ALBERTA
ENVIRONMENTAL APPEAL BOARD

Report and Recommendations

Date of Hearing - June 3, 1999
Final replies: June 25, 1999
Date of Report and Recommendations - July 23, 1999

IN THE MATTER OF Sections 84, 87, 90, 93, 102, and 126 of the *Environmental Protection and Enhancement Act*, (S.A. 1992, ch. E-13.3);

-and-

IN THE MATTER OF appeals filed by Mr. Charles W. Forster of Legal Oil and Gas Ltd. with respect to Environmental Protection Order No. 98-04 issued on February 17, 1998 by the Director, Land Reclamation Division, Alberta Environmental Protection.

Cite as: Legal Oil and Gas Ltd. v. Director, Land Reclamation Division, Alberta Environmental Protection.

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HEARING BEFORE

Dr. William A. Tilleman
Dr. M. Anne Naeth
Mr. Ron V. Peiluck

APPEARANCES

Appellant: Mr. Dennis R. Thomas, Q.C., counsel, Fraser Milner, representing Mr. Charles W. Forster, Legal Oil and Gas Ltd., Mr. Larry Leonard

Department: Mr. Grant Sprague, counsel, Alberta Justice, representing Mr. Chris Powter, Mr. Arnold Janz, Alberta Environmental Protection, Mr. Kevin Ball

Other Parties: Mr. Dennis Roth, counsel, Ackroyd, Piasta, Roth and Day, representing Mr. Armand and Ms. Jeannette Tieulie, Mr. Roland Tieulie

[1] This appeal concerns "Environmental Protection Order No. 98-04" [Order], issued on February 17, 1998, by Mr. Larry Brocke, the Director of the Land Reclamation Division [Director], Alberta Department of Environmental Protection [the Department]. The Order requires the appellants--Legal Oil & Gas Ltd. [Legal Oil] and Mr. Charles W. Forster to assess the extent of and then to remediate salt water "brine" and hydrocarbon pollution on farm land currently owned by Mr. Armand and Ms. Jeannette Tieulie, who are also parties in this appeal. The Tieulies' land is near Legal, Alberta, which is roughly 35 kilometres north of Edmonton. The Director based his issuance of the Order on sections 102 and 126 of the Alberta *Environmental Protection and Enhancement Act* [the Act], S.A. 1992, c. E-13.3.

[2] The salt water brine and hydrocarbon contamination arose from the operation, and now extends well beyond the legal borders of, a well-site on the Tieulies' land. Legal Oil, or its corporate predecessor (Forster's Petroleum Ltd.), has been the legal owner of the well-site on a more-or-less continuous basis since 1963. Mr. Forster is the sole director and shareholder of Legal Oil.

[3] The Order specifically requires Legal Oil and Mr. Forster to remediate the brine and hydrocarbon pollution *outside* of the boundaries of the well-site, and also to remediate the pollution inside of those boundaries, to the extent necessary to prevent further off-site contamination. For clarity, the Board's use of the terms "off-site" and "on-site" are with reference to the legal boundaries of the actual well, not the broader boundaries of the Tieulies' overall quarter-section of land in which the well is located. These distinctions are important because Legal Oil argues that the Act does not authorize the Director to require the company to address any off-site pollution; for that matter, the company also argues that it cannot be required to remediate any on-site pollution prior to its formal abandonment of the well. As indicated below, however, the Board believes that the quarter-section boundaries are more relevant to the outcome of this appeal than the off-site/on-site distinction which Legal Oil raises.

[4] Legal Oil also challenges the Order on the ground that the Act's provisions authorizing the Director to issue environmental protection orders do not apply retrospectively to substances which were released prior to September 1, 1993, which is the date the Act was proclaimed. Finally, Mr. Forster also argues that he should not be personally responsible for any actions required by the Order or, in other words, that the Director lacked authority to include him in the Order.

[5] The Board conducted a full-day evidentiary hearing in this appeal on June 3, 1999, following its receipt of written submissions, including documentary evidence, from all of the parties. After the hearing, each party submitted extensive written closing arguments and, subsequently, a written reply to the opposing parties' closing submission. Thus, the parties have had ample opportunities, in both written and oral form, to present their positions to the Board.

II. DISPUTED AND UNDISPUTED FACTS

[6] The origins of this dispute date back to 1949, when Mr. Armand Tieulie's father, Mr. Gabriel Tieulie, granted a "Petroleum and Natural Gas Lease" to Sinclair Canada Oil Co. [Sinclair], for the quarter-section which is the subject of the Director's Order. The Board will discuss several of the precise terms of this lease in the Analysis section below, but it is sufficient for purposes of this section to state that the lease gave Sinclair the right to drill for oil and gas on the Tieulies' quarter-section. In 1953, Sinclair drilled a well on that quarter-section and began producing oil from a roughly six acre well-site, pursuant to the lease and a well licence which Sinclair obtained from the predecessor to the current Alberta Energy and Utilities Board [EUB]. According to Mr. Forster's oral testimony, while it operated the well, Sinclair routinely discharged large volumes of brine into a pit adjacent to the drilling well, and the overflow of those discharges from the pit were the original source of the salt water pollution which is addressed in the Director's Order. Although the Board cannot recall any testimony or other evidence addressing Sinclair's relation to the hydrocarbon pollution, the parties all seem to concur that, in all likelihood, Sinclair's operations were the original cause of the present hydrocarbon contamination, as well.

[7] In 1961, Sinclair sold its overall interest in the well and, for all practical purposes, has ceased to exist for purposes of the present dispute.[1] The purchaser was Forster's Petroleum Ltd. which, in turn, transferred its interest to Legal Well Strippers Ltd., a direct predecessor of Legal Oil. Legal Oil does not appear to contest that it stands in the two former companies' shoes for purposes of any cleanup responsibility which the former may have incurred relative to the Order in this appeal. Legal Oil does argue, however, that it does not stand in *Sinclair's* shoes or, in other words, that it should not inherit responsibility for any environmental mess which Sinclair created.

[8] With the exception of a brief period sometime between 1961 and 1987, Legal Oil owned and operated the wellsite. In the mid-1980s, Legal Oil shut down its operations, apparently, due to a still unresolved dispute with the Tieulies over the well licence. That dispute appears to be related, at least in part, to the pollution issues presently before this Board.

[9] Mr. Armand Tieulie testified that he purchased the quarter-section from his father Gabriel in 1968 and had helped his father manage the farm land prior to that date. Mr. Tieulie also testified that the geographic extent of salt water brine contamination beyond the actual well-site has steadily increased since roughly 1965, and that this contamination has caused a corresponding loss of useable farm land. This testimony is consistent with paragraph 18 of the parties' Agreed Statement of Facts, which states that the "dimensions of the Off Site Areas affected by these substances have increased with time."

[10] There are several other facts which the parties vigorously dispute. These are: (1) whether the locations of Sinclair's pit(s) and associated release of brine and hydrocarbons were within or outside of the well-site; (2) whether Legal Oil (and its predecessors) affirmatively caused any additional release of brine and hydrocarbons either within or outside of the well-site; and (3)

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[1] The Board has been told only that, after Sinclair sold the well, it sold certain other assets to Atlantic Richfield Canada Ltd. which, in turn, was acquired by Petro-Canada Ltd. That company has disavowed any legal obligation which Sinclair may have incurred and chose not to participate in this Appeal. See May 11, 1999 letter from Ronald M. Kruhlak to Grant Sprague, Alberta Justice.

whether any brine or hydrocarbons released by either Sinclair or Legal Oil within the well-site has migrated outside of the well-site and, if so, whether that migration has occurred during Legal Oil's ownership of the well.[2] The Board notes at the outset that the evidence did not provide a definitive resolution to any of these factual issues. These uncertainties are not surprising, given the long history of use of the site, and the cost and practical difficulty of actually tracing the migration path and origin of the brine and hydrocarbon pollution. The uncertainties also highlight the difficulty of defining the magnitude and fate of pollution in terms of artificial, legal boundaries—in this case, the precise boundaries of the well-site. This difficulty is highlighted in this appeal by uncertainty as to even the *direction* of pollution migration—the evidence generally suggested that the pollution was migrating farther and farther away from the well-site from a source within or near the actual well-site; but there was testimony suggesting that at least some of the well-site contamination was caused by migration originating from *off-site* locations. Given these physical uncertainties, any attempt to define legal responsibility for cleaning up the overall pollution problem based on Legal Oil's legal relation to the well-site, is particularly problematic.[3]

[11] In the Board's view, however, the factual issues listed in the prior paragraph need not be resolved for several reasons. The most important of these reasons is that, under the Sinclair-Gabriel Tieulie Lease, and the Agreement transferring the Lease Legal Oil is a successor to Sinclair with respect to the *entire* quarter-section in which the pollution is occurring, *not* just the actual well-site. This conclusion, and the Board's other conclusions, are explained below.

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2 Legal Oil appears to concede that some amount of brine was released beyond the well-site, from a pipeline which the company constructed to transport that water to a disposal site beyond the Tieulies' quarter-section of land and that the company has not remediated that release. Thus, the validity of the Order does not appear to be in question with respect to that pipeline leakage.

3 Even if the Board concluded that Legal Oil was legally responsible only for contamination occurring on-site, there would still be the practical problem of distinguishing between on-site and off-site cleanup. A more holistic cleanup approach is clearly necessary, however, to truly solve the overall environmental problem on the Tieulies' quarter-section.

III. THE BOARD'S ANALYSIS

A. Legal Oil's Liability Under the Act's Section 102

[12] As relevant here, section 102(1) authorizes the Director to issue an "environmental protection order" to the "person responsible" for a "substance," when the Director is "of the opinion" that a "release" of the "substance" "may occur, is occurring or has occurred," and the "release" "may cause, is causing or has caused an adverse effect. . . ." There is no doubt in the Board's mind that the Act defines the terms "adverse effect," "release," and "substance" very broadly.[4] Similarly, section 102(3) gives the Director broad discretion in fashioning the terms of an "environmental protection order" by stating that the order may require the recipient to take "any" measures that the Director "considers necessary," including investigating the extent of and monitoring the release, remedying the environmental effects, and restoring the affected area.[5] In short, the Act provides the Director with considerable authority to require persons to address and ameliorate pollution for which they are "responsible." This broad authority is consistent with the strong environmental protection purposes of the Act generally, and is buttressed by numerous other provisions of the Act addressing pollution from "released substances."[6]

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4 See sections 1(b) ("adverse effect"); (ggg) ("release"); and (kkk) ("substance"); see also section 1(t) (broad definition of "environment" as used in the definition of "adverse effect").

5 Section 227(1) gives the Director express authority to set deadlines for steps required in "environmental protection orders" issued under section 102; that section also gives the Director considerable additional express authority in establishing the content of those orders.

6 Section 2 lists the Act's overall purpose as "to support and promote the protection, enhancement and wise use of the environment.. . ." The section states that this purpose is to be implemented in "recogni[tion]" of several principles, which include the following:

> (a) the protection of the environment is *essential* to the integrity of ecosystems and human health and to the well-being of society;
> (b) the need for Alberta's economic growth and prosperity *in an environmentally responsible manner*. . . .
> (c) the principle of sustainable development, which ensures that the use of resources and the environment today does not impair prospects for their use by future generations;
> (d) the importance of preventing and mitigating the environmental impact of

[13] Legal Oil's primary objection to the validity of the Order under this section, other than its retrospectivity argument discussed in section III. C below, is that Legal Oil is not a "person responsible" for the salt water brine and hydrocarbons which exist outside of the well-site boundary. As relevant here, section 1(ss) of the Act defines that term, with reference to a "substance," as: the "owner" or "previous owner" of the substance; "every" person who "has or has had charge, management or control of the substance"; and any "successor" or "assignee" of those two categories of "responsible persons." Legal Oil argues that it does not fit any of these three categories of "responsible persons" because, although it succeeded Sinclair with respect to Sinclair's interest in the well-site, the off-site pollution (other than the pipeline leaks) was caused solely by Sinclair's affirmative releases outside of the well-site and Legal Oil has had no control or legal relation to the off-site pollution resulting from those releases. An implied corollary to this argument is that the pollution which has existed within the well-site during Legal Oil's ownership of the site is not migrating off-site.

[14] The primary flaw with Legal Oil's position is that it ignores Legal Oil's legal connection to the off-site pollution. That connection stems from the 1949 Lease between Sinclair and Gabriel Tieulie. The first paragraph of that lease indicates that it covered, not just the roughly six acre well-site, but the Tieulies' entire quarter-section. Accordingly, the Lease granted Sinclair the exclusive right to extract oil and gas from that quarter-section, including the rights to "store and dispose" of those substances, to "build and install such . . . structures . . . as may be necessary," and to "us[e] and occup[y]" the entire quarter-section "to such an extent as may be necessary or

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development. . . .

(i) the responsibility of polluters to pay for the costs of their actions; [and]

(j) the important role of comprehensive and responsive action in administering this Act.

(Emphases added).

The Act's other provisions relating to "released substances" include sections 97-99, which generally prohibit harmful releases, section 100, which requires reporting of released substances, and section 101, which requires the cleanup of those substances independently of any cleanup requirements imposed by the Director through an "environmental protection order" under section 102.

convenient. . . ." Section twelve of the Lease provided that Sinclair would indemnify Mr. Gabriel Tieulie for any "loss, injury, damage, or obligation to compensate arising out of or connected with the work carried on by . . . [Sinclair] *on the said lands"* (emphasis added)—i.e. on the *entire* quarter-section, not just the well-site.[7] Moreover, the next section of the Lease stated that Sinclair "shall . . . be responsible for actual damages caused by his operations to the surface of, and growing crops and improvements on, *the said lands."* (Emphasis added).

[15] The December 8, 1961 Agreement between Sinclair and Legal Oil's predecessor--Forster's Petroleum—plainly transferred Sinclair's Lease interest in the Tieulies' entire quarter-section, not just Sinclair's interest in the well-site. The first "Whereas" clause on page one of that Agreement referred to the 1949 Lease and its coverage of the entire quarter-section; the third "Whereas" clause on page two indicates Forster's Petroleum's intent to purchase the "lease" including all "well and lease facilities . . . owned by Sinclair in connection therewith." In paragraph one (p. 2) of the Agreement, Sinclair "grant[ed] and assign[ed]" to Forster's Petroleum the "lease and the lands and premises and all the leased substances comprised therein . . . subject to . . . the performance and observance of the covenants, conditions and stipulations" in the Lease. In the next paragraph of the Agreement, Sinclair transferred to Forster's Petroleum its interest in the well and "lease facilities" "owned by Sinclair and used in connection with the operation" of the well. In paragraph six, Forster's Petroleum agreed to indemnify Sinclair from "the observance and performance of . . . [Sinclair's] covenants, conditions and agreements" in the Lease. In paragraph ten, the Agreement stated that it would be binding on Forster's Petroleum and its "successors and assigns"—i.e. Legal Oil.

[16] The Lease and Agreement provisions cited above clearly refute Legal Oil's claim that its legal responsibility for Sinclair's pollution "mess" stops at the six acre well-site boundary. Under those quoted provisions, Legal Oil inherited both Sinclair's rights and its responsibilities of access

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7 As relevant here, Lease section 1 defined "said lands" as the "lands hereinbefore described or referred to.. . ." Those lands, in turn, are the entire quarter-section referenced in the first paragraph of the lease.

to and use of the off-site portions of the Tieulies' quarter-section. In other words, even if the off-site pollution was caused entirely by Sinclair's affirmative disposals into or around an off-site pit, Legal Oil inherited that "facility" and the overall mess which Sinclair allegedly created.' Through this inheritance, Legal Oil became the "owner" of the released substances; Legal Oil had "management and control" over those substances; and Legal Oil was a "successor" and "assignee" of Sinclair, which itself was an "owner" of, and had "management and control" over, those substances. Thus, Legal Oil is clearly a "responsible person" under the Act's definition of that term in section 1(ss) of the Act and was, in turn, validly named in the Director's section 102 Order.[9]

[17] The Board acknowledges that the June 3, 1999 hearing in this appeal focussed, not on the provisions of the 1949 Lease and the 1961 Agreement, but on the sketchy evidence regarding the history of Sinclair and Legal Oil's operations on and outside of the well-site. However, at the hearing, the Tieulies' lawyer Mr. Roth did refer to the Agreement in arguing that Legal Oil's focus on the well-site boundary was misplaced. The Board cannot recall Legal Oil ever attempting to refute this argument at the hearing. Mr. Roth made that argument based on the Agreement again in his closing submission.[10] Once again, however, Legal Oil's reply to that closing submission fails to address the argument. In short, Legal Oil has had ample notice of, and opportunity to respond to, this issue, but has failed to avail itself of this opportunity.

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8 To put it another way: had Mr. Forster intended to distance himself from Sinclair's off-site mess, the general nature of which Mr. Forster testified that he was aware when he took over the Lease, he would surely have drafted the Agreement with different terms than the broad terms quoted above.

9 Given this conclusion, the Board does not need to address whether the Director's Order was properly issued under section 126 of the Act.

10 See June 18, 1999 Submission of . . . Jennette Tieulie and Armand Tieulie at 2-3.

B. Mr. Forster's Liability Under Section 102

[18] As noted previously, section 102 authorizes the Director to issue an "Environmental Protection Order" to the "person responsible" for the released substance addressed in the Order. Section 1(ss) of the Act defines "person responsible" in terms of the three categories discussed in section III. A of this Report and Recommendations, as well as a person acting as a "principal *or* agent" of persons in any of those three prior categories.[11] Mr. Forster is the sole shareholder in Legal Oil and the company's sole Director.[12] At the hearing, Mr. Forster also testified that he has been the President or, in other terms, the "manager" or "boss" of Legal Oil, and has had exclusive control over the company, except for the limited period during the 1980s when his son apparently owned the company. Mr. Forster nevertheless argues that he is neither a "principal" nor "agent" of Legal Oil and, regardless, that principles of fairness warrant excluding him personally from the Order. The Board disagrees on both grounds and finds the first of these claims particularly unpersuasive.

1. Is Mr. Forster A "Principal or Agent"?

[19] Neither of Mr. Forster's pre-hearing or closing submissions offered a definition of the terms "principal" and "agent" except to say, with supporting legal authority, that the latter concept does not include corporate directors or primary shareholders.[13] Mr. Forster's focus on his status as the sole shareholder and corporate director ignores Mr. Forster's concurrent status as Legal Oil's President, manager, or boss, with exclusive control of the company's operations. Given his managerial control, Mr. Forster clearly qualifies as either a "principal" or "agent," under both common sense and legal definitions of those terms. For example, the *Pocket Dictionary of Canadian Law* (2w' ed.) defines "principal" as a "chief' or "head." That source defines an "agent"

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[11] Emphasis added.

[12] Agreed Statement of Facts, para. 2.

[13] See May 27, 1999 Submission on behalf of Legal Oil & Gas Ltd. and Charles W. Forster at 4-5; Closing Arguments on behalf of Legal Oil & Gas Ltd. and Charles W. Forster, Response to Question #4.

as a person who "acts for another. . . ." Mr. Forster's own testimony confirmed that he was the "chief' or "head" of Legal Oil or, in agency terms, that he "act[ed]" for that company.

[20] In his post-hearing reply submission, Mr. Forster added that, by definition, an "agent" is one who acts for a "principal" and, therefore, he cannot logically be both a principal and an agent.[14] The Board questions Mr. Forster's implication that the Legislature intended "principal" to be defined solely in terms of the agency relationship. Under that concept, the first three categories of "responsible persons" in section 1(ss) would automatically be "principals." Thus, the word "principal" in the fourth definitional category would be pure surplusage. Instead of that interpretation, the Board believes the Legislature intended "principal" to have the meaning cited in paragraph 19 above, namely, the "chief' or "head" of a company or other organization which itself qualifies as a "responsible person."

[21] At any rate, Mr. Forster's observation, that he cannot be *both* a "principal" and an "agent" of Legal Oil, does not obviate the Board's conclusion that he is at least one or the other, if not also both, and thus a "person responsible" for purposes of section 102 orders.

2. Fairness

[22] The Director argues that it was fair to name Mr. Forster, as well as Legal Oil, due to Alberta Environment's history of contentious relations with Legal Oil, and to Legal Oil's unwillingness to voluntarily clean up the hydrocarbon and brine spills outside of the well-site.[15] In this case, the Board finds the evidence sufficient to support these factors and will not otherwise question the Director's judgment on this issue, given the broad discretion provided to the Director

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[14] Reply of Legal Oil & Gas Ltd. and Charles W. Forster at 4-5.

[15] Mr. Forster's Closing Arguments (response to Question #4, at 5) list corporate willingness to perform the obligations of an Environmental Protection Order, as a factor which the Director should have but failed to consider in deciding whether to also name a corporate officer. This argument is ironic given Legal Oil's opposition to the Order at issue in this appeal.

by the terms of section 102 and the broad definition of "persons responsible" in section 1(ss). Each of the prior decisions by this Board which were cited by Mr. Forster, supports this deferential approach toward the Director's choice of persons to name in an Environmental Protection Order.[16]

[23] The Board notes, however, that Legal Oil, as a company, and Mr. Forster, as an individual, are virtually identical for purposes of the matters relevant to this appeal. Given this identity, it would be inappropriate and unfair, from the public interest standpoint, for Mr. Forster to be able to hide behind Legal Oil's corporate "veil" to avoid liability for what were essentially his own business decisions, starting with his decision to inherit Sinclair's Lease, and accompanying obligations, with respect to the Tieulies' overall quarter-section. Thus, the Board notes this identity as an additional reason for naming Mr. Forster in the Order.

[24] Finally, the Board agrees with Mr. Forster's position that the Director should develop generic criteria for deciding which responsible persons to name in an Environmental Protection Order. However, the Board disagrees with Mr. Forster that the apparent lack of any such generic criteria should negate the Director's *ad hoc* judgment with respect to Mr. Forster.

C . Retrospectivity

[25] As noted in paragraph 4 above, Legal Oil challenges the Order on the additional ground that it is being applied "retrospectively"—i.e., to impose new legal consequences on conduct which occurred prior to the Alberta Legislature's enactment of the Act.[17] The Board notes at the outset that the distinction between the concepts of "retrospectivity" and "retroactivity" is not entirely

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16 See Mr. Forster's Closing Arguments, response to Question #4, at 2-3 (citations to Board decisions omitted).

17 See, *e.g.*, E.A. Driedger, "Statutes: Retroactive Retrospective Reflections" (1978) Can. Bar. Rev. 264 [Driedger, 1978] at 276; R. Sullivan, ed., *Driedger on the Construction of Statutes*, 3"[d] ed. (Toronto: Butterworths, 1994) [Driedger, 3"' ed.] at 510.

clear.[18] However, because all of the parties seem to agree that the former concept is at issue here, the Board will use that term solely.

[26] Legal Oil's retrospectivity claim raises two separate sets of issues: first, does the Director's Order really apply the Act retrospectively; and, second, if so, is that application contrary to the Legislature's intent? The following is an analysis of each of these issues.

1. Does the Director's Order Apply the Act Retrospectively?

[27] This issue raises two sub-issues: First, does the Order apply on the basis of conduct which occurred before the Legislature proclaimed the Act into force; and, second, does the Act's provisions authorizing the Order create new legal obligations?[19] The first of these two sub-issues is somewhat complex because of the long history of oil and gas operations on the Tieulies' quarter-section. The evidence strongly suggests that the salt water brine contamination was caused, at least in the first instance, by Sinclair's conduct which occurred well before the Act's 1993 proclamation date. Similarly, even the majority of Legal Oil's tenure of operations occurred prior to that date. However, the contamination itself is an *ongoing* occurrence (whether or not it is emanating from locations within or outside of the precise well-site boundaries) and, pursuant to the previously discussed provisions of the Lease and Agreement between Sinclair and Forster's Petroleum, Legal Oil remains responsible for that contamination. Thus, even if the brine and hydrocarbons were all released prior to 1993, the Director's Order applies the Act prospectively, not retrospectively, with respect to the ongoing contamination.

[28] Whether the Act's provisions authorizing the Order create new legal obligations is a similarly complex issue. The 1996 court decision cited by the Tieulies' counsel, *Colonial*

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18 See, *e.g.*, Dreidger, 3rd ed. at 511 (avoiding use of the former term due to historical confusion regarding its use).

19 See, *e.g.*, Driedger, 1978 at 267.

Developments (IV) v. Petro-Canada,[20] suggests that there has long been liability in tort, at least for damages, for sub-surface contamination like that present on the Tieulies' quarter-section. In *Colonial Developments,* the court allowed an application for summary judgment on Petro-Canada's liability for off-site hydrocarbon contamination emanating from the company's land. The court reached this conclusion even assuming that Petro-Canada itself did not affirmatively release any of the hydrocarbons but had simply "adopted the nuisance" created by prior owners of the land.[21] The court also made it clear that its decision was supported by the "weight of the case law and the gist of academic commentary [which] has consistently maintained that liability."[22] We agree.

[29] The Director's counsel cited to the *Land Surface Conservation and Reclamation Act*[23] *[LSCRA]* as creating reclamation obligations prior to the Legislature's 1993 proclamation of the Act.[24] Unfortunately, the Director's closing submission did not include any analysis of the *LSCRA*, nor even provided any citations to specific provisions of the former statute or to the statute as a whole, to substantiate counsel's legal claim. However, this claim is consistent with one of the Legislature's purposes in enacting the Act, as reflected in the transitional provisions in Part 12 of the Act, to consolidate various environment-related statutes. Moreover, the Board's own review of the *LSCRA* suggests that it might have been used to require Legal Oil to conduct the very same kind of assessment and remediation which is required by the Director's Order under the Act.[25]

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20 [1996] A.J. No. 1140 (Alta. Q.B.).

21 *Ibid.* (QL) at 2, para. 4; see also *ibid.* at 4, para. 18.

22 *Ibid.* (QL) at 5, para. 24. Legal Oil argues that this court decision is irrelevant because it did not address liability under the Act. See Legal Oil's Reply at 7. The Board agrees that the decision is not based on the Act, but the decision is still relevant in reflecting the common law which the Act supplements.

23 R.S.A. 1980, c. L-3 (repealed by the Act section 247(g)).

24 Closing Submission of the Director at 11, para. 69.

25 See sections 42 (reclamation orders) and 44 (orders specifically regarding off-site reclamation); see also section 2(1) (providing that the Act applies to all land in Alberta), 9 ("stop orders" to prevent or cease violations of the Act). The Board suspects that the similar remediation obligations could also have been imposed under legislation administered by the EUB and its

[30] By referring to the common law and to the *LSCRA*, the Board does not mean to suggest that, prior to the Act's proclamation, Legal Oil was subject to legal obligations that were identical in every respect to those stemming from the Act's section 102. The Board's point is simply that that section has historical antecedents. In other words, the obligations created by that section did not spring up from a legal vacuum when the Legislature proclaimed the Act into force.

[31] In sum, the Board believes there are strong factual and legal reasons for concluding that the Director's Order cannot be characterized solely or largely in retrospective terms. The Board notes, however, that this labelling issue can best be resolved more, by determining a point on a spectrum or a shade of grey, than by making a black or white determination. This spectrum approach can then be used as one of several factors in determining the extent to which the presumption against retrospective legislation should apply or, in other words, the strength of the presumption. From this standpoint, the Director's Order appears to reflect more of a prospective than a retrospective application of the Act and, thus, warrants a weak presumption that it was unintended by the Legislature in enacting section 102.

2. The Legislature's Intent

[32] As the discussion in section III. C. 1. above implied, Legal Oil's retrospectivity claim rests ultimately on a determination of the Legislature's intent. Legal Oil does not appear to argue that a retrospective application of the Act is unlawful even if that application is how the Legislature intended the Act to be applied.[26] However, the Supreme Court of Canada has provided a general rule

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predecessor-Boards although, apparently in deference to the Director, the EUB appears to have stayed out of the present pollution dispute.

[26] See, *e.g.*, Pierre-Andre Cote, *The Interpretation of Legislation in Canada*, 2" ed. (Quebec: Yvon Blais, Inc., 1991) [Cote, 2' ed.] at 112 (In resolving a retrospectivity issue, "{t]he role of both judge and reader is to detect this [legislative] intent, using all available indications. The text of the enactment itself, the presumptions and the appreciation of its consequences are merely guides to the discovery of legislative intent."); *ibid.* at 132 (the presumption against retrospective legislation is not a constitutional rule or rule of law, just a '"rule of construction"' (citation omitted)).

of interpretation or presumption, for judicial determinations of legislators' intent, that "statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act."[27] Of course, this is not the only relevant rule of interpretation. The Alberta *Interpretation Act* provides that Alberta statutes "shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of . . . [their] objects."[28] Any application of the former presumption must be squared with the latter.

[33] Consistent with the *Interpretation Act* provision cited above, courts and commentators have suggested that the presumption against retrospective legislation, itself, is inapplicable when the legislation is intended to protect the public rather than to simply impose punishment for past conduct.[29]

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27 *Gustayson Drilling (1964) Ltd. v. Canada (Minister of National Revenue),* [1977] 1 S.C.R. 271 *at* 279; see also, *e.g., Syncrude Environmental Assessment Coalition v. Alberta (Energy Resources Conservation Board)* (1994), 17 Alta. L.R. (3') 368 at 372 (Alta. C.A.) ("[T]he Alberta Legislature can legislate retrospectively, but its product must expressly say so or at least indicate that such an intention is clear by implication."). The Board wonders just how much of a departure from courts' normal interpretation approach the presumption creates, if it can be overcome not only by express statutory language but also by implication. Nevertheless, the courts' use of the words "necessary" and "clear" in the context of inferences of legislative intent, in the *Gustayson* and *Syncrude* cases, respectively, suggest that the implications must be strong ones to overcome the presumption against retroactive legislation.

28 R.S.A. 1980, c. 1-7, s. 10. The Supreme Court of Canada recently used an identical provision in section 12 of the federal *Interpretation Act,* R.S.C. 1985, c. 1-21, to reject a historical judicial presumption that ambiguous criminal law provisions should be interpreted in favour of the accused. See *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)* (1999), S.C.J. No. 87 at para. 18 (rejecting claim that the federal *Criminal Code* should be interpreted to preclude searches for evidence relating to possible defences to suspected violations of a federal environmental law).

29 See *Brosseau v. Alta. Securities Commission,* [1989] 1 R.C.S. 301 at 319 (presumption is inapplicable to statutes which impose a penalty for a past event, "so long as the goal of the penalty is not to punish the person in question, but to protect the public."); Driedger, 1978 at 275 ("[I]f the new punishment or penalty is intended to protect the public, the presumption does not apply."); *ibid.* at 276 (the presumption is inapplicable "if the new prejudicial consequences are intended as protection for the public rather than as punishment for a prior event."); see also Drieidger 3' ed. at 508 (presumption is inapplicable to provisions intended to protect the public interest). But see *ibid* at 521 (suggesting that the *Brosseau* court confused this exception with its rule that legislation which applies to on-going facts should not be considered retrospective, in the first place); and

[34] Applying these several rules of interpretation, the Board concludes that the Director's Order is consistent with the Legislature's intent in enacting the Act section 102. That section takes a broad temporal approach by referring expressly to "releases" in the present, future, and past tenses. Absent any express limitation on the past tense, this comprehensive approach strongly suggests that the Legislature intended to reach releases which occurred prior to the Act's 1993 proclamation date, at least, to the extent those releases are still causing an adverse effect. The Act's "person responsible" definition, in section 1(ss), further supports this inference, by expressly adopting a similarly comprehensive approach from a "timing" standpoint, by referring to "previous owner[s]" of the released substance, "every person" who "has had charge, management, or control" of the substance, and any "successor, assignee, executor, administrator, receiver, receiver-manager or trustee" of a responsible person. It is hard to imagine that the Legislature would have intended these comprehensive past tense references to go back only as far in the past as the Act's proclamation date, without actually stating so expressly.

[35] By contrast with these unconditional legislative references to the past in section 102, sections 58 and 59 of the Act require "approvals" only for persons who "commence" or "continue" certain specified activities. These latter sections' use of only the present and future tenses suggest strongly that the Legislature's express, comprehensive uses of the past tense, in sections 1(ss) and 102, were intended to be given their full, plain meaning.[30]

[36] Legal Oil contrasts the language of section 108 with that of section 102 to suggest that the latter section was not intended to be applied retrospectively.[31] Section 108 states that

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ibid. at 552 (suggesting that the public interest focus of legislation relates to an assessment of whether the legislation applies to on-going facts and, thus, is not retrospective).

30 See *Walker and Haugen et al. v. Director of Standards and Approvals* (May, 1994), No. 93-005 (E.A.B.) at 5-8 (EAB won't apply the Act approval provisions retrospectively to approvals issued under environmental legislation replaced by the Act, although those approvals may be relevant to considerations relating to approvals required under the Act for expansions or modifications to previously approved facilities.).

31 See Legal Oil's Closing Arguments at 3.

Division 2 of Part 4 of the Act, which relates specifically to the formal designation, and remediation of, "contaminated sites," applies "regardless of when a substance became present in, on or under the contaminated site." According to Legal Oil, this provision reflects the kind of express language necessary to show the Legislature's intent for retrospective application; therefore, one can infer, from the absence of this provision in Part 4, Division 1, in which section 102 occurs, that the Legislature did not intend that section to be applied retrospectively. The problem with this argument is that the express references in the past tense, in section 102, are equivalent to the Division-wide provision in section 108. Both sections apply to past releases; and, neither of the two sections expressly distinguishes between releases occurring before and after the Act's proclamation. Thus, section 108 appears to be indistinguishable from section 102 from the standpoint of the Legislature's intent on the retrospectivity issue.[32] The Board has previously concluded that the Legislature intended Part 4, Division 2, and Part 5 of the Act, to be applied retrospectively.[33] The Board sees no reason for reaching a different conclusion with respect to section 102 (in Part 4, Division 1).

[37] The Board's interpretation of section 102 results, not simply from the text of that provision, but from reading that text in light of the far-reaching environmental objectives in section 2 of the Act,[34] and the presumption discussed above, in section 10 of the *Interpretation Act*, that the Act should be given such "fair, large, and liberal" interpretation to "best ensure" the achievement of the Act's objectives. 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

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[32] In contrast with Division 2, at least one provision in Division 1 of Part 4 appears on its face to apply only to releases occurring subsequent to the Act's proclamation. See section 97(1) ("No person shall knowingly release or permit the release of substances into the environment. . . ."). Thus, it would have been inappropriate for the Legislature to provide a Division-wide provision in Division 1 like that in section 108 for Division 2. However, this difference does not derogate from the similarly expansive references to past releases in section 102, in particular, and section 108.

[33] See *Sarg Oils Ltd. v. Alberta (Department of Environmental Protection)* (May, 1995), No. 94-011 (E.A.B.) at 11.

[34] Those objectives were discussed and partially quoted *supra* in note 6 and the accompanying text, of this Report and Recommendations.

protection objectives could be achieved without interpreting the Act to authorize the Director to require that those historic releases be assessed and remedied.[35]

[38] Similarly, the Board concludes that the Order is clearly designed to protect the public from environmental harm rather than to punish Legal Oil. Thus, the Order falls within the public protection exception to the presumption against retrospective legislation, as discussed in paragraph 33 above, to the extent that exception is a valid one.

[39] Legal Oil's post-hearing submissions refer repeatedly to the unfairness to Legal Oil of being required to remediate up a pollution mess which it supposedly did not create. The Board questions whether this position is valid even from. Legal Oil's own standpoint, given the Lease and Agreement provisions discussed in section III. A. above and Mr. Forster's own hearing testimony indicating that he knew full well of Sinclair's disposal practices prior to his purchase of Sinclair's petroleum interest in the Tieulies' quarter-section. Moreover, Legal Oil's fairness position fails to consider: (1) the unfairness of requiring either the government (and, hence, the Alberta taxpayers) and/or the Tieulies to bear the entire burden of assessing and remediating the substance releases and reclaiming the damaged land; and (2) the public interest in remedying the environmental effects of a long-festering and *still growing* pollution problem.[36] It is likely impossible to develop solutions to the pervasive problem of historic contamination which are fair to everyone or even equally unfair to all interested parties (including Alberta tax payers). The Board will not second-guess the relative

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35 See *Sarg Oils, supra* note 33 at 11 (reading another provision of the Act retrospectively, in part, in light of the purposes of the Act, in section 2). See also *Gammon Resources Ltd. v. Alberta (Department of Environmental Protection)* (Nov., 1996), No. 96-012 (E.A.B.) at 16 ("The wording of section 119(b) of the Act makes it clear that the legislators intended to cast a broad net of potential liability to capture a wide class of operators, irrespective of the chronology of operation or the chain of title.").

36 As to the still growing nature of the problem, paragraph 18 of the parties' agreed statement of facts states that the "dimensions of the Off Site Areas affected by" the hydrocarbons and salt water "brine" "have increased with time." Mr. Tieulie's uncontradicted hearing testimony provided graphic details of the expanding nature of the pollution problem.

fairness of the overall solutions adopted by the Alberta Legislature, and their particular application by the Director by focussing on current well-site operators.[37]

[40] Besides citing the text of section 108 and relying on notions of fairness, Legal Oil also cites to the Alberta Court of Appeal's 1994 *Syncrude* decision[38] with respect to retrospectivity. That appeal involved the Energy Resources Conservation Board's [ERCB's] refusal to adjourn an evidentiary hearing on Syncrude's long-standing application to expand the production capacity of its oil sands facility in Fort McMurray. The appellants argued that the Act hearing should have been adjourned because the Alberta Legislature had just proclaimed the Act into force and that the lengthy application process was somehow entirely negated by the approval provisions under the Act. The court dismissed the appeal, in part, because it found no textual or other evidence that the Act was intended to negate then-pending the Act proceedings under that Board's governing legislation.[39] Moreover, Syncrude had already obtained other approvals from Alberta Environment, under the statutes which the Act was intended to replace, and those pre-the Act approvals were specifically re-affirmed by the Act's transitional provisions.[40] The appellate court was particularly concerned with the need for a "fair, orderly and prospective employment" of the Act *"in the processing of completed approval applications standing for hearing and decision"* under either the statutes preceding the Act

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37 The Board notes the hearing testimony of the Director's staff, that this focus is supported by the Alberta petroleum industry, as a whole, even if Legal Oil itself disagrees with it. The Board also notes that the above discussion is not meant to imply that section 102 orders should be issued *only* to current well-site operators. If, in a legitimate attempt to equitably distribute assessment and remediation costs among all potentially "responsible persons," Legal Oil can identify and document other responsible persons, it is welcome to petition the Director to issue additional environmental protection orders to those persons. The Board's point is simply that, due to environmental concerns and budget constraints, the Director should not be required to himself undertake the inquiries necessary to identify all responsible persons before issuing orders to current operators.

38 *Supra* note 27.

39 *Ibid., 17* Alta. L.R. (3d) at 370-372.

40 *Ibid.* at 370 (describing the other approvals), 371-372 (citing *EPEA* section 243(1)).

or those administered by the ERCB.[41] The court's decision appears to have been particularly influenced by the unfairness of the last-minute fashion in which the appellants raised their concerns under the Act.[42]

[41] Finally, the court acknowledged the "need to encourage the liberal assessment of environmental concerns."[43] However, the court made no mention of any such concerns which had not already been addressed through the prior approvals and/or through the Act hearing on Syncrude's application. In fact, the court specifically noted the Act's finding that Syncrude's application was "complete" and the appellants' acquiescence in that finding, at least, until their "epiphany on the eve of the [the Act] hearing.[44] Under these circumstances, there were no apparent environmental concerns to outweigh the procedural and fairness concerns weighing against halting the longstanding ERCB proceeding.

[42] If anything, the *Syncrude* court's acknowledgment of the need to "encourage liberal assessment of environmental concerns" supports the Director's Order in this case. Unlike *Syncrude*, there are significant, albeit as yet not fully or completely assessed, environmental concerns which *are* not being addressed in any other context. Notably, as mentioned previously, the EUB—the very Board with *direct* regulatory authority over oil and gas operations in Alberta--appears to be deferring completely to Alberta Environment on this matter. The *Syncrude* decision has no other application to the circumstances of this appeal. There is no long-standing approval or environmental

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41 *Ibid.* at 372 (emphasis added); see also *ibid.* ("[I]f the wording of a statute supports an interpretation which better encourages the smooth working of the system the statutory regime purports to regulate, we will favour, if we can, that interpretation as opposed to one which promotes uncertainty, friction and confusion.").

42 *Ibid.* at 370 (appellants raised their concern for the first time only five days before the scheduled hearing date even though the "incoming operation" of the Act was "well known to all parties" for at least four to five months); see also *ibid.* at 371 (referring to the appellants' "epiphany" regarding the supposed significance of the Act "on the eve" of the ERCB hearing).

43 *Ibid.* at 372.

44 *Ibid.* at 371.

remediation proceeding which might be negated or thrown into chaos by the Director's Order. Nor is there the kind of fairness concern like that in *Syncrude* stemming from the *Syncrude* appellants' approach of objecting to the ERCB hearing only at the last minute. Finally, the textual references to past releases in the Act section 102, read together with the Act's ambitious environmental objectives, stand in stark contrast with the absence of any Act provision cited by the *Syncrude* appellants suggesting that the Act was intended to cancel long-standing, pending ERCB proceedings.

[43] In sum, the Board concludes that the Legislature intended section 102 to be applied in the kind of circumstances present in this appeal. The Order has little retrospective application which, in turn, warrants no or, at most, only a weak, presumption against the statutory interpretation proffered by the Director. Even viewing the presumption at "full strength," it is overcome by the text of sections 1(ss) and 102, read together with the purposes of the Act and in light of the presumption favouring a "fair, large and liberal" construction of the Act as necessary for that statute to accomplish its purposes.

SPECIFIC RECOMMENDATIONS

[44] For the reasons listed above, the Board concludes that the Director's Order is valid. Pursuant to sections 84(1)(h) and 91(1) of the Act, the Board therefore recommends that the Minister confirm the Order.

GENERAL RECOMMENDATIONS

[45] Consistent with the discussion in paragraph 24 above, the Board also recommends that the Minister instruct the Director to establish generic criteria for deciding when to name

corporate officers, in their individual capacities, in environmental protection orders issued pursuant to the Act.

Dated July 23, 1999, at Edmonton, Alberta.

"original signed by"
Dr. William A. Tilleman

"original signed by"
Dr. M. Anne Naeth

"original signed by"
Mr. Ron V. Peiluck

ALBERTA ENVIRONMENT

Office of the Minister

MINISTERIAL ORDER

I, Gary Mar, Minister of Environment, pursuant to Section 92 of the *Environmental Protection and Enhancement Act* hereby order:

> That the decision of Director Mr. Larry Brocke, Director of Land Reclamation Division to issue Order No. 98-04 to Mr. Charles W. Forster and Legal Oil and Gas Ltd. on February 17, 1998 be confirmed.

DATED at the City of Edmonton, in the Province of Alberta, this 25 day of August, 1999

"original signed by"

Honourable Gary Mar,
Minister of Environment

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