ALBERTA
ENVIRONMENTAL APPEAL BOARD

Decision

Preliminary Meeting by Written Submission Only
Date of Decision – November 10, 2000

IN THE MATTER OF sections 84, 85 and 87 of the *Environmental Protection and Enhancement Act, S.A. 1992, c.E-13.3;*

-and-

IN THE MATTER OF an appeal filed on April 17, 2000 by Mr. Brian Whissell, on behalf of Villeneuve Sand and Gravel Alberta Ltd. with respect to Approval No. 72308-01-00 issued by the Director, Northeast Boreal Region, Alberta Environment, to Inland Aggregates Limited.

Cite as: *Villeneuve Sand and Gravel Alberta Ltd*. v. *Director, Northeast Boreal Region, Alberta Environment* re: *Inland Aggregates Limited.*

PRELIMINARY MEETING BY
WRITTEN SUBMISSION ONLY

BEFORE:	Dr. William A. Tilleman, Chair Dr. John P. Ogilvie Dr. Ted W. Best

WRITTEN SUBMISSIONS BY:

Appellant:	Villeneuve Sand and Gravel Ltd. represented by Mr. Edward R. Feehan, Duncan and Craig, Barristers and Solicitors
Approval Holder:	Inland Aggregates Limited represented by Mr. Bruce M. Luck, Corporate Counsel, Lehigh Portland Cement Limited (parent company of Inland Aggregates Limited)
Department:	Mr. Kem Singh, Director, North East Boreal Region, Alberta Environment represented by Mr. William McDonald, Alberta Justice
Barries:	Mr. Dale and Mrs. Deborah Barrie represented by Mr. Donald C.I. Lucky, Reynolds Mirth Richards and Farmer, Barristers and Solicitors

TABLE OF CONTENTS

I. BACKGROUND

[1] On April 17, 2000 the Environmental Appeal Board (the "Board") received a Notice of Appeal from Villeneuve Sand and Gravel Alberta Ltd. (the "Appellant"). The Notice of Appeal was filed by Mr. Brian Whissell, a Director of the Appellant. The appeal was in relation to the decision of Mr. Kem Singh, Director, Northeast Boreal Region, Alberta Environment (the "Director") under the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3 (the "Act") to issue Approval No. 72308-01-00 (the "Approval") to Inland Aggregates Limited (the "Approval Holder"). The Approval permits the Approval Holder to open up, operate and reclaim a pit (the "Pit") for the production of sand and gravel. The Pit is located on the West ½ of Section 29 and the North East ¼ of Section 30 in Township 54, Range 26, West of the 4th Meridian (the "Lands"), in the County of Sturgeon, Alberta.

[2] In summary, the basis for the appeal is that the Appellant claims to be the owner of the sand and gravel rights relating to the Pit and that the Appellant has not given its consent to the Approval Holder or the registered owner of the Lands to open up, operate or reclaim the Pit. The registered owners of the Land are Mr. Dale and Mrs. Deborah Barrie (the "Barries").

[3] By letter dated April 17, 2000, the Appellant also requested a "stay of enforcement of the approval" (the "Stay Application").

A. Procedural Background

[4] On April 19, 2000, the Board acknowledged receipt of the Notice of Appeal and the Stay Application and requested a copy of all correspondence, documents, and materials (the "Records") in relation to the appeal from the Director. On April 19, 2000 the Board also notified the Approval Holder of the appeal.

[5] According to standard practice, on April 19, 2000, the Board wrote to the Natural Resources Conservation Board (the "NRCB") and the Alberta Energy and Utility Board (the "EUB") asking whether these matters have been the subject of hearings or reviews under their respective jurisdictions. Replies were received from the NRCB on May 3, 2000, and from the EUB on May 23, 2000, stating that neither Board has held any hearing or reviews into these matters.

[6] On May 3, 2000, the Board received a letter from legal counsel for the Barries. The letter advised that the Barries are the registered owners of the Lands[1] and requested that the Notice of Appeal be dismissed for the following reasons:

1. The Appellant is not "directly affected" as it has no interest in the Lands and no interest in the Approval and therefore lacks standing to file the Notice of Appeal pursuant to section 87(5)(a)(i.1) of the Act.[2]
2. The Board lacks jurisdiction to consider the Appellant's Notice of Appeal because the sole ground of the appeal is that the Appellant is the "owner of the sand and gravel rights" on the Lands. This lack of jurisdiction is because (a) the Board's jurisdiction is limited to environmental issues and (b) any jurisdiction the Board may have had to decide the issue of the ownership of the sand and gravel rights has been entirely "ousted" by the decision of Madame Justice Johnstone.[3]
3. The Notice of Appeal is frivolous or vexatious or without merit pursuant to section 87(5)(a)(i) of the Act or otherwise not properly before the Board pursuant to section 87(5)(a)(i.2) of the Act. [4]

---

1 Copies of the land title for North West ¼ of Section 29 and the North East ¼ of Section 30 in Township 54, Range 26, West of the 4th Meridian were attached to the letter indicating the Barries as the registered owners. The Board notes that no copy of the land title for the South West ¼ of Section 29 was provided.

2 The letter cites the non-existent section 87(1)(i.i) of the Act as the authority for this proposition. The Board presumes the intent was to cite section 87(5)(a)(i.1) which provides:

> "The Board (a) may dismiss a notice of appeal if … (i.1) in the case of a notice of appeal submitted under section 84(1)(a)(iv) or (v), (g)(ii) or (j), the Board is of the opinion that the person submitting the notice of appeal is not directly affected by the decision or designation …"

The Notice of Appeal in this case was filed pursuant to section 84 (see Notice of Appeal, Part II) and, in that it appeals an Approval, presumably pursuant to section 84(1)(a)(iv).

3 *Dale R.. Barrie and Deborah L. Barrie* v. *Villeneuve Sand & Gravel Alberta Ltd.* (1999) 74 Alta. L.R. (3d) 241 (Alta. Q.B.), Johnstone J.

4 Section 87(5)(a)(i) provides:

> "The Board (a) may dismiss a notice of appeal if (i) it considers the notice of appeal to be frivolous or vexatious or without merit …"

Section 87(5)(a)(i.2) provides:

The letter then went on to provide submissions to support these reasons why the Notice of Appeal ought to be dismissed.

[7] On May 8, 2000, the Director provided a copy of the Records in relation to this matter as requested by the Board. On May 11, 2000, complete copies of the Records were provided to the Appellant, the Approval Holder, and the Barries.

[8] Also, on May 8, 2000, the Board wrote to the parties and, having reviewed the information provided by the parties, identified a number of preliminary issues. For the purposes of this decision, the relevant preliminary issues are:

1. Are the Barries a proper party to this appeal and therefore able to bring this preliminary motion?
2. Is the Appellant "directly affected"?
3. Does the Board have jurisdiction to hear this matter, particularly given that ownership of the sand and gravel appears to have been determined by the Court of Queen's Bench?
4. Is the appeal frivolous or vexations or without merit?

The Board's letter requested and received written submissions from the parties on these issues.[5]

B. Facts

"The Board (a) may dismiss a notice of appeal if … (i.2) for any other reason the Board considers that the notice of appeal is not properly before it …"

[5] The following written submissions were received by the Board:

1. Initial Submissions from the Appellant, the Director, and the Barries (incorporating the Barries' letter of May 3, 2000), all dated May 24, 2000.
2. Response Submission from the Director, dated May 30, 2000, advising that the Director has no further comments at this time. Response Submissions from the Appellant and the Barries, both dated May 31, 2000.
3. Final Submissions from the Appellant and the Barries, both dated June 7, 2000.
4. On June 8, 2000, the Board confirmed via telephone that the Director had no further submissions.
5. Submission from Lehigh Portland Cement Limited ("Lehigh), the parent company of the Approval Holder, dated June 5, 2000. This submission was received from Lehigh after several requests by the Board. The submission advises: "Inland concurs with the submission of … [the Barries] dated May 24, 2000 and the submission of … [the Director] also dated May 24, 2000." No further submissions were received from the Approval Holder.

[9] The Appellant alleges that the Lands were originally owned by a predecessor to the Appellant, Mr. George Whissell. Through a series of business transactions the Appellant alleges that the Lands were transferred into the name of the Barries, on or about May 31, 1990. The exact nature of these business transactions are a matter of some dispute. However, the Appellant advises at page 3, paragraph 7 of their May 24, 2000 Initial Submission that as part of this series of transactions: "It was agreed between George Whissell and the Barries that the gravel rights would be owned by George Whissell or his nominee (the "Gravel Agreement")." According to the Appellant, the sand and gravel rights were subsequently transferred to Mr. Brian Whissell and then to the Appellant on or about May 31, 1999. The Barries dispute the Appellant's characterization of these transactions, other than that the fact that the Barries became the registered owner of the Lands on or about May 31, 1990.

[10] The parties do agree that on March 24, 1999, the Barries entered into an agreement granting the sand and gravel rights to the Approval Holder. In response, on May 11, 1999, the Appellant filed a caveat against the Lands claiming a *profit à prendre.*[6]

[11] The Barries then filed an action in Court of Queen's Bench in an attempt to discharge the caveat on the basis that the Appellant has no interest in the Lands.

[12] The caveat was discharged following an application before Master Funduk on July 16, 1999.[7] In summary, at paragraph [29] of his decision, Master Funduk held:

> "I am firmly convinced that there is a high degree of improbability to the Respondent's [here the Appellant's] claim, to the point of it being specious. I do not accept Mr. Feehan's [counsel for the Appellant here] submission that there is

---

6 A *profit à prendre* is a right to make some use of the land of another, such as a right to take sand and gravel, and it carries with it the right of entry and the right to remove and take from the land the material or "profit" and also includes the right to use the surface as is necessary and convenient for exercise of the "profit". Definition adapted from Black's Law Dictionary (West Publishing Company:1990).

7 *Dale R. Barrie and Deborah L. Barrie* v. *Villeneuve Sand & Gravel Alberta Ltd.*, Unreported, 16 July 1999, Action No. 9903-09634, (Alta. Q.B.), Master Funduk.

> an oral trust agreement between the Applicants [here the Barries] for the sand and gravel." (Emphasis added.)

[13] The decision of Master Funduk was appealed to Madame Justice Johnstone.[8] Madame Justice Johnstone upheld the decision of Master Funduk.

[14] In her decision, Madame Justice Johnstone identifies the test for determining whether a caveat should be discharged. In paragraph [15] of her decision, she states:

> "The proper law in Alberta is that the caveator must show cause why its caveat should not be discharged. … [A]lthough the burden rests with the caveator, it need only show a *prima facia* claim to an interest in land – that there is a *bona fide* question to be tried, or one that cannot be determined by affidavit evidence alone."[9] (Emphasis added.)

[15] Madame Justice Johnstone concludes in paragraphs [31] and [32] of her decision that:

> "I have carefully considered the evidence, caselaw, and oral and written submissions of counsel. The Respondent [here the Appellant] has not satisfied its onus of proving a *prima facie* claim to a caveatable interest in land.
>
> I am satisfied that there is high degree of improbability to the Respondent's claim, to the point that – as Master Funduk concluded – it appears specious." (Emphasis added.)

C. Summary of Submissions by the Parties

1. Submissions in Common to the Parties - Are the Barries a Proper Party?

[16] All four parties appear to concur that the Barries are properly parties to this appeal. There does not appear to be a dispute that the Barries are the registered owners of the Lands. The Appellant takes issue with who is the owner of the sand and gravel rights.

2. Appellant

a. Appellant's Arguments – Is it Directly Affected?

---

8 See footnote 3 above.

9 In Black's Law Dictionary, at page 1189, *"prima facie*" is defined as: "At first sight; on the first appearance; on the face of it; … a fact presumed to be true unless disproved by some evidence to the contrary." Further, Black's Law Dictionary, at page 177, defines "*bona fide*" as: "In or with good faith, honestly, openly, and sincerely; without deceit or fraud."

[17] The Appellant's argument as to whether it is directly affected is simple. The Appellant accepts the view that the owner of the property and the owner of sand and gravel rights in a case such as this, are directly affected. This is the premise on which the Appellant's acceptance of the Barries as a party is based.

[18] The Appellant argues, at page 3 of their May 31, 2000 Response Submission (the "Appellant's Response Submission"), that "… [n]either the decision of Master Funduk nor the decision of Madame Justice Johnstone definitively address the issue of whether Villeneuve owns the sand and gravel rights."

b. Appellant's Arguments – Does the Board have Jurisdiction?

[19] In response to this question, at page 3 of the Appellant's Response Submission, the Appellant reiterates its view that the "… ownership of the sand and gravel has not been determined by the Court of Queen's Bench." Further, the Appellant points to the Director's view that the ownership of the property and the ownership of the sand and gravel rights is important with respect to this issuance of the Approval.

c. Appellant's Arguments – Frivolous, Vexatious, or Without Merit.

[20] Again, at page 4 of the Appellants Response Submission, the Appellant reiterates its view that determination of the ownership of the sand and gravel rights has not been finally determined by the Court of Queen's Bench and that the only issue that has been decided is whether the caveat filed by the Appellant was valid.

[21] The Appellant further argues that for the Board to hold that the Notice of Appeal was frivolous, vexatious, or without merit, it would have to do so "beyond doubt". The Appellant points to the evidence it put forward with respect to the Stay Application to "… confirm that there are genuine ownership issues …" and, that therefore, the matter is not beyond doubt.

3. Director's Position

[22] It is the Director's view that the Appellant is not directly affected. The basis for this view is that in the application before Madame Justice Johnstone, the Appellant was attempting to demonstrate that it was directly affected, and in this regard, the Appellant failed.

[23] Further, on the question of jurisdiction, it is the Director's view that the Board has the jurisdiction to review and determine the validity of the Approval. However, the Director is of the view that, in this instance, the issue that the Board is being requested to determine has already been conclusively determined by the Court of Queen's Bench. As a result, while the Board has jurisdiction to hear this appeal, it must take into account the previous decision of the Court.

[24] Finally, it is the Director's position that this appeal should be dismissed without any further hearing, again because the matter in question has already been determined conclusively by the Court of Queen's Bench.

4. Barries

[25] The Barries are of the view that the Appellant is not directly affected. The Barries argue that the Appellant has no interest in this matter whatsoever. They point to the decisions of Master Funduk and Madame Justice Johnstone where the Appellant was not able to demonstrate even a *prima facie* interest in the land.

[26] With respect to the jurisdiction of the Board, the Barries are of the view that the matter before the Board has already been determined by the Court of Queen's Bench. Further, on page 2 of their May 24, 2000 Initial Submission, the Barries are of the view that the matter which the Appellant is trying to bring before the Board is one of ownership and that it is:

> "… largely divorced from environmental concerns. While there may be occasions where this Board may have to consider ancillary ownership issues in an environmental appeal, it is submitted that this Board should only do so where the matter has not yet been adjudicated upon by a judge."

[27] The Barries argue that the appeal filed by the Appellant is frivolous, vexatious, and without merit. In this regard, they point to the finding by Master Funduk and Madame Justice Johnstone that the claim by the Appellant was "specious". They also point to the fact that both Master Funduk and Madame Justice Johnstone ordered the Appellant to pay solicitor and own client costs to the Barries.

II. ANALYSIS

A. Preliminary Issue – Are the Barries a Party?

[28] This first issue that the Board must deal with is to determine whether the Barries are a party to this appeal. If the Barries are a party to this appeal, then they are entitled to bring the motion that they have made in their letter of May 3, 2000.

[29] As stated in its letter of May 8, 2000, the Board is of the view that, where the subject matter of an appeal is an approval, the registered owner of the land on which the approved activity is to be carried out is, *prima facie*, a party to the appeal.

[30] The Board is of the view that such a landowner is *prima facie* a party, because a landowner will almost meet the "directly affected" test prescribed by the Act when the approval is linked to the land. Specifically, such activities will, by definition have, an impact on the landowner's land (the landowner's interest), the impact will exceed the impact on Albertan's as a whole, and the impact will be causally connected to the activity.

[31] Further, the landowner, as in this case, will grant some sort of right of access to the approval holder. The landowner will also have some pecuniary, financial (i.e. royalties), or other interest in the activity proceeding.

[32] In this appeal, all of the other parties to this appeal are prepared to accept that the Barries are a party.[10]

[33] The Board finds that the Barries are a proper party to this appeal. They are directly affected by the approved activity. They are the registered owner of the Lands. The Barries are entitled to bring the motion presented in their letter of May 3, 2000.

B. Does the Board have Jurisdiction to Deal with this Appeal?

[34] The Barries have raised the issue of whether the Board has the jurisdiction to deal with this Notice of Appeal because the Appellant's "… sole ground of appeal is that Villeneuve is the owner of the sand and gravel rights upon the Barries' Lands."[11] Specifically, the Barries argue that there are two separate bars to the Board's jurisdiction. The first bar is that: "… the Board generally lacks jurisdiction to adjudicate upon other than environmental issues."[12]

[35] With respect to this argument, the Board is of the view that it does have the jurisdiction to deal with this Notice of Appeal. The question before the Board in this regard is whether the Approval was properly issued. The Appellant's argue that the owner of the sand and gravel rights has not granted its consent to issue the Approval. They are challenging the validity of the Approval.

---

10 It should be noted that none of the other parties raised the issue of whether the Barries are a proper party. It was the Board that sought the comments of the other parties on this issue. Also, as stated above, the Director, the Barries, and the Approval Holder, by endorsing the submissions of the Director and the Barries, indicate that the Barries have a pecuniary interest in this matter.

The Board notes the argument put forward by the Appellant, wherein it accepts that the Barries are a party to this appeal, that if the Barries are a party to the appeal, then the Appellant is also a proper party to the appeal. The Board is not prepared to accept this argument because, among other things, it is premised on disputed facts.

11 See the Barries' letter of May 3, 2000.

12 Ibid.

[36] The Barries argue that the owner of the sand and gravel rights not granting its consent to issue an Approval in this case is not an environment issue. They argue that an ownership issue is an ancillary issue.

[37] The Board does not agree with these arguments. The validity of the Approval is at the heart of the environmental jurisdiction of the Board. If it could be demonstrated to the Board that the owner of the sand and gravel rights had not granted its consent to the issuance of the Approval, then the Board would be empowered to recommend to the Minister that the decision of the Director to issue the Approval be reversed.[13]

[38] In certain cases, the Board has jurisdiction to deal with questions of law. This position is supported by *Alberta Environment* v. *McCain Foods Inc. [2000] A.J. No. 469*.[14]

---

13 Section 91(1) of the Act states:

> In the case of a notice of Appeal referred to in section 84(1)(a) to (j) of this Act or in section 115(1)(a) to (i), (k), (m) to (p) and (r) of the Water Act, the Board shall within 30 days after the completion of the hearing of the appeal submit a report to the Minister, including its recommendations and the representations or a summary of the representations that were made to it.

14 In the *McCain* case, the Director questioned the ability of the Board to determine whether the Director had the jurisdiction to impose a particular condition. The argument was that this determination was a question of law and beyond the Board's scope. In paragraphs [20] and [21] of this decision, Mr. Justice Murray held:

> "[20] … The Act gives the Board broad powers on appeal which are not specifically limited. The Board is an expert tribunal established to consider appeals from environmental approvals. The Legislature has signaled its intention for the Board and the Minister to deal with these issues through the strong privative clause. There is no reason why the Board should not be able to decide the preliminary question of jurisdiction to hear such an appeal.
>
> **[**21] The comments of Madam Justice L'Heureux-Dubé in *R.* v. *Consolidated Maybrun Mines Ltd.* [1998] 1 S.C.R. 706, at p. 733, after reviewing the administrative appeal process in Ontario's equivalent to the Act in question here, are apropos:
>
> > In establishing this process, the legislature clearly intended to set up a complete procedure, independent of any right to apply to a superior court for review, in order to ensure that there would be a rapid and effective means to resolve any disputes that might arise between the Director and the persons to whom an order is directed. The decision to establish a specialized tribunal reflects the complex and technical nature of questions that might be raised regarding the nature and extent of contamination and the appropriate action to take. In this respect, the

[39] The second bar to the Board's jurisdiction, as stated in the Barries' May 3, 2000 letter, is:

> "… any jurisdiction the Board may have to decide issues of ownership (which is denied) has been entirely ousted in this case because of the decision of the Honourable Madame Justice Johnstone … wherein Her Ladyship ruled that Villeneuve has no ownership interest in the sand and gravel (and otherwise) in the Barries' Lands."

[40] This argument is dealt with below in "Loss of Jurisdiction." See paragraphs [49] and [50].

C. What is the effect of the Court's decision?

[41] There are four remaining grounds that the Barries have raised to challenge the Notice of Appeal. These ground are: 1) that the Board lacks jurisdiction because the matter in question has already been determined by the Court of Queen's Bench (see paragraph [40] above); 2) that the Appellant's are not directly affected; 3) that the appeal is frivolous or vexatious; and 4) that the appeal is without merit. The arguments presented are substantially similar. The real issue underlying all these grounds is: "What is the effect of the Court's decision in this matter on this Notice of Appeal?"

[42] As stated above, both Master Funduk and Madame Justice Johnstone effectively held that the Appellant had not been able to make out a *prima facie* case that it had an interest in the land; and the Court held that the Appellant's claim was "highly improbable" and arguably "specious".

[43] It is the view of the Board that it is legally obligated to respect the findings of Master Funduk and Madame Justice Johnstone; we are required by law to act accordingly. Specifically, the Board finds the decisions of Master Funduk and

---

> Board plays a role that is essential if the system is to be effective, while at the same time ensuring a balance between the conflicting interests involved in environmental protection."

Madame Justice Johnstone answers the four questions. The legal principle that requires the Board to follow these decisions is known as "issue estoppel."

1. Issue Estoppel

[44] Issue estoppel is intended to protect the public interest by bringing about the end of the disputes and providing finality and conclusiveness to legal proceedings. In simple terms, it means that the same issue should not be decided twice. Often the concept is expressed in criminal law as double jeopardy. It is a fundamental tenant of our legal system.[15]

[45] For issue estoppel to exist, a three-part test must be met. This three part is:

> "… (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and (3) that the parties to the judicial decisions … were the same persons as the parties to the proceedings in which the estoppel is raised…"[16]

[46] First, applying this test to the appeal before the Board, it is clear that the Board is being asked to decide the same issue as the one that was before Master Funduk and Madame Justice Johnstone.[17] While the questions are not identical, it is the Board's view that they are fundamentally the same and therefore meets the first part of the test.

[47] The second element is that the decision creating the estoppel must be final.[18] The Board concludes that Madame Justice Johnstone's decision is final in this regard.

---

15 In *420093 B.C.* v. *Bank of Montreal* [1996] 1 W.WR. 561 at page 565, the Alberta Court of Appeal cites The Law of Evidence in Canada by Mr. Justice John Sopinka et al. (Buttersworth:1992) at page 997 as stating that one of the principles of issue estoppel is that

> "… any action or issue which has been litigated and upon which a decision has been rendered cannot be retried in a subsequent suit between the same parties …. This principle prevents the contradiction of that which was determined in the previous litigation, by prohibiting the relitigation of issue already addressed."

16 *Carl Zeiss Stifung* v. *Rayner and Keller Ltd. (No.2)* [1967] 1 A.C. 853 at page 935 quoted with approval by Mr. Justice Dickson in *Angle* v. *Canada (Minister of National Revenue)* [1975] 2 S.C.R. 248.

17 The essential question to be decided in the appeal before the Board is: "Does the Appellant own the sand and gravel rights?" The question that was decided before Master Funduk and Madame Justice Johnstone was whether the Appellant had a sufficient interest in the sand and gravel rights to maintain the caveat.

18 The Board notes in the submissions of the Appellant that the action between the parties is continuing.

[48] Finally, parties in the matter before Master Funduk and Madame Justice Johnstone are obviously the same as before the Board. As a result, all three of the criteria have been met.

2. Loss of Jurisdiction

[49] Having concluded that issue estoppel binds the Board, we must now consider the Barries' argument in their May 3, 2000 letter that:

> "… any jurisdiction the Board may have to decide issue of ownership (which is denied) has been entirely ousted in this case because of the decision of Honourable Madame Justice Johnstone … wherein Her Ladyship ruled that Villeneuve has no ownership interest in the sand and gravel (and otherwise) in the Barries' Lands."

[50] Having concluded that the matter has been conclusively and completely dealt with by the Court of Queen's Bench, the Board will not address the issue further.

3. Directly Affected

[51] The Board is bound by the findings of the Court of Queen's Bench that the Appellant is unable to demonstrate a *prima facie* interest in the sand and gravel rights. Therefore, the Board finds the Appellant is not directly affected. Even if the Appellant had an ability to sue with respect the sand and gravel rights, the Board is not of the view that the Appellant is directly affected.

4. Frivolous or Vexatious or Without Merit

[52] The doctrine of issue estoppel is to prevent frivolous and vexatious litigation.[19]

However, the portion of the action that has addressed the viability of the caveat appears to be concluded. While the decision of Master Funduk was appealed to Madame Justice Johnstone, none of the parties have indicated that the matter has been appealed further.

19 In the case of *Pocklington Foods* v. *Alberta (Provincial Treasurer)*, (1995) 28 Alta. L.R. (3d) 96 at 101 the Court held:

> "It appears to us that this is exactly what rules dealing with issue estoppel – *res judicata* or judicial control of proceedings on grounds of an abuse of the court process and frivolous and vexatious litigation are intended to avoid – a second opportunity for counsel to explain what counsel ought to have properly explained on the first occasion.

[53] While the Board understands that the Appellant filed the Notice of Appeal before this Board in an attempt to further their position, the Board finds that their Notice of Appeal, if allowed, would reopen an already decided matter. In our opinion, and for that reason, the Notice of Appeal is frivolous and vexatious. Whether or not we are right in this finding, the issues in this appeal have already been decided by the Court of Queen's Bench and that means that Notice of Appeal is surely without merit. See section 87(a)(i) of the Act.

III. CONCLUSION

[54] The Board is bound by the findings of Master Funduk and Madame Justice Johnstone, both of the Court of Queen's Bench. Taking their findings into account, the Board holds that: 1) the Appellant is not directly affected and 2) the appeal is either frivolous or vexatious, as the Court said in *Pocklington Foods*, and it is surely without merit.

[55] The Board therefore dismisses the Notice of Appeal.

IV. Stay Application

[56] Given the decision of the Board to dismiss the Notice of Appeal, it is unnecessary to make a decision on the Stay Application.

Dated on November 10, 2000, at Edmonton, Alberta.

Dr. William A. Tilleman

… Where the second application seeks only to re-argue the first application, or to make arguments which were available at the time of the first, it should be dismissed as an abuse of the court process, or as frivolous and vexatious."

_____

Dr. John P. Ogilvie

_____

Dr. Ted W. Best