IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Shawnigan Residents Association v. British Columbia (Director, Environmental Management Act),* 2017 BCSC 107

Date: 20170124
Docket: 151867
Registry: Victoria

Between:

Shawnigan Residents Association

Petitioner

And

Director, *Environmental Management Act*, Cobble Hill Holdings Ltd. and Environmental Appeal Board

Respondents

Before: The Honourable Mr. Justice Sewell

On judicial review from: A decision of the Environmental Appeal Board of British Columbia in proceeding 2013-EMA-G02, dated March 20, 2015

Reasons for Judgment

Counsel for the Petitioners:	Robert S. Anderson, Q.C. Sean Hern
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Counsel for Active Earth Engineering Ltd.:	Richard S. Margetts, Q.C.

Place and Date of Hearing:	Victoria, B.C. January 11-15, 18-22, February 15-19, 22-26 and 29, 2016
Place and Date of Judgment:	Victoria, B.C. January 24, 2017

[1] The petitioner Shawnigan Residents Association ("SRA") is a registered society. As the name implies, its members are people living in the vicinity of Shawnigan Lake, a large lake located northwest of Victoria. Residents there are attracted by the natural beauty and amenities of the Shawnigan Lake region.

[2] The respondent Cobble Hill Holdings Ltd. ("CHH") is the holder of a permit issued pursuant to the *Environmental Management Act*, S.B.C. 2003, c. 53 [*EMA*], to operate a facility for the long-term storage of contaminated soil in a quarry located upstream from Shawnigan Lake. SRA's members are concerned about the risk to the environment from contaminants deposited in the landfill leaching into the environment, and in particular into Shawnigan Lake, which is the source of drinking water for many of the members. The permit in issue is Permit PR 105809 (the "Permit"). It was issued to CHH on August 21, 2013 by a Delegate (the "Delegate") of the Director, Ministry of Environment (the "Director").

[3] SRA opposed the issuing of the Permit. After the Permit was issued SRA filed an appeal with the Environmental Appeal Board (the "Board") established under the *EMA*. After a lengthy hearing, the Board affirmed the Permit, subject to additional conditions, in a decision dated March 20, 2015 (the "Decision").

[4] SRA seeks an order pursuant to the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 [*JRPA*], setting aside the Decision.

[5] SRA also seeks an order directing that the Permit be rescinded and cancelled.

[6] SRA advanced a number of grounds on which it submits the Decision must be set aside:

1. the Delegate had no jurisdiction to issue the Permit;

2. the Board denied SRA procedural fairness by imposing different restrictions on it about the manner in which it could adduce opinion

evidence than it did on the Delegate, who was also a party to the appeal;

3. the Board failed to address critical arguments advanced by SRA;

4. the Board unfairly refused to permit SRA to obtain the evidence of certain witnesses that SRA says was important to the proper disposition of the appeal;

5. the Decision was unreasonable;

6. there was a reasonable apprehension that the Board was biased; and

7. the Permit and the Decision were obtained by a fraud on the Delegate and the Board because critical information relating to the relationship of the qualified professionals (the "Qualified Professionals") who designed the facility and CHH was concealed and misrepresented to the Delegate and the Board.

   This ground is based on evidence which came to the attention of SRA after the Decision and SRA seeks leave to rely on that evidence on this judicial review.

[7] Given the conclusion I have reached, I do not need to deal with all of the grounds advanced by SRA.

[8] In these reasons I will therefore deal only with the questions of whether the Delegate had jurisdiction to issue the Permit, whether the Board acted fairly, whether the fresh evidence should be admitted and if so, what effect that fresh evidence should have on the Decision, and whether there is a reasonable apprehension that the Board was biased.

[9] For the reasons that follow, I have decided that the Delegate did have the jurisdiction to issue the Permit and that there are no grounds to support any apprehension of bias on the part of the Board. However, I have also decided that the

Board did not act fairly in its procedures with respect to the admission of opinion evidence, that the fresh evidence should be admitted and that the fresh evidence demonstrates that the conduct of CHH and the Qualified Professionals compromised the integrity of the approval process under the *EMA*.

[10] I have concluded, therefore, that the Decision must be set aside and the matter remitted to the Board for reconsideration in accordance with these reasons.

Preliminary Issue

[11] SRA seeks not only to have the Decision set aside but also an order that the Permit be rescinded.

[12] SRA recognizes that such an order is not usually available from this Court under the *JRPA* because the *EMA* provides a remedy by way of appeal to the Board. However, SRA submits that the conduct of CHH has been so egregious that it constitutes a special circumstance calling on the court to denounce that conduct by requiring CHH to re-apply for a permit under the *EMA*.

[13] I do not accept SRA's submission on this issue.

[14] In British Columbia, the law is well settled that when a statute provides for a statutory appeal of a decision and the appeal decision substantially addresses the merits of the decision under review, it is the appeal decision and not the original decision that is subject to judicial review.

[15] In *Yellow Cab Company Ltd. v. Passenger Transportation Board*, 2014 BCCA 329, Justice Groberman set out the principles governing judicial review of a decision subject to an internal appeal or review process:

> [39] There is a general principle that a party must exhaust statutory administrative review procedures before bringing a judicial review application: *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561. For that reason, where an alleged error comes within a tribunal's statutory power of reconsideration, a court may refuse to entertain judicial review if the party has not made an attempt to take advantage of the reconsideration provision. Of course, where the power of reconsideration is not wide enough to encompass the alleged error,

> reconsideration cannot be considered an adequate alternative remedy to judicial review, and the existence of the limited power of reconsideration will not be an impediment to judicial review.
>
> [40] Where a party has taken advantage of a tribunal's reconsideration power, and the tribunal has undertaken the reconsideration, it is the reconsideration decision that represents the final decision of the tribunal. In such a situation, it is only the reconsideration decision that may be judicially reviewed, since it is the final decision of the tribunal.

[16] In this case, SRA appealed the Permit to the Board and the Board conducted a full review of the merits of the Permit application, largely by way of a new hearing on the merits. In these circumstances, it is the Decision, being the decision on appeal that is the proper subject matter of a review application under the *JRPA.*

[17] I can see nothing in the record that would justify a departure from the usual rule in this case on this issue.

[18] Accordingly, I will review only the Decision in these reasons.

Background

[19] The background to this matter is set out in full in the Decision and need not be repeated here in detail. I will, however, briefly summarize it.

Regulatory and Policy Framework

[20] The Permit authorizes CHH to discharge refuse to the ground and effluent to an ephemeral stream from a contaminated soil treatment facility (the "Facility") and landfill located on a parcel of land near Shawnigan Lake ("Lot 23").

[21] The Permit was issued by the Delegate pursuant to s. 14 of the *EMA*. That section provides, in part:

> 14 (1) A director may issue a permit authorizing the introduction of waste into the environment subject to requirements for the protection of the environment that the director considers advisable and, without limiting that power, may do one or more of the following in the permit:
>
> (a) require the permittee to repair, alter, remove, improve or add to works or to construct new works and to submit plans and specifications for works specified in the permit;

> (b) require the permittee to give security in the amount and form and subject to conditions the director specifies;
>
> (c) require the permittee to monitor, in the manner specified by the director, the waste, the method of handling, treating, transporting, discharging and storing the waste and the places and things that the director considers will be affected by the discharge of the waste or the handling, treatment, transportation or storage of the waste;
>
> (d) require the permittee to conduct studies and to report information specified by the director in the manner specified by the director;
>
> (e) specify procedures for monitoring and analysis, and procedures or requirements respecting the handling, treatment, transportation, discharge or storage of waste that the permittee must fulfill;
>
> (f) require the permittee to recycle certain wastes, and to recover certain reusable resources, including energy potential from wastes.
>
> (2) A permit does not authorize the introduction of hazardous waste into the environment unless it specifies the characteristics and quantity of hazardous waste that may be introduced.

[22] The Ministry of Environment ("Ministry") has a five-step process governing the application process for a permit to discharge waste.

[23] Before an application is prepared, the Ministry advises the potential applicant to review all Ministry process and guidance documents, the applicable legislation, and to complete draft application materials. Once the draft documents are complete, the Ministry meets with the potential applicant to discuss the process, the draft application documents, and to determine whether a Technical Assessment Report ("TAR") from a Qualified Professional will be required. In this case, a TAR was required.

[24] The second step includes creation of the draft TAR, which addresses the technical aspects of the proposal, including "information regarding the source of the waste, the discharge quality and quantity, information about the receiving environment, any objectives or other criteria applicable to the receiving environment, and details about the potential environmental impacts if the permit is granted." Consultation with First Nations, agencies, and the public begins. The applicant must also prepare a consultation report, final application form, and final TAR.

[25] At stage three, the applicant submits the final application form, TAR, consultation report, and any required fees to the Ministry.

[26] The Ministry reviews the application at stage four. If the documents are acceptable, staff will prepare a draft authorization with attached conditions for the applicant's review and comment. Ministry staff also produce a report assessing the application and including any recommendations. The draft authorization, assessment report, and supporting documentation are then provided to the Director for consideration.

[27] At the fifth and final stage, the Director or her Delegate makes a decision on the permit application.

Lot 23

[28] Lot 23 is located within the Shawnigan Lake watershed. Shawnigan Creek crosses Lot 23 on its eastern side and flows into Shawnigan Lake. An ephemeral stream is located to the west of Lot 23 on Cowichan Valley Regional District ("CVRD") property. That stream flows south and into Shawnigan Creek approximately one kilometre north and downstream of Lot 23. A tributary flowing to the ephemeral stream originates on the western side of Lot 23, near the active quarry on the lot, and travels off Lot 23 at the western boundary.

[29] Lot 23 is the site of an active rock quarry, operated by South Island Aggregates Ltd. ("SIA"). SIA was the original permit applicant, but in February 2013, the Ministry was asked to name CHH, the owner of Lot 23, as the applicant instead. CHH leases Lot 23 to SIA for the quarry operation, which has been operating since 2006 and is expected to continue operating over the next 40 to 50 years. These mining operations also extend onto Lot 21 which lies to the north of Lot 23, and is also the site of an active quarrying operation.

The Application and Permit

[30] In the summer of 2010, SIA investigated the possibility of developing a contaminated soil landfill on Lot 23. Active Earth Engineering Ltd. ("Active Earth") drafted the permit application and conducted the technical assessment.

[31] As part of the application, Active Earth conducted a technical assessment of Lot 23, set out first in a draft TAR and then in the final version issued in August 2010. The TAR characterizes the geological and hydrogeological conditions on Lot 23, which are key to assessing the potential for environmental impacts arising in connection with the Permit. The TAR also reviewed in detail the operations and design of the proposed soil treatment and disposal Facility.

[32] The application and draft TAR were submitted to the Ministry in September 2011. The review period resulted in changes to the Facility design, including added protections, in response to new information and feedback received in the consultation process.

[33] On August 21, 2013, the Delegate issued the Permit authorizing the soil treatment Facility, landfill, water treatment system, and settling pond as Active Earth had designed. The Delegate did require the addition of two more monitoring wells at specified locations on Lot 23.

[34] The Facility has already been constructed and at the time of the Board's Decision was ready to operate.

The Appeals to the Board

[35] Four appeals of the Permit were filed in August and September 2013, including one by SRA.

[36] On November 15, 2013, the Board ordered a stay of the Permit. On February 11, 2014, the Board varied the stay to permit CHH to process soil under four specific contracts, but otherwise upheld the stay.

[37] The Board heard the appeals together and each appellant was invited to participate as a third party in each of the other appeals. Each appellant sought an order reversing the decision of the Delegate and rescinding the Permit.

[38] The appellants were concerned that allowing soil deposits of the type permitted and in the chosen location presented too many environmental risks which neither the Facility design nor the characteristics of Lot 23 could overcome. In particular, the appellants were concerned about the effects on local wells, the surrounding bodies of water and wetlands. All of the appellants took the position that the geology and hydrogeology of Lot 23 presented too many uncertainties to give them confidence that contaminants would not enter the environment, and pose a threat to drinking water and fish habitat.

[39] The specific grounds that SRA raised before the Board are set out at para. 134 of the Board Decision:

> 1. The testing and assessment of the suitability of [Lot 23's] geology and hydrogeology was inadequate and incomplete.
> 2. The monitoring and water treatment plans are deficient.
> 3. The Delegate failed to apply the appropriate test for the issuance of the Permit. In particular, the Delegate failed to ascertain the degree of scientific uncertainty related to the facility, and the degree of risk associated with a containment failure at the facility.
> 4. The Delegate failed to ascertain the consequences of such a containment failure and how it could affect the environment and drinking water in the Shawnigan Lake watershed.
> 5. The Permit Holder is not a sufficiently reliable operator to entrust with this facility.
> 6. The proposed financial terms contained in the Permit are insufficient and calculated on the wrong principle; namely, the cost to close the facility, rather than the cost to clean up the environment if there is a containment failure.

[40] During its closing arguments, SRA also argued that the Delegate lacked the jurisdiction to issue the Permit on the basis of the limitations set out in the delegation letter and that the Delegate exceeded his jurisdiction by issuing the Permit without considering two policies set by the Director, as the delegation letter required.

Although CHH objected, the Board decided to consider the issue because a lack of jurisdiction would render the Permit a nullity. It also reasoned that fairness had not been compromised as the parties had had an opportunity to make full submissions on the issue.

[41] In the Board's view, the appeals were conducted as new hearings pursuant to s. 100(1) of the *EMA*. The Board considered the evidence before the Delegate as well as new evidence presented to it. The Board heard from 29 witnesses, including nine who were qualified to give expert evidence. Nine of these witnesses were called by SRA, with six qualified as experts. The Delegate testified and called an additional nine witnesses. At para. 154 of its reasons, the Board noted that it was at the request of the appellants that many of these witnesses were made available, stating:

> In particular, at the request of the CVRD and the Residents Association, the Delegate called a number of scientists and technical experts from the government who provided advice to the Delegate, as well as staff from the Ministry of Energy and Mines to answer questions about the mine permit for the quarry. The Delegate was on the witness stand for a number of days and was subject to rigorous cross-examination.

[42] CHH called two witnesses, but did not call anyone from Active Earth or its expert, Dr. Kevin Morin, a hydrogeologist who authored a report provided in advance of the hearing and filed as an exhibit at the hearing. The Board also heard from a number of the appellants' expert witnesses who criticized the conclusions, opinions, and reports of Active Earth and Dr. Morin.

[43] SRA and CVRD argued that the Board should give no weight to the TARs, designs, or plans Active Earth had prepared, or to Dr. Morin's report. In response to an argument that the Board draw an adverse inference against CHH for its decision not to call these witnesses, the Board determined it would instead consider the entirety of the evidence and determine the weight to be given to the reports, assessments, and opinions of Active Earth and Dr. Morin, in light of the fact they were not tested through questioning.

[44] The Board also received a large body of documentary evidence, including the final TAR, several expert reports filed in advance of the hearing, the Delegate's lengthy book of documents entered as an exhibit, and some 110 other documents entered as exhibits.

[45] The Board rendered the Decision on March 20, 2015, upholding the Permit with certain additional conditions.

[46] SRA commenced this petition on May 19, 2015.

Discussion of Issues

The Delegate had no Jurisdiction to Issue the Permit

[47] SRA submits:

1. that the Director did not delegate to the Delegate the jurisdiction to issue the Permit;

2. that the Delegate acted without jurisdiction because he failed to consider two Director's policies as required by the express terms of the Director's Delegation dated May 13, 2013 (the "Delegation").

[48] This ground was considered by the Board at paras. 168–191 of the Decision.

[49] The Board rejected SRA's argument that the Delegate lacked jurisdiction or alternatively did not comply with the conditions of his appointment and thereby lost jurisdiction.

[50] The Delegate's jurisdiction to issue the Permit is founded on the Director's ability to delegate her powers pursuant to the *EMA*, and on the Delegation. It provides, in part, as follows:

Director's Delegation

WHEREAS:

A. Section 3 of the *Environmental Management Act*, S.B.C. 2003 ("the Act") authorizes the Director to delegate to any person any power,

duty or function of the Director under the Act, subject to the terms and conditions the Director considers necessary or advisable,

B. I consider it to be necessary and advisable for the better administration of the Act to delegate portions of my authority under the Act subject to the terms and conditions set out below.

THEREFORE:

1. I, Jennifer McGuire, Executive Director, hereby delegate to Hubert Bunce, A/Director, Environmental Protection Regional Operations, West Coast Region, the following:

> All sections of the *Environmental Management Act* excepting sections 39 to 64 inclusive; and
>
> All regulations under the *Environmental Management Act* excepting the *Contaminated Sites Regulation*, section 7 of the *Waste Discharge Regulation* and section 2(9) of the *Hazardous Waste Regulation*.

2. This delegation is subject to the following terms and conditions:

   (a) This delegation will not exhaust or otherwise limit my authority as Director to exercise discretion in respect of any matter assigned to me under the Act.

   (b) In exercising his powers, duties and functions, the delegate must consider policies set by the Director.

Standard of Review with Respect to Delegate's Jurisdiction

[51] SRA submits that the Board's decision that the Delegate had the jurisdiction to issue the Permit is reviewable on a correctness standard.

[52] The respondents submit that this decision is reviewable on a deferential reasonableness standard, and in any event was correct.

[53] I agree with the respondents that the Board's decision that the Delegate had the jurisdiction to issue the Permit is reviewable on a reasonableness standard.

[54] SRA began its submissions on this issue by referring to *Dunsmuir v. New Brunswick*, 2008 SCC 9, and in particular that part of *Dunsmuir* that sets out the approach a court should follow in determining the standard of review applicable to a decision of a tribunal. SRA submits that *Dunsmuir* established that a tribunal's decision about whether it has jurisdiction over the issue before it, is reviewable on a correctness standard:

> [59] Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction: D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 14-3 to 14-6. An example may be found in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19. In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences (para. 5, *per* Bastarache J.). That case involved the decision-making powers of a municipality and exemplifies a true question of jurisdiction or *vires*. These questions will be narrow. We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so.

[55] SRA also relies on *Greater Vancouver (Regional District) v. Darvonda Nurseries Ltd.*, 2008 BCSC 1251, in which Justice Wedge held that the Environmental Appeal Board was not entitled to deference on questions of law and statutory interpretation:

> [59] Several decisions of this Court have addressed the appropriate standard of review concerning EAB decisions. The jurisprudence establishes that while the EAB has expertise in respect of the technical and factual matters arising in appeals, it is not entitled to deference with respect to issues of law and statutory interpretation unless these also involve questions of fact. Where the review raises issues of fact or mixed fact and law, the standard of review will be reasonableness. On questions of statutory interpretation and law generally, the standard of review will be correctness because those questions fall within the expertise of the court and not the EAB.

[56] However, the Supreme Court of Canada has further explained the proper test for determining the applicable standard of review in a series of decisions decided after *Dunsmuir*. In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 [*Alberta Teachers' Association*], Justice Rothstein explained that generally a court must apply a deferential standard of review to a tribunal's interpretation of its home statute:

> [30] The narrow question in this case is: Did the inquiry automatically terminate as a result of the Commissioner extending the 90-day period only after the expiry of that period? This question involves the interpretation of s. 50(5) *PIPA*, a provision of the Commissioner's home statute. There is authority that "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (*Dunsmuir*, at para. 54; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 28, *per* Fish J.). This principle applies unless the interpretation of the home statute falls into one of the categories of questions to which the correctness standard continues to apply, i.e., "constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise, . . . '[q]uestions regarding the jurisdictional lines between two or more competing specialized tribunals' [and] true questions of jurisdiction or *vires*" (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at para. 18, *per* LeBel and Cromwell JJ., citing *Dunsmuir*, at paras. 58, 60-61).
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> …
>
> [41] Both Binnie J. and Cromwell J. object to the *creation of a presumption* of reasonableness review of the home statute of the tribunal. With respect, I find the objection perplexing in view of judicial and academic opinion that the presumption was implicitly already established in *Dunsmuir*. Professor D. J. Mullan writes in "The McLachlin Court and the Public Law Standard of Review: A Major Irritant Soothed or a Significant Ongoing Problem?", in D. A. Wright and A. M. Dodek, eds., *Public Law at the McLachlin Court: The First Decade* (2011), 79, at p. 108:
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> > Justice John Evans of the Federal Court of Appeal has argued in his 2009 10th Heald Lecture delivered at the College of Law at the University of Saskatchewan that in *Dunsmuir* (reinforced by *Khosa*), the Court had now established (re-established?) a very strong presumption of deferential review when a statutory authority is interpreting its home, or constitutive, statute, or any other frequently encountered statute, or even common or civil law principle. I too accept that . . . .
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> Both Justice Evans and Professor Mullan are recognized as leading scholars in the field of administrative law in Canada.

[57] I therefore conclude that the Board's interpretation of its home statute is reviewable on a reasonableness standard unless the interpretation involves the specific exceptions referred to in *Alberta Teachers' Association*.

[58] In my view, the Board's decision with respect to the jurisdiction of the Delegate does not fall into any of the exceptions to the presumption that a tribunal's interpretation of its home statute should be reviewed on a reasonableness standard.

The Board did not make a decision about its own jurisdiction, but about the jurisdiction of the Delegate to issue the Permit. That decision involved a mixed question of fact and law because it required the Board to consider whether the quarry was a contaminated site. However, even if the question is one of law alone it was clearly one which involved the interpretation of the Board's home statute.

[59] SRA's alternative argument that the Delegate did not consider two Director's policies also required the Board to determine whether they were Director's policies. It seems to me that this was a question that was within the expertise of the Board and is also reviewable on a reasonableness standard.

[60] SRA's submissions on this issue are premised on the Board's Decision being reviewable on a correctness standard. It begins its argument by referring to the principle that administrative decisions not authorized by the express or necessarily implied terms of a delegation of authority will be held to be *ultra vires*. It then argues that the principles of interpretation of statutes reiterated in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, require that the grant of authority be examined in the context in which it was granted.

[61] SRA submits that the provisions of the *EMA* provide the context in which to determine the scope of the powers delegated to the Delegate. It submits that the modern approach to the interpretation of statutes set out in the Supreme Court's decisions, including *Bell ExpressVu Limited Partnership*, leads to the conclusion that the Director could not have intended to delegate to the Delegate the power to authorize the deposit of contaminated soil into the quarry.

[62] The modern approach as articulated in *Bell ExpressVu Limited Partnership* is set out in para. 26:

> 26 In Elmer Driedger's definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

> Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example, *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 578, *per* Estey J.; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3, at p. 17; *Rizzo& Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 25; *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65, at para. 26; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33, *per* McLachlin C.J.; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 27. I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".

[63] SRA submits that the Delegation expressly excludes all of the Director's powers under the sections of the *EMA* that deal with contaminated sites as well as all powers under the *Contaminated Sites Regulation*, B.C. Reg. 375/96. It argues that in issuing the Permit the Delegate had to consider some provisions of the *Contaminated Sites Regulation*, but had no authority to do so.

[64] SRA submits that on a proper construction of the Delegation in the context of the *EMA*, the Director did not authorize the Delegate to issue the Permit. SRA refers to the Delegate's lack of expertise with respect to the subject matter of the Permit. It also submits that the Delegation expressly excluded the powers of the Director with respect to contaminated sites and under the *Contaminated Sites Regulation*.

[65] SRA also points out that the Delegate had no jurisdiction to approve a soil relocation agreement pursuant to s. 55 of the *EMA*, which is contained in Part 4. SRA argues that it is implausible that the Delegation would have precluded the Delegate from approving a one-time relocation of contaminated soil while at the same time authorizing him to issue a permit for the permanent storage of very large quantities of contaminated soil in a particular site.

[66] SRA also submits that the Delegation was expressly subject to the Delegate complying with all of the Director's policies and that the Delegate failed to consider

and comply with two policies of the Director and was therefore acting outside the scope of his authority.

The Board's Reasons on Jurisdiction

[67] The Board began its analysis of this issue by rejecting SRA's argument that Part 4 of the *EMA* applied to Lot 23 because of the presence of contaminated soil on a portion of the parcel of land on which the landfill was to be located. The Board decided that Part 4 did not apply to the Quarry site on Lot 23 because the subject matter of the Permit was not the remediation of a contaminated site, but rather, the deposit of refuse to ground and the discharge of effluent from that refuse into an ephemeral spring. As such, it was governed by s. 14 in Part 2 of the *EMA*, and was within the powers delegated to the Delegate.

[68] The Board also considered whether the two policies that SRA relied upon were Director's policies and found that they were not.

[69] Finally, the Board rejected SRA's argument that the Delegate exceeded his authority by considering guidance documents issued under Part 4 of the *EMA* and decided that the Delegate did not lose jurisdiction over the Permit application simply by considering those documents in determining whether to issue the Permit.

[70] I have already indicated that I consider that the Board's decision that the Delegate had the jurisdiction to issue the Permit must be reviewed on a reasonableness standard.

[71] I agree with the Board's analysis of the jurisdiction issue. However, even if I did not agree with it, I do not find anything unreasonable in the Board's analysis of this issue. The Board clearly set out its process of reasoning and the factual bases on which it reached its conclusion. As such, there is no basis for this Court to interfere with the decision.

[72] In my view, the modern approach to statutory interpretation requires the decision-maker to consider the terms of the instrument in the context of the *EMA*. I

conclude that the intent of the Delegation is clear. By it, the Director delegated all of her powers under the *EMA*, except for her powers under Part 4, which governs remediation of contaminated sites. The Permit was not issued with respect to the remediation of a contaminated site. It was a permit which authorized the introduction of waste into the Quarry site, Lot 23. Waste includes contaminated soils. The Permit was issued pursuant to s. 14 of the *EMA*, to which the Delegation expressly applies. I therefore find that the Delegate clearly had the jurisdiction to issue the Permit, subject to complying with the express limitations contained in the Delegation.

[73] The Board considered the argument that the Delegate did not follow two Director's policies at paras. 187-8 of the Decision. I agree with the Board's analysis of this issue. SRA bases its argument that the two sources are Director's policies on certain answers elicited from the Delegate on cross-examination with respect to Exhibits 85 and 86 in the Board's hearing. Mr. Bunce agreed that they were policies of the Director. However, his opinion on this matter is not definitive. The Board reviewed the exhibits and concluded they were not Director's policies as that term is used in the Delegation. I have reviewed the exhibits and agree with the Board's conclusion on this issue. More importantly, I am of the view that the Board's conclusion was reasonable.

[74] I am also of the view that the Board's decision on this issue was one of mixed fact and law. In particular, the Board's decision that the site of the Facility was not a contaminated site was based on the Board's review of the evidence before it and on the Board's expertise in interpreting matters that arise under the *EMA*. A decision on an issue of mixed fact and law is reviewable on a reasonableness standard.

[75] SRA has not shown that the Board's Decision was unreasonable.

[76] I therefore reject this ground of review.

Breach of Natural Justice

[77] SRA submits that the Board breached the rules of natural justice and as a result the hearing was unfair to it and the Decision should be quashed accordingly. It

sets out the grounds on which it relies on this issue at paras. 127–128 of its written submissions:

> 127. With respect to the hearing, the Board breached the principles of natural justice in the following ways:
>
> - failing to require all parties to comply with the same rigorous standards for the qualification of experts and admission of expert evidence;
> - admitting and giving significant weight to the contents of documents authored by the engineers from Active Earth who were available to the Respondent and Third Party but were not called to testify;
> - refusing to issue a summons for witness Kevin Bromley, yet making findings on the very subjects about which he would have testified;
> - refusing to consider the evidence of witness Alun Jones, yet making findings on the very subjects about which he would have testified;
> - refusing to allow testimony from SIA's former employees, yet making findings on the very subjects about which he would have testified; and
> - admitting Active Earth's Quarterly Report and Water Treatment System Commissioning Report into evidence and giving weight to them.
>
> 128. The Board breached the principles of natural justice and procedural fairness in its Decision by:
>
> - failing to address the Petitioners' objection to any weight being given to Active Earths' materials or Dr. Morin's report;
> - failing to address the Petitioner's argument that the Ministry does not allow landfills that are less toxic to be located on sites such as this[;]
> - failing to address the Petitioner's argument that the Delegate's submissions on the merits should be heard with significant caution …

[78] The issue of whether the Board acted fairly does not require determination of the appropriate standard of review. The issue to be determined is whether the Board's procedures conformed with the requirements of procedural fairness: *Seaspan Ferries Corporation v. British Columbia Ferry Services Inc.*, 2013 BCCA 55 at para. 52.

[79] I agree with the respondents that a number of the grounds advanced by SRA in support of its claim that the Board did not act fairly are really arguments that the Board's Decision was wrong or unreasonable.

[80] In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, the Court cautioned against characterizing inadequacy of reasons or procedural errors as demonstrating a lack of fairness:

> [21] It strikes me as an unhelpful elaboration on *Baker* to suggest that alleged deficiencies or flaws in the reasons fall under the category of a breach of the duty of procedural fairness and that they are subject to a correctness review. As Professor Philip Bryden has warned, "courts must be careful not to confuse a finding that a tribunal's reasoning process is inadequately revealed with disagreement over the conclusions reached by the tribunal on the evidence before it" ("Standards of Review and Sufficiency of Reasons: Some Practical Considerations" (2006), 19 *C.J.A.L.P.* 191, at p. 217; see also Grant Huscroft, "The Duty of Fairness: From Nicholson to Baker and Beyond", in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context* (2008), 115, at p. 136).

[81] I find that the complaints made in para. 128 of SRA's written submission do not raise issues of fairness or breach of the principles of natural justice. In my view they are assertions that the Board did not give adequate reasons. As such, they are relevant to an assessment of whether the Board's Decision was reasonable, but do not rise to the level of establishing unfairness or breaches of the rules of natural justice.

[82] Similarly, I find that most of the complaints made in paragraph 127 also raise issues about the reasonableness of the Board's Decision. However, I have concluded that the manner in which the Board dealt with the admission of opinion evidence does raise an issue of fairness.

[83] All parties agree that SRA was owed a duty of fairness by the Board. The question before me is whether the Board fulfilled that duty in the circumstances of this case.

[84] The leading case on the contents of procedural fairness is *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. In *Baker* at paras. 21–28, the Court set out a non-exhaustive list of factors to be considered in determining the content of the common law duty of procedural fairness applicable to a tribunal. These include:

1. the nature of the decision and the process followed;

2. the nature of the statutory scheme;

3. the importance of the decision to the parties affected;

4. the legitimate expectations of the parties affected; and

5. the choices of procedure made by the decision-making body.

Nature of Decision

[85] In this regard, I find that SRA was entitled to a degree of procedural fairness that closely resembled that applicable to a judicial model. This factor was addressed in *Baker* at paras. 22–23:

> Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is 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.
>
> Several factors have been recognized in the jurisprudence as relevant to determining what is required by the common law duty of procedural fairness in a given set of circumstances. One important consideration is the nature of the decision being made and the process followed in making it. In *Knight*, *supra*, at p. 683, it was held that "the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making". The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness. See also *Old St. Boniface*, *supra*, at p. 1191; *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109 (C.A.), at p. 118; *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission*), [1989] 2 S.C.R. 879, at p. 896, *per* Sopinka J.

[86] In this case, the Board had a detailed Procedure Manual that dealt specifically with the manner in which opinion evidence could be tendered. In addition, the proceedings before the Board were carried out in a formal way. Witnesses were sworn and were subject to cross-examination.

[87] At the time of the proceedings before it, the Board did not have the rule-making powers contained in s. 11 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45. The Procedure Manual, therefore, did not contain binding rules of procedure. However, the Procedure Manual expressly stated that parties involved in the appeal process could expect that the Board would follow the procedures set out in the Procedure Manual. In any event, my concern on this issue is based on the fact that the Board appears to have applied different standards for the admission of opinion evidence from SRA than it applied to opinion evidence from government staff.

Nature of the Statutory Scheme

[88] The statutory scheme in issue in this case is the *EMA.*

[89] Part 8 of the *EMA* gives a right of appeal to the Board of any decision made by the Director or a delegate of the Director. Section 94 gives the person who made the decision under appeal the right to request to be made a full party to the appeal and requires the Board to grant that status if requested. The evidence established that the person making the decision is always a full party to any appeal brought before the Board. In this case the Delegate participated in the hearings as a full party.

[90] Section 102 gives the Board the power to conduct a new hearing. That was the procedure followed in this case.

[91] I conclude that the statutory scheme in this case contemplates a formal adversarial type of hearing before the Board. When read together with the Board's Procedure Manual, the *EMA* clearly contemplates that a high degree of fairness, akin to that of a court proceeding, should apply to appeals.

[92] The fact that the Delegate participates in the hearing as a full party reinforces the necessity for a high degree of procedural fairness in the conduct of the hearing.

Importance of the Decision

[93] I am satisfied that the Decision in this case was of high importance to the parties. I have no reason to doubt the sincerity of the concerns expressed by SRA. It is also obvious that there could be serious environmental consequences if the Facility fails to contain the contaminants found in the soil being deposited in the quarry.

Legitimate Expectations

[94] In this case, I find that SRA had a legitimate expectation that it would be treated in the same manner as the Delegate before the Board. There is no indication in the Procedure Manual that evidence tendered by the Delegate would be treated in a different manner from evidence tendered by SRA, or that the provisions with respect to the admission of opinion evidence did not apply to the Delegate.

Choices of Procedure

[95] Finally, the choices of procedure to be followed by the Board are set out in the Procedure Manual. While the Board was not bound to follow the Procedure Manual, it seems to me that it should not have departed from the procedures set out therein with respect to the evidence of one party only.

Did the Board Act Fairly in its Treatment of Opinion Evidence?

[96] I have concluded that the Board did not act fairly in the manner in which it received opinion evidence in this case.

[97] Section 4.4.1 of the Procedure Manual that was in force at the time of the hearing contained the following provisions with respect to notice of expert evidence that a party intended to rely upon:

> ***Notification of expert evidence***
>
> An expert witness is a person who, through experience, training and/or education, is qualified to give an opinion on certain aspects of the subject matter of the appeal. To be an "expert" the person must have knowledge that goes beyond "common knowledge". (See section 4.4.2 for more information on expert evidence.)
>
> Any party that intends to present expert evidence at a hearing is required to provide the Board, and all other parties to the appeal, with at least 60 days advance notice that an expert will be called to give an opinion. Unless the Board authorizes otherwise, the notice must include:
>
> (a) a brief statement of the expert's qualifications and areas of expertise;
>
> (b) the opinion to be given at the hearing; and
>
> (c) the facts on which the opinion is based.
>
> If a party intends to produce a written statement or report by an expert(s) at a hearing, a copy of the statement or report must be provided to the Board and all parties to the appeal before the statement or report is given in evidence. Unless there are compelling reasons for later admission and the Board approves a variation of the admission date, expert reports must be distributed **60** days prior to the hearing date. The expert's qualifications must be included with the report.
>
> After receiving notice of expert evidence, the other parties or party may decide to respond to that expert evidence by presenting their own expert evidence at the hearing. If a party decides to provide expert evidence in response, the party must deliver notice of the expert evidence, including the information described above, no later than **30** days after receipt of the other party's notice of expert evidence.
>
> The purpose of advance notice of expert evidence is to give the other parties an opportunity to review and consider the expert evidence, and the facts on which it is based, in order to prepare questions to ask at the hearing and to consider whether to submit their own expert evidence.
>
> Failure to provide reasonable notice of expert evidence or expert reports may result in an adjournment of the hearing or exclusion of the intended evidence.

[98] In para. 4.2.2 of the Procedure Manual, the Board sets out the circumstances in which it will admit expert evidence:

> ***Expert evidence***
>
> As stated in section 4.4.1 under the heading "Notification of expert evidence," an expert witness is a person who, through experience, training and/or education, is qualified to give an opinion on certain aspects of the subject matter of the appeal. To be an "expert" the person must have knowledge that goes beyond "common knowledge".
>
> As stated previously in this section, sections 10 and 11 of the British Columbia *Evidence Act* do not apply to expert evidence that is presented at

> hearings before the Board, because the Board has established its own rules for the introduction of expert evidence and the testimony of experts. In addition, if there is a conflict between the Board's rules and sections 10 or 11 of the *Evidence Act*, the Board's rules on expert evidence apply.
>
> Experts must be "qualified" by the Board before giving their opinion. Each party will have an opportunity to cross-examine a proposed expert and make submissions before the Board makes a determination on qualifications. This means that the Board must be satisfied that the witness has the appropriate experience and training to be an expert in the matters for which he or she is giving expert opinion evidence.
>
> If a person is found not to be qualified to give expert evidence on a particular subject matter, the Board may still receive the witness's evidence. The Board will determine what weight should be given to each witness's testimony. The qualifications and experience of the witness will be a factor in determining the weight to be given that witness's testimony.

[99] The Board required SRA to comply with the requirements for admitting expert evidence set out above.

[100] The Board is not bound by the strict rules of evidence or by the provisions of ss. 10 and 11 of the *Evidence Act*, R.S.B.C. 1996, c. 124. However, the Board has decided that opinion evidence can only be given by a qualified expert. In that regard, the Board has adopted the general evidentiary rule that a witness may not give opinion evidence unless that witness has special knowledge that permits him or her to give an opinion on a matter.

[101] In this case, the Board applied the rules contained in its Procedure Manual to the evidence tendered by SRA. However, it did not apply the same rules to the evidence tendered by the Director or provided by Ministry staff. In its rulings and the Decision, the Board made distinctions between what it regarded as opinion evidence and what it described as fact evidence. The Board permitted staff members from the Ministry and from the Ministry of Mines to describe their observations and recommendations made in the course of carrying out their duties. Had the Board stopped there, I do not think that SRA would have any basis to complain.

[102] However, the Board went further. In arriving at its Decision, the Board clearly relied on opinion evidence from Ministry staff and from staff of the Ministry of Mines that was not tendered in compliance with its own Procedure Manual.

[103] In particular, the Board relied on the opinion of Kirk Hancock with respect to the permeability of Lot 23. SRA objected to Mr. Hancock giving opinion evidence, but the Board allowed him to testify as to his observations and conclusions. In so doing, I am satisfied that the Board relied on opinion evidence from Mr. Hancock. This is made clear at paras. 457 and 472 of the Board's Decision:

> [457] There is no dispute that a nearby quarry contains limestone deposits. Although the Panel agrees that isolated limestone deposits cannot be "ruled out" on the Site, the most compelling evidence is from Mr. Hancock on this matter. His view is that the geology of the Site precludes the presence of limestone. Although Mr. Hancock was not qualified as an expert in these proceedings because of his connection with the government, he has significant expertise and the Panel finds that his professional qualifications, employment and technical experience, and the 2 days he spent investigating the Site, makes his evidence the most compelling on this matter. He was specifically asked to look for limestone and, the Panel notes, the evidence of the Thurber experts support his conclusion.
>
> …
>
> [472] The question, then, is whether this uncertainty can be, or should be, resolved through further investigation? The Panel heard many different opinions on this question. Mr. Hancock testified that he would have preferred to have data from additional wells in order to characterize the Site. However, he also testified that he was satisfied that he could adequately characterize the Site with the information that he obtained during his 2 days on the Site, coupled with the data from the 5 monitoring wells and the core drilling program.

[104] The Board also based its decision on opinion evidence from Ms. Narynski of the Ministry of Energy and Mines with respect to the geotechnical aspects of the site and the effect of quarry blasting on the liners that are an integral part of the design of the Facility. The Board also relied on opinion evidence from Deborah Epps of the Ministry with respect to the efficacy of the water treatment system for overflow water from Lot 23.

[105] The Board did not apply the requirements of the Procedure Manual to the opinion evidence of these witnesses.

[106] It is clear that the Board perceived that it would be inappropriate to qualify government technical staff as experts because they were not independent. The

Board's reasoning on that concern is expressed at para. 391 with respect to Dr. Mortensen, and at para. 457 with respect to Mr. Hancock.

[107] At the hearing, the Board did not have the advantage of the Court's decisions in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 and *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, which both held that a tribunal could accept opinion evidence from an expert affiliated with a party as long as the tribunal was satisfied that the expert was willing and able to give fair, objective and nonpartisan evidence.

[108] There was therefore no legal impediment to the Board having Ministry staff qualified as experts. Despite failing to qualify them as experts, the Board clearly relied on their opinion evidence in reaching its conclusion. In the result, the only effect of the Board not qualifying Ministry staff as experts was that SRA was deprived of the procedural safeguards contained in the Procedure Manual with respect to notice of their evidence.

[109] I also consider it relevant that under s. 94(1)(b) of the *EMA*, the Delegate exercised his right to participate in the appeal as a party and advocate for upholding the Permit. In my view, this made it even more important that the Board treat SRA and the Delegate equally with respect to the requirements for tendering opinion evidence.

[110] Accordingly, I find that the Board did not act fairly with respect to the expert evidence which was before it. The appeal before the Board was essentially a contest among experts over the safety and engineering of the project. The rules with respect to the admissibility of and procedures for tendering that evidence were therefore of central importance to the conduct of the appeal. I conclude that the decision of the Board must be set aside on that ground.

[111] Given my findings on the fairness issue, I do not find it necessary to decide whether the decision was unreasonable or address the other procedural complaints of SRA.

[112] I will, however, address two further issues: SRA's application to adduce further evidence and the impact of that evidence if admitted; and SRA's allegation that the Panel was biased against it.

Should the Decision be set aside by reason of CHH's Conduct in the Approval Process?

[113] SRA submits that CHH and its principals engaged in conduct in the course of the approval process and before this Court that should result in the Decision and the Permit itself being set aside on that ground alone.

[114] To make this argument, SRA must obtain leave of the Court to expand the record to include matters that were not before the Board.

[115] CHH opposes the admission of this evidence.

[116] The general rule on judicial review is that the court should confine itself to considering only the record that was before the tribunal whose decision is under review. However, SRA submits that this is one of those exceptional cases in which it is necessary to introduce evidence which has come to light after conclusion of the hearings before the Board. SRA says that this evidence will demonstrate that the permit holder, CHH and its principals made false statements to the Board and concealed material information from the Delegate, the Board and this Court, which were material to the decision-makers' consideration of the issues before them.

[117] The most serious of the allegations is that CHH concealed from the Delegate and the Board the fact that the Qualified Professionals who provided technical information to the Ministry and prepared the TAR were equity participants in the Facility.

[118] The role of a Qualified Professional is described in the Decision at para. 4. The Qualified Professional is responsible for preparing the TAR. The importance of a TAR in the approval process and the role of the Qualified Professional in preparing it is set out in the Decision as follows:

> [27] The first step takes place before an application is prepared. The Ministry advises a potential applicant to review all Ministry process and guidance documents, the applicable legislation, and to complete draft application documents. The draft application documents include the terms of reference for a technical assessment and a draft public and agency consultation plan. Once these are completed, a pre-application meeting is arranged with the Ministry. During this meeting, the parties discuss the application process, the draft application documents, and determine whether a Technical Assessment Report ("TAR") will be required from a Qualified Professional[4]. This was required in the present case.
>
> [28] The second step can be a lengthy one. It involves preparing the final application for submission to the Ministry. During this step, modifications are made to the application and a draft TAR is created. A TAR is an important document that is designed to address the technical aspects of the proposal. It is to include information regarding the source of the waste, the discharge quality and quantity, information about the receiving environment, any objectives or other criteria applicable to the receiving environment, and details about the potential environmental impacts if the permit is granted.

[119] The qualifications necessary to be designated as a Qualified Professional are described in a footnote to para. 27 of the Decision:

> [4] A qualified professional means a person who is registered in British Columbia with an appropriate professional association, acts under that professional association's code of ethics, and is subject to disciplinary action by that professional association, and through suitable education, experience, accreditation and knowledge may be reasonably relied on to provide advice within an area of expertise related to the application. See Ministry of Environment "Guidance on Applications for Permits under the Environmental Management Act – Technical assessment; Date Updated: September 10, 2010.

[120] I accept SRA's submission that the Ministry expects that a Qualified Professional will provide unbiased and sound information in connection with the project under consideration. This expectation is inherent in the rationale for requiring a TAR.

[121] This conclusion is consistent with the contents of the *Operational Policy Manual* of the Environmental Protection Division for reviewing environmental impact assessments. This manual makes it clear that decisions must be "science-informed".

[122] The characteristics of science-informed decision-making are set out in Appendix A to the *Operational Policy Manual*:

> **Characteristics of Science Informed Decision Making**
>
> Effective use of science advice in decisions means that:
>
> there has been full consideration of the best available science
>
> the scientific knowledge used is sound (systematic, peer reviewed, independent, free from bias or bias is revealed)
>
> the full diversity of scientific thought from relevant disciplines is considered risks and uncertainties are explicitly taken into account
>
> there is an acknowledgment that the "best available" science does not encompass all possible knowledge
>
> decisions are transparent and open - all pertinent information, data, assumptions, values and interests are identified and accessible
>
> a rationale for major decisions is provided / available to all interested parties
>
> adaptive management principles have been incorporated and the decision is subject to ongoing review
>
> formal institutional processes exist to ensure accountability
>
> [Emphasis added.]

[123] In this case, Active Earth was designated as the Qualified Professional for the Facility and charged with preparing the TAR and acting as technical liaison between CHH and the Ministry. However, the evidence that has come to light since the hearing before the Board has satisfied me that from almost the outset of the plan to pursue the Facility until well after these proceedings were commenced, Active Earth was a co-owner, or at least had an agreement with CHH to become a co-owner, of the Facility for which the Permit was required.

Should the Evidence be Admitted?

[124] SRA submits that the additional evidence should be admitted to prevent a fraud from being perpetrated on the decision-making process leading up to the Decision. Its position is that the fraud goes to two important elements in this case: the reliability of the technical information provided by Active Earth and the suitability of the Permit holder, CHH, to operate a landfill requiring the safe storage of contaminated material on a permanent basis.

[125] Tribunals faced with an application to permit additional evidence to be submitted after a decision has been rendered must balance two important interests. The first is the interest of society in the finality of dispute resolution proceedings. The second is the preservation of the integrity of such proceedings. The cases to which I was referred all stress the importance of striking an appropriate balance between these important objectives.

[126] SRA relies on cases in which courts have set aside judgments in instances of actual fraud. It placed considerable reliance on *Canada v. Granitile Inc.*, 302 D.L.R. (4th) 40, [2008] O.J. No. 4934 (S.C.J.).

[127] In *Granitile Inc.*, the plaintiff obtained a judgment against the Government of Canada in a trial in 1998. An important reason why the plaintiff succeeded was that the trial judge found that the government failed to disclose a number of letters from and to its officials that supported the plaintiff's claim. The trial judge was very critical of the government for failing to disclose the letters and awarded punitive damages against it. However, on a second trial it was proven that the letters in question had been forged by the principal of the plaintiff, who also gave false testimony about their authenticity.

[128] Justice Lederer set the original judgment aside on the basis of the forgery. In his reasons he reviewed the authorities dealing with the admission of fresh evidence and the jurisdiction of the court to set aside entered judgments. Justice Lederer at paras. 283–326, then formulated a four-step test for determining whether a judgment obtained by fraud should be set aside, summarized as follows:

1. the party alleging the fraud must prove it on the balance of probabilities with clear and convincing evidence;

2. the party must not have had knowledge of the fraud and the evidence necessary to prove it at the time of the first trial;

3. the party must show that the fraud affected the result in the judgment but need not show that it was a determining factor;

4. the party must show that it acted to set aside the judgment without undue delay.

[129] SRA submits that *Granitile Inc.* permits the introduction of evidence of fraud in circumstances when the usual rule for the admission of fresh evidence would not permit it to be introduced.

[130] In *Ma v. Nutriview Systems Inc.*, 2016 BCCA 4, leave to appeal ref'd [2016] S.C.C.A. No. 83, the court considered an application to admit evidence that the successful plaintiff had tried to bribe a witness who ultimately was called by the defendant. The witness swore an affidavit that alleged that he had been offered a bribe to give false testimony in favour of the plaintiff.

[131] Justice Newbury, although dissenting in the result, outlined the legal principle applicable to the admission of the fresh evidence. In so doing, she referred to the test set out in *R. v. Palmer*, [1980] 1 S.C.R. 759:

> [26] In a well-known passage, Mr. Justice McIntyre speaking for the Court, noted the "broad discretion" given to appellate courts by s. 610(1)(d) of the *Criminal Code*, and the factors that are to be considered in exercising that discretion. In his words:
>
> > ... The overriding consideration must be in the words of the enactment "the interests of justice" and *it would not serve the interests of justice to permit any witness by simply repudiating or changing his trial evidence to reopen trials at will to the general detriment of the administration of justice*. Applications of this nature have been frequent and courts of appeal in various provinces have pronounced upon them—see for example *Regina v. Stewart; Regina v. Foster; Regina v. McDonald; Regina v. Demeter.* From these and other cases, many of which are referred to in the above authorities, the following principles have emerged:
> >
> > > (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen.*
> > >
> > > (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.

> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.
>
> The leading case on the application of s. 610(1) of the *Criminal Code is McMartin v. The Queen, supra.* Ritchie J., for the Court, made it clear that while the rules applicable to the introduction of new evidence in the Court of Appeal in civil cases should not be applied with the same force in criminal matters, it was not in the best interests of justice that evidence should be so admitted as a matter of course. Special grounds must be shown to justify the exercise of this power by the appellate court. … [At 775-6 …]

[132] SRA submits that in cases of fraud the party seeking to adduce fresh evidence need not show that the true facts if known would have led to a different result. They need show only that knowledge of the true facts and of the fraudulent conduct would have had an effect on the outcome.

[133] SRA argues that Active Earth acted fraudulently in acting as a Qualified Professional and preparing the TAR without disclosing that it had an ownership interest in the project it was reporting on. It submits that CHH was a party to that fraud by concealing its business relationship with the principals of Active Earth.

[134] In addressing this issue, I will use the term Active Earth to describe not only the corporate entity Active Earth Engineering Ltd., but also its principals and various corporations established by those principals for the purpose of participating as an owner of the Facility. The critical issue with respect to Active Earth is whether it or its principals had an ownership interest in the Facility while Active Earth was acting as the Qualified Professional in the Permit approval process.

[135] I have no difficulty in finding that Active Earth had an ownership interest of some sort in the Facility. The objective evidence can lead to no other rational conclusion.

[136] I need not review the overwhelming evidence establishing this point in detail. It is set out in detail in SRA's written submissions. I will, however, refer to some of

the more telling documents establishing that relationship, which appears to have been agreed as early as 2010.

[137] The first is an email from Matt Pye of Active Earth to Marty Block and Mike Sia of CHH dated January 17, 2012 discussing the legal structure that will be used for a partnership that clearly involves the Facility. In this email, Mr. Pye discusses modifying what had been a contemplated joint venture agreement into a shareholder agreement for a company yet to be formed. By this early date it appears that Active Earth or its principals were of the view that they would have some form of ongoing ownership interest in the Facility.

[138] On January 30, 2012, Michael Achtem of Active Earth sent an internal email to Mr. Pye and Jeff Taylor containing a summary of issues that were under discussion at that time with CHH.

[139] On September 11, 2012, the solicitor for Active Earth sent an email to another lawyer asking for assistance in preparing documents with respect to what is referred to in the reference line as the SIA (South Island Aggregates) Active Earth Joint Venture. This email refers to a signed draft agreement between a number of yet to be incorporated companies, one of which is referred to as Active Earth Newco. The recitals to this draft agreement state that the Facility will be owned and operated by a new company, to be owned by a new company owned by the principals of Active Earth and the principals of CHH. On September 11, 2012, two new companies, 0949811 B.C. Ltd. and 0949812 B.C. Ltd., were incorporated.

[140] These numbered companies entered into an agreement with CHH and SIA on February 14, 2013 (the “February 2013 Agreement”). In the February 2013 Agreement, 0949812 B.C. Ltd. is described as AEN and 0949811 B.C. Ltd. is described as OPCO.

[141] The recitals to the February 2013 Agreement set out the ownership structure of the Facility:

> WHEREAS AEN and SIA have identified a business opportunity involving the acquisition of a permit under the Waste Management Act to establish and operate a contaminated waste disposal site (the "Facility") on land presently owned/controlled by CHH;
>
> AND WHEREAS it is agreed by the parties that the waste disposal operation will be owned and operated by OPCO, a company jointly owned by SIA and AEN;
>
> AND WHERAS SIA and AEN will direct OPCO in the execution of its contaminated waste disposal operation employing land, equipment and resources supplied by South Island Aggregates Ltd. (SIA) and professional engineering technical expertise, science and ongoing testing provided by Active Earth Engineering Ltd. (AEE), all of which to be governed by the terms and conditions of this agreement as are more particularly hereinafter described;
>
> AND WHEREAS the parties have entered into this Agreement for the purposes of more particularly delineating their respective rights and responsibilities and to create a regime in which SIA and AEN are equal shareholders in OPCO;

[142] Article III of the February 2013 Agreement provides that the shareholders of OPCO will work cooperatively in the assembly and analysis of all necessary information to prepare and submit the application for the Permit.

[143] CHH has filed affidavit material to the effect that the February 2013 Agreement was never implemented or that if it was, it was abandoned shortly thereafter. However, there is ample evidence in the record to show that the principals of Active Earth and the principals of CHH considered that they were parties to a joint venture or partnership for the construction, permitting and operation of the Facility.

[144] It is clear that at the very least the parties were in the position of jointly pursuing the business opportunity represented by the Facility and that Active Earth was providing its engineering services as part of that pursuit.

[145] From the record it appears that the parties had a falling out over the relative value of their contributions to that venture in April 2014, when they exchanged statements of what they had respectively contributed to it. However, by that time it is unlikely that either party could have expelled the other from the opportunity.

[146] The record also shows that in May 2015 the parties were still negotiating their differences. On May 1, 2015, AEN gave a notice of default under the February 2013 Agreement. Up to that time there had been no disclosure of the February 2013 Agreement or of any of the email correspondence between Active Earth and CHH.

[147] I am of the view that Active Earth acted improperly in acting as Qualified Professionals and preparing the TAR without disclosing that interest.

[148] There is no evidence before me that Active Earth deliberately provided any false information to the Delegate or the Board. In fact, no Active Earth representative gave evidence at the Board hearings. While its role as Qualified Professional required it to be unbiased, Active Earth was not specifically asked to certify or declare that it was unbiased either by the Delegate or the Board.

[149] Fraud is a serious allegation. It requires an actual dishonest motive in carrying out the conduct complained of. On the basis of the record before me, I am not prepared to find that Active Earth's conduct in acting as Qualified Professional can be characterized as fraudulent or that CHH acted fraudulently in concealing its relationship with Active Earth.

[150] I therefore find that the *Granitile Inc.* test is not applicable to the issue of whether the evidence about Active Earth's ownership in the Facility should be admitted. I am of the view that this question should be decided on the basis of the jurisprudence that has followed and elaborated on the *Palmer* criteria for admitting the evidence.

[151] I am satisfied that the evidence could not reasonably have been obtained by SRA through any exercise of due diligence before the February 2013 Agreement was anonymously delivered to it. I am also satisfied that the evidence is credible.

[152] In my view, the evidence is relevant in that it bears on an important issue before the Board: the independence of the Qualified Professional who designed the Facility.

[153] CHH argues that the evidence does not meet the fourth criteria in *Palmer*; that is, it has not been shown that it would have been expected to have affected the result of the Board's Decision.

[154] I am satisfied that the relationship between Active Earth and the project was material and ought to have been disclosed to the Delegate and the Board. The scheme of the *EMA* relies on the integrity of the work product from Qualified Professionals. An important element in assessing any technical or scientific opinion is knowing whether the professional producing the opinion has any reason to be biased. The existence of a financial benefit to the Qualified Professional from a particular outcome is a clear example of a reasonable apprehension of bias in the person preparing the opinion.

[155] It is clear from the evidence that the Delegate relied on the TAR and on further information provided by Active Earth in assessing the application and deciding to issue the Permit. If the question before me had been whether to set aside the Permit, I would have had no difficulty in setting it aside and remitting it to the Ministry for reconsideration because the TAR was prepared by persons who were biased in favour of approving the project.

[156] However, I have already agreed with the respondents that the proper subject matter of this judicial review is the Board's decision to uphold the Permit.

[157] The powers of the Board are set out in s. 103 of the *EMA*:

> 103 On an appeal under this Division, the appeal board may
>
> (a) send the matter back to the person who made the decision, with directions,
>
> (b) confirm, reverse or vary the decision being appealed, or
>
> (c) make any decision that the person whose decision is appealed could have made, and that the appeal board considers appropriate in the circumstances.

[158] It is not entirely clear whether the Board's decision was made pursuant to s. 103(b) or s. 103(c) of the *EMA*. Paragraph 720 of the Board's reasons suggests

that the Board considered that it was confirming the Permit with some variations. However, it is clear that the Board conducted a rehearing of the merits of the application and reached its own conclusion on those merits.

[159] CHH submits that the Board conducted a hearing *de novo.* It submits that in so doing, the Board gave little or no weight to the TAR or the opinions of Active Earth and instead relied on the evidence presented at the hearing, which included evidence from staff of the Ministry and of the Ministry of Mines and Energy. CHH therefore says that SRA has failed to meet the requirements of either the third test set out in *Granitile Inc.* or the fourth test of *Palmer*; that is, that the evidence was not shown to be of sufficient significance to the decision to be admissible.

[160] I do not accept this submission. I find that the engineering information prepared by Active Earth, including the TAR and the additional information provided to the Ministry, did form an important, if not decisive, part of the evidence on which the Board based its ultimate Decision. At para. 65 of its reasons, the Board stated that Active Earth designed the Facility. In addition, a review of the Decision persuades me that the Board also accepted the overall design of the Facility, which was produced by Active Earth.

[161] I agree with CHH that the Board did not accept Active Earth's initial opinion on the question of whether the geology of the site itself provided sufficient protection against the escape of contaminants into the surrounding ground water. However, the fact remains that the Facility under consideration by the Board was designed by Active Earth.

[162] I am therefore of the view that SRA has met the requirements of the *Palmer* test. If I am wrong in concluding that the *Palmer* criteria are present, I would still admit the evidence on the basis that the interests of justice require it.

[163] In *Ma*, Newbury J.A. stated that even if the four criteria set out in *Palmer* are not met, a court has the discretion to admit fresh evidence if it is in the interests of justice to do so:

> [28] Although the *Palmer* criteria have been described using different words by Canadian courts (see, e.g., *Cory v. Marsh* [1993] 77 B.C.L.R. (2d) 248 (C.A.) at para. 28), the four criteria generally continue to be the starting point both in criminal cases and in civil cases, where they are said to be applied more strictly than in criminal cases. More recent authorities have clarified that even if the *Palmer* criteria are not met, a court of appeal has the discretion to admit fresh evidence if it is in the interests of justice to do so. As stated in *Golder Associates v. North Coast Wind Energy Corp.* 2010 BCCA 263:
>
> > In my view, the *Palmer* criteria reflect the caution with which the admission of fresh evidence must be considered, but they are not absolute. The source of the criminal law admissibility of such evidence is the present s. 683(1)(d) of the *Criminal Code*, R.S.C. 1985, c. C-46, which provides for the admission of evidence "in the interests of justice". That, I think, must be the overarching consideration in civil as well as criminal appeals. [At para. 37.]

[164] I am satisfied that the Board ought to have been made aware that the design of the Facility and the TAR presented to the Delegate was prepared by engineers who were not independent and who stood to profit from the continued operation of the Facility. That is a circumstance that goes to the heart of the integrity of the approval process under the *EMA*. The Delegate and the Board proceeded throughout on the basis that Active Earth were professionals acting on a fee for service basis.

[165] Before the Board, SRA argued that Active Earth's work product should not be relied upon because of the large amount of outstanding fees that Mr. Block of CHH testified was owed to it. The thrust of SRA's submission to the Board was Active Earth had a financial motivation to push for upholding the Permit because it was questionable whether it would be able to recover its fees if the Permit was overturned.

[166] The Board dealt with these submissions at paras. 269–273 of its decision. The Board did find that Active Earth was acting as an advocate for the Permit application. However, it is clear from its reasons that the Board accepted the evidence of Mr. Block that Active Earth was acting on a fee for service basis.

[167] In fact, Active Earth was not acting on a fee for service basis; rather, its principals were active participants in the business venture in respect of which the Permit was being sought. I am satisfied that the Board was misled on this point. Paragraph 273 of the Board's reasons shows the extent to which they were misled:

> [273] The Panel finds no merit to the assertion that Active Earth should be disqualified because they have not been fully paid for their work to date. As a result, the Panel accepts that the Delegate properly considered the work prepared by Active Earth as the Qualified Professional for SIA and Cobble Hill.

Mr. Block's Evidence before the Board

[168] SRA also relies on what it submits is Mr. Block's false evidence before the Board as a ground for setting aside the Decision.

[169] I have reviewed Mr. Block's evidence before the Board. I am forced to conclude that Mr. Block was not being truthful in the evidence he gave with respect to the nature of the relationship between Active Earth and CHH. For the purposes of this proceeding it is not necessary to determine whether Mr. Block committed perjury before the Board. As pointed out in *Granitile Inc.*, perjury requires an actual intention to deceive. I would be reluctant to make a finding that all of the elements necessary to establish perjury have been established against Mr. Block on a judicial review application.

[170] However, I am satisfied that his evidence about the nature of the relationship between Active Earth's interest in the project and about the financial arrangements between Active Earth and CHH was false and misleading.

[171] As I have already indicated, in its submissions to the Board, SRA made a direct attack on the work product of Active Earth and clearly raised the issue of the nature of the relationship between CHH and Active Earth. The Board dealt with both the relationship of Active Earth to the project and with Mr. Block's credibility in its reasons.

[172] I am satisfied that the Board proceeded throughout its deliberations on the basis that Active Earth was providing services to CHH on a fee for service basis and that it was acting as the Qualified Professional in providing information to the Delegate. The Board's analysis of this issue at paras. 269–273 was limited to the information provided to it by CHH through Mr. Block, to the effect that CHH owed over $500,000 in fees to Active Earth. That amount of engineering fees would not have seemed unreasonable considering the history of the Permit application up to that point.

[173] It is, however, quite clear that the information provided to the Board on this issue by Mr. Block was false. In fact, the engineering work of Active Earth, including its work product as Qualified Professional, was not being done on a fee for service basis, but as Active Earth's equity contribution to the joint venture that it was agreed would be the entity operating the Facility and earning income from it.

[174] Accordingly, I have no difficulty in concluding that the Board was misled into believing that there was no conflict of interest on the part of Active Earth, except for that inherent in the fact that they were acting for CHH and were advocating for an approval of the Permit in that capacity.

[175] I am satisfied that the Board was misled about the true nature of the relationship between Active Earth and CHH and the fact that Active Earth's principals were partners in the proposed Facility. That is information that ought to have been disclosed to the Board. I am also satisfied that Mr. Block deliberately concealed that information from the Board in his testimony on behalf of CHH.

[176] Accordingly, I find that the evidence with respect to Active's Earth's equity position in the Facility is admissible on this application.

[177] It is not for me to say what influence that information would have had on the Board's ultimate decision. However, I am satisfied that the withholding of this information from the Board brought the integrity of the approval process and appeal into question. I do not mean by this that the Board or the Delegate's integrity have

been brought into question. It is the conduct of CHH and Active Earth that has had that effect.

[178] I consider it to be in the interests of justice that the Board must reconsider its Decision with the benefit of the fresh evidence. Such an order is necessary to uphold the integrity of the approval and appeal process in this case.

CHH's Evidence on this Application

[179] I also find that CHH filed misleading evidence in this Court.

[180] In June 2015, after this petition was commenced, a copy of the February 2013 Agreement was delivered anonymously to SRA. As a result, SRA applied for further documentary disclosure from CHH.

[181] In response, counsel for CHH obtained an affidavit from Mr. Pye, sworn July 10, 2015. In that affidavit, Mr. Pye deposed that the February 2013 Agreement had "not been followed through with". He also deposed that at all times Active Earth had been providing engineering services at an hourly rate and that by May 2014, Active Earth and CHH had abandoned the concept of using OPCO. The contents of this affidavit are somewhat startling given the fact that only two months previously, on May 1, 2015, Active Earth's counsel had delivered a notice of default of the February 2013 Agreement to CHH.

[182] Not surprisingly, after consulting with his own counsel, Mr. Pye swore a second affidavit, giving a different version of the relationship between Active Earth and CHH and SIA. In this affidavit, Mr. Pye still did not disclose the notice of default, but deposed that it was CHH that had apparently tried to abandon the February 2013 Agreement.

[183] I need not review the extensive cross-examination of Mr. Pye, Mr. Block and Mr. Kelly. I think it sufficient to say that all three acknowledged that the underlying arrangement called for Active Earth or some entity representing its principals to

perform the engineering work required for the Facility in exchange for a 50% interest in the business operating the Facility.

[184] CHH's lack of candour in these proceedings reinforces my view that the interests of justice require that the Decision be set aside and the matter remitted to the Board for reconsideration in light of the fresh evidence.

Bias

[185] SRA seeks to set aside the Board's Decision on the ground that it was biased in favour of approving the Facility.

[186] In the petition, the basis on which bias is alleged is set out at page 38:

> 5. In view of the totality of the procedural unfairness and the substantively unreasonable findings of the Board evidenced in the hearing and the Decision, and in view of the Board's acceptance of the Delegate's inappropriately adversarial position within the proceeding, the SRA says that the Board's conduct gives rise to a reasonable apprehension of bias against the SRA, and the Decision and the Permit should be set aside as a result.

[187] In its written submissions, SRA argues that the cumulative effect of the numerous substantive and procedural grounds advanced for setting aside the Decision leads to the conclusion that the Board was biased in favour of permitting the Facility to become operational, but no longer relies on the allegation that the Board acted inappropriately by permitting the Delegate to take an adversarial position before it. That allegation was without merit given the clear provisions of s. 94 of the *EMA*.

[188] SRA does not appear to allege that any of the traditional categories of bias apply to the Board. The traditional categories are addressed in *Wewaykum Indian Band v. Canada*, 2003 SCC 45:

> 75 Three preliminary remarks are in order.
>
> 76 First, it is worth repeating that the standard refers to an apprehension of bias that rests on serious grounds, in light of the strong presumption of judicial impartiality. In this respect, de Grandpré J. added these words to the now classical expression of the reasonable apprehension standard:

> The grounds for this apprehension must, however, be substantial, and I . . . refus[e] to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".
>
> (*Committee for Justice and Liberty v. National Energy Board*, *supra*, at p. 395)
>
> 77 Second, this is an inquiry that remains highly fact-specific. In *Man O'War Station Ltd. v. Auckland City Council (Judgment No. 1)*, [2002] 3 N.Z.L.R. 577, [2002] UKPC 28, at par. 11, Lord Steyn stated that "This is a corner of the law in which the context, and the particular circumstances, are of supreme importance." As a result, it cannot be addressed through peremptory rules, and contrary to what was submitted during oral argument, there are no "textbook" instances. Whether the facts, as established, point to financial or personal interest of the decision-maker; present or past link with a party, counsel or judge; earlier participation or knowledge of the litigation; or expression of views and activities, they must be addressed carefully in light of the entire context. There are no shortcuts.

[189] The sole authority relied upon by SRA in support of its argument that the totality of the Board's conduct and Decision leads to a reasonable apprehension of bias is the decision of the Ontario Divisional Court in *Baker v. Law Society of Upper Canada*, 42 O.R. (3d) 413, [1999] O.J. No. 73.

[190] In my view, *Baker v. Law Society of Upper Canada* is an exceptional case that is distinguishable on its facts. The tribunal in that case acted in a high-handed and dismissive manner to Mr. Baker and his counsel. The conduct complained of is set out in the judgment:

> 3 The applicant raised a number of matters that it is alleged lead to a reasonable apprehension of bias and I will refer to each of them.
>
> 1. The first is a failure to grant a very brief adjournment where a decision was released after 11-1/2 months and where a reasonable expectation of such a right to adjournment had been created by a number of adjournments that were given on the basis that the reasons had not yet been received.
>
> 2. The failure to grant an adjournment when the Law Society of Upper Canada changed its position and called a witness not only with regard to the question of privilege but also with regard to the public interest privilege when no willsay had been made available to the applicant's counsel nor had there been any disclosure of what the evidence would be, and no advance advice that the evidence would include the public interest privilege as well as solicitor/client privilege.
>
> 3. A hearing in face of the stay order of Justice Beaulieu in breach of the said stay order.

> 4. Failure to give counsel for the solicitor notice that a hearing was going to be conducted and advising the solicitor by telephone at the number supplied by the solicitor asking that the solicitor attend.
>
> 5. Seeking submissions and agreeing with those submissions in the absence of the other counsel with regard to the propriety of proceeding with certain procedural matters such as fixing the dates of future hearings.
>
> 6. When finally advising the applicant's counsel, Mr. Moore, that matters were proceeding not accurately reviewing what had transpired up to that time.
>
> 7. An order in effect, although not necessarily phrased as an order, to re-attend in face of the stay for the purpose of explaining what was said to the Divisional Court.
>
> 8. Requiring counsel to attend to schedule and hold some 60 days available for future hearings in spite of the stay.
>
> 9. A further attendance by conference call notwithstanding the objection.
>
> 10. The actual decision which (a) was not delivered for some 11-1/2 months after advising what the results would be and estimating that the reasons would be forthcoming in a fairly short period.
>
> 10(a) With regard to the decision there is in the transcript and correspondence a concern that perhaps the decision was not the result of participation by all members of the panel. With regard to this allegation, we find that there is no clear indication that that was the case.
>
> 10(b) The content of the decision is also of some concern since the alternative relief asked for appeared not to be dealt with.
>
> 10(c) The Chair of the panel stated that it would not be dealt with because it was stale-dated. The answer was not, as counsel for the Law Society has argued, that the alternative relief asked for was impliedly dealt with in the reasons.

[191] These complaints bear no resemblance to the facts of this petition. The Board carefully considered each ruling it made in the proceedings. It gave SRA a full opportunity to make submissions with respect to those rulings and provided reasons for each of them.

[192] In my view, this ground is, in substance, simply a restatement of SRA's arguments that the Board did not act fairly and that its decision was unreasonable. However, a lack of procedural fairness or an unreasonable decision is quite different from a biased decision.

[193] Bias is a serious allegation impugning the integrity of the decision-maker. The law requires that bias be established by cogent evidence. In this case SRA has not presented any evidence of bias apart from the manner in which the Board dealt with its arguments and objections in the course of the hearing. In my view, SRA's allegations of bias are completely unfounded. In *Adams v. B.C. (W.C.B.)*, 42 B.C.L.R. (2d) 228 at 231, [1989] B.C.J. No. 2478 at para. 13 (C.A.), the court commented on the propriety of alleging bias in such circumstances:

> 13 This case is an exemplification of what appears to have become general and common practice, that of accusing persons vested with the authority to decide rights of parties of bias or reasonable apprehension of it without any extrinsic evidence to support the allegation. It is a practice which, in my opinion, is to be discouraged. An accusation of that nature is an adverse imputation on the integrity of the person against whom it is made. The sting and the doubt about integrity lingers even when the allegation is rejected. It is the kind of allegation easily made but impossible to refute except by a general denial. It ought not to be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound basis for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause. As I have said earlier, and on other occasions, suspicion is not enough. As the appellant has not shown Mr. Justice Cowan to have been in error in the exercise of his discretion under the Judicial Review Procedure Act, I would dismiss the appeal.

[194] SRA has not shown any reason why bias on the part of the Board should be found on the basis of the traditional categories in this case. The law is clear that bias within the traditional categories must be clearly proven and that the law will presume that statutory decision-makers are acting impartially unless the contrary is shown. As I have already indicated, SRA has not attempted to show any such bias.

[195] Accordingly, I see no merit in the claim that the Board was biased in this case.

Disposition

[196] The Decision is set aside and the appeal is remitted to the Board for reconsideration in accordance with these reasons.

[197] On the reconsideration, the Board should apply the same rules for the admission of opinion evidence to all parties before it, including the Delegate.

[198] The Board should permit SRA to lead evidence with respect to the relationship of Active Earth to the project, but it is for the Board to decide what effect, if any, that evidence will have on its disposition.

[199] As the Decision has been set aside, the stay of the Permit previously issued by the Board is reinstated until further order of the Board, but nothing in this decision affects the power of the Board to set aside the stay on application of any party before it.

Costs

[200] The parties may make arrangements to make submissions on costs through the Victoria Court Registry.

"Sewell J."