural Resources Service, Alberta Environment.*

HEARING BEFORE

William A. Tilleman, Q.C., Chairman
Curt Vos, Board Member
Ted W. Best, Board Member

APPEARANCES

Appellants: Mr. Tim Waters, Mr. Don Goett, Mr. Keith Goett, Kedon Waste Services Ltd. and Lethbridge Regional Landfill, represented by Mr. Thomas Mudry, McCaffery Goss Mudry

Director: Mr. Jay Litke, Director, Bow Region, Natural Resources Service, Alberta Environment, Ms. Erika Gerlock Mr. Rick Chisholm, Alberta Environment, represented by Ms. Charlene Graham, Alberta Justice

Board Staff: Mr. Gilbert Van Nes, General Counsel and Settlement Officer, and Ms. Denise Black, Hearing Officer

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I. BACKGROUND

A. Statutory Background

[1] On December 18, 2000, the Director, Bow Region, Natural Resources Service, Alberta Environment (the “Director”) issued Administrative Penalty No. 00/30-BOW-AP-00/34 (the “Administrative Penalty”) to Kedon Waste Services Ltd. and the Lethbridge Regional Landfill Ltd. (the “Appellants”) in the amount of \$8,500 for contravening sections 213(3) and 173 of *the Environmental Protection and Enhancement Act*, S.A. 1992, c.E-13.3. The offences occurred on February 8, 2000, February 29, 2000 and April 1, 2000 at SW-4-10-21-W4th in the County of Lethbridge. The Appellants allegedly failed to have moveable windscreens at the landfill; failed to submit information on the 1999 operations of the Class II part of the landfill by March 31, 2000; failed to immediately report contraventions of the Approval 19028-00-04 and disposed waste on the lands of another person without consent.

B. Factual Background

[2] On January 16, 2001 the Environmental Appeal Board (the “Board”) received a Notice of Appeal from Mr. Thomas Mudry, of McCaffery Goss Mudry, on behalf of the Appellants appealing the Administrative Penalty. The Board acknowledged the appeal on January 16, 2001 and requested the records related to the Administrative Penalty from the Director.

[3] According to standard practice, on January 16, 2001, the Board wrote to the Natural Resources Conservation Board (the “NRCB”) and the Alberta Energy and Utilities Board (the “AEUB”) asking whether this matter had been the subject of a hearing or review under their respective Board’s legislation. The NRCB and AEUB replied in the negative.

[4] On February 12, 2001, the Board received the records from the Director and provided a copy to the Appellants. At this time, the Board also requested that the Director and the Appellants provide available dates for a hearing during the weeks of April 2 and 23, 2001. The Board received a response from the Director on February 16, 2001 providing dates and also

requesting the Board determine the specific issues to be considered at the hearing as the Notice of Appeal does not set out any specific grounds of appeal. A response was received from the Appellants on February 22, 2001, along with a request to schedule the hearing for 2 days.

[5] On March 5, 2001, the Board requested the Appellants clearly outline their grounds of appeal and identify those specific issues contained in the Administrative Penalty to which they object. In this letter, the parties were also requested to provide dates for a hearing in May, as no mutually agreeable dates for April had been provided.

[6] On March 9, 2001, the Appellants responded to the Board's March 5, 2001 letter outlining their issues and stating:

“...the specific issues my client wishes to address are as follows:

1. To the extent that the Administrative Penalty was assessed against Kedon Waste Services Ltd. (Kedon), we take the position that this was improper as Kedon was neither the owner of the subject landfill, nor was it the Approval holder for the Landfills at the date of the alleged infractions.
2. My clients take the position that “moveable windscreens” referred in the Approval are neither described nor defined. The adequacy of same is not addressed in the Approval. My clients take the position that there were moveable windscreens at the landfill as at the date of the alleged infraction.
3. With reference to counts 3 and 4, my clients take the position and will present evidence that they did inform Alberta Environment that there were problems and the two reports could not be submitted by March 31, 2000, but the delay would not be a lengthy one, and a brief delay was agreed to by a representative of Alberta Environment.
4. With reference to count 6, my clients take the position that the provisions of the Approval override sections 173 and 168.2. The Approval specifically contemplates the reality of windblown litter leaving the site given the extremely windy conditions that exist in Lethbridge. The Approval indicates that LRL is to attempt to control litter, and LRL says that on the date of the alleged infraction, it was taking all reasonable steps to control the litter.

My clients further take the position that there is no evidence that the litter on the adjacent landowner's land came from the Landfill, and will present evidence that the litter could have easily come from other sources or locations.

Finally, as a matter of law, my clients take the position that section 168.2 of the *Act* is vague, ambiguous and incapable of being enforced. In addition, my clients take the position that sections 168.2 and 173 read together offend the Charter of Rights and Freedoms and are therefore unconstitutional. My clients also say that sections 168.2 and 173 do not apply to landfills.

5. As for count 5, my clients say that there was no infraction with respect to count 2 and therefore, no requirement to report anything. With respect to counts 3 and 4, my clients take the position that they did report the upcoming technical infractions in advance of obtained consent to same.”

[7] In consultation with the parties, the Board scheduled the hearing for May 2, 2001 in Calgary with a notice to affected parties published in the Lethbridge Herald. No persons other than the parties to this appeal notified the Board of their intention to participate in the appeal process. A news release was also issued and distributed to 95 daily newspapers, radio stations and television stations within Alberta. In its letter of March 13, 2001 to the parties, the Board also advised that it would make a determination of the issues to be dealt with at the hearing.

[8] On March 21, 2001, based on the request of the Appellant, the Board agreed to add a second day for the hearing and confirmed that the hearing would be held on May 2 and 3, 2001.

[9] The Director provided notice to the Board of his objection to the Appellants issue regarding the Charter of Rights and Freedom stating:

“The Board’s authority in matters such as this is to ‘confirm, reverse or vary the decision appealed and make any decision that the Director whose decision was appealed could make (s.90 of EPEA)’. It is submitted that the Director cannot make a determination of the constitutionality of a provision of the *Act*. As such, neither can the Board. All the Director can do is interpret and apply the provisions of the *Act*, therefore, that it the role of the Board, pursuant to s. 90, has.”

[10] On March 28, 2001, the Board wrote to the parties advising that the preliminary motion would be heard the morning of May 2, 2001 and stated:

“...the Board would like the parties to address the following questions with respect to the preliminary matter:

1. Is the Board precluded from dealing with the constitutional question raised by Mr. Murdy? In dealing with this question, the Board would like the parties to address, among other arguments the parties may wish to raise, the cases:
 - a. *Director, Prairie Region, Environmental Service, Alberta Environment v. Environmental Appeal Board and McCain Foods (Canada) Ltd.* (2000), 22 C.E.L.R. (N.S.) 258 (Alta.Q.B.);
 - b. *Douglas/Kwentlen Faculty Association v. Douglas College* [1990] 3 S.C.R. 570;

- c. *Cuddy Chicks Ltd. v. Ontario Labour Relations Board* [1991] 81 D.L.R. (4th) 121 (S.C.C.);
 - d. *Canada (Employment and Immigration) v. Tetreault Goboury* [1991] 2 S.C.R. 22; and
 - e. *Paul v. British Columbia Forest Appeals Commission* (1999), 31 C.E.L.R. (N.S.) 141 (B.C.S.C.).
2. Assuming the Board has the jurisdiction to deal with a constitutional question, should it deal with this question?
 3. Assuming the Board has the jurisdiction to deal with the constitutional question and assuming the Board should deal with the question, are the challenged provisions unconstitutional? In dealing with this question, the Board would like the parties to address, among other arguments the parties may wish to raise, the issues of:
 - a. Is it possible for the Board to interpret the provisions in such a manner that they are constitutional?
 - b. If the Board determines the provisions are unconstitutional what remedy should be granted?"

The Board also requested the Appellants comply with section 25 of the *Judicature Act*.¹

[11] With reference to the merits of the hearing, the Board determined it wanted to hear arguments on the following issues:

“In this regard, the Board would like the parties to address the following issues:

1. Is Kedon properly named as a party in the Administrative Penalty?
2. Did Kedon contravene section 4.1.9(c) of the Approval with respect to movable windscreens? And if so, is it a valid defense to argue that moveable windscreens are not described, defined or otherwise adequately addressed in the Approval?
3. Did Kedon contravene sections 4.2.9 and 4.4.10 of the Approval with respect to filing two reports? And if so, is it a valid defense to argue that Kedon informed Alberta Environment “... that there were problems and the two reports could not be submitted by March 31, 2000 ... and a brief delay was agreed to by Alberta Environment”?
4. Did Kedon contravene section 2.1.1 of the Approval by failing to report contraventions of sections 4.1.9(c), 4.2.9, and 4.4.10 of the Approval?
5. Did Kedon contravene section 173 of the Act by depositing waste on the land of another person without consent? And if so, is it a valid defense to

argues that the Approval overrides section 173 and 168.2 of the Act and that sections 173 and 168.2 do not apply to landfills?”

Parties were also requested to provide their written submissions and exhibits to the Board in relation to the hearing.

[12] The Board received a letter from the Appellants advising that they wished to pursue mediation and requested the Director provide his comments. On March 29, 2001, the Director advised that it wished to proceed directly to a hearing.

[13] On April 4, 2001, the Appellants advised the Board that it would not be pursuing the constitutional argument. In response, the Board reiterated the issues that it would hear at the hearing on the merits of the appeal as stated in paragraph 11 above.

II. HEARING

[14] Submissions were received from the Director and the Appellants and the hearing commenced on May 2, 2001. Part way through the second day of the hearing, the parties asked for an adjournment to pursue a settlement. The Board granted the adjournment and encouraged the parties to work towards an agreement beginning that afternoon. Several hours later, the parties advised the Board that they had reached a settlement, a copy of which is appended as page 7 to this Decision.

III. DECISION

[15] Pursuant to sections 90(3)(a) and 12(2) of the Environmental Appeal Board Regulation, A.R. 114/93, the Board confirms the parties agreement, set out on page 7 of this Decision. With respect to Notice of Administrative Penalty 00/30-BOW-AP-00/34, the Board concludes:

1. Count 2 is confirmed with a penalty of \$1500.00;
2. Count 3 is confirmed with a penalty of \$1000.00;
3. Count 4 is confirmed with a penalty of \$1000.00;
4. Counts 5 and 6 are withdrawn; and

5. Factors are assessed at plus \$500.00, for a total Administrative Penalty of \$4000.00.

[16] No costs were requested in the agreement and, therefore, no costs are awarded. Each party shall bear their own costs.

[17] The Board is pleased that the parties were able to reach a settlement agreement with respect this appeal.

Dated on May 14, 2001, at Edmonton, Alberta.

"original signed by"

William A. Tilleman, Q.C., Chairman

"original signed by"

Curt Vos

"original signed by"

Ted W. Best

- ¹ Section 25 of the Judicature Act, S.A. 1980, c.J-1, states:
- 25(1) If in a proceeding the constitutional validity of an enactment of the Parliament of Canada or of the Legislature of Alberta is brought into question, the enactment shall not be held to be invalid unless 14 days' written notice has been given to the Attorney General for Canada and the Minister of Justice and Attorney General for Alberta.
 - (2) When in a proceeding a question arises as to whether an enactment of the Parliament of Canada or the Legislature of Alberta is the appropriate legislation applying to or governing any matter or issue, no decision may be made on it unless 14 days' written notice has been given to the Minister of Justice and Attorney General for Alberta and the Attorney General of Canada.
 - (2.1) The notice shall include what enactment or part of an enactment is in question and give reasonable particulars of the proposed argument.
 - (3) The Attorney General for Canada and the Minister of Justice and Attorney General for Alberta are entitled as of right to be heard, either in person or by counsel, notwithstanding that the Crown is not a party to the proceeding.
 - (4) No person other than the Minister of Justice and Attorney General for Alberta or counsel designated by him shall, on behalf of Her Majesty in right of Alberta or on behalf of an agent of Her Majesty in right of Alberta, appear and participate in any proceeding within or outside Alberta in respect of a question referred to in subsection (1) or (2).
 - (5) If the Minister of Justice and Attorney General for Alberta or counsel designated by him appears in a proceeding within Alberta in respect of a question referred to in subsection (1) or (2), the Minister of Justice and Attorney General for Alberta is deemed to be a party to the proceeding for the purpose of an appeal from an adjudication in respect of that question and has the same rights with respect to an appeal as any other party to the proceeding.