**Imperial Oil Limited and Devon Estates Limited v. HMQ and the City of Calgary, 2003 ABQB**

Date: 20030430
Action No. 0201-15975

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

BETWEEN:

IMPERIAL OIL LIMITED AND DEVON ESTATES LIMITED

Applicants

- and -

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

Respondents

- and -

THE CITY OF CALGARY AND LYNNVIEW RIDGE RESIDENT'S ACTION COMMITTEE

Intervenors

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REASONS FOR JUDGMENT
of the
HONOURABLE MADAM JUSTICE ROSEMARY E. NATION

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APPEARANCES:

Ken Mills, Paul Jeffery and Ryan DuRussel of Blake Cassels & Graydon LLP
for the Applicants Imperial Oil Limited and Devon Estates Limited

Lorne A. Smart, Q.C. of Miller Thomson LLP
for Her Majesty the Queen in Right of Alberta
(as represented by the Minister of the Environment).

Andrew Sims, Q.C.
for the Alberta Environmental Appeal Board

Grant D. Sprague of Alberta Justice Legal Division
for the Director, Enforcement and Monitoring,
Bow Region, Regional Services, Alberta Environment.

Ronald M. Kruhlak of McLennan Ross and
Susan E.A. Trylinski of the City of Calgary
for the City of Calgary

Gavin Fitch of Rooney Prentice
for the Lynnview Ridge Resident's Action Committee

## INTRODUCTION

[1] Over thirty years ago, lands used in conjunction with a hydrocarbon refinery were reclaimed and redeveloped into a residential community. The levels of hydrocarbon vapours and lead in the soil at that community exceed acceptable levels relative to today's standards. Those standards are more stringent than previous standards, reflecting the increased scientific awareness of the health risks of lead and hydrocarbons in the environment. Alberta Environment issued an order requiring the Applicants to remediate the site. It is against this backdrop - who bears responsibility for the millions of dollars to clean up to today's standards, the residents' health, and governmental action - that this judicial review arises.

## FACTS

[2] The following is a summary of facts that are important to this judicial review. Some of these background facts are in a very summary form, and are reduced to their most simplistic level.

1. Lynnview Ridge Residential Subdivision, Phase IV ("Lynnview Ridge") includes 160 single-family residences and seven multi-family buildings.

2. From 1923 to 1975, Imperial Oil Limited ("Imperial") owned and operated a petroleum refinery on lands immediately north of Lynnview Ridge. In conjunction with that refinery, Imperial owned and operated above soil storage tanks on part of the lands in Lynnview Ridge; other parts of those lands were used for a "land farm", where petroleum sludge was spread on open lands.

3. The refinery, holding tanks and land farm were decommissioned between 1975 and 1977. That decommission and clean up complied with a consultant's advice as to what was necessary, as there were no regulatory standards relating to hydrocarbon or lead contamination at that time.

4. Devon Estates Limited ("Devon"), a wholly owned subsidiary of Imperial, became the registered owner of the lands in Lynnview Ridge as a result of two transactions: one in 1972 and the other in 1979.

5. Devon and Nu-West Developments ("Nu-West") entered into a joint venture to develop the Lynnview Ridge lands into a residential subdivision, with Nu-West providing the development expertise, and Devon providing the lands. Over time, the lands were transferred to Nu-West. After the lots were developed and houses built, title was transferred to private owners. The City of Calgary granted the necessary approvals to allow the residential subdivision.

6. As a result of monitoring and testing, environmental concerns arose, largely over hydrocarbon vapours and lead found in soil samples. These came to the attention of Alberta Environment.

7. In 1997, the Canadian Council of Ministers of the Environment issued guidelines ("CCME guidelines"), which proposed that the guideline for residential exposure to lead levels in soil should be 140 parts per million (ppm). This was a more stringent level than previously used or suggested. These guidelines were adopted by Alberta Environment in the spring of 2001.

8. There were meetings involving a representative of the Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment ("Director"), Imperial, the Calgary Health Region and the City of Calgary to discuss concerns arising from the testing in Lynnview Ridge. Alberta Environment had advised both Imperial and the City of Calgary that they may have exposure under environmental regulation. The residents of Lynnview Ridge were advised of issues relating to the presence of lead and hydrocarbon vapours.

9. On May 28, 2001, a Notice of Investigation was issued by Alberta Environment advising the City of Calgary and Devon that Alberta Environment was

investigating elevated lead levels and hydrocarbon vapours in the Lynnview Ridge lands, and that further steps may be taken.

10. On June 25, 2001, the Director issued an environmental protection order ("EPO") under what are now ss. 113 and 241 of the ***Environmental Protection and Enhancement Act***, R.S.A. 2000, c. E-12 ("***Act***" ). The EPO set out three pages of "whereas" clauses containing background facts. It named Imperial and Devon as "persons responsible" under the *Act* and directed Imperial and Devon to take various steps. In general terms these included: a requirement to submit an interim report by July 4, 2001, reporting on sampling results; a delineation of the substances in the soils; the immediate short-term measures that would be taken to address the risks; a communication and consultation plan to inform and consult with the Lynnview Ridge residents; and a schedule to implement the measures. The parties were directed to submit a report containing all options to remediate the substances by July 18, 2001. The remedial options report was directed to include a detailed summary of the remedial options including: methodology for statistical analysis and sampling; the remedial criteria for soils, surface and groundwater; the results of public consultation; and a schedule of implementation. The parties were directed to implement the work set out in any remedial options report that was accepted and approved by the "manager", and to start written status reports in August.

11. On July 3, 2001, Imperial and Devon appealed the EPO to the Environmental Appeal Board (the "Board"), which is set out in the *Act* as the appeal body to hear appeals in relation to an EPO.

12. After the filing of the appeal, there were numerous communications between the Board and the various participants. The Board set the hearing of the appeal for September 12 - 14, 2001. There were issues about document production that were brought before the Board, related to production of historical documents from the City of Calgary. Intervenor applications were brought. On August 23, 2001, the Board set out the issues to be determined by the Board, and sent out letters dealing with procedures, including times for the filing of affidavits and time limits for the examination and cross-examination of witnesses at the hearing.

13. A stay was never granted by the Board in relation to the EPO, although Imperial requested one. Steps were taken by Imperial (used hereinafter to refer collectively to Imperial and Devon) to deal with the short term risks to the residents of Lynnview Ridge, and various reports were provided by Imperial to the Director. In July, the Director extended his deadlines for the remedial options report to August 16, 2001. That report was provided by Imperial, and was reviewed by the Director with a group of technical advisors. At that time, Imperial voluntarily offered to purchase the private properties in Lynnview

Ridge, and today is the owner of 135 out of 160 of the single-family houses in the subdivision.

14. On September 11 and September 12, 2001, the Director wrote two letters (collectively the "September Letters") to Imperial, that required Imperial to do numerous things. The letter of September 11, 2001 is entitled "Decision on Conceptual Framework for Remediation at Lynnview Ridge". It indicates that the Director is continuing the process established under the *Act* and the EPO to ensure that the EPO is fully complied with and remedial actions are taken at Lynnview Ridge. The letter refers to the fact that continued sampling is necessary and that a detailed direction on remedial requirements will be provided once all the information is available. There is a general requirement that the top .3 metres of soil be removed on all private property, including the "removal of soil from beneath all decks, fences, driveways, patios, sidewalks on private property, gardens, shrubs and trees." It also provides that after the completion of remediation, Imperial shall restore all private residential property to its pre-disturbance condition to the satisfaction of the property owner. The September 12, 2001 letter was a follow up to the September 11letter, and dealt with a specific home, the requirement to submit a plan for the installation of sub-slab depressurization systems and the development of a Community Protection Plan.

15. The September hearing was adjourned and rescheduled for October 16-18, 2001. It proceeded on those dates. Imperial had filed a notice of appeal in relation to the September Letters, and this was the subject of submissions to the Board. The Board indicated that it would not allow an appeal of the September Letters, but would add another issue to the appeal, stated as follows: Is the EPO reasonable and sufficiently precise in the circumstances up to the date of the hearing?

16. In a letter dated December 12, 2001, the Board set the dates for the continuation of the hearing as February 5-6, 2002. That hearing occurred as scheduled. Written submissions were completed on March 21, 2002.

17. By letters dated March 19 and 26, 2002 (collectively the "March Letters"), the Director required further action by Imperial dealing with remedial requirements, and that steps be taken under the Community Protection Plan submitted by Imperial.

18. On April 1, 2002, Imperial asked the Board to allow them to appeal the March Letters, or for the Board to re-open the hearing to deal with them. Further written submissions were requested and received on this issue. The Board merely recommended that the Director and Imperial have an "adaptive

dialogue" and that either party could apply to the Board for a "reconsideration" of the EPO in light of the March Letters.

19. On May 21, 2002, the Board provided its Report to the Minister. The Report recommended that the EPO be confirmed, but varied to indicate that all work under the EPO shall be performed to the satisfaction of the Director, and that the EPO be interpreted such that the removal of soil under driveways, patios and sidewalks would not be required where they provide an effective barrier to lead in the soil. These latter two requirements arose from the September Letters. Further, the Board recommended that the Director be ordered to continue to require compliance with the EPO, and if new evidence supports it, to give consideration to applying the procedures under the *Act* relating to contaminated sites.

20. On July 22, 2002, the Minister issued his decision. He ordered the Director to require compliance with the EPO (without mentioning the modifications recommended by the Board), and if new evidence permits it, to give due consideration to applying the procedures related to contaminated sites.

21. Imperial filed an Originating Notice for this Judicial Review on September 24, 2002.

## ISSUES

[3] The issues in this Judicial Review are as follows:

1. The scope of the participation of the three named Respondents: the Minister, the Board and the Director;

2. The admissibility of the affidavit of Mr. Dedesko;

3. The standard of review;

4. Whether the Minister committed a reviewable error by allowing the use of s. 113 dealing with the release of a substance, instead of s. 129 dealing with contaminated sites;

5. Factors affecting procedural fairness;

6. Whether there was a breach of natural justice or procedural fairness by the Minister in relying on a Report from the Board, whose process Imperial alleges:

   a) restricted and denied cross-examination,

b) provided for an unreasonable process in the document exchange,

c) withheld reasons on the stay and intervener decisions.

d) allowed hearsay evidence by Dr. Friesen, and/or

e) put the onus at the hearing on Imperial;

7. Whether there was a breach of natural justice or procedural fairness by the Minister by:

a) failing to notify Imperial of his consideration of the Board's Report and failing to allow them to make submissions,

b) considering exhibits from the Board's hearing, but not the transcripts of the evidence, and/or

c) failing to provide reasons for his decision;

8. Whether the manner in which the Minister or the Board dealt with the September Letters resulted in procedural unfairness or a reviewable error by:

a) denying Imperial a right of statutory recourse (the ability to appeal the letters),

b) allowing the Director to delegate satisfaction for remedial work to the residents, and/or

c) allowing the Director to require, in a letter, the replacement of dirt to a certain remedial standard and under certain semi-permanent structures.

## ISSUE 1 - THE SCOPE OF THE PARTICIPATION OF THE RESPONDENTS

[4] Imperial raised an issue in relation to the scope of participation of the Director and the Minister in this judicial review. At the hearing, it did not dispute the ability of the Board to participate to the extent set out in the Board's brief. Imperial took the position that the Director should not make any representations, other than to answer questions the Court may have on specific areas, as its decision was not under review. Imperial also argued that there should be restrictions placed on the Minister. Argument was heard and an oral ruling made, with these written reasons to follow.

## 1. Decision

[5] The oral decision was that the Director and the Minister could participate at the hearing in the following areas:

a) to make representations about the statutory framework;

b) to speak to what have loosely been referred to as issues of "jurisdiction": the comparative use of s. 113 or s. 129 under the ***Act***, and issues about the meaning and scope of a letter after an EPO;

c) where natural justice issues were raised, to speak to the policy behind, and the reason for, the process used by the Director or the Minister, if that was a general practice of the Director or Minister and not just specific to this case; and

d) to provide any input that may be helpful in applying the ***Baker***, *infra* or ***Pushpanathan***, *infra*, factors in coming to a standard of review of any decision at their level, and to deal with the appropriate level of procedural fairness.

[6] The oral direction was that it was not suitable for the Director or the Minister to jump into the fray and be specific regarding the facts of this case, in terms of defending any decision made, where the comments did not fit into the above four categories.

## 2. Reasons

[7] Historically, there has been *dicta* in cases that suggests that a body whose decision is under review should be restricted to producing its record and making submissions on very restricted areas.

[8] These restrictions are best illustrated in discussion by the Supreme Court of Canada in the cases of ***Northwestern Utilities Ltd. v. City of Edmonton***, [1979] 1 S.C.R. 684 and ***CAIMAW v. Paccar of Canada Ltd.***, [1989] 2 S.C.R. 983. Those cases limited standing to referencing the record before the board at issue, and making representations in relation to jurisdiction (that the jurisdiction was not lost through a patently unreasonable interpretation of powers). Estey J. in discussing this at pp. 708-709 of ***Northwestern***, pointed out that an applicant may have to, on another day, submit to the same board, and the board's impartiality should not be impugned by aggressive participation in a judicial review.

[9] La Forest J. in ***Paccar***, however, at p. 1016, approved of the concept that when the issue is whether a decision was reasonable, there are policy reasons in favour of having the tribunal make submissions, as it can draw the attention of the courts to important matters, specific to the jurisdiction or expertise of the tribunal.

[10] Practically speaking, the participation of a tribunal in a judicial review has to be fashioned by reference to the structure of the body whose application is under review, and the issue being reviewed. For instance, if a body is the arbitrator between two opposing parties, and one party appeals, it makes sense that such a board would merely provide a record, and have less participation, as one would expect the two opposing parties to adequately raise the issues. There would still be a role, however, for that body to explain its constituent legislation, any policies or workings of the tribunal that bear on the issues, and to make submissions on its jurisdiction, if that was in issue. This should be done without favouring, or presenting arguments on behalf of, either of the two sides. If a body persisted in taking a side in such a judicial review, it would risk receiving the type of criticism that Mahoney J.A. directed to the labour board in the case of ***Ferguson Bus Lines Ltd. v. ATU, Loc. 1374*** (1990), 68 D.L.R. (4th) 699 ( F.C.A.) at pp.702 -703, leave to appeal to S.C.C. refused (1991), 74 D.L.R. (4th) viii.

[11] In the situation where a government body actively starts a process and makes an order or directive, and the recipient asks for judicial review of that order, different considerations are present. To allow that body only to file the record may result in the Court not having the benefit of the institutional knowledge of that body, which is charged with the administration of certain legislation. It is incorrect to suggest that an applicant would be able to bring forth that information. This was the circumstance being considered by Slatter J. in ***Skyline Roofing Ltd. v. Alberta (Workers' Compensation Board)*** (2001), 292 A.R. 86 (Q.B.). He was considering a statutory regime where there was a board, (the decision maker) and an appeals commission. He held that in the type of regime before him, it should be the board that justifies its policies and decisions, and the appeals commission should maintain impartiality. The latter was entitled to appear to argue jurisdictional issues relating to it, such as the standard of review to be applied, the question of its expertise and the jurisdiction of the appeals committee to hear the appeal. I agree with the reasoning in that case.

[12] It is noteworthy that with the functional and pragmatic approach, the Supreme Court of Canada has provided factors that this Court must consider to decide the level of review. The cases of ***Baker***, *infra* and ***Pushpanathan***, *infra*, require that certain information be considered that can only be provided by the body under review, such as the expertise of that body. Administrative bodies may also have submissions to make about policies and the workings of that body that is particular to them. They must have standing to allow a court to have the information to make a proper determination on the factors set out by the Supreme Court of Canada.

[13] That the courts should take a more pragmatic and functional approach in deciding the scope of the participation of tribunals involved in a judicial review is the subject of an article by Laverne Jacobs and Thomas Kuttner "Discovering What Tribunals Do: Tribunal Standing Before the Courts" (2002), 81 Can. Bar. Rev. 616. Those authors review various decisions, and demonstrate that courts are starting to define the participation of various bodies, relying more on the type of legislation, the nature of the dispute, the type of challenge that is being raised and practicality.

[14] This case, due to the type of legislation and the nature of the dispute, involves the decision making process at all levels: the Director, the Board and the Minister. It requires an approach crafted for its circumstances. As a result, the Director does have standing and the ability to speak to the statutory regime, jurisdictional issues in relation to it and factors that may apply in terms of the standard of review. Although it is not directly his decision that is under review in this case, one cannot review the Minister's decision without reference to the statutory framework, the jurisdiction and decisions taken by the Director and the Board's process through to its recommendations to the Minister.

[15] The Board, as an appeal board, should be restricted to comments about its jurisdiction, the standard of review, and its policies and procedures in general, where those are under attack. It is not to justify the correctness of its recommendations to the Minister or to enter the fray on natural justice issues. It is entitled to explain, for example, whether it sets limits on cross-examination in every case and why.

[16] The Minister, whose decision is directly under review, can likewise make comments on jurisdiction, expertise, the level of review, and if relevant, the general way in which the Minister receives and reviews decisions of the Board.

[17] All levels are restricted from making comments about their respective decisions, in terms of justifying them, or entering the "fray" with Imperial. By way of illustration, in the natural justice issues arising from the Board's hearing, the restrictions on cross-examination in this case or the hearsay evidence by Dr. Friesen should not be discussed in their specifics in the argument by the Board.

[18] In summary then, the three separate bodies - the Director, the Board and the Minister - have standing. The complex legislative regime set out in the *Act* is reviewed below, and is relevant in this decision. Although all three entities may be rooted in the "Crown", the statutory regime gives them each specific powers and roles. Imperial has raised issues about the performance and jurisdiction of all three and has named all three as Respondents. They all have standing but must keep a pragmatic and functional focus on their representations.

## ISSUE 2 - THE ADMISSIBILITY OF THE AFFIDAVIT OF MR. DEDESKO

[19] Mr. Dedesko, an employee of Imperial, swore an affidavit on September 23, 2003, which Imperial wished to be evidence before the Court conducting the judicial review. It dealt with communications between the Director and the residents of Lynnview Ridge, and communications between the Director and Imperial around the time the decision of the Minister was made public. Imperial takes the position that this is evidence of the ongoing use of letters after the EPO, much as the September and March Letters were.

[20] The Respondents take the position that this is fresh evidence, and there is no basis for it to be introduced at the judicial review; the review is to be based on the record.

[21] Affidavit evidence is not generally admissible in a judicial review, unless there are certain exceptional circumstances. These depend on the facts of the case, but generally deal with issues where there is a need to demonstrate facts that would be outside of the record.

[22] The affidavit evidence here relates to letters sent to the residents and communication between Imperial and the Director since the EPO and the September and March Letters. As it does not fall within one of the permitted exceptions, and adds no information that is important or relevant to the issues of this judicial review, I am not allowing this affidavit to be admitted or used in the context of this application.

**ISSUE 3 - THE STANDARD OF REVIEW**

[23] Judicial review requires that there be a determination of the standard the reviewing court will apply. The Supreme Court of Canada in the case of ***Pushpanathan v. Canada (Minister of Citizenship and Immigration)***, [1998] 1 S.C.R. 982 set out the factors for a court to consider. It introduced the pragmatic and functional approach to choose the appropriate standard. That standard is located on a spectrum that ranges from the most deferential standard of patent unreasonableness, through reasonableness at the mid-point, to correctness at the more exacting end.

[24] Bastarache J. in ***Pushpanathan*** outlines an analysis that is important to any consideration of the standard of review, as the standard of review may be different where more than one provision is being reviewed. He stated that the central inquiry in determining the standard of review is the legislative intent of the statute creating the tribunal whose decision is being reviewed. He quotes Sopinka J. in the case of ***Pasiechnyk v. Saskatchewan (Workers' Compensation Board)***, [1997] 2 S.C.R. 890 at para. 18 where he said:

> Was the question which the provision raises one that was intended by the legislators to be left to the exclusive decision of the Board?

[25] Bastarache J. went on to point out that there is a weighing of several factors, none of which is alone dispositive. He divided these into four categories; the presence of a privative clause; the expertise of the tribunal; the purpose of the act and the provision in particular; and the nature of the problem. Some general comments about these factors will be made in this section. The actual analysis has to be done with the focus being on the particular, individual provision being reviewed.

[26] It is important here also to discuss what Bastarache J. said in ***Pushpanathan*** about "jurisdictional issues". He was careful to point out that "jurisdictional" language is now replaced by the pragmatic and functional approach. That term has no magic under the new approach. It is only if the outcome of the pragmatic and functional approach finds the standard of review is correctness (i.e. that no deference is shown) that it may then be labelled a jurisdictional issue. This is important as the labelling "jurisdictional issue" does not happen first, and then correctness follows as the level of judicial review. Several submissions were

made by Imperial to suggest that some issues were "jurisdictional", and thus the level of review was automatically correctness. This is not a correct analysis since the advent of the pragmatic and functional approach articulated in the ***Pushpanathan*** decision.

[27] Why canvass some of the "***Pushpanathan*** factors" in general? Because many of the same considerations arise when applying the factors to each individual provision, and some general discussion of them will avoid duplication.

### 1. Privative Clause

[28] The presence of a full privative clause is compelling evidence that the court ought to show deference to the tribunal's decision, unless other factors indicate the contrary. There is no question this *Act* has a full and strong privative clause, but interestingly, only in relation to a decision of the Board or the Minister. Section 102 provides:

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

[29] This is a strong indicator that where under the *Act* the Board or Minister is empowered to do something, great deference should be shown by a court.

### 2. Expertise

[30] This has been described as the most important of factors to be considered, both in ***Canada (Director of Investigation and Research) v. Southam Inc.***, [1997] 1 S.C.R. 748, and by the comments on page 1007-8 of ***Pushpanathan***. A court must characterize the expertise of the tribunal, consider its own expertise relative to that of the tribunal, and consider the nature of the specific issue before the administrative decision-maker relative to the expertise. The criteria of expertise and the nature of the problem are closely interrelated. Once a broad relative expertise has been established, the court has sometimes been prepared to show considerable deference, even where the instrument being interpreted is the tribunal's constituent legislation (***Penzim v. British Columbia (Superintendent of Brokers)***, [1994] 2 S.C.R. 557), or where the question is a question of law within the tribunal's area of expertise (***Moreau-Bérubé v. New Brunswick (Judicial Council)***,[2002] 1 S.C.R. 249.

### 3. Purpose of the Act

[31] The purpose of the legislation in question, and the provision in particular, must be considered. The principle is that where the purposes of the statute and of the decision maker

are conceived not primarily in terms of establishing rights as between parties, or as entitlements, but rather as a delicate balancing between different constituencies, then the appropriateness of court supervision diminishes. It is recognized that a polycentric issue (one that involves a large number of interlocking and interacting interests and considerations) leans towards judicial deference.

[32] The purpose of this *Act* is clear; the legislature chose to set that out in s.2. It states that the purpose of the *Act* is to support and promote the protection, enhancement and wise use of the environment while recognizing ten factors, ranging from the protection of the environment, to the need for Alberta's economic growth and prosperity.

[33] It is also useful here to consider the framework of the *Act*. It has several separate parts dealing with: the environmental assessment process; approval and registrations; the release of substances; conservation and reclamation; potable water; hazardous substances; and pesticides. In general, Directors are given various powers, be it requiring an assessment for a project or making an order after a release of a pollutant. Part 4 of the *Act* sets up the Board to hear appeals from specific enumerated decisions, arising out of a number of different parts of the *Act*. Section 94 requires the Board to conduct a hearing of the appeal if a notice of appeal is filed under the *Act*. The Board can set its own process; it is given the right to establish its own rules and procedures.

[34] The *Act* gives the Board the right to make decisions in some situations, and in some situations it must give a report to the Minister, including its recommendations and the representations of the parties or a summary of those. In the latter situation, s. 100 (1) allows the Minster to confirm, reverse, or vary the decision appealed, make any decision that the person whose decision was appealed could make, and make any further order that the Minister considers necessary for the purpose of carrying out the decision.

### 4. The Nature of the Problem

[35] A determination must be made as to whether the problem is one of an issue of law, or whether it involves questions of mixed law and fact. Bastarache J. points out that deference on findings of fact is given because of the "on the spot" advantage enjoyed by the primary finder of fact. Less deference is given on questions of law, especially if the finder of fact has not developed a particular familiarity with the issue of law. This distinction, however, is not always clear when specialized boards are asked to make difficult or complicated findings of fact and law. The mandate of the board, and any coherent body of jurisprudence it has developed, may be of such integrity that even if the court does not agree with the interpretation, it defers to that interpretation.

## ISSUE 4 - WHETHER THE MINISTER COMMITTED A REVIEWABLE ERROR BY ALLOWING THE USE OF S. 113 INSTEAD OF S. 129

[36] Imperial argues that the Minister erred in accepting the recommendation of the Board that the Director was allowed to apply s. 113 in this situation. Imperial further argues that the Minister had no jurisdiction to uphold the EPO, as only the contaminated sites division of the *Act* is permitted to apply to sites contaminated before the existence of the *Act*. It is Imperial's position that in upholding the EPO under s. 113, the Minister applied the section retrospectively to the existence of substances on the Lynnview Ridge lands, contrary to the *Act* and general protections against the retrospective application of legislation. Imperial urges that this issue is jurisdictional, and curial deference should not be extended to questions of the limits on the Minister's jurisdiction.

### 1. Standard of Review

[37] The starting place on judicial review is to apply the four factors identified in ***Pushpanathan*** to the decision at issue here to determine the appropriate level of review. Considering the first factor, the privative clause suggests a high level of deference to a decision of the Minister. In relation to the second factor, the nature of the expertise has to be considered, with reference to the specific problem. Here, it is fair to look at the statutory scheme and recognize that a specialized board is empowered to have a hearing, and make recommendations to the Minister. One then can look at the expertise of the Board, as the appellate body, as well as the general expertise of the Minister. The Board has a scientific expertise in reviewing decisions of the Director. The expertise of the Minister in this scheme is to bring his knowledge of the political pressures to bear on the final decision. Balancing the wide and often conflicting interests as are set out in the purpose of the *Act* is a decision for which a Minister has qualifications and expertise by virtue of his or her position.

[38] Reviewing the third factor, the purpose of the *Act*, it is polycentric by the stated legislative intention. The application of s. 113 or s. 129 involves consideration of the release, its timing, its effects, responsibility for that release, responsibility for the cost of clean up, and the means by which it is to be cleaned up. The fourth factor involves looking at the nature of the problem. This is a question of mixed fact and law, as one not only deals with the interpretation of the legislation, but also a determination of facts in order to decide if the release fits in the legislative words.

[39] Having reviewed these four factors, the appropriate level of review of the Minister's Order on this question is that of "patent unreasonableness".

[40] The appropriate level of review of the Minister of the Environment in exercising his powers under the *Act* has been the subject of consideration in several cases in Alberta. The level of review in those cases is helpful, in terms of analysis, but as it is section and situation specific, it is not automatically the same in each case. Patently unreasonable has been the level of review applied in ***McCain Foods Ltd. v. Environmental Appeal Board (Alta)*** (2001), 291

A.R. 314 (Q.B.); ***Legal Oil and Gas Ltd. v. Alberta (Minister of Environment)*** (2000), 265 A.R. 341 (Q.B.); ***Fenske v. Alberta (Minister of Environment)*** (2000), 303 A.R. 356 (C.A.); and ***McColl - Frontenac Inc. v. Alberta (Minister of the Environment)*** 2003 ABQB 303.

**2. Analysis of the Issue**

[41] Imperial argues that in this fact situation, s. 129 is the only section that applies. The argument is that s. 129 is in a part of the *Act* that specifically deals with the release of substances on contaminated sites. Imperial suggests that this is the section that was crafted by the legislature to deal with historic releases, and to apply s. 113 is allowing the section to be applied retrospectively, which is against the rules of statutory interpretation.

[42] For the purposes of this judicial review, Imperial does not contest that the lead and hydrocarbons (the substances) on the Lynnview Ridge lands originated from the refinery and its related operations. Its argument is that the substances have been there since 1977, so there has been no release of substances since then.

[43] The word "release" is defined in s. 1(hhh) of the *Act* to include:

> to spill, discharge, dispose of, spray, inject, inoculate, abandon, deposit, leak, seep, pour, emit, empty, throw, dump, place and exhaust.

[44] Part 5 of the *Act* is entitled "Release of Substances". It is divided into two divisions. Division 1 is entitled:" Releases of Substances Generally". Section 113 falls under Division 1 and states:

> 113(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

Division 2 of Part 5 is entitled "Contaminated Sites". It commences with an application section, s. 123, which reads as follows:

> 123 This Division applies regardless of when a substance became present in, on or under the contaminated site.

[45] Division 2 of Part 5 gives the Director the power to designate an area of the environment as a contaminated site, if he or she is of the opinion that there is the presence of a

substance that may cause, is causing or has caused a significant adverse effect. It requires him or her to give notice to the owner, any other person responsible for the contaminated site and the local authority of the municipality in which the site is located. Section 129 allows the Director, where he or she has designated a contaminated site, to issue an environmental protection order. In doing so, it requires the Director to consider eight factors which are enumerated in the *Act*: when the substance became present; the circumstances and knowledge of the substance when a person obtained ownership (in the case of a previous owner); the care taken by the person responsible; and the industry standards at the time are some of these factors. It allows the Director the same powers as in s. 113. It allows the Minister to pay compensation to any person who suffers loss or damages as a direct result of the application of the Division.

[46] There is no question that Division 2 allows a comprehensive regime to deal with contaminated sites. The *Act* gives a right of appeal to the Board from the designation of a site as contaminated, as well as from any direction under s. 129 (4). It also requires the Director to be of the opinion that there is a "significant adverse effect", as opposed to the "adverse effect" required for s. 113. The definition of "person responsible for the contaminated site" casts a much wider net than the definition of "person responsible for the substance". Imperial argues that it loses the possibility of sharing the costs of the clean up, and the higher standard of a "significant adverse effect", when s. 113 is used in relation to Lynnview Ridge, as opposed to s. 129. Imperial takes the position that it complied with the accepted norms of clean up at the time the refinery was decommissioned, and points out that this factor is one that is to be considered by the Director under s. 129(2)(e). Imperial also argues that the factors outlined in s. 129(2) seem to introduce a consideration of the overall fairness of requiring each person to bear all or part of the costs of the clean up of the site.

[47] Section 113 does refer to a release of a substance that "has occurred" and "has caused, is causing or may cause" an adverse effect. There was much argument by the parties as to whether that covered a release in the far past, or was only to cover a recent release, but one that had happened by the time the Director was notified. The language in itself does use the past tense. It is a reasonable interpretation of the language that s. 113 can deal with a present or ongoing effect of a past release.

[48] There is a general principle of statutory interpretation that a statute will not be applied retrospectively, unless there is express wording in the legislation that it is meant to be so applied. This general principle has been tempered by the considerations in ***Brosseau v. The Alberta Securities Commission***, [1989] 1 S.C.R. 301 which held that the presumption may not be applicable to statutes that impose a penalty for a past event, if the purpose is not to punish offenders, but to protect the public, even though they may incidentally impose a penalty on a person related to a past event. The *Act* here, although it does have the ability to impose penalties, is predominately a protective statute, with its aim to protect the environment and the health of Albertans, while facilitating economic development.

[49] Caution has to be used when talking about retroactive application of legislation. R. Sullivan, ed. ***Dreidger on the Construction of Statutes***, 3d ed. (Toronto: Butterworths, 1994) at p. 517 says the following:

> Legislation clearly is retroactive if it applies to facts all of which have ended before it comes into force. Legislation clearly is prospective if it applies to facts all of which began after its coming into force. But what of ongoing facts, facts in progress? These are either continuing facts, begun but not ended when the legislation comes into force, or successive facts, some occurring before and some after commencement. The application of legislation to ongoing facts is not retroactive because, to use the language of Dickson J. in the ***Gustavson Drilling*** case, there is no attempt to reach into the past and alter the law or the rights of persons as of an earlier date. The application is prospective only to facts in existence at the present time. Such an application may affect existing rights and interests, but is not retroactive.

[50] The Board dealt with this argument at some length in its report to the Minister. The Board reviewed and acknowledged the differences between s. 113 and s. 129, at pp. 11 - 19 of its report and set out the proposition that the Director has a discretion as to the section under which he chooses to proceed. At pp. 27 - 46 it reviewed the issue of whether applying s. 113 involves a retrospective application of the *Act*. The Board pointed out that the concern of the Director is the ongoing presence of the substances and their present adverse effects. It does not accept it is entirely retrospective.

[51] When I review the detailed analysis of the Board, which is the basis of the recommendations to the Minister, and I consider the wording of the *Act* (which uses past language in s. 113) as well as the broad legislative scheme, I do not find that the decision of the Minister on this point was patently unreasonable. I note that Marceau J. dealt with a similar argument and came to a similar conclusion in the case of ***McColl-Frontenac Inc. v. Alberta (Minister of the Environment)***, *supra*, which decision was rendered after the oral argument in this case.

## ISSUE 5 - FACTORS AFFECTING PROCEDURAL FAIRNESS

[52] Evaluating procedural fairness, or issues of natural justice, does not involve the appropriate standard of judicial review. The former goes to the substance of the decision. Procedural issues go to the process by which a decision is reached. Judicial review of procedural fairness requires an assessment of the procedures and safeguards in a particular situation. As a substantial number of allegations were made by Imperial that it was denied procedural fairness, both at the Ministerial and the Board level, the general rules in relation to procedural fairness must be considered, and then those principles applied in relation to the specific allegations before this Court in this judicial review.

[53] The leading case from the Supreme Court of Canada on this topic is the case of ***Baker v. Canada (Minister of Citizenship and Immigration)***, [1999] 2 S.C.R. 817. That case made it clear that once a duty of fairness arises, the content of what this entails has to be decided in the specific context of each case. L'Heureux-Dubé J., speaking for the Court, set out at paragraph 22 criteria to consider in determining what procedural rights the duty of fairness would require to:

> ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

And at paragraph 28:

> The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

[54] Five factors were identified to aid in determining the content of the duty of fairness: the nature of the decision and the process followed; the nature of the statutory scheme; the importance of the decision to the individual affected; the legitimate expectations of the person challenging the decision; and the choices of procedure made by the agency itself. This list of factors is not exhaustive.

### 1. The Nature of the Decision

[55] The more the process provided for resembles judicial decision making, the more likely the procedural protections required will approximate the trial model. Thus, in looking at steps taken by the Board, which has a hearing process, the higher the need for procedural fairness. In looking at the process of the Minister, this factor would suggest less need for procedural fairness.

### 2. The Nature of the Statutory Scheme

[56] The role of the decision in the statutory scheme and surrounding indications in the statute help determine the content of the duty of fairness. Greater protections are required when there is no appeal procedure or the decision is determinative of the issue.

[57] Here, the statutory scheme is complex. It provides that a Director may make decisions. Some of those decisions can be appealed to the Board. The *Act* requires the Board to have a hearing (with oral or written submissions, at its discretion). The *Act* requires the Board to set its own procedure. There are specific regulations dealing with the Board. Alta. Reg. 114/93

goes into express detail about the notice and procedure before the Board. Examples of the type of detail are illustrated by the requirements that the Board give each party an opportunity to direct questions to the other at an oral hearing and provide each party an opportunity to give closing remarks at an oral hearing. The Regulations go into detail about the report and recommendations to the Minister required under ss. 98 and 99: it must contain a summary of the evidence, a statement of the issues to be decided, the recommendations and the reasons.

[58] It is clear that the statutory scheme anticipated a hearing before a Board to canvass clearly delineated issues. The Board is given the express power in s. 95(2) to determine the issues and the matters properly before it. The *Act* gives criteria for the Board to apply in that determination. A full report is to be provided with recommendations to the Minister. There is no appeal from the decision of the Minister, tending toward a higher degree of procedural fairness.

### 3. The Importance of the Decision

[59] The more important the decision to the lives of those affected, and its impact on those persons, the more stringent the procedural protections that are required. This is a significant factor. Although this often applies to issues such as the liberty, or the financial security, of individuals, it also applies to corporations. Here the decision has enormous economic cost to Imperial. It also has the potential to affect the health of the residents.

### 4. The Legitimate Expectations of Imperial

[60] If the party challenging the decision has a legitimate expectation that a certain procedure will be followed, that procedure will be required by a duty of fairness. This has also been extended so that if a claimant has a legitimate expectation that a certain result will be reached, fairness may require more extensive procedural rights than would otherwise be accorded. The latter proposition derives from the concept that decision makers should not be able to backtrack on substantial promises, without according significant procedural rights.

[61] Here, Imperial did not suggest it had a legitimate expectation of result. It argued, however, that it had a legitimate expectation that the contaminated sites provisions would be used. Imperial submitted that this expectation was based on a report made by the Contaminated Sites Implementation Advisory Group in 1994. This was a group which reported to the Minister. The report resulted in Alberta Environment issuing, in April 2000, a document entitled: "Guidelines for the Designation for Contaminated Sites Under the Environmental Protection and Enhancement Act". An employee of Imperial sat on the committee. Imperial feels that this fact situation better fits into the contaminated sites section of the *Act*, which forces the Director to consider more factors, and potentially look to more pockets to pay the cost of clean up. There was no suggestion that there was any specific representation by the Minister or a government official to Imperial as to procedure or result. There is nothing in the report or policy that suggests the contaminated sites provisions have to be used in this type of

situation, or that s. 113 would not be used where the contaminated sites provisions may also be applicable.

[62] Imperial also argued that it had a reasonable expectation that the CCME guidelines for lead in soil would be applied in the context of their own parameters, which indicate that they are site specific. Imperial argues that the Director ignored the site specificity, and simply chose 140 ppm. as a remediation standard.

[63] The Supreme Court of Canada, in the case of ***Moreau-Bérubé*** considered an argument about reasonable expectations. The appellant judge there argued that she did not understand she could be removed from the bench, particularly in light of the findings of fact and recommendation of the inquiry board. Arbour J. at paragraph 78 stated:

> The doctrine of reasonable expectations does not create substantive rights, and does not fetter the discretion of a statutory decision-maker. Rather, it operates as a component of procedural fairness, and finds application when a party affected by an administrative decision can establish a legitimate expectation that a certain procedure would be followed. [Citations omitted.]

### 5. Choices of Procedure

[64] The choices of procedure made by the agency are important, particularly here, where the statute leaves to the decision maker the ability to choose it own procedure, or when the agency has an expertise in determining what procedures are appropriate. Weight is to be given to the choice of procedure made by the agency and its institutional constraints.

[65] These concepts then, have to be applied when looking at each specific complaint about procedural fairness. The complaints of Imperial are grouped and examined at the level they are complained about; some are alleged to have occurred at the Board level, and some at the Ministerial level.

## ISSUE 6 - WAS THERE A BREACH OF THE DUTY OF PROCEDURAL FAIRNESS BY THE MINISTER AS A RESULT OF RELYING ON THE PROCESS BEFORE THE BOARD?

[66] Where the alleged breaches of procedural fairness or natural justice are at the Board level, the ***Baker*** factors have to be applied to that hearing. If there is a failure to provide procedural fairness at that level, it may lead to the process being impugned at that level and the decision of the Minister being *ultra vires*. It may be possible to remedy a procedural fairness breach by the Board at the Minister's level if the Minister shows he or she was cognizant of the breach and responds in a way to cure the defect: ***McColl-Frontenac*** at paragraph 17.

## 1. Cross-Examination Issues

### i) Restriction Argument

[67] Imperial complains that the Board severely restricted the time allotted to the parties to cross-examine at the hearing. In a letter circulated before the first hearing, the Board set time lines of one hour and 45 minutes for Imperial to present direct evidence, 50 minutes to cross-examine the Director, 20 minutes to cross-examine each opposing party and one hour to present rebuttal evidence. At the continuation of the hearing in February 2002, the Board, in advance, by letter, set time limits for Imperial of two hours on presentation of direct evidence, one hour on cross-examination of the Director, 20 minutes of any party opposing and 25 minutes to present rebuttal evidence.

[68] It is important to note from the record that other parties had more stringent restrictions, and all parties were to provide affidavit evidence pre-hearing and provide written argument post-hearing. At the hearing, on a number of occasions Imperial asked for more time to cross-examine, and that time was granted (see the return volume 7, pp. 30, 31, 69, 448-455 and volume 9, pp. 885, 923, 924, and 936 for examples). Imperial argues that this is not the point. It was forced to prepare for those time frames and thus could not properly cross-examine. At the judicial review, Imperial did not point out areas on which it wished to cross-examine in more detail, or instances it asked to cross-examine more and was denied, rather it relied on a general argument that, in light of all the background, circumstances, and the complexity of the issues, this was not sufficient time.

[69] Applying the *Baker* tests, the process of the Board is close to a trial process, with more abbreviated procedures for the presentation of oral evidence and cross-examination. There is no appeal. This is the "hearing" of the issues, and the chance for parties to test evidence. The decision is important to Imperial monetarily, but this is not an issue of liberty or freedom. No legitimate expectations came into play as Imperial knew before both hearings of the time limits being imposed by the Board. The *Act* here allows the Board itself to make decisions about its process and limitations on procedures, particularly if it requires oral evidence.

[70] I am unable to say that the general application of the restriction of time on cross-examination in this circumstance is a denial of natural justice. Every tribunal, including the court, has the ability to limit cross-examination. The limitation of cross-examination, to be a denial of natural justice, arises generally from questions that are asked and are denied, or requests to explore certain areas that are denied, that go to important issues. Here, the transcript indicates that when there was a request to spend more time on a witness, it was generally allowed. Although there may be circumstances where time restrictions on cross-examination made before the start of a hearing render a party incapable of completely dealing with the issues, I am not satisfied on the transcript and argument before me that this happened in this case.

### ii) Denial Argument

[71] Imperial argued that at the February hearing, it was denied the ability to examine Dr. Friesen as his evidence related to issue five. Dr. Friesen had presented evidence at the October hearing, and was cross-examined on that evidence. After that hearing, when issue five was delineated by the Board (this being the issue of the breadth of the EPO, in light of the September Letters), the Calgary Health Region (CHR) filed a brief which indicated it relied on the testimony of Dr. Friesen given before the Board at the October hearing. Imperial argues it had no opportunity to cross-examine Dr. Friesen in relation to issue five and it was denied the opportunity to do so in February.

[72] At the February hearing, the CHR did not put up Dr. Friesen, but rather Dr. Lambert presented oral evidence. The Chairman did request that Dr. Friesen join the panel to answer some questions the Board had, and invited Imperial to cross-examine Dr. Friesen. After an interchange found in the return in volume 9, pp. 1261-1268, Imperial was allowed to cross-examine Dr. Friesen but not on his evidence given in October, and only before the Chairman asked him questions.

[73] This procedure is irregular. The importance of Dr. Friesen's evidence, and how material it is in the final result has to be considered. There is nothing to suggest Dr. Friesen gave important evidence in the October hearing that could later be applied to issue five. The Board in its reasons does not reference or rely on Dr. Friesen's evidence in their discussion of issue five. Further, although the CHR stated that they were relying on Dr. Friesen's evidence, their major witness was Dr. Lambert who was cross-examined by Imperial. This is not the type of denial to allow cross-examination that is referenced in the cases of ***Innisfil (Township) v. Vespra (Township)***, [1981] 2 S.C.R. 145 or ***Emery v. Workers' Compensation Board Appeals Commission (Alta)*** (2000), 274 A.R. 331 (Q.B). As a result, I am unable to say that an inability to cross-examine Dr. Friesen on issue five is a breach of natural justice in this case.

### 2. Document Exchange Issues

[74] Generally, the Board does not become embroiled in document exchange issues, as there is a return filed by the Director, and the parties have the documents that are relevant. Here, because of the historic nature of the refinery, the approval of the City of Calgary of the subdivision, and the fact the City of Calgary was originally being evaluated by the Director as a possible person responsible, Imperial was eager to have document production that went back many years.

[75] In fact, the document production was something about which the Board asked for written submissions in setting their procedure. The Board rendered two written decisions dealing with documents. The first one was on August 24, 2001 when the Board wrote the parties a letter indicating it should hear the evidence currently available, and then hear arguments about the documents still needed. It felt only then would it make a proper decision in relation to the request, which was a request for historical documents that could be onerous

to fulfill. Imperial asked the Board to reconsider that decision, and it did so and gave written reasons on October 26, 2001. It held to its decision. The October hearing was adjourned, to allow issue five to be dealt with and to allow Imperial and the City of Calgary to resolve document production issues. Those two parties entered into a mediated, written agreement in relation to document production. It allowed both the City and Imperial to provide submissions and responses to the Director regarding these documents, and for the Director to review the documents and submissions, with a view to reconsidering the issue of whether the City of Calgary was a person responsible. The Board rendered its second decision on document production on December 10, 2001. It was 52 pages in length and dealt with witnesses and documents that it wished Imperial, the City of Calgary and Alberta Environment to produce.

[76] The complaint of Imperial is that it did not receive the documents from the City of Calgary in a timely manner. It received some of the historical documents in a binder on October 15, the night before the first hearing commenced. It states it did not have all of the documents before the start of the first hearing.

[77] The Respondents argue that accommodation was made for document production. It was understood that due to the historic nature of many documents that the search would take time, and there were a number of factors driving an early date for hearing, including the wish of Imperial to have an expedited hearing. It was argued that the Board accommodated this by providing that if documents came to light that bore on issues one to four after the October hearing, they could be submitted to the Board for its consideration, and addressed in written argument. The document disclosure was completed by the second hearing.

[78] When I review the issues surrounding document production, that these documents dealt mainly with the issues of the involvement of the City of Calgary, that it was left open to parties to submit documents of relevance after the October hearing which could be dealt with in argument, and consider this in conjunction with the factors in the *Baker* analysis, I am not persuaded that the way the documents were handled was a denial of natural justice in the circumstances of this case.

### 3. Withholding or Delay in Providing Reasons

[79] It was argued by Imperial that the Board withheld or delayed giving written reasons, which prejudiced Imperial. On October 19, 2001 the Board refused to grant a stay of the September Letters after receiving written submissions. The written reasons were to follow. Reasons were not issued until July 23, 2002, after the Board's recommendations were issued to the Minister, and one day after the Minister issued his decision. Imperial submits that this withholding of reasons for over a year was a denial of natural justice, as it denied it the right to know the reasons for the decision. Imperial argued this affects its ability to take steps to have that decision challenged or reviewed.

[80] In addition, Imperial alleged that reasons were delayed in relation to the decision regarding the status of the parties. On August 22, 2001, the Board notified the parties as to

who would be granted party status and intervener status. Written reasons were to follow and those were issued also on July 23, 2002.

[81] The question is whether not having written reasons for a year was a breach of procedural fairness by applying the ***Baker*** factors. It is not clear what remedy Imperial would have, or could have, taken had the reasons been delivered earlier. Imperial requested a reconsideration of the decision to stay, but withdrew that application after a resolution of that matter with the Director.

[82] Although it would be preferable for written reasons to be given in a more timely manner, when I apply the ***Baker*** factors, I am unable to find a procedural unfairness to Imperial in the delay of the written reasons, after these procedural decisions were communicated. Any right of judicial review that may have been available is not made unavailable because written reasons have not been issued. Here, there was no appeal by statute from these decisions.

### 4. Allowing Hearsay Evidence

[83] Imperial complained that the Board allowed hearsay evidence, by allowing Dr.Friesen to give anecdotal evidence about his parents' information about the refinery. It argues that allowing hearsay evidence is a breach of natural justice.

[84] The exchange about this evidence is found in the return at volume 7, pp. 445 to 447. After a discussion by the Board about its admissibility, Dr. Friesen related some information he was told by his parents.

[85] There is no question that the evidence was hearsay. Had it been considered by the Board, or used as the basis of a recommendation, it would have been fatal to the integrity of the Board's process. The fact that some hearsay may be heard or even allowed by a tribunal does not in itself offend the rules of natural justice, especially if it is given no weight. This very small anecdotal story taken by itself, is not sufficient to say that natural justice did not prevail, taking into account the circumstances in which it was given, the nature of the hearing and the recommendation of the Board.

### 5. Placing the Onus at the Hearing on the Applicants

[86] Imperial complains that the Board made it clear that the onus was on Imperial at the hearing. It argues that this is incorrect as the hearing is a hearing *de novo*, and the Applicant should not have the onus to show the Director was wrong in issuing an EPO. Imperial argues that the burden should have been on the Director to establish that his decisions were correct.

[87] The Board has statutory authority to set its own processes and procedures in *s.* 87(8) of the ***Act***. It points out that in doing so, it has a full record of the Director's proceedings. The Board screens the appeal, to be sure that there is not overlapping regulatory review, and to set

issues. It has the power to decide that new information not before the Director should be brought forward. It takes the position that it can hear evidence and argument on the issues it sets, but it cannot exercise a new discretion; it is hearing an appeal from an EPO already granted. It calls the hearing "*de novo*" since new evidence can be led, but it takes the position that as it cannot substitute its own decision this is not a true *de novo* hearing, and the onus should be on the Applicant. The Board in its report at paragraphs 49 - 60 considers the issue of onus comprehensively, which it always puts on the party that has filed the appeal.

[88] When I apply the factors in ***Baker***, I do not find that the practice of the Board in placing the onus on an applicant who appeals the decision of the Director to issue an EPO, is a breach of natural justice.

### 6. Collective Breaches

[89] Imperial argues that if any individual breach does not in itself amount to a denial of procedural fairness, that taken globally, they are sufficient to raise an issue about the fairness of the hearing, and thus raise issues about the Board's report and recommendations to the Minister.

[90] At the centre of this question is whether, looking at all the circumstances and applying the factors set out in ***Baker***, Imperial had an opportunity to present its case fully and fairly. Natural justice does not mean that a hearing before an administrative tribunal is the equivalent of a "perfect trial". The question is whether Imperial, looking at these complaints globally, was afforded procedural fairness in the presentation of its position.

[91] Looking at this question, I do not find that taking the complaints and looking at them globally, they are sufficient to amount to a breach of procedural fairness at the hearing before the Board.

## ISSUE 7 - WAS THERE A BREACH OF NATURAL JUSTICE OR PROCEDURAL FAIRNESS IN THE CONDUCT OF THE MINISTER?

[92] In looking at the allegations that the Minister breached the rules of procedural fairness, one has to look to the process, and how the Minister's decision making fits into the statutory scheme. Here, the *Act* sets up a complex process. Clearly it allows for an appeal from the Director to the Board, the latter of which is charged with the responsibility to have some form of hearing and make a report and recommendations to the Minister. The *Act* provides for the Minister then to confirm, reverse or vary the decision of the Director, and make any decision that the Director could make, and to make any further order that the Minister considers necessary for the purpose of carrying out the decision.

[93] In applying the ***Baker*** tests, one has to look at the function of the Minister in this process. In what has been described as a bifurcated process, where the Board is doing the fact finding and submitting a report, but the decision is being left to a person who applies political

and other influences, it may be that the procedural fairness requirements are different at the different levels of the bifurcated process.

[94] Applying the ***Baker*** factors to the Minister's decision, this is not like a judicial process, and so the first test would indicate a lesser likelihood of procedural protections. The statutory scheme clearly anticipates that the Board holds a hearing and reports to the Minister, who makes the ultimate decision and has wide powers. No appeal is allowed. The Board hearing and the Minister's ultimate decision is the appeal from the Director. The decision is important to Imperial, but also raises important issues about health and property rights for the residents, who are interveners. There are no legitimate expectations, in the sense that a certain procedure would be followed by the Minister, or that a certain result would occur. The ***Act*** sets procedure for the Board. As a result of all these factors, one does not come to the conclusion that a high level of procedural protection would be required.

### 1. Failure to notify the Applicants of the Minister's consideration of the Board's report and allow them to make submissions

[95] Imperial argues that the Minister cannot proceed and accord it no procedural protection. It argues that the parties are entitled to be informed of any policy factors the Minister will bring to bear, and should be able to address the Minister (whether in writing or a meeting or a hearing) with respect to the application of that policy to their interests. It is argued that it is unfair that the Minister's process in considering the Board's report and making a decision shuts out Imperial entirely.

[96] Considering the statutory scheme, where the Board has a hearing and reports to the Minister, and the Minister is given wide statutory power to made the decision on the appeal, I do not find that notice of the consideration, or input into whatever policy issues the Minister is going to bring to the decision, is a breach of procedural fairness, when applying the ***Baker*** principles.

### 2. Considering exhibits from the Board's hearing, but not the transcripts of the evidence

[97] The return of the Minister includes the exhibits from the hearing, but does not include all the documents before the Board, specifically the transcripts. Imperial argues that this means the Minster reviewed the exhibits, but not the evidence that went with them. It argues this means the Minister was selective in what he considered, and went beyond the Board's report, which is unfair, without affording Imperial an opportunity to be heard.

[98] Here the statute and regulations are specific on what the report from the Board is to contain. It is a comprehensive document, summarizing the evidence and the reasoning and making a recommendation to the Minister. It is not clear what the Minister reviewed. The fact the exhibits were in the return does not mean they were specifically reviewed.

[99] The factors in *Baker* do not lead me to find that the Minister proceeded unfairly, from the mere fact the return includes exhibits, but not the transcript that went with them.

### 3. Failing to provide reasons for his decision

[100] It was argued by Imperial that the Minister should have given reasons for his decision. Because of the general principles discussed at paragraphs [127] to [131] below, when he accepted the recommendation of the Board to enforce the June EPO, and to recommend the use of s. 129 if new evidence came to light, there would not be the special circumstances required to issue reasons.

[101] This argument, as it was raised relative to the issues arising from the September Letters, will be dealt with under issue 8 below.

## ISSUE 8 - DID THE MANNER IN WHICH THE MINISTER OR THE BOARD DEALT WITH THE SEPTEMBER LETTERS RESULT IN PROCEDURAL UNFAIRNESS OR A REVIEWABLE ERROR?

[102] This issue arises from the September Letters. Imperial argues that the Minister denied it a statutory recourse by implicitly deciding there was no appeal from the Letters. It argues that to the extent the Minister's decision means the Director is allowed to delegate satisfaction for remedial work to the residents, to order replacement of dirt underneath certain structures, or to require Imperial to replace the dirt to a certain depth, he has committed a reviewable error.

### 1. Legislative Framework

[103] The legislative framework of an EPO as set out in s. 113 allows the Director to issue an EPO when a release of a substance may, is or has occurred, that may, is or has caused an adverse effect. Section 113 (3) states the EPO may order the person to whom it is directed to take any measures the Director considers necessary, including, but not limited to, nine items set out: investigation, action to prevent the release, measuring the release, restoring the area affected by the release, monitoring, removing, destroying the substance, installing equipment and reporting. Section 241 of the *Act* provides that an EPO may contain provisions requiring the person to whom it is directed to maintain records, report, prepare environmental audits, submit information, and take other measures to protect or restore the environment. An EPO may also fix the manner and the time to carry out measures. Section 243 allows the Director to amend, cancel, or correct a clerical error in an EPO.

[104] The mechanism for the enforcement of an EPO is set out in s. 244(1) and states that if a person fails to comply with an EPO, the Minister may apply to the Court of Queen's Bench for an order directing that person to comply with the EPO. Section 245(1) also allows the Director to carry out the order and to recover the costs against the person to whom the EPO was directed, or against anyone who purchases the lands.

[105] EPO is not a defined term in the *Act*. There is no provision in the *Act* for "letters" or "directives". The legislation in s. 91(1) allows for an appeal where a Director issues an EPO under s.113. There is no section allowing an appeal from "letters" or "directives". Section 210(1)(d) allows the Director, if a person has contravened the *Act*, to issue an enforcement order to do anything referred to in s. 113 "in the same manner as if the matter were the subject of an environmental protection order." An enforcement order therefore cannot issue where an EPO is in existence.

## 2. The Letters and Their Pre-Hearing Status

[106] The September 11, 2001 letter is entitled: "Decision on Conceptual Framework for Remediation at Lynnview Ridge". The portion of the letter about which the Board heard evidence in February 2002 "directs" Imperial to do certain things as part of "the conceptual framework for remediation". It states that Imperial "shall" remove the top .3 metres of soil on all residential property, except under houses, multi-family buildings and garages (this includes removing dirt from under all decks, driveways and patios). It states Imperial "shall" remove all lead contaminated soil above 140 ppm identified at the depth of .3 to 1.5 metres and replace it. It directs that Imperial "shall" restore all residential property to its pre-disturbance condition to the satisfaction of the property owner.

[107] Imperial filed a notice of appeal in relation to the September Letters on September 18, 2001.

[108] The Board dealt with the ability of Imperial to appeal from the September Letters in its decision of October 26, 2001 (return: volume 1 page 022). The Board found that the September Letters do not constitute a decision for which a new notice of appeal may be submitted under s. 91. The Board points out the *Act* is silent as to whether an amendment of an EPO can be appealed, but held it could not hear an appeal from the September Letters. Rather, the Board allowed the letters to be referred to as new information, and decided under s. 101 to change its previous order and include an additional issue, and that was whether the terms of the EPO were too broad or vague, so that the implementation decisions are without a proper foundation. The Board in its decision was taking a pragmatic approach, to try and hear concerns about the letters as part of the appeal then currently outstanding. It also took pains at the hearing to isolate out the areas where Imperial took issue with the directives in the September Letters. Those were stated as: the removal of soil below .3 meters; the removal of soil beneath semi-permanent structures; and the requirement that remediation should be completed to the satisfaction of the property owner.

[109] The decision of the Board that orders such as those in the September Letters are not EPO's or amendments to them but merely part of the interactive process is consistent with the earlier Board decisions in ***McColl-Frontenac Inc. (Re)***, [2001] A.E.A.B.D. No. 68 (Appeal No. 00-067-R) (QL,AEAB) and ***Legal Oil and Gas Ltd. v. Alberta (Minister of the Environment)*** (1997), (Alberta Environmental Appeal Board) No 97-024.

[110] In *McColl-Frontenac* the Board pointed out that in an ideal world, the Director would issue a remedial order only when he or she had all the relevant facts. In the reality of the situation, however, the Director is empowered to issue an EPO if he or she is of the opinion there may be a release that may be causing harm. Under the legislation, the Director can require someone to investigate the situation and to do things; such as testing, monitoring and providing a remedial plan. In *Legal*, the Board had to consider an EPO granted in March 1996, with amendments in December 1996, and specific letters being issued in May and June, 1997. It was those two letters which the Applicant thought included unreasonable requests, and an appeal was launched. In the *Legal* decision, the Board recognized the difficulties that could arise if the Director was unreasonable in the directives he or she was sending out in furtherance of an EPO.

[111] In this case, it was argued by several of the Respondents that the Board's decision of October 26, 2001 ended any consideration of the September Letters or their contents, and if Imperial wanted them dealt with by the Board it should have asked for a judicial review of that decision. This proposition may have been correct had the Board not considered the September Letters in relation to issue five, and made direct recommendations about them. The Board's subsequent conduct (as will be discussed in detail below) was to hear evidence about and attempt to deal with the September Letters. Once the Board agreed to hear evidence about the September Letters, to seek separate judicial review of the October 26, 2001 decision would have unacceptably fragmented the process. ***Friends of the Old Man River Society v. Assn. Professional Engineers, Geologists & Geophysicists (Alberta)*** (1997), 55 Alta. L.R. (3d) 373 (Q.B.) at p. 403, reversed on other grounds (2001), 93 Alta. L.R. (3d) 27 (C.A.) at p. 41, leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 366. It was not unreasonable for Imperial to wait until the Board had conducted its hearing and the Minister had reached his decision, before seeking judicial review of the manner in which the September Letters were handled.

### 3. The Hearing and Recommendation Relating to the EPO and the September Letters

[112] At the hearing, the Director outlined the concept of the *Act*, and stated that EPOs must be general at times. They are sometimes issued when all information is not known, and allow the person responsible to be creative and have input into the clean up and remediation, doing it in essence under the Director's general supervision. The Director argued that EPOs may be general, with the specifics worked out later. He stated the letter of September 11 illustrates that, as it indicates that from the Director's point of view this is a continuing process under the *Act* and the EPO of June 25, to ensure that it is complied with and remedial actions are taken at Lynnview Ridge. The Director stated this is clearly allowed under the terms of ss. 113(3) and 241. The Director argued for an "adaptable process" in light of the realities he faces in dealing with these types of environmental issues. This process is set out in detail in the body of the affidavit of Mr Jay Litke (return: volume 11, tab H, sub tab 3, pp. 095 to 104).

[113] Imperial took the position that the September Letters should not have a life of their own, and if they do, they should, in essence, be an EPO or an amendment with the ability to be appealed to the Board. Otherwise, the specifics can be dictated by the Director. They argued that a vague or "fill in the blanks" EPO is equivalent to saying: "Investigate what I tell you, develop a plan to remediate and remediate what I tell you". If no essential details of the level of remediation are in the EPO, the recipient has no way to challenge the decision of the Director on what may be disputed standards or their application. An appeal of an EPO such as the one in June, would only deal with who was responsible and the retroactivity argument, but nothing about the actual application of the order. Here the EPO is very general. Only after Imperial complied with the original requirements to obtain information and provide remedial options, and only after the Director reviewed these, did the Director set the standards of remediation seen in the September 11, 2001 letter.

[114] The Board dealt with these issues starting at p. 84 of its decision. Because of its earlier decision that the September Letters could not be appealed, it was dealing with them as evidence, to decide if the terms of the original EPO were too broad or vague, so that the September Letters, treated as implementation decisions, are without foundation. It reviewed them by asking whether the Director was acting reasonably and fairly when deciding to issue and settle the terms of the EPO. This was decided in favour of the Director. The Board then embarked on a determination of whether the terms of the EPO were sufficiently precise. The Board reviewed the remedial options report developed by Imperial, and the September Letters. It discussed the application of the CCME Guidelines, and the information before it about the effect on community health. At pp. 102 and 103, the Board found that it was not too remote for the options report to require Imperial Oil to meet the CCME Guidelines. The Board agreed with the Director on the issue of the depth of removal of soil. On the issue of the removal of soils beneath semi-permanent structures, however, the Board agreed with Imperial, holding that the removal of soil beneath semi-permanent structures was unreasonable. The Board on p. 104 adopted a reasonable person test in terms of the order supporting the removal of soil under all decks, fences, gardens, shrubs and trees, but not under houses, multi-family units, garages, driveways, patios, or sidewalks. In paragraph 311, the Board said:

> In the case of structures such as driveways, patios, and sidewalks, the Director has not demonstrated that they would cause a risk to the environment or human health. As a result, the Order is not sufficiently precise to require this work. Had it been the intention of the Director to require this, then, in the interest of fairness, the Order should have provided some indication that this was a possible requirement and if it became apparent to the Director through the adaptable process that this would be necessary, then the Director should have issued a new order.

[115] The Board went on to deal with work to the satisfaction of the property owner, and expressed the view that work should be performed to an objective standard, or to the satisfaction of the Director. The Board pointed out that failure to comply with an EPO is a

prosecutable offence. It raised the concern that it is not reasonable to permit a prosecution to be founded on the subjective standards of a third party.

[116] The Board skirted the issue of the March Letters, encouraging the Director and the Applicants to resume their "adaptable dialogue", but adjourning the reconsideration motion *sine die*.

[117] Thus the report of the Board recommended that the Minister confirm the EPO, subject to an order that the Director interpret the EPO such that the EPO does not have within its scope the removal of .3 metres of soil under driveways, patios, and sidewalks on private property where they provide an effective barrier to the lead and the EPO require that all work should be performed to the satisfaction of the Director.

[118] The Minister did not sign the draft order prepared by the Board, with the restrictions on interpretation. He simply confirmed the EPO. Without reasons, it is unclear if the Minister was making a polycentric decision that remediation should be to the standard set out by the Director in the September Letters, or whether the Minister was taking issue with the orders in the September Letters even being reviewed. Was he just saying that the EPO stands (ie. Imperial is responsible)? Is his decision any type of comment on the September Letters?

## 4. The Problem That Arises

### i) Description

[119] The decision of the Minister, in the particular circumstances of this case, leaves totally unresolved the issue about the September Letters. The issue arises because the Board, after deciding that the letters were not appealable, in a round about way, allowed them to be reviewed. This is the only logical conclusion from its detailed consideration of the scientific evidence and the EPO, and the recommendation it made to the Minister, including recommendations about issues arising from the September Letters. The Minister, by confirming the EPO but saying nothing more about its interpretation, compounds the confusion as to whether the EPO is the June document only, or whether the Minister was making some statement on the scope of implementation placed on it by the Director, which involved a consideration of the September Letters.

[120] The Board here addressed the general June EPO but went on to address some conditions in the September Letters and recommended the EPO should have included words to indicate these requirements may be possible. The Board is clearly addressing the September Letters and their contents in suggesting some of their contents should be the subject of a new EPO.

### ii) The Court's Comment

[121] Conceptually, in applying the *Act* and the statutory scheme to this fact situation, the remedial standards in the September Letters, to have life and meaning, must be further EPO's or amendments to the EPO. It is a reality of this legislative scheme that all facts may not be known when an EPO is granted. Here an EPO issued without knowledge of even the remedial standards. Interactive discussions were therefore needed between Imperial and the Director, and scientific input was required to work out the details and time frames for remediation, and the actual standards of remediation. It is difficult to justify under this statutory scheme that the Director can make orders that constitute the basic standards of an EPO under "letters", that are not an amendment or a new EPO, and thus not capable of appeal.

[122] The *Act* contemplates that if the Director and the "person responsible for the release" have an issue over compliance with an EPO, the enforcement mechanism is set out in s. 244. It only allows the Court to order a party to comply with an EPO. The issue of enforcement of the directions in the September Letters was put to the Director at the hearing before the Board. The interchange at volume 9, pp. 1123 to 1127 of the record is revealing. The Director seems to be saying if non-compliance with the September Letters is non-compliance with the EPO, then enforcement proceedings could be taken. He agreed that in the Director's mind the September Letters are tied to the EPO. His position is not tenable if the Board is not allowing appeals of the orders in the September Letters. How can the department treat the letters and their contents not as an EPO or an amendment for appeal purposes, but accord them the status of an EPO for enforcement purposes?

[123] In this analysis, I am not suggesting that every letter or every discussion in furtherance of an EPO should be considered an amendment or a new EPO and subject to appeal. But when the letter goes to the heart of the EPO, (eg. orders the actual remedial standard) it is difficult to justify under this legislative framework that the setting of remedial standards (including to whose satisfaction the remediation is done) would not be treated as an EPO allowing both an appeal and ultimately, enforcement, if not obeyed. To leave it aside as a letter, not an EPO, leaves it as an orphan under the *Act* - not subject to appeal, and likely not subject to enforcement. How can the Director "order" someone to do something by a letter, when the statute only empowers him to "order" someone to do that something by way of an EPO?

[124] When a general EPO is issued in circumstances where there is no issue about who is the person responsible, does the Director have *carte blanche* to order the standards and details of remediation? This may often be where real and legitimate disputes arise. If the Board does not deal with them in an appeal situation, the end result may well be that the court will deal with them as a question of enforcement or on a judicial review.

[125] To argue that significant orders or directions, dealing with basic issues such as the remedial standard, would only be subject to judicial review, flies directly in the face of the policy behind the *Act*. It expressly sets up a scientific board to review the Director's work. It leaves the decision to the Minister to bring a wider, policy view to the decision. To suggest

that there should only be judicial review of the September Letters, would allow a body without the scientific background of the Board to review the decision, in an *Act* where a very strong privative clause protects the Board and the Minister, but not decisions of the Director. I have difficulty with the suggestion that this is the proper mechanism to deal with the technical details in the September Letters.

[126] If the Director purported to "order" Imperial to do things by the September Letters, but they were not an EPO or an amendment of the existing EPO, he had no authority to do so under the *Act*. When the Board purported to "adopt" these orphan "orders" and review them, but not as an EPO or an amendment to an EPO, it did so without jurisdiction. What the Minister meant, if anything, about the September Letters in his decision is unclear.

## 5. The Judicial Review

### i) Review of Process: Procedural Fairness

[127] Imperial argued that the Minister should be required to give reasons, as an issue of procedural fairness. The requirement of written reasons has been the subject of comment in a number of cases. In ***Baker***, L'Heureux-Dubé J. considered the arguments for and against written reasons and reviewed a number of cases where reasons had and had not been required in judicial reviews. Generally, the traditional position at common law has been that the duty of fairness does not require that reasons be provided by administrative tribunals. Despite this, courts and commentators often emphasize the usefulness of reasons to help with fair and transparent decision making.

[128] In ***Baker***, L'Heureux-Dubé J. concluded at p. 848 that:

> In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required.

[129] The case of ***Fenske*** reviewed whether the Minister was required to give reasons under this *Act*, where the Director had approved a landfill without requiring an environmental impact assessment. The Board report recommended that one be required. The Minister upheld the Director, but halted the construction and required supplemental reports dealing with land conservation, gas management, ground water monitoring, and soil management plans to be filed. At the judicial review, Lefsrud J. found that the Minister's failure to give reasons was a violation of the rules of fairness. The Court of Appeal in reviewing this decision, disagreed with the standard of review, which they found the chambers justice had dropped from patently unreasonable to reasonableness solely on the failure to provide reasons. The Court of Appeal found that the decision of the Minister was not irrational, or patently unreasonable, as it

provided a clear and coherent mechanism for the submission, review and discussion of further information, and froze construction in the interval.

[130] The decision in *Fenske* was driven by the finding in paragraph 41, where the Court found that the abuse of process identified by the Board lay in the Director's approval in the face of incomplete and conflicting information. The Minister's order, on its face, addressed that abuse by ordering the Commission to provide further information to the Director. It was therefore not considered unreasonable, as from the Minister's order it could be seen that the Minister was addressing the concern of the Board of incomplete information.

[131] On the issue of giving reasons, the Court of Appeal in ***Fenske*** held that the circumstances of the appeal did not bring it within one of the rare exceptions in which failure to give reasons by the Minister would amount to a breach of procedural fairness. The Court reviewed the case of ***Cook v. Alberta (Minister of Environmental Protection)*** (2001), 293 A.R. 237 (C.A.) where it was found that the failure to give reasons breached procedural fairness, as the Applicants were directly led to believe the Minister would follow the decision of the appeal committee that had been favourable to the Applicant. The Court of Appeal stressed the duty to provide reasons would be rare.

[132] Here, the decision of the Minister, when viewed in light of the recommendation of the Board, leads to a great deal of confusion. Because of the way the Board dealt with the September Letters, the Minister's silence on the recommendations of the Board in relation to them, rather than definitively deciding the issue, leaves legitimate questions as to what the Minister meant that go to the basis of the implementation of the EPO.

[133] The uncertainty raised by the decision is well illustrated in the submissions of the parties made at this judicial review:

1. The Director in paragraphs 58 and 59 of his written submissions says the September Letters were not, and could not, be the subject of appeal to the Board: "... As a result, the contents of the directives were not the subject of appeal and were not before the Minister." The Director argues that the only way to challenge the September Letters, or the Board's decision they were evidence, was through judicial review. The Director goes on to say in paragraph 66 that: "The extent of the remedial work was not a matter before the Board or the Minister".

2. The written submissions of the Minister state: "Any requirement that the Applicants remove and replace soils out from under decks, fences, driveways, patios, sidewalks on private property, gardens, shrubs and trees was not part of EPO-2001-01 and is not properly before this Honourable Court for judicial review." This might suggest the Minister's affirmation of the EPO did not involve any consideration of the September Letters.

3. Imperial submits that the effect of the Minister's decision was not only to uphold the approach of the Board in looking at the EPO and its breadth in issue five, but also to uphold the content of the Director's orders set out in the September Letters. It asks for relief from these orders.

[134] The problem is that the Board in reviewing the EPO and the September Letters as "evidence" recommended that Imperial did not have to comply with some of the "orders" in the September Letters, by characterizing that recommendation as a limitation on the interpretation of the June EPO. Counsel for the Minister and the Director are saying that the September Letters were never properly before the Board and thus were not before the Minister.

[135] Looked at in that light, the Minister ostensibly in rejecting the part of the recommendations that dealt with the September Letters specifically, but not providing reasons, leaves unanswered questions that are significant to all parties who are involved in a further relationship respecting Lynnview Ridge. The Board spent several days in hearings, and wrote a comprehensive report. The Minister made a decision. The confusion that is evident over the meaning of that decision cries out for clarification. In its present state, it leaves a paralysis in terms of the process to be followed now. Is only the EPO confirmed, or is it confirmed with the breadth of the September Letters? There are legitimate conflicting interpretations of the process, and the meaning of the Minister's decision.

[136] In the context of this judicial review, it is not for the Court to make decisions about the status of the September Letters, or the possible meaning of the Minister's decision. These circumstances, however, give rise to a special case, where the situation demands reasons for the decision of the Minister. The *Baker* tests applied here, require the Minister to give reasons to achieve procedural fairness.

[137] As a result, I direct that the Minister of the Environment provide reasons for his order dated July 22, 2002, and specifically address whether his decision means that the EPO is confirmed, but the September Letters were not properly under any review, or whether his decision is that the EPO stands and allows the September Letters to set the remedial standards they do.

### ii) Review of Substance: Is there a Reviewable Error?

[138] The judicial review of the substance of the Minister's decision that Imperial requested was whether the deadlines in the EPO, the delegation of approval to the residents, the depth of soil removal or the removal of semi-permanent structures (the three latter being provisions in the September Letters) were reviewable errors. The difficulty with the latter three requests is that they presuppose that the Minister was deciding those issues, and that is far from clear.

[139] The standard of review of the decision of the Minister is outlined above, and would be patent unreasonableness for these decisions.

[140] In relation to the first issue, Imperial argued that as the Board found the EPO originally imposed unachievable or unreasonable deadlines, that meant that on judicial review the EPO could not stand. I do not agree. If, as here, deadlines are imposed and then subsequently revised by agreement in an interactive process, the original deadlines cannot be challenged on a judicial review after the fact of the agreement. This is rather the interplay of the adaptive process, and is not open to judicial review after the fact, without more.

[141] In relation to the three issues arising from the September Letters, I cannot tell without reasons from the Minister if he made any decision about them or not. I have already expressed a concern about the September Letters being treated in any fashion other than an EPO or an amendment to an existing EPO.

[142] Imperial argued that if the decision of the Minister is that the September Letters stand as part of the EPO, it is a reviewable error if remediation is to the satisfaction of the property owners. On this point, I would have to agree with Imperial. If the effect of the Minister's decision was to confirm the direction in the September Letters that Imperial must restore all private residential property to its pre-disturbance condition to the satisfaction of the property owner, that is patently unreasonable. It is irrational in this statutory scheme that something the *Act* states is to be done to the Director's satisfaction, and something that may be subject to enforcement under the *Act*, would be delegated to the satisfaction of a third party. There is no objective standard to that delegation, and it is to persons who may be adverse in interest to Imperial. In some cases, ironically, Imperial itself is the property owner. The statutory scheme puts the power in the Director; it gives legislative sanction for work to be done to the Director's satisfaction. The Board considered not only the practical issue of the subjective standard, but also legal principles that go against the delegation of power. Based on the background of this dispute, the issues, and the possibility of enforcement action, the Director cannot delegate the level of remediation. The Director must clearly retain ultimate control of satisfaction with remediation. Nor is it sufficient for the Director to say he would ultimately retain control. The parties must know who controls the acceptability of remediation steps taken.

## CONCLUSION

[143] As a result, I direct the Minister of the Environment to provide reasons for his order dated July 22, 2002, and specifically address whether his decision means that the EPO is confirmed, but the September Letters were not properly under any review, or whether his decision was meant to address in any manner the provisions of the September Letters.

[144] I wish to make it clear that nothing in this judicial review shall be taken to restrict the Board from exercising its powers under s. 101 of the *Act*, should it wish to do so after having the benefit of reading the decision and reasons provided in this judicial review.

[145] Costs may be spoken to at a later date.

HEARD in Calgary from the 17th to the 21st of March, 2003.
**DATED** at Calgary, Alberta this 30th day of April, 2003.

Rosemary Nation
**J.C.Q.B.A.**

Action No:0201-15975

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

BETWEEN:

IMPERIAL OIL LIMITED AND DEVON ESTATES LIMITED

Applicants

- and -

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

Respondents

- and -

THE CITY OF CALGARY AND LYNNVIEW RIDGE RESIDENT'S ACTION COMMITTEE

Intervenors



REASONS FOR JUDGMENT
of the
HONOURABLE MADAM JUSTICE ROSEMARY E. NATIO

**ALBERTA ENVIRONMENT**

**OFFICE OF THE MINISTER**

# MINISTERIAL ORDER
# 19/2002
# *ENVIRONMENTAL PROTECTION & ENHANCEMENT ACT*
# R.S.A. 2000, c. E-12

## ORDER RESPECTING ENVIRONMENTAL APPEAL BOARD APPEAL NO. 01-062

- and -

## ENVIRONMENTAL PROTECTION ORDER NO. EPO - 2001-01

**Reasons of the Minister**
**May 20, 2003**

Reasons of the Minister
May 20, 2003

## 1. INTRODUCTION

On June 25, 2001, the Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment (the "Director") issued Environmental Protection Order ("EPO") No. EPO-2001-01 (the "Order") to Imperial Oil Limited ("Imperial") and its subsidiary Devon Estates Limited ("Devon Estates") under the *Environmental Protection & Enhancement Act* ("EPEA"). This Order was appealed to the Environmental Appeal Board (the "Board") on July 3, 2001 and following the completion of the appeal process I was provided with the Board's Report and Recommendations dated May 21, 2002 (the "Report and Recommendations"). On July 22, 2002, I issued Ministerial Order 19/2002 and in keeping with my practice and that of previous Ministers of Environment, I did so without reasons.

Imperial and Devon Estates applied for Judicial Review of this matter and following the hearing of this matter by the Honourable Madam Justice Rosemary E. Nation of the Court of Queen's Bench of Alberta, she issued Reasons for Judgment dated April 30, 2003. In the Reasons for Judgment, Justice Nation indicated that this is one of those unique and rare circumstances where I ought to have given reasons with the Ministerial Order, at least in relation to the September Letters (as described in her Reasons for Judgment). In light of the foregoing and Justice Nation's direction, I now provide my reasons but with some reluctance.

## 2. JULY, 2002 - PERSPECTIVE

After considerable analysis, the Board concluded that the September Letters formed part of an adaptable process and were not in and of themselves subject to appeal under EPEA. The Board stated that the September Letters were only evidence in relation to Issue 5 which dealt with the reasonableness and precision of the Order. The Board indicated it was examining the September Letters on that basis but as Justice Nation subsequently observed, the Board "in a round about way" proceeded to fully review the September Letters. Although the Board couched their recommendations in language to fit the context of Issue 5, the Board treated the September Letters as though they were part of the Order or a new EPO. It was apparent to me, based on the Board's own reasoning in the Report and Recommendations that the Board had gone beyond the scope of its authority. I nonetheless took into careful consideration all of the recommendations put forward at page 109 of the Report and Recommendations including those regarding the September Letters. I do not propose to list those recommendations here but will simply identify to the relevant ones by reference to the number assigned by the Board.

Recommendations 3, 4, 5 and 6 arise from the September Letters. Recommendations 3 and 4 confirm the Director's decision with respect to removal of soils containing greater than 140 ppm of lead between 0.3 and 1.5 metres and the removal of 0.3 metres of soil under decks, fences, gardens, shrubs and trees. I agreed with the Board's analysis with respect to issues 3 and 4 and the substance

of those recommendations. With respect to Recommendation 5, I disagreed with the Board. Although I acknowledge that the semi-permanent nature of the structures provide a barrier to exposure, I was concerned that driveways, patios and sidewalks are accessible and can be and are removed and moved to other locations. Failure to clean-up in accessible areas under semi-permanent structures leaves open the possibility for future clean-up and potential for inadvertent or unexpected exposure to lead contamination in the future. Practically this may result in future claims for compensation and the costs of future clean-up being borne by future generations who, for example, move their sidewalk at some later time. This financial consideration is quite apart from the potential for the creation of exposure pathways to lead being unknowingly or unwittingly created and the requirement for continued risk management on those lands. Although the risk may be low, it was my view that clean-up under semi-permanent structures creates a certainty from a financial, safety and public health perspective which is beneficial for current and future owners, the environment, the public, Imperial and Devon Estates.

With respect to Recommendation 6, I was in agreement with the Board that it would be improper for the Director to delegate his authority under Section 102(3) of EPEA. In light of the explanation provided by the Director set out in the Report and Recommendations that he only intended that Imperial and the owners have dialogue to identify restoration objectives and concerns, I was satisfied there had been no delegation at all and that the Director retained control over acceptability of remediation throughout.

## 3. JULY 22, 2002 - MINISTERIAL ORDER

By Ministerial Order, I confirmed the Order subject only to a consideration unrelated to the September Letters. When doing so I had accepted the view of the Board that the September Letters were not part of the Order per se or new Orders and therefore not subject to appeal to the Board. I was of the view that by upholding the Order it permitted the Director to proceed with implementation of the Order. Although I was cognizant of the Board's recommendations, having concluded the September Letters were independent of the Order, the consequence in my view was that the directions set out in the September Letters continued without modification.

## 4. REASONS OF JUSTICE NATION

I have now had the benefit of reviewing the Reasons for Judgment of the learned Justice Nation. She expressed her view that some, although not all letters made in furtherance of an EPO, may be considered an amendment to an EPO or a new EPO and subject to appeal to the Board under EPEA. She observed that for the remedial standards in the September Letters to have life and meaning they must be further EPO's or amendments to the Order. With this guidance, it is clear that the Board in describing its approach was mistaken in its characterization of the September Letters and its authority to review them. The Board purported to characterize the September Letters as evidence but, in fact, having heard evidence on the substance of the September Letters, proceeded with a complete and thorough analysis of the aspects of the September Letter raised by Imperial and Devon Estates as concerns and made recommendations as though the September Letters were under

appeal.

5. CONCLUSIONS

I accept Justice Nation's view that aspects of September Letters having provided a framework and foundation for implementation of the Order including the setting of remedial standards must have their genesis in an EPO to be effective. After receiving Justice Nation's guidance, my perspective now is that the September Letters were amendments which formed a constituent part of the Order and therefore properly the subject of an appeal by the Board. The Board although describing its process differently, in fact, heard a complete and thorough appeal of the Order including the September Letters.

I have addressed in these reasons my concurrence with the Board in relation to its confirmation of the Director's establishment of a standard of 140 ppm of lead and the depth of soil removal generally. In addition, I have indicated why I disagreed with the Board in relation to removal of soil under semi-permanent structures and that I require cleanup under those structures. On the issue of delegation, I wish to be abundantly clear that the Director is the only one who can make a decision on the acceptability of restoration of the private residential properties. I disagree that the Director delegated this decision and I am of the view that he retained his authority throughout. Having now examined the issues arising from the September Letters in the context of an appeal to the Board, I have not changed my views on those issues and the consequence of Ministerial Order 19/2002 in the end result remains the same.

The above constitutes my reasons in response to the direction by Madam Justice Rosemary Nation. I again express my reluctance to issue reasons but in light of the finding that this is a unique and rare circumstance calling for reasons, I have done so. Although it may be self evident, I wish to make it clear that no one should take the giving of these reasons as a basis for the expectation that reasons will be given in the future.

Dated at the City of Edmonton in the Province of Alberta this 21st of May, 2003.

Honorable Dr. Lorne Taylor
Minister of Environment

IN THE COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE OF CALGARY

BETWEEN:

IMPERIAL OIL LIMITED and DEVON ESTATES LIMITED

Applicants

and

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

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CITY OF CALGARY and
LYNNVIEW RIDGE RESIDENTS ACTION COMMITTEE

Interveners

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# D E C I S I O N  O N
# J U D I C I A L  R E V I E W

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Calgary, Alberta
June 25, 2003

Proceedings taken at Chambers, in the Court of Queen's Bench of Alberta, Courthouse, Calgary, Alberta

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June 23, 2003

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| The Honourable Madam Justice R. E. Nation | Court of Queen's Bench of Alberta |
| K. B. Mills, Esq.<br>P. R. Jeffrey, Esq.<br>R. Du Russell, Esq. | For the Applicants |
| G. D. Sprague, Esq. | For the Director, Alberta Environment |
| L. A. Smart, Q.C. | For the Minister of the Environment |
| A. C. L. Sims, Q.C. | For the Alberta Environmental Appeal Board |
| R. M. Kruhlak, Esq. | For the City of Calgary |
| G. Fitch, Esq. | For the Lynnview Ridge Residents Action Committee |
| K. Morosse, Ms., CSR(A) | Official Court Reporter |

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THE COURT: Good afternoon. Please be seated.

After my written decision in this judicial review, which was issued on April 30th, 2003, the Minister of the Environment issued written reasons on May 20th, 2003.

The parties to the judicial review have now returned to court with two issues on which they have requested direction: The March letters and issues arising out of issue 8 in my April 30th decision.

Imperial argues the original EPO should be

quashed or, alternatively, the March and September letters should be quashed. I heard submissions on June 23rd and indicated that I would give an oral decision today.

Dealing first with the March letters, I am denying Imperial's request that I quash the March letters. The March letters were never before me in this judicial review. They currently sit at the Board level where the Board adjourned the reconsideration motion sine die.

I recognize that what I have said in general in my decision and reasons of April 30th may impact on how they are now seen, and the parties may change how they view them as a result.

In the context of the judicial review before me, however, I do not have the jurisdiction to make an order in relation to those letters.

It is appropriate that the application for them to be reconsidered by the Board, which was adjourned, should proceed.

Dealing with issue 8, I order that the original EPO is to stand. In relation to the September letters, it is not appropriate; I order that they are quashed. This is a review of the Minister's decision.

It is only because of the confusion about whether the Minister was dealing with the September letters that they became involved in this judicial review. The Minister's reasons made it clear that he thought, in making his order about the original EPO, that the Director should

proceed to implementation of the order, and the directions in the September letters would continue without modification.

I have made my views abundantly clear in my reasons of April 30th as to the status of the September letters.

From this judicial review, if the directives in the September letters are meant to continue as an EPO and be enforceable, then Imperial is entitled to an appeal.

In terms of this decision, and the arguments I have heard, the following is my reason, the reasoning behind the decision as it was given:

First, the Minister's reasons were divided into five parts. Part 1 was an introduction, part 2 talks about his July 2003 perspective, part 3 clarifies his July 22nd 2003 Ministerial order, part 4 discusses my reasons, and part 5 comes to conclusions after my decision.

It is only part 2 and 3 which are responsive to my direction of April 30th, 2003, to deal with his order of July 22nd.

I make no comment on his statements about my decision or his conclusions, as they are not part of this judicial review, which concentrates on what he did and his reasons for doing so, up to and including July 22nd.

The parties have all indicated that parts 4 and 5 are not the subject of this current motion.

Two: The Minister's reasons are clear that he confirmed the original EPO. At the time, he accepted the Board's view that the September letters were not part of the EPO or a new EPO. He was of the view that the Director could proceed to implement the original EPO. He understood the September letters were independent of the EPO, and the directions continued without modification.

Clearly, the Minister meant to uphold the original EPO. He understood he had no statutory power to deal with the September letters, as he did not see them as part of the EPO or as a new EPO.

Although he took interest in the Board's comments about them, he saw those as outside the Board's authority and was not making any comment on the September letters in his decision of July 22nd.

Three: I reject the argument of Imperial, that since the Minister was mistaken in his thought that the September letters as an implementation order could carry on, that his whole decision is tainted. His reasoning does not in any way taint or affect his direction that the original EPO is confirmed.

There is nothing patently unreasonable about the Minister's confirmation of the original EPO.

Four: I reject the argument of Imperial Oil that an original EPO could not be issued without remediation standards. This is what happened here. It can be done and it is authorized under the Act.

My decision was simply that, if it is done, when the remediation standards are set, to be enforceable, they must be in the form of an EPO or an amendment to the original EPO.

Five: I reject the argument of Imperial Oil that there has to be a certain process between the person who will be subject to the order and the Director before an EPO is made or amended. This may be done in some circumstances, but it is not legislated under the Act and, therefore, it is not correct to say an EPO cannot be issued or amended before that process happens.

Six: I was clear in my decision that if the September letters are to be in force, as they contain remedial standards, they must have the status of an EPO or an amended EPO. The Act allows for their appeal.

I reject the arguments of the intervenors and accept the argument of Imperial that the hearing that occurred considering them as evidence on issue 5, which was entitled "Is the EPO Reasonable and Sufficiently Precise in the Circumstances Up to the Date of the Hearing?" cannot be the equivalent of an appeal under the Act in this case.

It cannot be decided from the record, that hearing evidence on issue 5 as it was framed in relation to the original EPO, with the September letters as evidence, could be accepted to the equivalent of an appeal of the September letters, as an EPO or an amended EPO.

The general tenants of administrative law

are clear, that where there has been a substantial breach of procedure, the Court doing a judicial review should be slow to hold it makes no difference to the final result.

From the record and the argument, I cannot make that determination. There is no question some evidence was called, but under the Act, Imperial has the right to an appeal of an EPO before the Board, according to the process under the Act which involves the Board setting its process and delineating the issues.

I realize that some of the evidence has already been heard by the Board that may be relevant on an appeal of the September letters, and to the extent that has happened, I would hope an accommodation could be made to allow the transcripts to be used, but Imperial should not have its right of an appeal constrained, and the Board must address this in the process it sets.

Seven: Counsel for the Board has asked that the Court be careful in saying who is to say if something is an EPO. I understand there are many letters that may be part of the interactive process, but not EPOs and, thus, not capable of enforcement under the Act.

I understand the Board does not want to be presented with an attempt to appeal every letter, but there is no magic in titles. The Director should have to entitle anything it considers an EPO or an amendment to an EPO as such.

It is well and good to have an interactive

process, but the Director should be clear whether it is merely being interactive or whether it is issuing an order.

An order it intends to enforce as an EPO or an amendment to an EPO should be entitled such. However, in the legislative scheme, the Board is the body to whom a party will go, as Imperial did in this case, if the Director is issuing orders that are really EPOs and the party wants to appeal.

As the Board is the body that is designated by statute to hear appeals, it, under the legislation, will have to make the determinations as to whether a party is entitled to an appeal as they come forward.

So I believe that deals with all the issues before me. And I would hope that counsel can now draft whatever order they feel necessary.

I understand the issue of costs may well be outstanding and have to be dealt with at another time, and the parties themselves can't deal with it.

I would also just ask, if anyone's ordering the reasons, that they do so on an expedited basis. Just so you know, my schedule is that I will be here until next Monday, but after that, I won't be in a position to review them for a period of time.

All right, so thank you all, counsel.

MR. KRUHLAK: Thank you, My Lady.

MR. JEFFREY: Thank you.

MR. SPRAGUE: Thank you.

(Proceedings adjourned at 2:15 p.m.)

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PROCEEDINGS ADJOURNED

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Certificate of Transcript

I, the undersigned, hereby certify that the foregoing pages 1 to 9 are a true and faithful transcript of the proceedings taken down by me in shorthand and transcribed from my shorthand notes to the best of my skill and ability.
Dated at the City of Calgary, Province of Alberta, this 25th day of June, A.D. 2003.

Kim Morosse, CSR(A)
Official Court Reporter

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