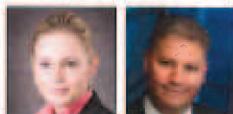
Focus ENVIRONMENTAL LAW

A victory of substance over form in B.C.



Una Radoja
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On July 17, the British Columbia Environmental Appeal Board ruled in an appeal by a landowner of a decision of a director, pursuant to the *Environmental Management Act*, where the director had refused to issue certificates of compliance (CoC) for two commercial properties in Greater Vancouver and required resubmission of the appellant's entire CoC application. The board overturned the director's decision and ordered the director to issue the CoCs.

A CoC confirms that environmental contamination at a site has been remediated to applicable standards, or the related risk addressed. It is therefore the key instrument sought from the Ministry of Environment following remediation of a site. The case clarifies the prerequisites for issuance of CoCs and the Ministry's powers related thereto.

The facts giving rise to the appeal were as follows: The appellant was the owner of a commercial property which had been contaminated by a dry-cleaning solvent known as PCE. The appellant remediated its property as well as a portion of a neighbouring property, known as the "management area," which had been impacted by migration of PCE.

> "The board's decision in this case confirms that the director does not have unfettered discretion to refuse to issue a [certificate of compliance].
>
> **Una Radoja and Richard Bereti**
> Harper Grey LLP

In October 2009, the appellant applied for CoCs for its property and the management area. In July 2011, the director issued draft CoCs to the appellant. Before the CoCs were finalized, the owner of the management area completed a detailed site investigation (DSI) on its lands and discovered concentrations of PCE in groundwater above the applicable (aquatic life) standard in three monitoring wells on its property outside of the management area. The exceedances were found at depths of more than 30 metres below ground. The neighbouring property owner submitted this data to the director. On February 8 of last year, the director rejected the appellant's application and required resubmission of the entire CoC application based on current, more stringent standards not in place when the application was made.

In the opinion of the director, the three off-site exceedances discovered by the neighbour meant that the appellant had failed to properly delineate, vertically and horizontally, the PCE contamination which had migrated from the appellant's site. Furthermore, in light of these off-site exceedances, the director was no longer satisfied that all of the PCE contamination at the appellant's site and the management area, at depths below 30 metres below ground, had been fully remediated. Finally, the director determined that the CoC application was deficient because the appellant had failed to submit a proper DSI report in support of the application. The director rejected the application.

In allowing the appeal and ordering the director to issue the CoCs, the board concluded that the appellant had completed a proper delineation of the PCE contamination at its property and the management area in accordance with the standards and requirements in place at the time the application was made. The board disagreed with the director that the presence of three isolated exceedances in the very deep groundwater, outside of the area for which the CoCs were being sought, automatically meant that the appellant had failed to complete a proper delineation. According to the board, the investigative standard is not one of perfection, but rather one of reasonableness. Based on expert evidence presented, the appellant's delineation met that standard.

Furthermore, according to the board, the presence of three minor PCE exceedances off-site did not impugn the quality of the appellant's remediation of its property or the management area, given the nature and scope of the remedial effort (i.e., massive excavation followed by further *in situ* treatment) and the totality of the confirmatory data presented.

With respect to the issue of a lack of a DSI, the board held that, absent an order, there is no legal requirement that a DSI be completed and a DSI report submitted in support of a CoC application. In any event, in the opinion of the board, the appellant had completed a proper DSI and submitted a DSI report, notwithstanding the fact that the "report" consisted of several documents, and did not bear the title "detailed site investigation." In the board's view, substance over form ought to prevail in adjudication of CoC applications.

Ultimately, since all legal requirements for issuance of CoCs were met, the board ordered the director to issue the CoCs.

The board's decision in this case confirms that the director does not have unfettered discretion to refuse to issue a CoC. Mere presence of off-site contamination, however isolated and minor, will not, in every case, form sufficient basis for a director to reject an application. If the legal and technical requirements for issuance of a CoC, in place at the time the application was made, have been met, based on an investigative and remedial standard of reasonableness, the director must issue the CoC, notwithstanding the presence of off-site contamination.

Una Radoja and Richard Bereti, Harper Grey LLP, acted for the successful party in this case and focus their respective practices on environmental matters.

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Pipeline: The future of oil transportation

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not justify its infringement of Sinclair's *Charter* rights because the criteria set out in s. 55.2 of the act (namely, whether she is "directly affected" by Enbridge's application) is vague and arbitrary. The applicants further contend that requiring parties to submit the Line 9B application form and limiting the content of their submissions are an unreasonable and unconstitutional exercise of the board's powers. They are seeking a declaration that s. 55.2 is unconstitutional and of no force and effect, along with an order quashing the decision to require the Line 9B application form, and an injunction restraining the board from making its recommendation on Line 9B until the FCC disposes of their application.

While the respondents have yet to file their response, Minister of Natural Resources Joe Oliver has defended the enactment of s. 55.2 and the new application form, arguing that they were required to "focus submissions" and stop groups like ForestEthics from using the board's review process as "a tool to delay decisions." He also contends that the board wanted to avoid a repeat of the Northern Gateway hearings where, according to Oliver, large numbers of people signed up to speak but only a third actually showed up.

Regardless of its outcome, the action commenced by ForestEthics and Sinclair is emblematic of a larger dialogue happening across the country between government, industry and citizens over the future of petroleum transportation in Canada. The tragedy of Lac Mégantic, and the proposed Northern Gateway and Keystone XL pipelines have all brought this issue to the national spotlight, and the forthcoming decisions of the federal cabinet will undoubtedly shape the direction that petroleum transportation will take in Canada for many years to come.

Carlos Mendes is an associate in the Vancouver office of Davis LLP where he practises general corporate commercial and real estate law. His practice includes mergers and acquisitions, commercial leasing, and general commercial, environmental, and municipal matters.