



**THE ISLAND REGULATORY AND
APPEALS COMMISSION**

Prince Edward Island
Île-du-Prince-Édouard
CANADA

**Docket LEV10005
Order LEV11-01**

IN THE MATTER of an appeal by Allan
B. Graham Trucking of an Order issued by
the Minister of Environment, Energy and
Forestry.

BEFORE THE COMMISSION
on Thursday, the 28th day of April, 2011.

Maurice Rodgerson, Chair
Michael Campbell, Commissioner
Ferne MacPhail, Commissioner

Order

Compared and Certified a True Copy

(Sgd.) Philip J. Rafuse

Appeals Administrator
Land, Corporate and Appellate Services Division

IN THE MATTER of an appeal by Allan
B. Graham Trucking of an Order issued by
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IN THE MATTER of an appeal by Allan B. Graham Trucking of an Order issued by the Minister of Environment, Energy and Forestry.

Appearances & Witnesses

1. For the Appellant Allan B. Graham Trucking

Counsel:

Laura Spurway

Witness:

Allan B. Graham

2. For the Respondent Minister of Environment, Energy and Forestry

Counsel:

Robert MacNevin

Witnesses:

Karen White

Morely Foy

Alan Robison

IN THE MATTER of an appeal by Allan B. Graham Trucking of an Order issued by the Minister of Environment, Energy and Forestry.

Reasons for Order

1. Introduction

[1] This is an appeal under section 29.1 of the *Environmental Protection Act* (the *Act*), R.S.P.E.I. 1988, Cap.E-9, by the Appellant Allan B. Graham Trucking (Graham). Graham's Notice of Appeal was filed on November 4, 2010.

[2] Graham appeals an October 14, 2010 Order of the Minister of Environment, Energy and Forestry (the Minister) purportedly made pursuant to "s.7.1" of the *Act* and directed to "Allan B. Graham Trucking Ltd."

[3] Commission staff originally scheduled the appeal for hearing on December 8, 2010. Counsel for the Minister requested a postponement of the hearing, with the consent of Counsel for Graham. The matter was then re-scheduled to January 12, 2011. Counsel for Graham then requested a postponement of the January 12, 2011 hearing, with the consent of Counsel for the Minister.

[4] The appeal was heard by the Commission on March 30, 2011.

2. Discussion

The Minister's Position

[5] In the Minister's October 14, 2010 Order, it was alleged:

- On June 24, 2009 the Minister's staff investigated a complaint concerning the failure of a sewage disposal system for a residential dwelling at property number 631358 (the subject property) located at or near Commercial Cross in the County of Kings and Province of Prince Edward Island. That same day, an employee of the Minister conducted a site inspection and soil permeability testing revealing that non-permeable soil existed at depths of 22 and 55 centimetres. A soil sample was taken and a soil sieve analysis confirmed that the percentage of silt and clay particles in the soil sample was 26.5 percent.

- By correspondence dated October 7, 2009, Graham was directed by the Minister to replace the fill material used for the installation of the sewage disposal system on the subject property with fill material meeting the specifications set out in the **Act's** Sewage Disposal Systems Regulations (the Regulations), said work to be completed by October 20, 2009.
- Graham confirmed with the Minister that the work had not been completed by October 20, 2009.
- There are reasonable and probable grounds that a violation of the Regulations has occurred on the subject property; namely the installation of a sewage disposal system not in compliance with the standards and requirements of the Regulations.
- There are reasonable and probable grounds that an act or omission of Graham is or may be a contravention of the **Act** or the Regulations or otherwise be a threat to the environment or environmental health.

[6] The Minister's October 14, 2010 Order then set out remedial work to be completed by Graham not before October 15, 2010 and not later than November 15, 2010.

Graham's Position

[7] On January 10, 2011, Counsel for Graham filed amended grounds for appeal. These grounds alleged the following:

- The Order was issued pursuant to section 7.1 of the **Act** which applies to corporations. Allan B. Graham Trucking Ltd. does not exist and therefore is not a legal entity. The Order should have been issued pursuant to section 7 of the Act which applies to natural persons.
- The Minister was statute barred from bringing the proceeding pursuant to section 32(7) of the **Act**.
- There were not reasonable and probable grounds to believe that the contravention of the **Act** was caused by the actions or by an omission of Graham.
- Graham's actions or omissions did not cause any contravention of the **Act** as he was not responsible for purchasing the fill material or arranging to have it put on the subject property.
- Pursuant to section 7.1(2) of the **Act**, Graham ought not to have been named in the Order.
- Any contravention of the **Act** is a result of the actions or omissions of the owners of the subject property and the supplier of the fill material and they are the parties who ought to have been named in the Order.
- The owners of the subject property caused the system failure due to the fact that they added an additional apartment to their single family dwelling after the system had been installed.

- In the alternative, if Graham was the correct party to be named in the Order, which he expressly denies, the fault ought to have been apportioned between all three parties involved, namely the supplier of the fill material, the owners of the subject property and Graham.

[8] The amended grounds for appeal then set out the requested relief sought by Graham.

Testimony heard by the Commission

[9] The Minister's primary witness at the hearing was Karen White. Ms. White is the Minister's Safety Standards Officer (Souris/Montague). Ms. White referred to her July 2009 memorandum. At the time of her memorandum, Ms. White was a drinking water technician for the Minister. Her memorandum offered the following conclusions:

Principle cause of failure: *(reason for failure, what will make the system work)*

Based on the departments findings the system was installed in impermeable soil and also the system is undersized for the current household use (two bedrooms plus a one bedroom apartment in the basement).

Soils limitations: *(noting any new information from current investigation)*

The results of the analysis of the composite soil sample indicated a composition of 26.5% silt and clay. The "infill" material does not meet the provincial requirement of less than 15% fines. This fill is not considered to be "Good Quality Fill".

System installation and/or subsequent modifications: *(note any changes since installation)*

Upon inspection it was discovered that a single pipe was connected to the first line of infiltrators and ran out of the embankment and was open ended with sewage slowly leaking into the nearby wooded area.

System capacity: *(hydraulically overloaded or changes to building from original proposal)*

The system currently installed does not meet the minimum requirements for a two bedroom single family dwelling and a one bedroom apartment. There is potential for hydraulic overloading of this system.

[10] In her testimony, Ms. White noted that, in the spring of 2009, Mr. Graham reported the failure of the septic system to the Montague office of the Minister of Communities, Cultural Affairs and Labour [as said Department then existed]. Following the receipt of the file, Ms. White interviewed the property owners on June 22, 2009. She then conducted an investigation of the failed septic system on June 24, 2009. Ms. White advised the Commission that the home on the subject property contained a one bedroom apartment which was not referred to in the building permit documentation contained in the file.

[11] Ms. White noted that when she examined the septic system lines following exploratory digging, the lines were full of liquid and in fact were spurting liquid, with the ground adjacent to the chambers wet with sewage. On one portion of the septic system, there was some liquid visible on the surface of the ground. She noted that if the system had been working properly, the ground should not be wet from sewage. She noted that the fill material included construction debris and other materials such as coffee cups. She noted that the original grade was low, but the ground was built up with fill for an unknown reason. She observed that it was unusual for soil for a septic system to be built up when not required.

[12] The Minister also presented evidence from Morley Foy, the Minister's Approvals / Regulatory Compliance Engineer. Mr. Foy testified that presence of 26.5% silt and clay in the fill material would account for the failure of the septic system. Mr. Foy noted that a septic installation contractor should be very knowledgeable about fill quality.

[13] The Minister also presented evidence from Alan Robison, the Minister's Safety Standards Chief. Prior to the issuance of the Minister's first Order, Mr. Robison had written a letter to Graham requesting that the situation be corrected. Mr. Robison noted that the maintenance of a septic system is the responsibility of the homeowner. He noted that it was the responsibility of the septic installation contractor to ensure that the proper fill was used.

[14] Graham's sole witness was Allan B. Graham. Mr. Graham told the Commission that he is in the construction and long haul trucking business. His business is structured as a sole proprietorship, not a corporation. He is licensed as a contractor for septic system installations. He has worked on septic systems for twenty years and he has never had a septic system failure other than the failure on the subject property. He explained that the homeowners did much of the work on their home themselves. With respect to the septic system, the homeowners had already obtained the tank and most of the piping. Numerous contractors had previously brought in fill. The fill was leveled off and graded before Mr. Graham started his work. All Mr. Graham did was install the septic field for a two bedroom house. He testified that had he known that a one bedroom apartment would be added, he would have "doubled the size of the field bed". Following the completion of his work, Mr. Graham arranged for the system to be inspected. The system was approved and a certificate of compliance was issued. Mr. Graham noted that the Province has recently changed the training given to contractors. As of the spring of 2009, Mr. Graham is qualified as a site assessor and is qualified to perform soil analysis. Knowing what he knows now, Mr. Graham would have refused to use the fill provided by the homeowner. However, when he installed the system in 2006, he did not have that training and he thought the fill was "OK".

Submissions of Legal Counsel

[15] Robert MacNevin, counsel for the Minister, submitted that the septic installation permit was issued to Graham, that Graham installed the system, and, as the licensed contractor, he had the legal duty to ensure that the fill used met environmental standards. Mr. MacNevin submitted that the Minister's Order was directed to Graham as he was responsible. The actions of the homeowners only served to accelerate the failure of the system.

[16] Mr. MacNevin acknowledged that subsection 32(7) of the **Act** contains a two year limitation period. However, he submits that this period would only commence once the Minister became aware of the problem in June 2009.

[17] Mr. MacNevin requested that the Commission confirm the Minister's October 14, 2010 Order, subject to a revised completion date of June 30, 2011.

[18] Laura Spurway, counsel for Graham, submitted that Graham relied on the category 1 classification of the soil. The septic installation that Graham constructed on the subject property had been inspected and approved by the Minister's staff in 2006. There were two causes for the failure of the system as identified in Ms. White's report.

[19] Ms. Spurway submitted that there is a two year limitation period commencing with the subject matter of the proceedings. She submitted that there is an important distinction between when the Minister became aware of the problem and when the subject matter arose. She submitted that the limitation period has now expired. Ms. Spurway submitted that the homeowners and the various suppliers of fill should have been named in the Minister's Order.

[20] Ms. Spurway requests that the Minister's Order be rescinded as it is now statute barred. However, in the alternative, Ms. Spurway requests that the homeowner be added to the Order, that the Order be amended to reflect Graham's actual business entity and that the Order be issued under the correct section of the **Act**.

3. Findings

[21] The Commission has considered the submissions of the parties as well as the law and hereby allows the appeal in part.

[22] Subsection 32(7) of the **Act** reads as follows:

32(7) Proceedings with respect to an offence under this Act or the regulations may be instituted at any time within two years after the time when the subject matter of the proceedings arose.

[23] Section 2 of the **Act** identifies the purpose of the **Act**:

2. The purpose of this Act is to manage, protect and enhance the environment. 1988,c.19,s.2.

[24] Section 9 of the **Interpretation Act** R.S.P.E.I. 1988, Cap. I-8 reads as follows:

9. Every enactment shall be construed as being remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. 1981,c.18,s.9.

[25] Black's Law Dictionary, 6th Edition defines the noun "Object" and the term "Object of a statute" as follows:

Object, n. End aimed at, the thing sought to be accomplished; the aim or purpose, the thing sought to be attained.

...

Object of a statute. Aim, intent or purpose of its enactment. End or design which it is meant to accomplish, while the “subject” is the matter to which it relates and with which it deals. Matter or thing forming groundwork of statute.

[26] The Commission is of the view that the “purpose” of an enactment is in essence the same as an “object” of the enactment. The Commission finds that it would be contrary to the purpose of the **Act** to interpret subsection 32(7) so that the two year limitation period could commence before the Minister or his staff had any knowledge that there may have been a violation of the **Act**. The Commission finds that the limitation period commenced in June 2009 when, according to the evidence, the Minister’s staff first became aware of the poor quality fill and the presence of an apartment unit. Accordingly, the Minister’s Order is not statute barred.

[27] Counsel for Graham pleads, in the alternative, that the Minister’s Order should be amended to direct the Order not only to Graham, but also to the homeowners. Counsel for Graham also argues that the Order should be amended to be made pursuant to section 7 rather than section 7.1 of the **Act**. Subsections 7(1) and (2) read as follows:

7. (1) This section applies to natural persons.

(2) Where the Minister or an environment officer believes, on reasonable and probable grounds,

(a) that a contaminant has been, is being, or is going to be, discharged into the environment, or, otherwise, that an act or omission of a natural person is or may be a contravention of this Act or the regulations or otherwise be a threat to the environment or environmental health; and

(b) that it is necessary or advisable for the protection of the environment or the prevention or control of danger to human life or health or of damage to property,

the Minister or the environment officer, as the case may be, may issue an environmental protection order to

(c) the natural person who is the owner or previous owner of the contaminant or the source of the contaminant;

(d) the natural person who is or was in occupation of the contaminant or the source of the contaminant;

(e) the natural person who has, or had, the charge, management, or control of the contaminant or the source of the contaminant;

(f) the natural person whose act or omission is or may be a contravention of this Act or the regulations or otherwise be a threat to the environment or environmental health; or

(g) one or more of the above persons.

[28] The Commission agrees with Counsel for Graham that the Order should have been issued pursuant to section 7 of the **Act** as Graham is a natural person, not a corporation. Indeed, one of the Minister's staff had the foresight to perform a search of the Corporate/Business Names Registry. This search was printed on "7/6/2010" for the Minister's file, gives the business entity as "ALLAN B. GRAHAM" and identifies the entity as a "Sole Proprietorship". Regardless of the interpretation which may be given to "7/6/2010", the registry search was added to the Minister's file in either June or July 2010, several months prior to the issuance of the October 14, 2010 Order. Unfortunately, in spite of the accurate information contained in this registry search, the Minister's Order was issued to the wrong entity and issued pursuant to the wrong section of the **Act**.

[29] The above noted errors must, however, be placed in an appropriate frame of reference. The issuance of Orders under the **Act**, and most especially the appeal of such Orders to the Commission, is something rather new. Indeed, the Minister's October 14, 2010 Order was the very first such Order to proceed to a full appeal hearing before the Commission. The hearing process is an educational process and therefore future orders will no doubt benefit from the scrutiny of past orders through the appeal process.

[30] There are other matters though which remain problematic. In 1999, the subject property was deemed to be a category 1 lot and yet the location of the test pit was not documented. This casts some doubt as to whether the subject property was in fact a category 1 lot. On August 25, 2006, the septic system was inspected and approved. The Commission is puzzled as to why the fill used was not examined as part of the inspection process.

[31] The evidence before the Commission suggests that the Minister's Department has come a long way in very recent years by strengthening environmental protection regulations and by providing training for those contractors who must apply environmental regulations. Indeed, the evidence of Mr. Graham strongly suggests to the Commission that he has benefitted from such training, which occurred a couple years after the installation of the septic system was installed on the subject property. Mr. Graham, and undoubtedly many other contractors, is now much better able to evaluate fill quality. The Commission also is cognizant of the fact that Mr. Graham was placed in a very difficult situation due to the cost reducing practices of the homeowners. It is noteworthy that it was Mr. Graham who ultimately brought the matter to the attention of the Minister's staff in 2009. That said, the Commission wishes to emphasize the importance of a contractor having both the training to evaluate fill material and the fortitude to refuse to install a septic system if the customer supplied fill (or any other materials) does not meet the environmental requirements.

[32] The Commission notes that the evidentiary foundation of the Minister's case is the investigation, report, observations and photographs provided by Ms. White. Ms. White's report and her testimony bring a high standard of professionalism, objectivity and thoroughness to the appeal process. Her report and testimony are most compelling.

[33] The Commission also had the benefit of Mr. Foy and Mr. Robison, for the Minister, and Mr. Graham for the Appellant Graham. The Commission finds all the witnesses to be knowledgeable, credible and sincere. The Commission also had the benefit of capable yet succinct submissions from both legal counsel.

[34] Based on the evidence before the Commission, the Commission finds that the failure of the septic system on the subject property was based on the poor quality of fill used, for which Graham was ultimately responsible, and the potential for hydraulic overload, as a result of a one bedroom apartment constructed contrary to the building permit, for which the homeowners are ultimately responsible.

[35] There is also evidence before the Commission, which remains unchallenged, to the effect that the homeowners refuse to allow Graham to set foot on their property. If this is in fact true, this would frustrate compliance of the Minister's Order. Mindful of section 2 of the **Act**, it is the responsibility of the Minister and his staff "... to manage, protect and enhance the environment".

[36] It is not necessary for either the Minister or the Commission to attempt to apportion the specific degree to which each of these two factors contributed to the failure of the septic system on the subject property. In the absence of a settlement agreement between the parties, such matters fall within the jurisdiction and expertise of the Court. However, upon a review of subsection 7(2) of the **Act**, the Commission finds that the act or omissions of the homeowners may have been a contravention of the **Act** and the Commission further finds that the cooperation of the homeowners will be necessary to resolve the matter. Therefore, the Commission hereby orders the Minister to amend the October 14, 2010 order to:

- Direct the Order to both Allan B. Graham and to the owners of parcel number 631358, the precise and current identity of said owners to be established by an up-to-date search of documents at the Registry of Deeds for Kings County.
- Revise the legislative foundation of the Order to refer to section 7 of the **Act**.
- Revise the deadline for compliance to June 30, 2011.
- Require the owners of parcel number 631358 to permit Allan B. Graham to perform the required work on their property and fully cooperate with the Minister's staff in order to ensure compliance with the Minister's Order.

4. Disposition

[37] An Order allowing the appeal in part and ordering amendments to the Minister's Order will be issued.

IN THE MATTER of an appeal by Allan B. Graham Trucking of an Order issued by the Minister of Environment, Energy and Forestry.

Order

WHEREAS the Appellant Allan B. Graham Trucking appeals an Order of the Minister of Environment, Energy and Forestry, dated October 14, 2010;

AND WHEREAS the Commission heard the appeal at a public hearing conducted in Charlottetown on March 30, 2011;

AND WHEREAS the Commission has issued its findings in this matter in accordance with the Reasons for Order issued with this Order;

NOW THEREFORE, pursuant to the *Island Regulatory and Appeals Commission Act* and the *Environmental Protection Act*

IT IS ORDERED THAT

1. The appeal is allowed in part.
2. The Minister is hereby ordered by the Commission to amend his October 14, 2010 Order to:
 - Direct the Order to both Allan B. Graham and to the owners of parcel number 631358, the precise and current identity of said owners to be established by an up-to-date search of documents at the Registry of Deeds for Kings County.
 - Revise the legislative foundation of the Order to refer to section 7 of the Act.
 - Revise the deadline for compliance to June 30, 2011.
 - Require the owners of parcel number 631358 to permit Allan B. Graham to perform the required work on their property and fully cooperate with the Minister's staff in order to ensure compliance with the Minister's Order.

DATED at Charlottetown, Prince Edward Island, this 28th day of April, 2011.

BY THE COMMISSION:

(Sgd.) *Maurice Rodgerson*

Maurice Rodgerson, Chair

(Sgd.) *Michael Campbell*

Michael Campbell, Commissioner

(Sgd.) *Ferne MacPhail*

Ferne MacPhail, Commissioner

NOTICE

Section 12 of the *Island Regulatory and Appeals Commission Act* reads as follows:

12. The Commission may, in its absolute discretion, review, rescind or vary any order or decision made by it or rehear any application before deciding it.

Parties to this proceeding seeking a review of the Commission's decision or order in this matter may do so by filing with the Commission, at the earliest date, a written **Request for Review**, which clearly states the reasons for the review and the nature of the relief sought.

Sections 13(1) and 13(2) of the *Act* provide as follows:

13.(1) An appeal lies from a decision or order of the Commission to the Court of Appeal upon a question of law or jurisdiction.

(2) The appeal shall be made by filing a notice of appeal in the Court of Appeal within twenty days after the decision or order appealed from and the rules of court respecting appeals apply with the necessary changes.

NOTICE: IRAC File Retention

In accordance with the Commission's Records Retention and Disposition Schedule, the material contained in the official file regarding this matter will be retained by the Commission for a period of 2 years.

IRAC141AA(2009/11)