McColl-Frontenac Inc. v. Alberta (Minister of Environment), 2003 ABQB 303

Date: 20030404
Action No. 0203 04933

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

McCOLL-FRONTENAC INC.

Applicant

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA (AS REPRESENTED BY THE MINISTER OF ENVIRONMENT) ENVIRONMENTAL APPEAL BOARD (ALBERTA) AND THE MANAGER OF ENFORCEMENT AND MONITORING BOW REGIONS

Respondents

REASONS FOR JUDGMENT
of the
HONOURABLE MR. JUSTICE R. P. MARCEAU

APPEARANCES:

Robert B. White, Q.C. and
Jamie Dee Larkam
Davis & Company
Suite 1201, 10060 Jasper Avenue
Edmonton, Alberta T5J 4E5
For the Applicant

Lorne A. Smart, Q.C.
Miller Thomson LLP
2700, 10155 - 102 Street
Edmonton, Alberta T5J 4G8
For the Respondent Her Majesty the Queen
(As Represented by the Minister of Environment)

Andrew C.L. Sims, Q.C.
Barrister and Solicitor
805, 10011 - 109 Street
Edmonton, Alberta T5J 3S8
For the Respondent, Environmental Appeal Board

Grant D. Sprague
Alberta Justice
Environmental Law Section
304, 4920 - 51 Street
Red Deer, Alberta T4N 6K8
For the Respondent, The Manager of Enforcement and Monitoring Bow Region

Summary

[1] McColl-Frontenac seeks judicial review of the Minister of Environment's decision to confirm an Environmental Protection Order (EPO) granted by the Director of Enforcement and Monitoring, Bow Region, Environmental Service, Alberta Environment (the Director), arguing that:

(1) The Minister breached the principles of natural justice by failing to give reasons for his decision,

or alternatively

(2) The Minister erred when he based his decision on a flawed report and recommendation by the Environmental Appeal Board (EAB) that

(a) did not provide the Agreed Statement of Facts to the Minister and misrepresented the facts in its report,

(b) by treating the facts in the Agreed Statement of Facts as evidence rather than as facts no longer in issue,

(c) raised a new issue without notice to the parties – the possibility of off-site ongoing migration of contaminants,

(d) erred by concluding that McColl Frontenac did not have a legitimate expectation that the *Guidelines for the Designation of Contaminated Sites* (the *Guidelines*) would be followed,

(e) created a reasonable apprehension of bias, and

(f) erred by misinterpreting the relevant sections of the ***Environmental Protection and Enforcement Act***, S.A. 1992, c. E13.3 (the Act),

(a) first by finding that Divison 1 of Part 4, not Division 2, of the Act was applicable, and

(b) secondly by finding that the EPO operated prospectively, and that to the extent that it operated retrospectively, the legislation was intended to have retrospective effect.

McColl Frontenac alleges that the first five of these errors breach the principles of natural justice and the duty to be fair, while the last two were errors of law.

[2] I find that there is no requirement in these circumstances for the Minister to give reasons. The Supreme Court of Canada decision in ***Suresh v. Canada (Minister of Citizenship and Immigration)***, (2002) 208 D.L.R. (4th) 1 (S.C.C.) does not prescribe a general right to reasons in all circumstances, nor did the Court in that decision give a broader definition of the procedural right to reasons than its decision in ***Baker v. Canada***, [1999] 2 S.C.R. 817. The Alberta Court of Appeal's decision in ***Fenske (c.o.b.) Glombick Farms) v. Alberta (Minister of Environment)***, (2002) 303 A.R. 356, held that there was no requirement for reasons where the Minister's order differed from the recommendations of the EAB in certain respects. Here, there is even less basis to require reasons when the Minister has adopted the EAB's recommendations entirely. There is nothing exceptional in these circumstances that would render the failure to give reasons a breach of natural justice.

[3] I find that the EAB provided a report to the Minister that was substantially accurate. Any discrepancies identified by McColl-Frontenac are not material to either the EAB's ultimate recommendation or to the Minister's decision.

[4] I find that there was no breach of the principles of fundamental justice occasioned by the EAB's finding that there was a possibility of off-site migration. First, making an inference drawn from the evidence does not constitute raising a new issue without notice to the parties, and secondly the Statement of Agreed Facts did not prohibit the EAB from drawing reasonable inferences from those facts.

[5] Further, the possibility of off-site migration was raised by the EPO granted by the Director, and was further raised in the submissions made by the Director to the EAB.

[6] I find that McColl Frontenac had no legitimate expectation that the process under the *Guidelines* would be implemented. The *Guidelines* itself points out that the process will only be used as "a last resort when there are no other appropriate tools."

[7] Nor do I accept McColl Frontenac's characterization of the EAB's comments as creating a reasonable apprehension of bias. McColl Frontenac alleges that the EAB's comments that co-operative parties will receive more favourable outcomes indicate prejudgment. However, when read in context the comments merely point out that cooperation is a better way to deal with environmental problems.

[8] The EAB's decision that Division 1 of Part 4 applied was not patently unreasonable. Section 110 (now s. 125) of Division 2 applies to a substance that has caused, may cause, or is causing, a "**significant** adverse effect," while s. 102 (now s. 113) applies to a substance that has caused, may cause, or is causing an "adverse effect." The qualification of what constitutes "significant" adverse effect is something well within the expertise of the Board, not the Court.

[9] Finally, the EAB's interpretation of the Act is not only not patently unreasonable, in my opinion it was correct. First, the EAB's interpretation of s. 102 as being expressly retrospective is not patently unreasonable. Moreover, to the extent that s. 102 is retrospective, as legislation intended for public protection it is an exception to the presumption against retroactive legislation: ***Brosseau v. Alberta (Securities Commission),*** [1989] 1 S.C.R. 301. Whether or not the the Act is applied retrospectively in this case, the EPO also deals with a present and ongoing threat.

The relevant statutory scheme and the EPO

[10] The EPO was issued under the provisions of the 1992 Act, and the parties referred to the sections as they were numbered at the time of the EPO and the hearing before the EAB. I will refer to the earlier section numbers as well, but in the first reference will also refer to the relevant section numbers under the ***Environmental Protection and Enforcement Act,*** R.S.A. 2000, c. E-12 *(EPEA* 2000) in parentheses. The relevant sections of the *EPEA 2000* are in Appendix A.

[11] The EPO was issued pursuant to s. 102. The EPO is in Appendix B.

Facts

[12] The parties drafted a Statement of Agreed Facts for the purposes of the EAB appeal. It is attached at Appendix C.

Who is the decision maker?

[13] The legislative scheme for the appeal of an environmental protection order is somewhat unusual. One appeals to the Environmental Appeal Board (the Board) under s. 84 (now s. 91). The Board conducts the appeal, although it need not conduct an oral hearing, but may instead

make its decision on the basis of written submissions (s. 86, now s. 94). Under s. 87(2) (now s. 95(2)) the Board determines what matters will be included in the hearing of the appeal. Further, if under s. 87(4) (now s. 95(4)) the Board determines that a matter will not be included in the hearing of an appeal, no representations may be made on that matter.

[14] Under s. 91(1) (now s. 99(1)) the Board is required to submit a report to the Minister, including its recommendations and the representations, or a summary of the representations, that were made to it. Under s. 92(1) (now s. 100(1)), it is the Minister, not the Board, that decides to either confirm, reverse, or vary the decision appealed. The Minister is empowered to make any decision that the person whose decision was appealed could make, and can make any further order that the Minister considers appropriate to carry out the decision. Once the Minister makes the decision, he is required under s. 92(2) (now s. 100(2)) to immediately give notice to the Board, and the Board is then required to given notice of the decision to all interested persons.

[15] Therefore, while it is the Board that holds the hearing, it is the Minister who makes the ultimate decision. The legislation expressly provides that the Board is required to conform to the rules of natural justice: ss. 94(2), 95(6), and 101. Moreover, a duty of procedural fairness applies when a decision is administrative and affects rights, privileges or interests: ***Cardinal v. Director Kent Institution***, [1985] 2 S.C.R. 643 at 837. This raises the conundrum of whether a breach of natural justice (or the duty to be fair) by the Board, which does not decide, will affect the decision of the Minister.

[16] Further, if the Board's report and recommendations do not meet the requisite standard of review (whether patently unreasonable, reasonable, or correctness, whichever is applicable), what effect does this have on the Minister's decision?

[17] In my opinion, in a situation where the Minister gives no reasons, and has adopted the order prepared by the EAB without any changes, any breach of natural justice or the duty to be fair by the Board, must render the Minister's decision *ultra vires*. Hypothetically, it is possible that if the Minister were aware of a possible breach of natural justice, he could conceivably act to cure the breach, if he provided reasons that demonstrated that he was aware of the breach and his decision was able to somehow cure the taint.

[18] Here, the Minister accepted the Board's report and recommendations, and without reasons, signed the order as recommended by the Board. I agree with Clackson J. who held in ***Legal Oil and Gas Ltd. v. Alberta (Minister of Environment)*** (2000), 265 A.R. 341 (Q.B.) that only the Minister's decision can be reviewed. Where the Minister issues no reasons of his own and signs the order proposed by the EAB, as here, then the Minister can be taken to have adopted the reasoning of the EAB. If judicial review of the EAB's decision would have been available if it were the final decision maker, then the Minister's decision is tainted by the same defect and should be quashed.

[19] If the Board erred and its reasons do not meet the standard of review, the Minister may, by giving reasons of his own, meet the standard himself. Keeping in mind that the exercise of ministerial discretion and decision-making generally involves polycentric considerations, that is they "require the simultaneous consideration of numerous interests and the promulgation of solutions which concurrently balance benefits and costs for many different parties,"the standard of review of the Minister's decision may be different than the Board's under the pragmatic and functional test: ***Pushpanathan v. Canada (Minister of Citizenship and Immigration)***, [1998] 1 S.C.R. 982 at para. 36.

[20] In conclusion, although there are a variety of possible permutations and combinations of decision-making under the scheme, depending upon whether the Minister accepts the EAB's recommendations, gives reasons of his own, or confirms, reverses, or varies the director's decision, the Minister is ultimately the only decision-maker subject to judicial review here.

What is the standard of review?

[21] The Supreme Court of Canada has laid out the framework for assessing the standard of review in ***Pushpanathan.*** The test, called the pragmatic and functional analysis, is premised on determining whether the legislators intended the question in issue to be left to the tribunal's exclusive jurisdiction. The analysis focuses on four factors:

(1) privative clause;

(2) expertise;

(3) purpose of the Act as a whole and of the provision in particular; and

(4) nature of the problem and whether the problem is one of law or fact.

Privative clause

[22] Section 92 contains a strong privative clause that protects the decisions of the Minister and the Board:

> 92 Where this Part empowers or compels the Minister or the Board to do anything, the Minister or the Board has exclusive and final jurisdiction to do that thing and no decision, order, direction, ruling, proceeding, report or recommendation of the Minister or the Board shall be questioned or reviewed in any court, and no order shall be made or process entered or proceedings taken in any court to question, review, prohibit or restrain the Minister or the Board or any of its proceedings.

This suggests a high level of deference.

Expertise

[23] Iacobucci J. has described the expertise of the tribunal as the most important factor to consider in determining the standard of review: ***Canada (Director of Investigation and Research) v. Southam Inc.***, [1997] 1 S.C.R. 748 at para. 50. The Court of Appeal in ***Fenske*** considered the standard of review to be applied to the Minister's decision when he did not accept the EAB's recommendations, at para. 26:

> In this case, the expertise of the Appellant is apparent from the scheme of the *EPEA* which vests in the Appellant and his ministry, the complex task of assessing and weighing the often competing technical and public policy considerations inherent in the protection of the environment. Indeed, the Appellant's expertise is such that he is free to confirm, reverse, or vary the recommendations of an expert Board.

The Minister's expertise, therefore, militates in favour of deference to his decision.

[24] The expertise of the EAB was considered by Lefsrud J. in ***Fenske*** at para. 22 noting that the EAB had more expertise than the Minister. The Court of Appeal did not disagree. In ***Legal Oil & Gas Ltd. v. Alberta (Minister of Environment)*** (2000), 265 A.R. 341 (Q.B.) Clackson J. addressed the issue of the EAB's expertise to interpret the Act, noting that:

> (1) the legislative scheme has established the EAB as an expert advisor to the Minister,
>
> (2) the issues to be dealt with under the Act require scientific expertise,
>
> (3) the purpose of s. 102 was to identify and rectify pollution problems, not to ascribe fault,
>
> (4) applications under s. 102 may involve many competing interests that must be balanced, and
>
> (5) there are policy considerations to be taken into account when making a decision under s. 102.

[25] Here, in making its report to the Minister, the EAB considered the factual background, analysed and interpreted particular sections of the Act, including ss. 102 and 114 (now s. 129), considered legislative policy, considered the problems associated with applying that policy, and considered the historical antecedents of the legislation. The Board has not only scientific expertise, but also cumulative expertise in interpreting and applying the Act. All these factors suggest that the EAB is a board with significant expertise entitled to deference.

Purpose of the legislation and particular provisions

[26] The purpose of the legislation as a whole is reflected in s. 2 of the Act, and includes supporting and promoting the protection, enhancement and wise use of the environment, while recognizing

> (1) the need for Alberta's economic growth and prosperity in an environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earliest stages of planning,
>
> (2) the principle of sustainable development,
>
> (3) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions;
>
> (4) the need for Government leadership in areas of environmental research, technology and protection standards;
>
> (5) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions;
>
> (6) the opportunities made available through the Act for citizens to provide advice of decisions affecting the environment;
>
> (7) the responsibility to work co-operatively with governments of other jurisdictions to prevent and minimize transboundary environmental impacts;
>
> (8) the responsibility of polluters to pay for the costs of their actions;
>
> (9) the important role of comprehensive and responsive action in administering this Act.

[27] The specific provisions of the Act that are relevant to these issues are found in Part 4 "Release of Substances", and in particular Division 1, under which the EPO was issued, and Division 2, the division McColl-Frontenac argues should have been applied. The purpose of this part of the Act is to provide a means for the Director to order clean up of contamination and to fulfill the purpose in s. 2(i) that polluters pay for the costs of their actions. The purpose of s. 102 is, as Clackson J. noted in ***Legal*** at paras. 28 and 33:

> ...to deal with pollution. Its scope is broad and directed toward the identification of pollution problems and rectification of those problems. Its primary concern is not ascribing fault, but rather determining an effective and efficient method of resolving a problem...

> As explained earlier, this Act is about protection and remediation based upon policy concerns. The Act requires consideration of many competing interests and involves a variety of non-judicial strategies for resolution of interests.

Nature of the problem

[28] McColl-Frontenac has alleged several errors, including breaches of natural justice and the duty to be fair and errors of law by the Board in interpreting the Act. It argues that the expertise of the Board and Minister is limited to the specific areas of expertise under the Act – issues related to environmental protection. At issue here, it argues, are pure questions of law, questions that neither the Board nor the Minister have more relative expertise than the Court.

[29] The Supreme Court in ***Southam*** and ***Pushpanathan*** noted that deference may be appropriate even in questions of pure law. In ***Pushpanathan*** the Court noted at para. 34:

> Once a broad relative expertise has been established, however, the Court is sometimes prepared to show considerable deference even in cases of highly generalized statutory interpretation where the instrument being interpreted is the tribunal's constituent legislation.

[30] In ***Pushpanathan***, the Court noted that it is often difficult to determine the difference between a question of fact or law, or a question of mixed fact and law and referred to the decision in ***Southam*** at para 37:

> Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future.

[31] Bastarache J. in ***Pushpanathan*** quoted with approval Justice L'Heureux-Dubé's statements in ***Canada (Attorney General) v. Mossop***, [1993] 1 S.C.R. 554, at pp. 599-600 that specialized tribunals may have jurisdiction to develop their own jurisprudence including the interpretation of their own legislation:

> Specialized boards are often called upon to make difficult findings of both fact and law. In some circumstances, the two are inextricably linked. Further, the "correct" interpretation of a term may be dictated by the mandate of the board and by the coherent body of jurisprudence it has developed. In some cases, even where courts might not agree with a given interpretation, the integrity of certain administrative processes may demand that deference be shown to that interpretation of law.

Conclusion on standard of review

[32] The Court of Appeal in ***Fenske*** determined that the patently unreasonable standard of review was appropriate for a ministerial decision under the Act. In ***Fenske*** the Minister did not grant the order recommended by the EAB, but issued an order partly reflecting the EAB decision and partly reflecting other policy considerations. The Court seems to have concluded that it was the resulting ministerial order, after considering the EAB recommendations, that must pass the standard of review. Presumably, had the Minister given reasons, they too would have formed part of the mix to which the Court would have applied the standard of review.

[33] In this case the Minister gave no reasons, but adopted the recommendations of the EAB. I conclude the Minister's reasoning must be taken to be that of the EAB's and the same standard of review applicable to the EAB's process, which led to the Minister's decision, is applicable to the Minister's decision. When I say that the Minister's reasoning is taken to be that of the Board's, I restrict that comment specifically to the situation where the Minister accepts the precise recommendation of the Board and does not issue a different order (as in ***Fenske***) or any additional reasons which differ or amplify the reasons of the EAB.

[34] I conclude that the standard of review for errors of law is whether the Minister's decision is patently unreasonable.

Breaches of Natural Justice and the duty to be fair

Alleged breach by the Minister:
Was the Minister required to give reasons?

[35] McColl-Frontenac argues that the Minister was required to provide reasons. First counsel for McColl Frontenac argues that based upon the reasoning in ***Suresh***, the Supreme Court of Canada has held that there is a general obligation for a tribunal to provide reasons where there is an important interest at stake. In the alternative, McColl-Frontenac argues, that because the representations by the EAB to the Minister were inaccurate, the Minister was required to provide reasons to demonstrate that his decision was not affected by the inaccuracies.

[36] The Court of Appeal in ***Fenske*** held that there was no requirement that the Minister provide reasons, citing the Supreme Court of Canada's decision in ***Baker***. In ***Baker*** the Supreme Court held that in certain circumstances the duty of procedural fairness may require a written explanation for a decision. Those circumstances were said to include situations where a decision had important significance for an individual or where there was a statutory right of appeal (at para. 43).

[37] In ***Fenske*** the Minister chose not to accept all the EAB's recommendations and the Minister's order therefore differed in several respects from the EAB's recommendations. In spite of these differences, the Court of Appeal disagreed with the Chambers Judge's conclusion that this constituted circumstances that brought the situation "within one of the rare exceptions in which the failure to provide reasons amounts to a breach of procedural fairness."

[38] The Court of Appeal in ***Fenske*** considered its decision in ***Cook v. Alberta (Minister of Environmental Protection)*** (2001), 293 A.R. 237 (C.A.). In ***Cook*** the Court said at para. 53:

> The requirement to give reasons in the unique circumstances of this case will increase the burden on the Minister and his staff. But not every case will require reasons. Indeed, cases that require the provision of reasons will be the rare exception. As noted in Baker, the requirements of fairness are context-driven and fact-specific. And, as illustrated by ***Baker*** itself, a reasons requirement can be met in a variety of ways.

[39] After citing this paragraph from ***Cook***, the Court in ***Fenske*** contrasted the situation in ***Cook*** with the situation in ***Fenske***, to demonstrate why reasons were not required in ***Fenske*** (at paras. 37- 39):

> The circumstances of this appeal do not bring it within one of the rare exceptions in which the failure to provide reasons amounts to a breach of procedural fairness.
>
> In ***Cook***, the Appellants were led to expect that the Minister would follow the decision of the Appeal Committee which had been favourable to the Appellant's position. The Minister's decision did not meet the Appellant's expectations, and no reasons were given for the Minister's departure from those expectations.
>
> Although the Minister's order in this appeal has important significance for the Respondents, there is nothing in the circumstances of the appeal that could have led the Respondents reasonably to expect that the Appellant would issue an order favourable to their position or that he would follow the Board's recommendations.

[40] Here, there is even less reason than in ***Fenske*** to provide reasons since the Minister has adopted all the EAB's recommendations and signed its proposed form of order.

[41] But McColl-Frontenac argues that the Supreme Court in ***Suresh*** established a general right to reasons more extensive than that established in ***Baker***.

[42] In my opinion ***Suresh*** is distinguishable. The Court there was dealing with the procedural requirements under s. 7 of the ***Charter*** and the principles of fundamental justice. While the principals of fundamental justice include the principles of natural justice and the duty to be fair, the principles of the former are broader than the latter and include substantive rights (***Suresh*** at para. 113). Moreover, the Court indicated that the principles it was describing were

to be applied "in a manner sensitive to the context of specific factual situations." (at para. 113).

[43] When determining the contents of the duty, the Court at para. 115 noted that the factors to be considered included:

> (1) the nature of the decision and the procedures followed in making it,
>
> (2) the role of the decision within the statutory scheme,
>
> (3) the importance of the decision to the individual affected,
>
> (4) the legitimate expectations of the person challenging the decision, and
>
> (5) the choice of procedure made by the agency itself.

[44] The Court in ***Suresh*** then examined these factors in relation to the specific facts. The applicant was a Sri Lankan convention refugee, detained by the Canadian government, which commenced deportation proceedings on security grounds. The Federal Court, Trial Division upheld a deportation order and following a deportation hearing, an adjudicator held that he should be deported. The Minister of Citizenship and Immigration issued an opinion declaring him to be a danger to the security of Canada and concluded that he should be deported based on an Immigration Officer's memorandum. On deportation he faced the risk of torture. On the basis of these facts the Court concluded that the procedural protections required did not include requiring the Minister to conduct an oral hearing or a complete judicial process, but did include a right to reasons:

> These reasons must articulate and rationally sustain a finding that there are no substantial grounds to believe that the individual who is the subject of a s. 53(1)(b) declaration will be subjected to torture, execution or other cruel or unusual treatment, so long as the person under consideration has raised those arguments. The reasons must also articulate why, subject to privilege or valid legal reasons for not disclosing detailed information, the Minister believes the individual to be a danger to the security of Canada as required by the Act. (Para. 126)

[45] In my opinion, ***Suresh*** goes no further than the Supreme Court of Canada's decision in ***Baker*** and the facts here are clearly distinguishable. First, this is not a s. 7 ***Charter*** case. Secondly, while the issues are no doubt important to McColl-Frontenac, they cannot be equated with the individual liberty and security interests at stake both in ***Baker*** and ***Suresh.***

[46] Applying the factors addressed in these cases:

(1) **The nature of the decision and the procedures followed in making it**
The process is a two step process in which the EAB holds a hearing,

accepts submissions, and renders an advisory opinion to the Minister, who in this case accepted the recommendation.

(2) **The role of the decision in the statutory scheme**: This decision is part of the remedial process aimed at identifying contaminated areas and ensuring that polluters clean the pollution they caused. The decision is not punitive but remedial.

(3) **The importance of the decision**: The decision is important to the corporation and will likely have precedential effect. It does not affect security or liberty interests. It is related to statutory obligations. The decision is not only important to the parties, but has important policy implications for other interests, including the public.

(4) **Legitimate expectations**: Legitimate expectations are not in issue here, as there were no assurances made that the Minister would follow a particular procedure (***Cook v. Alberta (Environmental Protection)*** (2001), 293 A.R. 237).

(5) **Procedure chosen by the tribunal**: The statutory procedure requires that the EAB give recommendations to the Minister and that the Minister decide. Where the Minister decides to accept the EAB's recommendations in their entirety, the EAB's reasons are essentially the Minister's.

[47] I conclude that there was no requirement for the Minister to provide reasons.

[48] Nor do I accept McColl-Frontenac's alternative argument regarding reasons. There were no material misrepresentations that rendered the EAB's reasons inaccurate, thus requiring the Minister to give reasons of his own. (Discussed below)

Alleged breaches arising from the reasons and recommendations by the EAB:

[49] The previous analysis of the two step process under the Act leads to the conclusion that if there was a fundamental breach of the rules of natural justice underlying the reasons and recommendations of the EAB, then unless the defect, be it bias or other unfairness, is corrected by reasons given by the Minister, the unfairness will taint the Minister's decision, and it will have to be quashed. This issue requires no assessment of the standard of review, as any breach means the decision must be quashed. The contents of the duty, however, is variable depending on the particular situation. See ***Baker v. Canada (Minister of Citizenship and Immigration),*** [1999] 2 S.C.R. 817*;* ***Moreau-Bérubé v. New Brunswick (Judicial Council),*** [2002] S.C.J. No. 9 at paras. 74-75.

Did the EAB's report misrepresent the facts to the Minister?

[50] McColl-Frontenac alleges several breaches of natural justice. The first is in relation to the alleged failure by the EAB to provide the Statement of Agreed Facts to the Minister when it provided its report and recommendations to the Minister under s. 91(1). Section 91(1) requires the EAB to submit a report to the Minister consisting of its recommendations and the representations, ***"or a summary of the representations that were made to it"*** (emphasis added). It is clear, therefore, that the statute authorizes the EAB to submit a summary of the materials it reviewed.

[51] McColl Frontenac alleged that having failed to provide the Statement of Agreed Facts, the EAB's report breached the principles of natural justice because it misrepresented the facts or drew facts from sources outside of the statement. Therefore, the next issue is whether the summary of the facts the EAB provided to the Minister is inaccurate or misrepresented the facts.

[52] McColl Frontenac's brief alleged that the EAB report found that there was off-site migration, while the Statement of Agreed Fact indicated that there was no evidence of off-site migration. I note that the EAB report did not find that there had been off-site migration, as asserted by McColl-Frontenac, but rather the EAB suggested that there was "a possibility" that there had been off-site migration. Counsel for McColl-Frontenac acknowledged this inaccuracy in its brief, but asserted other inconsistencies.

[53] McColl-Frontenac in its written submissions identified the following inconsistencies:

> (1) Paragraph 10 of the Agreed Statement of Facts stated that a gas station was on the property between 1956 and 1981; McColl-Frontenac Oil Company stored gasoline in underground tanks there; Texaco Canada Inc. records indicate that the gas station last operated in 1979, and the underground tanks were removed some time before July 14, 1981.
>
> The EAB's summary of the facts state: The early history of industrial use of the site is somewhat cloudy, but the parties have stipulated that a gas station was located on the property between 1956 and 1981 and, as part of the station's operation, gasoline was stored on the site in underground storage tanks. Corporate records **suggest** the gas station was last operated in 1979, and that the underground storage tanks were removed sometime before July 1981. However, there is no evidence before the Board as to how the tanks were removed and whether the removal actions included any checking and remedying any hydrocarbon leakage associated with the underground tanks.

Further along the EAB states:

> Because the gas station ceased operating in 1979 and the tanks were supposedly removed before July 1981, the Board presumes that the pollution sources ceased releasing additional pollution by 1981, well before EPEA came into force in 1993.
>
> [footnote: the Board makes this factual presumption hesitantly, since there was no direct documentation of the tanks' removal.]

[54] McColl-Frontenac objected to the word "suggest" in the EAB's summary, to the use of the word "stipulated," and to the Board questioning whether and how the tanks were removed. It asserted that there was no issue between the parties as to how and whether the tanks were removed, and that therefore it could not be questioned by the EAB.

[55] The identified "misrepresentations" are not material. The important and relevant points were identified by the EAB:

> (1) a service station was operated on the site,
>
> (2) gasoline was stored in underground tanks,
>
> (3) the underground tanks were removed sometime before the Act came into force, and
>
> (4) there is no evidence of how the tanks were removed.

[56] While I agree with McColl Frontenac that use of the word "suggest' may imply that the EAB could reject factual assertions in the Agreed Statement of Facts, the Board did not do so in a way that could be said to have affected its conclusions.

Did the EAB breach natural justice by finding facts outside the Statement of Agreed Facts?

[57] McColl-Frontenac submitted that the Agreed Facts are judicial admissions, that is facts that can no longer be considered to be in issue, citing ***McCormick on Evidence, 4th ed.*** (St. Paul Minn.: West Publishing, 1992). Treating the Agreed Facts as "evidentiary admissions" rather than "judicial admissions," McColl-Frontenac argues, breaches natural justice. McColl Frontenac argued, for example, that the EAB should not have considered the ownership of Highway Realties Corp., one of the operators of the gas station. The EAB noted that "That there is some speculation that Highway Realties was simply a real estate subsidiary of Texaco Canada Inc., although the evidence is hardly sufficient for the Board to find this linkage conclusive." McColl-Frontenac's objection to this reference and some subsequent references to the ownership of Highway Realties was that this was evidence found outside of the Statement of Agreed Facts. Again, this fact is not particularly material to the EAB's report, but if it were I do not agree that the EAB was limited to the facts in the Agreed Facts.

[58] I specifically decline to make a finding that the Agreed Statement of Facts has the same legal result as an agreed statement of facts placed before a court. Because the EAB has powers to investigate outside the ambit of what is placed before it by the parties, it has the option of finding facts in addition to the facts that the parties have agreed to, to draw inferences from the facts the parties have agreed to, and may perhaps be able to find facts inconsistent with the facts the parties have agreed to, although that was not the case here.

[59] I note in this regard that the EAB has broad discretionary powers under which to conduct the appeal. Under s. 87(2)(d) the EAB may decide to permit new relevant information to be presented that was not previously available; under s. 87(3) and (4) the EAB has the authority to determine what matters should and should not be included in the hearing before it; under s. 87(6) the EAB may permit any persons in addition to the parties it considers appropriate to make representations on the matters before it; and under s. 87(8) (now s. 95(8)) the EAB may establish its own rules and procedures.

[60] I conclude that neither the Minister or the EAB were limited to considering only the facts in the Statement of Agreed Facts. The parties were aware that the EAB had the Director's Record and were aware of the contents of the Director's Record. There is nothing in the legislation, the Statement of Agreed Facts, or in any agreement between the parties surrounding the Statement of Agreed Facts that limited the EAB to consideration of only the Statement.

Did the EAB raise a new issue without notice when it referred to off-site migration?

[61] McColl-Frontenac alleges that the EAB breached the principles of natural justice when it raised, as a new issue, the question of whether there was off-site migration of hydro-carbon contamination. It notes that under s. 87(2) the Board is empowered to determine what matters will be heard in the hearing, and that under 87(4) if the Board determines that a matter will not be included in the hearing of an appeal, no representations may be made on that matter.

[62] McColl-Frontenac appealed the entire EPO, and in its statement of the issues raised the following objections:

(1) the designation of McColl as the person responsible;
(2) the retroactive effect of the order;
(3) the requirement that investigation must be undertaken by McColl;
(4) the condition of the site does not present a harm to the public;
(5) the choice of the Director in proceeding with an order under section 102 of the Act; and
(6) the failure to designate other parties as persons responsible.

The Board accepted McColl's six objections as the list of issues the Board would address.

[63] McColl's submissions before the EAB however listed only four issues:

(1) the Director violated the Legislature's intent by applying a s. 102 order retrospectively to facts that occurred before *EPEA* came into force;

(2) the Director violated McColl's legitimate expectations that he would follow the *Guidelines for the Designation of Contaminated Sites;*

(3) the Director erred by failing to name other parties as responsible persons; and

(4) the Director erred by issuing the Order under s. 102 rather than under s. 114 of the Act.

These four issues then became the issues the EAB addressed in its Report and Recommendation. McColl-Frontenac argued that since the issue of off-site migration was not one of these initial issues, the EAB should not have raised it without notice to the parties.

[64] The EPO itself raises off-site migration several times:

> Whereas ***it is not known whether the Contamination has migrated off-site***, although ***Contamination was detected in additional soil samples taken on*** November 25, 1998 ***along the eastern boundary line of the Property***, being adjacent to 24th Street , NW, Calgary, that do not meet the *Soil Risk Management Criteria for Vapour Inhalation Pathway, Level 1: Coarse Grained Soil; (the "Criteria")*;
>
> Whereas as of October 18, 2000 the Company has not investigated the extent of the Contamination under the Property, or ***whether any Contamination has migrated off the Property***...
>
> Whereas the Manager is of the opinion that a release has occurred, and that there is Contamination under the Property, and which ***Contamination has potentially migrated off the Property***, that is causing, has caused, or may cause an adverse effect on the environment...
>
> 1. The Company shall submit an investigative plan (the "Investigative Plan") to the Manager by Friday December 1, 2000. The Investigative Plan shall include:
>
> a. A proposal delineating and quantifying the Contamination of the soil, surface water and groundwater, under the Property, and ***to any off-site areas***; and...
>
> 3. The Investigative Report shall contain at least the following information:...

> b. All analytical results and readings taken, correlated to the sampling locations both on the Property and ***on any off-site areas...***
>
> (Emphasis added)

[65] The EAB's reference to the possibility of off-site migration at para. 71 of its report is drawn directly from the terms of the EPO:

> However, these retrospective aspects of the Order are accompanied by a significant prospective one. The Cirrus Phase II Environmental Site Assessment shows that the pollution has lingered long past EPEA's 1993 proclamation date and, in fact, it is continuing to occur in the environment. The Board notes with particular concern that since high hydrocarbon vapour levels were observed at the eastern boundary of the site, along 24th street, the Order correctly notes that the pollution is potentially expanding in its geographic scope by migrating of-site.

[66] Moreover, the Submissions of the Director before the EAB addressed the possibility of off-site migration. At paragraph 11 of the submissions, the Director noted that the there was a present potential for adverse effect posed to the environment, and at paragraphs 23-26 the Director noted:

> Further, in this matter as in Legal; the fact of the ongoing and current adverse effect and the potential for further adverse effects remains. The adverse effect from the contamination associated with the operation of the petroleum station is as much a current factor as was the contamination in Legal.
>
> The Appellant argues that there is no source from which the contamination may flow today (in the form of storage tanks) and there is no off-site migration.
>
> The Director argues that such conclusions are premature.
>
> It may well be that there is some amount of product or vapours resident in the soils which in this case operate as a continuing source of the contamination and ***which maintains the present concern for off-site migration of the contaminants.***
>
> (Emphasis added)

[67] McColl-Frontenac responded to the Director's submissions on these points in its rebuttal submission at p. 3, arguing that since it was not known whether there was off-site migration, the Director did not make an informed decision and further that the submission misplaces the onus.

[68] First, I find that it was a reasonable inference to draw from the Agreed Statement of Facts, the Order, and the Director's Record that there was a possibility of off-site migration of contamination. The EAB's comments regarding off-site contamination were just that – a factual inference. This was not a question of raising a new matter within the meaning of s. 87(2).

[69] Secondly, McColl Frontenac was not surprised by the EAB's consideration of the possibility of off-site contamination. It was an important element in the EPO itself; McColl Frontenac appealed the entirety of the order. Further, it was raised by the Director in his submissions and McColl-Frontenac responded directly to the Director's submissions in its Rebuttal submissions. There was no breach of the principles of natural justice occasioned by the EAB's consideration of the matter.

[70] Thirdly, the first issue before the EAB required the Board to deal with the argument that there was retrospective application of s. 102. Determination of the possibility of future migration off the site was an important matter having regard to McColl Frontenac's argument.

Did McColl Frontenac have a legitimate expectation that the Guidelines would be followed?

[71] The doctrine of legitimate expectations does not create substantive rights, but is part of the rules of procedural fairness which govern administrative bodies. Where it is applicable, it extends only to procedural rights, ***Reference re Canada Assistance Plan (B.C.)***, [1991] 2 S.C.R. 525.

[72] McColl Frontenac argues that the *Guidelines* published by Alberta Environment gave rise to a reasonable expectation that the procedures set out therein would be followed, relying on a Federal Court of Appeal decision, ***Pulp, Paper and Woodworkers of Canada, Loc. 8 v. Canada (Minister of Agriculture, Pesticides Directorate)*** (1994), 174 N.R. 37 in which a government pamphlet stated that Agriculture Canada would consult with Health and Welfare Canada before approving pesticides. That statement was held to give rise to a reasonable expectation, and the Minister's decision was quashed for failing to consult before exercising his discretion.

[73] McColl Frontenac suggests that the EAB erred in its recommendations because it concluded that any legitimate expectations enured to the benefit of Al's Equipment Rentals. However, the EAB came to this conclusion based solely on the nature of the argument raised by McColl Frontenac in its submissions to the EAB. Under the *Guidelines* a proponent may ask Alberta Environment to consider designating a site as contaminated. McColl Frontenac argued (at para. 21 of its submissions to the EAB) that the submission of the environmental assessment reports by Al's Equipment Rentals and the related communications provided to Alberta Environment constituted such a request. The EAB rejected this argument on two grounds. First, there was nothing in the language of submissions or correspondence to indicate that Al's Equipment Rentals made any such request, and secondly, even if there were, it concluded, that any expectation would have enured to Al's Equipment Rentals, since it was the party making the alleged request.

[74] Given that the EAB's conclusion regarding Al's Equipment Rentals flowed directly from the focus of McColl Frontenac's argument regarding legitimate expectations, it was a reasonable response to the argument.

[75] Having reviewed the *Guidelines* myself, however, I see no other basis for McColl Frontenac to have a reasonable expectation that Alberta Environment would have followed the procedures outlined in it. Unlike the pamphlet in the ***Pulp, Paper and Woodworkers of Canada*** case, the statements in the *Guidelines* are not broad sweeping promises and generalizations. The Agriculture Canada pamphlet stated:

> Health and Welfare Canada, Environment Canada, Fisheries and Oceans Canada and their provincial counterparts all participate in the decision-making.
>
> We never stop evaluating a pesticide. As technology improves so do our evaluation standards...
>
> Agriculture Canada's registration process is among the most thorough in the world.

[76] In contrast, the *Guidelines* is more specific and indicates in the first page that it is expressly limited in application:

> This guideline is intended to aid in implementing the contaminated sites provision and to assist parties involved with contaminated sites in becoming aware of the designation process. This process is outlined in Figure 1. ***Normally, the designation of a contaminated site will only occur as a last resort when there are no other appropriate tools.***
>
> (Emphasis added)

On page 2 of the *Guidelines*, the Core Criterion indicates:

> Section 110(1) of the Act requires that the Director must be of the opinion that the presence of a substance on a site may cause a significant adverse effect in order to designate the site as a contaminated site.
>
> Section 1(b) of the *EPEA* defines "adverse effect" as "impairment of or damage to the environment, human health or safety or property". Adverse effect can become significant when there is an actual or high probability of impact which has or could have a severe consequence on human health, safety or the environment.

[77] Given that the *Guidelines* expressly provide that designation as a contaminated site is a "last resort" when there is an actual or high probability that the contamination in question has, or could have, a severe consequence on health, safety or the environment, it is difficult to understand what legitimate expectation this publication could have given rise to in relation to this site. The gas station has been closed and the underground tanks removed. There is no

evidence of "significant adverse effect," that is of "severe" consequences. There was no indication that the Director had gone through a variety of other routes, only to come to this "last resort." I find that there was no legitimate expectation that the *Guidelines* would be followed.

Do the EAB's reasons raise a reasonable apprehension of bias?

[78] McColl Frontenac alleges that the EAB may have been biased against it and may have predetermined the issue of liability. It quotes passages from the EAB's recommendations:

> [22] Although the Board's appeal record is unclear, it appears that Cirrus provided Alberta Environment with timely notice of the site assessments as early as February 1, 1999. Notwithstanding this notice, the Board's appeal record suggests there was no follow-up action for over a year, until February 11, 2000, when Al's Equipment Rentals informed Alberta Environment that "...hydrocarbon contamination had impacted the soil beneath the property." Al's Rentals also indicated, among other things, that they had attempted to get Imperial Oil (the parent company and sole shareholder of McColl) to deal with this matter but that Imperial had "rebuffed" those attempts on the ground that, under the contract between Al's Rentals and Texaco Canada Inc., Al's Rental's had purchased the property on an "as is, where is" basis."

McColl then quotes a passage from the middle of paragraph 25:

> The Board strongly believes that the parties' views on liability should not stand in the way of information sharing and other cooperative efforts to solve environmental problems. Besides the outcomes of legal disputes are likely to be ***more favourable*** to those parties that have exhibited a cooperative attitude toward solving the underlying problems.
>
> (Emphasis added by McColl Frontenac)

[79] However, McColl Frontenac left out some relevant footnotes and paragraphs. Following the first paragraph noted above, the EAB noted:

> [23] In a separate follow-up letter, Cirrus provided additional details about the site's history and the results of Cirrus' assessments. In its letter, Cirrus concluded that portions of the site have been "...contaminated with petroleum hydrocarbons..." and that the "...contamination has migrated off-site and has impacted property owned by the City of Calgary, along 24th Street N.W."
>
> [24] In a statement that is not echoed expressly in the narrative portions of either of its site assessments, Cirrus also claimed that its client did not cause any of the pollution and that the pollution had resulted, instead, from the former gas station. Cirrus then noted that Al's Rentals had tried to obtain information from Imperial Oil about how the

> underground tanks were removed and what efforts, if any, had been made to deal with related pollution when the gas station was closed. According to Cirrus, however, Imperial Oil had not provided any of the requested information.

A footnote immediately following this paragraph noted:

> 14 February, 2000 letter from Cirrus at 2-3 (Director's Record #38); see also Alberta Environment notes of March 30, 2000 phone conversation with Cirrus who stated that Imperial had given a "flat 'no' to collaboration on this project" (director's Record #37).

The beginning of paragraph 25 reads:

> [25] The Board regrets the dilatory approach taken by Imperial Oil. Even if Imperial's contractual argument was correct, had Imperial Oil provide the requested information, there might have been a more timely and appropriate response by Al's Rentals, Cirrus, Alberta Environment, or others. This outcome, of course, is one of the Act's objectives.

[80] In paragraphs 26-29, the EAB further discusses the process followed by Alberta Environment to try to resolve the issues. Reading these paragraphs in context, it is clear that the EAB was not expressing bias or prejudgment, but pointing out that among the objectives of the Act is promoting cooperation through having the interested parties work together to find solutions to environmental problems, without having to resort to an adversarial process. In my opinion, its comment that an outcome would be more favourable if the parties were cooperative, did not refer to its own decision, but to the outcome of the process generally. There is no reasonable apprehension of bias raised by the comments.

Errors of Law

Should the EPO have been issued under s. 114?

[81] McColl Frontenac argues that the EAB made a patently unreasonable error when it concluded that the Director need not issue the EPO order under s. 114. Section 114 is the section under which an EPO would be issued to deal with a site that has been designated as a contaminated site under s. 110 of Division 2.

[82] An EPO under Division 2 is distinctly different than under Division 1. As already noted in regards to McColl Frontenac's argument dealing with legitimate expectations, Division 2 applies to a site where the Director is of the opinion that a substance may cause, is causing, or has caused a **significant** adverse effect, while Division 1 applies where the Director is of the opinion that a substance may cause, is causing, or has caused simply an adverse effect. So there is a lower threshold under Division 1, than under Division 2. This by itself is sufficient

grounds to conclude that the Director had the discretion to proceed under Division 1. There has been no argument or evidence that the site posed a severe risk to either human health and safety or to the environment.

[83] Secondly, the Director cannot issue an EPO under s. 114 until the site has been designated as a contaminated site under s. 110. As the EAB noted that is the route that McColl Frontenac would have preferred. The s. 114 order would be preceeded by a comprehensive public process for designating the site as contaminated. The EAB commented that perhaps McColl Frontenac favoured this route as a "desire to invoke a cumbersome, time-consuming process simply to forestall the Director's issuance of any remedial order."

[84] Further, the kinds of directions in an EPO under s. 114 are different than those that can be issued under s. 102. In particular, under s. 102, the Director can require the person to whom the order is directed to investigate the situation. However notably, under s. 114, there is no similar provision for investigation. While s. 114(4)(a) incorporates s. 102, it only does so for the purposes of restoring or securing the contaminated site and surrounding environment. It states:

> (4) An environmental protection order made under subsection (1) may
>
> (a) require the person to whom the order is directed to take any measures that the Director considers are necessary to restore or secure the contaminated site and the environment affected by the contaminated site, including, but not limited to, any or all of the measures specified in section 102, ...

[85] On judicial review, McColl Frontenac reviewed the EAB's reasons and suggests that they support the application of s. 114 rather than s. 102 and agree with McColl Frontenac's submissions that the EPO had been issued pursuant to the wrong section of the Act. McColl Frontenac argues that despite these findings, the EAB still recommended upholding the Director's EPO. This, they contend is patently unreasonable.

[86] Had that, in fact, been the finding of the EAB, I might have agreed that the recommendation was patently unreasonable. However, in discussing the Director's discretion in choosing between issuing an EPO under s. 102 or s. 114 the EAB made the following observations:

> (1) There is no legislative criteria for determining whether to issue an order under s. 102 or s. 114;
>
> (2) The record shows Alberta Environment has never issued an EPO under s. 114, but there are instances where a designation under s. 110 has prompted the parties to reach a negotiated solution;

(3) The Board remains concerned that using s. 102 exclusively might render s. 114 meaningless;

(4) In the absence of legislative criteria for choosing between the two sections, the Board hopes Alberta Environment develops its own criteria, beyond the "last resort" criteria in the *Guidelines*;

(5) The Board presumes that this criteria was arrived at because the time-consuming and resource intensive nature of the contaminated site process and the "significant adverse effect" standard makes the s. 114 EPO the slowest tool for cleaning up a polluted site;

(6) The contaminated site provisions offer considerable benefits, including the chance to allocate cleanup responsibility to a present or recent owner, which may accomplish "a greater buy-in."

The Board concluded at para. 131:

> The Board offers these observations, not as hard and fast rules, and nor to suggest that there should be an implied presumption in favour of using the contaminated sites process over issuing section 102 orders. ***The Board's point is simply that Alberta Environment's justification for its last resort policy should be continually reviewed.*** (Emphasis added)

[87] This does not constitute agreement that s. 114 would have been the more appropriate section to proceed under in this case. This was an evaluation of the various polycentric issues to be considered when the Director exercises his discretion. The EAB was not unsympathetic to McColl Frontenac's point, but it was also aware of timeliness issues and the higher "significant adverse effect" standard. It noted that there are some policy reasons for proceeding under s. 114, but it also noted there were legitimate policy reasons for using s. 102. It most certainly did not find that the EPO should have been issued under s. 114. Its point was to suggest that Alberta Environment review its policies, keeping its comments in mind. Its reasoning was not patently unreasonable.

Did the EAB misinterpret the Act by applying it retrospectively?

[88] McColl-Frontenac argues that the EAB erred in finding that s. 102 could be applied retrospectively, arguing that the presumption is that statutes are not to be construed retrospectively unless such a construction is expressly, or by necessary implication, required by the Act. It argues that the application of s. 102 to the facts here is retrospective because it applies new legal consequences to conduct that took place long before the Act came into force.

[89] Driedger in *Construction of Statutes*, 2nd ed. (Toronto: Butterworth's, 1983) defined and contrasted the concepts of retrospectivity and retroactivity at pages 197-98:

> As has here already been indicated, a retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only; it is prospective, but it imposes new results in respect of a past event. A retroactive statute operates backwards. A retrospective statute operates forwards, but it looks backwards in that it attaches new consequences for the future to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event.

The EAB's jurisprudence re: retrospectivity

[90] The EAB considered the two components of the definition of retrospective operation – the past conduct or event and the new legal obligations or consequences for that event or conduct. McColl-Frontenac's ownership and operation of the site ended in 1986 when the property was sold to Al's Rentals in 1986, before the Act came into force. The EAB concluded that it was fair to assume that the source of the pollution was likely the operation of the gas station which ceased operations in 1979 and the underground tanks which were removed before July 1981. Thus, the conduct that lead to the pollution ceased before the Act took effect. It noted that in relation to legal obligations predating 1993, the Act had considerable historical antecedents, such as the *Clean Air Act,* the *Clean Water Act* and the *Hazardous Chemicals Act* which, while not identical to the Act, authorized similar remedial orders as under s. 102, so that the obligations of the Act "did not spring up from a legal vacuum."

[91] The EAB also considered the prospective aspects of the contamination – that pollution continues to linger and high vapour levels were observed at the boundary of the site, potentially migrating off-site. The Board noted at para. 72:

> Of course, the *raison d'etre* for the Order is not that pollution was ever released in the first place, but that it has never been cleaned up. Because of its focus on an ongoing pollution problem, the Order has a considerable prospective character.

[92] The Board, therefore, concluded that there was "no bright line," no clear demarcation about whether the EPO was retrospective or prospective. Rather, the EAB looked a retrospectivity as a spectrum, and suggested that this EPO rests on a spectrum with some aspects of it reflecting retrospective operation, and some of it prospective. It referred in particular to its decision in ***Legal Oil and Gas Ltd. v. Director, Land Reclamation Division, Alberta Environmental Protection,*** Appeal No. 98-009 (EAB) , in which it thoroughly canvassed its approach to retrospectivity under the Act.

[93] The appellant in ***Legal Oil*** contrasted the language in s. 102 in Division 1 and ss. 108 (now s. 123) and 110 in Division 2 of the Act, and argued that since s. 108 makes it clear that Division 2 is retrospective, the absence of a similar section in Division 1 indicates the legislative intention to restrict retrospective operation to only the division dealing with "contaminated sites." This is the same argument that McColl Frontenac made, both before the EAB and in the judicial review before me.

> 102(1) Subject to subsection (2), where the Director is of the opinion that
>
> (a) a release of a substance into the environment may occur, is occurring or has occurred, and
>
> (b) the release may cause, is causing or has caused an adverse effect, the Director may issue an environmental protection order to the person responsible for the substance.
>
> 108 This Division applies regardless of when a substance became present in, on or under the contaminated site.
>
> 110 Where the Director is of the opinion that a substance that may cause, is causing or has caused a significant adverse effect is present in an area of the environment, the Director may designate an area of the environment as a contaminated site.

[94] The EAB rejected this argument saying that the use of past tense in s. 102 constituted express language indicating that the Legislature intended that it also should be applied retrospectively:

> "may occur, is occurring or has occurred" and
>
> "may cause, is causing or has caused an adverse effect."

[95] The EAB further noted that a similar division-wide clause for Division 1 would have been inappropriate since Division 1 had at least one section (s. 97 (now s. 108)) that does not include retrospective application, only present application:

> "No person shall knowingly release or permit the release of ..."

It also referred to other sections, like ss. 58 and 59 of the Act, which relate only to the present or future.

[96] It also considered the Act's definition of "person's responsible" in s. 1(ss), which it held adopts a similar temporal definition, using the past tense to include persons who were previous owners, or who had charge, management or control of a substance or thing.

[97] The EAB in ***Legal Oil*** also looked beyond the text of the Act to consider the objective of the Act embodied in s. 2 and the presumption in s. 10 of the *Interpretation Act* that the Act should be given a "fair, large and liberal" interpretation, and concluded that:

> Given the prevalence of historic releases of substances which continue to pose threats to Alberta's environment, it is hard to imagine how the Act's sweeping environmental objectives could be achieved without interpreting the Act to authorize the Director to require that those historic releases be assessed and remedied. (At para. 37).

The EAB also noted that the Act was for public protection, and thus an exception to the presumption against retrospective operation: ***Brosseau v. Alberta (Securities Commission)***, [1989] 1 S.C.R. 301.

[98] Thus, the EAB concluded that Part 4, Division 1:

> ...provides a comprehensive legislative scheme for addressing past, present, and future pollution and in a manner that builds on, and is integrated with pollution legislation that preceded *EPEA*. A retrospective application of s. 102 would appear to be a necessary implication from this comprehensive regulatory approach.

[99] Accordingly, the EAB has developed and articulated its own jurisprudence and analytical approach to the interpretation of the Act. A tribunal's interpretation of legislation, particularly the legislative scheme that is expressly within its mandate, is subject to deference. The Supreme Court of Canada in ***Pushpanathan*** approved the statement of the law from ***Mossop***, [1993], 1 S.C.R. 554 that deference may be owed to a tribunal's interpretation of law in some circumstances (at 599-600):

> Further, the "correct" interpretation of a term may be dictated by the mandate of the board and by the coherent body of jurisprudence it has developed. ***In some cases, even where courts might not agree with a given interpretation, the integrity of certain administrative processes may demand that deference be shown to that interpretation of law.***
>
> (Emphasis added)

[100] Therefore, while I might not have decided that s. 102 was intended to be applied retrospectively, the EAB's analysis is not "clearly irrational," or "evidently not in accordance with reason," as the Supreme Court has defined the very strict test of what is patently unreasonable: ***Canadian Broadcasting Corporation v.The Canada Labour Relations Board***, [1995] 121 D.L.R. (4th) 385.

Is the Act for public protection?

[101] McColl Frontenac contended that the EAB erred in finding that there was a public protection exception to the presumption against retrospectivity. Counsel urged me to find that Clackson J. in ***Legal Oil*** had misapplied the ***Brosseau*** decision, and that the ***Brosseau*** decision should be restricted to a very narrow factual situation.

[102] The presumption against retrospective operation holds that statutes are not to be construed retrospectively unless such a construction is expressly or by necessary implication required by the language of the Act. The Supreme Court of Canada in ***Brosseau*** held that the presumption applied only to penal statutes and did not apply to statutes that imposed a penalty related to a past event as long as the goal of the penalty was public protection.

[103] McColl-Frontenac relies on the decision of the Federal Court of Appeal in ***Re Royal Canadian Mounted Police Act***, [1991] 1 F.C. 529 in which MacGuigan J.A. narrowly construed the exception in ***Brosseau***. He held that there cannot be a general public-protection exception, but rather the exception must be analysed as a question of legislative intent.

[104] In ***Brosseau***, L'Heureux-Dubé J.'s discussed the rule as outlined by Driedger in *Statutes: Retroactive, Retrospective Reflections* (1978), 56 Can. Bar Rev. 264 and in *Construction of Statutes* 2nd ed. (Toronto: Butterworths, 1983). Driedger notes that there are three kinds of retrospective statutes, and that only one attracts the presumption:

> First, there are the statutes that attach benevolent consequences to a prior event; they do not attract the presumption. Second, there are those that attach prejudicial consequences to a prior event; they attract the presumption. Third, there are those that attach a penalty on a person who is described by reference to a prior event, but the penalty is not intended as further punishment for the event; these do not attract the presumption.

[105] L'Heureux-Dubé J. expressly adopted this statement by Driedger, focussing on the third type of statute and describing a sub-category at para. 49:

> A sub-category of the third type of statute described by Driedger is enactments which may impose a penalty on a person related to a past event, so long as the goal of the penalty is not to punish the person in question, but to protect the public.

[106] She continued the analysis, citing two earlier English cases: ***R. v. Vine*** (1875), 10 L.R. Q.B. 195 and ***Re A Solicitor's Clerk***, [1957] 3 All E.R. 617. In ***R. v. Vine*** a new statutory provision disqualified convicted felons from selling alcohol, while in ***Solicitor's Clerk*** a statutory amendment disqualified people who had ever been convicted of larceny embezzlement or fraudulent conversion of property from acting as solicitor's clerks. Both decisions held that the presumption did not apply as the provisions were to protect the public. L'Heureux-Dubé J. concluded at para. 55:

> This is a measure designed to protect the public, and it is in keeping with the general regulatory role of the Commission. Since the amendment at issue here is designed to protect the public, the presumption against the retrospective effect of statutes is effectively rebutted.

[107] MacGuigan J.A., however, read the exception quite narrowly, suggesting that L'Heureux-Dubé's decision only extends to the very limited sub-category raised in the two English cases:

> In short, there is an exception to the presumption against retrospectivity where there is (1) a statutory disqualification, (2) based on past conduct, (3) which demonstrates a continuing unfitness for the privilege in question. To my mind this is quite a narrow exception to the general presumption, one that is very much more limited in scope than the Trial Judge's holding that an exception occurs whenever the statutory purpose may be conceptualized in broad terms as the protection of the public, whatever may be the effect upon the subordinate value of vested rights or interests.(at para. 32)

[108] In my respectful opinion, MacGuigan J.A. has drawn far too narrow an interpretation of L'Heureux-Dubé J.'s decision. At para. 51, she cites with approval Driedger's summary of the point in the article *Statutes: Retroactive, Retrospective Reflections*:

> In the end, resort must be had to the object of the statute. If the intent is to punish or penalize a person for having done what he did, the presumption applies, because a new consequence is attached to a prior event. ***But if the new punishment or penalty is intended to protect the public, the presumption does not apply.***
>
> (Emphasis added)

She concluded that the provision to disqualify traders was not intended to penalize, but to protect the public, and that therefore the presumption did not apply. There is nothing in her reasoning to suggest that her analysis was limited to statutory disqualifications that rendered persons unsuitable for a particular privilege.

[109] McColl Frontenac also cited Coté J.A. in ***D.D.S. v. R.H.*** (1993), 141 A.R. 44 who stated that most civil statutes are neither penal or public protection, and that:

> To try to divide all statutes into penal or public protection, show a statute is not penal, and then conclude it is public protection, would be very close to setting up a straw man. If all animals are either fierce or domestic, then one must conclude that a gopher is domestic because it is not fierce. (At para. 8)

[110] I agree with Coté J.A. that setting up a false dichotomy is not helpful. On the other hand, the Act is, by its nature, a public protection statute. Its principal aims recognize the values of protecting the environment which is essential to the integrity of human health and the well being of society, as well as ensuring that there is economic growth and prosperity. So while we cannot divide all statutes into either penal or public protection statutes, I think that this statute falls within the public protection category.

[111] McColl Frontenac argued that, notwithstanding the absence of the presumption, ultimately the question of whether s. 102 should be applied retrospectively is a question of statutory interpretation. I agree that it is relevant to look at the statute to discover legislative intent. One of the objectives of the Act is to that the polluter should pay. That is consistent with imposing an obligation not on the present occupier, but upon those who caused the pollution in the first place.

Does the EPO operate prospectively?

[112] I conclude by saying that not only do I think that the EAB's decision was not patently unreasonable, I think it was correct. The EAB did not make a finding that the order was solely retrospective or solely prospective. It found, as I noted earlier, that the order rested on a continuum, a spectrum, that had both retrospective and prospective elements. Whether or not there is a retrospective application, there is clearly a present application and present an ongoing possibility of a threat that must be dealt with, and that clearly comes within a prospective application of s. 102.

Conclusion

[113] I therefore dismiss the application for judicial review. The parties may speak to costs within 30 days of the decision.

HEARD on the 20th day of February, 2003.
DATED at Edmonton, Alberta this 4th day of April, 2003.

J.C.Q.B.A.

APPENDIX A

Environmental Protection and Enforcement Act, S.A. 1992, c. E13.3

Part 4
Division 1

97(1) No person shall knowingly release or permit the release of a substance into the environment in an amount, concentration or level or at a rate of release that is in excess of that expressly prescribed by an approval or the regulations.

(2) No person shall release or permit the release of a substance into the environment in an amount, concentration or level or at a rate of release that is in excess of that expressly prescribed by an approval or the regulations.

(3) For the purposes of this section, if there is a conflict between an approval and the regulations as to an amount, concentration, level or rate of release of a substance, the most stringent requirement prevails.

98(1) No person shall knowingly release or permit the release into the environment of a substance in an amount, concentration or level or at a rate of release that causes or may cause a significant adverse effect.

(2) No person shall release or permit the release into the environment of a substance in an amount, concentration or level or at a rate of release that causes or may cause a significant adverse effect.

(3) Subsections (1) and (2) apply only where the amount, concentration, level or rate of release of the substance is not authorized by an approval or the regulations.

(4) No person may be convicted of an offence under this section if that person establishes that the release was authorized by another enactment of Alberta or Canada.

99(1) A person who releases or causes or permits the release of a substance into the environment that may cause, is causing or has caused an adverse effect shall, as soon as that person knows or ought to know of the release, report it to

(a) the Director,

(b) the owner of the substance, where the person reporting knows or is readily able to ascertain the identity of the owner,

(c) any person to whom the person reporting reports in an employment relationship,

(d) the person having control of the substance, where the person reporting is not the person having control of the substance and knows or is readily able to ascertain the identity of the person having control, and

(e) any other person who the person reporting knows or ought to know may be directly affected by the release.

(2) The person having control of a substance that is released into the environment that may cause, is causing or has caused an adverse effect shall, immediately on becoming aware

of the release, report it to the persons referred to in subsection (1)(a), (b), (c) and (e) unless the person having control has reasonable grounds to believe that those persons already know of the release.

(3) A police officer or employee of a local authority or other public authority who is informed of or who investigates a release of a substance into the environment that may cause, is causing or has caused an adverse effect shall immediately notify the Director of the release unless the police officer or employee has reasonable grounds to believe that it has been reported by another person.

100(1) A person who is required to report to the Director pursuant to section 99 shall report in person or by telephone and shall include the following in the report, where the information is known or can be readily obtained by that person:

(a) the location and time of the release;
(b) a description of the circumstances leading up to the release;
(c) the type and quantity of the substance released;
(d) the details of any action taken and proposed to be taken at the release site;
(e) a description of the location of the release and the immediately surrounding area.

(2) In addition to a report under subsection (1), the person shall report in writing where required by the regulations.

(3) A person who reports under subsections (1) and (2) shall give to the Director any additional information in respect of the release that the Director requires.

101 Where a substance that may cause, is causing or has caused an adverse effect is released into the environment, the person responsible for the substance shall, as soon as that person becomes aware or ought to have become aware of the release,

(a) take all reasonable measures to
  (i) repair, remedy and confine the effects of the substance, and
  (ii) remove or otherwise dispose of the substance in such a manner as to effect maximum protection to human life, health and the environment, and
(b) restore the environment to a condition satisfactory to the Director.

102(1) Subject to subsection (2), where the Director is of the opinion that

(a) a release of a substance into the environment may occur, is occurring or has occurred, and
(b) the release may cause, is causing or has caused an adverse effect,

the Director may issue an environmental protection order to the person responsible for the substance.

(2) Where the release of the substance into the environment is or was expressly authorized by and is or was in compliance with an approval or registration or the regulations, the Director may not issue an environmental protection order

under subsection (1) unless in the Director's opinion the adverse effect was not reasonably foreseeable at the time the approval or registration was issued or the regulations were made, as the case may be.

(3) An environmental protection order may order the person to whom it is directed to take any measures that the Director considers necessary, including, but not limited to, any or all of the following:

(a) investigate the situation;

(b) take any action specified by the Director to prevent the release;

(c) measure the rate of release or the ambient concentration, or both, of the substance;

(d) minimize or remedy the effects of the substance on the environment;

(e) restore the area affected by the release to a condition satisfactory to the Director;

(f) monitor, measure, contain, remove, store, destroy or otherwise dispose of the substance, or lessen or prevent further releases of or control the rate of release of the substance into the environment;

(g) install, replace or alter any equipment or thing in order to control or eliminate on an immediate and temporary basis the release of the substance into the environment;

(h) construct, improve, extend or enlarge the plant, structure or thing if that is necessary to control or eliminate on an immediate and temporary basis the release of the substance into the environment;

(i) report on any matter ordered to be done in accordance with directions set out in the order.

103(1) Where an inspector, an investigator or the Director is of the opinion that

(a) a release of a substance into the environment may occur, is occurring or has occurred, and

(b) the release may cause, is causing or has caused an immediate and significant adverse effect,

the inspector, investigator or Director may issue an environmental protection order to the person responsible for the substance directing the performance of emergency measures that the inspector, investigator or Director considers necessary.

(2) Subsection (1) applies whether or not the release of the substance into the environment is or was expressly authorized by or is or was in compliance with an approval, a registration or the regulations.

104(1) Where an inspector, an investigator or the Director is of the opinion that

(a) a release of a substance into the environment may occur, is occurring or has occurred, and

(b) the release may cause, is causing or has caused an immediate and significant adverse effect,

the inspector, investigator or Director may take any emergency measures that the inspector, investigator or Director considers necessary to protect human life or health or the environment.

(2) Subsection (1) applies whether or not the release of the substance into the environment is or was expressly authorized by and is or was in compliance with an approval, a registration or the regulations.

(3) The inspector, investigator or Director shall forthwith notify Alberta Public Safety Services, the local authority of the municipality in which the substance is located and the medical officer of health of the health unit or health region under the Regional Health Authorities Act in which the substance is located of the emergency measures taken under subsection (1).

105(1) Where the Director is of the opinion that a substance or thing is causing or has caused an offensive odour, the Director may issue an environmental protection order to the person responsible for the substance or thing.

(2) Subsection (1) does not apply in respect of an offensive odour that results from an agricultural operation that is carried out in accordance with generally accepted practices for such an operation or in respect of which recommendations under Part 1 of the Agricultural Operation Practices Act indicate that the agricultural operation follows a generally accepted agricultural practice.

(3) An environmental protection order under this section may order the person to whom it is directed to take any or all of the following measures:

(a) investigate the situation;

(b) take any action specified by the Director to prevent the offensive odour;

(c) minimize or remedy the effects of the offensive odour;

(d) monitor, measure, contain, remove, store, destroy or otherwise dispose of the substance or thing causing the offensive odour or lessen or prevent the offensive odour;

(e) install, replace or alter any equipment or thing in order to control or eliminate the offensive odour;

(f) construct, improve, extend or enlarge a plant, structure or thing if that is necessary to control or eliminate the offensive odour;

(g) take any other action the Director considers to be necessary;

(h) report on any matter ordered to be done in accordance with directions set out in the order.

105.1(1) The Director may issue a remediation certificate in respect of land where

(a) a release of a substance into the environment has occurred,

(b) the release has caused, is causing or has the potential to cause an adverse effect, and

(c) remediation of the land has been carried out in accordance with

(i) the terms and conditions of any applicable approval,
(ii) the terms and conditions of an environmental protection order made in respect of the release,
(iii) the directions of an inspector or the Director, and
(iv) this Act.

(2) An application for a remediation certificate may be made by the registered owner of the land or the person responsible for the substance.

(3) An application for a remediation certificate must be made to the Director in a form and manner acceptable to the Director.

(4) The Director may issue or refuse to issue a remediation certificate, and may issue the remediation certificate subject to any terms and conditions the Director considers appropriate.

(5) The Director may
(a) amend a term or condition of, add a term or condition to or delete a term or condition from a remediation certificate if the Director considers it appropriate to do so,
(b) cancel a remediation certificate issued in error, or
(c) correct a clerical error in a remediation certificate.

105.2 Where a remediation certificate is issued, no environmental protection order requiring the doing of further work in respect of the same release of the same substance may be issued under this Act after the date prescribed or determined for the purposes of this section in accordance with the regulations.

105.3 The issuing of a remediation certificate does not affect any person's obligation to obtain a reclamation certificate under this Act.

105.4 The Lieutenant Governor in Council may make regulations
(a) respecting the procedure for the submission of applications for remediation certificates and the plans, specifications and other information that must accompany applications;
(b) respecting the manner in which remediation is to be carried out;
(c) respecting the establishment of standards or criteria to be used to determine whether remediation has been completed in a satisfactory manner;
(c.1) respecting the provision to the Director of information and reports relating to the remediation;
(d) prescribing dates or the manner of determining dates for the purposes of section 105.2, generally or in respect of different classes of land or releases of substances;
(e) respecting terms and conditions that may be contained in remediation certificates;
(f) respecting the giving of notices for the purposes of section 105.1.

106 The Minister may make regulations

(a) classifying releases for the purposes of this Division and exempting any release or any class of release from the application of this Division, and attaching terms and conditions to any such exemption;

(b) respecting the making of a written report under section 100(2) and its contents and providing for the waiver of a requirement to make a written report where in the opinion of the Director no adverse effect is likely to occur as a result of the release or the adverse effect caused by the release has been adequately controlled.

107(1) The Lieutenant Governor in Council may make regulations

(a) regulating and prohibiting the removal or rendering ineffective of any device, procedure or thing that reduces or prevents or is intended to reduce or prevent the release of any substance and that is attached or connected to or forms part of any thing;

(b) respecting the measures, including levels of remedial requirements, that may be required in an environmental protection order for the purposes of section 102(3)(e), including the incorporation or adoption for that purpose of documents that set out restoration guidelines;

(c) regulating the quantity and purity of water to be applied to land for the purpose of irrigation or watering of plant life if the water so applied may directly or indirectly cause an adverse effect;

(d) regulating or prohibiting any use of land or any action in respect of land as a result of which any substance is released on or under any land, including land

(i) adjacent to or underlying a watercourse, or

(ii) adjacent to or overlying an aquifer;

(d.1) prescribing the concentration, including the maximum concentration, of a substance that may be released into the environment;

(d.2) prescribing the amount, including the maximum amount, of a substance that may be released into the environment;

(d.3) prescribing the level, including the maximum level, of a substance that may be released into the environment;

(d.4) prescribing the rate, including the maximum rate, at which a substance may be released into the environment;

(d.5) respecting the method or type of method or instrument for measuring or determining

(i) the concentration of a substance released into the environment,

(ii) the weight of a substance released into the environment,

(iii) the rate of release of a substance into the environment, and

(iv) visible emissions;

(d.6) prescribing the point at which a measurement pursuant to the regulations is to take place;

(d.7) prescribing the maximum visible emissions permitted to be released;

(d.8) establishing a program for the certification of visible emission readers, including regulations respecting

(i) the manner in which visible emission readers are taught and certified,

(ii) the issuing, suspension and cancellation of certificates of qualification, and

(iii) the regulation of the activities of visible emission readers;

(e) generally, for the protection of the environment and the regulation of sources of substances.

(2) Before regulations are made under subsection (1)(d.1), (d.2), (d.3), (d.4) or (d.7), the Minister shall engage in any public consultation with respect to the proposed regulations that the Minister considers appropriate.

Division 2
Contaminated Sites
Application

108 This Division applies regardless of when a substance became present in, on or under the contaminated site.

109 The Minister may establish programs and other measures the Minister considers necessary to pay for the costs of restoring and securing contaminated sites and the environment affected by contaminated sites in circumstances where a person responsible for the contaminated site cannot be identified or is unable to pay for the costs.

110(1) Where the Director is of the opinion that a substance that may cause, is causing or has caused a significant adverse effect is present in an area of the environment, the Director may designate an area of the environment as a contaminated site.

(2) Subsection (1) applies notwithstanding that any or all of the following may apply:
(a) a reclamation certificate or remediation certificate has been issued in respect of the contaminated site;
(b) an administrative or enforcement remedy has been pursued under this Act or under any other law in respect of the contaminated site;
(c) the substance was released in accordance with this Act or any other law;
(d) the release of the substance was not prohibited under this Act;
(e) the substance originated from a source other than the contaminated site.

(3) The Director may cancel a designation of a contaminated site.

111 The Director shall
(a) give notice of the Director's decision to designate an area of the environment as a contaminated site to

(i) the owner of the contaminated site,
(ii) any of the other persons responsible for the contaminated site that the Director considers appropriate, and
(iii) the local authority of the municipality in which the contaminated site is located,
and

(b) provide notice of the Director's decision to designate an area of the environment as a contaminated site in accordance with the regulations.

112(1) Any person who is directly affected by a designation of a contaminated site may submit to the Director a statement of concern setting out that person's concerns regarding the designation of the contaminated site and that person's recommendations on any remedial measures that should be taken with respect to the contaminated site.

(2) A statement of concern must be submitted
(a) within 30 days after receipt of the notice under section 111(a) or the last provision of the notice under section 111(b), or
(b) within any longer period allowed by the Director in the notice.

113(1) A person responsible for the contaminated site may
(a) prepare for the approval of the Director a remedial action plan in respect of the contaminated site, and
(b) enter into an agreement with the Director, with other persons responsible for the contaminated site, or with both the Director and other persons responsible, providing for the remedial action to be taken in respect of the contaminated site and providing for the apportionment of the costs of taking that action.

(2) An agreement under subsection (1)(b) to which the Director is not a party is not valid unless it is approved by the Director.

(3) Where an agreement made under subsection (1)(b) is carried out in accordance with its terms, the Director may not issue an environmental protection order under section 114 to any of the persons responsible for the contaminated site who are parties to the agreement in respect of any matter that is provided for in the agreement.

114(1) Where the Director designates a contaminated site, the Director may issue an environmental protection order to a person responsible for the contaminated site.

(2) In deciding whether to issue an environmental protection order under subsection (1) to a particular person responsible for the contaminated site, the Director shall give consideration to the following, where the information is available:
(a) when the substance became present in, on or under the site;
(b) in the case of an owner or previous owner of the site,
(i) whether the substance was present in, on or under the site at the time that person became an owner;

(ii) whether the person knew or ought reasonably to have known that the substance was present in, on or under the site at the time that person became an owner;

(iii) whether the presence of the substance in, on or under the site ought to have been discovered by the owner had the owner exercised due diligence in ascertaining the presence of the substance before the owner became an owner, and whether the owner exercised such due diligence;

(iv) whether the presence of the substance in, on or under the site was caused solely by the act or omission of another person, other than an employee, agent or person with whom the owner or previous owner has or had a contractual relationship;

(v) the price the owner paid for the site and the relationship between that price and the fair market value of the site had the substance not been present in, on or under it;

(c) in the case of a previous owner, whether that owner disposed of the owner's interest in the site without disclosing the presence of the substance in, on or under the site to the person who acquired the interest;

(d) whether the person took all reasonable care to prevent the presence of the substance in, on or under the site;

(e) whether a person dealing with the substance followed accepted industry standards and practice in effect at the time or complied with the requirements of applicable enactments in effect at the time;

(f) whether the person contributed to further accumulation or the continued release of the substance on becoming aware of the presence of the substance in, on or under the site;

(g) what steps the person took to deal with the site on becoming aware of the presence of the substance in, on or under the site;

(h) any other criteria the Director considers to be relevant.

(3) In issuing an environmental protection order under subsection (1), the Director shall give consideration to whether the Government has assumed responsibility for part of the costs of restoring and securing the contaminated site and the environment affected by the contaminated site pursuant to a program or other measure under section 109.

(4) An environmental protection order made under subsection (1) may

(a) require the person to whom the order is directed to take any measures that the Director considers are necessary to restore or secure the contaminated site and the environment affected by the contaminated site, including, but not limited to, any or all of the measures specified in section 102,

(b) contain provisions providing for the apportionment of the cost of doing any of the work or carrying out any of the measures referred to in clause (a), and

(c) in accordance with the regulations, regulate or prohibit the use of the contaminated site or the use of any product that comes from the contaminated site.

115 In addition to serving an environmental protection order issued under section 114 on the person to whom it is directed, the Director shall

(a) give notice of the issuance of the order to the local authority of the municipality in which the contaminated site is located, and

(b) provide notice of the issuance of the order in accordance with the regulations.

116 The Minister may

(a) in accordance with any applicable regulations, or

(b) in the absence of any applicable regulations, in the manner and amount the Minister considers appropriate

pay compensation to any person who suffers loss or damage as a direct result of the application of this Division.

117 The Minister may make regulations regulating and prohibiting the use of a contaminated site or the use of any product that comes from a contaminated site.

118 The Lieutenant Governor in Council may make regulations

(a) authorizing the payment of compensation by the Government for the purposes of section 116, including regulations respecting

(i) the circumstances under which compensation will be paid, and

(ii) the manner in which a claim for compensation is assessed and made and the determination of the amount payable;

(b) respecting the manner in which notice is to be provided under sections 111(b) and 115(b).

APPENDIX B

ENVIRONMENTAL PROTECTION AND ENHANCEMENT ACT

BEING CHAPTER E-13.3 S.A. 1992 (the "Act")

ENVIRONMENTAL PROTECTION ORDER NO. 2000-08

TO:

McColl-Frontenac Inc.
(formerly "McColl-Frontenac Oil Company Limited" and "Texaco Canada Inc.")
237 – 4th Avenue SW
Calgary, Alberta
T2P 0H6

(the "Company")

WHEREAS McColl-Frontenac Oil Company Limited was the registered owner of a property legally described as Plan Capitol Hill Calgary 2846GW, Block 5, Lots 39 & 40, municipally known as 2505 – 24 Street NW, Calgary, Alberta (the "Property") from May 10, 1956 to October 12, 1956;

WHEREAS on October 12, 1956, a company entitled Highway Realties Limited purchased the Property and owned it until September 25, 1980;

WHEREAS on October 12, 1956, a lease agreement was registered on the land title of the Property between the then owner, being Highway Realties Limited, and the previous owner and lessee, McColl-Frontenac Oil Company Limited;

WHEREAS the lease was discharged from the land title of the Property on September 25, 1980, when the Property was sold to Texaco Canada Inc. who owned it until April 4, 1986;

WHEREAS on April 4, 1986, the Property was sold to a company entitled Al's Equipment Rentals (1978) Ltd., which had previously occupied the Property between 1982 to 1986;

WHEREAS Imperial Oil Limited, the parent corporation of the Company, has acknowledged that the use of the Property prior to 1985, when McColl-Frontenac Oil Company Limited and/or Texaco Canada Inc. leased or owned the Property, was a gas station for the sale of hydrocarbon petroleum products (the "Substances");

WHEREAS McColl-Frontenac Oil Company Limited and Texaco Canada Inc. are amalgamation predecessors to McColl-Frontenac Inc., being the Company;

WHEREAS in October, 1998, Al's Equipment Rentals (1978) Ltd. hired a consultant to conduct a Phase I environmental site assessment of the Property (the "Phase I Report"), and a Phase II environmental site assessment in October and November, 1998(the "Phase II Report");

WHEREAS the Phase I Report stated that:

1. a service station had been operated on the Property in the past;
2. land titles searches revealed that the Property was formerly owned by Texaco Canada Inc., and previously by McColl-Frontenac Oil Company Limited (now McColl-Fontenac Inc.);
3. vent tubes for underground storage tanks all ended in the centre section between the main building and the pump islands;
4. the underground storage tanks had likely been removed;
5. there was a high potential for a significant negative environmental condition at the site.

WHEREAS the Phase II Report stated that:

1. standpipe vapour concentration readings were measured in all groundwater monitoring wells which ranged from 5% LEL to 100% LEL, which may indicate the possible presence of subsurface organic vapours;
2. it was not possible to collect groundwater samples or to determine the hydraulic gradient;
3. soil was sampled at the groundwater monitoring locations in the vicinity of the former pump island and underground tank nest;
4. results of the BTEX (benzene, toluene, ethylbenzene and xylene), TVH (total volatile hydrocarbons) and TEH (total extractable hydrocarbons) analyses for all the soil samples confirmed that there is hydrocarbon contamination (the "Contamination") under the Property, and none of the soil samples met the *Soil Risk Management Criteria for Vapour Inhalation Pathway, Level 1: Coarse-Grained Soil;*

WHEREAS it is not known whether the Contamination has migrated off-site, although Contamination was detected in additional soil samples taken on November 25, 1998 along the eastern boundary line of the Property, being adjacent to 24th Street, NW, Calgary, that do not meet the *Soil Risk Management Criteria for Vapour Inhalation Pathway, Level 1: Coarse-Grained Soil: (the "Criteria");*

WHEREAS as of October 18, 2000, the Company has not investigated the extent of the Contamination under the Property, or whether any Contamination has migrated off the Property;

WHEREAS Jay Litke, Manager of Enforcement and Monitoring for the Bow Region, has been appointed a Director for the purposes of issuing environmental protection orders and enforcement orders under the Act (the "Manager");

WHEREAS the Manager is of the opinion that a release has occurred, and that there is Contamination under the Property, and which Contamination has potentially migrated off the Property, that is causing, has caused or may cause an adverse effect on the environment;

WHEREAS the Company is a "person responsible" for the Substances, or a thing containing the Substances, as defined in section 1(ss) of the Act, which have resulted in the Contamination;

THEREFORE, I, Jay Litke, Manager of Enforcement and Monitoring for Bow Region, pursuant to sections 102 and 227 of the Act, DO HEREBY ORDER THAT:

1. The Company shall submit an investigative plan (the "Investigative Plan") to the Manager by Friday, December 1, 2000. The Investigative Plan shall include:

    a) A proposal for delineating and quantifying the Contamination of the soil, surface water and groundwater, under the Property, and to any off-site areas; and

    b) A schedule of implementation for the Investigative Plan, including the date upon which a detailed written investigation report (the "Investigative Report") and a remediation plan (the "Remediation Plan") will be submitted to the Manager.

2. The Company shall implement the work set out in the Investigative Plan in accordance with the schedule of implementation as is approved by the Manager.

3. The Investigative Report shall at least contain the following information:

    a) Detailed descriptions of the survey procedures and equipment, and the methods used for sampling and analysis of all soils and water;

    b) All analytical results and readings taken, correlated to the sampling locations both on the Property and on any off-site areas;

    c) Identification of the sample locations and depths that require remediation to meet the Criteria; and

    d) Any other relevant information.

4. The Remediation Plan shall include:

   a) The remediation procedures to be implemented to meet the Criteria;

   b) A description of all measures that will be taken to ensure that there is no damage to undisturbed areas;

   c) Remediation, sampling and analytical testing and laboratory methods to be used; and

   d) A schedule of implementation describing the work planned to implement the Remediation Plan;

5. The Company shall implement the work set out in the Remediation Plan in accordance with the schedule of implementation as approved by the Manager.

6. The Company shall submit the first written status report commencing 30 days after the commencement of the work undertaken pursuant to the Remediation Plan, and every 30 days thereafter, until advised otherwise in writing by the Manager. Each status report shall contain a detailed summary of the progress of the work undertaken in the previous 30 days together with a detailed work plan for the next 30 days.

7. Within 7 days of completion of the remediation, the Company shall submit a final report to AENV detailing the remedial work undertaken at the site, and independent confirmation from a qualified environmental consultant that the soil and groundwater meets the Criteria.

APPENDIX C

BEFORE THE ENVIRONMENTAL APPEAL BOARD

IN THE MATTER OF SECTIONS 84, 86, 87, 88, 89,
91, 92, 93, AND 93.1 OF
THE *ENVIRONMENTAL PROTECTION AND ENHANCEMENT ACT* (the "Act"),
S.A. 1992, CH. E-13.3 AS AMENDED; AND

IN THE MATTER OF ENVIRONMENTAL PROTECTION ORDER NO. 2000-08
MADE PURSUANT TO SECTIONS 102 AND 227 BY JAY LITKE,
MANAGER OF ENFORCEMENT AND MONITORING FOR THE BOW REGION OF
ALBERTA ENVIRONMENTAL PROTECTION

AGREED STATEMENT OF FACTS

1. On November 2, 2000, Jay Litke, Manager of Enforcement and Monitoring Bow Region, issued Environmental Protection Order No. 2000-08 ("EPO No. 2000-08") to McColl-Frontenac Inc. (the "Appellant"), formerly "McColl-Frontenac Oil Company Limited" and "Texaco Canada Inc.". EPO No. 2000-08 was issued pursuant to sections 102 and 227 of the Act. [Document #4, Alberta Environment Records]

2. On November 6, 2000, the Appellant filed a Notice of Appeal and Application for Stay of EPO No. 2000-08. [Document #1, Alberta Environment Records]

3. By letter, dated November 14, 2000, Grant D. Sprague, counsel for Alberta Environment, advised that:

> "With respect to a stay, the Director is prepared to defer further steps on the Environmental Protection Order pending the appeal. As a consequence, a formal stay is not necessary." [Tab "A"]

4. At the request of the Environmental Appeal Board, the Appellant, by letter to the Board, clarified the Notice of Appeal. [Tab "B"]

5. The property which is the subject of EPO No. 2000-08 is legally described as Plan Capitol Hill Calgary 2846GW, Block 5, Lots 39 and 40, municipally known as 2505 - 24 Street NW, Calgary, Alberta (the "Property"). [Document #4, Alberta Environment Records]

6. Based upon a historical title search, the registered owners of the Property are or have been as follows [Document #44, Alberta Environment Records]:

810546 Alberta Ltd.	December 30, 1998 to present
Al's Equipment Rentals (1978) Ltd.	April 30, 1986 to December 30, 1998
Texaco Canada Inc.	September 25, 1980 to April 30, 1986
Highways Realties Limited	October 12, 1956 to September 25, 1980
McColl-Frontenac Oil Company Limited	May 10, 1956 to October 12, 1956

7. Based upon a historical title search, McColl-Frontenac Oil Company Limited had a lease registered on title from October 12, 1956 to September 25, 1980 (Registration No. 5648 H.C.). [Document #44, Alberta Environment Records]

8. According to Corporate Registry records, the Appellant is the amalgamation successor to McColl-Frontenac Oil Company Limited and Texaco Canada Inc. [Document #43, Alberta Environment Records]

9. Also according to Corporate Registry records, Highway Realties Limited was a federal corporation, first registered on March 6, 1956, and struck on May 30, 1981. Highway Realties Limited, in a Statement filed under the Alberta *Companies Act*, described its principal business as "owning and leasing of service station properties". [Document #43, Alberta Environment Records]

10. A gas station was located on the property between 1956 and 1981. As part of the operation of the retail gas station, the McColl Frontenac Oil Company stored gasoline in underground fuel tanks located on the Property. The records of Texaco Canada Inc. indicate that the gas station last operated in 1979, and that the underground storage tanks and equipment were removed some time prior to July 14, 1981. [Tab "C"; Note: the General Arrangement Plan and photographs which are said to be attached to this document cannot be located.]

11. Between 1982 and 1986, the Property was leased from Texaco Canada Inc. to Al's Equipment Rentals (1978) Ltd. for the operation of an equipment rental company. Since 1986, the Property has been used by Al's Equipment Rentals (1978) Ltd. and 810546 Alberta Ltd. for the operation of equipment rental companies. [Document #38, Alberta Environment Records]

12. The purchase agreement [Document #42, Alberta Environment Records] between Texaco Canada Inc. and Al's Equipment Rentals (1978) Ltd. expressly provides that:

> "6. The Purchaser [Al's Equipment Rentals (1978) Ltd.] has inspected and agrees to purchase the property as it stands, and it is agreed that there is no representation, warranty, collateral agreement, zoning, municipal permit or license, or condition affecting the said property of the agreement to purchase and sell, other than is expressed herein in writing."

This clause was included in the $410,000.00 written offer made by Al's Equipment Rentals (1978) Ltd., dated September 12, 1985, which was then accepted by Texaco Canada Inc. on December 5, 1985.

13. The current title to the Property is subject to a caveat regarding a restrictive covenant held by Texaco Canada Inc. (Registration No. 861 071 428). [Document #44, Alberta Environment Records] This caveat was filed on April 30, 1986, and reflects an agreement between Al's Equipment Rentals (1978) Ltd. and Texaco Canada Inc. Under the caveat, Al's Equipment Rentals (1978) Ltd. covenanted, by virtue of the agreement attached to the caveat, that no part of the Property would "be used or permitted to be used for the sale of gasoline or diesel fuels for a term of 20 years".

14. In October 1998, Al's Equipment Rentals (1978) Ltd., the then registered owner of the Property, hired a consultant, Cirrus Environmental Services Inc., to conduct a Phase I environmental site assessment of the Property. [Document #40, Alberta Environment Records] The Executive Summary of this assessment states:

> "As of the date of this report, the historical aspect of the assessment has revealed no previous reported environmental contamination and no reported conditions off-site with potential to cause contamination. Land titles searches revealed that the property was formerly owned by Texaco Canada Inc. and was also previously owned/leased by McColl-Frontenac Oil Company Limited. The Subject Property had once served as a service station and a private utility location service revealed that vent tubes for the underground petroleum storage tanks (UST's) all ended in the centre section between the main building and the pump islands. The utility locate also showed that it is likely that the UST's have been removed. The interior inspection revealed no visible sources of potential problems. The exterior inspection revealed several sources of potential problems: a 500-gallon overhead gasoline tank, a 75-gallon slip tank (diesel) and various 205L drums of petroleum-hydrocarbon-containing materials (e.g. kerosene, 10W30 motor oil).
>
> "The data collected during the course of this assessment suggests that the potential for significant negative environmental conditions existing at the Subject Property, as of the date of this report is *high*."
> (*emphasis in original*)

15. In January 1999, Cirrus Environmental Services Inc. completed a Phase II environmental site assessment of the Property Al's Equipment Rentals (1978) Ltd. [Document #39, Alberta Environment Records] The Executive Summary of this assessment states:

> "Standpipe vapour concentration readings were measured in all wells prior to sampling. The readings ranged from 5% LEL to 100% LEL, which may indicate the possible presence of sub-surface organic vapours.
>
> "The depth to water and the thickness of any phase-separated petroleum product was measured using a HERON electronic oil/water interface and water level indicator. Phase-separated hydrocarbons were not measured in any of the monitoring wells.
>
> "Due to the absence of groundwater in all but one (1) monitoring well, it was not possible to collect groundwater samples or determine the hydraulic gradient at this time.
>
> "Based on data collected during the Phase I ESA, a Phase II subsurface intrusive investigation was performed on 23 October 1998. Soil samples were collected from test holes C98-1, C98-2 and C98-3 and submitted to Enviro Test Laboratory (ESL) in Calgary for laboratory analyses of benzene, toluene, ethylbenzene, & xylenes (BTEX), total volatile hydrocarbons (TVH), total extractable hydrocarbons (TEH), and lead. A soil sample from C98-1 was also submitted for analysis of particle size. The results of the grain-size analysis showed that 49% was greater than 75 [micrometers]. In order for the soil to be classified as coarse grained, 50% of the particles must be greater than 75 [micrometers] but due to the sandy nature of different soil strata within the contaminated zone, the soil is being classified as coarse grained. Results of the BTEX, TVH and TEH analyses indicate that all of the soil samples submitted do not meet the *Soil Risk Management Criteria for Vapour Inhalation Pathway Level I: Coarse-Grained Soil.*
>
> "In order to help establish the extent of the contaminant plume, determine the direction of groundwater flow and provide additional information on potential subsurface contamination, a second subsurface intrusive investigation was performed on 25 November 1998. Further test holes were advanced on the interior of the site and along the property line adjacent to 24th Street N.W. Additional groundwater monitoring wells installed as part of this investigation.

"Six (6) confirmatory soil samples, from C98-7 (at 17.5' & 27.5'), C98-8 (at 45') & C98-10 (at 15', 20' & 25'), were submitted to ETL in Calgary for analyses of BTEX, TPH, and lead. Results of the analyses indicate the soil samples from C98-7 [at] 17.5' and C98-10 [at] 15' do not meet the *Soil Risk Management Criteria for Vapour Inhalation Pathway Level I: Coarse-Grained Soil.*"

16. On February 11, 2000, counsel for Al's Equipment Rentals (1978) Ltd. contacted Alberta Environment to advise that the environmental site assessments had "disclosed that hydrocarbon contamination had impacted the soil beneath the [P]roperty". [Document #38, Alberta Environment Records]

17. On February 14, 2000, the environmental consultant for Al's Equipment Rentals (1978) Ltd. also contacted Alberta Environment to advise of the results of the environmental site assessments. [Document #38, Alberta Environment Records]

18. In the spring of 2000, Alberta Environment initiated contact with the Appellant to discuss the Property. The Appellant, by letter dated April 17, 2000, indicated to Alberta Environment that:

"Imperial sold the site in 1985. The agreement of purchase and sale provides that 'the purchase inspected and agreed to purchase the property as it stands and there is no representation, warranty, ... other than was expressed in the agreement'. I presume that the Purchaser of the property in 1985 would have been aware of the prior use of the property (service station) and purchased it with that knowledge. Also, Imperial would have complied with any laws applicable to the property at that time.

It is Imperial's position that responsibility for the property rests with the owner."

The Appellant, by letter dated May 10, 2000, further indicated to Alberta Environment that:

> "This letter is a follow-up to our recent telephone conversation where you requested a meeting to discuss the site and a request by AENV for [the Appellant] to become involved in the site.
> [The Appellant's] position is clearly stated in my letter of April 17th. I cannot see the usefulness of a meeting to re-iterate this position. If AENV has some further comments in regard to this, please advise."

[Document #37, Alberta Environment Records]

19. On October 31, 2000, two days prior to the issuance of EPO No. 2000-08, a meeting took place between Alberta Environment and the Appellant respecting the history of the Property, the contents of EPO No. 2000-08, and whether the Appellant would undertake remedial measures. The Appellant indicated that it was not prepared to undertake remedial measures as it had sold the Property "as is, where is" to Al's Equipment Rentals (1978) Ltd. and that responsibility for the Property rested with the current owner. Alberta Environment indicated that it would proceed to issue EPO No. 2000-08 [Document #6, Alberta Environment Records]

20. EPO No. 2000-08, issued November 2, 2000, states:

> "...the Manager is of the opinion that a release has occurred, and that there is Contamination under the Property, and which Contamination has potentially migrated off the Property, that is causing, has caused or may cause an adverse effect on the environment.
> ...the [Appellant] is a 'person responsible' for the Substances, or a thing containing the Substances, as defined in section 1(ss) of the Act, which have resulted in the Contamination."

21. The Act came into force on September 1, 1993. Since the Act came into force, Alberta Environment has produced annual reports detailing the enforcement responses taken by the Department. The following reports have been published:

September 1, 1993 - December 31, 1995	[Tab "D"]
January 1 - December 31, 1996	[Tab "E"]
January 1 - December 31, 1997	[Tab "F"]
April 1, 1997 - March 31, 1998	[Tab "G"]
April 1, 1998 - March 31, 1999	[Tab "H"]
April 1, 1999 - March 31, 2000	[Tab "I"]
April 1, 2000 - March 31, 2001	[Tab "J"]

22. There have been 76 environmental protection orders issued since the Act came into force; 44 were issued pursuant to Part 4 - Division 1 of the Act (Release of Substances Generally), 29 were issued pursuant to Part 5 of the Act (Conservation and Reclamation); 1 was issued pursuant to Part 6 of the Act (Groundwater and Related Drilling); and 2 were issued pursuant to Part 8 of the Act (Hazardous Substances and Pesticides). No environmental protection order has ever been issued pursuant to Part 4 - Division 2 of the Act (Contaminated Sites). [Summary of environment protection orders detailed in the Annual Reports - Tab "K"]

23. Of the 76 environmental protection orders issued since the Act came into force, only 7 involved property operating or previously operated as a gas station. These 7 gas station orders were issued between June 15, 2000 and November 2, 2000. Prior to June 15, 2000, no environmental protection order had ever been issued involving property operating or previously operated as a gas station. [Summary of environmental protection orders detailed in the Annual Reports - Tab "K"]

24. Pursuant to Part 4 - Division 2 of the Act (Contaminated Sites), there have been four Designations of Contaminated Sites, issued between January 19, 1996 and May 8, 1997. All of these Designations involved gas stations. [Summary of environmental protection orders detailed in the Annual Reports - Tab "K"]

25. In April 2000, Alberta Environment published the *Guideline for the Designation of Contaminated sites under the Environmental Protection and Enhancement Act* (the "Guideline"). [Excerpt, Document #36, Alberta Environment Records; Complete Version, Appellant's Authorities **Tab "L"**]

Action No: 0203 04933

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

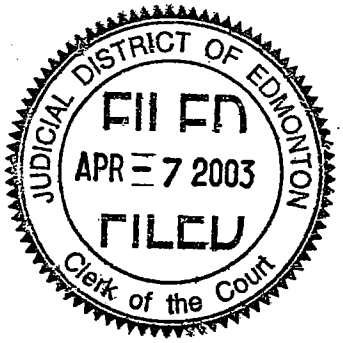
McCOLL-FRONTENAC INC.

Applicant

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA (AS REPRESENTED BY THE MINISTER OF ENVIRONMENT) ENVIRONMENTAL APPEAL BOARD (ALBERTA) AND THE MANAGER OF ENFORCEMENT AND MONITORING BOW REGIONS

Respondents



REASONS FOR JUDGMENT
of the
HONOURABLE MR. JUSTICE R. P. MARCEAU

Action No. 0203 04933

IN THE COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

MCCOLL-FRONTENAC INC.

Applicant

and

HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA
(AS REPRESENTED BY THE MINISTER OF ENVIRONMENT),
ENVIRONMENTAL APPEAL BOARD (ALBERTA), and
THE MANAGER OF ENFORCEMENT AND MONITORING BOW REGION

Respondents

I hereby certify this to be a true copy of the original
Dated this 11 day of June 2003
K Monroe
for Clerk of the Court

BEFORE THE HONOURABLE JUSTICE R. P. MARCEAU IN CHAMBERS, LAW COURTS, EDMONTON, ALBERTA) ON FRIDAY, THE 4th DAY OF APRIL, 2003

ORDER

UPON the application by the Applicants for Judicial Review; AND UPON hearing counsel for the Applicants and Respondents; AND UPON reviewing the materials filed by the respective parties; IT IS HEREBY ORDERED THAT:

1. The application for Judicial Review by the Applicants is dismissed.
2. Costs of the application may be spoken to.

JUSTICE MARCEAU

APPROVED BY:
DAVIS & COMPANY

Per: _____
Robert B. White
Counsel for McColl-Frontenac Inc.

47500.0001;1080704.W51;1

Andrew C.L Sims
Counsel for Environmental Appeal

Alberta Justice

Per:______________________________

Grant D. Sprague
Counsel for The Manager of
Enforcement and Monitoring Bow Region

Miller Thomson LLP

Per:______________________________

Lorne A. Smart
Her Majesty The Queen in Right
of Alberta (As represented by the
Minister of Environment)

ENTERED THIS _______ DAY OF
April, 2003.

____

CLERK OF THE COURT

Andrew C.L Sims
Counsel for Environmental Appeal

Alberta Justice

Per: _____
Grant D. Sprague
Counsel for The Manager of
Enforcement and Monitoring Bow Region

Miller Thomson LLP

Per: _____
Lome A. Smart
Her Majesty The Queen in Right
of Alberta (As represented by the
Minister of Environment)

ENTERED THIS _____ DAY OF
April, 2003.

_____
CLERK OF THE COURT

Andrew C.L Sims
Counsel for Environmental Appeal

Alberta Justice

Per: _____
Grant D. Sprague
Counsel for The Manager of
Enforcement and Monitoring Bow Region

Miller Thomson LLP

Per: _____
Lorne A. Smart
Her Majesty The Queen in Right
of Alberta (As represented by the
Minister of Environment)

ENTERED THIS 1 DAY OF
April, 2003.

_____
CLERK OF THE COURT

SEAL

Action No. 0203 04933

IN THE COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

MCCOLL-FRONTENAC INC.

Applicant

and

HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA (AS REPRESENTED BY THE MINISTER OF ENVIRONMENT), ENVIRONMENTAL APPEAL BOARD (ALBERTA), and THE MANAGER OF ENFORCEMENT AND MONITORING BOW REGION

Respondents

ORDER

MILLER THOMSON LLP
Barristers & Solicitors
2700 Commerce Place
10155 - 102 Street
Edmonton, Alberta
T5J 4G8

LORNE A. SMART, Q.C.
Telephone No. 429-1751

File No. 047500.0001 LAS