ALBERTA ENVIRONMENTAL APPEAL BOARD

DECISION

Preliminary Meeting: May 7 & 8, 1996
Date of Decision: June 28, 1996

IN THE MATTER OF Sections 84, 85, 86 and 87 of the Environmental Protection and Enhancement Act, (S.A. 1992, ch. E-13.3 as amended);

- and-

IN THE MATTER OF an appeal filed by Ed Graham, Alberta Trappers Association, the Lesser Slave Lake Indian Regional Council, and the Toxics Watch Society with respect to Approval No. 95-IND-237 issued by the Director, Chemicals Assessment and Management Division, Alberta Environmental Protection to Chem-Security (Alberta) Ltd. for the importation and treatment of PCB waste.

Cite as: Ed Graham et al v. Director of Chemicals Assessment and Management, Alberta Environmental Protection

PRELIMINARY MEETING BEFORE: William A. Tilleman, Chair
Joan C. Copp
Max A. McCann

APPEARANCES

Appellants - Ed Graham, Alberta Trappers Association, represented by Mitch Bronaugh.

Lesser Slave Lake Indian Regional Council represented by Grand Chief Jim Badger, Richard Secord and Karin Buss (counsel).

Toxics Watch Society, represented by Trent Hardin.

Other Parties - Director, Chemicals Assessment and Management Division, Alberta Environmental Protection, represented by Silver Lupul, and William McDonald (counsel).

Chem-Security (Alberta) Ltd., represented by Graham Latonas and Richard A. Neufeld (counsel).

Natural Resources Conservation Board, represented by William Kennedy (counsel).

BACKGROUND

This appeal relates to the operation of the Alberta Special Waste Treatment Centre (ASWTC) near Swan Hills, Alberta.

On November 30, 1995, the Acting Director of Chemicals Assessment and Management, Alberta Environmental Protection (Director) issued Approval No. 95-IND-237 (Approval) renewing an existing approval to Chem-Security (Alberta) Ltd. to operate the Alberta Special Waste Treatment Centre. The approval was due to expire on July 1, 1995. It was the first permanent approval for the operation of the incinerator issued pursuant to the *Environmental Protection and Enhancement Act* (the Act).

The Director had previously issued permits to construct under s. 3 of the *Clean Air Act* and s. 3 of the *Clean Water Act* on October 22, 1992. A test burn licence for the purposes of testing and commissioning before normal operations commenced had previously been issued under s. 4 of the *Clean Air Act* on December 23, 1993.

On December 20, 1995, Ed Graham of Fort Assiniboine filed an appeal of the Approval with the Board on behalf of the Alberta Trappers Association. On December 21, 1995, the Lesser Slave Lake Indian Regional Council, and on January 3, 1996 the Toxics Watch Society, (Appellants) filed notices of objection with the Environmental Appeal Board (Board). The Toxics Watch Society subsequently withdrew their appeal on May 7, 1996.

The Board advised the Director and Chem-Security (Alberta) Ltd. that the Approval had been appealed, and the Director was asked to provide copies of the application and the Approval. On February 9, 1996, the Board wrote to the Natural Resources Conservation Board (NRCB), asking the NRCB to confirm that a hearing was held with respect to this matter and to request a copy of the decision that was issued following that hearing.

On February 9, 1995, William Kennedy, Solicitor for the NRCB, advised the Board that the NRCB had "conducted reviews of two reviewable projects in relation to the Alberta Special Waste Treatment Centre... .". Those reviews resulted in NRCB Decision Report 9101 (April 1992), which dealt specifically with the expansion of the incineration capacity, and NRCB Decision Report 9301 (November 1994), which dealt specifically with the importation of hazardous wastes from other Canadian jurisdictions.

The Appellants essentially maintain that the Approval should be revoked because fugitive emissions from the plant are likely to be excessive, and because the Approval does not address the recommendations, concerns, and conditions of NRCB Approval No. 6, issued as a result of NRCB

Decision 9301.

THE PRELIMINARY MEETING

The Board decided to hold a preliminary meeting on May 6 and May 7, 1996. The sole purpose of this preliminary meeting was to deal with the jurisdiction of the Board to hear the issues raised by the Appellants, and accordingly, whether or not the Board should proceed with consideration of these appeals. This meeting was held pursuant to s.87 of the the Act.

The Board had asked each party to provide written representations on the following questions:

1. Were all of the matters raised by each appellant the subject of a public hearing or review under the *Natural Resources Conservation Board Act*, and did any or all of these appellants receive notice of and participate in or have the opportunity to participate in one or more hearings or reviews under the *Natural Resources Conservation Board Act*?

2. Is there any new information that is presented in the various appeals that are relevant to Approval No. 95-IND-237 and that was not available to the Acting Director on the date when he made the decision to issue the said approval, namely November 30, 1995?

3. Section 65(4)(a) of the Act states:

> In addition to any other criteria the regulations require the Director to consider in making a decision under this section, where, in the opinion of the Director, the Energy Resources Conservation Board or the Natural Resources Conservation Board has made a written decision in respect of the subject-matter of an approval, the Director
>
> (a) shall consider that written decision, and
>
> (b) may consider any evidence that was before the Energy Resources Conservation Board or the Natural Resources Conservation Board in relation to that written decision.

Did the Director comply with his obligations under s. 65(4) of the Act in issuing Approval No. 95-IND-237? On what evidence do you rely in reaching your conclusion?

4. In the event that the Board determines that it has jurisdiction to proceed in this matter, are the Appellants directly affected as contemplated by the Act?

ISSUES

The Board identifies the following preliminary issues in this appeal:

1. Which of the parties who submitted notices of objection, if any, are directly affected by the Director's decision to issue the Approval?

2. Did the parties who submitted notices of objection receive notice of, participate in, or have the opportunity to participate in a hearing or review by the Natural Resources Conservation Board?

3. If so, were all of the matters included in the notices of objection considered in the NRCB hearings or reviews?

Directly Affected

The Board reiterates and stresses that there is no simple test to determine whether a person is directly affected within s. 84 of the Act. As we stated originally in *Fred J. Wessley v. Director of Environmental Protection*,[1] this determination must be made on a case by case basis, taking into account the particular facts and circumstances of each appeal.

In *Dr. Martha Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection*[2], the Board reviewed the principles and authorities concerning the meaning of "directly affected". The Board stated that the word "directly" requires an appellant to establish that a direct personal or private interest of an economic, environmental or other nature is likely to be impacted or caused proximately by the approval in question. Generalized concerns or grievances will not be

---

1 Appeal No. 94-001, February 2, 1994.

2 (1995), 17 C.E.L.R. (NS) 246.

sufficient. The Board concluded its analysis by stating:

> "Two ideas emerge from this analysis about standing. First, the possibility that any given interest will suffice to confer standing diminishes as the causal connection between an approval and the effect on that interest becomes more remote. This first issue is a question of fact, i.e., the extent of the causal connection between the approval and how much it affects a person's interest. This is an important point; the Act requires that individual appellants demonstrate a personal interest that is directly impacted by the approval granted. This would require a discernible effect, i.e., some interest other than the abstract interest of all Albertans in generalized goals of environmental protection. "Directly" means the person claiming to be "affected" must show causation of the harm to her particular interest by the approval challenged on appeal. As a general rule, there must be an unbroken connection between one and the other.
>
> Second, a person will be more readily found to be "directly affected" if the interest in question relates to one of the policies underlying the Act. This second issue raises a question of law, i.e., whether the person's interest is supported by the statute in question. The Act requires an appropriate balance between a broad range of interests, primarily environmental and economic."[3]

The first paragraph of the passage was quoted with approval by Marceau J. in a judicial review application[4] brought to challenge the Board's decision on "directly affected" in the *Dr. Martha Kostuch* appeal. The court was satisfied that the Board applied the correct test[5] and dismissed the application.

The Board's interpretation of "directly affected" is consistent with the January, 1996 decisions of the Alberta Court of Appeal in *CUPE Loc. 30 et al v. W.M.I. Waste Management of Canada Inc.*[6]; and *Friends of the Athabasca Environmental Association et. al v. Public Health Advisory and Appeal*

---

3 *Ibid.*, at p. 257.

4 Kostuch v. Alberta Environmental Appeal Board, Alberta Queen's Bench, Action No. 9503-19741, March 28, 1996

5 *Ibid.*, at p.11

6 Appeal No. 9403-0228-AC.

Board.[7] In these cases, the court considered the meaning of s. 4(2) of the Alberta Public Health Act which gives a person who is "directly affected" by a decision of a local board of health, the right to appeal to the Public Health Advisory and Appeal Board. In the W.M.I. case, the court stated:

> "The phrase 'directly affected' must mean something more than "affected". However, it cannot be given an expanded meaning simply by virtue of expanding social consciousness: *Canada (A.G.) v. Mossop* (1993) 100 DLR (4th) 658 (SCC).
>
> In our view, the inclusion of the word "directly" signals a legislative intent to further circumscribe a right of appeal. When considered in the context of the regulatory scheme, it is apparent that the right of appeal is confined to persons having a personal rather than a community interest in the matter."[8]

Further, in both cases the Court of Appeal rejected the view that notwithstanding the words "directly affected", standing to appeal could be based on the principles of discretionary public interest standing that were outlined by the Federal Court in *Friends of the Island v. Canada (Minister of Public Works)*.[9] In the *Friends of the Athabasca* case, the Court of Appeal stated:

> "The Appellants urge the application of the principle in *Friends of the Island*, which held that courts have a broad discretion to grant standing to apply for judicial review. We specifically rejected that proposition in *WMI Waste Management*. The mandate of an administrative tribunal and its legal process must be construed in accordance with the legislative intent. In our view, that intent is clear. The use of the modifier "directly" with the word "affected" indicates an intent on the part of the Legislature to distinguish between persons directly affected and indirectly affected. An interpretation that would include any person who has a genuine interest would render the word "directly" meaningless, thus violating fundamental principles of statutory interpretation: *Subilomar Properties (Dundas) Ltd. v. Cloverdale Shopping Centre Ltd.* (1973) 35 DLR (d) 1 (SCC) at 5. An interpretation that would import expanding concepts of judicial discretion, contrary to the intention of the Legislature, would engage the sort of interpretive exercise expressly rejected by the Supreme Court in

---

[7] Appeal No. 9403-0365-AC.

[8] *Ibid.*, at p. 8.

[9] (1993), 102 D.L.R. (4th) 696 (F.C.T.D.).

Canada (Attorney-General) v. Mossop (1993) 100 DLR (4th) 658 at 673."[10]

We note that in its Report on Final Cost Awards concerning the application of Chem-Security for importation of hazardous waste from other Canadian jurisdictions,[11] the NRCB stated in relation to "directly affected":

> "The Board accepts the evidence that some witnesses, such as Mr. Harvey Giroux and Ms. Bertha Chalifoux who appeared before the Board in support of the IAA/LSLIRC, use or have in the past used Crown land in the Swan Hills for traditional aboriginal activities. The Board further accepts that these individuals may have ceased their activities in the immediate vicinity of the ASWTC as a result of their apprehensions concerning the effects on the environment from treating Alberta Only wastes at the Centre. If evidence satisfactory to the Board had indicated that the reviewable project would have further altered their behaviour in a manner that was not trivial, above and beyond the effects of the existing ASWTC operations in treating Alberta Only hazardous wastes, the Board may have concluded that they were directly affected individuals who could be eligible for funding. Persuasive evidence that the reviewable project would have further altered their behaviour in a manner that was not trivial was not provided to the Board."[12]

This Board considers that persons who file notices of objection bear the onus of establishing that they are directly affected by the application.[13] Yet it is important to note, as we did in *Hazeldean Community League and Two Citizens of Edmonton v. Director of Air and Water Approvals, Alberta Environmental Protection*,[14] that in special circumstances this onus may be discharged without proof of direct causation. And, we emphasize that the comments by the NRCB quoted above concerned whether those individuals were persons directly affected for the purpose of eligibility for intervenor costs under the *Natural Resources Conservation Board Act*. As we pointed out in *Gerald Ross v.*

---

[10] *Ibid.*, at p. 4.

[11] NRCB Application #9301, June 8, 1995.

[12] *Ibid.*, at p. 11.

[13] Environmental Appeal Board, Rules of Practice, Section IV, K, Burden of Proof, at p. 12.

[14] Decision Report (May 11, 1995) EAB Appeal No. 95-002 at p.4 (Alta. EAB).

Director, Alberta Environmental Protection,[15] in interpreting "directly affected", the fact that unlike the NRCB, this Board is primarily adjudicatory in nature, must be taken into account.

In any event, we are concerned that an approach to interpretation of "directly affected" such as that taken by the NRCB, has the effect of placing a burden on individuals asserting that they are directly affected to virtually prove the substance of such direct effects at an early stage in the proceeding. As we noted in *Dr. Martha Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection*,[16] the Alberta Court of Appeal recognized and commented on this dilemma in *Leduc (County No. 25) v. Local Authorities Board*[17]. The Court of Appeal stated that:

> "If the section is to be construed as requiring the person proposing to intervene to show with certainty that his rights *will* be affected, how is he to do it? A tribunal cannot know with any certainty at the start of the hearing what the proceeding will involve . . . "
>
> "The Board, by the nature of its task, is bound to make its ruling at an early stage of the proceeding. It is bound to rule fairly on a balance of probabilities whether the hearing has the potential to affect or vary a person's rights given the variations in result possible at the conclusion of the hearing".[18]

We agree. Our task is to determine at this preliminary stage of the proceeding whether on a balance of probabilities there is a potential, that is, a reasonable possibility, that any of the parties will be directly affected by the application. Mr. McDonald, on behalf of the Director, submitted that the critical issue is whether the individuals who testified as to their use of public land adjoining the plant site can establish a direct cause and effect relationship between the approval and damage to their interests such as damage to wildlife. In presenting argument before us, Mr. McDonald acknowledged that the parties have presented information to show that they have the personal interest necessary to

---

[15] Appeal No. 94-003, May 24, 1994 at p. 3.

[16] *Ibid.*, at pp. 15-16.

[17] (1987), 54 Alta. L.R. (2d) 396.

[18] *Ibid.*, at pp. 399-400.

meet what he described as the first part of the test.

We believe that Mr. McDonald's approach requiring proof of every element at an early stage of the appeal, would create precisely the problem that the Court of Appeal discussed in the *Leduc (County No. 25)* case. The parties would be required to prove not merely a potential, but a likelihood that natural resources in which they have a personal interest would be adversely affected by the approval. In our view, this is not the proper test for determining whether a person is directly affected within s. 84 of the Act, at least not in this case.

Application of the "Directly Affected Principles"

Lesser Slave Lake Indian Regional Council

The Alberta Court of Appeal held in *Friends of the Athabasca Environmental Association et al v. Public Health Advisory and Appeal Board*,[19] that for the purpose of establishing a direct effect, it is not enough for a corporate body to merely represent the interests of those who may be directly affected. There is no evidence that either the Lesser Slave Lake Indian Regional Council or the eight First Nations it represents are directly affected as organizations. Consequently, neither the Regional Council, nor the First Nations are parties directly affected. However, the position of the individuals named in the LSLIRC Notice of Objection may be different.

Charlie Chalifoux

Mr. Chalifoux is the junior trapping partner of Sam Sawka, who is the senior holder of registered trapping location No. 1259, which adjoins the plant on the east, north, and west. This partnership status gives him a specific personal interest in trapping the area that immediately joins the plant. He regularly traps within 2-3 miles of the plant and has a personal interest in trapping rights dependent on wildlife resources in the area that extends to the plant boundaries. The wildlife and its habitat may

---

[19] *Supra*, note 7 at 5.

potentially be adversely affected by emissions from the plant. This trapping interest, and its very close geographical proximity to the plant, and Mr. Chalifoux's use of the area, makes him a person directly affected by the Approval for the purpose of s.84 of the Act.

Chief Dustin Twin

Chief Twin has carried out hunting and trapping, including youth training in the Swan Hills, for at least 15 years. He has fished and trapped in the area of the plant, and his evidence shows that he picked blueberries in the area approximately 2 km south of the plant. Further, he drank water at several rivers and creeks in the area, and particularly at Chrystina Lake which is located some 2 km northeast of the plant.

Chief Twin, thus makes personal use of natural resources that are located in close geographical proximity to the plant and that may be adversely affected by plant emissions to air or water. He would feel any potential impacts on these resources directly and personally. Chief Twin is thus a person who is directly affected. However, because he did not file a Notice of Objection, nor is he named on the Notice of Objection filed by the Lesser Slave Lake Indian Regional Council, the Board cannot find that Chief Twin is a party to this appeal, at this point in time.

Harvey Giroux

Mr. Giroux regularly harvests parts of trees and plants to be used for medicinal purposes. This includes camping, picking and eating herbs at Chrystina Lake. These are unique personal uses of land and resources located in close geographical proximity to the plant and that may be adversely affected by plant emissions. On this basis, Mr. Giroux would be a person directly affected. However, like Chief Twin, Mr. Giroux is not a named appellant, and therefore cannot be a party to this appeal, at this point in time.

Ed Graham

Mr. Graham is holder of trap line location No. 1812, located approximately 25 km East of Swan Hills. He lives downstream on Timeu Creek which rises just south of the plant. Mr. Graham represents the Zone 3 Trappers Association, which in turn represents trappers in the trapping zone in which the plant is located. In the Board's opinion, these factors alone would not establish the necessary proximity to the Plant and causal connection to make Mr. Graham a person directly affected. Nor was there evidence to suggest that the Alberta Trappers Association Zone 3 is directly affected as an association.

At the Board's preliminary hearing, Mr. Graham responded to questions concerning Carolyn Aarsen, who holds trapping location No. 1580. This location directly adjourns the plant to the southeast. Ms. Aarsen appeared at the NRCB hearing. The exchange was as follows:

Q. [The Chairman] A-A-R-S-E-N okay. So Carolyn Aarsen traps in 1580?

A. [Mr. Graham] Yes.

* * * * *

Q. The Chairman: So she's a registered owner of that trapline?

A. Yes.

Q. And you're her partner, which means you trap there as well?

A. No. I'm not her partner in the sense of trapping in her area. I'm in the same Fort Assiniboine Association.

Q. Okay. So you represent the Association?

A. Yes. (Transcript p.118-119)

The result is that Mr. Graham has no personal interest in location no.1580 which is in very close proximity to the plant, and which may potentially be adversely affected by emissions from the plant.

He is therefore not a person directly affected. Ms. Aarsen does appear to be directly affected. However, since she is not a named appellant, she cannot be a party to this appeal, at this point in time.

Matters Considered by the NRCB

The effect of section 87(5)(b)(i) of the Act, is that, the Board shall dismiss a notice of objection if in its opinion the person submitting the notice of objection received notice of, participated in, or had the opportunity to participate in the hearings held by the NRCB concerning the Chem-Security plant and operations, and all matters included in the Notice of Objection were considered at those hearings. Hearings were held by the NRCB in 1991-1992 concerning proposed expansion of plant incineration capacity and in 1994 concerning proposed importation of hazardous wastes from outside Alberta for treatment at the plant.

The Meaning of Section 87(5)(b)(i)

Section 87(5)(b)(i) states:

> (5) The Board
>
> (b) shall dismiss a notice of objection if in the Board's opinion
>
> (i) the person submitting the notice of objection received notice of or participated in or had the opportunity to participate in one or more hearings or reviews under the *Natural Resources Conservation Board Act* at which all of the matters included in the notice of objection were considered.

In *Carter Group v. Director of Air and Water Approvals, Alberta Environment Protection*,[20] the Board noted that the section was intended to avoid duplication in the hearing process. We stated that:

> "The jurisdiction of this Board to become involved in a "review" of ERCB decisions that led to approvals which are eventually appealed here — is limited to express statutory authority. The legislators have been very selective in ensuring there is no multiplicity of proceedings based upon similar evidence."[21]

---

[20] Appeal No. 94-012, December 8, 1994.

[21] *Ibid.*, at 9.

and further that:

> "The Board interprets s. 87(5)(b)(i) of *Environmental Protection and Enhancement Act* to prevent re-litigation of issues which have been decided and have substantially remained static, both legally and factually."[22]

We concluded that:

> "...there is a strong presumption that appeals to this Board will not normally lie regarding the same issues of fact and the same parties that were before the ERCB."[23]

We are mindful of the judgment of the Alberta Court of Queen's Bench in *Slauenwhite v. Alberta Environmental Appeal Board.* In *Slauenwhite*[24] Wilkins J. emphasized that s.6(1) of the Approvals Procedure Regulation[25] imposes a duty on the Director in an approval decision to consider the environmental impacts of the entire project in question. His Lordship stated that it would be patently unreasonable for this Board to conclude that the Act precluded it from determining whether or not the environmental impacts of the whole project had been weighed in accordance with the Act and regulations.

The Board feels that it was correct in its approach to interpretation of s. 87(5)(b)(i) in the *Carter Group* appeal and that notwithstanding the substantive result in the *Slauenwhite* case, this approach is consistent with that case on the basis of our reading of Mr. Justice Wilkins' decision. In *Slauenwhite*, the court concluded that the environmental impacts of a significant part of the natural gas processing facility in question, the pipeline gathering system that would be constructed to deliver approximately 40% of the gas capacity to the proposed plant, had not been considered by either the

---

22 *Ibid.*, at 10-11.

23 *Ibid.*, at 10-11.

24 (1995), 175 A.R. 42 (Alta. Q.B.).

25 Alta. Reg. 113/93.

ERCB or the Director. There is no question here of failure to assess environmental impacts of a significant physical component of the Chem-Security facility.

"Matters"

In applying this approach to the interpretation of s.87(5)(b)(i), the meaning of two terms is critical — the word "matters" and the word "considered". We believe they must be read together.

Counsel for the Director submitted that "matter" should be given its ordinary meaning which emphasizes substance, as opposed to manner or form. He argued that in interpreting "matter" it is necessary to consider the balance that the Act attempts to achieve between an open and effective appeal process and avoiding duplication of hearings. This balance, he said, leads to the conclusion that the Approval that is the subject of this appeal cannot be considered a new matter merely because it did not exist at the time of the NRCB's hearings. Otherwise, section 87(5)(b)(i) would be inapplicable in virtually all circumstances. The Board agrees that to consider the Director's approval a new matter would frustrate the intention of the legislature.

The Board interprets "matter" in this context to mean subject matter or issues raised in the proceedings before the NRCB and before this Board. But it cannot encompass generic subject matters, such as air pollution, generally. Nor is "matter" a static concept so that a subject matter once raised before the NRCB can never be the subject of appeal to this Board. Mr. McDonald, counsel for the Director, acknowledged that new information that substantially alters one's previous understanding of the facility may be a new matter. [26]

To conclude otherwise is inconsistent with the duty of this Board under the Act to provide a full and fair appeal on the merits, including consideration of new evidence. This is the reason for s.87(2)(d) of the Act which requires the Board to consider, in determining which matters will be included in

---

[26] Transcript, May 7, 1996 at 170.

hearings, whether new information will be presented to the Board, and for s.85 which authorizes the Board to require submission of additional information.[27] The legislature could not have intended to remove the right of appeal, notwithstanding significant new information concerning a subject matter relevant to the appeal, merely because the general subject matter could be said to have arisen at an earlier NRCB or ERCB hearing.

Furthermore, such an inflexible view of "matter" is inconsistent with the fundamental purposes of the Act - particularly the following purposes set out in s.2:

> 2 The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following:
>
> (a) the protection of the environment is essential to the integrity of ecosystems and human health and to the well-being of society,. . .
>
> (c) the principle of sustainable development, which ensures that the use of resources and the environment today does not impair prospects for their use by future generations;"

An inflexible interpretation of matter is fundamentally inconsistent with these purposes because new information may raise a serious risk that "adverse effects", as defined in s.1 of the Act,[28] could result in serious environmental harm. If an inflexible approach to interpretation of "matter" is taken, the result may be that the Board's appeal process could not be invoked by persons directly affected with a view to achieving environmental protection. This result would be inconsistent with a liberal interpretation of the purposes of this Act -- and the Alberta Courts have stressed the need to encourage a liberal interpretation of the purposes of the Act.[29]

---

27 See Gulf Canada Resources v. EAB, Alberta Court of Queen's Bench, Action No. 9601 00113, April 25, 1996.

28 In Section 1(b), "adverse effect" means, "impairment of or damage to the environment, human health or safety or property."

29 See, e.g. *Syncrude Environmental Assessment Coalition v. Alberta* (E.R.C.B.) (1994), 17 Alta. L.R. (3d) 368 (C.A.); *Bow Valley Naturalists v. Alberta* (Minister of Environmental Protection) (1995), 35 Alta. L.R. (3d) 285 (Q.B.).

"Considered"

"Consider" has been defined to mean, "to look at closely, examine, contemplate" and "to contemplate mentally, fix the mind upon; to think over, meditate or reflect on, bestow attentive thought upon, give heed to, take note of."[30]

Consideration, in the context of this appeal, requires that a matter be raised or presented through submissions by parties or questions by the NRCB. This must be reasonably explicit rather than merely inferential, and must not be arbitrary. The matter must then be subject to a meaningful consideration. Further, consideration requires that the NRCB respond to the matter, at least by treating it as relevant and properly taking it into account in its decision.

The Test to be Applied

In the *Carter Group* appeal, the Board stated:

> "The Board interprets s. 87(5)(b)(i) of *Environmental Protection and Enhancement Act* to prevent relitigation of issues which have been decided and have substantially remained static, both legally and factually. The Board believes the ERCB decision operates as a barrier to a related appeal to our Board, in these circumstances: 1) where the appeal involves the same people who participated or had an opportunity to participate in the ERCB hearing or review; 2) where the matters appealed are identical; 3) were actually argued to the ERCB; 4) were essential to its judgement and material to its decision; and 5) properly relied upon by the Director. In other words, there is a strong presumption that appeals to this Board will not normally lie regarding the same issues of fact and the same parties that were before the ERCB.
>
> In addressing section 87(5)(b)(i), where there is no new evidence and no new matters, our Board will not lightly allow an appellant to effectively re-open an ERCB decision. It may be that this Board will have jurisdiction if the ERCB decision is clearly erroneous in that it does not reflect the evidence or the record and therefore could have misled the Director, or that the ERCB decision and evidence is insufficient to support the decision reached by the Director in granting the approval. Assuming an

---

30 Oxford English Dictionary, Vol. III at 767 (Oxford: Oxford University Press, 1989).

> appeal is otherwise valid, there may be circumstances where this Board would look closely at factual matters already decided by the ERCB, even where there is no new evidence. This would involve an exceptional case; for example, if the Director's decision was not clearly linked to the ERCB's evidence, or if it was, where the ERCB's decision was arbitrary (which would mislead the Director); or, if the ERCB clearly did not give effect to its new statutory (environmental) mandate and that decision caused the Director to unreasonably rely on certain evidence."[31]

That this Board may have jurisdiction to hear an appeal involving matters that have in some sense been considered by the NRCB or ERCB, where the Director breaches the environmental review duties established by the Act and its regulations, was confirmed by *Slauenwhite v. Alberta Environmental Appeal Board*.[32] In *Slauenwhite*, Justice Wilkins said:

> "It is the conclusion of this court that the failure by the Director to undertake the review required of him by regulation is a "matter" properly before the Board".[33]

Regarding potential new evidence, we stated in the *Carter Group* appeal Decision that:

> "An appellant may raise matters which have arisen between the time the ERCB decision was first reached and the appeal filed. Such matters could include changes in statutes or regulation, changes in material facts that would affect conditions in an approval, or matters based on the development of previously unavailable evidence. Conversely, an appellant cannot raise as a challenge to an approval, arguments which were available to the appellant when the ERCB heard the evidence and made its decision; nor can the appellant challenge the approval with evidence which arose but was not available to the appellant because of its decision not to participate during the ERCB hearings."[34]

The paragraph just quoted underlines the need to read the words "matter" and "considered" in s.87(5)(b)(i) together in applying the test. We now turn to application of this test.

---

31 *Supra*, note 20 at 10 - 11.

32 (1995), 175 A.R. 42 (Alta. Q.B.).

33 *Ibid* at p.49.

34 *Supra*, note 20 at 12.

DECISION

It is clear that the parties at this preliminary hearing either participated in the previous NRCB proceedings or had the opportunity to participate in those proceedings.

The Notices of Objection raise the issues of contamination (particularly by PCBs) from fugitive emissions, emergency venting, particulate emissions from incinerators, contaminated surface water runoff from the plant, emission monitoring, land filling of waste, and public consultation obligations. It is clear that in a broad sense all of these are matters that were addressed in the NRCB hearings. To the extent that they concern allegations that conditions of NRCB approvals have not been met, they are more appropriately subjects for enforcement action by authorized environmental regulators, or for judicial action. The issue here, though, is whether any of these matters can be said to be new matters because they involve changes in material facts or because they may be significantly changed as a result of new evidence that was not available to the NRCB and therefore not "considered" by it.

Fugitive Emissions

One of the "matters" the Appellants wish to address is fugitive emissions. The respondents argue that this subject was thoroughly covered in previous hearings before the NRCB, and therefore cannot be reconsidered by this Board.

Report on Application 9101

In the report concerning Application 9101, the NRCB's "Basis of Decision" chapter includes "emissions from the plant to the atmosphere'" which demonstrates the importance of emissions generally (p.10). Chapter 7 is entitled "Emissions". This chapter includes sections 7.1.7.1 and 7.1.7.2, which are entitled "Fugitive Emissions from Buildings" and "Fugitive Emissions from Transfer Stations" respectively. Section 7.1.7.1 outlines Chem-Security's plan to reduce fugitive emissions. This plan includes the closure of some buildings and areas that are a part of the problem

along with the installation of filtration systems. A significant reduction of fugitive emissions was projected. The NRCB said:

> "The applicant projects a decrease of fugitive emissions of PCBs from 15 kg to 1.3 kg per year on completion of those measures." (p.54).

In Section 7.4, entitled "Cumulative Emissions and Cumulative Deposition", the NRCB noted that Chem-Security felt that emissions will not have an adverse effect on human health. It stated:

> "The risks (to human health and the environment) arising from long-term accumulation of contaminants in environmental components, *assuming that fugitive emissions are controlled*, are estimated by Chem-Security to be so low that a manyfold increase in the period of operation would be required to generate risks near to the margin of what is normally considered acceptable." (emphasis added)(p.62)

Improvements in technology were anticipated. As the NRCB said:

> "What emissions and deposition levels might be after, say, five years of operation is uncertain, but the implication of possible advances in technology is that rates of deposition would decrease rather than increase." (p.62-63)

Despite this optimism, the NRCB was cautious:

> "However, the Board does not consider it appropriate to simply assume that improvements will be made and that emissions would decrease." (p.63)

Instead the NRCB stressed the importance of the emissions monitoring system.

Section 7.5.3.1, entitled "Recognition of the Problem", discusses the fugitive emissions problem in detail. It begins with these words:

> "The Board has chosen to discuss PCBs, chlorobenzenes and chlorophenols separately in this section because they are a subject of public concern and because the applicant has shown that the bulk of those released from the existing Centre originate

from fugitive emissions from waste handling and storage facilities." (p.77)

Fugitive emissions are again discussed in section 7.5.3.5, where it said:

> "The Board accepts the applicant's predictions of the potential benefits of the remedial measures to curtail fugitive emissions on the understanding that improvements in fugitive emission controls will be demonstrated through ongoing monitoring." (p.84)

Report on Application 9301

Like the report on Application 9101, the report on Application 9301 includes references to fugitive emissions throughout. Listed in the "Basis for Decision" chapter is "air emission sources and air quality effect". Section 8.2.3 of the report is entitled "Fugitive Emission Rates at the Treatment Centre". This section includes three subsections, one of which is entitled "Board Views on Fugitive Emissions". This subsection begins with the statement that:

> "The Board is concerned with fugitive emissions of PCBs at the Treatment Centre because it recognizes the potential cumulative effect of persistent PCB emissions through bioaccumulation in the tissues of animals and humans." (p.8-21)

Later, the NRCB mentioned that although the emission rate reductions targeted in the 1991 EIA were not met, it still believed it likely that Chem-Security will eventually achieve them. However, the NRCB was not sure that this will happen, and stated that it:

> "Is concerned that fugitive emissions of PCBs could increase if the incineration of greater quantities of PCBs were allowed to proceed without further assurance that the Applicant's fugitive control program is capable of curtailing fugitives to an acceptable degree." (p. 8-21, 8-23)

In its conclusion to the report it said:

> "The Board finds that the control of fugitive PCB emissions associated with the

> storage and handling of violative organic wastes prior to incineration is of concern." (p. 11-6)

As to the success of the previously implemented programs, the NRCB expressed the view that:

> "While there have been reductions of emissions at known sources of fugitive emission, the evidence indicates that the problem has not been successfully resolved and fugitive emissions are continuing to be observed on an around the plant site." (p.11-6)

Finally, the NRCB said that if the application were approved:

> "Chem-Security must be required to ensure the control of fugitive emissions at the site before the routine incineration of out of province PCB and PCP waste commences." (p. 11-6)

Are Fugitive Emissions a "New Matter"?

It is clear that the NRCB did contemplate the problem of fugitive emissions, and outlined how it felt the problem should be dealt with.

The report on application 9101 indicates that a decrease in fugitive emissions of PCB's from 15 kg to 1.3 kg per year was predicted. This has not happened. In fact, the present application states that "The estimated total amount of fugitive PCB emissions in 1994 is greater by a factor of 2.25 than the estimate of 1.74 g/h reported previously for 1990". (p.32) The projected amount of fugitive emissions, instead of decreasing to 1.3 kg per year as expected, has risen to 33.45 kg per year. While Chem-Security has attempted to justify this situation, the fact remains that the predicted emission levels are significantly higher than what was originally predicted.

The NRCB expressed much concern over the situation regarding fugitive emissions in its decision on Application 9301. Now, it appears that potentially the problem has worsened considerably.

In its conclusions from the decision on Application 9101, the NRCB commented on the predicted

levels of emissions as follows:

> "On the basis of a detailed review of those predicted levels, the monitored existing levels and their effects, standard for various contaminants, and all other relevant factors, the Board concludes that the emissions from the proposed expanded Treatment Centre would not create unacceptable risks to the health of humans or the environment." (p. 148)

The NRCB clearly based its conclusions and recommendations on the predicted levels of fugitive emissions *that were before it*. Its acceptance of the applicant's, (Chem-Security), predictions of the potential benefits of remedial measures proposed to control fugitive emissions was based on those predicted levels. Counsel for Chem-Security emphasized that both the original 1.3 kg per year, and the 33.45 kg per year number from the new application are not quantitative measurements, but predictions based on atmospheric modelling. In the Board's opinion, far from explaining the discrepancy, so as to link the original and the new projections, the fact that this information is based on modelling outputs, merely deepens the uncertainty raised by the new information and demands explanation.

The new information in the current Application projects fugitive emissions approximately 25 times greater than the levels projected in Application 9301 before the NRCB. The Board concludes that this difference is significant.

We are satisfied that a consideration of this new information could potentially lead to conclusions and recommendations different from those reached by the NRCB. Fugitive emission of PCBs is therefore a new matter that may be considered in this appeal.

Emergency Venting

Another matter raised in the appellant's Notice of Objection is emergency venting. Again, the respondents assert that this matter was thoroughly dealt with in the NRCB reports.

Report on Application 9101

Section 7.1.6 of the report is entitled "Emergency Venting". In this section, the NRCB said that:

> "(These rough calculations) suggest that emergency venting could contribute to a large part of the total annual emissions of some pollutants, especially those associated with particulates. The possibility exists that workers at the Treatment Centre may be exposed to relatively high concentrations of some contaminants during process excursions." (p.52)

Later, the report states:

> "The Board believes that emissions occurring during process excursions could be a significant contributor to some acute and chronic risks to human health and the environment and that reducing their quantity is a desirable goal." (p.53)

The NRCB makes some recommendations for how to deal with the problem of emergency venting. It suggests that an appropriate objective would be "ensuring that the best practical technology is being applied."

Report on Application 9301

In this report, section 8.2.2. is entitled "Emergency Venting Episodes at the Treatment Centre". The NRCB noted that although Chem-Security estimated that there would be four to seven emergency venting episodes per year with an average duration of 20 minutes, there were in fact nine such episodes in 1993. (p.8-16)

However, the NRCB said that "emergency venting episodes are now expected to reduce to 10 minutes from the previously predicted 20 minutes in Application 9101." (p.8-17) As a result, "the emergency venting emissions should be less than predicted in Application 9101, since the duration of such events would be reduced by 50 percent." (p.8-18)

The NRCB felt that emergency venting episodes should be reduced, and concluded:

> "Should the Application proceed, the Board would require Chem-Security to implement reasonable steps satisfactory to Alberta Environmental Protection that will further reduce emergency venting episodes, to a level of service more appropriate for a hazardous waste treatment facility processing Canadian wastes due to power interruption controllable by Chem-Security" (p.8-18)

This requirement became a condition of the approval of the project. These words indicate that the NRCB felt that the intermittent power supply problems could be rectified, and they are substantially restated in the Conclusion of the report on Application 9301 at page 11-6.

Is Emergency Venting a "New Matter"?

In the new application, Chem-Security says that "considerable effort has been expended and action taken to address the quality of the power supply and the requirements of this condition have been completed." (p.23) It says that "CSAL has had ongoing discussions with Alberta Power on the quality of the power supply since 1992" and that several measures have been implemented. (p.22) No evidence has been presented to suggest that the conditions have not been met.

No new information that would change the situation significantly is apparent in the application or in the evidence of the Appellants. Consequently, the Board concludes that emergency venting does not present a new matter not considered by the NRCB.

Surface Water

Another area of concern raised by the Appellants is surface water discharge requirements.

Report on Application 9101

Section 7.5.1.1 of the report is entitled "Surface Water". This section indicates that the NRCB was

confident that there were no problems with water quality:

> "The Board therefore concludes that water quality in the vicinity of the existing Centre generally meets Drinking Water Quality Guidelines and has not been adversely affected by operations to date." (p.66)

Section 7.7.3.6 of the report is called "Surface and Groundwater Quality". It discusses the monitoring stations installed to address surface water quality as follows:

> "The applicant explained that the primary reason for the choice of locations was to intercept any contaminants originating from the Centre that may be captured by surface water and moved away from the Centre." (p.102)

and concludes that :

> "The Board is satisfied that the current design of the monitoring program for surface water is adequate for the foreseeable future." (p.102)

Section 9.2 is headed "Surface runoff". In it, the NRCB wrote that:

> "the design of the proposed expansion is intended to ensure that all surface drainage enters the retention ponds." (p.116)

Later, it says that:

> "One of Chem-Security's design objectives is that no surface water from the active areas of the plant site would enter off-site drainage systems." (p.116)

The NRCB thought that Chem-Security would be successful in achieving this objective. If concluded that:

> ". . . the objective of retaining surface drainage from the active plant area on-site would be met by the proposed designs." (p.116)

Report on Application 9301

In this report the surface water monitoring program was considered again. However, no changes were made, and no further recommendations were given: The NRCB stated that it,

> ". . . heard no compelling evidence that the Application would lead to any significant adverse water or aquatic environmental effects that would preclude or limit the use of resources in the Swan Hills region." (p.8-30)

Is Surface Runoff a "New Matter"?

Surface water was clearly considered in the previous reports by the NRCB. The NRCB took pains to note in report 9101 that the whole process was designed to prevent contaminants from escaping the site of the plant. This indicates that the NRCB gave its approval concerning surface water on the basis that there would be no runoff directly into the environment outside the plant site.

Now, Approval 95-IND-237 authorizes some surface discharge from the retention ponds (sect. 5.1.4 at p.15). This is a new fact that in the Board's opinion is material to the potential for adverse environmental effects caused by surface water contamination. Surface water, particularly off-site discharge of surface water, therefore is also a new matter that may be a subject of appeal to this Board.

Other Issues Raised

As to the other issues raised in the notices of objection, the Board concludes, after carefully reviewing the NRCB decisions and the evidence before us and arguments presented, that all of these matters were considered by the NRCB within the meaning of s.87(5)(b)(i).

Amendment of Notice of Objection

The Lesser Slave Lake Indian Regional Council applied to amend its Notice of Objection, apparently to make it clear that the individuals listed on the Notice of Objection were objecting in their personal capacities.

However, we are satisfied that the individuals whose names appear in the Notice of Objection filed by the Lesser Slave Lake Indian Regional Council intended to object as individuals. It is, therefore, not necessary to amend the Notice of Objection as proposed, and the motion to amend is denied.

CONCLUSION

The Board determines that Charlie Chalifoux is a person "directly affected", whose appeal may be heard by this Board.

Of the issues raised by the Notices of Objection, only PCB fugitive emissions and off-site discharge of surface water are matters that were not considered by the NRCB as contemplated by s.87(5)(b)(i) of the Act and therefore can be subjects of appeal to this Board.

ORDER

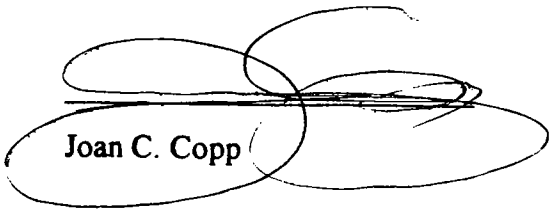
A hearing of this appeal on the matters of PCB fugitive emissions and off-site surface water discharge will be held on or before September 16, 1996. The sole Appellant in the appeal is Charlie Chalifoux.

The Director, of course, is a party to this appeal, and any other person may apply to the Board for

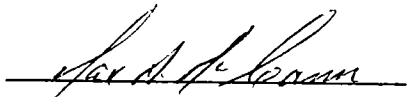
party status,[35] including Chief Dustin Twin, Harvey Giroux, Carolyn Aarsen, Ed Graham and Chem-Security (Alberta) Ltd.

Dated on June 28, 1996, at Edmonton, Alberta.

William A. Tilleman, Chair



Joan C. Copp



Max A. McCann

[35] See s.87(6) of the Act, and ss.8(c) and 9 of the Environmental Appeal Board Regulation, Alta Reg. 116/93.