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Docket: T-1150-07

Citation: 2008 FC 615

Ottawa, Ontario, May 16, 2008

PRESENT: The Honourable Madam Justice Layden-Stevenson

BETWEEN:

MINISTER OF THE ENVIRONMENT

Appellant

and

**CUSTOM ENVIRONMENTAL SERVICES LTD.,
GAVIN SCOTT AND BRIAN WINTERS**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] Custom Environmental Services Ltd. (CESL) was found, by a Chief Review Officer (CRO), to be exempt from the operation of the legislation that regulates the storage of PCB material. The Minister of the Environment (the Minister) asserts that the CRO's conclusion is wrong and that the CRO erred by failing to interpret "storage" in a manner that achieves the objectives of the relevant legislation.

[2] On this statutory appeal, I conclude that the standard of review applicable to the decision of the CRO is that of correctness. Applying that standard, I determine that the CRO's interpretation of

the relevant statutory provisions is incorrect. Further, and in any event, the interpretation is unreasonable. Consequently, the appeal will be allowed and the determination of the CRO will be set aside.

Background

[3] CESL, an Alberta company, operates a hazardous waste management facility in southeast Edmonton. Its business operations include the collection and transfer of materials, for disposal, of all classes of hazardous wastes (including polychlorinated biphenyl (PCB) waste) and the processing of hazardous recyclables. It is authorized by Alberta Environment to be a broker of hazardous waste in Alberta. The authorization permits CESL to operate as a receiver, generator, or carrier of hazardous waste and specifically requires that CESL, as a hazardous waste carrier, “comply with other relevant legislation, for example: The Transportation of Dangerous Goods Control Act and Associated Regulations and the Occupational Health & Safety Act”. CESL has also been licenced to transport hazardous waste by the Province of British Columbia.

[4] At its premises in southeast Edmonton, CESL receives, among other things, PCB contaminated material. Typically, it recycles the uncontaminated components and disposes of the PCB contaminants by transporting them to a disposal site (normally Swan Hills, Alberta). CESL uses its own fleet of vehicles, or third-party carriers, to transport the material. CESL is in possession of PCB material from the time of receipt (from the consignor) until the time of transport (to the waste disposal facility). The duration of CESL’s possession of PCB material varies.

[5] The *Storage of PCB Material Regulations*, SOR/92-507 (the Storage Regulations), enacted under the *Canadian Environmental Protection Act*, S.C. 1999, c. 33 (CEPA), regulate the storage of PCB material. The Storage Regulations, among other things, require that specific information with respect to received and removed PCB material be recorded and reported to Environment Canada. CESL claims that because its operation is conducted under the *Transportation of Dangerous Goods Act*, 1992, c. 34 (TDGA) and the associated *Transportation of Dangerous Goods Regulations*, SOR/2001-286 (TDGR), it is exempt from the Storage Regulations. It relies on subsection 3(4) of the Storage Regulations which specifically states that the Storage Regulations “do not apply in respect of the handling, offering for transport or transporting of PCB material governed by the [TDGA]”.

[6] A dispute between Environment Canada and CESL regarding the applicability of the Storage Regulations has existed for some time. The record indicates that, on occasion, CESL reported to Environment Canada regarding PCB material entering its facility. CESL maintains that such reporting was voluntary. In the late 1990s, correspondence between CESL’s solicitors and the Department of Justice reveals divergent views regarding the propriety of the Storage Regulations’ application to a processing facility, such as CESL.

[7] At some point in the early 2000s, Environment Canada began a “PCB Inventory Reconciliation Program” aimed at updating and consolidating its records on the storage of PCB material. In response to inquiries arising out of this program, CESL reiterated its position that it fell within the subsection 3(4) exemption of the Storage Regulations. Environment Canada asked CESL to provide an inventory update by February of 2002. Meetings between CESL and

Environment Canada were proposed and scheduled, but ultimately did not materialize. CESL submitted some information on “PCB activities”. Its information did not satisfy Environment Canada. It seems, from the record, that a stalemate ensued. By correspondence dated April 7, 2003, Environment Canada restated its position that the Storage Regulations applied to CESL. However, after re-stating its position, Environment Canada also stated that, because nearly a year had passed, it was “closing its file”. It informed CESL that it would “periodically request updates”.

[8] On May 5, 2005 (two years later), there was a fire at the CESL premises. CESL informed Environment Canada inspectors that while limited quantities of PCB material were involved in the fire, many of CESL’s records had been destroyed. Evidently, this event precipitated further correspondence and discussion regarding the applicability of the Storage Regulations to CESL’s operation.

[9] On June 6, 2006, an Environment Canada Enforcement Officer conducted an inspection at CESL. The officer noted two “C-containers” (shipping containers) containing PCB material. During the inspection, the manager of CESL informed the officer that CESL had shipped PCB material to the destruction facility “two to three weeks” earlier. Environment Canada’s last report from CESL regarding removal of PCB material was dated February of 2005. As of August 22, 2006, the Environment Canada record showed 3931 PCB items registered at the CESL facility with no record of these items having been moved. These “recorded” items were not on CESL’s premises at the time of the inspection.

[10] The Enforcement Officer determined that, although the quantities of PCB material at CESL during the inspection were insufficient to trigger the Storage Regulations, there was evidence that CESL, for quite some time, had not complied with the reporting requirements of the Storage Regulations. A departmental decision was taken to issue an Environmental Protection Compliance Order (EPCO) to CESL. As required by the provisions of the CEPA (ss. 237(1)), a notice of intent to issue the EPCO was delivered to CESL on November 20, 2006. CESL was provided an opportunity to make representations and did so on December 6, 2006.

[11] On December 8, 2006, Environment Canada issued an EPCO requiring CESL to comply with the Storage Regulations, specifically the recording (section 13) and reporting (paragraph 16(b)) requirements. The EPCO directs CESL to “submit on or by Wednesday 06 June, 2007, the written report(s) that contains the information required by the Regulations in regards to the removal of PCB material from the facility that will reconcile the 3931 items on the enclosed PCB inventory”. The “enclosed PCB inventory” consists of a list of items obtained from Environment Canada’s files, dating back to 2000. The evidence indicates that the “inventory” is a printout from Environment Canada’s database and does not represent the PCB material that was on site at the time of the June inspection.

[12] Pursuant to section 256 of the CEPA, CESL applied for review, by a Review Officer, of the EPCO. In accordance with section 257, a review was conducted. Following the review, in a decision dated May 18, 2007, the CRO cancelled the EPCO.

The Standard of Review

[13] The written submissions of the parties were filed before the Supreme Court of Canada released its reasons for judgment in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (*Dunsmuir*). Prior to the hearing of this matter, counsel were notified that the *Dunsmuir* decision should be incorporated into their oral arguments regarding the standard of review. However, as counsel for the respondents put it, “*Dunsmuir* doesn’t change much”. The Minister, on the one hand, maintained the position that the applicable standard of review is correctness and that, in any event, the CRO’s determination is unreasonable. CSEL, on the other hand, steadfastly held to the view that although the appropriate standard of review is reasonableness, the CRO’s conclusion withstands review on a correctness standard. In other words, the parties reiterated the respective positions advanced in their written submissions.

[14] *Dunsmuir* directs a two-stage inquiry for determination of the applicable standard of review. First, I am to look to the jurisprudence in an effort to ascertain whether the deference warranted regarding the particular type of administrative decision in issue has been satisfactorily determined. If it has not, I must proceed to a standard of review analysis which entails an analysis of the “factors making it possible to identify the proper standard of review”. This analysis must be contextual and is dependent upon the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal (*Dunsmuir* at paras. 62-64).

[15] The enabling legislation in this matter was enacted in 1999. Its provisions have been squarely before the Court on only a handful of occasions. Counsel did not submit, and I have not identified, any authority where the Court has determined the appropriate standard of review regarding a decision of a Review Officer appointed pursuant to the CEPA. Consequently, while the existing jurisprudence is interesting and informative, it is not determinative with respect to the applicable standard of review.

[16] The facts in this matter are not in dispute. Neither side suggests error on the part of the CRO in this respect. It is the application of the legislative provisions to the undisputed facts that forms the subject of debate. On its face, it appears that the issue centres on a question of mixed fact and law. In accordance with *Dunsmuir*, such a question is presumptively reviewable for unreasonableness. However, the standard of review analysis leads me to conclude that the applicable standard of review, in the circumstances of this case, is correctness.

[17] There is no privative clause. To the contrary, section 269 of CEPA provides for a statutory right of appeal to the Federal Court. Section 270 provides that the appellant has the right to be heard on all questions of fact and law. This is a broad appeal provision and is indicative of Parliament's intent that a decision taken under the legislation is to be subject to judicial oversight. It militates away from deference.

[18] Regarding the expertise of the decision-maker, section 243 of CEPA obliges the Minister to establish a "roster of review officers" from which one officer is to be appointed as CRO (subsection 244(1)). The CRO performs administrative functions, assigns review officers to conduct hearings

and, in certain cases (such as this one), conducts review hearings (subsection 244(2)). In the absence of the CRO, any review officer may act (subsection 244(3)). Appointments are for a term of three years and may be renewed (section 245, subsections (1) and (2)). Appointed individuals must be knowledgeable regarding the Canadian environment, environmental and human health, administrative law or traditional aboriginal ecological knowledge (section 247, my emphasis). The appointments are not full-time since review officers “shall not engage” in employment that is inconsistent with their function under the CEPA (section 248).

[19] Sections 260 and 261 of the CEPA equip the review officer with enforceable powers to summons witnesses and documents. Section 263 permits the review officer to confirm or cancel an EPCO, to amend or suspend a term or condition, to add or delete a term or condition, and to extend the duration of the EPCO for a period of not more than 180 days. The exercise of these powers is prohibited in the event of risk to: impairment of the quality of the environment; injury or damage to any property or to any plant or animal life; or danger to the health or safety of any person (section 265). A decision must be rendered within five days of the review (of the EPCO) and written reasons must be provided within ten days (section 266). However, a review officer (at any time before a notice of appeal is filed), upon providing reasonable notice and allowing a reasonable opportunity for oral submissions, may modify a decision.

[20] A request for review does not suspend the operation of an EPCO although a review officer, upon application, may suspend operation (if appropriate) and impose reasonable conditions that are consistent with the protection of the environment and public safety (section 258).

[21] These noted provisions impact on the characterization of the CRO's expertise. The statute requires some degree of knowledge, yet does not mandate expertise. The CRO in this case was required to interpret the Storage Regulations as well as provisions of the TGDA and the TDGR. Although the Storage Regulations were enacted pursuant to the CRO's enabling or "home" statute, the CRO was not called upon to interpret only the enabling legislation. Rather, it was necessary to interpret the home statute, its regulations, and other inter-related acts and regulations. Notably, there are 46 associated regulations passed pursuant to CEPA alone.

[22] There is no indication that the CRO has acquired expertise analogous to that of institutional tribunals (such as labour) where a body of jurisprudence is established. Nor is there any suggestion that the CRO is specifically knowledgeable with respect to dangerous goods, the transportation or storage of dangerous goods, or industry standards in these areas. General environmental knowledge does not equate to expertise. Indeed, given the volume of the associated regulations, it is difficult to imagine that any Reviewing Officer could develop specific expertise in all areas. This factor does not favour deference.

[23] The CEPA's purpose is to regulate the behaviour of entities in order to promote public safety, protect the environment and contribute to sustainable development through pollution protection. To that end, section 235 of CEPA allows an enforcement officer to issue an EPCO if the officer has reasonable grounds to believe that any provision of CEPA or its regulations has been contravened. The alleged contravention at issue here is with respect to the reporting and recording requirements mandated by the Storage Regulations. These provisions regulate the storage of specific quantities of PCB material that is "not being used daily".

[24] The TDGA promotes public safety in the transportation of dangerous goods and governs the transportation of PCB material. This statute and its associated regulations provide definitions of key terms such as “handling”, “in transport” and “offer for transport”. The Acts (CEPA and TDGA) work together to ensure that the chain of custody, of PCB material over the course of its existence, is tracked. Because the statutes are concerned with the protection of the public, their purpose may point toward deference: *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 at para. 31.

[25] The nature of the question appears to be one of mixed fact and law because it involves the application of a statutory provision to a particular factual situation. If this is so, deference may be owed. That is, *Dunsmuir* may dictate that the appropriate standard of review is reasonableness. However, in my view, the question before the CRO is a pure question of law. The factual context is not in dispute, nor has it ever been. The CRO’s task is strictly one of statutory interpretation. Moreover, in the context in which it arises, it is a question of general law that is of central importance to the proper functioning of the scheme as a whole and is outside the CRO’s “knowledgeable” area. If it is a mixed question, the question of law is easily extricated. This factor yields little deference.

[26] I conclude, in balancing the factors, that the applicable standard of review is that of correctness. I note that jurisprudence, in the environmental law context, points to a similar result. In *West Vancouver (District) v. British Columbia (Ministry of Transportation)*, [2005] F.C.J. No. 727, Mr. Justice Lemieux examined a decision of federal “Responsibility Authorities” under the *Canadian Environmental Assessment Act*. The “Responsibility Authorities” determined that a

highway project would not cause significant adverse environmental impact, without consulting the public, a process that the applicant claimed was mandatory under the Act. Mr. Justice Lemieux adopted the reasoning of Mr. Justice Rothstein, then of the Federal Court of Appeal, in *Friends of the West Country Association v. Canada (Minister of Fisheries and Oceans)*, [2000] 2 F.C. 263 (C.A.). Justice Rothstein, at paragraph 10, held that the standard of review was one of correctness. Additionally, and again in relation to the *Canadian Environmental Assessment Act*, the Federal Court of Appeal in *Inter-Church Uranium Committee Educational Co-operative v. Canada (Atomic Energy Control Board)*, 2004 FCA 218, found the applicable standard of review to be correctness on a question of statutory interpretation of the Act.

[27] In *Dunsmuir*, the Supreme Court noted that the nature of the question at issue was one of pure law. The Court considered whether the correctness standard would apply, despite the presence of an administrative regime (analogous to the labour context) and a privative clause. It concluded that the applicable standard of review was reasonableness. In this case, there is a question of law without a privative clause. This is not a judicial review. The statute provides a broad statutory right of appeal. The decision-maker is not an institutional-type tribunal. Although the CRO must have some knowledge, there is no requirement or indication of specific expertise. In my view, these factors distinguish this matter from *Dunsmuir*. Moreover, the noted factors connote a standard of review of correctness. However, if I am wrong in this respect, I will also have regard to the reasonableness standard.

The Undisputed Facts

[28] CESL recycles contaminated material. Incoming material arrives at CESL's premises in varying sizes, from very small to very large (such as transformers). The material contains PCBs in various volumes. CESL deals in large quantities of PCB material.

[29] After receiving PCB material, CESL sorts it, cleans it, carries out processing (depending on the material) and packages it for transport to the disposal site. Prior to the sorting and cleaning processes, the material may sit on site for a period of time. This time-frame depends largely on staff availability and workloads. Upon completion of the cleaning and sorting processes, CESL places the PCB material in containers where it remains until it is shipped to the disposal site for destruction.

[30] The PCB material in the containers remains on site until CSEL accumulates a sufficient quantity for shipment. Although the length of time to acquire such a load varies, on average, it is four to six weeks.

[31] The rationale underlying the need to accumulate a sufficient load of PCB material for shipment is that it is not economical to send several small shipments. Consequently, staffing and workload impact on the length of time required for the acquisition of enough material for a load. Additional factors affecting the duration that the PCB material remains on site include the availability of the disposal site (its schedule) and, from time to time, waiting for lab-analysis test results.

[32] In summary, PCB material is kept at CESL's premises, on average, from four to six weeks. However, depending on the circumstances, the duration ranges from a few days to a much longer period.

The Decision

[33] By decision dated May 23, 2007, the CRO determined that CESL's operations involving PCB material did not fall within the scope of the Storage Regulations. Therefore, the EPCO should be cancelled. The decision was based on the following key findings:

- The PCBs on CESL's premises are either waiting to be separated from recyclable material, being separated, or being collected into an appropriately sized shipment that will be sent to a destruction facility when the facility's schedule allows the shipment to proceed. There is no intention to store as such, except for the collection into an appropriate shipment;
- Neither the concept of "storage" under the Regulations nor the "handling in the course of transportation" under the [TDGA] covers all of CESL's activities unequivocally;
- When the PCB materials are consolidated in anticipation of shipment – this part of the journey may indeed be considered to be packing and handling in the course of transport and covered by the TDGA (and exempted from the Regulations);
- Yet, the term "handling" cannot be stretched to cover the intervention of the physical and chemical separation processes applied to the PCB material once it arrives at CESL's

premises. Most of the PCB material received by CESL is subject to these processes, which interrupt the shipment in a significant fashion. (CESL's creation of new shipping documents is not dispositive, but it is consistent with the conclusion that the shipment is interrupted);

- During these separation processes, the PCB material can be considered "in use" thereby removing the application of the Storage Regulations as these Regulations only apply to PCBs that are not being used. Although the PCB materials are not being put to their original industrial use, they are being actively subjected to a physical or chemical process of separation;
- CESL does not store PCB material in the sense of warehousing it for any appreciable period of time; the intent with respect to the PCB material on site is either to process it or to ship it for destruction. Any delay in shipment that takes place is purely incidental to this overall process.

It is from this decision that the Minister appeals.

Statutory Provisions

[34] The relevant statutory provisions are attached to these reasons as Schedule "A". For ease of reference, subsection 3(4) of the Storage Regulations, the definition of "handling" in section 2 of the TDGA and the definitions of "in transport" and "offer for transport" in section 1.4 of the TPGR are reproduced below.

Storage of PCB Material Regulations,
SOR/92-507

Règlement sur le stockage des matériels contenant des BPC,
DORS/92-507

3. (4) These Regulations do not apply in respect of the handling, offering for transport or transporting of PCB material governed by the *Transportation of Dangerous Goods Act*.

3. (4) Le présent règlement ne s'applique pas à la manutention, à l'offre de transport ou au transport de matériels contenant des BPC régis par la *Loi sur le transport des marchandises dangereuses*.

Transportation of Dangerous Goods Act, 1992
S.C. 1992, c. 34

Loi de 1992 sur le transport des marchandises dangereuses
L.C. 1992, ch. 34

2. In this Act,
...
“handling” means loading, unloading, packing or unpacking dangerous goods in a means of containment for the purposes of, in the course of or following transportation and includes storing them in the course of transportation;
...

2. Les définitions qui suivent s'appliquent à la présente loi.
[...]
« manutention » Toute opération de chargement, de déchargement, d'emballage ou de déballage de marchandises dangereuses effectuée en vue de leur transport, au cours de celui-ci ou par après. Les opérations d'entreposage effectuées au cours du transport sont incluses dans la présente définition.
[...]

Transportation of Dangerous Goods Regulations,
SOR/2001-286

Règlement sur le transport des marchandises dangereuses,
DORS/2001-286

...
1.4 Definitions
...
“in transport” means that a person has possession of dangerous goods for the purposes of transportation or for the purposes of storing them in the course of transportation.

1.4 Définitions
[...]
« en transport » Qualifie des marchandises dangereuses dont une personne a la possession en vue de leur transport ou de leur entreposage pendant leur transport.

<p>“offer for transport” means, for dangerous goods not in transport, to select or allow the selection of a carrier to transport the dangerous goods, to prepare or allow the preparation of the dangerous goods so that a carrier can take possession of them for transport or to allow a carrier to take possession of the dangerous goods for transport. ...</p>	<p>« demande de transport » En ce qui concerne des marchandises dangereuses qui ne sont pas en transport, le fait de choisir un transporteur ou d’en permettre le choix dans le but de les transporter, le fait de les préparer ou d’en permettre la préparation pour qu’un transporteur en prenne possession aux fins du transport ou le fait de permettre à un transporteur d’en prendre possession aux fins du transport. [...]</p>
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Issue

[35] The sole issue is whether the CRO correctly interpreted the legislative provisions.

Overview of the Arguments

[36] The Minister asserts that the purpose of the Storage Regulations is to achieve adequate control and safe storage of PCB material, a dangerous substance. The intent is to alert Environment Canada regarding “when and where PCB is located” to enable Environment Canada to “monitor, track and control” the location of the substance. Both the Storage Regulations and the TDGA deal with tracking the chain of custody of PCB material over the course of its existence.

[37] The Minister’s stated concern relates to the time between CESL “shipping in” and “shipping out” the PCB material. That is, the time period during which the PCB material, according to the Minister, is “stored” on site. During this time, the PCB material is not in “use daily”. Therefore, the Storage Regulations should apply.

[38] Further, the Minister submits that although the Storage Regulations exempt the handling, offering for transport or transporting of PCB material governed by the TDGA, not all of CESL's activities are covered by the exemption. The CRO erred in concluding that CESL's activities amounted to packing and handling of PCB material in the course of transportation within the meaning of the TDGA. She also erred in finding that "storage" comprises an element of intent.

[39] CESL maintains that if the TDGA applies, the Storage Regulations do not. The TDGA involves an industry that has as its object the disposal of hazardous material, specifically PCB material. Achievement of the objective begins with the consignor and ends at the disposal site. CESL is not the destination of the PCB material. Rather, it is a stopping point on the journey. The power to enact regulations under subsection 34(2) of the CEPA is restricted. There is no power to regulate an aspect of the substance that is regulated by or under another Act.

[40] CESL claims that the PCB material located on its premises is not "stored"; it is in the course of transportation. CESL is not a commercial storage facility nor does it charge any entity for storage of PCB material on its site. While several weeks or months may pass when the PCB material remains at CESL (a number of factors contribute to the time frame), CESL's intent is not to store PCB material, but to transport it to its final destination for destruction. This is the nature of its business.

[41] Relying on subsection 3(4) of the Storage Regulations, CESL contends that its activities are exempt because the provision states that the regulations do not apply to the handling, offering for transport or transporting of PCB material governed by the TDGA. All of CESL's activities with

respect to the PCB material are covered by some combination of these three categories. CESL submits that it has always functioned under, and in compliance with, the TDGA and its associated regulations.

Analysis

[42] Distilled, the CRO determined that CESL does not store PCB material in the sense of warehousing. The intent is to process it/ship it for destruction. During the separation processes, the material can be considered “in use”. The phase after processing may be considered packing and handling in the course of transport. Delay in shipment is purely incidental to the overall process.

[43] In my view, the CRO’s interpretation of the legislative provisions is incorrect. Further, it falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and the law”: *Dunsmuir*, para. 47.

[44] The Supreme Court of Canada has repeatedly articulated the proper approach to statutory interpretation. In *R. v. Jarvis*, [2002] 3 S.C.R. 757, at paragraph 77, the Court directed that “one is to seek the intent of Parliament by reading the words of the provision in context and according to their grammatical and ordinary sense, harmoniously with the scheme and the object of the statute”. The stated principle was supported by specific reference to the *Interpretation Act* R.S. I-23; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559; *Rizzo & Rizzo Shoes Ltd. (Re.)*, [1998] 1 S.C.R. 27; *R. v. Gladue*, [1999] 1 S.C.R. 688; E.A. Driedger, *Construction of Statutes* (2nd ed. 1983) at p. 87. The approach was confirmed again in *Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 539. This search for parliamentary intent constitutes

an exercise in ascertaining, in accordance with the noted principle, what Parliament set out to accomplish.

[45] I stated earlier at paragraph 22 of these reasons that the CEPA is regulatory legislation. Its purpose is to promote public safety, to regulate the behaviour of entities in order to protect the environment and contribute to sustainable development through pollution protection. The Storage Regulations were enacted following a fire at a storage warehouse in Basile-le-Grand, Quebec where, unknown to Environment Canada, PCB material had been stored for many years. The intent of the regulations is to monitor any high concentration or amount of PCB material being stored at any given location. The Storage Regulations prescribe specific requirements for persons who own or manage property on which PCB material is located, specifically with respect to safe storage, fire protection and emergency procedures. Section 2 states that a “PCB storage site” means a site referred to in section 4 that is used to store PCB material. Section 3 indicates that the regulations apply to certain quantities of PCB liquids, solids, substances, or equipment that are not being used daily. Mandatory storage, reporting and recording requirements are set out in sections 4, 9, 13 and paragraph 16(b) in relation to quantities of PCB material that are subject to the Storage Regulations.

[46] Section 4 requires that “every person who owns, controls or possesses PCB material, or who owns or manages a property in or on which PCB material is located shall store the PCB material in a specific manner. Section 9 further details the storage requirements that “every owner or manager of a PCB storage site” must adhere to, depending upon the type of PCB material involved. Under section 13, every owner or manager of a PCB storage site shall maintain, and have available for review by an enforcement officer, records on PCB materials received and removed from the storage

site. The owner or manager of a PCB storage site shall submit a copy of this information to the Minister pursuant to paragraph 16(b).

[47] The purpose of the TDGA is to promote public safety in the transportation of dangerous goods. The Act regulates the manner in which dangerous goods are imported, transported and labelled (both for and during transport). It provides for the designation of inspectors to foster compliance with the Act. Its schedule delineates nine classes of dangerous goods. The TDGA is relatively brief; it comprises some 22 pages. The TDGR (the associated regulations) are complex and lengthy, comprising some 722 pages. The TDGR are intended to incorporate all possible situations in transport, whatever the mode, for millions of chemical compounds.

[48] In totality, the TDGA's application is not confined to dangerous goods when they are actually "in transport". It also applies to the materials immediately prior to and after transport as well as to any storage that is necessary to transport them.

[49] The CRO properly recognized that CEPA, TDGA and their respective associated regulations are aimed at protecting the public welfare and should be given a broad and liberal interpretation. Additionally, the CRO noted that the legislative enactments are intended to function in harmony with one another.

[50] It is not disputed that when PCB material is *en route* to CESL or when it is *en route* from CESL to the disposal facility, it is being transported or is "in transport" and thus governed by the TDGA. It is the intervening period, between the arrival and the departure (the shipping in and

shipping out) of the PCB material that is the issue. More specifically, the question is: does the manner in which CESL deals with the PCB material during this intervening period fall within the scope of subsection 3(4) of CEPA. I should note that the Minister acknowledges that when the material is being packed up for transport (for example, 24-48 hours before transport) the period comes within the exemption.

[51] The CRO reasoned that the interpretation of the word “storage” and the meaning of the language of subsection 3(4) of CEPA are pivotal. I agree.

[52] In relation to “storage”, the CRO requested written submissions directed to the meaning of the word and, in particular, whether “intent” to store is a prerequisite element. Although the CRO did not definitively determine that intent was a condition precedent, she did conclusively determine, for various reasons that need not be enumerated, that CESL did not intend to store PCB material on its premises.

[53] The CRO’s analysis and conclusion are troublesome. Moreover, the interpretation is neither correct, nor reasonable. To return to the principle articulated earlier, the words of a provision are to be read in context, according to their grammatical and ordinary sense, harmoniously with the scheme and object of the statute. There is no need to revert to dictionary definitions in this case. The meaning of the word “store” is readily apparent from its ordinary meaning and the manner in which it is used in the context of the legislative provisions. To reiterate, section 2 of the Storage Regulations defines “PCB storage site” as a site referred to in section 4 that is used to store PCB material”. Section 4 requires that “every person who owns, controls or possesses PCB material, or

who owns or manages a property in or on which PCB material is located” shall store the PCB material in a specific manner.

[54] The word “store” is no vaguer than the word “keep”. Put another way, the word relates merely to the manner in which the PCB material must be kept or “stored”. The regulations dictate the manner in which anyone referred to in section 4 must store (or keep) the PCB material.

[55] But for the exemption in subsection 3(4) of the Storage Regulations, in my view, it is beyond dispute that the legislated requirements would apply to the activities of CESL. There is no question about the quantity of PCB material that arrives at CESL’s premises. Equally, there is no doubt that CESL would be considered a “PCB Storage Site” as contemplated by sections 2 and 4 noted above. However, subsection 3(4) exempts PCB activities covered by the TDGA. I will return to subsection 3(4) shortly.

[56] As for CESL’s submission that the PCB material is not destined (or intended) to remain indefinitely on CESL property, I agree with the Minister that the Storage Regulations do not require that storage be for any particular length of time or for any particular purpose. That is, the Storage Regulations do not apply only to long term or permanent PCB storage. I note that, even in the criminal context, there is no requirement of long-term or permanent storage in order to constitute “storage” within the meaning of subsection 86(1) of the *Criminal Code: R. v. Carlos*, [2002] 2 S.C.R. 411.

[57] The provisions of the Storage Regulations do not contemplate intent. Consequently, whether CESL intends to function as a commercial storage facility or intends to “store PCB material for long periods of time” is of no moment. In the course of its business, PCB material remains on CESL’s premises for weeks, or months. Whether CESL is keeping (or storing) the material for destruction, for later transportation, or for permanent storage, does not change the fact that, during the intervening period, the material is being stored. This result is the same irrespective of: “intent”; the fact that CESL does not operate as a warehouse; or, the fact that CESL is not compensated for the storage.

[58] What then is to be said of subsection 3(4) of the Storage Regulations? It states that these Regulations will not apply in respect of “the handling, offering for transport or transporting of PCB material governed by the [TDGA]”. The point to be made here is, to escape the application of the Storage Regulations, CESL must demonstrate that its operations fall within the meaning of at least one of the “activities” referred to in subsection 3(4). If CESL fails in this respect, compliance with the Storage Regulations is obligatory.

[59] For ease of reference, the TDGA provides that “handling” means loading, unloading, packing or unpacking dangerous goods in a means of containment for the purposes of, in the course of or following transportation and includes storing them in the course of transportation. “Offering for transport” means, for dangerous goods not in transport, to select or allow the selection of a carrier to transport the dangerous goods, to prepare or allow the preparation of the dangerous goods so that a carrier can take possession of them for transport or to allow a carrier to take possession of the dangerous goods for transport.

[60] The “transporting of PCB material governed by the [TDGA]” is also exempted from the Storage Regulations. “Transporting” is not defined in either the TDGA or the TDGR. The TDGR state that “in transport” means a person has possession of dangerous goods for the purpose of transportation or for the purpose of storing them in the course of transportation.

[61] The act of “unloading” PCB material from vehicles on CESL’s premises and, similarly, the “loading” of PCB material onto vehicles in order to ship it from CESL’s premises clearly will be captured by the definition of “handling”. Two remaining segments of CESL’s activities during the intervening period require examination: (1) the process of sorting/cleansing/separating these materials and (2) the accumulation of PCB material until sufficient quantity is acquired to make it economically feasible to ship it.

The sorting/cleansing/separating processes

[62] The CRO opined that “the term ‘handling’ cannot be stretched to cover the intervention of the physical and chemical separation processes applied to the PCB materials once they arrive at CESL’s premises.” The CRO found that, during these processes, the PCB material was “in use” and was not subject to the Storage Regulations (because the Storage Regulations apply only to PCB materials not in use). This conclusion is neither correct nor reasonable. Moreover, it gives rise to confusion.

[63] PCB material arrives at CESL because it is no longer being put to use and must be destroyed. Processing PCB material, to prepare it for destruction, is not “using” the material and

should not be so interpreted. Consider a situation where PCB material arrives at CESL (not in use). CESL begins to sort the PCB material (causing the material to be “in use” according to the CRO), but the task is interrupted and the material sits for several days. Is it still “in use”, or would the Storage Regulations apply during the suspension of the sorting task? Such an interpretation yields indefinable responses. The PCB material arrives at CESL after its useful cycle has ended. The “use” is not reincarnated at CESL by virtue of the sorting/cleansing/separating process.

The accumulation of PCB material pending sufficient quantity to ship

[64] The second segment concerns the time period during which sorted PCB material sits on the premises awaiting shipment. While factors external to the business operation can impact on the length of this period, the primary reason for the delay in shipping is that it is not economically viable to forward small shipments. Consequently, CESL accumulates quantities of PCB material in containers, over time, until a quantity sufficient to warrant shipment is acquired. The length of time can vary from days to months. As noted earlier, it averages four to six weeks.

[65] The CRO’s determinations in this respect are founded upon her earlier (and misconceived) determinations. In accordance with *R. v. Snap-On Tools of Canada Ltd.* (2001), 44 C.E.L.R. (N.S.) 301, an authority relied upon by both sides, the CRO adopted the finding of Kastner J. that the transportation of dangerous goods is not a finite transaction. Rather, it is “a continuum that commences at the packing of the item and continues through to the unpacking of the item at its destination”. Having concluded that the PCB material is not being stored (in the sense of warehousing) because the intent is to process it or to ship it for destruction, the RCO determined that the PCB material was “in use” during the sorting/cleansing/separating process. She then

summarily determined that, during the time frame which followed, the PCB material is “consolidated in anticipation of shipment” and that this “may indeed be considered to be packing and handling in the course of transport and hence covered by the [TDGA] and exempted from the operation of the Regulations.” No analysis is provided in support of the conclusion. It is therefore impossible for me to ascertain the basis upon which the RCO arrived at her conclusion in this respect. However, for the reasons that follow, I conclude that this determination is incorrect and unreasonable.

[66] CESL asserts that the time period during which the sorted PCB material sits on its premises awaiting transport constitutes “storage in the course of transportation” as part of the TDGA definition of “handling”. CESL is not the final destination for PCB material. Therefore, the PCB material is still in the course of transportation while it is temporarily located at CESL.

[67] Accepting the notion of the “continuum” advanced by the parties, the question becomes: when does the transportation of the PCB material end? Clearly, the PCB material, as noted earlier, is subject to the requirements of TDGA when it is being shipped into the CESL facility. However, when the PCB material arrives at the CESL facility (CESL does not deal only with PCB material), the continuum of transportation terminates.

[68] All PCB material shipped in (to CESL) and all PCB material shipped out (from CESL) is documented by movement manifests. A movement manifest is a document required under the TDGR to track the movement and location of dangerous goods. The evidence indicates that there is a generator/consignor, a carrier and a receiver. The generator/consignor must complete Section A

of the manifest; the carrier must complete section B; and the consignee or receiver must complete Section C.

[69] The CRO, after hearing the evidence of witnesses as to how CESL conducts its operations, conducted a site visit to witness the operations first-hand. She noted that the shipping documents accompanying the PCB material identify CESL as the destination, that is, the receiver (the termination point of transportation). When PCB material is shipped out from CESL, it must, as the “generator”, begin anew the process of completing documentation. While it is not entirely clear from the record whether, in every situation, CESL takes ownership of the material when it arrives on site, it is certainly the implication or inference arising from the evidence. For practical purposes, the transportation (and the operation of the TDGA) terminates when the PCB material arrives at CESL and is unpacked. It is at this point that the “tracking” operation of the Storage Regulations is triggered to fill the gap. A new continuum of transportation begins when CESL packs the material up to ship it out to the disposal site destination.

[70] I do not disagree with CESL that its facility is not a warehouse. However, for purposes of the legislation, its characterization is immaterial. The object of the TDGA and CEPA is to track dangerous substances. The point is, in the circumstances relating to CESL, the documentary “tracking” of dangerous goods pursuant to the TDGA, specifically PCB material, is aborted when the PCB material is shipped into and unloaded by the CESL operation.

[71] It is correct, as CESL states, that the TDGA definition of “handling” includes “storage in the course of transportation”. Further, the TDGR cover situations where goods may not actually be “in

transport”. However, given the purpose and the context of the definitions contained in the legislative provisions, and bearing in mind that the CEPA and TDGA are to be read in harmony, the TDGR must be read, in this respect, to mean storage that is necessarily incidental to the transport of the PCB material. It is difficult, if not impossible, to conceive that PCB material that sits on CESL premises for extended periods of time, due to staffing and workload issues (in at least one case for a period of five months or more), awaiting the sorting/cleansing/separation process could possibly fall within the parameters of the cited provision. Additionally, CESL readily acknowledged that the accumulation of sufficient PCB material to warrant shipment is a matter of economics. I concur with the Minister that this constitutes a business decision. Unquestionably, it is open to CESL to make such a decision. However, it does not follow that the accumulation of a sufficient quantity of PCB material to warrant an economically viable shipment is “storage in the course of transportation” for it is not storage that is necessarily incidental to the transport of the PCB material. The interpretation advanced by CESL stretches the exemption to include “storage for the purpose of future transportation”.

[72] The evidence indicates that, although the periods of time with respect to accumulation may vary, on average, they encompass four to six weeks. Further, PCB material shipped to CESL may sit on its premises awaiting the sorting/cleansing/separation process for an undefined period of time, depending upon staffing and workload. The periods of time are not insignificant. The documentary “tracking” is lost during these “hiatus” periods. This loss is contrary to the clear intention of Parliament in its enactment of the legislation. To hold otherwise compromises the intent and the integrity of the legislation.

[73] The decision of the CRO is both incorrect and unreasonable. As a result, the appeal will be allowed with costs. The decision of the CRO will be set aside and the EPCO restored. That said, I reiterate my comments at the hearing, with which the Minister concurred, that CESL cannot perform impossible feats. It is simply not possible for it to produce records that, due to destruction, no longer exist.

JUDGMENT

The appeal is allowed with costs. The decision of the Chief Review Officer is set aside and the Environmental Protection Compliance Order is restored.

“Carolyn Layden-Stevenson”

Judge

SCHEDULE “A”
to the
Reasons for order dated May 16, 2008
in
MINISTER OF THE ENVIRONMENT
and
CUSTOM ENVIRONMENTAL SERVICES LTD.,
GAVIN SCOTT AND BRIAN WINTERS

T-1150-07

Canadian Environmental Protection Act, 1999
S.C. 1999, c. 33

Loi canadienne sur la protection de
l’environnement (1999), L.C. 1999, ch. 33

Declaration

It is hereby declared that the protection of the environment is essential to the well-being of Canadians and that the primary purpose of this Act is to contribute to sustainable development through pollution prevention.

Déclaration

Il est déclaré que la protection de l’environnement est essentielle au bien-être de la population du Canada et que l’objet principal de la présente loi est de contribuer au développement durable au moyen de la prévention de la pollution.

Preamble

Whereas the Government of Canada seeks to achieve sustainable development that is based on an ecologically efficient use of natural, social and economic resources and acknowledges the need to integrate environmental, economic and social factors in the making of all decisions by government and private entities;

Préambule

Attendu :
que le gouvernement du Canada vise au développement durable fondé sur l’utilisation écologiquement rationnelle des ressources naturelles, sociales et économiques et reconnaît la nécessité, pour lui et les organismes privés, de prendre toute décision en tenant compte des facteurs environnementaux, économiques et sociaux;

Whereas the Government of Canada is committed to implementing pollution prevention as a national goal and as the priority approach to environmental protection;

qu’il s’engage à privilégier, à l’échelle nationale, la prévention de la pollution dans le cadre de la protection de l’environnement;

Whereas the Government of Canada acknowledges the need to virtually eliminate the most persistent and bioaccumulative toxic substances and the need to control and manage pollutants and wastes if their release into the environment cannot be prevented;

qu’il reconnaît la nécessité de procéder à la quasi-élimination des substances toxiques les plus persistantes et bioaccumulables et de limiter et gérer les polluants et déchets dont le rejet dans l’environnement ne peut être évité;

Whereas the Government of Canada recognizes the importance of an ecosystem approach;

qu’il reconnaît l’importance d’adopter une

Whereas the Government of Canada will continue to demonstrate national leadership in establishing environmental standards, ecosystem objectives and environmental quality guidelines and codes of practice;

Whereas the Government of Canada is committed to implementing the precautionary principle that, where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation;

Whereas the Government of Canada recognizes that all governments in Canada have authority that enables them to protect the environment and recognizes that all governments face environmental problems that can benefit from cooperative resolution;

Whereas the Government of Canada recognizes the importance of endeavouring, in cooperation with provinces, territories and aboriginal peoples, to achieve the highest level of environmental quality for all Canadians and ultimately contribute to sustainable development;

Whereas the Government of Canada recognizes that the risk of toxic substances in the environment is a matter of national concern and that toxic substances, once introduced into the environment, cannot always be contained within geographic boundaries;

Whereas the Government of Canada recognizes the integral role of science, as well as the role of traditional aboriginal knowledge, in the process of making decisions relating to the protection of the environment and human health and that environmental or health risks and social, economic and technical matters are to be considered in that process;

approche basée sur les écosystèmes;

qu'il continue à jouer un rôle moteur au plan national dans l'établissement de normes environnementales, d'objectifs relatifs aux écosystèmes et de directives et codes de pratique nationaux en matière de qualité de l'environnement;

qu'il s'engage à adopter le principe de la prudence, si bien qu'en cas de risques de dommages graves ou irréversibles, l'absence de certitude scientifique absolue ne doit pas servir de prétexte pour remettre à plus tard l'adoption de mesures effectives visant à prévenir la dégradation de l'environnement;

qu'il reconnaît que tous les gouvernements au Canada disposent des pouvoirs leur permettant de protéger l'environnement et qu'il est à leur avantage mutuel de collaborer pour résoudre les problèmes environnementaux auxquels ils ont tous à faire face;

qu'il reconnaît l'importance de s'efforcer, en collaboration avec les gouvernements provinciaux et territoriaux et les autochtones, d'atteindre le plus haut niveau possible de qualité de l'environnement pour les Canadiens et de contribuer ainsi au développement durable;

qu'il reconnaît que le risque de la présence de substances toxiques dans l'environnement est une question d'intérêt national et qu'il n'est pas toujours possible de circonscrire au territoire touché la dispersion de substances toxiques ayant pénétré dans l'environnement;

qu'il reconnaît le rôle naturel de la science et le rôle des connaissances autochtones traditionnelles dans l'élaboration des décisions touchant à la protection de l'environnement et de la santé humaine et la nécessité de tenir compte des risques d'atteinte à l'environnement ou à la santé ainsi que de toute question d'ordre social, économique ou technique lors de cette

Whereas the Government of Canada recognizes the responsibility of users and producers in relation to toxic substances and pollutants and wastes, and has adopted the “polluter pays” principle;

Whereas the Government of Canada is committed to ensuring that its operations and activities on federal and aboriginal lands are carried out in a manner that is consistent with the principles of pollution prevention and the protection of the environment and human health;

Whereas the Government of Canada will endeavour to remove threats to biological diversity through pollution prevention, the control and management of the risk of any adverse effects of the use and release of toxic substances, pollutants and wastes, and the virtual elimination of persistent and bioaccumulative toxic substances;

Whereas the Government of Canada recognizes the need to protect the environment, including its biological diversity, and human health, by ensuring the safe and effective use of biotechnology;

And whereas the Government of Canada must be able to fulfil its international obligations in respect of the environment;

Now, therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

235. (1) Whenever, during the course of an inspection or a search, an enforcement officer has reasonable grounds to believe that any provision of this Act or the regulations has been contravened in the circumstances described in subsection (2) by a person who is continuing the commission of the offence, or that any of those provisions will be contravened in the

élaboration;

qu’il reconnaît la responsabilité des utilisateurs et producteurs à l’égard des substances toxiques, des polluants et des déchets et a adopté en conséquence le principe du pollueur-payeur;

qu’il est déterminé à faire en sorte que ses opérations et activités sur le territoire domanial et les terres autochtones respectent les principes de la prévention de la pollution et de la protection de l’environnement et de la santé humaine;

qu’il s’efforcera d’éliminer les menaces à la diversité biologique au moyen de la prévention de la pollution, de la réglementation et de la gestion des risques d’effets nocifs de l’utilisation et du rejet de substances toxiques, de polluants et de déchets et de la quasi-élimination des substances toxiques persistantes et bioaccumulables;

qu’il reconnaît la nécessité de protéger l’environnement — notamment la diversité biologique — et la santé humaine en assurant une utilisation sécuritaire et efficace de la biotechnologie;

qu’il se doit d’être en mesure de respecter les obligations internationales du Canada en matière d’environnement,

Sa Majesté, sur l’avis et avec le consentement du Sénat et de la Chambre des communes du Canada, édicte :

235. (1) Lors de l’inspection ou de la perquisition, s’il a des motifs raisonnables de croire qu’une infraction à la présente loi ou à ses règlements a été commise — et continue de l’être — ou le sera, dans les cas prévus au paragraphe (2), l’agent de l’autorité peut ordonner à tout intéressé visé au paragraphe (3) de prendre les mesures prévues au paragraphe (4) et, s’il y a lieu, au paragraphe (5) qui sont

circumstances described in that subsection, the enforcement officer may issue an environmental protection compliance order directing any person described in subsection (3) to take any of the measures referred to in subsection (4) and, where applicable, subsection (5) that are reasonable in the circumstances and consistent with the protection of the environment and public safety, in order to cease or refrain from committing the alleged contravention.

237. (1) Except in exigent circumstances, the enforcement officer shall, wherever practicable, before issuing an order,

(a) provide an oral or a written notice of the intent of the enforcement officer to issue the order to every person who will be subject to the order; and

(b) allow a reasonable opportunity in the circumstances for the person to make oral representations.

(2) A notice of intent to issue an order shall include

- (a) a statement of the purpose of the notice;
- (b) a reference to the statutory authority under which the order will be issued; and
- (c) a statement that the party notified may make oral representations to the enforcement officer within the period stated in the notice.

243. The Minister shall establish and maintain a roster of review officers.

244. (1) The Minister shall appoint one of the review officers as the Chief Review Officer to perform the functions of the Chief Review Officer as and when required.

(2) The Chief Review Officer shall

(a) perform administrative functions related to the work of review officers, including assigning review officers to conduct review hearings; and

justifiées en l'espèce et compatibles avec la protection de l'environnement et la sécurité publique pour mettre fin à la perpétration de l'infraction ou s'abstenir de la commettre.

237. (1) Sauf en cas d'urgence, l'agent de l'autorité doit, dans la mesure du possible et avant de donner l'ordre, aviser oralement ou par écrit tout intéressé de son intention de le faire et donner à celui-ci la possibilité de lui présenter oralement ses observations.

(2) L'avis d'intention doit préciser les trois éléments suivants :

- a) son objet;
- b) le texte aux termes duquel l'ordre sera donné;
- c) le fait que l'intéressé peut, dans le délai précisé, présenter oralement ses observations à l'agent de l'autorité

243. Le ministre établit et tient à jour une liste de réviseurs.

244. (1) Le ministre nomme un des réviseurs à titre de réviseur-chef pour exercer, de la manière et au moment voulus, les fonctions afférentes.

(2) Le réviseur-chef exerce toutes les fonctions administratives liées au travail des réviseurs, notamment en affectant les réviseurs aux audiences à tenir en matière de révision, et, dans certains cas, tient lui-même ces audiences.

(b) in certain cases, conduct review hearings.

(3) If the Chief Review Officer is absent or unable to act or if the office is vacant, any other review officer that is designated by the Minister shall perform the functions of the Chief Review Officer.

245. (1) Review officers shall be appointed to hold office during good behaviour for a term of not more than three years, but may be removed by the Minister at any time for cause.

(2) A review officer may be re-appointed.

246. The Minister shall publish the roster of review officers in the Canada Gazette.

247. A person is not eligible to be appointed as a review officer unless the person is knowledgeable about the Canadian environment, environmental and human health, administrative law or traditional aboriginal ecological knowledge.

248. Review officers shall not accept or hold any office or employment inconsistent with their functions under this Act.

256. (1) Any person to whom an order is directed may, by notice in writing given to the Chief Review Officer within 30 days after receipt by the person of a copy of the written order or after the oral order is given, make a request to the Chief Review Officer for a review of the order.

(2) The Chief Review Officer may extend the

(3) Les fonctions du réviseur-chef sont, en cas d'absence ou d'empêchement de celui-ci ou de vacance de son poste, assumées par le réviseur que désigne le ministre.

245. (1) Sauf révocation motivée de la part du ministre, les réviseurs exercent leurs fonctions à titre inamovible pour un mandat maximal de trois ans.

(2) Le mandat des réviseurs est renouvelable. Publication dans la Gazette du Canada

246. Le ministre publie la liste des réviseurs dans la Gazette du Canada.

247. Seules peuvent être nommées réviseurs les personnes compétentes dans le domaine de l'environnement canadien, dans celui de la salubrité de l'environnement et dans celui de la santé humaine, dans celui du droit administratif ou dans celui des connaissances écologiques autochtones traditionnelles.

248. Il est interdit aux réviseurs d'occuper ou d'accepter une charge ou un emploi incompatible avec les fonctions qui leur sont confiées en application de la présente loi.

256. (1) Toute personne visée par l'ordre peut en demander la révision au réviseur-chef par avis écrit adressé dans les trente jours de la date où elle en reçoit le texte ou de celle où il lui est donné oralement.

(2) Le réviseur-chef peut proroger le délai dans lequel la demande de révision peut être faite s'il estime qu'il est dans l'intérêt public de le faire.

period within which a request for a review may be made where, in the Chief Review Officer's opinion, it is in the public interest to do so.

257. On receipt of a notice under subsection 256(1), the Chief Review Officer shall conduct a review of the order, including a hearing, or cause a review and hearing of the order to be conducted by a review officer assigned by the Chief Review Officer.

258. (1) Subject to subsection (2), the request for a review by a review officer does not suspend the operation of an order.

(2) A review officer may, on application made by a person subject to the order before the beginning of the hearing, suspend the operation of the order if the review officer considers it appropriate in the circumstances and, in that case, impose on all the persons subject to the order conditions that are reasonable in the circumstances and consistent with the protection of the environment and public safety.

(3) Where the operation of an order is suspended under subsection (2), the period for which the order is issued is suspended until the review is completed.

260. (1) A review officer may summon any person to appear as a witness before the review officer and may order the witness to

- (a) give evidence orally or in writing; and
- (b) produce any documents and things that the review officer considers necessary or desirable for the purpose of performing any of the review officer's functions.

(2) A witness who is served with a summons under subsection (1) is entitled to receive the fees and allowances to which persons who are summoned to appear as witnesses before the

257. Sur réception de l'avis de demande de révision, le réviseur-chef procède à la révision de l'ordre, notamment en tenant une audience, ou y fait procéder par le réviseur qu'il désigne.

258. (1) La demande de révision n'a pas pour effet de suspendre l'application de l'ordre.

(2) Le réviseur peut toutefois, sur demande présentée avant le début de l'audience par toute personne visée par l'ordre, en suspendre l'application s'il l'estime indiqué, et, le cas échéant, assujettir toutes les personnes concernées aux conditions justifiées en l'occurrence et compatibles avec la protection de l'environnement et la sécurité publique.

(3) Dès lors, l'effet de l'ordre est suspendu jusqu'à la fin de la révision.

260. (1) Le réviseur peut citer toute personne à comparaître devant lui et lui ordonner de déposer oralement ou par écrit, ou de produire toute pièce qu'il juge utile pour l'exercice de ses fonctions.

(2) La personne citée à comparaître a droit aux indemnités applicables aux convocations de la Cour fédérale.

Federal Court are entitled.

261. Any summons to a witness issued or order made under subsection 260(1) by a review officer may be made a summons to a witness or an order of the Federal Court or of the superior court of a province and is enforceable in the same manner as a summons to a witness or an order of that court.

262. To make a summons issued or an order made under subsection 260(1) by a review officer a summons or an order of the Federal Court or of the superior court of a province, the usual practice and procedure of the court in such matters may be followed, or a certified copy of the summons or order may be filed with the registrar of the court and the summons or order thereupon becomes a summons or an order of the court.

263. The review officer, after reviewing the order and after giving all persons who are subject to the order, and the Minister, reasonable notice orally or in writing of a hearing and allowing a reasonable opportunity in the circumstances for those persons and the Minister to make oral representations, may

- (a) confirm or cancel the order;
- (b) amend or suspend a term or condition of the order, or add a term or condition to, or delete a term or condition from, the order; or
- (c) extend the duration of the order for a period of not more than 180 days less the number of days that have passed since the day on which the order was received by the person who is subject to the order, not counting the days during which the order was suspended under subsection 258(3).

264. At any time before a notice of appeal to the Federal Court is filed in relation to an order, the

261. Les citations et les ordres visés au paragraphe 260(1) peuvent être homologués par la Cour fédérale ou une juridiction supérieure provinciale; le cas échéant, leur exécution s'effectue selon les mêmes modalités que les citations et ordonnances de la juridiction saisie.

262. L'homologation se fait soit selon les règles de pratique et de procédure de la juridiction, soit par le dépôt au greffe de celle-ci d'une copie certifiée conforme de la citation ou de l'ordre.

263. Après avoir examiné l'ordre, avoir donné aux intéressés et au ministre un avis écrit ou oral suffisant de la tenue d'une audience et leur avoir accordé la possibilité de lui présenter oralement leurs observations, le réviseur peut décider, selon le cas :

- a) de le confirmer ou de l'annuler;
- b) de modifier, suspendre ou supprimer une condition de l'ordre ou d'en ajouter une;
- c) de proroger sa validité d'une durée équivalant au plus à cent quatre-vingts jours moins le nombre de jours écoulés depuis sa réception hors suspension.

264. Tant qu'un avis d'appel à la Cour fédérale n'a pas été déposé, le réviseur peut, d'office et après avoir donné à l'intéressé un avis oral ou écrit suffisant et la possibilité de lui présenter ses observations, modifier la décision qu'il a prise

review officer may, on the review officer's own motion, after giving reasonable notice orally or in writing and allowing a reasonable opportunity in the circumstances for the person subject to the order to make oral representations, modify the decision of the review officer in respect of the order and exercise any of the powers of the review officer under section 263 in respect of the order.

265. A review officer shall not exercise any of the powers referred to in section 263 if doing so would result in

- (a) impairment or serious risk of impairment of the quality of the environment for any use that can be made of it;
- (b) injury or damage or serious risk of injury or damage to any property or to any plant or animal life; or

- (c) danger to the health or safety of any person.

266. The review officer shall, within five days after the completion of the review of an order, render a decision and give written reasons for doing so within 10 days after the completion of the review, and provide a copy of the decision and those reasons to all persons to whom the order was directed and to the Minister.

269. The Minister or any person to whom an order, as confirmed or varied by a review officer under section 263, is directed may, by filing a written notice of appeal within 30 days after the written reasons are provided by the review officer under section 266, appeal to the Federal Court — Trial Division from the decision of the review officer.

270. The Minister or the person to whom the order is directed, as the case may be, has the right, on an appeal to the Federal Court made

au sujet de l'ordre et exercer les pouvoirs visés à l'article 263.

265. Le réviseur ne peut toutefois exercer les pouvoirs visés à l'article 263 si cela devait occasionner :

- a) la dégradation ou un risque grave de dégradation de la qualité de l'environnement relativement à tout usage que l'on peut en faire;
- b) un préjudice ou des dommages — ou un risque grave de préjudice ou de dommages — à des biens, des végétaux ou des animaux;
- c) un danger pour la santé ou la sécurité de quiconque.

266. Le réviseur rend sa décision dans les cinq jours suivant la fin de la révision, la motive par écrit dans les dix jours suivant celle-ci et transmet une copie de la décision et des motifs aux personnes visées par l'ordre et au ministre.

269. Le ministre ou toute personne visée par la modification ou la confirmation de l'ordre peut interjeter appel de cette décision auprès de la Section de première instance de la Cour fédérale, en déposant un avis d'appel devant la Cour dans les trente jours suivant la transmission des motifs par le réviseur.

270. Lors de l'appel, la personne visée par la modification ou la confirmation de l'ordre ou le ministre, selon le cas, a le droit de se faire entendre sur toute question de droit ou de fait.

under section 269, to be heard on all questions of fact and law.

*Storage of PCB Material Regulations,
SOR/92-507*

2. In these Regulations,

...

"PCB storage site" means a site referred to in section 4 that is used to store PCB material;

...

3. (1) Subject to subsections (2), (4) and (5), these Regulations apply in respect of any of the following PCB material that is not being used daily:

(a) PCB liquids in an amount of 100 L or more;

(b) PCB solids or PCB substances in an amount of 100 kg or more;

(c) PCB liquids, PCB solids or PCB substances, or any combination thereof, in an amount less than that referred to in paragraph (a) or (b), that contains 1 kg or more of PCBs; and

(d) PCB equipment that contains an amount of PCBs, PCB liquids, PCB solids or PCB substances referred to in any of paragraphs (a) to (c).

...

3. (4) These Regulations do not apply in respect of the handling, offering for transport or transporting of PCB material governed by the Transportation of Dangerous Goods Act.

...

4. Every person who owns, controls or possesses PCB material, or who owns or manages a property in or on which PCB material is located or a parcel of land on which PCB material is located, shall store the PCB material at a site that is

(a) a building, room, shipping container or other

*Règlement sur le stockage des matériels
contenant des BPC, DORS/92-507*

2. Les définitions qui suivent s'appliquent au présent règlement.

[...]

«dépôt de BPC» Dépôt visé à l'article 4 qui sert au stockage des matériels contenant des BPC.

[...]

3. (1) Sous réserve des paragraphes (2), (4) et (5), le présent règlement s'applique aux matériels contenant des BPC suivants qui ne sont pas utilisés quotidiennement :

a) des liquides contenant des BPC, en une quantité de 100 L ou plus;

b) des solides ou des substances contenant des BPC, en une quantité de 100 kg ou plus;

c) des liquides, solides ou substances contenant des BPC, ou toute combinaison de ceux-ci, en des quantités moindres que celles visées aux alinéas a) ou b), qui renferment 1 kg ou plus de BPC;

d) tout équipement contenant des BPC qui renferme une quantité de BPC ou de liquides, solides ou substances contenant des BPC visée à l'un des alinéas a) à c).

[...]

3. (4) Le présent règlement ne s'applique pas à la manutention, à l'offre de transport ou au transport de matériels contenant des BPC régis par la Loi sur le transport des marchandises dangereuses.

[...]

4. Toute personne qui est le propriétaire de matériels contenant des BPC ou qui en possède ou en contrôle ou toute personne qui est le propriétaire ou le gestionnaire d'un bien dans ou sur lequel se trouvent des matériels contenant des BPC ou d'un terrain sur lequel se trouvent de tels matériels doit stocker ces matériels dans un dépôt qui est :

a) soit un bâtiment, pièce, conteneur ou autre

structure; or

(b) an area that is enclosed by a woven mesh wire fence or any other fence or wall with similar security characteristics, where the fence or wall is at least 1.83 m high.

13. Every owner or manager of a PCB storage site shall maintain, and have available for review by an enforcement officer, a record containing the following information in respect of all PCB equipment and containers of PCB material at the PCB storage site, including every container of PCB material that is found in another container:

(a) the name-plate description, the manufacturer's serial number, any number for the PCB material that is registered with or provided to the Department of the Environment, the quantity of any PCB liquid, PCB solid or PCB substance contained in each piece of PCB equipment and in each container and the location of the PCB equipment and the containers at the PCB storage site;

(b) in the case of PCB material received at the PCB storage site,

- (i) the address or location from which the PCB material was received,
- (ii) the name of the individual who received the PCB material at the site,
- (iii) the date of receipt,
- (iv) the name of the carrier, and
- (v) the information set out in paragraph (a) that is applicable to that PCB material; and

(c) in the case of PCB material removed from the PCB storage site,

- (i) the destination of the PCB material,
- (ii) the name of the individual who authorized the transport of the PCB material,
- (iii) the date of removal,

ouvrage;

b) soit un endroit entouré d'une clôture grillagée ou d'un autre genre de clôture ou d'un mur présentant des caractéristiques similaires sur le plan de la sécurité, la clôture ou le mur ayant au moins 1,83 m de haut.

13. Le propriétaire ou le gestionnaire du dépôt de BPC tient, en ce qui concerne l'équipement contenant des BPC et les récipients de matériels contenant des BPC au dépôt de BPC, y compris tout récipient de tels matériels qui se trouve dans un autre récipient, un registre qu'il tient à la disposition de l'agent de l'autorité pour examen et dans lequel sont consignés :

a) la mention que porte la plaque d'identification, le numéro de série du fabricant, tout numéro pour les matériels contenant des BPC qui est enregistré auprès du ministère de l'Environnement ou qui lui est communiqué, la quantité de liquides, de solides ou de substances contenant des BPC que renferme chaque pièce d'équipement contenant des BPC et chaque récipient, ainsi que leur emplacement au dépôt;

b) dans le cas des matériels contenant des BPC qui sont reçus au dépôt :

- (i) l'adresse ou le lieu de leur provenance,
- (ii) le nom du réceptionnaire,
- (iii) la date de réception,
- (iv) le nom du transporteur,
- (v) les renseignements visés à l'alinéa a) qui s'appliquent aux matériels;

c) dans le cas des matériels contenant des BPC qui sont enlevés du dépôt :

- (i) leur destination,
- (ii) le nom de la personne ayant autorisé leur transport,
- (iii) la date de leur enlèvement,
- (iv) le nom du transporteur,
- (v) les renseignements visés à l'alinéa a) qui s'appliquent aux matériels

- (iv) the name of the carrier, and
- (v) the information set out in paragraph (a) that is applicable to that PCB material.

14. Every owner or manager of a PCB storage site shall keep, and have available for review by an enforcement officer, a record of all inspections conducted at the PCB storage site under paragraph 11(a), which record shall

- (a) list all items that are inspected;
- (b) describe any deficiency found; and
- (c) set out the measures taken to remedy the deficiency.

15. Every owner or manager of a PCB storage site who is required to maintain a record pursuant to section 13 shall retain the record for not less than five years after the removal of all PCB material from the PCB storage site.

16. The owner or manager of a PCB storage site shall submit in writing to the Minister, care of the Regional Director of Environmental Protection, Department of the Environment, located in the same province as the PCB storage site,

- (a) a copy of the record referred to in section 13 within 90 days after the day on which these Regulations come into force or, in the case of a PCB storage site established after that day, within 30 days after the site has been established;
- (b) where PCB material is received at or removed from a PCB storage site, a copy of the information referred to in paragraphs 13(b) and (c)
- (i) on January 1 and July 1 of each year, for capacitors containing less than 0.5 kg of PCBs, and

14. Le propriétaire ou le gestionnaire du dépôt de BPC tient un registre de toutes les inspections effectuées au dépôt aux termes de l'alinéa 11a) et le tient à la disposition de l'agent de l'autorité pour examen, lequel registre :

- a) énumère tous les points inspectés;
- b) indique toutes les lacunes relevées;
- c) énonce les mesures à prendre pour y remédier.

15. Le propriétaire ou le gestionnaire du dépôt de BPC tenu de tenir un registre conformément à l'article 13 doit conserver celui-ci pendant au moins cinq ans après l'enlèvement, du dépôt, de tous les matériels contenant des BPC.

16. Le propriétaire ou le gestionnaire du dépôt de BPC présente par écrit au ministre, aux soins du directeur régional de la Protection de l'environnement, du ministère de l'Environnement, situé dans la même province que le dépôt de BPC :

- a) une copie du registre visé à l'article 13, dans les 90 jours suivant la date d'entrée en vigueur du présent règlement ou, s'il s'agit d'un dépôt de BPC mis sur pied après cette date, dans les 30 jours suivant sa mise sur pied;
- b) lorsque des matériels contenant des BPC sont reçus au dépôt ou en sont enlevés, une copie des renseignements visés aux alinéas 13b) et c) :
 - (i) le 1er janvier et le 1er juillet de chaque année, pour chaque condensateur renfermant moins de 0,5 kg de BPC,
 - (ii) dans les 30 jours suivant la date de réception ou d'enlèvement pour tout autre matériel contenant des BPC;
- c) tout changement de nom ou d'adresse du propriétaire ou du gestionnaire et tout

(ii) within 30 days after the date of receipt or removal, for any other PCB material; and

(c) information in respect of any change in the name or address of the owner or manager and any change in the location at the site of any PCB equipment or container of PCB material, within 30 days after the change.

Transportation of Dangerous Goods Act, 1992.
S.C. 1992, C. 34

2. In this Act,

...
"handling" means loading, unloading, packing or unpacking dangerous goods in a means of containment for the purposes of, in the course of or following transportation and includes storing them in the course of transportation;

Transportation of Dangerous Goods Regulations, SOR/2001-286

...
1.4 Definitions

...
"in transport" means that a person has possession of dangerous goods for the purposes of transportation or for the purposes of storing them in the course of transportation.

"offer for transport" means, for dangerous goods not in transport, to select or allow the selection of a carrier to transport the dangerous goods, to prepare or allow the preparation of the dangerous goods so that a carrier can take possession of them for transport or to allow a carrier to take possession of the dangerous goods for transport.

...

changement d'emplacement, au dépôt, de tout équipement contenant des BPC ou de récipients renfermant des matériels contenant des BPC, dans les 30 jours suivant le changement.

Loi de 1992 sur le transport des marchandises dangereuses, L.C. 1992, ch. 34

2. Les définitions qui suivent s'appliquent à la présente loi

[...]
« manutention » Toute opération de chargement, de déchargement, d'emballage ou de déballage de marchandises dangereuses effectuée en vue de leur transport, au cours de celui-ci ou par après. Les opérations d'entreposage effectuées au cours du transport sont incluses dans la présente définition.

Règlement sur le transport des marchandises dangereuses, DORS/2001-286

1.4 Definitions

[...]
« en transport » Qualifie des marchandises dangereuses dont une personne a la possession en vue de leur transport ou de leur entreposage pendant leur transport.

« demande de transport » En ce qui concerne des marchandises dangereuses qui ne sont pas en transport, le fait de choisir un transporteur ou d'en permettre le choix dans le but de les transporter, le fait de les préparer ou d'en permettre la préparation pour qu'un transporteur en prenne possession aux fins du transport ou le fait de permettre à un transporteur d'en prendre possession aux fins du transport.

[...]

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-1150-07

STYLE OF CAUSE: MINISTER OF THE ENVIRONMENT
CUSTOM ENVIRONMENTAL SERVICES LTD.,
GAVIN SCOTT AND BRIAN WINTERS

PLACE OF HEARING: Edmonton, Alberta

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DATED: May 16, 2008

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