Province of British Columbia

Environmental Appeal Board

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APPEAL NOS. 98-WAS-14(b) and 98-WAS-28(a)

In the matter of appeals under section 44 of the *Waste Management Act*, R.S.B.C. 1996, c. 482.

BETWEEN:	North Fraser Harbour Commission General Chemical Canada Ltd. Thomas Lawson	**APPLICANTS**
AND:	Deputy Director of Waste Management	**RESPONDENT**
AND:	B.C. Hydro and Power Authority BC Lands Canadian Pacific Railway CBR Cement Canada Ltd. (now Lehigh Portland Cement Ltd.) Ocean Construction Supplies Ltd. CGC Inc. HAL Industries Inc. Zeal Industries Ltd.	**THIRD PARTIES**
BEFORE:	A Panel of the Environmental Appeal Board Toby Vigod, Chair Don Cummings, Member Judith Lee, Member	
DATE:	April 28, 29, 1999	
PLACE:	Vancouver, B.C.	

APPEARING:

For North Fraser Harbour Commission:	Keith Mitchell, Counsel
For General Chemical Canada Ltd.:	Randy J. Aliment and David Jones, Counsel
For Thomas Lawson:	Thomas Manson and Robert Lonergan, Counsel
For the Deputy Director:	Frank Falzon, Counsel
For B.C. Hydro and Power Authority:	John Singleton and Michelle Green, Counsel
For BC Lands:	Joyce Thayer, Counsel
For Attorney-General of B.C.:	Joyce Thayer, Counsel
For Canadian Pacific Railway:	Craig P. Dennis, Counsel
For CBR Cement Canada Ltd. (now Lehigh Portland Cement Ltd.) and Ocean Construction Supplies Ltd.:	Deborah H. Overholt, Counsel

PRELIMINARY ISSUES OF LAW AND JURISDICTION

APPLICATIONS

The Panel heard two applications in regard to preliminary issues of law and jurisdiction. The first application is by North Fraser Harbour Commission ("NFHC") and General Chemical Canada Limited ("GCC"). They argue that the Deputy Director of Waste Management erred when he found that B.C. Hydro and Power Authority ("B.C. Hydro") could not be named as a responsible person to Remediation Order OS-15602 ("the Order") that he issued on May 20, 1998, to address coal tar contamination at 9250 Oak Street ("the Property") and adjacent lands and waters. The applicants are seeking an order that the matter be remitted to the Deputy Director for a determination, whether, on the facts, this is an appropriate case in which to find that B.C. Hydro is a responsible person. This application is in relation to the appeals filed in early November 1998 (Appeal No. 98-WAS-28) by NFHC, GCC and CGC Inc. ("CGC") of the October 15, 1998 decision of the Deputy Director in which he declined to add B.C. Hydro as a responsible person to the Order.

The second application is by Thomas Lawson for an order setting aside the Order naming him as a responsible person, on the basis that the Deputy Director does not have the authority to issue a remediation order against a person not resident in British Columbia. On June 18, 1998, Mr. Lawson appealed his inclusion in the Order issued by the Deputy Director on May 20, 1998 (Appeal No. 98-WAS-14). In his Notice of Appeal, Mr. Lawson set forward a number of grounds for his appeal. It was determined that the sole issue to be dealt with at this hearing was whether the Deputy Director has the authority to issue a remediation order against a person not resident in British Columbia.

The two applications were heard together. The Panel notes that there have been a number of subsequent amendments by the Deputy Director to the Order which have been appealed to the Environmental Appeal Board by various parties (see, Appeal Nos. 98-WAS-30, 34, and 99-WAS-01, 03, 04, 05, 15, 17). The Panel's decisions regarding the naming of Thomas Lawson or B.C. Hydro as responsible persons to Remediation Order OS-15602 would also apply to the amendments to the Order.

BACKGROUND

This Property has had a long and complex history. For approximately 65 years (1923-86), it was used by various companies to manufacture roofing, paving and building materials.

For the first 43 years, the Property was owned and operated by two companies (the Barrett Company Limited and Allied Chemical Canada Ltd.) which are now known as GCC. GCC used coal tar and its by-products as its principal feedstock for the roofing materials and other products it manufactured onsite.

From the early 1900's until the late 1950's, B.C. Electric Power and Gas Company Ltd., a predecessor of the B.C. Electric Company ("B.C. Electric") produced and sold coal tar, which it transported to the Property. From 1905 to 1965, B.C. Electric Railway Company Ltd., a subsidiary of B.C. Electric, leased a rail line running to and

over the Property. Coal tar was also transported to the site by truck and barge. It is not clear from the information available when B.C. Electric stopped transporting coal tar to the Property. B.C. Hydro was created by statute in 1964 as a Crown corporation, and was amalgamated with B.C. Electric and the B.C. Power Commission in 1965. B.C. Hydro took over the lease of the rail line in 1965 and continued to hold the lease until 1985.

In the late 1950s, GCC replaced coal tar with oil-based asphalt as the principal feedstock for much of its manufacturing. In October 1966, Canadian Gypsum Company (now CGC) bought the Property and continued the operation of the business until it sold it to Globe West Products Inc. ("Globe West") in 1980. Globe West is a British Columbia company incorporated in 1980, dissolved in 1995, and restored on September 25, 1997, for a limited period of two years pursuant to the Order of Master Brandreth-Gibbs, dated September 11, 1997. Globe West was a subsidiary of a parent company, Globe Asphalt Products Ltd. ("Globe Asphalt"). After an amalgamation with other companies in 1982, and a name change in 1987, the parent of Globe West became GN Industries Inc. ("GN"), an Ontario company. GN ceased doing business in Ontario in 1991, and has been wound up. During the relevant period, Mr. Lawson served as a director and officer of each of these companies. Mr. Lawson resides in Ontario and has never been a resident of British Columbia.

Globe West stopped manufacturing asphalt-based products onsite by early 1986. Later that year, it sold the Property to NFHC, which currently owns the site. Since then, the Property has been used for storage and vehicle parking, with parts of the Property leased to small businesses.

As a result of all this industrial activity, the Property became contaminated with coal tar and its byproducts. A more-detailed history of the Property is outlined in the Board's decision on an application for a stay of execution of the Order and will not be repeated herein (see, *North Fraser Harbour Commission et al.* v. *Deputy Director of Waste Management* (Environmental Appeal Board, Appeal No. 98-WAS-14(a), August 27, 1998) (unreported) where a stay was not granted). There is no dispute that the Property is a contaminated site as defined under the *Waste Management Act*.

On May 20, 1998, the Deputy Director issued a "Ruling Regarding Responsible Persons" and the Order that is the subject of the main appeal. The Deputy Director found GCC, CGC, GN, Thomas Lawson, NFHC and BC Lands to be "responsible persons" under the contaminated site provisions of the *Waste Management Act*. All of the "responsible persons," except BC Lands, appealed the Order to the Environmental Appeal Board. CBR Cement Canada Ltd. (now Lehigh Portland Cement Ltd.) and Ocean Construction Supplies Ltd. also appealed portions of the Order. In his ruling, the Deputy Director notes that the Property is polluted by "serious, extensive and highly coal tar related contamination" and that the Property and the other properties it has contaminated, including the Fraser River, "are among the most severely contaminated sites in British Columbia."

In the course of making submissions to the Deputy Director, CGC and GCC requested that B.C. Hydro be named as a responsible party in the Order. On October 15, 1998, the Deputy Director declined to add B.C. Hydro as a responsible party to the Order. The Deputy Director decided that B.C. Hydro cannot, as a

matter of law, be named a "responsible person" for the actions of B.C. Electric. He based his decision primarily on the terms of the Amalgamation Agreement (the "Agreement") attached as a schedule to the *Power Measures Act, 1966,* S.B.C. 1966, c. 38. He found that as a result of the amalgamation, B.C. Hydro's liability in this case was limited to those liabilities of B.C. Electric, which existed at the time of amalgamation. Therefore, B.C. Hydro could only be responsible for B.C. Electric's actions if B.C. Electric was a responsible person before the amalgamation occurred.

The Deputy Director went on to find that the responsible person provisions of Part 4 of the *Waste Management Act* are **retrospective**, not retroactive, in application. In other words, the *Act* does not "reach back" in time to make B.C. Electric a responsible person in 1965 at the time of amalgamation. He concluded that because B.C. Electric was not a responsible person when the amalgamation took place, B.C. Hydro did not take on any liability as a responsible person through its amalgamation with B.C. Electric.

Because of that decision, the Deputy Director did not consider whether B.C. Electric and/or B.C. Hydro are, based on the evidence, responsible persons under the *Waste Management Act.*

On November 3, 4 and 13, 1998, NFHC, GCC and CGC appealed the Deputy Director's October 15, 1999 decision to the Environmental Appeal Board. CGC did not file any submissions on the application to this Panel regarding B.C. Hydro. GCC and NFHC filed a joint submission which Lehigh Portland Cement Ltd. (formerly CBR Cement Canada Ltd.) and Ocean Construction Supplies Ltd. adopt.

All parties agree that if the Board finds that B.C. Hydro may, as a matter of law, be named a responsible person, the matter should be referred back to the Deputy Director for a decision as to whether B.C. Hydro is, based on the evidence, a responsible person.

After discussion with the parties, the Board agreed to hear the two applications in regard to preliminary issues of law and jurisdiction. As Mr. Lawson's application raises issues concerning the constitutional applicability of certain sections of the *Waste Management Act*, on April 13, 1999, Mr. Lawson filed a Notice of Constitutional Question with the Attorneys General of Canada and British Columbia pursuant to section 8(2) of the *Constitutional Question Act*, R.S.B.C. 1996, c. 68. The Notice reads as follows:

> It will be argued that orders made pursuant to sections 27.1 and 28.4 of the *Waste Management Act*, R.S.B.C. 1996, c. 482, are of no force and effect outside the Province of British Columbia or as against non-residents. The authority to make orders is not within the exclusive powers of the provincial legislatures enumerated in the *Constitution Act, 1867*. Further, section 96 of the *Constitution Act, 1867* reserves the power to make orders with such effect to judges appointed by the Governor General.

The Board agreed that Mr. Lawson's other grounds of appeal, relating to the question of whether he is a "responsible person" pursuant to the *Waste Management Act,* will be left for a later date.

ISSUES

1. Whether the terms of the amalgamation limit B.C. Hydro's liability, such that B.C. Hydro may not be named as a responsible person in the Order as a result of the actions of B.C. Electric.

The application, on this issue, proceeded on the assumption that no actions at the Property by B.C. Hydro, as either a separate entity from B.C. Electric before the amalgamation, or afterwards as an amalgamated entity, make it a responsible person. The parties accept that, for the purposes of deciding this issue, all actions for which B.C. Hydro could allegedly be liable are those of B.C. Electric prior to its amalgamation with B.C. Hydro.

2. Whether Part 4 of the *Waste Management Act* is retroactive, such that B.C. Electric could have been a "responsible person" at the time of amalgamation.

3. Whether the Deputy Director has the authority to issue a remediation order against a person not resident in British Columbia.

RELEVANT LEGISLATION

The Deputy Director issued the Order pursuant to Part 4 – Contaminated Site Remediation – of the *Waste Management Act*. Section 27.1 states that:

27.1 (1) A manager may issue a remediation order to any responsible person.

(2) A remediation order may require a person referred to in subsection (1) to do all or any of the following:

(a) undertake remediation;

(b) contribute, in cash or in kind, towards another person who has reasonably incurred costs of remediation;

(c) give security in an amount and form, which can include real and personal property, subject to conditions the manager specifies.

...

(4) When considering who will be ordered to undertake or contribute to remediation under subsections (1) and (2), a manager must to the extent feasible without jeopardizing remediation requirements

(a) take into account private agreements respecting liability for remediation between or among responsible persons, if those agreements are known to the manager, and

(b) on the basis of information known to the manager, name one or more persons whose activities, directly or indirectly, contributed most substantially to the site becoming a contaminated site, taking into account factors such as

(i) the degree of involvement by the persons in the generation, transportation, treatment, storage or disposal of any substance that contributed, in whole or in part, to the site becoming a contaminated site, and

(ii) the diligence exercised by persons with respect to the contamination.

Section 26 defines a "responsible person" as "a person described in section 26.5."

Section 26.5 reads as follows:

26.5(1) Subject to section 26.6, the following persons are responsible for remediation at a contaminated site:

(a) a current owner or operator of the site;

(b) a previous owner or operator of the site;

(c) a person who

(i) produced a substance, and

(ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the site to become a contaminated site;

(d) a person who

(i) transported or arranged for transport of a substance, and

(ii) by contract or agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the site to become a contaminated site;

(e) a person who is in a class designated in the regulations as responsible for remediation.

Section 26(1) states that a "'person' includes a government body and any director, officer, employee or agent of a person or government body."

"Owner" is defined in section 26(1) as "a person who is in possession of, has the right of control of, occupies or controls the use of real property, including, without limitation, a person who has any estate or interest, legal or equitable, in the real property, but does not include a secured creditor unless the secured creditor is described in section 26.5 (3)."

Section 26(1) also defines "operator" as "a person who is or was in control or responsible for any operation located at a contaminated site, but does not include a secured creditor unless the secured creditor is described in section 26.5 (3)."

Also relevant to the first issue is section 27, titled "General principles of liability for remediation." It provides as follows:

27 (1) A person who is responsible for remediation at a contaminated site is absolutely, retroactively and jointly and severally liable to any person or government body for reasonably incurred costs of remediation of the contaminated site, whether incurred on or off the contaminated site.

(2) For the purpose of this section, "costs of remediation" means all costs of remediation and includes, without limitation,

(a) costs of preparing a site profile,

(b) costs of carrying out a site investigation and preparing a report, whether or not there has been a determination under section 26.4 as to whether or not the site is a contaminated site,

(c) legal and consultant costs associated with seeking contributions from other responsible persons, and

(d) fees imposed by a manager, a municipality, an approving officer, a division head or a district inspector under this Part.

(3) Liability under this Part applies

(a) even though the introduction of a substance into the environment is or was not prohibited by any legislation in the introduction contributed in whole or in part to the site becoming a contaminated site, and

(b) despite the terms of any cancelled, expired, abandoned or current permit or approval or waste management plan and its associated operational certificate that authorizes the discharge of waste into the environment.

(4) Subject to section 27.3 (3), any person, including, but not limited to, a responsible person and a manager, who incurs costs in carrying out remediation at a contaminated site may pursue in an action or proceeding the reasonably incurred costs of remediation from one or more responsible persons in accordance with the principles of liability set out in this Part.

Service of notice

51 (1) A notice of a decision or order under this Act may be served on a person by registered mail sent to the last known address of the person.

...

Offences and penalties

(20) A person who

...

(c) fails to comply with a remediation order under section 27.1,

...

commits an offence and is liable to a penalty not exceeding $200,000.

The Amalgamation Agreement, the Schedule to the *Power Measures Act, 1966*, S.B.C. 1966, c. 38, provides that, as of 5 p.m. on August 20, 1965:

(1) The Authority, the Commission and the [B.C. Electric] Company hereby amalgamate with each other in such a manner that:

(a) they continue as one amalgamated corporation which is the British Columbia Hydro and Power Authority as established by the British Columbia Hydro and Power Authority Act, 1964,

(b) the Company and the Commission cease to exist as separate corporations, and

(c) the Authority shall be seized of, possess and hold all the properties, assets, undertakings, contracts, powers, rights, privileges, immunities, concessions and franchises… and subject to the Power Measures Act, 1964, *shall be liable for all the duties, liabilities and obligations, whether conferred or imposed by statute or otherwise, of each of the Authority, the Company and the Commission immediately before the amalgamation*. [emphasis added]

DISCUSSION AND ANALYSIS

1. Whether the terms of the amalgamation limit B.C. Hydro's liability, such that B.C. Hydro may not be named as a responsible person in the Order as a result of the actions of B.C. Electric.

GCC and NFHC contend that the Deputy Director erred by finding that the Amalgamation Agreement excludes the amalgamated B.C. Hydro from liability for the pre-amalgamation actions of B.C. Electric. They submit that this finding is contrary to the legislature's intention as reflected in the *Power Measures Act, 1966* and defeats the policy objectives underlying the *Waste Management Act*. GCC and NFHC argue that the main objective of the *Power Measures Act, 1966* and the Agreement was to combine the three amalgamating entities and continue them as one entity, holding all the assets and liabilities of the three amalgamating entities.

Furthermore, they note that the Crown is expressly subject to the *Waste Management Act*, under the definition of "person" in section 26(1), and that B.C. Hydro is expressly subject to the *Waste Management Act* according to section 32(7)(y) of the current *Hydro and Power Authority Act*. Given all these considerations, GCC and NFHC submit that B.C. Hydro is accountable for the actions of B.C. Electric, and that B.C. Hydro should stand in the same position as any other person responsible for contamination.

GCC and NFHC argue that general legal principles concerning corporate amalgamations should be applied when interpreting the language of the Agreement to determine the legislature's intent. GCC and NFHC contend that based on these principles, the amalgamated B.C. Hydro is a continuation of the three amalgamating entities, carrying with it all their assets, rights, duties, and liabilities. In support, they cite a number of Canadian cases commenting on the general

nature of amalgamations and interpreting the amalgamation provisions in corporate statutes of general application.

GCC and NFHC argue that the starting point for analyzing amalgamations under Canadian law is the Supreme Court of Canada decision, *R.* v. *Black and Decker Manufacturing*, [1975] 1 S.C.R. 411. In that case, the Court considered the meaning of part of the *Canada Corporations Act,* which provided that companies may "amalgamate and continue as one company." The Court examined the economic reasons for amalgamating: "to build, to consolidate, perhaps diversify ... so that through union there will be enhanced strength." The Court also considered amalgamation versus other ways of combining corporations, such as asset or share purchases, in which there is no fusion of corporate entities:

> ... in an amalgamation a different result is sought and different legal mechanics are adopted, usually for the express purpose of ensuring the continued existence of the constituent companies. The motivating factor may be the Income Tax Act or difficulties likely to arise in conveying assets if the merger were by asset or share purchase. But whatever the motive, the end result is to coalesce to create a homogeneous whole. The analogies of a river formed by the confluence of two streams, or the creation of a single rope through the intertwining of strands have been suggested by others. (p. 421)

The Court found that the amalgamated company, in that case, was a continuation of the pre-amalgamation companies, such that it was liable for the criminal acts of its predecessors. GCC and NFHC submit that the amalgamation resulting in the amalgamated B.C. Hydro should be viewed similarly based on these general principles.

Furthermore, GCC and NFHC submit that paragraph 3(1)(c) of the Agreement uses similar language to that used in the *Canada Corporations Act*, which provides that:

> The amalgamated company possesses all the property, rights, privileges and franchises, and is subject to all the contracts, liabilities, debts and obligations of each of the amalgamating companies.

In *Black and Decker*, these words were challenged as mere surplusage. However, the Court found that they were "all-embracing" and "merely supportive of a general principle." The Court found that if these words were read otherwise:

> ... then some corporate incidents, such as criminal responsibility must be regarded as severed from the amalgamating companies and outside the amalgamated company. What happens to these vestigial remnants? Are they extinguished and if so by what authority? ... The effect of the statute ... is to have the amalgamating companies continue without subtraction in the amalgamated company, with all their ... sins, if sinners they be. Letters patent of amalgamation do not give absolution. (p. 422)

GCC and NFHC draw a comparison between the amalgamation provisions of the *Canada Corporations Act* and the Agreement. They argue that the Agreement also uses broad, inclusive language to describe the entirety of the amalgamated B.C.

Hydro's obligations. In support, they note that the Agreement contains no words such as "shall only be liable for" or "shall have no liability except" which could indicate an intention to limit liability.

GCC and NFHC acknowledge that the British Columbia *Company Act* (or *Companies Act*, as it was in 1965) is not binding on the B.C. Hydro amalgamation. However, they refer to *Rossi* v. *McDonald's Restaurants,* [1991] B.C.J. 429 (S.C.) for assistance in interpreting the Agreement. In *Rossi*, the plaintiffs leased land to McDonald's Restaurants Canada. McDonald's later amalgamated with several other companies, but retained the McDonald's name. The amalgamation in *Rossi* was given effect by the province's issuance of a certificate of amalgamation under the Ontario *Business Corporations Act*. When the amalgamated McDonald's wished to exercise an option to renew the lease, the plaintiffs argued that it had no right to renew because the amalgamations breached a provision forbidding assignment of the lease. They argued that the lease was an asset of one of the pre-amalgamation companies. McDonald's took the position that the amalgamation did not constitute an assignment of the lease.

After considering *Black and Decker* and several other cases on amalgamations under various general corporate statutes, the Court decided that the amalgamating companies continued to exist as one amalgamated corporation, and that the amalgamation did not constitute an assignment of the lease.

In *Rossi*, the Court declined to follow one previous decision which rejected the notion that amalgamating companies continue to exist as an amalgamated company. *Crescent Leaseholds Ltd.* v*. Gerard Horn Investments Ltd.,* [1983] 1 W.W.R. 305 (Sask. Q.B.) involved an amalgamation under the British Columbia *Company Act* and the assignment of a lease. Despite *Company Act* provisions that the amalgamating companies "continued as one company" possessing "all the property, rights and interests, and … subject to all the debts, liabilities and obligations of each amalgamating company …," the Court rejected as "sophistry" the notion that the amalgamating companies continued to exist. Because the amalgamating companies "no longer have any status or identity in law …," the Court determined that the amalgamating companies had "disappeared." However, the Court in *Rossi* declined to follow *Crescent Leaseholds* because the bulk of case law considered in *Rossi*, including *Black and Decker*, made it "clear that under Federal, Ontario, and British Columbia corporations legislation there is a continued existence of the amalgamating corporations in the form of the amalgamated corporation."

GCC and NFHC submit that the amalgamation certificate issued by the provincial government in *Rossi* contained terms similar to those in paragraph 3(1)(c) of the Agreement, in that the amalgamating companies would "continue" as one amalgamated corporation, possessing "all the property, rights, privileges, franchises, and other assets," and "subject to all the liabilities, contracts and disabilities and debts" of the component corporations "as such exist **immediately before the amalgamation**." Therefore, GCC and NFHC argue that there is nothing unusual or unique about the wording of the Agreement, and that general principles on amalgamations apply when interpreting the Agreement.

GCC and NFHC argue that the general principles set out in *Black and Decker* and *Rossi* apply in this appeal, and that nothing in the Agreement changes the law as

set out in *Black and Decker*. They submit that the amalgamation resulting in B.C. Hydro has effectively continued the three previous entities as one combined entity, and nothing in the legislation or Agreement extinguishes B.C. Hydro's liability for the actions of its predecessors.

Regarding the language of paragraph 3(1)(c) of the Agreement, GCC and NFHC further submit that the words "immediately before the amalgamation" do not limit B.C. Hydro's liability in any special way. Contrary to the Deputy Director's decision, GCC and NFHC argue that those words are not unique, as they were also used in the amalgamation certificate in *Rossi*. GCC and NFHC also compare the words of the *Companies Act* with those of paragraph 3(1)(c) of the Agreement. Section 178(11) of the *Companies Act*, valid at the time of amalgamation, reads:

> From the date of the amalgamation, the amalgamating company shall be continued as one company … and **thereafter** the amalgamated company shall be seized of and shall hold and possess all of the property, rights and interests and shall be subject to all debts, liabilities and obligations of each amalgamating company … [emphasis added]

GCC and NFHC say that the words "immediately before the amalgamation" have a similar effect to the word "thereafter" in the *Companies Act* by establishing that from the moment of amalgamation, the new entity assumes the obligations of the amalgamating entities.

GCC and NFHC further submit that the Deputy Director was confused by the fact that the amalgamated company continued under the B.C. Hydro name, rather than that of B.C. Electric or the B.C. Power Commission. They say that the words "of each of" in the Agreement indicate an intent to make B.C. Hydro responsible for the pre-amalgamation actions of its predecessors.

In addition, GCC and NFHC submit that the Deputy Director's interpretation restricts the rights of third parties who have claims against B.C. Electric that did not arise until after the amalgamation. They argue that this interpretation is contrary to public policy, because it could extinguish a range of possible claims arising from B.C. Electric's past conduct. GCC and NFHC also submit that this interpretation is incorrect because laws which curtail rights must be strictly construed, and rights must expressly be restricted in such laws. They argue that the Agreement contains no express language indicating an intention to extinguish third party rights.

Finally, as an alternative argument, GCC and NFHC submit that if this appeal was concerned with an asset purchase, where liability may be avoided in certain circumstances, the common law principle of successor liability justifies making B.C. Hydro liable as a continuation B.C. Electric.

The Third Parties, Lehigh Portland Cement Ltd. (formerly CBR Cement Canada) and Ocean Construction Supplies Ltd., adopt the submissions of NFHC and GCC, noting that the implications of finding B.C. Hydro to be exempt from liability for the actions of its amalgamation components may have implications for other contaminated sites in the province.

The Respondent states that he arrived at his decision reluctantly. In his decision, he concludes, "B.C. Hydro has found a legal 'gap' which has little moral or policy justification insofar as avoidance of contaminated sites legislation is concerned .... It is open to the Legislature to close the gap ...."

The Respondent indicates that NFHC provided no submissions to him, and that GCC's submissions to him were quite different from those advanced in this appeal. He also states that only CGC (which made no submissions in the present appeal) argued that the provisions of the Agreement do not differ substantially from those of the *Company Act*. He notes that in this appeal, there has been a shift in argument away from the retroactivity of the responsible person provisions, which was a central issue in the submissions before him, towards the proper construction on paragraph 3(1)(c) of the Agreement.

The Respondent submits that, in his decision, he was unable to conclude that the words used in paragraph 3(1)(c) of the Agreement meant the same thing as those used in the *Companies Act*. However, he notes that a central submission of GCC and NFHC in this appeal is that the words have "similar effect." In his decision, he was also unable to find that a company can hide behind an amalgamation using terms similar to those in the *Companies Act* to avoid responsibility for the actions of the amalgamating companies. He found, however, that based on *Black and Decker* there is no single meaning in Canadian law as to what is meant by an amalgamation. He quotes from page 417 of the *Black and Decker* decision:

> Whether an amalgamation creates or extinguishes a corporate entity will, of course, depend upon the terms of the applicable statute ...

Finally, the Respondent submits that if his interpretation of the Agreement was wrong concerning B.C. Hydro's liability for the acts of B.C. Electric, he will proceed to consider whether B.C. Hydro is a responsible person.

B.C. Hydro submits that the Agreement and related legislative instruments show that the legislature intended to limit the liability of B.C. Hydro for the past actions of the amalgamating companies, such that B.C. Hydro is only responsible for B.C. Electric's liabilities that existed at the moment of amalgamation. B.C. Hydro focuses on the words "immediately before the amalgamation" as a clear indication that the legislature intended to limit the amalgamated B.C. Hydro's responsibility for the liabilities of its constituent parts as they existed as of August 20, 1965.

B.C. Hydro submits that the words in the Agreement should be given their plain ordinary meaning. B.C. Hydro argues that the Applicants have submitted no reason to indicate that the words "immediately before the amalgamation" should be given any other meaning than their plain meaning. Nor, states B.C. Hydro, is there any indication in the context or object of the *Power Measures Act*, or in the circumstances to which it is applied, to show that the words are used in a special sense different from their ordinary grammatical sense. B.C. Hydro submits that the Applicants are asking the Board to disregard the legislature's clear choice of language.

B.C. Hydro also contrasts the wording of section 178(11) of the *Companies Act* with that of the Agreement, noting that the former contains no specific limitation of liability as of a certain point in time. As a result, B.C. Hydro claims that all

amalgamations under the *Company Act* (or its predecessor legislation) are without statutory authority to limit liability in the way that the Agreement limits B.C. Hydro's liability. Therefore, there is no need to be concerned that other corporations may attempt to avoid responsibility for cleaning up contaminated sites by amalgamating via agreements that contain wording limiting liability for past conduct.

B.C. Hydro submits that interpretation of the Agreement should only be by reference to the rules of statutory interpretation, and not by reference to the judicial decisions cited by the Applicants. Arguments that the statutory language are contrary to the common law goes against the principle that validly enacted legislation is paramount over the common law.

B.C. Hydro submits that any general corporate legislation concerning amalgamations, and any judicial decisions based on such legislation, are not applicable because of the unique circumstances of B.C. Hydro's amalgamation. B.C. Hydro is not, nor has it ever been, subject to the provisions of the *Company Act* (or its predecessor legislation) concerning amalgamations. This point is conceded by the Applicants. B.C. Hydro submits, therefore, that arguments advanced by the Applicants based on language used in corporate legislation of general application, such as section 178(11) of the *Companies Act*, are distinguishable based on the unique circumstances and mechanism of the B.C. Hydro amalgamation.

B.C. Hydro further notes that B.C. Electric ceased to exist as a separate entity after the amalgamation, and was dissolved by a subsequent Order-in-Council.

The meaning of "amalgamation" - did the pre-amalgamation entities continue as one entity, or cease to exist?

Although the Panel accepts that the provisions of the *Company Act* (or *Companies Act,* as it was in 1965) and *Canada Corporations Act* are not binding on this amalgamation, these general corporate statutes may assist the Board in determining the meaning of words used in the Agreement. Similarly, case law interpreting the language in general corporate legislation may also assist in this regard. However, the Panel will consider these and other "external" interpretation aids only insofar as they assist in the interpretation of the specific amalgamation legislation.

One view on the amalgamation is that the act of amalgamating, in itself, extinguished B.C. Hydro's liability for B.C. Electric's pre-amalgamation actions. B.C. Hydro submits that B.C. Electric ceased to exist as an entity, and no ties exist that can connect B.C. Electric with post-amalgamation B.C. Hydro, such that liability can flow to B.C. Hydro from B.C. Electric's actions. The view of NFHC and GCC is that the three amalgamating entities joined to form a unified entity under the name of B.C. Hydro, in a manner analogous to three streams merging to form a river.

To determine the nature of this particular amalgamation, it is necessary to examine the specific language of the Agreement it is entire context. For purposes of interpreting the Agreement, principles of statutory interpretation apply, as a schedule is to be considered part of the statute to which it is appended, where the

intention to incorporate it is sufficiently clear. In this case, that intention is clear from section 3 of the *Power Measures Act, 1966*, which provides that "the Agreement ..., a copy of which forms the Schedule to this *Act*, is hereby ratified and confirmed ... and the terms and conditions of the amalgamation contained in said Agreement are and have been since the twentieth day of August, 1965, valid and in full force and effect."

Before examining the Agreement, it is helpful to place it in its greater legislative context by reviewing the history of the statutes that attempted to create B.C. Hydro and give effect to the amalgamation.

As submitted by B.C. Hydro, the impetus behind its creation arose from events surrounding the *Columbia River Treaty*, which was signed in 1961 and ratified in 1964, and the provincial government's obligation to construct and operate power generation developments under the *Columbia River Treaty*. B.C. Hydro was designated as the Canadian power development entity under this *Treaty*. Concurrently with this, the provincial government undertook steps to gain centralized control over the generation and sale of electricity in the province. The provincial government attempted to expropriate all B.C. Electric shares by vesting the shares in the provincial Crown under the *Power Development Act, 1961*. Shortly thereafter, the province made its first attempt to create B.C. Hydro and amalgamate it with B.C. Electric by enacting the *B.C. Hydro Power and Authority Act, 1962*. However, in July 1963, the British Columbia Supreme Court, in *British Columbia Power Corporation Ltd.* v. *Attorney-General of British Columbia et al.* (1963), 47 D.L.R. (2d) 633, held that both of these statutes were *ultra vires* the province, and, therefore, the amalgamation was invalid.

In response to the Court's decision, the legislature enacted the *B.C. Hydro and Power Authority Act, 1964* in March 1964. This statute successfully established B.C. Hydro as an agent of the provincial Crown. This gave the province a vehicle for constructing and operating the dams and power generation facilities contemplated in the Treaty. The 1964 *Act* also provided B.C. Hydro with the ability to amalgamate in any form, making B.C. Hydro a vehicle for centralizing control over electricity generation and its sale.

On August 20, 1965, representatives of B.C. Hydro, B.C. Electric, and the B.C. Power Commission signed the Agreement. The Agreement was ratified by the legislature with the enactment of the *Power Measures Act, 1966*, which also legalized the pre-amalgamation activities of B.C. Hydro in light of the 1963 Supreme Court decision. Under section 5 of the 1966 *Act*, all B.C. Electric shares, which were now held by the Crown, were deemed to have been surrendered to B.C. Hydro and cancelled immediately upon the amalgamation taking effect. Under section 6(1), the 1966 *Act* retroactively vested B.C. Hydro's immunities as an agent of the Crown, as well as its assets, powers, liabilities and obligations, in the other pre-amalgamation entities. Section 9 of the 1966 *Act* made section 6 "retroactive to the extent necessary to give full force and effect thereto on and after the thirtieth day of March, 1962 ...." Under section 9, the rest of the 1966 *Act* was deemed to be retroactive to March 20, 1962.

With these circumstances in mind, the Panel will consider the purpose and effect of this amalgamation.

The word "amalgamation" is not a legal term and is not susceptible of exact definition. Thus, the juridical nature of an amalgamation need not be determined by juridical criteria alone: *R.* v*. Black and Decker Manufacturing Co.,* at page 420. "Amalgamate" is generally defined in the *Merriam-Webster Dictionary* (10th ed.), 1995, "amalgamate" as "to unite ... to merge into a single body." In *Black's Law Dictionary* (6th ed.) 1990, "amalgamation" refers to the "union of different ... corporations, so as to form a homogeneous whole or new body; ... consolidation; merger; coalescence." These definitions suggest that an amalgamation is generally a way of combining different entities to form a unified entity.

As explained in *Black and Decker* at pages 420-421, there are other ways of putting companies together, such as an asset purchase or share purchase, that do not involve "fusion" of the corporate entities. Yet it is clear that the government chose to combine the three entities via an "amalgamation," as opposed to other possible approaches. Section 14(1) of the *B.C. Hydro and Power Authority Act, 1964* contemplates various means by which B.C. Hydro could merge with or acquire assets from other corporations, including, in section 14(1)(r), an amalgamation. Section 14(1)(o) provides that B.C. Hydro could also:

> ... purchase or otherwise acquire or lease the whole or any part of the property, assets, and undertaking, and to assume in whole or in part the obligations and liabilities of any corporation, firm, or person ...

Clearly, the government could have directed that B.C. Hydro combine with B.C. Electric in a way that does not generally imply a fusion of the constituent parts, but instead opted for an amalgamation.

In the specific context of the Agreement, opposing interpretations of "amalgamation" have been suggested by B.C. Hydro and GCC and NFHC. These interpretations arise from the parties putting different levels of importance on certain words in the Agreement. Paragraph (1)(a) of the Agreement provides that the three amalgamating entities "**continue** as one amalgamated corporation which is [B.C. Hydro], as established under the 1964 Act." However, paragraph (1)(b) provides that B.C. Electric and the B.C. Power Commission "**cease to exist** as separate entities." [emphasis added]

If "continue" is considered the operative word, the logical conclusion is that the amalgamating entities continue as constituent parts of the amalgamated B.C. Hydro. In other words, B.C. Electric merely "ceased to exist" as a "separate" entity. Indeed, it is clear that B.C. Electric ceased to exist as a separate corporation after the amalgamation.

Conversely, if the words "cease to exist" are considered operative, the conclusion is that B.C. Electric did not continue as a part of the amalgamated B.C. Hydro. This interpretation is problematic because it provides no explanation why the words "continue" or "as separate entities" were used. To consider these words to be meaningless or superfluous is contrary to the rule of statutory interpretation that every word in a statute is presumed to have a meaning and to advance the legislative purpose. Thus, as noted in *Dreidger on the Construction of Statutes*, (3rd edition, 1994), Ruth Sullivan, ed., at 159-160, interpretations which render any part of a statute meaningless or redundant should be avoided if possible.

The assertion that B.C. Electric ceased to exist in any form is also problematic in light of other parts of the Agreement. Paragraph (1)(c) of the Agreement states that B.C. Hydro "shall be seized of, possess and hold all the properties, assets ...," etc. of B.C. Electric. If B.C. Hydro acquired B.C. Electric's properties and assets, some of which were tangible, it is difficult to imagine that those assets, and thus parts of B.C. Electric, did not become a component of the amalgamated B.C. Hydro. A similar view was adopted by the Supreme Court of Canada in *Black and Decker*:

> Also, one must recall that the amalgamating companies *physically* continue to exist in the sense that offices, warehouses, factories ... are still there, and business goes on. In a physical sense, an amalgamating business or company does not disappear, although it may become part of a greater enterprise. (p. 420)

In this case, it is common ground that B.C. Hydro acquired at least one tangible property right of B.C. Electric: it took over B.C. Electric's lease of the rail line on the Property.

The government's intent may also be determined by examining the language of the Cabinet Order approving the amalgamation and dissolving B.C. Electric in 1965. Relevant portions of the Order are reproduced below:

> ... the amalgamation ... has been approved, and ... the amalgamation aforesaid has taken place, and that [B.C. Electric] **has ceased to exist as a separate corporation:**
>
> ...
>
> ... the incorporation of [B.C. Electric] be revoked and cancelled and that [B.C. Electric] be declared to be dissolved, and that such other provisions of the Companies Act apply to [B.C. Electric] to the extent necessary to effect the revocation, cancellation and dissolution hereby made. [emphasis added]

As with the Agreement, there is no express language in the Order clearly stating that B.C. Electric ceased to exist at all. The Order specifies that B.C. Electric ceased to exist as a separate corporation, and that its status as a corporate entity under the *Companies Act* be cancelled. Revocation of B.C. Electric's incorporation as a distinct and separate legal entity under the *Companies Act* was necessary for B.C. Electric to amalgamate with and become a part of B.C. Hydro.

The *B.C. Hydro and Power Authority Act, 1964* also provides some indication as to the nature of the amalgamation. Section 14(1)(r) provided that B.C. Hydro could "amalgamate in any manner with or enter into partnership with any corporation, firm, or person." This section clearly contemplates a wide array of possible ways that B.C. Hydro could be involved in an amalgamation. Upon an amalgamation, subsection 14(3) provided that the *B.C. Hydro and Power Authority Act, 1964* "applies **as if** the amalgamated corporation or the partnership were [B.C. Hydro]." [emphasis added] Section 14(3) implies an intention that the amalgamated B.C. Hydro would be a unified continuation of the pre-amalgamation entities. Section 14(3) does not say that the *Act* applies because the amalgamating entities **become** B.C. Hydro. It draws a clear distinction between the pre-amalgamation B.C. Hydro

and the amalgamated B.C. Hydro, and suggests that the latter is different in character from the former.

The view that the amalgamating entities continued as a unified whole under the B.C. Hydro name and corporate structure is supported by the general conception of amalgamation under general corporate statutes. Under sections 247 and 251 of the *Company Act*, the essence of an amalgamation is that two or more companies amalgamate and continue as one company, resulting in a single corporate entity that is a continuation of the amalgamating companies, with all their assets and liabilities.

These sections are not substantially different from those of the *Companies Act,* R.S.B.C. 1960, c. 67, which were in force in 1965. It provided that:

178 (1)… [a]ny two or more companies may amalgamate and continue as one company …

Section 178(11), reproduced above in the submissions of GCC and NFHC, contains language almost identical to that in the vesting provisions of section 251 of the current *Company Act*. The Panel agrees with GCC and NFHC that the provisions of these provincial Acts are not substantially different from those of the *Canada Corporations Act*.

The most relevant statute for the purpose of comparing general amalgamation provisions with those of the Agreement is the *Companies Act,* the province's general corporate statute in effect in 1965. The language of paragraph 3(1)(a) of the Agreement parallels that of section 178(1) of the *Companies Act*. In particular, both state that the amalgamating entities amalgamate in such a manner that they "continue as one" corporation. The provisions differ only in that the Agreement identifies specific amalgamating entities and describes their amalgamation as an event in the present tense, whereas the *Companies Act* expresses the general right of a company to amalgamate at any point in time.

Support for the view that amalgamating entities generally "continue" is also found in cases interpreting general corporate statutes. Although one lower court decision cited in the submissions (*Crescent Leaseholds*) supports the view that an amalgamation under the *Company Act* may not result in the continuation of the amalgamating companies because they had disappeared, that case was not followed in *Rossi*. After considering cases involving amalgamations under B.C., Ontario, and federal corporate statutes, the Court in *Rossi* concluded that under those general statutes, amalgamating corporations continue in the form of an amalgamated corporation.

Thus, when language of the Agreement is examined on its own and in comparison to the amalgamation provisions of the *Companies Act*, which have been interpreted by the courts, the Panel finds that the legislature intended to combine the three amalgamating entities in such a way that they **continue** to exist as one unified entity. As a consequence of their amalgamated status, they no longer exist as **separate** entities. Specifically, B.C. Electric continues as an element of the amalgamated B.C. Hydro, though it is no longer a discrete entity. The analogy of three streams merging and mixing to form one river illustrates this concept. Therefore, based on the nature of the amalgamation process, the amalgamated

B.C. Hydro cannot avoid liability for the past acts of a part of itself, i.e. B.C. Electric, unless there is a clear legislative intent to stop this liability from flowing to B.C. Hydro.

Liability of the amalgamated B.C. Hydro: the meaning of "immediately before the amalgamation"

Although the *Waste Management Act* is a law of general application in the province, the legislature may exempt particular persons or corporations from any general law. Similarly, although an amalgamated company generally carries all the rights, assets, obligations, and liabilities of the companies which continue as the amalgamated company, the legislature could have limited B.C. Hydro's liability for B.C. Electric's actions under the terms of the amalgamation.

The view that liabilities of the amalgamating entities are passed on to the amalgamated entity is supported in case law concerning the passing of assets and liabilities, as submitted by GCC and NFHC. In particular, *Black and Decker* states that amalgamating corporations in their new identity as an amalgamated corporation remain liable to prosecution for offences committed prior to the amalgamation.

However, the case law cited by GCC and NFHC is based on interpretations of general corporate statutes, and does not necessarily reflect the legislature's intention concerning the B.C. Hydro amalgamation. Therefore, the Agreement must be examined to determine whether the legislature intended to limit the amalgamated B.C. Hydro's liability for B.C. Electric's actions.

B.C. Hydro submits that the plain meaning of the phrase "immediately before the amalgamation" in the Agreement shows a legislative intention to exclude B.C. Hydro from liability for any obligations arising out of acts which occurred during the pre-amalgamation period. GCC and NFHC submit that this phrase merely marks the time from which the amalgamated B.C. Hydro takes on the liabilities of the amalgamating entities. The Supreme Court of Canada recently held in *Re: Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 that the words of a statute are to be read in their entire context. Writing on behalf of the Court, at page 28, Iacobucci, J. adopted the following quote from Elmer Dreidger in *Construction of Statutes* (2nd ed. 1983), page 87:

> 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 the Parliament.

The Panel notes the Agreement contains no phrases such as "is only liable for" or "is not liable thereafter for" which would clearly indicate an intention to limit liability. Rather, the Agreement contains broad and inclusive language, providing that the amalgamated B.C. Hydro "shall be liable for **all the duties, liabilities and obligations**" [emphasis added] of each of the amalgamating companies, "whether conferred or imposed by statute or otherwise … immediately before the amalgamation."

It is clear that the legislature contemplated that the amalgamated B.C. Hydro could be liable for the statutorily imposed liabilities, duties and obligations of the amalgamating entities. However, it is not clear from express language that liability is restricted to the post-amalgamation period in time. Thus, the language of general corporate statutes will be compared and contrasted with that of the Agreement to gain some insight into the legislature's intentions.

GCC and NFHC submit that the purpose of the words "thereafter" in section 178(11) of the *Companies Act* and "immediately before the amalgamation" in the Agreement is the same – to recognize the date from which the amalgamated company takes on the rights and liabilities of the amalgamating entities. Similar wording is found in section 137(13)(b) of the *Canada Corporations Act,* which was the relevant legislation in *Black and Decker*. It states that:

> (13) Upon the issue of letters patent pursuant to subsection (11), the amalgamation agreement has full force and effect and ...
>
> ...
>
> (b) the amalgamated company possesses all the property, rights, assets, privileges and franchises, and is subject to all the contracts, liabilities, debts and obligations of each of the amalgamating companies.

In that statute, the phrase "upon the issue of letters patent" has a similar effect as "thereafter" in the *Companies Act*.

The Panel notes that the language in paragraph 3(1)(c) of the Agreement parallels that of the *Companies Act* and *Canada Corporations Act*. Both the Agreement and the *Companies Act* provide that the amalgamated company "shall be seized of," "possess" and "hold" "all" of the "property, rights," etc., and "shall be" liable for or subject to "all" the "liabilities, obligations," etc. of "each of" the amalgamating entities. Any unique wording in the Agreement seems to be for the purpose of taking into account the particular circumstances of this amalgamation, in that the Crown "privileges and immunities" of these particular amalgamating entities are also mentioned.

Similar comparisons between the *Canada Corporations Act* and the Agreement can be made. In particular, there seems to be a parallel between the phrases "upon the issue of letters patent" in the *Canada Corporations Act* and "immediately before the amalgamation" in the Agreement. When viewed within the context of each respective statute, it is the Panel's view that both phrases designate the point in time at which the amalgamation takes effect. Under the *Canada Corporations Act*, the amalgamated company is subject to all the liabilities, etc. of the amalgamating companies once letters patent are issued making the amalgamation effective. In other words, from the moment of amalgamation, the amalgamated company is responsible for the past liabilities, obligations, etc. of the amalgamating companies. Since the Agreement itself made the amalgamation effective, it merely states that the amalgamated B.C. Hydro shall be liable for all the past liabilities, obligations, etc. of the amalgamating entities, i.e. those liabilities, obligations, etc. that existed immediately before the amalgamation.

Other statutes may also indicate legislative intent. The *Hydro and Power Authority Act, 1964* contains provisions regarding B.C. Hydro's pre-amalgamation authority to assume the obligations and liabilities of other companies. Section 14(1)(o) granted B.C. Hydro the power "to assume in whole or in part the obligations and liabilities of any corporation ...." Section 14(1)(p) gave B.C. Hydro the power to "assume duties and obligations of any corporation … to reimburse others for payment made and liabilities incurred, and to indemnify others against liabilities." This language shows that the legislature contemplated B.C. Hydro taking on some or all of the liabilities of other companies, and does not preclude either of the opposing interpretations of the Agreement.

The *Power Measures Act, 1966* makes explicit reference to certain limitations on the liability of B.C. Hydro in section 8, which amends the *Hydro and Power Authority Act, 1964* by adding sections 52A and 52B. Section 52A makes B.C. Hydro "not liable in an action based on nuisance or the rule in *Rylands* v. *Fletcher*" unless it has been negligent. This provision remains in the current *Hydro and Power Authority Act* as section 31. Section 52B limits B.C. Hydro's liability in actions, which are lawsuits brought before the courts, arising in respect of tort, contract and certain duties. There is no provision in those amendments expressly exempting B.C. Hydro from liabilities or obligations arising from the pre-amalgamation actions of the amalgamating entities.

Legislative intent can also be implied from the provisions of current statutes that are relevant. As stated in *Driedger on the Construction of Statutes,* (1994, 3rd ed.) at page 288:

> The legislature is presumed to know its own statute book and to draft each new provision with regard to the structures, conventions, and habits of expression as well as the substantive law embodied in existing legislation… Therefore, other things being equal, interpretations that minimize the possibility of conflict or incoherence among different enactments are preferred.

As an "agent of the government" B.C. Hydro is expressly included in the definition of "person" in section 26(1) of the *Waste Management Act*. Furthermore, under the current *Hydro and Power Authority Act,* B.C. Hydro is expressly subject to the *Waste Management Act*. Notably, when the *Waste Management Act* was proclaimed in 1982, it repealed and replaced the *Pollution Control Act*. B.C. Hydro had been subject to the *Pollution Control Act* under section 52(6) of the *Hydro and Power Authority Act*. As a consequence, when the *Pollution Control Act* was replaced, section 52(6) was amended to make B.C. Hydro subject to the *Waste Management Act.* Section 52(6) has since been replaced by section 32(7) of the *Hydro and Power Authority Act*, R.S.B.C. 1996, c. 212, which provides that:

> The following Acts and provisions apply to [B.C. Hydro]:
>
> …
>
> (y) the *Waste Management Act*;

These amendments since the amalgamation clearly show a legislative intention that B.C. Hydro may be a responsible person liable under the *Waste Management Act*.

There is no language in either the *Hydro and Power Authority Act* or the *Waste Management Act* that makes express or implied restrictions to such liability, even though the legislature has had ample opportunities to do so.

The potential effects of alternative interpretations of Part 4 of the *Waste Management Act* are also a relevant consideration. This includes examining the purpose of the contaminated site regime and how it would be furthered or hindered by different interpretations of the Agreement.

The contaminated site remediation scheme in Part 4 of the *Waste Management Act* came into force in 1997, via amendments authorized in 1993. When these amendments were debated in the Legislature in 1993, Hon. John Cashore, the Minister of Environment, Lands and Parks at that time, described the need for law reform and the purpose of the amendments:

> The proposed amendments will maintain the principle of the "Polluter Pays" but introduce fair and consistent administrative processes. This will insure to the greatest extent possible that innocent persons and government do not have to bear the costs and liability associated with the identification and remediation of these sites. (British Columbia, *Debates of the Legislative Assembly* (8 June 1993)

Thus, an important purpose of the scheme is to ensure that contaminated sites are cleaned up and that those who have benefited from and are responsible for contamination pay the clean-up costs.

If B.C. Hydro could not be named a responsible person based on the pre-amalgamation actions of B.C. Electric, or for that matter, any of the amalgamating entities, it would allow B.C. Hydro to escape liability for cleaning up contamination caused by the amalgamating entities. This would result in clean-up costs being borne by those not responsible, such as taxpayers where no responsible person can be named, or in those who are named a responsible persons bearing an unfair burden of the responsibility and cost for remediation. This would thwart a primary purpose of the contaminated site remediation scheme. Surely, if the legislature had intended B.C. Hydro to be exempt from this scheme, either wholly or in part, the legislature would have taken this into account by making clear, express provision for this in either the *Waste Management Act* or the *Hydro and Power Authority Act*. It did not do so; indeed, it clearly did the opposite.

Finally, if in the future B.C. Hydro is named a responsible person, it, like any other responsible person, has the right to commence a civil action to recover any remediation expenses it incurs in the event that it is not properly named a responsible person.

Therefore, based on the language of the Agreement as a whole and placed within the greater context of other statutory instruments, the Panel finds that the purpose of the words "immediately before the amalgamation" in the Agreement is to recognize the date from which the amalgamated B.C. Hydro became liable for all of the liabilities, duties and obligations of the amalgamating entities, and became seized of and possessed all their assets, rights, undertakings, powers, privileges, etc. The Agreement contains no language showing an express or clear intention to

limit the amalgamated B.C. Hydro's liability for the actions of the amalgamating entities, including B.C. Electric.

Therefore, the Panel finds that B.C. Hydro can be liable for the pre-amalgamation actions of B.C. Electric, and may be named a responsible person under Part 4 of the *Waste Management Act* on that basis. The Panel orders that this matter be remitted to the Deputy Director for a determination, as to whether, on the facts, this is an appropriate case in which to find that B.C. Hydro should be named as a responsible person to the Order and subsequent amendments.

2. Whether Part 4 of the *Waste Management Act* is retroactive, such that B.C. Electric could have been a "responsible person" at the time of amalgamation.

GCC and NFHC state that the issue of retroactive application need not be examined if the terms of the amalgamation are interpreted as passing on full responsibility for the actions of B.C. Electric to the amalgamated B.C. Hydro. Given the Panel's findings above, the Panel agrees. However, since the parties presented extensive argument on this issue, the Panel will briefly consider the issue of retroactivity.

GCC and NFHC assert that the Deputy Director erred by not finding that the "responsible person" definition and liability provisions of Part 4 of the *Waste Management Act* are retroactive. GCC and NFHC submit that the "responsible person" definition and the liability provisions are retroactive, in that they "reach back" in time and were effective at the time of amalgamation. Therefore, GCC and NFHC submit that even if the terms of the amalgamation did limit B.C. Hydro's liability for B.C. Electric actions, B.C. Electric was a responsible person when the amalgamation occurred and B.C. Hydro took on that liability when it amalgamated with B.C. Electric.

GCC and NFHC submit that section 27(1) of the *Waste Management Act* expressly imposes retroactive liability by providing that a responsible person is "retroactively" liable for remediation costs. GCC and NFHC argue that because liability for remediation costs is retroactively imposed, B.C. Electric's liability existed at the time of amalgamation and B.C. Hydro has no immunity from that liability.

GCC and NFHC submit that section 27(3), which provides that "liability under this Part applies" even though the discharge of waste into the environment was authorized by permit, or the introduction of the substance was not prohibited by legislation, change what were lawful activities into activities that now attract environmental responsibility. They argue that this section adds further credence to their claim that the legislation is retroactive.

GCC and NFHC submit that all the companies named in the Order were in compliance with the law when the site was contaminated, but there is no doubt they can be responsible for remediation under section 26.5(1) as previous owners and operators of a site, or producers or transporters (section 26.5 (1)(c) and (d)) and section 27(3) of the *Waste Management Act*.

GCC and NFHC compare Part 4 of the *Waste Management Act* to its American counterpart, the 1980 *Comprehensive Environmental Response, Compensation, and Liability Act* ("CERCLA"). GCC and NFHC cite American case law finding that

Congress intended CERCLA to have retroactive effect in imposing liability for remediating contaminated sites, even though the pre-enactment disposal was not unlawful when committed. In *United States* v. *Northeastern Chemical & Pharmaceutical Co., Inc.*, 810 F.2d 726, 732-33 (8th Cir. 1986), the Court held that the US government was entitled to compensation for clean-up costs incurred before CERCLA was enacted. The court concluded that CERCLA is "retroactive" even though it does not expressly provide for "retroactive" application.

GCC and NFHC argue that retroactivity is also supported by policy considerations. They argue that allowing B.C. Hydro to escape liability for B.C. Electric's actions is inconsistent with the "polluter pay" principle underlying the *Waste Management Act*, and could result in shifting remediation costs onto taxpayers in situations where B.C. Electric might be the only available responsible person. In support, GCC and NFHC refer to Waldemar Braul, "*Liability Features of Bill 26*", (1994) 4 J.E.L.P. 138:

> [w]ithout retroactive liability, the scope of the responsible persons is substantially reduced. The practical result would be that the taxpayer – not the polluter – pays for the enormous costs of remediating historic pollution. (page 160, note 69)

B.C. Hydro submits that, with the exception of section 27, Part 4 of the *Waste Management Act* is not retroactive, and therefore does not give the Deputy Director implied or express authority to retroactively name responsible persons for the purpose of imposing liability for remediation. B.C. Hydro argues that a plain reading of the responsible person definition in section 26.5 does not indicate that it should be applied retroactively to naming responsible persons, since there is no express use of the term "retroactive." The only express reference in the *Waste Management Act* to "retroactive" is under section 27(1), which B.C. Hydro submits deals with claims between responsible persons for remediation costs and applies to responsible persons only after they fall into the definition of responsible person.

B.C. Hydro cites *Gustavson Drilling (1964) Ltd.* v. *MNR,* [1977] 1 S.C.R. 271, and *Dreidger on the Construction of Statutes* (3rd edition, 1994), Ruth Sullivan, ed., as authority for the presumption that legislation is not intended to have "retroactive" application unless such a construction is expressly or by necessary implication required by the language of the statute.

B.C. Hydro further submits that even where legislation is clearly meant to have retroactive application, the extent of retroactivity should be minimized. B.C. Hydro submits that since section 26.5 is not expressly retroactive, whereas section 27(1) is expressly so, only section 27 should be interpreted as having retroactive application and that is only in relation to liability for reasonably incurred costs of remediation. Nor does the *Waste Management Act* contain a provision stating that it is "retroactive to the extent necessary to give effect to its provisions," which, according to B.C. Hydro, would be a clear indication of intent to make other provisions of the *Waste Management Act* retroactive (*Martelli* v. *Martelli* (1981), 33 B.C.L.R. 145 (C.A.)).

In conclusion, B.C. Hydro submits that the retroactive operation of section 27 does not apply until there is, independent of it, a finding or state of being of a responsible person under section 26.5. Consequently, the *Waste Management Act*

does not give the Deputy Director jurisdiction to find that B.C. Electric was a responsible person on the date of amalgamation, or at any time before the relevant provisions of the *Waste Management Act* came into force.

The Respondent relies primarily on his decision, relevant portions of which are summarized below.

At page 7 of his decision, the Deputy Director adopted the definitions of "retroactive" and "retrospective" endorsed by the Supreme Court of Canada in *Benner* v*. Canada (Secretary of State),* [1997] S.C.J. no. 26:

> A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event .... A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event.

In reaching his decision, the Deputy Director considered the wording of sections 26.5, 27(1), and 27.1(1) of the *Waste Management Act*. He also considered the effect of those provisions, which he found was to "dramatically expand in the present responsibility of persons for their past actions or status," but "not change the law as it as it existed before the legislation came into force."

Based on these considerations, the Deputy Director concluded that while section 27 of the *Waste Management Act* is retroactive, section 26.5 of the *Waste Management Act* is merely retrospective. Specifically, he found that the definition of responsible person "operates for the future, but in so doing imposes new legal consequences in respect of past actions, events or status."

The Respondent also submits that section 27(3) is indicative of retrospectivity rather than retroactivity, as the section changes the present consequences of past activities, rather than changing the law. He argues that all this section does is clarify that a person can be liable today for activities that were not prohibited in the past. It does not change the law in the past.

Although there is confusion around the meaning and proper use of the terms "retroactive" and "retrospective", the Panel, of course, adopts the definitions of retroactive and retrospective approved by the Supreme Court of Canada in *Benner*, and has considered the parties' submissions on that basis. Retroactive legislation changes the past legal consequences of completed transactions, while retrospective legislation changes the future consequences of completed transactions by imposing new liabilities or obligations.

The parties agree that Part 4 of the *Waste Management Act* is retrospective in application. The dispute lies in whether some or all of the relevant sections of Part 4 go further than this – that they are retroactive in application.

In statutory interpretation, there is a general presumption against retroactive application. This presumption arises from the concern that since retroactive laws effectively change the law that was applicable to past events, arbitrary or unfair consequences may arise for those who are caught by retroactive provisions.

However, subject to the limitations of the *Charter of Rights and Freedoms*, legislatures have the authority to enact retroactive legislation, even where a new or amended law interferes with vested rights. The presumption against retroactive application may be rebutted by express words or necessary implication indicating that the statute is meant to apply to past facts. The presumption may also be rebutted where express provisions do not exist, by showing the legislature's intent using evidence such as the purpose of the law and the circumstances in which the law was adopted.

Section 27(1) of the *Waste Management Act* is expressly retroactive in its application. However, no other section of the *Waste Management Act* is expressly retroactive. Nor does section 27(1) expressly confer retroactive application on any other provisions in the *Waste Management Act*. In the absence of express language indicating retroactivity, verb tenses, other words referring to the past, the imposition of new obligations on past actions, and the overall intent of the legislation may indicate retroactive or retrospective application (*West Fraser Timber Co.* v. *British Columbia (Regional Waste Manager*), [1988] B.C.J. No. 2127 (B.C.S.C.)). Since no other sections of the *Waste Management Act* are expressly retroactive, the purpose and scheme of the *Waste Management Act* must be examined to determine whether other provisions should by necessary inference be applied retroactively.

Section 26.5(1) makes use of both present and past tense language in defining persons responsible for remediation. Using the past tense, a responsible person may be "a previous owner or operator of the site" and "a person who produced a substance and … caused the substance to be disposed, handled or treated …." This clearly indicates that a person's **past actions** may result in responsible person status under the *Waste Management Act*. However, section 26.5 begins with the words, "… the following persons **are** responsible for remediation…." This suggests that responsible person status is a present state of being, rather than a past state of being, and that section 26.5 imposes responsible person status in the present for past actions. In other words, when considered in isolation, section 26.5 appears to be retrospective in application.

The next step is to consider section 26.5 in light of section 27(1). The purpose of section 27(1) is to impose retroactive liability on responsible persons for "reasonably incurred costs of remediation of the contaminated site." If section 27(1) is considered in relation to a retrospective section 26.5, the result is that polluters may be responsible persons as of no earlier than 1997 (when section 26.5 came into force), and if so are liable for remediation costs even if those costs were incurred before they became responsible persons. Thus, the possibility of retroactive liability is attracted after the possibility of responsible person status comes into existence. In the words of Waldemar Braul, "[t]hese liability principles are assigned to 'responsible persons'" (*Liability Features of Bill 26* (1994) 4 J.E.L.P. 138 at 183).

Section 27(3) clarifies that liability applies to responsible persons even though the introduction of a substance into the environment was not prohibited in the past or the discharge of waste was permitted. This section does not operate to make the activity in the past illegal but rather imposes consequences in the present for actions in the past that were lawful.

Similarly, section 27.1(1) gives a manager the authority to "issue a remediation order to any responsible person." When considered in light of a retrospective section 26.5, the result is that a polluter who is a responsible person as of 1997 may have to remediate contamination caused by their past actions.

This interpretation, whereby section 27(1) operates retroactively subsequent to the determination of responsibility under section 26.5, is consistent with the decision in *Northeastern Chemical & Pharmaceutical* cited by GCC and NFHC. In that decision, the Court interpreted CERCLA as allowing the government to collect remediation costs which were incurred before CERCLA was enacted. In the Panel's view, that decision did not interpret CERCLA to be retroactive in any respect other than retroactive liability for remediation costs.

The Panel agrees that an important purpose of Part 4 is to make polluters pay for cleaning up contamination that results from both their actions, regardless of whether those actions occur in the past or the present. This serves the public interest in preventing and reducing harm to the environment and human health, and correctly places the costs of clean up on those responsible, rather than on tax payers. With this purpose in mind, section 26.5 casts a broad net in defining "responsible person." However, the Panel finds that section 26.5 need not be applied retroactively in order for Part 4 to achieve its purpose. Rather, Part 4 imposes a duty, as of the law's coming into force, on responsible persons to pay "absolutely, retroactively and jointly and severally" for the cost of cleaning up contamination resulting from their past and present activities. By applying section 26.5 retrospectively and section 27(1) retroactively, the *Waste Management Act* makes responsible persons pay to the full extent possible, without having to make them responsible persons in the past.

Thus, based on the language used in the relevant provisions and the overall purpose of Part 4 of the *Waste Management Act*, the Panel finds that while section 27(1) is clearly retroactive, section 26.5 operates retrospectively to define who may be a responsible person. However, given the Panel's interpretation of the Amalgamation Agreement, it is not necessary to make a conclusive finding on this issue. B.C. Hydro may be named a responsible person as a result of B.C. Electric's pre-amalgamation actions.

3. Whether the Deputy Director has the authority to issue a remediation order against a person not resident in British Columbia.

The Panel notes that for the purposes of this application, Mr. Lawson has accepted the findings of fact made by the Deputy Director relating to the responsibility of Globe West, Globe Asphalt and GN of which he was or is an officer and a director. Mr. Lawson has also accepted the findings of fact made relating to his personal involvement with the Property.

Mr. Lawson's other grounds of appeals relating to the question of whether he is a "responsible person" under the *Waste Management Act* have been left for a later date. However, Counsel for Mr. Lawson concedes that his residence outside of British Columbia does not prevent Mr. Lawson from being a "responsible person" under the *Waste Management Act*. His constitutional challenge is that the Regional Manager cannot "issue" a remediation order to a responsible person who is a non-resident of British Columbia.

Mr. Lawson was the president and director of Globe West, a company registered in British Columbia. In 1980, Globe West purchased the Property and the asphalt business from Canadian Gypsum Company (now CGC), which it operated until about 1986. Globe West sold the Property to NFHC in 1986 with completion in 1987. The agreement called for the removal of personal property and improvements so that the property would be left in a "safe and sanitary condition." After Globe West ceased business in 1986, Mr. Lawson was personally involved in the sale of the Property to NFHC. Mr. Lawson, in his own name, contracted to have certain demolition activities performed. Between April and October 1987, the Property was decommissioned under a variety of arrangements. A written agreement with Zeal Industries (prepared by Mr. Baldry, a non-lawyer) was entered into in 1987 and amended June 4, 1987. The agreement was "between T.C.R. Lawson former owner of the subject site herein called the pre-owner and Zeal Industries Ltd. herein called the contractor."

In 1988, NFHC commenced a lawsuit against Mr. Lawson, GN and Globe West, amongst others, which resulted in a settlement, which included financial contributions to NFHC for remediation of the Property.

The Deputy Director found that "Mr. Lawson was aware of and directly involved in decision-making regarding the site. He was directly involved in organizing the decommissioning process." The Deputy Director's findings are consistent with those of Mr. Justice Spencer, who, in prior litigation, stated:

> The third-party Lawson controlled Globe West Products Inc. and GN Industries, Inc. and he hired crews to demolish and remove the personal property and improvements. In the course of those activities it is alleged that noxious pollutants were spilled and buried in pits on the land and that other pollutants escaped and drained into the soil.
>
> (see *North Fraser Harbour Commission* v. *Hardy BBT Ltd., et al.*, Vancouver Registry No. C884749, Reasons for Judgment, December 21, 1992, p. 2)

Globe West was dissolved in 1995, but in 1997, Canadian Pacific Railway ("CPR") brought an application for an order restoring Globe West to the Register of Companies in B.C. The application was successful and on September 25, 1997, the Court issued an order restoring Globe West to the Register of Companies for a period of two years. The Court ordered that Globe West's registration be deemed to have continued as if the Company had never been struck off the Register.

Mr. Lawson stated, by way of overview, that as a general principle of law, provincial laws have no application across provincial boundaries. Further, he notes that administrative orders will not be recognized by courts or tribunals in other jurisdictions. He submits that this is in contrast to a judicial order, which may have extraterritorial effect and be recognized outside provincial boundaries. Mr. Lawson says that he is not challenging the validity of the *Waste Management Act*, but only the authority of the Deputy Director under section 27.1 to issue a remediation order against a non-resident of British Columbia.

Mr. Lawson reviewed the legislative scheme under Part 4 of the *Waste Management Act*. He pointed out that section 26.5(1) of the *Waste Management Act* provides

that certain persons are "responsible for remediation at a contaminated site." These include a "previous owner or operator of the site." "Person" is defined broadly in section 26(1) as including a government body and "any director, officer, employee or agent of a person or government body." The jurisdiction to make remediation orders is found in section 27.1 of the *Waste Management Act,* which provides that: "a manager may issue a remediation order to any responsible person." Mr. Lawson submits that both the extended definition of person and section 27.1 are silent on the question of residency because of constitutional limitations.

Mr. Lawson also submits that policy considerations cannot override the constitutional limitations of Canadian federalism. He contends that it is not right to say that there will be no remedy against him if a remediation order cannot be issued. Mr. Lawson argues that even if a remediation order cannot be issued against a non-resident, there are other remedies available under the *Waste Management Act*, including the right of any person to bring an action against any responsible person for the reasonably incurred costs of remediation (section 27(4)). In other words, one does not have to be subject to a remediation order to be a responsible person under the statute or to be liable for the costs of remediation. Mr. Lawson submits that the issue, on this application, is not whether he is a responsible person or whether costs can be recovered from him in a civil action, but whether he can be subject to a remediation order.

Mr. Lawson submitted that there are two aspects to the question of the Deputy Director's authority to issue a remediation order to a non-resident. The first is whether the governing statute, the *Waste Management Act*, has extra-territorial application so as to apply to a non-resident, and the second is whether or not the law has extra-territorial application; does an administrative official have jurisdiction to consider issuing an order against a non-resident responsible person. Mr. Lawson argues that, unlike courts, a provincial administrative official, such as the Deputy Director, has no jurisdiction to assert its process extra-territorially over a non-resident. He submits that there is no rule or provision in the *Waste Management Act* that confers extra-territorial jurisdiction over non-residents. By comparison, Mr. Lawson refers to Rule 13 of the Rules of Court which he submits specifically deals with service *ex juris*. He argues that in the absence of a rule or enactment, there is no basis for the Deputy Director to issue a remediation order against a non-resident.

Regarding the extra-territorial application of the statute, Mr. Lawson submits that the basis for the *Waste Management Act* and environmental legislation in British Columbia is section 92(13) of the *Constitution Act, 1867* dealing with property and civil rights "in the province." He argues that "in the province" sets out the constitutional limitations on the *Waste Management Act*'s applicability. Mr. Lawson refers to a number of cases that address the territorial limitations of the operation of provincial legislation. *Re Dalgliesh Estate* (1956), 18 W.W.R. 519 (B.C.S.C.) involved the case of a resident of Saskatchewan applying for letters probate in respect to her mother's estate in British Columbia. The B.C. Registrar refused to issue letters probate in her maiden name. She brought an application for an order requiring him to do so. The Court held that the British Columbia *Change of Name Act* has no application to a resident of Saskatchewan.

McGuire v. *McGuire and Desorti*, [1953] 2 D.L.R. 394 (Ont. C.A.) involved an application in Ontario by a defendant spouse in a divorce action for a writ of *habeas corpus* to issue to a non-resident co-defendant who was in a Quebec penitentiary. The Court held that:

> … no provincial Legislature has any power to pass laws having any operation outside its own territory and no tribunal established by provincial legislation can extend its process beyond its own territory so as to subject either persons or property to its decisions. (p. 397)

The Court then referred to the following quotation from Story on *Conflict of Laws*: "Every exertion of authority of this sort beyond this limit is a mere nullity and incapable of binding such persons or property in any other tribunals."

Mr. Lawson submits that *McGuire* sets out the fundamental principle that he relies on. He argues that when applied to this case, it stands for the proposition that no tribunal, including the Deputy Director, can extend a remediation order beyond British Columbia. Mr. Lawson submits that in *McGuire* the Court held that the attempt to have a writ of *habeas corpus* issued to a non-resident was a nullity, and that in this case, the remediation order should be found to be a nullity as well. He claims that the Order is coercive as it orders the named responsible persons, including himself to, among other things, remove contaminated shallow sediments from the foreshore, and install erosion control works.

Mr. Lawson also refers to *Re Randolph* v*. Boyd* (1961), 29 D.L.R. (2d) 668 (B.C.C.A.) where the Court cites the proposition that "it may be accepted as a general principle that States can legislate effectively only for their own territories" (p. 669) and refers to the above-quoted statement in *McGuire.* Mr. Lawson submits that the general principle set out in *McGuire* "that no tribunal can extend its process beyond its own territory" is the law in British Columbia as well as Ontario.

Mr. Lawson referred to two cases that illustrate the proposition set out in *McGuire* in the context of administrative tribunals. *Hretchka* v. *Attorney General for British Columbia, British Columbia Securities Commission and Superintendent of Brokers for British Columbia*, [1972] S.C.R. 119 involved an appeal from a decision of the B.C. Securities Commission. The Court, in referring to an order of the Commission stated: "That order is not before us, but, in any event, like any other order of the Commission, it would have application only in the Province of British Columbia" (p. 126). Mr. Lawson submits that *Hretchka* illustrates that the principle set out in *Re Randolph and Boyd* and *McGuire* applies to administrative tribunals as well as courts.

Mr. Lawson also referred to *New Brunswick (Labour Relations Board)* v. *Eastern Bakeries Limited*, [1961] S.C.R. 72 which involved an application by a union for certification for all employees of the respondent company. There was an issue as to whether non-resident employees on the payroll were eligible to vote. The Court found that: "The New Brunswick Labour Relations Board can have no jurisdiction over persons residing and working outside that province …" (p. 78).

Mr. Lawson submits that these cases illustrate that the constitutional limitations of Canadian federalism preclude an administrative tribunal from issuing process that can bind a non-resident.

The Respondent submits that the cases relied on by Mr. Lawson only confirm the proposition that, of their own force, the orders of any court or administrative tribunal are enforceable only within provincial territorial boundaries. The Respondent states that, for example, *Hretchka* confirms the uncontroversial proposition that, of their own force, the coercive effect of orders of a provincial administrative tribunal apply only within the provincial territorial boundaries of their issuance. The Respondent contends that all the other cases relied on by Mr. Lawson say is that the province cannot authorize orders which, of their own force, purport to coerce, regulate and/or change the legal status of persons outside provincial boundaries.

The Respondent submits that the Court in *Eastern Bakeries* held that a provincial labour board has no jurisdiction to issue a certification order purporting to regulate persons outside provincial boundaries as employees according to that province's labour laws. In *Re Randolph and Boyd*, the Court declined to issue an order presuming a person dead under the B.C. *Survivorship and Presumption of Death Act*, 1958 because, in that case, there was no evidence of a person, property or proceeding within the territory of the province to which the order could apply and hence the petition was not within the intention of the legislature and was properly refused (p. 670). The Respondent submits that, in this case, the Order can have a practical effect in British Columbia.

The Respondent submits that *Re Dalgliesh* is more of a conflict of laws case, but makes the same point. The Court confirmed that the B.C. *Change of Name Act* could not dictate the "name" status of a Saskatchewan resident seeking letters probate here. The proper choice of law was the Saskatchewan legislation. In *McGuire*, the Court held that a judge could not issue a writ of *habeas corpus* compelling a person outside the province to come into the province of origin. The Respondent argues that a writ of *habeas corpus* is fundamentally different from a remediation order applicable only in British Columbia. He submits that Mr. Lawson has taken a passage from *McGuire* and built a theory on it. The Respondent argues that if the Court meant that one cannot serve a person outside of British Columbia with an order that is enforceable only in British Columbia, that is clearly wrong. But if what is meant is that one cannot issue process, such as a writ of *habeas corpus* to force a person to come into the province, than that is correct. The Respondent submits that *McGuire* can only be interpreted to stand for the latter proposition.

The Respondent agrees that a remediation order cannot, of its own force, have "extra-territorial effect" in the sense of reaching outside provincial boundaries and having coercive effect there. However, the Respondent submits that this fact is irrelevant to the issue of whether the Deputy Director has the jurisdiction to issue a remediation order, applicable within the province, to a responsible person respecting his or her acts and role within the province. In other words, while the Deputy Director does not have the power to compel Mr. Lawson to come into the jurisdiction and clean up the site, the order can be issued to Mr. Lawson imposing obligations on him in British Columbia for acts done in British Columbia. The Respondent submits that it is a fundamental error for Mr. Lawson to say that because the Order cannot apply, of its own force, in Ontario, than it is a nullity in British Columbia.

The Respondent submits that the cases cited by Mr. Lawson are different from the appeal before this Panel. The Order does not purport to be effective in Ontario. To

be effective in British Columbia, it does not depend on coercing Mr. Lawson to do anything in Ontario; nor does it have to do with his juridical actions in Ontario. The Order, applicable only in B.C., relates exclusively to Mr. Lawson's acts and status in this province, as an order in pith and substance related to the protection of British Columbia property. The Respondent submits that Mr. Lawson is a person who, because of his actions and decisions in relation to a previous owner of property in British Columbia, is responsible for remediation of the Property and who must, in this province, abide by the Order. The Respondent says that the Order is directed exclusively to the protection of "property and civil rights within the province."

The Respondent refers to a number of cases which illustrate the proposition that a provincial statute is properly construed as referring to persons outside the province when its pith and substance relates to matters within the province. In *Alberta* v. *Thomas Equipment Ltd.*, [1979] 2 S.C.R. 529, the Supreme Court of Canada found that persons residing outside a province are not immune to the application of provincial statutes which address their status and actions within the province. The case also illustrates that a person need never have set foot in another province in order to juridically perform acts within that province. In that case, Thomas Equipment Ltd. was at all times resident of New Brunswick. Its business included the sale of farm equipment. The company was charged with a breach of the *Alberta Farm Implement Act*. The issue before the Court was whether the Alberta statute could be enforced against Thomas Equipment, as a resident of New Brunswick. The threshold question was whether a "vendor", within the meaning of the Alberta statute, was limited to a vendor residing in Alberta.

A lower court found that "Thomas, because of the absence of its registration under *The Companies Act* at the time the offence occurred, was not a person or an entity within Alberta, and therefore could not have committed the offence." The Supreme Court of Canada rejected this view. It held that, as long as the vendor's actions arose in Alberta, its place of residence was irrelevant:

> Thomas is not being penalized under the Act for its conduct in New Brunswick, but because of what it failed to do in Alberta. The Manitoba statute [in the *Interprovincial Cooperatives* case] was aimed at the conduct outside the province of persons outside the province. The Alberta statute imposes an obligation upon a vendor who sells farm implements to a dealer in Alberta for resale in Alberta to repurchase those implements which are located in Alberta … (p. 545).

In *Thomas Equipment*, the corporation had no presence in Alberta, except for the contract it signed with an Alberta company. The fact that the connection to Alberta was only contractual led to the dissent by three members of the Court. However, the majority found a sufficient connection with events within Alberta, to make the Alberta statute applicable to a resident in New Brunswick.

The Respondent argues that the facts of the present case are much stronger than those in *Thomas Equipment*. Globe West is a British Columbia company. It owned the contaminated Property and operated an asphalt business on the site. Mr. Lawson was registered under British Columbia law as the President of Globe West and a director. Mr. Lawson personally attended at the site in order to conduct business here. He was the "operating mind" of Globe West. The Respondent submits that Mr. Lawson's status as a person responsible for remediation flows from

his clear and admitted connection to a contaminated site in British Columbia. The Respondent also addressed Mr. Lawson's argument that this case is not helpful as it involves a court and not a tribunal. The Respondent submits that this case involved the jurisdiction of a Provincial Court, which is juridically identical to the Deputy Director and the Environmental Appeal Board in that they are all creatures of statute.

The Respondent also referred to *R.* v. *W. McKenzie Securities Ltd.* (1966), 57 W.W.R. 157 (Man. C.A.), approved in *Global Securities Corp.* v. *British Columbia* (*Securities Commission*) (1998), 162 D.L.R. (4th) 601 (B.C.C.A.). In *McKenzie*, the issue was whether Manitoba's *Securities Act*, which prohibited the trading of securities in Manitoba without a license, applied to a resident of Ontario. Counsel for the accused made an argument similar to the one advanced in this case. Counsel argued that "To the extent that *The Securities Act* of Manitoba can be said to have application to the activities of the accused it should be declared ... *ultra vires* of the legislature of Manitoba" (p. 161). The Court rejected that argument as follows:

> It seems clear that the true nature of the provincial statutes above considered, no less than *The Securities Act* of our own province, is to provide protection to the public through a system of regulating and supervising the conduct of persons who engage in trading activities in securities within the province. *The Securities Act* of Manitoba is not designed to reach out beyond provincial borders and to restrain conduct carried on in other parts of Canada or elsewhere. Its operation is effective within Manitoba, and nowhere else. For a person to be subject to its restraint he must trade in securities in Manitoba. This is not to say that a non-resident of Manitoba can never become subject to the controls of the statute. If the activities of such a resident can fairly and properly be construed as constituting trading in the Province, then they fall within the purview of the Act. (p. 164)

The Respondent also referred to Hogg, *Constitutional Law of Canada* (Looseleaf Edition), pp. 13-7, 13-8, cited by the Supreme Court of Canada in *General Motors of Canada* v. *City National Leasing*, [1989] 1 S.C.R. 641 at 663-672 as follows:

> This "watertight" view of provincial boundaries fails to distinguish between the pith and substance of a statute – its "matter" – from its incidental effects. The general rule of constitutional law is that a law is classified by its pith and substance, and incidental effects on subjects outside jurisdiction are not relevant to constitutionality. No one would quarrel with the proposition that a provincial statute whose pith and substance is the destruction or modification of rights outside the province must be unconstitutional. But where the cases go wrong, as it seems to me, is in refusing to recognize that a statute whose pith and substance is a matter inside the province may incidentally destroy or modify rights outside the province.
>
> The correct approach is exemplified by *Ladore* v. *Bennett* (1939).
>
> ...

> In *Re Upper Churchill Water Rights* (1984), the Supreme Court of Canada accepted the thesis advanced in the previous two paragraphs that the Royal Bank line of cases was inconsistent with *Ladore* v. *Bennett* and that the latter case was the correct one. It is clear, therefore, that the impairment of extraprovincial rights (or other extraprovincial consequences) may be validly accomplished by a provincial legislature as an incidental effect of a statute that is in relation to a matter territorially within the province and within a provincial head of power.

The Court in *Global Securities* also stated:

> This leads to another point that is trite law: provincial legislation may have an extra-territorial effect but still be valid provided its dominant purpose, or pith or substance, lies within one of the heads of s. 92. This was settled conclusively by the Supreme Court of Canada in *Re Upper Churchill Water Rights*. (p. 612)

GCC, in its submissions in support of the Respondent's position, stressed the distinction between the issuance of the order and enforcement. It submits that a precondition of enforcement is that the order is issued but the converse is not true, that is, issuance is not dependent on whether the order can be enforced outside the province. GCC contends that one looks to the legislation for the authority to issue the order and that, in this case, the Order was made pursuant to a valid provincial statute regulating acts or omissions in British Columbia relating to land in the province. Section 27.1 of the *Waste Management Act* provides the specific authority for the Order. GCC submits that the Order does not regulate extra-provincial activity but rather it regulates intra-provincial activity with a lawful, incidental extra-provincial effect. It says that this principle is established in a number of judgments of the Supreme Court of Canada including *Thomas Equipment.*

GCC also referred to the case of *Re Upper Churchill Falls Water Rights*, [1984] 1 S.C.R. 297 where the Court indicated that:

> Where the pith and substance of the provincial enactment is in relation to matters which fall within the field of provincial legislative competence, incidental or consequential effects on extra-provincial rights will not render the enactment *ultra vires.*

GCC argues that in *Upper Churchill Falls*, the statute was *ultra vires* the legislature of Newfoundland as its pith and substance was to interfere with the rights of Hydro Quebec outside the province. In this case, GCC submits that the *Waste Management Act* is directed to activities in the province and is *intra vires*.

GCC also refers to an article by Elizabeth Edinger entitled "Territorial Limitation on Provincial Power" (1982), 14 Ottawa L.R. 57-99 which addresses the importance of the distinction between the issuance of an order and the enforceability of an order, and the issue of the incidental extra-provincial effect of provincial legislation. At page 63, she states: "The first point to be clarified is an elementary one: the distinction between the authority to legislate and the authority to enforce." Edinger also concludes:

> Nevertheless, the cases show that if the applicability of a provincial legislative provision turns on the existence of some conduct or activity within the province, it is highly unlikely that it will be declared invalid because of the territoriality principle even though the actor has never set foot in the province. *R. W. McKenzie Securities Ltd.* is a good example." (p. 76)

CPR, a third party in these proceedings, took no position on Mr. Lawson's application, but Counsel for CPR submits that a discussion of "pith and substance" and "incidental effects" is not relevant to the application. He argues that the question of "pith and substance" is an analytical technique used when the validity of legislation is challenged, which is not the situation here. He contends that the issue of applicability only arises once the validity of a law has been established. Counsel for CPR indicates he is raising this point because he does not want to be estopped from taking a position regarding the validity of the legislation in any future proceeding.

In reply, Mr. Lawson agreed with CPR and stressed the distinction between a challenge based on the constitutional validity of a statute and its constitutional applicability. He said that the pith and substance doctrine does not apply to a challenge based on the extra-territorial application of an order. He submits that he is not claiming that a Deputy Director cannot make a remediation order, but rather that it cannot be issued against a non-resident.

The Respondent disagrees with Mr. Lawson and CPR's submissions on this point, as does the Attorney General. The Respondent submits that what is at issue is the validity of section 27.1 and its full effect as intended by the legislature. The Respondent submits that if the pith and substance of section 27.1 is in relation to matters within the province, than the incidental effect relates to the issuance of the Order outside the province to an otherwise responsible person. The Respondent submits the notion of "pith and substance" is a doctrine of constitutional law, which applies both to a determination of constitutional validity and constitutional applicability. He argues that it would be incorrect not to look at the dominant characteristic of legislation when someone is arguing that it is inapplicable.

After the close of the hearing, Mr. Lawson submitted an excerpt from Hogg, *Constitutional Law of Canada* (4th ed.), entitled "Interjurisdictional Immunity" which sets out three different ways to attack a law that purports to apply to a matter outside the jurisdiction of the enacting legislature. These attacks go to the validity, applicability or the operability of the law. Hogg states that in respect to validity, it may be argued that the law is invalid because the matter of the law in its pith and substance comes within a class of subjects that is outside the jurisdiction of the enacting legislative body. An attack on applicability acknowledges that the law is valid in most of its applications, but argues that the law should be interpreted so as not to apply to the matter that is outside the jurisdiction of the enacting body. Hogg says that if this argument succeeds, the law is not held to be invalid, but simply inapplicable to the extra-jurisdictional matter, i.e. the law is "read down" (p. 15-25).

The Respondent argues that the pages filed by Mr. Lawson do not suggest that "pith and substance" is irrelevant when a challenge relates to "applicability" or "territoriality" as these pages do not talk about when the "pith and substance"

doctrine applies. The Respondent submits that Professor Hogg makes it clear that the doctrine of "interjurisdictional immunity" is not about the territoriality issues dealt with by him under the rubric of "pith and substance" and "real and substantial connection." The Respondent submits that "interjurisdictional immunity" is an exceptional doctrine applied when provincial laws affect federal subjects listed in section 91 such as federal works or Indians. The Respondent refers to a passage from Hogg which states that: "the pith and substance doctrine, which allows a provincial law to "affect" a federal matter, is applied much more frequently than the interjurisdictional immunity doctrine, which reads down the provincial law to exclude the federal matter" (p.15-32). He also refers to the following excerpt from Hogg:

> If the provincial law would affect the basic, minimum and unassailable core of the federal subject, then the interjurisdictional immunity doctrine stipulates that the law must be restricted in its application (read down) to exclude the federal subject. If, on the other hand, the provincial law does not intrude heavily on the federal subject, then the pith and substance doctrine stipulates that the provincial law may validly apply to the federal subject. (p. 15-33)

Thus, the Respondent argues that framing a challenge as one of "applicability" or "territoriality" does not in itself dictate proper constitutional analysis. The Respondent and the Attorney General submit that the test is whether there is a "real and substantial connection" to the matter whose pith and substance is within provincial jurisdiction.

The Attorney General of British Columbia submits that the jurisdiction on which the *Waste Management Act* is founded is very broad. It includes not only property and civil rights in a province (92(13)); but matters of a merely local or private nature in the province, which would include health (92(16)); enforcement of laws of the province (92(15)); and administration of justice in the province (92(14)). The Attorney General also submits that the Deputy Director's order is an order to protect the environment in British Columbia and is primarily remedial in nature.

The Attorney General submits that constitutional jurisdiction arises when the matter is connected to something that is pith and substance within the competence of the provincial government. In summary, the Attorney General argues that if there is a real and substantial connection to a matter whose pith and substance is within provincial jurisdiction, and here the regulatory scheme dealing with contaminated sites is clearly *intra vires* the province, that the Deputy Director's naming of Mr. Lawson as a responsible person in the Order is also *intra vires*.

The second aspect of Mr. Lawson's argument focuses on the distinction between court orders and administrative orders. Mr. Lawson argues that, at common law, a court had no jurisdiction over a non-resident. In support of that proposition, he cites *McGuire* where the Court stated: "but at common law no Court had any jurisdiction or powers over persons outside the territorial jurisdiction of the Court" (p. 398). Mr. Lawson submits that, by legislation, a province may enact provisions that authorize a **court** to issue process and take jurisdiction against a non-resident. Mr. Lawson refers to Rule 13 of the Rules of Court, which deals with service *ex juris*, which he submits founds the courts' jurisdiction to issue process against a non-resident.

Mr. Lawson refers to the case of *Morguard Investments Ltd.* v. *De Savoye*, [1990] 3 S.C.R. 1077 which involved a mortgage of land in Alberta which fell into default. The mortgagor had moved to British Columbia where he continued to reside. The Alberta mortgagees brought an action in Alberta and the defendant mortgagor was served in British Columbia in accordance with the rules for service *ex juris* of the Alberta Court. The mortgagor did not accede to its jurisdiction and the mortgagees obtained a personal judgment against the mortgagor. The plaintiff mortgagees then commenced a separate action in British Columbia to enforce the Alberta judgment. At issue was the recognition to be given by the courts in one province to a judgment of the courts in another province in a personal action brought in the latter province at a time when the defendant did not live there. Judgment was granted to the mortgagees by the Supreme Court of Alberta in a decision that was upheld by the Court of Appeal. The appeal by the defendant mortgagor to the Supreme Court of Canada was dismissed.

Mr. Lawson submits that this case points out that even in the context of courts, there are limits to jurisdiction over a person. He refers to the following passage:

> To what extent may a court of a province properly exercise jurisdiction over a defendant in another province. The rules for service *ex juris* in all the provinces are broad .... It is clear, however, that if the courts of one province are to be expected to give effect to judgments given in another province, there must be some limits to the exercise of jurisdiction against persons outside the province. (p. 1104)

In summary, Mr. Lawson argues that at common law a court had no jurisdiction over a non-resident. However, by statute or rule, jurisdiction over non-residents has been acquired by the courts but there are limits notwithstanding (*Morguard*). Mr. Lawson submits that, in this case, we are not dealing with a court and the decisions relied on by the Respondent and the other parties are not helpful in dealing with the issue of the authority of the Deputy Director as they deal with courts. Mr. Lawson argues that unlike a court where a statute or rule founds the jurisdiction over non-residents, an administrative tribunal cannot exercise jurisdiction with respect to persons outside of the province. Moreover, Mr. Lawson submits that the *Waste Management Act* has no provision for service *ex juris* – that is a function of the constitutional limitations.

Mr. Lawson submits that there is a combination of constitutional limitations and process limitations on the Deputy Director. He argues that the *Waste Management Act* confers no scheme or process by which service can be affected outside the province. Therefore, he submits that there is no ability to even entertain consideration of an Order against a non-resident, and that is why the Order is a nullity.

The Respondent submits, first of all, that the Court in *Morguard* emphasized the importance of not confusing the jurisdiction to make an order in the first place with its enforcement outside the province. As noted by the Court:

> No one denies the Alberta court's jurisdiction to entertain the action and enforce it there if it can. It would be surprising if they did. It concerns a transaction entered into in Alberta by individuals who were

> residents in Alberta at the time of the transaction and involves land situate in that province…
>
> The issue then, as already mentioned, is simply whether a personal judgment validly given in Alberta against an absent defendant may be enforced in British Columbia where he now resides. (p. 1086-1087)

The Respondent submits that the Court adopted the test of whether there is a "real and substantial connection" between the defendant and the province exercising jurisdiction to determine whether jurisdiction may be exercised over a defendant in another province. He refers to the following statement that followed on from the passage quoted by Mr. Lawson above. The Court stated:

> It will be obvious from the manner in which I approach the problem that I do not see the "reciprocity approach" as providing an answer to the difficulty regarding in personam judgments given in other provinces, whatever utility it may have on the international plane. Even there, I am more comfortable with the approach taken by the House of Lords in *Indyka* v. *Indyka*, *supra*, where question posed in a matrimonial case was whether there was a real and substantial connection between the petitioner and the country or territory exercising jurisdiction. (p. 1104)

The Respondent also referred to the following passages from *Morguard*, which set out the rationale for the "real and substantial connection" test:

> As I see it, the courts in one province should give full faith and credit, to use the language of the United States Constitution, to the judgments given by a court in another province or a territory, so long as that court has properly, or appropriately, exercised jurisdiction in the action. I referred earlier to the principles of order and fairness that should obtain in this area of the law. Both order and justice militate in favour of the security of transactions. It seems anarchic and unfair that a person should be able to avoid legal obligations arising in one province simply by moving to another province. (p. 1102-1103)
>
> …
>
> Turning to the present case, it is difficult to imagine a more reasonable place for the action for the deficiencies to take place than Alberta. As noted earlier, the properties were situate in Alberta, and the contracts were entered into there by parties then both resident in the province. … A more "real and substantial" connection between the damages suffered and the jurisdiction can scarcely be imagined. In my view, the Alberta court had jurisdiction, and its judgment should be recognized and be enforceable in British Columbia. (p. 1108)
>
> *It seems to me that the approach of permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the rights of the parties*. It affords some protection against being pursued in jurisdictions having little or no connection

> with the transaction or the parties. In a world where even the most familiar things we buy and sell originate or are manufactured elsewhere, and where people are constantly moving from province to province, it is simply anachronistic to uphold, a "power theory" or a single situs for torts or contracts for the property exercise of jurisdiction. [emphasis added]
>
> The private international law rule requiring substantial connection with the jurisdiction where the action took place is supported by the constitutional restriction of legislative power "in the province." As Guerin J. observed in *Dumont* v. *Taronga Holdings Ltd*. (1986), 49 D.L.R. (4th) 335 (Que. Sup. Ct.) at p. 339, … "In the case of service outside of the issuing province, service *ex juris* must measure up to constitutional rules." The restriction to the province would certainly require at least minimal contact with the province, and there is authority for the view that the contact required by the Constitution for the purposes of territoriality is the same as required by the rule of private international law between sister-provinces. (p. 1109)

The Respondent submits that by analogy to *Morguard*, the subject matter of the Order relates to a contaminated site situate in the province, and the responsibility of a man who was a registered director and President in the province of a company registered in the province that owned and operated the site. The "real and substantial connection" to British Columbia could not be clearer.

Finally, regarding the enforcement of the Order, the Respondent argues that, of its own force, the Order is effective in British Columbia. Second, the Respondent notes that, despite his residence in Ontario, the existence of the Order may render Mr. Lawson subject to a prosecution in British Columbia for failure to comply with the Order (section 54(20) of the *Waste Management Act*). He also submits that *Thomas Equipment* and *W. McKenzie Securities* make it clear that persons outside the province can be convicted for offences they commit inside the province. Finally, the Respondent argues that the existence of a remediation order, enforceable only within British Columbia, may well give rise to the ability of regulators or parties to apply to the Courts for a declaration which could in turn give rise to the Order being recognized in Ontario. While this is not an issue to be decided in this appeal, GCC submits that based on the developing principle of the full faith and credit rule set out in *Morguard*, that the Order could be more effective against Mr. Lawson than his submissions suggest.

In regard to the second aspect of Mr. Lawson's argument, the Respondent submits that he fundamentally disagrees with Mr. Lawson's submission that a tribunal cannot serve an order outside the province without a specific service *ex juris* rule. The Respondent submits that Mr. Lawson is wrong in saying that in the absence of legislation a tribunal can never serve a person outside of British Columbia. The Respondent says that section 27.1 of the *Waste Management Act* clearly provides that a remediation order can be issued to <u>any</u> responsible person. The Respondent submits that this provision is ample authority for issuance of a remediation order against a non-resident if that non-resident is a responsible person under the legislation.

The Respondent also disagrees with Mr. Lawson's argument that rules of service *ex juris* somehow confer jurisdiction on the courts that they otherwise would not possess. He argues that this is wrong, and that rules dealing with service *ex juris* are rules of process just like rules of service within a province, such as Rule 11 in British Columbia. The Respondent submits that the rules cannot confer jurisdiction on courts that they otherwise do not posses.

The Respondent submits that what *Morguard* says is that the rules which permit service *ex juris* are valid provided the dispute has a "real and substantial connection" with the jurisdiction. In other words, the constitution defines jurisdiction, not rules about service *ex juris*. He contends that *Morguard* makes it clear that when a province enacts rules like Rule 13, it cannot use these rules as a foothold to expand constitutional jurisdiction. The Respondent argues that Mr. Lawson wants to "turn *Morguard* on its head," by saying that if there is no Rule 13, than a person can never be notified of an order outside of the province.

The Respondent also referred to *Peterson* v. *Ab Bahco Ventilation et al.,* [1980] 3.W.W.R. 245 (B.C.S.C.) where the plaintiffs argued that a change to Rule 13 in British Columbia dispensing with the need to apply for leave to serve *ex juris* meant that there is no longer a discretion in the court to decline jurisdiction. The Court said:

> The change in our rules was to streamline the procedure and to do away with what was, in most cases, an unnecessary application to the court. It did not purport to do away with the long-established and necessary, common law doctrine of forum conveniens. (p. 256)

The Respondent submits that what *Morguard* and *Peterson are* saying is that the courts' jurisdiction does not depend on rules of court. For example, Rule 11 and Rule 13 are both rules for the conduction of litigation. The Respondent argues that if these rules were repealed, it does not mean that litigation could not continue, but rather that one could go to the court and obtain service. He submits that legislation does not dictate constitutionality, but rather the constitution dictates constitutionality.

The Respondent submits that courts are masters of their own procedure as are tribunals. He refers to *Knight* v. *Indian Head School Division No. 19* (1990), 69 D.L.R. (4th) 489 where the Supreme Court of Canada said:

> It must not be forgotten that every administrative body is the master of its own procedure and need not assume the trappings of a court. (p. 512)

The Respondent submits that tribunals do not need special rules of process to give notice to people affected by their proceedings. They give notice and the question is whether they have given adequate notice. The Respondent argues that the duty of fairness in administrative law is the juridical equivalent of the rules of court. He submits that even though there is not a Rule 11 governing the Deputy Director in respect to service of an order in the province, it is clear that the Deputy Director can issue a remediation order to a resident. The Respondent submits that the Deputy Director does not need the equivalent of a Rule 13 to issue a remediation order against a non-resident.

The Respondent submits that the fact that a person is outside the province is irrelevant if, as in this case, the legislation makes one a responsible person and the legislation specifically provides that a remediation order can be issued against any responsible person.

The Respondent argues that Globe West, a company registered in British Columbia, was the former owner of the site for seven years and therefore falls into the definition of responsible person under section 26.5(1) of the *Waste Management Act* which defines responsible person as a "previous owner or operator of the site." "Owner" is defined broadly as "a person who is in possession of, has the right of control of, occupies or controls the use of real property, including, without limitation, a person who has any estate or interest, legal or equitable, in the real property, but does not include a secured creditor unless the secured creditor is described in section 26.5(3)." Globe West also manufactured asphalt at the site for six of those seven years and can be considered a previous operator of the site. "Operator" means "a person who is or was in control of or responsible for any operation located at a contaminated site, but does not include a secured creditor unless the secured creditor is described in section 26.5(3).

Mr. Lawson as the president and director of Globe West is caught by the definition of "person" found in section 26(1) of the *Waste Management Act*, which includes any director or officer of a person. The Respondent refers to the Deputy Director's finding that Mr. Lawson was directly involved in decision making on the site and organized the decommissioning process. He submits that Mr. Lawson's status as director and president of Globe West arose under British Columbia law; he physically attended at the site, made decisions in this province, and as stated in Mr. Lawson's submissions to the Deputy Director, he came to Vancouver to interface with banks. He clearly has a "real and substantial connection" to the province.

The Respondent submits that under the *Waste Management Act*, a "previous owner" and its officers and directors, derive their status from an historical reality in the province – past ownership of land in British Columbia. A previous owner does not stop being a previous owner simply because he lives outside British Columbia.

The Attorney General argues that the approach taken by Mr. Lawson would set every regulatory scheme in this province "on its ear." For example, the *Motor Vehicle Act* and other provincial legislation would have to have specific service requirements in it for non-residents, which they presently do not have. The Attorney General also submits that any determination that a non-resident cannot be named as a responsible party would render the *Waste Management Act* ineffective. There are a number of non-resident corporations who are previous owners and operators of contaminated sites and presently subject to remediation orders that could be affected.

GCC submits that it is unreasonable for Mr. Lawson to suggest that an individual can direct operations of a British Columbia company that causes contamination of a site in British Columbia, and then claim that his presence outside of British Columbia protects him from the issuance of the Order by the Deputy Direction. That interpretation of the *Waste Management Act* would render the legislation ineffective and allow individuals to pollute with impunity and escape the consequences by directing operations from outside the province.

The Panel's Findings

As the Panel has noted at the outset, Mr. Lawson conceded that his residency outside of British Columbia does not preclude him from being a "responsible person" under the *Waste Management Act*. He has also agreed that a "non-resident" "responsible person" can be subject to an action brought by any person to recover reasonable costs of remediation pursuant to section 27(1) of the *Waste Management Act*. However, Mr. Lawson argues that there are constitutional limitations to the authority of the Deputy Director to "issue" a remediation order to a non-resident and that, further, there is no provision for service *ex juris*, similar to Rule 13, which would allow the Deputy Director to issue a remediation order to a non-resident.

The Panel finds that one must first have regard to the provisions of the *Waste Management Act*. Section 27.1 clearly provides that a remediation order can be issued to <u>any</u> responsible person. Section 26.5 defines a responsible person to include a "previous owner or operator of the site." This case involves contaminated property in British Columbia. Globe West, a company registered in British Columbia was a previous owner and operator of the site and a responsible person under the *Waste Management Act*. The statute extends the definition of a responsible person to include a director and officer of a company who was or is an owner or operator of the contaminated site. Mr. Lawson was or is the President and a director of Globe West, its parent company Globe Asphalt and its successor company, GN. On the facts as found by the Deputy Director, which the parties have accepted for this application, Mr. Lawson physically attended the Property on numerous occasions and made decisions regarding the site. He was directly involved in organizing the decommissioning process.

There is no doubt that the *Constitution Act, 1867* imposes a territorial limitation on provincial legislative power. The sections of the *Constitution Act, 1867* conferring power on the provincial legislatures, and in particular section 92, open with the words "in each province." Further, each class of subjects listed in section 92 contains the phrase "in the province." However, does that mean that the Deputy Director is constitutionally incapable of naming a responsible person to a remediation order, irrespective of his or her status, control or omissions within the province, where the person resides outside the province? The Panel concludes that the answer must be no.

The Panel agrees that a remediation order is, of its own force, enforceable only within British Columbia, however, this does not mean that an order cannot be issued. The cases clearly distinguish between the issuance and the enforceability of an order. In *Morguard*, the Supreme Court of Canada emphasized the importance of not confusing the jurisdiction to make an order in the first place with its enforcement outside the province.

The Panel agrees with the views expressed in the Edinger article which discusses the principles of the case of *Ladore* v. *Bennett* in the context of property in the province, as follows:

> To ask whether the legislation confers rights or divests non-residents of rights is not determinative in the *Ladore* approach. That approach permits a province to divest non-residents of rights provided that the

> legislation is directed to a valid provincial object and that the effect on the rights of non-residents is necessary for the achievement of that object. Furthermore, if property is located in the province it is generally conceded that the province has plenary jurisdiction. Yet legislation conferring rights to that property within the province may well derogate from rights of non-residents to that same property. Whether courts in other provinces would recognize and apply the legislation is an independent question which has no bearing on the validity of the legislation though it may have a bearing on its effectiveness. (p. 76)

The Panel finds that the "effect on the rights of non-residents" is necessary for the achievement of the objective of the *Waste Management Act* which is the clean up of contaminated sites in British Columbia.

The Panel finds that the cases referred to by Mr. Lawson such as *Hretchka*, *McGuire*, *Re Dalgliesh*, *Randolph and Boyd* and *Eastern Bakeries*, deal with orders which, of their own force, purport to coerce or regulate persons outside provincial boundaries. *Thomas Equipment* and *R*. v. *W. McKenzie Securities* make it clear that persons residing outside a province are not immune from the application of provincial statutes which pertain to their status and actions within the province. In the latter case, counsel for the accused advanced an argument very similar to the one advanced by Mr. Lawson. The Manitoba Court of Appeal rejected that argument and found that if a non-resident can fairly and properly be construed as constituting trading in the province, then they fall within the purview of *The Securities Act*. *McKenzie Securities* was approved in *Global Securities*, a 1998 decision of the British Columbia Court of Appeal.

The Panel agrees with the Respondent and the Attorney General that the real and substantial connection between Mr. Lawson and the subject matter of the Order is the constitutional litmus test for the exercise of jurisdiction by any court or tribunal in issuing an order against a non-resident as long as the pith and substance of the legislation authorizing the order is within provincial jurisdiction. In this case, Part 4 of the *Waste Management Act* deals with clean up of contaminated properties in the province of British Columbia. No one has challenged the validity of section 27.1, which authorizes the Deputy Director to issue a remediation order. On the facts referred to above, the Panel finds that Mr. Lawson has a "real and substantial connection" to the Property that is the subject of the remediation order.

Mr. Lawson has argued that in the absence of a rule similar to Rule 13 respecting service *ex juris* that the Deputy Director has no authority to "issue" an order against a non-resident. The Panel finds that administrative tribunals and officials, such as the Deputy Director, do not require a specific rule to serve either residents or non-residents with orders within their legislative purview. The Panel finds that provided the person being sent the order has received due process before the order is issued and received adequate notice, the order is validly issued. In this case, section 51 of the *Waste Management Act* provides that a notice of an order may be served on a person by registered mail. There is no dispute that Mr. Lawson received notice, nor is there any dispute that he made submissions on the draft order prior to its being finalized.

The Panel also notes that Mr. Lawson admits that he and any other non-resident can be a responsible person under the *Waste Management Act* and can be subject to a civil action brought by any person to recover reasonable costs of remediation. The language of section 27(1) dealing with the civil cause of action applies to any responsible person. It does not restrict the definition to a resident of British Columbia. Section 27.1 states that a remediation order can be issued to any responsible person. Again there is no restriction of the issuance of remediation orders to residents of British Columbia. The Panel finds that there is no statutory or constitutional limitation to a non-resident responsible person being named in a remediation order.

The Panel finds that Mr. Lawson cannot escape responsibility for his acts or omissions within the province solely on the basis that he is a non-resident of British Columbia.

For all the above reasons, the Panel finds that the Deputy Director has the authority to issue a remediation order against Thomas Lawson.

DECISION

The Panel finds that the Deputy Director erred in law when he found that he could not name B.C. Hydro as a responsible person to the Order. The Panel finds that B.C. Hydro can be liable for the pre-amalgamation actions of B.C. Electric, and may be named a responsible person under Part 4 of the *Waste Management Act* on that basis. The Panel orders that this matter be remitted to the Deputy Director for a determination, whether, on the facts, B.C. Hydro should be named as a responsible person to the Order.

The Panel finds that the Deputy Director has the authority to issue a remediation order against Thomas Lawson, a non-resident of British Columbia.

Toby Vigod, Chair
Environmental Appeal Board

August 23, 1999