TAB 4

2000 CarswellBC 2372, 2000 BCSC 1698, 84 B.C.L.R. (3d) 88, 36 C.E.L.R. (N.S.) 195, [2000] B.C.J. No. 2358

Beazer East Inc. v. British Columbia (Assistant Regional Waste Manager)

Beazer East inc. (Petitioner) and Environmental Appeal Board and Douglas T. Pope in his capacity as Assistant Regional Waste Manager (Respondents); Atlantic Industries Limited (Petitioner) and Douglas T. Pope in his capacity as Assistant Regional Waste Manager, and Environmental Appeal Board (Respondents)

British Columbia Supreme Court

Tysoe J.

Heard: October 10-11, 16-17, 19-20, 24-27, 2000
Judgment: November 24, 2000[FN*]
Docket: Vancouver L001638, L001898

Proceedings: affirmed *Beazer East Inc. v. British Columbia (Assistant Regional Waste Manager)* (March 29, 2000), Doc. 98-WAS-01-(b), (sub nom. *Beazer East Inc. v. British Columbia (Ministry of Environment, Lands & Parks)*) [2000] B.C.E.A. No. 15 (B.C. Environmental App. Bd.)

Counsel: *Leonard T. Doust, Q.C.*, and *Nicholas R. Hughes*, for Beazer East Inc.

James M. Sullivan and *Michelle B. Pockey*, for Atlantic Industries Limited.

Joyce Thayer and *G. Morley*, for Douglas T. Pope, in his capacity as Assistant Regional Waste Manager.

Richard E. Bereti and *S. Lesiuk*, for Canadian National Railway Company.

T. Murray Rankin, Q.C., and *Matt D. Pollard*, for Environmental Appeal Board.

Subject: Environmental; Public

Administrative law --- Standard of review — Correctness

Different standards of review were appropriate depending on nature of issue — Questions of law were subjected to standard of correctness, and questions of mixed law and fact were subjected to standard of reasonableness simpliciter — Waste Management Act, R.S.B.C. 1996, c. 482, s. 26.5(1)(c).

Administrative law --- Standard of review — Reasonableness — Reasonableness simpliciter

Different standards of review were appropriate depending on nature of issue — Questions of law were subjected to standard of correctness, and questions of mixed law and fact were subjected to standard of reasonableness simpliciter — Waste Management Act, R.S.B.C. 1996, c. 482, s. 26.5(1)(c).

Statutes --- Interpretation — Rules of interpretation — Object and purpose

Issue arose as to proper approach to statutory interpretation — In interpreting Act, effect must be given to wording chosen by legislature — Purpose of legislation is relevant to its interpretation but it does not override plain meaning of words used in legislation unless purpose of legislation would be defeated — Waste Management Act, R.S.B.C. 1996, c. 482, s. 26.5(1)(c).

Environmental law --- Statutory protection of the environment — Approvals, licences and orders — Miscellaneous issues

BE Inc. and AI Ltd. petitioned for order of certiorari quashing or setting aside remediation order and portions of board's decision and for declarations relieving them from responsibility for remediation of property — Petitions dismissed — Board correctly concluded that BE Inc. and AI Ltd. should remain named in remediation order — Waste Management Act, R.S.B.C. 1996, c. 482, s. 26.5(1)(c).

Administrative law --- Review for lack or excess of jurisdiction — General

AI Ltd. petitioned for order of certiorari quashing or setting aside remediation order and portions of board's decision — Petition dismissed — Board correctly concluded that it had no jurisdiction to stay remediation order pending outcome of cost recovery and allocation proceedings — Waste Management Act, R.S.B.C. 1996, c. 482, s. 26.5(1)(c).

Administrative law --- Discretion of tribunal under review — General

Board did not make error of law in refusing to consider equitable grounds on basis that Act precluded it from considering such grounds — Evidence existed before board to reasonably conclude that it was not abuse of process for manager to name AI Ltd. in remediation order — Waste Management Act, R.S.B.C. 1996, c. 482, s. 26.5(1)(c).

The subject property was contaminated as a result of a wood treatment operation which was carried on from 1931 to 1982. The site was owned throughout this period by CNR and was leased to the operators of the wood treatment business. AI Ltd. was the principal operator of the business and BE Inc. was the parent corporation of AI Ltd. In 1997, the Assistant Regional Waste Manager issued a remediation order naming BE Inc., AI Ltd. and CNR as persons responsible for remediation at the site. The manager named BE Inc. as a previous owner, operator and producer, AI Ltd. as a previous operator and CNR as a previous owner under s. 26.5(1) of the *Waste Management Act*. BE Inc. and AI Ltd. appealed the manager's decision to the Environmental Appeal Board. The board upheld the remediation order, with the exception of the reference to BE Inc. being a producer under s. 26.5(1)(c). BE Inc. and AI Ltd. petitioned for an order in the nature of certiorari quashing or setting aside the remediation order and portions of the Board's decision, and for declarations relieving them from the responsibility for the remediation of the site.

Held: The petitions were dismissed.

Different standards of review were appropriate depending on the nature of the issue. Questions of law were subjected to a standard of correctness and the questions of mixed law and fact were subjected to a standard of reasonableness simpliciter. The questions of law involved statutory interpretation and did not engage the expertise of the board. As the board heard the evidence, its expertise with respect to the questions of mixed law and fact came into play. More deference was given to the board on such questions and a standard of reasonableness simpliciter was appropriate.

With respect to statutory interpretation, the purpose of the legislation is relevant to its interpretation but does not override the plain meaning of the words used in the legislation unless the purpose of the legislation would be defeated. The objects of the *Waste Management Act* are the prevention of pollution and the identification and the remediation of contaminated sites. The Act must be given a fair, large and liberal interpretation to achieve these objects, but it is still necessary to give effect to the wording chosen by the legislature.

BE Inc. was properly named in the remediation order as a responsible person by virtue of being a previous operator of the site. The board was not correct in its interpretation of the first part of the definition of "owner" under s. 26(1) of the *Waste Management Act*, as BE Inc. did not have the "right of control" of the use of the property. To be a right within the meaning of the Act, it must be a legally enforceable right. The board concluded that BE Inc. had the right of control as a result of its requirement for the principal operator to have its property leases approved by it. The requirement for the principal operator to obtain the approval of BE Inc. in respect of its leases was not a legally enforceable right.

The board was not correct in its conclusions that BE Inc. was responsible for an operation at the site and was a "most substantial contributor." However, the naming of BE Inc. in the remediation order stood on the basis that it was a previous operator by virtue of its control of an operation at the site and that it was not entitled to an exemption under s. 26.6(1)(h). The legislature intended to exempt persons if the only activity which would make such persons an "owner" or an "operator" was their provision of assistance or advice respecting remediation of a contaminated site, as long as they were not negligent. Therefore, if BE Inc. would not have been an "owner" or an "operator" but for the involvement of its employees in the earlier remediation work, it would be entitled to the exemption. The board was correct in its interpretation and application of s. 26.6(1)(h).

The board was correct in its conclusions that AI Ltd. should remain named in the remediation order. The board did not make an error of law in refusing to consider the equitable grounds of fairness and culpability on the basis that the *Waste Management Act* precluded it from considering such grounds. The manager and board were not required to consider factors of equity and fairness in determining who should be named in the remediation order. If the legislature had intended to require a manager to consider such factors, it would have set out those factors in s. 27.1 of the Act. A requirement that a manager and the board must undertake an investigation into issues of culpability and appropriate allocations could be counterproductive to the Act's purpose of promoting prompt remediation of contaminated sites. Although a manager is not prohibited from considering equitable factors, he is not required to do so. A manager or the board has the discretion to refuse to consider equitable factors and to name any responsible person in a remediation order irrespective of their culpability or any other equitable factor.

There was evidence before the board to reasonably conclude that it was not an abuse of process for the manager to name AI Ltd. in the remediation order. The board found the manager was acting to protect the environment in naming AI Ltd. to the remediation order. The board concluded that issuance of the remediation order could not be an abuse of process in light of s. 28.7, which states that even though the powers of the manager have been previously exercised, a manager may exercise his or her powers in certain circumstances, including the circumstances that the site poses a threat to human health or the environment. The board went on to consider the merits of AI Ltd.'s submissions and concluded again that it was not an abuse of process for it to be named in the remediation order. Therefore, even if the board did commit an error of law, the error did not affect the outcome of the board's decision.

The board was correct in holding that it had no jurisdiction to stay the remediation order pending the outcome of the cost recovery and allocation proceedings. The wording of s. 48 of the *Waste Management Act* is directed only at stays pending the outcome of appeals. The board is authorized to order that the appeal can operate as a stay of the decision being appealed. No reasonable interpretation of the section can lead to the conclusion that the board is given the authority to stay remediation orders pending the outcome of other litigation. A cost recovery and allocation proceeding is not an appeal in any sense of the word.

Cases considered by *Tysoe J.*:

Abitibi Paper Co. v. R. (1979), 24 O.R. (2d) 742, 8 C.E.L.R. 98, 99 D.L.R. (3d) 333, 47 C.C.C. (2d) 487 (Ont. C.A.) — distinguished

Atco Ltd. v. Calgary Power Ltd., [1982] 2 S.C.R. 557, (sub nom. *Canadian Utilities Ltd. v. Atco Ltd.*) [1983] 1 W.W.R. 385, (sub nom. *Canadian Utilities Ltd. v. Atco Ltd.*) 20 B.L.R. 227, (sub nom. *Canadian Utilities Ltd. v. Atco Ltd.*) 23 Alta. L.R. (2d) 1, (sub nom. *Canadian Utilities Ltd. v. Atco Ltd.*) 41 A.R. 1, (sub nom. *Canadian Utilities Ltd. v. Atco Ltd.*) 45 N.R. 1, (sub nom. *Canadian Utilities Ltd. v. Atco Ltd.*) 140 D.L.R. (3d) 193 (S.C.C.) — considered

Baker v. Canada (Minister of Citizenship & Immigration), 174 D.L.R. (4th) 193, 243 N.R. 22, 1 Imm. L.R. (3d) 1, 14 Admin. L.R. (3d) 173, [1999] 2 S.C.R. 817 (S.C.C.) — considered

British Columbia (Minister of Environment, Lands & Parks) v. Alpha Manufacturing Inc. (1996), 132 D.L.R. (4th) 688 (B.C. S.C.) — referred to

British Columbia (Minister of Environment, Lands & Parks) v. Alpha Manufacturing Inc. (1997), 150 D.L.R. (4th) 193, 96 B.C.A.C. 193, 155 W.A.C. 193, 25 C.E.L.R. (N.S.) 217 (B.C. C.A.) — considered

British Columbia (Minister of Health) v. British Columbia (Environmental Appeal Board) (1996), 26 B.C.L.R. (3d) 367, 22 C.E.L.R. (N.S.) 167 (B.C. S.C.) — referred to

Canada (Director of Investigation & Research) v. Southam Inc., 144 D.L.R. (4th) 1, 71 C.P.R. (3d) 417, [1997] 1 S.C.R. 748, 209 N.R. 20, 50 Admin. L.R. (2d) 199 (S.C.C.) — applied

Haida Nation v. British Columbia (Minister of Forests) (1997), 45 B.C.L.R. (3d) 80, 153 D.L.R. (4th) 1, 98 B.C.A.C. 42, 161 W.A.C. 42, 25 C.E.L.R. (N.S.) 103, [1998] 6 W.W.R. 215, [1998] 1 C.N.L.R. 98 (B.C. C.A.) — considered

Hopkinson v. Ontario (Director, Southwestern Region, Ministry of the Environment) (June 10, 1993), Doc. 00099.A1, 00100.A1 (Ont. Environmental App. Bd.) — considered

Howe Sound Pulp & Paper Ltd. v. British Columbia (Environmental Appeal Board) (1999), 29 C.E.L.R. (N.S.) 224 (B.C. S.C.) — considered

Kovach, Re (1998), (sub nom. *Kovach v. Workers' Compensation Board (B.C.)*) 108 B.C.A.C. 283, (sub nom. *Kovach v. Workers' Compensation Board (B.C.)*) 176 W.A.C. 283, 52 B.C.L.R. (3d) 98, [1999] 1 W.W.R. 498, 12 Admin. L.R. (3d) 180 (B.C. C.A.) — referred to

Kovach, Re, 2000 SCC 3, (sub nom. *Kovach v. Workers' Compensation Board (B.C.)*) 251 N.R. 356, (sub nom. *Kovach v. British Columbia (Workers' Compensation Board)*) 184 D.L.R. (4th) 415, (sub nom. *Kovach v. Workers' Compensation Board (B.C.)*) 133 B.C.A.C. 85, (sub nom. *Kovach v. Workers' Compensation Board (B.C.)*) 217 W.A.C. 85, (sub nom. *Kovach v. British Columbia (Workers' Compensation Board)*) [2000] 1 S.C.R. 55 (S.C.C.) — considered

Olson v. British Columbia (Ministry of Environment & Parks) (August 21, 1989), Doc. Duncan 2286 (B.C. S.C.) — referred to

Pezim v. British Columbia (Superintendent of Brokers), 4 C.C.L.S. 117, [1994] 2 S.C.R. 557, 114 D.L.R. (4th)

385, (sub nom. *Pezim v. British Columbia (Securities Commission))* 168 N.R. 321, [1994] 7 W.W.R. 1, 92 B.C.L.R. (2d) 145, 22 Admin. L.R. (2d) 1, 14 B.L.R. (2d) 217, (sub nom. *Pezim v. British Columbia (Securities Commission))* 46 B.C.A.C. 1, (sub nom. *Pezim v. British Columbia (Securities Commission))* 75 W.A.C. 1 (S.C.C.) — applied

Pushpanathan v. Canada (Minister of Employment & Immigration), 226 N.R. 201, (sub nom. *Pushpanathan v. Canada (Minister of Citizenship & Immigration))* 160 D.L.R. (4th) 193, (sub nom. *Pushpanathan v. Canada (Minister of Citizenship & Immigration))* [1998] 1 S.C.R. 982, 43 Imm. L.R. (2d) 117, 11 Admin. L.R. (3d) 1 (S.C.C.) — applied

R. v. Black & Decker Manufacturing Co. (1974), 15 C.C.C. (2d) 193, [1975] 1 S.C.R. 411, 13 C.P.R. (2d) 97, 43 D.L.R. (3d) 393, 1 N.R. 299 (S.C.C.) — considered

R. v. Consolidated Maybrun Mines Ltd., 108 O.A.C. 161, 158 D.L.R. (4th) 193, 123 C.C.C. (3d) 449, 225 N.R. 41, 38 O.R. (3d) 576 (note), [1998] 1 S.C.R. 706, 7 Admin. L.R. (3d) 23, 26 C.E.L.R. (N.S.) 262 (S.C.C.) — referred to

R. v. Jewitt, [1985] 2 S.C.R. 128, [1985] 6 W.W.R. 127, 20 D.L.R. (4th) 651, 61 N.R. 159, 21 C.C.C. (3d) 7, 47 C.R. (3d) 193 (S.C.C.) — referred to

R. v. Keyowski, 83 N.R. 296, [1988] 1 S.C.R. 657, [1988] 4 W.W.R. 97, 65 Sask. R. 122, 40 C.C.C. (3d) 481, (sub nom. *Keyowski v. R.)* 62 C.R. (3d) 349, 32 C.R.R. 269 (S.C.C.) — referred to

R. v. Miles of Music Ltd. (1989), 31 O.A.C. 380, 48 C.C.C. (3d) 96, 23 C.I.P.R. 16, 24 C.P.R. (3d) 301, 69 C.R. (3d) 361, 43 C.R.R. 294, 74 O.R. (2d) 518 (Ont. C.A.) — referred to

R. v. O'Connor (1995), [1996] 2 W.W.R. 153, [1995] 4 S.C.R. 411, 44 C.R. (4th) 1, 103 C.C.C. (3d) 1, 130 D.L.R. (4th) 235, 191 N.R. 1, 68 B.C.A.C. 1, 112 W.A.C. 1, 33 C.R.R. (2d) 1 (S.C.C.) — referred to

R. v. Power, 2 M.V.R. (3d) 161, [1994] 1 S.C.R. 601, 89 C.C.C. (3d) 1, 117 Nfld. & P.E.I.R. 269, 365 A.P.R. 269, 165 N.R. 241, 29 C.R. (4th) 1 (S.C.C.) — referred to

R. v. Repap Smithers Ltd. (November 29, 1991), Doc. Smithers 8811-C (B.C. Prov. Ct.) — distinguished

Salomon v. Salomon & Co. (1896), [1897] A.C. 22, 45 W.R. 193, [1895-99] All E.R. Rep. 33 (U.K. H.L.) — referred to

Swamy v. Tham Demolition Ltd., 2000 BCSC 1253, 35 C.E.L.R. (N.S.) 105, 81 B.C.L.R. (3d) 293 (B.C. S.C. [In Chambers]) — referred to

Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. Union des employés de service, local 298, 35 Admin. L.R. 153, 95 N.R. 161, 89 C.L.L.C. 14,045, 24 Q.A.C. 244, (sub nom. *Union des employés de service, local 298 v. Bibeault)* [1988] 2 S.C.R. 1048 (S.C.C.) — referred to

United States v. Bestfoods (1998), 118 S. Ct. 1876, 141 L. Ed. 2d 43, 157 A.L.R. Fed. 735, 28 Envtl. L. Rep. 21,225 (U.S.S.C.) — considered

Victoria (City) v. Bishop of Vancouver Island, [1921] 3 W.W.R. 214, [1921] 2 A.C. 384, 59 D.L.R. 399 (British Columbia P.C.) — referred to

Westminster Bank Ltd. v. Zang (1965), [1966] A.C. 182, [1966] 1 All E.R. 114 (U.K. H.L.) — referred to

Will-Kare Paving & Contracting Ltd. v. R., 2000 SCC 36, 2000 D.T.C. 6467 (Eng.), 2000 D.T.C. 6479 (Fr.), (sub nom. *Will-Kare Paving & Contracting Ltd. v. Canada*) 188 D.L.R. (4th) 242, [2000] 3 C.T.C. 463, (sub nom. *Will-Kare Paving & Contracting Ltd. v. Minister of National Revenue*) 255 N.R. 208, (sub nom. *Will-Kare Paving & Contracting Ltd. v. Canada*) [2000] 1 S.C.R. 915 (S.C.C.) — referred to

724597 Ontario Ltd., Re (1995), 18 C.E.L.R. (N.S.) 137, (sub nom. *Ontario (Ministry of the Environment & Energy) v. 724597 Ontario Inc.*) 26 O.R. (3d) 423 (Ont. Div. Ct.) — considered

Statutes considered:

Commercial River Rafting Safety Act, R.S.B.C. 1996, c. 56

Generally — referred to

Competition Act, R.S.C. 1985, c. C-34

Generally — referred to

Comprehensive Environmental Response, Compensation and Liability Act, 1980, 42 U.S.C.

ss. 9601-9657 — referred to

Environment Management Act, S.B.C. 1981, c. 14

Generally — referred to

Environment Management Act, R.S.B.C. 1996, c. 118

Generally — referred to

Fisheries Act, R.S.C. 1970, c. F-14

Generally — referred to

Health Act, R.S.B.C. 1996, c. 179

Generally — referred to

Interpretation Act, R.S.B.C. 1996, c. 238

s. 8 — considered

Medical Practitioners Act, R.S.B.C. 1996, c. 285

s. 71 — referred to

Pesticide Control Act, R.S.B.C. 1996, c. 360

Generally — referred to

Pollution Control Act, R.S.B.C. 1979, c. 332

Generally — referred to

Public Utilities Board Act, R.S.A. 1970, c. 302

s. 98 — referred to

Utilities Commission Act, R.S.B.C. 1996, c. 473

s. 102 — referred to

Waste Management Act, R.S.B.C. 1996, c. 482

Generally — referred to

Pt. 4 [rep. & sub. R.S.B.C. 1996, c. 482 (Supp.), s. 3] — referred to

s. 26(1) "operator" [en. R.S.B.C. 1996, c. 482 (Supp.), s. 3] — considered

s. 26(1) "owner" [en. R.S.B.C. 1996, c. 482 (Supp.), s. 3] — considered

s. 26(2) [en. R.S.B.C. 1996, c. 482 (Supp.), s. 3] — referred to

s. 26.2 [en. R.S.B.C. 1996, c. 482 (Supp.), s. 3] — referred to

s. 26.4 [en. R.S.B.C. 1996, c. 482 (Supp.), s. 3] — referred to

s. 26.5 [en. R.S.B.C. 1996, c. 482 (Supp.), s. 3] — considered

s. 26.5(1) [en. R.S.B.C. 1996, c. 482 (Supp.), s. 3] — considered

s. 26.5(1)(b) [en. R.S.B.C. 1996, c. 482 (Supp.), s. 3] — considered

s. 26.5(1)(c) [en. R.S.B.C. 1996, c. 482 (Supp.), s. 3] — considered

s. 26.5(3) [en. R.S.B.C. 1996, c. 482 (Supp.), s. 3] — considered

s. 26.5(3)(c) [en. R.S.B.C. 1996, c. 482 (Supp.), s. 3] — considered

s. 26.5(3)(d) [en. R.S.B.C. 1996, c. 482 (Supp.), s. 3] — considered

s. 26.6(1) [en. R.S.B.C. 1996, c. 482 (Supp.), s. 3] — considered

s. 26.6(1)(a) [en. R.S.B.C. 1996, c. 482 (Supp.), s. 3] — considered

s. 26.6(1)(b) [en. R.S.B.C. 1996, c. 482 (Supp.), s. 3] — considered

s. 26.6(1)(c) [en. R.S.B.C. 1996, c. 482 (Supp.), s. 3] — considered

s. 26.6(1)(d) [en. R.S.B.C. 1996, c. 482 (Supp.), s. 3] — considered

s. 26.6(1)(h) [en. R.S.B.C. 1996, c. 482 (Supp.), s. 3] — considered

s. 27(1) [en. R.S.B.C. 1996, c. 482 (Supp.), s. 3] — referred to

s. 27(4) [en. R.S.B.C. 1996, c. 482 (Supp.), s. 3] — considered

s. 27.1 [en. R.S.B.C. 1996, c. 482 (Supp.), s. 3] — considered

s. 27.1(1) [en. R.S.B.C. 1996, c. 482 (Supp.), s. 3] — considered

s. 27.1(2) [en. R.S.B.C. 1996, c. 482 (Supp.), s. 3] — referred to

s. 27.1(3) [en. R.S.B.C. 1996, c. 482 (Supp.), s. 3] — referred to

s. 27.1(4) [en. R.S.B.C. 1996, c. 482 (Supp.), s. 3] — considered

s. 27.1(4)(a) [en. R.S.B.C. 1996, c. 482 (Supp.), s. 3] — considered

s. 27.1(4)(b) [en. R.S.B.C. 1996, c. 482 (Supp.), s. 3] — considered

s. 27.1(4)(b)(i) [en. R.S.B.C. 1996, c. 482 (Supp.), s. 3] — referred to

s. 27.1(4)(b)(ii) [en. R.S.B.C. 1996, c. 482 (Supp.), s. 3] — referred to

s. 27.2 [en. R.S.B.C. 1996, c. 482 (Supp.), s. 3] — referred to

s. 27.2(1) [en. R.S.B.C. 1996, c. 482 (Supp.), s. 3] — referred to

s. 27.3 [en. R.S.B.C. 1996, c. 482 (Supp.), s. 3] — referred to

s. 27.4 [en. R.S.B.C. 1996, c. 482 (Supp.), s. 3] — referred to

s. 28.7 [en. R.S.B.C. 1996, c. 482 (Supp.), s. 3] — considered

ss. 43-48 — referred to

s. 44 — pursuant to

s. 47 — considered

s. 48 — considered

s. 54(20) [en. R.S.B.C. 1996, c. 482 (Supp.), s. 5] — referred to

Waste Management Amendment Act, 1993, S.B.C. 1993, c. 25

Generally — referred to

Water Act, R.S.B.C. 1996, c. 483

Generally — referred to

Wildlife Act, R.S.B.C. 1996, c. 488

Generally — referred to

Regulations considered:

Waste Management Act, R.S.B.C. 1996, c. 482

Contaminated Sites Regulation, B.C. Reg. 375/96

Generally

ss. 19-33

s. 34

s. 35

s. 35(2)

s. 35(2)(f)

s. 35(5)

PETITIONS by companies for order of certiorari quashing or setting aside remediation order and portions of decision of Environmental Appeal Board, and for declarations relieving them from responsibility for remediation of property.

Tysoe J.:

INTRODUCTION

1 Beazer East, Inc. ("Beazer") and Atlantic Industries Limited ("Atlantic") both challenge, by way of judicial review, the decision of the Environmental Appeal Board (the "Board") dated March 29, 2000. The Board upheld the decision of the Assistant Regional Waste Manager (the "Manager") to name Beazer and Atlantic as responsible persons in a remediation order (the "Remediation Order") issued under s. 27.1 of the *Waste Management Act*, R.S.B.C. 1996, c. 482, as amended (the "*Act*"). Canadian National Railway Company ("CNR") was also named as a responsible person in the Remediation Order, but it did not appeal the Manager's decision and it has supported the Remediation Order, both before the Board and this Court.

2 Beazer and Atlantic have separately challenged the Remediation Order in two different proceedings. I am issuing one set of Reasons for Judgment for both proceedings because it is the same decision of the Board which is the subject matter of each proceeding and the Petitions in the two proceedings were heard together. Although the basis for attacking the Remediation Order is different in each proceeding, there is considerable overlap between the two matters.

UNDERLYING FACTS

3 I propose to set out the underlying facts which I do not believe are in dispute. As these are judicial review proceedings, it would be inappropriate for me to make any findings of fact (except, possibly, by way of negating a finding of fact unsupported by the evidence). It would be particularly inappropriate for me to appear to make any findings of fact in the circumstances of this matter because some of the issues dealt with by the Board may also be considered by this Court in pending actions pursuant to s. 27(4) of the *Act*. Hence, I wish to stress that although I may state certain things as facts, I am not making any findings of fact in this matter.

4 The property which is the subject matter of the Remediation Order is located at 8335 Meadow Avenue, Burnaby, along the Fraser River (the "Site"). It is contaminated as a result of a wood treatment operation which was carried on from 1931 to 1982. The Site was owned throughout this period by CNR and was leased to the operators of the wood treatment business.

5 The operator of the business remained the same from 1931 until the last 6 or 7 months of operation in 1982 but it had different names and owners, both during and after this period. It was named Timber Preservers Ltd. at the beginning of the period and changed its name to (i) TPL Industries Ltd. in 1967, (ii) Koppers International (Canada) Ltd. in 1973 and (iii) Atlantic Industries (Canada) Limited in 1989. I will refer to this company as the "Principal Operator".

6 In 1948, Swanson Lumber Co. Ltd. ("Swanson") acquired a controlling interest in the Principal Operator. In 1969, Beazer purchased the shares of Swanson and thereby became the parent corporation of the Principal Operator (although Beazer was then named Koppers Company Inc. and subsequently had another name, I will refer to it throughout as Beazer). This structure continued until 1981 when Beazer decided to sell Swanson, but not the Principal Operator. In order to facilitate the transaction, Beazer caused Swanson to transfer its shares in the Principal Operator to a numbered company owned by Beazer and the shares in Swanson were then transferred to the purchaser.

7 In April 1980, the Ministry of Environment issued an order under the *Pollution Control Act*, the predecessor of the *Act*, requiring the Principal Operator to clean up oily contaminants on the surface of the Fraser River and on the bottom sediments along the river-bank. In June 1980, the Principal Operator was charged with discharging oily wastes into the Fraser River and another order was issued under the *Pollution Control Act* requiring the Principal Operator to undertake a detailed assessment of the Site and to clean up the residual contaminants. The Principal Operator pleaded guilty to one charge and was fined $7,500.

8 In November 1981, there was a spill of pentachlorophenol into the Fraser River from the Site and charges were laid under the *Fisheries Act* (Canada). The Principal Operator pleaded guilty to one charge and was fined $6,000. In

June 1982, a pollution abatement order was issued to the Principal Operator under the *Pollution Control Act*. The order required the submission of plans for the dredging of the foreshore and reclamation of the shore of the Site.

9 In the spring of 1982, the Principal Operator sold its wood treatment assets to Domtar Inc. ("Domtar") which carried on the operation for approximately 6 months until it was permanently closed in the fall of 1982. The Principal Operator continued to carry on its other operations, which involved the manufacture of culverts at other locations.

10 Remedial work was carried out at the Site and, in June 1983, the Ministry of Environment advised the Principal Operator that the Site had been cleaned to its satisfaction. The Site was monitored following the completion of the remedial work and the monitoring continued until 1986, when the Ministry of Environment internally concluded that the requirements of the pollution abatement order had been satisfied.

11 In 1988, the shares in the Principal Operator were sold by Beazer to Border Enterprises Limited ("Border"). The Principal Operator amalgamated with another Border subsidiary in 1993 under the name of Atlantic (the other Border subsidiary had the same name as the amalgamated company).

12 CNR sold the Site to another party in 1984 and it has been sold on two subsequent occasions. The current owners are a group of eight companies.

13 In 1995, potential problems regarding the Site were brought to the attention of the Manager. In the summer of 1997, following the proclamation of the current Part 4 of the *Act*, the Manager invited submissions as to who should be required to remediate the Site. After receiving submissions, the Manager issued the Remediation Order on December 19, 1997 naming the following parties as persons responsible for remediation at the Site under s. 26.5(1) of the *Act*:

(a) Beazer, as a previous owner, operator and producer;

(b) Atlantic, as a previous operator; and

(c) CNR, as a previous owner.

Beazer and Atlantic each appealed the Manager's decision to name them in the Remediation Order.

DECISION OF ENVIRONMENTAL APPEAL BOARD

14 The appeals of Beazer and Atlantic were pursuant to s. 44 of the *Act* to the Board, which was established under the *Environment Management Act*, R.S.B.C. 1996, c. 118. Under s. 47 of the *Act*, the Board is authorized to confirm, reverse or vary the Manager's decision or to make any decision that the Manager could have made. The appeal was a hearing *de novo* and, after hearing evidence called by the parties, the Board made its own decisions with respect to the Remediation Order.

15 I will discuss the Board's decision in greater detail as I deal with the various challenges by Beazer and Atlantic. At this stage, I will simply set out a summary of the Board's conclusions:

(a) Beazer was a responsible person by virtue of being a previous owner and operator under s. 26.5(1)(b) of the *Act* but the Manager was wrong in concluding that Beazer had been a producer under s. 26.5(1)(c);

(b) Beazer was not entitled to an exemption under s. 26.6(1)(h) as being a person who provided assistance or advice respecting remediation work;

(c) the Manager had not improperly exercised his discretion in naming Beazer as a responsible person in the Remediation Order;

(d) Atlantic was a responsible person by virtue of being a previous owner and operator under s. 26.5(1)(b);

(e) Atlantic was not entitled to an exemption under s. 26.6(1)(d) as being a person who became an owner of a contaminated site without knowledge of the contamination;

(f) the Manager had not improperly exercised his discretion in naming Atlantic as a responsible person in the Remediation Order;

(g) the Remediation Order should not be vacated against Atlantic on the basis of an abuse of process; (h) the Board had no jurisdiction to stay the Remediation Order as against Atlantic pending the resolution of the outstanding legal action authorized by s. 27(4).

16 In the result, the Board dismissed the appeals of Beazer and Atlantic and upheld the Remediation Order, with the exception of the reference to Beazer being a producer under s. 26.5(1)(c).

17 In these proceedings, Beazer challenges each of the Board's conclusions relating to it and Atlantic challenges the last three of the Board's conclusions. Atlantic does not challenge the conclusions that it is a responsible person as a previous owner and operator and that it is not entitled to an exemption under s. 26.6(1)(d).

LEGISLATIVE SCHEME

18 Part 4 of the *Act* was brought into force on April 1, 1997. At the same time, the Cabinet enacted the *Contaminated Sites Regulation.*

19 Section 26.2 of the *Act* authorizes a manager to order an investigation of a site which he or she suspects is contaminated. Section 26.4 allows a manager to make a determination that a site is contaminated.

20 Section 26.5 provides that certain listed categories of persons are responsible for remediation of a contaminated site. The categories include current and previous owners and operators of sites. Those terms are defined in s. 26(1) as follows:

"owner" means 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);

"operator" means, subject to subsection (2), 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);

Subsection (2), which is referred to in the definition of "operator", has no application to these proceedings.

21 Section 26.6(1) lists the exemptions for persons who are not responsible for remediating a contaminated site. The one which is relevant to this matter is clause (h), which reads as follows:

(h) a person who provides assistance or advice respecting remediation work at a contaminated site in accordance with this Act, unless the assistance or advice was carried out in a negligent fashion;

22 Section 27(1) states that a responsible person is "absolutely, retroactively and jointly and severally liable" for reasonably incurred costs of remediation of the contaminated site. Section 27(4) provides that any person who incurs costs in carrying out remediation at a contaminated site may pursue legal action for costs of remediation from one or more responsible persons. This is the legal proceeding which has been called a "cost recovery action" or an "allocation proceeding". In addition to these terms, I will refer to it as a "cost recovery/allocation proceeding".

23 Section 27.1 is very important in these proceedings. Subsection (1) reads as follows:

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

Subsection (2) states that a remediation order may require the named persons to undertake remediation, make a financial contribution to another person who had incurred remediation costs or give security. Subsection (3) sets out factors for the manager to consider when deciding whether remediation should begin promptly. Subsection (4) reads as follows:

> (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.

24 Section 27.2 provides that on request of a person, a manager may appoint an allocation panel to provide an opinion on, among other things, the contribution of a responsible person to the contamination. The section sets out the factors for the allocation panel to take into account. The opinion of the allocation panel is not binding on the manager.

25 Section 27.3 allows a manager to determine a responsible person to be a minor contributor, in which case that person is not liable in a cost recovery/allocation proceeding for more than the amount or portion of the remediation costs specified by the manager. Section 27.4 contains provisions for the manager to enter into voluntary remediation agreements with responsible persons.

26 Section 28.7 states that a manager may exercise any of the manager's powers even though they may have been previously exercised if one of 6 conditions exists. Those conditions include additional information becoming available, revised standards and the site posing a threat to human health or the environment.

27 The final provision of the *Act* relevant to these proceedings which I will mention at this stage is s. 54(20). It states that a person who fails to comply with a remediation order commits an offence and is liable to a fine up to the sum of $200,000.

28 The pertinent sections of the *Contaminated Sites Regulation* are ss. 34 and 35. Section 34 states that nothing in s. 27(1) of the *Act* shall be construed as prohibiting the apportionment of liability by a manager through the issuance of a remediation order or by the court in a cost recovery/allocation proceeding. Section 35 of the Regulation contains provisions governing certain aspects of cost recovery/allocation proceedings. Subsection (2) sets out the factors to be considered in determining the appropriate allocation between responsible persons. These factors are similar, but not identical, to the factors to be considered by an allocation panel under s. 27.2 of the *Act*. The wording of subsection (5) is relevant to one of the issues in these proceedings, and it reads as follows:

> (5) In an action under section 27(4) of the Act, a corporation is not liable for the costs of remediation arising from the actions of a subsidiary corporation unless the plaintiff can prove that the corporation authorized, permitted or acquiesced in the activity of the subsidiary corporation which gave rise to the costs of remediation.

A similar provision with respect to the liability of directors, officers and employees is contained in the preceding subsection.

LEGISLATIVE HISTORY

29 In view of the submissions made by the parties, it is also necessary to consider the history of the enactment of Part 4 of the *Act* and the Contaminated Sites Regulation.

30 In March 1993, a group called the Canadian Council of Ministers of the Environment (the "CCME") produced a report on contaminated site liability. The report was prepared by a core group of 10 organizations which included the environment ministries of 4 provinces and the federal government. The B.C. environment ministry was not part of the core group but it was one of the 38 organizations listed as workshop participants.

31 The CCME report made 13 recommendations with a view of providing a model framework upon which individual governments in Canada could develop legislation. One of the stated objectives was to promote and facilitate a consistent approach to the issue of environmental liability across Canada.

32 The CCME report recommended that the most effective way to cast a broad net of liability was to list specific classes of persons who may be identified as potential responsible persons and to have a "catch-all clause" to bring in other potentially responsible persons into the net. It suggested that the list could include, among others, parent corporations. The report noted that industry representatives had made the point that parent corporations should remain in the net only if the subsidiary corporation was established primarily to avoid responsibility. After pointing out the position of the industry representatives, the report stated that it was only recommending 2 other statutory exemptions (namely, exemptions in respect of lenders and receivers/trustees).

33 Part 4 of the *Act* was added by the *Waste Management Amendment Act*, 1993. It was passed by the Legislature on June 15, 1993 but it was not proclaimed until April 1, 1997. In the meantime, the Ministry of Environment, Lands and Parks retained a professor at the University of Victoria, Chris Tollefson, to conduct an external review of Part 4 and associated draft regulations. After holding stakeholder consultation meetings and analyzing the remediation scheme, Professor Tollefson issued a report dated July 31, 1996.

34 Professor Tollefson concluded that Part 4 would operate in a manner that is consistent with the Ministry's principle of "polluter pay" but that the regime could be overbroad in some limited respects by imposing liabilities on responsible persons that are disproportionate to their relative contribution to site contamination. One of the areas of concern was the imposition of liability on a parent corporation for the actions of its subsidiary.

35 In his report Professor Tollefson said the following about the definition of "owner" in Part 4:

> Interpreted literally, the italicized phrase "has the right to control of" found in the definition of "owner" would appear to expand the potential liability of parent corporations considerably beyond the common law concepts of "sham" and "agency". Indeed the terminology "right of control" would seem to justify attributing liability directly to a parent where the parent had only an unexercised capacity to control the affairs of the subsidiary.

He went on to express the concern that there was a very real prospect that parent corporations will be named in private cost recovery actions involving their subsidiaries even where there is no evidence to suggest that the parent exercised any control over the activities of the subsidiary. He concluded that cost recovery plaintiffs should be required to prove that the parent corporation "authorized, permitted or acquiesced" in the activity giving rise to the contamination.

36 I interject to observe that Professor Tollefson did not explain the rational of why parent corporations which do not authorize, permit or acquiesce in the contaminating activity should be given a defence in cost recovery/allocation proceedings but should still be exposed to being named in remediation orders.

37 The Cabinet apparently accepted Professor Tollefson's recommendation in this regard because the wording recommended by him is found in s. 35(5) of the Contaminated Sites Regulation which was enacted on April 1, 1997, the same day on which the *Waste Management Amendment Act*, 1993 was proclaimed.

STANDARD OF REVIEW

38 The traditional approach in considering whether the court should interfere with the decision of an administrative tribunal was to determine whether the tribunal had made a jurisdictional error. The approach has been changed by a number of decisions of the Supreme Court of Canada in the past dozen years to what is called the "pragmatic and functional approach". The change began in *Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. Union des employés de service, local 298*, [1988] 2 S.C.R. 1048 (S.C.C.) and has continued with three decisions which all counsel agree are the leading authorities for the purposes of these proceedings, *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 (S.C.C.), *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.) and *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.).

39 In *Pezim*, the Court stressed that there is a spectrum for the applicable standard of review. It ranges from a standard of correctness to a standard of reasonableness. At the correctness end of the spectrum, the courts give the least amount of deference to the administrative tribunal and will interfere if the decision of the tribunal is incorrect. At the other end of the spectrum, the courts give the highest level of deference to the tribunal and will only interfere if the decision is patently unreasonable.

40 Although the standard of review can be located at any point along the spectrum, the Court in *Southam Inc.* gave recognition to a particular point on the spectrum between the two extremes. This point is a standard of reasonableness *simpliciter*. The Court explained this third standard as follows:

> I conclude that the third standard should be whether the decision of the Tribunal is unreasonable. This test is to be distinguished from the most deferential standard of review, which requires courts to consider whether a tribunal's decision is patently unreasonable. An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it. An example of the former kind of defect would be an assumption that had no basis in the evidence, or that was contrary to the overwhelming weight of the evidence. An example of the latter kind of defect would be a contradiction in the premises or an invalid inference.

> The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable. (pp. 776-7)

The Court also stated the standard of reasonableness *simpliciter* was closely akin to the "clearly wrong" test utilized by appellate courts in reviewing findings of fact by trial judges. The Court concluded in this regard by stating that "the standard of reasonableness simply instructs reviewing courts to accord considerable weight to the views of tribunals about matters with respect to which they have significant expertise". (at p. 779)

41 The difference between "unreasonableness" and "patent unreasonableness" is demonstrated in *Kovach, Re*, [2000] 1 S.C.R. 55 (S.C.C.), a decision in which the Supreme Court of Canada allowed the appeal substantially for the dissenting reasons of Donald J.A. in the B.C. Court of Appeal (*Kovach, Re* (1998), 52 B.C.L.R. (3d) 98 (B.C. C.A.). In contrast to the standard of reasonableness *simpliciter*, which involves a "somewhat probing examination", Donald J.A. stated that the review test for patent unreasonableness is whether the result is patently unreasonable, irrespective of whether there may be defects in the tribunal's reasoning. (at p. 112)

42 In *Pushpanathan*, the Court set out the following four factors to be taken into account when applying the pragmatic and functional approach to determine the standard of review:

(a) privative clauses;

(b) expertise;

(c) purpose of the Act as a whole, and the provision in particular; and

(d) the nature of the problem.

I will now review these factors within the context of this matter.

(a) Privative Clauses

43 There is neither a private clause nor a statutory right of appeal under the *Act*. In *Pushpanathan*, the Court stated that the absence of a privative clause does not imply a high standard of scrutiny where the other factors suggest a low standard and that a statutory right of appeal suggests a more searching standard of review. (at p. 773)

44 While the absence of a privative clause and a statutory right of appeal suggests that this factor does not point strongly to either extreme of the spectrum, there is another aspect of the legislation which I believe should be taken into account when considering this factor.

45 While the *Act* empowers a manager to investigate and determine whether a site is contaminated and to order responsible persons to remediate the site, the Legislature decided that the courts should be authorized to determine the allocation of responsibility for the contamination. Section 27(4) of the *Act* provides that any person who incurs costs of remediation may commence legal action for contribution from one or more responsible persons and s. 35(5) of the Contaminated Sites Regulation sets out the factors to be considered by the court in such an action. Section 27.2(1) also provides for allocation of responsibility to be considered by an allocation panel but the opinions of allocation panels are not binding and it is more likely that a person who incurs remediation costs will resort to legal action unless there is a reasonable prospect of a voluntary remediation agreement among all responsible persons.

46 In an action under s. 27(4), it will be necessary for the courts to determine who are responsible persons in order to allocate the responsibility for the contamination. This means that the courts will be considering the definitions of, among others, "owner" and "operator", the interpretation of which is central to Beazer's challenge of the Board's decision in this case. In other cases, both the courts and the Board will have to interpret s. 26.5 to determine if persons are responsible persons by virtue of being producers or transporters.

47 In my view, it would lead to embarrassment and unjust results if the courts and the Board arrived at different interpretations of the definitions of "owner" and "operator" (or any other provision of the *Act* in common to both the remediation order process and cost recovery/allocation proceedings). This points to a lesser degree of deference to be accorded to the Board in its interpretation of these two definitions.

48 It is my understanding that counsel for the Manager agrees with my conclusion in this regard but counsel for the Board submits that the existence of a civil cause of action is not relevant to the Court's determination of the standard of review. Counsel points to the Southam Inc. case, which involved the *Competition Act*, and says that it also contains provisions by which individual plaintiffs can pursue statutory civil actions based on conduct contrary to the offence provisions of that *Act*. The distinction to be made, in my view, is that the Southam Inc. decision involved an issue of mixed law and fact while the interpretation of the definitions in this case is an issue of law. There is much less likelihood of embarrassment and unjust results with respect to contrary conclusions by the courts and the administrative tribunal on issues of mixed law and fact because the facts will be different in each case.

49 It should not be taken as saying that this factor is determinative of the standard of review. I am simply saying that it is a factor to be taken into account and that it is a factor which weighs in the direction of less deference. It may well be outweighed by other factors.

(b) Expertise

50 In Southam Inc., the factor of expertise was described as the most important of the factors that a court must consider in settling on the appropriate standard of review.

51 In Pushpanathan, Bastarache J., on behalf of the majority of the Court, reiterated that expertise is a relative, not an absolute concept. He explained the dimensions of this factor:

> Making an evaluation of relative expertise has three dimensions: the court must characterize the expertise of the tribunal in question; it must consider its own expertise relative to that of the tribunal; and it must identify the nature of the specific issue before the administrative decision-maker relative to this expertise. (p. 1007)

He then observed that the criteria of expertise and the nature of the problem are closely interrelated. Bastarache J. also commented that if a broad relative expertise is established, the Court is sometimes prepared to show considerable deference even in cases of highly generalized statutory interpretation where the instrument being interpreted is the tribunal's constituent legislation. (at p. 1007 of [1997] 1 S.C.R.) In Pushpanathan itself, the Court concluded that the decision of the tribunal should be subjected to a standard of correctness because, for among other reasons, the tribunal did not enjoy relative expertise on the issue of law in question.

52 In the present case, the Board was established in 1981 under the *Environment Management Act*. In addition to its functions under the *Act*, it hears appeals under several other environmental statutes, including the *Commercial River Rafting Safety Act*, the *Health Act*, the *Pesticide Control Act*, the *Water Act* and the *Wildlife Act*. Counsel for the Board advised that its members presently include a health professional, several professional engineers, a biologist, a consultant on environmental regulatory issues, a pulp and paper worker with experience as an environmental officer, an agrologist, a retired industrial arts instructor, a former Crown counsel and several lawyers specializing in envi-

ronmental law. The expertise of the Board in environmental matters has been recognized in numerous previous decisions: see *Olson v. British Columbia (Ministry of Environment & Parks)* (August 21, 1989), Doc. Duncan 2286 (B.C. S.C.); *British Columbia (Minister of Health) v. British Columbia (Environmental Appeal Board)* (1996), 26 B.C.L.R. (3d) 367 (B.C. S.C.); *Howe Sound Pulp & Paper Ltd. v. British Columbia (Environmental Appeal Board)* (1999), 29 C.E.L.R. (N.S.) 224 (B.C. S.C.) and *Swamy v. Tham Demolition Ltd.*, 2000 BCSC 1253 (B.C. S.C. [In Chambers]).

53 As pointed by Bastarache J. in *Pushpanathan*, it is necessary to consider the aspect of expertise in light of the nature of the issue before the tribunal and the Court must consider its own expertise relative to that of the tribunal. There are numerous issues in question in these proceedings. Some of them are matters of statutory interpretation in respect of which the Court has more expertise than the Board. The *Act* is not the Board's constituent legislation and the issues of statutory interpretation do not involve questions which engage the Board's expertise.

54 Some of the issues relate to the jurisdiction of the Board. It is agreed by all counsel that true questions of jurisdiction are subject to a standard of correctness, but there are disagreements as to whether particular issues which have classified by Atlantic as questions of jurisdiction properly fall within that category.

55 There are issues which are not solely restricted to statutory interpretation or the Board's jurisdiction. The Board's expertise does come into play with respect to such issues and deference should be given to the Board on those issues. As the level of the Board's expertise increases, the level of deference given to the Board's decision will increase correspondingly.

(c) Purposes of the *Act*

56 The purposes of the *Act* are the prevention of pollution and the identification and remediation of contaminated sites: see *Howe Sound Pulp & Paper Ltd.* (at p. 231), *Swamy* (at para. 36) and *British Columbia (Minister of Environment, Lands & Parks) v. Alpha Manufacturing Inc.* (1996), 132 D.L.R. (4th) 688 (B.C. S.C.) at p. 693. It is the latter purpose which is the focus of Part 4 of the *Act*.

57 In *Swamy*, Hunter J. concluded that the principles set out in *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 (S.C.C.) by the Supreme Court of Canada applied to our legislation. In that case, the Court held that the purpose of the legislation before it was to prevent and remedy environmental contamination. The Court also said the following about the remediation purpose:

> Such a purpose requires rapid and effective means in order to ensure that any necessary action is taken promptly. This purpose is reflected both in the scope of the powers conferred on the Director and in the establishment of an appeal procedure designed to counterbalance the broad powers conferred on the Director by affording affected individuals an opportunity to present their points of view and assert their rights as quickly as possible...
>
> (para. 59)

Similarly, the purpose of remediation under the *Act* encompasses the need for expeditious action. The *Act* empowers a manager to issue a remediation order as required and anyone named as a responsible person has a right of appeal to the Board. The ultimate allocation of responsibility is left by the *Act* to a more time-consuming court process unless there is a voluntary remediation agreement among all responsible persons.

58 These purposes point to a higher level of deference to the Board, especially in situations where its expertise is engaged or where the matter in question involves an exercise of discretion by a manager or the Board.

(d) Nature of the Problem

59 There was an instructive discussion in *Southam Inc.* about this topic. The Court summarized the types of potential problems as follows:

> Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. A simple example will illustrate these concepts. In the law of tort, the question what "negligence" means is a question of law. The question whether the defendant did this or that is a question of fact. And, once it has been decided that the applicable standard is one of negligence, the question whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact. I recognize, however, that the distinction between law on the one hand and mixed law and fact on the other is difficult. (pp. 766-7)

The Court gave guidance with respect to distinguishing between questions of law and questions of mixed law and fact in the following passage:

> To some extent, then, the question resembled one of mixed law and fact. But the question was one of law, in part because the words in question were present in a statutory provision and questions of statutory interpretation are generally questions of law, but also because the point in controversy was one which might potentially arise in many cases in the future... (p. 767)

In the present context, the interpretation of the definitions of "owner" and "operator" in the *Act* involves statutory interpretation and is likely to arise in many cases in the future.

60 The Court also gave an example of the difficulty in distinguishing between questions of law and questions of mixed law and fact:

> ...if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law. (pp. 768-9)

61 Another type of problem involved in this case is the exercise of discretion by the Manager. In *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), the Supreme Court of Canada confirmed that the pragmatic and functional approach should be applied in deciding the amount of deference to be given to the exercise of discretion by an administrative decision-maker. Included in the factors to be considered are the amount of choice given by the legislation to the decision-maker and the nature of the decision.

62 In this case, the issues before the Board included all types of questions, but neither Beazer nor Atlantic is directly challenging findings of fact made by the Board. Rather than discussing and characterizing all of the issues raised by Beazer and Atlantic at this stage, I will consider the nature of the problem when I deal with each of the issues.

(e) Conclusion on Standard of Review

63 Taking all of these factors into account, it is my conclusion that there should be different standards of review depending on the nature of the issue. It is my view that (i) the questions of law should be subjected to a standard of correctness and (ii) the questions of mixed law and fact should be subjected to a standard of reasonableness *simpliciter*. I will discuss the standard of review to be applied to the exercise of discretion by the Manager when I deal with the relevant issue because it will be necessary to consider the language of the relevant provision of the *Act* and the nature of the decision made by the Manager.

64 The questions of law in this case involve statutory interpretation and do not engage the expertise of the Board. The courts have more relative expertise than the Board in considering matters of statutory interpretation. However, the Board heard the evidence and its expertise does come into play with respect to the questions of mixed law and fact. More deference should be given to the Board on these questions and a standard of reasonableness *simpliciter* is the appropriate standard in my view.

PRINCIPLES OF STATUTORY INTERPRETATION

65 Before I address the particular challenges of the Board's decision, I wish to deal with a disagreement of a general nature between counsel for Beazer and counsel for the Manager with respect to the correct approach to statutory interpretation.

66 Counsel for the Manager advocates a purposive approach to statutory interpretation which she submits first involves a determination of the purpose of the legislation, which then governs the interpretation of the wording of the statute.

67 This approach of giving priority to the purpose of the legislation over the literal meaning of the words in the statute finds support in *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994). However, the approach was rejected by the B.C. Court of Appeal in *Haida Nation v. British Columbia (Minister of Forests)* (1997), 45 B.C.L.R. (3d) 80 (B.C. C.A.). Esson J.A., on behalf of the majority, preferred the general statement of statutory interpretation found at p. 87 of the second edition of *Driedger on the Construction of Statutes* (Toronto: Butterworths, 1983), which reads as follows:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. This principle is expressed repeatedly by modern judges, as, for example, Lord Reid in *Westminster Bank v. Zang*, and Culliton C.J. in *R. v. Mojelski.* Earlier expressions, though in different form, are to the same effect; Lord Atkinson in *Victoria (City) v. Bishop of Vancouver Island*, [1921] A.C. 384, at p. 387, put it this way:
>
>> In the construction of statutes their words must be interpreted in their ordinary grammatical sense, unless there be something in the context, or in the object of the statute in which they occur, or in the circumstances with reference to which they are used, to show that they were used in a special sense different from their ordinary grammatical sense.

I need not delve into Esson J.A.'s very thorough reasoning which speaks for itself. However, as counsel for the Manager replies that she is relying on decisions of the Supreme Court of Canada in addition to the third edition of *Driedger*, I will mention that Esson J.A. addressed the apparent division in that Court and concluded that its majority judgments continue to rely on the second edition of *Driedger*and ignore the third edition. The most recent example, which post-dates the decision in *Haida Nation*, is the case of *Will-Kare Paving & Contracting Ltd. v. R.* (2000), 188 D.L.R. (4th) 242 (S.C.C.), where the Court quoted the first sentence of the above passage from the second edition of *Driedger* without mentioning the third edition. (at p. 257)

68 Of course, the purpose of the legislation is relevant to its interpretation but it does not override the plain meaning of the words used in the legislation unless the purpose of the legislation would be defeated. In this regard, the second edition of *Driedger* (at p. 88) quotes the following passage from *Westminster Bank Ltd. v. Zang* (1965), [1966] 1 All E.R. 114 (U.K. H.L.):

> But no principle of interpretation of statutes is more firmly settled than the rule that the court must deduce the

> intention of Parliament from the words used in the Act. If those words are in any way ambiguous - if they are reasonably capable of more than one meaning - or if the provision in question is contradicted or is incompatible with any other provision in the Act, then the court may depart from the natural meaning of the words in question.

In the *Haida Nation* decision, Esson J.A. commented on the fact that there are shades of difference between this passage and the passage quoted in the second edition of *Driedger* from Victoria (City) v. Bishop of Vancouver Island [[1921] 2 A.C. 384 (British Columbia P.C.)] but those shades of difference do not come into play in the case at bar.

69 In addition, as pointed out by Esson J.A. in the *Haida Nation* decision, the Court is bound by s. 8 of the *Interpretation Act*, R.S.B.C. 1995, C. 238, which reads as follows:

> Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

I have already considered the purposes of the *Act*. Its objects are the prevention of pollution and the identification and remediation of contaminated sites. The *Act* must be given a fair, large and liberal interpretation to achieve these objects but, with this in mind, it is still necessary to give effect to the wording chosen by the Legislature.

70 Esson J.A. also made reference to s. 8 of the *Interpretation Act* in *British Columbia (Minister of Environment, Lands & Parks) v. Alpha Manufacturing Inc.* (1997), 150 D.L.R. (4th) 193 (B.C. C.A.), a decision which involved the interpretation of the *Act*. He stated that it is necessary to interpret the *Act* by reference to the legislative purpose and that it would be contrary to s. 8 to give effect to an interpretation which would negate an essential object of the *Act* (at p. 203). He rejected the strained and technical interpretation of the language of the *Act* being put forward by the appellant in that case.

SUMMARY OF BEAZER'S PETITION

71 Beazer first seeks an order in the nature of certiorari quashing or setting aside the Remediation Order against it. It next seeks an order in the nature of certiorari quashing or setting aside the portions of the Board's decision (i) finding Beazer to be a "previous operator" of the Site, (ii) finding Beazer to be a "previous owner" of the Site, (iii) finding that Beazer was not exempt for the remediation work it carried out at the Site and (iv) finding that the Manager properly exercised his discretion in naming Beazer in the Remediation Order. Beazer also seeks declarations that (i) it is not a responsible person, (ii) it is exempt for the remediation work it carried out at the Site and (iii) it did not "contribute most substantially" to the contamination at the Site and should not have been named in the Remediation Order. Alternatively, Beazer requests that the matter be remitted to the Board for reconsideration.

72 I will now deal with each of Beazer's submissions. I will utilize separate headings in which I will attempt to capture the essence of the issue.

WAS BEAZER A PREVIOUS OWNER?

73 The Board dealt first with the issue of whether Beazer fell within the definition of "operator", but the nature of the parties' submissions make it more convenient to begin by dealing with the issue of ownership.

(a) The Board's Decision

74 Although I am first considering the ownership issue, it is necessary to review some of the Board's conclusions with respect to the issue of whether Beazer was an operator because the conclusions are common to both issues.

75 The Board declined to follow a decision of the United States Supreme Court in the case of *United States v. Bestfoods*, 118 S. Ct. 1876 (U.S.S.C., 1998), which involved a consideration of the terms "operator" and "owner" under the U.S. federal environmental legislation, the *Comprehensive Environmental Response, Compensation and Liability Act*, 42 U.S.C. 9601-9657 (the "U.S. Legislation").

76 The Board did not find s. 35(5) of the *Contaminated Sites Regulation* to be the test for determining whether a parent corporation is an operator. The Board found that the Legislature did not intend to "pierce the corporate veil" in the sense that liability for remediation as an operator does not occur simply because of the legal relationship between a company and its shareholders. Thus, a parent which owns 100% of its subsidiary's shares does not, on that fact alone, become an operator under the *Act*. By implication, the Board also made these same findings with respect to the ownership issue.

77 The Board relied on the broad language used by the Legislature in the definition of "owner" to reject the narrow approach advocated by Beazer to the effect that corporate principles dictate that parent corporations should not be treated as owners of real property belonging to their subsidiaries. The Board concluded that Beazer had the right to "control the use of" the real property as a result of the fact that all leases of the Site had to be approved by Beazer before they could be entered into by the Principal Operator.

(b) Standard of Review

78 The interpretation by the Board of the definition of "owner", if it is expressly stated by the Board or can be discerned from the Board's reasons, is a question of law, and is subject to a standard of correctness. If the definition was correctly interpreted by the Board, the application of the facts to the definition is a question of mixed law and fact, and is subject to a standard of reasonableness *simpliciter*.

(c) Discussion of Question of Law

79 I will again set out the relevant portion of the definition of "owner" for ease of reference:

> "owner" means a person who is in possession of, has the right of control of, occupies or controls the use of real property...

80 The first issue to be determined is whether a parent corporation can be an "owner" by virtue of its share ownership in its subsidiary. Although this was not the conclusion of the Board, it is the Manager's position that the correct interpretation of the definition leads to such a conclusion.

81 I will first address the effect of the CCME report and s. 35(5) of the *Contaminated Sites Regulation*. Beazer says that in view of the fact that the CCME report recommended that parent corporations could be listed as responsible persons, the Legislature must have rejected the notion of making parent corporations liable for the actions of their subsidiaries merely because of their status as parent corporation. The Manager responds that the Legislature made the definitions of "owner" and "operator" sufficiently broad to include a person having the status of a parent corporation and that it was not necessary to specifically list parent corporations as responsible persons.

82 In my view, nothing can be inferred from the fact that the Legislature had the benefit of the CCME report and chose to describe responsible persons in a fashion different than recommended in the CCME report. The Legislature decided not to list classes of persons as responsible persons and to use a "catch-all clause". Instead, the Legislature used definitions containing language of a general nature. It is necessary to interpret that language in order to determine whether the Legislature intended to include parent corporations generally. It may have been possible to draw an inference if the Legislature did list classes of persons as responsible persons and chose not to include parent corporations in the list (in which case the issue would be whether parent corporations fall within the "catch-all clause"). However,

the Legislature did not use this approach and I do not believe that anything can be read into its decision to use a different approach.

83 The Manager says that the express intent of the Legislature to include parent corporations within the broad definition of "owner" is found in s. 35(5) of the Contaminated Sites Regulation. Section 35(5) specifically makes reference to parent corporations and the Manager submits that the exemption in s. 35(5) was incorporated in explicit recognition that parent corporations would be caught by the definitions of "owner" and "operator". In this regard, the Manager relies on the following passage from the third edition of *Driedger:*

> Where the provision to be interpreted appears in a regulation, it is read in the context of both the regulation and the enabling Act as a whole. Where the provision to be interpreted appears in the enabling Act, the regulations are often ignored. Because regulations are a subordinate form of legislation, usually made after the enabling Act has been passed, they have limited value in interpreting provisions of the Act. In appropriate circumstances, however, where the Act and the regulations are closely meshed so as to form an integrated scheme, provisions from both are interpreted in the light of that overall scheme. (p. 246)

Finally, the Manager says that if a parent corporation is active in the affairs of its subsidiaries, it will never be able to rely on s. 35(5) and that the threshold test under the *Act* has to be higher than s. 35(5) (i.e., parent corporations can be responsible persons even if they are not active in the affairs of their contaminating subsidiaries.

84 While it is true that a statute and its regulations should usually be interpreted together when they form an integrated scheme, it is my opinion that it would not be appropriate in the present circumstances to have regard to s. 35(5) of the *Contaminated Sites Regulation* when interpreting the definitions of "owner" and "operator" in the *Act*. Although the *Act* and Regulation came into force on the same day, the *Act* was passed by the Legislature almost four years before the Regulation was enacted. Section 35(5) of the Regulation was included on the recommendation of Professor Tollefson three years after the *Act* was passed by the Legislature on the basis of his view that there was a very real prospect that the definition of "owner" would be interpreted to include parent corporations. To have regard to s. 35(5) of the Regulation in these circumstances would not be proper in my view because it would be tantamount to utilizing the views of an outsider in attempting to ascertain the intention of the Legislature.

85 I do not agree with the Manager's submission that s. 35(5) is meaningless unless the definition of "operator" and "owner" are interpreted to include parent corporations on the basis of their shareholdings in subsidiaries. It is possible that a parent corporation can be found to be an owner or an operator as a result of its involvement with the contaminated site but will nevertheless be able to rely on s. 35(5) if such involvement was unrelated to the contamination (and if it did not otherwise authorize, permit or acquiesce in the activity of the subsidiary giving rise to the contamination).

86 Accordingly, I find neither the CCME report nor s. 35(5) of the Regulation to be of assistance in interpreting the definitions of "owner" and "operator" in the *Act*. I will now turn my attention to the *Bestfoods* decision.

87 On its face, *Bestfoods* is very similar to the case at bar. It involved the question of whether the terms "owner" and "operator" contained in environmental legislation include parent corporations. As it is a decision of the U.S. Supreme Court, a great deal of respect should be accorded to it even if it is not technically binding on this Court. The U.S. Supreme Court concluded that in certain circumstances a parent corporation could be an operator under the U.S. Legislation.

88 In *Bestfoods*, it was not alleged that a parent corporation is liable as an owner or operator under the U.S. Legislation simply as a result of control through ownership of the shares in its subsidiary. The Court also suggested that a parent corporation might never be found to be an owner of a contaminated site, but it did not preclude the possibility of a parent being found to be an operator. In this regard, it decided that the critical question is:

> ...whether, in degree and detail, actions directed to the facility by an agent of the parent alone are eccentric under accepted norms of parental oversight of a subsidiary's facility. (p. 1889)

The problem facing the U.S. Supreme Court was that the U.S. Legislation "is not a model of legislative draftsmanship" because the "phrase 'owner or operator' is defined only by tautology, however, as 'any person owning or operating' a facility" (at p. 1881).

89 In other words, the U.S. Legislation does not have meaningful definitions of the terms "owner" or "operator". The U.S. Supreme Court was required to give meaning to those terms without any assistance from the legislative body. In the present case, however, the Legislature has provided guidance by giving substantive definitions to the terms "owner" or "operator". Thus, while the *Bestfoods* decision is helpful in giving meaning to the words "owner" and "operator" within the context of the U.S. Legislation, it provides little assistance in giving meaning to the words contained in the definitions of "owner" and "operator" under the *Act*.

90 There was considerable discussion before the Board and this Court about "lifting the corporate veil". In my view, this case is not about lifting the corporate veil in the sense of making the shareholders of a corporation liable for the actions of the corporation. Rather, this case is about the interpretation of the *Act*. The text, *Gower's Principles of Modern Company Law*, 6th ed. (London: Sweet & Maxwell, 1997), stated its conclusion about the topic of lifting the corporate veil in the following terms:

> Where then does this leave "lifting of the veil"? Well, considerably more attenuated than some of us would wish. There seem to be three circumstances only in which the courts can do so. These are:
>
> > (1) when the court is construing a statute, contract or other document;
> >
> > (2) when the court is satisfied that a company is a "mere façade" concealing the true facts;
> >
> > (3) when it can be established that the company is an authorized agent of its controllers or its members, corporate or human.
>
> And (2) only is a true example of lifting the veil; in (1) and (3) the separate personality of the company is not denied but the practical effect on the parties' rights and liabilities is the same as if it had been. (p. 173)

Here, the effect of interpreting the *Act* may be the same as lifting the corporate veil but it would be based on the wording of the *Act* and it would not be ignoring the separate existence of a corporation from its shareholders.

91 In support of its position that a parent corporation can be an "owner" by virtue of its share ownership in the subsidiary, the Manager relies primarily on the decision of the Supreme Court of Canada in *Atco Ltd. v. Calgary Power Ltd.*, [1982] 2 S.C.R. 557 (S.C.C.). At issue in that case was whether Atco Ltd. required the consent of the Public Utilities Board of Alberta before it could acquire shares in Calgary Power Ltd. In order to decide whether the consent was required, it was necessary to determine whether Atco Ltd. was an owner of a public utility. The Court concluded that Atco Ltd. was the owner of a public utility because it owned the majority of the shares in a company which, in turn, owned almost all of the shares of three companies which were public utilities.

92 In the Alberta legislation, the phrase "owner of a public utility" was defined to mean "a person owning, operating, managing or controlling a public utility". The focus was whether Atco Ltd. controlled a public utility. The genesis of the Court's reasoning is as follows:

> In the discharge of its varied functions it is difficult to appreciate how the Board can maintain a sound and comprehensive regulatory position so as to discharge its duty to the public at large in the regulation of public utilities and their owners, unless a broad interpretation is accorded to the words adopted by the legislature in s. 98. In my view, the words "owner of a public utility" must, by reason of s. 2, *supra*, include a person without legal ownership in the system but having the power to control. (p. 575).

It is important to note that the Court was influenced by the need to give a broad interpretation to the words in s. 98 of the legislation (which was the provision stipulating the requirement for the consent of the Public Utilities Board). Earlier in the reasons of the majority, the Court noted that the use of the word "union" in s. 98, as opposed to the ordinary terms of amalgamation, merger and consolidation, was an attempt by the legislative draftsman to employ the widest terminology to bring corporate or non-corporate action of all kinds and descriptions in the nature of merger or unification of more than one enterprise under the purview of the Board.

93 In addition, the Court made reference to another section in the legislation which contained the phrase "where any person directly or indirectly controls the business of an owner of a public utility" and noted a legislative realization of the possibility of a person not directly owning the assets of a system but having indirect control of the system by any means, including perhaps by ownership of shares. In the case at bar, the phrase "directly or indirectly" is found in s. 27.1(4) of the *Act* but it is used there in the context of activities contributing to the contamination, not in the context of ownership or control.

94 In the present case, there are no other provisions of the *Act* which suggest a legislative intent to give the words in the definition of "owner" a meaning broader than their ordinary meaning. Indeed, there are provisions which indicate that the Legislature intended to give them their ordinary meaning. Further, the legislative purpose of remedying contaminated sites will not be defeated by giving the words their ordinary meaning.

95 The Board concluded that Beazer had "the right of control of ... the use of real property". It did not expressly consider dictionary definitions of the word "right". The relevant definition of the word "right" in the *Concise Oxford Dictionary of Current English*, 9th ed. (Clarendon Press: Oxford, 1998) is: "a thing one may legally or morally claim". The word "right" in the definition of "owner" is not referring to a moral claim. Rather, it is referring to a legal claim.

96 To be a right within the meaning of the *Act*, it is my view that it must be a right recognized by law. Put another way, it must be a legally enforceable right. A parent corporation does not have the legal right to control a subsidiary's use of its assets. The rights of a parent corporation vis-à-vis its subsidiary flow from its shares. The rights attached to shares typically include the rights to vote for, among other things, the directors and auditors of the subsidiary, to attend shareholder meetings, to receive dividends and to receive a return of capital. It has been well established since *Salomon v. Salomon & Co.* (1896), [1897] A.C. 22 (U.K. H.L.) that a corporation has a separate existence from its shareholders. A shareholder does not have a legally enforceable right to control or direct the use of the corporation's assets.

97 Of course, a parent corporation may have *de facto* control over the use of a subsidiary's assets. With the knowledge that a parent corporation can change the directors of a subsidiary and that the directors can change the officers, the management of the subsidiary may follow the directions of the parent corporation with respect to the use of its assets because the officers realize that they may be removed if they ignore those directions. However, there is a difference between a right to control and an ability to control.

98 In my view, the Legislature was well aware of this difference when it defined the term "owner". The Legislature chose to use the word "right" in the definition rather than a word like "ability". I say that the Legislature was aware of the difference because it did use words like "ability" in another place in Part 4 of the *Act* related to the definition of "owner".

99 The definition of "owner" provides that it does not include a secured creditor unless the secured creditor is described in s. 26.5(3). In that section, the Legislature provided that a secured creditor is responsible for remediation in certain circumstances and that a secured creditor is not responsible for remediation if it acts primarily to protect its security interest, including if the secured creditor:

> (d) has the capacity or ability to influence any operation at the contaminated site in a way that would have the effect of causing or increasing contamination, but does not exercise that capacity or ability in such a way as to cause or increase contamination;

It was open to the Legislature to define "owner" to include persons who had the capacity or ability to control the use of real property but it chose to confine the definition to persons who had the right of control of the use of the property (and persons who occupied the property or who actually controlled the use of the property).

100 The Board did not expressly state its interpretation of the phrase "right of control" but it concluded that Beazer had the right of control as a result of its requirement for the Principal Operator to have its property leases approved by it. The requirement for the Principal Operator to obtain the approval of Beazer in respect of its leases was not a legally enforceable right. Accordingly, the Board must have interpreted the phrase "right of control" to mean something less than a legally enforceable right and the Board erred in this interpretation.

101 In its reference to control, the definition of "owner" is not restricted to "right of control". The verb "controls" is also contained in the definition but the Board did not consider this aspect of the definition in view of its conclusion that Beazer had "right of control". Although it may be argued that the Board would have relied on the same evidence in arriving at its conclusion that Beazer had "right of control" to decide that Beazer controlled the use of real property, it would be inappropriate for me in these judicial review proceedings to assume the role of the Board and make determinations on my own. If necessary, the question of whether Beazer controlled the use of the Site can be remitted to the Board for consideration.

WAS BEAZER A PREVIOUS OPERATOR?

(a) The Board's Decision

102 The Board found that the words "in control of" in the definition of "operator" related to factual control of an operation on the contaminated site, and it rejected Beazer's submission that actual control of day to day operations was required. The Board also found that the words "responsible for" referred more to legal authority over, and obligations with respect to, an operation.

103 After considering the evidence, the Board concluded that there were numerous indicia that Beazer had both control and responsibility for operations at the Site and that the totality of the evidence showed that Beazer had the requisite "control of" and "responsibility for" an operation located at the Site.

(b) Standard of Review

104 The interpretation of the definition of "operator" is a question of law and is to a standard of correctness. The application of the facts by the Board to the definition is a question of mixed law and fact, and is subject to a standard of reasonableness *simpliciter*.

(c) Discussion of Question of Law

105 I will again set out the relevant portion of the definition of "operator" for ease of reference:

"operator" means . . . a person who is or was in control of or responsible for any operation located at a contaminated site...

106 The Board disagreed with the Manager's position that a parent corporation can be said to have "control of" or be "responsible for" an operation on a site by virtue of its ownership of 100% of the shares, and it examined the meaning of those terms. For the reasons I gave in connection with the interpretation of the term "owner", I agree with the Board's conclusion in this regard.

107 The Board relied on the following definitions of "responsible", "responsibility" and "control" from *Black's Law Dictionary*, 6th edition, 1992:

"responsible": legally accountable or answerable;

"responsibility": the obligation to answer for an act done;

"control": to exercise restraining or directing influence over. To regulate; restrain; dominate; curb; to hold from action; overpower; counteract; govern.

In comparison, the relevant definitions of these words in the *Concise Oxford Dictionary* are as follows:

"responsible": liable to be called to account (to a person or a thing); being the primary cause;

"responsibility": the state or fact of being responsible; authority; the ability to act independently and make decisions;

"control": the power of directing, command.

The Concise Oxford Dictionary also defines the phrase "in control" to mean "directing an activity."

108 I agree with the Board's conclusion that the words "in control of" in the definition relate to factual control of "any operation" on the contaminated site and that there is no reason to give the words a restricted meaning so to require that there be actual control of day to day operations. I referred to the Legislature's treatment of secured creditors when considering the definition of "owner" and it also provides guidance with respect to the interpretation of the definition of "operator". Like the definition of "owner", the definition of "operator" states that it does not include a secured creditor unless it is described in s. 26.5(3). In the exclusions in s. 26.5(3), clause (*c*) provides that a secured creditor is not responsible for remediation if it "participates only in purely financial matters related to the site". This suggests that the Legislature intended the phrase "in control of . . . any operation" in the definition of "operator" to have a broad meaning. As the Legislature found it necessary to exclude participation in financial matters by secured creditors, the Legislature must have intended the phrase "in control of . . . any operation" to be sufficiently broad to cover control of financial operations at a contaminated site.

109 The Board did not say anything about its interpretation of the words "responsible for" other than its conclusion that they refer more to legal authority over, and obligations with respect to, an operation. Beazer submits that these words mean legally answerable for the operation in the sense of being vicariously liable for someone else's actions. In my view, this is an overly narrow interpretation and does not reflect the ordinary meaning of the words in the context of the *Act*.

110 In general terms, it is my view that the intention of the Legislature was to include persons who made decisions

or had the authority to make decisions with respect to any operation on the site. These are the persons who are potentially culpable because they were the ones who made or could have made decisions in relation to operations on the site, which may have included operations that caused or contributed to the contamination. A person who makes the decisions with respect to an operation is "in control" of the operation and a person who has the authority to make the decisions with respect to an operation is "responsible" for the operation. In my opinion, a person who is responsible for an operation is one who is accountable for the operation but the accountability is not necessarily legally enforceable.

111 I also believe in using the word "responsible", the Legislature intended to include persons who brought about an operation in the sense of causing the operation to be carried on or carried out. Such a person would be responsible for the operation because, but for the actions or decision of that person, the operation would not have been carried on or carried out. This is consistent with the second definition of the word "responsibility" which I quoted above from the *Concise Oxford Dictionary* (namely, "being the primary cause").

112 In the end result, it has not been demonstrated that the Board gave an incorrect interpretation to the definition of "operator", although its reference to legal authority suggests that it may have interpreted the definition too narrowly. I will now consider the question of mixed law and fact regarding the application of the facts to the definition.

(d) Discussion of Question of Mixed Law and Fact

113 In its decision, the Board reviewed the evidence at length and concluded that while none of the indicia were determinative in and of themselves, the totality of the evidence showed that Beazer had the requisite "control of" and "responsibility for" "any operation" at the Site.

114 The Board stated categories of evidence which it found were indicia that Beazer had both control and responsibility for operations at the Site. These categories were (i) extensive financial control over the Principal Operator, (ii) the organizational and decision-making structures that were in place, (iii) the control of Beazer over the lease for the Site, (iv) the signing of certain agreements and (v) the involvement of Beazer in the environmental affairs of the Principal Operator. I will endeavour to summarize the evidence which the Board appears to have accepted.

(i) *Extensive Financial Control*

In each year the Principal Operator was required to prepare a budget which was approved by Beazer. Capital expenditures over a certain amount (initially $100,000 and subsequently $200,000) had to be approved by Beazer. Capital expenditures under the amount could only be made if they were in the annual budget and they had to be reported to Beazer for ratification.

(ii) *Organizational and Decision Making Structures*

When Beazer acquired the Principal Operator in 1969 (through its acquisition of the shares of Swanson), members of Beazer's appropriation committee insisted that there must be a Beazer "watchdog" over the Principal Operator and that they needed to maintain control over an investment of such a size. A Beazer employee, Mallory Smith, was appointed as President of the Principal Operator and he talked at least once a week with Burnett Bartley, a Beazer executive who was in charge of its forest products division and became its deputy chairman. Mr. Smith travelled to Beazer's head office in Pittsburgh to attend monthly management meetings.

The Board found that Mr. Bartley was fully aware of the operations at the Site and approved of them. The Board found further that Mr. Bartley played an active hands-on role in the managing of the operations of the Principal Operator. In this regard, the Board made reference to a memorandum from Mr. Bartley to Mr. Smith in which Mr. Bartley stated that the two of them needed to decide on the organizational structure so that they could see what kind of a business they were going to be running. In this memorandum, Mr. Bartley told Mr. Smith to stop spending money on four items.

Although the Principal Operator was a subsidiary of Beazer, it was made a division of Beazer in 1974. The Board considered this to be indicia of the close ties between Beazer and the Principal Operator. It is a misnomer to call a subsidiary of a corporation one of its divisions but the fact that Beazer named the Principal Operator as one of its divisions is evidence that Beazer did not regard the Principal Operator to be a subsidiary in the normal sense of a parent-subsidiary relationship.

(iii) *Control of the Lease*

The Principal Operator leased the Site from CNR and new leases had to be entered into from time to time when the lease terms expired. The Principal Operator was not free to enter into new leases with CNR on its own. Beazer required that the leases be approved by its real estate department and its appropriation committee.

(iv) *Indemnification Agreements*

In 1982 the Principal Operator sold its assets to Domtar and surrendered its lease to CNR. Beazer became involved in these transactions and gave assurances to both of Domtar and CNR. In February 1982, Mr. Bartley wrote a letter to Domtar, in which he stated as follows:

> [Beazer] and Domtar have had an enjoyable business relationship for over 40 years and our reputation, like your own, has not been attained by not fulfilling our obligations. It is not our intention to pass off our responsibilities to others with regard to environmental matters in Canada, U.S. or elsewhere around the world and our corporate reputation attests to this. If the $1 million guarantee by [Beazer] of the responsibilities and warranties of an agreement between our subsidiary and Domtar leaves you uncomfortable, then there is no point in pursuing this further.

In the agreement of purchase and sale entered into by Domtar, the Principal Operator and Beazer on March 10, 1982 (the "Share Purchase Agreement"), Beazer guaranteed to Domtar the performance of the Principal Operator in the cleanup of the Site to an aggregate monetary limit of $2 million.

On March 18, 1982, Beazer granted an indemnity agreement to CNR (the "Indemnity Agreement") in which it agreed to indemnify CNR in respect of all expenses CNR incurred as a result of contamination of the Site as a result of wood preserving and treatment operation carried on by the Principal Operator from 1969 to 1982.

(v) *Involvement in Environmental Affairs*

The Board referred to three matters in connection with Beazer's involvement in the environmental affairs of the Principal Operator.

The first matter involved visits to the Site by Beazer employees in the early 1970s. In 1970, a Mr. Campbell, who was in Beazer's operating department, visited the Site in relation to personnel issues. Mr. Campbell sent his reporting memorandum to Beazer's head of wood preserving production, who reported to Mr. Bartley, and a carbon copy was sent to Mr. Smith. In his memorandum Mr. Campbell made reference to "our long range plan for supervision". In 1972, a Mr. Blankenbeker, who was the plant manager of a Beazer plant in California, visited the Site in relation to production or operational matters. He provided recommendations to Mr. Smith on the operations of the treatment plant at the Site. Mr. Blankenbeker returned to the Site in 1973, and the Board found that the purpose of this visit was to see if his recommendations had been followed up on.

The second matter occurred in the early 1980s after the environmental problems became known. The Board found that a member of Beazer's law department played an active role in monitoring the conduct of the charges laid against the Principal Operator.

The third matter also occurred after the environmental problems became known. In April 1982, Mr. Smith had become frustrated with the lack of progress of the three local consultants he had retained in connection with the contamination. He asked Beazer's environmental resources department for help in carrying out the cleanup. Two Beazer employees, Mr. Quagliotti and Dr. Middleton, were involved in investigations, remediation and monitoring from 1982 to 1986. The local consultants reported to these Beazer employees, and Mr. Quagliotti dealt directly with the Ministry of Environment.

115 Beazer says that the Board erred because the facts relied upon by it in concluding that Beazer was an "operator" fit into two categories:

(a) facts relating to Beazer's relationship with the Principal Operator as a whole and not to Beazer's actions towards an operation at the site;

(b) facts relating to an operation at the site that do not constitute evidence of Beazer being "in control" of the operation.

Beazer goes on to say that it can be seen from the facts relied on by the Board that it either applied the wrong test despite having articulated the test correctly or relied on irrelevant considerations in determining that Beazer was an "operator". If the Board had limited itself to relevant considerations, says Beazer, there would not have been a basis to conclude that Beazer was in control of or responsible for an operation at the Site. Furthermore, says Beazer, even if some of the facts relied on by the Board were relevant to the correct test, it cannot be determined what the Board would have decided if it had properly confined itself to relevant considerations. Hence, it is the position of Beazer that the Board's decision must be set aside and that if there were some facts relevant to the correct test (which Beazer does not accept), the matter should be remitted to the Board.

116 I agree with Beazer that the Indemnity Agreement does not relate to "any operation" at the Site. Beazer was taking responsibility for contamination at the Site but the contamination is not an operation. This relates to the "responsible for" aspect of the definition of "operator", and I do not know how much reliance was placed on the Indemnity Agreement by the Board in concluding that Beazer was responsible for an operation at the Site.

117 However, I disagree with the balance of Beazer's submission. Other than the Indemnity Agreement and the Share Purchase Agreement, the evidence relied upon by the Board was direct and indirect evidence that Beazer was in control of the wood preserving and treatment operation and the remediation operation at the Site. Although some of the evidence was not directed at specific activities on the Site, it was evidence from which the Board could reasonably conclude that Beazer was generally in control of the wood preserving and treatment operation.

118 The standard of review to this question of mixed law and fact is reasonableness *simpliciter*. As pointed out by the Supreme Court of Canada in Southam Inc., this standard is closely akin to the "clearly wrong" test utilized by appellate courts in reviewing findings of fact. An unreasonable decision is one that is not supported by any reasons that can stand up to a somewhat probing examination. In my view, there was evidence from which the Board could reasonably conclude that Beazer was in control of an operation at the Site. Although the Board may have erred in concluding that Beazer was responsible for an operation at the Site, it was not clearly wrong in concluding that Beazer was a previous operator on the basis that it was in control of an operation at the Site.

119 Accordingly, I decline to interfere with the Board's decision that Beazer was an "operator" within the meaning

of the *Act*.

REMEDIATION EXEMPTION

(a) The Board's Decision

120 The Board held that the public policy reason for the exemption under s. 26.6(1)(h) is to ensure that arm's length third party consultants and others whose primary role is providing assistance and advice respecting remediation work, are not held to be responsible persons unless they are negligent. It found that Beazer was not solely or primarily involved in the Site providing assistance or advice respecting remediation work and that it was otherwise an owner and operator at the Site. The Board concluded that Beazer could not rely on the activities of its employees to be exempt from being found to be a responsible person as an owner and operator under the *Act*.

(b) Standard of Review

121 This is a question of law and is subject to the standard of correctness.

(c) Discussion of Question of Law

122 The exemption in s. 26.6(1)(h) is available to "a person who provides assistance or advice respecting remediation work at a contaminated site in accordance with this Act, unless the assistance or advice was carried out in a negligent fashion".

123 Beazer says that the Board misconstrued its position. It only sought to apply the exemption to ensure that it was not determined to be an "operator" based on its involvement in providing assistance and advice in respect of the remediation in the 1980s. Beazer says it did not seek to "escape" liability founded on any other conduct. The Board erred, says Beazer, in holding that the exemption is only available to arm's length consultants.

124 While Beazer feels that the Board misconstrued its position, I believe that Beazer is misinterpreting the Board's decision. The Board simply stated what it considered to be the public policy reason for the exemption. I think the Board is probably right that the Legislature had third party consultants primarily in mind when it enacted the exemption under s. 26.6(1)(h), but the Legislature chose to use broader language.

125 It is my view that the Board's decision is consistent with Beazer's main position. It did not hold that Beazer could not rely on the exemption because it was not a third party consultant. Rather, the Board found that Beazer was not solely or primarily involved in the Site providing remediation assistance or advice and that Beazer was otherwise an owner and operator at the Site. The Board held that an owner or operator cannot escape liability under this exemption if its employees were also involved in remediation operations. Hence, in concluding that Beazer was not entitled to the exemption, the Board was relying, not on Beazer's lack of independence, but on its finding that Beazer was an owner and operator apart from its involvement in the remediation.

126 I agree with the Board that a person who is otherwise a responsible person cannot become exempt simply as a result of providing assistance or advice respecting remediation work at the contaminated site. Based on its submissions, Beazer also agrees with the Board in this regard.

127 It is my view that the Legislature intended to exempt persons if the only activity which would make such persons an "owner" or an "operator" was their provision of assistance or advice respecting remediation of a contaminated site (as long as they were not negligent). Therefore, if Beazer would not have been an "owner" or an "operator" but for the involvement of Mr. Quagliotti and Dr. Middleton in the remediation work in the 1980s, it would be

entitled to the exemption under s. 26.6(1)(h).

128 I appreciate that clause (h) does not have the following language which is found in clauses (a), (b) and (c) of s. 26.6(1): "a person who would become a responsible person only because". I concede that, in effect, the interpretation given by me (as well as the Board and Beazer) reads those words into clause (h). I believe that reading those words into clause (h) does less violence to the interpretation of the *Act* than reading in any other words to avoid a person who is an owner or operator being able to escape liability by assisting with the remediation of the contamination (which may have been directly caused by that person).

129 Beazer's argument goes a step further. It says that the *Act* provides that conduct in the nature of remediation assistance and advice does not attract liability and that it would be incongruous to hold that exempt conduct can support a finding that a party is a "responsible person". Its position is that the Board's decision that Beazer was an "operator" should be set aside because it relied on irrelevant conduct. In my view, there are two answers to this argument.

130 First, the *Act* does not exempt conduct; it exempts persons. The evidence of the control which Beazer exercised in connection with the remediation work was evidence which the Board was entitled to consider in deciding whether Beazer was in control of any other operation at the Site. The Board considered the way in which Beazer exerted control, and the activities of the Beazer employees in connection with the remediation work was relevant to this consideration as it applied to other operations at the Site.

131 Second and more important, the Board stated its conclusion that Beazer "was otherwise an owner and operator at the Site". This means that the Board concluded that apart from the remediation assistance and advice, Beazer was an "operator". The Board did not need to consider the evidence of the remediation assistance and advice in order to conclude that Beazer was an "operator". Accordingly, even if it was irrelevant evidence and had been ignored by the Board, Beazer would still have been found by the Board to be an "operator".

132 My conclusions are that (i) the Board was correct in its interpretation and application of s. 26.6(1)(h), and (ii) the Board's consideration of Beazer's involvement in the 1980s remediation does not affect the reasonableness of the Board's conclusion that Beazer was an "operator".

SHOULD BEAZER HAVE BEEN NAMED?

(a) The Board's Decision

133 The Board found that the Manager had a wide discretion conferred upon him under s. 27.1 of the *Act* and that the only restriction on the Manager's discretion is that, when the Manager is aware of one or more responsible persons who contributed most substantially to the site becoming contaminated, he must name them in a remediation order unless naming them would jeopardize the remediation requirements. The Board was of the view that it should consider whether Beazer must be named to the Remediation Order as a "most substantial contributor" and, if not, whether the Manager properly exercised his discretion in naming Beazer under the category of "any responsible person".

134 After reviewing the evidence at length, the Board concluded that Beazer was a person whose activities contributed most substantially to the Site becoming a contaminated site and that, therefore, the Manager had properly exercised his discretion in naming Beazer to the Remediation Order. The Board found no reason to come to a different conclusion.

(b) Standard of Review

135 The interpretation of s. 27.1 is a question of law and is subject to a standard of correctness. The application of

the facts to s. 27.1 is a question of mixed law and fact which is subject to a standard of reasonableness *simpliciter*. I will discuss the standard of review applicable to the Manager's exercise of discretion after I have dealt with the question of mixed law and fact.

(c) Discussion of Question of Law

136 I will set out again the statutory provisions for ease of reference. Section 27.1(1) states that "a manager may issue a remediation order to any responsible person". Section 27.1(2) provides that a remediation order may require a named person to undertake remediation, contribute towards another person who has reasonably incurred costs of remediation or give security. Section 27.1(4) reads:

> (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.

137 Beazer says that s. 27.1(4) is a clear expression of the "polluter pays" principle. A manager must name the primary polluters; namely, the persons whose activities contributed most substantially to the contamination. Beazer goes on to submit that s. 27.1(4) provides for the manager to name additional "responsible persons" in two defined circumstances. The first is where it is not feasible to name the person or persons who contributed most substantially to the contamination because there is insufficient information. The second is where it is not feasible to name only the person or persons who contributed most substantially because doing so would jeopardize remediation requirements (for example, when the primary polluters do not have the financial capability to carry out the remediation work). Beazer argues that the Board erred in holding that a manager could name any responsible person as long as the most substantial contributor was named in the remediation order.

138 This submission requires the wording of s. 27.1 to be examined. Subsection (1) provides that a manager may issue a remediation order to *any* responsible person. Subsection (1) does not state that it is subject to subsection (4) or any other provision of the *Act*. On the face of subsection (1), therefore, any person who qualifies as a responsible person under s. 26.5(1) may be named in a remediation order unless the manager has improperly exercised his or her discretion in naming the person.

139 Is this interpretation of subsection (1) affected by subsection (4)? The introductory words of subsection (4) make reference to the situation of the manager considering who will be ordered to undertake or contribute to remediation under subsections (1) and (2). Therefore, subsection (4) does come into play in determining whether appropriate persons have been named to the remediation order.

140 Subsection (4) states that the manager *must* do two things in deciding who to name in a remediation order. The use of the word "must" indicates that these two things are mandatory requirements. In brief, these two things are:

(a) to take into account private agreements respecting liability for remediation;

(b) to name one or more persons who contributed most substantially to the site becoming contaminated.

Both of these clauses are qualified by the phrase "to the extent feasible without jeopardizing remediation requirements".

141 The intention of the qualifying phrase is clear with respect to the first matter. If there is a private agreement between responsible persons in which one party assumes responsibility for all of the contamination and the other "responsible" person is absolved from responsibility, the manager can only name the first party in the remediation order and cannot name the absolved party in the order; subject, however, to the qualification that the remediation requirements must not be jeopardized by the absence of the absolved party in the order. If the remediation requirements would be jeopardized by the absence of the absolved party in the order, the manager may then ignore the private agreement and name the absolved party in the order (although that party may be absolved from liability under the private agreement, they would still be a responsible person under s. 26.5(1)). An example of a situation where the absence of the absolved party in the order would jeopardize the remediation requirements is where the other responsible person does not have the financial capability to carry out all of the remediation work. If the absolved party was then named in the remediation order and incurred remediation costs, it could still rely on the private agreement in the cost recovery/allocation proceedings authorized by s.27(4) to seek reimbursement from the other party to the agreement.

142 The intention of the qualifying phrase is not as readily apparent in connection with the second clause. Apart from the qualifying phrase, the intent of clause (b) of s. 27.1(4) would appear to be to deprive the manager of the discretion to decide not to name in a remediation order the person or persons who contributed most substantially to the site becoming contaminated. In other words, it limits the manager from *excluding* persons from the remediation order but it does not restrict the manager from *including* any person in the remediation order as long as they qualify as a responsible person under s. 26.5(1). Thus, a responsible person may be named in a remediation order as long as they cannot rely on a private agreement under clause (a) of s. 27.1(4) and as long as the manager has not otherwise exercised his or her discretion improperly. However, a party named in a remediation order can complain about the omission of a responsible person from the order if it contributed most substantially to the site becoming contaminated.

143 The issue, then, is whether the meaning of clause (b) is altered by the qualifying phrase that the remediation requirements must not be jeopardized. This issue is made more difficult by the fact that the phrase qualifies both clause (a), which is exclusionary in nature, and clause (b), which is inclusionary in nature.

144 Some meaning must be given to the qualifying phrase. Its meaning is relatively clear with respect to clause (a) as I explained above. But it must have some meaning with respect to clause (b) because if the Legislature intended it to qualify only clause (a), it would have inserted the phrase in the body of clause (a). Does the giving of meaning to the qualifying phrase mean, as Beazer submits, that the manager must not name any party other than the person or persons who contributed most substantially to the site becoming contaminated unless the remediation requirements will be jeopardized by the absence of other responsible persons in the order?

145 Beazer implicitly argues that there is no circumstance where remediation requirements will be jeopardized by the naming in the remediation order of the person or persons who contributed most substantially to the site becoming contaminated. Hence, the argument is that the qualifying phrase must be interpreted as preventing the manager from naming those who did not contribute most substantially to the site becoming contaminated unless the remediation requirements would thereby be jeopardized.

146 In my view, although the circumstances where remediation requirements will be jeopardized by the reme-

diation order naming a "most substantial contributor" may not be common, I can envisage such circumstances. For example, it may be important that the remediation begin immediately in circumstances where the person who contributed most substantially has limited financial means but there is another responsible person with substantial financial means. These are circumstances where even on Beazer's interpretation of s. 27.1, the manager could name the other responsible person as well as the person who contributed most substantially to the site becoming contaminated. However, it is possible that the manager may decide that the naming in the order of the "most substantial contributor" would jeopardize the remediation requirements because the remediation may be delayed by disagreements between the two persons regarding the method of remediation or the payment of the attendant costs (notwithstanding that they are jointly and severally liable). It would then be open to the manager to name in the remediation order only the person with substantial financial means and to refrain from naming the person who contributed most substantially to the site becoming contaminated despite the mandatory wording of clause (b) of s. 27.1(4).

147 Another example is a situation where the remediation requirements would be jeopardized by the time it would require the manager to make the appropriate investigations in order to determine which person contributed most substantially to the site becoming contaminated. On the information known to the manager, he or she may not be able to ascertain which person or persons contributed most substantially to the site becoming contaminated. If the remediation requirements would be jeopardized by delay, section 27.1(4) gives the manager the discretion to issue a remediation order without making the determination of which person or persons contributed most substantially to the site becoming contaminated.

148 I have given two examples of situations where, as a result of jeopardy to remediation requirements, a remediation order may be issued without naming or ascertaining the identity of the person or persons who contributed most substantially to the site becoming contaminated. I have no doubt that there could be other such situations. Accordingly, a meaning can be properly given to the qualifying phrase in s. 27.1(4) which does not require that the subsection be interpreted as limiting the discretion of a manager in naming any responsible person to a remediation order (except in the circumstance described in clause (a) where a private agreement respecting liability for remediation would lead the manager to exclude a responsible person from the order).

149 Beazer's interpretation of s. 27.1 would lead to a qualification of s. 27.1(1) which is simply not justified by the wording of s. 27.1(4). Subsection (1) states that a manager may issue a remediation order to any responsible person. By necessary implication, clause (a) of subsection (4) limits the manager's discretion and prevents the manager from naming certain responsible persons if doing so would be contrary to private agreements between responsible persons (as long as remediation requirements are not jeopardized). On the other hand, clause (b) provides that certain persons must be named in the order. It does not state, either expressly or by necessary implication, that certain persons must not or should not be named in the order. The discretion of the manager under subsection (1) to issue a remediation order to any responsible person is not limited by clause (b) of subsection (4). The only thing limited by clause (b) of subsection (4) is the manager's discretion not to name in a remediation order the person or persons who contributed most substantially to the site becoming contaminated (as long as remediation requirements would be jeopardized by naming such person or persons in the order).

150 I conclude that the Board correctly interpreted s. 27.1.

(d) Discussion of Question of Mixed Law and Fact

151 After correctly interpreting s. 27.1, the Board then considered whether it was mandatory for Beazer to be named in the Remediation Order as a "most substantial contributor". In my view, it was unnecessary for the Board to have dealt with this issue because, on the correct interpretation of s. 27.1, Beazer was properly named as a responsible person under subsection (1) and nothing in subsection (4) required it to be excluded.

152 The Board did not explain why it dealt with the issue of whether Beazer was a "most substantial contributor".

Perhaps the Board decided to deal with the issue in case its interpretation of s. 27.1 was found to be in error. I would ordinarily deal with the issue in any event because the Board did consider it and Beazer's Petition seeks a declaration that it did not contribute most substantially to the contamination. However, there is an additional reason why I have concluded that it would not be appropriate for me to address this issue.

153 Section 27.1(4)(b) requires a manager to name one or more persons whose activities, directly or indirectly, contributed most substantially to the site *becoming* a contaminated site. The Legislature chose not to require the manager to name persons who contributed most substantially to the site *being* a contaminated site. The evidence before the Board was that there had been contamination at the Site for 39 years prior to the Principal Operator becoming a subsidiary of Beazer. There was a dispute on the evidence whether there was more creosote contamination before or after 1969 but there does not appear to be any doubt that there was contamination before 1969. Therefore, it seems to me that there is an issue regarding the meaning of the word "becoming" and that there may be factual issues of whether the Site had already become a contaminated site before Beazer's involvement and whether the Site would be contaminated at the present time if the contamination had stopped in 1969.

154 As these issues were not canvassed before me and as it is not necessary to determine whether Beazer was a "most substantial contributor", I have concluded that it would not be appropriate to review the Board's conclusion in this regard.

Discussion of Exercise of Discretion

155 The ultimate conclusion of the Board on this topic was that the Manager properly exercised his discretion. In my view, the appropriate standard of review with respect to the Manager's exercise of discretion in naming a responsible person to a remediation order is patent reasonableness. The Manager has expertise with respect to remediation requirements and, apart from s. 27.1(4) which I have found inapplicable, the Legislature did not impose any limits on the exercise of the Manager's discretion in naming responsible persons in remediation orders.

156 Other than the submissions regarding s. 27.1(4), there is nothing to indicate that the Manager acted improperly in naming Beazer in the Remediation Order. I conclude that it has not been demonstrated that the exercise of discretion by the Manager in naming Beazer in the Remediation Order or the Board's ratification of it was patently unreasonable.

CONCLUSIONS ON BEAZER'S PETITION

157 Beazer was properly named in the Remediation Order as a responsible person by virtue of being a previous operator of the Site. Although the Board was not correct in its interpretation of the first part of the definition of "owner" and although the Board may not have been correct in its conclusions that Beazer was responsible for an operation at the Site and was a "most substantial contributor", the naming of Beazer in the Remediation Order stands on the basis that it was a previous operator by virtue of its control of an operation at the Site and that it is not entitled to an exemption. There is no reason to remit the matter back to the Board.

158 My specific conclusions with respect to the relief sought in Beazer's Petition are as follows:

(a) the Remediation Order is not quashed or set aside;

(b) the portion of the Board's decision finding Beazer to be a previous owner of the Site is set aside;

(c) the other challenged portions of the Board's decision are not quashed or set aside;

(d) none of the requested declarations are granted; and

(e) the matter is not remitted to the Board for reconsideration.

SUMMARY OF ATLANTIC'S POSITION

159 Like Beazer, Atlantic first seeks an order in the nature of certiorari quashing and setting aside the Remediation Order. It then applies for an order in the nature of certiorari quashing or setting aside the portions of the Board's decision (i) finding that the Board was unable to consider equitable grounds as the basis for relieving Atlantic from liability for the remediation, (ii) finding that Atlantic was not relieved from liability on the basis of private agreements, (iii) finding that the conduct of the Provincial Crown did not constitute an abuse of process relieving Atlantic from liability, (iv) finding that the Board was without jurisdiction to stay the Remediation Order pending the determination of the cost recovery/allocation proceedings and (v) finding that the Manager properly exercised his discretion in naming Atlantic to the Remediation Order. Atlantic also requests declarations that (i) it is relieved of liability on the basis of abuse of process by the Provincial Crown, (ii) it is relieved of liability on the basis of private agreements and (iii) it is relieved of liability on equitable grounds. Alternatively, Atlantic asks that the matter be remitted back to the Board for reconsideration.

160 It was conceded by Atlantic during the hearing before this Court that I could not relieve it of liability in respect of the remediation. There were discussions on various issues about whether it would be necessary to remit the issues to the Board for further consideration if I agreed with Atlantic's submissions.

161 In discussing Atlantic's submissions, I will again use headings to identify the nature of the issue. Although Atlantic's Amended Petition seeks to quash or set aside five portions of the Board's decision, the first aspect dealing with equitable grounds and the fifth aspect dealing with the exercise of the Manager's discretion were addressed in a combined submission covering both aspects.

EQUITABLE GROUNDS

(a) The Board's Decision

162 Before summarizing the Board's decision with respect to this submission, I should first detail the portions of the Board's decision which Atlantic is not challenging.

163 Atlantic had argued before the Board that it was not an owner or operator of the Site because, in essence, it had nothing to do with the ownership of the Site or any operation on the Site. It simply happened to amalgamate with the Principal Operator after the contamination had come to an end. The Board rejected this argument on the basis of the decision of the Supreme Court of Canada in *R. v. Black & Decker Manufacturing Co.* (1974), 43 D.L.R. (3d) 393 (S.C.C.), where it was held that no company is created or extinguished on amalgamation and that the effect of an amalgamation is to blend and continue the amalgamating companies into the amalgamated company (the effect of the amalgamation depends on the wording of the governing corporate legislation but the Board found that the language in the legislation governing Atlantic's amalgamation were almost identical). The Board concluded that by virtue of amalgamating with the Principal Operator, Atlantic fell within the definitions in the *Act* of "owner" and "operator", and contributed most substantially to the site becoming contaminated. The Board also concluded that Atlantic was not entitled to the exemption under s. 26.6(1)(d) of the *Act* for persons who became owners or operators of sites after their contamination.

164 On the issue in question, the Board found that any factor relied upon by a manager or the Board under s. 27.1(4)(b) of the *Act* must relate to the factors enumerated in s. 27.1(4)(b)(i) and (ii), and that "benefit" was not an appropriate consideration. It distinguished two decisions of the Ontario Environmental Appeal Board relied upon by

Atlantic and held that the *Act* governs the questions of who are responsible persons, who are exempt and what factors the manager should consider in exercising his or her discretion. The Board stated that while some of the factors suggested by Atlantic may be relevant in determining whether a person was a "most substantial contributor" under s. 27.1(4)(b), the factors were not helpful to Atlantic in view of its amalgamation. The Board stated that, in any event, a responsible person can be named in a remediation order even if it did not contribute most substantially to the site becoming contaminated. The Board concluded that the Manager had properly exercised his discretion in naming Atlantic to the Remediation Order and that there was no reason for the Board to come to a different conclusion.

(b) Standard of Review

165 The interpretation of the *Act* is a question of law and is subject to a standard of correctness. The application of the facts to s. 27.1 of the *Act* is a question of mixed law and fact, and is subject to a standard of reasonableness *simpliciter*. For the same reasons as stated in connection with the exercise of discretion to name Beazer in the Remediation Order, the exercise of discretion to name Atlantic in the Remediation Order is subject to a standard of patent reasonableness.

(c) Discussion of Question of Law

166 Atlantic says that the Board committed a jurisdictional error by refusing to consider factors of fairness and culpability, and thereby fettered its discretion. Atlantic submits that the following provisions of the *Act* and the Contaminated Sites Regulation provide a broad discretion and therefore require the Manager (and the Board on appeal) to consider factors of equity and fairness in the determination of liability through the issuance of a remediation order:

> (a) in deciding whose activities contributed most substantially to the site becoming contaminated under s. 27.1(4)(b) of the *Act*, the manager must consider factors such as the degree of involvement of the person and the diligence exercised by the person;
>
> (b) s. 26.6(1) of the *Act* lists a number of exemptions which incorporate the concepts of fault and involvement;
>
> (c) ss. 19 through 33 of the Regulation list a number of further exemptions which are based on culpability;
>
> (d) s. 34 of the Regulation provides that nothing in s. 27(1) of the *Act* shall be construed as prohibiting the apportionment of a share of liability to one or more responsible persons by a manager in issuing an order under s. 27.1 of the *Act* if justified by available evidence;
>
> (e) s. 27.2 of the *Act*, which deals with allocation panels, provides the Manager (and the Board on appeal) with factors for apportioning liability and these factors are culpability-based;
>
> (f) s. 35(2) of the Regulation lists the factors which must be considered in a cost recovery/allocation proceeding and they are based on culpability, justice and fairness; and
>
> (g) ss. 43 - 48 of the *Act*, which deal with appeals to the Board, have provisions which are based on natural justice, fairness and equity.

167 In my view, these provisions do not support Atlantic's view that the Manager and the Board on appeal are required to consider factors of equity and fairness in determining who should be named in a remediation order. In the provisions relied upon by Atlantic, the Legislature has set out the circumstances in which factors of culpability, jus-

tice, fairness and equity must be considered. If the Legislature had intended to require a manager to consider such factors when issuing a remediation order under s. 27.1(1), it would have set out those factors in s. 27.1. It is true that the factors of involvement and diligence are listed in s. 27.1(4)(b) but those factors are to be considered by a manager in determining who *must* be named in a remediation order as a "most substantial contributor", not who *may* be named in the discretion of the manager under s. 27.1(1).

168 I agree with the position of the Manager that in order to ensure timely remediation, the Legislature has implemented a scheme which casts a wide net over responsible parties who are jointly and severally liable for the costs of remediation and who may be required to undertake prompt remediation. In this regard, the Legislature has chosen to leave the requirement to deal with issues of culpability and fair allocations to an allocation panel under s. 27.2 of the *Act* (if requested) and to the courts in cost recovery/allocation proceedings under s. 27(4) of the *Act* and s. 35 of the Regulation. A requirement that a manager (and the Board on appeal) must undertake an investigation into issues of culpability and appropriate allocations could be potentially counterproductive to the purpose of the *Act* of promoting prompt remediation of contaminated sites. The Legislature did not impose such a requirement on a manager when issuing a remediation order under s. 27.1(1) of the *Act*.

169 I have concluded that a manager is not *required* to consider equitable factors when issuing a remediation order. However, I do not believe that a manager is *prohibited* from considering such factors. Section 27.1(1) is discretionary in nature. It states that a manager *may* issue a remediation order to *any* responsible person. It does not require that a manager *must* issue a remediation order to *all* responsible persons. In my view, it would not be an improper exercise of discretion for the manager to take equitable factors such as culpability into account as long as the result is not inconsistent with the primary objective of Part 4 of the *Act* to have expeditious and complete remediation of contaminated sites. Section 34 of the Regulation reflects this discretion because it states that s. 27(1) of the *Act* shall not be construed as prohibiting an apportionment of liability by a manager in issuing a remediation order. However, a manager (or the Board on appeal) has the discretion to refuse to consider equitable factors and to name any responsible person in a remediation order irrespective of their culpability or any other equitable factor.

170 In its submissions before the Board and this Court, Atlantic relied upon two Ontario decisions, *Hopkinson, Re* (June 10, 1993), Doc. 00099.A1, 00100.A1 (Ont. Environmental App. Bd.) and *724597 Ontario Ltd., Re* (1995), 18 C.E.L.R. (N.S.) 137 (Ont. Div. Ct.). Atlantic points to the statement of the Ontario Environmental Appeal Board in the *Hopkinson* decision that once it was determined that the Director under the Ontario legislation had jurisdiction to make an order against a person, the next step is to determine whether there is any reason to relieve that person from compliance with the order. As the Ontario Board did not state its reason for this approach, I do not find this decision to be helpful in interpreting the provisions of the *Act*.

171 In *"Appletex"*, the appellate division of the Ontario Court of Justice held that the Ontario Environmental Appeal Board did not exceed its jurisdiction by applying considerations of fairness to relieve two persons from much of their liability under an order issued by the Director under the Ontario legislation. The reasoning of the Court was as follows:

> Both ss. 18 and 43 of the EPA provide that the Director *may* make orders against persons who have or have had control of an undertaking or property. Neither section uses the word *shall*, which might impose an obligation on the Director to make an order in the case of every contaminant. The ordinary meaning of the word "may" is to make a power permissive, although the context in which "may" is used may require that the legislation be construed as imperative. (See E.A. Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983), pp. 9-15)
>
> In my judgment, there is nothing in the context in which "may" is used in ss. 18 and 43 to indicate that it was used in other than its ordinary meaning of being permissive. (p. 142)

The *"Appletex"* decision does not support the proposition that the Ontario Director/ Board is required to apply considerations of fairness when making an order. Rather, it stands for the proposition that the Ontario legislation is permissive in its wording and that it is open to the Director/Board to apply considerations of fairness. This is consistent with my interpretation of the B.C. *Act*.

172 The question remains, however, whether the Board improperly fettered its discretion by concluding that it was prevented from considering equitable grounds to remove Atlantic from the Remediation Order. The Board's decision needs to be examined in greater detail in order to make this determination.

173 After summarizing the submissions of the parties, the Board first noted that it did not have inherent equitable jurisdiction. It next discussed the factors articulated in s. 27.1(4)(b) and observed that other factors to be considered must be of similar nature to the articulated factors and do not include "benefit" as a consideration. I note that s. 27.1(4)(b) related to the issue of "most substantial contributor" and does not deal with the issue of what persons may be named in a remediation order under s. 27.1(1).

174 The Board then considered the two Ontario decisions which it found were dealing with a different legislative scheme. The Board noted that there was no guidance for discretion in the Ontario statute, while there is a structured discretion under s. 27.1 of the *Act* and a number of exemptions from responsible party status. After making reference to the CCME report, the Board noted that the process of issuing a remediation order is a summary process and that other safeguards and defences are built into the cost recovery process. It made reference to clause (f) of s. 35(2) of the Contaminated Sites Regulation and noted that the factor of a fair and just allocation does not appear in s. 27.1. The Board may have overlooked s. 34 of the Regulation in making this observation.

175 The Board then found that there was no basis to ignore the legal effect of Atlantic's amalgamation and that, due to the amalgamation, Atlantic was a responsible person and a "most substantial contributor". The balance of the Board's reasoning is as follows:

> While, in another circumstance, some of the factors suggested by Atlantic may be relevant to whether the person "contributed most substantially to the site becoming contaminated," *given the amalgamation in this case, the factors are not helpful to Atlantic in the remediation order process*. In any event, as stated in issue #3 above, a responsible person can be named in a remediation order even if it did not contribute most substantially to the site becoming contaminated.
>
> In summary, the Panel finds that the Assistant Manager properly exercised his discretion in naming Atlantic to the Order, and the Panel finds no reason to come to a different conclusion. (p. 65) (emphasis added)

176 Even if the Board's reasons could be read as a conclusion that the *Act* prohibited the Manager (and the Board on appeal) from considering equitable grounds, the Board did go on to consider the factors relied upon by Atlantic. It concluded that the factors were not helpful to Atlantic in view of the amalgamation. This is similar to the preceding issue where the Board considered whether Beazer was a "most substantial contributor" when it was not necessary to do so in view of its interpretation of s. 27.1. In both situations, the Board went on to consider the addition issue. Here, the Board directed its mind to the factors and decided that they were not helpful to Atlantic.

177 I conclude that the Board did not make an error of law on this issue by refusing to consider the equitable grounds on the basis that the *Act* precluded it from considering such grounds.

(d) Discussion of Question of Mixed Law and Fact

178 As I have concluded that the Board did consider the factors relied upon by Atlantic and found them unhelpful to Atlantic in the remediation order process in view of its amalgamation, it is necessary to decide whether this con-

clusion stands up to the standard of review of reasonableness *simpliciter*.

179 The equitable factors relied upon by Atlantic are as follows:

(a) the Site was wholly contaminated before the sale of the Principal Operator to Atlantic's parent and the subsequent amalgamation;

(b) Beazer and CNR contributed substantially to the Site becoming contaminated;

(c) unlike Beazer and CNR, Atlantic enjoyed no benefit as a result of the contamination;

(d) Atlantic is named in the Remediation Order only because of (i) the Provincial Crown's negligence, (ii) Beazer's failure to disclose potential liabilities, (iii) the legal effect of the amalgamation and (iv) the enactment of retroactive legislation;

(e) Atlantic conducted due diligence before the acquisition of the Principal Operator was acquired and the subsequent amalgamation; and

(f) the failure of Atlantic to comply with the Remediation Order can result in charges.

180 Apart from factor (d) (which will be dealt with under the abuse of process argument) and factor (f) (which applies to any person named in a remediation order), the concept which underlies these factors is that Atlantic is distinct from the Principal Operator. This concept does not reflect the legal result of the amalgamation. Based on the effect of the amalgamation as set out in the *Black & Decker Manufacturing Co.* decision, Atlantic *is* the Principal Operator (together with the other company which amalgamated with the Principal Operator). There is no separate identity. The amalgamating companies continued in Atlantic "with all their strengths and their weaknesses, their perfection and imperfections, and their sins, if sinners they be" (*Black & Decker Manufacturing Co.* at p. 401). Atlantic cannot divorce itself from the sins of the Principal Operator (although it may be able to visit some of the sins on Beazer and other responsible persons in the cost recovery/allocation proceedings).

181 The Board's conclusion that these factors are not helpful to Atlantic in view of its amalgamation is reasonable.

(e) Discussion of Exercise of Discretion

182 Even if the Board's reasons are construed as a holding that it could not consider the equitable factors relied upon by Atlantic, the Board's ultimate conclusion on this topic was that the Manager properly exercised his discretion in naming Atlantic to the Remediation Order and the Board found no reason to come to a different conclusion. Although s. 47 of the *Act* authorizes the Board to make its own decision, it is also entitled to confirm the decision being appealed. In my view, the Board confirmed the Manager's exercise of discretion.

183 The Manager was not required to take into account the factors relied upon by Atlantic in exercising his discretion when deciding whether to name it in the Remediation Order. It has not been shown that the Manager took improper considerations into account when exercising his discretion or improperly fettered his discretion in deciding which responsible persons should be named in the Remediation Order. It was not patently unreasonable for the Manager to exercise his discretion in this fashion or for the Board to confirm the Manager's exercise of discretion.

PRIVATE AGREEMENTS

(a) The Board's Decision

184 The agreements relied upon by Atlantic were the Share Purchase Agreement by which Beazer sold the shares in the Principal Operator to Border and the accompanying Indemnity Agreement between Beazer and the Principal Operator. In the Share Purchase Agreement, Beazer made a representation and warranty to Border that there were no outstanding liabilities against the Principal Operator except those disclosed in a schedule (which did not indicate any liability in connection with the Site). The Share Purchase Agreement provided that the representation and warranty was to continue for a period of two years from the closing date of November 14, 1988. In the Indemnity Agreement, Beazer agreed to indemnify the Principal Operator against any undisclosed liabilities for a period of two years from November 15, 1988.

185 The Board found that as the representation and warranty and the indemnity had expired in November 1990, the Share Purchase Agreement and the Indemnity Agreement (together, the "Agreements") were not agreements that had to be taken into account by the Manager under s. 27.1(4)(a) of the *Act*. In view of this finding, the Board stated that it did not have to consider whether the Agreements are the types of agreements contemplated in s. 27.1(4)(a). In its conclusion, the Board found that Atlantic ought not be relieved from being named in the Remediation Order on the basis of the Agreements.

(b) Standard of Review

186 The issue involves the interpretation of the *Act*. It is a question of law which is subject to a review standard of correctness.

(c) Discussion of Question of Law

187 For ease of reference, I will set out again s. 27.1(4)(a) of the *Act*:

> (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

188 Atlantic submits that the Board's construction of this provision was too restrictive and is at odds with one of the clear purposes of the *Act* to assign liability on the basis of who is truly culpable for or who benefited from the contamination. Atlantic says that the Board's construction ignores the retroactive nature of the *Act* and that, if the Legislature had intended to restrict clause (a) to existing agreements only, it would have done so expressly.

189 In my opinion, the intent of s. 27.1(4)(a) is to require a manager to take the provisions of agreements between responsible persons into account as long as it does not jeopardize remediation requirements. Therefore, if two responsible persons enter into an agreement which provides that one of them is responsible for certain contamination and the other is not responsible for it, the manager should only name the first of these persons (even though they are both technically responsible persons under the *Act*) unless the naming of the first person only would jeopardize the remediation requirements. A manager would also have to respect agreements which provided for an allocation of responsibility that was less than a full allocation to one responsible person when exercising his or her discretion under s. 27.1(2) (again, as long as it would not jeopardize remediation requirements). If effect is given to the agreement in the remediation order process, there will be no need for a cost recovery/allocation proceeding as between the responsible persons who were parties to the agreement.

190 While an unenforceable agreement may be a factor considered by the court in a cost recovery/allocation proceeding, the necessity of such a proceeding will not be avoided by the manager taking the agreement into account.

And how is the manager supposed to take an unenforceable agreement into account? Should the manager give effect to the agreement when the parties themselves cannot enforce it? It could lead to strange results if the manager were to attempt to give effect to an unenforceable agreement while the court would find it unenforceable and may give little, if any, weight to it in the cost recovery/allocation proceeding. I do not think the Legislature intended that the manager would be required to answer such questions.

191 The *Concise Oxford Dictionary* defines "agreement" to mean "an arrangement between parties as to a course of action etc.". In considering the definition of "owner", I concluded that the word "right" means a legally enforceable right. Similarly, in using the word "agreements" in s. 27.1(4)(a), it is my view that the Legislature was referring to legally enforceable agreements. As the representation and warranty in the Share Purchase Agreement and the indemnity in the Indemnity Agreement have expired, they are no longer legally enforceable and are not agreements which the Legislature intended the Manager to take into account.

192 I conclude that the Board was correct in its interpretation of s. 27.1(4)(a). Although the parties made submissions to this Court as to whether the Agreements were the types of agreements contemplated by s. 27.1(4)(a), the Board did not consider the issue. It would be inappropriate for this Court in these proceedings to deal with an issue which was not decided by the Board.

ABUSE OF PROCESS

(a) The Board's Decision

193 The Board rejected Atlantic's submission that the conduct of the Provincial Crown with respect to the remediation of the Site in the early 1980s and the subsequent monitoring of the Site made it an abuse of process for the Manager to name it in the Remediation Order. It distinguished the two case authorities relied on by Atlantic and stated that, in any event, Atlantic's allegations of negligence in this case were not grounds for removing it from the Remediation Order. The Board found that there was authority under s. 28.7 of the *Act* to issue a remediation order whether or not previous remedial work had been done and that it was not an abuse of process for the Manager to have named Atlantic in the Remediation Order.

194 The Board went on to say that the Manager was dealing with a situation where, for the protection of the environment, he had to consider naming persons to a remediation order and that it was not an abuse of process for the Manager to have named Atlantic in the Remediation Order.

(b) Standard of Review

195 If the issue under review is a question of law, the standard of review will be one of correctness. It will be a question of law if the Board regarded the allegations of abuse of process as irrelevant considerations or if it can be discerned that the Board misconstrued the doctrine of abuse of process. If the issue under review is whether the Board correctly applied the facts of this case to the doctrine of abuse of process, it will be a question of mixed law and fact, in which case the standard of review will be reasonableness *simpliciter*.

(c) Discussion of Question of Law

196 In its submissions on this topic, Atlantic relies on two decisions, *Abitibi Paper Co. v. R.* (1979), 24 O.R. (2d) 742 (Ont. C.A.) and *R. v. Repap Smithers Ltd.* (November 29, 1991), Doc. Smithers 8811-C (B.C. Prov. Ct.). In *Abitibi Paper Co.*, the owner of a paper mill voluntarily undertook a program to eliminate the discharge of effluents into a river. A senior government official wrote to Abitibi stating that if the work was not completed by a specified date, a control order would be issued to ensure completion and failure to meet such a control order would subject Abitibi to the probability of prosecution. Prior to the specified date and after the government official had expressed satisfaction

with the progress of the work program, Abitibi was charged with violating the environment legislation. The Ontario Court of Appeal upheld the decision of the provincial court judge to stay the charges as an abuse of process. The Court focused most of its reasons on whether the ability of the court to grant stays of proceedings for abuse of process in civil cases extended to a prosecution for breach of a provincial statute.

197 In *Repap Smithers Ltd.*, a government official agreed with the operator of a mill that it could continue to operate a non-compliant burner as long as it was working towards a long-term plan to resolve the situation. After the mill operator delivered a long-term plan and the ministry agreed to make amendments to the mill's permit to accommodate the plan, the operator was charged with exceeding its permit. The Court stayed the charges as an abuse of process.

198 In both of these cases, the court stayed charges where the polluter had a reasonable expectation, based on statements of government officials, that it would not be charged if it worked towards a solution. In each case, the conduct of the government was found to be unfair.

199 I now turn to whether the Board erred on a question of law. First, Atlantic says that the Board regarded the allegations of abuse of process to be irrelevant because s. 28.7 of the *Act* states that even though the powers of the manager have been previously exercised, a manager may exercise his or her powers in certain circumstances, including the circumstance that the site poses a threat to human health or the environment. The Board did seem to conclude that the issuance of the Remediation Order could not be an abuse of process in light of s. 28.7. However, the Board went on to consider the merits of Atlantic's submission and concluded again that it was not an abuse of process for Atlantic to be named in the Remediation Order. So even if the Board did commit an error of law in this regard, the error did not affect the outcome of the Board's decision.

200 The second error of law alleged by Atlantic is that the Board misunderstood the doctrine of abuse of process by restricting the doctrine exclusively to situations involving governmental abuse relating to the laying of criminal charges. I do not agree with this submission. All the Board did was distinguish the *Abitibi Paper Co.* and *Repap Smithers Ltd.* decisions, and I agree that these decisions are distinguishable from the present case. Although the Board repeated CNR's submission that the government's authority to take remedial steps was not challenged in *Repap Smithers Ltd.*, I do not agree with Atlantic that this demonstrates a conclusion by the Board that the doctrine of abuse of process is restricted to the laying of charges. The Board had the *Abitibi Paper Co.* decision before it and the principal point in that decision was whether the court's ability to stay civil proceedings for abuse of process extended to proceedings alleging breaches of provincial statutes. I think the Board was simply making the point that it is possible to have a situation where it may not be an abuse of process to require remedial steps to be taken even though it may be an abuse of process to lay charges.

(d) Discussion of Question of Mixed Law and Fact

201 The doctrine of abuse of process provides that in the clearest of cases a proceeding should be stayed as an abuse of the court's process if it would be unfair, vexatious or oppressive to allow it to continue: see *Abitibi Paper Co.*, *Repap Smithers Ltd.*, *R. v. Jewitt* (1985), 21 C.C.C. (3d) 7 (S.C.C.), *R. v. Keyowski* (1988), 40 C.C.C. (3d) 481 (S.C.C.), *R. v. Miles of Music Ltd.* (1989), 48 C.C.C. (3d) 96 (Ont. C.A.), *R. v. Power* (1994), 89 C.C.C. (3d) 1 (S.C.C.), and *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1 (S.C.C.). Conduct making the continuation of proceedings unfair, vexatious or oppressive includes fraud, bad faith, improper motives and other acts which shock the conscience of the community and are detrimental to the proper administration of justice.

202 The Board's ultimate conclusion was that it was not an abuse of process for the Manager to have named Atlantic in the Remediation Order because the Manager was acting to protect the environment. Although the Board did not articulate its conclusion in the language typically used in the abuse of process decisions, its conclusion is not clearly wrong and is not an unreasonable decision in the sense of not being supported by any reasons that can stand up

to a somewhat probing examination.

203 It is not my function to review the evidence and come to my own conclusions about the facts and to then apply those facts to the abuse of process doctrine. Rather, I am to conduct a somewhat probing examination and determine whether the decision was unreasonable because it is not supported by any reasons.

204 It was Atlantic's position that the Provincial Crown led the Principal Operator to believe that it would get a "clean bill of health" if it complied with the pollution abatement order which had been issued under the *Pollution Control Act*. The Principal Operator did the remedial work and the Provincial Crown issued a letter stating that the remedial plan had been implemented to its satisfaction. Atlantic also submitted to the Board that the Provincial Crown was negligent in stating that the Site had been properly remediated and in its subsequent monitoring of the Site.

205 However, there was evidence before the Board that the Provincial Crown did not advise the Principal Operator that no further remedial work be required. There was evidence that a government official verbally advised the Principal Operator that although the Provincial Crown was satisfied with the cleanup, it could not provide complete assurances that future cleanups would not be necessary. There was also evidence that it was the intention to have the Site monitored after the remedial work was completed and no monitoring would have been required if it was contemplated that no further remedial work would ever be required. Before the Board was a written confirmation of a conversation in 1983 involving Mr. Quagliotti, one of the Beazer representatives who was looking after the remedial work on behalf of the Principal Operator, in which he acknowledged that the Provincial Crown could change its mind in 5 years and require further excavation. The Board specifically found that in naming Atlantic to the Remediation Order, the Manager was acting to protect the environment.

206 In my view, there was evidence before the Board from which it could reasonably conclude that it was not an abuse of process for the Manager to name Atlantic in the Remediation Order.

JURISDICTION TO STAY

(a) The Board's Decision

207 Atlantic applied to the Board to stay the Remediation Order pending the resolution of the cost recovery/allocation proceedings for numerous reasons, including its financial circumstances. During the hearing before it, the Board made a ruling that Atlantic could not introduce evidence about its financial circumstances because its financial status was not relevant to the determination of whether Atlantic should be relieved of liability.

208 In its decision, the Board held that its jurisdiction was limited to the granting of a stay pending the outcome of an appeal before it and that it had no jurisdiction to issue a stay once it made its determination on the issues involved in the appeal.

(b) Standard of Review

209 This was the one issue where all of the parties were agreed on the standard of review. It is a question of law involving the Board's jurisdiction and the appropriate standard is one of correctness.

(c) Discussion of Question of Law

210 Atlantic made relatively extensive submissions on several collateral issues, including the issue of whether the Board gave adequate reasons for refusing to hear evidence on Atlantic's financial status and issues related to the test to be applied by the Board when considering a stay application. All Atlantic says on the jurisdictional issue itself is that

the language of s. 48 of the *Act* conferring discretion on the Board to grant a stay of a remediation order is broad and unfettered. I do not take Atlantic to say that the Board has the inherent jurisdiction to grant a stay. The Board is a creature of statute and only has the powers given to it by the statute.

211 Section 48 reads as follows:

> An appeal taken under this Act does not operate as a stay or suspend the operation of the decision being appealed unless the appeal board orders otherwise.

The wording of s. 48 does not support Atlantic's position. Section 48 is clearly directed only at stays pending the outcome of appeals. The Board is authorized to order that the *appeal* can operate as a stay of the decision being appealed. No reasonable interpretation of the section can lead to the conclusion that the Board is given the authority to stay remediation orders pending the outcome of other litigation, even if it is related litigation authorized by the *Act*. If the *Act* provided for a right of appeal from a decision of the Board, it might be possible to interpret s. 48 to extend to such a further appeal (although other legislation giving a right of appeal to the courts have specific provisions empowering the administrative tribunal to grant a stay pending the outcome of that appeal) (see, for example, the *Utilities Commission Act*, R.S.B.C. 1996, c. 473, s. 102 and the *Medical Practitioners Act*, R.S.B.C. 1996, c. 285, s. 71). However, a cost recovery/allocation proceeding is not an appeal in any sense of the word.

212 I conclude that the Board was correct that it had no jurisdiction to stay the Remediation Order pending the outcome of the cost recovery/allocation proceedings.

CONCLUSIONS ON ATLANTIC'S PETITION

213 The Board was correct in its conclusions that Atlantic should remain named in the Remediation Order and that it had no jurisdiction to stay the Remediation Order pending the outcome of the cost recovery/allocation proceedings.

214 Dealing specifically with the relief sought in Atlantic's Amended Petition:

(a) the Remediation Order is not quashed or set aside;

(b) none of the challenged portions of the Board's decision are quashed or set aside;

(c) none of the requested declarations are granted; and

(d) the matter is not remitted to the Board for reconsideration.

COSTS

215 I believe that there was a consensus among the parties that consideration of the issue of costs would await my decision on the principal issues. The parties may make arrangements through Trial Division for a hearing with respect to costs. Alternatively, if all of the parties agree, the submissions on costs may be made in writing and sent to me through Trial Division.

Petitions dismissed.

FN* A corrigendum issued January 29, 2001 has been incorporated herein.

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