ALBERTA
ENVIRONMENTAL APPEAL BOARD

Decision

Date of Meeting – November 21, 2001
Date of Decision – December 10, 2001

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 by Imperial Oil Limited and Devon Estates Limited with respect to Environmental Protection Order #EPO-2001-01 issued on June 25, 2001 by the Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment.

Cite as: Document Production Motions: *Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment.*

BEFORE	William A. Tilleman, Q.C., Chairman
Appellants	Imperial Oil Limited and Devon Estates Limited represented by Mr. Ken Mills, Mr. Dalton McGrath, and Ms. Erin Gagner, Blake, Cassels & Graydon.
Director	Mr. Jay Litke, Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment represented by Mr. Grant Sprague, Alberta Justice.
Intervenors	The City of Calgary represented by Mr. Ron Kruhlak and Mr. Daron Naffin, McLennan Ross and Mr. Tim Haufe, City of Calgary. Calhome Properties Ltd. represented by Mr. Ted Helgeson, Helgeson & Chibambo Law Office.
Not Attending	The Lynnview Ridge Residents Action Committee represented by Mr. Gavin Fitch, Ronney Prentice. The Calgary Health Region represented by Mr. David Wood, Donahue Ernst Young and by Dr. Brent Friesen, Calgary Health Region.

EXECUTIVE SUMMARY

This is a decision respecting two applications for document production in relation to an appeal filed by Imperial Oil Limited and Devon Estates Limited (a wholly owned subsidiary of Imperial Oil) of an Environmental Protection Order (the EPO) issued to them with respect to the Lynnview Ridge residential subdivision in Calgary, Alberta.

The Board has the power to order a witness to attend and produce documents at a hearing, pursuant to sections 3 and 4 of the *Public Inquiries Act*. For the Board to order the attendance of a witness and the production of documents, the Board must be satisfied that the evidence is potentially relevant and necessary to the issues that will be considered at the hearing of the appeal.

With respect to this appeal the Board has decided to order Imperial Oil Limited, the City of Calgary (an intervenor in this appeal), and Alberta Environment to provide witnesses and produce documents that the Board believes are potentially necessary and relevant to the issues before the Board in this appeal. However, the Board does not want to extend the use of its powers beyond their intended purpose, therefore, the Board has imposed a number of general restrictions on the production of documents:

1. Unless directed otherwise, the order of the Board respecting the production of documents is subject to proper claims of solicitor-client privilege.
2. Unless directed otherwise, the order of the Board respecting the production of documents is subject to the implied undertaking that information acquired through this process shall not be used for any purpose that is ulterior or collateral to the lawsuit.
3. Unless otherwise provided for, the order of the Board respecting the production of documents is limited to those documents that relate to lands that are or became the Subdivision lands as specified in the EPO, being Lynnview Ridge Phase 4.
4. Unless otherwise provided for, the order of the Board respecting the production of documents is limited to those documents that relate to "charge, management, or control of the Substances."
5. Unless otherwise provided for, the order of the Board respecting the production of documents is limited to those documents that are capable of relating to "section 102 and 114 of the Act."

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I. BACKGROUND

[1] This is a decision respecting two applications[1] for document production in relation to an appeal filed by Imperial Oil Limited ("Imperial Oil" or "IOL") and Devon Estates Limited ("Devon Estates") under the *Environmental Protection and Enhancement Act*, S.A. 1992, c.E-13.3 (the "Act" or "EPEA"). Imperial Oil and Devon Estates (collectively the "Appellants") filed a Notice of Appeal respecting Environmental Protection Order #EPO-2001-01 (the "EPO") with the Environmental Appeal Board (the "Board") on July 3, 2001. The EPO was issued to the Appellants on June 25, 2001, by the Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment (the "Director") with respect to the Lynnview Ridge residential subdivision (the "Subdivision" or "Lynnview Ridge") in Calgary, Alberta.

A. The EPO

[2] The EPO states that Imperial Oil ran an oil refinery between 1923 and 1975, on the lands that are now the Subdivision. The EPO states that the majority of lands that are now the Subdivision were then transferred to Devon Estates who developed the lands in conjunction with another company. According to the EPO, Devon Estates is a wholly owned subsidiary of Imperial Oil.

[3] The EPO states that in 1999 and 2000, the City of Calgary undertook a review of the "…numerous environmental assessments that had taken place at the Subdivision…." According to the EPO, this review was prompted by previous complaints from residents of the Subdivision. The EPO states that following this review, a monitoring program was implemented that resulted in "…sampling and monitoring for hydrocarbons and lead (the 'Substances')…." The EPO states that the analytical results included in a May 2001 draft report indicate that "…numerous high hydrocarbon vapour concentrations [were] confirmed…" and that "…a number of soil samples taken for lead analysis … ranged over 1200mg/kg, and therefore exceed the Canadian Council of Ministers of Environment (CCME) soil limit of 140mg/kg."

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[1] The first application was filed by the Appellants requesting that the City of Calgary produce documents. The second application was brought by the City of Calgary requesting that the Appellants produce documents, and was the result of an agreement reached between the Appellants and the City of Calgary.

[4] The EPO concludes that the Director "…is of the opinion that a release of the Substances has occurred, and that the release of the Substances has resulted in an adverse effect…." Further, the EPO concludes that Imperial Oil and Devon Estates are "…persons responsible…" pursuant to section 1(ss)[2] of the Act.

B. The Notice of Appeal

[5] In the Notice of Appeal, the Appellants object to the EPO in its entirety, and in particular that the Director failed to "…name other persons known to him as persons responsible…." More specifically, the Appellants identify seven grounds of appeal:

1. The deadlines in the EPO are unreasonable and impractical.
2. The Director exercised his discretion unfairly by failing to name the City of Calgary, Calhome Properties Ltd. ("Calhome"), Nu-West Development Corporation Ltd. ("Nu-West"), Curtis Engineering & Testing Ltd. ("Curtis"), Entek Engineering Limited ("Entek"), Kidco Holdings Limited ("Kidco") and others as "persons responsible".
3. The Director exercised his discretion unfairly by failing to take into account a number of facts when he issued the EPO. These facts included:
   (a) ownership of the Subdivision lands by other parties at various times;
   (b) participation in the development process by the City of Calgary in a capacity other than a regulator;
   (c) development, review and approval of remedial measures by other parties prior to development of the Subdivision;
   (d) disposal of the contaminated soil;
   (e) approval by the City of Calgary of zoning changes subject to approval of the remediation;

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[2] Section 1(ss) of the Act provides:

"In this Act … (ss) 'person responsible', when used with reference to a substance or a thing containing a substance, means

(i) the owner and a previous owner of the substance or thing,

(ii) every person who has or has had charge, management or control of the substance or thing, including, without limitation, the manufacture, treatment, sale, handling, use, storage, disposal, transportation, display or method of application of the substance or thing,

(iii) any successor, assignee, executor, administrator, receiver, receiver-manager or trustee of a person referred to in subclause (i) or (ii), and

(iv) a person who acts as the principal or agent of a person referred to in subclause (i), (ii) or (iii)…."

(f) timing and extent of business relationships between the Appellants and other parties;
(g) discussions between the City of Calgary and Alberta Environment and subsequent further development of the Subdivision in accordance with remedial measures;
(h) conflicting and additional data regarding contamination and the adverse impact; and
(i) changes in environmental guidelines.

4. Failure by the Director to consider legal precedents from other jurisdictions.

5. The Director improperly exercised his discretion in issuing the EPO pursuant to section 102 rather than section 114 of the Act.[3]

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[3] Section 114 of the Act provides:

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 he 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 his 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;

6. The Director improperly exercised his discretion by applying section 102 of the Act retrospectively.[4]

(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.

[4] Section 102 of the Act provides:

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.

7. In the event that the Director was entitled to issue the EPO under section 102 of the Act, the Director improperly exercised his discretion by naming the Appellants as "persons responsible" under the Act because there has not been a release and in the event there has been a release, the release will not cause an adverse effect.

C. Procedural History

[6] The Board acknowledged the appeal on July 3, 2001, and requested that the Director provide the records (the "Records") related to this appeal. The Board received the Records on July 5, 13, and 23, 2001, and subsequently provided copies to the Appellants and the intervenors.

[7] In its letter of July 3, 2001, the Board also requested that the parties identify other parties that may have an interest in this appeal. The other parties that were identified were the City of Calgary, Calhome, Nu-West, Curtis, Entek, Kidco, and the Lynnview Ridge Residents Action Committee (the "Residents Committee"). The Board subsequently received intervention requests from the City of Calgary, Calhome, the Residents Committee, the Calgary Health Region, and Rio Verde Properties Ltd. The City of Calgary, Calhome, the Residents Committee, and the Calgary Health Region were subsequently granted full party status, while Rio Verde Properties Ltd. was granted intervenor status only.

[8] Further, according to standard practice, the Board wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board asking whether this matter had been the subject of a hearing or review under their respective legislation. Both boards responded in the negative.

[9] In consultation with the parties, on July 27, 2001, the Board set a merits hearing for September 12, 13, and 14, 2001, in Calgary.

[10] On July 31, 2001, the Appellants filed an application with the Board to compel the production of certain documents in the possession of the City of Calgary. The requested documents fell in seven categories.[5] On August 2, 2001, the Appellants also provided a legal

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[5] The seven categories of documents the Appellants requested were:

"1. All documentation pertaining to Development Agreement #80-011 (City Clerk's Identification #18098-A), entered into on October 9, 1980, between the City of Calgary and Nu-West Development Corporation for the development of Lynnview Ridge Phase

brief regarding the Board's jurisdiction to compel the production of the documents. On August 3, 2001, the Board received a letter from the Director outlining his position on the production of documents question.

[11] In response to this application, the Board decided to hold a conference call between the Board's General Counsel and legal counsel for the various parties.[6] On August 3, 2001, the Board wrote to the parties regarding the proposed conference call and indicated that "...it appears that it may be necessary for the issues to be determined prior to determining whether to order the City of Calgary to provide the documents requested by…" the Appellants. The Board continued "…it would seem prudent to add the topic of issues and procedural matters to the conference call … [and t]herefore, the topics for discussion at the conference call will be: 1. production of documents, 2. issues, 3. procedural and scheduling matters." The conference call was held on August 7, 2001.

[12] On August 8, 2001, the Board wrote to the parties and established a procedure to receive submissions on the issues the Board would consider pursuant to sections 87(2), (3), and

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IV(the "Development Agreement");

2. All of the working files of the City of Calgary, Department of Engineering, which may include notes, memorandum, correspondence, recommendations of engineers and proposed conditions regarding the planning and development of Lynnview Ridge Phase IV, including but not limited to all documents set out in Schedule 'A';
3. All of the working files of the City of Calgary, Land Department which may include, notes, memorandum, and correspondence, recommendations of City planners and proposed conditions regarding the development of Lynnview Ridge Phase IV, including but not limited to all documents set out in Schedule 'B';
4. All of the working files of the City of Calgary, Department of Planning and Planning Commission which may include, notes, memorandum, and correspondence, recommendations of City planners and proposed conditions regarding the development of Lynnview Ridge Phase IV, including but not limited to all documents set out in Schedule 'C';
5. All miscellaneous documents listed in Schedule 'D';
6. All of the working files of the following City of Calgary employees, each of whom were involved at different stages in the planning and development of Lynnview Ridge Phase IV throughout 1970-1983 as listed in Schedule 'E'; and
7. All documentation, including notes, memorandums, correspondence, searches, agreements, or guarantees regarding the purchase by Calhome Properties Ltd. (the City of Calgary's wholly owned subdivision) of the lands located in Lynnview Ridge Phase IV and legally described as Plan 8011474, Block 1, Lots 25 & 26."

[6] The parties involved in the conference call were the Appellants, the Director, the City of Calgary, Calhome, and the Residents Committee.

(4)[7] of EPEA. Following a consideration of these submissions, on August 22, 2001, the Board decided that the issues that will be considered at the merits hearing are:

> "Issue 1: 'Are the Appellants persons responsible under section 102? This question is limited to the issues of whether section 102 has retroactive effect.'
>
> Issue 2: 'Has there been a release within the meaning of section 1(ggg) having regard to its 'historical nature' and has this release caused an adverse effect?'
>
> Issue 3: 'Does the Director have the discretion to choose between issuing an EPO under section 102 and issuing an EPO under section 114? If the Director has the discretion to choose between issuing an EPO under section 102 and issuing an EPO under section 114, was that discretion exercised properly?'
>
> Issue 4: 'Did the Director exercise his discretion unreasonably by not naming others known to the Director as persons responsible under the EPO?'"[8]

[13] On August 24, 2001, the Board also wrote to the parties with respect to a motion by the Appellants to compel the production of documents from the City of Calgary. The Board advised:

> "As determined by the Board following the August 7, 2001 conference call, the Board was of the view that *before* it would be in a position to provide further direction regarding the production of documents, it was necessary to first determine what issues would be considered at the hearing of this appeal. Those

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[7] Section 87(2), (3), and (4) of the Act provide:

"(2) Prior to conducting a hearing of an appeal the Board may in accordance with the regulations determine which matters included in notices of appeal properly before it will be included in the hearing of the appeal, and in making that determination the Board may consider the following:

(a) whether the matter was the subject of a public hearing or review under *the Natural Resources Conservation Board Act* or under any Act administered by the Energy Resources Conservation Board and whether the person submitting the notice of appeal received notice of and participated in or had the opportunity to participate in the hearing or review;

(b) whether the Government has participated in a public review in respect of the matter under the *Canadian Environmental Assessment Act* (Canada);

(c) whether the Director has complied with section 65(4)(a);

(d) whether any new information will be presented to the Board that is relevant to the decision appealed from and was not available to the person who made the decision at the time the decision was made;

(e) any other criteria specified in the regulations.

(3) Prior to making a decision under subsection (2) the Board may, in accordance with the regulations, give to a person who has submitted a notice of appeal and to any other person the Board considers appropriate, an opportunity to make representations to the Board with respect to which matters should be included in the hearing of the appeal.

(4) Where the Board determines that a matter will not be included in the hearing of an appeal, no representations may be made on that matter at the hearing."

[8] *Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* (August 22, 2001), EAB Appeal No. 01-062-ID at paragraph 46.

> issues have now been determined in the Board's Decision of August 22, 2001.
>
> Now that these issues have been determined, the Board would like to receive the comments from the parties as to whether it should compel the production of the documents, taking into account the four issues that have been determined. However, having regard to these issues, the Board is of the view that it should receive these comments, not now, but at the hearing.
>
> The Board is of the view that prior to making a decision as to whether to compel the production of documents, it should *first* hear what evidence is currently available. As a result, the Board will be proceeding to the hearing scheduled for September 12, 13, and 14, 2001. At the hearing, the Board will hear the evidence that is currently available, hear the legal arguments respecting the issues, and then hear arguments as to whether further information is necessary and whether the documents requested should be produced. The Board is of the view that only then will it be in a position to make a proper decision regarding the Appellants' request to order the production of documents. It may be that once the Board has heard this information, that it will not be necessary for the Board to order the production of these documents. The Board is mindful that locating, producing and reviewing these documents will require a considerable investment of resources.
>
> Therefore, the Board requests that the parties include in their written submissions, arguments respecting each of the documents that have been requested. These arguments should address why *each* of the documents being requested are (1) relevant, (2) material and necessary to the appeal, and (3) why the evidence cannot be obtain in some other way. Once the Board has heard the evidence that is currently available regarding the four issues, heard the legal arguments respecting these issues based on this evidence, and heard the arguments respecting the documents, the Board will determine whether it has sufficient information to continue with the appeal and make its Report and Recommendations or alternatively determine that further information is necessary and therefore order the production of documents." (Emphasis in the original.)

[14] The Board reiterated its direction regarding the document production issue in its September 5, 2001 letter, which also detailed the procedure that would be followed at the hearing.

[15] In preparation for the hearing that was scheduled for September 12, 13, and 14, 2001, the Board had established a process for receiving affidavits, response affidavits, and written arguments from the parties. During the period from August 31, 2001 to September 7, 2001, the Board received these various submissions.

[16] On September 11, 2001, the Director wrote the Appellants a letter (the "September 11, 2001 Letter") which indicated that it was a "Decision on Conceptual Framework

for Remediation at Lynnview Ridge". On September 12, 2001, the Director provided an additional letter to the Appellants (the "September 12, 2001 Letter").[9]

[17] On September 11, 2001, the Board received a letter from the Appellants which indicated that:

> "…the Director has this morning issued a letter [the September 11, 2001 Letter] which contains a decision on the Remedial Options Report provided by Imperial on August 16, 2001. The letter directs Imperial to take certain steps as part of the conceptual framework for the remediation at Lynnview Ridge.
>
> Imperial expects that, once it has had an opportunity to review and seek clarification on the Director's letter of September 11, 2001, some or all of the steps required by the Director may be the subject of further appeal by Imperial.
>
> …Imperial requests an adjournment of the hearing to properly deal with all matters which Imperial wishes to place before the Board. This will include those aspects of the Director's letter of September 11, 2001 that Imperial seeks to appeal."

[18] The Board granted the Appellants' adjournment request and advised that it would reschedule the hearing as soon as possible.

[19] Following consultation with the parties, by letter dated September 17, 2001, the Board asked the parties to hold October 15 to 19, 2001, for the rescheduled hearing.[10]

D. The "Second" Notice of Appeal and Other Motions

[20] On September 18, 2001, the Appellants submitted a second Notice of Appeal (the "Second Notice of Appeal") to the Board, appealing the September 11 and 12, 2001 Letters.[11]

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[9] The Appellants subsequently provided the Board with copies of the September 11, 2001 Letter and the September 12, 2001 Letter (collectively the "September 11 and 12, 2001 Letters"). The Appellants frequently refer to these letters as the "Director's Decision".

[10] By letter dated September 19, 2001, the Board subsequently confirmed the dates of October 16 to 18, 2001, for the rescheduled hearing. In its letter of September 17, 2001, the Board also asked the Appellants to submit to the Board any of the motions referred to in their September 11, 2001 letter by September 18, 2001. (In doing so, the Board was mindful of section 84(4)(a) of the Act, which requires Notices of Appeal in relation to EPOs to be filed within 7 days.)

[11] In the second Notice of Appeal, the Appellants stated that the details of the decision to which the Appellants object are:

> "1. The Appellants object to installing sub-slab depressurization systems on all private residential property for vapour management, object to submitting any plan for installation of the sub-slab depressurization systems by October 31, 2001, and object to the requirement that all systems be installed before the onset of winter;

[21] In a September 18, 2001 letter attached to the Second Notice of Appeal, the Appellants requested, among other things, that the Board deal with the document production issue in advance of the new hearing dates.

[22] On September 19, 2001, the Director responded to the Second Notice of Appeal and the September 18, 2001 letter from the Appellants. The Director expressed the view that "…there is no jurisdiction for the purported appeal attached to Mr. Mills' letter."

[23] On September 19, 2001, the Board sent letters to the parties to this appeal requesting submissions on the various motions made by the Appellants in the second Notice of Appeal. Among the motions the Board wanted to consider was the question:

> "Should the Board reconsider its decision to deal with the request by Imperial to compel the production of documents from the City of Calgary at the hearing?"

The Board then established a process to receive submissions on the various motions, including this question, and subsequently received these submissions. With respect to the document production question, the Board asked for submissions on the question of whether the Board should reconsider and in the event the Board determined that it should reconsider, whether the Board should change its decision.

[24] On October 12, 2001, the Board wrote to the parties and advised that with respect to the document production question, the Board would "…deal with the issue of document production at the hearing as originally planned." The letter went on to state that at the hearing the Board would receive arguments "…respecting these four issues, and the motion respecting

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2. The Appellants object to the removal of the top 0.3 m of soil in those instances where it is not required to meet the 140 ppm guideline previously specified by Alberta Environment. Furthermore, the Appellants object to removal of soil beneath residential driveways and sidewalks;
3. The Appellants object to replacing all soil above the CCME 140 ppm guideline in the 0.3 to 1.5 metre depth range with clean fill;
4. The Appellants object to providing additional site data beyond that additional data to be provided as part of the final lead and hydrocarbon delineation data proposed to be provided by the Appellants;
5. The Appellants object to paragraphs B5 and B6 of the Decision concerning testing and/or cleaning of furniture, rugs and drapes;
6. The Appellants object to the requirement for further confirmatory sampling of soils other than what has been previously agreed to with the Director; and
7. The Appellants object to the deadlines stipulated in the Decision as being unreasonable and impractical."

the document production." The Board subsequently provided its reasons in a decision dated October 26, 2001.[12] In response to the Second Notice of Appeal, to which the request to deal with the document production issue prior to the hearing was attached, the Board decided to add a fifth issue.[13]

[25] At the hearing, the Board instructed the Appellants, the City of Calgary, and the Director to meet to discuss whether an agreement could be reached respecting document production. Following these discussions, these parties advised that an agreement had been reached to establish a process to address the document production issue. The agreement included a cross-motion by the City of Calgary to compel the Appellants to produce documents relevant to this appeal. For the purposes of this decision, the essential elements of the agreement provided that:

1. both the Appellants and the City of Calgary agreed to work together to reach an agreement to produce the documents that were relevant to this appeal;
2. where the Appellants and the City of Calgary were unable to agree on whether certain documents should be produced, the parties could bring the outstanding document production requests back before the Board;
3. the documents that the parties agreed to produce or that the Board ordered to be produced would form the basis for submissions from the Appellants and City of Calgary to the Director; and
4. the Director would then review these submissions and reconsider the issue of whether the City of Calgary is a person responsible with respect to the matters before the Board and then advise the Board of his position prior to the continuation of the hearing.

[26] On November 9, 2001, following considerable discussions between the Appellants and the City of Calgary, the Board received a copy of four lists detailing the positions of the Appellants and the City of Calgary. These lists were entitled:

1. "The Appellants Do Not Object to the Following City of Calgary Search Requests."

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[12] *Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* (October 26, 2001), EAB Appeal No. 01-062-ID.

[13] In the Board's letter of October 17, 2001, the Board advised that Issue 5 would be: "Is the EPO reasonable and sufficiently precise in circumstances up to the date of the hearing?"

2. "The Appellants Object to the Following City of Calgary Search Requests."[14]

3. "The City of Calgary Does Not Object to the Following Imperial Oil Limited Document Request."

4. "The City of Calgary Objects to the Following Imperial Oil Limited Document Requests."[15]

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[14] The documents the Appellants object to producing are:

"1. Files of D.H.A. Sellers relating to the development of Lynnwood [*sic*] Phases 4 and 5.

2. Records exchanged between Devon or Imperial and Nu-West Development Corporation Ltd. ("Nu-West") relating to the development of Lynnwood [*sic*] Phases 4 and 5 (June 1976 to June 1981).

4. Imperial file no. 16.24.02, files of Peter Southey, W.G. Brown, and J.D. Brown re former Calgary Refinery and development of Lynnwood [*sic*] Phase 4, 1977-1987. See Exhibit 59 of A. Teal Affidavit.

6. Files of, and records authored by the following Imperial or Devon employees or officers for the period June 1976 to June 1981 relating to the development of Lynnwood [*sic*] Phases 4 and 5

a. William G. Bahen

b. Bob Calvin

c. Jim Horton

d. Art Eberwein

10. Copies of all meeting minutes between Nu-West and Devon or Imperial re development of Lynnwood [*sic*] Phases 4 and 5 June 1976 to June 1981.

12. Record relating to the testing, failures, spills or ruptures of the storage tanks previously located on what is now Lynnwood [*sic*] Phases 4 and 5.

13. Records relating to the landfarming operations conducted by Imperial on what is now Lynnwood [*sic*] Phases 4 and 5.

15. Files of Devon relating to the development of Lynnwood [*sic*] Phase 4 and 5 (June 1976 to June 1981).

16. The files from which the Exhibits to the Affidavit of A. Teal in this matter were extracted.

18. Records exchanged between Devon and Imperial and their consultant or consultants retained by Nu-West relating to the development of Lynnwood [*sic*] Phase 4 and 5 (June 1976 to June 1981).

19. All records of Imperial relating to decommissioning and reclamation of the storage tanks and land farming area on what is now Lynnwood [*sic*] Phase 4 and 5 (June 1974 to June 1978)."

Note that references missing from list were documents that the parties were able to agree upon.

[15] The documents the City of Calgary objects to producing are:

"**A. City's Willingness To Lift Restrictions of March 30, 1959 Agreement Between City and IOL (1970-1980)**

i. all notes, minutes, memorandums, correspondence and reports dated between 1970-1980 from the Planning and Legal Department files pertaining to the March 30, 1959 Agreement between the City and IOL

ii all the working files of the following employees dated between 1970-1980 pertaining to the March 30, 1959 Agreement between the City and IOL

(a) G.C. Hamilton (Commissioner of Operations and Development)

(b) J. D. Salmon (City Solicitor)

B Ogden Sector Plan/Design Brief (January 1969-June 1971)

i. initial January 1969 Study;

ii. February 25, 1970 B.A.C.M. Conceptual Development Plan and Report submitted by B.A.C.M.

iii. April 1970 Presentation of Preliminary Sector Design Brief to Imperial Oil and B.A.C.M.

iv. all notes, memorandums, correspondence and report surrounding meeting held on April 1, 1970 between Sherwood, West, Moir, Jackson, Sellers (IOL) and Facey, Leithch, Mailend (City Planning Department), re: City's plans regarding the development of Ogden area as it relates to surplus refinery land

v. May 5, 1970 Critiques of preliminary Sector Design Brief from the City Planning and or Engineering Departments from the City Planning and/or Engineering Departments

vi notes from meeting September 29, 1970 at City Planning Office attended by Michael Rogers, Al Murlow and Michael Facey

vii February 23, 1971 – notes or minutes from Ogden Post Circulation Meeting from the City Planning and/or Engineering Departments

ix all of the working files of the following employees dated between 1969 - 1971 pertaining to the Ogden Design Brief of the residential development of Ogden area.

(a) Art Froese (Senior Planner Land Uses Amendments)

(b) Michael H. Rogers (Director of Planning)

(c) Al Murlow (Planning Department)

(d) Michael Facey (Planning Department)

M. Monitoring Test Wells

i. All documentation pertaining to City's involvement in monitoring test wells on Subdivision Lands in 1995 and again in 1998

O. City Of Calgary (the "City") Early Initiatives Re: Residential Development Of Ogden Area (1963-1971)

i. all documentation including notes, memorandums, correspondence and reports from Planning and Legal Department files dated 1963 – 1971 pertaining to residential development of the Ogden area.

ii. all documentation, including notes, memorandums, correspondence and reports form the Spring of 1963 pertaining to an inquiry carried out by Mayor Harry Hays regarding whether IOL would be interested in selling its lands in the Ogden Area.

iii. all documentation, including notes, memorandums, correspondence and reports surrounding meetings held on May 15, 1963 between Mayor H. Hays, P.N.R. Morrision (Deputy Minister), D.E. Batchelor (Chief Commissioner), A.G. Martin (City Planner), G.M. Burden (IOL) and S.T. Reynolds (IOL) (re: City's inquiry as to whether IOL would be interested in selling some of its lands for residential development).

iv. all of the working files of the following employees between 1963-1971:

(a) Harry Hays (Mayor) and/or Office of the Mayor pertaining to the residential development of the Ogden area.

(b) D.E. Batchelor (Chief Commissioner) pertaining to the residential development of the Ogden area

(c) A.G. Martin (City Planner) pertaining to the residential development of the Ogden area.

(d) J. D. Salmon ((City Solicitor) pertaining to the residential development of the Ogden area.

(e) Michael Facey (Planning Department) pertaining to the residential development of the Ogden area.

[27] For the purposes of this decision, only the second and fourth lists (the lists the Appellants and the City of Calgary object to producing (the "Outstanding Requests")) are relevant. Following receipt of these lists, the Board also received submissions from the Appellants and the City of Calgary and a request to appear before the Board to present arguments respecting the Outstanding Requests.

[28] In consultation with the parties, on November 16, 2001, the Board set the date for a motions hearing in Calgary to receive arguments respecting the Outstanding Requests. The Board advised that:

> "The purpose of this meeting is to hear oral arguments in relation to the document production issue. The Board confirms its understanding that the parties have agreed to have this matter heard and decided by the Chairman alone."

Further, the Board advised that:

> "The meeting will deal with two motions. The first will be the motion by the Appellants to compel the City of Calgary to produce documents. The second will be the motion by the City of Calgary to compel the Appellants to produce documents."

[29] On November 21, 2001, the Board convened a motions hearing to receive arguments respecting the Outstanding Requests.[16] The Board confirmed at the opening of the motions hearing that the parties agreed that as Chairman, I could hear and decide the matter of document production alone.[17]

(f) Mailend (Planning Department) pertaining to the residential development of the Ogden area.

(g) R. Leitch (Planning Department) pertaining to the residential development of the Ogden area."

Note that references missing from list were documents that the parties were able to agree upon.

[16] In attendance at the motions hearing were the Appellants, the City of Calgary, and the Director. Counsel for Calhome attended the hearing, but did not make any representations although he had reserved the right to do so. Counsel for the Residents Committee and the Calgary Regional Heath Authority advised that they would not be attending the motions hearing.

[17] I also advised that I had discussed the matter with Mr. Peiluck and Dr. Vos, the other Board members assigned the hearing panel, and they also agreed that I should deal with these motions hearing alone.

II. SUMMARY OF ARGUMENTS

A. The Appellants

[30] In the Appellants' Submission dated November 9, 2001, they argue that the Board clearly has the power to compel the production of documents. The Appellants refer to *Ash*[18] to highlight the importance of fair and reasonable discovery and argue that this principle should not be construed narrowly. The Appellants point to the *Ash* case as an example where the City of Calgary was "…obligated to produce reasonable, relevant information requested by the other participants." The Appellants argue that a key consideration for the Board in deciding the document production issue is relevancy.

[31] The Appellants point to the Supreme Court of Canada in *Frenette* v. *Metropolitan Life Ins. Co.*[19] ("*Frenette*") as establishing the test for relevance. In their submissions the Appellants state that in *Frenette*:

> "…[the Court] was considering an application by a litigant to have a third-party produce documents and the Court was faced with the question of how to define relevance while at the same time, attempting to prevent a 'fishing expedition.' Although this decision was made in the context of civil proceedings (which is largely a distinction without a difference in this case given that the test of relevancy is the same and the case involved compelling production of documents from a third party), the Board may find some assistance in the Court's definition of relevancy…."

[32] In *Frenette* the Court stated:

> "It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary…. If a party seeking the order is able to satisfy the judge that the document, or information in a document, may relate to a matter in issue, the judge should make the order unless there is a compelling reason why he should not make it, e.g. the document is privileged."[20]

[33] Regarding the documents that the City of Calgary objects to producing, the Appellants argue that they are all relevant and material to the issue of whether the City of

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18 *Ash* v. *Director, Alberta Environmental Protection* (June 8, 1998), E.A.B. Appeal No. 97-032.

19 *Frenette* v. *Metropolitan Life Ins. Co*., [1992] 1 S.C.R. 647.

20 *Frenette* v. *Metropolitan Life Ins. Co*., [1992] 1 S.C.R. 647 at page 692.

Calgary had charge, management, or control of the Subdivision lands.[21] In their submission, the Appellants argue that that these "…documents need to be produced to ensure procedural fairness and to allow the Board to make a fully informed decision as to whether the Director erred in his discretion in not naming the City as a person responsible…."

[34] In the Appellants' Submission of November 9, 2001, they present specific arguments respecting each of the four areas of documents that the City of Calgary objects to producing. The fundamental point that the Appellants argue with respect to these documents is that they are potentially relevant.

[35] Finally, the Appellants reviewed the documents that the Appellants object to producing. In general, the argument presented by the Appellants is that documents requested by the City of Calgary are in violation of the agreement reached by the parties in that the documents are privileged or irrelevant, or that the request is overly broad.

[36] At the November 21, 2001 motions hearing, the Appellants questioned why the Director proceeded to make his decision so quickly and states that the Director "…was not compelled under any deadline to come to a conclusion that the City was [not] a person responsible within the meaning of the Act." The Appellants then state that the reason why "… the Director felt compelled to make such a finding at that juncture based only on two documents is not known."[22] The Appellants also submit that "… given the historical nature of this matter, the significant absence of viva voce evidence, the complexity of the issues and other factors, the full and complete disclosure of relevant documents is an important facet of procedural fairness and natural justice."[23]

[37] With respect to the test of relevancy, the Appellants cite the Board's *Rules of Practice*[24] and suggest that the Board's rules regarding admissibility are a reflection of the *Frenette* case. The Appellants repeat their argument that although the *Frenette* case is in a civil

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[21] See Issue 4 identified by the Board. Issue 4 provides: "Did the Director exercise his discretion unreasonably by not naming others known to the Director as persons responsible under the EPO?"

[22] 00650 starting at 8.

[23] 00650 starting at line 19.

[24] Dated February 1997. Under the heading *Evidence: Admissibility*, **"**Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the appeal more probable or less probable than it would be without the evidence."

context, it has some precedential value.[25] Further, the Appellants argue that on the issue of production, the Board should err on the side of the broader rather than narrower production, in order to determine whether the City of Calgary is a "person responsible."[26] The Appellants state:

> "All of the documents requested by the Appellants relate to the City's role in the planning, development, and inspection and approval process of the subdivision and undoubtedly have a tendency to establish that the City had charge, management, and control of the substances and, accordingly, was the person responsible within the meaning of the Act."[27]

[38] Finally, in closing, the Appellants argue:

> "It is submitted that the Board cannot proceed to determine the issues in appeal in the absence of what has clearly been demonstrated to be an incomplete record; there's no doubt about that. Those documents are relevant, material, and necessary to have a complete record of the facts to properly consider whether the City should be a person responsible in respect of the [*sic*] - anything less would be a fundamental denial of natural justice and procedural fairness."[28]

B. The City of Calgary

[39] In the City of Calgary's Submission of November 9, 2001, the City of Calgary commented that the Appellants' most frequent objection to the City of Calgary's document requests was that they were "too broad". In response to this objection, the City of Calgary noted that their request for production consisted of 19 documents, as compared to the Appellants' two requests totaling 303 documents.

[40] At the Board's motions hearing, the City of Calgary stated that they "…did strive to develop a process to produce some additional documentation … [and we] think we've gone far beyond any legal obligations we might have in attempting to accommodate the Appellants' requests."[29] The City of Calgary commented that the Appellants appear to be equating the issue of charge, management and control of the substance with that of the subdivision development processes.[30]

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25 00652 starting at line 1.

26 00653 starting at line 21.

27 00653 starting at line 26.

28 00664 starting at line 16.

29 00665 starting at line 13.

30 00665 starting at line 16.

[41] The City of Calgary expressed concern about the Appellants' intent "…either intentionally or unintentionally seeking to subvert the EAB process into what is really a civil document production process without the associated safeguards."[31] The City of Calgary also commented on the Appellants' request for documents when the City of Calgary was not a principle party to this appeal, stating that there is "…a significant difference in producing documents or testing their production in a matter which is a lawsuit before the courts and this Board."[32]

[42] Regarding the documents that the City of Calgary did not produce, the City of Calgary argued that they were not relevant, that more justification was needed, or that the amount of information would make it impractical to produce these documents. The City of Calgary argued that the Appellants have requested that the City "…[c]ontinue to produce this information because it might shed some light on the issues before us. No one can say or is suggesting that this information is absolutely critical to make some finding."[33]

[43] The City of Calgary noted that the Appellants acknowledged that the documents requested may or may not corroborate the evidence already submitted, adding that the Board has a difficult challenge trying to balance issues of fairness as these issues go both ways.[34] In response to this statement, I noted that the documents provided by the City of Calgary may, ironically, help to protect the City of Calgary[35] or it could help to protect Imperial Oil.[36]

C. The Director

[44] In the Director's letter of August 3, 2001, he reviewed Alberta Environment's search for further records and advised that the documents requested by the Appellants were not in the possession of Alberta Environment. The Director also advised that:

> "…[p]ursuant to s. 87 of the Act, the Board does have the powers of a commissioner under the *Public Inquiries Act* including the power to require the production of any 'documents, papers and things that the commissioner or

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31 00666 starting at line 11.

32 00668 starting at line 24.

33 00676 starting at line 13.

34 00676 starting at line 20.

35 00677 starting at line 1.

36 00677 starting at line 11.

commissioners consider to be required for the full investigation of the matters into which he or they are appointed to inquire' (s.3, *Public Inquiries Act*).

The Director submits that the Board, prior to compelling the production of the documents should consider the following matter:

a) whether the Board is satisfied that the documents are necessary for 'the full investigation of the matter' considering the Board's obligation to hear appeals and to make a report and recommendation to the Minister to vary, confirm or reverse the Director's decision.

   There are two points for consideration: is this information necessary and does this information relate to the matter before of [*sic*] this Board.

   On the first point, the Director submits that the Board must consider to what level or the magnitude of evidence that it might need to address the Appellant's contention that other parties should be named in the Order under appeal. Pursuant to s.102 of the Act, the Director must form an opinion. It would appear that there are several possible arguments. One option may be that the level of evidence in support of the Appellant's contention should be similar to that required of a court in resolving issues of contribution between joint tortfeasors. Alternately, the level of evidence may need only be sufficient as to raise a realistic possibility that another party could be named. The Board's resolution of this point will determine the degree of evidence and the appropriate level of inquiry needed for this appeal.

   The Director would submit that the information is not necessary to determining is [*sic*] there has been a release of a substance which is causing an adverse effect on the environment and the role of the appellant.

   Further, the production of these documents is not likely necessary for the appellant to advance their argument. That is to say that the argument of the appellants on the involvement of the City of Calgary is not dependant upon the production of these documents. There is information concerning the involvement of the City of Calgary. The information requested by the appellant will only supplement or add weight to their position.

   On the second point, the mandate of the Board is to consider the purposes of the Act, the decision of the Director and what recommendations should be made to the Minister not to determine legal liabilities. The Board's mandate does not require the ultimate determination of all the facts or the civil law liability.

b) the materials referenced were not in the possession of the Director at the time the decision was made nor were the documents referenced by Imperial Oil Ltd. at the time of the meeting prior to the issuance of the Order under appeal.

   The Director submits that the fundamental aspect of this point is procedural fairness as well as relevancy to the matter. In advance of making a decision to issue an Order, the Board is generally familiar with

> the Department's practice of providing parties the opportunity to make representations. The Director provided this opportunity to both the City of Calgary and the appellant. This information which was provided by those parties is part of the Director's record. It may be procedurally unfair to the City of Calgary to now consider information that could have or ought to have been sought or referred to at the time the Director made his decision.
>
> c) the Board's process has been referred to as a polycentric process as it considers a multitude of parties' interests and policies as opposed to a mere bipolar determination of the rights of any party.
>
> The Director submits that the intention of the appeal process under the Act is to provide for a forum where the decisions of the Director can be reviewed and considered in the light of available scientific information, policies of the Department, concerns of the affected parties and the intention and provisions of the Act. This broad polycentric approach is distinct from the more narrow legalistic determination of rights as between parties. Such a narrow approach is not intended by the Act. To permit the Board's process to be used either as a discovery process or for an attempt to establish civil liability would be to abuse the Board's process. The Act is clear that any civil liability that may exist for any party is unaffected by the process under this Act.
>
> d) an other forum exists to determine the rights of the appellant.
>
> If the appellant wishes to preserve or enforce its civil remedies against any party, it has the ability to do so through the court system. The Act clearly preserves all rights and actions that may be commenced by the appellants. That forum provides a balanced, dispute process that will ultimately result in a determination of legal rights." (Emphasis in the original.)

[45] At the motions hearing, the Director indicated that he did not have a position with respect to the production of documents.[37] I, however, stated that I would be asking the Director to comment on the documents that are produced, noting the importance of ensuring that the Director is in a position to make the best decision possible.[38] The Director prefaced his remarks by stating "…the Director has agreed to consider whatever documents flow from this process…."[39]

[46] Regarding the issue of charge, management and control, the Director commented that he "…would echo the comments of my friend Mr. Kruhlak [counsel for the City of Calgary] when he says the issue gets back to whether the City was in care, management and control of the

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37 00646 starting at line 20.

38 00679 starting at line 24.

39 00680 starting at line 3.

substances, in this case, the land and hydrocarbons, that are the subject of the environmental protection order."[40]

[47] Following the application for production of documents by the Appellants, and in response to my questions, the Director stated that he:

> "…is keen to receive documents that relate to care, [*sic*] management and control of the substances. I think, sir, and I want to be careful in my comments, the Director has not reached any conclusion at this point based on these applications, and does not want to be saying this or that clearly is or is not the answer. I think, sir, his comments that you heard from were fairly clear. Based on the evidence and the information that he received from the parties prior to making his decision, he was comfortable with his decision, but he is prepared to consider more information that may relate."[41]

[48] During a discussion regarding the Ogden Briefs, the Director acknowledged the potential relevance of certain documents to the matter of care, management, and control.

> "MR. SPRAGUE: … Again, sir, that does not appear to reflect, from my perspective, a great deal of information on care, management and control of the substances by the City. It is clear that Imperial Oil was still in control of the substances through that time and this document does not appear to do much. These documents do not appear to have much to do with the City having actual control.
>
> THE CHAIR: So what if the -- and I am not sure if this is going to be the case at all -- but what if the order to produce documents relevant to the Ogden sector brief, for example, that dealt with the area now known as phase 4 and also dealt with any potential for discussion, charge, management and control of substances, what would be the Director's answer to that?
>
> MR. SPRAGUE: I think in that case, sir, if there was an order to care, management and control we would concur that they would be relevant. As I had understood, this brief dealt with a prior phase; whereas, area 4, Lynnwood 4 was not even contemplated. So I am assuming, sir, and again we do not have the benefit of the documents either.
>
> THE CHAIR: Right.
>
> MR. SPRAGUE: But just on the basis that there was an Ogden sector design brief I do not think does much in terms of establishing care, management and control on behalf of the City.
>
> THE CHAIR: But if you were limited, as I just stated, what would you say?
>
> MR. SPRAGUE: I think that would be appropriate.

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40 00680 starting at line 19. (Corrected to the Board's records.)

41 00681 starting at line 3.

THE CHAIR: Thanks a lot."[42]

[49] When I asked the Director about the his power to compel the production of documents pursuant to the EPO (as opposed to the Board's process during a hearing), the Director indicated that while documents could be compelled during the investigation prior to the EPO's issuance, he was not sure about obtaining further documents under the EPO.

> "THE CHAIR: … [W]hat ability does he [(the Director)] have, and all the lawyers can comment, to get these documents on his own through some -- does he have some investigatory powers that he can, in the process of naming parties or designating sites, as were the case, how far can the Director reach before getting to the point absent a specific investigation for which police powers are involved.
>
> MR. SPRAGUE: Certainly, sir, with respect to an investigation, an investigator pursuant to the Act, as you know, has powers to review and obtain evidence. With respect to this proceeding, as you have already heard from the parties and also during the hearing itself, requests were made from the parties at several meeting to produce documents they thought were relevant. It was very clear that the Director asked both the appellants and the City to respond to what documents they felt he should look at because he was very clear in his indication of his views of persons responsibility. And in response to that he received whatever documents he received. At this point, sir, the parties have agreed to produce some of these documents and he has agreed to look at them. I do not know if I am tackling the point you wish.
>
> THE CHAIR: No, what if they did not produce any documents? What ability does he have to satisfy himself that, can he go out and get them?
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> MR. SPRAGUE: He can pursuant to an investigation that is underway. He could ultimately go to –
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> THE CHAIR: But that would be pursuant to an investigation.
>
> MR. SPRAGUE: It would, sir.
>
> MR. KRUHLAK: That is exactly what took place at the start of this matter, sir. The Director did indicate to both the appellants and the City and a number of other parties that there was an investigation and did request documents, and those documents were provided, as I understand. Certainly I can say that on behalf of the City of Calgary because Mr. Tobert testified to that effect, that documents requested of the City by the director were provide, and I believe the same is with respect to the appellants.
>
> MR. SPRAGUE: Sir, the notes of the investigation were tendered and referred to specifically in the cross-examination of Mr. Teal.
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> THE CHAIR: So if documents were not provided, you have the ability with the decision or EPO to produce those documents, and would you do that?

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[42] 00868 starting at line 2.

> MR. SPRAGUE: I am not sure with respect to the current EPO, if it provides a basis for obtaining further documents. It is back to the investigation of ours prior to the issue." [43]

III. ANALYSIS

[50] First, the Board would like to take this opportunity to thank the parties for their work in developing a process to assist the Board with document production and for their comments at the motions hearing. The Board notes that the parties invested a great deal of effort to reduce the number of outstanding requests for documents. Now let me turn to the legal analysis.

A. The Board's Power to Compel the Production of Documents

1. Legislation

[51] The Board's power to compel the production of documents is found in section 87(1) of the Act, which incorporates the provisions of the *Public Inquiries Act*, R.S.A. 1980, c. P-29. Section 87(1) of the Act states that the Board "…has all the powers of a commissioner under the *Public Inquiries Act*." Sections 3 and 4 of the *Public Inquiries Act* state:

> "3. The commissioner or commissioners have the power of summoning before him or them any persons as witnesses and of requiring them to give evidence on oath, orally or in writing, and to produce any documents, papers and things that the commissioner or commissioners consider to be required for the full investigation of the matters into which he or they are appointed to inquire.
>
> 4. The commissioner or commissioners have the same power to enforce the attendance of persons as witnesses and to compel them to give evidence and to produce documents and things as is vested in a court of record in civil cases, and the same privileges and immunities as a judge of the Court of Queen's Bench."

[52] Section 87(1) of the Act grants the Board the same powers as a Commissioner of inquiry but does not extend the operation of the *Public Inquiries Act* itself to the Board. Therefore, the Board has the power to summon witnesses and require them to give evidence and produce documents and the same power to enforce the orders as a court of record in civil cases. However, the Board cannot rely on other provisions of the *Public Inquiries Act* that do not fall within the other powers of a Commissioner.

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[43] 00682 starting at line 23.

2. Other Authorities

[53] In the Appellants' Submission dated August 2, 2001, provided to the Board with the Appellants' initial motion for the production of documents dated July 31, 2001, the Board was directed to examples of other boards and tribunals that have the power to require the production of documents. The usefulness of these examples depends on the similarity of the wording of the various examples with the wording of sections 87(1) of the Act and sections 3 and 4 of the *Public Inquiries Act*.

[54] In a similar manner, the law of evidence as it applies to the discovery of documents referred to in the Appellants' Submission of August 2, 2001, while a useful reference, should not be binding without a proper understanding of Part 3 of the Act.[44] Although the Board is given the same powers of enforcement as a court of record on civil cases and the same privileges and immunities as a judge of the Court of Queen's Bench, the power to require the production of documents is not, in my opinion, identical to the civil court system. Therefore, the tests developed by the courts to determine when a person must produce documents during the discovery process will not directly apply to the Board. Among other things, the matters before the Board are *not* in the nature of civil litigation. Rather, the matters before the Board are in the nature of a statutory right of appeal governed by developed principles of administrative law and in particular, the principles of procedural fairness.

3. Alberta Cases

[55] A review of case law in Alberta yields little of assistance. A number of cases make reference to sections 3 and 4 of the *Public Inquiries Act*, but do not provide an explanation of how the sections should be applied.[45]

[56] The Appellants' refer to the Alberta Court of Appeal decision of *Calgary General Hospital Board* v. *Williams.*[46] However, this case does not materially assist the Board. The

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[44] Part 3 of the *Environmental Protection and Enhancement Act* deals with the power of the Environmental Appeal Board.

[45] See: *Co-operators General Insurance Co.* v. *Alberta (Human Rights Commission)* (1991), 80 Alta.L.R. (2d) 73 (Alta.Q.B). *United Assn. of Journeyman and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 488* v. *Alberta (Board of Industrial Relations)*, [1975] A.J. No. 270 (Alta.S.C.T.D.). *Furniture and Bedding Workers Union, Local 33* v. *Alberta (Board of Industrial Relations)*, [1969] A.J. No. 12 (Alta.S.C.T.D.).

decision does not interpret sections 3 and 4 of the *Public Inquiries Act* but merely refers to the sections and confirms that the sections grant the Board the power to summon witnesses and compel the production of documents. The Court states that:

> "A simple read of these two sections [(section 3 and 4 of the *Public Inquires Act*)] clearly empowers the Appeal Board to summon witnesses and to compel production of documents. They can enforce the attendance of witnesses and the production of documents. It is hardly consistent with a limited appeal on the record that the Appeal Board has such powers. Surely, it clearly shows the intent of the Legislature that the appeal is really a new hearing."[47]

4. Analogy to the Nova Scotia *Public Inquiries Act*

[57] The Board notes that section 4 of the Nova Scotia *Public Inquiries Act* uses similar language to the Alberta *Public Inquiries Act* and as a result, may provide some guidance, even though it is not binding. Section 4 of the Nova Scotia *Public Inquiries Act* provides that:

> "The commissioner ... shall have the power of summoning before him ... any persons as witnesses and of requiring them to give evidence on oath orally or in writing ... and to produce such documents and things as the commissioner deems requisite to the full investigation of the matters into which he … [is] appointed to inquire."

[58] In *Halifax Shipyard Ltd.* v. *Marine, Office and Technical Employees Union, Local 28*,[48] the Nova Scotia Supreme Court reviewed an arbitrator's decision to order production of documents. Although the Supreme Court of Nova Scotia ultimately found that the arbitrator did not have authority to order production of the documents because they were not in the party's possession, it discussed the meaning of section 4 of the Nova Scotia *Public Inquiries Act*.

[59] On the issue of whether the arbitrator could order the production of documents, Justice Nathanson said:

> "Section 16(7) provides that the Labour Relations Board has the powers of a commissioner under the Public Inquiries Act, including the power to summon and enforce the attendance of witnesses and compel them to give oral or written

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46 *Calgary General Hospital Board* v. *Williams* (1983), 26 Alta.L.R. (2d) 220 (Alta.C.A.).

47 *Calgary Genera Hospital Board* v. *Williams* (1983), 26 Alta.L.R. (2d) 220 (Alta.C.A.) at paragraph 7. While the case is not of assistance in interpreting section 3 or 4 of the *Public Inquiries Act* it provides further support for the Board's *de novo* jurisdiction.

48 *Halifax Shipyard Ltd.* v. *Marine, Office and Technical Employees Union, Local 28*, (1997), 155 N.S.R. (2d) 357 (N.S.S.C.).

> evidence on oath and to produce documents. This provision applies only to witnesses summoned to testify. In my opinion, it grants a power equivalent to the power to issue '*subpoenas duces tecum*' and does not grant the power to order production of documents by other than witnesses or on occasions not connected with the giving of evidence."[49]

[60] Justice Nathanson also said that the power under section 5 of the Nova Scotia *Public Inquiries Act* to enforce the attendance of witnesses does not authorize the power to order the production of documents by other than witnesses or otherwise in connection with witnesses testifying.[50] In reaching these conclusions, Justice Nathanson rejected the arbitrator's argument that the arbitration process is intended to ensure a speedy and fair resolution of disputes and the method by which that end is most expeditiously achieved is through the production of apparently relevant documentation prior to the commencement of a full hearing on the merits. Justice Nathanson said that "…arbitrators do not have inherent jurisdiction to order production of documents…" and "…any such authority must be derived from the governing statutes."[51]

[61] Justice Nathanson also approved a previous decision of the arbitration panel[52] on this issue as a "…valuable precedent…." In that case, the arbitration panel said, "…it seems impossible to find in this section a jurisdiction for orders ... upon anyone ... to make a pre-hearing production of documents not necessarily related to the process of giving evidence."[53]

[62] I had similar concerns and I expressed them during the course of the motions hearing.[54]

[63] Justice Nathanson also considered whether the documents in question were relevant. In doing do, he did not refer to the language of section 4 of the Nova Scotia *Public Inquires Act* to determine a test. He referred instead to Sopinka et. al., *The Law of Evidence in*

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[49] *Halifax Shipyard Ltd.* v. *Marine, Office and Technical Employees Union, Local 28*, (1997), 155 N.S.R. (2d) 357 (N.S.S.C.) at 366. Per D. Paciocco, *The Law of Evidence* (1999: Irwin Law) at page 241: "A *subpoena duces tecum* requires not only that the person attend to give evidence but [also requires] that person to bring anything in his possession or control that relates to the charge and, more particularly, those things specified in the subpoena."

[50] *Halifax Shipyard Ltd.* v. *Marine, Office and Technical Employees Union, Local 28*, (1997), 155 N.S.R. (2d) 357 (N.S.S.C.).

[51] *Halifax Shipyard Ltd.* v. *Marine, Office and Technical Employees Union, Local 28*, (1997), 115 N.S.R. (2d) 357 (N.S.S.C.) at page 360.

[52] *Halifax (City)* v. *Halifax Civic Workers' Union, Local 108* (1986), 28 LAC (3d) 384 (N.S.S.C.).

[53] *Halifax (City)* v. *Halifax Civic Workers' Union, Local 108* (1986), 28 L.A.C. (3d) 384 (N.S.S.C.) at page 387.

Canada (1992) and stated that "…the relevance of the documents sought to be produced is the relationship, connection or nexus between the documents and the matter being arbitrated."[55]

[64] In *Nova Scotia (Attorney General)* v. *Police Review Board (N.S.)*[56] the Supreme Court of Nova Scotia considered the Crown's immunity from discovery. However, in doing so, the Court referred to the relevance of evidence under section 4 of the Nova Scotia *Public Inquiries Act.* Justice Oland stated that the Board's authority to receive evidence is not without limits. He said section 4 of the Nova Scotia *Public Inquiries Act* states that the Commissioners have the power to order the production of documents as they "…deem requisite to the full investigation of the matters which he or they are appointed to inquire." Justice Oland continued by stating that when the Police Review Board failed to consider and determine whether the testimony sought related to the investigation before it, it failed to meet the requirements of section 4 and was without jurisdiction to issue the subpoena.[57]

5. Summary of the Board's Power of Production

[65] From my review of sections 3 and 4 of the Alberta *Public Inquiries Act* and the relevant case law, I have been has been able to identify a number of principles that must be considered in order for the Board to compel the production of any documents.

1. The documents being produced must be produced to the Board in order to help us resolve our appeal. The Board does not have the jurisdiction to order a party to merely produce documents to another party.[58]
2. The Board's power is in the form of a *subpoena duces tecus*. The Board may only subpoena a witness and compel the witness to produce documents. The Board may not order the production of documents alone or without a witness.[59] The evidence should be presented to the Board in the context of a witness testifying before the Board.[60]

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[54] 00759 at line 24.

[55] *Halifax Shipyard Ltd.* v. *Marine, Office and Technical Employees Union, Local 28*, (1997), 115 N.S.R. (2d) 357 (N.S.S.C.) at page 365.

[56] *Nova Scotia (Attorney General)* v. *Police Review Board (N.S*) (1999), 178 N.S.R. (2d) 59 (N.S.S.C.).

[57] *Nova Scotia (Attorney General)* v. *Police Review Board (N.S*) (1999), 178 N.S.R. (2d) 59 (N.S.S.C) at pages 69 to 70.

[58] Section 3 of the *Public Inquiries Act* provides that the Board, as a Commissioner, has the "…power of summoning before him or them…." (Emphasis added.)

[59] Section 3 of the *Public Inquiries Act* provides that the Board, as a Commissioner, has the power to summon "…any persons as witnesses and of requiring … to produce any documents, papers and things…." (Emphasis

3. Any documents that the Board compels to be produced must be in the possession of the witness, if available, or the next best witness, and the Board requires him or her to attend and testify.[61]

4. Any documents that the Board compels to be produced must be "…required for the full investigation of the matters into which … [the Board is] appointed to inquire."[62] The documents that the Board compels to be produced must be necessary for the Board to consider the subject matter of the appeal before it.[63]

5. The documents must be relevant to the matters before the Board. They must be related to, connected with, or have a nexus with the appeal before the Board.[64]

[66] Applying these principles, the order of the Board in this case requires that:

1. The documents that the Board orders produced below, shall be produced to the Board. However, in accordance with the agreement, the Appellants and the City of Calgary shall provide a copy of the documents produced to the other party.

2. The Appellants and the City of Calgary shall each provide at least one witness at the continuation of the hearing. The witnesses shall be the best person available and in the best position to speak to the documents that are produced.

3. The only documents that shall be produced shall be in the private possession of the parties. Any documents that are normally available to the public, such as a public library or public archives, are not caught by the Board's order.[65]

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added.) See: *Halifax Shipyard Ltd.* v. *Marine, Office and Technical Employees Union, Local 28*, (1997), 115 N.S.R. (2d) 357 (N.S.S.C.) at page 366.

60 See: *Halifax (City)* v. *Halifax Civic Workers' Union, Local 108* (1986), 28 LAC (3d) 384 (N.S.S.C.) at page 387.

61 See: *Halifax Shipyard Ltd.* v. *Marine, Office and Technical Employees Union, Local 28*, (1997), 115 N.S.R. (2d) 357 (N.S.S.C.).

62 Section 3 of the *Public Inquiries Act*.

63 See: *Nova Scotia (Attorney General)* v. *Police Review Board (N.S*) (1999), 178 N.S.R. (2d) 59 (N.S.S.C) at pages 69 to 70. See also the Board's letter of August 24, 2001: "These arguments should address why *each* of the documents being requested are (1) relevant, (2) material and necessary to the appeal, and (3) why the evidence cannot be obtained in some other way."

64 See: *Halifax Shipyard Ltd.* v. *Marine, Office and Technical Employees Union, Local 28*, (1997), 115 N.S.R. (2d) 357 (N.S.S.C.) at page 365. See again the Board's letter of August 24, 2001: "These arguments should address why *each* of the documents being requested are (1) relevant, (2) material and necessary to the appeal, and (3) why the evidence cannot be obtained in some other way."

65 In this regard, the Board notes the City of Calgary's concern that it should not be required to go and search for records that are publicly available such as the public archives.

The question that remains to be determined with respect to the documents that will be produced is whether the documents are potentially relevant and necessary to the appeal and issues before the Board.

B. Potentially Relevant and Necessary

[67] With respect to the issue of relevance, the Appellants have argued that the Supreme Court of Canada case of *Frenette* should guide the Board, and in general the Board agrees. In *Frenette* the Court stated:

> "It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary…. If a party seeking the order is able to satisfy the judge that the document, or information in a document, may relate to a matter in issue, the judge should make the order unless there is a compelling reason why he should not make it, e.g. the document is privileged."[66]

[68] The City of Calgary responds that there is "…a significant difference in producing documents or testing their production in a matter which is a lawsuit before the courts and this Board."[67]

[69] The Director has argued, in his August 3, 2001 letter, that relevance to the matter before the Board is the key consideration and the consideration of relevance should take into account what documents were before the Director at the time he made his decision and the polycentric nature of the Board's process.

1. The Test for Production

[70] *Frenette*, then, is the starting point. However, in the Board's view, the test for potential relevance, as it relates to the exercise of its powers under the *Public Inquiries Act,* should take into account that the documents that a party is asking the Board to compel must "be related to, connected with, or have a nexus with the appeal before the Board"[68] and must be

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66 *Frenette* v. *Metropolitan Life Ins. Co*., [1992] 1 S.C.R. 647 at page 692.

67 00668 starting at line 24.

68 See: *Halifax Shipyard Ltd.* v. *Marine, Office and Technical Employees Union, Local 28*, (1997), 115 N.S.R. (2d) 357 (N.S.S.C.) at page 365. See also the Board's letter of August 24, 2001: "These arguments should

"…required for the full investigation of the matters into which … [the Board is] appointed to inquire."[69] In the Board's view *Frenette* alone does not take this into account.

[71] The starting point in administrative law is that a party subjected to an administrative decision – the Director's decision to issue the EPO – has the right to know the case against them and the right to defend themselves.[70] This means that the Appellants right to review the record of the Director is almost absolute. Since its inception in 1993, the Board established a longstanding and notorious practice of working to ensure that the person affected by a decision of the Director has a complete copy of the Director's record to ensure that they know the case against them and have the right to defend themselves. In the Board's view, these are fundamental principles of natural justice and procedural fairness. The Board notes that while the complete scope of the right to obtain the record of a decision-maker appears not to have been completely settled by the courts, there are some discussions that the right, depending on the nature of the decision, may be equivalent to that of *Stinchcombe*.[71]

[72] While principles of natural justice and procedural fairness with respect to production of a record appear to relate to the record of the decision-maker, *not* a third party, the Board notes that their may be exceptions to this rule.

[73] In this regard, the Board rejects the argument by the Appellants that failing to order the entire production of all the documents that they have requested would be a violation of the principles of natural justice and procedural fairness. As the Board has stated, in determining whether to order the production of documents, the proper test is as prescribed by section 3 of the *Public Inquiries Act*: "Are the documents potentially relevant and necessary to the issues that the Board is considering in the context of the appeal?"

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address why *each* of the documents being requested are (1) relevant, (2) material and necessary to the appeal, and (3) why the evidence cannot be obtained in some other way."

[69] Section 3 of the *Public Inquiries Act*.

[70] *The Board of Education* v. *Rice*, [1911] A.C. 179 H.L. See also *Consolidated Bathhurst Packaging Inc.* v. *I.W.A. Local 2-69*, [1990] 1 S.C.R. 282.

[71] *R.*. v. *Stinchcombe*, [1991] 3 S.C.R. 326. See also *Kullam* v. *Calgary (City) Police Commission* (March 20, 1995), (Alta.Q.B.)

2. Issues

[74] Therefore, in determining whether the documents requested are relevant and necessary, the Board must take into account the issues that it has determined will be considered at the hearing. In its decision of August 22, 2001[72] and October 26, 2001,[73] pursuant to section 87 of the Act, the Board has identified five issues that it is considering in this appeal:

> Issue 1: "Are the Appellants persons responsible under section 102? This question is limited to the issues of whether section 102 has retroactive effect."
>
> Issue 2: "Has there been a release within the meaning of section 1(ggg) having regard to its 'historical nature' and has this release caused an adverse effect?"
>
> Issue 3: "Does the Director have the discretion to choose between issuing an EPO under section 102 and issuing an EPO under section 114? If the Director has the discretion to choose between issuing an EPO under section 102 and issuing an EPO under section 114, was that discretion exercised properly?"
>
> Issue 4: "Did the Director exercise his discretion unreasonably by not naming others known to the Director as persons responsible under the EPO?"
>
> Issue 5: "Is the EPO reasonable and sufficiently precise in circumstances up to the date of the hearing?"

In order for the Board to order the production of documents, in accordance with section 3 of the *Public Inquiries Act*, the Board must be satisfied that the requested documents be relevant and necessary for the determination of one or more of the five issues to be heard in this appeal.

[75] In the Board's view, there are also a number of other considerations that should be taken into account to determine whether a requested document is relevant and necessary.

3. The Role of a Third Party

[76] In the Board's view, it is important to keep in mind that the matter before the Board involves the Director issuing an EPO to the Appellants. The Director and the Appellants are the principle parties before the Board – the *lis* is between them. In the course of defending itself against the EPO – arguing that it was improperly issued – the Appellants have accused third parties – including the City of Calgary – of also being persons responsible for the

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[72] *Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* (August 22, 2001), EAB Appeal No. 01-062-ID.

[73] *Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* (October 26, 2001), EAB Appeal No. 01-062-ID.

contamination that has been found on the Subdivision lands. For that reason, the City of Calgary asked to be a party in these proceeding to defend itself against the accusations of the Appellants.

4. Public Interest Considerations

[77] While the principle focus of the Board is the dispute between the Appellants and Director (whether the EPO is appropriate), the function of the Board (to prepare a Report and Recommendations to the Minister) carries with it a requirement to consider the public interest, which includes the interests of the parties before us. This factor needs to be considered in determining whether a particular document request is relevant and necessary. The Board's public interest mandate is made clear by the purposes of the Act, which are found in section 2. Section 2 is broad, speaking *inter alia* of the "well-being of society":

> "The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following:
> (a) the protection of the environment is essential to the integrity of ecosystems and human health and to the well-being of society;
> (b) 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;
> (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 development and of government policies, programs and decisions;
> (e) the need for Government leadership in areas of environmental research, technology and protection standards;
> (f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions;
> (g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment;
> (h) the responsibility to work co-operatively with governments of other jurisdictions to prevent and minimize transboundary environmental impacts;
> (j) the responsibility of polluters to pay for the costs of their actions;
> (k) the important role of comprehensive and responsive action in administering this Act."

[78] In carrying out its mandate, the Board is required – as outlined in sections 2(b) and (c) of the Act - to balance a number of competing interests. While the degree of public interest varies depending on the type of appeal and the issues before the Board, the Board knows

the current appeal has a significant public interest element. First, the subject matter before the Board deals with the interpretation of significant parts of the Act, and the Board's decision on the clean up of the hydrocarbons may have broad implications for industry, municipalities, and members of the public. Second, at the heart of the issues before the Board, are the people of the Lynnview Ridge Subdivision,[74] many of whom have left their homes, and the people of Calgary. This is evidenced by the participation before the Board of the Resident's Committee and the Calgary Health Authority.

C. Broad Considerations

[79] In the course of the requests for documents, two significant issues need to be addressed. They are more appropriately addressed in a general discussion rather than in the individual document requests.

1. Scope of the Document Requests – Planning Issues

[80] While the Board is considering a total of five issues for the purpose of the documents that are being requested, it would appear that the parties are in agreement that these issues relate to the concepts of "charge, management, and control"[75] and "sections 102 and 114 of the Act". I concur.

[81] As the Board has previously stated, the first two issues[76] are principally legal questions dealing with the interpretation of the Act. The fifth issue[77] is also principally a legal question that looks at scope of the EPO in light of the subsequent implementation decision.

[82] However, the third and fourth issues[78] have factual elements that may possibly be addressed by some of the documents requested by the parties. The first part of Issue 3 looks at

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74 The Board notes that many of the residents of the Lynnview Ridge Subdivision have accepted the offer of the Appellants to purchase their homes and, have therefore left the community.

75 "Charge, management or control" are used in sections 1(ss) and 96(1)(b) of the Act.

76 Issue 1: "Are the Appellants persons responsible under section 102? This question is limited to the issues of whether section 102 has retroactive effect." Issue 2: "Has there been a release within the meaning of section 1(ggg) having regard to its 'historical nature' and has this release caused an adverse effect?"

77 Issue 5: "Is the EPO reasonable and sufficiently precise in circumstances up to the date of the hearing?"

78 Issue 3: "Does the Director have the discretion to choose between issuing an EPO under section 102 and issuing an EPO under section 114? If the Director has the discretion to choose between issuing an EPO under section 102 and issuing an EPO under section 114, was that discretion exercised properly?" Issue 4: "Did the

the interrelationship between sections 102 and 114 of the Act. The second part of Issue 3 looks at whether the discretion that the Director has with respect to sections 102 and 114 was exercised correctly. Issue 4 goes directly to the decision of the Director with respect to who is a person responsible and therefore looks squarely at the question of who had charge, management, or control of the Substances. As a result, the documents that could potentially be relevant to the Board's consideration of the issues in this appeal are those documents that either go to sections 102 or 114, or the charge, management or control of the Substances.

[83] The Appellants are, in simple terms, arguing that the Director has misinterpreted or misapplied sections 102 and 114 of the Act, and as the City of Calgary had charge, management, or control of the Substance, the Director should have named the City of Calgary as a person responsible. These are relevant issues for the purpose of document production.

[84] When the Board reviews the documents being requested by the Appellants, many of the documents relate to the City of Calgary's planning and subdivision jurisdiction. In fact, the Appellants state:

> "All of the documents requested by the appellants relate to the City's role in the planning, development, and inspection and approval process of the subdivision and undoubtedly have a tendency to establish that the City had charge, management, and control of the substances and, accordingly, was the person responsible within the meaning of the Act."[79]

[85] With respect to some of the document requests, the City of Calgary responds that the Appellants appear to be incorrectly equating the issue of charge, management, and control of the substance with that of the subdivision development processes.[80] In several cases, the Board agrees with the City of Calgary.

[86] Those documents that relate *solely* to the planning and subdivision development processes that the City of Calgary carries out under the authority granted to them by the *Municipal Government Act*, S.A. 1996, c.M-26.1 and its predecessor legislation, are not directly related to the environmental clean-up issues that are before the Board, because their essence is planning, not whether the Director has misinterpreted or misapplied section 102 and 114 of the

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Director exercise his discretion unreasonably by not naming others known to the Director as persons responsible under the EPO?"

79 00653 starting at line 26.

80 00665 starting at line 16.

Act, or whether the City of Calgary had charge, management, or control of the Substances and therefore should have been named as a person responsible under the EPO. Of course, if there was an overlap, and a planning document also dealt with the question of charge, management, or control, then it should be produced.

[87] As a result, unless otherwise provided for below, the only documents that the Board orders produced are those documents that (1) relate to "charge, management, or control of the Substances", or (2) are capable of relating to "section 102 and 114 of the Act."

[88] In the same light, the Board is not interested in any document *unless* it relates to the Subdivision lands. Again, this limitation is necessary because the appeal before the Board relates only to the Subdivision lands that are specified in the EPO. The Board is of the view that documents relating to other lands cannot legally be relevant or necessary for the Board to determine the issues in this appeal, because those lands would be outside the EPO.

[89] As a result, unless otherwise provided for below, the only documents that the Board will order the production of are those *documents that relate to lands that are or became the Subdivision lands as specified in the EPO*, being Lynnview Ridge Phase 4 in the City of Calgary.

2. Privilege

[90] There was a great deal of discussion before the Board at the motions hearing about the concept of privilege, and specifically three concepts of privilege: (1) implied undertaking, (2) general solicitor-client privilege, and (3) situations where solicitor-client privilege has been waived. With respect to the situations were solicitor-client privilege has been waived, there are two specific requests before me that deal with documents that are subject to solicitor-client privilege.

Implied Undertaking

[91] One of the concerns that the City of Calgary expressed during the course of the motions hearing was that the document production process was in danger of becoming a pre-discovery process. In this regard, the Board notes with particular concern comments of the Appellants during the cross-examination of the City of Calgary's witness in the main hearing of

this matter, where there were references to a potential civil action. I want to make it clear that the Board will not become a vehicle to assist parties in associated civil actions.

[92] During the course of argument, the City of Calgary requested that the Board order that any documents produced in context of these proceedings should be subject to an implied undertaking. The City of Calgary directed the Board to the case of *LSI Logic Corp. of Canada Inc.* v. *Logani*[81] where Justice Fruman stated:

> "In Alberta there is an implied undertaking that 'information acquired through the discovery process shall not be used for any purpose which is ulterior or collateral to the lawsuit'…. The implied undertaking applies both to oral and documentary evidence obtained through pretrial disclosure…."

[93] During the course of the motions hearing, the Appellants and the City of Calgary conferred and agreed that the principle of an implied undertaking should apply to the documents produced in the context of this appeal. I agree and the Board expects the Appellants and the City of Calgary to honour this implied undertaking not only in relation to the documents that the Board orders produced, but also to the documents that the parties have agreed to produce to each other in the context of the agreement reached between them.

Solicitor-Client Privilege

[94] Another concern expressed by the parties is general solicitor-client privilege. It is common ground between the Appellants and the City of Calgary that, subject to the discussion below about situations in which solicitor-client privilege has been waived, the order of the Board should not include those documents that are subject to solicitor-client privilege.

[95] In the course of the motions hearing, the Appellants referred the Board to the case of *Bre-X Minerals Ltd. (Trustee of)* v. *Verchere*[82] where the general concept of solicitor-client privilege was discussed by the Alberta Court of Appeal. In the *Bre-X* case, the Court of Appeal said:

> "[16] Solicitor-client privilege … protects the sanctity of the confidence between client and lawyer. The current rationale for solicitor-client privilege has remained unchanged for some time. The basis for this privilege was articulated aptly in *Greenough* v. *Gaskell* (1833), 1 My. & K. 98 at 103, 39 E.R. 618 at 620-21:

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81 *LSI Logic Corp. of Canada Inc.* v. *Logani* (August 8, 2001), 2001 ABQB 710 at paragraph 93.

82 *Bre-X Minerals Ltd. (Trustee of)* v. *Verchere* (October 5, 2001), 2001 ABCA 255 at paragraphs 16 to 19.

> …it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations which form the subject of all legal proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skillful person, or would only dare to tell his counsellor half his case.
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> [17] The Supreme Court has consistently commented that solicitor-client privilege is an important cornerstone to effective representation of clients by counsel. The court has gone as far to characterize solicitor-client privilege as a 'fundamental civil and legal right…': *Solosky* v. *The Queen*, [1980] 1 S.C.R. 821 at 839.
>
> [18] It should be emphasized that solicitor-client privilege is not merely a rule of evidence but a substantive rule, which protects the client's fundamental right to confidentiality."

[96] Subject to the discussion below about situations in which solicitor-client privilege has been waived, the Board is of the view that solicitor-client privilege should definitely be preserved. As a result, unless directed otherwise below, the order of the Board respecting the production of documents is subject to proper claims of solicitor-client privilege.

Waived Solicitor-Client Privilege

[97] During the course of the proceedings before the Board to date, the parties have in some cases obtained or otherwise disclosed documents that would ordinarily be subject to claims of solicitor-client privilege. This involves two particular requests that are before the Board for the purposes of this decision that go to the scope and nature of solicitor-client privilege.

[98] First, the Appellants have requested that the City of Calgary produce documents relating to the March 30, 1959 Agreement between Imperial Oil Limited and the City of Calgary that are found in the working files of J. D. Salmon - then City Solicitor. The Appellants have a letter dated April 1, 1971 from J. D. Salmon that they argue shows that the City of Calgary was exerting some sort of control over the development of the Lynnview Ridge Subdivision and are seeking the other documents from the files of J. D. Salmon that may support this claim. The City of Calgary responds that the documents are subject to solicitor-client privilege.

[99] Second, the City of Calgary has a similar request against Imperial. The City of Calgary has requested files stemming from a letter dated November 30, 1987 relating to Peter

Southey, W.G. Brown, and J.D. Brown, who appear to be solicitors for Imperial Oil Limited in various capacities. Again, the City of Calgary has copies of letters from these individuals and would like to see other related documents. Like the City of Calgary, the Appellants respond that the documents are subject to solicitor-client privilege.

[100] The question before the Board is to what extent should it order the production of further documents while still protecting solicitor-client privilege. The exceptions are: (1) for documents already in the possession of the parties that are not subject to solicitor-client privilege in the first place, or alternatively, (2) if they are subject to solicitor-client privilege where that privilege has been waived.

[101] The first exception is that the communication is between a lawyer and a person who is not his client is not generally subject to solicitor-client privilege. This exception does not apply where a lawyer is communicating with another lawyer of the client or where the lawyer is communicating with a person who is assisting the client (i.e. an expert) in contemplation of litigation. As a result, the Board is of the view that any correspondence in the identified files between a lawyer and another persons – who is not the client, another lawyer of the client, or a consultant retained for the purpose of litigation - is not subject to solicitor-client privilege, and its production is therefore ordered, subject to the general conditions above.

[102] The second exception is that once a document that is subject to solicitor-client privilege is disclosed privilege is lost and cannot be regained. As a result, where the Appellants or the City of Calgary have waived or lost solicitor-client privilege in relation to any of the documents that have been requested, the production of these documents is not restricted by solicitor-client privilege.

[103] The real question with respect to documents in which solicitor-client privilege has been waived or lost is *what is the effect on other associated documents*. For example, what is the effect on documents that are referenced in the documents sent to a third party or documents over which privilege is lost?

[104] With respect to this question, the Appellants direct the Board to the *Bre-X* case. This is a case of the Alberta Court of Appeal where the trustee in bankruptcy in seeking to waive the privilege of the bankrupt. Other than standing for the general principles relating to solicitor-

client privilege, *Bre-X* does not directly address documents that are sent to a third party, documents over which privilege is lost, or the effect on associated documents.

[105] The City of Calgary directs the Board to the case of *Casino Tropical Plants Ltd.* v. *Rentokil Tropical Plant Services Ltd.*[83] from the British Columbia Court of Appeal. In this case, a solicitor for the plaintiff swore an affidavit in the context of the litigation. The defendant argued that the plaintiff had waived any solicitor-client privilege. The case quotes with approval Sopinka, *The Law of Evidence in Canada*, at page 644:

> "An obvious scenario of waiver is if the holder of the privilege makes a voluntary disclosure or consents to disclosure of any material part of a communication. … Similarly, if a client testifies on his or her own behalf and gives evidence of a professional, confidential communication, he or she will have waived the privilege shielding all of the communications relating to the particular subject matter. Moreover, if the privilege is waived, *the production of all documents relating to the acts contained in the communication* will be ordered." (Emphasis added.)

[106] The City of Calgary also directs the Board to the case of *Stuart Olson Construction Inc.* v. *Sawridge Plaza Corp.*[84] from the Alberta Court of Queen's Bench. This case arose in the context of a lawsuit regarding a contractual dispute. The defendants applied for the production of document relates to the state of mind of the plaintiffs during negotiating the contract between the parties. During discoveries, the plaintiff admitted that they had received legal advice prior to entering into the contracts. The Court states:

> "Where there is a waiver, either intentionally or by implication, a disclosure of all or part of what was communicated under the umbrella of privilege may have to be disclosed in order to answer the demands of fairness or consistency. In general, full disclosure is necessary even when the waiver is only a partial one. This will be so where only by seeing the whole of the communication between the solicitor and the client can fairness and consistency as between the litigants is assured."[85]

[107] The parties have also directed the Board's attention to *Husky Oil Operations Ltd.* v. *MacKimmie Matthews.*[86] This cases deals with a claim of solicitor's negligence, where the defendant is seeking copies of legal opinions, which are subject to solicitor-client privilege, from

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83 *Casino Tropical Plants Ltd.* v. *Rentokil Tropical Plant Services Ltd.* (May 8, 1998), C975753 (B.C.S.C.).

84 *Stuart Olson Construction Inc.* v. *Sawridge Plaza Corp.* [1995] AJ 953.

85 *Stuart Olson Construction Inc.* v. *Sawridge Plaza Corp.* [1995] AJ 953 at paragraph 17.

86 *Husky Oil Operations Ltd.* v. *MacKimmie Matthews* (January 21, 1999), 1999 ABQB 54.

the defendant law firm that are said to have been "…summarized in other documents which have been produced."[87] The Court refers to the case of *F.P. Bourgault Industries Seeder Division Ltd.* v. *Flexi-Coil Ltd.*[88] where the Federal Court stated:

> "Reference to the terms of a document as such will usually waive privilege in the document. But an action taken, or an opinion formed and expressed as a result of reading the document does not waive privilege in the document if it is not mentioned or specifically referred to. That is to say, adopting the words of a solicitor's letter of legal advice without giving any credit does not waive any privilege which exist [*sic*] in the document plagiarized."

[108] The Board also notes the case of *George Doland Ltd.* v. *Blackburn Robson Coates & Co et al.,*[89] which is referred to by Sopinka, *The Law of Evidence in Canada*. In this case privilege was waived where the plaintiff called their solicitor to give evidence regarding a telephone conversation. The Court held:

> "So far as the second ground is concerned, the ambit ground, I do not consider that the contentions of counsel for plaintiffs are correct. Up to that date, the date of the impending litigation, if I may call it that, in my judgement the defendants are entitled to ask for and see any documents relating to the facts of the two items contained in the telephone conversation which I have made reference."

[109] Based on these cases, it would appear to the Board that any document either mentioned in the waived document or implicated by it, can be produced.

[110] While the Board is of the view that the full disclosure of the Appellants' current legal files is not sought, the Board is concerned about a broad application of this principle. The Board takes some comfort in the discussion in *Bre-X* that recognizes that there are "…public interests [that] may compete with the public interest in solicitor-client privilege…" even though the case goes on to note that there are "…very, very few interests [that] are more important than those protected by this privilege."[90] I agree, and therefore, the Board orders the production of those documents that are either mentioned, referred to, or were directly implicated from the

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87 *Husky Oil Operations Ltd.* v. *MacKimmie Matthews* (January 21, 1999), 1999 ABQB 54 at paragraph 1.

88 *F.P. Bourgault Industries Seeder Division Ltd*. v. *Flexi-Coil Ltd.* (1995), 64 C.P.R.(3d) 70 (F.C.T.D.) at page 72.

89 *George Doland Ltd.* v. *Blackburn Robson Coates & Co et al.*, [1972] 3 All.E.R. 959 (Q.B.)

90 *Bre-X Minerals Ltd. (Trustee of)* v. *Verchere* (October 5, 2001), 2001 ABCA 255 at paragraphs 48 and 49.

following two letters: (1) dated April 1, 1971 from J. D. Salmon and (2) dated November 30, 1987 to Peter Southey from W.G. Brown.[91]

[111] Additionally, the documents that are produced in this category are those documents that relate to "charge, management, or control of the Substances" and that documents that are capable of relating to "section 102 and 114 of the Act." Again, they will also be geographically limited to the lands that are or became the Subdivision lands as specified in the EPO, being Lynnview Ridge Phase 4.

D. Application by the Appellants for Documents from the City of Calgary

1. Appellants' Request – A (i to ii(a)) – 1959 Agreement

[112] The Appellants have requested the following documents from the City of Calgary:

> "**A. City's Willingness To Lift Restrictions of March 30, 1959 Agreement Between City and IOL (1970-1980)**
>
> i. all notes, minutes, memorandums, correspondence and reports dated between 1970-1980 from the Planning and Legal Department files pertaining to the March 30, 1959 Agreement between the City and IOL
>
> ii all the working files of the following employees dated between 1970-1980 pertaining to the March 30, 1959 Agreement between the City and IOL
>
> (a) G.C. Hamilton (Commissioner of Operations and Development)…."

[113] The Appellants have not convinced the Board that the documents included in this category are relevant and necessary to the issues before the Board. The request is overly broad, and significantly, appears to relate to planning and subdivision matters that do not fall within the mandate of the Board. As a result, the Board is not prepared to order that these documents be produced.

2. Appellants' Request – A (ii(b)) – J.D. Salmon

[114] The Appellants have requested the following documents from the City of Calgary:

> "**A. City's Willingness To Lift Restrictions of March 30, 1959 Agreement Between City and IOL (1970-1980)**…

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[91] The Board notes that during the motions hearing, the parties referred the Board to letters dated March 31, 1971 (to D.E. Lewis from G.C. Harrilton) and July 29, 1971 (to M.H. Rogers from R.F. Dawson). Both letters reference J.D. Salmon. The Board anticipates that these would examples of the types of documents the Board would anticipate being produced.

ii all the working files of the following employees dated between 1970-1980 pertaining to the March 30, 1959 Agreement between the City and IOL…

(b) J. D. Salmon (City Solicitor)."

[115] As discussed above, the Board will order the production of only those documents that are either mentioned, referred to, or were directly implicated from the letter dated April 1, 1971 from J. D. Salmon. The documents that are to be produced must be documents that relate to "charge, management or control of the Substances" or documents that are capable of relating to "section 102 and 114 of the Act." Again, the documents must also be geographically limited to the lands that are or became the Subdivision lands as specified in the EPO, being Lynnview Ridge Phase 4. The documents produced are also subject to the implied undertaking.

3. Appellants' Request – B (i to vii) – Ogden Sector Plan

[116] The Appellants have requested the following documents from the City of Calgary:

"B Ogden Sector Plan/Design Brief (January 1969-June 1971)

i. initial January 1969 Study;

ii. February 25, 1970 B.A.C.M. Conceptual Development Plan and Report submitted by B.A.C.M.

iii. April 1970 Presentation of Preliminary Sector Design Brief to Imperial Oil and B.A.C.M.

iv. all notes, memorandums, correspondence and reports surrounding meeting held on April 1, 1970 between Sherwood, West, Moir, Jackson, Sellers (IOL) and Facey, Leithch, Mailend (City Planning Department), re: City's plans regarding the development of Ogden area as it relates to surplus refinery land

v. May 5, 1970 Critiques of preliminary Sector Design Brief from the City Planning and or Engineering Departments from the City Planning and/or Engineering Departments

vi notes from meeting September 29, 1970 at City Planning Office attended by Michael Rogers, Al Murlow and Michael Facey

vii February 23, 1971 – notes or minutes from Ogden Post Circulation Meeting from the City Planning and/or Engineering Departments…."

[117] The Board is prepared to accept that these documents may be relevant and necessary to the issues before the Board because they relate to either the Subdivision lands or the development of the refinery lands. As I discussed with Mr. Sprague at the hearing, the Board is of the view that if documents relate to "charge, management, or control of the Substances", or are capable of relating to "section 102 and 114 of the Act" then the Board is of the view that the document will be potentially relevant and necessary to the Board's consideration. As a result,

subject to the general requirement discussed above, the Board will order the production of these documents.

4. Appellants' Request – B (ix) – Working Files

[118] The Appellants have requested the following documents from the City of Calgary:

> **"B Ogden Sector Plan/Design Brief (January 1969-June 1971)**…
> ix all of the working files of the following employees dated between 1969-1971 pertaining to the Ogden Design Brief of the residential development of Ogden area.
> (a) Art Froese (Senior Planner Land Uses Amendments)
> (b) Michael H. Rogers (Director of Planning)
> (c) Al Murlow (Planning Department)
> (c) Michael Facey (Planning Department)."

[119] The Appellants have not convinced the Board that the documents included in this category are relevant and necessary to the issues before the Board. The terms of the request relate mainly to planning and are overly broad. As a result, the Board is not prepared to order that these documents be produced.

5. Appellants' Request – M – Monitoring Test Wells

[120] The Appellants have requested the following documents from the City of Calgary:

> **"M. Monitoring Test Wells**
> **i.** All documentation pertaining to City's involvement in monitoring test wells on Subdivision Lands in 1995 and again in 1998."

[121] Documentation relating to monitoring wells appears to be squarely within the Board's jurisdiction. Information that directly relates to the contamination of the Subdivision lands is clearly relevant and necessary for the Board to consider. Further, the Board is of the view that it is in the public interest to disclose this information. As a result, the Board will order the production of *all* documents pertaining to the City of Calgary's involvement in monitoring test wells on the Subdivision lands in 1995 and 1998, subject only to proper claims of solicitor-client privilege and the implied undertaking.

6. Appellants' Request – O (i to iv) – Early Initiative

[122] The Appellants have requested the following documents from the City of Calgary:

> **"O. City Of Calgary (the "City") Early Initiatives Re: Residential Development of Ogden Area (1963-1971)**
>
> i. all documentation including notes, memorandums, correspondence and reports from Planning and Legal Department files dated 1963 – 1971 pertaining to residential development of the Ogden area.
>
> ii. all documentation, including notes, memorandums, correspondence and reports from the Spring of 1963 pertaining to an inquiry carried out by Mayor Harry Hays regarding whether IOL would be interested in selling its lands in the Ogden Area.
>
> iii. all documentation, including notes, memorandums, correspondence and reports surrounding meetings held on May 15, 1963 between Mayor H. Hays, P.N.R. Morrision (Deputy Minister), D.E. Batchelor (Chief Commissioner), A.G. Martin (City Planner), G.M. Burden (IOL) and S.T. Reynolds (IOL) (re: City's inquiry as to whether IOL would be interested in selling some of its lands for residential development).
>
> iv. all of the working files of the following employees between 1963-1971:
>
> (a) Harry Hays (Mayor)/and or Office of the Mayor pertaining to the residential development of the Ogden area.
>
> (b) D.E. Batchelor (Chief Commissioner) pertaining to the residential development of the Ogden area
>
> (c) A.G. Martin (City Planner) pertaining to the residential development of the Ogden area.
>
> (d) J. D. Salmon (City Solicitor) pertaining to the residential development of the Ogden area.
>
> (e) Michael Facey (Planning Department) pertaining to the residential development of the Ogden area.
>
> (f) Mailend (Planning Department) pertaining to the residential development of the Ogden area.
>
> (g) R. Leitch (Planning Department) pertaining to the residential development of the Ogden area."

[123] The Appellants have not convinced the Board that the documents included in this request are relevant and necessary to the issues before the Board. The terms of the request are again overly broad and appear to relate to mainly to planning and subdivision matters. As a result, the Board is not prepared to order that these documents should be produced.

E. Application by the City of Calgary for Documents from the Appellants

1. City of Calgary's Request – 1 and 16 – D.H.A. Sellers and A. Teal Files

[124] The City of Calgary has requested the following documents from the Appellants:

> "1. Files of D.H.A. Sellers relating to the development of Lynnwood [*sic*] Phases 4 and 5. …
>
> 16. The files from which the Exhibits to the Affidavit of A. Teal in this matter were extracted."

[125] The Board is of the view that the files of D.H.A. Sellers and other files that Mr. A. Teal reviewed in order to prepare his affidavit are obviously relevant and necessary for the Board to review in considering the issues before the Board. These documents go to the heart of Mr. Teal's testimony and are required to properly understand its context. As a result, the Board will order the production of all files, including those of D.H.A. Sellers, that Mr. Teal reviewed in order to produce his affidavit, subject only to proper claims of solicitor-client privilege and the implied undertaking.

2. City of Calgary's Request – 2 – Nu-West Documents

[126] The City of Calgary has requested the following documents from the Appellants:

> "2. Records exchanged between Devon or Imperial and Nu-West Development Corporation Ltd. ("Nu-West") relating to the development of Lynnwood [*sic*] Phases 4 and 5 (June 1976 to June 1981)."

[127] The Board is of the view that the documents included in this category are relevant and necessary to the issues before the Board. As a result, the Board will order the production of these documents subject to all of the general restrictions identified above by the Board.

3. City of Calgary's Request – 4 – Southey, Brown and Brown

[128] The City of Calgary has requested the following documents from the Appellants:

> "4. Imperial file no. 16.24.02, files of Peter Southey, W.G. Brown and J.D. Brown re former Calgary Refinery and development of Lynnwood [*sic*] Phase 4, 1977-1987. See Exhibit 59 of A. Teal Affidavit."

[129] As discussed above, the Board orders the production of only those documents that are either mentioned, referred to, or were directly implicated from the letter dated November 30,

1987 to Peter Southey from W.G. Brown. The documents that are to be produced must be documents that relate to "charge, management, or control of the Substances" or documents that are capable of relating to "section 102 and 114 of the Act." Again, the documents must also be geographically limited to the lands that are or became the Subdivision lands as specified in the EPO, being Lynnview Ridge Phase 4. The documents produced will also be subject to the implied undertaking.

4. City of Calgary's Request – 6 – Working Files

[130] The City of Calgary has requested the following documents from the Appellants:

> "6. Files of, and records authored by the following Imperial or Devon employees or officers for the period June 1976 to June 1981 relating to the development of Lynnwood [*sic*] Phases 4 and 5
>
> a. William G. Bahen
> b. Bob Calvin
> c. Jim Horton
> d. Art Eberwein."

[131] The Board is of the view that the documents included in this request are relevant and necessary to the issues before the Board. The Board believes that documents included in this request relate to the clean up of what is now the Subdivision lands. As a result, the Board will order the production of these documents subject to all of the general restrictions identified by the Board.

5. City of Calgary's Request – 10 – Meeting Minutes

[132] The City of Calgary has requested the following documents from the Appellants:

> "10. Copies of all meeting minutes between Nu-West and Devon or Imperial re development of Lynnwood [*sic*] Phases 4 and 5 June 1976 to June 1981."

[133] The Board understands that the Appellants have agreed to produce these documents. As a result, the Board need not address this request.

6. City of Calgary's Request – 12, 13, and 19 – Tank Farm and Land Farming

[134] The City of Calgary has requested the following documents from the Appellants:

> "12. Record relating to the testing, failures, spills or ruptures of the storage tanks previously located on what is now Lynnwood [*sic*] Phases 4 and 5.
>
> 13. Records relating to the land farming operations conducted by Imperial on what is now Lynnwood [*sic*] Phases 4 and 5. …
>
> 19. All records of Imperial relating to decommissioning and reclamation of the storage tanks and land farming area on what is now Lynnwood [sic] Phase 4 and 5 (June 1974 to June 1978)."

[135] Documentation relating to the tank farm and the land farming operation is squarely within the issues to be considered in this appeal and therefore within the Board's jurisdiction. Information that directly relates to the contamination of the Subdivision lands is clearly relevant and necessary for the Board to consider. Further, the Board is of the view that it is in the public interest to disclose this information. The Board also understands that Mr. A. Teal reviewed these documents in the course of preparing his affidavit. *As a result, the Board will order the production of all documents in this category, subject to all of the general restrictions identified by the Board.* However, given that the nature of documents requested is particularly relevant to the issues before the Board, the Board would like to receive all documents back to the initial operation of the facility, meaning approximately 1923. The Board notes that it may be difficult for the Appellants to locate all of these documents because of the length of time that has passed. In this regard, the Board has decide to order Alberta Environment to also review its files to see if it is able to locate and produce any documents that would be relevant to this and the other requests.

7. City of Calgary's Request – 15 – Devon Files

[136] The City of Calgary has requested the following documents from the Appellants:

> "15. Files of Devon relating to the development of Lynnwood [*sic*] Phase 4 and 5 (June 1976 to June 1981.)"

[137] The Board is of the view that any relevant and necessary documents that would be found in this category would be caught in the production of documents ordered by the Board in relation to the preparation of Mr. A. Teal's affidavit. As a result, the Board will not order the production of other documents in this category.

8. City of Calgary's Request – 18 – Consultants' Files

[138] The City of Calgary has requested the following documents from the Appellants:

> "18. Records exchanged between Devon and Imperial and their consultant or consultants retained by Nu-West relating to the development of Lynnwood [*sic*] Phase 4 and 5 (June 1976 to June 1981)."

[139] My initial impression was that the request regarding consultants was overly broad and could be considered a "fishing trip." However, I am now of the view that it is possible that relevant and necessary documents may be included in this request. As a result, the Board is prepared to treat the consultants' files in the same manner that has addressed files that are subject to solicitor-client privilege. In other words, where a document has already been produced, the Board is prepared to order the production of any documents included within this request that are referred to or that are necessarily related to or implied in the documents that have already been produced. The documents that are to be produced as a result of this request must also relate to "charge, management, or control of the Substances" or be capable of relating to "section 102 and 114 of the Act." Again, the documents must also be geographically limited to the lands that are or became the Subdivision lands as specified in the EPO, being Lynnview Ridge Phase 4. Documents that are the subject of solicitor-client privilege shall not be produced. The documents that are produced will be subject to the implied undertaking.

F. Further Documents in the Possession of Alberta Environment

[140] Given the nature of the documents that are being requested by the Board, the Board notes that it may not be possible for the parties to locate all of the documents requested. To this end, the Board will request Alberta Environment to review its files and provide the Board with any documents that may be in Alberta Environment's possession that would be responsive to any of the requests under which the Board has ordered that documents be produced. In particular, the Board would like Alberta Environment to review its files for documents relating to the tank farm and the land farming operation of the Appellants. The Board makes this request because it believes that documentation relating to the tank farm and land farming appears to be squarely within the issues included in the appeal and therefore within the Board's jurisdiction. Information that directly relates to the contamination of the Subdivision lands is clearly relevant and necessary for the Board to consider. The Board is of the view that it is in the public interest to disclose this information. Documents that are subject to solicitor-client privilege shall not be produced and the documents that are produced will be subject to the implied undertaking.

IV. DECISION

[141] In summary, the Board has the authority to order the production of document pursuant to section 3 of the *Public Inquiries Act*. In accordance with this section:

1. The documents that the Board orders produced shall be produced to the Board. In accordance with the agreement, the Appellants and the City of Calgary shall provide a copy of the documents produced by agreement with the other party.
2. The Appellants and the City of Calgary shall each provide at least one witness at the continuation of the hearing. The witnesses shall be the best person available and in the best position to speak to the documents that are produced.
3. The only documents that shall be produced shall be in the private possession of the parties. Any documents that are normally available to the public, such as a public library or public archives, are not caught by the Board's order.

[142] The production of documents shall, unless otherwise specified, be subject to certain general conditions. These general conditions are:

1. Unless directed otherwise, the order of the Board respecting the production of documents is subject to proper claims of solicitor-client privilege.
2. Unless directed otherwise, the order of the Board respecting the production of documents is subject to the implied undertaking that information acquired through this process shall not be used for any purpose that is ulterior or collateral to the lawsuit.
3. Unless otherwise provided for, the order of the Board respecting the production of documents is limited to those documents that relate to lands that are or became the Subdivision lands as specified in the EPO, being Lynnview Ridge Phase 4.
4. Unless otherwise provided for, the order of the Board respecting the production of documents is limited to those documents that relate to "charge, management, or control of the Substances."
5. Unless otherwise provided for, the order of the Board respecting the production of documents is limited to those documents that are capable of relating to "section 102 and 114 of the Act."

A. Application by the Appellants for Documents from the City of Calgary

[143] The Board orders the production of the following documents by the City of Calgary:

[144] **Appellants' Request – A (ii(b)) – J.D. Salmon**

> "**A. City's Willingness To Lift Restrictions of March 30, 1959 Agreement Between City and IOL (1970-1980)**…
>
> ii all the working files of the following employees dated between 1970-1980 pertaining to the March 30, 1959 Agreement between the City and IOL …
>
> (d) J. D. Salmon (City Solicitor)."

[145] As discussed above, the Board will order the production of only those documents that are either mentioned, referred to, or were directly implicated from the letter dated April 1, 1971 from J. D. Salmon. The documents requested are subject to the general conditions identified above.

[146] **Appellants' Request – B (i to vii) – Ogden Sector Plan**

> **"B Ogden Sector Plan/Design Brief (January 1969-June 1971)**
>
> i. initial January 1969 Study;
>
> ii. February 25, 1970 B.A.C.M. Conceptual Development Plan and Report submitted by B.A.C.M.
>
> iii. April 1970 Presentation of Preliminary Sector Design Brief to Imperial Oil and B.A.C.M.
>
> iv. all notes, memorandums, correspondence and reports surrounding meeting held on April 1, 1970 between Sherwood, West, Moir, Jackson, Sellers (IOL) and Facey, Leithch, Mailend (City Planning Department), re: City's plans regarding the development of Ogden area as it relates to surplus refinery land
>
> v. May 5, 1970 Critiques of preliminary Sector Design Brief from the City Planning and or Engineering Departments from the City Planning and/or Engineering Departments
>
> vi notes from meeting September 29, 1970 at City Planning Office attended by Michael Rogers, Al Murlow and Michael Facey
>
> vii February 23, 1971 – notes or minutes from Ogden Post Circulation Meeting from the City Planning and/or Engineering Departments…."

[147] The documents requested are subject to the general conditions identified above.

[148] **Appellants' Request – M – Monitoring Test Wells**

> **"M. Monitoring Test Wells**
>
> i. All documentation pertaining to City's involvement in monitoring test wells on Subdivision Lands in 1995 and again in 1998."

[149] The Board orders the production of all documents pertaining to the City of Calgary's involvement in monitoring test wells on the Subdivision lands in 1995 and 1998, subject only to proper claims of solicitor-client privilege and the implied undertaking.

B. Application by the City of Calgary for Documents from the Appellants

[150] The Board orders the production of the following documents by the Appellants:

[151] **City of Calgary's Request – 1 and 16 – D.H.A. Sellers and A. Teal Files**

> "1. Files of D.H.A. Sellers relating to the development of Lynnwood [*sic*] Phases 4 and 5. …
>
> 17. The files from which the Exhibits to the Affidavit of A. Teal in this matter were extracted."

[152] The Board will order the production of all files, including those of D.H.A. Sellers, that Mr. Teal reviewed in order to produce his affidavit, subject only to proper claims of solicitor-client privilege and the implied undertaking.

[153] **City of Calgary's Request – 2 – Nu-West Documents**

> "2. Records exchanged between Devon or Imperial and Nu-West Development Corporation Ltd. ("Nu-West") relating to the development of Lynnwood [*sic*] Phases 4 and 5 (June 1976 to June 1981)."

[154] The documents requested are subject to the general conditions identified above.

[155] **City of Calgary's Request – 4 – Southey, Brown and Brown**

> "4. Imperial file no. 16.24.02, files of Peter Southey, W.G. Brown and J.D. Brown re former Calgary Refinery and development of Lynnwood [*sic*] Phase 4, 1977-1987. See Exhibit 59 of A. Teal Affidavit."

[156] As discussed above, the Board orders the production of only those documents that are either mentioned, referred to, or were directly implicated from the letter dated November 30, 1987 to Peter Southey from W.G. Brown. The documents requested are subject to the general conditions identified above.

[157] **City of Calgary's Request – 6 – Working Files**

> "6. Files of, and records authored by the following Imperial or Devon employees or officers for the period June 1976 to June 1981 relating to the development of Lynnwood [*sic*] Phases 4 and 5
>
> a. William G. Bahen
> b. Bob Calvin
> c. Jim Horton
> d. Art Eberwein."

[158] The documents requested are subject to the general conditions identified above.

[159] **City of Calgary's Request – 12, 13, and 19 – Tank Farm and Land Farming**

> "12. Record relating to the testing, failures, spills or ruptures of the storage tanks previously located on what is now Lynnwood [*sic*] Phases 4 and 5.
>
> 13. Records relating to the land farming operations conducted by Imperial on what is now Lynnwood [*sic*] Phases 4 and 5. …
>
> 20. All records of Imperial relating to decommissioning and reclamation of the storage tanks and land farming area on what is now Lynnwood [*sic*] Phase 4 and 5 (June 1974 to June 1978)."

[160] The Board orders the production of all documents in this category *back to the initial operation of the facility*, meaning 1923, subject to all of the general restrictions identified above.

[161] **City of Calgary's Request – 18 – Consultants' Files**

> "18. Records exchanged between Devon and Imperial and their consultant or consultants retained by Nu-West relating to the development of Lynnwood [*sic*] Phase 4 and 5 (June 1976 to June 1981)."

[162] Where a document has already been produced that falls into this category, the Board orders the production of any documents included within this request that are referred to or that are necessarily related to or implied in the documents that have already been produced. The documents that are to be produced will be subject to all of the general restrictions identified above.

C. Further Documents in the Possession of Alberta Environment

[163] The Board requests that Alberta Environment review its files and provide the Board with any documents in its possession that are responsive to any of the requests for documents that the Board has ordered produced. In particular, the Board would like Alberta Environment to review its files for documents relating to the tank farm and the land farming operation of the Appellants. The documents produced by Alberta Environment will be subject to all of the general requirements identified above.

D. General Comments

[164] One of the concerns expressed by some of the parties has been insuring that the search for the documents that the Board orders produced be conducted properly and completely.

The concern about proper production was particularly expressed by the Appellants in comments at the end of the motions hearing. As I stated in response, the Board has no such concerns. The Board is satisfied that as Officers of the Court, all counsel that have appeared before the Board will ensure that the searches are conducted properly, completely, and in accordance with the obligation to bring before the Board all relevant evidence regardless of whether it is for or against their clients.

[165] Another concern that has been expressed by some of the parties is that the matter of document production be brought to a close as soon as possible. Some of the parties have expressed concern that the production of documents will merely result in further document production requests. This will not be so. The Board is of view that the document production request in this instance has been very thorough and as a result, the Board will not entertain further applications for document production. Bring matters such as this to a close is necessary for the proper function of an administrative tribunal, and an effective and efficient hearing.

[166] Finally, on the issue of timing, the Board has requested that the parties provide the documents that they have agreed upon in accordance with the timeline specified in the agreement. With respect to the remainder of the documents, the Board understands that the parties have requested a conference call to determine the date that the further documents shall be produced and the submissions concerning these documents be provided to the Director. Following this conference call, the Board will provide further directions as to timing.

Dated on December 10, 2001, at Edmonton, Alberta.

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William A. Tilleman, Q.C., Chairman