Environmental Appeal Board

Fourth Floor 747 Fort Street
Victoria British Columbia
Telephone: (250) 387-3464
Facsimile: (250) 356-9923

Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1

Website: www.eab.gov.bc.ca
E-mail: eabinfo@gov.bc.ca

DECISION NO. 2013-EMA-002(c)

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

BETWEEN:	Seaspan ULC	**APPELLANT**
AND:	Director, *Environmental Management Act*	**RESPONDENT**
AND:	Domtar Inc.	**THIRD PARTY**
AND:	Fibreco Export Inc. and 602534 BC Ltd.	**THIRD PARTIES**
AND:	Attorney General of British Columbia	**THIRD PARTY**
AND:	Vancouver Fraser Port Authority	**THIRD PARTY**
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE:	Conducted by way of written submissions concluding on April 19, 2013	

APPEARING:	For the Appellant:	Robert W. Hunter, Counsel Ryan D.W. Dalziel, Counsel
	For the Respondent:	Dennis Doyle, Counsel
	For the Third Parties:	
	Domtar Inc.	Gary A. Letcher, Counsel Andrea C. Akelaitis, Counsel Micah S. Clark
	Fibreco Parties	Janice H. Walton, Counsel
	Vancouver Fraser Port Authority	Nicholas R. Hughes, Counsel
	Attorney General of BC	Nancy E. Brown, Counsel

APPEAL

[1] This is an appeal by Seaspan ULC ("Seaspan") against a January 8, 2013 decision (the "Decision") made by Alan W. McCammon, a Delegate of the Director, *Environmental Management Act* (the "Director"), Ministry of Environment. In his Decision, the Director accepted Seaspan's November 2011 site remediation plan and, at the same time, the Director also accepted a site remediation plan filed by Domtar Inc. ("Domtar"). Both plans were submitted in accordance with a February

16, 2010 Remediation Order (the "Remediation Order"). Seaspan maintains that the Director committed an error of law and jurisdiction by accepting both plans, yet requiring a single plan to be implemented at the site.

[2] In a preliminary decision dated March 6, 2013, the Board granted an application by Seaspan to have this appeal heard separately from other related appeals scheduled to be heard in the Fall of 2013 (see *Seaspan ULC v. Director*, *Environmental Management Act*, Decision No. 2013-EMA-002(a); [2013] B.C.E.A. No. 3 (Q.L.)). The Board granted Seaspan's application on the following terms:

- The hearing will be limited solely to the questions of law set out in Seaspan's Notice of Appeal.
- The hearing will be conducted on an expedited basis, in writing, to ensure that the matter can be completed in sufficient time for all parties to prepare for the Fall hearing.
- The Board commits to releasing its decision on the appeal expeditiously.
- The Board will hear the appeal as suggested by Seaspan, akin to an appellate court by reviewing the Director's actions for an error of law only.
- The appeal will be decided on the basis of written legal arguments, no evidence will be accepted. If it becomes evident that evidence is required, the Board may cancel the written hearing and hear the appeal with the others during the Fall.

[3] The Board's powers on an appeal are set out in section 103 of the *Environmental Management Act* (the "*Act*") which states that, on an appeal, the Board may:

> (a) send the matter back to the person who made the decision, with directions,
>
> (b) confirm, reverse or vary the decision being appealed, or
>
> (c) make any decision that the person whose decision is appealed could have made, and that the appeal board considers appropriate in the circumstances.

[4] Seaspan asks the Board to vacate the Decision and send the matter back to the Director with directions to determine which of the two site remediation plans should be implemented.

[5] On April 24, 2013, the Board granted an application by Seaspan for a stay of part of the Decision pending this decision of the Board on the merits of Seaspan's appeal (see *Seaspan ULC v. Director*, *Environmental Management Act*, Decision No. 2013-EMA-002(b), (unreported)).

Preliminary question of jurisdiction

[6] Within the written submissions made by the Director on this appeal, the Director challenged the Board's jurisdiction to hear Seaspan's appeal at all. The

Director submits that the part of the Decision relating to his acceptance of remediation plans does not give rise to a right of appeal under the *Act*. Specifically, he submits that Seaspan does not have standing as "a person aggrieved" under section 100(1) of the *Act*. Further, the Director submits that the Decision itself is not appealable under section 99 of the *Act*. Therefore, the Director submits that the appeal should be dismissed as being outside of the scope of the Board's jurisdiction. The Director's application will be addressed as the first issue in the appeal.

BACKGROUND

[7] The Decision under appeal came about as a result of certain requirements in the 2010 Remediation Order. To appreciate the issues in this appeal, it is therefore important to understand the circumstances leading up to the Remediation Order, the requirements in the Remediation Order that resulted in the submission of two remediation plans, and the contentious portions of the Director's Decision itself.

The Remediation Order

[8] The Remediation Order was issued to both Seaspan and Domtar as "responsible persons" under the *Act*. The order required them to address contamination found on various parcels of land and a water lot located in the District of North Vancouver and collectively referred to as "the Site".

[9] Domtar previously owned one of the parcels where it operated a wood preserving facility from 1923 to 1965; Seaspan bought that parcel for its shipyard activities in 1965, and is the current owner. Seaspan leases other parcels at the Site from either the Vancouver Fraser Port Authority (the "Port"), or the District of North Vancouver. Seaspan uses those parcels for shipbuilding and ship repair activities.

[10] One parcel of the Site that also falls under the Remediation Order is occupied by Fibreco Export Inc. ("Fibreco"). The Port, Fibreco and Domtar are all Third Parties to this appeal.

[11] The contamination that is the subject of the Remediation Order consists of "creosote and creosote-derived substances in non-aqueous phase liquid (NAPL) and dissolved forms together with metal and organometal substances", resulting from Domtar's historical wood preserving activities on part of the Site and Seaspan's shipyard activities. The Director describes the Site as being "the source of serious contamination and significant environmental protection concerns."

[12] The Ministry was originally notified of the contamination in 1995. In 1997, Seaspan informed the Ministry that it would be working with Domtar "in order to move this matter forward." Since that time, the contamination has been the subject of various investigations and reports. However, these two parties were never able to agree on a remedial solution. As a result, in 2010, the Director issued the Remediation Order. In his Reasons for the order, he states:

> 11. While the parties have received considerable regulatory prompting and committed resources to investigation and remediation planning, they have been unable, in the absence of legal compulsion,

> to produce a final remediation plan and begin the necessary remediation work.
>
> 12. From an environmental protection standpoint, the key components of an effective remediation plan were identified as early as 2002. ….

Remediation plan requirements in the Order

[13] Part 3 of the Remediation Order establishes the remediation requirements imposed by the Director.

[14] Requirement 1 is titled "Amend and finalize Site remediation plan". Requirement 1(a) states that the responsible persons are required to "Amend the Site remediation plans submitted by Domtar and Seaspan dated December 13, 2002, September 3, 2004, and March 2006." The Director then sets out a detailed list of the additional plans, investigations and information required for the amended plan, as well as the applicable standards to be met.

[15] Requirement 1(b) provides the responsible persons with an option to propose "alternative remediation methods" in the amended plan:

> (b) If desired, propose as part of amending the Site remediation plan, alternative remediation methods than those currently proposed for containment and control of mobile NAPL and dissolved substances, for consideration by the director. An alternative will only be approved if the director is satisfied that the plan (i) complies with the requirements of the Environmental Management Act including EMA s. 56, the Contaminated Sites Regulation and this Order, (ii) provides equal or superior environmental protection to the remediation methods previously selected, and (iii) can be implemented within the same time frame than the currently proposed remediation methods.

[16] Requirement 1(d) requires the responsible parties to prepare and submit the final site remediation plan to the Director by a specified date.

[17] Implementation of the remediation plan is covered in Requirement 2 of the Remediation Order. It states:

> The responsible persons shall implement the final Site remediation plan subject to any conditions imposed by the director.

Compliance with these requirements

[18] Seaspan and Domtar each submitted an alternative remedial approach under Requirement 1(b). In a decision dated July 15, 2011, the Director concluded that these plans did not meet the requirements of the Remediation Order, and rejected the plans. The Director also stated:

> In 2010, rather than jointly amending and finalizing a single Site remediation plan, the responsible persons chose to avail themselves of the opportunity to propose alternative remediation methods than those embodied in the 2002-2006 plans and to prepare different, separate Site remediation plans.

> As stated in my letter of clarification to the parties dated April 8, 2010, I have been consistently seeking the preparation, finalization and implementation of a single comprehensive and effective remediation plan for the Site that complies with the requirements of the *Environmental Management Act* (the "Act") and the Contaminated Sites Regulation (the "Regulation").

[19] Consequently, the Director determined that he would no longer consider alternative remediation methods: the parties would have to submit an amended plan as required under 1(a).

[20] On September 12, 2011, the Director amended the Remediation Order to set out a new timeline for the submission of "the amended Site remediation plan". At that time, he reiterated that he was seeking a single, finalized and implementable remediation plan.

[21] In a letter dated October 21, 2011, the Director advised Seaspan and Domtar as follows: "If I receive two, separate final Site remediation plans …, I will proceed to review them and select the superior one, from an environmental and human health protection perspective …".

The Decision

[22] Despite efforts to produce a single plan, Seaspan and Domtar ultimately submitted separate final remediation plans in November of 2011 for the Director's consideration. In the Decision, the Director decided that both plans were eligible for consideration. He states:

> Despite assertions to the contrary, and acknowledging that there are cost ramifications to the remediation plan differences, I find both remediation plans to be fundamentally consistent with the 2002-06 Plans and therefore both eligible for consideration in response to Remediation Requirement 1(a) of the Order. (page 8)

[23] The Director goes on to state:

> During the course of my reviews, I was once again reminded of the Order's highest priority for Site remediation – implementation of <u>action</u> to eliminate unacceptable risks at the Site – a priority that reflects the ministry's principal mandate to protect human health and the environment. Given my focus on these primary responsibilities, I am not prepared to also be the arbiter to settle the ongoing disagreements between Domtar and Seaspan. Provincial contaminated sites legislation recognizes the challenges in determining shares of responsibility and includes provisions designed to assist with resolution such as allocation panels and perhaps more importantly a statutory cause of action for recovery of remediation costs. The legislation also signals, in the provisions related to remediation orders for example, the importance of environmental protection over and above the final assignment of shares of remediation responsibility. In other words, the legislation facilitates an approach which can expedite remediation at complex sites and allow the final cost allocation to be determined afterwards.

> Having carefully considered the submissions before me, it is my conclusion that implementation of either plan would be capable of meeting the environmental protection objectives of the Order.
>
> [Emphasis in original]

[24] The Director concludes:

> Therefore, it is my decision to accept both plans and to leave it to the responsible persons to decide which plan will be implemented in accordance with the remaining requirements of the Order.

[25] Under the heading "Implications of Decision and Next Steps", the Director states:

> As a result of the above decision, Remediation Requirement 2 of the Order (remediation plan implementation) is now in effect.
>
> …
>
> In addition to confirming for me which remediation plan will be implemented at the Site, the responsible persons are required to comprehensively update the remediation plan schedule to adjust for the time that has passed since initial submission.

[26] New and revised "due dates" for certain schedules and reports were also included in the Decision.

Seaspan's appeal

[27] Seaspan lists three grounds for appealing the Director's decision. It states that the Director erred:

1. by producing an order that was fundamentally deficient and contrary to s. 48(2) [of the *Environmental Management Act*], in that it failed to stipulate the remediation to be undertaken, leaving it instead to the agreement of the parties;
2. by producing an incoherent and internally contradictory order, in that it required implementation of a "final Site remediation plan" that had not yet been selected; and
3. by producing an order that is unreasonable in that it is incapable of implementation absent agreement between Domtar and Seaspan as to the appropriate terms of a remediation plan; and is intended to compel the parties to reach a timely agreement notwithstanding that the Director has no jurisdiction to order the parties to negotiate and reach an agreement.

[28] Seaspan asks the Board to vacate the offending parts of the Decision and send the matter back to the Director with directions to determine which of the two site remediation plans should be implemented; specifically, which of the plans best constitutes a "permanent solution" as advocated under section 56 of the *Act*. That plan may then be the subject of an order requiring implementation under section 48.

[29] The Director challenges the Board's jurisdiction over the appeal, asking for it to be dismissed as a preliminary matter. However, if the Board has jurisdiction, the Director, Domtar, and Fibreco each submit that the Decision should be upheld, and Seaspan's appeal dismissed.

[30] The Port did not provide any submissions on the merits of the appeal.

[31] The Attorney General of British Columbia was added as a Third Party to this appeal, but its main interest is in the appeals of the Remediation Order (to be heard in the Fall) where a constitutional question has been raised. It takes no position on the merits of this appeal.

ISSUES

[32] The issues to be determined are as follows:

1) Does the Board have jurisdiction over Seaspan's appeal?
2) If so, did the Director commit an error of law by approving two remediation plans which then required the responsible persons to negotiate the implementation of one of those plans and begin implementing that plan.

RELEVANT LEGISLATION

[33] The relevant sections of the *Act* will be set out in the Panel's discussion and analysis of the particular issues, as required.

DISCUSSION AND ANALYSIS

1. Does the Board have jurisdiction over Seaspan's appeal?

The Director's Submissions

[34] The Director challenges the Board's jurisdiction over Seaspan's appeal on two grounds. First, the Director submits that Seaspan does not have standing to appeal on the grounds identified because it is not "a person aggrieved" within the meaning of section 100 of the *Act*. Section 100(1) states:

> **100** (1) A person aggrieved by a decision of a director or a district director may appeal the decision to the appeal board in accordance with this Division.
>
> ...
>
> [Emphasis added]

[35] Over the years, the test applied by the Board to determine whether an appellant is "a person aggrieved" is "whether the person has a genuine grievance because an order has been made which prejudicially affects his or her interests." None of the parties challenge the applicability of this test to the present case.

[36] The Director submits that Seaspan cannot be "a person aggrieved" because the Decision that it seeks to appeal is one that "allows it to implement its own plan of remediation in response to the February 16, 2010 Remediation Order."

[37] In support, the Director cites the Board's decision in *427958 BC Ltd. (dba Super Save Group of Companies) v. Deputy Director of Waste Management et al*, Decision No. 2004-WAS-007(a), November 2, 2004); [2004] B.C.E.A. No. 37 (Q.L.) [*Super Save*]. The Director submits that, in *Super Save*, the Board found that the appellant in that case (Super Save) was not "a person aggrieved" by the issuance of an approval in principle ("AIP") authorizing a responsible person to implement a remediation plan submitted by that responsible person.

[38] The Director's second jurisdictional argument is that he did not make an appealable "decision". The Director notes that not every decision is appealable. To be "a decision of a director" that is appealable under section 100(1) of the *Act*, the decision must fit within the definition of "decision" under section 99 of the *Act*:

Definition of "decision"

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

(a) making an order,

(b) imposing a requirement,

(c) exercising a power except a power of delegation,

(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.

[39] The Director submits that the parts of the Decision that Seaspan seeks to appeal do not fall within any of these categories. Although the Remediation Order was "the making of an order", the Decision is not an order. Further, whereas the Remediation Order "imposed a requirement", the Decision does not do so within the meaning of section 99(b) of the *Act*.

[40] Regarding the latter, the Director submits that the parts of the Decision at issue are not "requirements" because they do not create obligations; they only identify actions that may be taken to satisfy Seaspan's obligations under the earlier Remediation Order. In support for this point, the Director quotes from the Board's decision in *BC Hydro and Power Authority v. Director, Environmental Management Act*, Decision No. 2006-EMA-008(a), June 5, 2007; [2007] B.C.E.A. No. 6 (Q.L.) [*BC Hydro*]. In that case, the issue was whether a decision to amend an AIP was appealable. The Board found that the director's review and approval of a plan was not a requirement. It found as follows:

> It is also clear from the relevant provisions that the conditions or requirements are specified or imposed by a director unilaterally. An applicant submits their remediation plan to the director for approval, and the director reviews the plan. The director may approve the plan or not, and approval may be subject to the conditions that the director specifies. The applicant's agreement with any conditions specified by the director is not required. … . [Emphasis added]

[41] In *BC Hydro*, the Board concluded that the amended AIP was not "the imposition of a requirement", and did not meet any of the other subsections of the definition of decision. The appeal was dismissed. Similarly, the Director submits that the Board should dismiss Seaspan's appeal.

Seaspan's Submissions

[42] Seaspan submits that the Director's position on whether there has been a "decision" under section 99 of the *Act* is incorrect. It submits that the Decision does indeed impose a requirement, and does so expressly. The Decision states that Remediation Requirement 2 "is now in effect"; previously, it was not in effect. Seaspan argues that it is now subject to a new requirement to implement a remediation plan. In its view, that is enough to create a "decision" that is capable of being appealed.

[43] Seaspan further argues that the decision has legal consequences and is final in nature, two factors that have been previously accepted by the Board as relevant to a decision under section 99 and 100 of the *Act* (see *BCR Properties Ltd. v. Manager, Risk Assessment and Remediation*, Decision No. 2011-EMA-004(a), November 10, 2011; [2011] B.C.E.A. No. 19 (Q.L.)).

[44] Seaspan distinguishes the *BC Hydro* case relied upon by the Director, and submits that it should not be applied to this case.

[45] On the question of its standing to appeal as "a person aggrieved", Seaspan points out that, when it submitted its plan for approval, it sought approval of its plan at the expense of Domtar's plan. In other words, it sought approval for its plan and the rejection of Domtar's plan. Seaspan argues that the approval of both plans is counter to its interests.

[46] Seaspan also submits that the *Super Save* case relied upon by the Director regarding standing is distinguishable; moreover, the Board has never found that a responsible person is not "a person aggrieved".

[47] The other parties did not make submissions on the jurisdictional question.

The Panel's Findings

(i) Standing

[48] The Director submits that Seaspan cannot be aggrieved because his Decision was to accept the very plan that Seaspan submitted for acceptance. As Seaspan is allowed to implement its plan, how can it be "aggrieved"? In support, the Director relies upon the Board's decision in *Super Save*.

[49] In *Super Save*, the Board considered whether Super Save was a "person aggrieved" under section 44 of the *Waste Management Act*, the predecessor to section 100 of the *Act*. In that case, Super Save was a neighbouring property owner attempting to challenge the director's decision to approve the AIP issued to BC Hydro. The AIP allowed BC Hydro to implement a plan to remediate three parcels of its land. Super Save was concerned that contamination had migrated from the BC Hydro properties to its lands. It appealed the AIP, alleging that potential off-site impacts should have been investigated prior to the AIP being issued.

[50] The Board found that Super Save was not "a person aggrieved". It stated as follows:

> In the present case, the Panel finds that, while Super Save may have a grievance, it is not one that directly arises from the content of the AIP, which prejudicially affects Super Save's interests. The Panel finds that, in issuing the AIP, the Deputy Director did not make a decision that prejudicially affects Super Save's interests. Rather, he made a decision that approves a plan to implement remediation on certain properties. While the Deputy Director may have been aware of the contamination on Super Save's property before he issued the AIP, he was not obligated to address that contamination in the AIP. Rather, he was required to consider whether he should approve the implementation of a proposed remediation plan for the BC Hydro Properties and the adjacent federal lands. The Panel finds that, by approving that plan, he did not prejudicially affect Super Save's interests. (page 8)

[51] Comparing the facts in *Super Save* with those in the present appeal, the Panel agrees with Seaspan that its situation is distinguishable from Super Save's. In the present appeal, Seaspan submitted one of the plans at issue, the plan relates to properties that Seaspan owns or leases, and Seaspan is subject to the Decision under appeal. While the Director is correct that, like the AIP in *Super Save*, his Decision addresses the implementation of a plan of remediation, unlike *Super Save*, his Decision was issued directly to Seaspan.

[52] Although *Super Save* is distinguishable, the Panel must still consider whether Seaspan is a "person aggrieved" by the Decision. Of importance in this case is the fact that the Decision not only accepts Seaspan's plan, but also Domtar's plan. In the Panel's view, it is the dual nature of this acceptance that provides the main basis for Seaspan's genuine grievance. Because both plans are accepted, it places Seaspan in a position where it will have to work together with Domtar in order to determine which plan to implement, despite years of being unable to agree on a single plan. The Director was aware of the parties' inability to agree on a plan, which is why he issued the Remediation Order in the first place. As a result of the Decision, Seaspan is expected to enter another round of negotiations with Domtar when it is clear that Seaspan believes that only its plan is consistent with its interests and is best for cleaning-up the Site.

[53] Even if Seaspan is free to implement its own plan without such negotiations, Domtar is similarly free to do the same. If this occurs, it may result in delays and

may prejudice the ultimate clean-up of the Site, a Site upon which Seaspan is currently operating a business.

[54] In the circumstances, the Panel finds that Seaspan has "a genuine grievance because an order has been made which prejudicially affects his or her interests." Thus, the Panel finds that it has standing to appeal as "a person aggrieved" under section 100(1) of the *Act*.

(ii) Appealable "decision"

[55] In this case, the Director issued the Remediation Order pursuant section 48 of the *Act*. Requirement 1(a) of the Remediation Order requires the parties to amend the previous remediation plans in accordance with a detailed list of specifications set out in the order. Requirement 1(d) requires the responsible parties to prepare and submit the final Site remediation plan to the Director. Requirement 2 states that "the responsible persons shall implement the final Site remediation plan subject to any conditions imposed by the director."

[56] The parties prepared and submitted the final plans as required. The question now is whether, by accepting both plans, placing the responsibility of choosing one plan on the parties, and by bringing Requirement 2 into effect, the Director exercised any of the statutory powers identified as a "decision" under section 99 of the *Act*?

[57] Over the years, the Board has interpreted the definition of "decision" in section 99 numerous times. However, none of the previous cases are identical to this one.

[58] When the Director issued the Remediation Order in 2010, he made an appealable decision under section 99(a) – the making of an order. Within that order, he also imposed requirements under section 99(b). As stated above, one of those requirements is Requirement 2 of the Remediation Order, which states: "The responsible persons shall implement the final Site remediation plan subject to any conditions imposed by the director" [Emphasis added].

[59] The Panel finds that when the Director accepted both plans, he imposed a condition; the condition being that the parties had to choose the plan to be implemented. In effect, he said to the parties that, "I will accept both plans on the condition that you decide amongst yourselves which one will be implemented."

[60] Unlike other cases where the jurisdictional issue before the Board involves an amendment to an order or AIP, neither of which is appealable under section 99, the Decision was contemplated by, and occurred as one of the steps within the context of, the Remediation Order itself. Thus, the Panel finds that the Decision constitutes a condition, or a requirement, imposed by the Director as part of the Remediation Order – even though it was imposed three years later. It is therefore appealable under subsection 99(e), "including a requirement or a condition in an order ...".

[61] In answer to Issue #1, the Panel finds that it has jurisdiction over Seaspan's appeal.

2. Did the Director commit an error of law by approving two remediation plans which then required the responsible persons to

negotiate the implementation of one of those plans and begin implementing that plan.

Seaspan's Submissions

[62] As stated earlier, Seaspan argues that the Director erred in law as follows:

1. by producing an order that was fundamentally deficient and contrary to section 48(2) of the *Act* (set out below), in that it failed to stipulate the remediation to be undertaken, leaving it instead to the agreement of the parties;
2. by producing an incoherent and internally contradictory order, in that it required implementation of a "final Site remediation plan" that had not yet been selected; and
3. by producing an order that is unreasonable in that it is incapable of implementation absent agreement between Domtar and Seaspan as to the appropriate terms of a remediation plan, and it is intended to compel the parties to reach a timely agreement notwithstanding that the Director has no jurisdiction to order the parties to negotiate and reach an agreement.

[63] Seaspan submits that administrative decision-makers must act within the statutory authority given to them by the Legislature, and may not exercise authority not specifically assigned to them: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190; 2008 SCC 9 [*Dunsmuir*] (at para. 29). Accordingly, if the Decision took the Director outside of the authority given to him by the *Act*, his decision must be vacated to that extent.

[64] Seaspan also submits that a decision-maker must exercise his or her statutory powers reasonably. In *Dunsmuir*, the Supreme Court of Canada described the court's role in reviewing for reasonableness in these terms:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. (para. 47)

[65] Seaspan submits that, applying this standard, the Decision is flawed in that it both falls outside of the Director's statutory authority and, even if it is within that authority, it represents an unreasonable exercise of that authority. Seaspan submits that these flaws are clear "on the face of the decision": no assessment of evidence is required to discover them. Seaspan's full argument on both of these points (lack of statutory authority and unreasonableness) are addressed under separate headings below.

(i) The Decision is contrary to section 48 of the Act

[66] Seaspan submits that the relevant portions of section 48 do not permit a remediation order "that simultaneously accepts two remediation plans". Subsections 48(1) and (2) are as follows:

48 (1) A director may issue a remediation order to any responsible person.

(2) A remediation order may require a person referred to in subsection (1) to do any or all of the following:

(a) undertake remediation;

...

[Seaspan's emphasis]

[67] "Remediation" is defined in section 1 as follows:

> **"remediation"** means action to eliminate, limit, correct, counteract, mitigate or remove any contaminant or the adverse effects on the environment or human health of any contaminant, and includes, but is not limited to, the following:
>
> (a) preliminary site investigations, detailed site investigations, analysis and interpretation, including tests, sampling, surveys, data evaluation, risk assessment and environmental impact assessment;
>
> (b) evaluation of alternative methods of remediation;
>
> (c) preparation of a remediation plan, including a plan for any consequential or associated removal of soil or soil relocation from the site;
>
> (d) implementation of a remediation plan;
>
> (e) monitoring, verification and confirmation of whether the remediation complies with the remediation plan, applicable standards and requirements imposed by a director;
>
> (f) other activities prescribed by the minister;

[68] According to subsections (c) and (d) of this definition, remediation includes the preparation of "a remediation plan", and implementation of "a remediation plan". Seaspan submits that this choice of words indicates that the Legislature contemplated a single plan. While acknowledging that section 28(3) of the *Interpretation Act*, R.S.B.C. 1996, c. 238, provides that "in an enactment words in the singular include the plural", Seaspan points out that section 2(1) of the *Interpretation Act* also makes it clear that this can be rebutted if there is a contrary intention. Section 2(1) of the *Interpretation Act* states:

> **2**(1) Every provision of this Act applies to every enactment, whether enacted before or after the commencement of this Act, unless a contrary intention appears in this Act or in the enactment.

[69] Seaspan argues that the definition of remediation in the *Act* rebuts the "singular includes plural" presumption, by referring in subsection (e) to orders involving "monitoring, verification and confirmation of whether the remediation complies with the remediation plan", thereby confirming that the Legislature contemplated compliance with a single plan. Further, the use of the singular in subsections (c) – (e) of the definition is different from the balance of the definition, which speaks in (a) of "preliminary site investigations, detailed site investigations, analysis and interpretation, including tests, sampling, surveys, data evaluation, risk assessment and environmental impact assessment"; and in (b), of "evaluation of alternative methods of remediation" [Seaspan's emphasis]. Seaspan concludes:

> Clearly, when the Legislature contemplated a range of investigative options, or evaluation of multiple alternative methods of remediation, it considered use of the plural appropriate; it then used the singular in speaking of 'a remediation plan' and 'the remediation plan' because it intended that a remediation order would refer only to one.

[70] Thus, Seaspan submits that section 48 contemplates that a remediation order will require "a person" to "undertake remediation" such as to undertake preparation of a remediation plan, or implementation of a remediation plan. Although the Director has discretion under section 48 to order a responsible person to remediate, Seaspan submits that his order must comport with the definition of "remediation" – it is not a discretion without limits or boundaries (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1992] 2 S.C.R. 817).

[71] Further, to be enforceable, Seaspan submits that the Decision must specify the action to be taken in order for it to be enforceable by administrative penalties and/or prosecution.

[72] In the present case, Seaspan argues that the Director failed to exercise his discretion within those legislated boundaries, and that he did not specify the action to be taken. His decision does not order Seaspan and Domtar to implement either of the existing plans, or a hybrid plan of the Director's making. Contrary to the definition of remediation, the Decision does not say what "action to eliminate […] contaminant[s]" is required; rather, the Decision leaves it to the responsible persons to decide the way forward. Consequently, the Decision does not specify the "remediation" to be "undertaken".

[73] Seaspan further submits that, when the Director stated that he was "not prepared to also be the arbiter to settle the ongoing disagreements between Domtar and Seaspan", he abdicated his responsibility under section 48 of the *Act*. Once the Director decided to make the Remediation Order, Seaspan submits that he was obliged to say what remediation must be undertaken. By accepting both plans without any further guidance, the Decision left the parties in the position they were in before the Decision was made; with two distinct and competing remediation plans. Seaspan submits that this is not a valid exercise of authority under section 48.

[74] Seaspan also refers to section 56 of the *Act* which states:

Selection of remediation options

56 (1) A person conducting or otherwise providing for remediation of a site must give preference to remediation alternatives that provide permanent solutions to the maximum extent practicable, taking into account the following factors:

(a) any potential for adverse effects on human health or for pollution of the environment;

(b) the technical feasibility and risks associated with alternative remediation options;

(c) remediation costs associated with alternative remediation options and the potential economic benefits, costs and effects of the remediation options;

(d) other prescribed factors.

(2) When issuing an approval in principle or a certificate of compliance, a director must consider whether permanent solutions have been given preference to the maximum extent practicable as determined in accordance with any guidelines set out in the regulations.

[75] Seaspan maintains that the principle of "permanent solutions" in section 56(1) expressly applies to the Director when issuing an AIP or a certificate of compliance under section 56(2). Although the Director properly used section 56 to guide his analysis of the various remediation options (para. 112 of his Reasons for the Remediation Order), he failed to pursue that analysis to its logical conclusion. Seaspan submits:

> The essential problem in this case is that Seaspan and Domtar disagree about how best to carry out their obligation under s. 56 to 'give preference to remediation alternatives that provide permanent solutions to the maximum extent practicable'. Since the Delegate is of the view that a remediation order is an appropriate response to that disagreement (as he concluded in February 2010), then, reading s. 48 in light of s. 56, his remediation order should set out a single plan of action that resolves the dispute by selecting the plan that 'provide[s] permanent solutions to the maximum extent practicable'.

[76] Seaspan submits that it is necessary to read section 48 in light of the context provided by the *Act* as a whole, including section 56, to understand the extent of the jurisdiction that the Legislature intended to confer on the Director. It submits that the entire statute "goes to statutory authority of jurisdiction" (*Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 352 D.L.R. (4th) 433; 2012 SCC 68, at paras. 11-13). When the Director departed from his previously emphasized approach of a single plan, Seaspan maintains that he failed to validly exercise the authority conferred upon him by section 48.

[77] Although the Director believes that he had statutory authority to make his decision, Seaspan submits that the Board owes no deference to the Director: it may substitute its view of section 48 for that of the Director. Regardless of whether Seaspan's appeal raises a "question of jurisdiction" or a question of legal error on the part of the Director, it submits that the difference is simply one of labeling. It argues that the Decision was based on an incorrect interpretation of section 48 and the definition of "remediation". It is, therefore, inconsistent with the *Act*.

(ii) The Decision is unreasonable "on its face"

[78] In addition to the statutory interpretation argument, Seaspan also submits that the Decision is unreasonable on its face. In *Dunsmuir* (quoted above), the Supreme Court of Canada stated:

> In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[79] Seaspan submits that the Decision is neither "intelligible", nor "defensible", for three reasons.

[80] First, it produces an incoherent and internally contradictory Remediation Order. The Decision states that "Remediation Requirement 2 […] is now in effect". This requirement was for the responsible persons to "implement the final Site remediation plan subject to any conditions imposed by the director". However, Seaspan submits that there is no "final Site remediation plan" to implement. Therefore, the Decision is at odds with a central premise of the Remediation Order; i.e., that there would be a single plan chosen for implementation. Even assuming that the Director had the statutory authority to provide the parties with choices in his Decision, it was unreasonable for him to do so in contradiction of other implementation requirements in the order. Seaspan submits that the Decision to bring Requirement 2 into effect, should be vacated.

[81] Second, Seaspan submits that the Decision is incapable of implementation, absent agreement of a kind that the parties are unable to reach, despite over ten years of studies, planning and effort. Although the Director was well aware of the parties' long history of failed efforts to reach agreement, he gave a deadline of February 20, 2013 for submission of an updated remediation plan schedule. Seaspan submits that this is patently unreasonable.

[82] Third, the Decision attempts to indirectly compel the parties to reach an agreement, which is beyond the Director's authority under the *Act* and supporting regulations. The effect of the Decision "is to use the prospect of penalties or prosecution to force the parties to reach agreement rapidly, lest they otherwise be alleged to have contravened the remediation order". However, there is nothing in the *Act* or the *Contaminated Sites Regulation* that gives the Director the power to coercively require responsible persons to agree. According to Seaspan, the Director is attempting to do indirectly what he could not do directly. Instead, he should have chosen a plan with any modifications that he considered appropriate, and ordered the implementation of that plan under section 48.

[83] To clarify its position, Seaspan submits that its plan is the final site remediation plan and should be recognized as such by the Director. It states that, the problem with the Director's decision is that, as a result of the wording of Requirement 1(d) and the wording of the Decision, the Director has advised Seaspan that its plan has been approved and can be implemented immediately; however, he has said the same thing to Domtar. This is unreasonable in that it is inconsistent with the Director's clear intent that there be a single plan, it is inconsistent with his prior decision-making, and this Decision results in an incoherent Remediation Order.

The Director's Submissions

[84] The Director submits that his Decision has been mischaracterized by Seaspan as a "remediation order" under section 48 of the *Act*. He submits that the Decision is not, itself, a remediation order, but rather, "the acceptance of remediation plans submitted under the requirements of an earlier Remediation Order dated February 16, 2010". This is supported by the opening paragraph of the Decision as follows:

> I have completed my detailed review of two, separate remediation plans, one submitted by Domtar and one submitted by Seaspan in response to my February 16, 2010 remediation order, as amended (the "Order"). The Order was issued to protect the environment at the above-referenced high risk contaminated site (the "Site"). This letter summarized my consideration of the remediation plans and a number of associated submissions and technical review documents. Specifically, the documents reviewed are as itemized in Section 1.5 of the Ministry Technical Review document dated September 2012 together with the expert opinions of Mr. Thomas Franz … and Dr. Alex Sy … and the most recent submissions of Domtar … and Seaspan …. This letter also communicates the decision resulting from review of the remediation plans.

[85] The Director submits that his decision to accept separate remediation plans is not contrary to section 48(2) of the *Act*, and not otherwise incoherent or incapable of implementation as asserted by Seaspan for the following reasons.

- The Director has issued only one remediation order for the Site, dated February 16, 2010, naming both Seaspan and Domtar. The Remediation Order was issued under section 48 of the *Act.*
- Requirements 1 and 2 of the Remediation Order were for the preparation and implementation of a final site remediation plan that would ensure compliance with numerical standards or risk based standards prescribed in the *Contaminated Sites Regulation*.
- Under the Remediation Order, the parties were required to submit an amended site remediation plan and "any proposed alternative remediation methods" no later than May 11, 2010. Requirement 1 was subsequently changed on September 12, 2011, to, among other things, remove (b) and to confirm that the key objective of the order was to obtain a "single, finalized and implementable Site remediation plan".

- Section 47 of the *Act* sets out the "general principles of liability for remediation". It provides that remediation obligations are both joint and separate. That is, they can be met either individually or collectively by the parties. Section 47(1) states as follows:

  > **47**(1) A person who is responsible for remediation of a contaminated site is absolutely, retroactively and jointly and separately liable to any person or government body for reasonably incurred costs of remediation of the contaminated site, whether incurred on or off the contaminated site.

- No single plan was submitted by the parties to amend and finalize the Site remediation plan previously submitted jointly by Domtar and Seaspan.
- In accordance with the principles of liability set forth in section 47 of the *Act*, in the event that the parties are unable to agree to the joint completion and implementation of a remediation plan, the parties are obliged to act unilaterally under the principle of separate liability in order to achieve compliance with the Remediation Order.
- In light of the principle of individual and collective responsibility under section 47 of the *Act*, it is open to either party to undertake remediation to a standard that will meet the requirements of the Remediation Order.
- It would be contrary to the intent of the *Act*, including the section 47 principle of joint and separate liability, if responsibility under an order could be avoided by the inability or unwillingness of the ordered parties to agree on remediation particulars.
- While it may be true that the Director cannot *require* the parties to reach agreement, it is equally true that the failure to reach agreement may have legal consequences, including the imposition of an obligation to act unilaterally as authorized under the independent remediation provisions in section 54(1) of the *Act* which states:

  > **Independent remediation procedures**
  >
  > **54**(1) A responsible person may carry out independent remediation in accordance with the minister's regulations whether or not
  >
  > (a) a determination has been made as to whether the site is a contaminated site,
  >
  > (b) a remediation order has been issued with respect to the site, or
  >
  > (c) a voluntary remediation agreement with respect to the site has been entered into.
  >
  > [Emphasis added]

- The Director submits that this provision would allow Seaspan to implement its own remediation plan proposal notwithstanding the Director's acceptance of Domtar's remediation plan. Seaspan's claims of "impossibility of compliance" should not be accepted.

[86] In summary, the Director argues that the Decision is not incoherent or incapable of implementation. He submits that it is based on detailed plans of how remediation can be carried out in a fashion that is expected to meet the requirements of the Remediation Order. Those requirements were designed to achieve compliance with numerical standards or risk based standards prescribed in the *Contaminated Sites Regulation*.

[87] As a practical consideration, the Director also submits that there is no defensible basis in law for him to refuse an approval of remediation works that are capable of meeting the requirements of the Remediation Order. Therefore, the Decision meets the "justification" criteria adopted by the Court in *Dunsmuir*.

[88] Notwithstanding the Director's acceptance of two remediation plans, the Director points out that there are still many aspects of either plan that will require discussion, negotiation and eventual agreement among the responsible parties prior to implementation. These include the location and timing of works, all of which must be carried out with due regard to the operations of a working shipyard. The Director submits that the endorsement of a single plan would not obviate the need for cooperation and agreement between the parties. Thus, the parties' history of disagreement should not be a reason to overturn the Decision.

[89] Based upon all of the above, the Director submits that Seaspan's appeal should be dismissed, and the Board should order it to undertake remediation in accordance with the principles of liability set out in section 47 of the *Act*.

Domtar's Submissions

[90] Domtar also submits that Seapan's appeal must be dismissed. It argues that section 48 of the *Act* gives the Director broad discretion and flexibility to manage a contaminated site. In this context, the Director had the statutory authority to make the Decision. In support, Domtar emphasizes the following words in section 48:

48 (1) A director **may** issue a remediation order to any responsible person.

(2) A remediation order **may** require a person referred to in subsection (1) to do any or all of the following:

(a) undertake remediation;

[91] Domtar points out that section 48 does not require the Director to choose or approve a remedial approach or a remedial plan. The word "may" is permissive language that clearly imports flexibility. The Director can issue an order that says no more than the responsible persons must undertake remediation to clean-up the contamination. If the Director had, as he was entitled to do, said no more than the parties are ordered to undertake remediation to clean-up the contamination, all of the complaints raised by Seaspan would still be present.

[92] As a matter of jurisdiction, Domtar submits that the Director did not have to prequalify a plan, or both plans. He could have simply ordered the parties to undertake remediation, which would require the parties to work it out between themselves, just as they will have to, as joint and separate responsible persons, for

any number of remediation-related issues for which they are jointly responsible. In the end, Domtar submits that "a" remediation plan will be implemented.

[93] Domtar also states that nothing contained in the definition of remediation narrows the Director's powers: semantics should not be used to obscure what the section says. The introductory words, before listing the subsections to which Seaspan refers, clearly state that, *inter alia*, remediation "means action to … remove any contaminant … **and includes, but is not limited to**, the following …." [Domtar's emphasis]. In light of those words, Domtar submits that there is no contrary intention to section 28(3) of the *Interpretation Act*: singular includes plural.

[94] Domtar submits that "The wide range of choices, or tools, arising from Section 48 and Section 1(1) further demonstrate that intention of the legislation to provide a broad discretion in furtherance of the broad powers necessary to address a range of issues which arise in managing action to remediate contaminated sites."

[95] In light of the remedial nature and purpose of the legislation, Domtar submits that the Board should resist the attempt by Seaspan to read limiting words into section 48. The fact that the Director would have preferred a single plan, does not mean that he was required to select a single plan.

[96] Domtar submits that the Director's task was to determine whether the plans submitted met the environmental requirements of the Remediation Order. His finding that each plan met the environmental requirements of the order is not challenged in Seaspan's Notice of Appeal and, in any event, it is "antithetical to an appeal on a pure question of law."

[97] To test the veracity of its argument, Domtar provides an example. It states that, if there had only been one responsible person and that responsible person had submitted two alternative plans for consideration by the Director, and the Director had found that each of the plans met the environmental requirements of the order so either plan could be implemented, even a strained interpretation of section 48 could not lead to the conclusion that the Director, in that circumstance, did not have the jurisdiction to make such a discretionary order.

[98] The fact that, in this case, there is more than one responsible person cannot drive, or inform, a jurisdictional analysis. On the pure question of law posed by Seaspan's appeal, Domtar submits that the answer must be that the Director had the jurisdiction to direct that either of the two plans may be implemented. Specifically, once the Director determined that each plan met the environmental requirements of the Order, the parties are to advance implementation through either of the plans.

[99] As argued by the Director, Domtar submits that this is consistent with the nature of joint and separate liability for remediation: it falls to the parties, not the Director, to advance implementation of remedial measures. Domtar states that this will involve a range of decisions for the parties, from who will pay costs as they are incurred, to selection of bids and contractors, to scheduling of work. Domtar states: "Here Seaspan could have, and can, elect to implement its own plan, implement Domtar's plan or, as part of the implementation process, negotiate a solution with Domtar. It cannot be said that the Director's decision to provide compliance choices to the parties is unreasonable in the circumstances."

[100] In this regard, Domtar submits that, having determined that both plans met the environmental requirements of the Remediation Order, the Director decided not to "choose sides" on an issue which may influence cost recovery, but which was not important to remediation. He left that assessment for the court to determine, or for the parties to determine themselves. The court process, with all of the tools aimed at getting to the truth – including cross-examination under oath – is best suited for that process. Domtar submits that there is some evidence to suggest that concerns with being able to recover its costs underlies Seaspan's appeal.

[101] Domtar submits that the Board should be cautious not to limit the broad discretionary power provided by the legislature to a Director in the remediation order process. Referring to section 8 of the *Interpretation Act*, Domtar quotes from the BC Court of Appeal in *Workshop Holdings Ltd. v. CAE Machinery Ltd.*, 12 B.C.L.R. (4th) 236; 2003 BCCA 56:

> [55] This task of interpretation requires an analysis of that legislation following the principle mandated by the *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 8:
>
> > 8. Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[102] Domtar also references the BC Court of Appeal decision in *Whitehorse (City) v. Yukon (Y.T.C.A.)*, 29 B.C.L.R. (2d) 323; [1988] Y.J. No. 5 (C.A.) at page 5, where the Court states that, in situations where a statutory decision-maker is given "broad jurisdiction which could be exercised in different ways in different circumstances", a court "should be slow to create limits on the flexibility the legislation appears to contemplate."

[103] Having found that each plan would be capable of meeting the environmental protection requirements of the Remediation Order, the Director went on to state that he accepted both plans and left it to the responsible persons to decide which plan will be implemented.

[104] In response to Seaspan's assertion that the parties have a long history of "failed efforts to reach agreement", Domtar points out that the two parties not only agreed on a remedial plan (Alternative 49) but, as stated in the Remediation Order, jointly submitted it to the Ministry and it was approved. The Domtar plan submitted in November 2011 is that plan, with minor modifications.

[105] Domtar points out that, in effect, Seaspan blames the Director for providing the parties with compliance choices. Seaspan could, and can, comply by:

(a) unilaterally implementing its own plan (and seek to convince a court on cost recovery that those costs are reasonably incurred);

(b) implementing the lower cost Domtar plan which does not include infrastructure upgrades; or

(c) entering into any number of resolution scenarios with Domtar.

[106] Accordingly, compliance does not require agreement, although given the range of issues still to come in implementing remediation, Domtar submits that agreement would be preferable.

[107] Regarding section 56 of the *Act*, Domtar submits that, if relevant at all, this section goes to the issue of whether either of the two plans fails to meet the environmental requirements of the Remediation Order. That issue is not before the Board on this appeal. It further points out that, despite Seaspan's focus in section 1(1) on when singular is used and when plural is used, Seaspan ignores the fact that section 56 states: "… must give preference to remediation alternative**s** that provide permanent solutions to the maximum extent practicable …". [Domtar's emphasis].

[108] For all of these reasons, Domtar submits that the Decision is not incapable of implementation. Neither is it incoherent or internally contradictory. The Decision provides choices. The fact that Seaspan does not like the choices available to it does not make the decision unreasonable. Further, Seaspan's complaint that six weeks is not long enough to make a choice is not compelling, absent a request for more time.

Fibreco's Submissions

[109] Fibreco submits that the Decision accepting both plans is incidental to the Remediation Order, and is clearly contemplated within Requirement 1 of the Remediation Order itself. It is not a separate decision under section 48 of the *Act*. Fibreco submits that, to be within the Director's jurisdiction, the Decision need only be within the scope contemplated by the Remediation Order, which it is.

[110] Alternatively, if the Decision is bound by the requirements of section 48, Fibreco submits that the Director acted within his jurisdiction. Specifically, Fibreco submits that it is clear on the face of the Decision that the Director ordered the responsible persons to implement one of the two remediation plans submitted by the parties, both found to be acceptable by the Director. The Decision does not order, or allow for, any other plan or "hybrid", as suggested by Seaspan.

[111] With respect to the reasonableness of the Director's Decision, Fibreco submits that the Board cannot make a determination on this aspect of the appeal without an analysis of the facts, including the relationship between Seaspan and Domtar. This would require an oral hearing.

[112] Fibreco submits that, even if the Board accepts that there has been a long history of contention between the responsible parties, that does not lead to a conclusion that the Decision is incapable of implementation. Fibreco argues that this is "tantamount to saying that the Decision is unreasonable because the two responsible parties are incapable of acting reasonably." Fibreco submits that it is not unreasonable for the Director to expect two large, sophisticated commercial entities, to be capable of reaching an agreement on which of two plans, both prepared by reputable consulting firms and both deemed acceptable by the Ministry of Environment, will be implemented. It notes, "While the Decision may have been unusual, it was not unreasonable."

The Panel's Findings

(i) Is the Decision contrary to section 48 of the Act

[113] To begin with, there is no dispute that the Director could have accepted one plan as meeting the requirements of the Remediation Order. The question is whether he committed an error of law by not doing so. In other words, was the Director required by law to choose only one plan even if both plans were acceptable?

[114] Seaspan argues that the Director could not accept two plans under section 48. This is based on the words "undertake remediation" in section 48 of the *Act*, and the definition of "remediation" in section 1. It argues that the definition of "remediation" makes it clear that the Legislature only contemplated a single plan, and that singular does not include plural in the context of this definition.

[115] Seaspan further argues that, in failing to comply with this requirement for a single remediation plan, the Director also erred by failing to comply with the opening words of the definition in that he failed to specify what "action" was to be undertaken under section 48(2).

[116] The Panel rejects Seaspan's argument for a number of reasons.

[117] First, the only reason that Seaspan and Domtar submitted their respective remediation plans in November 2011 was because they were required to do so in the Remediation Order. The Remediation Order named both of them as responsible persons, and it was issued to both of them. The remediation plans were not ordered under a specific "remediation plan" authority in the statute, as there is none. Nor is there a separate statutory authority addressing approval of a remediation plan required under a remediation order; the only section establishing a process for such approvals is in the context of an AIP or certificate of compliance.

[118] Thus, the Panel agrees with the Director and the Third Parties that Seaspan has mischaracterized the nature of the Decision; it has characterized the Decision as a "remediation order" under section 48, whereas the Decision was simply contemplated by, and occurred as one of the steps within the context of, the Remediation Order itself. The Remediation Order required the responsible persons to amend and finalize the Site remediation plan. The Remediation Order provided detailed instructions as to what was to be included in a final remediation plan, and the standards that would have to be met. The Remediation Order also addressed implementation. Therefore, the Remediation Order does specify the "remediation" to be "undertaken" under section 48(2)(b) of the *Act*. Further, the action to be taken under the Remediation Order is sufficiently specific to be enforceable by administrative penalties and/or prosecution. Thus Seaspan's section 48 analysis was flawed from the outset.

[119] However, the Panel also acknowledges that the Remediation Order itself appears to contemplate the submission of a single plan. In letters written after the order was issued, the Director confirmed this was his intention. He advised the responsible persons that he sought the preparation of a "single comprehensive and effective remediation plan for the Site". Notwithstanding that this was his intent, the Panel finds there is nothing that prohibits the Director from changing the terms of the order. In fact, this is exactly what a regulator is expected to do when the

circumstances warrant change. In the context of this appeal, the Director did so on two occasions. In July of 2011, after receiving two "alternative remediation method" proposals under Requirement 1(b), the Director advised that he would no longer consider such methods and that the parties would have to submit an amended plan under Requirement 1(a). Next, in a letter of October 21, 2011, the Director advised Seaspan and Domtar that, if he received two separate final Site remediation plans, he would "review them and select the superior one, from an environmental and human health protection perspective."

[120] The Panel finds that, when issuing a remediation order, the Director has broad discretion and flexibility. Regarding the exercise of discretion, the Supreme Court of Canada stated at paragraph 50 in *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4 (quoted by the same Court in *Reference re Broadcasting* Regulatory Policy CRTC 2010-67 and Broadcasting Order CRTC 2010-168, 2012 SCC 68), as follows:

> … discretion is to be exercised within the confines of the statutory regime and principles generally applicable to regulatory matters, for which the legislature is assumed to have had regard in passing that legislation.

[121] As has been noted at various times by the Board, and by the courts, when creating the contaminated sites regime in the *Act*, the Legislature wanted to ensure that a site is cleaned-up first, with the details about who should pay, and disputes about how much each "responsible person" should pay, to be determined at a later date. This is reinforced by the section 47(1) joint and separate liability provision referred to by the Director and Domtar.

[122] In this regard, the Panel agrees with Domtar that the Director could have issued a remediation order that simply ordered the parties to "undertake remediation", which would have required them to work things out between themselves, as joint and separate responsible persons. This is also consistent with the focus of the legislation, which is to place the burden, or responsibility, for deciding the method of remediation on the responsible persons. That responsibility is not placed on the Director under this legislative scheme, as is evident from the opening words of section 56 of the *Act*:

> **56**(1) A person conducting or otherwise providing for remediation of a site must give preference to remediation alternatives that provide permanent solutions to the maximum extent practicable, taking into account the following factors: ….

[123] The contaminated sites provisions in the *Act* reflect the general move, by many governments, towards performance-based legislation. Rather than "micro-managing" a party's actions through permits and approvals, many governments moved towards a results-based model of legislating. This is now found in legislation regulating the BC forestry sector, as well as the regulation of certain industries that emit pollutants. It is a model that was sought by many industries and corporate stakeholders who wanted governments to establish outcomes (results), but for the government to leave it to them to decide how to achieve those outcomes in a way that is best for their businesses. Ironically, in the present case, Seaspan seeks to have the Director decide what the parties must do, despite the cost and business implications.

[124] The Panel finds that the Director's role in this case was to review the plans in terms of compliance with the Remediation Order and the legislation. There is nothing in section 48, or any other section in the *Act*, requiring the Director to "pick one plan".

[125] In order to make its argument that the Director was required to make a choice, Seaspan relies on the definition of "remediation". It states that the Remediation Order "must comport" with the definition of "remediation", and that the Director's authority under section 48 "is not a discretion without limits or boundaries". Seaspan argues that the definition of "remediation" refers to a single plan and, therefore, the Director could not accept two plans.

[126] In the Panel's view, for Seaspan's argument to succeed, the definition would have to be read such that only a single plan can be submitted and/or accepted. This means that multiple responsible persons named to an order would have to submit a single plan under subsection 1(c) of the definition ("preparation of a remediation plan"). Further, Seaspan's interpretation may mean that different plans cannot be submitted by different responsible persons for different parts of a site.

[127] The Panel finds that Seaspan's argument cannot succeed: the definition of "remediation" does not prohibit two or more remediation plans from being submitted for consideration, and from being found acceptable for the purposes of remediating a particular site.

[128] First, the Panel notes that a definition is an interpretive aid; it is not substantive law. The substance comes from the empowering sections, in this case section 48. Although this presumption is also rebuttable, there is no basis for it to be rebutted in this case.

[129] Further, the definition of "remediation" is found in section 1. Therefore, it applies to the entire *Act* – not simply to section 48. This is important because it indicates that the definition was not created with only section 48 in mind; it applies wherever that word is used in the entire enactment.

[130] Given both of these points, the Panel finds that the Legislator's use of the singular "remediation plan" was not meant to limit the Director's discretion in section 48. Rather, when drafting the definition of "remediation" to be used throughout the *Act*, the Legislator would likely use words applicable to the multitude of situations in which the defined term arises. It is unlikely that the subsections in the definition would be crafted with such precision as to mandate only one remediation plan in all circumstances. It is more likely that the Legislators would rely upon the *Interpretation Act* for the proposition that "words in the singular include the plural", to provide flexibility for the various contexts in which the defined term appears.

[131] In addition, while Seaspan is correct that certain words in the definition are plural, such as "investigations" and "tests", the Panel does not believe that this is indicative of a contrary intention. It is more consistent with the normal or expected course of events, than for the express purpose of showing a contrary intention. There will likely be multiple tests and investigations performed at a contaminated site, but only one remediation plan is expected to be implemented. In any event, the Panel also notes that, in addition to "words in the singular include the plural",

section 28(3) of the *Interpretation Act* then goes on to state that "words in the plural include the singular".

[132] Even if the Panel is wrong and there is a contrary intention, this does not affect the Panel's finding on this issue. The Remediation Order was issued to two responsible persons, and each of those persons was ordered to submit "a plan". Since each person submitted "a plan", the Director had to consider each plan and could accept "the plan" as meeting the objectives of the Remediation Order. Although acceptance of two plans creates practical issues with respect to implementation, the Panel finds that this does not affect the Director's statutory authority to do so. The issues that arise in relation to implementation will be addressed under the "reasonableness" heading below.

[133] In conclusion, the Panel finds that the definition of "remediation" in section 1 of the *Act* cannot be read as limiting the Director's discretion under section 48 of the *Act* in terms of his ability to allow more than one plan to be submitted under a Remediation Order, or his ability to conclude that more than one plan is acceptable under that order.

[134] Finally, Seaspan submits that the Decision is contrary to section 48 of the *Act* because it requires the parties to reach an agreement on which plan to be implemented, and the Director has no authority to order the parties to negotiate and reach an agreement. In making this Decision, Seaspan submits that the Director abdicated his responsibility under section 48.

[135] The Panel has already found that the Director had discretion to allow two plans to be submitted and to accept both plans. Although the Panel agrees with Seaspan that the Director has no statutory authority to *order* the parties to negotiate or agree on which plan to be implemented, this is not what has occurred. The Director has not made an *order*, he has simply found that both remediation plans are acceptable for the Site.

[136] In any event, the Panel agrees with the Director and Domtar that Seaspan could implement its own plan under section 54(1) of the *Act*, notwithstanding the Director's acceptance of Domtar's plan.

[137] Further, the Panel finds that the Director's approval of two plans does not conflict with the objective of permanent solutions under section 56 of the *Act*. One can find that two plans will meet the objective of providing permanent solutions to contamination. The Panel also notes that, while permanent solutions may be an appropriate consideration for the Director, subsection 56(1) applies to the responsible persons themselves, and subsection 56(2) only applies to a director's consideration of an AIP or certificate of compliance.

(ii) Is the Decision unreasonable "on its face"?

[138] Seaspan submits that the Decision is neither "intelligible", nor "defensible" under *Dunsmuir* for three reasons:

1. It produces an incoherent and internally contradictory Remediation Order because it states that Requirement 2 (implementation) is "now in effect" yet there is no "final Site remediation plan" to implement. Seaspan

submits that the Decision to bring Requirement 2 into effect, should be vacated.

2. The Decision is incapable of implementation, absent agreement of a kind that the parties are unable to reach.

3. The Decision attempts to indirectly compel the parties to reach an agreement, which is beyond the Director's authority under the *Act* and supporting regulations. The effect of the Decision "is to use the prospect of penalties or prosecution to force the parties to reach agreement rapidly, lest they otherwise be alleged to have contravened the remediation order". According to Seaspan, the Director is attempting to do indirectly what he could not do directly. Instead, he should have chosen a plan with any modifications that he considered appropriate, and ordered the implementation of that plan under section 48.

[139] The Panel rejects Seaspan's argument that the Decision is unreasonable because "Requirement 2 (implementation) is 'now in effect' yet there is no 'final Site remediation plan' to implement." Requirement 2 of the Remediation Order states:

> The responsible persons shall implement the final Site remediation plan subject to any conditions imposed by the director.

[140] In his Decision, the Director states, "As a result of the above decision, Remediation Requirement 2 of the Order (remediation plan implementation) is now in effect."

[141] In fact, the final Site remediation plans have been identified and found acceptable for implementation.

[142] Nor is the Decision incapable of implementation. Seaspan repeatedly points to its history of disagreement with Domtar to support its basic position that the Decision was ill-conceived and unreasonable on its face. However, the fact that Seaspan and Domtar disagree does not provide a legal reason for limiting their choices. It does not make the Director's Decision unreasonable. Section 47 of the *Act* provides for joint and separate liability, which contemplates the involvement of more than one responsible person and, together with the cost recovery provisions, the legislation implicitly contemplates disagreements amongst responsible persons.

[143] The Panel also notes that Seaspan and Domtar can agree on issues, and have done so in the past. As noted by the Director and Domtar, this is just one of many choices that are left to the parties to decide upon in the context of a complex contaminated site.

[144] The Panel also agrees with Fibreco that, the long history of contention between Seaspan and Domtar does not lead to a conclusion that the Decision is "incapable of implementation". As Fibreco observes:

> It is not unreasonable for the Director to expect two large, sophisticated commercial entities, to be capable of reaching an agreement on which of two plans, both prepared by reputable consulting firms and both deemed acceptable by the Ministry of Environment, will be implemented.

[145] This is not to say that implementation will be easy; however, the responsible persons are certainly "capable" of reaching an agreement and, as noted above, have managed to do so in the past. Further, the Panel agrees with the Director that there is no legal prohibition on either party pursuing implementation of its own plan. On this latter point, the Panel will address an additional argument made by Seaspan.

[146] Seaspan submits that the Director has always wanted a single plan: his Decision states that he is leaving it to "the responsible persons to decide which plan will be implemented". However, in response to Seaspan's appeal, the Director now says that Seaspan does not have to negotiate or come to an agreement with Domtar because it can go ahead and implement its own plan under section 54 of the *Act*. Seaspan submits that this new statement comes from the Director's legal counsel on the appeal. It argues that the Director clearly contemplated joint decision-making – not a unilateral call by Seaspan – in respect of the selection of the remediation plan to be implemented, and the Director ought not to be able to revise his reasoning through the submissions of legal counsel on appeal.

[147] The Panel finds that the fact that the Director, through his legal counsel, advised that either party may implement its own plan through independent remediation under section 54 of the *Act*, but did not mention this in his Decision, does not affect the legal validity of the Decision. As part of the *Act*, section 54 is not some unknown or unknowable option. This is a public statute and section 54 may be relied upon by a responsible person, whether or not it is referred to by a director in a decision. This is not a change in the Director's rationale as much as the Director pointing out an additional statutory option available to the parties, should that be more palatable.

[148] While it is true that the Director wanted the parties to submit a single plan for the Site, as Domtar observes, "The fact that the Director would have preferred a single plan, does not mean that he was required to select a single plan." Nor does his desire for a single plan, but acceptance of two submitted plans, make his Decision unreasonable. In other contaminated sites cases, the responsible persons have been more than willing to compromise or allow one party to take the lead and argue about costs later. Here, that is not happening. The simple fact is that the two companies have not come to an agreement on a final remediation plan. Is the Director to act as a referee for every disagreement? The answer is "no".

[149] Under its argument that the Decision is "incapable of implementation", Seaspan also submits that the Director gave a deadline of February 20, 2013 for submission of an updated remediation plan schedule. Seaspan submits that this is "patently unreasonable", given the parties history of failed efforts to reach agreement. On this point, the Panel agrees with Domtar. If more time was required, Seaspan's remedy is to, first, request more time.

[150] Finally, Seaspan argues that the Decision is unreasonable because it attempts to indirectly compel the parties to reach an agreement, which is beyond the Director's authority under the legislation. It states that the effect of the Decision is "to use the prospect of penalties or prosecution to force the parties to reach agreement rapidly, lest they otherwise be alleged to have contravened the remediation order." Seaspan argues that the Director does not have authority to

"coercively require responsible persons to agree", and that he is attempting to do indirectly what he could not do directly.

[151] The Panel has already addressed the Director's jurisdiction to compel agreement. Regarding the other points, the Panel finds that, particularly for these responsible persons, it is the legislation and not the Director that creates a "looming threat" of enforcement action. If Seaspan and Domtar do not make every reasonable effort to comply with the new condition in Requirement 2 (to decide which of their plans to implement), or the Remediation Order itself, enforcement action is appropriate. The parties have had many years to get remediation underway and there is no dispute that the Site is the source of "serious contamination and significant environmental protection concerns." Although there is currently no indication that enforcement action will be taken, it is not unreasonable, on its face, for the Director, through his Decision, to establish new deadlines to "compel" the parties to take action towards remediation, whether that is by negotiating which plan will be implemented, or through independent implementation of a plan.

Conclusion

[152] In summary, the Panel finds that the Director has broad discretion under the *Act* to allow two plans to be submitted, to be considered, and to be accepted as meeting the terms of the Remediation Order and the legislation, even if only one plan will ultimately be implemented at this Site.

[153] The Director allowed two plans to be submitted, stating that he would evaluate the plans and "select the superior one, from an environmental and human health protection perspective." It appears that he did so, and came to the conclusion that they were equal plans from an "environmental and health protection perspective." The Director found that both plans met the detailed requirements of the Remediation Order, which is why he accepted them both. In doing so, the Panel finds that the Director acted within the statutory authority given to him by the Legislature, and that the Decision, on its face, meets the standard of reasonableness as described by the Court in *Dunsmuir*.

[154] While it might have been helpful if the Director only required one plan, or chose one plan, the Panel finds that there is nothing in the legislation that mandates it. Further, while some may view the Decision as prolonging the dispute between Seaspan and Domtar, and as being inconsistent with the legislative emphasis on expeditious remediation, it is apparent from the separate appeals by Seaspan and Domtar that, regardless of whose plan was accepted, the other would have appealed.

[155] Finally, it should be noted that the Panel has limited its consideration of Seaspan's reasonableness arguments to the "face of the Decision", as proposed by Seaspan. It does not address the substantive arguments that Domtar and Seaspan will be making in the Domtar's appeal of this Decision, and the appeals of the other related decisions that are scheduled to be heard in the Fall of 2013.

DECISION

[156] In making this decision, the Panel of the Environmental Appeal Board has carefully considered all of the evidence before it, whether or not specifically reiterated here.

[157] For the reasons provided above, the appeal is dismissed.

[158] For clarity, the stay that was issued on April 24, 2013 is hereby vacated.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

May 9, 2013